



**Ngoje & 7 others v National Irrigation Authority & another (Civil Appeal E090 & E097 of 2024 (Consolidated)) [2025] KEELC 771 (KLR) (14 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 771 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
CIVIL APPEAL E090 & E097 OF 2024 (CONSOLIDATED)**

**JO MBOYA, J  
FEBRUARY 14, 2025**

**BETWEEN**

**EZRA OPIYO NGOJE ..... 1<sup>ST</sup> APPELLANT  
PETER ANYUOR MANG'IRA ..... 2<sup>ND</sup> APPELLANT  
GEORGE ODHIAMBO LAGO ..... 3<sup>RD</sup> APPELLANT  
SOLOMON OWITI AKURA ..... 4<sup>TH</sup> APPELLANT  
ISAAC OGAL AKURA ..... 5<sup>TH</sup> APPELLANT  
PETER ODHIAMBO AKURA ..... 6<sup>TH</sup> APPELLANT  
PIUS AMOLO OOKO ..... 7<sup>TH</sup> APPELLANT  
PAMELA ATIENO NYAOKE ..... 8<sup>TH</sup> APPELLANT**

**AND**

**NATIONAL IRRIGATION AUTHORITY ..... 1<sup>ST</sup> RESPONDENT  
NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

*(Being appeals from the Judgment of the Land Acquisition Tribunal dated and delivered on 14th June 2024 in Tribunal case No. TRLA/E008 of 2024 – EZRA OPIYO NGOJE as consolidated with TRLAP/E004/2024 Peter Anyuor Mangira, TRLAP/E005/2024 George Odhiambo Lago, TRLAP/E006/2024 Solomon Owiti Akura, TRLAP/E007/2024, Isaac Ogal Akura, TRLAP/E009/2024 – Peter Odhiambo Akura TRLAP/E010/2024 – Pius Amolo Ooko and TRLAP/E011/2024 – Pamela Atieno Nyaoke all against National Irrigation Authority and National Land Commission)*



## JUDGMENT

### Introduction And Background:

1. The Appellants herein [who were the Claimants in various matters before the Land Acquisition Tribunal] filed various Statements of Claim and wherein same [Appellants] sought the following reliefs:
  - i. A declaration that the absent payment of just compensation and promptly, the purported creating of wayleaves and public rights of way over and in respect of the Claimants' Land Parcel Number North Kadem/Kanyuor/646 in favour of the 1<sup>st</sup> Respondent and/or its predecessor did not follow the law, is unconstitutional, illegal, unlawful, null and void and is of no effect and ought to be removed from the land at a cost to the Respondents.
  - ii. A declaration be issued to the effect that the Claimant is entitled to prompt and adequate compensation in the sum and amounts as claimed in the proceedings being the value of the portion of land lost.
  - iii. A declaration be issued that policy decisions and regulations affecting the public and rights of individuals must conform to *the constitution* and the relevant statute in terms of both its content and the manner in which it is adopted and failure to comply renders the policy decision, regulation or acts invalid and that the decision by the 1<sup>st</sup> Respondent [National Irrigation Authority] to commence construction of MD4 of the detailed design of Lower Kuja Irrigation Development Project in Area B-Block 3 Sagama on L.R No. North Kadem/Kanyuor/646 without first implementing a resettlement action plan and payment of just compensation to the Claimant amounts to trespass, is unconstitutional, violates statute law, is illegal, unlawful and therefore null and void.
  - iv. A declaration that the now abandoned construction activities of the 1<sup>st</sup> Respondent at MD4 of the detailed design of Lower Kuja Irrigation Development Project in Area B-Block 3 Sagama on L.R No. North Kadem/Kanyuor/646 without creation of wayleaves and without adequate payment of prompt and adequate compensation as provided for by the law has infringed, violated and/or threatened the Claimants' property rights.
  - v. Compensation on terms and in the nature of special damages as pleaded in paragraph 25 of the Claim herein be ordered payable to the Claimant.
  - vi. General and exemplary damages for trespass to land and for violation of rights to property and the right to clean and healthy environment.
  - vii. An order be issued compelling the 1<sup>st</sup> Respondent to meet the cost of resurvey and marking of the boundaries to land parcel No. North Kadem/Kanyuor/646 by a registered and or licenced surveyor.
  - viii. Absent payment of just compensation as provided for by law being paid to the Claimant, a restoration order in respect of North Kadem/Kanyuor/646 and an order compelling the 1<sup>st</sup> Respondent to remove MD4 from the Claimants' land and to restore the land to its original state unless and until a prompt and adequate compensation is paid to the Claimant for the wayleaves as is provided for by law.
  - ix. Costs of the suit be awarded to the Claimant.



- x. And the Claimant will further and forever continue praying to this Tribunal as a project affected person in general for appropriate reliefs as the Tribunal may deem fit and just to grant and concerning the 1<sup>st</sup> Respondent's activities as affecting and negatively impacting on the Claimants' property and to restore and ensure a clean and safe environment.
2. The rest of the Claims replicate the reliefs that have been highlighted and captured in the preceding paragraph. Suffice it to state that the claims by the Appellants herein were canvassed before the tribunal culminating into the delivery of the Judgement rendered on 14<sup>th</sup> June 2024, wherein the Tribunal issued assorted order[s].
3. Aggrieved by the Judgement of the Tribunal, the Appellants herein filed the instant appeal and wherein the Appellants have adverted to various grounds. For coherence, the grounds of appeal at the foot of the Memorandum of Appeal dated 3<sup>rd</sup> July 2024 are as hereunder:
  - i. The decision of the tribunal is contrary to both law and usage having the force of law since the tribunal failed to make specific findings and to issue a declaration that the 1<sup>st</sup> respondent, National Irrigation authority had trespassed onto each of the respective appellants' parcels of land as had been pleaded, committed wanton acts of damage and destruction by creating an irrigation infrastructure known as MD 4 thereon, which later turned into a huge canyon, causing loss and damage and in failing to award general damages for trespass which trespass is continuing.
  - ii. The tribunal erred in fact and in law when it failed to determine some material issue of law and to award compensatory damages in the manner as had been sought by each appellant in their respective statement of claim and as captured correctly at paragraph 10 of the judgment for each appellant and based on the valuation report that was produced in evidence before it without any objection, absent any other counter valuation report, which claim was in the nature of special damages which were clearly pleaded and proved as required.
  - iii. The tribunal erred in law when it failed to make a determination and to issue orders of declarations on each of the specified violations of rights of the appellants as had been pleaded with respect to unlawful, irregular and unconstitutional creation of wayleaves and on the rights to fair administrative action under Article 47, right to freedom from and against discrimination under article 27, and the right to equal benefit and equal protection of the law contrary to articles 28 of *the constitution* and in failing to make an appropriate award in the nature of damages and compensation as are applicable to constitutional litigation and where rights are found to have been violated and without assigning reasons for such a failure.
  - iv. The tribunal erred in law and in fact when it failed to award exemplary damages in the circumstances of the disputes as were before it to each respective appellant given the unconstitutional, arbitrary, unlawful and recklessness acts of continuing trespass, in the creation of wayleaves over the appellants' parcels of land as it found to have occurred, without prompt and adequate compensation, which in effect amounted to expropriation of land without compensation.
  - v. The global sum[s] awarded to each appellant by the tribunal, Mesne profits, given the circumstances were so inordinately low and inadequate, as to amount to an obvious error and a mistake on the part of the tribunal in the exercise of its discretion in the award of such damages, where trespass and violation of fundamental rights are proven and do not compare well or at all to awards made previously in similar cases as had been cited before it and such low awards, defeats the very purposes of seeking compensation and redress for rights violation before courts



and the purpose for which courts make them and thus warrants being interfered with by an appellate court.

- vi. The tribunal erred in abdicating its statutory duty, role function and mandate and ceding the same to the 2<sup>nd</sup> respondent, a litigant and a judgment debtor in the proceedings to determine the amount and value of compensation due to each appellant in the circumstances of the disputes thus making the 2<sup>nd</sup> respondent a judge in its own cause, which actions offend and engages the provisions of the right of access to justice and the rights contemplated by article 47(3) (a) of *the constitution*.
  - vii. The amount of Kshs.200,000/= only, awarded to each appellant as mesne profits given the duration of the continuing trespass is so inordinately low as to constitute an erroneous estimate of the damages which each appellant continues to suffer since September 2019 when the 1<sup>st</sup> appellant trespassed onto each respective parcel and have denied the appellants occupation and use of the same and there no prospects of restoration of the same in the foreseeable future.
  - viii. The tribunal, in effect failed to take into account the fact that a public project that was meant to have brought benefits and advantages to the appellants as part of the community instead through open neglect, corruption, misuse of resources and open discrimination has resulted instead to the destruction of property and loss of livelihood and in failing to make an appropriate award that would go towards resettlement action plan and livelihood restoration which the 1<sup>st</sup> respondent has neglected to undertake without reasons.
4. Other than the Appellants in respect of appeal E090 of 2024, the 1<sup>st</sup> Respondent in the said appeal, namely, National Irrigation Authority [NIA], also filed a separate and distinct appeal. For coherence, the appeal on behalf of the National Irrigation Authority was assigned and designated as Milimani ELC Appeal Number E097 of 2024.
5. Vide the Memorandum of Appeal dated 12<sup>th</sup> July 2024, the Appellant [National Irrigation Authority] has raised the following grounds of appeal:
- i. The Honourable tribunal erred in law in conferring upon itself the jurisdiction to hear and determine the matters related to a violation of rights as a result of the process of compulsory acquisition of land when:
    - a. Section 133C of the *Land Act* limited the Honourable tribunal's jurisdiction to hearing and determining appeals from the decision of the commission relating to the process of acquisition of land.
    - b. The Jurisdiction to issue a declaration of the rights as sought by the 1<sup>st</sup> to 8<sup>th</sup> respondents is a preserve of the high court and courts of equal status under Article 165 (3) (b) of *the constitution*.
  - ii. The Honourable tribunal erred in law and in fact in failing to consider the appellant's intention was to formally register the wayleaves upon obtaining the consent of the respondents and not to compulsorily acquire the land.
  - iii. The Honourable tribunal erred in law and in fact in directing the 9<sup>th</sup> respondent (the National Land Commission) to conduct a survey and valuation of the suit properties when:
    - a. It did not have any jurisdiction to hear and determine the dispute before it and



- b. The said directive from the Honourable tribunal steers the appellant to compulsory acquire the suit properties when the tribunal found that way leaves had been created and made no finding towards compulsory acquisition.
  - iv. The Honourable tribunal erred in fact and in law in awarding the respondents mesne profits of the sum of Kshs.200,000/= only, each on account of a breach of the respondent's constitutional rights without justification and presentation of a criteria used to arrive at the flat rate figure.
  - v. The Honourable tribunal erred in fact and in law in finding that the respondents are entitled to mesne profits despite its preliminary finding that no special damages were due to the claimants before it.
  - vi. The Honourable tribunal erred in law rejecting the doctrine of purposive interpretation of article 23 of the 2010 constitution and the *land act* in favour of narrow, restrictive and pedantic interpretation and hence arrived at the wrong conclusions.
6. The two [2] appeals, namely, E090 of 2024 and E097 of 2024 were consolidated and heard together. Suffice it to state that the proceedings were undertaken in the file respecting Milimani ELCA Number E090 of 2024. Simply put, the guiding file in respect of the two appeals is ELCA Number E090 of 2024.
  7. Further and in an addition, the parties agreed to canvass and dispose of the appeals by way of written submissions. In this regard, the court proceeded to and circumscribed the timelines for the filing and exchange of the written submissions.
  8. First forward, the Appellants filed written submissions dated 25<sup>th</sup> November 2024; whereas the 1<sup>st</sup> Respondent filed written submissions dated 18<sup>th</sup> December 2024. The two [2] sets of written submissions form part of the record of the court.

