



**Shazmeer Enterprises Limited v County Government of Mombasa (Constitutional  
Petition E007 of 2022) [2024] KEELC 4382 (KLR) (20 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4382 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
CONSTITUTIONAL PETITION E007 OF 2022**

**LL NAIKUNI, J**

**MAY 20, 2024**

**BETWEEN**

**SHAZMEER ENTERPRISES LIMITED ..... PETITIONER**

**AND**

**THE COUNTY GOVERNMENT OF MOMBASA ..... RESPONDENT**

**JUDGMENT**

**I. Preliminaries**

1. The Judgment of this Honourable Court pertains to the filed Constitution Petition dated 22<sup>nd</sup> February, 2022. It was by Shazmeer Enterprises Limited, the Petitioner herein against the County Government of Mombasa, the Respondent herein. *The Constitution* Petition is brought under the dint of the provisions of Articles 2, 23(1), 40 and 162(1),(2)(b) of *the Constitution* of Kenya 2010.
2. Despite of the proper service of the Petition being effected upon the Respondent, there was no responses nor submissions made to the Petition elicited. However, its is instructive to note that the Respondent did file responses to the interlocutory application that accompanied the Petition thereof while the office of the Attorney General filed written submissions. In essence, although the Petition was unopposed, but being a land matter and its sensitivities, the Honourable Court has proceeded to render a full fledged Judgement on its own merit.

**II. The Petitioner's Case**

3. The Petitioner sought for the following orders:-
  - a. A declaration be and is hereby issued that the property known as Mombasa/M.S/BLOCK 1/1674 is a private property owned by the Petitioner.
  - b. A declaration be and is hereby issued that there is no public access and/or public road passing through the property known as Mombasa/M.S/Block 1/1674.



- c. A declaration be and is hereby issued that the Respondent herein, the County Government of Mombasa, has breached the Petitioner’s constitutional rights to acquire and own property as guaranteed by Article 40 of *the Constitution* of Kenya, 2010.
- d. A declaration be and is hereby issued that the Respondent herein, the County Government of Mombasa, has by its acts of creating a public access road as complained of herein, unlawfully encroached and trespassed onto the Petitioner’s property known as Mombasa/M.S/BLOCK 1/1674 situate in Likoni, Mombasa County.
- e. There be and is hereby issued an order of permanent injunction to restrain the Respondent herein, the County Government of Mombasa, its agents, assigns, employees, officers and/or any person acting on behalf, authority, instructions and/or directives of the Respondent from trespassing on, stepping onto, visiting, vandalizing, demolishing, and generally interfering with the Petitioner’s ownership, rights, use and occupation of the property known as Mombasa/M.S/BLOCK 1/1674.
- f. There be and is hereby issued an order of mandatory injunction to compel the Respondent to restore the suit property known as Mombasa/M.S/BLOCK 1/1674 to its original state by covering up and blocking the murrum road passing through the said property and fencing both ends of the road to prevent any access thereon within 14 days of this order in default of which the Petitioner be at liberty to do so and recover the costs thereof from the Respondent by applying and following the execution process provided for in the *Civil Procedure Act* Cap. 21, Laws of Kenya and the Civil Procedure Rules, 2010.
- g. There be and is hereby issued an order compelling the Respondent to block the murrum access road created by the Respondent on the property known as Mombasa/M.S/BLOCK 1/1674 and to use its government resources and machinery to prevent access and use of the said road by members of the public and/or any other person.
- h. The Officer Commanding Station (OCS) of Likoni Police Station to ensure compliance with this court’s orders herein and that peace and law and order is maintained at all times.
  - i. General and Exemplary damages for trespass to and/or conversion of property, and nuisance.
  - j. Mesne profits.
  - k. Costs of this Petition be paid by the Respondent.
  - l. Any further relief or order that this Honourable Court shall deem just and fit to grant.

### III. The Legal Foundation of the Petition

4. The Petition was founded on the following legal provisions:
  - a. Under the provision of Article 40 of *the Constitution* of Kenya, 2010 (Hereinafter “*the Constitution*”), the Petitioner has a right to acquire and own property. The said right includes the right to occupy, use and develop such property. The Respondent has breached the Petitioner’s right to own and use the suit property under Article 40 of *the Constitution* of Kenya 2010 by:
    - i. Creating an illegal public access road on the suit property yet the suit property is a private property, is not a road reserve and has no provision for a public road.



- ii. The Respondent had deliberately made it impossible for the Petitioner to occupy, use, develop and enjoy the suit property by literally blocking the Petitioner, its agents and employees from accessing the suit property.
  - iii. The Respondent had incited and set up the local residents of Likoni area against the Petitioner and consequently the residents have become very aggressive, hostile and menacing to the Petitioner and the Petitioner's agents and employees thereby making it impossible for the Petitioner to access, develop, occupy and use the suit property.
  - iv. The Respondent had sent its agents to remove barriers erected by the Petitioner in an effort to secure and protect the suit property from trespass by members of the public.
- a. Breach of Article 40(3) of *the Constitution* by the Respondent making it impossible for the Petitioner to access, occupy, sue and enjoy its property
  - b. Article 2 (1) of *the Constitution, the Constitution* is the supreme law of the Republic and binds all State organs including at the level of the County Government. The Respondent acted against the spirit and letter of Article 2 (1) by illegally taking over the Petitioner's property and creating a public access thereon in a manner that is in breach of Article 40 (3) of *the Constitution*.

#### IV. The Brief Facts

5. The brief facts of the case was that the Petitioner is the registered owner of the leasehold interest of the property known as Mombasa/M.S/BLOCK 1/1674 (Hereinafter "The Suit Property") situate in Likoni, Mombasa County. The Petitioner owns the suit property for leasehold term of 99 years with effect from 1<sup>st</sup> July 1992 from the Government of Kenya.
6. On or about 30<sup>th</sup> December 2021, the Respondent, without any colour of right and without the authority and consent of the Petitioner, entered onto and trespassed on the suit property and paved a wide murrum public access road through the suit property. The road was created illegally because the suit property is not a road reserve and has no provision for public access road and the same is not provided for in the official map. The Respondent trespassed on the suit property by illegally accessing the same, entering thereon and creating the public access road.
7. Before creating the impugned access road, the Respondent herein had previously claimed that there is an access road cutting through the suit property with the sole objective of dispossessing and taking away the suit property from the Petitioner. In order to achieve its ulterior objective and to advance the false narrative that there is a public access road passing through the suit property, the Respondent incited local residents to demonstrate and protest against the Petitioner. Further and in addition, the Respondent has been working with the National Land Commission under the guise of unblocking an imaginary and an alleged public access passing through the suit property.
8. The main issue in dispute in this Petition was that the Respondent's action as described in this Petition and more specifically the creation of a public access road on the suit property which is a private property and has no provision for a public road is in breach and violation of the Petitioner's constitutional rights.
9. The Petition is premised on the testimonial facts, grounds and the averments made out in the 38<sup>th</sup> Paragraphed affidavit sworn by MR. ALNOOR HABIB JIWAN on the 17<sup>th</sup> February, 2022 and he avers as follows:-
  - i. He is a Director of the Petitioner Company, aware of the facts herein and duly authorized to swear this Affidavit.



- ii. The Petitioner is the registered owner of the leasehold interest of the property known as Mombasa/M.S/BLOCK 1/1674 situated in Likoni in Mombasa County - the suit property. Annexed in the affidavit and marked as "AJ - 2" was a true copy of the Certificate of Lease.
- iii. The Petitioner owns the suit property for leasehold term of 99 years with effect from 1<sup>st</sup> July 1992 from the Government of Kenya. Annexed in the affidavit and marked as "AJ - 3" was a true copy of the Lease.
- iv. On or about 30<sup>th</sup> December 2021, the Respondent, without any colour of right and without the authority and consent of the Petitioner, entered onto and trespassed on the suit property and paved a wide access road cutting through the suit property. Annexed herewith and marked as "AJ - 4" was a true copy of a Survey Report dated 10<sup>th</sup> June 2016 which does not show the road; marked as "AJ - 5" and "AJ - 6" respectively are photographs and a survey Report dated 7<sup>th</sup> February 2021 both showing the access road after it was created by the Respondent and marked as "AJ - 7" was a Certificate of Photographs.
- v. The road was created illegally because the suit property is not a public property or a road reserve and has no provision for the access in the official map. Annexed in the affidavit and marked as "AJ - 8" was a true copy of the official map which does not contain the access road.
- vi. The creation of the public access road on the suit property was done by the Respondent illegally because it was not authorized and sanctioned by the Petitioner and the road was created on a private property belonging to the Petitioner.
- vii. The Respondent trespassed on the suit property by illegally accessing the same, entering thereon and creating the access road.
- viii. Vide a letter dated 31<sup>st</sup> December 2021, the Petitioner demanded that the Respondent desist from the trespass and its illegal acts but the Respondent declined to comply. Annexed in the affidavit and marked as "AJ - 9" was a true copy of the Petitioner's letter dated 31<sup>st</sup> December 2021.
- ix. Previously, there had been numerous and spirited attempts by third parties, instigated and incited by the Respondent, to trespass upon and illegally take away the suit property from the Petitioner.
- x. Sometime in about August 2010, six (6) individuals trespassed on the suit property prompting the Petitioner to sue them in the civil case "High Court Civil suit (Mombasa) No. 299 of 2010: Shazmeer Enterprises Limited – Versus - Mwinyi Dao & 5 others" in which an order was issued on 16<sup>th</sup> July 2012 by Justice M.K Ibrahim (as he then was) to restrain the Defendants from trespassing on the suit property. Annexed in the affidavit and marked as "AJ - 10" was a true copy of the Ruling delivered by Justice M.K Ibrahim on 16<sup>th</sup> July 2012.
- xi. The National Land Commission attempted to repossess the suit property from the Petitioner through a Notice published in the Daily Nation Newspaper of 23<sup>rd</sup> January 2018 requiring the Petitioner to vacate the suit property within 90 days.
- xii. The Petitioner challenged the decision of the National Land Commission (NLC) in court vide "Petition no. 8 of 2018: Shazmeer Enterprises Limited – Versus - the National Land Commission" in which a Judgement was delivered in the Petitioner's favour by Justice C.K Yano on 31<sup>st</sup> October 2019 and the Notice by the NLC was quashed. Annexed in the affidavit



and marked as “AJ - 11” was a true copy of the judgement delivered by Justice C.K Yano on 31<sup>st</sup> October 2019.

