Attorney General on behalf of the Cabinet Secretary, Ministry of Interior and Coordination of National Government v Nguruman Limited (Civil Appeal E026 of 2022) [2025] KECA 348 (KLR) (28 February 2025) (Judgment)

Neutral citation: [2025] KECA 348 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E026 OF 2022

PO KIAGE, LA ACHODE & WK KORIR, JJA

FEBRUARY 28, 2025

BETWEEN

THE ATTORNEY GENERAL ON BEHALF OF THE CABINET SECRETARY, MINISTRY OF INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT ..... APPELLANT

AND

NGURUMAN LIMITED ..... RESPONDENT

(An appeal against the Judgment and Decree of the Environment and Land Court at Narok (M. N. Kullow, J.) dated 28th July, 2021 as corrected vide the Ruling dated 8th November 2021inELC Petition No. 18 of 2018)

JUDGMENT

1. This appeal emanates from the judgment of the Environment and Land Court at Narok (M.N. Kullow, J.) dated 28th July 2021 as corrected vide the Ruling dated 8th November 2021, in ELC Petition No. 18 of 2018.

2. By a constitutional petition dated 17th October 2018, it was deposed that the respondent is the sole registered proprietor of the land known as LR. No. Narok/Nguruman/Kamorora/1 (the suit land), measuring 26,993 hectares, which is a massive 66,700 acres. The land is situated in Narok County, in Nguruman area, and lies approximately due west of lake Magadi. To the east it neighbours Shompole and Ol Kiramatian group ranches which are situated in Kajiado County. The boundary between the suit land and the said group ranches is the Narok-Kajiado County boundary. The respondent averred that the suit land was adjudicated in the early 1970s under the provisions of the *Land Adjudication Act*, Chapter 284 of the Laws of Kenya pursuant to which an entity known as Nguruman Kamorora Group Ranch was registered as the absolute proprietor thereof on 19th June 1975. On or around 1983, one Mr. Hermanus Steyn entered into discussions with the said group ranch with a view to either leasing

or buying the suit land. The land was subsequently transferred from Nguruman Kamorora group ranch to the respondent and after complying with all statutory requirements, the respondent was duly registered as the absolute proprietor on 13th January 1986. The respondent thereafter leased the land to Mr. Hermanus Steyn for a period of 20 years from 1st August 1986, and entered into several share sale agreements pursuant to which the Steyn family acquired a majority shareholding in the respondent.

3. In summary, the substance of the respondent's claim against the appellant as was elucidated in the petition is that, in 1991, armed members of the neighbouring Shompole group ranch trespassed into the southern portion of the respondent's land, caused wastage and then unlawfully and illegally remained thereupon. As a result, the respondent filed a suit namely, Narok Resident Magistrate's Court Civil Case No. 15 of 1991; Nguruman Limited vs. Shompole Group Ranch. In that matter, the court issued orders of permanent injunction restraining further or continued trespass. The court also ordered the then Provincial Administration to ensure compliance with the court order. Those orders were initially overturned by the High Court but later reaffirmed by this Court in Nairobi Civil Appeal No. 52 of 1993; Nguruman Limited vs. Shompole Group Ranch and the same remain in force to date. However, despite the said court orders remaining in force, the trespassers refused despite requests, to vacate the suit land and the state machinery failed or refused to provide any assistance to the respondent. The respondent extracted and served the court orders that directed various arms of government to ensure compliance with the orders of permanent injunction. Through its representatives, it also held meetings and wrote letters requesting the assistance of state machinery to remove the armed illegal occupiers but the government through its various state agencies failed or refused to remove the illegal occupiers from the suit land. Subsequently, the illegal occupiers were joined by others and they proceeded to settle in the southern portion of the land, where they cultivated the Pakase river basin.

4. In the year 2000, members of the Shompole group ranch, Ol Kiramatian group ranch and others unlawfully further invaded, trespassed and encroached upon the suit land. The respondent once again responded by lodging various suits including, HCCC No. 145 of 2001; Nguruman Limited vs. Shompole Group Ranch and Others, (later renamed Kericho HCCC No. 65 of 2009 Nguruman Limited vs. Shompole Group Ranch & Others) and HCCC No. 146 of 2001; Nguruman Limited vs. Ol Kiramatian Group Ranch & Others (later renamed Kericho HCCC No. 66 of 2009 Nguruman Limited vs. Ol Kiramatian Group Ranch & Others). In a judgment dated 2nd December 2009, the High Court (Angawa, J.) found in favour of the respondent and directed the provincial administration to supervise the immediate removal of the invaders from every part of the suit land. Subsequently, eviction orders dated 7th July 2010 were extracted and duly served. However, the appellant through its respective agents, officers, servants and/or officials failed or refused to take any action to protect the respondent's rights as ordered by the High Court. In an attempt to procure voluntary compliance from the illegal occupiers, the respondent through its officials initiated a meeting with the leadership of Shompole and Ol Kiramatian group ranches and other Loodikilani elders. The meeting was held at Magadi on 16th May 2014, whereupon the respondent offered to forgo the damages awarded by the High Court in exchange for the trespassing members of Shompole and Ol Kiramatian voluntarily vacating the suit property and returning to their own land. The respondent explained to the attendees of the meeting that if that offer was not taken up, it would proceed to enforce the decree of the court, which could expose the group ranches to attachment and auction of their properties. The offer was initially accepted but it never yielded results as, thereafter, the illegal occupiers became more threatening and violent in their continued unlawful occupation of the suit property.

5. The respondent returned to court and procured further orders dated 3rd July 2014, directing the Officer Commanding Police Division, Kajiado North Sub-County and the Sub-County Administrative Police Commander for Kajiado North Sub-County to assist in the eviction of the illegal occupiers. The

said orders were duly served upon the then Inspector General of Police who directed his deputies to execute the court orders expeditiously. The police conducted several reconnaissance visits to the suit property and in August 2014 instructed the respondent to improve a bush track within its land which they would use in the eviction exercise. The respondent was further advised by the then County Commander of Nairobi County to apply for the private hire of police officers to enable it to conduct the road improvement without interference from the illegal occupiers. Despite the respondents' applying and paying for the said officers as advised, they were never provided.

6. On or about 23rd October 2014, a meeting was held at Harambee House in Nairobi, which housed, then as now, the Office of the President. The meeting was chaired by Joseph Ole Lenku, the then Cabinet Secretary for Interior and Coordination of National Government. According to the respondent, the purpose of the meeting was to discuss and defeat its quest to execute the decree in Kericho HCCC No. 65 of 2009 Nguruman Limited vs. Shompole Group Ranch & Others, as consolidated with Kericho HCCC No. 66 of 2009 Nguruman Limited vs. Ol Kiramatian Group Ranch & Others. The meeting was also supposed to defeat the respondent's ownership and occupation of the suit land. The meeting was attended by various state and public officers as defined by Article 260 of the Constitution. The respondent claimed that at this meeting, an elaborate plan and strategy was formulated and agreed upon on how the suit land would be invaded, occupied and sub- divided amongst the invaders and their clansmen. It was also resolved that all government security personnel on the property and its surrounding areas be withdrawn. Meanwhile, the respondent learnt that then governor of Kajiado County, Mr. David Nkedienye, had called for a meeting to be held on the land on 31st October 2014. The respondent conveyed that information together with a request for protection to various security officers of the state. On 30th October 2014, the respondent filed Machakos ELC No. 149 of 2014 Nguruman Limited vs. David Nkedienye and obtained temporary orders restraining the Governor of Kajiado County from entering upon or inciting invasion of the suit property. The orders also directed the Kajiado Police County Commander to provide security on the suit land. The said court orders were served upon both the Governor and the Police Commander of Kajiado County on the morning of 31st October 2014.

7. Later in the day on that fateful 31st October 2014, armed officers of the National Police Service accompanied a large crowd of trespassers into the suit property. The trespassers included State and Public Officers, illegal occupiers, armed youths and others members of the public who had been transported into the property in buses. The State and Public officers included, the County Commissioner for Kajiado County and his deputy, the Officer Commanding Police Division Ngong, the Officer Commanding Administration Police Ngong, the Member of Parliament (MP) for Kajiado Central, the Governor of Kajiado County, the Members of Parliament Kajiado West and East, the Chairperson of the National Land Commission (NLC) and the Land Registrar of Kajiado North Sub-County, amongst a host of others. The respondent contended that the State Officers incited the crowd along ethnic lines using racist invective directed against its 'muzungu' shareholders and its directors. Further, the crowd was told that property rights were subject to ethnicity and nobody other than the Loodikilani Maasai such as those of Shompole and Ol Kiramatian had a right to live on the property. It was alleged that the State Officers instructed the illegal occupiers not to vacate the suit property and incited the crowd to invade and take over the remainder of the land on the premise that they had the full backing of the government. Soon thereafter, the suit land was invaded by armed groups of people who violently ejected the respondent's staff from its Olduvai and Nkareketi Camps and proceeded to loot and destroy the property. Subsequently, Moses Sakuda, the MP for Kajiado West Constituency

posted photographs of the meeting held on 31st October 2014, on his Facebook profile, together with the following words;

> '...The Land is ours and muzungu has 12 hours to leave. Muzungu aende ulaya!'

8. On 1st November 2014, the respondent reported the on-going invasion, looting and destruction at Magadi Police Station which was recorded under OB 1/11/2014 No.6. In the ensuing days the respondent reported the matter to and sought assistance from various relevant authorities but no police action was forthcoming. On 2nd November 2014, the armed invaders burnt down the respondent's Olduvai Camp and also took possession of Laro Camp and in doing so completed the total expulsion of the respondent from its property. The respondent reported the ongoing invasion and destruction at Ngong Police Station which was recorded under OB 35/3/11/14 or OB 33/3/11/14. On 8th November 2014, the Laro Lodge was burnt down. The respondent once again made a report of the same at Ololunga and Ngong Police Stations and the incidents were recorded under various Occurrence Book (OB) numbers. The illegal invasion and occupation was also widely reported in national press, both on television and print media. Since the commencement of the invasion on 31st October 2014, the respondent remains dispossessed of the suit property, which invaders continue to occupy and cultivate for their own gain. The respondent alleged that despite numerous requests and court orders, the state had not taken any steps to restore it to its property.