### **Parties' Submissions:**

#### **Appellants' Submissions**

9. The appellants' filed written submissions dated 25<sup>th</sup> November 2024 and wherein the appellants raised, highlighted and canvassed five [5] salient issues for consideration and determination by the court. Firstly, learned counsel for the appellants submitted that the tribunal erred in law in failing to determine all the issues that were raised and canvassed by the appellants. In particular, it was submitted that the appellants herein had raised various/diverse declaratory issues, which required determination by the Honourable Tribunal.
10. Nevertheless, learned counsel for the appellants has submitted that despite the tribunal finding and holding that the 1<sup>st</sup> Respondent had indeed violated, breached and infringed upon the rights of the appellants same [tribunal] failed to grant specific declaratory reliefs. In this regard, it was submitted that the failure by the tribunal to issue/grant the diverse declaratory reliefs, which were sought for vide the Statements of Claim, has occasioned a miscarriage of justice.
11. Secondly, learned counsel for the appellants has submitted that in failing to adjudicate on and determine all the issues that were placed before it, the tribunal abdicated its jurisdictional mandate and thus failed to discharge/perform its statutory duties in accordance with the law.
12. Thirdly, learned counsel for the appellants has submitted that the appellants laid and/or placed before the tribunal sufficient material and or evidence underpinning their claim for recompense. In particular,



it was posited that the appellants placed before the tribunal material to warrant the grant of orders of general damages for trespass and exemplary damages, but the tribunal failed to exercise its judicial mind towards addressing recompense in favour of the appellants.

13. It was submitted that by failing to address and adjudicate upon the question of general damages for trespass and exemplary damages, the tribunal denied and or deprived the appellants of lawful entitlements and appropriate remedies under the Law.
14. To support the submission that the appellants were entitled to recompense, on account of general damages for trespass and exemplary damages, learned counsel for the appellants has cited and referenced various decisions including *Attorney General vs Zinji Ltd [petition 1 of 2020]* [2021] KESC 23 (KLR) (siv) (3<sup>rd</sup> December 2021) (Judgment); *Telkom Kenya Ltd and another vs the Ministry of Sports Culture and Heritage and 4 others; Ministry of Public Service, Youth and Gender Affairs and 2 others (interested parties)* [Environment and Land Petition No. 11 of 2021] [2023] KEELC 19328 (KLR) (17<sup>th</sup> July 2023) (Judgment) and *Gatabaki and another vs AG & others (Environment and Land Petition 44 of 2018)* [2024] KEELC 6088 (KLR) (23<sup>rd</sup> September 2024) (Judgment).
15. Fourthly, learned counsel for the appellants has also submitted that the tribunal erred in law and fact in failing to award to and in favour of the appellants exemplary damages, yet the conduct of the 1<sup>st</sup> Respondent in creating the wayleaves and establishing the offensive irrigation infrastructure on the appellants lands was not only oppressive, wanton, illegal but also cynical.
16. In any event, it was submitted that the appellants herein had placed before the tribunal sufficient material and evidence to warrant the grant of exemplary damages, taking into account that the First Respondent is a State Organ and thus ought to operate within the confines of *the Constitution* and the Law.
17. Fifthly, learned counsel for the appellants has submitted that though the tribunal assessed and awarded mesne profits in favour of the appellants' and made the award of mesne profits in the sum of Kshs.200,000/= only, same was contended to be inordinately low and unrealistic. In any event, it was submitted that the award and computation in respect of mesne profits did not take into account the pleadings and the evidence that was tendered by the appellants.
18. Owing to the foregoing submissions, learned counsel for the appellants has submitted that the award on account of mesne profits reflects the existence of an error of principle. In this regard, it was contended that this court ought to interfere with the said award.
19. To buttress the submissions that basis has been laid and or placed before the court to warrant interference with the award of mesne profits, learned counsel for the appellants has cited and referenced the decision in the case of *Peter M. Kariuki vs Attorney General (2014) eKLR*; and *Kemfro Africa Ltd t/a Meru Express vs Lubia & another (1987) KLR*.
20. Arising from the foregoing, learned counsel for the appellants has implored the court to find and hold that the appeal vide *Milimani ELC Appeal E090 of 2024*; is meritorious and thus same [appeal] ought to be allowed.
21. On the other hand, learned counsel for the appellants has submitted that the appeal vide *ELCA E097 of 2024*; which has been mounted by the 1<sup>st</sup> Respondent [National Irrigation Authority] is devoid of merits. In particular, it has been submitted that the tribunal was seized of the requisite jurisdiction to entertain and adjudicate upon the statement[s] of claim that were placed before it [tribunal] by the appellants.



22. Furthermore, learned counsel for the appellants [ELC Appeal E 090 of 2024] has also submitted that the tribunal was mandated to grant declaratory relieves taking into account the provisions of Articles 3, 10(1), 19, 23 (2) and 169 of *the constitution* 2010; as read together with section 133 C [6] [8] of the *Land Act* 2012 [2016].
23. To this end, learned counsel for the appellants has invited the court to find and hold that the appeal by the 1<sup>st</sup> Respondent, namely; Milimani ELCA E097 of 2024, is devoid of merits and thus ought to be dismissed with costs.

#### **1<sup>st</sup> Respondent's submissions:**

24. The 1<sup>st</sup> Respondent filed written submissions 18<sup>th</sup> of December 2024; wherein the 1<sup>st</sup> Respondent highlighted five [5] pertinent issues for consideration and determination. First and foremost, the 1<sup>st</sup> Respondent contended that the tribunal was divested of the requisite jurisdiction to entertain and adjudicate upon the dispute that was laid before it by the appellant[s] herein. In particular, the 1<sup>st</sup> Respondent posited that the tribunal was not seized of jurisdiction to address questions touching on and concerning the creation of wayleaves and [sic] Compulsory acquisition of Land.
25. Furthermore, the 1<sup>st</sup> Respondent submitted that in so far as the statement[s] of claim also adverted to and canvassed declaratory orders touching on violation[s] of Fundamental Rights and Freedoms under *the Constitution*, 2010; the tribunal was not seized of the requisite jurisdiction. For good measure, it was contended that it is only the High court and the Court of Equal Status, namely, the Employment and Labour Relations Court; and the Environment and Land Court; that are seized of the requisite jurisdiction to grant the declaratory orders by dint of Articles 165 (3) and 162 of *the Constitution* 2010.
26. To underpin the foregoing submissions, learned counsel for the 1<sup>st</sup> Respondent cited and referenced the provisions of section 133c [8] of the *Land Act* and Article 23 (2) of *the Constitution* 2010.
27. Further and in addition, learned counsel for the 1<sup>st</sup> Respondent also cited and referenced the holding in the case of Stephen Wachira Karani & another vs Ag & 4 others (2017) eKLR and Republic vs Transport Licensing Appeal Board, National Transport Safety Authority and Figkomba sacco Ltd the Ex-parte MN GN Sacco Ltd (2017) eKLR respectively, to buttress the position that the tribunal[s], like the one beforehand are not seized of the jurisdiction to grant the declaratory Orders, either in the manner sought or at all.
28. Arising from the foregoing, learned counsel for the 1<sup>st</sup> Respondent, posited that the tribunal was therefore devoid of jurisdiction to hear and entertain the dispute that was mounted/lodged by the appellants herein. Consequently, and in this regard, it was posited that the tribunal ought to have struck out the appellant's statements of claim.
29. Secondly, learned counsel for the 1<sup>st</sup> Respondent submitted that the 1<sup>st</sup> Respondent acquired wayleaves over and in respect of the suit properties in accordance with the provisions of Sections 143 to 148 of the *Land Act*, 2012 [2016]. In any event, it was contended that the manner in which the wayleaves were acquired was procedural and legitimate and thus the contention by the appellants that the acquisition/creation of the wayleaves was irregular and illegal, is erroneous and legally untenable.
30. Moreover, it was submitted that the 1<sup>st</sup> Respondent also engaged and involved the local community in the acquisition of the way leaves and the establishment of the irrigation infrastructure. In addition, it was submitted that the 1<sup>st</sup> Respondent also procured and obtained the requisite licence[s], namely; the Environmental and Social Assessment License from National Environmental Management Authority [NEMA].



31. Arising from the foregoing, learned counsel for the 1<sup>st</sup> Respondent has submitted that the 1<sup>st</sup> Respondent did not violate the fundamental rights and freedoms of the Appellants, either as alleged or at all. In any event, it was submitted that the 1<sup>st</sup> Respondent tendered plausible and cogent evidence to demonstrate non-violation of the fundamental rights of the appellants, but the tribunal failed to take into consideration the evidence tendered and adduced.
32. Additionally, it was submitted that the tribunal adopted and applied a skewed and slanted approach in its evaluation of the evidence that was tendered by the 1<sup>st</sup> Respondent. In this regard, learned counsel for the 1<sup>st</sup> Respondent submitted that the manner in which the tribunal evaluated the evidence on record culminated in the tribunal overlooking critical evidence showing that the creation and establishment of the wayleaves was undertaken in accordance with the law.
33. Thirdly, learned counsel for the 1<sup>st</sup> Respondent has submitted that the tribunal proceeded to and awarded mesne profits to and in favour of the appellants in the sum of Kshs.200,000/= only, to each and every appellant, on account of [sic] violation of the appellant's constitutional rights under article 40 [3] of *the Constitution* 2010. However, learned counsel for the 1<sup>st</sup> Respondent has submitted that the award of mesne profits was erroneous and misconceived.
34. In particular, learned counsel for the 1<sup>st</sup> Respondent has submitted that the appellants herein did not prove and or establish that the 1<sup>st</sup> Respondent had violated their [appellants] constitutional rights, to warrant the grant of any recompense, let alone an award on account of mesne profits.
35. Moreover, learned counsel for the 1<sup>st</sup> Respondent has also submitted that the tribunal failed to appreciate the relevant law applicable to and concerning the award of mesne profits. In this regard, it has been contended that the tribunal failed to appreciate that the appellants did not strictly and or specifically prove the claim for mesne profits, either as required under the law or at all.
36. To buttress the submissions pertaining to and concerning the manner of proving a claim for mesne profits, learned counsel for the 1<sup>st</sup> Respondent has cited and referenced the decision in Michael. J.C.K Kapsot vs Kotut Arap Too (2020) KELC 3194; Peter Mwangi Mbuthia and another vs Samow Aiden Osman (2024) eKLR and Chief Land Registrar and 4 others vs Nathan Tirop Koech & 4 others (2018) eKLR, respectively.
37. Additionally, learned counsel for the 1<sup>st</sup> Respondent has also submitted that the tribunal proceeded to and awarded mesne profits at a flat rate of Kshs.200,000/= only, to each and every appellant albeit without demonstrating the legal basis to warrant an award of mesne profits at a flat rate. Instructively, learned counsel posited that in the absence of any reason and or basis for deploying such a strategy, the decision by the tribunal was wrought with error and thus same has occasioned a miscarriage of justice.
38. Fourthly, learned counsel for the 1<sup>st</sup> Respondent has submitted that the learned tribunal was also in error in ordering and or directing the National Land Commission [NLC] to undertake a survey and valuation of the suit properties belonging to the appellants, with a view to facilitating compensation.
39. Pertinently, learned counsel for the 1<sup>st</sup> Respondent has submitted that the order/direction[s] of the tribunal was geared towards facilitating compensation allegedly on the basis of compulsory acquisition. However, it was contended that the 1<sup>st</sup> Respondent was not disposed to compulsorily acquire the suit properties. On the contrary, it was contended that the 1<sup>st</sup> Respondent had procured wayleaves which is not synonymous with compulsory acquisition.



