Gatabaki & another v Attorney General & 8 others (Environment & Land Petition 44 of 2018) [2024] KEELC 6088 (KLR) (23 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6088 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND PETITION 44 OF 2018

JO MBOYA, J

SEPTEMBER 23, 2024

BETWEEN

NANCY WANJA GATABAKI ..... 1ST PETITIONER

NANCY WANJA GATABAKI, JOSEPHINE BEATRICE GATHONI ANS SUSAN ESTHER WANGARI (AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE DR SAMUEL MUNDATI GATABAKI) ..... 2ND PETITIONER

AND

THE HON ATTORNEY GENERAL ..... 1ST RESPONDENT

MINISTRY OF LANDS ..... 2ND RESPONDENT

THE CABINET SECRETARY FOR THE MINISTRY OF TRANSPORT & INFRASTRUCTURE DEVELOPMENT ..... 3RD RESPONDENT

CHIEF LAND REGISTRAR ..... 4TH RESPONDENT

NATIONAL LAND COMMISSION ..... 5TH RESPONDENT

KENYA URBAN ROADS AUTHORITY ..... 6TH RESPONDENT

CHIEF VALUER, COUNTY GOVERNMENT OF NAIROBI .. 7TH RESPONDENT

THE DIRECTOR OF SURVEY ..... 8TH RESPONDENT

THE DIRECTOR OF CITY PLANNING ..... 9TH RESPONDENT

JUDGMENT

Introduction And Background

1. The Petitioners approached the court vide Petition dated 12th April 2018 and wherein same sought various reliefs. Subsequently, the Petition was amended vide Amended Petition dated 16th March 2021.

Besides, the Petitioners thereafter sought for and obtained leave to file and serve a further amended petition resting with the Further Amended Petition dated 6th April 2023 and wherein the Petitioners sought for the following reliefs:

a. It be declared that the Respondents have contravened the Petitioners right to property under Article 40 (1) (3) of *the Constitution* and therefore that the acquisition of their land L.R No. 5980 and L.R No. 4508/1 was unconstitutional and illegal.

b. It be declared that the Respondents have committed trespass to land L.R No. 5980 and L.R No. 4508/1.

c. A declaration that the Petitioners are entitled are entitled to payment of damages and compensation for the violations and contravention of their fundamental rights under the aforementioned provisions of *the Constitution*.

d. The Petitioners be paid full and just compensation of market rates for the acquisition of the properties illegally acquired from L.R No. 5980 and L.R No. 4508/1 by the government of Kenya.

e. General, aggravated, exemplary damages and for destruction and unlawful deprivation of the property L.R No. 5980 and L.R No. 4508/1.

f. Compensation.

g. Compensation for 16.38 acres at current market value estimated at Kes 1,622,000,000 [Kenya Shillings One Billion Six Hundred and Twenty-Two Million] plus an additional 15% disturbance compensation of Kes 243,300,000; Totalling to an amount of KES 1,865,300,000 [One Billion Eight Hundred and Sixty-Five Million Three Hundred Thousand].

h. Loss of use and mesne profits.

i. Compensation for a dam constructed at Kes 1,500,000 Only.

j. Interests and costs.

k. Any other relief the court may deem just and equitable.

2. Suffice to state that the Further Amended Petition is premised on various grounds which have been highlighted in the body thereof. Furthermore, the Further Amended Petition is supported by three [3] distinct Verifying Affidavits sworn by Nancy Wanja Gatabaki, Josephine Beatrice Gathoni Gatabaki and Susan Esther Wangari Gatabaki respectively.

3. In response to the Further Amended Petition the 1st to 4th, 6th and 7th Respondents duly entered appearance and thereafter filed a Notice of Preliminary Objection dated 13th April 2023 as well as a Response together with a Cross-Petition.

4. For coherence, the Cross-Petition sought for the following reliefs:

a. A declaration that the land constituted as L.R. No. 5980/2 is public land which was surrendered for a road and not available for allocation for private use and the Respondents herein cannot and are not entitled for compensation at all.

b. A declaration that the land constituted as L.R No. 5980/1 measuring approximately 7.340 hectares; Deed Plan Number 125786 was issued for surrender purposes in respect of a public utility.

c. That the procurement and creation of Deed Plan Number 465367 dated 24th March 2023 in respect of L.R 5980/74 by the Respondents is unlawful, illegal and unconstitutional.

d. An order quashing Deed Plan No. 465367 dated 24th March 2023 in respect of L.R No. 5980/74.

e. A declaration that the Respondents are not entitled to compensation by way of compulsory acquisition as there was no compulsory acquisition but a surrender of L.R No. 5980/2.

f. An order for recovery of the land constituted as L.R No. 5980/1 measuring approximately 7.340 hectares; Deed Plan No. 125786 which was issued for surrender purposes in respect of a public utility from the Respondent or their heirs, successors, assignees, purchasers or any other person in unlawful possession, occupation of and trespass thereon.

g. In the alternative and without prejudice to the foregoing, if there is any compensation to be made to the Respondents to the Cross-Petition by the apparent admitted mistakes of Mr. S. A Harunani-Licensed Land Surveyor, the same compensation should be borne by the said Mr. S. A Harunani-Licensed Land Surveyor.

h. An order that Mr. S. A Harunani-Licensed Land Surveyor be compelled to indemnify the Government of Kenya for any loss or costs or any liability that may accrue as a result of this Petition and Cross-Petition arising from the impugned survey and re-survey to the full extent of the said laws or costs or ant liability.

i. That the Respondents be condemned to bear the costs of this Cross-Petition and the costs of the Petition jointly and severally.

j. Any other appropriate relief this Honourable Court may deem fit to grant.

5. The Cross- Petition is supported by the affidavit of one Wilfred Muchai sworn on 13th June 2023 and to which same has attached assorted documents in support thereof.

6. Other than the foregoing, it suffices to point out that the 5th Respondent duly entered appearance but did not file any response to the Petition.

7. The Petition herein came up for directions on various dates resting with 3rd July 2023 whereupon the parties covenanted to proceed vide viva voce evidence. In this regard, the court proceeded to and issued directions pertaining to the manner of hearing and determination of the Petition and the Cross-Petition, respectively.

Evidence By The Parties:

a. The Petitioners' case

8. The Petitioners' case revolves around the evidence of three[3] witnesses namely, Nancy Wanja Gatabaki, Suleiman Harunani and James Wagema Ruitha who testified as PW1, PW2 and PW3 respectively.

9. It was the testimony of PW1 [Nancy Wanja Gatabaki] that same is the 1st Petitioner in the matter. Besides, PW1 averred that same is also is also a co-administratix of the estate of Dr. Samuel Mundati Gatabaki, now deceased alongside Josephine Beatrice Gathoni Gatabaki and Susan Esther Wangari Gatabaki respectively.

10. Additionally, PW1 averred that by virtue of being one of the Petitioners herein, same [PW1] is conversant with the facts of this matter. Furthermore, the witness averred that same has filed various affidavits namely the Supplementary Affidavit sworn on 17th July 2018; the Supporting Affidavit sworn on 6th April 2023; and the Further Supplementary Affidavit sworn on 6th April 2023 respectively.

11. Thereafter, the witness proceeded to and adopted the contents of the various affidavits as well as her witness statement. For good measure, the contents of the various affidavits and the witness statement were duly admitted and constituted as the evidence-in-chief of the witness.

12. It was the further testimony of the witness that one Dr. Samuel Mundati Gatabaki [now deceased] and herself [witness] purchased L.R Nos. 5980 and 4508/1, respectively on or about 1970. It was the further testimony of the witness that the two properties were thereafter registered in the names of Dr. Samuel Mundati Gatabaki and herself.

13. It was the further testimony of the witness that L.R No. 5980 was subsequently subjected to subdivision without the consent and permission of Dr. Samuel Mundati Gatabaki and herself. In this regard, the witness averred that same was obligated to and retained the services of a private investigator to undertake investigations pertaining to the circumstances leading to the sub-division of L.R No. 5980 and excision of a portion thereof.

14. Additionally, the witness averred that the investigations that were commissioned by and on her behalf culminated into the discovery that L.R No. 5980 was subject of subdivision by one Mr. Harunani – Licensed Land Surveyor.

15. Be that as it may the witness averred that same subsequently met Mr. Harunani – Licensed Land Surveyor who divulged the details pertaining to the sub-division of L.R No. 5980. In this regard, the witness testified that after meeting and interrogating Mr. Suleiman Harunani, same [witness] came to the conclusion that the said Suleiman Harunani was not involved in any fraud over the land in question.

16. It was the further testimony of the witness that the only portion of L.R No. 5980 which was surrendered related to an access road to access the 60 acres. Other than L.R No. 5980, the witness averred that Dr. Samuel Mundati Gatabaki and herself were also the owners of L.R No. 4508/1.

17. It was the further testimony of the witness that L.R No. 4508/1 was purportedly compulsorily acquired albeit without due process of the law being followed. In any event, the witness averred that neither Dr. Samuel Mundati Gatabaki nor herself was notified of the intended compulsory acquisition or at all.

18. Furthermore, the witness averred that after same discovered the fraudulent actions and/or activities perpetrated by the Respondents herein, same [witness] engaged a licensed and registered valuer to undertake valuation over and in respect of the portions of L.R Nos. 5980 and 4508/1 with a view to ascertaining the market value thereof.

19. PW1 further testified that subsequently the valuer who was appointed, namely, James Wagema Ruitha, prepared a valuation report showing the values of the properties that had been encroached upon by the Northern Bypass.

20. Other than the foregoing, the witness adverted to the Further Amended Petition dated 6th April 2023 and which Further Amended Petition the witness sought to adopt and rely on. Besides, the witness ventured forward and implored the court to grant the reliefs sought at the foot of the Further Amended Petition.

21. On cross-examination by learned counsel for the 1st to 4th, 6th and 7th Respondents the witness stated that same has adopted the contents of the various affidavits which were filed alongside the Original Petition, the Amended Petition and the Further Amended Petition respectively.

22. It was the further testimony of the witness that her late husband, Dr. Samuel Mundati Gatabaki and herself bought and acquired L.R Nos. 5980 and 4508/1 in 1970. However, the witness averred that same has not brought the certificate of title in respect of the two properties to court. Nevertheless, the witness added that the original certificates of title are available and can be brought to court if the court so orders.

23. While under further cross-examination, the witness averred that same has attached a letter to her Supplementary Affidavit and the letter is addressed to Messrs. Harunani-Licensed Land Surveyor. Besides, the witness averred that the letter under reference alluded to the fact that the land had been illegally amalgamated into L.R No. 5980/5.

24. The witness further averred that the question of amalgamation of L.R No. 5980/5 is under challenge. In this regard, the witness averred that same has since filed a case against Muga Developers Limited.

25. On the other hand, it was the testimony of the witness that even though the land, namely L.R No. 5980/5 was amalgamated, same [witness] still has the original certificate of title in respect of L.R No. 5980 under her custody. Furthermore, the witness averred that same sold a portion of L.R No. 5980. It was averred that the portion of the land which was sold measured 60 acres.

26. On further cross-examination, the witness averred that same is aware that a sub-division scheme was duly prepared. Besides, the witness testified that the sub-division scheme which was prepared has been availed to court. Furthermore, it was stated that the subdivision scheme is dated July 1979.

27. While still under cross-examination, the witness averred that the sub-division scheme shows that the land was sub-divided into four portions. Besides, the witness stated that there is a portion which was reserved for public utility.

28. Other than the foregoing, the witness averred that same wrote a letter addressed to the firm of advocates known as Messrs. Chaundry & Co. Advocates.

29. On further cross-examination, the witness averred that the sub-division scheme which had been prepared had been duly approved. Further, the witness averred that the approval in respect of the sub-division scheme is indicated at the foot of the letter attached thereto.

