



Dima & another v Kenya Ports Authority & another (Constitutional Petition E014 of 2023) [2024] KEELC 7286 (KLR) (30 October 2024) (Judgment)

Neutral citation: [2024] KEELC 7286 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CONSTITUTIONAL PETITION E014 OF 2023
LL NAIKUNI, J
OCTOBER 30, 2024
IN THE MATTER OF: ARTICLE 22, OF THE CONSTITUTION OF KENYA 2010
AND
IN THE MATTER OF: ARTICLE 10,19,20,23,40,47,162,165
AND 258 OF THE CONSTITUTION OF
KENYA,2010
AND
IN THE MATTER OF: SECTION 13 OF THE
ENVIRONMENT AND LAND COURT ACT 2011
AND
IN THE MATTER OF: SECTION 107,111,112,113,117
AND 120 OF THE LAND ACT NO. 6 OF 2012
AND
IN THE MATTER OF: CONTRAVENTION OF THE
BILL OF RIGHTS UNDER ARTICLE 40 AND 47 OF
THE CONSTITUTION OF KENYA, 2010

BETWEEN

JOAN ATIENO DIMA 1ST PETITIONER

MICHAEL ATWENG'A OCHOK 2ND PETITIONER

AND

KENYA PORTS AUTHORITY 1ST RESPONDENT

NATIONAL LAND COMMISSION 2ND RESPONDENT



JUDGMENT

I. Preliminaries

1. The Judgment of this Court pertains to the filed Constitution Petition dated 27th November, 2023 by, Joan Atieno Dima and Michael Atweng'a Ochok, the Petitioners herein and the Kenya Ports Authority and National Land Commission, the Respondents herein. *The Constitution* Petition was brought under the dint of the provisions of Articles 10, 19, 20, 22, 23, 40, 47, 162,165 and 258 of *the Constitution* of Kenya 2010, Section 13 of the *Environment and Land Court Act*, No. 19 of 2011 and Sections 107,111,112, 113, 117 and 120 of the *Land Act* No. 6 of 2012. The Petition was accompanied by an affidavit in support
2. Upon service of the Petition, the 2nd Respondent entered their appearance through a memorandum of appearance and responded through a replying affidavit dated 17th April, 2024.

II. Description of the Parties

3. The Petitioners were described as adults of sound minds and Kenyan citizens; the 1st Respondent was described as a statutory body established through an Act of Parliament, with capacity to sue and be sued in its own name, having its principal place of operations in Mombasa within the Republic of Kenya. The 2nd Respondent was described as an independent commission and a body corporate with perpetual succession and a seal, capable of suing and being sued in its corporate name and established under Article 67 as read together with Article 253 of *the Constitution* of Kenya.

III. The Petitioners' Case

4. The Petitioners sought for the following orders: -
 - a. A declaration that the Petitioners' rights to acquire and own property guaranteed under Article 40 of *the Constitution* of Kenya and Sections 111(1) and 115(1) of the *Land Act*,2012 have been contravened by the Respondents;
 - b. A declaration that the Petitioners' rights to fair administrative action guaranteed under Article 47 of *the Constitution* of Kenya have been contravened by the Respondents;
 - c. A Declaration that the 1st Respondent has compulsorily acquired the Petitioners' properties known as Subdivision Number 2445 Section VI Mainland North and Subdivision Number 2446 Section VI Mainland North unprocedurally and without compensation.
 - d. An Order directing the Respondents to forthwith effect payment of compensation pursuant to the awards dated 1st September, 2014 of Kshs. 42,780,000.00 for 0.2509 hectares of Land Subdivision Number 2445 Section VI Mainland North and Kshs. 61,050,000.00 for 0.344 hectares of Subdivision Number 2446 Section VI Mainland North all amounting to Kshs. 103,830,000.00 to the Petitioners;
 - e. A declaration that the Petitioners are entitled to Interest on the compensation pursuant to the awards dated 1st September, 2014 of Kshs.42,780,000.00 for 0.2509 hectares of Land Subdivision Number 2445 Section VI Mainland North and Kshs.61,050,000.00 for 0.344 hectares of Subdivision Number 2446 Section VI Mainland North at the prevailing bank rates from 2013 when the 1st Respondent took possession of the Suit Properties until payment in



full as provided for under Section 117(1) of the Land Act and an order to this effect be issued for compliance by the Respondents.

- f. An order directing the Respondents to forthwith undertake valuation and pay the compensation in respect of the further utilization by the 1st Respondent of 0.01 hectares of Land Subdivision Number 2445 Section VI Mainland North and 0.0585 hectares of Subdivision Number 2446 Section VI Mainland North within 30 days or such period as the Honourable Court may order.
- g. A declaration that the Petitioners are entitled to interest on the compensation in respect of the further utilization by the 1st Respondent of the 0.01 hectares of Land Subdivision Number 2445 Section VI Mainland North and 0.0585 hectares of Subdivision Number 2446 Section VI Mainland North at the prevailing bank rates with effect from the year 2013 when the 1st Respondent took possession of the Suit Properties until payment in full as provided for under Section 117 as read together with Section 120 of the Land Act and an order to this effect be issued for compliance by the Respondents;
- h. The costs of, and incidental to, this Petition.
- i. Such other or further orders or directions as the Court may deem fit to grant.

IV. The Brief Facts

- 5. The brief facts of the case were and still are that the Petitioners were the registered proprietors of the parcels of land known as Subdivision Number 2445 Section VI Mainland North measuring 1.36 acres and Subdivision Number 2446 Section VI Mainland North measuring 0.98 acres (Hereinafter “The Suit Properties”) both situate at Mombasa County. In or about 2013, the 1st Respondent, without permission and authority from the Petitioners, unlawfully and unprocedurally entered, and commenced construction of a road and a fence, upon the Suit Properties and the Petitioners complained of the illegal and unlawful entry and the illegal activities thereon in their letter dated 17th December, 2013 and sought compensation from the 1st Respondent but the latter did not respond to the Petitioners’ letter but blatantly continued with their illegal activities on the Suit Properties without due regard to the Petitioners’ right to own property and the protection of the said rights under Article 40 of the Constitution.
- 6. On 24th January, 2014, the 2nd Respondent published Gazette Notice Number 405 that the Government intended to acquire 0.2509 hectares of Land Subdivision Number 2445 Section VI Mainland North and 0.344 hectares of Subdivision Number 2446 Section VI Mainland North, the Suit Properties herein, on behalf of Kenya National Highways Authority (KeNHA) for the Mombasa Port Area Road Development Project (MPARD) namely the construction of Mombasa Southern Bypass and Kipevu Terminal Link Road.
- 7. Pursuant to a further Gazette Notice No. 1796 published on 21st March, 2014 by the 2nd Respondent, the Petitioners attended the meeting for inquiry and hearing of claims for compensation held at the DO’s Office at Changamwe on 19th May, 2014 and provided proof of ownership of the Suit Properties subsequent to which the 2nd Respondent issued compensation awards both dated 1st September, 2014 in favour of the Petitioners in the sum of Kenya Shillings Fourty Two Million Seven Eighty Thousand (Kshs.42,780,000.00/=) for 0.2509 hectares of Land Subdivision Number 2445 Section VI Mainland North and a sum of Kenya Shillings Fourty Two Million Seven Eighty Thousand Kshs. 61,050,000.00 for 0.344 hectares of Land Subdivision Number 2446 Section VI Mainland North all amounting to



a sum total of One Hundred and Three Million Eight Thirty Thousand (Kshs. 103,830,000.00/=) which the Petitioners duly accepted.

8. In spite of the delivery of the compensation awards and the numerous visits the Petitioners made to the 2nd Respondent's offices in Nairobi in a span of at least 2 years, the 2nd Respondent did not pay the aforesaid sums of Kenya Shillings Fourty Two Million Seven Eighty Thousand (Kshs. 42,780,000.00) and Kenya Shillings Fourty Two Million Seven Eighty Thousand (Kshs. 61,050,000.00) or any part thereof and the Petitioners were surprised to see Gazette Notice Number 340 published on 13th January, 2017 deleting the Suit Properties with regard to Mombasa Port Area Road Development Project (MPARD) without any explanation to the Petitioners yet the road passing through the Suit Properties and a fence thereon had already been completed in or about 2015 and the Petitioners' complaint contained in their letter dated 19th May, 2017 addressed to the 2nd Respondent and KeNHA did not elicit any response and the Suit Properties remained encumbered by the compulsory acquisition vide the Gazette Notice Number 405 of 24th January, 2014 as revealed in the Certificates of Postal Search dated 11th July, 2018.
9. Vide the notice dated 18th May, 2018, the Petitioners protested to the 1st Respondent for the acquisition of the Suit Properties without following the due process and failing to pay compensation and after numerous correspondence and meetings between the Petitioners and the 1st Respondent, the latter confirmed that it was under obligation to compensate the Petitioners for the portion of the road that passed through the Suit Properties and the fence that had been erected thereon.
10. Despite the existence of the awards made by the 2nd Respondent on 1st September, 2014 as aforesaid, on 26th February, 2019, the 1st Respondent sought for valuation of the Suit Properties by the Director, Land Valuation, Ministry of Land and Physical Planning, but the 1st Respondent has to date not shared the Valuation Report with the Petitioners notwithstanding the numerous requests made by the latter.
11. The Petitioners averred that apart from the 0.2509 hectares of Land Sub - division Number 2445 Section VI Mainland North and 0.344 hectares of Sub - division Number 2446 Section VI Mainland North that had already been gazetted and utilized for the construction of the road and the security fence, the 1st Respondent further utilized 0.01 hectares of Land Subdivision Number 2445 Section VI Mainland North and 0.0585 hectares of Sub - division Number 2446 Section VI Mainland North (effectively the entire parcel) and the 1st Respondent letter dated 20th January, 2021 addressed to the Cabinet Secretary, National Treasury and Planning and a further letter dated 1st March, 2023 addressed to the 2nd Respondent confirm the further utilization and the Petitioners are entitled to compensation in regard to the compulsory acquisition of the said portions.
12. The Respondents failed to follow the requisite procedure with regard to compulsory acquisition of the Suit Properties and have refused and or failed to pay the just and full compensation promptly or at all for more than 10 years now since the 1st Respondent took possession of the Suit Properties and commenced the construction of the road in 2013 to date. The Petitioners further stated that pursuant to Sections 111, 113 and 115 of the *Land Act*, No. 6 of 2012, they were entitled to be paid promptly upon the making of the awards dated 1st September, 2014 and the delay in paying compensation since the commencement of the Respondent's activities on the Suit Properties in 2013 and making of the awards in 2014 to date is unreasonable and contravenes the aforesaid provisions.
13. The further utilization of 0.01 hectares of Land Subdivision Number 2445 Section VI Mainland North and 0.0585 hectares of Sub - division Number 2446 Section VI Mainland North (effectively the entire parcel) as aforesaid contravenes the Petitioners' rights to property under Article 40 of *the Constitution* of Kenya, 2010 and Sections 111, 113, 115 and 117 of the *Land Act*, 2012. Since the



Petitioners had not been paid the just and full compensation promptly or at all by the Respondents for the compulsory acquisition of the Suit Properties as required by *the Constitution* of Kenya and the *Land Act* No. 6 of 2012, the 1st Respondent entry upon the Suit Properties is a breach of the Petitioners' right to property under Article 40 of *the Constitution* of Kenya, 2010.