40. It was the further submission by learned counsel for the 1<sup>st</sup> Respondent that the order by the tribunal was intended to steer the 1<sup>st</sup> Respondent to compulsorily acquire the suit property, yet the same tribunal had found and held that the 1<sup>st</sup> Respondent had already acquired/created way leaves.
41. To anchor the foregoing submissions, learned counsel for the 1<sup>st</sup> Respondent has cited and referenced the decision in Kenya Electricity Transmission Company Ltd vs Malicha [Environment and Land Appeal E20 of 2021] [2023] KEELC 71. (KLR).
42. Finally, learned counsel for the 1<sup>st</sup> Respondent has submitted that the circumstances surrounding the dispute beforehand did not warrant the grant of an order of exemplary/aggravated damage. In particular, learned counsel has submitted that the 1<sup>st</sup> Respondent acquired the wayleaves legally and in accordance with the law. In particular, it was contended that the 1<sup>st</sup> Respondent did not deploy and or use force in the acquisition of the wayleaves and the implementation of the irrigation infrastructure.
43. In short, learned counsel for the 1<sup>st</sup> Respondent has posited that the appellants did not establish and or prove the requisite ingredients to warrant the grant of an order of exemplary damages or at all. In this regard, Learned counsel contended that the tribunal was right in not granting an order for exemplary damages.
44. In support of the submissions touching on and concerning circumstances where an award of exemplary damages do issue, learned counsel for the 1<sup>st</sup> Respondent has cited and referenced inter alia Municipal Council of Eldoret vs Titus Gatitu Njau (2020) eKLR; Godfrey Julius Ndumba Mbogori & another vs Nairobi City Council (2018) eKLR and Ken Odoni and 2 others vs James Okoth Omburah T/a Okoth Omburah & Co. Advocates, respectively.
45. Arising from the foregoing submissions, learned counsel for the 1<sup>st</sup> Respondent has implored the court to find and hold that the Appeal by the appellants vide Milimani ELC Appeal E090 of 2024, is devoid of merits and thus ought to be dismissed.
46. On the contrary, it has been posited [submitted] that the appeal by the 1<sup>st</sup> Respondent, namely, Milimani ELC Appeal E097 of 2024, is meritorious and thus ought to be allowed with costs.

#### **Issues For Determination:**

47. Having reviewed the pleadings that were filed on behalf of the respective parties before the Land Acquisition Tribunal; the evidence tendered [both oral and documentary evidence]; the entire record of appeal; the judgment of the tribunal and upon consideration of the written submissions filed on behalf of the respective parties, the following issues emerge [crystalise] and are thus worthy of determination.
  - i. Whether the Land Acquisition Tribunal was seized of the requisite Jurisdiction to entertain the subject dispute and by extension, to grant the various reliefs that were sought/impleaded or otherwise.
  - ii. Whether the Land Acquisition Tribunal entertained and adjudicated upon all the issues/claims that were placed before it by the parties.
  - iii. Whether the Land Acquisition Tribunal abdicated its constitutional and statutory mandate [sic] in handing over the issues raised by the parties to and in favour of National Land Commission, which was a party to the suit and whether such conduct constitutes dereliction of duty.



- iv. Whether the award on account of Mesne profits in favour of the appellants in Appeal E090 of 2024; was lawful and well-grounded or otherwise.
- v. Whether the Land Acquisition Tribunal ought to have granted the declaratory reliefs sought together with general damages and exemplary damages or otherwise.
- vi. What reliefs, if any; ought to issue in respect of the subject appeal.

### **Jurisdictional Posture**

48. The Appeal beforehand is a first appeal from the decision of the court of first instance, namely, the Land Acquisition Tribunal. By virtue of being a first appeal, this honourable court is vested with the requisite jurisdiction to review, re-evaluate and re-analyse the findings of the court of first instance and thereafter to arrive at an independent- conclusion[s], taking into account the pleading[s] filed; evidence on record and the applicable laws.
49. Nevertheless, it is imperative to underscore that even though this court is clothed with jurisdiction to review, re-evaluate and re-analyse the findings and observations of the trial court, this court is however called upon to exercise necessary caution and circumspection. In addition, the court is called upon to defer to the findings of the trial court unless, the findings of the trial court are informed by extraneous factors or better still, are perverse to the evidence on record.
50. The scope and jurisdictional remit of this court whilst entertaining a first appeal has been elaborated upon and underscored in various decisions. In the case of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, the Court of Appeal for Eastern Africa [EACA] elaborated on the applicable principle and stated thus:

“...This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

51. Likewise, the extent and scope of the Jurisdiction of the first appellate court was also elaborated upon in the case of *Abok James Odera T/A A.J Odera & Associates versus John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, where the Court of Appeal held thus;

We also wish to be guided by the reasoning of this court in the case of *Mwana Sokoni versus Kenya Business Limited* (1985) KLR 931 page 934,934 thus:-

“Although this court on appeal will not lightly differ from the Judge at first instance on a finding of fact, it is undeniable that we have the power to examine and re-evaluate the evidence on a first appeal if this should become necessary. As was said by the house of Lords in *Sottos Shipping versus Sauviet Sohold*, the Times, March 16,1983.

“It is uncertain whether their Lordships should have reached the same conclusion on the evidence, but it is important that, sitting in the appellate court they should be over mindful of the advantages enjoyed of the trial Judge who saw and heard the witnesses and was in a comparably better position than the Court of Appeal to assess the significance of what was said, how it was said, and equally impotent what was not said”



Again, in *Peters versus Sunday Post Limited* (1958) EA424, a decision of the Court of Appeal for Eastern Africa, Sir Kenneth O' Conner, P said at page 429:

“It is a strong thing for an appellate court to differ from the finding on a question of fact of the Judge who tried the case and who has had the advantage of seeing and hearing and the witnesses”

52. Duly guided by the established position [ratio] which underlines the scope and extent of the jurisdiction of the 1<sup>st</sup> appellate court, I am now disposed to revert to the subject matter and to discern whether the Land Acquisition Tribunal [hereinafter and before referred to as tribunal] correctly applied the law in the course of determining the dispute between the parties.
53. Additionally, I am also well positioned to review and re-evaluate the factual matrix [evidence] presented before the tribunal and thereafter endeavor to ascertain whether the factual findings made and arrived at by the tribunal correspond with the weight of the evidence tendered by the parties and which is on record.

### **Analysis And Determination**

#### **Issue Number One (1) Whether the Land Acquisition Tribunal was seized of the requisite jurisdiction to entertain the subject dispute and by extension, to grant the various reliefs that were sought/impleaded or otherwise.**

54. The Appellant in respect of Appeal E097 of 2024 [the 1<sup>st</sup> Respondent herein] has contended that the Tribunal was neither seized nor possessed of the requisite jurisdiction to entertain and adjudicate upon the dispute that was raised by the claimants before the Tribunal. Furthermore, it has been contended that the Tribunal is not seized of the mandate to grant any declaratory orders/remedies, which were sought at the foot of the Statements of Claim.
55. Moreover, it has been contended that the grant of declaratory orders is the exclusive preserve of the High Court by dint of Article of 165 (3) of *the Constitution* and courts of equal status, namely, the Employment and Labour Court; and the Environment and Land Court, respectively. In this regard, it has been posited that the Tribunal could therefore not grant any of the declaratory orders that were sought and an endeavour by the Tribunal to grant such declaratory orders; if any, would be tantamount to the Tribunal acting ultra vires.
56. Arising from the contention by the 1<sup>st</sup> Respondent and in particular that the Tribunal was devoid and divested of the requisite jurisdiction, it is appropriate to interrogate the contention beforehand and to discern whether the Tribunal was indeed seized of the requisite jurisdiction.
57. Pertinently, the submissions touching on lack of jurisdiction raises two [2] perspectives, namely, whether the Tribunal was seized of jurisdiction to entertain the claims on behalf of the Appellants; and whether the Tribunal could grant [sic] declaratory reliefs or otherwise.
58. I beg to start with the first perspective. There is no gainsaying that the Appellants [who were the claimants before the Tribunal] have contended that the 1<sup>st</sup> Respondent herein created and established wayleaves over and in respect of their properties albeit without complying with the law. Furthermore, it was contended that the 1<sup>st</sup> Respondent also proceeded to and constructed massive canals which have impacted upon the storm water discharge system in the area.
59. Additionally, the Appellants complained that as a result of the offensive actions/activities by the 1<sup>st</sup> Respondent, the creation of wayleaves and public rights of way, the Appellants have been deprived of



their right to use their landed properties. In any event, the Appellants posited that the actions of the 1<sup>st</sup> Respondent have exposed the Appellant to perennial flooding of their homesteads as a result of the distorted storm water discharge system.

60. Other than the foregoing, the Appellants also complained that the creation of the wayleaves and the establishments of the public right of way were undertaken without just and prompt compensation. In this regard, the Appellants also highlighted breach, violation and infringement of their [Appellants] right to property in terms of Article 40 of *the Constitution* and right to clean and healthy environment under Article 42 of *the Constitution*.
61. To my mind, the crux/substratum of the Appellants' claim turns on the legitimacy of the wayleaves that were created by the 1<sup>st</sup> Respondent; the establishment of public right of way and the violation of the Appellants' right to property. Nevertheless, the key pillar/cornerstone that anchor the Appellants' claim is the manner in which the impugned way leaves were created.
62. It is my humble position that the question touching on and concerning the legitimacy of wayleaves and the attendant compensation or otherwise is an issue that falls within the statutory mandate and jurisdiction of the Tribunal. For good measure, the Tribunal is conferred with the jurisdiction of first instance in matters of wayleaves and establishment of public right of way.
63. Put differently, the Tribunal constitutes the first port of call for every claimant, the Appellants herein not excepted, who has a claim touching on and concerning the legitimacy of the creation of [sic] wayleaves and establishment of public right of way. This jurisdiction is statutorily conferred and thus belongs to the Tribunal.
64. To underscore the jurisdiction of the Tribunal to deal with or to entertain and adjudicate upon matters of wayleaves and establishment of public right of way, it is imperative to reference the provisions of Section 133 (c) of the *Land Act*, 2012 [2016]. In particular, Section 133 (c) (6) of the *Land Act* [supra] is pertinent and apt.
65. For ease of appreciation, the provisions of Section 133 (c) of the *Land Act* [supra] are reproduced as hereunder:

#### 133 C. Jurisdiction of the Tribunal

- (1) The Tribunal has jurisdiction to hear and determine appeals from the decision of the Commission in matters relating to the process of compulsory acquisition of land.
- (2) A person dissatisfied with the decision of the Commission may, within thirty days, apply to the Tribunal in the prescribed manner.
- (3) Within sixty days after the filing of an application under this Part, the Tribunal shall hear and determine the application.
- (4) Despite subsection (3), the Tribunal may, for sufficient cause shown, extend the time prescribed for doing any act or taking any proceedings before it upon such terms and conditions, if any, as may appear just and expedient.
- (5) If, on an application to the Tribunal, the form or sum which in the opinion of the Tribunal ought to have been awarded as compensation is greater than the sum which the Commission did award, the Tribunal may direct that the Commission shall pay interest on the excess at the prescribed rate.