30. It was the further testimony of the witness that the conditions attached to the sub-division scheme were duly accepted. Besides, the witness added that arising from the acceptance, same was granted a final approval relating to the sub-division scheme.

31. It was the further testimony of the witness that after being granted the final approval in respect of the sub-division scheme, same [witness] engaged Mr. Harunani on 8th November 1985. Furthermore, the witness added that when the original sub-division scheme was prepared in 1979, Mr. Harunani was not her surveyor.

32. On further cross-examination, the witness averred that there was a sale agreement between Dr. Samuel Mundati Gatabaki, herself and a purchaser wherein a portion of land measuring 60 acres was sold to the purchaser. However, the witness added that the purchaser did not conclude the payment of the entire purchase price.

33. It was the further testimony of the witness, that arising from the failure of the purchaser to conclude the payment of the purchase price, a suit was filed before the court between the purchaser on one hand and Dr, Samuel Mundati Gatabaki and herself on the other hand. Nevertheless, the witness added that the said suit was subsequently settled vide a consent entered into between the parties. In this regard, the witness referenced the consent dated 3rd October 1985 and which culminated into a decree issued on 20th January 1987.

34. On further cross-examination, the witness averred that the land in question, namely, L.R No. 5980 was fraudulently subdivided. Nevertheless, the witness added that arising from the consent entered into the court, the land was to be sub-divided into two portions.

35. It was the further testimony of the witness that the late Dr. Samuel Mundati Gatabaki and herself had constructed a dam on a portion of L.R No. 5980. However, it was the testimony of the witness that same has not tendered any document before the court to demonstrate that there was a dam on a portion of the suit property. Furthermore, the witness conceded that the same has not exhibited a copy of the bill of quantities.

36. On the other hand, it was the testimony of the witness that the sub-division gave rise to various deed plans and the deed plans are before the court. In this regard, the witness referenced the deed plans at pages 657-709 of the Petitioners' Bundle of Documents.

37. It was the further testimony of the witness that same wrote a complaint letter to the Director of Survey. However, the witness added that same does not have a copy of the letter which was written to the Director of Survey.

38. While under cross-examination, the witness averred that in 2010, Kenya Urban Roads Authority constructed the Northern Bypass. Furthermore, the witness said that the Northern Bypass has eaten onto L.R Nos. 5980/2 and 4508/1.

39. Additionally, the witness averred that the sub-division scheme captured a portion of L.R No. 5980 which was due for surrender. In this regard, the witness averred that the portion which was due for surrender has remained on the ground.

40. On re-examination, the witness averred that the dispute between Dr. Samuel Mundati Gatabaki; herself and Gitere was resolved vide consent. Besides, the witness added that the terms of the consent were clear and L.R No. 5980 was to be sub-divided in accordance with the sketch plan attached thereto.

41. While still under re-examination, the witness averred that same did not agree to the excision of a portion of L.R No. 5980 for the construction of the Northern Bypass. It was the testimony of the witness that the excision of a portion of L.R No. 5980 and the construction of the Norther Bypass thereon was fraudulent.

42. Other than the foregoing, it was the testimony of the witness that the Norther Bypass does not cut across the land belonging to the Giteres. However, while under further re-examination, the witness beat an about-turn and averred that Gitere's land touches on the Northern Bypass.

43. In addition, the witness averred that same [witness] wrote a letter to Mr. Harunani-Licensed Land Surveyor to interrogate the circumstances leading to the excision of L.R No. 5980. Nevertheless, the witness pointed out that the letter which was written to Mr. Harunani was not intended to interfere with the proceedings before the court.

44. The second witness who testified on behalf of the Petitioner was Mr. Suleiman Harunani. Same testified as PW2.

45. It was the testimony of the witness [PW2] that same is a licensed land surveyor. Furthermore, the witness averred that same has worked as a licensed land surveyor for more than 54 years. In this regard, the witness testified that same is therefore knowledgeable of and conversant with survey works.

46. On the other hand, it was the evidence of the witness that same is conversant with the facts of the instant matter. In this regard, the witness added that same has since recorded two sets of witness statements, namely the witness statement dated 6th April 2023 and 16th June 2024 respectively. Furthermore, the witness sought to adopt and rely on the contents of the two sets of witness statements as his evidence in chief.

47. Suffice it to point out that the two sets of witness statements were thereafter adopted and constituted as the evidence in chief of the witness. Besides, it was the testimony of the witness that same was retained and engaged to undertake survey works on L.R No. 5980, belonging to and registered in the name of Dr. Samuel MUndati Gatabaki [now deceased] and Nancy Wanja Gatabaki.

48. It was the further testimony of the witness that by the time same [PW2] was undertaking the survey works, the Norther Bypass had not been constructed. Additionally, it was the testimony of the witness that there is a difference between acquisition and surrender. Furthermore, the witness averred that land has to be acquired before the issue of surrender can arise.

49. It was the further testimony of the witness that his two statements have elaborately explained the process that was undertaken by himself during the sub-division of L.R No. 5980. At any rate, it was the further testimony of the witness that where the government acquires land for surrender, no compensation is payable. However, the witness added that where the land is being acquired for other purposes, the government is obliged to pay compensation.

50. Other than the foregoing, the witness testified that the sub-division scheme which was prepared as pertains to and in respect of L.R No. 5980 was duly approved by the Director of Survey. Nevertheless, the witness added that subsequently, an error was discovered as pertains to the deed plan in respect of L.R No. 5980/2 and thereafter the Director of Survey sanctioned the correction of the error leading to the preparation of two deed plans.

51. It was the further testimony of the witness that other than the witness statements which same has adopted before the court, same [witness] also prepared and signed a report. In this regard, the witness adverted to the report at page 598 of the Petitioners' List and Bundle of Documents which report was thereafter tendered and produced as an exhibit.

52. It was the further evidence of the witness that the Norther Bypass has eaten onto a portion of L.R No. 5980 and hence the Petitioners' claim before the court is legitimate. In particular, the witness highlighted paragraph 40 of his witness statement which same averred supports the claim at the foot of the Further Amended Petition.

53. On cross-examination by learned counsel for the 1st to 4th, 6th and 7th Respondents, the witness testified that same has the original maps pertaining to and in respect of the suit property namely, L.R No. 5980. Besides, the witness averred that same received instructions from the Gatabakis. Furthemore, it was the evidence of the witness that the instructions that same received from the Gatabakis was to excise 60 acres out of L.R. No. 5980.

54. While under further cross-examination, the witness averred that the instructions that same received from the Gatabakis included directions to sub-divide the suit property L.R. No. 5980. In addition, the witness averred that the instructions related to the sub-division of the suit property into four portions.

Besides, the witness added that the sub-division scheme relative to the sub-division of L.R. No. 5980 is before the court.

55. On the other hand, it was the testimony of the witness that L.R. No. 5980 was sub-divided into four portion culminating into L.R Nos. 5980/1 [measuring 7.34 hectares]; 5980/2; 5980/3 [measuring 50 hectares]; and 5980/4 [measuring 23 hectares].

56. It was the further testimony of the witness that L.R. No. 5980/1 was reserved for public use. L.R. No. 5980/2 was reserved for a road. L.R. No. 5980/3 was for the Gatabakis and whereas L.R. No. 5980/4 was for the Gatabakis but same was earmarked for transfer to the Giteres.

57. On further cross-examination, the witness averred that the sub-division relative to L.R. No. 5980 has never been cancelled to date. Furthermore, it was the testimony of the witness that the preparation of the sub-division scheme is the first step towards the sub-division of a designated parcel of land. Besides, the witness added that once the sub-division scheme is approved, same is followed by survey and thereafter the preparation of a deed plan.

58. It was the further evidence of the witness that L.R. No. 5980/1 shows that the area was for public use. The witness added that L.R. No. 5980/2 is shown to be reserved for the proposed road. Furthermore, the witness averred that L.R. No. 5980/2 does not show and/or refer to a proposed road for acquisition.

59. While under further cross examination, it was the testimony of the witness that the sub-division scheme would require an approval from various authorities. Besides, the witness averred that where the sub-division scheme alludes to conditions, such conditions must be met and/or satisfied. It was the further testimony of the witness that if the conditions for approval are not satisfied then the sub-division scheme would be rejected. However, the witness clarified that the sub-division in respect of L.R. No. 5980 was duly approved.

60. It was the further testimony of the witness, that the sub-division scheme in respect of L.R. No. 5980 was duly registered. In addition, the witness averred that before the sub-division scheme is registered the same is forwarded to the Directorate of Survey for purposes of authentication. Besides, the witness averred that the deed plans relating to L.R. No. 5980/1, L.R. No. 5980/2, L.R. No. 5980/3 and L.R. No. 5980/4 were all given to the advocate for the Gatabakis.

61. On further cross examination, the witness averred that L.R. Nos. 5980/1 and 5980/2 were surrendered to the government. However, the witness added that L.R. No. 5980/3 went to the Gatabakis while L.R. No. 5980/4 was the one allocated and designated to the Gitere's.

62. On further cross examination, it was the testimony of the witness that subsequently the Director of Survey wrote to him [witness] and that the letter in question has been tendered and produced before the court. Furthermore, the witness added that before the Director of Survey wrote to him [witness], someone must have complained to the Director of Survey.

63. It was the further testimony of the witness that thereafter same [witness] wrote back to the Director of Survey and acknowledged that there was a mistake in the survey. At any rate, the witness acknowledged that where a surveyor makes a mistake in the course of his [surveyor's] works, the surveyor is liable for the mistake.

64. It was the further testimony of the witness that the sub-division scheme which was duly registered captured the area that was reserved for public utilities as well as the area that was for surrender. However, the witness clarified that the sub-division scheme does not show that the portion was reserved for acquisition for a road.

65. While under further cross examination, it was the testimony of the witness that the road that is complained of was constructed by Kenya Urban Roads Authority. Furthermore, the witness averred that if the road was constructed on the portion of land that was surrendered then there would be no need for the government to acquire the land. In addition, the witness added that the government cannot acquire own land.

66. On further cross examination, the witness averred that same did not carry out and/or undertake survey in respect of L.R No. 4508/1. Nevertheless, the witness averred that even though same did not undertake survey in respect of L.R No. 4508/1, same has nevertheless commented on the said parcel of land.

67. It was the further testimony of the witness that it is him [witness] who prepared the sub-division scheme for and in respect of L.R No. 5980 before the same was subdivided.

68. On re-examination by learned counsel for the Petitioners, the witness averred that the acreage of L.R No. 5980 before sub-division was 200 acres. However, it was the further testimony of the witness that the acreage of the sub-division[s] adds to 206 acres. Furthermore, it was the testimony of the witness that same is aware of the dispute between the Gatabakis and the Giteres. At any rate, the witness averred that the dispute between the Gatabakis and the Giteres has not been fully determined.

69. While still under re-examination, the witness averred that same is aware that the correction in respect of the deed plan for L.R No. 5980/2 culminated into the creation of two deed plans. Furthermore, the witness averred that one deed plan was for access road while the other was for the reserved road.

70. Additionally, it was the evidence of the witness that the acquisition of land for purposes of surrender must be accompanied by a deed of surrender. Nevertheless, the witness averred that the surrender in question was not accompanied by a deed of surrender.

71. On the other hand, the witness averred that the Petitioners' claim before the court relates to the portion that has been encroached upon by Kenya Urban Roads Authority. Furthermore, the witness averred that the road in question, namely the Northern Bypass, has encroached into the Petitioners' land.

72. The third witness who testified on behalf of the Petitioners was James Wagema Ruitha. Same testified as PW3.

73. It was the testimony of the witness that same [PW3] is a registered and practising valuer. In this regard, the witness averred that same is therefore conversant with matters pertaining to valuation. In any event, the witness added that same was registered as a valuer in 1988.