14. Further, the failure by the Respondents to pay the just and full compensation promptly to the Petitioners while the 1st Respondent had entered upon the Suit Properties and implemented project by constructing and completing the road and erecting a security fence constituted a blatant breach of the Petitioners' right to fair administrative action under Article 47 of *the Constitution* of Kenya which requires any administrative action to be inter alia expeditious, efficient and reasonable. Pursuant to Section 117 (1) of the *Land Act*, 2012, the Petitioners are entitled to interest on any compensation award not paid from 2013 when the 1st Respondent took possession of the Suit Properties and from 1st September, 2014 when the compensation awards were made until payment in full.
15. Before filling the Petition, the Petitioners wrote several letters to the Respondents herein demanding that due process be followed in the acquisition of the Suit Properties and compensation paid but have not received any useful response from the Respondents or any of them.
16. The Petitioner therefore prayed to this Honourable Court to intervene and remedy the Blatant breach of the Petitioners' constitutional rights.
17. The Petition was supported by a 23 Paragraphed affidavit sworn by Michael A. Ochok, the 2nd Petitioner herein on the same date as the petition with eleven (11) annexures marked as "MAO 1 to 11" where he averred that: -
 - a. He had the authority of the 1st Petition to swear this affidavit on her behalf as well.
 - b. The Petitioners were registered proprietors of the parcels of land known as Subdivision Number 2445 Section VI Mainland North measuring 1.36 acres and Subdivision Number 2446 Section VI Mainland North measuring 0.98 acres (hereinafter "the Suit Properties") both situate at Mombasa County. Annexed in the affidavit and marked "MAO - 1" were copies of the Certificates of Title and the respective Certificates of Postal Search.
 - c. In or about the year 2013, the 1st Respondent, without permission and authority from them, unlawfully and illegally entered, and commenced construction of a road and a fence, upon the Suit Properties and we complained of the illegal entry, encroachment and the illegal activities thereon in their letter dated 17th December, 2013 and sought compensation from the 1st Respondent but the latter did not respond to their letter but blatantly continued with its illegal activities on the Suit Properties without due regard to our right to own property and the protection of the said right under Article 40 of *the Constitution*. Annexed in the affidavit and marked "MAO - 2" was a copy of the said demand letter.
 - d. On 24th January, 2014, the 2nd Respondent published Gazette Notice Number 405 that the Government of Kenya intended to acquire 0.2509 hectares of Land Subdivision Number 2445 Section VI Mainland North and 0.344 hectares of Subdivision Number 2446 Section VI Mainland North, the Suit Properties herein, on behalf of Kenya National Highways Authority (KeNHA) for the Mombasa Port Area Road Development Project (MPARD) namely the construction of Mombasa Southern Bypass and Kipevu Terminal Link Road. Annexed in the affidavit and marked as "MAO - 3" was a copy of the Gazette Notice.
 - e. Pursuant to a further Gazette No. 1796 published on 21st March, 2014 by the 2nd Respondent, the Petitioners attended the meeting for inquiry and hearing of claims for compensation held



at the DO's Office in Changamwe on 19th May, 2014 and provided proof of ownership of the Suit Properties. Annexed in the affidavit and marked as "MAO - 4" was a copy of the Gazette Notice.

- f. Subsequent to the inquiry and hearing of claims for compensation, the 2nd Respondent issued compensation awards both dated 1st September, 2014 in the Petitioners' favour in the sum Kenya Shillings Fourty Two Million Seven Eighty Thousand (Kshs. 42,780,000/-) for 0.2509 hectares of Land Sub - division Number 2445 Section VI Mainland North and a sum of Kenya Shillings Sixty One Million Fifty Thousand (Kshs. 61,050,000/-) for 0.344 hectares of Land Subdivision Number 2446 Section VI Mainland North all amounting a total of Kenya Shillings One Hundred and Three Million Eight Thirty Thousand (Kshs. 103,830,000/-) which they duly accepted. Annexed in the affidavit and marked as "MAO - 5" were copied of the awards.
- g. In spite of the delivery of the compensation awards and the numerous visits the Petitioners made to the 2nd Respondent's offices in Nairobi in a span of at least 2 years, the 2nd Respondent did not pay the aforesaid sums of Kshs. Kenya Shillings Fourty Two Million Seven Eighty Thousand 42,780,000/- and a sum of Kenya Shillings Sixty One Million Fifty Thousand (Kshs. 61,050,000/-) or any part thereof and the Petitioners were surprised to see Gazette Notice Number 340 published on 13th January, 2017 deleting the suit properties with regard to Mombasa Port Area Road Development Project (MPARD). Annexed in the affidavit and marked as "MAO - 6" was a copy of the Gazette Notice.
- h. The deletion vide the Gazette Notice aforesaid was done without any explanation to the Petitioners yet the road passing through the Suit Properties and a fence thereon had already been completed in or about 2015 and the Petitioners complaint contained in their letter dated 19th May, 2017 addressed to the 2nd Respondent and KeNHA did not elicit any response. Annexed in the affidavit and marked as "MAO - 7" was a copy of the said letter.
- i. Vide the notice dated 18th May, 2018, the petitioners protested to the 1st Respondent for compulsorily acquiring the Suit Properties without following the due process and failing to pay compensation and after numerous correspondence and meetings between us and the 1st Respondent, the latter confirmed that it was under obligation to compensate us for its use of Suit Properties for the construction of the road and the security fence. Annexed in the affidavit and collectively marked as "MAO - 8" were copied of the correspondence.
- j. In the meantime the Suit Properties remained encumbered by the compulsory acquisition vide the Gazette Notice Number 405 of 24th January, 2012 as revealed in the Certificate of Postal Search dated 11th July, 2018. Annexed in the affidavit and collectively marked as "MAO - 9" were copies of the Certificates of Postal search.
- k. Despite the existence of the awards made by the 2nd Respondent on 1st September, 2014 as aforesaid, on 26th February, 2019, the 1st Respondent sought for valuation of the acquired portions of the Suit Properties by the Director, Land Valuation, Ministry of Land and Physical Planning, but the 1st Respondent has to date not shared the Valuation Report with any of the petitioners despite having undertaken to do so and reminders to the 1st Respondent have completely and utterly been ignored. Annexed in the affidavit and marked as "MAO - 10" were copies of the correspondence to that effect.
- l. Apart from the 0.2509 hectares of Land Subdivision Number 2445 Section VI Mainland North and 0.344 hectares of Subdivision Number 2446 Section VI Mainland North that



had already been gazette for acquisition and duly utilized for the construction of the road and the security fence, the 1st Respondent further utilized 0.01 hectares of Land Subdivision Number 2445 Section VI Mainland North and 0.0585 hectares of Subdivision Number 2446 Section VI Mainland North (effectively the entire parcel) and the 1st Respondent letter dated 20th January, 2021 addressed to the Cabinet Secretary, National Treasury and Planning and a further letter dated 1st March, 2023 addressed to the 2nd Respondent confirm the further acquisition and the petitioners are entitled to compensation in regard to the compulsory acquisition and utilization of the said portions. Annexed in the affidavit and marked as “MAO - 11” were copies of the said letters.

- m. The 1st and 2nd Respondents failed to follow the requisite procedure with regard to compulsory acquisition of the Suit Properties and have refused and or failed to pay the just and full compensation promptly or at all for more than 10 years now since the 1st Respondent commenced the construction of the road in the year 2013 to date.
- n. Pursuant to Sections 111,113 and 115 of the Land Act, 2012, the Petitioners were entitled to be paid promptly upon the making of the awards dated 1st September, 2014 and the delay since the commencement of the Respondent’s activities on the Suit Properties in the year 2013 and making of the awards in 2014 to date is unreasonable and contravenes the aforesaid provisions.
- o. Further utilization of 0.01 hectares of Land Subdivision Number 2445 Section VI Mainland North and 0.0585 hectares of Subdivision Number 2446 Section VI Mainland North (effectively the entire parcel) by the 1st Respondent as aforesaid contravenes the petitioners’ rights to property under Article 40 of the Constitution of Kenya, 2010 and Sections 111,113,115 and 117 of the Land Act, No. 6 of 2012.
- p. Since the petitioners have not been paid the just and full compensation promptly or at all by the Respondents for the compulsory acquisition of the Suit Properties as required by the Constitution of Kenya and the Land Act No. 6 of 2012, the 1st Respondent entry upon the Suit Property is a breach of their right to acquire and own property under Article 40 of the Constitution of Kenya, 2010.
- q. Further, the failure by the Respondents to pay the just and full compensation promptly to the Petitioners while the 1st Respondent has entered upon the suit properties and implemented project by constructing and completing the road and erecting a security fence constitutes a blatant breach of our right to fair administrative action under Article 47 of the Constitution of Kenya which requires any administrative action to be inter alia expeditious, efficient and reasonable.
- r. Pursuant to Section 117 as read together with section 120 of the Land Act, 2012, the Petitioners are entitled to interest on the compensation award not paid from 2013 when the 1st Respondent took possession of the Suit Properties until payment in full.
- s. The Petitioners averred that before filing this Petition, they wrote several letters to the Respondents demanding that due process be followed in the acquisition of the Suit Properties and compensation paid but they have not received any useful response from the Respondents or any of them.
- t. It was in the interest of justice that this Honourable Court intervened and remedies the blatant breach of their constitutional rights as sought in the petition filed herein.



