Kenya Urban Roads Authority & another v Belgo Holdings Limited (Civil Appeal E011 of 2021) [2025] KECA 764 (KLR) (9 May 2025) (Judgment)

Neutral citation: [2025] KECA 764 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E011 OF 2021

DK MUSINGA, F TUIYOTT & GV ODUNGA, JJA

MAY 9, 2025

BETWEEN

KENYA URBAN ROADS AUTHORITY ..... 1ST APPELLANT

THE MINISTER OF ROADS ..... 2ND APPELLANT

AND

BELGO HOLDINGS LIMITED ..... RESPONDENT

(Being an Appeal the Judgment and Decree of the Environment and Land Court of Kenya at Nairobi (L. Komingoi, J.) dated and delivered on 30th January 2020 in ELC Case No. 545 of 2012)

JUDGMENT

1. This appeal arises from the judgement of the Environment and Land Court of Kenya at Nairobi (L. Komingoi, J.) dated and delivered on 30th January 2020 in ELC Case No. 545 of 2012. That suit was commenced by a plaint dated 23rd August 2012 in which the respondent sought the following reliefs against the appellants jointly and severally:

> "(i) An order of permanent injunction retraining the Minister of Roads and/or Kenya Urban Roads Authority from entering upon or trespassing on Land Reference Number 28587 and 28586 (original numbers 3859 and 3860) Peponi Road Nairobi.
>
> ii. An order of mandatory injunction directing the Minister of Roads or Kenya Urban Roads Authority to vacate forthwith any portions of the said properties currently occupied by them.
>
> ii. Damages for trespass.

iii. A declaration that the plaintiff is the indefeasible owner and registered proprietor of the portions of the said properties claimed by the Minister of Roads and or Kenya Urban Roads Authority to be land acquired by the Government.

iv. A declaration that the plaintiff is being deprived of its rights to the said properties (protected by Article 40 of *the Constitution*) by the Minster of Roads and or Kenya Urban Roads Authority; and

v. Costs of this suit."

2. The respondent's case, as set out in the plaint and the evidence of its witness and director, Akber Ismail, who testified as PW1 was: that the respondent is the owner and registered proprietor of LR No. 28586 (original number 3860) and LR No. 28587 (original number 3859) (the suit properties); that the suit properties are situated on Peponi Road, Nairobi, comprising 44 acres or thereabouts each; that by a conveyance dated 21st January 1974, duly registered at the Government Lands Registry, Nairobi, in Volume N.7 Folio 159/23 and Volume N.17 Folio 63/13, the suit properties were transferred to Jays Syndicate Limited (Jays); that simultaneously with this transfer, Jays conveyed the suit properties to the Standard Bank Limited (the Bank), through an indenture dated 21st January 1974 and registered in Volume No. N.176 3114 and

   Volume N.17 Folio 351/24, as security; that since the suit properties were held under the Government Lands Act, they accordingly vested in the Bank, subject to the right of redemption on repayment of the loan; and that it was not until around 25th April 1981 that the suit properties were re- conveyed to Jays.

3. It was stated: that by a Notice No. 942 published in Kenya Gazette of 21st March 1975, the Commissioner of Lands (the Commissioner) gave notification, under the repealed Land Acquisition Act (the Act), that the Government intended to acquire 6.548 acres out of LR No 3859 and 6.137 acres out of LR No. 3860 for road purposes; that by a Notice No. 943, also published in the same Gazette Notice, the Commissioner ordered an inquiry to be held to ascertain the claims for compensation by persons interested therein; that inquiries at the Lands Office and elsewhere led PW1 to believe that payment of compensation was neither made to Jays nor to the Bank in which the suit properties were vested; that the Commissioner did not serve the Bank with any notices as required by sections 3, 11 or 19 of the Act; that no fiscal survey of the portions of the suit properties intended to be acquired was made by the Commissioner pursuant to section 17 of the Act and no survey seems to have been made of the said portions as no beacons were placed where the proposed road was to be constructed; that no notices were served on Jays or the Bank under section 19(1) of the Act and no possession was taken by the Commissioner of the said portions of the suit properties and hence they did not vest in the Government; and that in essence, the Commissioner seemed to have abandoned the acquisition process.

4. It was contended: that in 1980, Jays was in possession of the entire suit properties which the Government had intended to acquire for road purposes, and no notice was served on it that possession of the suit properties had been taken over by the Government, and that the said portions had vested in the Government; that at no time was the Bank, Jays or any other party in possession of the documents of title to the suit properties notified, to deliver the title documents to the Registrar of Government Lands pursuant to section 20(1) of the Act in order to endorse on the title documents that the said portions had been vested on the Government under the Land Acquisition Act; and that Jays seemed to have been in possession of the suit properties from 1974 till 1981.

5. On 18th July 1980, PW1 was instructed to incorporate Lakeview Development Limited (Lakeview), with PW1 as one of the subscribers to the Memorandum & Articles of Association and its director from incorporation till 1991; that PW1 was then instructed by Lakeview to act on its behalf in the purchase of the suit properties from Jays; that by an agreement dated 21st July 1980, Lakeview agreed to purchase the suit properties from Jays for a price of Kshs 4.5 million; that and by a conveyance dated 25th April 1981 registered in the lands registry in Volume N.17 Folio 63/16 and Volume N.7 Folio 351/25, Lakeview acquired the entire suit properties from Jays; that Jays then handed over possession of the suit properties to Lakeview, including the portions on which the road was to be constructed, and Lakeview remained in possession thereof till 1995.

6. According to PW1, prior to completion of the said sale, he made a search at the Government of Lands Registry, Nairobi, and found no reference therein that portions of the suit properties had been acquired by the Government. He also examined and perused the title deeds and found no mention of such acquisition and paid to Nairobi City Council (the City Council) rates for the entire suit properties. According to PW1, a perusal of some letters concerning the proposed sub-division of the suit properties and the communication exchanged with the Commissioner, made no reference to portions which had allegedly been acquired for road construction. Further, correspondence exchanged by PW1 with City Council did not indicate that any portions aforementioned had been acquired. He averred that he relied entirely on the state of the register and title deeds and that neither Jays nor anyone else informed Lakeview or its directors that portions of the suit properties did not belong to Jays and had been acquired by the Government.

7. It was averred: that Lakeview was in possession of the entire suit properties and remained in such possession until 1995 and during that period it let the suit properties out to third parties for coffee cultivation; that in or around December 1994, PW1 agreed with one of his clients that he should incorporate the respondent and on 14th December 1994, it was duly formed with PW1 as one of the subscribers to the Memorandum & Articles of Association and a director ; that by an agreement dated 29th May 1995, Lakeview agreed to sell the suit properties to the respondent for a sum of Kshs 20 million; that PW1's firm acted for the respondent in the transaction and PW1 applied through the Commissioner to obtain consent of the Nairobi Land Control Board for the transfer, and in its letters to the Board, the Commissioner clearly recognised that the area of each plot was 44 acres; that PW1 paid rates for the entire property to the City Council and was issued with receipts; that before completion of the sale, PW1 made a search of the records kept by the Registrar of Government Lands and perused the title deeds and found no mention of any records or notes or memorandum thereon to the effect that portions of the suit properties had been acquired by the Government; that on reliance on the state of the register and title deeds, the purchase was completed through a conveyance dated 27th July 1995 registered in volumes N7 Folio 351/31 and N61 Folio 15/23; and that the respondent, like Lakeview, was a bona fide purchaser without any notice of the alleged acquisition.