74. On the other hand, the witness averred that same is conversant with the facts of this matter. In particular, the witness stated that same was instructed by the Petitioners to undertake valuation over and in respect of the suit properties, namely L.R No. 5980 and 4508/1 with a view to preparing a valuation report. In this regard, the witness added that same thereafter proceeded to and undertook the requisite valuation in respect of the named properties.

75. Other than the foregoing, the witness averred that same has also recorded a witness statement in respect of the instant matter. In particular, the witness stated that the witness statement is dated 26th January 2021 and which witness statement was thereafter adopted and constituted as the evidence in chief of the witness.

76. It was the further evidence of the witness that pursuant to the instructions by the Petitioners, same prepared and signed a valuation report. To this end, the witness adverted to the valuation report dated

28th March 2018 and which report was duly tendered and produced as an exhibit on behalf of the Petitioners.

77. It was the further testimony of the witness that same has provided the background information relating to the encroachment onto L.R Nos. L.R No. 5980 and 4508/1 respectively. In particular, the witness averred that the extent of encroachment measures 13.64 acres.

78. Other than the foregoing, it was the testimony of the witness that the same has highlighted the criteria deployed towards arriving at the figures alluded to and the foot of the valuation report. Furthermore, the witness averred that same also recorded a further witness statement dated 6th April 2023 and which witness statement the witness sought to adopt and rely on.

79. Additionally, it was the testimony of the witness, that at the foot of the supplementary witness statement dated 6th April 2023, same has adverted to a further valuation report and wherein the computation for compensation amounts to KES 1,865,300,000 only.

80. On cross-examination by learned counsel for the 1st to 4th, 6th and 7th Respondents, the witness averred that same [witness] was instructed to undertake valuation of the suit property for purposes of compensation. The witness further averred that same proceeded to and undertook the valuation exercise culminating into the preparation of two sets of the valuation reports.

81. It was the further testimony of the witness that in the course of undertaking the valuation, same adopted and deployed the comparable approach. Nevertheless, the witness added that even though same adopted and deployed the comparable approach, same has not included the details of the comparables which were utilised and taken into in arriving at the final figures.

82. While under further cross examination, the witness averred that in the course of the valuation same was availed various survey plans which enabled him [witness] to ascertain the location of the suit properties. Furthermore, the witness averred that the valuation relates to the portion of land that was excised from the private land belonging to the Petitioners.

83. It was the further testimony of the witness that the valuation reports reflect the market value of the land. In addition, the witness averred that same [witness] has indicated the basis of the valuation undertaken by himself.

84. On re-examination the witness stated that same adopted and deployed the comparable approach in arriving at the valuation figures. However, the witness added that same has not captured the details of the comparables at the foot of the report because it is unethical to capture such details without the consent of the registered owners thereof.

85. It was the further testimony of the witness that while carrying out valuations, the valuers are authorised to adopt various approaches including comparables. In this regard, the witness averred that the comparable approach would relate to and concern usage of comparable properties situate within the same locality.

86. On further re-examination, the witness averred that the values articulated at the foot of the valuation report were informed by his knowledge of valuation, experience and also from the values of the comparables derived from the guidelines published by the Institution of Surveyors of Kenya.

87. In addition, the witness stated that the values that have been alluded to at the foot of the valuation report are correct and realistic.

88. With the foregoing testimony, the Petitioners' case was closed.

b. The 1st to 4th, 6th and 7th Respondents' Case

89. The case for the 1st to 4th, 6th and 7th Respondents revolves around the evidence of three [3] witnesses, namely Abdulkadir Ibrahim Jatani, Wilfred Muchai Kabue and Timothy Waiywa Mwangi, who testified as RW1, RW2 and RW3 respectively.

90. It was the testimony of the witness [Abdulkadir Ibrahim Jatani] that same is the Deputy Director in Charge of Survey at Kenya Urban Roads Authority. Furthermore, the witness averred that same is a licensed surveyor by profession. In this regard, the witness averred that same is therefore conversant with and knowledgeable of survey works.

91. It was the testimony of the witness that same in conversant with the facts of this case. In addition, the witness averred that same has since sworn a Replying Affidavit sworn on 26th April 2018 and wherein same [witness] has adverted to the issues surrounding the dispute beforehand. In this regard, the witness sought to adopt and rely on the contents of the Replying Affidavit.

92. Suffice it to point out that the contents of the Replying Affidavit sworn on 26th April 2018 were thereafter adopted and constituted as the evidence of the witness. Besides, the witness also adverted to the various annexures attached thereto and sought to tender same as exhibits before the court. In the absence of any objection to the production of the various annexures, same [annexures] were produced and marked as exhibits D1 to D3, respectively.

93. It was the further testimony of the witness that L.R No. 5980/2 was surrendered to the government. Furthermore, the witness averred that L.R. No. 5980/2 arose from the sub-division of L.R No. 5980. On the other hand, the witness averred that the sub-division of L.R No. 5980 was captured at the foot of survey plan F/R No. 185/71.

94. It was the further testimony of the witness that the Northern Bypass was constructed in 2010. Furthermore, the witness added that the road was constructed by the government. In addition, the witness averred that the land on which the road was constructed had been surrendered to the government and hence same [land] belonged to the government.

95. On the other hand, it was the testimony of the witness that L.R No. 5980/2 was surrendered. In particular, the witness adverted to the surrender having been duly registered by the Director of Survey. Furthermore, the witness averred that the surrender of L.R No. 5980/2 was duly indicated on the deed plan.

96. It was the further testimony of the witness that the deed plan relating to the surrender of L.R No. 5980/2 has been tendered and produced before the court. In this respect, the witness adverted to the deed plan at page 28 of the Bundle of Documents. Besides the witness testified that once the rights are vested in the government vide surrender, such rights cannot be revised.

97. On cross-examination by learned counsel for the Petitioners, the witness averred that same [witness] is conversant with the term public utility. In particular, the witness stated that term public utility refers to social amenities including schools, hospitals, social halls etc. Furthermore, the witness also added that public utilities would also include market places and police stations.

98. On the other hand, the witness averred that paragraph 5 of his Replying Affidavit confirms that L.R No. 5980/1 was indeed surrendered for public utility. Furthermore, the witness referenced paragraph 11 of the Replying Affidavit and averred that the said paragraph touches on the portion of land that had been surrendered for roadworks.

99. While under further cross examination, the witness averred that the Petitioners herein owned the two parcels of land namely L.R No. 5980 and L.R No. 4508/1 respectively. Besides, the witness averred that the Norther Bypass has traversed the smaller parcel of land.

100. While under further cross-examination, the witness averred that the Northern Bypass has eaten onto a portion of land measuring approximately 13.00 hectares. At any rate, the witness stated, that same is aware that the Government of Kenya cannot take any person's land without due process of the law.

101. On further cross-examination, the witness averred that L.R No. 5980 was subdivided into four portions. In addition, the witness averred that L.R No. 5980/2 was thereafter surrendered for road reserve. Besides, the witness also adverted to the compulsory acquisition of L.R No. 4808.

102. While under further cross-examination, the witness averred that whenever Kenya Urban Roads Authority wishes to construct a road, same [Kenya Urban Roads Authority] would seek the intervention of the government to acquire land. Thereafter, the witness added, that the land that shall have been acquired shall be subjected to survey by the Director of Survey.

103. On further cross-examination, the witness averred that L.R No. 5980 was subjected to sub-division into four portions. Besides, the witness averred that prior to the sub-division of L.R No. 5980, a sub-division scheme was duly prepared. Thereafter, the sub-division scheme was subjected to approval by the relevant authorities including the Director of Survey.

104. It was the further testimony of the witness that upon the approval of the sub-division scheme, the owner of the land which is the subject of subdivision would be called upon to surrender the mother title. However, the witness added that same is not aware whether the mother title in respect of L.R No. 5980 was ever surrendered.

105. Other than the foregoing, the witness testified that the sub-division scheme as well as the survey plan in respect of L.R No. 5980 were duly registered. Furthermore, the witness also stated that the sub-divisions arising from L.R No. 5980 were also registered.

106. On re-examination, the witness testified that the sub-division of L.R No. 5980 was undertaken by Messrs. Suleiman Harunani – Licensed Land Surveyor. Furthermore, the witness averred that the sub-division was undertaken on the basis of the scheme plan which was duly approved by the Director of Survey.

107. It was the further testimony of the witness that the road/Norther Bypass was constructed on the portion of land which had been surrendered. Besides, it was the testimony of the witness that once land is surrendered same becomes public land and hence the government cannot be called upon to make compensation for what had been surrendered.

108. The second witness who testified on behalf of the 1st to 4th, 6th and 7th Respondents is Wilfred Muchai Kabue. Same testified as RW2.

109. It was the testimony of RW2 [Wilfred Muchai Kabue] that same is currently the Principal Surveyor at the Ministry of Lands, Housing, Public works and Urban Development. At any rate, the witness averred that same worked with the Directorate of Survey for more than twenty-nine (29) years.

110. Other than the foregoing, the witness averred that same is also a licensed surveyor. In this regard, the witness added that his license number is 204 of 8th March 2012. Furthermore, the witness also averred that same is also a member of the Institution of Surveyors of Kenya.

111. Other than the foregoing, the witness averred that same is also conversant with the facts of this case. In this regard, the witness added that same has since recorded a witness statement dated 13th June 2023. Besides, the witness sought to adopt and rely on the contents of the said witness statement.

112. To this end, the witness statement dated 13th June 2024 was thereafter adopted and constituted as the evidence in chief of the witness.

113. Additionally, the witness adverted to a List and Bundle of Documents dated 12th June 2023 containing 38 documents and which documents the witness sought to produce in evidence. There being no objection to the production of the documents as exhibits before the court, same [documents] were duly tendered and produced as exhibits D4 to 41 respectively on behalf of the named Respondents.

114. On cross-examination by learned counsel for the Petitioners, the witness averred that same is not aware whether Dr. Samuel Mundati Gatabaki and Nancy Wanja Gatabaki objected to the acquisition of their land. Furthermore, the witness averred that same is not aware whether Kenya Urban Roads Authority obtained the permission from the Petitioners herein to construct the road.

115. On further cross-examination, the witness averred that same is aware that there was a sub-division scheme that was prepared as pertains to and in respect of the sub-division of L.R No. 5980. Besides, the witness stated that the subdivision scheme was carried out by a licensed surveyor.

116. While under further cross-examination, the witness averred that same is aware that prior to compulsory acquisition, it behoves the Commissioner of Lands [now defunct] to issue and serve a gazette notice. Furthermore, the witness added that the Commissioner of Land would also be called upon to undertake a public hearing.

117. It was the further testimony of the witness that prior to and before the sub-division of L.R No. 5980, a sub-division scheme was duly prepared and thereafter approved. Furthermore, the witness also testified that the sub-division scheme was also registered.

118. While under further cross-examination, the witness averred that during the registration of the sub-division scheme, the owner of the land which is the subject of the sub-division scheme is enjoined to surrender the original certificate of title.

119. On re-examination, the witness herein averred that L.R No. 5980 was sub-divided on the basis of a duly approved sub-division scheme. Besides, the witness averred that upon the sub-division of L.R No. 5980, the portion known as L.R No. 5980/2 was surrendered to the government. Furthermore, the witness added that the surrender was duly minuted at the foot of Deed Plan No. 125787 dated 7th March 1986.

120. It was the further testimony of the witness that once land is surrendered, same [such land] becomes public property and same cannot therefore be the basis of compulsory acquisition.

121. The third witness who testified on behalf of the 1st to 4th, 6th and 7th Respondents is Timothy Waiywa Mwangi. Same testified as RW3.

122. It was the testimony of the witness [Timothy Waiywa Mwangi] that same is currently the Deputy Director of Physical Planning in the Ministry of Lands, Housing, Public works and Urban Development. Furthermore, the witness averred that same is a physical planner by profession.