- xiii. Before creating the impugned access road, the Respondent herein had previously claimed that there is an access road cutting through the suit property with the sole objective of dispossessing and taking away the suit property from the Petitioner. In order to achieve its ulterior objective and advance the false narrative that there is an access road passing through the suit property, the Respondent incited local residents to demonstrate and protest against the Petitioner.
- xiv. Sometime in February 2019, following the incitement and instigation by the Respondent, the local residents under the umbrella body known as Likoni Community for Development organized a demonstration against the Petitioner on the allegation that the Petitioner had blocked an alleged access road which was supposed to pass through the suit property to the Likoni Ferry. Annexed in the affidavit and marked as “AJ - 12” was a true copy of an undated letter written by Likoni Community for Development notifying the Officer In Charge of a Police Station (OCS) of Likoni Police Station of the demonstration. Further and in addition, the Respondent has been working with the NLC under the guise of unblocking public access road allegedly passing through the suit property. Vide a letter dated 24<sup>th</sup> March 2016, the Respondent working in cahoots with the NLC expressed its intention to unblock a purported access road on the suit property.
- xv. The Respondent, despite threatening and frustrating the Petitioner, did not execute its threats because we protested its actions. The matter then went quiet for about for (4) months until 29<sup>th</sup> July 2016 when the Respondent wrote to various Government officers and instructed them to open the alleged access road on the Petitioner's property. Annexed in the affidavit and marked “AJ - 13” was a true copy of a letter dated 29<sup>th</sup> February 2016 by the National Land Commission, marked as “AJ - 14” is a true copy of the Respondent's letter dated 24<sup>th</sup> March 2016 and marked as “AJ - 15” was a true copy of the Respondent's letter dated 29<sup>th</sup> July 2016.
- xvi. The letters mentioned in the preceding paragraphs, written by the Respondent, the NLC and the Likoni Community for Development erroneously referred to Plot Number CR 393/MS/1 while the intended property was the suit property herein owned by the Petitioner. The letters referred to above were addressed to ALBA PETROLEUM which is a sister to the Petitioner Company and which companies were both owned by the Deponent. The letters were served upon the Deponent as the owners of the two companies. The Respondent together with other Government entities such as the NLC and the local residents of the Likoni area have piled immense pressure on the Petitioner to open a public road on the suit property yet none existed thereon.
- xvii. Due to the fact that the suit property was not fenced at the material time, members of the public found it convenient to pass through the property on their way to Likoni Ferry. As a result, a small footpath was created on the suit property. In order to prevent the footpath from becoming a major public access road, they decided to erect a boundary wall around the property in the year 2012. The construction of the boundary wall was duly approved by Municipal Council of Mombasa, the Respondent's predecessors. Annexed in the affidavit and marked “AJ - 16” was a true copy of a letter dated 25<sup>th</sup> September 2012 by the Town Clerk of Municipal Council of Mombasa confirming the approval.
- xviii. In the said letter dated 25<sup>th</sup> September 2012, the Town Clerk of the defunct Municipal Council of Mombasa confirmed that there was no road reserve on the suit property save for power line and telephone way leave. In order to be certain that there was no road reserve on the suit



property, the Petitioner commissioned a Government Surveyor to undertake a survey and give a detailed report. Annexed in the affidavit and marked “AJ 17” is a true copy of the Petitioner’s letter dated 17<sup>th</sup> September 2012 addressed to the Government Surveyor.

- xix. The Provincial Surveyor undertook survey of the suit property on 18<sup>th</sup> September 2012 which clearly indicated that there is no access road through the suit property. Annexed herewith and marked “AJ 18” is a true copy of the Survey Report by the Provincial Surveyor dated 26<sup>th</sup> September 2012. The said Survey Report by the Provincial Surveyor clearly indicated that the footpath running through the suit property was not official and could therefore not be used. Despite the survey reports by both the private and Government surveyors showing that there was no access road through the suit property, the Respondent had always insisted that there was a public access road cutting through the suit property which the Respondent has always threatened to unblock and open.
- xx. The Respondent put its threats into reality on or about 30<sup>th</sup> December 2021 when the Respondent through its employees visited the suit property and used a tractor to create a murrum access road cutting through the suit property. Refer to the photographs and Survey Report and marked above as “AJ - 5” and “AJ - 6” respectively. The Respondent’s actions of creating a public access on the Petitioner’s private property was illegal and in violation of the Petitioner’s constitutional rights to property. Further the Respondent’s actions of creating a public access road on the Petitioner’s private property amount to compulsory acquisition of the Petitioner’s private property from public use without paying any compensation to the Petitioner.
- xxi. The Respondent, its employees and agents have made it impossible for the Petitioner to quietly and peaceably occupy, use and enjoy the suit property through the following actions of the Respondent:
  - i. Creating public access road on the suit property when there was none.
  - ii. Inciting members of the public and the local residents of Likoni to demonstrate and rebel against the Petitioner.
  - iii. Removing barriers placed on the suit property by the Petitioner to prevent any illegal access and the trespass thereon.
- xxii. On 27<sup>th</sup> January 2022, one of the officers from the Respondent’s Lands, Planning and Housing Department by the name of SAID MAASUD accompanied by Likoni member of County Assembly (MCA), MWAKA BAKARI aka MAMA MWAKA stormed the suit property in the company of angry mob and removed the temporary barrier which the Petitioner had put in place to block the murrum access road illegally created by the Respondent. They harassed and threatened the Petitioner’s employees who were guarding the suit property. Annexed in the affidavit and marked as “AJ - 19” were a set of photographs showing the named persons on the suit property and jointly marked as “AJ - 20” were statements of the Petitioner’s witnesses who witnessed the trespass and invasion by the named persons.
- xxiii. The Respondent had permitted members of the public to use and access the road created on the suit property hence there was a need to compel the Respondent to block the road and stop members of the public and other persons from using the said road. It was in the interest of justice that the orders sought herein were granted to protect and safeguard the Petitioner’s constitutional rights to own, occupy and use the suit property without any interference from



the Respondent, its employees, agents or any other person acting on behalf of the Respondent. The affidavit is sworn in support of the main Petition.

## **V. Submissions**

10. While all parties were in court on the 22<sup>nd</sup> May, 2023 directions were given that the Petition dated 22<sup>nd</sup> February, 2022, be disposed off by way written submissions. Pursuant to that, and as indicated only the Petitioner and the office of the Attorney General obliged. On 4<sup>th</sup> July, 2023 the Honourable Court confirmed the same a Judgment date was reserved on Notice.
11. However, the delivery of the Judgement was the same was deferred due to a Notice of Motion application dated 25<sup>th</sup> October, 2023 filed by the Respondents. The parties via a consent agreed to file their submissions and the Honourable Court was compelled to defer the delivery of the Judgment to another date being 20<sup>th</sup> May, 2024.

## **A. The Written Submissions by the Petitioner**

12. The Petitioner through the Law firm of Messrs. Oluga & Company Advocates filed their submissions dated 25<sup>th</sup> June, 2022. Mr. Oluga Advocate commenced his submissions by stating that the submissions were in respect of the Petitioner's Petition dated 22<sup>nd</sup> February 2022 seeking the above stated orders. The Learned Counsel submitted that the Petition was supported by the Affidavit of ALNOOR HABIB JIWAN sworn and filed on 17<sup>th</sup> February 2022 which was also in support of the interlocutory application for conservatory order. Attached to the Supporting Affidavit are exhibits marked as "AJ - 1" to 19" which the Petitioner relied on in support of the case. Although they were served but the Respondent never filed any response to the Petition. Earlier, the Respondent filed Grounds of Opposition but only in response to the application for conservatory orders dated 17<sup>th</sup> February 2022 which this Honourable Court rendered itself on vide a ruling delivered on 27<sup>th</sup> March 2023. Effectively, the Petition was unopposed.
13. The background according to the Learned Counsel was that the Petitioner is the registered owner of the leasehold interest of the property known as Mombasa/M.S/BLOCK 1/1674 - the suit property situate in Likoni. The Petitioner owns the suit property for leasehold term of 99 years with effect from 1<sup>st</sup> July 1992 from the Government of Kenya. On or about 30<sup>th</sup> December 2021, the Respondent, without any colour of right and without the authority and consent of the Petitioner, entered onto and trespassed on the suit property and paved a wide murrum public access road through the suit property.
14. The Learned Counsel averred that before creating the impugned access road, the Respondent herein had previously claimed that there is an access road cutting through the suit property with the sole objective of dispossessing and taking away the suit property from the Petitioner. In order to achieve its ulterior objective and to advance the false narrative that there was a public access road passing through the suit property, the Respondent incited local residents to demonstrate and protest against the Petitioner. Further and in addition, the Respondent has been working with the National Land Commission under the guise of unblocking an imaginary and an alleged public access passing through the suit property.
15. The Learned Counsel argued that the main issue in dispute in this Petition was that the Respondent's action as described in the Petition and more specifically the creation of a public access road on the suit property which was a private property and had no provision for a public road was in breach and violation of the Petitioner's constitutional rights.