8. It was contended: that the respondent took over the suit properties and remained in possession until around January 2004 when some fraudsters and trespassers grabbed the suit properties; that the said trespassers were evicted with orders from the court and the respondent's possession was restored in May 2007 and the respondent has been in occupation since then; that in or around May 1996, the then President exempted the suit properties from the provisions of the Land Control Act vide Legal Notice No. 259 published in the Kenya Gazette of 23rd August 1996 which clearly recognised that each of the plots was 44 acres in size; that PW1 continued to pay rates to City Council for the plots; that in order to bring to an end fraudulent attempts to deprive the respondent of the suit properties, the Commissioner agreed with the respondent to exchange the title to the suit properties from that held under the Government Lands Act to that under the Registration of Titles Act; that towards this end,

new Deed Plans Nos. 310720 for LR No. 28586 (original 3860) and No. 310721 for LR No. 28587 (original 3859) respectively, were prepared by the Director of Surveys at the request of the Department of Lands for both plots in their entirety; that the President then issued to the respondent, in exchange, two Grants numbered IR 124735 & 124736 registered on 3rd August 2010; and that the respondent remains an indefeasible proprietor of the suit properties and is entitled to the protection of its rights under Article 40 of *the Constitution*.

9. PW1 stated that around the middle of August 2011, he was driving on Peponi Road when he found an earthmover and other mechanical equipment on the suit properties and it appeared that someone was digging all over, moving and dumping soil and probably laying foundation for or making a road; that this activity was around the said portions of the suit properties purportedly acquired in 1975/76; that he got in touch with David Ruto, the respondent's property manager, who informed him that he was unaware of the developments. That two days later, PW1 confirmed that all the equipment belonged to the Government, and was informed by their operators, that they were building roads; that the road construction went on for several weeks despite protests by the respondent; and that at the end of the trespass in September 2011, the respondent regained possession of the suit properties and is still in possession thereof.

10. PW1 stated that there were correspondences showing that no survey was done demarcating the portions aforementioned that was necessary for the road purposes and that in 1978, the City Council was still seeking surrender of the road reserve as a condition for approving subdivision of the suit properties.

11. On cross examination, PW1 denied that there was any acquisition of any part of the land in 1975. He reiterated: that no notices were issued under the Land Acquisition Act to the Standard Bank; that with respect to the letter dated 6th August 1976 from the Senior Valuer to the Chief Engineer Ministry of Works in respect of LR Nos 3859 and 3860, that there is no evidence that payment was made to Jays Syndicate Limited and Standard Bank Limited; that he incorporated Lakeview Development Limited on 18th July 1980 and that Lakeview Development Limited sold the suit properties to the respondent; that subdivision was never done on the suit properties and there was nothing to show that the land had been surveyed; that the respondent was the one paying rates for the suit properties and produced a bundle of receipts as exhibits; that the respondent was in possession of the suit properties; and that no new deed plans were issued for 44 acres each and that, as at 2010, they showed that no acquisition or excision had been done; that the alleged portions did not vest in the Government under the Land Acquisition Act; and that the court in HCCC 266 of 2005 held that the suit properties belonged to the respondent, which decree had not been set aside.

12. The appellants, through the Attorney General, filed a statement of defence dated 16th November 2012 denying all the allegations in the plaint and averred: that the Government acquired the portions of the suit properties for a link road from Waiyaki way to Redhill Road in 1975 and made payment in 1976; that the said compulsory acquisition was known to the previous owners as it was well captured in the approved sub division plan and confirmed through the minutes of the Physical Planning Committee of the City Council of Nairobi; that the Commissioner for Lands made a final survey plan and there was an approved subdivision plan; that the appellants had not trespassed on the suit properties but were implementing the project for which the land was compulsorily acquired; that the respondent's claim over the portion was irregular, null and void and contrary to public policy and public interest; and that the resultant titles over the portions of the suit land, which was compulsorily acquired, are not protected as per Article 40(6) of *the Constitution*. They prayed that the suit be dismissed with costs.

13. On behalf of the appellants, DW1, Abdulkadir Ibrahim Jatani, the Manager, Surveys at the 1st appellant, adopted his witness statement dated 15th March 2016. In that statement, he stated: that from

the available records, the Government acquired land for a link road from Waiyaki Way to Redhill Road in 1975 vides Gazette Notice Nos. 942 and 943 of 21st March 1975 respectively and payments were done in 1976; that the existing road alignment has been set out in strict compliance with the 1975 acquisition plan and that the available documentation reveal that at the time of acquisition, the land between Gatathuru River and Tigiri River, where the Deed Plans for LR No. 28587 and 28586 fall, were indeed LT No. 3860 and 3859 respectively; that these plots were among the list of those acquired through the Gazette Notice of 1975; that the titles for LR No. 28586 and LR No. 28587 were only issued in August 2010, whereas the Government's compulsory acquisition and payment for a road corridor on the self-same property was done in 1975 and 1976 respectively to M/s Jays Syndicate; that the position on the ground is clear as all encroachments on the link road corridors were cleared five years ago to pave way for construction and the construction of the entire link road that commenced on the 21st February 2011 and concluded on the 20th May 2012.

14. DW1 further stated: that the survey plan FR No. 7/187 of 1921 indicated positions for the two parcels of land as LR No. 3860 and 3859, as surveyed in 1921 which clearly compares with the acquisition plans and payment by the Government in 1975; that the subdivision proposal to LR No. 3860 and LR No. 3859 submitted by Lakeview and approved by the City Council dated 19th September 1978 recognised the acquired road corridor;

    that the facts of acquisition was well known to Jays and to Lakeview and was well captured in the approved subdivision plan and confirmed through the minutes of the Physical Town Planning Committee of the City Council dated 19th September 1978; and that a claim for ownership over the acquired portion for road utility purposes is inconsistent and contrary to the acquisition of 1975; and that the titles which the respondent purportedly hold appear to have omitted the fact of the existence of the portion acquired for road purposes and are hence are not protected under Article 40(6) of *the Constitution*.

15. In his evidence before the court, DW1 added: that the Government acquired the land for a 60 metre road reserve and that the same was presented to Lakeview, the then owner of the suit properties; that by a letter dated 6th August 1976, the Senior Valuer advised the Chief Engineer of Roads to effect payments for the portion acquired for the link road between Waiyaki Way and Red Hill in favour of Jay Syndicate Limited and Standard Bank in the assessed sum of Kshs.214,000. DW1 relied on the defendant's bundle of documents filed on 16th January 2012 and 29th March 2017.