V. The Response by the 1st Respondent

18. The 1st Respondent through Stephen Kyandih, a legal counsel in the employ of the 1st Respondent opposed the Petition dated 27th November, 2023 through a 19th paragraphed Replying Affidavit dated 17th April, 2024 who averred as follows:-
- i. The 1st Respondent was a stranger to the allegations at paragraph 4 of the Petitioner's Supporting Affidavit and was put to strict proof of the said allegations. In particular, the 1st Respondent had not at any given time acted in any matter as intimated in paragraph 4 as stated.
 - ii. In response to paragraphs 5 to 10 of the Petitioners' Supporting Affidavit, the process being referred to was carried out by the 2nd Respondent in the performance of its statutory mandate and the Petitioners were fully engaged and aware of the process.
 - iii. Furthermore, any change by deletion by the 2nd Respondent as well as KeNHA was regularized by the publication of the gazette notice. The 1st Respondent was not involved in the said process.
 - iv. In response to paragraph 10 of the Petitioner's Supporting Affidavit, the Petitioners were aware that the properties were acquired vide a gazette notice and they participated in the process up to the point of deletion. Thereafter they approached the 1st Respondent vide the Notice under Section 66(a) of the [*Kenya Ports Authority Act*](#).
 - v. All processes of acquisition have a mandatory procedure to be subscribed to. The 1st Respondent could not directly acquire property by compulsorily acquiring one in light of the new land regime established under [*the Constitution*](#). The 1st Respondent had to liaise with various national government institutions and departments which include the Treasury and especially the 2nd Respondent.
 - vi. The communication subject of the annexures marked as "MAO – 8", and in particular from the 1st Respondent were strictly on a without prejudice basis. The letter one without prejudice basis were only for purposes of aiding parties to negotiate a settlement without fear of the said information not being used against them. The use of the letters in the Petition herein was therefore prejudicial to the 1st Respondent.
 - vii. The 1st Respondent proceeded to conduct itself in good faith all through after the Notice served by the Petitioners. They reiterated the contents of Paragraph 7 above.
 - viii. In response to Paragraphs 12 and 13 of the Petitioner's Supporting Affidavit, the existence of the valuation by the 2nd Respondent would not automatically call upon the 1st Respondent to compensate the Petitioners. The 2nd Respondent had an independent budgetary allocation and empirical process enabling it reach the figures.
 - ix. The involvement of the 2nd Respondent, KeNHA, and the 1st Respondent meant that it became exceedingly difficult to ascertain the party to compensate the Petitioners. The responsible party has therefore to be identified to avoid multiplication of claims, double compensation and loss of public funds.
 - x. Similarly, whereas the law requires that in an event of compulsory acquisition the entity acquiring confirm availability of funds and that all surveys have been done; the uniqueness of the Mombasa Port Development Project was that the financing of the project was financed



through many entities. This made the process of apportioning of compensation delicate and prolonged.

- xii. Mid – project, there were changes that necessitated a redesign of the project and abandoning of some sections of the project. Being there no consultation within the entities, there is confusion on who was responsible for compensating the Petitioners. The 1st Respondent has not in any manner declined to proceed with compensation where its legally obligated, in any case, it had no authority to avoid legal liability once it arises.
- xiii. Despite the fact that the 1st Respondent had benefitted from the acquisition did not mean that she was responsible to make good of the Petitioner’s claims. The 1st Respondent, KeNHA and Kenya Railways all benefited from the project and therefore it would be unfair to burden the 1st Respondent with the sole responsibility of compensating the Petitioners without there not being any empirical assessment
- xiv. The 1st Respondent has to seek guidance and obtain authorization from the national government through the Treasury, 2nd Respondent and comply with its establishing statute before making payment for any compensation, including to the Petitioners’ herein.
- xv. In response to response to paragraph 14 of the Petitioner’s Supporting Affidavit, we wish to reiterate the contents of Paragraphs 10 to 15 above and put the Petitioner’s to strict proof of contrary assertions.
- xvi. In response to paragraphs 15 to 20 of the Petitioner’s Supporting Affidavit, they wished to reiterate paragraphs 4 to 16 above.
- xvii. The Affidavit was in opposition to the Petition as filed herein and prayed that the same be dismissed with costs.

VI. Submissions

19. The parties while all in court on the 12th March, 2024 consented to canvassing the Petition dated 27th November, 2023 by way of written submissions. Pursuant to which on 27th May, 2024 after the Honourable Court confirmed the same a Judgment date was reserved on 30th October, 2024, 2024.

A. The Written Submissions by the Petitioners

20. The Petitioners through the Law firm of Messrs. Mwakireti & Asige Advocates filed their written submissions on 7th May, 2024. Mr. Mwakireti Advocate submitted that for hearing and determination was the Petitioners’ Petition dated 27th November, 2023 seeking the above stated reliefs against the Respondents.
21. According to the Learned Counsel, the Petition was supported by the affidavit of Michael A. Ochok, the 2nd Petitioner, sworn on 27th November, 2023 on his own behalf and on behalf of Joan Atieno Dima, the 1st Petitioner. The facts deposed in the said affidavit are as follows: -
 - a. The Petitioners were registered proprietors of the parcels of land known as Subdivision Number 2445 Section VI Mainland North measuring 1.36 acres and Subdivision Number 2446 Section VI Mainland North measuring 0.98 acres (hereinafter “the Suit Properties”) both situate at Mombasa County. Annexed in the affidavit and marked “MAO 1” were copies of the Certificates of Title and the respective Certificates of Postal Search.



- b. In or about 2013, the 1st Respondent, without permission and authority from them, unlawfully and illegally entered, and commenced construction of a road and a fence, upon the Suit Properties and we complained of the illegal entry, encroachment and the illegal activities thereon in their letter dated 17th December, 2013 and sought compensation from the 1st Respondent but the latter did not respond to their letter but blatantly continued with its illegal activities on the Suit Properties without due regard to our right to own property and the protection of the said right under Article 40 of *the Constitution*.
- c. On 24th January, 2014, the 2nd Respondent published Gazette Notice Number 405 that the Government of Kenya intended to acquire 0.2509 hectares of Land Subdivision Number 2445 Section VI Mainland North and 0.344 hectares of Sub - division Number 2446 Section VI Mainland North, the Suit Properties herein, on behalf of Kenya National Highways Authority (KeNHA) for the Mombasa Port Area Road Development Project (MPARD) namely the construction of Mombasa Southern Bypass and Kipevu Terminal Link Road.
- d. Pursuant to a further Gazette No. 1796 published on 21st March, 2014 by the 2nd Respondent, the Petitioners attended the meeting for inquiry and hearing of claims for compensation held at the DO's Office in Changamwe on 19th May, 2014 and provided proof of ownership of the Suit Properties.
- e. Subsequent to the inquiry and hearing of claims for compensation, the 2nd Respondent issued compensation awards both dated 1st September, 2014 in the Petitioners' favour in the sum Kenya Shillings Fourty Two Million Seven Eighty Thousand (Kshs. 42,780,000/-) for 0.2509 hectares of Land Subdivision Number 2445 Section VI Mainland North and a sum of Kenya Shillings Sixty One Million Fifty Thousand (Kshs. 61,050,000/-) for 0.344 hectares of land Subdivision Number 2446 Section VI Mainland North all amounting to a total sum of Kenya Shillings One Hundred and Three Million Eight Thirty Thousand (Kshs. 103,830,000/-) which they duly accepted.
- f. In spite of the delivery of the compensation awards and the numerous visits the Petitioners made to the 2nd Respondent's offices in Nairobi in a span of at least 2 years, the 2nd Respondent did not pay the aforesaid sums of the sum Kenya Shillings Fourty Two Million Seven Eighty Thousand (Kshs. 42,780,000/-) and a sum of Kenya Shillings Sixty One Million Fifty Thousand (Kshs. 61,050,000/-) or any part thereof and the Petitioners were surprised to see Gazette Notice Number 340 published on 13th January, 2017 deleting the suit properties with regard to Mombasa Port Area Road Development Project (MPARD).
- g. The deletion vide the Gazette Notice aforesaid was done without any explanation to the Petitioners yet the road passing through the Suit Properties and a fence thereon had already been completed in or about 2015 and the Petitioners complaint contained in their letter dated 19th May, 2017 addressed to the 2nd Respondent and KeNHA did not elicit any response.
- h. Vide the notice dated 18th May, 2018, the Petitioners protested to the 1st Respondent for compulsorily acquiring the Suit Properties without following the due process and failing to pay compensation and after numerous correspondence and meetings between us and the 1st Respondent, the latter confirmed that it was under obligation to compensate us for its use of Suit Properties for the construction of the road and the security fence.
- i. In the meantime the Suit Properties remained encumbered by the compulsory acquisition vide the Gazette Notice Number 405 of 24th January, 2012 as revealed in the Certificate of Postal Search dated 11th July, 2018.



- j. Despite the existence of the awards made by the 2nd Respondent on 1st September, 2014 as aforesaid, on 26th February, 2019, the 1st Respondent sought for valuation of the acquired portions of the Suit Properties by the Director, Land Valuation, Ministry of Land and Physical Planning, but the 1st Respondent had to date not shared the Valuation Report with any of the petitioners despite having undertaken to do so and reminders to the 1st Respondent had completely and utterly been ignored.
- k. Apart from the 0.2509 hectares of Land Subdivision Number 2445 Section VI Mainland North and 0.344 hectares of Sub - division Number 2446 Section VI Mainland North that had already been gazette for acquisition and duly utilized for the construction of the road and the security fence, the 1st Respondent further utilized 0.01 hectares of Land Sub - division Number 2445 Section VI Mainland North and 0.0585 hectares of Subdivision Number 2446 Section VI Mainland North (effectively the entire parcel) and the 1st Respondent letter dated 20th January, 2021 addressed to the Cabinet Secretary, National Treasury and Planning and a further letter dated 1st March, 2023 addressed to the 2nd Respondent confirm the further acquisition and the Petitioners are entitled to compensation in regard to the compulsory acquisition and utilization of the said portions.
- l. The 1st and 2nd Respondents failed to follow the requisite procedure with regard to compulsory acquisition of the Suit Properties and have refused and or failed to pay the just and full compensation promptly or at all for more than 10 years now since the 1st Respondent commenced the construction of the road in the year 2013 to date.
- m. Pursuant to Sections 111,113 and 115 of the Land Act, No. 6 of 2012, the Petitioners were entitled to be paid promptly upon the making of the awards dated 1st September, 2014 and the delay since the commencement of the Respondent's activities on the Suit Properties in the year 2013 and making of the awards in the year 2014 to date is unreasonable and contravenes the aforesaid provisions.
- n. Further utilization of 0.01 hectares of Land Subdivision Number 2445 Section VI Mainland North and 0.0585 hectares of Subdivision Number 2446 Section VI Mainland North (effectively the entire parcel) by the 1st Respondent as aforesaid contravenes the Petitioners' rights to property under Article 40 of the Constitution of Kenya, 2010 and Sections 111,113,115 and 117 of the Land Act, No. 6 of 2012.
- o. Since the Petitioners have not been paid the just and full compensation promptly or at all by the Respondents for the compulsory acquisition of the Suit Properties as required by the Constitution of Kenya and the Land Act No. 6 of 2012, the 1st Respondent entry upon the Suit Property was a breach of their right to acquire and own property under Article 40 of the Constitution of Kenya, 2010.
- p. Further, the failure by the Respondents to pay the just and full compensation promptly to the Petitioners while the 1st Respondent had entered upon the suit properties and implemented project by constructing and completing the road and erecting a security fence constitutes a blatant breach of our right to fair administrative action under Article 47 of the Constitution of Kenya which requires any administrative action to be inter alia expeditious, efficient and reasonable.