- (6) Despite the provisions of sections 127, 128 and 148 (5), a matter relating to compulsory acquisition of land or creation of wayleaves, easements and public right of way shall, in the first instance, be referred to the Tribunal.
- (7) Subject to this Act, the Tribunal has power to confirm, vary or quash the decision of the Commission.
- (8) The Tribunal may, in matters relating to compulsory acquisition of land, hear and determine a complaint before it arising under Articles 23 (2) and 47 (3) of *the Constitution*, using the framework set out under the *Fair Administrative Action Act* or any other law.
66. Flowing from the contents of Section 133C (6) of the *Land Act*, 2012 [2016]; there is no gainsaying that the dispute that was raised and canvassed by the Appellants beforehand fell within the jurisdictional remit of the Tribunal and not otherwise. Instructively, the Tribunal was constituted as the port of first call. In this regard, the Appellants correctly approached the Tribunal for the determination of the various issues which coloured the Statements of Claim.
67. Jurisdiction is such a critical point. Indeed, matters of jurisdiction go to the root of the dispute. In this regard, where a court/tribunal is divested of jurisdiction, same must down its tools at the earliest moment without [sic] purporting to await further evidence. That has been and is still the position of the law.
68. To this end, it suffices to take cognisance of the holding of the Supreme Court [the apex court] in the case of; In the Matter of the Interim Independent Electoral Commission (Applicant) (Constitutional Application 2 of 2011) [2011] KESC 1 (KLR) (20 December 2011) (Ruling); where the court underscored the importance of jurisdiction in the following terms:
29. Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):
- “I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.”
30. The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by *the Constitution*.
69. The jurisdictional question and its essence [pivot] was also highlighted by the Supreme Court in the case of Samuel K. Macharia v KCB 2012 eKLR where the court stated and held thus:
- (68) A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the



Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.

Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*.

Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

70. In as much as a court of law or tribunal is called upon to eschew handling a matter which does not fall within its jurisdictional remit, it must not be lost on courts and tribunals alike, that it is also a serious matter to abdicate judicial mandate [read, Jurisdiction] where same is granted under the Law. Instructively, a court or a tribunal ought not to run away and abdicate its jurisdiction in handling and entertaining a dispute that lawfully belongs to it.
71. In my humble view, a situation where court or tribunal abdicates its statutory mandate would be tantamount to dereliction of judicial duty. Such an endeavour is just as worse as assumption of jurisdiction where none has been provided under *the constitution* or statute. Be that as it may, I hold the firm position that the tribunal was seized of the requisite jurisdiction and thus same [tribunal] correctly entertained the claim[s] that was canvassed by the Appellants.
72. Arising from the foregoing discourse, I come to the conclusion that the first limb of the 1<sup>st</sup> Respondent's contention pertaining to lack of jurisdiction was misconceived and legally untenable.
73. Next, is the issue as to whether the tribunal was seized of jurisdiction to issue and/or grant declaratory reliefs/remedies under *the Constitution*, 2010? To start with, it is important to underscore that *the Constitution* 2010; provides for both vertical and horizontal application of *the Constitution*. In this regard, all state organs and persons are obligated to comply with the terms of *the constitution*. [See Articles 3(1), 10(1), 19(1), 20(2) and 21(1) of *the Constitution* 2010].
74. Secondly, it is not lost on this court that the tribunal beforehand is constituted/deemed as a subordinate court. In this regard, the tribunal in matters vested upon same has the same capacity/mandate to grant similar orders/remedies that could have been granted by the subordinate courts. For good measure, the provisions of Article 169 of *the Constitution*, 2010; suffice.
75. Additionally, it is apposite to recall that the grant of declaratory orders pertaining to and concerning claims for redress of violation/infringement of fundamental rights and freedoms is provided for under Article 20(3) and 23 [3] of *the Constitution* 2010.
76. Instructively, Article 23 (2) of *the Constitution* 2010; confers/vests upon Parliament the mandate to enact law or statute to clothe the subordinate courts with the requisite jurisdiction to deal with claims pertaining to redress of violation/infringement of fundamental rights and freedoms in appropriate case[s].
77. Given the relevance of the said provision, it is apposite to reproduce the provisions of Article 23(2) of *the Constitution*.
78. Same are reproduced as hereunder:



- (2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
79. Moreover, it is worthy to recall that by dint of Section 133 (c) (8) of the *Land Act*, the Tribunal is mandated to deal with and to grant reliefs under the provisions of Article 23 as read together with Article 47 of *the Constitution*. In this regard, there is no gainsaying that the Tribunal is seized of the requisite jurisdiction to grant and issue declaratory reliefs/remedies, [where apposite], provided that the dispute under reference falls within its statutory jurisdiction.
80. The provisions of Section 133 (c) (8) of the *Land Act*, 2012 [2016] provide as hereunder:
- (8) The Tribunal may, in matters relating to compulsory acquisition of land, hear and determine a complaint before it arising under Articles 23 (2)
81. It is also important to take cognisance of the decision of the Court of Appeal in *Kibos Distillers Limited & 4 others v Benson Ambuti Adegwa & 3 others* [2020] KECA 875 (KLR) where the Court of Appeal stated and held thus:

A party or litigant cannot be allowed to confer jurisdiction on a court or to oust jurisdiction of a competent organ through the art and craft of drafting of pleadings. Even if a court has original jurisdiction, the concept of original jurisdiction does not operate to oust the jurisdiction of other competent organs that have legislatively been mandated to hear and determine a dispute. Original jurisdiction is not an ouster clause that ousts the jurisdiction of other competent organs. Neither is original jurisdiction an inclusive clause that confers jurisdiction on a court or body to hear and determine all and sundry disputes. Original jurisdiction simply means the jurisdiction to hear specifically constitutional or legislatively delineated disputes of law and fact at first instance. To this end, I reiterate and affirm the dicta that in *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR where it was stated that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.

82. Additionally, the issue that the tribunals like the one beforehand can entertain and address constitutional matters arising from and attendant to disputes that fall within their mandate was also canvassed and elaborated upon in the case of *Gabriel Mutava, Elizabeth Kwini & Mary Martha Masyuki v Managing Director Kenya Ports Authority & Kenya Ports Authority* [2016] KECA 411 (KLR) where the Court of Appeal stated as hereunder:

In saying all these, we are not oblivious to the fact that a party is entitled to sue under *the Constitution* even if there is an alternative remedy, and or other mechanism for the resolution of the dispute. However, it has since emerged on the authorities that constitutional litigation is a serious matter that should not be sacrificed on the altar of all manner of frivolous litigation christened constitutional when they are not and would otherwise be adequately handled in other legally constituted forums. Constitutional Litigation is not a panacea for all manner of litigation, we reiterate that the first port of call should always be suitable statutory underpinned forums for the resolution of such disputes.” (Emphasis added)

[See also the holding in *Bethwel Allan Omondi Okal versus Telkom Founders [K] Limited and Others* [2018] eKLR]



83. To my mind, the statutory tribunal, which constitutes the first port of call, is clothed with the powers to issue and grant declaratory orders. It would be an absurdity to hold that a tribunal which is seized of the statutory jurisdiction, like the one beforehand, would have to refer a declaratory issue to a superior court and thereafter wait to determine the consequential issues flowing and attendant to the declaration, once the Superior Court has [sic] handled the question/ issue of declaration.
84. For instance, the Appellants herein approached the tribunal seeking inter alia a declaration that the actions that were undertaken on their [Appellants] parcels of land without due compliance with the law amounted to trespass and was thus illegal, unlawful and thus void. In this regard and taking into account the contention by the 1<sup>st</sup> Respondent, it would mean that the tribunal would refer that declaratory aspect to the Environment and Land Court; and thereafter wait to assess and award recompense arising from trespass, only upon the issuance of [sic] the declaratory orders by the ELC.
85. Quite clearly, such kind of arguments are contrary to and antithetical to the rule of law. Similarly, such kind of arguments run counter the provisions of Articles 10(1), 19(1), 23(2) and 259(1) of *the Constitution* 2010.
86. Notwithstanding the constitutional underpinning that vest the mandate on tribunals [which are subordinate courts] to issue declaratory orders, it is also apposite to cite and reference the provisions of Order 3 Rule 9 of the Civil Procedure Rules 2010. For good measure, the said provisions of the law do not limit the powers of a court to issue declaratory reliefs.
87. For good measure, any court and/or tribunal is obligated to issue and grant a declaratory order, subject only to the fact that the dispute under reference falls within the jurisdictional remit of such a court/ tribunal.
88. Finally, and before departing from this issue, it is apposite to take cognisance of the decision of the Court of Appeal in the case of Johana Nyokwoyo Buti v Walter Rasugu Omariba (Suing through his attorney Beutah Onsomu Rasugu) & 2 others [2011] eKLR where the court discussed the legal import and tenor of a declaratory order and the legal effect thereof.
89. For coherence the Court of Appeal stated thus:

A declaration or declaratory judgment is an order of the court which merely declares what the legal rights of the parties to the proceedings are and which has no coercive force – that is, it does not require anyone to do anything. It is available both in private and public law save in judicial review jurisdiction at the moment. The rule gives general power to the court to give a declaratory judgment at the instance of a party interested in the subject matter regardless of whether or not the interested party had a cause of action in the subject matter.

90. Arising from the foregoing, I am afraid the contention by the 1<sup>st</sup> Respondent that the tribunal was not seized of jurisdiction to issue and grant declaratory reliefs/remedies is erroneous. Instructively, the position taken and advanced by learned counsel for the 1<sup>st</sup> Respondent and the High court decision referenced by the Learned Counsel for the 1<sup>st</sup> Respondent; are contrary to the provisions of Articles 3(1), 10(1), 19(1), 20(2), 23(2) and 259(1) of *the Constitution* 2010.

**Issue Number Two (2) Whether the Land Acquisition Tribunal entertained and adjudicated upon all the issues/claims that were placed before it by the parties.**

91. The Appellants before the court [who were the Claimants before the Tribunal] sought a plethora of reliefs and declaratory orders whose details have been highlighted elsewhere hereinbefore.



