



Export Milling (EPZ) Ltd v H. Young & Co. (EA) Limited & 2 others (Environment & Land Case 85 of 2018) [2024] KEELC 1355 (KLR) (26 February 2024) (Judgment)

Neutral citation: [2024] KEELC 1355 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 85 OF 2018
LL NAIKUNI, J
FEBRUARY 26, 2024**

BETWEEN

EXPORT MILLING (EPZ) LTD PLAINTIFF

AND

H. YOUNG & CO. (EA) LIMITED 1ST DEFENDANT

KENYA PORTS AUTHORITY 2ND DEFENDANT

EXPORT PROCESSING ZONE AUTHORITY 3RD DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgment before this Honourable Court pertains to the suit instituted by Export Milling (EPZ) Limited, the Plaintiff herein through an Amended Plaint dated 20th February, 2019 and filed on the same date against the H. Young & Co. (EA) Limited, Kenya Ports Authority and Export Processing Zone Authority the 1st, 2nd and 3rd Defendants herein.
2. Upon service of the Plaint and Summons to Enter Appearance onto the Defendants, they entered appearances and filed their Statements of Defence. Indeed, the 3rd Defendant filed a Counter - Claim dated 26th May, 2020. At this juncture, it is instructive to note that though the issues in the case were not as complex, but the parties herein over – exaggeratedly blew it beyond the expected magnitude and proportion by filing exceedingly bulky and voluminous documents. Resultantly, the records for the Court ended up into three large volumes of files which honestly speaking was completely unnecessary to say the very least and without any prejudice to any party herein.
3. Nonetheless, on 15th November, 2022, the Honourable Court reserved a hearing date on 6th February, 2023 where the Plaintiff its witness tendered their evidence accordingly. The matter proceeded through adducing of viva voce evidence whereby the Plaintiff’s witness PW - 1 testifying in Court on 6th



February, 2023 and the Plaintiff closed its case. The Defendants called DW - 1, DW - 2 and DW - 3 on 19th June, 2023 whereby the parties respectively testified and closed their cases. The Honourable Court proceeded to give directions for the filling of submissions.

II. The Plaintiff's case

4. Primarily, from the filed pleadings, the Amended Plaintiff, the brief facts of the case are as follows. The Plaintiff is described as a limited Liability Company duly incorporated under the Companies Act Cap. 486 Laws of Kenya. The Plaintiff was the registered proprietor as Lessee of all that property known as Sub - division number 4785 (Original Number 3842/2/3) of Section VI Mainland North (Hereinafter referred to as "The Suit Premises") from the 3rd Defendant Export Processing Zone Authority for a term of 50 years from 1st August 2013 and was entitled to possession thereof. The 1st and 2nd Defendants had without the consent of Plaintiff and without any color of right whatsoever entered upon the suit premises unlawfully and had commenced a construction thereon of what appeared to be a road which act amounted to a trespass and which trespass was continuing. Prior to the commencement of construction of the road on the suit premises the 2nd Defendant had evinced an intention to acquire the suit premises through outright purchase of the same. The Plaintiff, the 2nd Defendant and the 3rd Defendants had entered into negotiation for the outright purchase of the suit premises by the 2nd Defendant and in the course of those negotiations the same parties agreed to have the valuation of the suit premises determined by the National Land Commission. Accordingly the National Land Commission determined that the Plaintiff be paid a sum of Kenya Shillings Kenya Shillings Five Thirty Seven Million Eight Fifty Eighty Thousand Two Thirty Six Hundred and Fourty Six Cents (Kshs. 537,858,236.46) being the tenants sub - lease interest whereas the 3rd Defendant was to be paid a sum of Kenya Shillings Two Hundred and Two Million Six Hundred and Six Thousand Thirty Nine and Fifty Five cents (Kshs. 202,606.039.55) being the Landlords reversionary interest. The 2nd Defendant without paying the Plaintiff the sum assessed by the National Land Commission and thereby acquiring the suit premises has contracted the 1st Defendant to construct the road on the suit premises.
5. By reasons of the matters aforesaid, the Plaintiff had been deprived of the use and enjoyment of the suit premises and had suffered loss and damage. The Plaintiff's claim against the Defendant was for orders of injunction to restrain the Defendant from continuing with the trespass and to compel the Defendant to demolish and remove from the suit premises the structure that it was presently constructing. Alternatively and without prejudice to the foregoing the Plaintiff posited that it had been deprived of the use and enjoyment of its land and the Plaintiff claimed the full value of the suit premises as had been assessed by the National Land Commission in the sum of Kenya Shillings Five Thirty Seven Million Eight Fifty Eighty Thousand Two Thirty Six Hundred and Fourty Six Cents (Kshs. 537,858,236.46). In the long run, the Plaintiff prayed for Judgment to be entered against the 1st, 2nd & 3rd Defendants jointly and severally for:-
 - a. An order of injunction restraining the Defendants either by itself, its servants and/or Agents or otherwise howsoever from entering upon, or carrying out any construction of any nature on the suit premises know as subdivision number 4785 (Original Number 3842/2/3) of Section VI Mainland North or dealing with the suit premises in any manner whatsoever pending the hearing and determination of the suit.
 - b. A mandatory injunction compelling the Defendants to remove any structures of any nature erected by the Defendants either by itself, its servants and/or Agents on the suit premises.
 - c. Damages
 - d. Alternatively Kshs. 537,858,236.46 being the value of the suit premises



- e. Costs.
6. On 6th February, 2023 the hearing for the Plaintiff commenced whereby he summoned one witness – the PW - 1. He testified as follows:-

A. Examination in Chief of PW - 1 by Mr. Omollo Advocate.

7. PW – 1 was sworn and testified in English language. He identified himself as Martin Mwangome Munga, a holder of the national identity card bearing numbers 8458718. His date of birth was 1965. He was a certified secretary currently residing in Mikindani. He was also a director/ shareholder of the Plaintiff company. He recalled signing a witness statement on 12th April, 2018 and a further witness statement dated 9th June, 2022 which he adopted the contents of the same as his evidence. He had also filed two bundles of documents dated 12th April, 2018 and 9th June, 2022 which he produced and were admitted as Plaintiff's Exhibit No. 1 to 11 accordingly. He had presented the case on the basis that they were the owners of the suit property. The witness vehemently refuted the claim made by the 3rd Defendant to the effect that the Plaintiff obtained the suit premises through fraudulent means. He stated that they received an offer by EPZ-A which they signed and made all the necessary payment. After some while they were given the lease and after signing it they sent it back. He signed the Lease on 28th July, 2015. But after that they took it back. EPZ – A were supposed to have given them a title for registration, EPZ – A told them that the original title got lost. Instead, they gave them a provincial title. Subsequently, the lease was registered. He had produced official search showing the owner of the suit premises was Export P.Z. The Land Registrar confirmed the Plaintiff was the registered owner.
8. PW – 1 stated that they proceeded with the registration, In fact, it enabled them to apply for approval to build. The Registration was done in the year 2018. They remained with it for 24 months after the registration. The 3rd Defendant claim that the registration was to acquire tender which was not true.
9. He recalled that they went to the Kenya Ports Authority. While there, they were taken around to be given alternative land but they never reached a consensus. Despite all this, the Plaintiff was prepared and determined to take the land but they were not given the same. They sued H. Young Co. EA Ltd, as they encroached on their land. They were constructing. They did this without the Plaintiff's consent. As a result, the Plaintiff decided to institute this suit to obtain a Court order to restraining the Defendants from using and interfering with the land. Although they obtained the order, but later it was vacated and the 2nd Defendant proceeded on with the construction of the road. They sought full compensation of the land.

B. Cross examination of PW - 1 by Mr. Kariuki Advocate.

10. He confirmed to the Court that they sued the 1st Defendant for encroachment. Later on the Court held that the land had been compulsorily acquired for public use. Hence they sought to be compensated for that encroachment.

C. Cross examination of PW - 1 by Mr. Kongere Advocate.

11. PW - 1 testified that his main concern was with registration of the parcel known as Land reference number MN/B1/4785 into their names. They sought for compensation being sum of Kenya Shillings Kenya Shillings Five Thirty Seven Million Eight Fifty Eighty Thousand Two Thirty Six Hundred and Fourty Six Cents (Kshs. 537,858,236.46/- as they were the Lessee to the plot. With reference to the 2nd Defendant, bundle of documents the witness told the Court that an offer was made and on 25th July, 2013. They accepted the said offer. Apart from the said Letter of offer, there was no other offer from EPZ (A). He was not aware that there was a Lessee to that Property and that Kenya Ports Authority



wanted to acquire that property. According to the witness, by March, 2013 they had not paid any money to EPZ (A). On being referred to the contents of Page 8 of on the last paragraph of his statement, he confirmed that they had made that payment. By this time, the offer had not been made to them. The witness went further to state page 10, a letter dated 10th June, 2013, they had received it. They had an invoice of US Dollar 110 . They paid it. However, he had no evidence whether they had paid or not. At page 75 were minutes of the meeting dated 4th December, 2017 there was a claim of Kenya Shillings two Thirty Seven Million Seven Nineteen Thousand Seven Sixty One Hundred (Kshs. 237,719,761/=) but by the time they had not constructed any structure. They asked to be paid a deposit of Kenya Shillings Seventy Million (Kshs. 70,000,000/-). They had not seen any notice for the compulsory acquisition of the property by anyone.

D. Cross examination of PW - 1 by Mr. Nyaosi Advocates:-

12. PW – 1 stated that the lease was registered by EPZ, the Plaintiff. It was on 8th May, 2018. It was way after the 2nd Defendant had taken possession. They were told the title was lost. There was no correspondence to this effect produced in Court. But he recalled that they wrote the letter in the year 2014, the issue of compensation had been going on for long. They could not get any approval due to the failure on getting the registration. When referred to the 3rd Defendant’s documents, the witness told the court that page 41 on the letter dated 21st July, 2015 and page 42 on the letter dated 25th August, 2015, they had not submitted fictitious drawings. They did not have any letter detailing the frustrations they were facing.
13. The witness told Court that on page 7 were the terms and conditions of demise. They had not complied with the conditions by the year 2014. This was when they were taken round by KPA people who suggested to them of giving them an alternative land. He was not sure by so doing it was because their land had been compulsorily acquired. Page 8 of the 2nd Defendant’s bundle of documents, he was not sure they had not made any proposal for compensation. Their proposal was on page 18 - of the 3rd Defendant’s bundle. The documents were dated 13th November, 2015. They indicated loss of business for the period of the year 2014 to 2015 which amounted to a sum of Kenya Shillings Ninety Two Million Six Fourty Eight Thousand Nine Twenty Four Hundred (Kshs. 92,648,924/-) it was abstract to Kenya Ports Authority. The 2nd item was damage and Escalation Costs of Finance amounting at a sum of Kenya Shillings One Hundred Million Five Fourty Thousand Seven Seventy Four Hundred (Kshs. 100,540,774.00/-). By this time, they had not bought equipment nor incurred the expenses as yet. It was still a proposal. Their total expenses was US Dollar 2,353,661.00 (equivalent to Kenya shilling conversion of Kshs. 102/-) and this was the figure of minutes of 2014 and we are asking from KPA in consideration for the Lease. From the correspondence, they had evidence of submissions for the Architect fees of a sum of Kenya Shillings Two Million Five Hundred Thousand (Kshs. 2,500,000/-); the EIA Experts Fees worth at a sum of Kenya Shillings One Million Three Hundred and Fifty Thousand (Kshs 1,350,000/-) and Miscellaneous Expense of a sum of Kenya Shillings One Million One Hundred and Fifty Thousand (Kshs. 1,150,000/-).
14. The witness told the court that the 2nd Defendant’s documents were as follows:-
 - a. Letter dated 16th June, 2015 – by this time they had not cleared the consideration for the registration of the Lease.
 - b. Letter dated 17th June, 2015 was for by that we had not signed the lease.
 - c. Letter dated 14th July, 2015.



15. The witness stated that they returned the leases to Kenya Ports Authority for their signature and they returned it to them. They responded. EPZ(A) signed the Leases and sent back to them. It was the EPZ - (A) to register the leases (See the letter dated 14th July, 2015).

E. Re - examination of PW - 1 by Mr. Omollo Advocate.

16. PW – 1 when referred to the Letter dated 14th July, 2015, he reiterated that he signed the lease on 28th July, 2015. EPZ (A) signed the lease on 23rd September, 2015 after signing, they sent it to the Plaintiff for registration. EPZ (A) forwarded to them through correspondence. They applied for land for the EPZ without asking for a particular land parcel. It was EPZ (A) who offered the land. With reference to the minutes dated 4th December, 2014 there was the issue of compulsory acquisition which was to be done by the National Land Commission. There was the valuation report by the National Land Commission which referred to Kenya Shillings Five Thirty Seven Million Eight Fifty Eighty Thousand Two Thirty Six Hundred and Fourty Six Cents (Kshs. 537,858,236.46). which the National Land Commission referred to as direct costs. By the time they were negotiating with the Kenya Ports Authority and EPZ (A) their lease had not been registered. Their interest was captured in the minutes. The Letter of Offer was given by EPZ (A) i.e. it was for compensation for the investors while awaiting the registration of leases.
17. The Plaintiff closed its case on the 6th February, 2023.

III. The 1st Defendant's case

18. The 1st Defendant is described as a Limited Liability Company duly incorporated under the *companies act* Cap 456 laws of Kenya in the Amended Plaintiff. The 1st Defendant filed their Statement of Defense dated 18th April, 2018 on 19th April, 2018. It was their averment that the subject matter of this Suit was the construction of a road known as Kipevu Road, Mombasa passing through all that parcel of land known as Land Sub - division Number 4785 (Original Number 3842/2/3) of Section VI Mainland North. The Defendant disputed the contents of Paragraph 2 of the Plaintiff and put the Plaintiff to strict proof thereof. In any event, and according to the 1st Defendant, the property known as Land Subdivision Number 4785 (Original Number 3842/2/3) of Section VI Mainland North was registered in the name of Export Processing Zones Authority.
19. The 1st Defendant denied the contents of Paragraph 3 of the Plaintiff and put the Plaintiff to strict proof thereof. More particularly, the 1st Defendant denied the Plaintiff's allegation that the 1st Defendant had illegally trespassed onto the Plaintiff property as alleged. Nevertheless, the Plaintiff stated that:
- a. By way of a Letter of Bid dated 21st March, 2016, the Defendant bid for a Tender for the Design and Construction of Kipevu Road Mombasa(EPC/Turnkey).
 - b. By way of a letter dated 18th August, 2016, the Kenya Ports Authority notified the 1st Defendant that the 1st Defendant had been awarded the Tender Number KPA/072XXXX-for the Design & Construction of Kipevu Road in Mombasa.
 - c. By way of a letter dated 19th August, 2016, the 1st Defendant unconditionally accepted the award of the said Tender Number KPA/072XXXX - for the Design & Construction of Kipevu Road in Mombasa.
 - d. The 1st Defendant and Kenya Ports Authority entered into a formal contract for the Design & Construction of Kipevu Road, Mombasa.



- e. In addition to the above, by way of a Letter of Indemnity dated 15th June, 2017, the Kenya Ports Authority undertook to indemnify the 1st Defendant against all actions, proceedings, liabilities, claims, costs and expenses brought against the 1st Defendant in connection with the design and Construction of the said Kipevu Road Mombasa.
 - f. In the foregoing premises, by way of a letter dated 3rd April, 2018, the Kenya Ports Authority instructed the 1st Defendant to proceed to the site meant for construction of Kipevu Road Mombasa, which site included the Suit property, in order to commence construction works.
 - g. In the above premises, it was clear that the reason as to why the 1st Defendant entered onto the Suit property and commenced construction works thereon was because the Suit property constitutes part of the site over which the Kenya Ports Authority contracted the 1st Defendant to design and construct the Kipevu Road Mombasa, and further because the Kenya Ports Authority instructed the 1st Defendant to enter into the Suit property for purposes of constructing the said Kipevu Road, Mombasa.
20. The 1st Defendant denied the contents of Paragraph 4 of the Plaintiff and put the Plaintiff to strict proof thereof. Further to the foregoing, the 1st Defendant stated that at the time the 1st Defendant proceeded to the project site, the Suit property was vacant and not occupied by the Plaintiff or any other person. In the foregoing premises, the 1st Defendant stated that the Plaintiff had not adduced any or any sufficient evidence or grounds to entitle the Plaintiff to the orders sought in the Plaintiff.
21. The Honourable Court on the 5th May, 2023 directed that the defense hearing to be fixed on priority basis on the 19th June, 2023. On 19th June, 2023 the 1st Defendant called its first witness DW - 1.