16. In cross-examination, DW1 admitted that he was not working with Kenya Urban Roads authority at the time and that the Deed Plan No. 310721 in respect of the LR No. 28587 (original 3859) dated 2010, did not show a subdivision. He, however, insisted that the process of acquisition was complete and that survey can be done at any time.

17. In her judgement, the learned Judge identified the following issues for determination:

    i. Whether the Government acquired 12.865 acres out of the suit properties in 1975.

    ii. What was the effect of the judgment in HCCC 266 of 2005 and HC Petition 21 of 2016 as regards the ownership of the suit properties.

    iii. Whether the respondent was entitled to the reliefs sought.

    iv. Who should bear costs?

18. The learned Judge cited Article 40 of *the Constitution* and sections 3 and 6(1) of the Land Acquisition Act, which provide for the procedure to be followed in the compulsory acquisition of property by the Government, and agreed with the respondent that no evidence was adduced to show that payment was

made on 6th September 1976 to Jays Syndicate Limited. According to the learned Judge, the appellants did not call a witness or produce documents to confirm payment and that no compulsory acquisition had occurred with knowledge of Lakeview Developments Limited. It was held that the burden was on the appellants to show that payment had been made.

19. The court found that there was evidence by the respondent that in 2010, the titles were converted from Government *Land Act* to Registered Titles Act and that new deed plans were issued as Deep Plan No. 310720 for LR No. 28586 (original 3860) and No. 310720 for LR No. 28587 (Original 3859) respectively, with no mention of the acquisition in 1975. The learned Judge, therefore, found that the intended acquisition of portions of the suit properties was not completed, and cited the case of Chief Land Registrar & 4 Others v Nathan Tirop Koech & 4 Others [2018] eKLR for the proposition that no person can be deprived of his property except in accordance with the provisions of *the Constitution* or statute. The learned Judge noted that DW1, in cross examination, stated that he did not know when the acquisition process was completed. It was also noted that the respondent was a second purchaser of the suit properties after Jays Syndicate Limited and was also a first grantee, of the entire suit properties, from the State under the Registration of Titles Act, in the year 2010. According to the learned Judge, it was also not in doubt that the High Court in the HCCC 266 of 2015 as consolidated with HCCC 507 of 2003 (OS) held that the respondent was the lawful and exclusive owner of the entire suit properties, while in Petition Number 20 of 2016, the High Court held that, the decision declaring the respondent to be the lawful owner of the suit properties, was a judgment in rem binding everyone and that that judgment had not been set aside and/or reviewed.

20. It was further found that prior to issuing the grants, the Ministry of Lands, in its letter dated 21st January 2010, accepted the validity of the judgment in HCCC 266 of 2005 without any qualifications, while in its inquiry, the National Land Commission accepted the binding effect of both High Court judgments and concluded its inquiry and confirmed in the letter dated 18th May 2018 that the respondent was the lawful proprietor of the suit properties.

21. The Court noted that the appellants admitted that they forcefully moved onto the portions of the suit properties comprising 21.8 acres or thereabout and built a road against the wishes of the respondent, the registered proprietor, an action that amounted to trespass for which the respondent was entitled to damages. Trespass, the learned Judge found, was actionable per se, based on the High Court decision in Nakuru Industries Limited v SS Mehta & Sons 2016 eKLR. From the evidence, the court found that the portion of the suit properties that had been trespassed on, was about 21.8 acres and on the authority of the ELC Case of Philip Ayaya Aluoch v Chrispnus Ngayo [2014] eKLR, held that, although the exact value was not given, an award of Kshs.2,000,000 as general damages for trespass was reasonable and proceeded to award the same

22. It was the learned Judge's view that, due to the conduct of Kenya Urban Roads Authority and its contractor, the respondent was also entitled to exemplary damages, and on the authority of the of Adulhamid Ebrahim Ahmed v Municipal Council of Mombasa [2004] eKLR, Mike Maina Kamau v Attorney General [2014] eKLR and Titus Gatitu Njau v Municipal Council of Eldoret [2015] eKLR, awarded Kshs.20,000,000 in exemplary damages. The learned Judge also held that Kenya Urban Roads Authority ought to comply with the laws relating to acquisition of private properties and granted a permanent injunction restraining the appellants from occupying or dealing with the portions of the suit properties.

23. In her disposition, the learned Judge entered judgment in the respondent's favour, which we paraphrase, as follows:-

a. A permanent injunction restraining the Minister for Roads and or Kenya Urban Roads authority from entering upon or trespassing on LR Nos 28586 and 28587 (original nos 3859 and 4860 Peponi Road Nairobi).

b. A mandatory injunction directing the Minister for Roads and or Kenya Urban Roads Authority to vacate forthwith any portions of the suit properties currently occupied by them.

c. General damages for trespass Kshs.2,000,000/- and exemplary damages of Kshs. 20,000,000 plus interest from the date of this Judgment till payment in full.

d. A declaration that the respondent is the indefeasible owner and registered proprietor of the portions of the said properties claimed by the Minister for Roads and or Kenya Urban Roads Authority to be land acquired by the Government.

e. A declaration that the respondent is being deprived of its rights to the suit properties (protected by Article 40 of *the Constitution*) by the Minster of Roads and or Kenya Urban Roads Authority.

f. That the respondent shall have costs of the suit.

24. Dissatisfied with the judgement, the appellants moved this Court, challenging the said decision on the following grounds:

1. The Learned Judge erred in law and facts in failing to consider and give due weight to the evidence rendered by the appellants such failure occasioning miscarriage of justice.

2. The Learned Judge erred in law and fact in coming to the conclusion that the appellants had admitted having forcefully moved onto the portions of the suit property comprising of 21.8 acres of thereabout.

3. The Learned Judge erred in law and fact in finding that the respondent's evidence to show that the area allegedly invaded by Kenya Urban Roads Authority and its contractor was a 60 meter road corridor measuring 21.8 acres.

4. The Learned Judge erred in law and fact in awarding exemplary damages of Kshs. 20,000,000.00 on the basis that several court orders were issued to restrain Kenya Urban Roads Authority and its contractor which were allegedly not obeyed as there were no such court orders.

5. The Learned Judge erred in law and fact in failing to consider that parts of the suit properties were compulsory acquired vide Gazette Notice No. 942 and 943 of 21st March.975 and payment made to the then registered owners.

6. The Learned Judge erred in law and in fact in failing to appreciate that the area acquired from LR. 3853 was 6.548 acres and in respect of LR No. 3860 was 6.137 acres totalling 12. 685 acres.

7. The Learned Judge erred in law and fact in declaring the respondent as indefeasible owner of the portions of the suit properties claimed by Kenya Urban Roads Authority and the Minister for Roads.

8. The Learned Judge erred in law in substantially amending the judgment that was read in open court on 30th January, 2020 occasioning a serious miscarriage of justice.

9. The Learned Judge erred in law and fact in awarding the respondent general damages for trespass amounting to Kshs. 2,000,000.00 which is untenable.