9. In particularising the losses it had suffered, the respondent relied on the valuation report prepared by Messrs COG Consultants Limited. The respondent pleaded that the appellant's inaction violated various provisions of *the Constitution* including, Articles 2, 3, 10, 20, 21, 27, 29, 40, 50, 238 and 244. Further, the appellant was in violation of Article 17(1) and (2) of the Universal Declaration of Human Rights (1948), Article 14 of the African Charter on Human and Peoples' Rights (1981) and Article 2(3) of the International Covenant on Civil and Political Rights (1966). In the result, the respondent sought various orders as follows;

    a. A declaration that the Petitioner's right to protection of property guaranteed under Article 40 of *the Constitution* and under the Universal Declaration of Human Rights 1948 and the African Charter on Human and People's Rights (1981) was and continues to be violated by the State;

    b. A declaration that the Petitioner's right not to be subjected to any form of violence either from public or private sources guaranteed by Article 29(c) and further guaranteed by Articles 238, 239 and 244 of *the Constitution* was and continues to be violated by the state;

    c. A declaration that the conduct of the State violates the principle of rule of law enshrined as a National Value under Article 10 of *the Constitution* and prejudices the administration of justice.

    d. A declaration that the Petitioner's right to have disputes that can be resolved by application of the law decided in a fair and public hearing before a court guaranteed under Article 50(1) was and continued to be violated by the state.

    e. A declaration that the Petitioner's fundamental right to equality and protection against discrimination guaranteed under Article 27 of *the Constitution* was and continues to be violated by the State;

    f. Compensation for the land L.R. No. Narok/Nguruman/Kamorora/1 of Ksh.33,350,000,000 being the value of the said land;

    g. General damages for violation of the Petitioner's fundamental rights;

h. Aggravated damages of Ksh.1,000,000,000 for violation of the fundamental rights of the Petitioner since 1991;

i. Interest on (g), (h) and (i) above at court rates from date of judgment until payment in full;

j. Special damages under Article 23(3) of *the Constitution* of Kenya 2010 of:

   i. Ksh.340,000,000 being compensation for the lodges and ancillary buildings on L.R No. Narok/Nguruman/Kamorora/1 that were unlawfully destroyed pursuant to the invasion and occupation thereof commenced on 31st October 2014;

   ii. Ksh.162,000,000 being compensation for electric power, water supply and reticulation infrastructure on L.R No. Narok/Nguruman/Kamorora/1 that was unlawfully destroyed pursuant to the invasion and occupation thereof commenced on 31st October 2014.

   iii. Ksh.510,000,000 being compensation for transport infrastructure on L.R No. Narok/Nguruman/Kamorora/1 that was unlawfully destroyed pursuant to the invasion and occupation thereof commenced on 31st October 2014.

   iv. Ksh.61,177,196 being compensation for loose assets, furniture and consumables of the Petitioner on L.R No Narok/Nguruman/Kamorora/1 that was destroyed or stolen pursuant to the invasion and occupation thereof commenced on 31st October 2014.

   v. Ksh.11,250,000 being compensation for motor vehicles on L.R No. Narok/Nguruman/Kamorora/1 that were destroyed or stolen pursuant to the invasion and occupation thereof commenced on 31st October 2014.

   vi. Ksh.39,470,400 being the value of perennial trees cultivated on the property L.R. No. Narok/Nguruman/Kamorora/1 which were destroyed or died pursuant to the invasion and occupation thereof commenced on 31st October 2014;

   vii. Ksh.34,672,600 per year from 1st November 2014 until date of judgment being compensation for loss of agricultural revenue by the Petitioner from the parts of L.R. No. Narok/Nguruman/Kamorora/1 rendered unavailable to the Petitioner pursuant to the invasion and occupation thereof commenced on 31st October 2014;

   viii. Ksh.170,100,000 per year from 25th November 1991 until date of judgment being compensation for loss of agricultural revenue by the Petitioner from the part of L.R. No. Narok/Nguruman/Kamorora/1 that was unlawfully rendered unavailable to the Petitioner by dint of the illegal occupation of the Pakase river basin commenced in 1991 and continuing to date.

   ix. United States Dollars 9,198,00 per year from 1st November 2014 until date of judgment being compensation for loss of potential ecotourism revenue by the Petitioner from the tourism facilities on L.R. No. Narok/Nguruman/Kamorora/1 that were rendered unavailable to the Petitioner pursuant to the invasion and occupation thereof commenced on 31st October 2014.

   x. Interest on (i) to (ix) above at court rates until payment in full;

k. Any other or further order(s) or reliefs as this court shall deem just;

l. Costs of the Petition with interest thereon at court rates.

10. The petition was supported by the affidavit sworn on 17th October 2018, by Martin Richard Steyn (Mr. Steyn), a director of the respondent. The affidavit essentially rehashes the averments of the respondent in the petition.

11. In response to the petition, Harsama Kello (Mr. Kello), who was serving as County Commissioner in Kajiado County in the year 2014 swore a replying affidavit on 14th March 2019. He averred that the petition was an abuse of the court process as the cause of actions complained of had already been addressed and determined in various cases that had been filed by the respondent. Further, before the said court proceedings were commenced, objection proceedings were filed by members of the Shompole and Ol Kiramatian group, being objection No. 1 of 1973 Nguruman Kamorora Adjudication section. That objection was heard on 10th January 1974 by the Land Adjudication Officer who dismissed it. Mr. Kello claimed that although the objection was dismissed, it seems that the dispute never went away and has all along been simmering. Moreover, in the aforesaid court cases, the government was only ordered to supervise the immediate removal of the trespassers by the court bailiffs. The order did not task the government with the actual removal and hence it was upon the respondent and not the government to see to it that the said orders were enforced. It was averred that the respondent's threat to auction the land belonging to the two group ranches `directly created a hostile and volatile situation leading to the various arms of government, duly elected leaders as well as Independent Commissions like the National Land Commission to step in and reassure the community that their land would not be auctioned. Mr. Kello denied the allegation that the government withdrew security personnel present on the suit land and surrounding areas in order to pave way for the planned illegal invasion and expulsion of the respondent. He asserted that the government did all it could to restore order on the land and maintain peace and security.

12. It was deposed that according to a report commissioned by the government before the adjudication process, the neighbouring Maasais used to utilise part of the suit land during dry seasons to graze and thus the respondent should have taken into consideration that factor when purchasing the land and granted the Maasais this right. Mr. Kello claimed that the respondent was the author of its own misfortune and cannot blame the government for creating a hostile environment. Further, the respondent's cavalier, racist and condescending insensitive attitude was illustrated in the plaint filed in Nairobi HCCC No. 145 of 2001 on 31st January 2001 at paragraph *4* which reads as follows, 'In view of the nomadic personalities of the defendants and apparent lawlessness and anticipated violence by the defendants and the other members, the plaintiff will seek the leave of this court in the first instance to serve summons: by registered post to group ranches postal address being o. Box 19 Magadi; through Chief Joseph Ntoros Lorkinyei of Shompole Location P.o Box 2 Magadi.' Mr. Kello asserted that pursuant to Article 40(6) of the Constitution, the right to own and enjoy property is limited to property found to have been lawfully acquired. This right cannot be said to have crystallised in the respondent's case since there is a suit in court challenging the legality of the respondent's title to the suit land being, Kajiado ELC No. 430 of 2017 formerly Machakos ELC No. 171 of 2014, which was filed by the representatives of both the Shompole and the Ol Kiramatian group ranches. One of the issues under contention in that suit is the actual size of the suit land. It was deposed that the contention as to how the acreage of the suit land increased from about 6,970 to 26,993 hectares needs to be resolved.

13. Mr. Kello averred that the respondent did not make effort to apply and pay for the services of police officers so that they could undertake a successful eviction and thereafter remain on the land for some time so as to prevent recurrence of the invasion. Moreover, destruction of property is a criminal offence and thus the respondent ought to have identified the persons behind the trespass, invasion and destruction of property, and reported them to the police so that investigations could be initiated and

possible prosecution undertaken by the Director of Public Prosecutions. It was contended that the government cannot be forced to compensate any victim of a crime who suffers loss.

14. Additionally, the appellant lodged a cross-petition dated 5th November 2019, and supported by an affidavit sworn on 5th November 2019 by Tom Chepkwesi, the Narok County Land Registrar in charge of Narok Land Registry at the material time. It was reiterated that the question of how the acreage of the suit land increased from about 6,970 hectares to 26,993 hectares needs to be resolved and an explanation to be given by the respondent as to where the extra 20,000 hectares of land came from otherwise, the increase is a nullity in law. The appellant prayed that the cross- petition be allowed and the following orders be granted;

    i. That this Honourable court be pleased to recall and order the rectification of the petitioner's title No. Narok/Nguruman/Komorora/1 under section 80(1) of the *Land Registration Act* to reflect the correct acreage as at the completion of adjudication and registration which is 6,970 hectares.

    ii. That the court be pleased to order fresh adjudication of the 20,000 hectares to be excised from Narok/Nguruman/Komorora/1 in order to establish, determine, ascertain and record the rights and interest over the land of all the people on the ground with regard to the area covered by the said land.

    iii. That the respondent to the cross-petition be condemned to pay the costs of the petition and the cross-petition

15. Mr. Steyn opposed the averments made in the affidavit sworn by Mr. Kello, through a further affidavit sworn on 17th April 2019. He contended that since members of the Shompole and Ol Kiramatian group ranches did not appeal the decision of the Land Adjudication Officer that dismissed their objection to the adjudication register, they are deemed to have accepted that decision. Referring to the various orders that were issued by courts, Mr. Steyn insisted that the appellant through its agents, officials and officers was directed to enforce court orders including an order of permanent injunction against members of the group ranches from trespassing the suit land. He rejected the appellant's claim that the state was only required to supervise the removal of the trespassers by court bailiffs. Equally, the assertion that the state did all that it could to restore order and maintain peace and security on the suit land was denied. Mr. Steyn deposed that despite the numerous pleas to the government and state agencies, the government did nothing to protect the rights of the respondent. He dismissed the claim that they displayed a racist and condescending attitude in the plaint filed in Nairobi HCCC No. 145 of 2001, arguing that there was nothing condescending or racist in seeking leave of court to serve hostile armed invaders of private property in a manner that does not expose the process server to potential bodily harm.

16. On the claim that there was unexplained increase in the acreage of the suit land, Mr. Steyn explained that after completion of the adjudication process, the representatives of Nguruman Kamorora group ranch were determined to be absolute proprietors of Nguruman/Kamorora Adjudication Section. A register in relation to the suit property was opened on 19th June 1975 which indicated that the boundaries of the property were delineated by the Registry Map Sheet Nos. 159/4, 160/3, 171W/2 and 171/1 and the same was also reflected in the Registry Index Map for Nguruman/Kamorora Registration Section which was prepared by Survey of Kenya in July 1974. However, the register mistakenly stated that the approximate acreage of Nguruman Kamorora Adjudication Section was 6970 hectares and the land certificates issued on 19th June 1975 and 3rd March 1983 also indicated the incorrect acreage. After the mistake became apparent, the Director of Surveys wrote a letter dated 12th July 1984, under reference number ACS/59/Vol. V/44, to the Chief Land Registrar informing

him that the acreage of the land had been recomputed, that its area should read 26,993 hectares, and the register should be amended accordingly. The Chief Land Registrar then wrote to the Land Registrar Nairobi on 2nd August 1984, under reference number NRK/A/29/59, instructing him to amend the area list of the property. After the area list was amended, a new title was issued to Nguruman Kamorora Group Ranch on 28th August 1984 indicating the correct acreage. It was averred that the respondent did identify the individuals behind the trespass, invasion and destruction of its property and it reported the same to the police on numerous occasions. Accordingly, it was the duty of the Police to conduct prompt, efficient and professional investigations and present the same to the Director of Public Prosecutions, a duty they failed to discharge.