16. The Petitioner's case was that the road was created illegally because the suit property was not a road reserve and had no provision for public access road and the same is not provided for in the official map. Further, that the Respondent trespassed on the suit property by illegally accessing the same, entering thereon and creating the public access road.
17. The issue for determination according to the Learned Counsel was that *the Constitution* provides that a person who instituted proceedings claiming that a right or fundamental freedom in the Bill of Rights had been denied, violated or infringed, or is threatened may be granted "appropriate reliefs" under Article 23(3) of *the Constitution* of Kenya, 2010 (hereinafter "*the Constitution*"). It was therefore our view that the main issue for the court's determination was whether the Petitioner had made a proper case for issuance of the orders sought in the Petition.
18. The Learned Counsel relied on the provision of Article 40 of *the Constitution* submitting that the Petitioner had a right to acquire and own property. The said right included the right to occupy, use and develop such property. The Respondent had breached the Petitioner's right to own and use the suit property under Article 40 of *the Constitution* of Kenya 2010 by:
  - i. Creating an illegal public access road on the suit property yet the suit property was a private property, was not a road reserve and had no provision for a public road.
  - ii. The Respondent had deliberately made it impossible for the Petitioner to occupy, use, develop and enjoy the suit property by literally blocking the Petitioner, its agents and employees from accessing the suit property.
  - iii. The Respondent had incited and set up the local residents of Likoni area against the Petitioner and consequently the residents have become very aggressive, hostile and menacing to the Petitioner and the Petitioner's agents and employees thereby making it impossible for the Petitioner to access, develop, occupy and use the suit property
  - iv. The Respondent had sent its agents to remove barriers erected by the Petitioner in an effort to secure and protect the suit property from trespass by members of the public.
19. The above facts were supported the documents annexed to the Supporting Affidavit and more specifically the Topo-Cadastal Survey Report by Edward Kiguru dated 7<sup>th</sup> February 2022 (see page 33 of the Supporting Affidavit), the photographs (see pages 88 to 90 of the Supporting Affidavit) and the Witness Accounts (see witness statements at pages 91 & 92 of the Supporting Affidavit). The Respondent never filed any response, affidavit or adduce any evidence to counter the Petitioner's evidence which therefore remained uncontroverted. The Respondent's actions of creating a public access on the Petitioner's private property is illegal and in violation of the Petitioner's constitutional right to property.
20. The Learned Counsel further submitted that the Respondent's actions of creating a public access road on the Petitioner's private property amounted to compulsory acquisition of the Petitioner's private property for public use without paying any compensation to the Petitioner. The Respondent, its employees and agents had made it impossible for the Petitioner to quietly and peaceably occupy use and enjoy the suit property through the following actions:
  - i. Creating public access road on the suit property when there was none.
  - ii. Inciting members of the public and the local residents of Likoni to demonstrate and rebel against the Petitioner.



- iii. Removing barriers placed on the suit property by the Petitioner to prevent any illegal access and the trespass thereon.
21. By making it impossible for the Petitioner to access, occupy, sue and enjoy its property, the Respondent breached Article 40 (3) of *the Constitution* which prohibits the State from depriving a person of property, any interest or right over property. The Respondent violated Article 40 (3) of *the Constitution* by using the Petitioner's private property for public purposes (public access road) without paying any compensation to the Petitioner. Under Article 2 (1) of *the Constitution, the Constitution* is the supreme law of the Republic and binds all State organs including at the level of the County Government. The Respondent acted against the spirit and letter of Article 2 (1) by illegally taking over the Petitioner's property and creating a public access thereon in a manner that is in breach of Article 40 (3) of *the Constitution*.
22. In conclusion, the Learned Counsel urged the Honourable Court that for the reasons stated it should allow the petition and award costs to the Petitioner.

## **B. The Written Submissions by the Respondent**

23. The Respondent through the office of the County Attorney, filed their written submissions dated 5<sup>th</sup> February, 2024 where the Learned Counsel submitted that according to the Certificate of Lease provided by the Petitioner, the suit land was initially public land before it was leased to the Petitioner in the year 1992. The Petitioner ran into trouble with members of the Public when it embarked on fencing the suit property in the year 2012 (As per Annexure AJ - 16 of the Affidavit in support of the Petition) thereby blocking their access to Likoni Ferry Channel. This was admitted by the Petitioner in the contents of Paragraphs 21 and 22 of the Affidavit in support of the Petitioner which stated:

“Due to the fact that the property was not fenced at the material time, members of the public found it convenient to pass through the property on their way to Likoni Ferry. As a result, a small footpath was created on the suit property. In order to prevent the footpath from becoming a major public access road, we decided to erect a boundary wall around the property in the year 2012”.
24. On the issues for determination, the Learned Counsel relied on the following two (2) issues:- Firstly, on whether there existed a right of way for members of the public on the suit property prior to Construction of a boundary wall by the Petitioner in 2012. The Learned Counsel submitted that a foot path was created over time. The Petitioner started inquiring about the existence of the footpath from 2012 as per annexure “AJ – 16 and 17” of the Affidavit in support of the Petition. Uncontroverted evidence in the form of google satellite images which were records in the public domain confirmed that the footpath had been in existence even in the year 2003. This was confirmed by annexure as “JWF – 1” of the Affidavit in response to the Petition sworn by John Wambua Francis. It must be noted that, google images were a recent phenomenon and were used by the Respondent for purposes of debunking the allegation that the foot path was a recent creation on the suit land.
25. The truth of the matter was that, the residents of Likoni had used the Likoni Ferry Channel for as long as it had existed. This meant that they had used the footpath to access the Likoni Ferry Channel even when the suit land was still public land which was prior to the year 1992 when the Petitioner alleged to have acquired a lease over the suit property. Therefore, it was not true that the footpath was created around the year 2010 and after the Petitioner acquired a lease from the national government. On the law, the Learned Counsel submitted that the suit was based on the provision of Article 40 of



the Constitution 2010 on protection of the right to property. However, there were exceptions to this right as per the provision of Article 40 (3) (a) which provides:

- (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-
  - (a) Results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five;

26. Thus, it was the Learned counsel's submission that the Petitioners right to the suit land was subject to any other interest that existed on the land including overriding interests that did not necessarily have to be registered to exist. In the same vein, failure to register the interests never negated the existence of the overriding interests which were equitable rights over land. The Learned Counsel further averred that rights of way could be created even when none existed formally through usage as was the case in the present Petition. The suit land was public land that members of the public had been using prior to acquisition of a lease by the Petitioners. The members of the Public had been using the land to access Likoni Ferry channel since time immemorial as such an easement was created over the land. In this regard, the provision of Section 5 of the Land Act provides as follows on Forms of tenure:-

- (1) There shall be the following forms of land tenure-
  - (a) freehold;
  - (b) leasehold;
  - (c) such forms of partial interest as may be defined under this Act and other law, including but not limited to easements; and
  - (d) customary land rights, where consistent with the Constitution.
- (2) There shall be equal recognition and enforcement of land rights arising under all tenure systems and non-discrimination in ownership of, and access to land under all tenure systems.

27. The Learned Counsel submitted that based on the provisions of the law above, the fact that the area plan never showed existence of a road and/or footpath on the suit property never negated the fact that one was created over time. The members of the public using the footpath may not even have been aware of the fact that the land which was public land had since been acquired by the Petitioner continued to exercise right of way over the suit property until the Petitioner interfered with the right through construction of a boundary wall. It was this interference that led to demolition of the wall complained of by the Petitioners. To justify his argument and while opposing the Petition, the Learned Counsel invoked "the doctrine of prescription". He asserted that members of the public acquired rights over the land by prescription. He cited the Section 7 of the Land Act provides that title to land may be acquired through:-

- (a) allocation.
- (b) land adjudication process.
- (c) compulsory acquisition.
- (d) prescription; (emphasis added)
- (e) settlement programs.
- (i) transmissions.



- (g) transfers.
  - (h) long term leases exceeding twenty-one years created out of private land; or
  - (j) any other manner prescribed in an Act of Parliament.
28. To buttress his point, the Counsel referred Court to the case of:- “Benina Ndugwa Kunyumu & 4 others – Versus - National Land Commission [2015] eKLR” observed as follows:
- “ 16. Section 7 (d) of the Land Act provides that land may be acquired through prescription, while Section 28 (h) of the Land Registration Act provides that all registered land shall be subject to rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription.
  - 17. It is therefore true that from the provisions of Section 7(d) of the Land Act and Section 28(h) of the Land Registration Act, the doctrine of prescription is applicable in this country in respect to acquisition of title to land.”
29. It was the Learned Counsel’s contention that members of the public acquired a right over the land in the nature of an easement as per the provision of Section 5 (c) of the Land Act. This right was acquired through prescription and which never required registration for it to be valid. He further cited the case of:- “Esther Wanjiku Mwangi & 3 others – Versus - Wambui Ngarachu (sued as the legal representative of the estate of Ngarachu Chege - Deceased) [2019] eKLR” noted as follows:
- “ 41. It is possible for a number of rights to be created on land. An easement is geared towards creating interaction among neighbors of social and commercial nature. Rights of access are social and commercial in that respect...If the land were to be registered in their names, it would amount to a total ouster of the owner of the servient land, which is against the very nature of a right to an easement. An easement dissipates/dissolves once there is unity of the servient and dominant tenements. The owner of the servient tenement continues to retain exclusive control and ownership of the land. The easement being an overriding interest may or may not be registered on the title. It moves with the land. It is a right that binds the land and not the holder of the easement.”
30. Similarly, the Petitioner’s acquisition of a lease over the land was never an ouster of the right of members of the public over the land. In saying so, he referred Court to the case of: “Fairview Estate Limited – Versus - Ann Wangari Kirima & 2 others [2016]eKLR” the Court noted that:
- “ A right acquired over land by prescription attaches to the land and moves with it. I am of the view that such right cannot be defeated by the sub - division or transfer of the servient land. In the case of Githu – Versus - Ndeete (1984) KLR 77 it was held that:  
“The mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person’s adverse possession.”  
I am of the view that the same reasoning will apply to easement acquired by prescription.”
31. The Learned Counsel submitted that Respondent reiterated that, the easement has always existed and continued to exist even after acquisition of the land by the Petitioners. Further, he cited the provision of Section 26 (1) of the Land Registration Act to that effect. He emphasized that the Petitioner’s lease



was subject to the easement acquired over the land through prescription. As submitted before, the Petitioner's rights over the land existed alongside those of the general members of the public.