10. The Learned Judge erred in law and fact in coming to a finding that the defendants had deprived the respondent of their right to property contrary to Article 40 of *the Constitution*.

11. The Learned Judge erred in law and fact in dismissing the appellants' substantive defence and overwhelming evidence

12. The Learned Judge erred in descending into the arena of litigation and making sweeping assumptions, statements and conclusion not borne by evidence and/or supported by the material placed before the superior court.

13. In the circumstances of this case the Learned Judge abdicated her constitutional, statutory and judicial mandate of fair adjudication and the analysis of facts, evidence and findings and perpetuated an injustice in breach of Articles 48 and 159 of *the Constitution* and Section 1 and 1A of the *Civil Procedure Act*, Cap. 21 Laws of Kenya.

14. The Learned Judge erred in law and in fact in issuing an order of permanent injunction restraining the Minister for Roads and/or Kenya Urban Roads Authority from entry on the suit land without considering the real and true.....? before the court that there was a tarmacked road already existing on the suit properties.

15. The Learned Judge erred in law and in fact in issuing a mandatory injunction against the appellants to vacate the suit land which order was untenable in the circumstances.

16. The Learned Judge erred in law in materially altering the judgment that was read in open court on 30th January, 2020 which difference is marked and substantial as it introduces monetary reliefs of general and exemplary damages of Kshs. 22 Million.

17. he Learned Judge erred in law and fact in failing to acknowledge the nexus between the acquisition correspondence tendered by the defence, and the defence theory which should have indicated to the court of there being an acquisition and monies being paid as settlement in respect thereof occasioning a miscarriage of justices.

25. The appellants pray that the judgment and decree be set aside and they be awarded costs of this appeal.

26. During the plenary hearing on the Court's virtual platform on 10th February 2025, learned Principal State Counsel, Mr Allan Kamau, appeared for the appellants, while learned counsel, Mr Karanja, held brief for Mr Ochieng Oduol for the respondent. Both counsel relied entirely on their written submissions.

27. In the submissions filed on behalf of the appellants, Mr Kamau contended: that the learned Judge erred in fact and in law to hold that the intended acquisition of portions of the suit properties was never completed; that pursuant to section 6(2) of the Land Acquisition Act the Commissioner of Lands caused notices to issue on the intention of the Government to acquire the portions of the suit properties; that the validity of the gazette notices was never challenged by the respondent in evidence; that under section 8, 9,10,11,12 and 13 of the Land Acquisition Act, payment of prompt compensation is upon compulsory acquisition; that a plain and textual reading of section 8 of the Act indicates that compensation issues arise upon a factual determination of compulsory acquisition and it is on that basis that, under section 19 thereof, possession of the compulsory acquired land is taken upon making an award and not actual payment; that under section 2 of the Act, an award is defined to mean an award of compensation made under section 10 thereof, which is a written document filed, prepared and filed in the office of the Commissioner, thus the failure to pay the compensation does not invalidate compulsory acquisition but is subject to a remedy of specific performance with

interest under section 16(1); that payment was made as per the letter dated 6th August 1976 signed on behalf of the Commissioner of Lands instructing the Chief Engineer Roads to pay Jay Syndicate and Standard Bank Limited Kshs. 214,000.00 being the award in respect of compensation of the compulsorily acquired portions of the suit properties; that under the doctrine of privity of contract, the respondent has no locus to question the legal propriety of undertaking the compulsory acquisition of the portions of the suit properties, having not been privy to the acquisition process; and that the validity of the acquisition could only be questioned within the time limits specified under the Act.

28. In support of their submissions, the appellants cited the case of Kenya National Highway Authority v Shalien Masood Mughal & 5 Others [2017] eKLR, submitting that the issue of trespass does not therefore arise, and that the right to property under Article 40(6) of *the Constitution* does not extend to property that is subject to matter of compulsory acquisition. They further cited the case of Kenya National Highway Authority v Shalien Masood Mughal & 5 Others [2017] eKLR and submitted that the acreage of the suit properties allegedly trespassed upon was never pleaded, thus it was incumbent upon the respondent, under section 107 of the *Evidence Act*, to demonstrate that the appellants did in fact enter, acquire or took possession of more than the portion that had been gazetted, a burden which the respondent failed to discharge.

29. According to the appellants, even if this Court was to find that the appellants trespassed on the suit properties, the amount payable should be the market value of the property at the time of publication of the Gazette Notice as per the paragraph 1 of the Schedule to the Act. The appellants submitted that the respondent neither placed nor tendered before the trial court any evidence to buttress the claim for payments of general damages for trespass and the exemplary damages.

30. It was the appellants' case that the learned Judge erred in substantially amending the judgment that was read in open court by adding an award of exemplary damages of Kshs. 20,000,000.00, which sum was not pronounced in the judgment on 30th January 2020. We were urged to set aside in its entirety the judgment and decree for having been arrived at erroneously and allow this appeal with costs.

31. The respondent, on its part, submitted: that pursuant to section 24 of Registration of Titles Act, then in force, it was, in the absence of fraud, the indefeasible owner of the entire suit properties; that its title to the suit properties is protected and safeguarded by Article 43 of *the Constitution*; that the appellants did not deny in their defence the contention that not all requirements of acquisition had been complied with by the Government or that fresh titles were issued in the year 2010 to the respondent by the Government under Registration of Titles Act; that the appellants are bound by their pleadings and the Memorandum of Appeal cannot depart from them; and that the alleged steps undertaken by appellants were totally inadequate to complete the process of compulsory acquisition of private property.

32. The respondent cited the cases of Elizabeth Githinji & Others v Kenya Urban Roads Authority and The Ministry of Roads & Others [2019] eKLR, Angaine v M'muronga [2011] 2KLR 160, Musimba v National Land Commission & Others [2016] 2 EA 260, Commissioner of Lands v Coastal Aquaculture KLR (E&L) 264, Town Council of Awendo v Onyango [2015] eKLR on the proposition that where a person's property is forcefully acquired, the government must fully comply with the law and follow the laid down procedures strictly and meticulously. It was submitted that no person's property may be acquired compulsorily without due process as prescribed under section 6(2) of the Land Acquisition Act. The respondent further submitted that there is no substance in the appellants' stand that the portions of the suit properties were lawfully acquired in years 1975 and 1976, and the case of Rutongot Farm Limited v Kenya Forest Service [2018] eKLR was cited for the proposition that proprietary interest in a property is protected under Article 40 of *the Constitution* and that no person shall be arbitrarily deprived of property.