123. Other than the foregoing, it was the testimony of the witness that by virtue of his office, same [witness] is conversant with the facts of this matter. In addition, the witness stated that same has since recorded a witness statement dated 31st May 2023 and which witness statement the witness sought to adopt

and rely on as his evidence in chief. In this regard, the witness statement was thereafter adopted and constituted as the evidence in chief of the witness.

124. Additionally, the witness adverted to the List and Bundle of Documents dated 31st May 2023 and thereafter sought to tender and produce the documents as exhibits before the court. There being no objection, the documents were tendered and admitted in evidence as exhibits D42 to 44, respectively.

125. On cross-examination by learned counsel for the Petitioners, the witness herein averred that same is privy to and knowledgeable of the facts of the matter. In particular, the witness averred that same is aware of an application that was made for purposes of subdivision of L.R No. 5980. Furthermore, the witness testified that the application for sub-division of L.R No. 5980 was thereafter approved.

126. It was the further testimony of the witness that L.R No. 5980 was subsequently sub-divided at the instance of the owner. In this regard, the witness referenced the sub-division scheme which was prepared by the licensed surveyor on behalf of the registered proprietor of the land in question.

127. It was the further testimony of the witness that L.R No. 5980 was sub-divided into four portions. However, the witness added that same is not aware whether any portion of L.R No. 5980 was subjected to compulsory acquisition. Nevertheless, it was the testimony of the witness that where compulsory acquisition is undertaken, the acquiring authority is obligated to pay just compensation.

128. On re-examination, the witness averred that the application for sub-division is ordinarily made by the registered proprietor of the property. In this regard, the witness stated that the application for sub-division was made by the registered owners of the suit property.

129. Other than the foregoing, the witness averred that L.R No. 5980/2 was duly surrendered to the government. In this regard, the witness testified that once land is surrendered to the government, same [land] cannot be the subject of compulsory acquisition. At any rate, the witness averred that the surrender of L.R No. 5980/2 was never revoked. In addition, the witness averred that the surrender in question is still in existence.

130. It was the further testimony of the witness that where an application for revocation is made in respect of a surrender, such application must be circulated to the Director of Physical Planning for approval. At any rate the witness stated that once a surrender has been acted upon and the rights vested in the government, the rights cannot be interfered with and/or revoked.

131. While under further re-examination, the witness averred that land which has been surrendered to the government becomes public land. In addition, the witness averred that such land cannot be reverted to private land.

132. With the foregoing testimony, the case for the 1st to 4th, 6th and 7th Respondents was closed.

c. 5th Respondent's case

133. The 5th Respondent herein duly entered appearance but did not file any response to the Petition. Furthermore, though the 5th Respondent participated in the proceedings, same [5th Respondent] did not tender any evidence.

134. Suffice it to point out that the 5th Respondent's case was thereafter closed without any evidence being tendered, or at all.

Parties' Submissions:

135. At the close of the hearing, the advocates for the respective parties covenanted to file and exchange written submissions. In this regard, the court thereafter proceeded to and circumscribed timelines for the filing and exchange of the written submissions.

136. Pursuant to and in line with the directions of the court, the Petitioners proceeded to and filed two [2] sets of written submissions, namely, the submissions dated 28th March 2024 and wherein same highlighted three issues for consideration by the court.

137. For coherence, the Petitioners highlighted the issue as to whether the Respondents had arbitrarily deprived the Petitioners of their properties in contravention of the provisions of Article 40 of *the Constitution*; whether the Respondents had failed to comply with the legal process[es] attendant to the compulsory acquisition of the Petitioners' properties and whether the Petitioners are entitled to the reliefs at the foot of the Further Amended Petition.

138. The second set of written submissions filed by the Petitioners is the one dated 19th July 2024 and in respect of which the Petitioners have similarly canvassed three issues, namely, whether L.R No. 5980 was surrendered or acquired; whether the suit property was compulsorily acquired and whether the Petitioners' rights were violated.

139. On behalf of the 1st to 4th, 6th and 7th Respondents, the submissions are dated 30th April 2024. For coherence, the 1st to 4th, 6th and 7th Respondents have highlighted four [4] issues for consideration by the court namely, whether the suit property was surrendered or acquired, whether the suit property was compulsorily acquired, whether the Petitioners' rights were violated and the court should grant the orders sought in the Petition and whether the Cross-Petition is meritorious.

140. In addition, Learned Counsel for the 5th Respondent herein also filed written Submissions dated the 27/05/2024. For good measure, the said submissions have highlighted the position taken by and on behalf of the 5th Respondent in respect of the instant matter.

141. The written submissions [details in terms of the preceding paragraphs] form part of the record of the court. Furthermore, the court has reviewed and considered the contents of the written submissions as well as the various authorities cited and referenced thereunder.

142. Nevertheless, even though the court has neither rehashed nor reproduced the submissions by and on behalf of the parties, the court is however grateful to the parties for the comprehensive submissions that have been filed.

143. Furthermore, the court expresses gratitude for the incisive submissions that have been placed before it and the failure to rehash/ re-produce the written submissions is not borne out of contempt.

Issues For Determination:

144. Having reviewed the Further Amended Petition dated 6th April 2023; the various documents attached thereto; the responses as well as the Cross-Petition; the evidence of the parties and finally the written submissions filed, the following issues crystalise [emerge] and are therefore worthy of determination.

    i. Whether L.R No. 5980 does exist and if so, whether the Petitioners' rights thereto have been breached, violated and/or infringed upon by the Respondents or otherwise.

    ii. Whether L.R No. 4508/1 was compulsorily acquired and if so, whether the due processes of the law attendant to compulsory acquisition were complied with or otherwise.

iii. Whether the Petitioners are entitled to the reliefs sought or any of the said reliefs.

iv. Whether the Cross-Petition is meritorious and if so, what reliefs ought to be granted, if any.

Analysis And Determination:

i. Whether L.R No. 5980 does exist and if so, whether the Petitioners' rights thereto have been breached, violated and/or infringed upon by the Respondents or otherwise.

145. The Petitioners herein have approached the court contending that their proprietary rights to and in respect of L.R Nos. 5980 and 4508/1 respectively have been violated, breached and/or infringed upon by the Respondents. In particular, the Petitioners have contended that the Respondents herein have interfered with their rights to and in respect to L.R. No. 5980 and thus same [Petitioners] have sought for recompense.

146. As pertains to the Petitioners claims pertaining to L.R. No. 5980, it suffices to highlight and reference paragraphs 18, 23, and 25 of the Further Amended Petition and wherein the Petitioners have contended that the Respondents have encroached onto and trespassed upon a portion measuring 14.88 acres.

147. Arising from the contention that the Respondents have encroached upon and trespassed onto a portion of L.R. No. 5980, the Petitioners have thus sought various declaratory orders as well as compensation for loss of user. In particular, the Petitioners have sought for compensation in the sum of KES 1,865,300,000 only.

148. Given the contention by and on behalf of the Petitioners that their constitutional rights to L.R. No. 5980 have been breached and violated, it is imperative to discern and ascertain whether indeed L.R. No. 5980 does exist and if so, whether same belongs to and is registered in the names of the Petitioners. Furthermore, it shall also be necessary to discern whether the Petitioners are indeed entitled to recompense (sic) on the basis of violation of the rights attendant to L.R. No. 5980.

149. To start with, there is no gainsaying that L.R. No. 5980 was bought and acquired by Dr. Samuel Mundati Gatabaki [now deceased] and Nancy Wanja Gatabaki respectively in 1970. Subsequently, the property namely L.R. No. 5980 was transferred and registered of Dr. Samuel Mundati Gatabaki [now deceased] and Nancy Wanja Gatabaki respectively. In this regard, the said persons became the lawful and registered proprietors of L.R. No. 5980.

150. First forward, Dr. Samuel Mundati Gatabaki [now deceased] and Nancy Wanja Gatabaki thereafter entered into a sale agreement with Gitere Kahura Investments Limited dated 22nd August 1978 and wherein the vendors sought to sell to and in favour of the purchaser a portion of L.R. No. 5980 measuring 60 acres only.

151. PW1 tendered evidence that arising from the sale agreement, the purchaser [Gitere Kahura Investments Limited] paid the purchase price at the foot of the sale agreement save for KES 200,000 only. In this regard, PW1 stated that the sale agreement collapsed.

152. Nevertheless, it was the further evidence of PW1 that the purchasers [Gitere Kahura Investments Limited] filed a suit vide Nairobi HCCC 2752 of 1982 wherein same [purchaser] sought to compel the vendors to sub-divide L.R. No. 5980 and thereafter transfer 60 acres thereof to the purchaser. In any event PW1 ventured forward and stated that the suit filed by the purchasers was ultimately resolved vide consent entered into 3rd October 1985.

153. It was the further testimony of PW1 that arising from the consent order, L.R. No. 5980 was to be sub-divided into two portions namely 5980 'A" and 5980 "B" respectively. Furthermore, the witness averred that there was no agreement to surrender any portion of L.R. No. 5980.

154. From the evidence of PW1, what comes out clearly is that L.R. No. 5980 was indeed subjected to sub-division pursuant to and as a result of the consent order. At any rate, it was the evidence of PW1 that same discovered that a surveyor by the name Suleiman Harunani was retained to sub-divide L.R. No. 5980 and that indeed the said surveyor proceeded to and generated a sub-division scheme in respect of the said property.

155. To this end, it suffices to reproduce the evidence of PW1 while under cross-examination by the learned chief litigation counsel and wherein same stated as hereunder:

> I am aware that a sub-division scheme was duly prepared. The same was duly prepared and I have availed the same to court. The sub-division scheme is dated July 1979. I had agreed with the purchaser that I was to sell 60 acres of the land. The sub-division scheme has four portions. The portion in question is said to be reserved for public utility.

156. Furthermore, PW1 proceeded to and stated as hereunder while under cross-examination.

> I did accept the conditions of the approval. I was thereafter granted final approval as pertains to the sub-division scheme. I engaged Mr. Harunani – Licensed Land Surveyor on 8th November 1985.

157. While still under cross-examination on the question pertaining to the sub-division of L.R. No. 5980, PW1 is on record as hereunder:

> The sub-divisions gave rise to deed plans and the deed plans are before the court. The deed plans are at pages 657-709 of the Petitioners' Bundle of Documents. I do confirm that there was a final approval for the sub-divisions. I do confirm that there were three deed plans.
>
> I can see that Mr. Gitere was granted the deed plan in respect of a portion of L.R. No. 5980. The sub-divisions were done in 1979.

158. From the evidence by PW1, whose details have been highlighted in the preceding paragraphs, it is apparent that L.R. No. 5980 was the subject of a sub-division scheme that was duly approved by the relevant authorities including the Directorate of Survey. Furthermore, it is also apparent that L.R. No. 5980 was indeed sub-divided and thereafter same [L.R. No. 5980] ceased to exists as a title.

159. On the other hand, it is also important to take cognisance of the evidence of PW2, namely Suleiman Harunani. It is worthy to recall that same [Suleiman Harunani] was the licensed surveyor who was retained and instructed to undertake the sub-division of L.R. No. 5980. Furthermore, it is the said witness, who thereafter proceeded to and prepared the sub-division scheme relating to L.R. No. 5980.

160. While under cross-examination by the learned chief Litigation counsel, PW2 stated as hereunder:

> I received instructions from the advocates for the Gatabakis. The instructions were to excise 60 acres from L.R. No. 5980. The instructions also included the directions to subdivide the land/suit property. The land in question was to be sub-divided into four portions. I have the sub-division scheme before the court.