“The role of the Court in enforcing rights acquired through prescription.

Section 149 of the *Land Act* 2012 empowers Courts to enforce public rights of way by providing as follows:

In determining any question or dispute concerning the existence or effect of a public right of way, a Court may make an order on any condition, which it thinks fit on all or any of the following matters-

- (a) the existence of a public right of way;
- (b) the enforceability a public right of way by or against any person;
- (c) the extent of the use of the easement, analogous right or public right of way and whether that use exceeds what is reasonable or is permitted under the terms of the grant of the easement or the terms of the order creating the analogous right or public right of way;
- (d) the question whether any work is required to be done under the terms of an easement, analogous right or public right of way; and, if so, the nature and extent of the work required to be undertaken;
- (e) the reasonable and proper cost of any such work as is required to be undertaken;
- (f) the person or persons by whom the costs of any such work is to be borne and if the cost is to be shared between two or more persons, the shares to be borne by each such person;
- (g) the date by which and the manner in which any such work is to be undertaken;
- (h) the entry on to any land, whether or not it is land over which an easement, analogous right or public right of way has been created, or the purpose of doing the work and the use over or on that land of any vehicles, plant, machinery and installations for the purpose of carrying out that work; or
- (i) any other matter arising in relation to question or dispute about an easement, analogous right or public right of way.”

32. In line with the above provisions the Learned Counsel urged the Court to find that there existed a right of way over the land in the nature of an easement acquired through prescription which never required registration for it to exist. The easement allowed members of the public right of way through the property which right was interfered with by the Petitioner through construction of a boundary wall over the property. The Court in the case of:- “Fairview Estate Limited (Supra)” observed as follows in a case where the Defendants just like the Petitioner herein argued that rights such as the ones being averred by the Respondent had to be registered for them to exist:

“I am not in agreement with the submissions by the Defendants that until the easement is established by a judgment obtained under Section 38 of the Act and registered against the land affected thereby, the same does not come to existence. I am of the view that the easement is acquired under Section 32 of the Act and once acquired, the vesting thereof



upon the person who has acquired the same and the registration of the same against the title of the land affected thereby is a mere formality. I also disagree with the submissions by the Defendants that Section 98 (7) of the Land Registration Act, 2012 bars the acquisition of easement by prescription. I am of the view that that part of the Land Registration Act, 2012 deals solely with the creation of easements. The same does not deal with easements acquired under the Limitation of Actions Act, Cap. 22 Laws of Kenya, I am not persuaded that by Section 98 (7) of the Land Registration Act, the legislature intended to abolish the acquisition of easement by prescription. I am of the view that if that was the intention, the same would have been expressed in clear terms and through appropriate amendment to the Limitation of Actions Act, Cap. 22 Laws of Kenya. Section 7 of the Land Act, 2012 whose commencement date is the same as that of the Land Registration Act, 2012 provides at Section 7(b) that prescription is one of the methods through which title to land may be acquired. Section 28(c) and (h) of the Land Registration Act which is said to have outlawed the acquisition of easement by prescription provides that rights of way and rights acquired or in the process of being acquired by virtue of any written law “relating to the Limitation of actions or by prescription” (emphasis mine) are overriding interest and does not require registration to be valid. In light of the express provisions of the Limitation Actions Act, Cap. 22 Laws of Kenya and the provisions of the Land Act and Land Registration Act which I have cited above, the Defendant’s contention that an easement cannot be created by prescription has no basis.” Underline added for emphasis.

33. Thus, it was the Learned Counsel’s contention that, the Respondent had rights over the suit property which rights they held in trust for members of the public as created in the manner observed above. This was in the category of community land in line with the provision of Article 63 (1) and 63 (2) (d) (iii) of the Constitution which provide that:

“ 63.

- (1) Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest.
- (2) Community land consists of-
  - (d) land that is-
    - (iii) lawfully held as trust land by the county governments,”

34. Therefore, the Learned Counsel asserted that it had every right to improve on the easement acquired over the land in favor of members of the public as the Petitioner’s rights were subject to the overriding interests of the members of the public acquired over time through prescription. Hence, it was in order for the Respondent to improve upon it by putting murrum for the betterment of members of the public.

35. Secondly, on the issue of the Petitioner constructing a boundary wall without obtaining approval from the Respondent. The Learned Counsel submitted that in any event, the alleged construction of a boundary wall by the Petitioner over the suit property was being done without the requisite approval and was therefore illegal. This was because, the Petitioner had admitted to having been granted approval way back in the year 2010. This was during the reign of the defunct Municipal Council of Mombasa. None had been sought from the Respondent herein to justify any construction on the



suit property. The letter from the then Clerk indicating that there was no road across the property appearing on the official plan and/or maps never negated the existence of the easement created through prescription. Thus, the letter could not be relied upon to extinguish the overriding interest in the nature of easement over the suit property which the Respondent relied upon in serving members of the Public by improving upon it by putting murrum.

36. In conclusion, the Learned Counsel based on the forgoing, urged the Honourable Court to find that the Petition lacked merit. It should proceed to dismiss it with costs to the Respondent.

### **C. The Supplementary Written Submissions by the Petitioner**

37. With the leave of Court, the Petitioner through the Law firm of Messrs. Oluga & Company Advocates filed a Supplementary submissions dated 6<sup>th</sup> November, 2023. Mr. Oluga Advocate stated that the said supplementary submissions had been triggered by the Respondent's Replying Affidavit sworn by JOHN WAMBUA FRANCIS sworn on 9<sup>th</sup> October 2023 and filed after the Petitioner had filed its submissions dated 25<sup>th</sup> June 2023. In the Replying Affidavit, the Respondent alleged that there had always existed a path created on the suit property through usage by members of the public. The Respondent annexed satellite images to show that there had been a path on the suit property. However, those satellite images could not be used by the court to find in favour of the Respondent because of the following reasons:

- i. The satellite images were not dated. Therefore they never showed the history of the suit property. They never showed that there had been a path on the suit property which existed before the Petitioner acquired the same.
  - ii. The satellite images were blurred and had been corrupted and interfered with by drawing a thick red line on them. Thus, they were not naturally taken images. This court could not rely on doctored images to make a finding in favour of the Respondent.
  - iii. The images, being electronic evidence, were not accompanied by a Certificate under the provision of Evidence Act vouching for their authenticity and confirming that the same were not doctored. The person who took, downloaded and printed/processed the images and the gadget or gadgets used were not identified. The images were inadmissible in evidence.
  - iv. Even if the satellite images were admissible, since they were not dated, the same could not be used to prove the history of the suit property and that there had always existed a path thereon as alleged by the Respondent. The satellite images were current ones and the path shown there, if any, was actually the one that was created recently and which triggered the filing of this Petition. It was not an old path that had existed historically as the Respondent wanted the court to believe.
38. The Respondent had not produced a single statement from members of the public who was alleged to have been using the path and who were said to have been inconvenienced. There had been a previous attempts by some persons to trespass on the Petitioner's land but the Petitioner sued them in the civil case: "High Court Civil Suit (Mombasa) No. 299 of 2010: Shazmeer Enterprises Limited – Versus - Mwinyi Dao & Others in which Justice M.K. Ibrahim (as he then was) delivered a ruling on 6<sup>th</sup> July 2012 and ruled as follows:

"I have considered the surveyor's report dated 23<sup>rd</sup> August 2010 and marked "AHJ - 2" annexed to the Applicant's first affidavit. It confirms encroachment and trespass on the Plaintiff's land by third parties..."



On 8<sup>th</sup> December 2010 the Court ordered inter alia that:-

1. The Defendant shall procure a surveyor to survey area they occupy showing the boundaries with the Plaintiff's land Plot No. 1674.
2. The Surveyor shall show if there is any public road between the two areas of road between the two acres of land.
3. The Defendant's Surveyor to submit his report within 14 days.

The Defendant's did not procure and present any Survey Report to assist the Court. The court is not surprised having all the facts now including that these plot is no evidence that the Defendants have any legal interest in respect of Plot 252. The absence of a surveyor's report to support their claim leaves only the Surveyor Reports and evidence presented by the Plaintiff.

In the light of the foregoing and applying the principles laid down by the GIELLA CASE, I do find that the Plaintiff has shown a prima facie case with a probability of success. I agree with the Plaintiff's submissions that it needs protection of its property pending the hearing of the suit to acquire plot 252 if indeed they can as it does not belong to them. The theatrics and outburst of the Defendants in court was uncalled for and is condemned by this court.

I do hereby grant prayer (b) and (c) of the Application dated 31<sup>st</sup> August 2010."

39. According to the Learned Counsel, it could be seen from the above ruling that the members of the public who attempted to trespass on the Petitioner's property were enjoined by Justice Ibrahim. Therefore, it was not true as alleged by the Respondent that the members of the public had been using the suit property and that they would be inconvenienced in any way if the orders sought herein were granted. They wished not be labor the point.
40. In conclusion, the Learned Counsel urged the Court to rely on the documents filed in court by the Petitioner, the main submissions and these supplementary submissions to find in favour of the Petitioner.