33. According to the respondent, the issue of the respondent's ownership of the suit properties is res judicata, both in personam and in rem since the issue was adjudicated in HCCC No. 266 of 2005. In the respondent's view, under section 44(2)(d) of the *Evidence Act*, the declaration of ownership in favour of the respondent in HCCC No. 266 of 2005 is conclusive proof that the suit properties belong to the respondent as from 27th July 1995 since that judgment has never been appealed against. Further, the National Land Commission accepted the binding effect of the aforementioned judgment of the High Court and confirmed in its letter dated 18th May 2018 that the respondent was the lawful proprietor of the suit properties and that decision binds each and every Government department and organ. In this regard, the respondent cited the case of Compar Investments v National Land Commission & Others [2016] eKLR for the proposition that the only power the court can exercise over the decision of the National Land Commission if the power of review. The respondent noted that since the National Land Commission was not accused of any wrong doing, this Court cannot make a decision which would be contrary to one made by the National Land Commission in May 2018, nor are the appellants entitled to seek such an order from the Court. According to the respondent, the appellants have no right to claim that portions of the suit properties belong to the Government when the National Land Commission has held to the contrary, and this Court cannot rule against it either.

34. Regarding the general and exemplary damages awarded by learned Judge, the respondents submitted: that the court's decision was informed by the conduct of the 1st appellant in abusing the respondent's proprietary rights and ignoring court injunctions against the contractor whom it advised to defy the court orders restraining it from constructing a road on the respondent's properties; that there was uncontroverted evidence before the trial court that the 1st appellant was advised by the then Attorney General, that the appellant did not have any defence to the respondent's claim; that the 1st appellant ignored the National Land Commission's and the Commissioner of Lands' position that the respondent was the sole proprietor of the suit properties, and defied the Grant to the suit properties made by the Government to the respondent under the Registration of Titles Act in the year 2010; that the appellants continue to defy the judgment of the trial court and continues with its trespass despite the fact there is no stay of the judgment; and that the public interest cannot override the interest of private citizen as both are entitled to equal protection of law.

35. On the alleged amendment of the judgement, the respondent contended: that the doctrine of functus officio as expounded by the Supreme Court in Raila Odinga v IEBC and Others [2013] eKLR does not bar the court from correcting clerical errors, nor does it prevent a judicial change of mind even when a decision has been communicated to the parties; that proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected; and that the learned Judge was not functus officio, and was entitled to polish up her judgment as regards quantum of damages.

36. We were urged to dismiss the appeal with costs.

37. We have considered the appeal and this being a first appeal, we are under a duty to subject the entire evidence and the judgment to a fresh and exhaustive examination with a view to reaching our own conclusions in the matter. In carrying out this duty, we have to remember that we had no opportunity of seeing and hearing the witnesses who testified during the trial and to make an allowance for the same. We have also to remember that it is a big thing to overturn the findings of a trial court which has had the singular opportunity of reaching its conclusions based on a combination of the evidence adduced and observation by the court of the demeanour of witnesses. In a nutshell, a first appellate court must of necessity proceed with caution in deciding whether or not to interfere with the findings of a trial court, but of course where such findings are not supported by the evidence on record or where they are founded on a misapprehension of the law, the axe must fall on the impugned judgement. This position

is anchored in section 78 of the *Civil Procedure Act*, which requires a first appellate court to re-evaluate, reassess and reanalyse the extracts of the record and draw its own conclusions. These provisions have been underscored in numerous decisions of the Superior Courts among them Peters v Sunday Post Limited [1958] EA 424, where the predecessor to this Court expressed itself as follows:

> "Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given...Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question...It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

38. From submissions made, the issues that fall for our determination are as follows:

    a. Whether the suit properties were acquired by the Government for the purposes of road construction.

    b. Whether the suit properties belong to the respondent.

    c. Whether the appellants trespassed on the suit properties.

    d. Whether the reliefs awarded by the trial court were warranted.

e. Whether the judgement was materially altered after delivery.

f. What orders should this Court grant.

39. Regarding the first issue, it must be made clear from the outset that what we are called upon to determine is not whether the suit properties were properly acquired by the registered proprietors from which the respondent acquired its title. No wrong doing is alleged against Jays or Lakeview. Rather, the contention is that portions of the suit properties were lawfully acquired by the appellants hence they had no property in those portions to transfer to the respondent at the time they purported to do so.

40. Intertwined with the same issue is whether the ownership of the said portions of the suit properties has been determined in previous court determinations hence the issue is res judicata. Since res judicata is a threshold jurisdictional issue, we will deal with it in limine. Res judicata, as a principle, is founded on the two concepts which were set out by the Indian Supreme Court in the case of Lal Chand v Radha Kishan, AIR 1977 SC 789 where it was stated that:

> " The principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue.
>
> The practical effect of the res judicata doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties – because it is the court itself that is debarred by a jurisdictional injunct, from entertaining such suit."

41. In our laws, the principle is codified in section 7 of the *Civil Procedure Act* which provides as hereunder:

> " No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

42. In Florence Maritime Services Ltd v Cabinet Secretary Transport, Infrastructure & 3 Others [2021] eKLR, the Supreme Court extensively examined the doctrine of res judicata stating that:

> " That the doctrine of res judicata is based on the principle of finality which is a matter of public policy. The principle of finality is one of the pillars upon which our judicial system is founded and the doctrine of res judicata prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively."

43. The Supreme Court cited with approval the words of Justice Russell in the Federal Court of Canada in the case of Sami v Canada (Citizenship and Immigration), 2012 FC 539 (CanLII) for the holding that:

> " the 'preconditions for res judicata' are that, firstly, "the same question was decided in earlier proceedings. Secondly, that 'the judicial decision which is said to create the estoppel was

final' and, third, that 'the parties to the judicial decision were the same persons as the parties to the proceedings in which the estoppel was raised.'"

44. The Supreme Court then pronounced that:

> " For res judicata to be invoked in a civil matter the following elements must be demonstrated:
>
> a. There is a former Judgment or order which was final;
>
> b. The Judgment or order was on merit;
>
> c. The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
>
> d. There must be between the first and the second action identical parties, subject matter and cause of action."

45. It is important to note that the four elements set out in section 7 of the *Civil Procedure Act* and in the case of Florence Maritime Services Ltd v Cabinet Secretary Transport, Infrastructure & 3 others (supra), to test whether any two cases are res judicata, are conjunctive and not disjunctive. All of them must be proved in order for the bar, based on res judicata, to be upheld.

46. The respondent's position that the substance of the dispute herein is res judicata is in reference to High Court Civil Case No. 266 of 2005 – Belgo Holdings Limited v John Armstrong Njogu & 6 Others and Nairobi High Court Petition No. 21 of 2016 – Belgo Holdings Limited v The National Land Commission & Another (reported as Belgo Holdings Limited v National Land Commission & another [2017] eKLR) (the Petition). On the face of it, in none of the said suits were the appellants parties. Whereas the 7th defendant in High Court Civil Case 266 of 2005 was the Registrar of Government Lands, from the copy of the decree incorporated in the record, the relief sought, that is material to this case, was:

> " A declaration that the Plaintiff is and has been since 27th July 1995 the only lawful proprietor of the suit properties described in the Amended Plaint (Land Reference Numbers 3859 and 3860)."

47. The issues that were before the Court in the present dispute were, inter alia, whether the suit properties were acquired by the appellants before the respondent acquired proprietary interest therein and whether the appellants trespassed onto the suit properties. Clearly, in terms of both the parties to the suit and the subject matter, res judicata was not applicable.