- q. Pursuant to Section 117 as read together with Section 120 of the [Land Act](#), No. 6 of 2012, the Petitioners are entitled to interest on the compensation award not paid from 2013 when the 1st Respondent took possession of the Suit Properties until payment in full.
 - r. The Petitioners averred that before filing this Petition, they wrote several letters to the Respondents demanding that due process be followed in the acquisition of the Suit Properties and compensation paid but they have not received any useful response from the Respondents or any of them.
 - s. It was in the interest of justice that this Honourable Court intervened and remedies the blatant breach of their constitutional rights as sought in the Petition filed herein
22. The Learned Counsel relied on the following documents in support of the Petition alluded to and attached to the supporting affidavit were enumerated herein below: -
- a. Certificates of Title and their respective certificate of postal search marked as annexure “MAO - 1” at pages 1-9.
 - b. A copy of the demand letter dated 17th December, 2013 from the Petitioners to the 1st Respondent marked as annexure as “MAO - 2” at pages 10-11.
 - c. A copy of the Gazette Notice Number 405 published on 24th January, 2014 evincing the intention to acquire portions of the suit properties for the construction of Mombasa Bypass and Kipevu New Terminal Link Road marked as annexure “MAO - 3” at pages 12-15.
 - d. A copy of the Gazette Notice Number 1796 published on 21st March, 2014 requiring the Petitioners, inter alia, to attend inquiries and hearing of claims for compensation marked as annexure “MAO - 4” at pages 17-19.
 - e. Award of compensation dated 1st September, 2014 for Plot No. MN/VI/2445 in the sum of Kenya Shillings Fourty Million Seven Eighty Thousand (Kshs. 42,780,000/-) and the acceptance thereof marked as annexure “MAO - 5” at pages 20-22.
 - f. Award of compensation dated 1st September, 2014 for Plot Number MN/VI/2446 in the sum of Kenya Shillings Sixty One Million Fifty Thousand (Kshs. 61,050,000/-) and the acceptance thereof at pages 23-25.
 - g. A copy of Gazette Notice Number 340 published on 13th January, 2017 deleting the Suit Properties with regard Mombasa Port Area Road Development Project (MPARD) marked as annexure “MAO - 6” at pages 26 - 30.
 - h. A copy of the Petitioners' letter dated 19th May, 2017 complaining of the deletion marked as annexure “MAO - 7” at pages 31 - 32.
 - i. The Petitioners' notice dated 18th May, 2018 addressed to the 1st Respondent and subsequent correspondences between the Petitioners and the 1st Respondent collectively marked as annexure “MAO - 8” at pages 33 -45.
 - j. Copies of certificates of postal searches confirming that the suit properties were still encumbered by the compulsory acquisition vide gazette notice no. 405 of 24th January, 2014 marked as annexure “MAO - 9” at pages 46 - 47.
 - k. Copies of letters exchanged between the 1st Respondent and the Petitioners on the aspect of valuation of the suit properties marked as annexure “MAO - 10” at pages 48-59(a).



1. Copies of letters by the 1st Respondent to Respondent confirming that the 1st Respondent has utilized more land than the area of the suit properties that was gazetted marked as annexure “MAO - 11” at pages 60-71
23. According to the Learned Counsel, there was no response by the Respondents. The Respondents were duly served with the Petition. They were obliged to respond to the Petition within 15 days of service of the Petition. They did not. The 1st Respondent sought the indulgence of the court twice to file its response but did not file any. The 2nd Respondent had not appeared nor filed any response to the Petition. Accordingly, the facts as narrated by the Petitioners remain uncontroverted and the Petition was therefore unopposed. The court directed that the Petition proceeds as an undefended Petition and further directed parties to file submissions.
24. On the issues for the determination, the Learned Counsel relied on the following:-
 1. Whether the Petition meets the threshold for constitutional petitions;
 2. Whether the Respondents have contravened the provisions of Article 40 and 47 of *the Constitution* of Kenya in the compulsory acquisition process of the suit properties belonging to the Petitioners;
 3. What relief should the court grant if the Respondents have contravened the provisions of Article 40 and 47 of *the constitution*;
 4. Who should bear the costs of the petition
25. On issue one, the Learned Counsel submitted that the Petition filed herein met the threshold for Constitutional Petitions. The Petitioners allege that their constitutional rights to acquire and own property and fair administrative under Articles 40 and 47 of *the Constitution* of Kenya, 2010 respectively had been contravened by the Respondents. Their properties had already been taken and utilized by the 1st Respondent for a public purpose since 2013 but compensation was yet to be paid to date.
26. The Learned Counsel submitted that the constitutional violations have been pleaded with a “reasonable degree of precision” as held in the case of “Anarita Karimi Njeru – Versus - Republic [1980]KLR 154” and the Petitioners had proved ownership of the suit properties by attaching copies of the certificates of title and certificates of postal search (see annexure as “MAO - 1”).
27. The Petitioners, having proved ownership of the suit properties and the right to own property being one of the rights under the Bill of Rights, were therefore entitled to file the petition herein as provided for under Article 22 (1) of *the Constitution* which provides that: -

“Every person has the right to institute court proceedings claiming that, a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened”.
28. In the case of “Fort Properties Limited – Versus - Attorney General & 2 others, [2021] eKLR”, this Honourable Court in making a finding that the petition similar to the one herein had met the threshold for constitutional petitions, held that: -

“..... This Court must give a liberal interpretation and consideration to any provision of *the Constitution* and have regard to the language and wording of *the Constitution* and where



there is no ambiguity attempt to depart from the straight texts of the Constitution must be avoided.

Further, it is important to fathom that the Constitution is “a living instrument having a soul and consciousness of its own”. It must always be interpreted and considered as a whole with all the provisions sustaining and coordinating each other and not destroying the other.”

29. They urged the Honourable Court to make a similar finding in respect of the petition herein.
30. On the second issue the Learned Counsel submitted that the Petitioners were the registered proprietors of the suit properties. The 1st Respondent entered the suit properties in the year 2013 and commenced construction of a road. No notice was given to the Petitioners of the 1st Respondent’s intended acquisition of the suit properties for the said purpose. The Petitioners’ letter dated 17th December, 2013 complained of the 1st Respondent’s activities on the suit properties did not elicit any response and the 1st Respondent continued with their activities. The provision of Article 40 (3) of the Constitution provides that: -

“The state shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation

- a)
- b) is for a public purpose or in the public interest and is carried out in accordance with this constitution any Act of parliament that: -
 - (i) requires prompt payment in full, of just compensation to the person;

31. The relevant Act of parliament in this regard is the Land Act No. 6 of 2012 (hereinafter “The Act”) provides in Section 111(1) that:

“if land is acquired compulsorily under this Act, just compensation shall be paid promptly in full to all persons whose interest in the land have been determined.”

32. According to the Learned Counsel submitted that however, prior to prompt payment in full, of just compensation to the person and possession by the acquiring entry, the provisions of Sections 110,112,113,114 of the Act have to be complied with. Section 110 of the Act provided for notice and certification in writing by the National Land Commission that the land was required for a public purpose or in the public interest. Section 112 (1) provides for inquiry as to compensation and states that: -

“At least 30 days after publishing the notice of intention to acquire land, the commission shall appoint a date for an inquiry to hear issues of propriety and claims for compensation by person interested in the land.”

33. Thereafter, the commission was required to prepare a written award under the provision of Section 113, given a notice of award under Section 114 and thereafter effect payment under section 115 of the Act. From the pleadings and documents filed herein, the 1st Respondent took possession of the suit properties in the year 2013 without compliance with Articles 40 of the Constitution and the process of compulsory acquisition under the provision of Sections 110, 111, 112, 113 and 114 of the Act.



34. The Petitioners had provided proof of entry by the 1st Respondent on the suit property vide the letter dated 17th December, 2013 by the Petitioners to the 1st Respondent which was duly acknowledged on 18th December, 2013. In its letter dated 20th January, 2021 addressed to Cabinet Secretary, National Treasury & Planning, the 1st Respondent in reference to the suit properties, inter alia, stated that “the road was built between March, 2012 and 2016”, and “...the position on the ground, as can be seen from the attached, is that the road, fence and storm water drainage is already developed on the parcels of land...” (see pages 61 and 65 of the annexure marked as “MAO - 11”. The same letter at page 66 confirms the Petitioners’ complaint that “...they were never informed or involved during project implementation. They were therefore not paid...”.
35. According to the Learned Counsel, the above two letters prove the assertion that the 1st Respondent entered into the suit properties in the year 2013 and constructed a road, fence and storm water drainage without any notice to the Petitioners and without following the process of compulsory acquisition as provided for under Article 40(3) of *the Constitution* and the provisions of the Act cited hereinabove and they urged this Honourable Court to find so.
36. In making the finding, the Honourable Court will find fortitude in reliance of the decision of “Attorney General – Versus - Zinj Limited (Petition 1 of 2020) [2021] KESC 23 (KLR) (Civ)” where the Supreme Court held that: -
- “The only way the Government could lawfully deprive the Respondent of part or all of its property, was through a compulsory acquisition, in conformity with the provisions of Article 40 (3) of *the Constitution*, and the procedure stipulated in the Land Acquisition Act (now repealed) which was the applicable law at the time...It follows that any compulsory acquisition process, ought to have commenced with a requisite Notice to the respondent, and any other persons claiming an interest in the land. The public purpose for which the land was to be acquired, ought to have been clearly stated. Most critically, the resultant acquisition ought to have been attended with prompt payment in full, of a just compensation to the respondent.”
37. There was an attempt by the 2nd Respondent to follow the process of compulsory acquisition of the suit properties by a different entity namely Kenya National Highways Authority (KeNHA) as follows:-
1. The notice of intention to acquire land for the Mombasa Port Area Road Development Project (MPARD), Mombasa Southern Bypass and Kipevu New Terminal Link Road published in Gazette Notice No. 405 of 24th January, 2014 (see page 14).
 2. Notice of inquiry for hearing of claims to compensation published in Gazette Notice No.1796 of 21st March, 2014. (see page 18 and 19).
 3. Issuance of written awards for compensation both dated 1st September, 2014 and duly accepted by the Petitioners.
38. Despite the aforesaid steps having been undertaken by the 2nd Respondent, no payment was forthcoming despite the Petitioners’ several visits to the 2nd Respondent’s offices in Nairobi to inquire why there was delay in payment of compensation yet construction of the road had commenced in the year 2013 and had duly been completed as at 2015.
39. The 2nd Respondent did not explain the delay of over 4 years since the awards were made only to publish the gazette Notice No. 340 titled “Construction of Mombasa Southern Bypass” deleting the suit properties (see page 30). The Petitioners’ complaint in respect of the deletion of their suit properties



contained in their letter dated 19th May, 2017 did not elicit any response from the 2nd Respondent or KeNHA. Having hit a brick wall in obtaining information from the 2nd Respondent on compensation and the ensuing delay and thereafter the subsequent deletion of the suit properties, the Petitioners issued a notice to the 1st Respondent dated 18th May, 2018 requiring it to pay compensation for the acquired portions of the suit properties having been previously aware that the road and fence on the suit properties was constructed by the 1st Respondent.