## VI. Analysis and Determination

41. I have carefully assessed all the filed pleadings pertaining to *the Constitution* Petition dated 22<sup>nd</sup> February, 2022, the Affidavits by the the Petitioner, the articulate written submissions by both the Petitioner and the Respondent, the plethora of cited authorities, the appropriate provisions of *the Constitution* of Kenya, 2010 and the statutes.
42. For the Honorable Court to reach an informed, just, fair and reasonable decision, it has condensed the subject matter into the following three (3) salient issues for its determination. These are:-
  - a. Whether the Petition by the Petitioner meets the threshold for Constitution Petitions.
  - b. Whether *the Constitution* Petition has any merit and, if affirmative, if the parties were entitled to the reliefs sought?
  - c. Who will bear the Cost of the suit.



**Issue No. a). Whether the Petition by the Petitioner meets the threshold for Constitution Petitions.**

43. Primarily, the Honourable Court deciphers that the main substratum in this Petition revolves around whether there was any violation, threat, infringement and or denial of the fundamental rights enjoyed by the Petitioner by the Respondent in particular on the right to own private property. Under this Sub - heading, for the Court has tasked itself to respond to the query on the whether the Petition is in conformity to the Constitutional threshold. To effectively execute this mandate, it will be inevitable to critically assess certain aspects of the concept of Constitutional provision. To begin with, under the provision of Article 2 (1) & (4) of *Constitution of Kenya, 2010* (Hereinafter “*the Constitution*”) defines *the Constitution* as being the Supreme law of the Republic and it bids all persons and all States at all levels. Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency and any act or omission in in contravention of this Constitution is invalid.
44. Additionally, I dare say that a Constitution is a living tissue. Just like all other tissues, it has to be fed and watered. It breathes. Without oxygen and freshness it will die. I have learnt that these things are not just metaphorical. They are real. As a matter of course, *the Constitution* of Kenya under Article 259 (1) provides a guide on how it should be interpreted as such:-
- a. Promotes its purposes, values and principles;
  - b. Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
  - c. Permits the development of the law; and
  - d. Contributes to good governance.....”
45. This Court must give a liberal interpretation and consideration to any provision of *the Constitution* and have regard to the language and wording of *the Constitution* and where there is no ambiguity attempt to depart from the straight texts of *the Constitution* must be avoided. It must always be interpreted and considered as a whole with all the provisions sustaining and coordinating each other and not destroying the other.
46. Based on the principles set out in the edit of the Court of appeal case of the “Mumo Matemu – Versus – Trusted Society of Human Rights Alliance & Another (2013) eKLR” provided the standards of proof in the Constitutional Petitions as founded in the case of “Anarita Karimi Njeru – Versus - Republic [1980] eKLR 154” where the court is satisfied that the Petitioner’s claim were well pleaded and articulated with absolute particularity. It held:-
- “Constitutional violations must be pleaded with a reasonable degree of precision.....”
- Further, in the “Thorp – Versus – Holdsworth (1886) 3 Ch. D 637 at 639, Jesse, MR said in the year 1876 and which hold true today:
- “The whole object of pleadings is to bring the parties to an issue and the meaning of the rule.....was to prevent the issue being enlarged which would prevent either party from knowing when the cause came on for trial what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues and thereby diminish expense and delay especially as regards the amount of testimony required on either side at the hearing.”
47. The provision of Article 23(3) of *the Constitution* empowers a court to grant appropriate reliefs in any proceedings brought under Article 22 where there has been violation or threat of a violation of a fundamental right or freedom. The relief may include a conservatory order.



48. In this Petition, the Petitioner is seeking a declaration that Respondent herein, the County Government of Mombasa, has breached the Petitioner's constitutional rights to acquire and own property as guaranteed by the provision of Article 40 of *the Constitution* of Kenya, 2010 and a declaration be and is hereby issued that the property known as Mombasa/M.S/BLOCK 1/1674 is a private property owned by the Petitioner.
49. This Honorable Court must establish the constitutional basis of the Petition which is founded under paragraph 11 to 17 which include:-
- i. Under Article 40 of *the Constitution* of Kenya, 2010, the Petitioner has a right to acquire and own property. The said right includes the right to occupy, use and develop such property. The Respondent has breached the Petitioner's right to own and use the suit property under Article 40 of *the Constitution* of Kenya 2010 by:
    - a. Creating an illegal public access road on the suit property yet the suit property is a private property, is not a road reserve and has no provision for a public road.
    - b. The Respondent has deliberately made it impossible for the Petitioner to occupy, use, develop and enjoy the suit property by literally blocking the Petitioner, its agents and employees from accessing the suit property.
    - c. The Respondent has incited and set up the local residents of Likoni area against the Petitioner and consequently the residents have become very aggressive, hostile and menacing to the Petitioner and the Petitioner's agents and employees thereby making it impossible for the Petitioner to access, develop, occupy and use the suit property.
    - d. The Respondent has sent its agents to remove barriers erected by the Petitioner in an effort to secure and protect the suit property from trespass by members of the public.
  - ii. The Respondent's actions of creating a public access on the Petitioner's private property is illegal and in violation of the Petitioner's constitutional right to property.
  - iii. Further the Respondent's actions of creating a public access road on the Petitioner's private property amount to compulsory acquisition of the Petitioner's private property for public use without paying any compensation to the Petitioner.
  - iv. The Respondent, its employees and agents have made it impossible for the Petitioner to quietly and peaceably occupy use and enjoy the suit property through the following actions:
    - a. Creating public access road on the suit property when there is none.
    - b. Inciting members of the public and the local residents of Likoni to demonstrate and rebel against the Petitioner.
    - c. Removing barriers placed on the suit property by the Petitioner to prevent any illegal access and the trespass thereon.
  - v. By making it impossible for the Petitioner to access, occupy, sue and enjoy its property, the Respondent breached the provision of Article 40 (3) of *the Constitution* which prohibits the State from depriving a person of property, any interest or right over property.
  - vi. The Respondent violated the provision of Article 40 (3) of *the Constitution* by using the Petitioner's private property for public purposes (public access road) without paying any compensation to the Petitioner.



vii. Under the provision of Article 2 (1) of *the Constitution*, *the Constitution* is the supreme law of the Republic and binds all State organs including at the level of the County Government. The Respondent acted against the spirit and letter of the provision of Article 2 (1) by illegally taking over the Petitioner's property and creating a public access thereon in a manner that is in breach of the provision of Article 40 (3) of *the Constitution*.

50. Thus, in application of these set out legal principles for instituting a Constitutional Petition, I discern that the Honorable court is fully satisfied that the Petitioner herein has dutifully complied. It has fully met the threshold of reasonable precision in pleadings for instituting this Petition against the Respondent herein and pleading for the prayers sought.

**Issue No. b). Whether the Constitutional Petition has any merit and, if affirmative, if the parties were entitled to the reliefs sought?**

51. Under this Sub title, the Honorable Court has noted that there exists a land dispute on the use and occupation of the suit property by the Respondent paving a murrum public access road through the suit property on 30<sup>th</sup> December, 2021. It is instructive to note the vehement argument that the right to property vested onto the Petitioner was not absolute. Rightfully so, like any other private property, it was subject to compulsory acquisition for public use. However, all said and done, the Respondent never committed themselves on undertaking whether this was the case here. Clearly, this has threatened the constitutional provision vested unto the Petitioner without any compensation as envisaged under the provision of Article 40 ( 3 ) of *the Constitution* of Kenya, 2010 and Sections 109 to 119 of the *Land Act*, No. 6 of 2012. Article 40(1),(2),(3), and (4) of *the Constitution* provides that:

- “ 1) 1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property-(a) of any description; and (b) in any part of Kenya. (2) Parliament shall not enact a law that permits the State or any person- (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4). (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation- (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that-
- i. requires prompt payment in full, of just compensation to the person: and
  - ii. allows any person who has an interest in, or right over, that property a right of access to a court of law.
- (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.”
- a. Further Article 47 of *the Constitution* states as follows:



- (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
- (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall-
  - (a) Provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
  - (b) Promote efficient administration.’

52. From all the evidence placed before the Court, there is no doubt the land belongs to the Petitioner. The property is well safeguarded under the provisions of Article 40 (1) and (2) of *the Constitution* of Kenya, 2010. Assuming that the Respondent intended to compulsorily acquire the suit property from the Petitioner for public use the procedure for doing so is elaborate and well founded in law. The current law or statutory framework governing compulsory acquisition of interest in land is founded under Part VIII, Sections 107 to 133 of the *Land Act* No. 6 of 2012 and Article 40 (1), (2) and (3) of *the Constitution* of Kenya (See “Viranda Ramji Gudka & 3 Others – Versus - The AG (2014)eKLR” as read together with Part V of The Land Regulations of 2017.
53. Under the provisions of the *Land Act*, 2012, Section 107 of the Act holds that, the NLC ordinarily prompted by the request of the National or County Government through the Cabinet Secretary or County Executive member respectively for authentication of the compulsory acquisition of land are required to submit the request to NLC providing a reason for the land acquisition which must not be remote or fanciful. Strictly, the Land must be acquired for public purpose or in public interest and not any other purpose as dictated by Article 40 (3) of *the Constitution* of Kenya. In this case the threshold must be met. If the Land is so acquired the compensation which is just, adequate, full and prompt is to be to persons affected by the project or have interest on the land under the provision of Section 111 of the Act. Upon the conclusion of the inquiry, the NLC makes compensatory awards to every person whom it has determined to be interested in the land after serving such person with a notice of award and offer of compensation. (See. Sections 113 & 114).
54. Adequate and conclusive compensation can also be in form of land if available, whose value is not exceed that amount of money the NLC considers should have been awarded (See. See Section 142 (2). Once the award is accepted, it must be promptly paid by the NLC, after which the process of compulsory acquisition of land is completed by the taking possession of the Land in question being taken by the NLC. The property is deemed to have vested in the National or County Government as the case may be with both the proprietor and the Land Registrar being duly notified which in this case the Petitioner claimed not to have been notified when the Respondent made the murrum public road in his property which claim have not been disputed by the Respondent as they did not respond to the Petition making it eligible for compensation.