92. To the extent that the Appellants [Claimants] had placed before the Tribunal various/assorted issues for determination, it was incumbent upon the tribunal to interrogate and thereafter determine all the issues that had been impleaded. It is immaterial whether the reliefs/remedies were being allowed or otherwise.
93. Suffice it to underscore that the tribunal owed it to the parties and by extension to the rule of law to ensure that all issues that were canvassed and placed before same [Tribunal] are determined and addressed. Instructively, it was not open for the tribunal to remain mute on pertinent issues and in particular, the declaratory orders that had been sought.
94. To the extent that the tribunal failed to address and redress all the issues that were impleaded and placed before it, there is no gainsaying that the impugned decision of the tribunal was contrary to Articles 10 (2) (b) and (c), 27 (1) and (2) and 50 (1) of *the constitution*, 2010.
95. It was the duty of the tribunal to address the various perspectives/nuances of the claims that were placed before it. For clarity, it is worth recalling that the Appellants herein had contended that the creation of the wayleaves and establishment of public right of access, were all undertaken without due compensation. Furthermore, it was contended that the impugned actions were carried out without due compensation and thus constituted trespass.
96. To my mind, it was the duty of the tribunal to review the totality of the evidence on record including the two letters dated 3<sup>rd</sup> February 2020 and 11<sup>th</sup> June 2020, which were authored by Engineer Nesline Ogwe on behalf of the National Irrigation Authority.
97. Additionally, it is worth recalling that Kenya National Human Rights Commission [KNHRC] had also generated a report and which report highlighted various acts of illegality. Similarly, National Environment Management Authority [NEMA] had also adverted to a failure by the 1<sup>st</sup> Respondent to abide by and/or comply with all the conditions that informed the Environment Social Impact Assessment licence which had been issued to the 1<sup>st</sup> Respondent. In particular, it was posited that the 1<sup>st</sup> Respondent had failed to put in place the mitigation measures that were alluded to in the report.
98. Quite clearly, the tribunal failed to effectively discharge and/or perform its statutory mandate. For good measure, had the tribunal dealt with and addressed all the issues, same [tribunal] would have appreciated the need to either dismiss or allow the assorted declaratory reliefs, that had been sought for by the Claimants at the foot of the Statements of Claim.
99. In a nutshell, it is my finding and holding that in failing to address and remedy all the issues that were laid before it, the tribunal abdicated its judicial mandate and/or responsibility. In this regard, it is my finding that the tribunal neither addressed nor determined all the issues in dispute.

**Issue Number Three (3) Whether the Land Acquisition Tribunal abdicated its constitutional and statutory mandate in determining the issues raised by the parties to and in favour of the National Land Commission, which was a party to the suit and whether such conduct constitutes deliriation of duty.**

100. The tribunal in the course of rendering its decision issued various orders inter alia an order directing the 2<sup>nd</sup> Respondent [National Land Commission] to undertake survey and valuation of the various properties belonging to the Appellants. Furthermore, the tribunal also ordered the 2<sup>nd</sup> Respondent to thereafter undertake the requisite compensation on behalf of the 1<sup>st</sup> Respondent.
101. The act of ordering and directing the National Land Commission to undertake survey, valuation and consequential compensation of the Appellants herein aggrieved both the Appellants and the 1<sup>st</sup>



- Respondent. In particular, the Appellants herein have submitted that the act of referring the dispute to National Land Commission, which was a party to the matter, constituted abdication of statutory mandate and/or duty.
102. Additionally, it was contended that the Appellants herein had placed before the tribunal a valuation report speaking to and concerning the monetary value of their portions of land, which had been rendered unusable. In this regard, it was contended that the Tribunal ought not to have referenced the dispute to National Land Commission for inter alia, survey and valuation.
  103. On the other hand, the 1<sup>st</sup> Respondent has also impugned the action by and on behalf of the tribunal to direct the National Land Commission [NLC] to undertake survey and valuation of the suit property. According to the 1<sup>st</sup> Respondent, the directive/order by the tribunal was made without the requisite jurisdiction.
  104. On the other hand, it was the contention by the 1<sup>st</sup> Respondent that the impugned directive and/or order directing the 2<sup>nd</sup> Respondent to undertake survey and valuation appears to be driving the 1<sup>st</sup> Respondent towards compulsory acquisition whereas the 1<sup>st</sup> Respondent is not inclined to undertake [sic] compulsory acquisition, or at all.
  105. Arising from the foregoing, learned counsel for the 1<sup>st</sup> Respondent has posited that the reference of a segment of the dispute to the National Land Commission for determination is therefore illegal and unlawful. To this end, the 1<sup>st</sup> Respondent has implored the court to find and hold that the impugned order ought to be set aside.
  106. Having reviewed the rival submissions, I beg to take the following position. Firstly, it is not lost on this court that the issue in dispute did not touch on and/or concern compulsory acquisition of the Appellants' parcels of land. Instructively, if the question beforehand had concerned compulsory acquisition, then the 1<sup>st</sup> and 2<sup>nd</sup> Respondents would have been enjoined to comply with and/or abide by the provisions of Sections 107 -113 of the Land Act, 2012 [2016].
  107. Notably, it would have been incumbent upon the 1<sup>st</sup> Respondent to liaise with the 2<sup>nd</sup> Respondent and to intimate to the 2<sup>nd</sup> Respondent its [1<sup>st</sup> Respondent's] desire to acquire land for public use. However, this was not the case.
  108. In this regard, the directive and/or order by the tribunal and directing the 2<sup>nd</sup> Respondent to undertake survey and valuation was therefore made in error. For clarity, National Land Commission is not tasked with the mandate to undertake survey and valuation other than for the limited scope of undertaking compulsory acquisition. [See Sections 107-113 of the Land Act, 2012 [2016]. See also Patrick Musimba v National Land Commission [2015] eKLR].
  109. Secondly, it is worthy to recall that National Land Commission had been joined as a party. Notably, National Land Commission was the 2<sup>nd</sup> Respondent. In any event, National Land Commission had itself generated correspondence and tendered evidence that the 1<sup>st</sup> Respondent had neither approached same nor sought to involve same [National Land Commission] in any endeavour including intended acquisition of the land.
  110. To the extent that National Land Commission had taken a position in the matter and coupled with the fact that same had been found not culpable, it was not apposite and/or expedient to direct National Land Commission to undertake survey and valuation of the Appellants Land[s], which were the subject of the dispute before the Tribunal.



111. Thirdly, there is no gainsaying that National Land Commission is an independent and constitutional commission. For coherence, National Land Commission is established by dint of Article 67 of *the Constitution* 2010 and which provision also underpins the mandate/jurisdiction of the Commissions.
112. In addition, it is worth pointing out that by virtue of being an independent constitutional commission, the 2<sup>nd</sup> Respondent which was being ordered and/or directed to undertake the survey and valuation is a body that does not take directions and/or orders from the tribunal as pertains to the manner in which same [National Land Commission] operates and/or discharges its mandate.
113. To this end, it is imperative to reference the provisions of Articles 249 and 250 of *the constitution* 2010.
114. Same stipulate and provide as hereunder:

249. Objects, authority and funding of commissions and independent offices

- (1) The objects of the commissions and the independent offices are to—
  - (a) protect the sovereignty of the people;
  - (b) secure the observance by all State organs of democratic values and principles; and
  - (c) promote constitutionalism.
- (2) The commissions and the holders of independent offices—
  - (a) are subject only to this Constitution and the law; and
  - (b) are independent and not subject to direction or control by any person or authority.
- (3) Parliament shall allocate adequate funds to enable each commission and independent office to perform its functions and the budget of each commission and independent office shall be a separate vote.

250. Composition, appointment and terms of office

- (1) Each commission shall consist of at least three, but not more than nine, members.
- (2) The chairperson and each member of a commission, and the holder of an independent office, shall be—
  - (a) identified and recommended for appointment in a manner prescribed by national legislation;
  - (b) approved by the National Assembly; and
  - (c) appointed by the President.
- (3) To be appointed, a person shall have the specific qualifications required by this Constitution or national legislation.
- (4) Appointments to commissions and independent offices shall take into account the national values referred to in Article 10, and the principle that the composition of the commissions and offices, taken as a whole, shall reflect the regional and ethnic diversity of the people of Kenya.
- (5) A member of a commission may serve on a part-time basis.



- (6) A member of a commission, or the holder of an independent office—
  - (a) unless ex officio, shall be appointed for a single term of six years and is not eligible for re-appointment; and
  - (b) unless ex officio or part-time, shall not hold any other office or employment for profit, whether public or private.
- (7) The remuneration and benefits payable to or in respect of, a commissioner or the holder of an independent office shall be a charge on the Consolidated Fund.
- (8) The remuneration and benefits payable to, or in respect of, the members of a commission or the holder of an independent office shall not be varied to the disadvantage of that person during their respective terms of office.
- (9) A member of a commission, or the holder of an independent office, is not liable for anything done in good faith in the performance of a function of office.
- (10) The members of a commission shall elect a vice-chairperson from among themselves—
  - (a) at the first sitting of the commission; and
  - (b) whenever it is necessary to fill a vacancy in the office of the vice-chairperson.
- (11) The chairperson and vice-chairperson of a commission shall not be of the same gender.
- (12) There shall be a Secretary to each commission who shall be—
  - (a) appointed by the commission; and
  - (b) the chief executive officer of the commission.

115. Flowing from the contents of Article 249 (2) of *the constitution*, I am afraid that the orders and/or directives of the tribunal directed to and in favour of National Land Commission was equally erroneous.

116. Fourthly, it is important to recall that the Appellants herein had placed before the tribunal various valuation reports speaking to the area that had been affected as well as the monetary value speaking to the values of the various portions of land that had been trespassed upon and/or interfered with.

117. Notably, the valuation report was on record and therefore the tribunal ought to have been guided by same. In any event, it is not lost on this court that the 1<sup>st</sup> Respondent had neither filed nor placed on record any contrary valuation report to controvert the one placed on record/tendered by the Appellants.

118. To underscore the legal position that the tribunal was obliged to act upon and/or be guided by the terms of the valuation report which had not been disputed, it suffices to adopt and reiterate the holding of the Supreme Court [the apex Court] in the case of Attorney General v Zinj Limited [2021] KESC 23 (KLR) where the court stated and held as hereunder:

In granting special damages, the trial judge was guided by the Valuation Report tabled by the respondent. In the absence of a contrary report on record, we have no basis upon which to interfere with the award. Even if there had been one such other report, our jurisdiction to interfere would still have been largely circumscribed, unless the award had clearly ignored the fundamental principles of valuation as demonstrated by the counter-report.



119. The Court of Appeal in the case of *Criticos v National Bank of Kenya Limited* (as the successor in business to Kenya National Capital Corporation Limited “Kenyac”) & another [2022] KECA 870 (KLR) also reiterated the same position. For good measure, the court stated thus:

As properly held in *STEPHEN KININI WANG'ONDU* (*supra*), expert evidence can only be challenged by another expert.

120. In a nutshell, my answer to issue number three is fourfold. Firstly, National Land Commission was impleaded as a party and thus the tribunal could not cede its statutory mandate and jurisdiction to a party/litigant before it. Such a scenario constitutes abdication of statutory mandate and duty.