48. However, the trial court found that the dispute was caught up by issue estoppel as a result of the determinations in the above suits. The estoppel, according to the court, arose from the fact that the determination in HCCC No. 266 of 2005 was found, in Petition No. 21 of 2016, to be an in rem determination. From the decree in HCCC No. 266 of 2005 as set out in the judgment in Petition 21 of 2016, it was expressed that:

> " It be and is hereby declared that the Plaintiff has been since 27 July 1995 the lawful proprietor of Land Reference Numbers 3859 and 3860 situated in the City of Nairobi the title thereto being registered at the Government Lands Registry at Nairobi in Volume N7 Folio 351/31 and Volume N61 Folios15/23 (hereinafter called "the suit property")"

49. In Petition 21 of 2016, the court expressed itself as follows:

> " From the facts outlined and a perusal of the judicial pronouncements in HCCC No 507 of 2003 as consolidated with HCCC No.266 of 2005, the court rendered itself on the status of the suit property. The judgment was not on or upon any personal rights to the suit property or personal liabilities ordinarily not associated with the property. Rather it was a determination on the status of the suit property. It bound the parties. It also bound the world. More critically, the evidence availed to the court then, included a detailed investigatory report conducted by the criminal investigations department of the State. The report had been prepared at the instance of the court. The report detailed the history of the two parcels. The report detailed the process of acquisition by the Petitioner. The report suggested that there had been irregularities in the manner the Petitioner had acquired the two parcels of land but the Court thought and found otherwise and rendered a judicial determination confirming the Petitioner as the true owner. The court had before it all the relevant facts, details and an independent investigator even as the verdict was returned. The court determined not only the legality but also the propriety of the Petitioner's title to the suit property."

50. In arriving at that decision, the court referred to Halsbury's Laws of England, Vol. 15 (4th Ed) at paragraph 351, on the definition of a judgment in rem as:

> " Judgment of the court of competent jurisdiction determining the status of ... a thing, or the disposition of a thing as distinct from particular interest in it of a party to the litigation".

51. At paragraph 366, a distinction is made between judgments in rem and judgments in personam or inter partes as follows as:

> " judgments inter partes are only binding between the parties thereto and those who are privy to them. The judgment in rem of a court of competent jurisdiction is as regards...property situate within the jurisdiction of the court pronouncing the
>
> judgment, conclusive against all the world in whatever it settles as to the status of the property, or as to the right or title to the property, as to whatever disposition it makes of the property itself".

52. That a judgement in rem is not binding on courts of concurrent jurisdiction was appreciated by the Supreme Court in Dina Management Limited v County Government of Mombasa & 5 Others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (Constitutional and Human Rights) (21 April 2023) (Judgment) in which it was held that:

> " It is vital to note that the decisions in HCCC No 131 of 2011 and ELC Petition 12 of 2017 were made by courts of concurrent jurisdiction. By majority, this court stated in Attorney-General & 2 others v Ndii & 79 others; Prof Rosalind Dixon & 7 others (amicus curiae) (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) (31 March 2022) (Judgment) that decisions made by courts of concurrent jurisdiction made in rem are not binding on courts of equal jurisdiction. The ideal scenario on stare decisis is for trial court judges to follow decisions of other judges of the same court unless there are compelling reasons to depart from the same. This is to ensure consistency, certainty, predictability, and sound judicial administration."

53. It, therefore, follows that the decision made in HCCC No. 266 of 2005, though persuasive, was not binding on the learned Judge and that being the position, the submission that the issue of proprietary interest in the suit parcels cannot be gone into, is incorrect. What the court held in HCCC No. 266 of 2005 was that the respondent had been, since 27 July 1995, the lawful proprietor of Land Reference Numbers 3859 and 3860, going by the documentation. The fact that a person is the lawfully registered proprietor of land does not bar a claim based, for example, on overriding interest from being made and upheld. In determining the proprietorship of a parcel of land, the court does not lock out any claims that may, for example, be made based on trust, which may not be discernible from the title.

54. Before we conclude this discussion, we are aware that there is currently a raging debate amongst legal scholars as to whether, in practical terms, there is any real distinction between a judgement in rem and a judgement in personam. According to Morris E. Cohn, Jurisdiction in Actions in Rem and in Personam, 14 ST. Louis L. Rev. 170 [1929]:

> "...we should realize that actions in rem and in personam are fundamentally the same, and that formal distinctions-such as jurisdictional requirements--should to some extent be abolished. Disregarding current misapprehension, what is an action in rem? Does it really effect the status of a thing? Is not the result of a judgment in rem similar to one in personam in that the rights of persons ultimately are the things affected? How foolish, then, to say that a decree by a court actually changes a thing, or its status! Of course, we know that this is another legal fiction. But what we do not realize is that we are allowing a fiction to prevent a just proceeding...In conclusion, we think that judgments in rem, at least in some cases, ought to be recognized as vestigial remnants of medieval times, of a time when symbolism was permitted to obstruct the course of justice. We venture to suggest that our times are beyond such formal impediments and that our judges are capable of looking at the interests of the people involved as the final object of any legal decree. Judgments in personam and in rem should be recognized to be mere formulae, to some degree, at any rate. They are the exteriors of the forms of action which have grown up in our system of jurisprudence, and they should not be allowed to obstruct the path of justice. People, their rights of user in things, and their relationships toward each other are the things which a lawsuit actually controls. The adjudication of these things should not be interfered with by formulary procedure."

55. Our determination of the relevance of res judicata and estoppel or in rem judgement, now paves way for us to deal, substantially, with the issue of whether the suit properties were acquired by the Government for the purposes of road construction. It is not contested that by a Notice No. 942 published in Kenya Gazette of 21st March 1975, the Commissioner of Lands gave notification under the Land Acquisition Act of the Government's intention to acquire

6. 548 acres out of LR No 3859 and 6.137 acres out of LR No.3860 for road purposes. In the same Gazette Notice was Notice No. 943, by which the Commissioner of Lands ordered an inquiry to be held to ascertain the claims for compensation by persons interested therein. The respondent's case in however that there is no evidence that payment of compensation was made to the then registered proprietor, Jays Syndicate Limited or to Standard Bank Limited in whose favour the suit properties were conveyed to secure a loan by Jays. It was further contended that the Commissioner never served the Bank with any notices under sections 3, 11 or 19 of the Act and no physical survey of the portions of the suit properties intended to be acquired was made by the Commissioner pursuant to section 17 of the Act. Further, it is contended, no beacons were placed where the proposed road was to be constructed. In addition, there were no notices served on Jays or the Bank under section 19(1) of the Act, and no possession was taken by the Commissioner of the said portions of the suit properties.

The failure to comply with the foregoing, according to the respondent, was an indication that the suit properties never vested in the Government and for all intents and purposes, the Commissioner had abandoned the acquisition process. This, it was argued, is informed by the fact that Jays continued in possession of the suit properties and no notice was issued under section 20(1) of the Act for delivery of the titles to the Registrar of Lands in order for the said portions to be endorsed on the title, vesting the said portions in the Government under the Land Acquisition Act.