55. According to the Respondent in its submissions, the according to the Certificate of Lease provided by the Petitioner, the suit land was initially public land before it was leased to the Petitioner in the year 1992. The Petitioner ran into trouble with members of the Public when it embarked on fencing the suit property in 2012 (As per Annexure as “AJ – 16” of the Affidavit in support of the Petition) thereby blocking their access to Likoni Ferry Channel. This is admitted by the Petitioner under the averments made out in Paragraphs 21 and 22 of the Affidavit in support of the Petitioner. I have keenly gone through the Certificate of Lease marked as “AJ – 2”, dated 17<sup>th</sup> September, 1992 which lease was for a period of 99 years at a rent of a sum of Kenya Shillings Sixty Nine Thousand Six Hundred (Kshs. 69,600/-) from 1<sup>st</sup> July, 1992. The Petitioner’s case was founded on the provision of Articles 40 and 47 of *the Constitution*. The provision of Article 47 protects the right to fair administrative action while the provision of Article 40 guarantees protection of personal property against arbitrary acquisition by the State. In order to protect the right to property, a party must establish a proprietary right or interest in land as *the Constitution* does not itself create these rights or interests.
56. The position of the holder of a title deed over a parcel of land is well stated in Section 26(1) of the *Land Registration Act*, No. 3 of 2012 which provides as follows:
- “The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner , ... and the title of that proprietor shall not be subject to challenge, except-
- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
  - b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”
57. In saying so, I seek to rely on the following observation of the court in the case of “Daudi Kiptugen – Versus - Commissioner of Lands & 4 Others (2015) eKLR”:
- “In order to determine the question whether the lease held by the Plaintiff is valid, it must be demonstrated that it was properly acquired. It is not enough that one waves a Lease or a Certificate of Lease and assert that he has good title by the mere possession of the Lease or Certificate of Lease. Where there is contention that a Lease or Certificate of Lease held by an individual was improperly acquired, then the holder thereof must demonstrate through evidence that the Lease or Certificate of Lease that he holds was properly acquired. The acquisition of title cannot be construed only in the end result, the process of acquisition is material. It follows that if a document of title was not acquired through the proper process, the title itself cannot be said to be a good title. If this were not the position, then all one would need to do is to manufacture a Lease or Certificate of Title at a backyard or the corner of a dingy street and by virtue thereof claim to the rightful proprietor of the land indicated therein. It is therefore necessary for this court to determine how the plaintiff ended up having a Lease and Certificate of Lease in his name and further determine if the Government did intend to issue the Plaintiff with a Lease over the suit land.”
58. The Respondent has not provided any evidence that the Certificate of lease dated 17<sup>th</sup> September, 1992 to the Petitioner in respect of the suit property was ever cancelled, revoked or invalidated in any way as provided for under the provision Section 80 of the Act. Overall this Court finds the Petitioner is the rightful owner of the suit property and the Certificate of Lease held by the Petitioner was still in



operation until its expiry in 2091 when the Petitioner would be at liberty to apply for a renewal or forfeit ownership of the suit property.

59. Be that as it may, having said all that the Respondent has breached the Constitutional right of the Petitioner, the rightful proprietor of the suit property by acquiring its land without consent and utilizing it thereafter.
60. In the case “Patrick Musimbi – Versus - National Land Commission & 4 Others Petition No. 613 of 2014” the word “Compensation” was viewed as carrying a corollary that the loss to the seller must be completely made up to him on the ground that unless he receives a price that fully equaled his pecuniary detriment the compensation would not see equivalent to the compulsory sacrifice. Just compensation is therefore mandatory. It should be prompt and in full, and should use principles of equivalence but must also protect coffers from improvidence. Therefore, from the above detailed statutory analogy, it’s clear that the compulsory acquisition of Land by the state for public use is ordinarily a creature of statute. While this is the case, the citizens should not be deprived, disowned and/or dispossessed of their land by the state or any public authority whatsoever against their wish unless expressly authorized by law and public interest also decisively demands so.
61. The citizen has to be protected from wanton and unnecessary deprivation of their private property. There is no doubt to the fact that deprivation of a person’s private property against their will is an invasion of their proprietary rights. There is no contention that while the state is indeed entitled to compulsory acquisition rights of land for public use these fundamental rights must be keen and exercised with circumspect to be checked lest it is being done merely as an abuse and sheer whimsical gimmick to deprive the citizen their private rights. It’s an extremely delicate balance to be weighed with utmost care.
62. In the case of “Patrick Musimbi (Supra)” held “inter alia:-
- “As the taking of a person’s property is a serious invasion of his proprietary rights, the application of constitutional or statutory authority for the deprivation of those rights require to be most carefully scrutinized. In short, in our view, there must always exist a presumption against an intention to interfere with vested property rights as the legislative and constitutional intentions is always the protection rather than interference with the proprietary rights.....the power to expropriate private property as donated in the State by both *the Constitution* and statute law (the *Land Act*) leaves the private land owner with no alternative. The power involves the taking of a person’s land against his will. It is a serious invasion of his proprietary rights through the use of statutory authority. The private land owner has no alternative but wait for compensation. It is consequently necessary that the court must remain vigilant to see to it that the State or any organ of the State does not abuse the constitutional and statutory authority to expropriate private property. It is on this basis that courts have consistently held that the use of statutory authority to destroy proprietary rights requires to be most carefully scrutinized. Just compensation is mandatory”.
63. Further, the provision of Article 47 of *the Constitution* states as follows:-
- (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
  - (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.



- (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
- (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
  - (b) promote efficient administration.’
64. From a cursory look of the court file and the evidence presented by the Parties it is evident the Petitioner is the absolute and legal proprietor of all that suit property with the indefeasible rights, interest and title vested on him under the under the provision Section 26 (1) of the *Land Registration Act*, No. 3 of 2012 which could not be taken away except in accordance with *the Constitution* of Kenya and the law which the Honourable Court has established already previous in this judgment. Therefore the use and occupation of the land by the Respondent was improper as it violated, threatened and infringed the Petitioner’s rights to private property as entitled to under the provision of Article 40 of *the Constitution* of Kenya, 2010. In the Petition, the Petitioner talks of ‘continued violation and infringement of his private proprietary rights’, as provided for under the provision of Article 40 (1), (2) and (3) of *the Constitution* of Kenya, 2010. Having found that the Petition raises constitutional issues, the court would like to point out its concern about the manner in which the Petitioner has come to court.
65. When a court is called upon to determine whether “a prima facie case” has been established, it should not delve into a detailed analysis of the facts and law but should focus on determining whether the Applicant has put forward a case that is arguable and not frivolous. In the case of “Board of Management of Uhuru Secondary School – Versus - City County Director of Education & 2 others [2015] eKLR” the Court posited that:
- “26. It is in my view not enough to merely establish a prima facie case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order but rather there must also be evident a likelihood of success. The prima facie case ought to be beyond a speculative basis...”
66. From various authorities of the Courts the principles required to be satisfied before granting conservatory orders or interim conservatory orders comprises of the following:-
- a. First, an Applicant must demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he/she is likely to suffer prejudice.
  - b. The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.
  - c. Thirdly, the court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.
  - d. The final principle for consideration is whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.
67. The first issue for determination is whether the Petitioner has established a prima facie case that warrants the grant of orders sought. It has been held in various decisions that a prima facie case is not a case which must succeed at the hearing of the main case but which discloses arguable issues in a case alleging violation of rights.



68. A prima facie case was defined in the case of “Kevin K Mwititi & Others – Versus - Kenya School of Law & Others (2015) eKLR” where the court stated;

“.....A prima facie case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words, the Petitioner has to show that he or she has a case that discloses arguable constitutional issues.”

69. The subject of this Petition is Mombasa/M.S/BLOCK 1/1674. The Petitioner averred that they are the registered owner of the suit property. On or about 30<sup>th</sup> December 2021, the Respondent, without any colour of right and without the authority and consent of the Petitioner, entered onto and trespassed on the suit property and paved a wide murrum public access road through the suit property. The road was created illegally because the suit property is not a road reserve and has no provision for public access road and the same is not provided for in the official map. The Respondent has now threatened to finish working on the road by paving it all the way to the ocean, making it wider and tarmacking the same. The Respondent has also made it impossible for the Petitioner to use occupy and enjoy the suit property because the Respondent has deployed its officers on the suit property and the Respondent has been spreading malicious information that the suit property is a public land reserved for road construction and this has incited the local residents who have menacingly made it impossible for the Petitioner to occupy and use its property. The Respondent trespassed on the suit property by illegally accessing the same, entering thereon and creating the public access road. Before creating the impugned access road, the Respondent herein had previously claimed that there is an access road cutting through the suit property with the sole objective of dispossessing and taking away the suit property from the Petitioner. In order to achieve its ulterior objective and to advance the false narrative that there is a public access road passing through the suit property, the Respondent incited local residents to demonstrate and protest against the Petitioner. The Respondent did not oppose the Petition.

70. In Petition seeking for a conservatory order, it is imperative that the court warns itself that it is required not to make any definitive finding of fact or law. This position was enunciated in the case of “Kenya Association of Manufacturers & 2 Others – Versus - Cabinet Secretary – Ministry of Environment and Natural Resources & 3 Others (2017) eKLR” where the court stated as follows:-

“In an application for a conservatory order, the court is not invited to make any definite or conclusive findings of fact or law on the dispute before it because that duty falls within the jurisdiction of the court which will ultimately hear the substantive dispute.”

71. It is evident from the Petitioner’s pleading that the Petitioner is contesting the Respondent entering into and trespassed on the suit property and paved a wide murrum public access road through the suit property. The road was created illegally because the suit property is not a road reserve and has no provision for public access road and the same is not provided for in the official map.