F. Examination in Chief of DW - 1 by Mr. Kariuki Henry Advocate.

22. DW – 1 was sworn and testified in English language. He identified himself as Mr. Richard Arina Kobala. He was a holder of the Kenyan national identity card bearing numbers 899XXXX. He was born on 20th November, 1967. He was an Engineer employed by a company trading in the name and style of H. Young Limited and the Project manager for Kipevu road Mombasa. He recorded a witness statement on 18th April, 2018 and filed a list of documents dated 18th April, 2018. The bundle consisted of eight 8 documents marked as 1st Defendant Exhibit 1 to 8. According to the witness the role of H. Young Limited was contracted by KRA to construct the KIPEVU Road Mombasa. There was a tender by KPA which they bid and the same was accepted by KPA as evidenced at page 4 of their bundles being a letter to KPA dated 21st March, 2016. The bid was accepted by KPA and they were notified of the acceptance. At page 7 the witness told the court that the letter of offer to H. Young Limited from the KPA was dated 18th May, 2016. It was signed by Head of Procurement KPA. They accepted the award unconditionally through a Letter of Acceptance dated 19th August, 2016. After that they entered into a contract with KPA for the said project which was at Page 8 of the bundle. The contract between KPA and H. Young Limited for the construction of the road was duly executed on dated 19th October, 201.
23. Subsequently, the witness informed Court that they entered the site for purposes of the construction work on April, 2017. Later on, they got a letter dated 15th June, 2017 by the KPA to proceed with the construction work. At page 88 they started the construction to its logical conclusion and handed over in April 2021. From the best of his knowledge, he had not been faulted on the terms of the contract. He prayed for the dismissal of the suit against the 1st Defendant with costs.



G. Cross – Examination of DW – 1 by Mr. Kongere Advocate.

Nil.

H. Cross examination of DW - 1 by Mr. Nyaosi Advocate.

24. DW – 1 stated that they took possession of the site on 1st April, 2017. They were served with document on 13th April, 2018 they had begun work as instructed by KPA. To them, the land belonged to EPZ Ltd. By the time they took works, there was no development on the land.

I. Cross examination of DW - 1 by Mr. Omollo Advocate.

25. He confirmed that he was aware that KPA was in the process of acquiring the land for construction of the road. He did not know whether they (KPA) acquired the land or not. On being referred to the Letter of Indemnity at page 88, he told Court that they were not involved in the acquisition of the land.

J. Re - examination of DW - 1 by Mr. Kariuki Advocate.

26. On being referred to a letter dated 2nd April, 2018, he reiterated that it was on the allocation of the land.
27. The 1st Defendant closed its case on 19th June, 2023.

IV. The 2nd Defendant's case

28. The 2nd Defendant is described as a Statutory Corporation established pursuant to the [Kenya Ports Authority Act](#) Cap 391 Laws of Kenya.
29. On 19th June, 2023 the 2nd Defendant called its first witness DW 1.

K. Examination in Chief of DW - 2 by Mr. Kongere Advocate.

28. DW – 2 was sworn and testified in English language. He identified himself as Mr. John Charles Chau Mwangi. He held the Kenyan identity card bearing numbers 2360401. He was born on 26th July, 1984. He recorded a statement dated 7th June, 2022 and a list of documents dated 7th June, 2022 with five documents and the second list of documents and third list of documents dated 24th January, 2022 marked as 2nd Defendants' Exhibit 1 to 8.

L. Cross – Examination of DW – 2 by Mr. Kariuki Advocate

Nil.

M. Cross examination of DW - 2 by Mr. Nyaosi Advocate.

28. DW – 2 told the Court that by the time they handed over the construction to the 2nd Defendant the acquisition of the land had not been concluded but there were many meetings to that effect as evidenced at page 71. It was a meeting between KPA and H- Young Limited. EPZ had its representatives in attendance i.e. the meeting held on 4th December, 2017 for a compensation claim of a sum of Kenya Shillings Two Thirty Seven Million Seven Nineteen Hundred Seven Sixty One Hundred (Kshs. 237,719,761/-). From the meeting, there was no discussion on compensation of the land.
29. When referred to the 3rd Defendants documents at page 18, he stated that the letter from the Plaintiff to KPA dated 13th November, 2015 was entitled compensation for the use of the land. This was the basis of the claim i.e. compensation for the loss of leased land and not the acquisition of the land. The cost of the leased land was United States dollar Four Ten Thousand Six twenty Hundred (US \$ 410,625/-). He



confirmed to have worked with KPA since the year 2018. By then there had been no development on the land. There were no equipment either. They did an official search of the land in the year 2018. There were no encumbrances at the time. When referred to the 1st Defendant list of documents, he told the court that the certificate of posts of official search showed there were no encumbrances onto the property.

30. The witness told the court with reference to minutes of the meeting held on 4th December, 2017 at page 17, it entitled Ms. Export Milling EPZ Ltd for compensation although there was a condition of 50% of claim to have been paid before the contractor was allowed to enter the site. He was not aware whether this was paid. Between April 2018 to 2021 there was no letter from KPA. KPA were not informed of EPZ taking over of the site.

N. Cross examination of DW - 2 by Mr. Omollo Advocate.

31. The witness confirmed that KPA – the 2nd Defendant had been ready to compensate EPZ and they could compensate the investors. In the process of negotiation, KPA found out that the lease was not registered. When referred to the minutes of the meeting held on 4th December, 2017, at pages 71 and 72, it stated that Mr. Songoro informed the meeting KPA was expanding Kipevu Road and some of the parcels affected belonged to EPZ (A). There was a claim referred to the National Land Commission. NLC assessed the land at a figure of Kenya shillings Five Hundred million (Kshs. 500,000,000/-). Out this figure, KPA was to make a deposit of 50% of the payment. However, the payment was never made. Despite this KPA instructed H – Young Limited to move into the land for the commencement of the construction works and which they did to completion. But still no payments were done. He was aware several valuers had valued the suit land. With reference to the replying affidavit by Mr. Michael Songoro, the witness stated that there was:-

- a. Messrs. Maina Chege.
- b. NLC valued the land at a sum of Kshs. 537,000,000/-

32. He was aware of these land valuations.

O. Re - examination of DW - 2 by Mr. Kongere Advocate.

33. When referred to the minutes of the meeting held on 4th December, 2017, he told the Court that there had been subsequent engagement with KPA/EPZ on an amicable settlement on the disputed land value.
34. On 19th June, 2023 after its witness testified the 2nd Defendant marked the close of its business.

V. The 3rd Defendant's case

35. The 3rd Defendant is described in the amended plaint as a Statutory Corporation established pursuant to the Export Processing Zone Authority Act, Cap 517 Laws of Kenya. In its defence the 3rd Defendant in answer to paragraph 5 of the Plaint, the 3rd Defendant averred that it is the registered proprietor as Lessee of all that property known as subdivision number 4785 (Original Mombasa 3842/2/3) of Section VI No.1 Mainland North for a term of 99 years from 1st January, 1995. As set out in the Counter-Claim herein the 3rd Defendant challenged the validity of Lease to the Plaintiff registered on 9th May, 2018 for a term of 30 years from 1st August, 2013. Further the 3rd Defendant averred that as at 12th April, 2018 when these proceedings commenced, the Plaintiff had no proprietary interest in the suit property. Whereas the 3rd Defendant admitted negotiations were undertaken between itself, the Plaintiff and the 2nd Defendant for the outright purchase of the suit property by the 2nd



Defendant the 3rd Defendant was not aware of the determination and the circumstances under which the National Land Commission allegedly determined that the Plaintiff be paid Kenya Shillings Five Thirty Seven Million Eight Fifty Eighty Thousand Two Thirty Six Hundred and Fourty Six Cents (Kshs. 537,858,236.46) being the tenant's sub - lease interest whereas the 3rd Defendant was to be paid a sum of Kenya Shillings Two Hundred and Two Million Six Hundred and Six Thousand and Thirty Nine and Fifty Five cents (Kshs. 202,606,039.55) being the Landlord's reversionary interest. In answer to the averments in paragraphs 8 and 9 of the Plaintiff the 3rd Defendant stated that the circumstances under which the road was being constructed on the suit property the Plaintiff had not and could not be deprived of the use and enjoyment of the suit premises and therefore it had not suffered loss and damage. The Plaintiff was not entitled to compensation for the full value of the suit premises in the sum of Kenya Shillings Five Thirty Seven Million Eight Fifty Eighty Thousand Two Thirty Six Hundred and Fourty Six Cents (Kshs. 537,858,236.46) as pleaded in paragraph 10 of the Plaintiff and its claim was untenable, fraudulent, null and void ab initio on the ground of illegality.

36. The particulars of fraud and illegality relied upon by the 3rd Defendant were that:-

- i. At all material times the subject land plot was leased to Ms. Olsa (EPZ) Limited and therefore not available for allocation to the Plaintiff.
- ii. As at February, 2013 when the Plaintiff applied for allocation of the suit plot the process of acquisition of the same for expansion of Kipevu Road had already commenced.
- iii. In view of the commencement of process of land acquisition for purposes of expansion of Kipevu Road, the Plaintiff's letter of offer dated 28th June, 2013 was issued in furtherance of a fraudulent scheme.
- iv. The 1st Defendant having become aware of the then ongoing plans to acquire the suit plot for expansion of the Kipevu Road as confirmed by its letter dated 28th November, 2014 the 1st Defendant was enjoined to stop its quest for lease of the suit plot and halt any development, planning and financial arrangements concerning the suit plot.
- v. In proceeding to execute a lease over the suit plot notwithstanding the above, the 1st Defendant's conduct clearly showed that its sole interest in pursuing a lease over the subject plot was to secure compensation for the same at the expense of the Kenyan public and the 3rd Defendant.
- vi. The Plaintiff commenced this proceedings on or about 12th April, 2018 on the premise that it was the registered proprietor of the suit plot yet its sub-lease interest was not registered until 9th May, 2018.

37. The 3rd Defendant relied on the following particulars of illegality:-

- a. The letter of offer dated 28th June, 2013 by the 3rd Defendant's CEO to lease the suit plot to the 3rd Defendant was a nullity ab initio as the said plot was the subject of a subsisting lease between the 3rd Defendant and Ms. Olsa (EPZ) Ltd.
- b. The Plaintiff never accepted the 3rd Defendant's offer by 31st July, 2013 as clearly required in the letter of offer dated 28th June, 2013.
- c. The Plaintiff executed a lease over the suit plot after it had become aware that the same was the subject of land acquisition for purposes of expansion of Kipevu Road.



- d. The Plaintiff submitted to the 2nd Defendant a claim for compensation before it had been registered as the proprietor of a sub-lease interest in the suit plot.
 - e. The Plaintiff's compensation claim was invalid on account of the fact that the Plaintiff had not procured an EIA Licence under Section 58 of EMCA to undertake development project on the suit plot and/or not been issued EPZA license as required by the EPZ Act.
 - f. Further the Plaintiff never complied with the conditions of the approval in principle letter dated 22nd December, 2008.
38. The 3rd Defendant admitted the contents made out under Paragraph 11 of the Amended Plaint. The 3rd Defendant in their defense prayed that the Plaintiff's suit be dismissed with costs.
39. On the Counter - Claim, the 3rd Defendant deposed that the Plaintiff the Export Processing Zones Authority is a statutory corporation established under Section 3 of the Export Processing Authority Act, Cap 517 whose principal functions and objectives include:-
- a. the development of all aspects of the export processing zones with particular emphasis on provision of advice on the removal of impediments to, and creation of incentives for, export-oriented production in areas designated as export processing zones; and
 - b. the regulation and administration of approved activities within the export processing zones, through implementation of an administrative system in which the export processing zone enterprises are self-regulatory to the maximum extent; and
 - c. the protection of Government revenues and foreign currency earnings.
40. At all material times the Plaintiff (in the Counter Claim) was and remained the registered proprietor of a land parcel known as L.R. No. 46892 (Original Number 3842/2/3) of Section VI Mainland North, the suit property herein by dint of a lease for a term of 99 years from 1st January, 1995. In or about 1995 the Government of Kenya acquired a parcel of land measuring 23.45 Hectares in Kipevu in Mombasa District for use by the Plaintiff. Subsequently the said land was sub-divided into 16 plots and leased out by the Plaintiff to various investors. The said 16 plots included the suit property herein.
41. On 6th July, 2010 a lease dated 3rd February, 2010 was registered in favour of Olsa (EPZ) Limited for a term of 50 years from 1st July, 2008. The said lease was revoked on 27th January, 2014 vide a Deed of Revocation dated 16th January, 2014. The Plaintiff stated that in January, 2013 the Government of Kenya commenced the process of land acquisition for Kipevu Road expansion project. Among the parcels of land identified for acquisition for purposes of the said project were the following parcels belonging to the Plaintiff:-
- i. MN/VI/4785-3.285 Ha.
 - ii. MN/VI/4794-7.786 Ha
 - iii. MN/VI/4799-0.9984 Ha
 - iv. MN/VI/2462-1.009 Acres
 - v. MN/VI/4798-1.5 Acres
42. In view of the above the Plaintiff and Kenya Ports Authority -the 3rd Defendant herein - commenced negotiations to facilitate the acquisition of the above land parcels for road expansion. The foregoing notwithstanding by a letter dated 6th February, 2013 the First Defendant applied for allocation of the



2 Hectares of land at Kipevu EPZ namely the suit property herein that at all material times was leased to Ms. Olsa EPZ Ltd. In view of the above, by a letter of offer Ref:CONF/EPZ/1189/CEO(32) dated 28th June, 2003 the Plaintiff offered to lease Land Plot No.MN/VI/4785 to the First Defendant which accepted the same vide a letter dated 11th November, 2013. The Plaintiff stated that the said letter was issued after commencement of the process of land acquisition for Kipevu Road expansion and whilst the subject land plot was leased to Ms. Olsa (EPZ) Ltd.Further to the foregoing the Plaintiff stated that by a letter dated 28th November, 2014 addressed to the Plaintiff's Chief Executive Officer the 1st Defendant stated, inter-alia, that the 1st Defendant was aware of the 2nd Defendant's plans to expand Kipevu Road which would take up most of the subject land and therefore requested to be allocated alternative land in Kipevu EPZ.

43. Notwithstanding the foregoing, by a letter dated 14th July, 2015 the Plaintiff forwarded to the 1st Defendant three sets of original leases in respect of the subject property. The said lease was executed by the 1st Defendant's directors on 28th July, 2015 whilst the Plaintiff executed the same on 23rd September, 2015. By a letter dated 13th November, 2015 the 1st Defendant submitted to the 2nd Defendant, through the Plaintiff's CEO, its claim for compensation for loss of leased land, business opportunities and escalation of development costs due to delays. The Plaintiff averred that unless and until the 1st Defendant's Lease was registered it could not submit a claim for compensation for loss of leased land and it could not suffer loss of business opportunities and escalation of development costs. Consequently, the Plaintiff averred that the 1st Defendant's claim for compensation aforementioned was null and void ab initio.
44. In addition to the above averments, the Plaintiff averred that at all material times the Plaintiff did not procure an EIA Licence for its proposed project which in turn it could not do so unless and until its lease of the subject property was registered. In the premises the Plaintiff avers that by dint of Section 58 of the Environmental Management Co-ordination Act,1999 the 1st Defendant had no locus standi to commence planning, approval and financing of its proposed project unless and until it had procured an EIA Licence. In the event, the Plaintiff avers that the 1st Defendant's claim for compensation submitted vide its letter dated 13th November,2015 was illegal, null and void ab initio.
45. By a letter dated 25th August, 2016 the Plaintiff's CEO forwarded to the Chairman of the National Lands Commission (NLC) the compensation claim by the 1st Defendant herein and Ms. Lowdan Exporters (EPZ) Ltd being investors that would be affected by the proposed land transfers between the Plaintiff and the Second Defendant. The Plaintiff reiterates that at the time of submission of the said compensation claim the 1st Defendant had not been registered as the lessor of the subject land plot.In view of the foregoing, the Plaintiff avers that the sum set aside by the 2nd Defendant for acquisition of the subject land plot are payable to the Plaintiff and that the 1st Defendant is entitled to no more payment than the refund of US Dollars Four Ten Thousand Six Twenty Five Hundred (US\$ dollars 410,625.00) being the cost of lease as per the Lease Agreement between the Plaintiff and the 1st Defendant.
46. Through its Counter - Claim dated 26th May, 2020, (the 3rd Defendant) as a Plaintiff in the Counter Claim, prayed for Judgement to be entered in its favour as follows:-
 - a. That a declaration be issued to declare That the 1st Defendant had no proprietary interest in Plot No. MN/VI/4785 when the Plaintiff and the 2nd Defendant commenced the process to acquire the same for expansion of Kipevu Road, Mombasa.