161. Furthermore, and while still under cross-examination, PW2 stated as hereunder:

> The resultant portions are namely L.R. No. 5980/1, L.R. No. 5980/2, L.R. No. 5980/3 and L.R. No. 5980/4. L.R. No. 5980/1 was reserved for public use. L.R. No. 5980/2 was surrendered for roads. L.R. No. 5980/3 was for the Gatabakis and L.R. No. 5980/4 was for the Gatabakis but the same was earmarked for transfer. The sub-divisions have not been cancelled to date.

162. In addition, and while under further cross-examination, PW2 stated as hereunder:

> L.R. No. 5980/1 shows that the area was for public use. L.R. No. 5980/2 is shown to be reserved for the proposed road. L.R. No. 5980/2 does not show and/or refer to a proposed road for acquisition.

163. From the evidence of PW2, there is no gainsaying that L.R. No. 5980, which has been adverted to by the Petitioners herein was indeed sub-divided and same thereafter gave rise to various independent titles. Furthermore, the various independent titles that arose from L.R. No. 5980 were designated for various purposes who details were highlighted at the foot of the relevant deed plans.

164. At any rate, it is also important to recall that the same PW2 also testified and stated as hereunder:

> In respect of L.R. No. 5980/1, 5980/2, 5980/3 and 5980/4 all the deed plans were given to the advocates for the Gatabakis. The deep plan for L.R Nos. 5980/1, 5980/3 and 5980/4 were returned. However, the deed plan for L.R. No. 5980/1 and 5980/2 were never released to me. I do confirm that L.R Nos. 5980/1 and 5980/2 were surrendered to the government.

165. Additionally, PW2 also stated thus:

> "L.R. No. 5980/3 went to the Gatabakis while L.R. No. 5980/4 was the one that was allocated and designated to go to the Giteres."

166. Suffice it to point out that following the sub-division of L.R. No. 5980 which gave rise to the various sub-divisions namely L.R. No. 5980/1, L.R. No. 5980/2, L.R. No. 5980/3 and L.R. No. 5980/4, one can no longer make reference to L.R. No. 5980 as an independent and separate title. For good measure, the said title ceased to exists and thus no legal rights and/or interests attach thereto.

167. Other than the testimonies of PW1 and PW2, whose details have been highlighted hereinbefore, it also material to reference the evidence of RW1 and RW2 respectively as pertains to whether or not L.R. No. 5980 remains in existence or otherwise.

168. According to RW1 [Abdulkadir Ibrahim Janai], L.R. No. 5980 was sub-divided into four portions and the sub-division thereof was minuted at the foot of Survey Plan No. 185/71.

169. In the course of his testimony in chief, RW1 stated as hereunder:

> "The suit property herein, namely L.R. No. 5980/2 was surrendered to the government. I wish to add that L.R. No. 5980/2 arose from the sub-division of L.R. No. 5980." Referred to documents no. 2 at the foot of the Respondents' List and Bundle of Documents and the witness states that "the document is the Survey Plan No. F/R 185/71. The Survey Plan relates to the subdivision of L.R. No. 5980"

170. It was the further evidence of RW1 that L.R. No. 5980/2 was surrendered. In this regard, the witness stated as hereunder:

> "I am aware that L.R. No. 5980/2 was surrendered because there was a surrender. The surrender was duly filed/lodged with the Director of Survey. The surrender was duly registered. The registration is indicated on the Deed Plan as a surrender."

171. On the other hand, RW2 [Wilfred Muchai Kabue] while under cross-examination by learned counsel for the Petitioners stated as hereunder:

> "I am aware that before the sub-division scheme is formally registered, the original certificate of title has to be surrendered. I do confirm that the owners of the land would be compelled to surrender the Certificate of Title."

172. While under re-examination by learned chief litigation counsel, RW2 stated as hereunder:

> "I am conversant with L.R No. 5980. I also wish to add that the land in question was the subject of sub-division. I can see a surrender deed plan in respect of L.R. No. 5980/2. The deed plan is no. 125787 dated 7th March 1986. The deed plan was issued for surrender purposes."

173. Suffice it to underscore that the totality of the evidence on record demonstrate that L.R. No. 5980 which was adverted to by the Petitioners and wherein the Petitioners contend that their rights have been violated, was indeed sub-divided and thereafter ceased to exist.

174. To my mind, it was the Petitioners who contended that L.R. No. 5980 was still in existence and that their rights thereto had been violated by the Respondents. In this regard, it was therefore incumbent upon the Petitioners to tender and place before the court plausible evidence to demonstrate inter alia the existence of L.R. No. 5980 and the nature of breach that is complained of.

175. Simply put, the burden of proving the existence of L.R. No. 5980 as well as the fact that the Respondents have violated the constitutional rights attendant to ownership thereof, was cast upon the Petitioners and not otherwise. [See Sections 107, 108 and 109 of the *Evidence Act* Chapter 80 Laws of Kenya].

176. To buttress the foregoing position, it suffices to cite and reference the holding of the Supreme Court in the case of Samsom Gwer & 5 others v Kenya Medical Research Institute & 3 others (Petition *12 of 2019*) [2020] KESC 66 (KLR) where the court highlighted the burden of proof and stated as hereunder.

> "49. Section 108 of the *Evidence Act* provides that, "the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;" and Section 109 of the Act declares that, "the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."
>
> 50. This Court in Raila Odinga & Others *v. Independent Electoral & Boundaries Commission & Others, Petition No. 5 of 2013*, restated the basic rule on the shifting of the evidential burden, in these terms:...a Petitioner should be under

obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden...."

51. In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent."

177. In addition, the obligation of the claimant and in this case the Petitioners to discharge the burden of proof before same can be entitled to the reliefs sought was also highlighted by the Court of Appeal in the case of Agnes Nyambura Munga (suing as the Executrix of the Estate of the late William Earl Nelson) v Lita Violet Shepard (sued in her capacity as the Executrix of the Estate of the Late Bryan Walter Shepard) [2018] eKLR.

178. For coherence, the court stated and held thus:

> " The burden of proving the existence of any fact lies with the person who makes the assertion. That much is clear from Sections 107 and 109 of the *Evidence Act*. The standard of proof is on a balance of probabilities which Lord Denning in the case of Miller vs Minister of Pensions (1947) explained as follows:
>
> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.""

179. Arising from the foregoing analysis and coupled with the ratio decidendi in the decision[s] supra, I come to the conclusion that the Petitioners' contention that L.R No. 5980 does exist has neither been established nor proven. At any rate, evidence abound and same is corroborated by PW1 that indeed L.R No. 5980 was sub-divided and thus ceased to exist.

180. In a nutshell, my answer to issue number one is therefore threefold. Firstly, L.R No. 5980 which has been adverted to and referenced by the Petitioners ceased to exist as an independent title. In this regard, same is non-existent.

181. Secondly, insofar as L.R No. 5980 ceased to exist as an independent title, no legal rights and/or interests attach thereto and hence the contention by the Petitioners that the Respondents have violated their [Petitioners'] rights thereto has been mounted in vacuum. [See Kenya Forests Services Limited vs Rutongot Farm Limited 2015 eKLR].

182. Thirdly, to the extent that the Petitioners have no demonstrable rights and/or interests to and in respect of L.R 5980 which is non-existent, same [Petitioners] cannot be heard to stake a claim for recompense for (sic) violation of rights which are unknown to law.

ii. Whether L.R No. 4508/1 was compulsorily acquired and if so, whether the due processes of the law attendant to compulsory acquisition were complied with or otherwise.

183. Other than the claim touching on and concerning L.R 5980 which has been discussed hereinbefore, the Petitioners herein have also contended that the Respondents herein compulsorily acquired L.R 4508/1 without complying with the due process of the law. In particular, the Petitioners have contended that same [Petitioners] were never issued with any notice of intention to compulsorily acquire L.R 4508/1.

184. Furthermore, the Petitioners have averred that even though the Respondents and in particular, the 6th Respondent proceeded to and constructed the Northern Bypass on inter alia L.R 4508/1, the gazette notice which was issued did not relate the said parcel of land. To the contrary, the gazette notice which was published on 2nd March 2010 touched on and concerned L.R 4808 which parcel of land is situate in Molo within Nakuru County.

185. It was also the position of the Petitioners that the impugned gazette notice published on 2nd March 2010 and which has been relied upon to anchor the contention that L.R 4508/1 was compulsorily acquired did not even highlight the name/details of (sic) the owners of the said L.R 4808.

186. On the other hand, it was the evidence of PW1 that as a result of the failure by the Respondents and in particular the Commissioner of Lands [now defunct] to properly gazette the notice for compulsory acquisition of L.R 4508/1 and to issue the notice of intention to acquire, the Petitioners herein were deprived of the opportunity to either object to the acquisition or attend the public inquiry.

187. In addition, it was the evidence of PW1 that the only time that same got to know of the purported acquisition of L.R 4808 which is distinct from L.R 4508/1 is when it was contended that the monies at the foot of the compulsory acquisition had been deposited with the Commissioner of Lands.

188. For good measure, PW1 stated as hereunder:

> "I am aware of the sum of KES 17,750,000 that was deposited with the Office of the Commissioner of Lands [now defunct]. However, i did not come across any advertisement over and in respect of L.R 4508/1. Later on, I came across some piece of advertisement but the same was in respect of a piece of land situated in Nakuru. Besides, the gazette notice also confirmed that the land being acquired was in Nakuru."

189. Furthermore, in the course of her evidence in chief, PW1 stated as hereunder:

> "I wish to add that there was no notice that was advertised over and in respect of L.R 4508/1."

190. On the other hand, PW3 [James Wagema Ruitha] testified that same was retained by the Petitioners to undertake a valuation in respect of inter alia L.R 4508/1. In the course of undertaking the valuation, the witness averred that same established that the respondents had encroached onto L.R 4508/1.

191. Nevertheless, in the course of his evidence in chief before the court, the witness averred as hereunder:

> "I have availed to the court background information that relates to the suit properties. I have also pointed out that there was an error in the gazette notice which pointed out that the land in question was located in Njoro, Nakuru County."

192. Other than PW3, evidence touching on the land which was the subject of compulsory acquisition was also adverted to by RW1 [Abdulkadir Ibrahim Jatani] who stated that the land which was the subject

of compulsory acquisition was L.R 4808. For good measure, RW1 stated as hereunder while under cross-examination by learned counsel for the Petitioners:

> " The letter also confirms that L.R 4808 was the subject of compulsory acquisition. I also see that there was public hearing that was alluded to. I am aware that where KURA wishes to acquire land for construction of a road, the acquisition would be done by the government. I also wish to state that the survey would be done by the Director of Survey."

193. Suffices to underscore that the totality of the evidence that was placed before the court as concerns the property which was the subject of compulsory acquisition relate to and concern L.R 4808. There is no evidence that the Commissioner of Land ever issued or generated a gazette notice for the compulsory acquisition in respect of L.R 4508/1.

194. At any rate, there is no gainsaying that the Norther Bypass which is the road that is contended to have encroached onto L.R 4508/1 does not extend to Njoro area in Nakuru County. In this regard, it is not conceivable that the Commissioner of Lands [Now defunct] could have purported to compulsorily acquire L.R 4808 Njoro in Nakuru for the construction of the Norther Bypass.

195. To my mind, the Petitioners have established and demonstrated that L.R 4508/1 was actually encroached upon by the Respondents and in particular the 6th Respondent, who proceeded to and constructed the Northern Bypass on L.R 4508/1 prior to and or before same was compulsorily acquired.

196. Other than the foregoing, it is also not lost on this court that the Respondents and in particular the 5th and 6th Respondents did not tender and/or produce before the court any gazette notice underpinning the purported compulsory acquisition of L.R 4508/1. For good measure, if there was any such gazette notice, same would no doubt be in the custody of the named Respondents.

197. In the absence of the requisite gazette notice underpinning compulsory acquisition of L.R 4508/1 and coupled with the fact that the Petitioners were never served with a notice of intention to compulsorily acquire their land, it is common ground that the impugned activities touching on and concerning L.R 4508/1 were undertaken illegally and unlawfully.