72. Additionally, the Honorable Court finds that actions by the Respondent amounted to trespass and hence were criminal in nature and actionable. Trespass is defined under the provision of Section 3 (1) of *Trespass Act* Cap 294 as follows:-

“Any person who without reasonable excuse enters, is or remains upon or erects any structure on or cultivates or grazes stock or permits stock to be on private land without the consent of the occupier therefore shall be guilty of an offence”.



73. From the book “Clark & Lindsell on Torts 12<sup>th</sup> Edition” Paragraph 113, defines trespass as follows:
- “trespass to land consists in any unjustifiable infusion by one person or property upon land in the possession of another”
74. Thus trespass is an intrusion by a person into the land of another, especially wrongful entry on another’s real property who is in possession and ownership. While ‘Continuous trespass’ is tress in the nature of permanent invasion on another’s rights, such as a sign that overhangs another’s property”.
75. In the case of “Lutaaya – Versus- Sterling Civil Engineering (Supra) the court stated as follows regarding the tort of trespass to land:-
- “Trespass to land occurs when a person makes unauthorized entry upon land and thereby interferes or portends to thereby, therefore with another’s lawful possession of that land. Needless to say, the tort of trespass to land is committed not against the land but against the person who is in actual or constructive possession of the land. As common law, the cardinal rule is that only a person in possession of the land has capacity to sue in trespass. Thus the owner of unencumbered land has such capacity to sue, but a land owner who grants a lease of his land does not have capacity to sue because he pa..... with possession of land” ... where trespass in continuous, the person with the right to sue .....subject to the law on limitation of action exercise the right immediately after the trespass commences or any time during its continuous or after it has ended.”
76. Further according to Clerk & Lindsell on Torts, 19<sup>th</sup> Edition the writer states at Paragraphs 9 - 13:-
- “Proof of ownership is Prima Facie of possession, unless there is evidence that another person is in possession but if there is a dispute as to which of the two persons are in possession the presumption is that the person holding title to land is in possession.”
77. It now well established that trespass to land is actionable per se (without proof of any damage). See the case of “Park Towers Limited – Versus - John Mithamo Njika & 7 others (2014) eKLR” where J.M Mutungi J. stated:-
- “I agree with the Learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case.....”.
78. Indeed, the Respondent had not demonstrated any lawful or better entitlement/ right to Plot No. Mombasa/M.S/BLOCK 1/1674 that superseded the Petitioner’s interest over the suit property. For these reason, therefore, the Petitioner is entitled to damages and reliefs sought, since the law provided that where trespass was proved, a party need not prove that he/she suffered any specific damage or loss to be awarded damages. In such circumstances, the Court proceeds to assess the damages awardable based on the facts and circumstances of this case. Hence, the Court finds that the Respondent was fully liable to pay damages for the trespass into the Petitioner’s suit property.
79. In the case of “Duncan Nderitu Ndegwa – Versus - KPLC Limited & Another (2013) eKLR” where P. Nyamweya J. held that: -
- “...once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount



of Kshs 100,000/= as compensation of the infringement of the Plaintiff's right to use and enjoy the suit property occasioned by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants trespass”

80. From the evidence on record, the Petitioner has proved trespass but there is nothing in its evidence that can be used to enable this court determine the actual damage and/or measure of the damage or loss that the Plaintiff and its members suffered for them to be compensated for the loss. However, in relying on the above case law and the principles laid out, I find the Petitioner indeed suffered damages as a result of the Respondent's continued acts of trespass. I will proceed and award him a sum of Kenya Shillings Five Million Five Hundred Thousand (Kshs. 5,500,000/=) as general damages.
81. Having found that the Respondent trespassed into the Petitioner's land, the next issue is whether as a result of the same; the Respondent should be permanently restrained. The Principles on Injunction were established in the celebrated case of “Giella – Versus - Cassman Brown & Co. Ltd (1973) EA 358”. I hold that the Petitioner has indeed established a prima facie case and proved its case to the required threshold to warrant the grant of permanent injunctive orders sought. Consequently, I will proceed to find that the Respondent either by themselves, agents, servants and /or anyone claiming under the Respondent should be permanently restrained from entering, trespassing onto, building structures thereon, interfering with and/or in any other manner dealing with the suit land.
82. The provision of Section 19 (2) of the Land Acquisition Act provides that in cases of urgency, the Government may take possession of the acquired land even before payment of the award. Subsection (4) provides that upon taking of possession, the land vests in the Government absolutely free from encumbrances.
83. On the issue as to whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order, I find that it will be served better by preserving the Petitioner's title until issues of whether or not the Respondent has trespassed by making an access road across the suit property are heard and determined.
84. Article 165(3)(b) of *the Constitution* grants this court the jurisdiction to determine whether a fundamental right or freedom has been denied or threatened or violated to the interpretation of *the Constitution*.
85. The law as to what amounts to a substantial question of law is now well settled. In the case of “Sir Chuntlal - Versus - Mehta and Sons Ltd – Versus - The Century Spinning and Manufacturing Co. Ltd 1962 AIR 1314” the Supreme Court of India defined the elements of a substantial question of law were stated as follows;
- “The proper test for determining whether a question of law raised in the case is substantial would in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this court or by the Privy Council or by the Federal Court or not free from difficulty or calls for discussions of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of the law.”
86. Similarly, in the case of “Maina Kiai & 2 Others – Versus - Independent Electoral and Boundaries Commission & Another (2017) eKLR” the court outlined the ingredients that determine whether a matter is a substantial point of law.



87. Accordingly, a substantial question of law is one that is of general public importance or one that affects the rights of a large cross section of the public. A party seeking certification must lay a basis for the certification.
88. The Petitioner has demonstrated to the Court that the Petition raises a substantial point of law whose determination will have a significant bearing on the public interest. Being that the access road is for public use and if the Respondent erroneously trespassed to have it there the members of the public using it will be affected.
89. I take note that the Petitioner specifically prayed for mesne profits in the Petition dated 22<sup>nd</sup> February, 2022 submitting that it is entitled to the mesne profits. The provision of Section 2 of the Civil Procedure Act Cap 21 of the Laws of Kenya defines mesne profits as follows:-

“mesne profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession;

90. The provision of Order 21 Rule 13 of the Civil Procedure Rules, 2010 provides as follows:-

13.

- (1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree—
  - (a) for the possession of the property;
  - (b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits;
  - (c) directing an inquiry as to rent or mesne profits from the institution of such suit until—
    - (i) the delivery of possession to the decree-holder;
    - (ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the court; or
    - (iii) the expiration of three years from the date of the decree, whichever event first occurs.
- (2) Where an inquiry is directed under sub rule (1) (b) or (1) (c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.

91. The Court of Appeal in the case of “Attorney General – Versus - Halal Meat Products Limited [2016] eKLR” considered when mesne profits could be awarded. The court stated as follows:-

“It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another. See McGregor on Damages, 18thEd. para 34-42.”



92. The court in the case of “Rajan Shah T/A Rajan S. Shah & Partners – Versus - Bipin P. Shah [2016] eKLR” had this to say in considering an issue of whether the Plaintiff had established a case for mesne profits:-

“In *Bramwell – Versus - Bramwell*, Justice Goddard stated that “... mesne profits is only another term for damages for trespass, damages which arise from the particular relationship of landlord and tenant.” Similarly, in an Australian case, *Williams & Bradley – Versus - Tobiasen* it was stated that these words: “Mesne profits are the pecuniary benefits deemed to be lost to the person entitled to possession of land, or to rents and profits, by reason of his being wrongly excluded there from.

The wrongful occupant is a trespasser, and the remedy rests on that fact. The action is based on the claimant’s possession, or right to possession, which has been interfered with.

A more useful description of mesne profits can be found in *Halsburys Laws of England*, which defines mesne profits as an action by a land owner against another who is trespassing on the owner’s lands and who has deprived the owner of income that otherwise may have been obtained from the use of the land. The landlord may recover in an action for mesne profits the damages which he has suffered through being out of possession of the land. Mesne profits being damages for trespass can only be claimed from the date when the defendant ceased to hold the premises as a tenant and became a trespasser. The action for mesne profits does not lie unless either the landlord has recovered possession, or the tenant’s interest in the land has come to an end.

*Halsburys*, op. cit, 4<sup>th</sup>, above, suggests that where mesne profits are awarded they usually follow the previous rent rate and in the absence of that, a fair market value rent.

The *Black’s Law Dictionary* defines mesne profits as: - “the profits of an estate received by a tenant in wrongful possession between (2) two dates.” The *Concise Oxford English Dictionary* defines mesne profits as: - “the profits of an estate received by a tenant in wrongful possession and recoverable by the Landlord.”

The term ‘mesne profits’ relates to the damages or compensation recoverable from a person who has been in wrongful possession of immovable property. The Mesne profits are nothing but a compensation that a person in the unlawful possession of others property has to pay for such wrongful occupation to the owner of the property. It is settled principle of law that wrongful possession is the very essence of a claim for mesne profits and the very foundation of the unlawful possessor’s liability therefore. As a rule, therefore, liability to pay mesne profits goes with actual possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits.

Mesne profits are awarded in place of rents, where the tenant remains in possession after the tenancy agreement has run out or been duly determined. A landlord claiming for mesne profits is claiming for the profits intermediate from the date the tenant ought to have given up possession and the date he actually gives up possession.

After the service of a written notice or at the end of the term granted and the tenant holds over without the permission of the landlord, the tenant is liable to pay mesne profits for the use and occupation of the premises till he delivers up possession.