40. The correspondences at pages 33-46 confirm that the 1st Respondent accepted that it was liable to pay compensation to the Petitioners, yet the 1st Respondent continued with the same dilatory tactics as further correspondence at pages 48-59(a) demonstrate.
41. The Learned Counsel submitted that it took another 3 years from the year 2018 for the 1st Respondent to confirm in its letter dated 20th January, 2021 that “the road [on the suit properties] was built between March, 2012 and 2016” and that “.....the position on the ground...is that the road, fence and storm water drainage is already developed and existing on the parcels of land....”, yet did not pursue the matter further to ensure compensation was paid to the Petitioners as envisaged under *the Constitution* and the *Land Act*.
42. The Learned Counsel humbly submitted that the conduct of the 1st Respondent violated the Petitioners right under Article 40 and 47 of *the Constitution* and is in breach of Section 110-115 of the *Land Act*. Ten years after the 1st Respondent took possession of the suit properties and constructed a road, fence and storm water drainage, compensation was yet to be paid. The delay was inordinate and amount to deprivation of private property in contravention of Article 40 of *the Constitution*.
43. The Learned Counsel relied on the following case of “Fort Properties Ltd – Versus - Attorney General & 2 others (supra)”, this Honourable Court found that the Respondents in the said case had not imputed any reasonable and cogent cause for the procrastination for a period of over six (6) years in the payment of compensation to the Petitioner and further held as follows regarding the blame games between the different government agencies involved:-

“.....I find this preposition to be an evasive, dereliction and abdication of their statutory obligations depicted by the Respondents. It is a mere theatrics clothed in such casual and playful blame games of mechanically passing the buck from one quarter to the other even after six (6) years of the project at the chagrin of the Petitioner. Why should the Petitioner or any other innocent citizen of this country who are Person Affected by the Projects (PAPs) be subjected to such inhuman, ill and unreasonable treatment for the mistake of the State and its agencies? It is unacceptable. I find these actions to be utter violation, infringement and denial of their Constitutional rights and freedoms to say the least...”

44. The Learned Counsel urged the Court to make a similar finding herein.
45. On the third issue, the Learned Counsel averred submitted that having demonstrated the contravention by the Respondents of the constitutional and statutory provisions regarding the acquisition of the suit properties, they humbly submitted that the reliefs sought in the Petition ought to be granted. They urged the court to grant prayers (a), (b), (c), and (d). As regards prayers (f), the Petitioners have demonstrated that the 1st Respondent utilized more land than what was gazetted. The



1st Respondent's letter dated 20th January, 2021 at page 66 and the one dated 1st March, 2023 at page 71 confirm this fact. The provision of Section 119 of the Land Act provides that: -

“Whatever the survey provided for in Section 118 discloses that the size of the land acquired is greater or less than the size of the land in respect of which the award has been made, compensation shall be paid for the excess size in accordance with this Act.”

46. According to the Learned Counsel, the Petitioners were therefore entitled to compensation in respect of the excess portions of the suit properties utilized by the 1st Respondent. They urged the court to grant prayers (f) as sought. Turning to prayers (e) and (g) of the petition, they submitted that interest is payable from the date of possession by the 1st Respondent in 2013 both in respect of awards already made on 1st September, 2014 and in respect of the compensation that is to be paid for the excess land utilized and to be valued under prayer (f). The letter by the Petitioners dated 17th December, 2013 (pages 10-11) and the one by the 1st Respondent dated 20th January, 2021 both agree that the 1st Respondent took possession at least by the year 2013. It was confirmed in the latter's letter that “...the road was built between March 2012 and 2016” and “...the road, fence and storm water drainage is already developed and existing on the parcels of land...”
47. They urged the Court to find that interest on compensation is payable from the year 2013 when the 1st Respondent took possession until payment in full. This was in accord with section 117 of the Land Act. As regards the rate of interest, section 117 of the Land Act provided for payment of interest at prevailing bank rate. Determining the prevailing bank rate at this stage would require adducing evidence which may not be feasible at this stage. The prevailing bank rates will obviously be higher than the court rate of 14 per cent per annum. The Petitioners were willing to accept the court rate of 14% p.a. They urged the court to fix the rate of interest payable on the compensation at 14% p.a.
48. On the issue 4, the Learned Counsel submitted that the Petitioners had demonstrated that they were entitled to seek the intervention of the Court in view of the conduct of the Respondents. The Petitioners were very patient in seeking an amicable resolution of the matter and the 10 years wait attests to this fact. The Respondents were not keen. It was necessary that the petition be filed to compel the Respondents to comply with constitutional and statutory provisions. They urged the Honourable Court in granting the reliefs sought, to also award costs to the Petitioners.

VII. Analysis and Determination

49. I have carefully considered all the filed pleadings pertaining to the Petition dated 27th November, 2023, the Affidavits by the Petitioner, the articulate written submissions by both the Petitioner and the Respondent, the cited authorities, the appropriate provisions of the Constitution of Kenya, 2010 and the statutes.
50. For the Honourable Court to reach an informed, just, fair and reasonable decision, it has condensed the Subject matter into the following three (3) salient issues for its determination. These are: -
 - a. Whether the Petition by the Petitioners meets the threshold for Constitution Petitions.
 - b. Whether the Constitution Petition has any merit and, if affirmative, if the Petitioners are entitled to the reliefs sought?
 - c. Who will bear the Cost of the Petition?



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

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



- a. A declaration that the Petitioners' rights to acquire and own property guaranteed under Article 40 of *the Constitution* of Kenya and Sections 111(1) and 115(1) of the *Land Act*, 2012 have been contravened by the Respondents;
 - b. A declaration that the Petitioners' rights to fair administrative action guaranteed under Article 47 of *the Constitution* of Kenya have been contravened by the Respondents;
 - c. A Declaration that the 1st Respondent has compulsorily acquired the Petitioners' properties known as Subdivision Number 2445 Section VI Mainland North and Subdivision Number 2446 Section VI Mainland North unprocedurally and without compensation.
 - d. An Order directing the Respondents to forthwith effect payment of compensation pursuant to the awards dated 1st September, 2014 of Kshs. 42,780,000.00 for 0.2509 hectares of Land Subdivision Number 2445 Section VI Mainland North and Kshs. 61,050,000.00 for 0.344 hectares of Subdivision Number 2446 Section VI Mainland North all amounting to Kshs. 103,830,000.00 to the Petitioners;
 - e. A declaration that the Petitioners are entitled to Interest on the compensation pursuant to the awards dated 1st September, 2014 of Kshs.42,780,000.00 for 0.2509 hectares of Land Subdivision Number 2445 Section VI Mainland North and Kshs.61,050,000.00 for 0.344 hectares of Subdivision Number 2446 Section VI Mainland North at the prevailing bank rates from 2013 when the 1st Respondent took possession of the Suit Properties until payment in full as provided for under Section 117(1) of the *Land Act* and an order to this effect be issued for compliance by the Respondents.
 - f. An order directing the Respondents to forthwith undertake valuation and pay the compensation in respect of the further utilization by the 1st Respondent of 0.01 hectares of Land Sub - division Number 2445 Section VI Mainland North and 0.0585 hectares of Subdivision Number 2446 Section VI Mainland North within 30 days or such period as the Honourable Court may order.
 - g. A declaration that the Petitioners are entitled to interest on the compensation in respect of the further utilization by the 1st Respondent of the 0.01 hectares of Land Subdivision Number 2445 Section VI Mainland North and 0.0585 hectares of Subdivision Number 2446 Section VI Mainland North at the prevailing bank rates with effect from the year 2013 when the 1st Respondent took possession of the Suit Properties until payment in full as provided for under Section 117 as read together with Section 120 of the *Land Act* and an order to this effect be issued for compliance by the Respondents;
 - h. The costs of, and incidental to, this Petition.
 - i. Such other or further orders or directions as the Court may deem fit to grant
57. This Honorable Court must establish the constitutional basis of the Petition which is founded on the facts of the petition. The brief facts of the case were and still are that the Petitioners were the registered proprietors of the parcels of land known as Subdivision Number 2445 Section VI Mainland North measuring 1.36 acres and Subdivision Number 2446 Section VI Mainland North measuring 0.98 acres (hereinafter "the Suit Properties") both situate at Mombasa County. In or about 2013, the 1st Respondent, without permission and authority from the Petitioners, unlawfully and unprocedurally entered, and commenced construction of a road and a fence, upon the Suit Properties and the Petitioners complained of the illegal and unlawful entry and the illegal activities thereon in their letter dated 17th December, 2013 and sought compensation from the 1st Respondent but the latter did



not respond to the Petitioners' letter but blatantly continued with their illegal activities on the Suit Properties without due regard to the Petitioners' right to own property and the protection of the said rights under Article 40 of *the Constitution*.