121. Secondly, National Land Commission by virtue of Article 67 (2), 249 (2) and 250 of *the Constitution* is not subject to the direction of any authority and/or person, the tribunal not excepted, as pertains to the manner in which same National Land Commission is to undertake its mandate.

122. Consequently, and in this regard, the orders and direction by the tribunal and in particular, where same directed the National Land Commission to undertake survey and valuation were therefore illegal and unconstitutional.

123. Thirdly, it is not lost on the court that the Appellants herein had tendered and placed before the tribunal valuation reports speaking to and confirming the values of the portions of land which had been trespassed upon. There being no contrary report to controvert the one on record, the tribunal had no basis to call for a valuation report from National Land Commission.

124. In any event, it suffices to state and underscore that Kenya subscribes to the common law jurisdiction. In this regard, the Kenyan Courts and the tribunals alike are not at liberty to descend into the arena of controversy by directing the provision of a report to help a party before same in proving or disproving her/his case, or defence, whichever is applicable. [See *Kenya Anti-Corruption Commission v Stanley Mombo Amuti* 2019 eKLR, paras 83 and 84 thereof].

125. Finally, the mandate of the National Land Commission is statutorily circumscribed. The only instance where same [National Land Commission] is called upon to undertake survey and valuation is towards undertaking compulsory acquisition in terms of Sections 107 – 113 of the *Land Act* 2012 [2016]. However, in respect of the dispute beforehand, National Land Commission had not been approached by any state organ and/or body to undertake compulsory acquisition.

126. Quite clearly, the directive/order that National Land Commission proceeds to undertake survey and valuation was made *per incurium*.

**Issue Number Four (4) Whether the award on account of Mesne profits in favour of the Appellants in appeal E090 of 2024 was lawful and well-grounded or otherwise.**

127. The Appellants herein filed the Statement of Claim dated 9<sup>th</sup> February 2024; and wherein the Appellants pleaded particulars of loss and special damages. One of the particulars of loss and special damages that was pleaded touches on and concerned a claim for mesne profits which was indicated to be based on lost opportunity to grow subsistence crops. Furthermore, the Appellants contended that same would earn the sum of Kshs. 25,000/- only, per season for two seasons each year.

128. It was the further contention by the Appellants that as a result of the actions and/or omissions by the 1<sup>st</sup> Respondent, same [Appellant] have lost profits at the rate of Kshs. 25,000/- per season for two seasons yearly w.e.f September 2019.



129. To my mind, what I hear the Appellants to be claiming is that same [Appellants] are entitled to the sum of KShs. 50,000/- only per year w.e.f from 2019 till determination of the suit. In this regard, if the Appellants had proven their entitlement to mesne profits, then the tribunal would have been obliged to make necessary award.
130. At any rate, it is worthy to recall that the tribunal proceeded to and awarded to the Appellants the sum of KShs. 200,000/- only each, on account of mesne profits. Nevertheless, the award of KShs. 200,000/- only on account of mesne profits has aggrieved the 1<sup>st</sup> Respondent who contends that the impugned award was not merited.
131. Moreover, the 1<sup>st</sup> Respondent has submitted that the tribunal proceeded to an awarded KShs. 200,000/- only on account of mesne profits without demonstrating the basis for arriving at and awarding the said figure.
132. On the other hand, the Appellants contend that the uniform award of the sum of KShs. 200,000/- only on account of mesne profits was inordinately low as to constitute an error of principle. In this respect, learned counsel for the Appellants sought to impress upon the court to enhance the award so as to reflect the reality of the loss suffered by the Appellants.
133. Having taken into account the rival submissions by the parties, my answer to the issue herein is two-pronged. Firstly, it is common ground that a claim for mesne profits is akin to a claim for special damages. In this regard, any claimant, the Appellants not excepted, are obligated to plead and particularize the claim for mesne profits.
134. Pertinently, where the claim for mesne profits is neither pleaded nor particularised, then a court of law cannot engage with and/or purport to make any award on account of mesne profits.
135. To this end, it suffices to adopt and reiterate the position/holding in the case of *Karanja Mbugua & another v Marybin Holding Co. Ltd* [2014] KEELC 378 (KLR) where the court stated and held thus:

This court is alive to the legal requirement that mesne profits, being special damages must not only be pleaded but also proved, as shown by the provisions of Order 21, Rule 13 of *Civil Procedure Act*. The said provisions state as follows with regard to a decree for possession and mesne profits:

“(1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree-

For the possession of the property.

For the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits.

Directing an inquiry as to rent or mesne profits from the institution of such suit until:-

The delivery of possession to the decree-holder

The relinquishment of possession by the Judgment – debtor with notice to the decree-holder through the court; or

The expiration of three years from the date of the decree, whichever even first occurs.



(2) Where an inquiry is directed under sub-rule (1) (b) or (1) (c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.”

136. Additionally, it is also important to take cognisance of the holding of the Court of Appeal in the case of Christine Nyanchama Oanda v Catholic Diocese of Homa Bay Registered Trustees [2020] KECA 536 (KLR) where the court reiterated the legal position that a claim for mesne profits must not only be pleaded and particularised, but must also be specifically/strictly proven.

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

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...”

138. Back to the instant matter. It is worthy to recall that the Appellants herein indeed pleaded and particularized mesne profits. For good measure, the court has highlighted the nature of pleadings touching on the claim for mesne profits at the onset of this particular issue. To this end, it suffices to underscore that the Appellants indeed pleaded and particularised mesne profits.

139. Having pleaded and particularised mesne profits, it was incumbent upon the Appellants to venture forward and to tender/adduce before the court plausible and credible evidence to vindicate the claim on account of mesne profits. Notably, the evidence towards proving the claim for mesne profits must be such that the claim is truly/strictly proven.

140. Though the Appellants contended that same were using their respective portions of land for growing subsistence crops and that same would accrue the sum of KShs. 25,000/- per season for two seasons in a year; no agricultural report was ever procured and/or tendered before the tribunal. Moreover, no expert witness was called to testify on behalf of the Appellants as pertains to the productivity of their [Appellants’] land.

141. In the absence of any agricultural report, the contention that the Appellants herein would procure the sum of Kshs. 25,000/- per season for two seasons in year was just a mere statement devoid of any evidential anchorage. To my mind, the figure of Kshs. 25,000/- per season for two seasons in a year appears to have been plucked from the blues. Furthermore, it is evident that the claim on account of mesne profits was merely thrown on the face of the tribunal without more.

142. I am afraid that the Appellants herein did not discharge the burden towards proving the claim based on mesne profits. [See Sections 107-109 of the [Evidence Act](#) Cap 80 Laws of Kenya].

143. The manner in which special damages must be proven has been highlighted and elaborated in a plethora of decisions. However, it suffices to cite and reference the decision of the Court of Appeal in Superior Homes (Kenya) PLC v Water Resources Authority & 9 others [2024] KECA 1102 (KLR) where the court held and stated thus:

73. It is a basic principle that, before a court can award special damages, those damages must be specially pleaded and strictly proved. In Ouma v. Nairobi City Council [1976] KLR 207, Chesoni, J. (As he then was) held as follows:



“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.”

144. Even though the Appellants had pleaded mesne profits, unfortunately the Appellants fell short of adducing plausible, cogent and credible evidence towards strictly proving the claim for mesne profits. In this regard, it was not open for the tribunal to make an award for mesne profits.
145. Arising from the foregoing, I therefore find and hold that the complaint by the 1<sup>st</sup> Respondent touching on and concerning the award of mesne profits is legitimate and merited. In this regard, I find and hold that the award on account of mesne profits was not well grounded.
146. Simply put, it is my finding that the contention that the Tribunal committed an error in awarding Mesne Profits, is merited. Same thus warrants interference by this Court.

**Issue Number Five (5) Whether the Land Acquisition Tribunal ought to have granted the declaratory reliefs sought together with general damages and exemplary damages or otherwise.**

147. The Appellants herein sought various and diverse reliefs at the foot of the Statements of claim. In particular, the Appellants sought a number of reliefs/remedies touching on declarations.
148. Despite the fact that the Appellants had impleaded various/diverse declaratory reliefs, it is important to state that tribunal did not find it just, expedient and apposite to address the various declaratory orders that were sought.
149. Nevertheless, it is not lost on this court that the tribunal proceeded to and made an award on account of mesne profits. For good measure, the tribunal found and held that the actions complained of constituted and/or amounted to breach/infringement and/or violation of the Appellants’ property rights. Simply put, the actions complained of constituted and amounted to trespass.
150. It is also worthy to recall that the tribunal found and held that the wayleaves complained of and the consequential actions taken by the 1<sup>st</sup> Respondent were undertaken without due regard to the rights of the Appellants. In any event, there is no gainsaying that the tribunal also found and held that the 1<sup>st</sup> Respondent did not comply with and/or adhere to the law regulating the creation of wayleaves.
151. Moreover, it is also important to underscore that the tribunal also found and held that the 1<sup>st</sup> Respondent had neither paid out the requisite compensation nor engaged the Appellants in a scheme towards settlement of compensation. In this respect, the tribunal indeed came to the conclusion that the 1<sup>st</sup> Respondent had violated the Appellants rights to clean and healthy environment as well as right to property. [See Articles 40 and 42 of *the Constitution* 2010].
152. In spite of the various findings that are discernible from the judgement of the tribunal, same [tribunal] did not find it apposite to distil and fashion appropriate declaratory orders in the manner highlighted by the provisions of Article 23 (2) of *the Constitution* 2010.
153. At any rate, it is worth recalling that the Appellants herein had themselves pleaded various and diverse declaratory remedies intended to address their [Appellants’] grievances.
154. Additionally, the Appellants herein had also pleaded a claim for general damages for trespass. Instructively, the actions by an on behalf of the 1<sup>st</sup> Respondent herein constituted and amounted to trespass and in this regard, it behoved the tribunal to decree and award general damages.