In the present case, there was no written lease. The case leading to this appeal was filed by the tenant (the Respondent) against the land lord (appellant) in 2007 challenging a proclamation issued by auctioneers against him under the instructions of the appellant and



also seeking an injunction against the Respondent. The initial defense filed by the appellant dated 18<sup>th</sup> October 2007 was a denial of the averments in the plaint. The respondents claim as enumerated in the plaint discloses a rent dispute. An amended defense was filed on 9<sup>th</sup> August 2010 whereby the Appellant cited a notice dated 3<sup>rd</sup> March 2008 in which he communicated to the Respondent that he had terminated the lease and sought vacant possession. The Respondent through his advocates replied to the said letter and wrote inter alia as follows:-

“..... the alleged tenancy/lease herein between our client and yours is the subject matter in Nyeri CMCC No. 585 of 2007.....The issues your clients are raising .....are the same issues already in court. Your clients notice of termination of lease ....is therefore inconsequential.”

Thus, the above notice was challenged on the above grounds. There is no further communication on record on the issue. The appellant never wrote back to dispute the Respondents response. It is important to point out that Mesne profits are nothing but a compensation that a person in the unlawful possession of others property has to pay for such wrongful occupation to the owner of the property. It is settled principle of law that wrongful possession is the very essence of a claim for mesne profits and the very foundation of the unlawful possessor’s liability therefore. As a rule, therefore, liability to pay mesne profits goes with actual illegal possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits provided the occupation is illegal.

For starters, it should be noted that the concept of mesne profits is a remedy available to the Landowner/Landlord in the event that a contractual tenancy ceases to exist and the tenant/occupier thereafter continues to occupy the premises as a trespasser.

Thus, where a landlord/tenant relationship existed like in the present case, it must be demonstrated beyond doubt that the tenancy was terminated legally and that the termination notwithstanding the tenant remained in occupation as a trespasser. Where a tenancy is created by operation of law, the tenant does not become a trespasser until the tenancy has become duly determined according to law. This position was reiterated by the apex court of Nigeria which stated:-

“Because a claim for ‘Mesne profits’ is based on trespass and is inappropriate in respect of lawful occupation as a tenant, it can only be maintained when the tenancy has been duly determined and the tenant becomes a trespasser...where a tenancy is created by operation of law, the status of trespasser will not arise, until the tenancy is duly determined according to law... however, the lawful use and occupation of the land and premises implies an agreement to pay damages for use and occupation of the land and premises. It is a quasi-tenancy which the law recognizes...”

93. It is the humble opinion of the Honourable Court that the Petitioner has not tabled evidence before this court to enable the court make a determination on the same. It is noteworthy that the murrum public road did not generate any income hence the mesne profits are not applicable in this instant petition.



94. The Petitioner sought for exemplary damages. As stated by the Court of Appeal in “Godfrey Julius Ndumba Mbogori & another – Versus - Nairobi City County [2018] eKLR”, where the Court held that:-

“Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of *Rookes v Barnard* [1964] AC 1129 where Lord Devlin set out the categories of cases in which exemplary damages may be awarded which are: i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government, ii) cases in which the defendant’s conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and iii) where exemplary damages are expressly authorized by statute”.

95. In the case of “Mikidadi – Versus - Khaigan & Another (2004) eKLR” where it was held as follows:

“Exemplary damages are only to be awarded in limited instances namely. (a) oppressive arbitrary or unconstitutional action by servants of Government. (b) Conduct calculated by the defendant to make him a profit which may well exceed the compensation payable to the plaintiff, or (c) Cases in which the payment of exemplary damages is authorized by statute.”

96. In this instance, I wish to make reference to the case of “*Rookes – Versus - Barnard* (1964) 1 All ER 367”, where the Court held that:

‘exemplary damages may be awarded in two classes of cases; first where there is oppressive, arbitrary or unconstitutional action by the servants of the government, and secondly, where the defendant’s conduct was calculated to procure him some benefit, not necessarily financial, at the expense of the plaintiff.

97. In relying on this authority and the current circumstances, I do find that the actions of the Respondents to ostensibly compulsorily acquire the suit land not only unconstitutional, oppressive but also irregular. It was not calculated to benefit them knowing fully well that there was an operative and existing valid lease granted unto the Petitioner vesting him with indefeasible rights, interest and title on the suit land. In these premises, I find that the Petitioner suffered a loss in the hands of the Respondent and proceed to award it the sum of Kenya Shillings Five Million (Kshs. 5,000,000/-) as exemplary damages.

#### **Issue No. c). Who will bear the Costs of the Petition**

98. It is now well established that the issue of Costs is the discretion of Courts. Costs is an award that is granted to a party at the conclusion of a legal action or proceedings in any litigation process. According to the Black Law Dictionary, “Cost” is defined to mean, “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”. The proviso of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs are discretionary and they do follow events. By the events, it means the results or outcome of any legal action or proceedings thereafter. The case before Court being a Constitutional Petition, Rule 26 (1) and (2) of *the Constitution* of Kenya (Protection of Rights and fundamental Freedoms practice and Procedure Rules 2013) (“The Mutunga Rules”) provides:-

“(1) The award of costs is at the discretion of the Court.



- (2) In exercising its discretion to award costs, the Court shall take appropriate measures to ensure that every person has access to the Court to determine their rights and fundamental freedoms.”

99. In the case of “Reids Hewett & Company – Versus - Joseph AIR 1918 cal. 717” and “Myres – Versus - Defries (1880) 5 Ex. D. 180”, the House of the Lords noted:-

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

100. Further, these legal principles were upheld in the Supreme Court case of “Jasbir Rai Singh – Versus – Tarchalans Singh, (2014) eKLR” and the Court of Appeal cases of “Cecilia Karuru Ngayu – Versus – Barclays Bank of Kenya & Ano. (2016) eKLR” the Courts held:-

“.....the basic rule on attribution of costs is that costs follow the event.....it is well recognized that the principles costs follow the event is not to be used to penalize the losing party rather it is for compensating the successful party for the trouble taken in presenting or defending the case”.

101. Therefore, the events in the instant case is that the Petitioner herein has succeeded in establishing its case on preponderance of probabilities. For that very fundamental reason, therefore, the costs of this suit will be made to the Petitioner to be borne by the by the Respondent.

## VII. Conclusion and Disposition

102. Consequently, having intensively and thoroughly deliberated on all the framed issues herein, this Honorable Court arrives at the finding that the Petitioner herein has succeeded in all the prayers sought from its filed Petition. For avoidance of doubt, I allow the Petition dated 22<sup>nd</sup> February, 2022 specifically under the following terms:-

- a. That Judgement be and is hereby entered in favour of the Petitioner as per the Petition dated 22<sup>nd</sup> February, 2022 in its entirety.
- b. That a declaration be and is hereby issued that the property known as Mombasa/M. S/ BLOCK 1/1674 is a private property owned by the Petitioner.
- c. That a declaration be and is hereby issued that there is no public access and/or public road passing through the property known as Mombasa/M. S/BLOCK 1/1674.
- d. That a declaration be and is hereby issued that the Respondent herein, the County Government of Mombasa, has breached the Petitioner’s constitutional rights to acquire and own property as guaranteed by Article 40 of *the Constitution* of Kenya, 2010.
- e. That a declaration be and is hereby issued that the Respondent herein, the County Government of Mombasa, has by its acts of creating a public access road as complained of herein, unlawfully encroached and trespassed onto the Petitioner’s property knows as Mombasa/M. S/BLOCK 1/1674 situate in Likoni, Mombasa County.



- f. That there be and is hereby issued an order of permanent injunction to restrain the Respondent herein, the County Government of Mombasa, its agents, assigns, employees, officers and/or any person acting on behalf, authority, instructions and/or directives of the Respondent from trespassing on, stepping onto, visiting, vandalizing, demolishing, and generally interfering with the Petitioner's ownership, rights, use and occupation of the property known as Mombasa/M. S/Block 1/1674.
- g. That there be and is hereby issued an order of mandatory injunction to compel the Respondent to restore the suit property known as Mombasa/M.S/Block 1/1674 to its original state by covering up and blocking the murrum road passing through the said property and fencing both ends of the road to prevent any access thereon within 14 days of this order in default of which the Petitioner be at liberty to do so and recover the costs thereof from the Respondent by applying and following the execution process provided for in the *Civil Procedure Act* Cap. 21, Laws of Kenya and the Civil Procedure Rules,2010.
- h. That there be and is hereby issued an order compelling the Respondent to block the murrum access road created by the Respondent on the property known as Mombasa/M. S/Block 1/1674 and to use its government resources and machinery to prevent access and use of the said road by members of the public and/or any other person.
- i. That the Officer Commanding Station (OCS) of Likoni Police Station to ensure compliance with this court's orders herein and that peace and law and order is maintained at all times.
- j. That the Honourable Court do hereby issues an order for compensation to the Petitioners as is provided for under Article 70 (1), (2) (c) as read with Article 3 as well as article 23(3) (a) and (e) of *the Constitution* of Kenya, 2010.
- k. That a declaration that in breach of the above the Petitioner has a right for redress for the trespass and compensation amounting to a sum of Kenya Shillings Five Million, Five Hundred (Kshs 5,500,000/-) pursuant to the provision of Article 23 (3) (b) and (e) of *the Constitution* of Kenya, 2010 as read with Section 13 (7) of the Environment Management and Co-ordination Act of 1999 which the Respondent herein should be compelled to pay.
- l. That the Petitioner is hereby also awarded Kenya Shillings Five Million (Kshs 5,000,000/-) as exemplary damages which also the Respondent should comply to pay.
- m. That the costs and interest of the Petition dated 22<sup>nd</sup> February, 2022 to be awarded to the Petitioner and be borne by the Respondent.

It is so ordered accordingly.

**JUDGMENT DELIVERED THROUGH MICRO - SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA LY THIS 20<sup>TH</sup> DAY OF MAY 2024.**

.....

**HON. JUSTICE L. L. NAIKUNI**

**ENVIRONMENT AND LAND COURT AT MOMBASA**

Judgement delivered in the presence of:-

- a. M/s. Firdaus Mbula – the Court Assistant
- b. Mr. Kilonzo holding brief for Mr. Oluga Advocate for the Petitioner.



c. No appearance for the Respondent.