17. In reply to the cross-petition, Mr. Steyn swore an affidavit on 2nd December 2019, arguing among other things that, the cross- petition did not answer the petition but rather, raised new matters that were extraneous to the petition; whereas the respondent in the petition was the Cabinet Secretary of the Interior, the cross- petitioner was an entirely different government office; the cross- petition did not disclose any constitutional provisions allegedly violated by the respondent and neither did it indicate the manner in which the respondent infringed any constitutional provisions. Moreover, the issue of respondent's proprietorship and the boundaries of the suit land was res judicata.

18. The matter proceeded for trial before Kullow, J. on 10th December 2019 when two (2) witnesses gave testimony in support of the petition. Mr. Steyn, PW1, expounded the averments in the petition. He produced and played the video footage of the meeting that was held on the suit land by state officials and trespassers on 31st October 2014. PW1 further identified the state officials that were present during that meeting. The second witness was Joseph Wanjau Gathuri, PW2, the consultant who prepared the valuation report. In cross-examination, he explained that he had made previous inspections of the property and had the details in his system. On the material day of the valuation, he did not see any motor vehicles, and neither were there agricultural activities. On ecotourism, he compared the respondent with the Shampole and Olaro ranches which were not operational but he had their prior records.

19. The appellant called six (6) witnesses. Mr. Kello, DW1, was the County Commissioner for Kajiado County when the meeting on 31st October 2014 was held on the suit land. He testified that he attended the meeting and recalled that among the State Officials and Politicians who were present were Mr. Nkaissery, Governor Nkedienye, MP Moses Sekudo, Senator Peter Musintel, MP for Kajiado County Pheres Tobiko, Chairman of the National Land Commission (NLC) Dr. Mohammed Swazuri, NLC Commissioners Khalif and Lenchura and the Land Registrar of Kajiado County. DW1 explained that prior to the meeting they had intelligence information that Mr. Steyn wanted to sell the land. The politicians wanted to stop the sale and to hear the grievances of the local Maasai community. After the meeting, however, tension escalated and the local community started attacking the people working on the suit land. Paramilitary teams from AP, GSU and regular police were deployed to contain the situation. DW1 stated that he was aware that the invaders of the suit land had never left to date.

20. George Sedah, DW2, the OCPD of Kajiado County at the material time in 2014 testified that in July 2014, auctioneers visited him with court orders involving the respondent and Shampole Group Ranch in Kericho HCCC Nos. 65 and 66 of 2009. In order to execute the orders, he needed the respondent to pay for about 500 officers. DW2 indicated that if payments would have been made the police would have acted immediately. He confirmed attending the meeting of 31st October 2014, where he was tasked with providing security. Next was Tom Chepkwesi, DW3, the Narok Land Registrar. He testified that the original acreage of the suit land was 6970 hectares but it is now 26993 hectares. The increase in size was as a result a communication from the Chief Land Registrar to the Land Registrar which recomputed the suit land and directed the amendment of the area list. According to DW3, the process

of adjudication of the land was not done properly; it should have been done together with the officials of land adjudication, since they are the ones who knew persons who have a claim over the land.

21. Wilson Kibet Kiplangat, (DW4) the then Tourism Regulatory Authority Manager, South and Central Rift gave testified that the Tourism Regulatory Authority had not licensed the camps that the respondent was operating. The camps included Olalui and Keriketi camp which contains Eiti, Enkashoe and Nkariketi Camps. Joseph Ole Lenku, the Cabinet Secretary (CS) in the Ministry of Interior and Coordination of National Government during the period in issue gave evidence as DW5. He confirmed having held a meeting at his office in Harambee House with MPs and representatives of Magadi ward in Kajiado West Sub-county. The meeting concerned a dispute between the respondent and the Ol Kiramatian and Shompole communities that was degenerating into a security situation. DW5 denied stopping the enforcement of court orders that were obtained by the respondents. He also contested claims that they discussed invasion of the suit land at the meeting. The last witness for the appellant was Dr. Clement Isaiah Lenoshuru (DW6), a Commissioner with the NLC at the material time. He confirmed attending the meeting of 31st October 2014, together with the NLC Chairman, Mr. Swazuri and Commissioner Khalif. DW6 recalled that prior to the day of the meeting, the NLC had received complaints about historical injustices on the suit land. There was a dispute about ownership of the land.

22. The parties thereafter filed submissions and Kullow, J. delivered his Judgment, challenged herein, on 28th July 2021. Subsequently, vide a motion dated 1st September 2021, the respondent sought rectification of the judgment to the extent that in the petition, the respondent had prayed for compensation for the value of the suit land to the tune of Ksh.33,350,000,000. However, in his judgment, the learned Judge gave an order of compensation for the land amounting to Ksh.33,350,000, which to the respondent was an error. Upon considering the motion, the learned Judge was of the view that the error alleged was clerical owing to an accidental slip. He held that the intention of the court was to grant the respondent compensation equivalent to the value of the suit land as captured in the valuation report filed by the respondent which was, Ksh.33,350,000,000. The Judgment was thus rectified to that effect. The final orders of the trial court were as follows;

    i. A declaration do issue that the petitioner's right to protection of property as guaranteed under Article 40 of *the Constitution* of Kenya 2010 was violated by the state.

    ii. That an order of compensation of Land Reference Narok/Nguruman/Kamorora/1 of Ksh.33,350,000,000 is hereby issued.

    iii. Based on valuation report that was not controverted by the respondents, I grant the following: -

        a. Ksh.340,000,000 being compensation for the lodges and ancillary buildings on LR. No. Narok/Nguruman/Kamorora/1 that were unlawfully destroyed pursuant to the invasion and occupation thereof commenced on 31/10/2014.

        b. Ksh.162,000,000 being compensation for electric power, water supply and reticulation infrastructure on LR No. Narok/Nguruman/Kamorora/1 that was unlawfully destroyed pursuant to the invasion and occupation thereof commenced on 31/10/2014.

        c. Ksh.61,177,196 being compensation for loss of assets, furniture and consumables of the petitioner on LR No. Narok/Nguruman/Kamorora/1 that was destroyed or stolen pursuant to the invasion and occupation thereof commenced on 31st October 2014.

d. Ksh.11,250,000 being compensation for motor vehicles on LR No. Narok/ Nguruman/Kamorora/1 that were destroyed or stolen pursuant to the invasion and occupation thereof commenced on 31st October 2014.

e. Ksh.39,470,400 being the value of perennial trees cultivated on the property LR No. Narok/Nguruman/Kamorora/1 which were destroyed or died pursuant to the invasion and occupation thereof commenced on 31st October 2014.

f. United States Dollars 9,198,000 per year from 1st November 2014 until date of judgment being compensation for loss of potential ecotourism revenue by the petitioner from the tourism facilities on LR No. Narok/Nguruman/Kamorora/1 that were rendered unavailable to the petitioner pursuant to the invasion and occupation thereof commenced on 31st October 2014 and interest thereon until payment in full.

g. The Cost of the petition to the petitioners.

23 Dissatisfied with that judgment, the appellant lodged this appeal based on 30 extensive grounds. In summary, the appellant complains that the learned Judge erred by;

1. Failing to properly identify and analyse issues for determination and therefore reaching the wrong decision.

2. Failing to appreciate that the legal, procedural and evidential threshold for granting the reliefs sought had not been satisfied.

3. Failing to undertake a proper analysis of the quantum of damages sought.

4. Relying on a defective valuation report to grant both general and special damages.

5. Applying the wrong principles or none in reaching the quantum of compensation and thus making an excessive award of damages.

6. Misapprehending section 24 of the *National Police Service Act* and thereby unlawfully imposing a non-existent duty on the police in execution of orders on civil cases.

7. Misdirecting himself in holding that courts do not have their own police force to enforce court orders yet court orders ought to and are enforced by court bailiffs.

8. Holding that the respondents had violated the constitutional right of the petitioner to own property.

9. Holding that the appellant was vicariously liable for the alleged violation of the respondent's constitutional rights.

10. Attributing the invasion, destruction and loss of property to the government.

11. Failing to take into consideration the history of the dispute between the respondent and the neighbouring group ranches.

12. Failing to appreciate the previous litigation between the respondents and the neighbouring group ranches.

13. Failing to appreciate evidence before court to the effect that since time immemorial the suit land had been inhabited by residents from neighbouring ranches.

14. Failing to consider the appellants' evidence, submissions and cross-petition.

15. Failing to appreciate that the petition was premature as the issues of ownership had not been fully determined in other ongoing suits.

16. Failing to take into consideration the evidence on the actions taken by the government to secure the suit land.

17. Failing to appreciate that section 152B to 152G of the *Land Act*, 2012 places the onus of evicting squatters on private land on the private registered owner.

18. Ignoring the ruling in Machakos ELC 149 of 2014 where the Inspector General of Police filed a report dated 21st January 2015, setting out various actions that the respondent was supposed to put in place to enable the police assist in the eviction of the squatters.

19. Dismissing the appellant's claim.

20. Failing to appreciate the binding Supreme Court judgments in William Musembi & Others vs. Moi Educational Center and, Mitu-Bell vs. KAA & another, which prohibit evictions without putting in place measures stipulated in *the Constitution*.

21. Failing to find that the acreage of the suit land could not have been altered and increased from approximately 6900 hectares to 26,900 hectares without undertaking fresh adjudication.

24 In the end, the appellant beseeched us to set aside the impugned judgment and allow the appeal. He prayed that we allow the cross- petition and award him the costs of the appeal.

25. In opposition to the appeal, the respondent filed a notice of grounds affirming the decision dated 9th February 2024, raising a prolix 32 grounds of contention which, essentially, rehash the factual background to the dispute as already set out at the beginning of this judgment. The respondent also filed a notice of cross-appeal dated 14th March 2024, arguing that the impugned decision ought to be varied because the learned Judge erred in failing to;

1. Make the following declarations;

    a. A declaration that the respondent's right not to be subjected to any form of violence either by the public or private sources guaranteed under Article 29(c) and further guaranteed under Articles 238, 239 and 244 of *the Constitution* was violated by the state, and

    b. A declaration that the conduct of the State violated the principle of rule of law enshrined as a national value under Article 10 of *the Constitution* and prejudices the administration of justice.

2. Award the respondent interest at court rates on the compensation for the suit land from 1st November 2014 until payment in full.

3. Award the respondent interest at court rates on the following sums from 1st November 2014 until payment in full;

    a. Ksh.340,000,000 being compensation for the lodges and ancillary buildings on the suit land that were unlawfully destroyed pursuant to the invasion and occupation thereof commenced on 31st October 2014.

    b. Ksh.162,000,000 being compensation for electric power, water supply and reticulation infrastructure on the suit land that was unlawfully destroyed pursuant to the invasion and occupation thereof commenced on 31st October 2014.

c. Ksh.61,177,196 being compensation for loss of assets, furniture and consumables of the respondent on the suit land that were destroyed or stolen pursuant to the invasion and occupation thereof commenced on 31st October 2014.

d. Ksh.11,250,000 being compensation for motor vehicles on the suit land that were destroyed or stolen pursuant to the invasion and occupation thereof commenced on 31st October 2014; and

e. Ksh.39,470,400 being the value of perennial trees cultivated on the suit land which were destroyed or died pursuant to the invasion and occupation thereof commenced on 31st October 2014.