- b. That a declaration be issued to declare That the 1st Defendant's claim for compensation submitted to the 2nd Defendant through the Plaintiff's Chief Executive Officer vide a letter dated 13th November, 2015 is null and void ab initio.
 - c. That a mandatory order of injunction be issued to compel the 2nd Defendant to pay the sum of money payable as compensation for acquisition of land Plot No.MN/VI/4785 to the Plaintiff.
 - d. Costs of the suit and the Counter-Claim.
47. On 19th June, 2023 the 3rd Defendant called its witness DW - 3.

J.Examination in Chief of DW - 3 by Mr. Nyaosi Advocate.

47. DW – 3 was sworn and testified in English language. He was called Mr. Andrew Gichuki Njuru. He held the Kenyan identity card bearing numbers 21031635. He was an Assistant Manager at EPZ. He swore two witness statements dated 26th May, 2020 and 8th June, 2022 respectively, which he adopted and relied on as his evidence. Further, he filed a bundle of documents consisting of six (6) documents. They were produced and marked as the 3rd Defendant's exhibit 1 to 6.

K.Cross examination of DW - 3 by Mr. Kongere Advocate.

48. The witness confirmed that as per the year 2022 they had leased land to Olsa Ltd. They had had surrendered it to them in the year 2014. The surrender was registered in June 2014. Before the surrender, they had planned to give the land to Export Milling Limited. However, before that they got into negotiations with KPA – the 2nd Defendant herein. A draft lease was executed between EPZ (A) in the year 2014. EPZ (A) should be compensated for the land. EPZ (A) had filed a Counter Claim. They demanded to be paid. Nonetheless, he admitted that the amount was not shown from the filed Counterclaim.

L. Cross – Examination of DW – 3 by Mr. Kariuki Henry Advocate

Nil.

M. Cross examination of DW - 3 by Mr. Omollo Advocate.

49. The Witness told the court that the suit property was leased to EPZ Ltd i.e. the Plaintiff from 1st August, 2013 for 50 years. He confirmed that lease was subsequently registered. They filed the Counter – Claim whereby the verifying affidavit was sworn by Andrew Gichuki Njuru. He did not recall receiving any authority to swear the said verifying affidavit. He knew Ephantus Mogera was a legal officer from EPZ (A). They had produced the lease at pages 4 and 67. He had produced a letter dated 28th June, 2013. An offer was made to EPZ. It was accepted. They were already negotiating with KPA which negotiations were well within their knowledge. The letter was not there in the documents they produced in Court. It was their case that the 3rd Defendant was only entitled to a sum of 410,625 US dollars. The contract was registered late after the issue of compensation was known. It was registered by EPZ – A. He could not tell why there was a delay. The agreement was prepared by MARIA Corporate Section of EPZ (A). DW – 3 could not tell who was to blame. He did not know when the title was issued.

N. Re - examination of DW - 3 by Mr. Nyaosi Advocate.

50. With reference to page 51, the witness told the Court that the lease was registered on 9th May, 2018. The registration of the lease was after the property had been taken. There was no registered property before the year 2018. The lease was signed on 23rd September, 2015 to 28th July, 2014. This was when



the representation of the signed lease was made. From the record, there no registered lease. He would not knowledge whose fault it was for the delay caused in the registration of the lease.

51. The 3rd Defendant marked the close of its case on 19th June, 2023.

VI. Submissions

52. On 19th June, 2023, upon the close of the Plaintiff, the 1st, 2nd and 3rd Defendant's case, the Honourable Court, instructed the parties to canvass the Amended Plaintiff dated 20th February, 2019 and Counter Claim dated 26th May, 2020 by way of written submissions giving each parties 21 days leave to file and serve the written submissions. Pursuant to that on 27th July, 2023 having confirmed compliance by all the parties, (apart from the 1st Defendant whose Submissions the Court never got to see at the time of penning down this decision) the Honourable Court reserved a Judgment date on notice.

A. The Written Submissions by the Plaintiff.

53. On 25th July 2023 the Learned Counsel for the Plaintiff herein, the law firm of Messrs. Kamoti Omollo & Company Advocates filed their written Submissions. Mr. Omollo Advocate commenced his submission by providing the Honourable Court with a brief background of the case. He stated that the Plaintiff instituted this suit against the 1st, 2nd and 3rd Defendants herein. They sought for the afore stated prayers. He summarised the Plaintiff and the Defendant's cases as follows.

a. The Plaintiff's case

54. According to the Learned Counsel, the Plaintiff is the registered proprietor as Lessee of the 3rd Defendant of the suit premises for a term of 50 years from 1st August 2013. The Plaintiff produced in evidence the Lease dated 23rd September 2015, certificates of postal search and copy of provisional certificates of title number CR 46892 being documents numbers 1, 2, 3 and 4 respectively in the Plaintiff's supplementary list of documents dated 9th June 2022.

55. Prior to the aforesaid lease being entered into and executed by the Plaintiff and the 3rd Defendant, the 3rd Defendant has by a letter of offer dated 28th June 2013 offered to lease the suit premises to the Plaintiff for a consideration of US \$ 410,625. The Plaintiff duly accepted the offer. The Letter of Offer was produced by the Plaintiff being document number 2 in the Plaintiff's list of documents dated 12th April 2018.

He informed Court that, sometime in the year 2016 the Plaintiff learnt that the Government of Kenya intended to acquire land for purposes of the 2nd Defendant expanding truck routes in the Kilindini Port area and that the suit premises was one of the plots of land to be affected by the acquisition hence the Plaintiff was to be compensated.

By a letter dated 25th August 2016, Document number 3 in the Plaintiff's list of documents dated 12th April 2018 the 3rd Defendant asked the National Land Commission to ascertain the compensation payable to the investors of the 3rd Defendant among them the Plaintiff who had leased Plot MN/VI/4785. In that letter the 3rd Defendant specifically stated that:-

“Kenya Ports Authority (KPA) have committed to making just compensation to the investors”

56. Additionally, the Learned Counsel averred that by a letter dated 14th December 2017 the National Land Commission forwarded to the 2nd Defendant the valuation schedule ascertaining the sum payable to the Plaintiff. The report signed by Mr. Joash M. Oindo Deputy Director Valuation and Taxation



National Land Commission valued the Plaintiff's sub lease interest in the sum of Kenya Shillings Five Thirty Seven Million Eight Fifty Eight Thousand Two Thrity Six Hundred and Fourty Six cents (, Kshs.537,858,236.46) inclusive of direct costs of Kenya Shillings Two Thirty Seven Million Seven Nineteen Hundred Seven Sixty One Hundred (Kshs. 237,719,761/-). He referred Court to document number 4 in the Plaintiff's list of documents dated 12th April 2018.

57. Further to that, by a letter dated 8th March 2018 the 3rd Defendant informed the Plaintiff that the acquisition of the suit premises was to be done by a mixture of both compulsory acquisition and private treaty. In April 2018 before the 2nd Defendant had acquired the suit property either through compulsory acquisition or outright purchase the 1st Defendant entered upon the suit premises and commenced construction of a road thereon. The Plaintiff was contained to file suit. Contemporaneously with filing the suit Plaintiff filed an application and obtained temporary order of injunction restraining the 1st Defendant from continuing with the construction of the road. The 1st Defendant (who was initially the only Defendant in the suit) then applied for and obtained an order to enjoin the 2nd and 3rd Defendants to the suit.

b. The 1st Defendant's case

58. As far as the Learned Counsel was concerned, the case for the 1st Defendant was that it made a bid for the design and construction of Kipevu Road. It was awarded the tender by the 2nd Defendant. Subsequently the 1st and 2nd Defendants entered into a formal contract for the design and construction of the road. On 15th June 2017 the 2nd Defendant gave the 1st Defendant a letter of indemnity by which the 2nd Defendant undertook to indemnify the 1st Defendant against all actions proceedings liabilities claims costs and expenses brought against the 1st Defendant in connection with the design and construction of the said road. Finally by a letter dated 3rd April 2018 the 2nd Defendant instructed the 1st Defendant to proceed to the suit premises and commence construction of the road.

c. The 2nd Defendant's case

59. The Learned Counsel summarised the 2nd Defendant's case as follows. It had expressed a wish to acquire the suit premises for purposes of expansion of the Kipevu road and construction of a truck marshalling yard. The 2nd Defendant commenced negotiating with the 3rd Defendant to acquire the suit premises. Several meetings were held between the 2nd and 3rd Defendants the minutes of which were produced in evidence by the 2nd Defendant. While negotiations were ongoing, the 2nd Defendant awarded the 1st Defendant a contract for construction of the road. To avert mounting damaged the 2nd Defendant instructed the 1st Defendant to take over the suit property and commence construction.

d. The 3rd Defendant's case

60. The Learned Counsel posited that the 3rd Defendant claimed it was the registered proprietor as Lessee of the suit premises. The 3rd Defendant admitted that there were negotiations between the Plaintiff, the 2nd Defendant and the 3rd Defendant for outright purchase of the suit property of the 2nd Defendant. However, the 3rd Defendant challenged the validity of the Plaintiff's lease and stated that the Plaintiff's claim for compensation for the full value of the suit property was fraudulent, null and void ab initio on the ground of illegality.

The 3rd Defendant filed a Counter Claim in which it sought certain declarations and a mandatory injunction to compel the 2nd Defendant to pay the sum of money payable as compensation for acquisition of the suit property to the 3rd Defendant. The Learned Counsel submitted that there was



no dispute that by a letter dated 28th June 2013 the 3rd Defendant offered to lease the suit property to the Plaintiff and subsequently on 23rd September 2015 the 3rd Defendant executed a Lease of the suit property in favour of the Plaintiff. Both the Plaintiff and the 3rd Defendant produced the Letter of Offer and the Lease in evidence. Further, he averred that it was not in dispute that the Plaintiff's lease had been registered. The Plaintiff produced in evidence a Certificate of Postal Search dated 8th May 2018 which confirmed that its lease of the suit premises had been registered.

Nonetheless, the 3rd Defendant contended that the Plaintiff's claim was fraudulent null and void on ground of illegality to wit:-

- a. at all material time the suit property was leased to Olsa (EPZ) Limited and was therefore not available for allocation to the Plaintiff. The 3rd Defendant's witness one ANDREW NJURU stated in paragraph 8 of his further witness statement dated 8th June 2022 stated that:-

“I am aware that Olsa (EPZ) Limited breached the terms of the Lease therein as per the letter dated 25th March 2013 and the same was terminated”.

To the Counsel, in view of that testimony the allegation of fraud and illegality on the basis of the existence of the lease to Olsa EPZ Limited had been discounted because by the time the 3rd Defendant gave the Plaintiff the letter of offer dated 28th June 2013 the previous lease had been terminated.

- b. The Plaintiff never accepted the 3rd Defendant's offer by 31st July 2013 as clearly required in the letter of offer dated 28th June 2013. However, by looking at the Letter of Offer at page 20 of the 3rd Defendant's documents, it was seen that the 3rd Defendant's allegation was baseless. It clearly showed that the Plaintiff confirmed its acceptance of the terms and conditions of that letter by signing the same on 25th July 2013 six days before the expiry of the offer.
 - c. The Plaintiff having become aware of the then ongoing plans to acquire the suit plot for expansion of the Kipevu Road as confirmed by its letter dated 28th November 2014 the Plaintiff was enjoined to stop its quest for lease of the suit plot. The same allegation had been repeated in the witness statement of the 3rd Defendant's witness Andrew Njuru dated 26th May 2020 at paragraph 10. However the 3rd Defendant never produced the alleged letter dated 28th November 2014. That allegation had not been proved at all.
61. By and large, the Learned Counsel contended that the 3rd Defendant never produced any evidence that the Plaintiff procured the Lease of the suit premises through fraud. The 3rd Defendant had in paragraph 17 of its defence stated that by a letter dated 14th July 2015 the 3rd Defendant forwarded to the Plaintiff three sets of original lease in respect of the subject property. The said lease was executed by the Plaintiff's directors on 28th July 2015 whilst the 3rd Defendant executed the same on 23rd September 2013. During cross examination by the Plaintiff's Counsel the 3rd Defendant's witness confirmed that the Lease was executed by the Chairman of the board and the Chief Executive Officer of the 3rd Defendant.
 62. Thus, he averred that the 3rd Defendant has totally failed to prove its allegation that the Plaintiff's claim was fraudulent, null and void on the ground of illegality. To support that assertion the Counsel cited



the case of:- “Ahmed Mohamed Noor – Versus - Abdi Aziz Osman [2019] eKLR Mrima J stated as follows:-

59. There is no doubt that fraud is a serious accusation. It must be pleaded and proved. Bullen, Leake & Jacobs on Pleadings 13th Edition provides as follows: _

Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged. The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that fraud was the cause of the loss complained of (see). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and distinctly proved. ‘General allegations, however strong may be by words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice’.

At the outset both 2nd and 3rd Defendant’s understood that the Plaintiff had a lease hold interest in the suit property and had to be compensated in the acquisition of the suit property. In a meeting between the 2nd and 3rd defendants on 3rd March 2015 the minutes of which appear at page 22-29 of the 2nd Defendant’s list and bundle of documents it was reported that Plot Number MN/VI/4785 lease for Olsa was terminated and the plot leased to Export Milling EPZ Limited for 50 years. Compensation for the Plaintiff was discussed at that meeting. Also see the minutes of the meeting of 28th July 2015 at page 30-35 of the 2nd Defendant’s list and bundle of documents. Finally, on 21st August 2017 and 4th December 2017 the Plaintiff’s representatives held a meeting with officials of the 2nd and 3rd Defendants. See pages 69-72 of the 2nd Defendant’s list and bundles of documents.

63. During those two meetings it was confirmed that the Plaintiff’s claim had been forwarded to the National Land Commission for verification. Both the 2nd and 3rd Defendants confirmed at the meeting of 4th December 2017 that the 2nd Defendant was to compensate the Plaintiff upon verification and confirmation of the Plaintiff’s claim by the National Land Commission. The National Land Commission did in fact give a report of their evaluation of the compensation payable to the Plaintiff in the sum of Kenya Shillings Five Thirty Seven Million Eight Fifty Eight Thousand Two Thrity Six Hundred and Fourty Six cents (, Kshs.537,858,236.46).

The 2nd and 3rd Defendant having made those representations at the meetings aforesaid and in the 2nd Defendant’s letter dated 8th March 2018 these Defendants created a legitimate expectation to the Plaintiff that the Plaintiff was to be compensated for the suit property before the same was acquired by the 2nd Defendant. The 2nd and 3rd Defendants have violated the Plaintiff’s right to legitimate expectation.

64. To buttress his point, the Learned Counsel referred Court to the case of:- “Communications Commission of Kenya and 5 Others – Versus - Royal Media Services and 5 Others [2014] eKLR the Supreme Court stated as follows:-

265. “Legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. Therefore, for an expectation to be legitimate, it must be founded upon a promise or practice by public authority that is expected to fulfil the expectation.”



He stressed that the Plaintiff's right to the suit property was protected under the provision of Article 40 of the Constitution of Kenya, 2010.

65. He opined that the 2nd and 3rd Defendants were both statutory corporations established under the provisions of the Kenya Ports Authority Act Cap 391 and Export Processing Zones Act Cap 517 Laws of Kenya respectively. The Constitution of Kenya protected not only title to property but also interest in, or right over any property of any description. It may not matter if such interest was registered or not. The Defendants had tried to capitalise on the fact that at the time the Plaintiff filed suit its lease had not been registered. Having acknowledged that the Plaintiff had a leasehold interest in the suit property that interest was protected by the provision of Article 40 of the Constitution.
66. It was in fact wrongful and a violation of the Plaintiff's constitutional right to property for the 2nd Defendant to casually instruct the 1st Defendant to move into the suit property and commence construction of the road knowing that it had not acquired the suit property from the Plaintiff either by compulsory acquisition or by outright purchase contrary to the representation it had made in its letter to the Plaintiff dated 8th March 2018. The 3rd Defendant had totally failed to demonstrate any fraudulent conduct on the part of the Plaintiff that let the 3rd Defendant to execute the lease in favour of the Plaintiff. In the course of the proceeding herein two valuation reports were made by Knight Frank Valuers Limited and Dr. Victor Olonde for the Director Land Valuation Government Valuer respectively. Their reports had been produced in evidence by the 2nd Defendant in its supplementary list and bundle of document. However, the Plaintiff's claim was based on the valuation report by the National Land Commission that had the constitutional and statutory mandate to determine assessment of just compensation for compulsory acquisition of property. He held that as Justice I G Kimani stated in the case of:- "Ravaspaul Kyalo Mutisya v National Land Commission [2022] eKLR

"13. Further Article 67 of the Constitution establishes the National Land Commission with mandate over public land including land that has been compulsorily acquired. The Land Act 2012 governs the process of Compulsory Land Acquisition and mandates at section III(1) that the National Land Commission shall regulate the assessment of such just compensation and to prepare the award for compensation of such land that has been acquired".