198. Suffice it to point out that where the government through the Commissioner of Lands [now defunct] was keen to compulsorily acquire private land it was incumbent upon the Commissioner of Lands [now defunct] to comply with the prescription of the law as elaborated at the foot of sections 3,5, 6 and 9 of the Land Acquisition Act, Chapter 295,[now repealed].

199. Given the importance of the provisions supra, it is apposite to reproduce same. In this regard, the cited [referenced] provisions are reproduced as hereunder:

> 3. Whenever the Minister is satisfied that the need is likely to arise for the acquisition of some particular land under section 6, the Commissioner may cause notice thereof to be published in the Gazette, and shall deliver a copy of the notice to every person who appears to him to be interested in the land.
>
> 5. As soon as practicable after entry has been made under section 4, the Commissioner shall make good or pay full compensation for any damage resulting from the entry.
>
> 6.
>
> (1) Where the Minister is satisfied that any land is required for the purposes of a public body, and that—

(a) the acquisition of the land is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of any property in such manner as to promote the public benefit; and

(b) the necessity therefor is such as to afford reasonable justification for the causing of any hardship that may result to any person interested in the land, and so certifies in writing to the Commissioner, he may in writing direct the Commissioner to acquire the land compulsorily under this Part. (2) On receiving a direction under subsection (1), the Commissioner shall cause a notice that the Government intends to acquire the land to be published in the Gazette, and shall serve a copy of the notice on every person who appears to him to be interested in the land.

9.

(1) The Commissioner shall appoint a date, not earlier than thirty days and not later than twelve months after the publication of the notice of intention to acquire, for the holding of an inquiry for the hearing of claims to compensation by persons interested in the land, and shall—

a. cause notice of the inquiry to be published in the Gazette at least fifteen days before the inquiry; and

b. serve a copy of the notice on every person who appears to him to be interested or who claims to be interested in the land.

(2) The notice of inquiry shall call upon the persons interested in the land to deliver to the Commissioner, not later than the date of the inquiry, a written claim to compensation.

(3) On the date appointed under subsection (1), the Commissioner shall—

(a) make full inquiry into and determine who are the persons interested in the land;

c. make full inquiry into the value of the land, and determine that value in accordance with the principles set out in the Schedule; and

d. determine, in accordance with the principles set out in the Schedule, what compensation is payable to each of the persons whom he has determined to be interested in the land.

(4) The Commissioner may for sufficient cause postpone an inquiry or adjourn the hearing of an inquiry from time to time: Provided that a postponement or an adjournment under this subsection shall not extend the inquiry beyond twenty-four months from the date appointed under subsection (1) for the holding of the inquiry.

(4A) Where an inquiry is not held within the time prescribed under this section the Minister shall be deemed to have revoked his direction to acquire the land and section 23 shall mutatis mutandis apply.

(5) For the purposes of an inquiry, the Commissioner shall have all the powers of the Court to summon and examine witnesses, including the persons interested in the land, to

administer oaths and affirmations and to compel the production and delivery to him of documents of title to the land.

(6) The public body for whose purposes the land is being acquired, and every person interested in the land, is entitled to be heard, to produce evidence and to call and to question witnesses at an inquiry.

200. My reading of the provisions that have been cited and referenced herein before, drive me to the conclusion that whenever the state through the Commissioner of Lands [now defunct] was keen to compulsorily acquire private land, it was mandatory that a gazette notice be published in the Kenya Gazette and the gazette notice in question was to highlight the details of the property which is the subject of compulsory acquisition with the requisite particularity and not otherwise. Furthermore, the gazette notice was also to capture and reflect the details of the owner of the property and of every person who appears to be interested in the land.

201. Other than the publication of the gazette notice and the service of the notice of intention to acquire the designated property, the Commissioner of Lands [now defunct] was obligated to convene a public inquiry/hearing in accordance with Section 9 of the Land Acquisition Act [now repealed] to enable the registered owner of the land and every other person interested in the land to attend the hearing and be heard as pertains to the question of the award.

202. The necessity to comply with every aspect of the provisions of Sections 3, 5 and 9 of the Land Acquisition Act [now repealed] was underscored by the Court of Appeal in the case of Commissioner of Lands & Another v Coastal Acquaculture Limited [1997] eKLR where the court stated and held thus:

> I recall again the dictum of Lord Mansfield in Rex v Croke earlier referred to, and would add that where as in this appeal, the person affected, namely, the respondent had absolutely no say in the making of the original decision by the Minister which was conveyed to the Commissioner and the Minister's written direction to the Commissioner to acquire the land and which merely on the say so of the Minister, had been so acquired by the Commissioner, it is more than desirable indeed, mandatory, that the respondent be given a fair chance and opportunity of challenging the decision and actions of the Minister and the Commissioner, by furnishing the respondent in the notice of intention to acquire and which notice, as I have noted, is misleading in nature, not only, with the information that the Commissioner had received the Minister's direction to acquire the land but also, of the public body for which the land had been acquired, the public purpose therefor, and that all this was justified under the given circumstances. This is particularly so where it is the notice of the compulsory acquisition which for the first time, informs the affected party of what had happened to his land and also sets in motion the claim to compensation process.

203. Additionally, the importance of complying with the procedures attendant to compulsory acquisition which are now underpinned by the provisions of sections 107-113 of the *Land Act* 2012 [2016] as read together with Article 40 of *the Constitution* was also underscored by a Five-judge bench in the case of Patrick Musimba v National Land Commission & 4 Others 2016 eKLR

> 82. As the taking of a person's property against his will is a serious invasion of his proprietary rights, the application of constitutional or statutory authority for the deprivation of those rights requires 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 intention is always the protection rather than interference with proprietary rights.

.....

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

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

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

204. There is no gainsaying that compulsory acquisition occasions grave consequences on the right to ownership of property. In particular, the owner of the property is being deprived of his property. In such circumstances, it is incumbent that due caution be taken to ensure that the owner is suitably notified of the intention to compulsorily acquire. Furthermore, upon compulsory acquisition, the owner must be justly compensated.

205. Flowing from the discussions, whose details have been enumerated in the preceding paragraphs, it is my finding and holding that L.R 4508/1 was never compulsorily acquired. For good measure, the requisite provisions of the Land Acquisition Act Chapter 295 Laws of Kenya [now repealed] were never adhered to.

206. In addition, it is also not lost on this court that other than the failure to publish the requisite gazette notice and to serve the notice of intention to acquire, no compensation was ever remitted to the Petitioners.

207. Notwithstanding the foregoing, the 6th Respondent proceeded to and constructed the Northern Bypass on L.R No. 4508/1 in 2010. In this respect, there is no gainsaying that the construction of the Northern Bypass or the section thereof which traverses L.R No. 4508/1 constitutes trespass to land.

208. Owing to the fact that there was no compulsory acquisition of L.R No. 4508/1 and coupled with the finding that the construction of the road thereon, constitutes and amount to trespass, it is common ground that the Petitioners' rights were indeed violated and/or infringed upon.

209. Arising from the foregoing analysis, my answer to issue number two is fourfold. Firstly, the property namely L.R No. 4508/1 was never compulsorily acquired. In any event, neither of the processes underpinned by the provisions of Sections 3, 5, 6 and 9 of the Land Acquisition Act [now repealed] were complied with.

210. Secondly, the entry upon and construction of the Northern Bypass or the section thereof that traverses L.R No. 4508/1, constitutes trespass and thus represents an infringement of the Petitioners' rights to property.

211. Thirdly, despite the construction of the Northern Bypass or a section thereof on L.R No. 4508/1, the Respondents herein and in particular the 5th and 6th Respondents did not deem it apposite and expedient to pay any recompense to the Petitioners.

212. Fourthly, the Petitioners herein by virtue of the provisions of Section 23 of the Registration of Titles Act [now repealed] and Sections 24 and 25 of the *Land Registration Act* 2012 are indeed entitled to suitable compensation for the offensive activities complained of.

213. Nevertheless, the question as to the nature of recompense due and payable to the Petitioners shall be addressed shortly. For good measure, the quantum of compensation, where apposite is the basis of Issue number three [3] hereunder.

iii. Whether the Petitioners are entitled to the reliefs sought or any of the said reliefs.

214. The Petitioners herein have highlighted a plethora of reliefs at the foot of the Further Amended Petition dated 6th April 2024. Given the diverse reliefs sought at the foot of the Further Amended Petition, it is apposite to addressed the reliefs seriatim and to discern whether or not same are awardable.

215. To start with, the Petitioners herein sought for declaratory orders that the Respondents have violated and/or infringed upon their proprietary rights as pertains to L.R No. 5980. In this regard, the Petitioners sought for recompense for such violation.

216. Nevertheless, while dealing with issues number one, which concerned whether or not L.R No. 5980 does exist, the court returned a verdict that the said parcel of land was sub-divided and thereafter same ceased to exist.

217. On the other hand, the Petitioners herein have also contended that the Respondents have violated and/or infringed upon their rights to and in respect of L.R No. 4508/1. In this respect, it suffices to reiterate that the court has since found and held that L.R No. 4508/1 was never compulsorily acquired. To the contrary, the land which was the subject of compulsory acquisition was L.R No. 4808 situate in Njoro, Nakuru County and which is separate from L.R No. 4508/1 situate along Kiambu Road, Nairobi County.

218. In the premises, it is my finding and holding that the activities perpetrated by the Respondents and in particular, the 5th and 6th Respondents on L.R No. 4508/1, constitutes trespass. Instructively, the Petitioners are entitled to suitable compensation.

219. On account of compensation, it is worthy to recall that the Northern Bypass or the section thereof that traverses L.R No. 4508/1 has been in place since 2010. In this regard, there is no gainsaying that the Petitioners have been denied and deprived of the right to use and benefit from the said property.

220. Arising from the foregoing, the Petitioners are thus entitled to general damages for trespass and in this regard, it is my humble albeit considered view that same [Petitioners] are entitled to general damages in the sum of KES 200,000,000 taking into account the size of L.R No. 4508/1, the location thereof, the nature of the offensive activities and the duration attendant thereto.

221. To buttress the award of general damages in terms of the preceding paragraphs, I beg to cite and reference the decision of the Supreme Court [the Apex Court] in the case of *Attorney General v Zinj Limited (Petition 1 of 2020)* [2021] KESC 23 (KLR) where the court stated thus:

> Following our determination to the contrary, it becomes clear that the principles governing compensation for compulsorily acquired land, could not be applicable to the suit land, as the same had not been so acquired. The most appropriate remedy in our view, was an award of damages, as held by the trial court and partially upheld by the Court of Appeal.