155. What constitute trespass is well defined vide Section 3 of the *Trespass Act* Chapter 294 Laws of Kenya. In addition, trespass has also received judicial elaboration in a number of decisions rendered by various courts including the Court of Appeal.
156. In the case of *Church Commissioners for Kenya of the Anglican Church of Kenya v Wayuga* [2024] KECA 1048 (KLR) the
53. Trespass is described under the *Trespass Act* Cap 294 to mean “any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof”. On the other hand, a continuing trespass is defined in Jowitt’s Dictionary of English Law 2nd Edition (page or paragraph?) as follows:-
- “A continuing trespass is one which is permanent in its nature; as where a person builds on his own land so that part of the building overhangs his neighbor’s land”.
- In Black’s Law Dictionary 8th Edition (page or paragraph?), a continuing trespass is defined as:- “A trespass in the nature of a permanent invasion on another’s rights, such as a sign that overhangs another’s property.” Finally, in Clerk & Lindsell on Torts 16th Edition, paragraph 23 - 01, it is stated that:- “Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues.”
157. In my humble view, the totality of the evidence on record including letters dated 3<sup>rd</sup> February 2020 and 11<sup>th</sup> June 2020 written by Engineer Nesline Ogwe; on behalf of the 1<sup>st</sup> Respondent [National Irrigation Authority] vindicate trespass. In this regard, the failure by the tribunal to decree and award recompense on account of trespass constitutes a serious error of principle and a miscarriage of justice.
158. Next, the Appellants also sought exemplary damages. It is instructive to note that the 1<sup>st</sup> Respondent [National Irrigation Authority] is a state organ, chargeable with statutory mandate to be exercised for the benefit of the citizens of the Republic of Kenya.
159. Furthermore, it is not lost on this court that the 1<sup>st</sup> Respondent herein [National Irrigation Authority] is obligated to comply with and/or adhere to the provisions of Articles 10, 21, 28 and 232 of *the Constitution* 2010. Quite clearly, the 1<sup>st</sup> Respondent and its officers cannot operate in a manner that disregards and belittles the provisions of *the Constitution* 2010.
160. Additionally, it is also worth stating that the 1<sup>st</sup> Respondent being a state organ/corporation is obligated to work alongside other state organs in an endeavour to ensure that its functions and activities benefit the people of Kenya. However, it is sad to note that the 1<sup>st</sup> Respondent ignored the recommendations from various state organs, inter alia, NEMA; NLC and even KNHRC, who pointed out various acts of mal-administration.
161. To my mind, the manner in which the 1<sup>st</sup> Respondent went about its activities starting from the creation of the illegal wayleaves and the implementation of the irrigation infrastructure that has left [visited] untold suffering on the Appellants, was/is not only arbitrary and cynical, but oppressive.
162. Quite clearly, the 1<sup>st</sup> Respondent herein behaved and has behaved in a rogue manner. The 1<sup>st</sup> Respondent did not care about the catastrophe and the pain that its actions have occasioned and visited on the Appellants, most of whom have neem rendered destitute.
163. Surely, the conduct of the 1<sup>st</sup> Respondent comes within the parameters that warrant the grant of exemplary/aggravated damages. Notably, the award of exemplary/aggravated damages takes into account the oppressive behaviour of the state organ like the 1<sup>st</sup> Respondent herein.



164. The law on award of exemplary/aggravated damages was highlighted by the Court of Appeal in the case of *Municipal Council of Eldoret v Titus Gatitu Njau* [2020] KECA 782 (KLR) where the court stated and held as hereunder:

As stated by this Court in *Godfrey Julius Ndumba Mbogori & another v Nairobi City County* [2018] eKLR:

“Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of *Rookes v Barnard* [1964] AC 1129 where Lord Devlin set out the categories of cases in which exemplary damages may be awarded which are:

- i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government, ii) cases in which the defendant’s conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and iii) where exemplary damages are expressly authorized by statute”.

165. Arising from the foregoing analysis, I come to the conclusion that the tribunal ought and should have decreed and awarded exemplary damages. Consequently, the failure to do so is yet another serious omission and a miscarriage of justice.

166. Other than the foregoing, it is also imperative to recall that the Appellants had also sought a restorative order intended to compel the 1<sup>st</sup> Respondent to restore the suit properties to their status ante, namely, the status of the suit properties prior to and before the act[s] complained of. Yet again, the tribunal failed to engage with and consider whether the factual matrix and the evidence tendered warranted a restorative order.

167. It is evident and apparent that though the 1<sup>st</sup> Respondent had procured and obtained an Environment Social Impact Assessment Licence [ESIA] from NEMA, the 1<sup>st</sup> Respondent failed to put in place the mitigation measures that were highlighted at the foot of the licence. Suffice it to state that NEMA itself wrote to the 1<sup>st</sup> Respondent highlighting the mitigation measures that the 1<sup>st</sup> Respondent had failed to comply with and/or adhere to. [See the letter dated 21<sup>st</sup> December 2020]

168. In my humble view, barring compliance with the law and in particular, adherence to the terms of the Environment Social Impact Assessment Licence [ESIA], the 1<sup>st</sup> Respondent ought and should have been ordered to restore the suit properties to the status ante.

169. As concerns restorative order, I beg to adopt and reiterate the position that was taken and highlighted by the Supreme Court of Kenya [the apex court] in the case of *Owino Ohuru vs Export Processing Zone & Others*

[170] The decision of the ELC also specifically refers to the application of Article 69 of *the Constitution*, the State’s obligation, and what happens if the State ignores and/or fails to comply with the orders made by the court. It is upon the State to show compliance with the orders through filing of reports showing the steps they have undertaken to remedy the environmental degradation. In the instance that the same is not done within the timeline provided, consequential orders may issue.

(171) As to whether the 11th appellant is capable of undertaking the exercise, the actions of the 11th appellant cannot be overstated in this matter. They have been present from the beginning and



have championed the rights of the residents of Owino-Uhuru village. In presenting the claims, some of the residents undertook medical examinations to determine their lead exposure. The various reports filed in court present a step to step measures as to what ought to be done to restore the contaminated land. The Senate Committee Report gave the following recommendations;

- a. the immediate clearing of the environment, including detoxifying, and restoring the soil;
- b. the replanting of trees;
- c. the immediate testing of all residents of Owino-Uhuru for lead exposure;
- d. the detoxification of all infected persons and pets;
- e. the removal of hazardous waste slug the plant has disposed off over the years and continues to dispose of at the Mwakiunge Dumpsite;
- f. the testing of all street children and other persons who scavenge for a living at the dumpsite;
- g. the immediate and full compensation of all the victims.

(172) The report by Okeyo Benards, & Wangila Abraham: Eco- Ethics International- Kenya Chapter called for education on lead exposure. The report by Wandera Chrispus Bideru, the Government Chemist proposed the setting up of a functional diagnostic treatment Centre at a convenient place in Mombasa for screening and treatment of persons affected by lead exposure; excavation of soil and dust areas with elevated lead level and relocation of affected residents to alternative safe areas.

(173) To our minds, the recommendations present clear restoration measures, which are not technical in nature. We are also minded that Principle 15 of the Rio Declaration and Section 3 (5) of the EMCA opine that lack of full scientific certainty should not be used as a reason for postponing cost-effective action to prevent environmental degradation. We have shown the wide range of remedies a court can issue including the issuance of structural remedies. (See also Esther Wanjiru Mwangi & 3 others v Xinghui International (K) Limited [2016] eKLR, & Isaiah Luyara Odando & another v National Management Environmental Authority & 2 others; County Government of Nairobi & 5 others (Interested Parties) [2021] eKLR). We must reiterate that the duty to protect the environment is not the sole preserve of the State; if there is failure on their part, individuals and persons of good will shall embrace this initiative- as has been done by many non-governmental organizations.

(174) We therefore find that the Court of appeal erred in dismissing the restorative orders issued by the ELC and the award of Kshs. 700 million in default. We are however alive to the fact that considerable time has passed since the orders of the ELC were issued. Within that frame time the 1st appellant and the respondents may have taken restorative measures which ought to have been accounted for before the default clause comes into place. We therefore find it fit to direct the respondents to file at the ELC in Mombasa, their respective reports, if any, within three (3) months of this decision, on the various restorative measures they have undertaken in line with the judgement of the ELC and the directions issued by the Court of Appeal or on their own initiative. The default clause should thereafter take effect if no restorative measures have been undertaken by the 1st appellant and the respondents. The ELC court will ascertain whether



there is need for further directions to restore the damage caused based on the reports filed .  
[Underlining Supplied].

170. Taking into account the principles highlighted in the Export Processing Zone [EPZ] supra and coupled with the provisions of Articles 42, 69, and 70 of *the Constitution* 2010, basis exists to warrant the grant of a restorative order.
171. Pertinently, the tribunal ought to and should have granted such an order taking into account that the wayleaves complained of and the consequential actions flowing from the impugned wayleaves, including the abandoned Irrigation infrastructure, had occasioned serious environmental degradation.

**Issue Number Six (6) What reliefs, if any; ought to issue in respect of the subject appeal.**

172. The Appellants herein had sought diverse reliefs before the tribunal. The diverse reliefs which were sought for have been highlighted and captured in the introductory aspect of the judgement herein.
173. Given the diverse reliefs that were sought, it is imperative to interrogate each and every relief/remedy and thereafter to decipher whether the Appellants were entitled to the various reliefs sought or better still, some of the said reliefs.
174. It is instructive to underscore that the Appellants herein sought various declaratory reliefs. Essentially, the declarations that were sought by and on behalf of the Appellants revolved around the legality or otherwise of the wayleaves that had been created by the 1<sup>st</sup> Respondent on the parcels of land belonging to the Appellants. In addition, the declaratory orders also concerned the effects and implications of the action[s] including the irrigation infrastructure that was put in place by the 1<sup>st</sup> Respondent albeit without the consent of the project affected persons, namely, the Appellants.
175. While dealing with issue number five [5] elsewhere herein before, the court found and held that the tribunal, which by dint of article 169 of *the Constitution*, 2010; is a subordinate court was seized of the mandate to grant declaratory orders. The only caveat was whether the subject dispute underpinning the declaratory order fell within its jurisdiction.
176. Suffice it to state that this court has since found and held that by dint of Section 133C (6) of the *Land Act*, 2012 [2016]; as read together with Article 23(2) of *the Constitution*, 2010; the tribunal was mandated to issue and fashion appropriate declaratory orders.
177. Premised on the foregoing exposition, I come to the conclusion that the Appellants herein were entitled to the declaratory orders sought in terms of prayers (a), (c), and (d) at the foot of the Statement of Claim dated 9<sup>th</sup> February 2024.
178. The Appellants herein had also sought a declaration to be issued to the effect that the Claimant is entitled to prompt and adequate compensation in the sum and amounts as claimed in the proceedings being [sic] the value of the portion of land lost. What I hear the Appellants to be seeking is just and prompt compensation for the portion[s] of the land lost.
179. Nevertheless, it is not lost on this court that compensation in the manner sought by the Appellants would denote that the Appellants' designated portions of land would have been taken away from them. However, the situation beforehand merely turns on illegal entry and trespass onto the Appellants' parcels of land.
180. In any event, it is worthy to recall that the 1<sup>st</sup> Respondent has never shown and/or exhibited a desire to pursue compulsory acquisition. For good measure, National Land Commission is on record vide



letter dated 11<sup>th</sup> March 2021 confirming that the Commission has never been approached to undertake compulsory acquisition.