58. On 24th January, 2014, the 2nd Respondent published Gazette Notice Number 405 that the Government intended to acquire 0.2509 hectares of Land Subdivision Number 2445 Section VI Mainland North and 0.344 hectares of Subdivision Number 2446 Section VI Mainland North, the Suit Properties herein, on behalf of Kenya National Highways Authority (KeNHA) for the Mombasa Port Area Road Development Project (MPARD) namely the construction of Mombasa Southern Bypass and Kipevu Terminal Link Road.
59. Pursuant to a further Gazette Notice No. 1796 published on 21st March, 2014 by the 2nd Respondent, the Petitioners attended the meeting for inquiry and hearing of claims for compensation held at the DO's Office at Changamwe on 19th May, 2014 and provided proof of ownership of the Suit Properties subsequent to which the 2nd Respondent issued compensation awards both dated 1st September, 2014 in favour of the Petitioners in the sum of Kenya Shillings Fourty Two Million Seven Eighty Thousand (Kshs.42,780,000.00/=) for 0.2509 hectares of Land Subdivision Number 2445 Section VI Mainland North and a sum of sum of Kenya Shillings Fourty Two Million Seven Eighty Thousand (Kshs. 61,050,000.00) for 0.344 hectares of Land Sub - division Number 2446 Section VI Mainland North all amounting to a total sum of a total sum of Kenya Shillings One Hundred and Three Million Eight Thirty Thousand (Kshs. 103,830,000.00) which the Petitioners duly accepted.
60. In spite of the delivery of the compensation awards and the numerous visits the Petitioners made to the 2nd Respondent's offices in Nairobi in a span of at least 2 years, the 2nd Respondent did not pay the aforesaid sums of sum of Kenya Shillings Fourty Two Million Seven Eighty Thousand (Kshs. 42,780,000.00) and sum of Kenya Shillings Sixty One Million Fifty One Thousand (Kshs. 61,050,000.00) or any part thereof and the Petitioners were surprised to see Gazette Notice Number 340 published on 13th January, 2017 deleting the Suit Properties with regard to Mombasa Port Area Road Development Project (MPARD) without any explanation to the Petitioners yet the road passing through the Suit Properties and a fence thereon had already been completed in or about 2015 and the Petitioners' complaint contained in their letter dated 19th May, 2017 addressed to the 2nd Respondent and KeNHA did not elicit any response and the Suit Properties remained encumbered by the compulsory acquisition vide the Gazette Notice Number 405 of 24th January, 2014 as revealed in the Certificates of Postal Search dated 11th July, 2018.
61. Thus, in application of these set out legal principles for filing a Constitutional Petition, the Honorable court is fully satisfied that the Petitioner herein has dutifully complied and fully met the threshold of reasonable precision in pleadings for instituting this Petition against the Respondent herein and pleading for the prayers sought. The next question would be whether the Petitioner had proved the alleged breach of the rights particularized in the Petition as to fair administration in furtherance to the rights of the Petitioner on the suit property.

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

62. Under this sub - heading, it's imperative to extrapolate indepth on the concept of Land Compulsory acquisition and in Kenya. The current law or statutory framework governing compulsory acquisition of interest in land is founded under Part VIII, Sections 107 to 133 of the *Land Act* No. 6 of 2012 and Article 40 (1), (2) and (3) of *the Constitution* of Kenya (See "Viranda Ramji Gudka & 3 Others – Versus - The AG (2014)eKLR" as read together with Part V of The Land *Regulations of 2017*).



63. The Petitioners have alleged that its fundamental rights were infringed upon. Based on the principles set out in the edit of The Court of appeal case of the “Mumo Matemu – Versus - Trusted Society of Human Rights Alliance & Another (Supra)” provided the standards of proof in the Constitutional Petitions as founded in the case of “Anarita Karimi Njeru – Versus - Republic [1980] eKLR 154” where the court is satisfied that the Petitioner’s claim was well pleaded and articulated with absolute particularity. It held: -

“Constitutional violations must be pleaded with a reasonable degree of precision.....”

64. The Petitioner has contended that on 24th January, 2014, the 2nd Respondent published Gazette Notice Number 405 that the Government intended to acquire 0.2509 hectares of Land Subdivision Number 2445 Section VI Mainland North and 0.344 hectares of Subdivision Number 2446 Section VI Mainland North, the Suit Properties herein, on behalf of Kenya National Highways Authority (KeNHA) for the Mombasa Port Area Road Development Project (MPARD) namely the construction of Mombasa Southern Bypass and Kipevu Terminal Link Road.

65. Pursuant to a further Gazette Notice No. 1796 published on 21st March, 2014 by the 2nd Respondent, the Petitioners attended the meeting for inquiry and hearing of claims for compensation held at the DO's Office at Changamwe on 19th May, 2014 and provided proof of ownership of the Suit Properties subsequent to which the 2nd Respondent issued compensation awards both dated 1st September, 2014 in favour of the Petitioners in the sum Kenya Shillings Fourty Two Million Seven Eighty Thousand (Kshs.42,780,000.00/=) for 0.2509 hectares of Land Subdivision Number 2445 Section VI Mainland North and a sum of Kenya Shillings Sixty One Million Fifty Thousand (Kshs. 61,050,000.00/=) for 0.344 hectares of Land Subdivision Number 2446 Section VI Mainland North all amounting to a total sum of Kenya Shillings One Hundred and Three Million and Three Eight Thirty Thousand (Kshs. 103, 830,000.00/=) which the Petitioners duly accepted.

66. In spite of the delivery of the compensation awards and the numerous visits the Petitioners made to the 2nd Respondent's offices in Nairobi in a span of at least 2 years, the 2nd Respondent did not pay the aforesaid sums of the sum Kenya Shillings Fourty Two Million Seven Eighty Thousand (Kshs. 42,780,000.00) and a sum of Kenya Shillings Sixty One Million Fifty Thousand (Kshs. 61,050,000.00/=) or any part thereof and the Petitioners were surprised to see Gazette Notice Number 340 published on 13th January, 2017 deleting the Suit Properties with regard to Mombasa Port Area Road Development Project (MPARD) without any explanation to the Petitioners yet the road passing through the Suit Properties and a fence thereon had already been completed in or about 2015 and the Petitioners' complaint contained in their letter dated 19th May, 2017 addressed to the 2nd Respondent and KeNHA did not elicit any response and the Suit Properties remained encumbered by the compulsory acquisition vide the Gazette Notice Number 405 of 24th January, 2014 as revealed in the Certificates of Postal Search dated 11th July, 2018.

67. Vide the notice dated 18th May, 2018, the Petitioners protested to the 1st Respondent for the acquisition of the Suit Properties without following the due process and failing to pay compensation and after numerous correspondence and meetings between the Petitioners and the 1st Respondent, the latter confirmed that it was under obligation to compensate the Petitioners for the portion of the road that passed through the Suit Properties and the fence that had been erected thereon.

68. Despite the existence of the awards made by the 2nd Respondent on 1st September, 2014 as aforesaid, on 26th February, 2019, the 1st Respondent sought for valuation of the Suit Properties by the Director,



Land Valuation, Ministry of Land and Physical Planning, but the 1st Respondent has to date not shared the Valuation Report with the Petitioners notwithstanding the numerous requests made by the latter.

69. The provision of Article 40(1), (2), (3), and (4) of *the Constitution* provides that:

- “1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property-(a) of any description; and (b) in any part of Kenya.
- (2) Parliament shall not enact a law that permits the State or any person- (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).
- (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation- (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that-
- i. requires prompt payment in full, of just compensation to the person: and
- ii. allows any person who has an interest in, or right over, that property a right of access to a court of law.
- (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.”
- a. Further Article 47 of *the Constitution* states as follows:
- “(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
- (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall-
- (a) Provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
- (b) Promote efficient administration.’

70. The Petitioners averred that apart from the 0.2509 hectares of Land Subdivision Number 2445 Section VI Mainland North and 0.344 hectares of Subdivision Number 2446 Section VI Mainland North that



had already been gazetted and utilized for the construction of the road and the security fence, the 1st Respondent further utilized 0.01 hectares of Land Subdivision Number 2445 Section VI Mainland North and 0.0585 hectares of Subdivision Number 2446 Section VI Mainland North (effectively the entire parcel) and the 1st Respondent letter dated 20th January, 2021 addressed to the Cabinet Secretary, National Treasury and Planning and a further letter dated 1st March, 2023 addressed to the 2nd Respondent confirm the further utilization and the Petitioners are entitled to compensation in regard to the compulsory acquisition of the said portions.

71. The Respondents failed to follow the requisite procedure with regard to compulsory acquisition of the Suit Properties and have refused and or failed to pay the just and full compensation promptly or at all for more than 10 years now since the 1st Respondent took possession of the Suit Properties and commenced the construction of the road in 2013 to date. The Petitioners further stated that pursuant to Sections 111, 113 and 115 of the *Land Act*, 2012, they were entitled to be paid promptly upon the making of the awards dated 1st September, 2014 and the delay in paying compensation since the commencement of the Respondent's activities on the Suit Properties in 2013 and making of the awards in the year 2014 to date is unreasonable and contravenes the aforesaid provisions.
72. The further utilization of 0.01 hectares of Land Subdivision Number 2445 Section VI Mainland North and 0.0585 hectares of Subdivision Number 2446 Section VI Mainland North (effectively the entire parcel) as aforesaid contravenes the Petitioners' rights to property under Article 40 of *the Constitution* of Kenya, 2010 and Sections 111, 113, 115 and 117 of the *Land Act*, 2012. Since the Petitioners had not been paid the just and full compensation promptly or at all by the Respondents for the compulsory acquisition of the Suit Properties as required by *the Constitution* of Kenya and the *Land Act* No. 6 of 2012, the 1st Respondent entry upon the Suit Properties is a breach of the Petitioners' right to property under Article 40 of *the Constitution* of Kenya, 2010.
73. Further, the failure by the Respondents to pay the just and full compensation promptly to the Petitioners while the 1st Respondent had entered upon the Suit Properties and implemented project by constructing and completing the road and erecting a security fence constitutes a blatant breach of the Petitioners' right to fair administrative action under Article 47 of *the Constitution* of Kenya which requires any administrative action to be inter alia expeditious, efficient and reasonable. Pursuant to Section 117(1) of the *Land Act*, 2012, the Petitioners are entitled to interest on any compensation award not paid from 2013 when the 1st Respondent took possession of the Suit Properties and from 1st September, 2014 when the compensation awards were made until payment in full. Article 40 of *the Constitution* of Kenya 2012, which provides that every person has the right to acquire and own property of any description and that the state shall not deprive a person of property of any description unless the deprivation is carried out in accordance with *the Constitution*. and provides for compensation to be made to property holders, in the event of acquisition of Land by the State.
74. I opined in the case of “Alba Petroleum *Limited – Versus - National Land Commission & 4 others* (*Constitutional Petition 36 of 2022*) [2024] KEELC 1267 (KLR) (26th February 2024) (Judgment)”, that:-
- “155. The court is of the opinion that a public authority must act within the four corners of the law wherever it takes any administrative or executive action. Every action must be anchored in the law and it must have a lawful justification or excuse. No action should be taken capriciously, arbitrarily and without due process. That is what the rule of law is all about.”