222. Furthermore, the assessment and award of general damages in favour of the Petitioners herein is informed by the elaborate principles that were distilled by the Court of Appeal in the *Kenya Power & Lighting Company Ltd v Ringera & 2 others (Civil Appeal E247 & E248 of 2020* (Consolidated)) [2022] KECA 104 (KLR)

> " 38. The principles both parties have relied upon in their invitation for the Court to decide either way are those enunciated by the predecessor of this Court and either crystallized or restated by this Court which we find prudent to distill and replicate as hereunder:"
>
> i) Harlsburys Laws of England 4th Edition Vol. 45 at para 26 pg 1503, namely, the owner of the land is entitled to nominal damages where there is no actual damage occasioned to the owner by the trespass, such amounts as will compensate the owner for loss of use resulting from the damage caused by the trespass, reasonable damages are payable where the trespasser has made use of the owner's land, exemplary damages are payable where the trespassers conduct towards the owner is not only oppressive but also cynical and carried out in deliberate disregard of the right of the owner of the land with the object of making a gain by his/her unlawful conduct, general damages may be increased where the trespass is accompanied by aggravating circumstances to the detriment of the owner of the land.
>
> ii) Duncan Nderitu Ndegwa vs. Kenya Pipeline Company limited & Another [2013] eKLR - damages payable for trespass are the amount of diminution in value or the loss of reinstatement of the land with the overriding principle being to put the claimant in the position he was in prior to the infliction of harm.
>
> iii) Philip Ayaya Aluchio vs. Crispinus Ngayo [2014] eKLR, - the measure of damages for trespass is the difference in the value of the plaintiffs' property immediately before and immediately after the trespass or the cost of restoration whichever is less.
>
> iv) Ephantus Mwangi & Another vs. Duncan Mwangi [1981 – 1988] I KAR 278, - an appellate court is not bound to accept and act on the trial court's findings of fact if it appears clearly that the trial court failed to take account of particular circumstances or probabilities material to an estimate of evidence.b) a Court of Appeal will not normally interfere with a finding of fact by the trial court, unless it is based on no evidence or on

a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.

v) Kiambu Dairy, Farmers Co-operative Society Limited vs. Rhoda Njeri & 30 Others [2018] eKLR, - the extend of an award of compensatory damages lies in the discretion of the trial court and interference therewith on appeal must be approached with a measure of circumspection and well settled principles.

vi) Kemfro Africa Limited vs. Lubia & Another [No. 2] [1987] KLR 30 as approved in Peter M. Kariuki vs. Attorney General [2014] eKLR, - before interference with the quantum of damages awarded by a trial court the appellate court must be satisfied that either the judge in assessing the damages took into account an irrelevant factor, or left out of account a relevant one or short of the above, the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages payable.

vii) Johnson Evans Gicheru vs. Andrew Martin & Another [2005] eKLR, - this Court on appeal will be disinclined to disturb the finding of the trial Judge as to the amount of damages awarded by the trial court merely because if it had tried the case itself in the first instance, it would have awarded either a higher or lesser sumb) justification for reversing a trial Judge on an award of damages only applies where the court is convinced either that the Judge acted upon some wrong principle of law or that the amount awarded was so extremely high or so very low as to make it an entirely erroneous estimate of the damage to which the aggrieved party is entitled.

viii) Sumaria & Another vs. Allied Industries Limited [2007] 2 KLR I, - an appellate court should be slow in moving to interfere with a finding of fact by a trial court unless it was based on no evidence or based on a misapprehension of the evidence or that the Judge had been seen demonstrably to have acted on a wrong principle in reaching the finding he/she did

ix) Butt vs. Khan [1981] KLR 349, - an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate

x) it must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.

vii. Total (Kenya) Limited formerly Caltex Oil (Kenya) Limited vs. Janevans Limited [2015] eKLR, - whether the claim is in contract or tort, the only damages to which an aggrieved party is entitled to is the pecuniary loss;

(b) the accruing awardable damages is aimed at putting the aggrieved party into as good a position as if there had been no such breach or interference. In other words, in the position it/he/she was in with regard to the object trespassed upon before the onset of such a trespass;

(c) it is meant to cushion the aggrieved party against the expenses caused as a result of the trespass and loss of benefit over the period of the duration of the trespass."

222. Other than the claim for general damages [which has been addressed] herein before, the Petitioners herein have also sought for aggravated and exemplary damages. However, it is common knowledge that aggravated and exemplary damages relate to one and the same this. For good measure, the dichotomy between aggravated and exemplary damages is blurred.

223. At any rate, once the court awards exemplary damages, it would duplicitous to award aggravated damages. Simply put, an award of both would connote double jeopardy and by extension unjust enrichment which must not be countenanced.

224. Be that as it may, I beg to highlight and underscore that the conduct of the 6th Respondent of proceeding to and constructing the Northern Bypass on a portion of L.R No. 4508/1, without the consent and permission of the Petitioners and long before (sic) compulsory acquisition, amounted to a serious violation of the Petitioners' right to property.

225. Put differently, the act of the 6th Respondent herein was not only barbaric but also constituted a serious affront to the fundamental rights of the Petitioners in terms of the provisions of Article 40 of *the Constitution*, 2010.

226. In this case, I beg to adopt and reiterate the holding of the court in Arnacherry Limited v Attorney General [2014] eKLR where the court stated as hereunder.

> 46. Turning on to the case before me, with the above authorities as my guide, it is my view that the acts complained of and which have led to the filing of this Petition transpired prior to the promulgation of *the Constitution* 2010 and have extended further after the promulgation of *the Constitution*. The invasion of and unlawful occupation of the suit land has therefore been continuing and to argue that it is a one off event is a misguided submission. It is also my view that this Petition was filed for breaches of fundamental rights especially with regard to private property and it is obvious to me that the violations complained of are continuing and transcend both constitutional regimes. To argue that the issues raised are barred by the doctrine of non-restrospectivity is an error and in saying so, I am guided by the decision of the Supreme Court in Samuel Kamau Macharia (supra).

227. To my mind, and taking into account the observations supra, I come to the conclusion that the activities complained of and the manner in which same were undertaken, suffice to warrant the grant of exemplary damages.

228. Simply put, the actions complained of were not only oppressive but were calculated to injure the Petitioners' rights to property in terms of Article 40, even though it is the government and the state agencies which are obliged to protect the rights of her citizens. [See the provisions of Article 10[1], 19 and 20 of *the Constitution*, 2010]

229. To buttress the holding that the Petitioners are entitled to exemplary damages, it suffices to cite and reference the holding of the Court of Appeal in the case of Municipal Council of Eldoret v Titus Gatitu Njau 2020 eKLR where the court elaborated on the circumstances that would give rise to an award of exemplary or punitive damages.

230. For coherence, the court stated and held thus:

> 28. This Court, in Nation Media Group v Gideon Mose Onchwati & Kenya Oil Company Limited [2019] eKLR stated as follows:
>
> > " The bulk of the learned Judge's award fell under the head of exemplary damages for which she granted some Kshs. 12,000,000. Now, exemplary damages are awardable in very rare instances where the conduct of the defendant is deserving of punishment, and they are meant to vindicate the law. They have nothing to do with compensating the plaintiff. This Court in THE Nairobi Star Publication Limited V Elizabeth Atieno Oyoo [2018] addressed this issue as follows, and we agree;
> >
> > As regards exemplary damages, the same are only to be awarded in limited instances. The categories of cases in which exemplary damages should be awarded are set out, in paragraph 243 of Halsbury's Laws of England, as follows:
> >
> > (1) Oppressive, arbitrary or unconstitutional actions by servants of government;
> >
> > (2) Conduct calculated by the defendant to make him a profit which may well exceed the compensation payable to the plaintiff; or
> >
> > (3) Cases in which the payment of exemplary damages is authorized by statute."
> >
> > See also John V Mgn Limited (supra).
> >
> > We are not satisfied from our perusal of the record, and from the submissions made before us, that there is anything in the conduct of NMG (the appellant), far from laudable though it was, that was so callous, reprehensible, steeped in impunity or actuated by mercenary considerations, that it called for the extreme measure of punishing it by way of exemplary damages. The same did not lie and we would set aside that head and the sum of Kshs. 12,000,000 in entirety."

231. Premised on the ratio decidendi highlighted in the decision supra, I find and hold that the Petitioners are entitled to exemplary damages for the offensive activities touching on and concerning L.R. No. 4508/1. In this regard, I proceed to and do hereby award exemplary damages of KES 100,000,000.

232. Other than the foregoing, it is also not lost on this court that the trespass complained of is a continuing trespass. In any event, the Northern Bypass which is complained of has already been constructed and same shall remain on L.R. No. 4508/1, for posterity.

233. Owing to the foregoing, no amount of award on account of general damages and exemplary damages would suffice. In this regard, it is the finding and holding of this court that the 5th Respondent ought to proceed and issue the requisite gazette notices towards compulsory acquisition of L.R. No. 4508/1. In this regard, the 5th Respondent is hereby ordered and directed to commence the process of compulsory acquisition in accordance with the provisions of 107-113 of the *Land Act* 2012 [2016].

234. For good measure, the process pertaining to and concerning compulsory acquisition should be commenced by the 5th Respondent within 60 days from the date of the judgement herein. Furthermore, upon the completion of the process of compulsory acquisition, the 5th Respondent should proceed to pay out the just and due compensation to underpin compulsory acquisition of L.R. No. 4508/1.

235. For coherence, the compensation that would arise from the process of compulsory acquisition [details in terms of the preceding paragraphs] is separate and distinct from the payment of general and exemplary damages, which are premised on the fact that the activities thus far constitute trespass.

236. Furthermore, the Petitioners herein also sought for compensation on account of loss of use and means profits. Nevertheless, there is no gainsaying that where a claimant, the Petitioners not excepted, have sought for general damages, same cannot simultaneously seek for mesne profits.

237. However, where a claimant seeks for both general damages and mesne in the same cause, it behoves the court to decree and award one and thereafter decline/dismiss the other. In this regard, having decreed and awarded recompense on account of general damages, the Petitioners herein cannot simultaneously accrue any further award on account of mesne profits.

238. To this end, it suffices to cite and reference the holding of the Court of Appeal in the case of Christine Nyanchama Oanda v Catholic Diocese of Homa Bay Registered Trustees [2020] eKLR where the court stated and held as hereunder:

> It is settled law that where a party claims for both mesne profits and damages for trespass, the court can only grant one and not both. Mesne Profits is defined as the profit of an estate received by a tenant in wrongful possession between the dates when he entered the suit property and when he leaves (See: Black's Law Dictionary 9th edition). Mesne Profits must be pleaded and proved. In the case Peter Mwangi Msuitia & Another v Samow Edin Osman [2014] eKLR, this Court held as follows:
>
> > " As regards the payment of mesne profit, we think the applicant has an arguable appeal. No specific sum was claimed in the Plaint as mesne profit and it appears to us prima facie, that there was no evidence to support the actual figure awarded..."
>
> In the case of Inverugie Investment v Hackett (Lord Lloyds [1995]3 ALL ER 842 it was held thus:
>
> > " Our understanding of the above persuasive authority is that once the learned Judge made the award under the subhead "mesne profits" there was no justification for him awarding a further Kshs.10 million under the subhead "trespass" since both mean one and the same thing..."

239. The Petitioners also sought compensation on account of (sic) the dam that was constructed on L.R No. 5980. To this end the Petitioners sought for the sum of KES 1,500,000 only. Nevertheless, there is no gainsaying that despite laying a claim for compensation on account of the dam, no evidence was placed before the court either in terms of a feasibility report, the requisite licenses from WARMA, NEMA or even the local authorities. Besides, the Petitioners did not tender and/or adduce any Bill of quantities if any.

240. Suffice it to point out that the claim for compensation on account of the dam constitutes special damages and hence it behoved the Petitioners not only to plead same but to specifically prove the loss. Sadly, no plausible or cogent evidence was tendered before the court.

241. Without belabouring the point, it suffices to cite and reference the decision in Peter Mark Gershom Ouma v Nairobi City Council [1976] eKLR where the court stated and held thus:

> Thus for a plaintiff to succeed on a claim for special damages he must plead it with sufficient particularity and must also prove it by evidence. As to the particularity necessary for pleading and the evidence in proof of special damage the court's view is as laid down in the English leading case on pleading and proof of damage, Ratcliffe v Evans (1892) 2 QB 524 where Bowen L J said at pages 532, 533:
>
> The character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.

242. Other than the fact that the Petitioners neither tendered nor produced the requisite evidence to prove the loss attendant to (sic) the dam, it is also not lost on the court that the alleged dam was said to have been constructed on L.R No. 5980 which the court found and held to have ceased to exist upon the registration of the sub-division scheme.

243. Whichever way one looks at the claim pertaining to compensation for (sic) the dam, the bottom line is that the claim thereunder has neither been proven nor established. Same is therefore not tenable.