4. Specify that the interest he awarded on the sum of United States Dollars 9,198,000 per year from 1st November 2014 would be at court rates from date of judgment until payment in full.

5. Award the respondent the following special damages that were specifically pleaded and strictly proven;

a. Ksh.510,000,000 being compensation for transport infrastructure on the suit land that was unlawfully destroyed pursuant to the invasion and occupation thereof commenced on 31st October 2014.

b. Ksh.34,672,600 per year from 1st November 2014 until date of judgment being compensation for loss of agricultural revenue by the respondent from parts of the suit land rendered unavailable to the respondent pursuant to the invasion and occupation thereof commenced on 31st October 2014;

c. Ksh.170,100,000 per year from 25th November 1991 until date of judgment being compensation for loss of agricultural revenue by the respondent from parts of the suit land that was unlawfully rendered unavailable to the respondent by dint of the illegal occupation of the Pakase River basin commenced in 1991 and continuing to date.

26. In the end the respondent beseeched us to allow the cross-appeal as prayed and it be granted costs.

27. We have gone to great lengths to set out all the evidence on record, albeit in great summary, in obedience to our duty as a first appellate court to proceed as a re-hearing of the case with a view to making our own inferences of fact and arriving at independent conclusions after a fresh and exhaustive re-appraisal and analysis of the entire evidence. We do so while paying respect to the conclusions made by the first instance Judge, but are at liberty to depart therefrom if the evidence so commands. See Selle Vs. Associated Motor Boat Company Ltd[1968] EA 123.

28. In preparation for the appeal, both parties filed written submissions together with their case digests which were orally highlighted before us by counsel.

29. At the hearing, Mr. Eredi, a Chief State Counsel, appeared for the appellant while Mr. Ahmednassir, Senior Counsel (SC) appeared for the respondent.

30. Mr. Eredi set out four (4) issues for determination namely;

a. Whether the learned Judge erred in law and fact by failing to properly identify issues for determination, leading to an erroneous conclusion.

b. Whether the learned Judge erred in law and fact by delivering a judgment that lacked analysis of the points for determination, their decision, and the reasons behind such decision.

c. Whether the learned Judge erred in law and fact by not appreciating the legal, procedural and evidential threshold required for granting the reliefs sought, and consequently arriving at an incorrect decision.

d. Whether the learned Judge erred in law and fact by failing to undertake a proper analysis of the quantum of damages sought, leading to the granting of prayers without a sufficient basis.

31. On the first two issues, it was submitted that the learned Judge's failure to properly identify the issues; analyse the evidence adduced by the appellants in opposition to the petition and in support of the cross petition; and, analyse the submissions on record and the applicable law was contrary to Order 21 Rule 5 of the Civil Procedure Rules which provides that, 'in suits which issues have been framed, the court shall state its findings or decision, with reasons thereof, upon each separate issue.' Counsel contended that from the judgment, it is apparent that the learned Judge noted that the appellant called five (5) witnesses. However, at page 818 of the record he proceeded to mention in passing two (2) of the said witnesses without undertaking any analysis of the evidence adduced to rebut the respondent's claims, leaving the appellant to wonder whether the learned Judge grasped, comprehended, analysed and appreciated the evidence that was adduced by the appellant. It was urged that the learned Judge failed to conduct a thorough analysis of the case in the judgment so as to justify the decision he made. Moreover, he failed to analyse even the two (2) issues that he identified. Counsel argued that the process of arriving at the value of damages was not discussed by the learned Judge and that the failure to conduct a thorough analysis warranted the judgment being set aside. For this assertion Mr. Eredi relied on Order 21 Rule 4 of the Civil Procedure Rules which provides that, 'Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision', and the decision in Jacinta Nduku Masai Vs. Leonida Mueni Mutua & 4 Others[2018] eKLR.

32. On whether the threshold for granting the reliefs sought was met, Mr. Eredi cited the decision in Republic Vs. Kenya National Examination Council[2016] eKLR where the court emphasised the importance of meeting legal, procedural and evidential thresholds for granting relief. He contended that failure to appreciate and apply the legal, procedural and evidential threshold for granting relief undermined the integrity of the judgment which raised concerns about its fairness and validity. Concerning damages, the learned was criticised for failing to undertake a proper analysis of the facts and quantum of damages sought. He was faulted for failing to appreciate that the petition was premature as the issue of ownership of the suit land had not been fully determined in other ongoing suits. Further, invasion of the suit land had been provoked by the respondent and occasioned by private individuals and thus the government could not be held liable. Counsel submitted that the valuation report that was relied upon by the court in granting both general and special damages was defective as it was not based on any legal basis other than the valuer's opinion. It was also not supported by evidence which would have anchored the conclusions therein.

33. Regarding the compensation of Ksh.33,350,000 awarded to the respondent for the value of the suit land, it was contended that the government has not taken over the land to entitle the respondent to that amount and neither was liability established on the part of the government. Counsel urged that the respondent still owns the land and has never been deprived or dispossessed of it by the government. Mr. Eredi submitted that the fact that the respondent was able to send the valuer to the ground to undertake the valuation exercise means that it still owns the land which they can ingress and egress at will. Moreover, from the photographs that were attached to pleadings, there were none for the alleged trespassers. Counsel argued that there is no evidence to prove that the trespassers are on the land with the authority and consent of the government or that they are not on the land as a matter of right. It was contended that there was no basis for the court to award the respondent such colossal

amounts of money. Mr. Eredi submitted that the government tendered evidence to demonstrate that the respondent was only entitled to 6970 hectares as per the adjudication register and not 26,933 hectares as fraudulently added to the title without following due process. He faulted the basis upon which the valuer arrived at the amount stated per acre contending that the trial court should have taken judicial notice that the land was located in too remote a part of the country to warrant the value placed on it. Further, evidence of comparative values was not annexed to the report. On reliance of the Supreme Court decision in Atttorney General Vs. Zinj Limited[2021] KESC 23 (KLR), it was submitted that the government can only compensate a land owner where the government had processed and issued title documents to squatters and, invasion of land by squatters does not amount to compulsory acquisition. Counsel contended that the issue of ownership of the suit land was not res-judicata as the appellant was not party to the previous suits. Moreover, there was no intention to adjudicate the entire Nguruman into one parcel as the report in the supplementary record shows. The sketch map at page 140 shows several forests which had been recommended for exclusion in case of any adjudication.

34. Mr. Eredi challenged the award made for the value of improvements that were destroyed arguing that there was no proof of approved building plans, bill of quantities, receipts, NEMA approvals, Water Resource Authority licences for water abstraction under section 12 of the *Water Act* or any proof of water payments bills for the water supply. Similarly, there was no proof that the Kenya Civil Aviation Authority licensed, certified and registered the respondent to construct and operate the airstrips pursuant to section 7(x) of the *Civil Aviation Act*, Chapter 394 of the Laws of Kenya. Counsel submitted that the award was merely speculative and unfounded. He cited the Environment and Land Court decision in Charles Kinyua Kagio & 2 Others Vs. Attorney General On Behalf Of The Ministrty Of State For Provincial And Internal Security And Ministry Of State For DefencE [2021] eKLR, where the court held that for liability to attach to the Attorney General, who was sued on behalf of two ministries, the plaintiffs were obligated to demonstrate that the demolished structures were duly approved, lawfully existed and should not have been removed by the government.

35. On the award for particulars of other losses, the respondent's claim that he was unable to cultivate 1050 acres of maize in the Pakase (Pagasi) basin due to illegal occupation was challenged. Counsel asserted that the respondent has never been in occupation of that area. He referred to a report that was done by an Inter- Ministerial Committee and produced before adjudication of the land, found at pages 126 to 193 of the supplementary record of appeal. The report shows that the Pakase/Pagasi basin was fully inhabited by the Loodikilani Maasai and the Sonjo. On the potential loss of agricultural revenue, Mr. Eredi contended that the respondent did not establish that it had been farming the suit land and earning the said amounts from the land as an ongoing concern. Further, it never produced any report by the agricultural or forest officer. Regarding the claim on loss of potential ecotourism, it was submitted that the award on the same was baseless as the valuer allegedly based its value on figures obtained from neighbouring lodges which were out of operation at the time of writing the report. Counsel submitted that the respondent's lodges/camps were not operational and have never been operational since no business permits and licenses were provided. DW4 from the Tourism Regulatory Authority confirmed that none of the lodges or camps were licensed to operate. In the result counsel insisted that no compensation for real or potential loss can be awarded for an unlicensed business. Moreover, no tax returns were attached and no audited accounts were availed to demonstrate the alleged loss.

36. Mr. Eredi dismissed the assertion that the police failed to execute court orders obtained by the respondent which granted it permanent injunction against trespassers. He contended that court orders are implemented by court bailiffs and not the police; the role of the police being merely to maintain law and order. For this submission counsel cited South Shore International Ltd Vs. Talewa Road Contractors & Another[2013] eKLR. It was submitted that the respondent's petition was res

judicata in view of the decisions in Kericho HCCC Nos. 65 and 66 of 2009 and, Miscellaneous Application No. 222 of 2004 Nguruman Limited vs. Commissioner of Police and Others. Counsel contended that in Kericho HCCC Nos. 65 and 66 of 2009, the court directed the Rift Valley Provincial Commissioner together with the Ololung'a District Commissioner, Loita Divisional Officer, Olgarua Location Chief together with the Kenya Police Force, to supervise the immediate removal by the Court bailiffs of the trespassers. To counsel, the import of the order was that the police and other institutions mentioned therein were only supposed to supervise the execution of the said order. The duty was on the respondent as the decree holder to execute its judgment which they failed to.

37. On the alleged invasion of the suit land in the year 2014, Mr. Eredi disputed that the meeting that was convened at Harambee House Office by the then Minister for interior, Mr. Joseph Ole Lenku, was for planning the invasion. It was submitted that the Minister testified that the said meeting, held on 24th October 2014, was a routine security meeting with the leaders of Kajiado County, which area was at the material time, prone to insecurity. Counsel contended that the social media posts by politicians, which were relied on by the respondent cannot be taken as the official government position. Counsel continued that the meeting of 31st October 2014 was called to assure residents of the area that the government was aware that the respondent had obtained orders to auction land belonging to the two group ranches. The government was seeking to find a solution to the dispute and it enlisted the NLC which at the time had the mandate to deal with issues relating to historical land injustices such as the dispute in issue. Counsel denied the claims that the meeting resolved to have the farm invaded.