75. Further, in the case of “Republic – Versus - Kombo and 3 Others ex-parte Waweru [2008] 3 KLR (EP) 478” which was cited by the Petitioner it was held, inter alia, that:

“The rule of law has a number of different meanings and corollaries. Its primary meaning is that everything must be done according to the law. Applied to the powers of government, this requires that every government authority which does some act which would otherwise be wrong (such as taking a man’s land), or which infringes a man’s liberty (as by refusing him planning permission), must be able to justify its action as authorized by law and nearly in every case this will mean authorized directly or indirectly by Act of Parliament. Every act of government power that is to say, every act which affects the legal rights, duties or liberties of any person, must be shown to have a strictly legal pedigree. The affected person may always resort to the courts of law, and if the legal pedigree is not found to be perfectly in order the court will invalidate the act, which he can safely disregard.”

76. The meaning and intent of the provision of Article 40 (3) of *the Constitution*. The provision of Article 40, reads in part as follows:

40. (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property--

- (a) of any description; and
- (b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person—

- (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
- (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

- (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
- (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—
 - (i) requires prompt payment in full, of just compensation to the person; and
 - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

77. The Land Acquisition Act (now repealed) provided for the procedure to be followed in the compulsory acquisition of property by the Government of Kenya. When the compulsory acquisition herein began, the Land Acquisition Act Cap 295 Laws of Kenya, Section 3 of the Land Acquisition Act provided as follows: -

“Whenever the Minister is satisfied that the need is likely to arise for the acquisition of some particular land under section 6, the Commissioner may cause notice thereof to be published



in the Gazette, and shall deliver a copy of the notice to every person who appears to him to be interested in the land.”

78. Under the provision of Sections 24, 25 and 26 of the [Land Registration Act](#) 2012 upheld the indefeasibility of title:

Section 24 stipulates as follows:-

Subject to this Act—

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

Section 25 of the act provides;

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
 - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

Section 26 is to the effect that;

Certificate of title to be held as conclusive evidence of proprietorship

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.



- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

79. The 1st Respondent on the other hand contended that it was a stranger to the allegations at Paragraph 4 of the Petitioner's Supporting Affidavit and was put to strict proof of the said allegations. In particular, the 1st Respondent had not at any given time acted in any matter as intimated in paragraph 4 as stated. The process being referred to was carried out by the 2nd Respondent in the performance of its statutory mandate and the Petitioners were fully engaged and aware of the process.
80. Furthermore, any change by deletion by the 2nd Respondent as well as KeNHA was regularized by the publication of the gazette notice. The 1st Respondent was not involved in the said process. The Petitioners were aware that the properties were acquired vide a gazette notice and they participated in the process up to the point of deletion. Thereafter they approached the 1st Respondent vide the Notice under Section 66(a) of the *Kenya Ports Authority Act*. All processes of acquisition have a mandatory procedure to be subscribed to. The 1st Respondent could not directly acquire property by compulsorily acquiring one in light of the new land regime established under *the Constitution*. The 1st Respondent had to liaise with various national government institutions and departments which include the Treasury and especially the 2nd Respondent
81. The communication subject of the annexures marked as "MAO – 8", and in particular from the 1st Respondent were strictly on a without prejudice basis. The letter one without prejudice basis were only for purposes of aiding parties to negotiate a settlement without fear of the said information not being used against them. The use of the letters in the Petition herein was therefore prejudicial to the 1st Respondent. The 1st Respondent proceeded to conduct itself in good faith all through after the Notice served by the Petitioners.
82. Under the provisions of the *Land Act*, No. 6 of 2012, the provisions of Section 107 of the Act holds that, the NLC - the 2nd Respondent herein is ordinarily prompted by the request of the National or County Government through the Cabinet Secretary or County Executive member respectively for authentication of the compulsory acquisition of land are required to submit the request to NLC providing a reason for the land acquisition which must not be remote or fanciful. Strictly, the Land must be acquired for public purpose or in public interest and not any other purpose as dictated by Article 40 (3) of *the Constitution* of Kenya. In this case the threshold must be met. Significant variation in the law includes the provision of Section 107 (3) of the *Land Act*, of 2012 which gives the NLC powers to reject a request for acquisition if it establishes that the requirement prescribed in Section 107 (3) of the *Land Act* and Article 40 (3) of *the Constitution* of Kenya.
83. Under the provision of Section 108, as part of the NLC's due diligence, it must ensure that the land to be acquired is authenticated by the survey department to ascertain the real owner. It must be satisfied that the purpose for public use has been met through conducting intense inquiry that the land is suitable for the intended acquiring body. (See "Nas Auto Spares – Versus – Land Acquisition & Compensation Tribunal & 2 Others (2015) eKLR). This process is thereafter followed by a verification meeting (See Section 107 (2) with the acquiring body where the latter provides a list of affected parcels of land and the respective owners, title searches details, Cadastral Maps of the affected areas, a Resettlement Action Plan (RAP) accompanied by a list or Persons Affected by the Project (PAPs) so that their applications can be put into consideration. Under the provisions of Sections 107 (5) & 110 (1) of the Act, the 3rd Respondent upon approval of a request for the compulsory acquisition a Notice of the intention to acquire the land is published in the gazette and County gazette. A notice must clear.



Failure to give notice in itself is a denial of the natural justice and fairness. The notice is delivered to the Land Registrar as well as every person who appears to have an interest in the land. The NLC should also ensure that the land to be acquired is georeferenced and authenticated by the authority responsible for survey department both County and national governments – Section 107 (8) of the Land Act for the identification of the legal owner. In the course of such inquiries the NLC is also to inspect the land and do all things as may be necessary to ascertain whether the land is suitable for the intended purpose as stated out under Section 108 of the Land Act. This preliminary or per inquiry stage of the land acquisition is merely undertaken by the NLC.

84. The land owners play no role at all hereof. Under the provision of Section 112 of the Land Act is where the land owner gets to be involved directly for purposes of determining proprietary interest and compensation. The section makes an elaborate procedure where at least 30 days after the publication of the notice of intention to acquire land in gazette and at least fifteen (15) days before the actual date of inquiry of an intended inquiry. The NLC is required to serve the notice of inquiry on every person who appears to have an interest on the land in question. The inquiry hearing determines who the interested persons are based written claims for compensation received by the NLC by the date of the inquiry (See Section 112 (2) of the Act. At this stage, the NLC exercises a quasi - judicial powers.
85. For purposes of conducting this inquiry, the NLC has powers of court to summon and examine witnesses including the interested persons and the public body for whose land is acquired and to administer oaths, affirmation and to compel production of documents and delivery of title documents (See Section 112 (5) of the Act makes a separate award of compensation for every person determined to be interested in the land and then offers compensation. The compensation may take either of the two forms prescribed. It could be a monetary award or land in lieu of the monetary award of land of equivalent value is available. Once the award is accepted, it must be promptly paid by the NLC. Where it is not accepted then the payment is to be made into a special compensation account held by the NLC – as stated under the provision of Sections 113-119 of the Act. If the Land is so acquired the compensation which is just, adequate, full and prompt is to be to persons affected by the project or have interest on the land under the provision of Section 111 of the Act.
86. Upon the conclusion of the inquiry, the NLC makes compensatory awards to every person whom it has determined to be interested in the land after serving such person with a notice of award and offer of compensation. (See. Sections 113 & 114). Adequate and conclusive compensation can also be in form of land if available, whose value does not exceed that amount of money the NLC considers should have been awarded (See. See Section 142 (2). Once the award is accepted, it must be promptly paid by the NLC, after which the process of compulsory acquisition of land is completed by the taking possession of the Land in question being taken by the NLC. The property is deemed to have vested in the National or County Government as the case may be with both the proprietor and the Land Registrar being duly notified. Where the award is not accepted then the payment is made into a special compensation account held by NLC and which NLC shall pay interest on the amount awarded at the prevailing bank rates from the time of taking possession until the time of payment and such award is not subject to taxation. A compensation award can be successfully reviewed by court when there has been an error in assessing an award payable through the misapprehension of the nature of the user of property in question as envisaged under the provision of Sections 120 - 122 of the Land Act.
87. In the case of:- “Patrick Musimba (Supra)” the word compensation was viewed as carrying a corollary that the loss to the seller must be completely made up to him on the ground that unless he receives a price that fully equaled his pecuniary detriment the compensation would not see equivalent to the compulsory sacrifice. Just compensation is therefore mandatory. It should be prompt and in full, and should use principles of equivalence but must also protect coffers from improvidence. Therefore, from



the above detailed statutory analogy, it's clear that the compulsory acquisition of Land by the state for public use is ordinarily a creature of statute. While this is the case, the citizens should not be deprived, disowned and/or dispossessed of their land by the state or any public authority whatsoever against their wish unless expressly authorized by law and public interest also decisively demands so. The citizen has to be protected from wanton and unnecessary deprivation of their private property. There is no doubt to the fact that deprivation of a person's private property against their will is an invasion of their proprietary rights. There is no contention that while the state is indeed entitled to compulsory acquisition rights of land for public use this fundamental rights must be keen and exercised with circumspect to be checked lest it is being done merely as an abuse and sheer whimsical gimmick to deprive the citizen their private rights. It's an extremely delicate balance to be weighed with utmost case.

88. In what has now become “the Classicus Locus” case on compulsory acquisition of land, the case of: “Patrick Musimbi –Versus - *National Land Commission & 4 Others*” *Petition No. 613 of 2014*” held inter alia:-

“As the taking of a person's property is a serious invasion of his proprietary rights, the application of constitutional or statutory authority for the deprivation of those rights require to be most carefully scrutinized. In short, in our view, there must always exist a presumption against an intention to interfere with vested property rights as the legislative and constitutional intentions is always the protection rather than interference with the proprietary rights..... the power to expropriate private property as donated in the State by both *the Constitution* and statute law (the *Land Act*) leaves the private land owner with no alternative. The power involves the taking of a person's land against his will. It is a serious invasion of his proprietary rights through the use of statutory authority. The private land owner has no alternative but wait for compensation. It is consequently necessary that the court must remain vigilant to see to it that the State or any organ of the State does not abuse the constitutional and statutory authority to expropriate private property. It is on this basis that courts have consistently held that the use of statutory authority to destroy proprietary rights requires to be most carefully scrutinized. Just compensation is mandatory”

89. This Honourable Court is of the opinion that the Petitioners have demonstrated a violation of their legal and constitutional rights being the registered proprietor of the suit property, and it is entitled to all the reliefs sought. In application of these set out principles for filing a Constitutional Petition to this case, the Honourable court is fully satisfied that the Petitioners herein had not dutifully complied and fully met the threshold of reasonable precision in pleadings for instituting this Petition against the Respondent and pleading for the prayers sought.

90. In the foregoing I find the claim by the Petitioners on the breach of the Respondents on the constitutional rights merititious and hereby proceed to examine the material before court as to whether it supports the Petitioners' prayers on the the Petitioners. The Petitioners on prayer one have attached their certificate of title. I have held before in this court times without number as I have in the case of:- “Said & 3 others – Versus - Kenya Rural Roads Authority (Environment & Land Case 198 of 2020) [2024] KEELC 4662 (KLR) (4 June 2024) (Judgment)” that:-

“.....It is trite law that for a person to prove legal ownership of land they must bear a prima facie conclusive evidence in form of documentation for instance a Certificate of Title. The proprietor and/or absolute owner ought to have it registered in his/her name. have a title for one to have acquired indefeasible title, interest and title on the land as vested in law. Ideally, the legal effect and efficacy of registration of the documentation is provided for under the



provision of Section 24 of the *Land Registration Act*, No. 3 of 2012 which provides as follows: -

“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

58. Section 25 (1) of the said Act further provides that: -

“the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to any lawful encumbrances, set out in this section.”

58. Further, a certificate of title is prima facie held to be evidence of ownership of the stated land. This is provided for in Section 26(1) of the *Land Registration Act* which provides; -

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except

- a. on grounds of fraud, or misrepresentation to which to which the person is proved to be a party; or
- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

58. It will be seen from the provision of Section 26 above, that the certificate of title is to be taken as prima facie evidence that the person named therein is the proprietor of that land. Sections 24 and 25 above, in essence, do provide that it is the title holder who is entitled to the proprietary rights comprised in the subject land. A certificate of title is conclusive evidence of ownership and is prima facie evidence that the registered proprietor is the owner. Whereas Section 24 of the *Land Registration Act* gives the registered proprietor absolute rights over the registered land, Section 26 gives sanctity to title and makes provisions of when such title can be cancelled or revoked.



59. To cap it up, it is evident that the right to own and acquire property in Kenya is premised under Article 40 of *the Constitution* of Kenya, 2010. The said Article provides as follows: -

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

91. The Petitioners have averred that they are the registered proprietors of the parcels of land known as Subdivision Number 2445 Section VI Mainland North measuring 1.36 acres and Subdivision Number 2446 Section VI Mainland North measuring 0.98 acres (hereinafter “the Suit Properties”) both situate



at Mombasa County. In their supporting affidavit they annexed and marked “MAO - 1” copies of the Certificates of Title and the respective Certificates of Postal Search which I had the pleasure of perusing and indeed the Petitioners are the owners. What does that then mean? It simply means that unless the Respondents pleaded that the suit properties were obtained by the Petitioners in a fraudulent manner, Section 24 of the *Land Registration Act* gives the registered proprietor absolute rights over the registered land and the benefits that come with the said land. In finding that the Petitioners are the bona fide owners of the suit property; they are entitled to prayer 1 on the foot of their Petition.

92. On prayer two the court examines the right to fair administrative action. The provision of Article 47(1) of *the Constitution* is in mandatory terms that:-

“every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”

93. *The Constitution* binds all persons and all state organs in the course of performing their duties. The provisions in Article 47 to the extent that they require that an administrative action to be expeditious, fair, lawful and reasonable, and that where such an action adversely affect a person’s right or fundamental freedom, the affected person is entitled to be given written reasons for the action, is a constitutional control over administrative bodies to ensure that they do not abuse their power and that individuals concerned receive fair treatment when actions are taken against them. Failure to observe this constitutional decree, for all intent and purposes, undermines the rule of law and the value of Article 19(1) of *the Constitution* which states that the Bill of Rights is an integral part of Kenya’s democratic state as the framework for social, economic and cultural policies. (See “Kenya Human Rights Commission & another – Versus – Non - Governmental Organizations Co-ordination Board & another [2018] eKLR”).

94. In the case of:- “Dry Associates Limited – Versus - Capital Markets Authority and Another, [2012] eKLR” the Court observed: -

“Article 47 is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law or judicial review under the *Law Reform Act* (Cap 26 of the Laws of Kenya) but is to be measured against the standards established by *the Constitution*.”

- (1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) Every person has the right to be given written reasons for any administrative action that is taken against him.
- (3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-
 - (a) prior and adequate notice of the nature and reasons for the proposed administrative action;
 - (b) an opportunity to be heard and to make representations in that regard;
 - (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;



- (d) a statement of reasons pursuant to section 6;
 - (e) notice of the right to legal representation, where applicable;
 - (f) notice of the right to cross-examine or where applicable; or
 - (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.
- (4) The administrator shall accord the person against whom administrative action is taken an opportunity to-
- (a) attend proceedings, in person or in the company of an expert of his choice; Administrative action to be taken expeditiously, efficiently, lawfully etc.
 - (b) be heard;
 - (c) cross-examine persons who give adverse evidence against him; and
 - (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.
- (5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.
- (6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of *the Constitution*, the administrator may act in accordance with that different procedure.”

95. The importance of this right to fair administrative action as a constitutional right in the provision of Article 47 cannot be over emphasized. The Court of Appeal stated in the case of “Judicial Service Commission – Versus - Mbalu Mutava & another [2014] eKLR” that:-

“ Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by Article 47 (1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

96. The Respondents have not explained their failure to pay the just and full compensation promptly to the Petitioners while the 1st Respondent had entered upon the Suit Properties and implemented project by constructing and completing the road and erecting a security fence constitutes a blatant breach of the Petitioners’ right to fair administrative action under Article 47 of *the Constitution* of Kenya which requires any administrative action to be inter alia expeditious, efficient and reasonable. Pursuant to Section 117(1) of the *Land Act*, 2012, the Petitioners are entitled to interest on any



compensation award not paid from 2013 when the 1st Respondent took possession of the Suit Properties and from 1st September, 2014 when the compensation awards were made until payment in full. Subsequently going by the facts above the Court finds that the Petitioners' right to administrative action guaranteed under Article 47 of *the Constitution* of Kenya have been contravened by the Respondents.

97. On the declaration that the 1st Respondent has compulsorily acquired the Petitioners' properties known as Subdivision Number 2445 Section VI Mainland North and Subdivision Number 2446 Section VI Mainland North unprocedurally and without compensation; the Honourable Court at paragraph 62 to paragraph 87 of this judgment already determined that the Respondents transmitted the Petitioners' land by compulsory acquisition and by *the constitution* Article 40 (3) were to adequately compensate the Petitioners which they never did. For this reason prayers 3, 4 and 5 is found to be merited.
98. The Court further finds that it will not harm the Respondents to undertake valuation and pay the compensation in respect of the further utilization by the 1st Respondent of 0.01 hectares of Land Sub - division Number 2445 Section VI Mainland North and 0.0585 hectares of Subdivision Number 2446 Section VI Mainland North within 30 days or such period as the Honourable Court may order being that the Petitioners are the registered owners of the property they have been utilizing.
99. I also take note that in their response the 1st Respondent absolved themselves from any liability in the transmission of the suit properties but it must be noted that they were the ones that utilized the property and the properties were also acquired therefore the liability also lied on them as well.

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

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

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

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

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



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

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

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

VIII. Conclusion and Disposition

104. Consequently, having intensively and thoroughly deliberated on all the framed issues herein, this Honorable Court arrives at the finding that the Petitioners herein has succeeded in all the prayers sought from its filed Petition. For avoidance of doubt, I allow the Petition dated 27th November, 2023 specifically under the following terms: -

- a. That Judgement be and is hereby entered in favour of the Petitioners as per the Petition dated 27th November, 2023 in its entirety.
- b. That a declaration do and is hereby made that the Petitioners’ rights to acquire and own property guaranteed under Article 40 of *the Constitution* of Kenya and Sections 111 (1) and 115 (1) of the *Land Act*, 2012 have been contravened by the Respondents.
- c. That a declaration do and is hereby made that the Petitioners’ rights to fair administrative action guaranteed under Article 47 of *the Constitution* of Kenya have been contravened by the Respondents.
- d. That a declaration do and is hereby made that the 1st Respondent has compulsorily acquired the Petitioners’ properties known as Sub - division Number 2445 Section VI Mainland North and Sub - division Number 2446 Section VI Mainland North unprocedurally and without compensation.
- e. That an order do and is hereby issued directing the Respondents to forthwith effect payment of compensation pursuant to the awards dated 1st September, 2014 of a sum of Kenya Shillings Fourty Two Million Seven & Eighty Thousand (Kshs. 42,780, 000.00/=) for 0.2509 hectares of Land Sub - division Number 2445 Section VI Mainland North and a sum of Kenya Shillings Sixty-One Million Fifty Thousand (Kshs. 61,050,000.00/=) for 0.344 hectares of Sub - division Number 2446 Section VI Mainland North all amounting to a total sum of Kenya Shillings One Hundred and Three Million Eight Thirty Thousand (Kshs. 103, 830, 000.00/=) to the Petitioners.
- f. That a declaration do and is hereby made that the Petitioners are entitled to Interest on the compensation pursuant to the awards dated 1st September, 2014 of a sum of Kenya Shillings Fourty Two Million Seven & Eighty Thousand (Kshs.42, 780, 000.00/=) for 0.2509 hectares of Land Sub - division Number 2445 Section VI Mainland North and a sum of Kenya Shillings Sixty One Million Fifty Thousand (Kshs. 61,050,000.00/=) for 0.344 hectares of Sub - division Number 2446 Section VI Mainland North at the prevailing bank rates from 2013 when the



1st Respondent took possession of the Suit Properties until payment in full as provided for under Section 117 (1) of the Land Act and an order to this effect be issued for compliance by the Respondents.

- g. That an order do and is hereby issued directing the Respondents to forthwith undertake valuation and pay the compensation in respect of the further utilization by the 1st Respondent of 0.01 hectares of Land Sub - division Number 2445 Section VI Mainland North and 0.0585 hectares of Sub - division Number 2446 Section VI Mainland North within 30 days or such period as the Honourable Court may order with interest.
- h. That the costs and interest of the Petition dated 27th November, 2023 to be awarded to the Petitioner and be borne by the Respondents.

It is so ordered accordingly.

**JUDGMENT DELIVERED THROUGH THE MICROFT TEAMS VIRTUALLY MEANS DATED,
SIGNED AND AT MOMBASA THIS 30TH DAY OF OCTOBER 2024.**

HON. MR. JUSTICE L. L. NAIKUNI

ENVIRONMENT AND LAND COURT AT MOMBASA

Judgement delivered in the presence of: -

- a. M/s. Firdaus Mbula – the Court Assistant.
- b. Mr. Mwakireti Advocate for the Petitioners.
- c. Mr. Manyange Advocates for the 1st Respondents
- d. No appearance for the 2nd Respondents.