56. In order to determine this issue, we need to interrogate, in brief, the process of acquisition of land under the repealed Land Acquisition Act. Section 6(2) of the Act provides for notification in the Gazette by the Commissioner that the Government intends to acquire the land and that Notice was to be served on every person who appeared to the Commissioner to be interested in the land. It is not alleged that the notice was not served, since neither Jays nor the Bank were made parties to the suit and they never testified before the trial court. Section 7 of the Act provides that the Commissioner may cause the land which is to be acquired to be marked out and measured (if this has not already been done), and shall cause a plan of the land to be prepared. In this case the portions to be acquired were already known. Section 8 of the Act provides that where land is acquired compulsorily under that part, full compensation shall be paid promptly to all persons interested in the land. In our view, by the use of the underlined phrase, it is clear that payment is not a pre-condition to acquisition since the compensation is only payable where land is acquired.

Accordingly, this section does not peg acquisition to compensation such that land may be acquired even before compensation and once it is acquired compensation is to be paid promptly. It follows that the mere fact that compensation has not been made, does not necessarily mean that the acquisition did not take place. Section 9 of the Act deals with inquiry as to compensation and subsection (1) provides that the Commissioner shall appoint a date, not earlier than thirty days and not later than twelve months after the publication of the notice of intention to acquire, for the holding of an inquiry for the hearing of claims to compensation by persons interested in the land. Such a notice is required to be published in the Gazette and also to be served on persons who appear to be interested in the land. That was what Notice No. 943 was all about. In the absence of the joinder of Jays or the Bank or evidence from them, we are unable to determine whether or not they were served.

57. Thereafter follows an inquiry upon conclusion of which, the Commissioner prepares a written award. Section 2 of the Act states that:

> " award" means an award of compensation made under section 10;

58. Award is therefore not compensation but determination of what is payable in respect of the acquisition and is the basis of the compensation. It is stated to be final. Section 11 of the Act provides that on making an award, the Commissioner shall serve on each person whom he has determined to be interested in the land a notice of the award and offer of compensation. The appellants' position is that payment was made as per the letter dated 6th August 1976 signed on behalf of the Commissioner of Lands to the Chief Engineer Roads. That letter was in respect of several parcels of land, including the portions of the suit properties whose compensation was in the sum of Kshs 214,000. The letter instructed the Chief Engineer, Roads, to pay Jay Syndicate and Standard Bank Limited the said sum. On the face of the letter were notations for urgent payment. One of the notations on the letter was "P. V. effect" dated 6th September 1976 which DW1 explained to mean "payment voucher effected". In re-examination, DW1 explained, with reference to the letter dated 6th August 1976, that:

> " this letter is the evidence of payment of the sum of Kshs 214,000. In government, payment is effected when payment voucher is given. This payment was made to commissioner of lands

who is supposed to disburse the payment to the beneficiary it states: "I shall be grateful to receive cheques for the following amounts to complete this acquisition". The evidence is here. Payment was made to Jays Syndicate and Standard Bank Ltd. A request for cheques and payment voucher was effected. Once the ministry of roads remits the funds to the ministry of lands, to us the payment has been affected."

59. In cross-examination PW1, who came into the picture in 1980, stated that he never acted for Standard Bank or Jays Syndicate and that he was not aware of any complaint by the two that they were not served. He also stated that he was not aware if Jays Syndicate made a claim when the Gazette Notice was published. He also admitted that:

> " I don't know whether the cheques were issued."

60. In the absence of evidence to the contrary from those to whom payment was to be made, we cannot make a definite finding that payment was not made. It was the respondent who was alleging that payment was not made, hence the burden was upon it to prove that allegation. That the respondent bore that burden becomes clearer still because of the manner in which the respondent, who as the plaintiff at trial, pleaded its case in paragraphs 8 and 9 of the plaint, which was as follows:

> " 8. If, which is denied, the First Defendant contends that in or about the year 1976 the Commissioner paid compensation under the Act to the said Jays. The First Defendant has not shown any evidence of such payment.
>
> 9. If such payment was made to Jays as alleged (which is denied) then payment was to a wrong party as in year 1976 the entire estate in the said properties was vested in and held by the Bank. No notices were ever served by the Commissioner on the Bank as required by Sections 3, 11 and 19 of the Act."

61. The appellants placed before the court a document that prima facie indicated that payment was made and in light of such evidence, not being controverted by those who were in a better position to do so, it would mean that the allegation of non- payment was not proved since section 3(4) of the *Evidence Act* provides that:

A fact is not proved when it is neither proved nor disproved.

62. Section 17 of the Act provides that where part only of the land comprised in documents of title has been acquired, the Commissioner shall, as soon as practicable, cause a final survey to be made of all the land acquired. We do not understand this section to mean that acquisition cannot be said to have been done if the survey has not been done. The framing of this section is such that the survey follows the acquisition. This is so, since section 18 states that whenever the final survey provided for in section 17 discloses that the area of the land acquired is greater than the area of the land in respect of which the award has been made, compensation shall be paid for the excess area in accordance with this Act. Section 19(1) of the Act provides that after the award has been made, the Commissioner shall take possession of the land by serving on every person interested in the land a notice that, on a specified day, which shall not be later than sixty days after the award has been made, possession of the land and the title to the land will vest in the Government. Possession pursuant to section 19(1) is by notice. Section 19(1) does not talk about physical possession. Upon taking possession of the land the Commissioner is required to serve on the registered proprietor of the land and the Registrar, a notice that possession of the land has been taken and that the land has vested in the Government, after which the land vests in the Government absolutely, free from encumbrances. We reiterate that in the absence of evidence from the then proprietor of the suit properties, we cannot ascertain whether or not the notice was given.

63. Under section 20 of the Act it is provided that:

1. Where the documents evidencing title to the land acquired have not been previously delivered to him, the Commissioner shall in writing require the person having possession of the documents of title to deliver them to the Registrar, and thereupon that person shall forthwith deliver the documents to the Registrar.

2. On receipt of the documents of title, the Registrar shall—

a. where the whole of the land comprised in the documents has been acquired, cancel the documents;

b. where only part of the land comprised in the documents has been acquired, record upon the documents that so much of the land has been acquired under this Act and thereafter return the documents to the person by whom they were delivered, and upon such receipts, or if the documents are not forthcoming, cause an entry to be made in the register recording the acquisition of the land under this Act.

64. The respondent's position, as brought out by PW1 in his cross- examination, is that since section 20 was not complied with, and that nothing happened for 40 years:

> " It seems to me that the process was abandoned."