38. On the failure of the government to conduct an eviction on the suit land, Mr. Eredi relied on the decision in Jandu Investment Limited Vs. Attorney General & 2 OtherS [2019] eKLR for the argument that there is a legal regime governing the eviction process on private land and the respondent provided no proof that it took steps under the Act to evict the squatters. Counsel contended that the respondent ought to have complied with sections 152E and 152G of the *Land Act* 2012 (Revised 2016). Section 152E requires that prior to eviction, a 90-day eviction notice should be issued by the land owner and served upon the unlawful occupiers including, in the case of a large group, publishing in at least two daily newspapers of nationwide circulation and displaying the notice in at least 5 strategic locations within the occupied land. On the other hand, Section 152G provides for mandatory procedures during eviction. Counsel submitted that courts have frowned upon unlawful evictions or unplanned evictions and in some instances granted citizens compensation against government on account of forceful eviction. Further, when rights are violated by private individuals like in this case, the only recourse available to the victim is through private law remedies by filing suits against them, obtaining judgments and executing the said judgments as provided for under the *Civil Procedure Act* and Rules. Counsel continued that the respondent failed to profile the alleged squatters from those who are rightfully on the land. He referred to the replying affidavit of Mr. Kello to which was attached a preliminary report by the inter- ministerial working party on land allocation in the Nguruman escarpment and the construction of the Magadi-Mara Road, dated December 1971-January 1972. The report indicates that the land was occupied by 5,500 individuals and families and it was expected to double by 1990. The report further states that the communities residing in the neighbouring group ranches used to utilise the land during the dry season, a fact that the respondent ought to have considered when it purchased the land. It was also contended that the conflict in this matter arose when the respondent asserted its rights beyond the original acreage of the suit land which was 6,970 hectares.

39. Citing the decision in Shimoni Resort Vs. Registrar Of Titles & 5 Others[2016] eKLR, counsel argued that the respondent failed to respond to the particulars of fraud in the cross- petition, particularly those concerning the extra acreage of land and thus, *the Constitution* cannot protect sanctity of a title which is found to have been unlawfully or irregularly acquired. The learned Judge was faulted for failing to interrogate whether or not the title held by the respondent was valid. Concerning the duty of the

police to act, counsel referred to the principles applicable as enunciated in Charles Murigu Muriithi & 2 Others Vs. Attorney General [2019] eKLR and Joseph Boro Ngera Trading As Ngera Fancy Farm Vs. Attorney General [2019] eKLR. The principles are that, there must be a special duty of care activated by information made available to the state and that the police failed to act; the complainant must prove that the acts complained have been perpetrated against it by the police and, the applicant must demonstrate that the police placed them in danger that they would otherwise not have been in. On the first principle, it was submitted that the government was aware that there was tension on ground and it put in place measures to address the deteriorating situation. The measures included the meeting convened by the Cabinet Secretary for Internal Security where it was resolved that other government institutions be activated to go to the ground and address the issue. On the principle that the complainant must prove that the acts complained of must have been perpetrated against it by the Police, counsel submitted that no evidence was produced to prove that the police perpetrated the alleged invasion and destruction of property. There was also nothing to show that the State placed the respondent in danger that they would otherwise not have been.

40. Mr. Eredi contended that the respondent had not executed the judgments obtained in various cases that they had filed since the year 1991, and that this indolence cannot be visited upon the appellant. Further, the respondent having failed to prove that their constitutional rights had been infringed by the state, no award of damages or compensation could be made to them. It was asserted that liability also fell on the respondent for having contributed directly to the inflamed situation that caused the invasion. In the end, counsel urged that we declare that there was a mistrial and remit this matter back to the High Court to be heard afresh.

41. In reply to the appellant's submissions, Mr. Ahmednassir, SC for the respondent charged that the case before the trial court was not about eviction or squatters as alluded to by Mr. Eredi, but rather, a Constitutional Petition grounded on Article 40(3). Counsel explained that there was a farm invasion of the suit land as it occurs in countries like South Africa and Zimbabwe, where white owned farms are invaded by Africans in the neighbourhood. Counsel submitted that the respondent company is owned by European Kenyans and what happened is that government officials led by the Cabinet Secretary in charge of internal security at the material time, organized his tribesmen to take over the land. Mr. Ahmednassir, SC, pointed out that it was common ground that the invaders took over the land, occupied it, and divided it among themselves. He referred us to pages 545 to 551 of the record where there is a report by the Office of the Inspector General of the National Police Service dated 21st January 2015. The report describes the farm invasion and the kind of people who invaded it. Mr. Ahmednasir, SC, in particular referred to page 549 of the record where the report indicates that the squatters are, 'highly motivated and hostile since they enjoy massive political backing and support from their various political leaders.'

42. It was submitted that the learned Judge was right in determining that the State was liable for the invasion of the suit land because the evidence on record supports the decision. Further, the learned Judge's decision was consistent with principles on liability of public authorities as distilled from case law from South Africa including, The Minister Of Safety And Security And Another Vs. Rudman(2004) (ZASCA68;2005 (2) SA 16 (SCA) (18 August 2004) and Mashongwa Vs. Prasa(2015) ZACC 36; 2016 (3) SA 528 (CC) (26 November). Counsel contended that the notion of accountability under Article 10 of *the Constitution* required protection of the respondent and its property in the sense that, an omission is wrongful if the defendant is under a legal duty to act positively to prevent harm suffered by the plaintiff, if it reasonable to expect the defendant to have taken positive measures to prevent the harm. Further, where the conduct of the state as represented by persons who perform functions on its behalf is in conflict with constitutional duty to protect rights in the Bill of Rights, the notion of accountability must assume an important role in determining whether

a legal duty ought to have been recognized in any particular case. On reliance of the South African case of Minister Of Safety And Security Vs. Duivenboden (20020 ZASCA 79; (20020 3 ALL SA 741 (SCA) (22 August 2002), Mr. Ahmednassir, SC, argued that where there is a potential threat that puts constitutionally protected rights to human dignity, to life and to security of the person at risk, the state, represented by its officials, has a constitutional duty to protect the affected persons. It was urged that the state is liable for the consequences that arose from the meetings convened by DW5 on 23rd October 2014 and 31st October 2014 which, according to DW1, DW2 and DW6, triggered the invasion and destruction of the respondent's property, in that there is a duty imposed on the state and all its organs not to perform any act that infringes the rights under the Bill of Rights.

43. Counsel continued that the state is liable for the failure to protect the respondent and its property from harm by third parties since it is DW5 who created the danger of harm to the respondent when he convened the meetings of 23rd October 2014 and 31st October 2014 which triggered the invasion, and the police assumed specific responsibility and assured the respondent of protection after the intended attacks were reported on several occasions to the police. On reliance of the United Kingdom decision in Poole Borough Council Vs. GN (through his litigation friend "The Official Solicitor' and another (2019) UKSC 25, counsel urged that a duty to protect from harm or to confer some other benefit might arise where the public body had created the source of danger or had assumed responsibility to protect the claimant from harm. It was submitted that police duties are not subject to payment for protection. Counsel contended that the state is liable for the losses suffered by the respondent since there is an absolute and unconditional obligation for the police to take all reasonable steps which appear to them to be necessary for keeping the peace, for preventing crime or for protecting property from criminal injury. The public who pay for this protection through taxes cannot lawfully be called upon to make a further payment for that which is their right.

44. Next, it was submitted that the state is liable for the actions of the non-state actors who invaded the respondent's property because, section 24 of the *National Police Service Act* imposed a positive obligation on the police to protect the respondent and its property.

45. Further, it is the failure of the police to prevent the illegal acts by the non-state actors complained of that leads to state liability even where the state itself or its officials are not directly responsible for the violations perpetrated by private individuals. Mr. Admednassir, SC, asserted that the respondent was liable for the losses suffered by the respondent because of the special relationship that existed between the respondent and the police, which arose from the orders that the respondent obtained from Kariuki J on 30th October 2014 directing the police to protect the respondent and its property; service of those orders on the police; the several reports that the respondent made to the police prior to and after the invasion of its property; the assurances given to the respondent by the police that its property would be protected; the orders that the respondent obtained from Kariuki, J. on 3rd November 2014 directing the police to remove invaders from the suit land; and, the undertaking given by the Inspector General of Police to Kariuki J., on 26th January 2015 that the police would comply with the orders directing them to protect the respondent's property and remove the invaders therefrom.

46. Mr. Ahmednassir, SC submitted that the respondent had been deprived of his property under Article 40 of *the Constitution*, because any interference with the use, enjoyment or exploitation of private property is a deprivation in respect of the person having the title or right to or in the property concerned. Citing Evelyn College Of Design Ltd Vs. Director Of Children's Department And Another [2013] eKLR, it was submitted that even where property is said to be illegally acquired, it cannot be dispossessed without due process. Such dispossession cannot be effected by preventing a property owner from enjoying incidents of ownership.

47. While acknowledging that the impugned judgment was not an ideal judgment in terms of its elegance, he contended that it was wrong for the appellant's counsel to allege that the learned Judge did not delineate issues for determination. Two issues were set out for determination namely; whether the respondent was deprived of its property under Article 40 and whether it was entitled to compensation. Further, Mr. Ahmednassir, SC, argued that although the appellant claimed that the learned Judge did not consider certain facts and the law applicable, he does not state those facts and the law that was omitted in the analysis. Counsel submitted that the action of DW5, in terms of the meetings convened on 23rd October 2014 and 31st October 2014, created the necessary nexus and foundation that led to the factual situation on the suit land at present, which is that the respondent has lost total use and control of the land. In this respect, counsel cited the decision in Roshanali Karmali Khimji Pradhan Vs. The Attorney General [2004] eKLR where the court held that failure on the part of government officials and the security agents that led to invasion of the farm makes the state liable. The court stated;

> "It is reasonable in this case to see that the gang of youth who were taking oath to commit serious criminal offences and were also being trained in the use of guns and were armed with bows and arrows would find the plaintiff's farm an easy target. Indeed, they entered into the farm, took livestock and destroyed the buildings. One worker was killed in the process. Applying the principles of the above cited cases, it is clear the plaintiff did suffer loss because of the failure of the security agents to take action as required by law (Police Act)."

48. Further, counsel cited this Court's decision in Zinji Limited Vs. The Attorney General & 3 Others[2019] eKLR, where the Court captured the place of property rights in our constitutional set up as follows;

> "[1] 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 inviolability of that right was succinctly appreciated by this court in Chief land registrar & 4 others vs. Nathan Tirop Koech & 4 others [2018] eKLR as follows: "Land ownership and land rights is both a historical and emotive subject in Kenya. A right to hold property is a constitutional right as well as a human right and no person can be deprived of his property except in accordance with the provisions of *the constitution* or statute. The condition precedent to taking away anyone's property is that the authority must ensure compliance with *the constitution* and statutory provisions."

49. On reliance of both the High Court and Court of Appeal decisions in Charles Murigu Murithi & 2 Others Vs. Attorney General[2015] eKLR, it was submitted that the police owe the public a general duty of care to protect their lives and properties. However, an individual can trigger a special duty of care if he puts the police on notice on the danger he faces or sought their assistance to thwart an impeding threat. Where the police have been put on a specific notice of a threat and fail to act on the notice, the state will be held liable for any loss that occurs as a result of the threat materialising Mr. Ahmednassir, SC, conceded that the cross-petition was not addressed by the learned Judge, attributing the same to an oversight on the part of the learned Judge which can be corrected by this Court. Mr. Ahmednassir, SC, submitted that a government body, whether at the national or county level, cannot file a cross- petition because it is not a human being that has legally enforceable rights under the Bill of Rights. For this assertion, counsel cited Meru County Government Vs. The Ethics And Anti-Corruption CommissionNairobi Civil Appeal No. 193 of 2014. It was argued that the cross-petition is misconceived because the Shompole and Ol Kiramatian groups did not appeal to the Minister, the decision of the Land Adjudication Officer as per section 29(1) of the *Land Adjudication Act*. Counsel

asserted that in the absence of such an appeal, the suit land's adjudication register became final in all respects, after it was so certified as per section 29(3)(b) of the *Land Adjudication Act*. To buttress this position, counsel cited multiple decisions including, Ambale Vs. Masolia [1986] Klr 241 And Elijah Ntaiyia Vs. Lekinini Kulale & 3 Others [2008] eKLR.

50. It was contended that section 152(e) of the *Land Act* was not applicable as it came into force on 21st September 2016, when the Land Laws Amendment *Act No. 28 of 2016* came into effect. To counsel, the section could not apply retrospectively for eviction orders that were issued by the Resident Magistrate Court in Narok in the early 1990s and thereafter by Ang'awa J. in the late 2000s. To buttress this argument, counsel cited Kamau Macharia And Another Vs. Kenya Commercial Bank Ltd & 2 Others [2012] eKLR. Further, the principles of law applicable in cases of eviction are not applicable in this case concerning enforcement of fundamental rights where the learned Judge had a discretion and exercised that discretion judiciously by determining that damages, not an order of eviction, was the most effective remedy to address the violation of the respondent's fundamental right to property. Counsel urged that orders of eviction were not the appropriate remedies because the State proved unwilling or unable to assist in enforcing eviction orders that the respondent obtained from the Resident Magistrate Court in the early 1990s and which were restored by the Court of Appeal in mid-1990s. The orders of Ang'awa J. directing State Organs to assist the respondent in enforcement of the eviction orders were also not complied with.

51. Concerning the objection made by the appellant on the amount awarded to the respondent for the value of the suit land, counsel urged that the award was in accordance with the valuation report which was adduced in evidence. The credibility or accuracy of the said report was not challenged by the appellant either during cross- examination of PW2 or by tabling a government valuation report to counter the contents of the respondent's report. Counsel argued that in the circumstances, this Court has no basis upon which it can interfere with the award of special damages that the learned Judge granted for the deprivation of property, which was the market value of the suit land. For this submission counsel cited the Supreme Court decision in Attorney General Vs. Zinj Limited[2021] KESC 23 (KLR).

52. Mr. Ahmednassir, SC, contended that the learned Judge inadvertently omitted to award some of the damages that the respondents claimed and proved by way of the valuation report. These were, special damages of Ksh.510,000,000 for damaged transport infrastructure; loss of user damages for lost potential agricultural revenue from parts of the suit property of Ksh.34,672.600 per year from 1st November 2014 until date of judgment; and, Ksh.170,100,000 per year from 25th November 1991 until date of judgment as loss of user damages for lost agricultural revenue from Pakase river basin. He urged that the omission was an error correctable by this Court under the slip rule. Counsel faulted the learned Judge for failing to award the respondent interest on the special damages. He asserted that an award of interest is discretionary, the basis of which is that the defendant has kept the plaintiff out of his money and the defendant has had the use of it himself so he ought to compensate the plaintiff accordingly. Citing Begumisa Financial Services Ltd Vs. General Mouldings Ltd And Another (2007) 1 EA 28 at p. 31-32, counsel submitted that when a person is entitled to a liquidated amount or to specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interest from the date of filing suit. Where, however, damages have to be assessed by the court, the right to those damages does not arise until they are assessed and their interest is only given from the date of judgment. Further, where a party has been deprived of land or moveable property and receives a monetary award in compensation for the loss, the usual practice is to award interest from the date of such deprivation. For this proposition, counsel cited Kilimani Vs. Attorney General (1969) Ea 502 And New Tyres Enterprises Ltd Vs. Kenya Alliance Insurance Company Limited (1987) KLR 380 at p.383 - 3384 Counsel denied the allegation that the petition was res judicata, submitting that the

petition before the trial court was the only constitutional petition that the respondent had ever filed. It was argued that the appellant's ownership claims over the suit land were the ones that were res judicata since the claims were dismissed by the Resident Magistrate in Narok and the Court of Appeal as long ago as 1994. Moreover, the Land Registrar conclusively determined that Shompole's claim over the disputed Pakase area was unsupported by physical evidence and the map of the area. In conclusion, Mr. Ahmednassir, SC, urged that we dismiss the appeal and cross-petition and allow the cross-appeal as filed, with costs.

53. We sought counsel's opinion on the claim made by the appellant that the respondent was not licensed to run an airstrip or conduct water reticulation processes. There was also no evidence of payment of income tax and no receipts or returns to indicate the income earned and, the alleged comparable income was for lodges that were not operational. Mr. Ahmednassir, SC, conceded that indeed the respondent's lodges and camps were not licensed. He, however, quickly added that the absence of a license does not mean that one is not operating a lodge. He implored us to look at the evidence and the cross-appeal and give the respondent what it had proved to the satisfaction of the law. We further probed counsel about the meeting that was held on 23rd October 2014 at Harambee House, whether he knew as a matter of fact what transpired in that meeting or whether there was substance in the argument by the appellant that the meeting was a regular meeting of government security agencies who discussed the insecurity in the area in issue. Counsel's answer was that the two meetings, the one of 23rd October 2014 and that of 31st October 2014 have to be read together for the reason that the people who attended the meeting of 23rd October 2014 are the same ones who organized the public rally of 31st October 2014. The local leaders who were present at both meetings stated at the rally and also later posted in their social media accounts that the then Cabinet Secretary of Internal Security, DW5, had sanctioned the invasion to the suit land.

54. We sought an explanation from Mr. Ahmednassir, SC on how the acreage of the suit land increased from 6970 hectares to 26,993 hectares. Counsel explained that the size of the land has never changed. The land always measured 26,993 hectares but when the title was being typed in the year 1971 or 1972, a mistake was made and it was indicated that the land was 6,970 hectares. However, before the respondent bought the land, they told the vendor to do the rectification; the process was done and the number was changed from 6,970 to 26,993, which is reflected in the title.

55. In reply to the foregoing submissions by Mr. Ahmednassir, SC, Mr. Eredi rejected the contention that the government cannot file a cross-petition arguing that a cross-petition is akin to a counter-claim and there was no way the government would have made its claim other than by filing a cross-petition. Moreover, a government can claim the right to property under Article 40 of *the Constitution* and in the instant case it was asserting that the title for the suit land is defective because when the acreage of the land was increased, a fresh adjudication ought to have been conducted under the *Land Adjudication Act*. Article 40(6) of Constitution does not protect a title that was unlawfully obtained. Counsel referred us to page 556 of the record where, upon the Inspector General of Police presenting in court a report pursuant to the orders made on 3rd November 2014, in Machakos ELC Petition No. 149 of 2014, the court dispensed with the Inspector General and directed him to continue with the process of providing security to the suit land. To counsel, the fact that the court dispensed with the appearance of the Inspector General of Police showed that the court was satisfied with the actions that had been recommended. Mr. Eredi argued that the respondent ought to have prosecuted that suit to the end instead of filing a fresh petition. Regarding the meeting that was held on 24th October 2014, counsel insisted that the convener of the meeting, DW5, testified before court and explained the purpose of the meeting, thus this Court should not believe the insinuations that had been made from the bar by the respondent's counsel as to what happened in the meeting. He urged us to listen to the video footage

and draw our own conclusion as to what was said at the rally, particularly by the NLC Chairman, Dr. Swazuri, and the NLC Commissioner, Dr. Lanshuru.

56. Mr. Eredi submitted that the word 'squatter' had been defined by the Supreme Court in Fanikiwa Limited & 3 Others V Sirikwa Squatters Group & 17 Others[2023] KESC 105 (KLR), and the respondent ought to have obtained court orders against the squatters who invaded the land as opposed to blaming the government for the invasion. On quantum of damages, counsel insisted that the general and special damages that were awarded were not proved to the required standard. In conclusion we were urged to dismiss the Petition or at the very least, return the matter to the trial court for it to write a proper judgment.

57. We probed Mr. Eredi as to why the government did not file an alternative valuation report to counter that of the respondent, now that they were challenging the values in that report. In reply, counsel contended that the values in the report were not proven and that in any case the appellant called a witness from the Tourism Regulatory Authority who testified that some of the items that the respondent sought to be compensated were not licensed.

58. Having perused the record and the submissions made by parties, we distill the following issues for determination;

    1. Whether the learned Judge failed to properly analyse the case before him and thus arrive at a justified decision.

    2. Whether the cross-petition was merited.

    3. Whether the appellant was liable for the invasion and destruction of the suit land.

    4. Whether the respondent was entitled to the award of damages as granted?

    5. Whether the cross-appeal should be allowed.

59. On the first issue, the appellant criticises the learned Judge for failing to identify the issues for determination, analysing them and making a decision on them. Based on Order 21 Rule 4 of the Civil Procedure Rules, the learned Judge is faulted for failing to conduct a thorough analysis of the case in order to justify his final decision. In response, counsel for the respondent acknowledged that the impugned judgment was not an ideal judgment in terms of its elegance. He, however, disagreed that the learned Judge failed to delineate issues for determination. Counsel pointed out the two (2) issues that were identified for determination by the learned Judge namely; whether the invasion of the petitioner's land constituted an act of deprivation of property contrary to Article 40 of *the Constitution* and, whether or not the petitioners are entitled to compensation as prayed in the petition. We have taken time to meticulously review the voluminous record of this matter and no doubt, we agree with the appellant that, this is a matter that required the learned Judge to do much more than he did in his judgment. We think the case required a more detailed evaluation and analysis of both the oral and documented evidence. That notwithstanding, as a first appellate court we have proceeded to re-evaluate and re-analyse the evidence herein, as is required of us, in an endeavour to ensure that justice is done.