181. To my mind, compensation in the manner sought by the Appellants would be tantamount to unjust enrichment insofar as the Appellants would accrue compensation while at the same time retaining ownership of the designated portions of land. Such an endeavour would be contrary to and in contravention of Article 10(2) of *the Constitution*, 2010; and more particularly, the principle of equity and social justice.
182. Arising from the foregoing analysis, I am not minded to decree compensation in the manner impleaded at the foot of prayer (b) of the Statement of Claim dated 9<sup>th</sup> February 2024.
183. Fast forward, the Appellants had also sought special damages, details in terms of paragraph 25 of the Statement of Claim. In particular, the Appellants had sought for the value of the destroyed land in the sum of KShs. 1,090,000/- only. However, the prayer for the value of the destroyed land is a replica of the prayer for compensation for the lost portion of land, which the court has highlighted in the preceding paragraph.
184. Simply put, no basis has been laid to warrant the grant of same.
185. Next, the Appellants also sought costs of the valuation report in the sum of KShs. 60,000/- only and the costs of the EIA Report in the sum of KShs. 40,000/- only. However, despite pleading the claims for the costs of the valuation report and the EIA report, the Appellants did not tender and/or adduce any receipts before the tribunal.
186. In my humble view, the tribunal was correct in finding and holding that the plea for recompense on account of the costs of the valuation report and the costs of the EIA report were not strictly [specifically] proved. It was not enough to throw the said claims on the face of the tribunal and simply ask for a positive order.
187. Sadly, the law on proof of special damages does not countenance such perfunctory [casual] approach. [See David Bagine versus Bundi [1997]eklr]
188. On the other hand, the Appellants sought an order of general damages for trespass. It is instructive to recall and reiterate that the law on trespass is to the effect that trespass is actionable per se. In this regard, the moment a claimant proves trespass then the court chargeable with handling the matter in question is obligated to award damages for trespass.
189. The manner of assessing and awarding damages for trespass to land is now well documented and settled. Suffice it to state that the court concerned is enjoined to take into account the size of the land trespassed upon; the duration of trespass; the gravity of the actions complained of; the nature of benefits, if any, accrued to the trespasser and the location of the property trespassed upon. Additionally, where the factors are aggravating, the court is obligated to enhance the award of general damages.
190. To this end, I beg to adopt and reiterate the decision of the Supreme Court of Kenya in the Case of Attorney General v Zinj Limited [2021] KESC 23 (KLR); where the Court stated thus:

The main basis upon which special damages could be granted for the deprivation of property, was the market value of the suit property. In case of general damages, a court of law exercised discretion guided by the circumstances of each case.
191. The criteria for assessing and awarding general damages for Trespass was equally elaborated upon by the Court of Appeal in the case of Kenya Power & Lighting Company Ltd v Ringera & 2 others [2022] KECA 104 (KLR).



192. The court ventured forward and highlighted the applicable principle[s] in the manner following:

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 distil and replicate as hereunder:
- i) Halsbury's 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 Morton & 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 sum



- b) 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.
193. To my mind, the learned tribunal ought to have ventured forward and awarded general damages for trespass. In any event, the law is settled that even where the court or tribunal is inclined to dismiss a claim, same [court/tribunal] is obligated to assess the quantum of damages that would have been awardable had the claimants succeeded.
194. Notwithstanding the foregoing, I beg to posit that the Appellants tendered and produced before the tribunal a valuation report which captured the capital value of the damages incurred on the designated parcels of land. The valuation report provided a sound legal basis for measuring and assessing general damages.
195. In the premises, and taking into account the provisions of section 78 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya; which underscores the powers of the first appellate court, I am minded to and do hereby assess and award general damages as hereunder:
- i. Ezra Opiyo Ngoje – Plot No. 602 – KShs. 390,000/-
  - ii. Peter Anyuor Mangira – Plot No. 730 - KShs. 1,440,000/-
  - iii. George Odhiambo Lago – Plot No. 6931 - KShs. 120,000/-
  - iv. Solomon Owiti Akura – Plot No. 6176 - KShs. 360,000/-
  - v. Isaac Ogal Akura – Plot No. 646 - KShs. 90,000/-



- vi. Peter Odhiambo Akura – Plot No. 6178 - KShs. 360,000/-
- vii. Pius Amolo Ooko – Plot No. 647 - KShs. 120,000/-
- viii. Pamela Atieno Nyaoke – Plot No. 634 - KShs. 360,000/-
196. The award of general damages [details in terms of the preceding paragraph] has been guided by the principles highlighted in the Kenya Power and Lighting Company case [supra].
197. Additionally, the Appellants herein have sought exemplary damages. In Halsbury’s Laws of England 4<sup>th</sup> Edition Vol. 45 at para 26 pg 1503, the learned author while discussing the circumstance where exemplary damages are payable stated as hereunder:
- “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...
198. To my mind, the Appellants herein were entitled to exemplary damages. For good measure, the conduct that was exhibited by the 1<sup>st</sup> Respondent was not only unconstitutional and oppressive, but same was equally cynical and intended to subject the Appellants to cruel and inhuman treatment contrary to Articles 28 and 29 (f) of *the Constitution*.
199. Arising from the foregoing, I find it apposite, nay expedient, to decree and award exemplary damages to the Appellants in the sum of Kshs. 3,000,000/- each.
200. Finally, the Appellants sought a restoration order whose net effect was to restore the suit properties to the status quo ante, namely the status prior to and before the construction of the irrigation infrastructure by the 1<sup>st</sup> Respondent. In any event, the Appellants had posited that the infrastructure was abandoned by the 1<sup>st</sup> respondent and same [infrastructure] has been the source of excessive flooding arising from storm water.
201. In my humble view, the 1<sup>st</sup> Respondent had the capacity and resources to put in place the mitigating factors that had been recommended by NEMA at the foot of the environment social impact assessment licence. However, the 1<sup>st</sup> Respondent herein did not seem to care about the debilitating consequences of its actions.
202. Worse still, the 1<sup>st</sup> Respondent herein has never deemed it apposite to engage the Appellants in an endeavour to mitigate their suffering. For good measure, it is not lost on this court that the 1<sup>st</sup> Respondent is happy to fight through various court processes even when the consequences of its actions have been documented by various state organs including NEMA and National Land Commission.
203. Flowing from the foregoing, I come to the conclusion that a restoration order is appropriate and apt. In this regard, the 1<sup>st</sup> Respondent shall undertake restoration of the suit properties within a duration of 180 days from the date of delivery of the Judgement herein in accordance with the provisions of Section 111 of the Environment Management Coordination Act 1999 [2015].
204. In the event of default by the 1<sup>st</sup> Respondent to undertake the restoration, National Environment Management Authority [NEMA] shall undertake the restoration of the suit properties in accordance with the provisions of Section 25(4) of the Environment Management Coordination Act 1999 [2015]. However, the costs of undertaking such restoration shall be borne by the 1<sup>st</sup> Respondent [National Irrigation Authority].



## Final Disposition :

205. Flowing from the analysis [details enumerated in the body of the judgement] it must have become crystal clear that the Appeal by the Appellants vide Milimani ELCA No. E 090 of 2024 is meritorious.
206. On the other hand, it suffices to state that the appeal by and on behalf of the 1<sup>st</sup> Respondent, namely, Milimani ELCA No. E 097 of 2024 is devoid of merits; save for the aspect touching on the question of mesne profits. For good measure, the court has agreed with the 1<sup>st</sup> Respondent that the plea for mesne profits was not specifically and strictly proven.
207. In the circumstances, the final orders that commend themselves to the court as pertains to the instant Appeal[s] are as hereunder:
- a. Appeal ELCA No. E 090 of 2024 be and is hereby allowed.
  - b. The decision of the tribunal rendered on 14<sup>th</sup> June 2024 be and is hereby set aside and/or varied.
  - c. Judgement be and is hereby entered in favour of the Appellants on the following terms:
    - i. A declaration be and is hereby issued that absent payment of just compensation and promptly, the purported creation of wayleaves and public rights of way over and in respect of the Appellants' land parcel numbers North Kadem/Kanyuor/646, 602, 730, 6931, 6176, 646, 6178, 647, and 634; in favour of the 1<sup>st</sup> Respondent and/or its predecessor did not follow the law, is unconstitutional, illegal, unlawful, null and void.
    - ii. A declaration be and is hereby issued to the effect that policy decisions and regulations affecting the public and rights of individuals must conform to *the constitution* and the relevant statute in terms of both its content and the manner in which it is adopted and failure to comply renders the policy decision, regulation or acts invalid and that the decision by the 1<sup>st</sup> Respondent [National Irrigation Authority] to commence construction of MD4 of the detailed design of Lower Kuja Irrigation Development Project in Area B-Block 3 Sagama on L.R Nos. North Kadem/Kanyuor/646, 602, 730, 6931, 6176, 646, 6178, 647, and 634 without first implementing a resettlement action plan and payment of just compensation to the Appellants is unconstitutional and amounts to trespass.
    - iii. A declaration be and is hereby issued that the now abandoned construction [irrigation infrastructure] activities of the 1<sup>st</sup> Respondent at MD4 of the detailed design of Lower Kuja Irrigation Development Project in Area B-Block 3 Sagama on L.R Nos. North Kadem/Kanyuor/646, 602, 730, 6931, 6176, 646, 6178, 647, and 634 without creation of wayleaves and without adequate payment of prompt and adequate compensation as provided for under the law has infringed upon the Appellants' property rights.
    - iv. General damages be and is hereby awarded to and in favour of the Appellants in accordance with paragraph 179 hereof. For coherence general damages for trespass are awarded as hereunder: Ezra Opiyo Ngoje – Plot No. 602 – KShs. 390,000/- Peter Anyuor Mangira – Plot No. 730 -KShs. 1,440,000/-George Odhiambo Lago – Plot No. 6931 - KShs. 120,000/-Solomon Owiti Akura – Plot No. 6176 - KShs. 360,000/- Isaac Ogal Akura – Plot No. 646 - KShs. 90,000/-Peter Odhiambo Akura – Plot No. 6178 - KShs. 360,000/-Pius Amolo Ooko – Plot No. 647 - KShs. 120,000/-Pamela Atieno Nyaoke – Plot No. 634 - KShs. 360,000/-



- v. Exemplary damages be and is hereby awarded to the Appellants in the sum of KShs. 3,000,000/- each.
- vi. The award of general and exemplary damages shall accrue interest at court rates [14% per annum] from the date of Judgement.
- vii. A restoration order be and is hereby issued against the 1<sup>st</sup> Respondent to restore the suit properties to the status quo ante [status quo prior to the construction of the now abandoned irrigation infrastructure] and same to be undertaken and completed within 180 days from the date of Judgement hereof.
- viii. In default by the 1<sup>st</sup> Respondent to undertake and implement the restoration order in accordance with Section of 111 of the EMCA 1999 [2015] and within the circumscribed timeline, National Environment Management Authority shall undertake the restoration of the suit properties albeit at the expense of the 1<sup>st</sup> Respondent [National Irrigation Authority].
- d. Costs of the Appeal [ELCA E090 of 2024] be and are hereby awarded to the Appellants.
- e. ELCA E097 of 2024 be and is hereby dismissed, save for the aspect touching on Mesne profits.
- f. The Appellant in ELCA E 097 of 2024 be and is hereby awarded ¼ costs to be borne by the Respondents in ELCA No. E 097 of 2024.
- g. Any other relief[s] not expressly granted is hereby declined.

208. It is so ordered.

**DATED, SIGNED AND DELIVERED ON THE 14<sup>TH</sup> DAY OF FEBRUARY 2025**

**OGUTTU MBOYA,**

**JUDGE.**

In the presence of:

Mutuma/Benson – Court Assistant.

Mr. Kennedy Okong’o for the Appellants in ELCA E 090 of 2024; and for the Respondents in ELCA No. E 097 of 2024

Mr. Delbert Ochola for the 1<sup>st</sup> Respondent in ELCA No. E 090 of 2024; and for the Appellant in ELCA No, E 097 of 2024

No Appearance for the 2<sup>nd</sup> Respondent in ELCA No. E 090 of 2024