65. We do not agree with this view. In our understanding, section 20 requires that a notice of delivery of the documents of title be given in writing. It places an obligation on the Commissioner to give a written demand for delivery of the documents as a trigger to the surrender of the same to the Registrar. It does not mean that if the requisition is not done, then the land reverts to the proprietor. Similarly, we do not understand that in cases where only part of the land is acquired the default in endorsing on the title that fact, reverts the land to the proprietor. In our view, once the land is acquired it can only be dealt with pursuant to the purpose for which it was acquired and reversion to the proprietor is not contemplated. That is our understanding of the decision of the Supreme Court in the case of Town Council of Awendo v Nelson O Onyango & Others (Petition 37 of 2014) [2019] KESC 38 (KLR) (Civ) (30 April 2019) (Judgment) where it was held that:

> " The public purpose, for which the land was compulsorily acquired, may have been spent, but the un-utilized portions thereof, remain public land. It is therefore our view, that such land as remains un-utilized can only be applied to a public purpose, or be utilized to promote the public interest, even if the said interest is not such as had been originally envisaged. Un-utilized portions of land, may in this instance, be allocated to private entities, including those from whom the land was acquired, at a price, provided that, the land is to be put to such use as will promote the public interest."

66. From that position, even if the purpose for which the portions were required was spent, the suit properties could not revert to the respondent or to those from whom it acquired its title. The respondent's cause of action, if any, would have been for the compensation for the said portions pursuant to section 16(1) of the Act which provides that:

> " Where the amount of any compensation awarded is not paid or paid into Court on or before the taking of possession of the land, the Commissioner shall pay interest on the amount

awarded at such rate as may be prescribed which shall not be less than six per cent per annum from the time of taking possession until the time of payment or payment into Court."

67. In our view, nothing much turns upon the letter dated 18th May 2018 by the National Land Commission. That letter simply confirmed that the Commission was complying with the order made in Petition No 21 of 2016. It did not state, and could not competently state, that no claims whatsoever could be made against the suit properties. It, in fact, did not expressly state that the respondent was entitled to the suit properties, having not made a determination thereon. Its view was simply that it was barred from proceeding with its investigation.

68. Our own consideration of the relevant provisions of the repealed Land Acquisition Act leads us to the conclusion that the respondent failed to adduce sufficient evidence to prove its case. The burden of proof was clearly upon it, and even if the appellants had not adduced evidence,that would not necessarily have meant that the respondent's case had to succeed. We associate ourselves with this Court's decision in Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR as espousing the correct legal position that:

> "It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side."

69. The same position was adopted by this Court in Charterhouse Bank Limited (Under Statutory Management) v Frank N. Kamau [2016] eKLR where it held that:

> "We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendant's failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff or his witnesses to cross- examination and the evidence adduced by the plaintiff is thereby thoroughly discredited, judgment cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgement merely because the defendant has not testified... In the appeal before us, the evidence by the appellant's witness was subjected to cross-examination and, with respect, we agree with the respondent that taken as a whole, it did not prove the case of breach of contract pleaded by the appellant on a balance of probabilities. If anything, the evidence on record shows that in its dealings with the respondent, the appellant acted in a very casual and cavalier manner."

70. In order to prove its case, the evidence of Jays Syndicate Limited and Standard Bank Limited was crucial, and we fail to understand why they were neither joined as parties to the suit nor called as witnesses to support the respondent's case. The respondent, in not taking either of those steps, took a calculated risk, one which was bound to boomerang on it if the evidence in its possession turned out to be insufficient, as it eventually did.

71. Regarding the issue of the issuance of the Grant to the respondent in 2010, Article 40(6) of *the Constitution* provides that:

> " The rights under this Article do not extend to any property that has been found to have been unlawfully acquired."

72. That leads to the issue whether the suit properties belong to the respondent. In light of our findings regarding the failure by the appellant to prove its allegation that the portions of the suit property that were intended to be acquired were not procedurally acquired, we find that the suit properties belonged to the respondent, subject to the portions that were the subject of Notice Nos. 942 and 943 published in Kenya Gazette of 21st March 1975. Without evidence that the suit properties were not acquired by the appellants, in light of the prima facie evidence of acquisition, the respondent failed in its claim. It was upon the respondent, in light of the appellant's defence, to prove, not only that it had the title to the suit properties, but also the root of the whole of the title thereof. This could only have been proved by calling those from whom it acquired its title to come forth and testify as to whether or not the process under the Land Acquisition Act was complied with. We reiterate what this Court stated in Munyu Maina v Hiram Gathiha Maina Civil Appeal No 239 of 2009 [2013] eKLR, thus:

> " where the registered proprietor's root title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register. To establish whether the appellant is a bona fide purchaser for value therefore, we must first go to the root of the title, right from the first allotment, as this is the bone of contention in this matter." [Emphasis added]

73. To that extent, we agree with the position in the case of Elijah Makeri Nyangw'ra v Stephen Mungai Njuguna & Another [2013] eKLR that:

> " The heavy import of Section 26(1)(b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26(1)(b)...is to protect the real title holders from being deprived of their titles by subsequent transactions."

74. Since there is no satisfactory evidence, that the appellants trespassed on any other parts of the suit properties other than the portions gazetted, we find that the appellants were not liable in trespass. It follows, therefore, that the respondent was not entitled to the reliefs which were awarded by the learned Judge.

75. It was contended that the judgement was materially altered after delivery. Although, in light of the decision we have arrived at above, nothing turns on the issue, we note that the record contains two copies of the judgement. One is an unsigned draft judgement that mentions an award of general damages without indicating the amount. The other one is the certified, signed copy of the judgement in which an award of Kshs 2,000,000 is given as general damages and an award of Kshs 20,000,000 given as exemplary damages. As far as we are concerned, the judgement is the one signed by the learned Judge and certified as correct.

76. Before concluding this judgement, we must express our reservation on the reliefs that were granted. DW1 testified that:

> " We commenced gravelling including the acquired portion of the suit properties. The road was gravelled...The red line shows the government has constructed the road."

77. In cross-examination, he stated:

> " The clearing commenced on 21/2/11 and concluded on 20/5/12. The road was gravelled and motorable even where the suit properties are. Now we are tarmacking. The contractor is on the land."

78. Without independently confirming the position on the ground, the learned judge issued, inter alia: a permanent injunction restraining the Minister for Roads and or Kenya Urban Roads authority from entering upon or trespassing on LR Nos 28586 and 28587 (original Nos 3859 and 4860 Peponi Road Nairobi); and a mandatory injunction directing the Minister for Roads and or Kenya Urban Roads Authority to vacate forthwith any portions of the suit properties currently occupied by them. In matters such as these, where the actual position on the ground is disputed, and the subject of the dispute concerns the wider public, the trial courts may well be advised to confirm that position before granting orders in order to avoid a situation where the enforcement thereof may lead to unnecessary inconvenience to the public, particularly where alternative remedies may well suffice.

79. In the premises, we find merit in the appeal, set aside the judgement in Nairobi ELC Case No. 545 of 2012) and substitute therefor an order dismissing the respondent's suit with costs.

80. Judgement accordingly.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY, 2025.

D. K. MUSINGA (PRESIDENT)

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

F. V. ODUNGA

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.