Dr. Victor Olonde the Government Valuer must have had the above stated legal provisions in mind when in his letter dated 12th January 2022 at page 3 of the 2nd Defendant's further list of documents he stated that he is unable to make a valuation for compulsory acquisition of the land as that mandate is with only the National Land Commission. As the Learned Honourable Mr. Justice Yano had considered the public interest when he lifted the interlocutory injunction that had restrained the 1st Defendant from constructing a road on the suit premises and thereby allowed the Defendants to construct the road. The order that commended itself to us the alternative prayed that the Plaintiff be paid the sum of Kenya Shillings Five Thirty Seven Million Eight Fifty Eight Thousand Two Thrity Six Hundred and Fourty Six cents (Kshs. 537,858,236.46) as assessed by the National Land Commission together with interest and costs.

In conclusion, he urged the Honourable Court to enter Judgement in favour of the Plaintiff and to dismiss the 3rd Defendant's Counter Claim with costs.



B. The Written Submissions by the 2nd Defendant.

67. The 2nd Defendant through the Law firm of Messrs. Muriu Mungai & Company LLP Advocates filed their written submissions dated 3rd October, 2023. Mr. Kongere Advocate commenced the submissions by stating that this suit earned a justification for the criticism that practitioners had a penchant of litigating to be paid. Notably, the suit had given rise to two volumes of the court file. The issue arises from the Amended Plaintiff dated 20th February 2019, and the 3rd Defendant's Counterclaim dated 26th May 2020, against the Plaintiff and 2nd Defendant.'
68. According to the Learned Counsel, held that the Plaintiff called Mr. Martin Munga who testified as PW-1. The 1st Defendant called Mr. Richard Kuloba, who testified as DW-1. The 2nd Defendant called Mr. John Mwangi Chau, who testified as DW-2. The 3rd Defendant called Mr. Andrew Njuru, who testified as DW-3. The brief facts of the case was that the 2nd Defendant ("KPA"), intended to expand the Kipevu Road at gate 18. It sought to acquire several properties some of which were owned by the 3rd Defendant ("EPZA"). The identity of those properties was irrelevant save for subdivision number 4785 (Original No. 3842/2/3) Section VI Mainland North (the "Suit Property").
69. The Learned Counsel averred that, the suit property was hitherto registered in the name of EPZA as a lessee from the Government of Kenya. When KPA sought to acquire the Suit Property, EPZA informed KPA that a third party (whose exact identity was then undisclosed) had a sublease over the Suit Property and was therefore supposed to be compensated. Despite the voluminous pleadings, there were then, as was now, just two (2) sticking points in the process. The first was the identity of the person to land's office never disclosed any sub-lease to a third party. The second sticking point was the quantum of the compensation. There were then four (4) different valuation reports giving values of:-
- a. A Sum of Kenya Shillings Two Hundred and Fifty Million (Kshs. 250,000,000.00/=);
 - b. A Sum of Kenya Shillings Two Hundred and Eighty Million (Kshs.280,000,000.00/=);
 - c. A Sum of Kenya Shillings Five Thirty Seven Million Eight Fifty Eight Thousand Two Thrity Six Hundred and Fourty Six cents (, Kshs.537,858,236.46); and
 - d. A Sum of Kenya Shillings Five Sixty Eight Million (Kshs. 568,000,000.00/=).
- That had been complicated presently by the existence of a valuation report by Knight Frank Limited and another one by the Government Valuer.
70. Parties were unable to resolve those issues. Despite that, KPA, then facing an emergency, instructed the 1st Defendant on 3rd April 2018, to commence construction on the Suit Property. That led to the suit by the Plaintiff ("Export Mining") seeking injunctive reliefs against the 1st, 2nd and 3rd Defendants. That Plaintiff was amended on 20th February 2019 to include KPA and EPZA as Defendants, and an alternative prayer for a sum of Kenya Shillings Kenya Shillings Five Thirty Seven Million Eight Fifty Eighty Thousand Two Thrity Six Hundred and Fourty Six Cents (Kshs. 537,858,236.46), being compensation assessed by NLC. The tussle, up to that point, appeared to be between Export Milling and EPZA filed its Defence & Counter - claim. There, EPZA contended that it was in fact the only party entitled to compensation, whose quantum it did not plead, and that Export Milling's title was in fact unlawfully acquired.
71. The Learned Counsel submitted this was the case that went to trial and which the witnesses to whom they earlier referred, concentrated in proving. On the issues for determination, the Learned Counsel relied on the following four (4) grounds.



72. Firstly, on whether the 1st Defendant was wrongly sued. The Learned Counsel argued that they had appreciated Export Milling’s submissions on the issue, the point was just an agent. Giving Export Milling all the benefit of doubt they could muster, once KPA came to the suit in May 2018 and declared that H Young was its agent, that was the time to drop the suit against H. Young.
73. The Learned Counsel submitted that consistent authority existed for the proposition that an agent of a disclosed principle cannot be sued. The Learned Counsel relied on “Victor Mabachi & Another – Versus - Nurtun Bates Limited [2013] eKLR”.
74. Secondly, on the issue of whether the Plaintiff was or was not entitled to compensation. The Learned Counsel reiterated that they could not help but agree, to a large extent, with EPZA on this point. Export Milling brought this suit claiming a legally enforceable interest over the suit property. That legally enforceable interest, if it truly and lawfully existed, would no doubt make Export Milling’s case irresistible.
75. But like EPZA said and cited ample authority for it, the tide had shifted and parties seeking compensation must demonstrate that the rights they seek to enforce, in fact came into existence in accordance with the law. Otherwise, their claims would continue to be dismissed as happened in the case of:- “Sarnager Singh Hayer & another – Versus - Kenya Railways Corporation [2022] eKLR”.
76. The Learned Counsel submitted that here Export Milling said it acquired its interests from EPZA. EPZA had not only rejected that assertion, but had asserted that the supposed acquisition was in fact unlawful. They need not regurgitate the instances of unlawfulness cited by EPZA beyond saying he entirely agreed that those facts erode Export Milling’s claim to ownership. This, the Learned Counsel believed, must be the conclusion upon a careful and proper appreciation of the provision of Section 26 of the Land Registration Act 2012, as understood in the case of:- “Sarnager Singh (supra)”.
77. Even forgetting for a moment that Export Milling’s title was on shaky ground, it was not lost on him that at the point of coming to court, Export Milling’s lease was in fact not registered. EPZA had referred to copious authorities on the effect of an unregistered instrument where statute demands registration. While such a document was enforceable between EPZA and Export Milling, it was not enforceable against third parties such as KPA (“Mega Garment Limited – Versus - Mistry Jadva Parbat & Co. (Epz)Limited [2016] eKLR”).
78. For those two broad reasons therefore, the second issue, the Learned Counsel submitted, resolved itself with a finding that Export Milling had no enforceable claim to the Suit Property; certainly not against KPA, the 2nd Defendant.
79. Thirdly, on the issue of whether or not EPZA was not entitled to compensation. The Learned Counsel asserted that just as with Export Milling, EPZA’s claim to compensation was without legal basis. Foremost, a claim for compensation for deprivation of property was a claim in special damages as in the case of:- “Attorney General – Versus – Zinj Limited [2021]KESC 23 (KLR)”. On settled authority, special damages must be specifically pleaded and strictly proved (“Transporters (K) Ltd – Versus – Charles Mugabo [1999] eKLR”). in the absence of specific pleadings of special damages, none can be awarded however much proof there may be (“Mathew Mutua Mutio – Versus - Car & General (K) Ltd [2000]eKLR”).
80. The Learned Counsel submitted that there EPZA never pleaded any value of compensation. Instead, it simply asks the court to direct KPA “to pay the sum of money payable as compensation for acquisition..”. This was akin to a party “throwing [things] at the head of the Court”, a practice the case of:- “David Bagine – Versus – Martin Bundi [1997] eKLR” specifically warned against. It



follows therefore that, whatever may be the merit in EPZA's claim, it could not be entitled to any compensation.

81. The Learned Counsel submitted that it was unarguable that both EPZA and KPA were public bodies. He referred Court to the provision of Section 111(1D) of the *Land Act* 2012 which provides:-

“Compensation relating to compulsory acquisition shall not be paid to a public body unless there is a demonstrable inference that the land was purchased and developed by that public body.

82. This was a statutory bar to the payment of any compensation to EPZA unless it demonstrated that EPZA purchased and developed the land. EPZA never attempted to demonstrate any of those things, with the result that its claim to compensation must fail. What they had said so far meant that both the suit by Export Milling and the counterclaim by EPZA were for dismissal in their entirety. That made their submissions on the last issue only necessary should the matter end up on appeal and the trial court was reversed on issues 2 and 3.

83. Under the issue of what was the quantum of compensation to either, if at all, the Learned Counsel argued that they had gotten to the alternative prayer for compensation as opposed to the injunctions because, they think, given the circumstances here, no injunction would be available even in their wildest imagination.

84. Assuming, arguendo, there was a finding that either Export Milling or EPZA or both, are entitled to some form of compensation, what would be that amount? The Learned Counsel recalled that “Zinj Limited (Supra)” said:-

The main basis upon which special damages can be granted for the deprivation of property, is the market value of the said property.

85. This statement guided on the type of valuation report to look at. This was the one that valued “the market value”, as opposed to “the value for purposes of compulsory acquisition”. This to the Honourable Court meant that the report by NLC, upon which Export Milling's claim was hinged, must be rejected outright. Having rejected that report, the 2nd Defendant was left with a report by the Government Valuer dated 10th January, 2022, and a report by Knight Frank Limited dated 25th May, 2021. EPZA invited the court to disregard the report by the Government Valuer because it never valued the Suit Property for purposes of compulsory acquisition. To Learned Counsel, going by “Zinj Limited (Supra)”, that is the more reason to rely on that report. The Government valuer's report assess the value of the suit property at a total of Kenya Shillings Four Eighty Million (Kshs. 480,000,000.00/=) with Kenya Shillings Four Twenty Million (Kshs. 420,000,000.00/=) for the sub-lessee (presumably Export Milling). This report differed with the one by Knight Frank Limited which assessed the value at Kenya Shillings Six Hundred and One Million (Kshs. 601,000,000.00/=), with Kenya Shillings Eighty One Million (Kshs. 81,000,000.00/=) payable to head-lessee and a sum of Kenya Shillings Five twenty Million (Kshs. 520,000,000.00/=) payable to the sub-lessee.

86. The Learned Counsel's contention was that faced with conflicting reports of experts, the court be engaged in an evaluation process. This was because an expert report was only as good as its reasoning (“Stephen Kinini Wang'onde – Versus - The Ark Limited [2016]eKLR”). They assisted the court in that role. Here both reports applying the comparative approach, confirm that a comparable acre of land would be between a sum of Kenya Shillings Sixty Million (Kshs. 60,000,000/-) to Kenya shillings Eighty Five Million (Kshs. 85,000,000/-). The Government valuer then gave a 20% discount for the “quantum factor”, in appreciation that “larger than average size properties are let at lower levels of value



per unit of area than normal sized properties.” The Government valuer gave a further 10% discount on account of “the terrain and irregular shape” (see page 18 of KPA’s Bundle).

87. The Learned Counsel submitted that the Knight Frank’s report never, ex facie, took into account the “quantum factor”. Further, it noted the irregular shape and terrain but never gave a discount for it, nor gave reasons for not giving that discount. Therefore, this meant that Knight Frank had failed to take into account relevant factors thus arrived a wrong conclusion. On authority, that was a basis for rejecting the report by Knight Frank. That left the 2nd Defendant with the report by the Government Valuer, which the Learned Counsel invited the court to adopt as the fair value for purposes of compensation to whoever the court may find entitled to receive such compensation.
88. The Learned Counsel talked about interest, should a monetary award be made. KPA had consistently been lamenting about the delay by Export Milling and EPZA, in bringing the matter to trial. That was a relevant consideration when the court exercises its undoubted discretion to award interest on any monetary award (“John C. Omollo – Versus - South Nyanza Sugar Co. Ltd [2020] eKLR”).
89. Therefore, the Learned Counsel invited the Court to only award interest at court rates from the date of Judgment for to order otherwise, would be to saddle the EPZA’s apathy. That, would be rewarding indolence at the expense of the tax paying public.
90. In conclusion, the Learned Counsel urged the Honourable Court notwithstanding of the voluminous and perhaps the unnecessary documentation, to dismiss of both the suit and the Counter - Claim.

C. The Written Submissions of the 3rd Defendant

91. The 3rd Defendant through the Law firm of Messrs. Mickay & Company Advocates filed written submissions dated 30th August, 2023. Mr. Nyausi Advocate commenced their submission by stating that the Plaintiff’s case was based on the Amended Plaint dated 20th February, 2019 wherein it sought for Judgement against the 1st, 2nd and 3rd Defendants jointly and severally for the prayers stated above.
92. The 3rd Defendant filed its Statement of Defence and Counterclaim dated 26th May, 2020 disputing the demands of the Plaintiff and seeks a number of declarations and a mandatory order of injunction be issued to compel the 2nd Defendant to pay the sum of money payable as compensation for acquisition of MN/VI/4785 to itself. When the matter came up for hearing of the Plaintiff’s case on the 6th February, 2023, Mr. Martin Munga (PW - 1) adopted his statements dated 12th April, 2018 and the one dated 9th June, 2022 and produced the bundle of documents dated 12th April, 2018 and 9th June, 2022.
93. When the matter came up for defense hearing on the 19th June, 2023, on behalf of the 1st Defendant, Mr. Richard Kobala (DW - 1) adopted his statement dated 18th April, 2018 and produced the bundle of documents of even date, on behalf of the 2nd Defendant, John Chau (DW - 2) adopted his statement dated 7th June, 2022 and produced the bundle of the 3rd Defendant, Mr. Andrew Njuru (DW3) adopted the witness statements dated 26th May, 2020 and 8th June, 2022 and the bundle of documents of even date. Upon conclusion of the hearing, directions were given in respect of filing of submissions and the 3rd Defendant tenders these humble submissions for the Honourable court’s consideration.
94. On the background, the Learned Counsel submitted that the parcel of land known as subdivision 4785 (Original Mombasa 3842/2/3) of Section VI No.1 Mainland North-L.R. MN/VI/4785 (the “Suit property”) was in July, 2013 identified together with other parcels of land for public use for construction of the Kipevu Road with a view of easing traffic congestion in all roads around the Changamwe roundabout leading to the Port of Mombasa. As a result, the 1st and 2nd Defendants entered into a formal contract for the design and construction of the road and it is on the basis that



the 1st Defendant proceeded to the Suit Property and commenced construction activities as detailed in the letter of 3rd April, 2018.

95. The Learned Counsel opined that further the entry of the 1st Defendant onto the Suit Property had been authorized by the 2nd Defendant through the letter of 3rd April, 2018 despite the fact that at this point no compensation had been made to the rightful owner contrary to the discussions held. This action led to the Plaintiff instituting this suit on the 12th April, 2018 seeking injunctive orders against the 1st Defendant from forceful takeover and trespassing against the Suit Property and a number of declarations based on the unregistered lease held by it at that point in time. Pursuant to the Application dated 23rd April, 2018, filed by the 2nd Defendant, the initial injunctive orders granted to the Plaintiff were lifted and the construction proceeded and as confirmed by DW1, the project was completed and handed over sometime in April 2021 and is currently being used by the general public.
96. The Plaintiff's case therefore was that it ought to be compensated in terms of the valuation schedule prepared by the National Land Commission on 14th December, 2017 which determined the Plaintiff's sublease interest in the sum of Kenya Shillings Five Thirty Seven Million Eight Fifty Eighty Thousand Two Thirty Six Hundred and Fourty Six Cents (Kshs. 537,858,236.46) -inclusive of direct costs of Kenya Shillings Two Thirty Seven Million Seven Nineteen Hundred Seven Sixty One Hundred (Kshs. 237,719,761/-) Kenya Shillings Two Thirty Seven Million Seven Nineteen Hundred Seven Sixty One Hundred (Kshs.237,719,761/-). The 1st Defendant on the other hand maintains that it being an agent of the 2nd Defendant dated 15th June, 2017 it follows then that all remedies sought lie against the 2nd Defendant as its principal. The 2nd Defendant's case is that it has always been ready to compensate the rightful owner provided that the owner was properly determined and the compensation amount properly agreed upon.
- i. On the issues for determination, the Learned Counsel relied on the following six (6) issues namely. Firstly, on whether the Plaintiff had any proprietary interest in the suit property at the time of instituting the suit. The Learned Counsel posited that it was not in dispute that through the letter dated 28th June 2013, the 3rd Defendant offered to lease the Suit Property to the Plaintiff who accepted the same on the 25th July, 2013. Further, it was also not disputed that pursuant to this offer the Plaintiff and the 3rd Defendant entered into the lease dated 23rd September, 2015 over the Suit property, which was subsequently registered on 9th May, 2018 after the forceful takeover of the Suit Property and institution of the suit. It was also not disputed that at the point of forceful takeover of the Suit Property on the 9th April, 2018 and at the time of institution of the suit on 12th April, 2018, the Suit Property was registered in the 3rd Defendant's name as confirmed by the Certificate of Postal Search dated 17th April, 2018 produced by the 1st Defendant. It would then appear that between 12th April, 2018 and 9th May, 2018, somehow, the held between the 2nd and 3rd Defendants as evidenced by the minutes of 28th March, 2013 produced by the 2nd Defendant.
97. The Plaintiff's claim for compensation was based on the lease they currently hold but it cannot be glossed over that as at the time of institution of the suit, the lease currently held by the Plaintiff was unregistered yet there was a statutory requirement for registration. The question then, was whether or not one can claim any compensation based on an unregistered interest, and if so, how much?