60. As to whether the cross-petition was merited, it was rightly conceded by counsel for the respondent that the learned Judge never considered the cross-petition by the appellant. The cross- petition had primarily sought that the trial court recalls and orders rectification of the title to the suit land to reflect the correct acreage as at the completion of adjudication and registration which is 6,970 hectares. It also sought fresh adjudication of the extra acreage of land that was, allegedly, fraudulently added to the suit land. The appellant contends that the respondent failed to respond to how the extra acreage on the suit

land was obtained, that is from 6,970 to 26,993 hectares. Our perusal of the record, however, shows the contrary. It reveals that the respondent explained that issue through the further affidavit of Mr. Steyn, sworn on 17th April 2019. Counsel for the respondent also responded to the issue of the additional acreage during the hearing. He explained that the land has always measured 26,993 hectares but when the title was being typed in the year 1971 or 1972, long before the respondent bought it, a mistake was made and it was indicated that the land was 6,970 hectares. However, before the respondent bought the land, the vendor was told to do the rectification and the number was corrected from 6,970 to 26,993 Hectares, which is reflected in the title. The respondent further submitted that if the Shompole and Ol Kiramatian groups were dissatisfied with the decision of the Land Adjudication Officer concerning the suit land, they should have appealed to the Minister as stipulated under section 29(1) of the *Land Adjudication Act*. In the absence of such appeal, the suit land's adjudication register became final in all respects. Section 29(1) provides as follows;

> "(1) Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by—
>
> a. delivering to the Minister an appeal in writing specifying the grounds of appeal; and
>
> b. sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final."

61. In Elijah Ntaiyia Vs. Lekinini Kulale & 3 Others[2008] KEHC 3147 (KLR), Musinga, J.A (P), as he then was, expressed himself as follows on the adjudication process and the option of appeal;

> " The first defendant appealed to the Minister and vide a decision that was delivered on 20th May, 2003, the appeal was dismissed. The parties were ordered to respect the boundaries as they existed then. At that time, the 17 acre parcel of land in dispute had already been awarded to the plaintiff.
>
> Section 29(1)(b) of the *Land Adjudication Act* Cap 284 provides that the Minister's decision on appeal is final. The Minister is under an obligation to forward a copy of his decision to the Director of Land Adjudication and to the Chief Land Registrar.
>
> The reason for so doing is that, following determination of all appeals in an adjudication section, the adjudication register is altered to conform with the determinations by the Minister and the adjudication register becomes final. What follows thereafter is issuance of title deeds.
>
> It has already been determined that the suit land belongs to the plaintiff. That determination is final as provided by Section 29(1)(b) of the *Land Adjudication Act*.
>
> The decision could only have been challenged by way of judicial review proceedings to quash the same but that was not done. Such proceedings cannot be instituted now. Even assuming the defendants could have challenged the decision by showing that the plaintiff had fraudulently acquired the suit land, the limitation period for an action founded on fraud is three years, see Javed Iqbal Abdul Rahman & Another Vs Alfred Wekesa Sambu & Another (supra). The limitation period begins to run when the fraud is discovered. The

allegations of fraud made in the statement of defence that was filed on 29th March, 2007 cannot salvage the defendants' case at all."

62. In view of the above decision, and noting that it has not been demonstrated that members of the Shompole and Ol Kiramatian groups addressed their grievance through the prescribed appeal process, we find neither basis nor reason to issue any orders that would interfere with the acreage of the suit land as is reflected in the title. Consequently, we are not persuaded that the cross-petition was merited.

63. On whether the appellant was liable for the invasion and destruction of the suit land, the appellant contests the claim that the police failed to execute court orders obtained by the respondent, which granted it permanent injunction against trespassers. It is argued that court orders are implemented by court bailiffs and not the police; the role of the police being merely to maintain law and order. The appellant contends that the government was aware that there was tension on the suit land and it put in place measures to address the deteriorating situation. Further, the government has not taken over the land for it to compensate the respondent, and neither are the trespassers on the land with the authority and consent of the government. In opposition to the appeal, counsel for the respondent concurred with the trial court's holding that the State was liable for the invasion of the suit land because the evidence on record supports that finding. It was submitted that the notion of accountability under Article 10 of *the Constitution* required protection of the respondent and its property and, where the conduct of the State as represented by persons who perform functions on its behalf is in conflict with the constitutional duty to protect rights in the Bill of Rights, the notion of accountability must assume an important role in determining whether a legal duty ought to have been recognized in any particular case. The respondent asserted that the State is liable for the actions of the non-state actors who invaded its property because, section 24 of the *National Police Service Act* imposed a positive obligation on the police to protect the respondent and its property. The failure of the police to prevent the illegal acts by the non-state actors therefore lead to State liability even where the State itself or its officials are not directly responsible for the violations perpetrated by private individuals.

64. Evidence was adduced to the effect that as far back as 1991, the Resident Magistrate's Court in Narok in Civil Case No. 15 of 1991 issued orders of permanent injunction against the Shompole group ranch, which orders were upheld by the Court of Appeal on 13th July 1994 in Civil Appeal No. 52 of 1993. A perusal of the record shows that the order read as follows;

> " The defendants are permanently restrained, themselves, their servants, agents, members or otherwise from continuing or repeating the trespass to the plaintiff's land as complained of and as physically marked in official records and so confirmed by the District Land Registrar with the District Surveyor Kajiado on 27/9/91 in the presence of both the Plaintiff and the defendant. The Provincial Administration is required to ensure compliance."

65. Subsequently, on 2nd December 2009, the High Court issued orders of permanent injunction against members of the Shompole and Ol Kiramatian groups in Kericho HCCC Nos. 65 and 66 of 2009. That Court further ordered their eviction from the suit land and directed various security agencies to supervise the eviction in the following terms;

> " The Rift Valley Provincial Commissioner together with the Ololung'a District Commissioner, Loita Divisional Officer, Olgarua Location Chief be and hereby directed together with the Kenya Police Force (responsible for maintenance of peace) to supervise the immediate removal by the Court Bailiffs of the 1st Defendant its members agents and or their

servants from the suit premises comprised in and known as Title No. Narok/Nguruman/Kamorora/1."

66. The court also awarded the respondent nominal damages as below;

> " Nominal damages in the sum of Kenya Shillings Five Million (Ksh.5,000,000.00) be and is hereby awarded to the plaintiff together with interest on that sum at court rates from date of filing suit until payment in full."

67. The respondent took steps to enforce the above judgment of 2nd December 2009 by extracting an eviction order dated 3rd July 2010 directing the police to supervise and provide assistance in the removal of the invaders. On 4th August, 2014, the then Inspector General of Police, Mr. David M. Kimaiyo wrote to his deputies and copied the respondent, advising them to ensure that the court orders in Kericho HCCC Nos. 65 and 66 were executed.

68. The respondent claimed that the attitude of the police however changed when DW5, the then Minister for Interior held the meeting of 23rd October 2014, which meeting was attended by high ranking State Officers. The meeting was widely publicized in social media channels by the area local leaders who were present. On the same day, Moses Ole Sakuda, the MP for Kajiado West Constituency wrote the following words on his Facebook page;

> " Presently with all Maa Leaders in the Office of the President on Shompole and Ol Kiramatian Group Ranches land issue. With Attorney General, Cabinet Secretary, Inspector General, and the President. Auction of the above land will never happen."
>
> "All Kajiado County Elected Leaders today in a press conference and meetings at office of the President. Shompole and Ol Kiramatian Group Ranches will not be auctioned period. Any grabbed land will go back to Loodokilani people full stop."

69. On 29th October 2014, the respondent learnt from a social media post by MP Moses Sakuda that the government had convened a meeting on the suit property on 31st October 2014, to launch a full-scale invasion and takeover of its land. The post read as follows;

> " Friday 31st 2014, All roads will lead to Shompole and Ol Kiramatia Group Ranches. In attendance will be the Chairman National Land Commission, his CEO and Commissioners. CS Lands, Office of the President, All Elected Leaders from Kajiado County (Gov. Senator, Women Rep., Hon. Mps, Gen. Nkaiseri, Peris Tobiko, Katoo Ole Metito, Joseph Maanje and Myself, Kajiado County elected MCAs, Chairman Kenya Meat Commission Ole Kores, County Commissioner, Narok South MP Hon. Ole Lemain, Group Ranches Officials. Our Mission is clear Land Must Return To The Original Owners And All Land Fraudsters/thieves Must Face The Full Wrath Of The Law. Siku za Mwizi ni arubaini."

70. The respondent decided to file a suit in order to secure its property, being Machakos ELC Case No. 149 of 2014. The High Court issued orders on 30th October 2014 directing the police to provide security on the property and ensure that peace prevails and no breach of peace takes place. Those orders were served upon the police on 31st October 2014. On that particular day, a large meeting was held on the suit land involving state officials, local politicians and invaders. The State Officials present included the County Commissioner of Kajiado County, DW1, who presided over the meeting, together with members of county administration. The meeting was also attended by high ranking police officers. During the meeting, highly inflammatory and inciteful remarks full of xenophobic and racial rhetoric were made

by local politicians, encouraging invaders to take over the property. Shortly after and in consequence of the meeting, the invasion, looting and destroying of the property on the suit land and ejection of the respondent and its employees commenced. It was pleaded that the respondent lodged complaints with the police seeking assistance but no action was taken. The respondent decided to return to court and obtained orders on 3rd November 2014 where the court directed the Inspector General of Police to ensure that the suit property was effectively and adequately protected from any further invasion and destruction by Shompole and Ol Kiramatian Group Ranches. However, the police continued to do nothing with their deliberate inaction resulting in the invaders settling on the suit land. It was averred that the invaders continue to settle upon the land and the registered owners have no access to it.

71. To our mind, the events that occurred on the suit land in the face of court orders directing the security agencies to protect the respondent's property clearly show that there was acquiescence on the part of the security agencies to the invasion of the respondent's property. They made no attempt to protect the land in the face of heavily armed and emboldened invaders. The effect was that the respondent was eventually deprived of its property in violation of its right under Article 40 of *the Constitution*. ZINJ Limited Vs. Attorney General & 3 Others [2019] KECA 894 (KLR) this Court captured the place of property rights in our constitutional set up as follows;

> " 1. 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 inviolability of that right was succinctly appreciated by this Court in Chief Land Registrar & 4 others vs. Nathan Tirop Koech & 4 others [2018] eKLR as follows: "Land ownership and land rights is both a historical and emotive subject in Kenya. A right to hold property is a constitutional right as well as a human right and no person can be deprived of his property except in accordance with the provisions of *the Constitution* or Statute. The condition precedent to taking away anyone's property is that the authority must ensure compliance with *the Constitution* and Statutory provisions.""

72. We concur with the holding of the Court in Roshanali Karmali Khimji Pradhan Vs. The Attorney General [2004] eKLR to the effect that failure on the part of government officials and the security agents that leads to invasion of one's farm or property makes the state liable. Further, we associate ourselves with the sentiments of this Court in CHarles Murigu Muriithi & 2 Others Vs. Attorney General [2019] KECA 246 (KLR).

73. The Court determined that the government will be liable where it is demonstrated that the damage that was occasioned could have been prevented through exercise of reasonable diligence. The Court stated:

> " Those views, [with which] we agree entirely reflect the law in this area to which we may only add the following. Because there is no common law right of recovery for damages caused by mob violence, the Government will be liable only where it is demonstrated that the resulting damage could have been prevented through exercise of reasonable diligence by the police or where it is shown that there was implicit official acquiescence in the volatility of the situation, or where there is, like in some jurisdictions, statutory basis for holding the Government liable, or where the police are altogether indifferent. In some situations the Government may also consider gratis payment to victims out of benevolence."