244. Finally, the Petitioners herein also sought for compensation for 16.38 acres comprising of L.R No. 5980 and 4508/1 which was encroached upon. In this regard, the Petitioners sought for the sum of KES 1,865,300,000 only. At any rate, the Petitioners highlighted and relied on the valuation report prepared by PW3 [James Wagema Ruitha].

245. Nevertheless, even though the Petitioners tendered and produced the said valuation report, it is important to point out that the said valuation report did not articulate what value is assignable to L.R No. 5980 and L.R No. 4508/1. For good measure, the report made an omnibus valuation touching on and concerning the two properties in question.

246. However, while discussing issue number one, this court found and held that L.R No. 5980 ceased to exist and thus no valuation could attach to a non-existent parcel of land. On the other hand, whereas the court has found that the Petitioners rights to L.R No. 4508/1 were violated, there is no valuation report speaking exclusively to the value of L.R No. 4508/1.

247. Other than the foregoing, it is also worth recalling that computation of the award for purposes of compulsory acquisition is the preserve of the National Land Commission. Furthermore, the process to be followed towards ascertaining the valuation for purposes of making an award is very elaborate. Simply put, it is the National Land Commission to undertake the valuation and generate the award.

248. In view of the foregoing, this court is unable to discern what figure out of the valuation report is assignable to L.R No. 4508/1 or otherwise. In this regard, I find and hold that the valuation report by PW3 is of no assistance to the court.

249. Notwithstanding the foregoing, it is also not lost on the court that the court has since made a directive elsewhere hereinbefore that National Land Commission should commence the process of compulsory acquisition of L.R No. 4508/1 within 60 days from the date of the judgement and thereafter generate the requisite award to the Petitioners.

iv. Whether the Cross-Petition is meritorious and if so, what reliefs ought to be granted, if any.

250. The 1st Respondent herein filed a Cross-Petition dated 12th June 2023 and in respect of which same sought for various reliefs. For coherence the reliefs sought at the foot of the Cross-Petition are diverse. Nevertheless, the crux of the Cross-Petition touches on whether or not L.R 5980/1 and 5980/2, respectively constitute public properties on account of surrender.

251. As pertains to whether L.R 5980/1 and 5980/2 indeed constitute public property it suffices to revert to the evidence of PW2 [Suleiman Harunani], who testified and stated as hereunder:

> " The resultant portions are namely L.R. No. 5980/1, L.R. No. 5980/2, L.R. No. 5980/3 and L.R. No. 5980/4. L.R. No. 5980/1 was reserved for public use. L.R. No. 5980/2 was surrendered for roads. L.R. No. 5980/3 was for the Gatabakis and L.R. No. 5980/4 was for the Gatabakis but the same was earmarked for transfer. The sub-divisions have not been cancelled to date.
>
> L.R. No. 5980/1 shows that the area was for public use. L.R. No. 5980/2 is shown to be reserved for the proposed road. L.R. No. 5980/2 does not show and/or refer to a proposed road for acquisition.
>
> In respect of L.R. No. 5980/1, 5980/2, 5980/3 and 5980/4 all the deed plans were given to the advocates for the Gatabakis. The deep plan for L.R Nos. 5980/1, 5980/3 and 5980/4 were returned. However, the deed plan for L.R. No. 5980/1 and 5980/2 were never released to me. I do confirm that L.R Nos. 5980/1 and 5980/2 were surrendered to the government.
>
> "The suit property herein, namely L.R. No. 5980/2 was surrendered to the government. I wish to add that L.R. No. 5980/2 arose from the sub-division of L.R. No. 5980." Referred to documents no. 2 at the foot of the Respondents' List and Bundle of Documents and the witness states that "the document is the Survey Plan No. F/R 185/71. The Survey Plan relates to the subdivision of L.R. No. 5980".

252. Additionally, RWI also adverted to the fact that L.R Nos. 5890/1 and 5980/2 were indeed surrendered. For good measure, RW1 stated as hereunder:

> " I am aware that L.R. No. 5980/2 was surrendered because there was a surrender. The surrender was duly filed/lodged with the Director of Survey. The surrender was duly registered. The registration is indicated on the Deed Plan as a surrender."

253. To the extent that L.R Nos. 5890/1 and 5980/2 were indeed surrendered to the government and thus became public properties, same cannot therefore be claimed by the Petitioners. For good measure, once land is surrender to the government, the subject land remains public land and is held for and on behalf of the public. Furthermore, such land is subject to public trust principles. [See Town Council of Awendo v Nelson O Onyango 1st - 13th Respondents, Attorney General 14th Respondent; Abdul Malik Mohamed & 178 others (Petition *37 of 2014*) [2019] KESC 38 (KLR)].

254. Arising from the foregoing, there is therefore no gainsaying that the Petitioners herein through Suleiman Harunani could not purport to deal with the deed plan underpinning L.R No. 5980/2 in

any other manner including the fraudulent creation of deed plan no. 465367 dated 24th March 2023 pertaining to and concerning L.R No. 5980/74.

255. Put differently, the deed plan attendant to and underpinning L.R No. 5980/74 and any resultant sub-divisions arising therefrom are unlawful and void. To this end, it suffices to reiterate the doctrine of ex nihilo nihil fit – out of nothing comes nothing.

256. In view of the foregoing, there is no gainsaying that L.R No. 5980/1 and L.R No. 5980/2, constitute public land and thus same cannot be encroached upon and/or claimed by the Petitioners. In any event, if the Petitioners have encroached thereto, then same must vacate and handover vacant possession to the Hon. Attorney General on behalf of the people of Kenya.

257. In a nutshell, my answer to issue number four [4] is to the effect that the Cross-Petition is merited to the extent that L.R Nos. 5980/1 and 5980/2, respectively were duly surrendered to the government and thus same constitute public property.

258. Additionally, the Cross-Petition is also successful to the extent that no compensation can issue to and on account of L.R No. 5980/2 insofar as same was duly surrendered to the government. Furthermore, the Deed plan underpinning the surrender was duly registered. [See the evidence of RW2, who highlighted that the surrender deed plan in respect of L.R No. 5980/2 was registered on 7th March 1986]. [See also the evidence od PW2, while under cross examination by Learned Chief Litigation Counsel].

Final Disposition:

259. Flowing from the analysis [details highlighted in the body of the judgement herein], it must have become evident and apparent that the Petitioners have partially succeeded on their claims at the foot of the Further Amended Petition dated 6th April 2023.

260. On the other hand, the 1st Respondent has also partially succeeded on the basis of the Cross-Petition and in particular as pertains to the fact that L.R Nos. 5980/1 and 5980/2, respectively, were duly surrendered to the government and thus became public land.

261. Arising from the foregoing, the Further Amended Petition is allowed on the following terms:

i. A declaration be and is hereby made that L.R No. 5980 ceased to exist and became non-existent following the registration of the sub-division scheme touching on and concerning the said L.R No. 5980. For coherence, the portion of Land belonging to the Petitioner is LR No 5980/3.

ii. A declaration be and is hereby made to the effect that L.R No. 5980 having ceased to exist, no rights accrue to and in favour of the Petitioners herein which was capable of being breached and/or violated by the Respondents, either as claimed or at all.

iii. A declaration be and hereby made to the effect that L.R No. 4508/1 lawfully belong to the Petitioners and that same was never compulsorily acquired in accordance with the provisions of the Land Acquisition Act Chapter 295 Laws of Kenya [now repealed] or at all.

iv. The actions and/or activities of the Respondents and in particular the construction of the Norther Bypass on L.R No. 4508/1 constitutes and amounts to trespass to property.

v. The Petitioners be and are hereby awarded general damages in the sum of KES 200,000,000 only for trespass to L.R No. 4508/1.

vi. The Petitioners be and are hereby awarded the sum of KES 100,000,000 on account of exemplary damages for trespass to L.R No. 4508/1.

vii. The awards in terms of clauses (v) and (vi) shall attract interest at court rates from the date of judgement until payment in full.

viii. The award in terms of clauses (v) and (vi) shall be borne by the 6th Respondent.

ix. The 5th Respondent be and is hereby ordered to commence the process of compulsory acquisition of L.R 4508/1 in accordance with the provisions of Sections 107-113 of the *Land Act* 2012 [2016] and thereafter to generate the requisite award in favour of the Petitioners.

x. The process pertaining to compulsory acquisition in terms of clause (ix) shall be commenced within sixty (60) day from the date of judgement.

xi. The compensation arising from the compulsory acquisition shall be payable in addition to the award of general damages and exemplary damages.

xii. The claim for compensation for 16.38 acres in the sum of KES 1,865,300,000 only be and is hereby dismissed.

xiii. The claim for loss of user, aggravated damages and mesne profits be and is hereby dismissed.

xiv. The claim for compensation on account of (sic) the dam be and is hereby dismissed.

xv. Any relief not expressly granted is hereby declined.

xvi. The Petitioners be and are hereby awarded half costs of the Petition and same shall be borne by the Respondents, jointly and/or severally.

262. The Cross-Petition by and on behalf of the 1st Respondent has also partially succeeded. In this regard, judgement be and is hereby entered in the following terms:

i. A declaration be and is hereby issued that the land constituted as L.R. No. 5980/2 is public land which was surrendered for a road and not available for allocation for private use and the Respondents to the Cross-Petition herein cannot and are not entitled for compensation at all.

ii. A declaration be and is hereby issued that the land constituted as L.R No. 5980/1 measuring approximately 7.340 hectares; Deed Plan Number 125786 was issued for surrender purposes in respect of a public utility and same is therefore public land.

iii. An order be and is hereby issued to the effect that the procurement and creation of Deed Plan Number 465367 dated 24th March 2023 in respect of L.R 5980/74 by the Respondents was unlawful, illegal and unconstitutional.

iv. An order be and is hereby issued quashing Deed Plan No. 465367 dated 24th March 2023 in respect of L.R No. 5980/74.

v. A declaration be and is hereby issued to the effect that the Respondents to the Cross-Petition are not entitled to compensation by way of compulsory acquisition as there was no compulsory acquisition but a surrender of L.R No. 5980/2.

vi. The Respondents to the Cross-Petition be and are hereby ordered to vacate and handover vacant possession in respect of L.R No. 5980/1 measuring approximately 7.340 hectares; Deed Plan No. 125786 to the 1st Respondent on behalf of the People of Kenya and same to be handed over within 90 days from the date of judgement.

vii. In default to vacate and handover vacant possession of L.R No. 5980/1 measuring approximately 7.340 hectares; Deed Plan No. 125786, the 1st Respondent shall be at liberty to levy eviction against the Respondents to the Cross Petition and the costs/expenses incurred shall be certified by the Deputy Registrar and same to be recovered as part of costs.

viii. Additionally, any sub-division arising from L.R No. 5980/1 measuring approximately 7.340 hectares; Deed Plan No. 125786 be and are hereby declared null and void.

ix. The Chief Land Registrar and the Directorate of Survey be and are hereby mandated/ authorised to revoke any deed plan and certificate of title arising from L.R No. 5980/1 measuring approximately 7.340 hectares; Deed Plan No. 125786 and thereafter to expunge same from their records.

x. Any relief not expressly granted is hereby declined.

xi. The 1st Respondent be and is hereby awarded half costs of the Cross-Petition and same shall be borne by the Respondents to the Cross-Petition jointly and/or severally.

263. It is so ordered.

DATED, SIGNED AND DELIVERED ON THE 23RD DAY OF SEPTEMBER 2024

OGUTTU MBOYA

JUDGE.

In the presence of:

Benson – Court Assistant.

Mr. Paul K. Muite SC, Mr. Gatheru Gathemia and Mr. Patrick Ndambiri for the Petitioners.

Ms Kerubo h/b for Mr. Oscar Eredi (Chief litigation counsel) for the 1st – 4th , 6th and 7th Respondents

Ms. Wanini for the 5th Respondent