98. The Learned Counsel relied on the provision of Section 43 (2) of the [Land Registration Act](#) which provides as follows:-

“No instrument effecting any disposition of private land under this Act shall operate to sell or assign land or create, transfer or otherwise affect any land, lease or charge until it has been registered in accordance with the laws relating to the registration of instrument.”

99. It was the Learned Counsel’s contention that the lease as held by the Plaintiff then at the time of institution of the suit was not capable of conferring legal or equitable estate in the Suit Property to the Plaintiff. Nevertheless, although the lease did not confirm to the statutory requirement, by law and precedents, the same remains enforceable as between the parties in the terms and conditions stipulated therein.

100. On this the Learned Counsel was guided by the provision of Section 36 (2) of the [Land Registration Act](#) which provides that an unregistered lease, is for all intents and purposes, only but a contract between the parties. To quote the said section:

“Nothing in this section shall be construed as preventing any unregistered instrument from operating as a contract.”

101. He referred Court to the case of:- “Raphael Wamiti Gachoka – Versus - Oakpark Apartments Mombasa Limited [2022]eKLR” held as follows:-

“The lease is unregistered, yet there is a statutory requirement for registration, the lease as it stands is not capable of conferring legal or equitable estate in the land, however the terms and conditions stipulated in the contract are enforceable inter parties.”

102. He also cited the case of:- “Chon Jeuk Suk Kim & another – Versus - E.J. Austin & 2 others [2013] eKLR”, the Court of Appeal effect of unregistered leases and whether they conferred proprietary interest on the lessor:

“Those decisions show that an agreement of a lessor unregistered lease where the statute requires contract between the parties for the period stated in the document and the non-registration does not preclude the use of the document to show the terms of contract between the parties.”

103. Also in “Mega Garment Limited – Versus - Mistry Jadv Parbat & Co. (EPZ) Limited (2016) eKLR”, the Court of Appeal discussed the status of an unregistered lease and stated as follows:

“The time-honored decision of this court in Bachelors Bakery Ltd-v-Westlands Securities Ltd (1982)KLR 366 which has been followed in a long line of subsequent decisions elucidates the status of an unregistered lease. It reiterates and confirms the firmly settled law, first that a lease for immovable property for a term exceeding one year can only be made by a registered instrument; that a document merely creating a right to obtain another document, like the one in this dispute, does not require to be registered to be enforceable; that such an agreement is valid inter partes even in the absence of registration, but gives no protection against the rights of third parties. That exposition of the law holds true in this case...”

104. From the foregoing, the gravamen of the 3rd Defendant was that the lease held by the Plaintiff was to be enforced between the two. At page 4 of the lease, it was clear that the stand premium of the lease



agreed between the Plaintiff and the 3rd Defendant is USD 410,155.31 less USD 470 and there is no dispute about this being the value of the sublease. Accordingly, it is the Learned Counsel's submission that based on the above, since at the time of the institution of the suit, the Suit Property belonged to the 3rd Defendant and not to the Plaintiff any compensation payable by the 2nd Defendant should be to the 3rd Defendant and consequently, the length and breadth of the Plaintiff's claim to the Suit Property cannot exceed the value paid for the same.

105. Secondly, on the issue of whether the Lease dated 23rd September, 2015 was validly and legally acquired. The Learned Counsel submitted that the Plaintiff relied on the provision of Sections 25 and 26 of the *Land Registration Act*, No. 3 of 2012 for the argument that the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the court are indefeasible and that the onus was upon the Defendant to challenge the Plaintiff's title by establishing fraud, misrepresentation, illegal acquisition or acquisition of the same by a corrupt scheme. The 3rd Defendant never denied the existence of a lease. What it questioned was the legality and the manner in which it was acquired. It was simply not enough for the Plaintiff to wave a lease in the eyes of the court, and claim compensation from the interest allegedly arising from the same.

106. To buttress on that point, the Learned Counsel quoted the case of:- "Kenya Anti-Corruption Commission – Versus - Online Enterprises Limited & 4 others [2019] eKLR":-

"In order to determine the question whether the lease held by the 1st Defendant is valid, it must be demonstrated that it was properly acquired. It is not enough that one waves a Lease or a Certificate of Lease and assert that he has good title by the mere possession of the Lease or Certificate of Lease. Where there is contention that a Lease or Certificate of Lease held by an individual was improperly acquired, then the holder thereof, must demonstrate, through evidence, that the Lease or Certificate of Lease that he holds, was properly acquired. The acquisition of title cannot be construed only in the end result, the process of acquisition is material and important especially when there are doubts to the regarding the process."

107. Black's Law Dictionary, 9th Edition at page 131 defines "fraud" as

"a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment."

108. The process leading to the acquisition of the lease over the Suit Property was nothing short of knowingly misrepresenting the truth or concealing material facts. It was subterfuge by Plaintiff. The fact that the Plaintiff rushed to register the lease on 9th May, 2018, was itself, an evincement of the rationale behind the whole charade. The Plaintiff had applied for allocation of two (2) hectares at Kipevu EPZ on 6th February, 2013, and was only issued with the offer letter on 28th June, 2013 and accepted the same on 25th July, 2013 which is after the commencement of the land acquisition process. Yet at this point in time it should be noted that, the 2nd Defendant had already vide the letter dated 1st July, 2013 expressed interest in acquiring the Suit Property for construction of a holding ground for trucks waiting to enter the port.

109. Further, the Suit Property as confirmed by DW - 3 was at that point leased to Olsa (EPZ) Limited for a term of 50 years from 1st July, 2008. That the said lease was subsisting at all times including to the time when the letter of offer was issued to the Plaintiff and therefore the Suit Property was not available for allocation to the Plaintiff. The same could also be gleaned from the Copy of the Certificate of Title produced by the 3rd Defendant and pages 16 - 17 of the minutes of 27th November, 2014 produced by the 2nd Defendant. The 3rd Defendant had also informed the 2nd Defendant that there was a tenant



occupying the Suit Property who would need to be compensated as per the minutes of the meeting was not disclosed in the said minutes, it was unlikely that the tenant was the Plaintiff.

110. The Learned Counsel submitted that the Plaintiff also confirmed to have made payments towards the lease premium as early flow of a transaction which, legally and factually speaking, should be above reproach. During cross-examination the Plaintiff confirmed that it never raised concerns at any point regarding the delay in registering the lease. Further, they never held any correspondence in respect of the same. In the meeting of 28th March, 2013 it was agreed that the lease held by the tenant would be terminated as such the fact that a lease with the then tenant would be terminated and a new one issued to the Plaintiff contrary to the discussions only point to the subterfuge underlying the acquisition of the lease.
111. Lastly, under cross-examination, the PW - 1 and DW - 3 confirmed that the 3rd Defendant was the one who was supposed to register the lease as required by the Export Processing Zones Act, 1990 and Regulations made thereunder, yet somehow it was the Plaintiff who actually registered the lease after the 2nd Defendant took possession of the Suit Property. From the foregoing, it was inconceivable for the lease held by the Plaintiff to be one acquired procedurally.
112. The Counsel cited the case of:- “Musa Sheikh Aden & another – Versus - County Government of Garissa & another [2018]eKLR”, the court, while quoting the decision in “Mrao Ltd -Versus -First American Bank of Kenya Ltd & 2 Others [2003] KLR 125” stated as follows regarding a “Proper Lease:-”

“ A proper lease between parties creates a right which a court of equity is obligated to protect upon infringement.”
113. The lease held by the Plaintiff was by no means a proper lease. It was superimposed on another valid, existing lease at the time of creation. It was also tainted with fraud. Resultantly, the document purported to be a lease was incapable of remedy or protection by the court. Resultantly, the Plaintiff had no right to any compensation from the acquisition of the Suit Property by the 2nd Defendant. If at all they deserved any recompense, it would be for the value of the lease. The proprietary interest the Plaintiff so claims was a tenuous attempt at justifying the unjustifiable.
114. Fourthly, on the issue of whether the Plaintiff was entitled to the reliefs sought. The Learned Counsel submitted that the Plaintiff sought an alternative remedy of a sum of Kenya Shillings Five Thirty Seven Million Eight Fifty Eight Thousand Two Thirty Six Hundred and Fourty Six cents (Kshs.537,858,236.46/-) which represented the respect of property they had no proprietary interest in at the time of the acquisition. The sum of Kenya Shillings Five Thirty Seven Million Eight Fifty Eight Thousand Two Thirty Six Hundred and Fourty Six cents (Kshs. 537,858,236.46/-) assessed by the National Land Commission consisted direct costs of Kenya Shillings Two Thirty Seven Million Seven Nineteen Hundred Seven Sixty One Hundred (Kshs. 237,719,761/-) Kenya Shillings Two Thirty Seven Million Seven Nineteen Hundred Seven Sixty One Hundred (Kshs. 237,719,761/-) as detailed out in the letter dated 13th November, 2015 produced by the 3rd Defendant. Yet there was no evidence tendered by the Plaintiff to support the direct costs of Kenya Shillings Kenya Shillings Two Thirty Seven Million Seven Nineteen Hundred Seven Sixty One Hundred (Kshs. 237,719,761/-). During cross – examination, PW - 1, confirmed that as at year 2014 they had not developed the Suit Property as there was a tenant and they had not bought any equipment as at then. As such, the claim for loss of business, damages and escalation costs of finance remained unsupported. Further no approvals had been gotten as required by the approval in principle letter of 22nd December, 2008.



115. In addition, there was no proof that the Plaintiffs spent anything apart from the cost of the lease on the suit property. The Plaintiffs never produced any EIA license in support of the expense incurred nor were there any approved plans or architectural drawings in respect of the Suit Property as per the letter dated 25th August, 2015 produced by the 3rd Defendant. Moreover, the Plaintiff could not prove any spending on the proposed mill. All they had was a quote, without any proof of spending. Further, as per the said lease, the Plaintiff was to procure and EIA licence for its project and commence erecting buildings within twenty-four months from the date of the lease or the same stands as surrendered. During cross-examination the Plaintiffs witness confirmed that as at April, 2018 they had not put up buildings as such, the lease stood as surrendered and even the subsequent registration would not in any way grant a proprietary interest.
116. Even as per the discussions of the meeting held on 4th December, 2017, at that point the Plaintiff was only sought for the sum of Kenya Shillings Two Thirty Seven Million Seven Nineteen Hundred Seven Sixty One Hundred (Kshs. 237,719,761/-) being the direct costs as assessed by the National Land Commission. The said sum was in light of the fact that the Plaintiff had no proprietary interest in the suit and therefore for the claim to metamorphose to include the value of the land was unfounded. If at all the Plaintiff deserved any compensation, that compensation should never exceed the value of the lease, which was a contract inter partes, at the time the 1st Defendant entered into possession. The registration of the lease post fact, never entitled the Plaintiff to any compensation.
117. The Learned Counsel submitted that on the Plaintiff's claim for others of permanent and mandatory injunctions to prevent the 1st, 2nd and 3rd Defendants from interfering with the suit property, on the permanent injunction. Korir, J aptly captured the position as regards what constitutes a permanent or perpetual injunction in the case of "Kenya Power & Lighting Co. Ltd – Versus - Sheriff Molana Habib(2018)eKLR" when he stated thus:-
- “A permanent injunction which is also known as perpetual injunction is granted upon the hearing Court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the Plaintiff to be protected.”
118. It was not disputed that the road had now been completed and was in full use. It followed then that an award of a permanent injunction could not issue as the same had been overtaken by events. On the mandatory injunction, it was trite law that such should only be granted in special circumstances and in clearest of cases as stated in "Kenya Breweries Ltd – Versus - Okeyo [2002]1EA 109" and the English decision of "Locabail International Finance Limited – Versus - Agroexport and others [1986] 1All ER 901".
119. It was the Learned Counsel's submission that the Plaintiff had not established by way of evidence the existence of special circumstances to warrant the granting of the mandatory injunction and further as the road expansion project was now completed and in use by the 2nd Defendant and the benefit of the greater and wider public and having involved expenditure of colossal sums of public funds, the same should not issue.
120. Fifthly, on whether the 3rd Defendant was entitled to the relief sought in its Counterclaim. The Learned Counsel averred that it was a principle of law that whoever lays a claim before the court against another had the burden to prove it. The 3rd Defendant had led evidence to show that it was the owner of the Suit Property at the time of the institution of the suit. Further, the 3rd Defendant had shown that the



lease held by the Plaintiff was unlawful ab initio and therefore under the provision of Article 40 (6) of the Constitution, the Plaintiff could not enjoy property rights over the same.

121. Under the provision of Article 40 (6) of the Constitution, the protection of the right to property never extended to any property that has been found to have been unlawfully acquired and thus the protection offered by the provision of Sections 25 and 26 were not available to the Plaintiff as held in the case of:- “Republic – Versus - District Land Registrar, Mombasa & 5 Others Ex-Parte Super Nove Properties Ltd [2016] eKLR” where the court found that there can be no indefeasibility of title as against Article 40 (6) of the Constitution. On the compensation value for the Suit Property, several valuation reports were produced Lands and Physical Planning and the one by Knight Frank Valuers Limited. On the valuation report done by the Ministry of Lands and Physical planning, they were guided by the letter dated 12th January, 2022 produced by the 2nd Defendant which noted the inadequacy of the valuation done as such, the same should not be used to assign the compensation value.
122. On the other hand the valuation done by the National Land Commission failed to consider that at the time of the valuation, the Plaintiff had no proprietary right over the Suit Property as it had no registrable interest thus a reversionary interest could not arise. Accordingly, the assignment of a reversionary interest when none existed is faulty. In respect of the valuation done by Knight Frank Valuers Limited, this represents a fair assessment of the compensation value for reasons that as per the discussions between the 2nd and 3rd Defendants, the Suit Property was to be acquired by way of a transfer by private treaty and not compulsory acquisition.
123. Accordingly, it was the Learned Counsel’s submission that the sum to be determined as compensation payable should be paid to the 3rd Defendant as the rightful owner of the Suit Property.
124. Finally, on who was entitled to the costs of the suit. The Learned Counsel contended that it was trite law that costs should follow the event. Undoubtedly, it was on the instruction of the 2nd Defendant that the 1st Defendant took over the Suit Property necessitating this court action. It was also a fact that the involvement of the 3rd Defendant in this suit was only as a result of the application for joinder made by the 1st Defendant. Having been called upon to defend its proprietary interests it then followed that it was only fair that it should not be punished. Rather it ought to be compensated for the trouble taken in prosecuting and defending the case.
125. In conclusion, it was the Learned Counsel’s submission that the court machinery should not be used as a pawn for pursuit of fraudulent ends. That was exactly what the Plaintiff’s claim was. Therefore, the Learned Counsel in his closing submission urged the Honourable Court to dismiss the Plaintiff’s claim against the 3rd Defendant and to have the 3rd Defendant’s claim be allowed as prayed.

VII. Analysis and Determination

126. I have carefully read and considered the pleadings herein by the Plaintiff and the Defendants, the written submissions, the myriad of cases cited herein by parties, the relevant provisions of the Constitution of Kenya, 2010 and statutes.
127. In order to arrive at an informed, Just, equitable and reasonable decision, the Honorable Court has framed the following five (5) salient issues for its determination. These are:-
 - a. Whether the Plaintiff are the bona fide owners of the suit land and if so are they entitled to the orders sought



- b. Whether the government could lawfully deprive a person of part or all of their property via a grant of lease to another person and what was the lawful procedure for the government to compulsorily acquire land
- c. Whether the 3rd Defendant's Counter Claim is sustainable?
- d. Whether the Honourable Court considers awarding damages for unlawful compulsory acquisition of land?
- e. Who will bear the Costs of suit instituted on 20th February, 2019 and the counter claim dated 26th May, 2020?

Issue No. a.) Whether the Plaintiff are the bona fide owners of the suit land and if so are they entitled to the orders sought.

128. Under this sub - title, as indicated the main substratum of this matter is rather straight forward. In simple terms, it is two fold. Firstly, who exactly between the Plaintiff and the 3rd Defendant herein is the bona fide and legal registered proprietor to the suit properties known as sub - division number 4785 (Original Number 3842/2/3) of Section VI Mainland North and Secondly, who is entitled and/or justified for the compensation arising from the compulsory acquisition of the said property by the 2nd Defendant from the project undertaken by the 1st Defendant herein.
129. The Plaintiff claim for compensation over the suit properties based on the lease they currently hold but it cannot be glossed over that as at the time of institution of the suit, the lease currently held by the Plaintiff was unregistered yet there was a statutory requirement for registration. According to them, they are the legal and bona fed owners to the suit properties. The Honourable Court will be looking at this issue indepth later on here below. On the other hand the 3rd Defendant claims to be the registered proprietor as Lessee of all that suit properties for a term of 99 years from 1st January, 1995. As set out in the Counter-Claim herein the 3rd Defendant challenges the validity of Lease to the Plaintiff registered on 9th May, 2018 for a term of 30 years from 1st August, 2013. Further the 3rd Defendant avers that as at 12th April, 2018 when these proceedings commenced, the Plaintiff had no proprietary interest in the suit property. Whereas the 3rd Defendant admits negotiations were undertaken between itself, the Plaintiff and the 2nd Defendant for the outright purchase of the suit property by the 2nd Defendant.
130. The 3rd Defendant claims not being aware of the determination and the circumstances under which the National Land Commission allegedly determined that the Plaintiff be paid Kenya Shillings Five Thirty Seven Million Eight Fifty Eighty Thousand Two Thirty Six Hundred and Fourty Six Cents (Kshs. 537,858,236.46) being the tenant's sublease interest whereas the 3rd Defendant was to be paid Kenya Shillings Kenya Shillings Two Hundred and Two Million Six Hundred and Six Thousand and Thirty Nine and Fifty Five cents (Kshs 202,606,039.55 being the Landlord's reversionary interest. In answer to the averments in paragraphs 8 and 9 of the Plaint the 3rd Defendant stated that the circumstances under which the road is being constructed on the suit property the Plaintiff has not and could not be deprived of the use and enjoyment of the suit premises and therefore it has not suffered loss and damage. The Plaintiff was not entitled to compensation for the full value of the suit premises in the sum of Kenya Shillings Five Thirty Seven Million Eight Fifty Eighty Thousand Two Thirty Six Hundred and Fourty Six Cents (Kshs. 537,858,236.46) as pleaded in paragraph 10 of the Plaint and its claim is untenable, fraudulent, null and void ab initio on the ground of illegality.
131. The 1st and 2nd Defendants has had without the Plaintiff's consent and without any colour of right whatsoever entered upon the suit premises unlawfully and has have commenced a construction thereon of what appears to be a road which act amounts to a trespass which trespass is continuing. Prior to



the commencement of construction of the road on the suit premises the 2nd Defendant had evinced an intention to acquire the suit premises through outright purchase of the same. At the sametime, the Plaintiff, the 2nd Defendant and the 3rd Defendants had entered into negotiation for the outright purchase of the suit premises by the 2nd Defendant and in the course of those negotiations the same parties agreed to have the valuation of the suit premises determined by the National Land Commission. Accordingly, upon conducting its valuation of the suit properties, the National Land Commission determined that the Plaintiff be paid Kenya Shillings Five Thirty Seven Million Eight Fifty Eighty Thousand Two Thirty Six Hundred and Fourty Six Cents (Kshs. 537,858,236.46) being the tenants sub - lease interest whereas the 3rd Defendant was to be paid a sum of Kenya Shillings Two Hundred and Two Million Six Hundred and Six Thousand and Thirty Nine and Fifty Five cents (Kshs. 202,606.039.55/=) being the Landlords reversionary interest. The 2nd Defendant without paying the Plaintiff the sum assessed by the National Land Commission and thereby acquiring the suit premises has contracted the 1st Defendant to construct the road on the suit premises.

132. In the view of the given circumstances and the surrounding facts and inferences, it becomes inevitable to undertake the historical background and the root of the title to establish the actual justification and on the ownership of the suit property. In saying so, the Court is ably informed by the now famous Court of Appeal the case of:- “Munyu Maina – Versus - Hiram Gathiha Maina [2013] eKLR”, held as follows:

‘We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.’

Additionally, it is trite law that when there are two competing titles, the first in time will prevail. This position was emphasized in the case of “Wreck Motors Enterprises – Versus - The Commissioner of Lands and Others Civil Appeal Civil Appeal No. 71 of 1997”, where the court held that:

“Where there are two competing titles the one registered earlier is the one that takes priority.”

133. The same position was held in the case of “Gitwany Investment Ltd – Versus - Tajmal Limited & 3 Others (2006) eKLR” where the Court held that:-

‘.....the first in time prevails, so that in the event such as this one whereby a mistake that is admitted, the Commissioner of Lands issues two title in respect of the same parcel of land, then if both are apparently and on the face of them issued regularly and procedurally, without fraud save for the mistake then the first in time must prevail’

134. The 3rd Defendant told the Honourable Court that the Plaintiff did not accept the 3rd Defendant’s offer by 31st July, 2013 as clearly required in the letter of offer dated 28th June, 2013. The Plaintiff executed a lease over the suit plot after it had become aware that the same was the subject of land acquisition for purposes of expansion of Kipevu Road. The Plaintiff submitted to the 2nd Defendant a claim for compensation before it had been registered as the proprietor of a sub-lease interest in the suit plot.



135. Ordinarily, no land should be registered more than once and having two separate leases held by separate persons. Therefore in this case, there must be one title deed which is genuine and one which was issued either unlawfully or through mistake and thus double allocation.
136. The 3rd Defendant in its submissions argued that it was not in dispute that through the letter dated 28th June 2013, the 3rd Defendant offered to lease the Suit Property to the Plaintiff who accepted the same on the 25th July, 2013. Further, it is also not disputed that pursuant to this offer the Plaintiff and the 3rd Defendant entered into the lease dated 23rd September, 2015 over the Suit property, which was subsequently registered on 9th May, 2018 after the forceful takeover of the Suit Property and institution of the suit. It was also not disputed that at the point of forceful takeover of the Suit Property on the 9th April, 2018 and at the time of institution of the suit on 12th April, 2018, the Suit Property was registered in the 3rd Defendant's name as confirmed by the Certificate of Postal Search dated 17th April, 2018 produced by the 1st Defendant. It would then appear that between 12th April, 2018 and 9th May, 2018, somehow, the held between the 2nd and 3rd Defendants as evidenced by the minutes of 28th March, 2013 produced by the 2nd Defendant. The 3rd Defendant went ahead to argue that at all material times the Plaintiff was and remains the registered proprietor of a land parcel known as L.R. No. 46892 (Original Number 3842/2/3) of Section VI Mainland North, the suit property herein by dint of a lease for a term of 99 years from 1st January, 1995. In or about 1995 the Government of Kenya acquired a parcel of land measuring 23.45 Hectares in Kipevu in Mombasa District for use by the Plaintiff. Subsequently the said land was sub-divided into 16 plots and leased out by the Plaintiff to various investors. The said 16 plots included the suit property herein.
137. On 6th July, 2010 a lease dated 3rd February, 2010 was registered in favour of Olsa (EPZ) Ltd for a term of 50 years from 1st July, 2008. The said lease was revoked on 27th January, 2014 vide a Deed of Revocation dated 16th January, 2014. The Plaintiff stated that in January, 2013 the Government of Kenya commenced the process of land acquisition for Kipevu Road expansion project. Among the parcels of land identified for acquisition for purposes of the said project were the following parcels belonging to the Plaintiff:-
- i. MN/VI/4785-3.285 Ha.
 - ii. MN/VI/4794-7.786 Ha
 - iii. MN/VI/4799-0.9984 Ha
 - iv. MN/VI/2462-1.009 Acres
 - v. MN/VI/4798-1.5 Acres
138. The 3rd Defendant has admittedly not denied that the existence of a lease held between it and the Plaintiff it only questions the legality and the manner in which it was acquired. It is simply not enough for the Plaintiff to wave a lease in the eyes of the court, and claim compensation from the interest allegedly arising from the same.
139. As may be observed, the law is extremely protective of title and provides only two instances for the challenge of title. It is trite law and based on the burden of proof any allegation of fraud has to be proved based on the provision of Section 107 of the *Evidence Act*, Cap. 80. The allegation of fraud on the title is rather gravies and serious. This is where the title was obtained by fraud, omission or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme. In saying that I have cited the plethora of decisions on this aspect by Courts. These are: "Kagina – Versus Kagina & 2 Others



(2021) (KECA) 242; the Viraj Morajaria Versus – Nansingh Madhusingh Darbar & Another 2000, eKLR and “Kinyanjui Kamau -Versus - George Kamau Njoroge [2015] eKLR”, where the Honourable Court of Appeal observed as hereunder:-

“It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo – Versus - Ndolo (2008) 1 KLR (G&F) 742 wherein the Court stated that:

“.....We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases.....”

In the particulars of fraud, the appellant alleged that he did not consent to the transfer of the property. We find this was not true; as pointed out by the courts below, the appellant had full knowledge of and consented to the transaction. The evidence of the chief (DW -2) was instructive in this regard, as was a letter to the Land Registrar, Kiambu. This letter in particular shows that the appellant was fully aware of the transaction between the respondent and his deceased brother.

The evidence that was adduced by the Land Registrar seemed to indicate that there may have been some mischief in the manner that the title in favour of the respondent was procured. In his evidence, the Land Registrar indicated that the file in respect of the subject property could not be found, and as such, any transfer that may have been undertaken may have been fraudulent. In cases where fraud is alleged, it is not enough to simply infer fraud from the facts. In *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR (Civil Appeal No. 106 of 2000) Tunoi JA (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

140. Certainly, from the evidence placed herein, the 3rd Defendant has failed to demonstrate that the title held by the Plaintiff was acquired illegally or through fraudulent means. That allegation therefore must fail.
141. Be that as it may, I find that the title held by the Plaintiff is bona fide and legal. It was the first in time and as equity teaches in its maxim that; “when two equities are equal, the first in time prevails”. It follows that then the Plaintiff’s title deed was the first in time a lease for a term of 30 years from 1st August, 2013 and should prevail there having been no evidence produced by the 3rd Defendant to prove that the third party was the lessee of the suit property. For these reason, the Plaintiff is the absolute and legal owners of the suit land with all the indefeasible rights, title and interests vested on it by law and particularly the provisions of Sections 24, 25 and 26 of the *Land Registration Act*, No. 3 of 2012.



Issue No. b.) Whether the Government could lawfully deprive a person of part or all of their property via a grant of lease to another person and what the lawful procedure for the government to compulsorily acquire land.

142. Under this sub heading, the main substratum pertains to the legal concept of compulsory acquisition of private property by the Government for purposes of public use. Principally, the process is governed by the Article 40 (3) of *the Constitution* of Kenya, 2010. It provides ‘inter alia’:-

“The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-

- a. results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
- b. is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that-
 - i. requires prompt payment in full, of just compensation to the person; and
 - ii. allows any person who has an interest in, or right over, that property a right of access to a court of law.

143. Pursuant to that, the other legal provisions that guide the process are found from Part VIII and the provision of Sections 107 to 120 of the *Land Act*, No. 6 of 2012. It consists of the gazettelement and the notifications, the holding of inquiry, evaluation, awarding and the actual compensation of the award promptly, fairly and adequately. I cite my own case of “Fort properties Limited – Versus - the National Land Commission & Others” eKLR (2021) and that of “Patrick Musimba – Versus - National Land Commission & 4 others (2016) eKLR”.

144. The brief facts of the case as per the Amended Plaint were as follows that the Plaintiff was the registered proprietor as Lessee of all that property known as subdivision number 4785(Original Number 3842/2/3) of Section VI Mainland North (the suit premises) from the 3rd Defendant Export Processing Zone Authority for a term of 50 years from 1st August 2013 and is entitled to possession thereof. The 1st and 2nd Defendants has had without the Plaintiff’s consent and without any colour of right whatsoever entered upon the suit premises unlawfully and has have commenced a construction thereon of what appears to be a road which act amounts to a trespass which trespass is continuing. Prior to the commencement of construction of the road on the suit premises the 2nd Defendant had evinced an intention to acquire the suit premises through outright purchase of the same. The Plaintiff, the 2nd Defendant and the 3rd Defendants had entered into negotiation for the outright purchase of the suit premises by the 2nd Defendant and in the course of those negotiations the same parties agreed to have the valuation of the suit premises determined by the National Land Commission. Accordingly the National Land Commission determined that the Plaintiff be paid Kenya Shillings Five Thirty Seven Million Eight Fifty Eighty Thousand Two Thirty Six Hundred and Fourty Six Cents (Kshs. 537,858,236.46) being the tenants sublease interest whereas the 3rd Defendant was to be paid Kenya Shillings Two Hundred and Two Million Six Hundred and Six Thousand and Thirty Nine and Fifty Five cents (Kshs. 202,606.039.55/=) being the Landlords reversionary interest. The 2nd Defendant without paying the Plaintiff the sum assessed by the National Land Commission and thereby acquiring the suit premises has contracted the 1st Defendant to construct the road on the suit premises.



145. According to the 1st Defendant the subject matter of this Suit is the construction of a road known as Kipevu Road, Mombasa passing through all that piece or parcel of land known as Land Subdivision Number 4785 (Original Number 3842/2/3) of Section VI Mainland North. The Defendant disputed the contents of paragraph 2 of the Plaintiff and put the Plaintiff to strict proof thereof. In any event, the property known as Land Subdivision Number 4785 (Original Number 3842/2/3) of Section VI Mainland North is registered in the name of Export Processing Zones Authority - the Suit property.
146. According to the 1st Defendant, by way of a Letter of Bid dated 21st March, 2016, the Defendant bid for a Tender for the Design and Construction of Kipevu Road Mombasa (EPC/Turnkey). By way of a letter dated 18th August, 2016, the Kenya Ports Authority notified the Defendant that the Defendant has been awarded the Tender Number KPA/072/2015-16/PDM-for the Design & Construction of Kipevu Road in Mombasa. By way of a letter dated 19th August, 2016, the Defendant unconditionally accepted the award of the said Tender Number KPA/072/2015-16/PDM - for the Design & Construction of Kipevu Road in Mombasa. The 1st Defendant and the 2nd Defendant entered into a formal contract for the Design & Construction of Kipevu Road, Mombasa. In addition to the above, by way of a Letter of Indemnity dated 15th June, 2017, the Kenya Ports Authority undertook to indemnify the Defendant against all actions, proceedings, liabilities, claims, costs and expenses brought against the Defendant in connection with the design and Construction of the said Kipevu Road Mombasa.
147. According to the 1st Defendant, by way of a letter dated 3rd April, 2018, the 2nd Defendant instructed the 1st Defendant to proceed to the site meant for construction of Kipevu Road Mombasa, which site includes the Suit property, in order to commence construction works. In the above premises, it is clear that the reason as to why the Defendant entered onto the Suit property and commenced construction works thereon is because the Suit property constitutes part of the site over which the 1st Defendant contracted the 1st Defendant to design and construct the Kipevu Road Mombasa, and further because the 1st Defendant instructed the 1st Defendant to enter into the Suit property for purposes of constructing the said Kipevu Road, Mombasa.
148. Further to the foregoing, the 2nd Defendant states that at the time the 1st Defendant proceeded to the project site, the Suit property was vacant and not occupied by the Plaintiff or any other person. In the foregoing premises, the 2nd Defendant states that the Plaintiff has not adduced any or any sufficient evidence or grounds to entitle the Plaintiff to the orders sought in the Plaintiff.
149. DW - 1 for the 1st Defendant when examined in chief told the Court that the role of the 1st Defendant was contracted by the 2nd Defendant to construct the KIPEVU Road Mombasa. There was a tender by the 2nd Defendant which they bid and the same was accepted by the 2nd Defendant evidenced at page 4, entitled, the letter to the 2nd Defendant dated 21st March, 2016. The bid was accepted by KPA and they were notified of the acceptance. At page 7 the witness told the court that the letter was dated 18th May, 2016 to the 1st Defendant signed by Head of Procurement KPA. They accepted the award unconditionally through a letter dated 19th August, 2016. After that they entered into a contract at page 8 between the 1st and 2nd Defendant for the construction dated 19th October, 2016 when it was executed.
150. The witness stated that they entered the site for purposes of the construction work. On April, 2017 after which they got a letter dated 15th June, 2017 by the 2nd Defendant to proceed. At page 88 they started the construction to its logical conclusion and handed over in April 2021. From the best of his knowledge he had not been faulted on the terms of the contract. He prayed for the dismissal of the suit with costs.



151. The witness confirmed in Cross examination that he was aware that the 2nd Defendant was in the process of acquiring the land for construction of the road. He did not know whether they (KPA) acquired the land. He told the Court that at page 88 of the letter of indemnity they were not involved in the acquisition of the land.
152. The main controversy, revolves around the legality or otherwise, of the manner in which the Government, went about acquiring portions of the suit property, and conferring title over the same, in favour of third parties. The only way the Government could lawfully deprive the Plaintiff of part or all of its property, was through a compulsory acquisition, in conformity with the provisions of Article 40 (3) of *the Constitution*, and the procedure stipulated in the Land Acquisition Act (now repealed). Towards this end, can it be said that the Government acquired the portion of the suit property compulsorily? The facts on record do not that way point. Being the custodian of the Land Register, and the guarantor of titles emanating there-from, the Government was acutely aware that the suit property was owned by the Plaintiff.
153. It follows that any compulsory acquisition process, ought to have commenced with a requisite Notice to the Plaintiff, and any other persons claiming an interest in the land. The public purpose for which the land was to be acquired, ought to have been clearly stated. Most critically, the resultant acquisition ought to have been attended with prompt payment in full, of a just compensation to the Plaintiff. There is nothing on the record to show, that any of these mandatory processes, was followed before a portion of the suit property was acquired.
154. The Defendants - DW - 2 told the Court that by the time they handed over the construction to the Defendant the acquisition of the land had not been concluded but there were many meetings to that effect evidenced at page 71. It was a meeting between KPA and H- Young Limited , EPZ had its representatives in attendance i.e. the meeting held on 4th December, 2017 for a compensation claim of a sum of Kenya Shillings Two Thirty Seven Million Seven Nineteen Hundred Seven Sixty One Hundred (Kshs. 237,719,761/-) from the meeting, there was no discussion on compensation of the land. When referred to the 3rd Defendants documents at page 18, he stated that the letter from the Plaintiff to KPA dated 13th November, 2015 titled compensation for the use of the land. This was the basis of the claim i.e. compensation for the loss of leased land and not the acquisition of the land. The cost of the leased land was 410,625/- US dollars. He confirmed to have worked with KPA since 2018, by then there was no development on the land. There were no equipment either. They did an official search in 2018, there was no encumbrances at the time. When referred to the 1st Defendant list of documents, he told the court that the certificate of posts of official search showed there was no encumbrances onto the property. The witness told the court with reference to minutes of the meeting held on 4th December, 2017 that at page 17, entitled Ms. Export Milling EPZ Ltd for compensation although there was a condition of 50% of claim to have been paid before the contractor was allowed to site. He was not aware whether this was paid. Between April 2018 to 2021 there was no letter from KPA and they were not informed of EPZ taking over of the site.
155. According to the 2nd Defendant's witness, DW 2, told the court that KPA had been ready to compensate EPZ and they could compensate the investors. In the process of negotiation, KPA found out that the lease was not registered. When referred to the minutes of the meeting dated 4th December, 2017, at page 71 and 72, Mr. Songoro informed the meeting KPA was expanding Kipevu Road and some of the parcels affected belonged to EPZ (A). There was a claim referred to the National Land Commission. They assessed the figure of Kenya Shillings Five Hundred Million (Kshs 500,000,000/-), 2nd Defendant was to make a deposit of 50% of the payment. The payment was never made. Despite this KPA instructed H – Young to move into the land for the works. He was aware several valuers had



valued the suit land. With reference to the replying affidavit by Mr. Michael Songoro, the witness stated that there was:-

- a. Messrs. Maina Chege Valuers.
- b. NLC Kshs. 537,000,000/-

He was aware of these valuations. 40. The witness when referred to the minutes of the meeting held on 4th December, 2017, he told the Court that there had been subsequent engagement with KPA/ EPZ.

156. The 3rd Defendant in its defence told the Honourable Court that it is the registered proprietor as Lessee of all that property known as subdivision number 4785 (Original Mombasa 3842/2/3) of Section VI No.1 Mainland North for a term of 99 years from 1st January, 1995. As set out in the Counter-Claim herein the 3rd Defendant challenges the validity of Lease to the Plaintiff registered on 9th May, 2018 for a term of 30 years from 1st August, 2013. Further the 3rd Defendant avers that as at 12th April, 2018 when these proceedings commenced, the Plaintiff had no proprietary interest in the suit property. Whereas the 3rd Defendant admits negotiations were undertaken between itself, the Plaintiff and the 2nd Defendant for the outright purchase of the suit property by the 2nd Defendant the 3rd Defendant is not aware of the determination and the circumstances under which the National Land Commission allegedly determined that the Plaintiff be paid Kenya Shillings Five Thirty Seven Million Eight Fifty Eighty Thousand Two Thirty Six Hundred and Fourty Six Cents (Kshs. 537,858,236.46) being the tenant's sublease interest whereas the 3rd Defendant was to be paid Kenya Shillings Two Hundred and Two Million Six Hundred and Six Thousand and Thirty Nine and Fifty Five cents (Kshs. 202, 606,039.55/=) being the Landlord's reversionary interest. In answer to the averments in paragraphs 8 and 9 of the Plaintiff the 3rd Defendant stated that the circumstances under which the road is being constructed on the suit property the Plaintiff has not and could not be deprived of the use and enjoyment of the suit premises and therefore it has not suffered loss and damage. The Plaintiff was not entitled to compensation for the full value of the suit premises in the sum of Kenya Shillings Five Thirty Seven Million Eight Fifty Eighty Thousand Two Thirty Six Hundred and Fourty Six Cents (Kshs. 537,858,236.46) as pleaded in paragraph 10 of the Plaintiff and its claim is untenable, fraudulent, null and void ab initio on the ground of illegality.
157. According to the 3rd Defendant at all material times the subject land plot was leased to Ms. Olsa (EPZ)Ltd and therefore not available for allocation to the Plaintiff. As at February, 2013 when the Plaintiff applied for allocation of the suit plot the process of acquisition of the same for expansion of Kipevu Road had already commenced. In view of the commencement of process of land acquisition for purposes of expansion of Kipevu Road, the Plaintiff's letter of offer dated 28th June, 2013 was issued in furtherance of a fraudulent scheme. The 1st Defendant having become aware of the then ongoing plans to acquire the suit plot for expansion of the Kipevu Road as confirmed by its letter dated 28th November, 2014 the 1st Defendant was enjoined to stop its quest for lease of the suit plot and halt any development, planning and financial arrangements concerning the suit plot. In proceeding to execute a lease over the suit plot notwithstanding the above, the 1st Defendant's conduct clearly shows that its sole interest in pursuing a lease over the subject plot was to secure compensation for the same at the expense of the Kenyan public and the 3rd Defendant. The Plaintiff commenced this proceedings on or about 12th April, 2018 on the premise that it was the registered proprietor of the suit plot yet its sub-lease interest was not registered until 9th May, 2018.
158. According to DW - 3, as per 2022 they had leased land to Olsa Ltd who they had surrendered it to in 2014, the surrender was registered in June 2014. Before the surrender they had planned to give the land



to Export Milling Ltd. Before that they got into negotiations with KPA. A draft lease was executed between EPZ (A) in 2014. EPZ (A) should be compensated for the land. EPZ (A) had filed a counter claim and demanding to be paid the amount was not shown from the Counterclaim. The Witness further told the court that the suit property was leased to EPZ Ltd i.e. the Plaintiff from 1st August, 2013 for 50 years. He confirmed that lease was subsequently registered. They filed the counterclaim. The verifying affidavit by Andrew Gichuki Njuru but he did not recall receiving any authority to swear it. He knew Ephantus Mogera was a legal officer from EPZ (A) they had produced the lease at pages 4 and 67. He had produced a letter dated 28th June, 2013, an offer was made to EPZ. It was accepted, they were already negotiating with KPA which negotiations were well within their knowledge. The letter was not there in the documents they produced in Court. It was their case that the 3rd Defendant was only entitled to a sum of 410,625 US dollars. The contract was registered late after the issue of compensation was known. It was registered by EPZ – A. He could not tell why there was a delay. The agreement was prepared by MARIA Corporate Section of EPZ (A), he could not tell who was to blame. He did not know when the title was issued.

159. This Honourable Court therefore has no doubt, that the issuance of the title to the 2nd Defendant over a portion of the suit property, amounted to a violation of Article 40(3)(a) and (b) of *the Constitution* as the ownership of the suit property by itself was in question being that the 3rd Defendant claimed that they intended giving the sublease to a third party.
160. On the issue of whether the law was followed in acquiring the said suit land, the Law provides under Section 120 (2) of the *Land Act* (2012) for situations where land can be acquired before the process of compensation is completed. The court in “African Gas and Oil Company Limited – Versus - Attorney General & 3 others [2016] eKLR” asserted this as it held that:
- “First, it is correct that section 120 (2) of the *Land Act* empowers the 3rd Respondent, in cases where there is an urgent necessity for the acquisition of land, and it would be contrary to the public interest for the acquisition to be delayed by following the normal procedures of compulsory acquisition under the *Land Act*, to take possession of land upon the expiration of fifteen days from the date of publication of the notice of intention to acquire.”
161. From the foregoing it is clear that the Commission can only take possession of property before payment of compensation where there is an urgent necessity for the acquisition of the land, and it would be contrary to the public interest for the acquisition to be delayed by following the normal procedures of compulsory acquisition under this Act. Possession can only be taken upon the expiration of fifteen days from the date of publication of the notice of intention to acquire. It is the Courts view that this section does not apply to a situation where the property to be acquired was not in the notice of intention to acquire land.
162. The court finds that the Preliminary notice provided for under Section 107 (5) of the *Land Act* is a mandatory requirement in the process of compulsory acquisition and the same must be served on every person who appears may be interested in the land and this would include the Appellant herein as the registered proprietor of the land.
163. The Court therefore finds that the 2nd Defendant did not follow the law in acquiring the Plaintiff's property due to failure to issue a notice of intention to acquire land under Section 107 (5) of the *Land Act*.



Issue No. c). Whether the 3rd Defendant's Counter - Claim is sustainable?

164. On the counter claim, the 3rd Defendant deposed that the Plaintiff the Export Processing Zones Authority is a statutory corporation established under Section 3 of the Export Processing Authority Act, Cap 517 whose principal functions and objectives include:-
- a. the development of all aspects of the export processing zones with particular emphasis on provision of advice on the removal of impediments to, and creation of incentives for, export-oriented production in areas designated as export processing zones; and
 - b. the regulation and administration of approved activities within the export processing zones, through implementation of an administrative system in which the export processing zone enterprises are self-regulatory to the maximum extent; and
 - c. the protection of Government revenues and foreign currency earnings.
165. At all material times the Plaintiff was and remains the registered proprietor of a land parcel known as L.R. No. 46892 (Original Number 3842/2/3) of Section VI Mainland North, the suit property herein by dint of a lease for a term of 99 years from 1st January, 1995. In or about 1995 the Government of Kenya acquired a parcel of land measuring 23.45 Hectares in Kipevu in Mombasa District for use by the Plaintiff. Subsequently the said land was sub-divided into 16 plots and leased out by the Plaintiff to various investors. The said 16 plots included the suit property herein. On 6th July, 2010 a lease dated 3rd February, 2010 was registered in favour of Olsa (EPZ) Ltd for a term of 50 years from 1st July, 2008. The said lease was revoked on 27th January, 2014 vide a Deed of Revocation dated 16th January, 2014. The Plaintiff stated that in January, 2013 the Government of Kenya commenced the process of land acquisition for Kipevu Road expansion project. Among the parcels of land identified for acquisition for purposes of the said project were the following parcels belonging to the Plaintiff:-
- i. MN/VI/4785-3.285 Ha.
 - ii. MN/VI/4794-7.786 Ha
 - iii. MN/VI/4799-0.9984 Ha
 - iv. MN/VI/2462-1.009 Acres
 - v. MN/VI/4798-1.5 Acres
166. In view of the above the Plaintiff and Kenya Ports Authority -the 3rd Defendant herein - commenced negotiations to facilitate the acquisition of the above land parcels for road expansion. The foregoing notwithstanding by a letter dated 6th February, 2013 the First Defendant applied for allocation of the 2 Hectares of land at Kipevu EPZ namely the suit property herein that at all material times was leased to Ms. Olsa EPZ Ltd. In view of the above, by a letter of offer Ref: CONF/EPZ/1189/CEO(32) dated 28th June, 2003 the Plaintiff offered to lease Land Plot No. MN/VI/4785 to the First Defendant which accepted the same vide a letter dated 11th November, 2013. The Plaintiff stated that the said letter was issued after commencement of the process of land acquisition for Kipevu Road expansion and whilst the subject land plot was leased to Ms. Olsa (EPZ) Ltd. Further to the foregoing the Plaintiff stated that by a letter dated 28th November, 2014 addressed to the Plaintiff's Chief Executive Officer the 1st Defendant stated, inter-alia, that the 1st Defendant was aware of the 2nd Defendant's plans to expand Kipevu Road which would take up most of the subject land and therefore requested to be allocated alternative land in Kipevu EPZ.



167. This Honourable Court has previously opined that the Plaintiff holds the lease to the suit properties and therefore the 3rd Defendant is only but the landlord for the period of 50 years until the lease lapses which land the 3rd Defendant holds as the landlord.
168. The 3rd Defendant through its Counter claim dated 26th May, 2020 where the Counter claimer prayed for judgement to be entered in its favour as follows:-
- a. That a declaration be issued to declare that the 1st Defendant had no proprietary interest in Plot No. MN/VI/4785 when the Plaintiff and the 2nd Defendant commenced the process to acquire the same for expansion of Kipevu Road, Mombasa.
 - b. THAT a declaration be issued to declare that the 1st Defendant's claim for compensation submitted to the 2nd Defendant through the Plaintiff's Chief Executive Officer vide a letter dated 13th November, 2015 is null and void ab initio.
 - c. THAT a mandatory order of injunction be issued to compel the 2nd Defendant to pay the sum of money payable as compensation for acquisition of land Plot No. MN/VI/4785 to the Plaintiff.
 - d. Costs of the suit and the Counter-Claim.
169. This Honourable Court takes note that the 3rd Defendant has joined issues with the Plaintiff in the claim for the land and compensation for compulsory acquisition. For these reasons, therefore, this Honourable Court finds merit in the claim by the 3rd Defendant.

ISSUE No. d). Whether the Honourable Court considers awarding damages for unlawful compulsory acquisition of land

170. Under this sub title we have already discussed and the Honourable Court has concluded that the Plaintiff was the bona fide owner of the lease by the 3rd Defendant and is therefore entitled to compulsory acquisition. As regards relief, under Article 23 of *the Constitution* the court may grant appropriate relief to indicate the right so infringed. As I have stated, this case is about due process rights and I shall therefore grant orders necessary to secure these rights. The petitioner is entitled to a nominal award and costs of the suit to vindicate its rights.
171. On the issue of compulsory acquisition Mutungi, J stated in the case of “Virendra Ramji Gudka & 3 Others – Versus - Attorney General (2014) eKLR”, that,
- “Rights of compulsory acquisition are conferred by specific provisions of the law being Article 40 of *the Constitution* and Sections 107 to 133 of the *Land Act*, No. 6 of 2012 which replaced the provisions previously contained in the Land Acquisition Act”.
172. The meaning and intent of the Article 40 (3) of *the Constitution*. Article 40, reads in part as follows:
40. (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property--
- (a) of any description; and
 - (b) in any part of Kenya.
- (2) Parliament shall not enact a law that permits the State or any person—



- (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
 - (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).
 - (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—
 - (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
 - (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—
 - (i) requires prompt payment in full, of just compensation to the person; and
 - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.
173. Acquisition by the Government is ordinarily direct and by processes known to the Land Acquisition Act (now repealed) by the *Land Act*. The law governing compulsory acquisition is in Part VIII, Section 107 to 133 of the *Land Act* 2012. The process of compulsory acquisition was laid down in the decided case of “Patrick Musimba (Supra) where the court held as follows:-

“Under Section 107 of the *Land Act*, the National Land Commission (the 1st Respondent herein) is ordinarily prompted by the national or county government through the Cabinet Secretary or County Executive member respectively. The land must be acquired for a public purpose or in public interest as dictated by Article 40 (3) of *the Constitution*. In our view, the threshold must be met: the reason for the acquisition must not be remote or fanciful. The National Land Commission needs to be satisfied in these respects and this it can do by undertaking the necessary diligent inquiries including interviewing the body intending to acquire the property.

Under Sections 107 and 110 of the *Land Act*, the National Land Commission must then publish in the gazette a notice of the intention to acquire the land. The notice is also to be delivered to the Registrar as well as every person who appears to have an interest in the land.

As part of the National Land Commission’s due diligence strategy, the National Land Commission must also ensure that the land to be acquired is authenticated by the survey department for the rather obvious reason that the owner be identified. In the course of such inquiries, the National Land Commission is also to inspect the land and do all things as may be necessary to ascertain whether the land is suitable for the intended purpose: see Section 108 of the *Land Act*.

The foregoing process constitutes the preliminary or pre-inquiry stage of the acquisition.

The burden at this stage is then cast upon the National Land Commission and as can be apparent from a methodical reading of Sections 107 through 110 of the *Land Act*, the landowner’s role is limited to that of a distant bystander with substantial interest.

Section 112 of the *Land Act* then involves the landowner directly for purposes of determining proprietary interest and compensation. The section has an elaborate procedure with the National Land Commission enjoined to gazette an intended inquiry and the



service of the notice of inquiry on every person attached. The inquiry hearing determines the persons interested and who are to be compensated. The National Land Commission exercises quasi-judicial powers at this stage.

On completion of the inquiry the National Land Commission makes a separate award of compensation for every person determined to be interested in the land and then offers compensation. The compensation may take either of the two forms prescribed. It could be a monetary award. It could also be land in lieu of the monetary award, if land of equivalent value, is available. Once the award is accepted, it must be promptly paid by the National Land Commission. Where it is not accepted then the payment is to be made into a special compensation account held by the National Land Commission: see Sections 113- 119 of the [Land Act](#).

The process is completed by the possession of the land in question being taken by the National Land Commission once payment is made even though the possession may actually be taken before all the procedures are followed through and no compensation has been made. The property is then deemed to have vested in the National or County Government as the case may be with both the proprietor and the land registrar being duly notified: see Sections 120-122 of the [Land Act](#).

If land is so acquired the just compensation is to be paid promptly in full to persons whose interests in land have been determined: See Section 111 of the [Land Act](#). This is in line with the Constitutional requirement under Article 40(3) of [the Constitution](#) that no person shall be deprived of his property of any description unless the acquisition is for a public purpose and subjected to prompt payment in full of just compensation.

[The Constitution](#) dictates that acquisition be in accordance with the provisions of [the Constitution](#) itself and any Act of Parliament. [The Constitution](#) itself only provides for just compensation being made promptly.

The current procedure for acquisition of land by the State is as outlined above. As can be seen parliament took very seriously its constitutional duty to legislate on the State's powers of deprivation or expropriation. Perhaps conscious of the emotive nature of land issues, the Legislature appeared scrupulous and contemplative.

174. It is a trite principle of law, that any injury or loss suffered by a person either through a tortious act, omission or breach of contract, attracts redress in a court of law. The redress includes an award of damages to the extent possible as may be determined by the court. The question regarding the type, extent, and quantum of damages to be awarded, has long been settled through a long line of decisions from the courts. Under article 22(1) of [the Constitution](#), every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed, or is threatened. Among the reliefs that a court may grant upon proof of violation of a fundamental right, is an order for compensation (Article 23 (3)(e)). The quantum of damages to be awarded, depends on the nature of the right that is proven to have been violated, the extent of the violation, and the gravity of the injury caused.
175. The right to property is sacrosanct and as such, that right is vigorously protected in this country under [the Constitution](#). In the previous Constitution the protection of that right was enshrined under Section 75 and currently it is delineated under Article 40 of [the Constitution](#). The right of access to court in case of a dispute relating to compulsory acquisition of land is a constitutional right under Article 40 (3) (ii) which allows any person who has an interest in, or right over, the property to be acquired a right of access to a court of law. Section 128 of the [Land Act](#) (2012) provides that any dispute arising



out of any matter provided for under this Act may be referred to the Land and Environment Court for determination.

176. It was held in “Katra Jama Issa v Attorney General & 3 others [2018] eKLR” that;

“...Compensation of compulsorily acquired property be quantified in accordance with the principle of equivalence. A person is entitled to compensation for losses fairly attributed to the taking of his land but not to any greater amount as “fair compensation requires that he should be paid for the value of the land to him, not its value generally or its value to the acquiring authority” (emphasis added)”

177. It is established that an elaborate and detailed criteria for assessing this compensation including the improvements made and increase in value of the land, damage likely to be caused during the process and the number of people on the property. Factors to be considered in assessment of compensation include the market value of the land, damage sustained or likely to be sustained by persons interested at the time of the Commission's taking possession of the land by reason of severing the land from his or her other land, damage sustained or likely to be sustained by persons interested at the time of the Commission's taking possession of the land by reason of the acquisition injuriously affecting his or her other property, whether moveable or immovable in any other manner or his or her actual earnings. damage genuinely resulting from diminution of the profits of the land between the date of publication in the Gazette of the notice of intention to acquire the land and the date the Commission takes possession of the land. From the evidence on record and the testimony PW - 1 and that of DW - 3, I find that the Plaintiff and the 3rd Defendant proved their case on a balance of probability as against the 1st and 2nd Defendants. The Plaintiff has pleaded for damages which are unquantified or alternatively a sum of Kenya Shillings Five Thirty Seven Million Eight Fifty Eighty Thousand Two Thirty Six Hundred and Fourty Six Cents (Kshs. 537,858,236.46) being the value of the suit premises and the 3rd Defendant has pleaded to have the a mandatory order of injunction to be issued to compel the 2nd Defendant to pay the sum of money payable as compensation for acquisition of land Plot No.MN/VI/4785 to the Plaintiff.

178. From the evidence presented, it is not in doubt that at the time the land was gazetted for compulsory acquisition, the Plaintiff, the 2nd Defendant and the 3rd Defendants had entered into negotiation for the outright purchase of the suit premises by the 2nd Defendant and in the course of those negotiations the same parties agreed to have the valuation of the suit premises determined by the National Land Commission. Accordingly the National Land Commission determined that the Plaintiff be paid a sum of Kenya Shillings Five Thirty Seven Million Eight Fifty Eighty Thousand Two Thirty Six Hundred and Fourty Six Cents (Kshs. 537,858,236.46) being the tenants sublease interest whereas the 3rd Defendant was to be paid Kenya Shillings Two Hundred and Two Million Six Hundred and Six Thousand and Thirty Nine and Fifty Five cents (Kshs. 202,606.039.55) being the Landlords reversionary interest. The 2nd Defendant without paying the Plaintiff the sum assessed by the National Land Commission and thereby acquiring the suit premises has contracted the 1st Defendant to construct the road on the suit premises. The Plaintiff therefore seeks an order that the it is entitled to full compensation for the value of the suit property in the sum of Kenya Shillings Five Thirty Seven Million Eight Fifty Eighty Thousand Two Thirty Six Hundred and Fourty Six Cents (Kshs. 537,858,236.46) being the tenants sublease interest whereas the 3rd Defendant was to be paid a sum of Kenya Shilling Kenya Shillings Two Hundred and Two Million Six Hundred and Six Thousand and Thirty Nine and Fifty Five cents (Kshs. 202,606.039.55) being the Landlords reversionary interests subject to the Plaintiff and the 3rd Defendant surrendering the leasehold title to the 2nd Defendant. In long analysis, its the view of this Honourable Court that the Plaintiff and the 3rd Defendants are entitled to full, just and adequate compensation arising from the



compulsory acquisition of the suit properties by the 2nd Defendant based on the valuation assessed and recommended by the National Land Commission out of the other commissioned valuation reports and the Land Lord reversionary interest computed thereof.

179. The 3rd Defendant also pleaded to have a mandatory injunction compelling the 2nd Defendant to pay the sum of money payable as compensation for acquisition of land Plot No.MN/VI/4785 to the Plaintiff.
180. Permanent Injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the Plaintiff in order for the rights of the Plaintiff to be protected. This Court has the discretionary powers to grant the Permanent Injunction under Sections 1A, 3 & 3 A of the Civil Procedure Act, Cap. 21; Section 3 and 13 of the Environment and Land Court Act, No. 19 of 2011 and Sections 101 of the Land registration Act, No. 3 of 2012 and Section 150 of the Land Act, No. 6 of 2012; and Order 40 Rules, 1, 2 and 3 of the Civil Procedures Rules, 2010 if it feels the right of a Party has been fringed, violated and/or threatened as the Court cannot just sit, wait and watch under these given circumstances.
181. Further, in my own decision from the case of:- “Bandari Investment & Co. Ltd – Versus - Martin Chiponda & 139 Others (2022) eKLR” the following was my own opinion when distinguishing between a prohibitory injunction and a mandatory injunction:-

“ 36. Before proceeding further, it is significant to appreciate the great distinction between the prohibitory injunction as envisaged in the ‘Locus Classicus’ case of ‘Giella-Versus- Cassman Brown, 1973 E.A. Page 358 and a Mandatory Injunction. The first authority on making this distinction was ‘Shepard Homes -Versus-Sandham (1970) 3 WLR Pg. 356 Case’ in which Megarry, J as he then was stated follows:-

“Whereas a Prohibitory Injunction merely requires abstention from acting, a Mandatory Injunction requires the taking of positive steps, and may require the dismantling or destruction of something already erected, or constructed. This will result in a consequent waste of time, money and materials. It is ultimately established that the Defendant was entitled to retain the erection”.

Permanent Injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the Plaintiff in order for the rights of the Plaintiff to be protected.

39. It’s the effect of the order that matters as opposed to its mere positive working which makes it mandatory.”

182. In “Kenya Breweries Limited – Versus - Okeyo Keyo (2002)EA VOL 1 at page 111” the Court of Appeal stated as follows when discussing the mandatory order of injunction:-

“The test whether to grant a mandatory injunction or not is correctly stated at Volume 24 Halbury’s Laws of England (4 Edition) paragraph 948 which reads: “A mandatory injunction can be granted on an interlocutory application as well as at the hearing, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks it ought to be decided at once or if the act done is



a simple and summary one which can be easily remedied, or if the Defendant attempted to steal a march on the Plaintiff mandatory injunction will be granted on an interlocutory application.”

183. This Honourable Court further went to state that the circumstances under which the Court would grant a Mandatory Injunction was well stated out by the Court of Appeal in the Case of “Malier Unissa Karim –Versus - Edward Oluoch Odumbe (2015) eKLR” as follows:-

“The test for granting a Mandatory Injunction is different from that enunciated in the “Giella –Versus - Cassman Brown case which is the locus classicus case of Prohibitory Injunctions. The threshold in Mandatory is higher than the case of Prohibitory Injunction and the Court of Appeal in the case of “Kenya Breweries Ltd-Vs- Washington Okeyo (2002) EA 109” had the occasion to discuss and consider the principles that govern the grant of a Mandatory Injunction was correctly stated in Vol. 24 Halsbury Laws of England 4th Edition Paragraph 948 which states as follows:-

“A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the Defendant attempts to steal a match on the Plaintiff, a Mandatory Injunction will be granted on an Interlocutory application”.

184. Additionally, based on a passage from 24 Halsbury Laws of England, Page 248, the case of “Locabail International Finance Limited - Versus - Agro Export and others (1986) All ER 906”, the court held thus:-

‘A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can easily be remedies, or if the Defendant attempted to steal a march on the Plaintiff...a Mandatory injunction will be granted on an interlocutory application.’

185. The reason for this rule on granting of Mandatory Injunction is plain. Megarry .J put it succinctly in a subsequent passage in the case of “Shepard Homes Case (Supra)” as follows:-

“.....if mandatory injunction is granted on motion, there will be normally be no question of granting a further mandatory injunction at the trial; what is done and the Plaintiff has, on motion, obtained once and for all the demolition or destruction that he seeks. Where an injunction is prohibitory, however, there will often still be a question at the trail whether the injunction should be dissolved or contained”

- 186 From the facts herein, all the evidence shows that the Plaintiff is bona fide lessee of the suit property subdivision number 4785 (Original Number 3842/2/3) of Section VI Mainland North. As much as it has been contested by the Defendants, this Honourable Court has opined that the Plaintiff and the 3rd Defendant are entitled to compensation if the 2nd Defendant is utilizing their property for public use and public projects.

187. By reasons of the matters aforesaid, the Plaintiff averred that it has been deprived of the use and enjoyment of the suit premises and has suffered loss and damage. Alternatively and without prejudice



to the foregoing the Plaintiff states that it has been deprived of the use and enjoyment of its land and the Plaintiff claims the full value of the suit premises as has been assessed by the National Land Commission in the sum of Kenya Shillings Five Thirty Seven Million Eight Fifty Eighty Thousand Two Thirty Six Hundred and Fourty Six Cents (Kshs. 537,858,236.46).

188. It was the 3rd Defendant Learned Counsel's submission that the Plaintiff has not established by way of evidence the existence of special circumstances to warrant the granting of the mandatory injunction and further as the road expansion project is now completed and in use by the 2nd Defendant and the benefit of the greater and wider public and having involved expenditure of colossal sums of public funds, the same should not issue.
189. Although, and as testified herein that the project is now complete and hence the orders sought may have been overtaken by events, this Honourable Court is satisfied that the Plaintiff and the 3rd Defendant have proved their claim to be granted the mandatory injunction they sought against the 1st and 2nd Defendants for whatever its worth.

ISSUE No. d). Who will bear the Costs of suit instituted on 20th February, 2019 and the Counter claim by the 3rd Defendant dated 26th May, 2020

190. It is now well established that costs is an issue which at the discretion of Courts. Costs mean the award that a party is granted at the conclusion of a legal action or proceedings in any litigation. The Black Law Dictionary defines "Cost" to means,

“the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”.

191. The provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow events. By events it means the result of the legal action. In the case of "Reids Hewett & Company vs Joseph AIR 1918 cal. 717 & Myres – Versus – Defries (1880) 5 Ex. D. 180", the House of the Lords noted:-

“The expression "Costs shall follow the events" means that the party who, on the whole succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word 'event' should be read distributive and the costs of any particular issue should go to the party who succeeds upon it.....”

192. The events in the instant suit are that the Plaintiff and the 3rd Defendant have succeeded to present their claim and the Counter Claim. Therefore this Honourable Court awards the costs to the of both the suit and the Counter - Claim to the Plaintiff and the 3rd Defendant to be paid jointly and severally by the 1st and 2nd Defendants.

VIII. Conclusion and Disposition

193. In the long run, having intensively and thoroughly deliberated on all the framed issues herein, this Honorable Court arrives at the finding that the Plaintiff and the 3rd Defendant have succeeded in all the prayers sought from its filed Plaint and the Counter claim and the Honourable Court orders as follows:-
- a. That this Honourable Court do and hereby issues a declaration that the 1st Defendant had no proprietary interest in Plot No. MN/VI/4785 when the Plaintiff and the 2nd Defendant commenced the process to acquire the same for expansion of Kipevu Road, Mombasa.



- b. That this Honourable Court do and hereby issues a declaration That the 1st Defendant's claim for compensation submitted to the 2nd Defendant through the Plaintiff's Chief Executive Officer vide a letter dated 13th November, 2015 is null and void ab initio.
- c. That the Plaintiff and the 3rd Defendant are hereby awarded the sum of Kenya Shillings Five Thirty Seven Million Eight Fifty Eight Thousand Two Thirty Six Hundred and Fourty Six Cents (Kshs. 537,858,236.46) and Kenya Shillings Two Hundred and Two Million Six Hundred and Six Thousand and Thirty Nine and Fifty Five cents (Kshs. 202,606.039.55) being the Landlords reversionary interest respectively.
- d. That this Honourable Court do and hereby issues a mandatory order of injunction be issued to compel the 2nd Defendant to pay the sum of money payable as compensation for acquisition of land Plot No.MN/VI/4785 to the Plaintiff within the next 30 days from today.
- e. That the costs of the suit against the 1st and 2nd Defendants and the Counter - Claim by the 3rd Defendant are awarded to the Plaintiff and the 3rd Defendant to be paid by the 1st and 2nd Defendants jointly and severally.

It is so ordered accordingly.

JUDGMENT DELIVERED THROUGH MICRO – SOFT VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 26TH DAY OF FEBRUARY 2024.

.....

HON. JUSTICE L.L NAIKUNI

ENVIRONMENT AND LAND COURT AT, MOMBASA

Judgement delivered in the presence of:-

- a. M/s. Firdaus Mbula – the Court Assistant.
- b. Mr. Vincent Omollo Advocates for the Plaintiff.
- c. No appearance for the 1st Defendant.
- d. Mr. Billy Kongere Advocate for the 2nd Defendant.
- e. M/s. Yala Advocate holding brief for Mr. Nyausi Advocate for the 3rd Defendant.