74. The Court in the case of Gullied Mohamed Abdi Vs. Ocpd Isiolo Police Station & 2 Others [2006] Eklr, awarded damages to the plaintiff of Ksh.8,750,000 for loss of his livestock. The Court held that the failure of the police to pursue the raider and recover the stolen livestock crystalises the liability of the state. The Court held that;

> " In refusing and/or failing to hearken to the plaintiff requests to follow and recover his animals, the Police Force in my view and finding, breached the legal duty of care it owed the plaintiff as an individual. By reporting to the Force when he did and demanding assistance, the plaintiff in my finding, brought himself within the scope, of a duty of care of the duty owed to him under section 14(1) of the Police Act. It was thus, the report and the request for help that activated the plaintiff's rights under the relevant law and not the mere existence of the imposed duty of care in the Police Act."

75. We hear the respondent's counsel to be saying that the appellant's inaction can be deemed to amount to constructive acquisition by the State of the respondent's land. This was indeed the holding of the High Court in Arnacherry Limited Vs. Attorney General [2014] KEHC 8304 (KLR) where the court observed as follows;

> " 57. Turning back to the allegation of violation of constitutional rights, the core right at the centre of this dispute is the right to property under Article 40 of *the Constitution*, which has been reproduced elsewhere above. The facts in support of the allegation have not been contested and it is by now obvious that whereas the initial invaders of the suit land were civilians, the Government of the Republic of Kenya joined them and proceeded to establish a police station therein and also built schools and posted teachers to the said schools. It also set up its offices on the suit land including those of a Chief and Sub-Chief. What other conclusion can be reached in the circumstances other that the State has, without lawful process, compulsorily acquired the said parcel of land? Acquisition is ordinarily direct and by processes known to the Land Acquisition Act (Repealed) and now the Lands Act, 2012. Constructive acquisition however may well occur in circumstances such as the ones obtaining in the present Petition and there is no doubt that Article 40 was thereby violated."

76. International law also recognises that expropriation may take place even if the disposed rights of property have not been acquired by the state. See STarret Housing Corporation, Starret Systems Inc. Starret Housing International Inc. Vs. The Government Of The Islamic Republic Of Iran, Bank Markazi Iran, Bank Omran, Bank Mellat (1983) 4 Iran R. 122 at 154:

> " It is recognised in international law that measures taken by a state can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the state does not purport to have expropriated them and the legal title to the property formally remains with the original owner."

77. However, the position in our jurisdiction is found in the holding by the Supreme Court in Attorney General Vs. Zinj Limited [2021] KESC 23 (KLR) that:

> " 32. We have already held that the Government's action of issuing titles over a portion of the respondent's land, amounted to a violation of its right to

property. In addition, we have held that such action could not be regarded as "a compulsory acquisition" as it was done contrary to *the Constitution* and the law. The acquisition was "compulsory" only because the Government used its coercive powers to deprive the respondent of its property in disregard of *the Constitution*. However, such governmental action cannot be regarded as "a compulsory acquisition" as known to law. It was simply a brazen and an unlawful deprivation of the respondent's right to property, for which just recompense was awarded by the trial court.

33. Having so held, we find difficulty in vindicating the appellate court's conclusion, to the effect that, the Government had compulsorily acquired the land. Following our determination to the contrary, it becomes clear that the principles governing compensation for compulsorily acquired land, could not be applicable to the suit land, as the same had not been so acquired. The most appropriate remedy in our view, was an award of damages, as held by the trial court and partially upheld by the Court of Appeal..."

78. The Supreme Court stressed that the term "constructive compulsory acquisition", is "a legal tenet unknown to our law." The argument by the respondent that the failure by the State to protect its land from invasion amounted to constructive compulsory acquisition is therefore not tenable.

79. Nevertheless, failure by the police and other agencies of government to act on the plea and complaint of individuals and the harm caused as a result of that failure to act creates legal responsibilities on the part of the government. That was the holding in C.K. (A Child) Through Ripples International As Her Guardian And Next Of Kin & 11 Others Vs. The Commission Of Police/inspector General & 3 Others [2013] eKLR, where the police despite numerous complaints failed to act leading to abuse and cases of child molestations.

80. In view of the foregoing authorities, we are satisfied that the appellant was liable for the invasion and destruction of the respondent's property. Consequently, we are in agreement with the learned Judge that the respondent's right to property as underpinned in *the Constitution* was violated. This was in consequence of the failure by the police to take any action to protect the property from invasion, destruction and illegal occupation despite numerous requests and court orders in what was clearly an untenable abdication of one of the State's foremost duties, namely the protection of private property. The situation is in this case compounded by the fact that government functionaries among them the powerful Minister of Interior in the President's office, were complicit in the incitement and encouragement of the invasion of the land by the neighbouring community once the respondent's directors were labelled foreigners and "Mzungu" who they expressly stated should not be on their land. One of the politicians in fact went to as far as to say they should be expelled not only from their land, but from the country-notwithstanding that they were citizens. All these brazen, and contemptuous acts of rank impunity led to the total dispossession of the respondent's land. This is therefore a classic case of unlawful expropriation by private citizens with the State's connivance and the State must in law be liable to compensate the respondent.

81. On the question of quantum of damages, the appellant contests the various amounts awarded to the respondent, terming them exorbitant and misguided. It is argued that it is not the government which invaded the suit land. Further that the respondent ought to have filed suit against the alleged invaders and gotten orders against them, which would then be executed. State Counsel referred to the evidence of DW4 who stated that the camps and lodges that were owned by the respondent were not licensed and so they could not claim for compensation of a business that was not licensed. It is also contended that the respondent did not attach tax returns or any other documents to show that it was a viable business.

Moreover, the legal tender in this country is Kshs. and thus there is no reason why the learned Judge gave an award in USD without giving reasons. For the respondent, counsel challenged the contestation on the damages awarded. He urged that the amounts awarded were based on the valuation report of PW2, an expert witness and the credibility or accuracy of that report was not challenged by the appellant either during cross-examination of PW2 or by tabling a government valuation report to counter the contents of the respondent's report.

82. We have contemplated the amount of damages awarded by the learned Judge in relation to the loss suffered by the respondent with much anxiety. We are mindful that the appellant's failure to obtain a valuation report challenging the credibility of the values contained in the report presented by PW2, in addition to failing to effectively cross-examine him on the same, leaves little or no room for us interfere with the awards. However, we think, on the face of it, we cannot ignore the fact that some of the amounts are manifestly excessive and their computation unjustified. To begin with, the valuation report does not explain how the Ksh.33,350,000,000 being the value of the land, was arrived at. The report indicates that the whole parcel of the suit land is approximately 26,993 hectares or 66,770 acres. Arithmetically this means that each acre of the suit land was estimated to cost about Ksh.500,000. We think it is implausible for an acre of that land to cost that much, in the year 2015 when the valuation was conducted, and particularly for land that is in a remote part of this country, as was submitted by the appellant. Further, from an aerial view, based on the video footage that was provided by the respondent, the suit land appears to a be a dry area with shrubs. It defies logic how the land cost so high a figure as suggested by the valuer. As we have pointed out, the Government through the Attorney-General should have done a better job in countering that aspect of the report but did not. However, doing the best we can, we reduce the value given for the land by half from Ksh.33,350,000,000 to Ksh.16,675,000,000.

83. The learned Judge further awarded the respondent United States Dollars 9,198,000 per year from 1st November 2014, until date of judgment, being compensation for loss of potential ecotourism revenue. Besides the contention, which we agree with, that no reason was given as to why the amount is cited in dollars, there was no evidence, including income tax returns, that were attached to the valuation report showing how much income the respondent used to earn from the camps and lodges. We agree with the appellant that evidence of income tax returns would have been the most appropriate way of exhibiting the amount of revenue that the respondent earned from the eco-tourism. We are therefore persuaded by the appellant's plea that this part of the claim was not proved to the required standard, and it must be set aside. The rest of the awards are reasonable enough and shall remain undisturbed.

84. Concerning the cross-appeal, it is argued that the learned Judge inadvertently omitted to award some of the damages that the respondents claimed and proved by way of the valuation report. The amounts claimed included Ksh.510,000,000 being compensation for transport infrastructure on the suit land, Ksh.34,672,600 and Ksh.170,100,000 being compensation for loss of agricultural revenue by the respondent from various parts of the suit land. In view of the uncontroverted submission that, the respondent had no evidence of the alleged air strips on the suit land being licensed by relevant authorities, we are not persuaded that the respondent deserved to receive compensation for the same. We also decline to compensate for the respondent the claimed loss of agricultural revenue, evidence of revenue from the said agricultural activities having not been proven. The learned Judge was also faulted for failing to award the respondent interest on the special damages. The award of interest being discretionary to the court, counsel for the respondent did not indicate to us how the learned Judge misguided himself in exercising that discretion. In the result we are not inclined to interfere with the learned Judge's decision not to award interest. We are alive, as must have been the learned Judge, of who finally bears the brunt of these awards. Public interest demands that we do not overburden public coffers. In sum then, we find no merit in the cross appeal.

85. Ultimately, we allow the appeal partially in consideration of the matters we have addressed, and dismiss the cross-appeal. The final orders, reflective of our findings, are that the judgment and decree of the Environment and Land Court is set aside and substituted with the following orders in favour of the petitioner.

    1. A declaration do issue that the petitioner's rights to protection of property as guaranteed under Article 40 of *the Constitution* of Kenya 2010 was violated by the State.

    2. An order of compensation of Land Reference Narok/Nguruman/Kamorora/1 of Ksh.16,675,000,000.

    3. Ksh.340,000,000 being compensation for the lodges and ancillary buildings on LR No. Narok/Nguruman/Kamorora/1 that were unlawfully destroyed pursuant to the invasion and occupation thereof commenced on 31/10/2014.

    4. Ksh.162,000,000 being compensation for electric power, water supply and reticulation infrastructure on LR No. Narok/Nguruman/Kamorora/1 that was unlawfully destroyed pursuant to the invasion and occupation thereof commenced on 31/10/2014.

    5. Ksh.61,177,196 being compensation for loss of assets, furniture and consumables of the petitioner on LR No. Narok/Nguruman/Kamorora/1 that was destroyed or stolen pursuant to the invasion and occupation thereof commenced on 31/10/14.

    6. Ksh.11,250,00 being compensation for motor vehicles on LR No. Narok/Nguruman/Kamorora/1 that were destroyed or stolen pursuant to the invasion and occupation thereof commenced on 31/10/2014.

    7. Ksh.39,470,400 being the value of perennial trees cultivated on the property LR No. Narok/Nguruman/Kamorora/1 which were destroyed or died pursuant to the invasion and occupation thereof commenced on 31/10/2014.

87. The order on costs that commends itself to us is that each party shall bear own costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF FEBRUARY, 2025.

P. O. KIAGE

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR