



**Gituthi & 37 others v National Land Commission & 2 others (Constitutional  
Petition E001 of 2021) [2023] KEELC 15999 (KLR) (23 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15999 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
CONSTITUTIONAL PETITION E001 OF 2021**

**LN GACHERU, J  
FEBRUARY 23, 2023**

**BETWEEN**

**STEPHEN MBUGUA GITUTHI ..... 1<sup>ST</sup> PETITIONER  
DAVID CHEGE THETHERE ..... 2<sup>ND</sup> PETITIONER  
STEPHEN NJOROGE MWAURA & 35 OTHERS ..... 3<sup>RD</sup> PETITIONER**

**AND**

**NATIONAL LAND COMMISSION ..... 1<sup>ST</sup> RESPONDENT  
ATHI WATER WORKS DEVELOPMENT AGENCY ..... 2<sup>ND</sup> RESPONDENT  
THE HON. ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The Petitioners herein Stephen Mbugua Gituthi, David Chege Thethere and Stephen Njoroge Mwaura, suing on their own behalf and on behalf of 35 Others Petitioners brought this Petition dated December 7, 2021, against the Respondents herein and sought for the following orders;
  - a. A declaration that the purported compulsory acquisition based on Gazette Notice No 8479, dated October 16, 2020, and published on October 21, 2020, of the suit properties and improvements undertaken by the Respondents was carried *ultra vires* the Constitution and statutory law, thus infringing and violating the Petitioners' rights to property.
  - b. A declaration that Gazette Notice No 8479, dated October 16, 2020 and published on October 21, 2020, and all the Respondents' actions based on it, are illegal, irregular, unprocedural, unconstitutional and void for all intents and purposes, and Gazette Notice is hereby quashed.
  - c. Special damages under Article 23(3)(e) of the Constitution as pleaded at paragraph 90 of the Petition, being the just compensation for the suit properties and improvements as valued on



November 14, 2020, together with interest thereon at the Court rates of 14% p.a from date of filling the Petition until payment in full.

2. It was the Petitioners averments that they are all residents and property owners in Ngethu village in Kiambu County, Rwegetha and Kiriaini villages in Murang'a County. The 1<sup>st</sup> Petitioner averred that he is the registered owner of Loc.1/Rwegetha/552, and the beneficial owner of Loc. 1/Rwegetha/553, in Murang'a County. The 2<sup>nd</sup> Petitioner averred that he is the registered owner and actual occupier of Loc.1/Kiriaini/568, and Loc.1/Kiriaini/1110, situated in Murang'a County and the 3<sup>rd</sup> Petitioner averred that he is the beneficial and actual occupier of land parcel No Chania/Ngorongo/2132, situated in Ngethu village in Kiambu County.
3. Further that all the other Petitioners are either the legal or beneficial owners or actual occupiers of parcels of land located in Ngethu, Rwegetha and Kiriaini villages (hereinafter) referred as the suit properties, which parcels of land border each other in Kiambu and Murang'a Counties.
4. They further averred that in 2018, there were various improvements on the suit properties as follows; -
  - a. Residential houses and related structures such as pit latrines, water tanks, gates and fences (hereinafter referred as "Residential Houses").
  - b. Crops some of which are listed at paragraph 63 of the Petition.
  - c. Trees some of which were also listed at paragraph 63 of the Petition.
  - d. Animal structures such as cow sheds, chicken pens, pig sties, and beehives.
5. The Residential houses, crops, trees, and Animal Structures are hereinafter collectively referred to as "Improvements".
6. It was their contention that as the legal, beneficial or actual occupiers of the suit properties and improvements, their property rights are and were guaranteed, respected and protected by Article 40 of the Constitution and secured in accordance with the principle embodied in Article 60(1) (b) of the Constitution.
7. They also averred that sometime in the year 2015, they learnt from rumours around the village that the 2<sup>nd</sup> Respondent had floated a proposal to construct a water pipeline, which would pass from Kigoro in Murang'a County through the villages (Pipeline project) and for which pipeline project, Wayleaves would have to be created on the suit properties.
8. The Petitioners also contended that vide a Gazette Notice No 9589, dated November 14, 2016, Gazette Notice No 10870 of November 3, 2017, and Gazette Notice No 2188 of March 9, 2018, the 1<sup>st</sup> Respondent expressed its intentions to acquire the suit properties and improvements on behalf of the 2<sup>nd</sup> Respondent for the Pipeline Project.
9. Further that vide the Gazette Notices above, the 1<sup>st</sup> Respondent intended to create a right of way (Water Pipeline Way leave) on the suit properties and improvements pursuant to Sections 143, 144 and 162(2) of the Land Act, No 6 of 2012.
10. Again the Petitioners averred that by a further Gazette Notice Number 2189, dated March 9, 2018, the 1<sup>st</sup> Respondent invited the Petitioners for inquiries on the Pipeline project, which inquiries were indicated to be pursuant to Sections 112 and 162 (2) of the Land Act, 2012. That the inquiries were to take place on April 11, 2018, for Kiriaini village, April 12, 2018 for Rwegetha village and April 13, 2018, for Ngethu village.



11. That the Petitioners through their Advocate wrote to the Respondents and even the Commission of Administrative Justice and Ethics and Anti-Corruption Commission, protesting the lack of information about the Pipeline Project, the harassment by the Respondents agents, the skewed process of valuation that the Respondents had taken and generally against the whole process. However, their protest and requests for information did not enact any substantive response from the Respondents, who went ahead to hold the sham inquiries. Further, that immediately upon the conclusion of the various impugned inquiries, the 1<sup>st</sup> Respondent gave its awards to them as stated in Para 61 of their Petition.
12. However, the Petitioners were dissatisfied with the said awards because among other things, the awards did not indicate the rate and the value for each of the suit properties and improvements; the 1<sup>st</sup> Respondent used subjective criteria instead of objective criteria to make the awards. It was their contention that the global awards by the 1<sup>st</sup> Respondent to each of the Petitioners were so inordinately low and did not reflect the market value of the suit properties and improvements.
13. That the Petitioners rejected the awards by the 1<sup>st</sup> Respondent but nevertheless, in July 2018, the 1<sup>st</sup> Respondent issued them with Notices of taking possession under Section 120(1) of the [Land Act, 2012](#), which required them to vacate the suit properties and improvements in 14 days.
14. That in the beginning of July 2018, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents illegally took possession of the suit properties and improvements and started construction of the Pipelines Wayleaves, without either having paid just and fair compensation or deposited the same in a special compensation account.
15. That despite demands by the Petitioners, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents refused to disclose the basis and rates used for the awards.
16. Consequently, on August 29, 2018, the Petitioners moved the ELC Court vide Murang'a ELC Pet No 5 of 2018;- [Stephen Mbugua Gitutbi & 59 Others vs National Land Commission & Athi Water Services Board](#), claiming against the Constitutional violations and seeking various reliefs. The said Petition was opposed by the Respondents and on July 31, 2019, the Court declared that the acquisition of the suit properties and improvements undertaken by the Respondents was carried out *ultra vires* the [Constitution](#) and Statutory Law, thus infringing and violating the Petitioners right to property.
17. Further, the Court prohibited the Respondents, their servants, agents in any manner whatsoever from vesting the right of way (Way leave) in favour of the 2<sup>nd</sup> Respondent unless due process was followed and prompt payment of just compensation was made to the Petitioners.
18. Further that the 2<sup>nd</sup> Respondent was later found in contempt of the Court orders on June 18, 2020, and the CEO of the 2<sup>nd</sup> Respondent (Engineer Mwangi Thuita) was sentenced to pay a fine and fined Ksh, 375,000/= on June 10, 2021.
19. That upon the above conviction, the Respondents engaged the Petitioners in negotiations for settlement of the just and fair compensation and an agreement and consent dated July 13, 2020, was signed among the three (3) parties with an agreed term of joint valuation and payment.
20. However, the 1<sup>st</sup> & 2<sup>nd</sup> Respondents breached the said agreement and consent that had been filed in Court and proceeded with the trespass on the suit properties and improvements. It was their contention that the 1<sup>st</sup> & 2<sup>nd</sup> Respondents has been trespassing on their suit properties since July 2018, when the 1<sup>st</sup> & 2<sup>nd</sup> Respondents illegally and without the Petitioner's consent took possession of the suit properties and improvements, constructed the Pipeline Wayleaves and continued the construction despite a Court Order prohibiting the same. That the said trespass has continued and is calculated



- to confer a benefit on the 2<sup>nd</sup> Respondent at the expense of the Petitioners' rights to just and fair Compensation, fair administrative action and fair hearing.
21. Further that the Respondents collective action were, have been and continue to be oppressive, arbitrary and in constitutional. As a result, the Petitioners have suffered damage in the form of loss of their properties and they continue to suffer such losses. Therefore, the Petitioners claimed exemplary damages.
  22. Further that vide a Gazette Notice No 8479 dated October 16, 2020, the 1<sup>st</sup> Respondent purported to compulsory acquire the suit properties and improvement.
  23. The Gazette Notice states;

“In pursuance of the [Land Act, 2012](#) Part VIII and further to Gazette Notice Nos 9589 of 2016, 10870 of 2017, 2188 and 2189 of 2018, and the Court Order in the Murang'a ELC Petition No 5 of 2019, the National Land Commission, on behalf of the Athi Water Works Development Agency (AWWDA), gives notice that it intends to correct the above notices to read “intention to acquire land” pursuant to Section 107 of the [Land Act](#) instead of “intention to create a right of way(water pipeline wayleave)”pursuant to section 143 and 144 of the [Land Act, 2012](#)”.
  24. It was the Petitioners allegations that the 1<sup>st</sup> Respondent adopted a procedure for Compulsory acquisition that is alien to the laid down procedure on Part VII of the [Land Act](#) (Sections 107 – 133).
  25. It was the Petitioners further contention that the Gazette Notices No 9589 of 2016, 10870 of 2017, 2188 and 2189, were illegal from the start and could not be corrected vide Gazette Notice No 8479, dated October 16, 2020, and published on October 21, 2020, since the stated Gazette Notices had been declared by the Court in Murang'a ELC Pet. No 5 of 2018, to be *ultra vires* the [Constitution](#) and the Statutory Law, thus infringing and violating the Petitioners' right to property. The Petitioners further stated that once the process of creating a Wayleave has started and ended with laying of the Water pipelines, the Respondents could not replace or interchange such a process with the process of compulsory acquisition without strictly following the laid down process.
  26. Further that the laid down procedure for compulsory acquisition does not start midway within an inquiry and issuance of the awards as the 1<sup>st</sup> Respondent purported to do particularly when the Preliminary and the pre-inquiry stages of the acquisition had already been declared by the Court to have been *ultra vires* the [Constitution](#) and Statutory Law.
  27. The Petitioners also averred that the 1<sup>st</sup> Respondent did not cause the suit properties and improvements which the 2<sup>nd</sup> Respondent was and is illegally occupying to be mapped and valued as required by Section 107(4) of the [Land Act](#). If it had done so, the 1<sup>st</sup> Respondent would have found out that the 2<sup>nd</sup> Respondent had illegally taken and occupied extra land than the due gazetted. It was the Petitioners further allegations that the 1<sup>st</sup> Respondent did not value the suit properties and improvements in accordance with Section 107 A of the [Land Act](#).
  28. The Petitioners also stated that on 14<sup>th</sup> November 2020, they instructed Zam Consult valuers and Management Co. Ltd to value the suit properties and improvements as per the Law which valuation were presented to the 1<sup>st</sup> Respondent during the impugned inquiries. Zam Consult Valuers and Management Company Limited, had also valued the suit properties and improvements in September 2018. That vide the same Gazette Notice No 8479 of 2020, the 1<sup>st</sup> Respondent purported to issue Notices of inquiries to the Petitioners to hear their claim for compensation for 17<sup>th</sup> & November 18, 2020. That on November 17, 2020, the Advocates on record protested the illegality of the content of



Gazette Notice No 8479 dated October 16, 2020. The Petitioners also stated that their participation in the inquiries was entirely in good faith and not a pursuance of any legal obligation. That the Petitioner attended the impugned inquiries where they presented their claim for compensation supported by valuation reports by their valuer.

29. It was their contention that on December 15, 2020, the 1<sup>st</sup> Respondent issued to the Petitioners almost similar awards in some cases the exact award and in some cases no awards.
30. Therefore, that showed that the 1<sup>st</sup> & 2<sup>nd</sup> Respondents were and are biased and intent on compensating the Petitioners for the suit properties and improvements according to their set values, instead of just compensation at the market values as declared by the Constitution and the Land Act, 2012.
31. That by giving the same awards that were issued on 2018, then that shows that the 1<sup>st</sup> Respondent approached the inquiries with a biased disposition and the quasi – judicial process of hearing and making awards to the Petitioners. The Petitioners averred that the inquiries and the awards emanating from the 1<sup>st</sup> & 2<sup>nd</sup> Respondents could not meet Constitutional threshold of a fair hearing, fair administrative action and could not be the basis for a just compensation for compulsory acquisition.
32. Further, that just like the awards given in 2018, the awards given in 2020, showed that the 1<sup>st</sup> Respondent did not indicate the rate and the value for each of the suit properties and improvements. Also it did not give reasons for such valuation and compensation. That the similarity of the awards showed that the 1<sup>st</sup> Respondent disregarded the valuation process laid down in the Land Act. Further that the 1<sup>st</sup> Respondent failed to communicate for more than 12 months, now its award to some of the Petitioners, leaving them in the dark as to the outcome of the impugned hearings. It was the Petitioners' further contention that the suit properties and improvements are yet to be vested with the 2<sup>nd</sup> Respondent, no new titles have been issued by the Land Registrar for the resultant titles from the suit properties contrary to Section 121 of the Land Act, 2012, and the 1<sup>st</sup> Respondent has not made prompt payment to the Petitioners despite having taken possession of the suit properties and completed the Pipeline Project. Therefore, the 1<sup>st</sup> Respondent has again failed in its Constitutional and statutory mandate of compulsory acquisition of the suit properties and improvements.
33. They also contended that the whole process of acquisition of the suit properties by the 1<sup>st</sup> Respondent for the benefit of the 2<sup>nd</sup> Respondent was marred with procedural illegalities and infringement of the fundamental rights.
34. The Petitioners enumerated the illegalities done by the Respondents. These illegalities were:

Constitutional violation: when the Respondents disregarded the laid down process of the compulsory acquisition, violation of the Constitution and statutes, violation of the Court orders, threatening, denying, violating and infringing the Constitutional rights as specified and therefore the Respondents were in contravention of the rule of law and exhibited wanton impunity. Further that the Respondents denied the Petitioners access to information by failing to give the Petitioners written reasons for the awards to enable them to exercise their right of access to justice.
35. Further the Respondents denied the Petitioners right to Property Under Article 40 of the Constitution by arbitrary depriving the Petitioners of the suit properties and improvements by disregarding the procedure on compulsory acquisition as laid down in Sections 107 to 133 of the Land Act, and the Respondents acted *ultra vires* its Constitutional and Statutory power. Further that the Respondents illegally took possession of the suit properties and improvements without prompt payment of just



- compensation, and by disobeying the Court Order, the Respondents breached their rights to equal protection and equal benefit of the Law under Article 27 of the Constitution.
36. Further that the Respondents have breached the right to fair administrative action as guaranteed by Article 47 of the Constitution. That the 1<sup>st</sup> Respondent approached the process of compulsory acquisition with a biased disposition and predetermined outcome.
37. The Petitioners also alleged that their right of access to justice as provided under Article 48 of the Constitution was denied and violated when the Respondents among other things refused, neglected and/or failed to provide any information or written reasons for the awards as registered by the Petitioners.
38. Further that the Petitioners right to fair hearing under Article 50(1) of the Constitution was violated when the Respondents sought to impose its own values on the Petitioners and the 1<sup>st</sup> Respondent sought to be a Judge in its own cause while denying the Petitioners their right to be heard with the above violations. That conduct of the Respondents was illegal, unconstitutional, arbitrary, oppressive, unfair and unreasonable and has and continue to violate the Petitioners exercise of their right to property. That due to these violations by the Respondents, the Petitioners have suffered and continue to suffer loss and damages. The Petitioners urged the Court to issue the declarations and orders sought to safeguard and prevent violation of their fundamental rights and freedoms under the Constitution. The Petitioners urged the Court to grant their reliefs as sought.
39. The Petition is opposed; -
40. The 1<sup>st</sup> Respondent, National Land Commission filed a Replying Affidavit sworn by Brian Ikol, the Director, Legal Affairs and Disputes Resolution of the 1<sup>st</sup> Respondent. He averred that he is conversant with the matter and had been duly authorised by the 1<sup>st</sup> Respondent to sign the Affidavit on its behalf.
41. It was his averment that the 1<sup>st</sup> Respondent as an Independent Commission established under Article 67(i) of the Constitution and governed by National Land Commission Act No 5 of 2012, is the body duly vested with the mandate to compulsory acquire land required for public purpose or public use on behalf of the National or County Government upon request for acquisition of public land.
42. He averred that on or about the year 2016, the Ministry of Water and Sanitation through the Athi Water Services Board, the 2<sup>nd</sup> Respondent requested the 1<sup>st</sup> Respondent to carry out an exercise of acquisition of land for the construction of Water Pipeline from Thika Dam to Kigoro Treatment works and to Gigiri Works.
43. That at the inception of the acquisition exercise, the 1<sup>st</sup> Respondent gave Notices of intention to acquire in pursuance with the provisions of the Land Act, vide Kenya Gazette Notices No 9589 of November 18, 2016, 10570 of November 3, 2017, as well as No 2188, 2189 and 2190 of March 9, 2018.
44. Consequently, the 1<sup>st</sup> Respondent embarked on the exercise of carrying out inspections, inquiries and valuations on the affected parcels of land, as well as issuance of awards to the Project affected persons, including the Petitioners with a view to compensating them.
45. However, the Petitioners herein together with others not before Court, filed Murang'a ELC Pet No 5 of 2018: Stephen Mbugua Gituthi & 59 Others vs National Land Commission & Another challenging the manner in which the project was being undertaken.
46. He also averred that on July 31, 2019, the Court rendered a Judgement declaring that the acquisition of the suit properties and improvements undertaken by the Respondents was carried *ultra vires* the Constitution and Statutory Law thus, infringing the Petitioners right to property.



47. It was his contention that thereafter the Respondents embarked on compliance with the Courts Judgement, though the process was delayed by inevitable circumstances as the 1<sup>st</sup> Respondent had been without a Chairman and Commissioners for about 9 months until November 2019, when the new Commissioners were sworn in.
48. It was his further contention that only the Commissioners could initiate the process of Compulsory acquisition by making a request to Government printers to cause the publication of the requisite Gazette Notices.
49. Further that contrary to the allegations by Petitioners, the 1<sup>st</sup> Respondent did not disregard the consent, rather the Court declined to adopt it for being functus officio, and as such the 1<sup>st</sup> Respondent could not enforce it without it being adopted as the order of the Court.
50. He also averred that on October 16, 2020, the 1<sup>st</sup> Respondent caused the publication of a Gazette Notice No8479, in the form of a corrigendum and inquiry Notice in order to carry out a repeat of the inquiries. It was his contention that contrary to the allegations by the Petitioners, no information was withheld from them. That all the documents relating to the acquisition were presented to them and their Advocates during the inquiries while others were filed in Court as pleadings as the case was still alive. He further contended that the documents disclosing the scales applied in the valuation were attached to the Replying Affidavit of Brian Ikol and the further affidavit of Joash Oindo in Muranga ELC Pet. No 5 of 2018; Therefore, the Respondents did not deny or withhold any information from the Petitioners. Therefore, the Respondents did not contravene access to information as alleged.
51. Further, that in compliance with the Gazette Notice of October 16, 2020, the Respondents conducted repeat inquiries on the November 17, 2020, and the December 16, 2020, at the Rwegetha and Ngethu Chief's offices in which the Petitioners were in attendance.
52. That during the inquiries, the Petitioners and Advocates made their representations and presented copies of their ownership documents together with Valuation Reports and the 1<sup>st</sup> Respondent officers then retreated to consider the documents. Therefore, the Petitioners were given a fair hearing and fair administrative action contrary to the allegations.
53. He alleged that during the verification of the documents, it was discovered that some of the Petitioners were purporting to represent their deceased relatives without Letters of Administration and as such officers of the 1<sup>st</sup> Respondent declined to give them awards as the action could amount to intermeddling.
54. Mr Ikol contended that at the date of repeat inquiries, construction of the wayleaves had already been undertaken on the Petitioners' parcels of land and as such the 1<sup>st</sup> Respondent could only use the Data that had been collected during the first inquiries to prepare the awards of compensation. That in undertaking the exercise of valuation, the 1<sup>st</sup> Respondent took into account all the various principles of valuation.
55. Further that considering that the properties were being acquired for a Wayleave, the Petitioners could only be compensated for loss of use of the land and the destruction of the crops only. That the Petitioners have since been using the Wayleave to plant crops as they used to.
56. Mr. Ikol further deponed that due to the prevailing circumstances, the repeat valuation was done in due consideration of the first date of the intention to acquire and the Data collected during the first inquiries in the presence of the Petitioners and the Local Administration. That the Petitioners have conveniently failed to disclose that fact.



57. That the Valuation Reports presented by the Petitioners were exaggerated and not a true presentation of the current market values as per the Ministry of Lands rate, and the report were based on the Petitioners sale agreements whose consideration is usually based on a “willing seller willing buyer basis”.
58. That since the acquired wayleaves were for the pipelines to run under and the Petitioners could still use their land, then the compensation was lower than the sale of land which formed the basis of the Petitioners Valuation Report. That the Petitioners’ Valuation Reports did not present audited accounts or Kenya Revenue Authority Returns to support the purported loss of income. Instead, the attached purchase agreements which were prospective and not actual reflection of loss of income. Therefore, the 1<sup>st</sup> Respondent decided that the awards were just compensation for acquisition of the Wayleave and there was no justification for additional amounts.
59. Mr. Ikol further deponed that from the onset, the Petitioners declined to receive the awards even prior to disclosure of the amounts offered; that the Petitioners were offered awards and they opted to reject them. He further deponed that some of the Petitioners being satisfied with the repeat inquiries, accepted the new awards issued and the 1<sup>st</sup> Respondent proceeded to process their payments immediately. Therefore, the 1<sup>st</sup> Respondent has always been ready and willing to compensate the project affected persons and only a few have declined to accept the awards.
60. It was his further averments that the Respondents have not violated the Petitioners rights to property as alleged and in fact, it is the Petitioners who have totally declined the offer by the 1<sup>st</sup> Respondent in the hope of acquiring unwarranted higher amounts from public funds or coffers.
61. It was his contention that the Petition lacks merit and does not warrant issuance of the general and exemplary damages sought. That the 1<sup>st</sup> Respondent has no role in the implementation of the project, save for the limited role in acquisition on behalf of the 2<sup>nd</sup> Respondent.
- Mr. Ikol urged the Court to dismiss the instant Petition with costs.
62. The 2<sup>nd</sup> Respondent opposed the Petition through the Replying Affidavit of Eng. Michael M. Thuita, who averred that he is the Chief Executive Officer and Accounting Officer of Athi Water Works Development Agency (AWWDA) formerly Athi Water Services Board; the 2<sup>nd</sup> Respondent herein. He also averred that Athi Water Works Development Agency (AWWDA), is mandated with undertaking the development, maintenance and management of National Public Water Works within its area of Jurisdiction namely Nairobi, Kiambu and Murang’a,
63. It was his contention that the Government of Kenya came up with a project known as Water and Sanitation Services Improvement Project Additional Financing (WASSIP) – Bulk Water supply for Nairobi; Construction of Northern Collection Tunnel Phase 1.
64. That to facilitate the project, the Government through the National Treasury secured loans and grants from various development partners through financing agreements. That in accordance with the requirements to channel the given loans to the project executing agency as per the agreements, the Government of Kenya entered into subsidiary loan agreement dated December 17, 2012, and amended on December 9, 2014 with Athi Water Services Board (now Athi Water Works Development Agency) being the project implementing agency for consideration of USD 146,421,482.
65. Further that the 2<sup>nd</sup> Respondent as the Project Implementing Agency entered into contracts with various contractors for various components.



66. That to facilitate implementation of the Project, the 2<sup>nd</sup> Respondent identified the land required for the construction of inter alia the construction of Raw and Treated Water Gravity Main from Thika Dam to Kigoro Water Treatment Works to Gigiri Tanks (the subject matter of the Petition herein).
67. Further that in line with the law, the 2<sup>nd</sup> Respondent being the acquiring body applied in writing to the 1<sup>st</sup> Respondent to acquire the required land. He contended that the 1<sup>st</sup> Respondent in executing its mandate and as admitted by the Petitioners caused to be advertised by Gazette Notice No 9589 dated 14<sup>th</sup> November 2016, Gazette Notice No 10870, of November 3, 2017, and Gazette Notice No 2188 of March 9, 2018, for the purpose of and intention to acquire the suit properties and improvements on behalf of the 2<sup>nd</sup> Respondent for the Pipeline project.
68. It was his further contention that the Gazette Notices provided expressly the intention to create a right of way (Water Pipeline wayleave) on the suit lands pursuant to Sections 143, 144 and 16(2) of the [Land Act, 2012](#).
69. Eng. Thuita further averred that due to the above Gazette Notices, the 1<sup>st</sup> Respondent issued a Gazette Notice 2189 dated March 9, 2018, inviting the Petitioners and all affected persons for inquiry on April 1, 2018, April 11, 2018 and April 13, 2018 pursuant to Section 112 and 162(2) of the [Land Act, 2012](#).
70. That the inquiry exercise was conducted on the set dates and all affected parties were granted leave to make presentations culminating to various awards for the project affected persons which awards were within the law,
71. It was Eng. Thuita's contention that to facilitate compensation to the Project affected persons and for the purpose of acquisition of the wayleave, the 2<sup>nd</sup> Respondent deposited the compensation sum with the 1<sup>st</sup> Respondent for the purpose of compensating the Project affected persons. That the 1<sup>st</sup> Respondent, is the institution constitutionally mandated to acquire land for public purpose and for compensation.
72. It was his contention that in the year 2018, the 1<sup>st</sup> Respondent issued the Petitioners with Notices of taking possession under Section 120 of the [Land Act, 2012](#). That the Petitioners were aggrieved with the awards and moved to Court vide Murang'a Petition No 5 of 2018; [Stephen Mbugua Gituthi & 57 others vs the National Land Commission and Athi Water Services Development Agency](#).
73. Eng. Thuita further contended that by a Judgment rendered on July 31, 2019, the Court quashed the acquisition process of the suit lands and declared it *ultra vires*, the [Constitution](#) unless the due process was followed and prompt payment of just compensation was made to the Petitioners. It was his further contention that in compliance with the Court order that directed that due process be followed, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents took some steps albeit with a delay in implementation of the same due to lack of the 1<sup>st</sup> Respondent Commissioners.
74. He further contended that on October 16, 2020, the National Land Commission issued Gazette Notice No 8479, for the purpose of compulsory acquiring the suit land pursuant to the [Land Act](#) which Gazette Notice stated.
- “...the National Land commission, on behalf of Athi Water Works Development Agency give notice that it intends to correct the above notice to read “intention to acquire land”. Pursuant to Section 107 of the [Land Act](#) instead of intention to create a right of way (Water Pipeline wayleave) pursuant to Section 143 and 144 of the [Land Act](#) 2512”
75. Further that upon hearing the project affected persons in the presence of the Petitioners' Advocate on record, and in accordance with the law, the National Land Commission made awards taking into



account and considerations the value of the land, the required portion being affected by the water pipeline and all improvements on the suit land, in accordance with its mandate.

76. That the awards included the value of the land and improvements and therefore the process of acquisition by the National Land Commission, was above board and did meet the requirement as directed by the Court in Murang'a Petition No 5 of 2018. He contended that the Petitioners prayers for acquisition of the suit land through private treat cannot apply, as the same will offend the Public Finance Management Act, the National Land Commission Act and the Land Act, 2012. He denied that the Respondents have trespassed on the Petitioners' land.
77. It was Eng. Thuita's further contented that the Petition herein is frivolous, vexatious and an abuse of the Court's process, and Murang'a Petition No 5 of 2018.
78. Further that the Court should take cognizance of the fact that the matter is of great public interest and national importance, being the Nairobi Bulk Water Supply Program which is a Vision 2030 Flagship Project of the National Government.
79. He also contended that majority of the project components in the Northern Collection Water System being time bound as per the Contracts are at advance stage (above 96%) completion except the water transmission pipelines from Ngethu to Nairobi project which is 36% overall completion with construction works for the pipeline project having come to a complete stop due to restricted access to the site for the construction as a result of cases such as this one.
80. It was his further contention that the Petitioners are just engaging in continuous litigation and are not interested in allowing the Government to implement State projects, that will benefit all and sundry, and yet the process of compensation had been followed. Therefore, this Petition is in bad faith, frivolous and vexatious and he urged the Court to dismiss it.
81. The Petitioners filed a Further Affidavits through Stephen Mbugua Gituthi dated April 19, 2022, and averred that after reading the Replying Affidavit by Engineer Thuita, he denied the averments thereto and reiterated the contents of his Supporting Affidavit. He further contended that the creation of the wayleaves was a mere nullity as it was carried out, but was based on acts that had been found to be *ultra vires* the Constitution and statutory law.
82. Further that the Respondents have failed again to promptly pay fair and just compensation to the Petitioners and there is no law that bars the Respondents from assessing the fair and just compensation through private treaty.
83. On allegation that this Petition is, Murang'a Petition No 5 of 2018, he averred that the causes of action for Murang'a Petition No 5 of 2018, are different from the ones in the current Petition; the cause of action are based on different facts; that there is continuing trespass that raises new causes of action daily and thus this Petition is not .
84. It was his contention that there can be no public interest in breach of the law and the freedoms and rights enshrined in the Constitution and the continuous contempt of Court. It was his further contention that the Petitioners are entitled to Just Compensation of the suit properties and improvements, that the Respondents have illegally and unjustifiably taken, contrary to the Constitution, Statute law and a Court order. Further that the award given by the 1<sup>st</sup> Respondent remains the end product of a flawed process to which the Respondents jointly curtailed the participation of the Petitioners and which illegalities only the Court can cure. Further that the Respondents got it wrong from the start by following the wrong procedure of creating rights of way and compounded the illegalities by disregarding the dictates of the Constitution and various statutes



and principles of law including the Law to fair hearing, while carrying out the impugned inquiries, valuations and giving awards. He urged the Court to allow the Petition.

85. The Petition was canvassed by way of written submissions.
86. The Petitioners filed their written submissions on August 26, 2022, and further submissions on November 2, 2022, through the Law Firm of Muri Mwaniki Thige & Kageni LLP.
87. Petitioners submitted that they are the legal and beneficial owners or actual occupiers of the suit properties all of which are situated within Kiriaini and Rwegetha village in Murang'a County and Ngethu Village in Kiambu County. They further submitted that through Murang'a ELC Petition No 5 of 2015, the Respondents' action of acquiring the Petitioners suit properties was declared *ultra vires* the Constitution and Statutory law, and that the Respondents were prohibited from vesting the right of way (wayleave) unless due process was followed. However, in breach of the said Court order, the Respondents proceeded with the construction of the pipeline on the Petitioners' suit properties and the 2<sup>nd</sup> Respondent's Chief Executive Officer was even found guilty of breach of the Court orders.
88. In support of the Petition, the Petitioners set out five issues for determining.
89. In submitting that the Petition herein is not Muranga ELC Petition No 5 of 2018, the Petitioners submitted that in Petition No 5 of 2018, the cause of action was based on Gazette Notices No, 9598 of 2015, 10870 of 2017 and 2188 of 2018. However, this Petition is based on Gazette Notice No 8479, which was published one year post judgment.
90. The Petitioners further submitted that Murang'a ELC Petition No 5 of 2018, dealt with the issue of whether the Respondents carried out the process of creating public right on the suit properties in a legal and constitutional manner. In the present Petition, the issue is whether the Respondents carried out the process of compulsory acquisition of the suit properties as stated in Gazette Notice No 8479 in a legal and constitutional manner. Further that the 3<sup>rd</sup> Respondent was not a party to Murang'a ELC Petition No 5 of 2018, and in the current Petitioner, the Attorney General, 3<sup>rd</sup> Respondent is a substantive Party to the Petition as the Officers of the National Police Service aided and abetted in the trespass on the suit properties despite prohibiting orders.
91. For this submissions, the Petitioners relied on the case of John Florence Maritime Services Ltd & Another Vs Cabinet Secretary Transport & Infrastructure & 3 others Petitioner No 17 of 2015 (2021) KESC 39(KLR) [Judgment] where the Supreme Court stated as follows:

“We restate the elements that must be proven before a Court may arrive at the conclusion that a matter is *res judicata*. For *res judicata* to be invoked in a civil matter the following elements must be demonstrated:

  - a) There is a former Judgment or order which was final;
  - b) The Judgment or order was on merit;
  - c) The Judgment or order was rendered by a Court having jurisdiction over the subject matter and the parties; and
  - d) There must be between the first and the second action identical parties, subject matter and cause of action”
92. It was the Petitioners further Submissions that all the above conditions have not been met to render the current Petition Murang'a ELC Petition No 5 of 2018.



93. In regard to whether the Petition is an abuse of the Court Process, the Petitioners submitted that the Petition herein is brought pursuant to various Articles of the Constitution. That the Petitioners pleaded the factual background supporting the Petition, which factual background was supported by the Affidavit of Stephen Mbugua Gituthi, and the annexures thereto. The Petitioners also pleaded the way that their constitutional rights were infringed by the Respondents. Further, that the Replying Affidavit by the Respondents showed that they understood with precision the grievances by the Petitioners. In supporting this submissions, the Petitioners relied on the case of Anarita Karimi Njeru Vs Republic (1979) eKRL, where the Court held that; -

“If a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed”.

94. Submitting on whether the acquisition of the suit property conformed to the Constitution and Statute Law, the Petitioner relied on Article 40 of the Constitution and specifically Article 40 (3)(b) which states as follows;

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

.....

(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.”

95. The Petitioners submitted that the Respondents infringed their constitutional rights since the Respondents failed to acquire the said suit properties as provided by the Constitution and Statute Law. That through Gazette Notice No 8479, of October 16, 2020, the 1<sup>st</sup> Respondent notified the public including the Petitioners that it was intending to acquire the suit properties pursuant to section 107 of the Land Act. However, the said Gazette Notices No 8479, of October 16, 2020, was of no effect in as far as it intended to correct Gazette Notices No9589 of 2016, 10870 of 2017, 2188 and 2189 of 2018 (the Impugned Gazette Notices) since the said Gazette Notices had been declared by the Court in Petition No 5 of 2018 to be *ultra vires* the Constitution and Statutory Law.

96. It was their further submissions that the impugned Gazette Notices were for creation of the rights of way (water pipeline wayleave) over the suit properties, whereas Gazette Notice No 8479, on October 16, 2020, was for compulsory acquisition of the suit properties. They also submitted that the Court having declared that the Respondents breached the law on purporting to create the wayleave over the suit properties, therefore the pre-inquiry stage of the acquisition process having been declared *ultra vires* the Constitution, then it could not form the basis of the compulsory acquisition. It was the Petitioners’ further submissions that the 1<sup>st</sup> Respondent failed to follow the procedure for compulsory



acquisition of the suit properties as stipulated in Sections 107 -133 of the Land Act. They relied on the case of Patrick Musimba Vs National Land Commission & 4 others (2016) eKLR.

97. Further that the 1<sup>st</sup> Respondent did not comply with the provisions of Section 107(2) of the Land Act, by having the suit properties valued and mapped. Failure to do so violated the Petitioners' rights to property. It was submitted that had the 1<sup>st</sup> Respondent carried out valuation, then the just and fair compensation for compulsory acquisition of the suit properties and improvements would and should have been higher than the mere creation of a public right of way.

98. On prompt payment of just compensation, the Petitioners submitted that the Respondents ought not to have taken possession before making such payments. They relied on the case of Machareus Obaga Anunda Vs Kenya Electricity Transmission Co. Ltd (2015) eKLR, where the Court held; -

“ the circumstances, it is not clear to me on what basis the defendant purported to enter onto the suit properties. From what I have set out above, no wayleave had been created in favour of the defendant as provided by law and no compensation paid to the plaintiff. I am of the view that even if the wayleave had been lawfully created which is not the case here, the defendant could not enter the suit properties without first making prompt payment of just compensation to the plaintiff which is a constitutional imperative before one can be deprived of property.

99. The Petitioners also submitted that failure by the 1<sup>st</sup> Respondent to prove the basis of valuing the suit properties and improvements meant that the compensation awarded to the Petitioners can therefore not be upheld. For this, they relied on the case of Ngugi Mbugua Vs Chairman of National Land Commission & 3 others (2021) eKLR, where the Court held that;-

“ ... That 1<sup>st</sup> Respondent having failed for produce a counter valuation to the one produced by the Petitioner and the allegation by the Petitioner that a larger portion was acquired as opposed to which was gazetted, the Court finds and holds that it could only mean that the award for compensation given to the petitioner was not just and was it lower as the same is not verifiable”.

100. In submitting that the Respondents violated their rights to access to justice, the Petitioners submitted that the 1<sup>st</sup> Respondent failed to give written reasons for the awards, failed to give valuation used as basis for the award, failed to explain why the Petitioners valuations were rejected and failed to award some of the Petitioners even after they participated in the inquiries. For this submissions, the Petitioners relied on various decided cases; amongst them the case of Gami Properties Ltd Vs National Land Commission (2017) eKLR, where the Court held;-

“ It is on record that the Respondent ignored or refused to furnish the information requested. In this case the right of the Appellant to property is being adversely affected by the administrative action (compulsory acquisition) and the appellant has a right to be given written reasons for the action. I see no reason why the Respondent elected to ignore a fundamental right to the Appellant that is enshrined in Article 47(2) of the Constitution”.

101. In conclusion, the Petitioners submitted that the Respondents herein did not comply with the Constitution and Statutory law, while acquiring suit properties. Further, that the Respondents denied, violated and infringed the Petitioners' Constitutional Rights to property, access to information, access to justice, fair hearing and fair administrative action.



102. Regarding the issue of whether the Respondents trespassed on the suit properties despite a Court prohibitory orders, the Petitioners submitted that the Respondents took possession of the suit property in July 2018, as from the Notices of taking possession, it issued to the Petitioners that the Petitioners challenged the compulsory acquisition vide Petition No 5 of 2018, and on July 31, 2019, the Court issued a prohibition order. However, in contempt of the said Court order, the Respondents continued with construction of the pipeline with Police Officer protecting them. Further that the Petitioners filed for contempt on October 22, 2019, and on June 18, 2020, the Court found the CEO of the 2<sup>nd</sup> Respondent Engineer Michael Mwangi Thuita, guilty of contempt of Court orders issued on July 31, 2019, and was fined Kshs 375,000/= for contempt. Therefore, it was the Petitioners' submissions that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents trespassed on the suit properties after July 31, 2019, when they illegally and without Petitioners' consent continued being in possession of the suit properties and improvements, continued the construction despite a Court order prohibiting the same. That the said trespass was undertaken with the knowledge and active participation of the County Commissioner, Murang'a County and the 3<sup>rd</sup> Respondent herein, who had been served with the Court Order. The Petitioners relied on the case of *Omar R. Yakin & Another Vs the AG* (2021) eKLR, where the Court held that when the Respondent decided to disregard the Court Order and proceeded to demolish the structures that were on the suit property, that was unlawful.
103. It was the Petitioners' further submissions that since they have proved that the Respondents trespassed on their suit properties and which trespass is continuing, then they should be awarded Kshs 1,500,000/= each for such trespass by the Respondents. They further sought aggravated damages of Kshs 500,000/= for each of the Petitioners. They relied on the case of *Dominic Mbugua Wainaina & another Vs National Land Commission & 2 others* (2019) eKLR.
104. In submitting that the Petitioners are entitled to prayers sought in the Petition, they submitted that the Petitioners have made a case as to why they are entitled to the prayers sought in the Petition. They also submitted that they are entitled to costs of the Petition. The Petitioners urged the Court to allow their Petition,
105. The 1<sup>st</sup> Respondent filed its written submissions on January 12, 2023, through Njuguna Jacqline Advocated. The 1<sup>st</sup> Respondent submitted that indeed the Petitioners filed Murang'a Petition No 5 of 2018, wherein on July 31, 2019, the Court entered judgment in favour of the Petitioners and issued prohibition orders against the Respondents barring them from vesting the right of way (wayleave) unless due process was followed and prompt payment of just compensation made in favour of the Petitioners.
106. That in compliance with the said Court order, the 1<sup>st</sup> Respondent on October 16, 2020, caused a publication of Gazette Notice No 8479, in the form of a corrigendum and inquiries notice in order to carry out repeat inquiries. It further submitted that on November 17, 2020, and December 16, 2020, the Respondents conducted repeat inquiries at the Rwegetha and Ngethu Chief's offices in which the Petitioners were in attendance. It was their further submissions that during the inquiries, the Petitioners and their advocates made their representations and presented copies of their ownership documents together with valuation reports. That the 1<sup>st</sup> Respondent retreated to consider them. They also submitted that the Petitioners were given sufficient notices and their submitted Valuation reports were considered in preparing the their allegations. Therefore, the Petitioners were given a fair hearing contrary to their allegations.
107. It was the 1<sup>st</sup> Respondent's further submissions that the Petitioners' Valuation Reports were not a reflection of the true market Value as per the Ministry of Lands Data. That the Petitioners did not present audited account or Kenya Revenue Authority returns to support their purported loss of



income. That instead, the Petitioners attached purchase agreements which were prospective and not actual reflection of loss of income. It was also submitted that upon inquiries, the 1<sup>st</sup> Respondent did not find reasons to vary the awards. However, some of the parties rejected the award, but some other parties accepted the awards as they were satisfied with the repeat inquiries. Therefore, the 1<sup>st</sup> Respondent was willing to compensate the Petitioners and that it discharged its statutory mandate and that the Petition herein is unmerited.

108. The 1<sup>st</sup> Respondent identified three issues for determination.
109. Submitting on whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents violated the Petitioners right to property, vide Article 40 of the [Constitution](#), it submitted that the State has a right to eminent domain. That by the Petitioners asking the Court to quash the Notices for compulsory acquisition as well as seeking mandatory injunction against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from compulsory acquiring, the Petitioners are curtailing the States power of eminent domain, which is against the [Constitution](#). For this, the 1<sup>st</sup> Respondent relied on the case of [Veronica Waithira; Trustee of Inter Christian Churches and 3 Others Vs Kenya National Highway Authority](#) (2014) eKLR, where the Court held; -

“Section 28 (e) of the [Land Registration Act](#) No 3 of 2012 declares rights of compulsory acquisition as an overriding interest over registered Land which does not need to be noted on the register meaning that the Government through the National Land Commission can at any time compulsorily acquire any property for the purposes spelt out under Article 40 (3) of the [Constitution](#) provided the acquisition process and procedure is adhered to. It does appear to me that the plaintiffs cannot stand in the way if their property is identified as required for a public purpose as all the Government would need to do is to initiate the process of compulsory acquisition under the law.”

110. On whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents conducted the process of compulsory acquisition for the suit properties in accordance with the law and Court order, the 1<sup>st</sup> Respondent relied on Part VII of the [Land Act, 2012](#), which lays down the process of compulsory acquisition. It was the 1<sup>st</sup> Respondent’s submissions that the laid down procedure was duly adhered to. That as per the Replying Affidavit of Brian IKol, it is evident that the 1<sup>st</sup> Respondent gave out the requisite Notices for inquiries in the form of corrigendum Notices owing to the peculiar circumstances of the project. That these new notice which were duly communicated and which culminated in turn out of the interested persons in meeting the 1<sup>st</sup> and 2<sup>nd</sup> Respondents officials on various dates and detail was well explained by the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent relied on the case of [Patrick Musimba Vs National Land Commission & 4 others](#) (2016) eKLR, where the Court held;-

“Section 112 of the [Land Act](#) then involves the landowner directly for purposes of determining proprietary interest and compensation. The section has an elaborate procedure with the National Land Commission enjoined to gazette an intended inquiry and the service of the notice of inquiry on every person attached. The inquiry hearing determines the persons interested and who are to be compensated. The National Land Commission exercises quasi-judicial powers at this stage. At Paragraph 147 it is stated that;

“.....The Public need not only be invited but must also be given adequate opportunity to participate. As to whether the public participates and their views taken, is truly another sphere”

111. It was further submitted that the Petitioners have failed to disclose to this Court that over three quarters of the project affected persons, were given their awards of compensation and being satisfied with the



process of compulsory acquisition, they accepted the awards and were duly compensated promptly. Therefore application of different standards of compensation could occasion an injustice to the other persons whose parcels of land fall within the same locality. That the Petitioners herein rejected the awards given to them seeking higher compensation amount which is unjustified.

112. The 1<sup>st</sup> Respondent also submitted that the valuation process was undertaken with due regard of the principle set out in the repealed “*Land Acquisition Act* chapter 295 Laws of Kenya” that this standard was buttressed by the decision in the case of *Stanley Munga Gitbunguri vs National Land Commissions* in ELC Appeal No 70 of 2015 where the Court stated;

“Under section 113 of the Act, the Respondent is then required to prepare a written award of compensation upon the conclusion of the inquiry. Section 113(2) further provides that the award shall be conclusive evidence of;

- i. The size of the land to be acquired;
- ii. The value, in the opinion of the Commission of the land;
- iii. The amount of the compensation payable, whether the persons interested in the land have or have not appeared at the inquiry”

113. It was also submitted that the 1<sup>st</sup> Respondent opposed the prayer for joint valuation, as the same could be impracticable owing to the fact that the Petitioners standards had great discrepancies with the Respondents standard of valuation and therefore the Valuers would come up with varying amounts which would amount to waste of Court’s time.

114. Submitting on whether the Petitioners are entitled to the order sought in the Petition, the 1<sup>st</sup> Respondent submitted that having complied with the statutory requirements and the orders of the Court, and the 1<sup>st</sup> Respondent having complied with the due process of compulsory acquiring the Petitioners’ parcels of land, then the Petitioners are not entitled to the prayers sought. 1<sup>st</sup> Respondent relied on the case of *John Peter Mwangi Kagira Vs National Land Commission & Another* (2021) eKLR, where the Court stated: -

“22. As to whether the Respondents acted in breach and whether the said breach was deliberate, it is on record that both Respondents have denied any willful non- compliance of the Court orders. They however admit that there was a delay in complying with the orders. The explanation for the delay is that the 1<sup>st</sup> Responded who is constitutionally and legally, mandated to undertake the acquisition of the wayleaves was without commissioners for a period of 9 months. This was in public domain that the commissioners were only appointed in November 2019. The Court has no reason to disbelief this position.

23. Further the 1<sup>st</sup> Respondent has given detailed steps that it took to comply with the orders of the Court namely, the gazetteement Notice No 6384 dated 28/8/2020, inquiry held on the 28/8/20 leading to the award dated the 17/11/2020.

24. From the forgoing, the Court is of the view that the Respondents complied with the orders of the Court in repeating the acquisition processes and there is no ground to fault it albeit with delay which has been explained to



the satisfaction of the Court. This was done with the involvement of the Applicant.”

115. The 1<sup>st</sup> Respondent further submitted that the orders sought would amount to interfering with the statutory mandate of the 1<sup>st</sup> Respondent and this Court should not entertain the same.
116. It was also submitted that the Petitioners have not revealed the specific violations of the *Constitution* or otherwise in relation to the alleged violation of the above stated rights. They relied on the case of *Anarita Karimi Njeru VS The Republic* (supra)
117. It was the 1<sup>st</sup> Respondent’s further submissions that the Petitioners pleaded 15 prayers with no precision as is required of the Constitutional Petitions.
118. In conclusion, the 1<sup>st</sup> Respondent submitted that the Petition herein lacks merit and should be dismissed with costs.
119. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents too filed their written submissions on October 5, 2022, and submitted that after the Court Judgment of July 31, 2019, the 1<sup>st</sup> Respondent in compliance of the order of the Court issued a Gazette Notice No 8479, for the purposes of compulsory acquiring the suit land pursuant to the provisions of the *Land Act, 2012*.
120. It was submitted further that upon hearing the project affected persons in the presence of the Petitioner’s Advocate on record, and in accordance with the law, the 1<sup>st</sup> Respondent made awards taking into consideration the value of the land, the required and acquired portions being affected by the water pipeline and all the improvements on the suit properties in accordance with its mandate. Therefore, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submitted that the process of acquisition by the National Land Commission was above board and has met the requirements directed by the Court in Murang’a Petition No 5 of 2018.  
  
The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents identified five issues for determination.
121. On whether the suit herein is , the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submitted that the Petition No 5 of 2018, involved similar issues and parties. The issue was acquisition of the suit properties along the pipeline corridor and similar reliefs had been sought. Therefore, this Petition offends the provisions of Section 7 of the *Civil Procedure Act*.
122. In submitting whether the Gazette Notice No 8479, for purpose of compulsory acquiring the suit properties pursuant to the *Land Act, 2012*, was in compliance with the Statutory Law and Court Order in Petition No 5 of 2018, it was submitted that the issuance of Gazette Notice No 8479 was in compliance of the judgment of the Court for purposes of compensating the Petitioners from the acquisition and creation of right of way over the suit properties herein.
123. On whether the Petitioners were granted opportunity during the hearing and issuance of the awards, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submitted that as admitted by the Petitioners, they indeed appeared and made presentations in relation to the values of their land, which was a process of giving the Petitioners fair hearing.
124. It was further submitted that the duty of assessing the amount payable was bestowed upto the National Land Commission, whereby upon issuance of a Notice, they carry out an assessment and issue award as exhibited by the Petitioners themselves. That the Petitioners accepted and appeared, but have now been driven by private interests beyond the market value to demand through this Court award and compensation in excess of the market value.



125. On whether the suit properties were acquired through private treaty in disregard of the Land Value (Amendment Act 2019) and the [Land Act, 2012](#), it was submitted that the [Land Act, 2012](#) governs the process of Compulsory Land Acquisition in Kenya which is a preserve of National Land Commission. Further that the National Land Commission shall regulate and assess such a just compensation and then prepare the awards for compensation of such land that has been acquired.
126. It was the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submissions that the Valuation Reports by the Petitioners Valuers was not credible, fair and/or based on market value guided by the Government valuer at all. That the valuation by the Petitioners was a pure commercial enterprise, seeking to distort and mislead the Court on the true value of the suit parcels of land herein. They urged the Court to ignore the Valuation Reports by the Petitioners and that it should dismiss the Petition herein and rely on the Government valuer and National Land Commission. They relied on the case of [Katra Jama Issa Vs Attorney General & 3 Others](#) (2018) eKLR, where the Court held; -
- “...Compensation of compulsorily acquired property be quantified in accordance with the principle of equivalence. A person is entitled to compensation for losses fairly attributed to the taking of his land but not to any greater amount as “fair compensation requires that he should be paid for the value of the land to him, not its value generally or its value to the acquiring authority” (emphasis added)”
127. It was further submitted that the [Land Value \(Amendment\) Act 2019](#), establishes the criteria for assessing value for compulsory acquired freehold land as stated in Section 107 A (1) which states
- “Valuation of freehold land and community land for purposes of compensation under this Act shall be based on the provisions of this Part and the land value index developed for that purpose by the Cabinet Secretary in consultation with county governments and approved by the National Assembly and the Senate.”
128. They also relied on the case of [Patrick Musimba Vs National Land Commission & 4 others](#) (2016) eKLR, where it was stated; -
- “In our view, a closer look at Article 40(3) of the [Constitution](#) would reveal that the [Constitution](#) did not only intend to have the land owners who is divested of his property compensated or restituted for the loss of property but sought to ensure that the public treasury from which compensation money is drawn is protected against improvidence. Just as the owner must be compensated so too must the public coffers not be looted .... Once a property is acquired and there is direct loss by reason of the acquisition, the owner is entitled to be paid the equivalent. One must receive a price equal to his pecuniary detriment; he is not to receive less or more”.
129. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents urged the Court to find that the due process was followed and the Court should adopt the Government value as given and disregard the private commercial valuation provided by the Petitioners.
130. On costs, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submitted that the Petitioners having filed a second suit should be condemned to pay costs of this Petition.
131. The Petitioners filed further written submissions on November 2, 2022 and reiterated their early submissions dated August 26, 2022. They further submitted that even though some parties have accepted the awards as given by the Respondents, the Petitioners herein should not be made to suffer injustices and illegalities meted out by the 1<sup>st</sup> Respondent because other parties have accepted such



impugned outcomes. It was their further submissions that the 1<sup>st</sup> Respondent did submit that they relied on the principles set out in Land Acquisition Act (repealed) instead of the Land Act, 2012 and the Land (Assessment of Just Compensation) Rules 2017, that were already in force when the Respondents were acquiring the suit properties in 2020.

132. In conclusion, the Petitioners submitted that they have already shown that the suit properties and improvements were taken by the Respondents in an unconstitutional and illegal manner without prompt payment of Just Compensation in breach of their Constitutional rights, in disregard of the Court Order and that the Respondents committed a continuous trespass while doing so. They urged the Court to allow their petition.
133. The Court has considered the Petition herein, the Response to the said Petition and the annexures thereto. The Court too has considered the rival written submissions and the cited authorities and finds as follows; -
134. This is a Constitutional Petition wherein the Petitioners have alleged violations of the various Fundamental rights by the Respondents herein. The Petitioners have alleged contravention of their rights and Fundamental freedoms as found under Articles 27, 35, 40, 47, 50, 60(1) (b) 232 and 249 of the Constitution. This Court will therefore have to consider the above stated Articles of the Constitution, alongside the arguments advanced by all the parties to come to a conclusion on whether there was indeed a breach of the same or not.
135. As this Court determines the issue herein, it will take into account the Provisions of Article 259 which provides that in interpreting the Constitution, the Court should do so in a manner that promotes its purposes, values and principles and also advances the rule of law, human rights and Fundamental Freedoms in the Bill of Rights.
136. Before delving into the controverted issues, the Court finds that the following facts are not in dispute.
137. That the Petitioners are actual and beneficial owners of various parcels of land that are situated in Rwegetha and Kiriaini areas of Murang'a County and Ngethu in Kiambu County.
138. That in the year 2016, the National Land Commission expressed intention to acquire portions of the Petitioners stated parcels of land for purposes of creating Wayleave for Water Pipeline Project. That the National Land Commission expressed that intention through various gazette notices.
139. There is also no doubt that the Petitioners were dissatisfied with the way the National Land Commission had gone about acquiring their suit properties.
140. The Petitioners herein and others not in this Petition filed Murang'a ELC Petition No 5 of 2018 on August 29, 2018, and alleged Constitution violating by National Land Commission and Athi Water Services.
141. It is evident that on July 31, 2019, the Court entered Judgement and issued these two orders;
  - a. A declaration is hereby made that the acquisition of the suit properties and improvements undertaken by the Respondents was carried *ultra vires* the Constitution and Statutory Law, thus infringing and violating the Petitioners right to property.
  - b. An order of prohibition be and is hereby issued prohibiting the Respondent, their servants, agents in any manner whatsoever from vesting the right of way (wayleave) in favour of the 2<sup>nd</sup> Respondent unless due process is followed and prompt payment of just compensation is made to the Petitioners.



- c. Cost of the Petition be met by the Respondent Jointly.
142. The Court has gone through the said Judgement of the Court and has noted that the Petitioners thereon had sought for various reliefs. However, most of the prayers were dismissed apart from the two mentioned above.
143. In para 76 of the said Judgement of July 31, 2019, the Court had found that though the Respondents were intending to acquire Wayleave or rightway as set out in Sections 143-149 of the Land Act, they proceeded under the provision of Section 107 of the Land Act, which was in respect of compulsory acquisition. It was the Court's findings that the two procedures are different and therefore the 1<sup>st</sup> Respondent (National Land Commission) failed to adhere to the provisions of the Act. For failure to adhere to the correct procedure of acquisition of wayleave as enacted by Sections 143-149 of the Land Act, the Court on Para 80 of the Judgement came to a conclusion that the 1<sup>st</sup> Respondent had failed to comply with the mandatory procedure set out and therefore no wayleave was created infavour of the 2<sup>nd</sup> Respondent, in the manner contemplated and provided by the law.
144. It is evident that by the time of filing Petition No 5 of 2018, the Respondents had already taken possession and the construction works of laying the pipelines was underway.
145. In the end, the Court found that the acquisition of the Petitioners suit properties was *ultra vires* the Constitution and statutory law. The Respondents were prohibited from vesting the right of way (way leave) in favour of the 2<sup>nd</sup> Respondent.
146. It is also not in doubt that in attempt to comply with the Court Order vide the above Judgement of the Court, the 1<sup>st</sup> Respondent caused to be Published Gazette Notice No 8479, on October 16, 2020, wherein the 1<sup>st</sup> Respondent published its "intention to acquire land" under Section 107 of the Land Act, 2012.
147. The 1<sup>st</sup> Respondent therefore changed the mode of acquisition from intention to create right of way to compulsory acquisition.
148. The Court in its Judgement of July 31, 2019, had held that the two processes are Governed by different provisions of law and the procedures are different. The said Gazette Notice No 8479 was clear that it was issued in compliance with the Court order in Murang'a ELC Pet No 5 of 2019.
149. The Petitioners were invited for inquiry and again after the 1<sup>st</sup> Respondent published the awards for each of the persons affected by the project(PAP), the Petitioners herein rejected the said Awards. They filed this Petition herein claiming infringement of their fundamental rights and freedoms.
150. The Petition is vehemently opposed by the Respondents.
151. The above being the undisputed facts. The Court finds that the issues for determination are;
- i. Whether the Petition herein is res-judicata Murang'a Pet No 5 of 2018; Stephen Mbugua Gituthi & 59 others vs the National Land Commission & Athi Water Services Board.
  - ii. Whether the Petition is an abuse of the Court process and that there are no Constitutional violations.
  - iii. Whether the acquisition of the suit property is conformed to the Constitution and Statute law and whether the acquisition breached the Petitioners Constitutional rights.
  - iv. Whether the Respondent trespassed on the suit properties despite a Court prohibitory orders.



- v. Whether the Petitioners are entitled to the prayers as sought.
152. As already analysed by the Court, the Petitioners herein and others not before this Court filed Murang'a ELC Pet. No 5 of 2018 and claimed contravention of the rights in the manner that the 1<sup>st</sup> Respondent acquired the right of way (way leave) in favour of the 2<sup>nd</sup> Respondent thereon for construction of the properties.
153. The Court in its Judgement found that the Petitioners were not opposed to the acquisition of their suit properties for the purpose of laying the pipelines for the water project. However, the Court faulted the manner of acquisition of the said right of way and found it *ultra vires* the Constitution and Statutory law.
154. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents have submitted that in Petition No 5 of 2018, the Petitioners had raised similar issues of acquisition of the suit properties. It was their submissions that the Petitioners actions of bringing this Petition contravenes the provision of Section 7 of the Civil Procedure Act which states;

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

This submission is vehemently opposed by the Petitioners herein who alleged that the cause of acting in the two Petitions are different. That in Petition No 5 of 2018, the issue was whether the Respondents had carried out the process of creating public rights on the suit properties is illegal and Constitutional manner, the issue is whether the Respondents carried out the process of compulsory acquisition of the suit properties as stated in Gazette Notice No 8479 in a legal and Constitution manner. Indeed, the cause of actions are different.

155. The doctrine of *res judicata* is employed to allow a litigant only one bite at the Cherry. The doctrine is used to prevent litigants from returning to Court to claim further reliefs not claimed in the earlier action. Therefore, the doctrine is used to prevent multiplicity of suits which clog the Court system and help to bring litigation to an end.
156. The Supreme Court of Kenya in the case of John Florence Maritime Services Ltd & Another vs Cabinet Secretary Transport & Infrastructure & 3 Others, Pet No 17 of 2015(2021) KESC 39(KLR), set out the elements to be considered and proved before a Court can arrive at the conclusion. That the matter is . The Court stated;

“For to be invoked in a Civil matter, the following elements must be demonstrated;

- a. There is a former Judgement or Order which was final.
- b. The Judgement or Order was on merit.
- c. The Judgement or Order was rendered by a Court having jurisdiction over the subject matter and the parties and
- d. There must be between the first and second action identical parties, subject matter and cause of action.



157. The Court has considered the Petition No 5 of 2018, and the current Petition and finds that indeed the parties are the same except that in the current Petition, the Attorney General is a Party but in Petition No 5 of 2018, the Attorney General was not a Party.
158. Further the Court finds that though the said Judgement was issued by a Court with Jurisdiction, the final orders were a declaration and prohibition with a condition that unless there is compliance with the due process and prompt and just compensation. That meant that there was a possibility that the process would be repeated. Therefore, the said Judgement did not conclude the issue of acquisition of the suit properties.
159. Further the cause of action in Petition No 5 of 2018, was on creation of public right of way on the suit properties whereas the current Petition is over the process of compulsory acquisition of the suit properties vide a Gazette Notice No 8479.
160. This Court finds that the doctrine of cannot be invoked in the present Petition. This Petition is not Murang'a ELC Petition No 5 of 2018, and it is this Court's considered view that the Petition herein is properly before the Court.

**(ii) Whether the Petition herein is an abuse of the Court process and that there is no Constitutional violation.**

161. The 2<sup>nd</sup> & 3<sup>rd</sup> Respondents had averred in Paragraph 29 of the Replying Affidavit sworn by Engineer Michael M Thuita, that the Petition herein is frivolous, vexatious and an abuse of the Court process, *res judicata* Murang'a Pet No 5 of 2018.
162. *Black's Law Dictionary* 9<sup>th</sup> Edition defines abuse of process as;  
 “The improper and tortious use of legitimately issued Court process to obtain a result that is either unlawful or beyond the process scope. Also termed abuse of legal process; malicious abuse of process; malicious abuse of legal process”
163. In the case of *Muchanga Investment Ltd Vs Safaris Unlimited (Africa) Ltd & 2 Others* Civil Appeal No 25 of 2002; [2009] KLR 229, the Court of Appeal stated as follows;  
 “The term abuse of Court process has the same meaning as abuse of the Judicial process. The employment of Judicial process is regarded as an abuse when a party uses the judicial process to the intention and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to proceedings which is wanting in bonafide and frivolous, vexatious, or oppressive”.
164. From the above holding of the Court, abuse of the Court process means abuse of legal procedure or improper use of legal process. It is therefore clear that abuse of the Court process is an obstacle to the efficient administration of justice.
165. However, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents did not submit on this aspect of abuse of the Court process.
166. The Petitioners submitted that they have pleaded the factual background to support the Petition and have shown the contravention of their constitutional rights under various Articles of the *Constitution*. They also submitted that their Petition has met the test for redress of Constitution violations as laid down in the case of *Anarita Karimi Njeru vs R*(supra).



167. Indeed, the Court has considered the Petition and finds that the Petitioners have set out with reasonable degree of precision that of which they have complained of and the Articles of the Constitution that are alleged to have been violated and infringed.
168. Further the Court found that the Petition herein is not Pet No 5 of 2018. The Petitioners have alleged contraventions of their Constitutional rights and these are serious issues that needs Court's consideration. It is upon the Petitioners to prove the said contravention. Therefore, the Court finds that the Petition herein is not an abuse of the Court Process. It is not frivolous or vexatious. It is incumbent upon the Petitioners to prove the level of violation of their Constitutional rights.

**(iii) whether the acquisition of the suit properties conformed to the Constitution and Statute Law and Whether the said acquisition breached the Petitioners Constitutional Rights.**

169. This indeed is the main bone of contention of this Petition.
170. From the available evidence, it is evident that after the Court issued a Judgement on July 31, 2019, the Respondents sought to comply by causing a new Gazette Notice No 8479 as a corrigendum and notice of inquiry. The said publication was done on October 16, 2020, and it read that in a bid to correct the earlier notices and the Court Order in Murang'a ELC Petition No 5 of 2019, the National Land Commission on behalf of Athi Water Works Development Agency gave notice which intended to correct the said earlier notice to read "intention to acquire land pursuant to Section 107 of the Land Act, instead of intention to create right of way(Water Pipeline wayleave)"
171. From the said Gazette Notice 8479, the National Land Commission indicated the parcels of land to be affected, the owners of the said parcels of land and the size of the land to be effected.
172. Further, the National Land Commission invited every person affected by the said acquisition to deliver a written claim for compensation, copy of ID Card and personal details to National Land Commission, before the date of the inquiry.
173. It is evident that the 1<sup>st</sup> Respondent, a Constitutional Commission established under Article 67 of the Constitution is mandated to carry out compulsory acquisition on behalf of the National Government and this is in exercise of the States power of eminent domain. This States power of eminent domain allows the state to acquire land for public use subject to just and prompt compensation.
174. This is provided for in Article 40 of the Constitution which provides;

“Protection of right to property

- (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.
- (5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.
- (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

175. Thus from the above provision of law, it is not in doubt that the Constitution gives the State right to eminent domain.
176. From the available evidence, the State or National Government had attempted to exercise this right of eminent domain from the year 2016 when it caused various Gazette Notices namely Gazette Notice No 9589 dated November 14, 2016, Gazette No 10870 of November 3, 2017, and Gazette Notice No 2188 of March 9, 2018.
177. Thereafter, the state took possession of the suit properties through 2<sup>nd</sup> Respondent and laid down Water pipelines thereon by creating wayleave. Before taking possession, the 1<sup>st</sup> Respondent had carried inquiries in accordance with Section 107 of the Land Act, which deals with compulsory acquisition of land. However, what the 1<sup>st</sup> Respondent intended to acquire was right of way (Wayleave) which is governed by Sections 143- of the Land Act.
178. The Court in its Judgement in Pet. No 5 of 2018, found that indeed the Respondents have carried out inquiries, invited the persons affected by the project including the Petitioners herein. That the said persons had been allowed access to information. The only problem was that the procedure adopted by the 1<sup>st</sup> Respondent was for compulsory acquisition under Sections 107-113 of the Land Act, and not right of way or a Wayleave as provided by Section 143 of the Land Act. For that reason, the Court did declare the process of acquisition of the Wayleave, *ultra vires* the Constitution and Statute Law.
179. Even after the said Judgement of July 31, 2019, the 2<sup>nd</sup> Respondent was still in need of carrying on with the Water Project because the contracts that it had entered with various entities were still in force and were time bound.
180. Vide a letter dated September 26, 2019, the 2<sup>nd</sup> Respondent wrote to the 1<sup>st</sup> Respondent, requesting it to comply with the Mandatory procedure on acquisition of Wayleave in line with the Judgement of the Court. 2<sup>nd</sup> Respondent requested National Land Commission (1<sup>st</sup> Respondent) to proceed with the



- completion of creation of wayleave by making a recommendation to the Cabinet Secretary, Ministry of Lands and Physical planning.
181. On their part 1<sup>st</sup> Respondent, National Land Commission, wrote a letter to the Cabinet Secretary, Ministry of Lands and Physical planning on October 9, 2019, recommending to the said Cabinet Secretary to gazette the public right of way in accordance with the Law. The above two letters kicked off the second phase of acquisition of the Petitioners parcels of land.
  182. As noted earlier in compliance of the Court's Judgement of July 31, 2019, National Land Commission caused a Publication of Gazette Notice No 8479, intending to acquire the Petitioners parcels of Land under Section 107 of the [Land Act](#).
  183. However, the Petitioners have alleged that even the second phase of acquisition of their parcels of land by the Respondents herein did not comply with the law and that is the reasons why they are in Court through this Petition.
  184. It was the Petitioners allegations that Gazette Notices No 9589 of 2016, 10870 of 2017, 2188 and 2189 of 2018, were illegal from the start and could not be corrected vide Gazette Notice No 8479, dated October 16, 2020.
  185. However, it is clear that the said earlier Gazette Notices were not quashed and further Gazette Notice No 8479, was issued in compliance with the Court Order which had in prayer No 2 stated "unless due process is followed and prompt payment of just compensation is made".
  186. How could due process have been followed? It could have been followed by restarting the process of acquisition of the suit properties and that what the essence of Gazette Notice No 8479 of October 16, 2016.
  187. It was the finding of the Court in its Judgement of 31<sup>st</sup> July 2019, that the Petitioners were not opposed to acquisition of the suit properties, but were opposed to the manner of acquisition. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents in an attempt to correct the earlier anomalies issued Gazette Notice No 8479.
  188. Part VIII of the [Land Act](#) provides the procedure of compulsory acquisition of interest to land. The said procedure is provided for from Sections 107 to 126 of the said [Land Act](#).
  190. Under Section 107, of the [Land Act](#), the National Land Commission (1<sup>st</sup> Respondent herein) is prompted by the National or County Government through Cabinet Secretary or County Executive member to acquire land for Public interest purpose. In this case, the Athi Water Works Development was the acquiring entity. For purpose of Article 40(3) of the [Constitution](#) provides that the state can deprive a land owner of the ownership of the said land, so long as the purpose of the acquisition must be for public purpose or interest.
  191. The laying of Water pipes herein was for purpose of enhancing Water Supply in Nairobi and its environs and that was a public interest purpose. Therefore, the threshold as stated in Article 40(3) of the [Constitution](#) was met.
  192. As provided by Sections 107 and 110 of the [Land Act](#), the National Land Commission, must cause the Gazette Notice of the intention to acquire land. This Gazette Notice No 8479 was published on October 16, 2020, and every person affected was notified and requested to appear. Since the land to be acquired had been identified, it was clear that the National Land Commission had authenticated these parcels of land in earlier inquiries. The Petitioners though opposed to the second inquiry as alleged in their Petition attended the inquiries and presented their claims for compensation. They supported



- their Valuation through the Valuation report of Zamconsult valuation and Management Co. Ltd, which is a private entity.
193. After inquiries, the Petitioners were issued with awards on December 15, 2020, which they alleged were biased and they reject the said award.
  194. However, the 1<sup>st</sup> Respondent averred that after carrying out inquiries, and valuation of the land, the Commission took into account the damage sustained, or likely to be sustained on the land at the time of taking possession, damage sustained or likely to be sustained by person interested on the land at the time of taking possession, reasonable expenses, incidental damages genuinely resulting from diminution of profit of land between the date of publication of Notice of intention to acquire land and the date of possession of land is taken.
  195. It should be noted that at the time of publication on October 16, 2020, the 2<sup>nd</sup> Respondent had done substantial work on the land. In Para 31 of the Replying Affidavit of Eng. Thuita, he stated that the contracts for construction of the Water Project being time bound, some of them were 96% complete, by the time this Petition was filed.
  196. The 1<sup>st</sup> Respondent averred that the Valuation Report done by the Petitioners were exaggerated. The 2<sup>nd</sup> Respondent averred that the acquisition of land could not be done through private treaty as that would offend the [Public Finance Management Act](#) the [National Land Commission Act](#) and [Land Act, 2012](#). This Court finds that for the Respondents to comply with the Judgement of the Court of July 31, 2019, there was need to publish the Gazette Notice No 8479, as provided by Section 107 of the [Land Act](#).
  197. As admitted by the Petitioners, inquiries were carried out as provided by Section 112 of the [Land Act](#). The Petitioners gave their input and thereafter the National Land Commission (1<sup>st</sup> Respondent) came up with the awards. Whether the awards were acceptable to the Petitioners or not, the Court herein is concerned with the question of whether the acquisition was done as per the [Constitution](#) and the statutory law.
  198. The answer to the above is that the acquisition was done as per the dictates of the [Constitution](#) because the 2<sup>nd</sup> Respondent who was acquiring land did prove that the said acquisition was for public purpose or interest as provided by Article 40(3) of the [Constitution](#).
  199. The 1<sup>st</sup> Respondent informed the Cabinet Secretary for the Ministry of Lands and Physical Planning and caused Gazette Notice No 8479, to be published on October 16, 2020. The affected persons were clearly identified, together with their parcels of land and the area affected(acreage), inquiries were carried out and the Petitioners were invited and they participated. Awards were given on 15<sup>th</sup> December 2020, though rejected by some of the persons affected by the project like the Petitioners herein, but was accepted by others affect parties. The rejection of the awards did not illegitimize the process.
  200. Having considered the available evidence and the written submissions, the Court finds and holds that the acquisition of the suit properties conformed with the [Constitution](#) and the Statute Law; The Court has not found any violation of the Petitioners' fundamental rights and freedoms.

**(iv) Did the said acquisition breach the Petitioners Constitutional right especially to just and prompt compensation?**

201. The Petitioners alleged that the Respondents even after taking possession of their suit properties failed to promptly compensate them as provided by the [Constitution](#). The Respondents submitted that they were guided by the Principles of valuation in giving the awards to the Petitioners herein. It was their



allegations that some of the affected persons were satisfied with the award and they accepted the said awards. That what the Petitioners herein are asking are basing their claim on an exaggerated Valuation Report and all out to unjustly enrich themselves from the Public Coffer.

202. The 2<sup>nd</sup> Respondent submitted that the Petitioners awards or compensation were based on the valuations done by Government Valuer instead of private Valuer. That the said compensation was done in accordance with the Constitution and Provisions of the statues Law.

Section III(1) of the Land Act provides that.....”If land is acquired compulsory under this Act, just Compensation shall be paid promptly in full to all persons whose interest in and have been determined.

203. The Gazette Notice No 8479, was issued on October 16, 2020, inquiries were carried in November 2020 and awards were made known to the persons affected by the project on December 15, 2020. That was within a period of two (2) months after the Gazette Notice was published. The release of the award was prompt.

204. Before giving out the award, the 1<sup>st</sup> Respondent had adhered to Section 112(2) of the Land Act which provides; -

“The notice of inquiry shall call upon persons interested in the land to deliver a written claim of compensation to the Commission, not later than the date of the inquiry.”

205. The Petitioners alleged that the 1<sup>st</sup> Respondent made the award on December 15, 2020. This was in accordance with Section 113(1) of the Land Act which provides; -

“Upon the conclusion of the inquiry, the Commission shall prepare a written award, in which the Commission shall make a separate award of compensation for every person whom the Commission has determined to have an interest in the land.”

206. In the case of Stanley Munga Githunguri vs National Land Commission in ELC Appeal No 70 of 2015, the Court held;

“Under section 113 of the Act, the Respondent is then required to prepare a written award of compensation upon the conclusion of the inquiry. Section 113(2) further provides that the award shall be conclusive evidence of;

- iv. The size of the land to be acquired;
- v. The value, in the opinion of the Commission of the land;
- vi. The amount of the compensation payable, whether the persons interested in the land have or have not appeared at the inquiry”

207. Again in the case of Ketra James Issa vs AG & 3 others (2018) eKRL, the Court held;

“...Compensation of compulsorily acquired property be quantified in accordance with the principle of equivalence. A person is entitled to compensation for losses fairly attributed to the taking of his land but not to any greater amount as “fair compensation requires that he should be paid for the value of the land to him, not its value generally or its value to the acquiring authority” (emphasis added “



208. A three bench decision of *Patrick Musimba vs National Land Commission & 4 Others* (2018) eKLR, set out the parameters to be considered in gauging whether the compensation was just. The Court held as follows; -

“in our view, a closer reading of Article 40(3) of the *Constitution* would reveal that the *Constitution* did not only intend to have the land owner who is divested of his property, compensated or restituted for the loss of his property but sought to ensure that the public treasury from which compensation money is drawn is protected against improvidence. Just as the owner must be compensated so too must the public coffers not be looted. It is that line of thought that, under Article 40(3), forms the basis for “prompt payment in full, of just compensation to the person” deprived of his property through compulsory acquisition”

209. Taking into account the submissions herein and considering the awards made by the 1<sup>st</sup> Respondent on December 15, 2020, the Court finds that as provided by Article 40(3) of the *Constitution*, the said awards were made promptly and given the size of land acquired for each of the Petitioner herein and given that the National Land Commission had a mandate to determine the award after considering all the materials provided, the Court finds and holds that the awards made to the Petitioners herein were just compensation and the Court finds no breach of the Petitioners’ Constitutional right was proved.

**(v) whether the Respondents trespassed on the suit properties despite the Court order?**

210. As the Court had held earlier, the Judgement of the Court prohibited the Respondents from vesting right of way (wayleave) to the 2<sup>nd</sup> Respondent (Athi Water Works Development Agency) unless the due process was followed and prompt and just compensation is made.

211. The Court has found that by issuing Gazette Notice No 8479 of October 16, 2020, the Respondents were following the due process of compulsory acquisition. By the time the Petitioners filed Murang’a Petition No 5 of 2018, the Construction works of laying the pipelines had begun. The Petitioners had admitted that the Respondents had taken on the land.

Section 120(2) of the *Land Act* provides that in cases of where there is an urgent necessity for the acquisition of land and it would be contrary to the public interest for the acquisition to be delayed by following the normal procedure of compulsory acquisition under the Act, the Commission may take possession and make compensation in due course.

212. It is evident that the construction of the Water Pipelines herein was under contracts that had timelines. There was therefore an urgent necessity and there was urgent need for 2<sup>nd</sup> Respondent to enter the suit properties and continue with the construction works after complying with the due process as suggested by the Court in its Judgement of July 31, 2019. Then the process of compulsory acquisition kicked off and the Commission allowed the 2<sup>nd</sup> Respondent to take possession as provided by Section 120(2) of the *Land Act*. In any event, the Petitioners knew that the 2<sup>nd</sup> Respondents had started the process of laying down the Water pipelines on their parcels of land and therefore the Court cannot find and hold that the Respondents trespassed on the suit properties despite the Court orders. See the case of *Patrick Musimba* (supra) at Para 93 where the Court held;

“The process is completed by taking possession of the land in question being taken over by National Land Commission once payment is made even though the possession may actually be taken before all the procedures are followed through and no compensation is made. The property is then 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 (Section 120-122 of the *Land Act*)”.

213. Therefore, it is this Courts findings that the Respondents did not trespass on the suit properties.

**(vi) Whether the Petitioners are entitled to the Prayers sought?**

214. Having found that the Respondents herein did follow the due process of compulsory acquisition as provided for by the *Constitution* and as suggested by the Court in its Judgement of 3 July 1, 2019, and having found that the 1<sup>st</sup> Respondent did determine the awards due to the persons affected by the project and having found that the said award was prompt and just compensation, then this Court finds and holds that the Petitioners herein are not entitled to any of the prayers sought. It is evident that some of the affected persons were satisfied with the awards given after inquiries and only a few of them rejected the award. Further it was submitted by the Respondents that the project is about 96% complete and the Petitioners are making use of their parcels of land that were left intact. Through the Replying Affidavits by the Respondents, they have demonstrated that due process was followed after the Judgement of July 31, 2019. That some of the Petitioners in Pet. 5 of 2018 have been compensated after they accepted their awards of compensation based on the Government Valuation. The Petitioners are thus not entitled to any of the prayers sought and there is no good reasons to quash the Gazette Notice No 8479, dated October 16, 2020.

215. Having now carefully considered the available Affidavits evidence, the annexures thereto, the written submissions and the relevant provisions of law, the Court finds and holds that the Petition herein is not merited. For the above reasons, this Petition is disallowed and dismissed entirely.

216. This being a public interest case, each of the parties herein shall bear its own costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2023.**

**L. GACHERU**

**JUDGE**

**Delivered virtually In the presence of;**

Joel Njonjo/Mwende – Court Assistants

Mr Thige for Petitioners

M/s Njuguna for the 1<sup>st</sup> Respondent

Mr Motari & Miss Kerubo for the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents

