



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC PETITION NO. 2 OF 2020

IN THE MATTER OF THE MATTER OF CONTRAVENTION OF ARTICLES 2, 10, 19, 20, 21, 22, 28, 31, 40, 47, 62, 64, 68, 159, 165 (3), 238, 245, 258 AND 259 OF THE CONSTITUTION

AND

IN THE MATTER OF VIOLATION OF THE RIGHT OF EQUALITY BEFORE THE LAW

AND EQUAL PROTECTION AND BENEFIT OF THE LAW AND ALL ATTENDANT

RIGHTS AND DENIAL OF THE RIGHT TO FAIR ADMINISTRATIVE ACTION

BETWEEN

1. WILFRED JUMA WASIKE
2. JOSEPH WANJALA KHAEMBA
3. JOHN WANYONYI KHISA
4. ISAAC WEKESA MAKOKHA
5. HARRISON WABWIRE KHISA
6. WILLIAM KUNDU AYUMA.....PETITIONERS
7. STANLEY SHIKUKU
8. PIUS WANYAMA MABONGA
9. JOSEPHAT MAKOKHA
10. CONSTANT SIMIYU KHAEMBA
11. NASHON WANJALA

12. PIUS WALUCHO

(Suing as Members of Matisi Centre Self- Help Group)

VERSUS

MINISTRY OF INTERIOR AND CO-ORDINATION.....1STRESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

1. The Petitioners are said to be members of **Matisi Centre Self Help Group** (*hereinafter known as the “the Group”*). It was registered on **17/9/2003**.

2. The case of the Petitioners is that they are the legal proprietors of all that parcel of land known as **Kiminini/Kinyoro Block 3/Matisi/561** (*hereinafter referred to as “the suit land”*) which measures approximately **0.3399 Ha**. They claim to have purchased the suit land for the purpose of making a living. Their further claim was that as a result of the Post-Election Violence (PEV) experienced (in Kenya) in **2008**, following the **2007** disputed elections, the Group moved out of both their homes and the suit land, leaving it vacant. They stated that after that, the **1st Respondent** erected a police post on the suit land for use to help in quelling the violence that erupted around the area.

3. Their contention was that the **1st Respondent** neither consulted them nor sought their consent before entering when erecting the post on the suit land. After the PEV was quelled, the **1st Respondent** never took any step to remove the police post from the suit land. According to them, the actions of the Respondents amount to trespass on their property as well as a violation of their right to own property.

4. The Petitioners faulted the state organs for intimidation aimed at scaring them. They contend further that due to these actions, they suffered loss and damage. They claimed the loss and damage included deprivation of their right to property, denial of the right to use and earn a living from the property and its unlawful conversion for public use thus incurring untold loss.

5. They emphasized on the import of the following Articles of the Constitution, namely, **Articles 31, 40(1), 50 (1), 62, and 68**. They contended that the government had a duty to ensure that their rights and fundamental freedoms were protected. Further, they argued that the government was obligated to respect and protect their dignity and not interfere with their privacy except in accordance with the law. They stated that it was the duty of the government to ensure that they had equal and not partial protection and benefit of the law. They were particular that the government was under the duty to make expeditious, efficient, lawful, reasonable and procedurally fair administrative action which did not, therefore infringe on their rights and fundamental freedoms.

6. They prayed for the following reliefs:

a) **A declaration that the petitioners fundamental rights to property and a right of a fair administrative action was violated, transgressed by the respondents by virtue of the illegal trespass to their property by the respondents, their agents and or servants and interference of development and enjoyment of the suit land.**

b) **A declaration that the respondents have illegally and unlawfully invaded the petitioners land L.R. No. Kiminini/Kinyoro Block 3/Matisi/561 by trespassing thereon and erecting a police post.**

c) **An award of damages for breach of fundamental rights to human dignity, right to fair administrative action.**

d) **An order of eviction of the respondents, their agents, and/or servants from the above quoted property**

e) **Any other relief this honourable court may deem fit to grant**

f) Interest on (c) above

g) Costs of the petition.

The Petitioners' Supporting Affidavit

7. The Petitioners filed an affidavit accompanying the Petition. It was sworn by **Wilfred Juma Wasike** on **24/7/2020** and filed on **7/8/2021**. He swore it on his own behalf and that of the other petitioners. He annexed and marked as **WJW1** a copy of the authority to plead. He reiterated the claims in the Petition. He annexed a copy of registration of the group and marked it as **WJW2**. He added that the group comprised of seven members who had signed the letter of authority a copy of which he annexed and marked as **WJW3**. He also annexed a copy of the title deed to show that the Group was the registered owners of the suit land.

8. He deponed that the Group was doing business on the suit land before leaving it vacant due to the post-election violence in **2007**. That during their absence, the respondents erected a police post on the suit land without seeking their consent or authority. He deponed further that despite their requests for the respondents to vacate, they remained adamant and in possession to date. He accused the 1st Respondent, a Government Department, for using its powers to deny them their right to use the property and they could not fight it. He annexed to the Affidavit a copy of a demand letter sent to the 2nd Respondent as the Chief Legal Advisor of Government requiring them to vacate the land in vain. He marked it as **WJW5**. He averred that the respondents being state organs were bound by the Constitution to respect their rights.

9. In addition to the prayers enumerated in the Petition, the deponent prayed that the Court issues eviction orders against the Respondents from their property.

Reply to Response to the Petition

10. After being served with a response, the Petitioners filed a reply on **2/9/2021**. In it, they denied the contents of the Reply. In addition, they stated that the Respondents could not simply take private property and turn it into public property on account of provision of security, a wider public right. They put the Respondents to strict proof. Again, they pointed out that there was a procedure to be followed by the Respondents if they were interested in the suit land: it was not just to take it, by force.

The Respondents' Responses

11. On **12/8/2021**, the Respondents filed a joint response to the petition. It was dated **25/4/2021**. Besides denying the contents of the Petition, the Respondents averred that it was frivolous, mischievous, scandalous, a grope in the dark, untenable, disclosed no cause of action, an abuse of the precious judicial time and raised no constitutional questions to warrant a Constitutional petition. Further, they stated that Matisi Police Post was in existence since the year **2000** hence any suggestion that the Respondents trespassed onto the land in **2007/2008** was false.

12. Their contention was that the suit land, on which the Police Post now sits, is public land. They stated that it was properly acquired by way of a gift and the Post had been on the property openly, quietly and uninterruptedly for over **20** years. Together with that, the respondents averred that there was nothing constitutional about the petitioners' claim for the reason that it was based on trespass which according to them was private in nature and ought to be pursued through the ordinary civil proceedings. Additionally, they stated that the petitioners' claim was statute barred as the Respondents were in possession of the land for over **20** years. To them, they had acquired the land by way of adverse possession. Lastly, they contended that the Petition did not meet the constitutional threshold enunciated in Anarita Karimi Njeru -versus- Republic (1976-1980) KLR 1272 case to merit the grant of the orders sought. They prayed that the petition be dismissed with costs.

Submissions

13. The Petitioners filed their submissions on **30/09/2021**, they also filed supplementary submissions dated **22/12/2021** on **24/12/2021**. The Respondents filed theirs dated **13/10/2021** on the same date. I summarize their arguments as follows.

Petitioners' Submissions

14. The Petitioners repeated the contents of the Petition as well as the supporting affidavit. They emphasized that they were the registered owners of the suit land. They also reiterated that the Respondents had infringed or violated their right to own property by entering and erecting a Police Post on the suit land without their consent or authority. They submitted that due to the Respondents' actions, they were not able to use the suit land.

15. Submitting on loss and damage, they stated that the Respondents trespassed onto the suit land since 2008. They prayed for an award of compensation amounting Kenya Shillings One Million (Ksh.1,000,000/=), for every year the respondents trespassed on their land from 2008. They submitted that the respondents did not rebut the fact that the Petitioners were the registered owners of the property. They accused the respondents of building the Police Post on the suit land forcefully and with impunity. They submitted that they were helpless and could not resist the respondents' actions.

16. They suggested that if the Respondents felt that they still needed to use the land for the purpose of police services, then they could pay the petitioners the present value of the land. They relied on the cases of **James Shikwati Shikuku versus County Government of Kakamega & 3 Others** and **Isaac Shivachi Mutoka & 2 Others ELC Petition No. 8 of 2006** and the Supreme Court one of **Mitu-Bell Welfare versus The Kenya Airports Authority & 2 Others; Society and Initiative for Strategic Litigation in Africa -Petition No. 2 of 2018** to fortify their arguments.

17. In their supplementary submissions dated 30/9/2021 and filed on same date, the Petitioners denied the respondents' contention that they entered into the suit land in 2007/2008. Further, in response to the respondents' submission that land was Public Land as they had acquired it by way of a gift, they questioned by whom, when and how the respondents acquired the land. They stated that the respondents acquired the land unprocedurally. They re-emphasized that there was a laid down procedure for acquiring land by the government from an individual and therefore could not just take away private property and make it public land without following the requisite procedure. They invited the court to be guided by **Article 40** of the Constitution.

18. The Respondents submitted that the **Matisi Self Help Group** was not a body corporate therefore could not own property. They also argued that the Petitioners did not prove that they were registered members of the Group, did not prove that they purchased suit land and that they ought to have filed a civil suit instead.

19. The Petitioners submitted that it was true that the Group was not a body corporate. However, they denied it not being able to own property. They insisted that there was no legal proof of such an allegation by the Respondents. They submitted that a Self-Help Group, a Non-Governmental Organization (NGO), a Community Based Organization (C.B.O.) and any other group could own property. They emphasized that they had a valid certificate of registration of the group which is renewed every year by paying annual subscriptions. Their further submission was that the respondents had not moved the court for cancellation of the title deed to the suit land. They clarified that a Self-Help Group can own property but cannot sue in its own name in comparison with a corporate body which can sue and be sued in its own name. They emphasized that the Group could only institute a suit through its officials. They relied on the case of **Kapsiwo Community Self Help Group versus The Attorney General & 6 Others ELC Petition No. 9 of 2013 formerly Eldoret HCC Petition No. 10 of 2013** to fortify their argument. Finally, they urged the court to disregard the respondents' submissions together with the authorities cited as they did not address the legal points raised. They also submitted that the court allows their Petition with costs.

Respondents' submissions.

20. By their submissions, the respondents begun by stating both the Petitioners and Respondents' cases. They framed four issues for determination, namely:

i. Whether a claim for trespass can be ventilated through a constitutional Petition

ii. Whether Petitioners have legitimate expectation to own and occupy the suit property

iii. Whether the Respondents acquired registrable interest in the suit property

iv. Whether Petitioners' rights and fundamental freedoms were infringed.

21. Their submission was that they did not trespass on the suit land. They insisted that they were permitted to enter into the suit land

in the year 2000 before it was transferred to the Petitioners. They argued that the registration of the land in the name of the Petitioners did not take into consideration that the respondents were in occupation of the land then, which according to them was an overriding interest on the title of the land pursuant to **Section 30** of the **Registered Land Act**, Chapter 300 of the Laws of Kenya now repealed.

22. They also submitted that they had acquired the land by way of adverse possession. Further, they submitted that the Petitioners' claim was purely civil in nature that ought to be ventilated in an ordinary civil court where *viva voce* evidence would be taken and witnesses be cross-examined and there was nothing constitutional the Petition disclosed. They relied on the case of **David Ramogi & 4 Others versus C.S. Ministry of Energy & Petroleum & 7 Others (2017) e KLR**, **Rodgers Mwema Nzioka versus Attorney General & 8 Others (2006) e KLR** and that of **Eric Wambua Muli & Another Versus Prime Bank Limited & 3 Others (2017) e KLR** to advance their arguments. In addition, they insisted that the Petition did not raise any constitutional questions to be addressed by the court, rather that the suit merely sought redress to some private wrongs of trespass to land by the respondent. To them, the Petitioners chose the wrong path in bringing a suit in the form of a Petition and termed it as an abuse of the court process.

23. On the issue of whether the petitioners had legitimate expectation to own or occupy the suit land, they did not dispute that the land was registered in the name of the Petitioners. However, they challenged the validity of the title. They argued that the title could not be registered on 17/9/2003 in the name of a Self-Help Group which was registered on 20/6/2020 as it was non-existent. They submitted further that the Self-Help Group could not own property because it was not a body corporate hence it lacked *locus* to own property in its own name and that the transfer to its name was invalid, null and void *ab initio*. They submitted that for that reason, the Petitioners could not claim a violation of the right to property and could not be protected by **Article 40 (6)** of the Constitution when it did not acquire any interest in properties found to have been acquired unlawfully and procedurally or irregularly.

24. In their view, the Petitioners had not shown their identity to the court and they had not proved that they were members of the Group therefore did not have legitimate expectation to acquire any interest in the suit land.

25. As to whether the Petitioners' rights and fundamental freedoms were violated, the Respondents denied any violation. They claimed that the Petitioners had not specifically pleaded and proved it and that the Petition did not meet the threshold in the ***Anarita Karimi Njeru versus The Republic (1976-1980) KLR 1272*** as well as that in the case of ***Mumo Matemu Versus Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR*** among others. They then summed it up that the Petitioners had not proved the allegations of violation of their rights and fundamental freedoms and the respondents' occupation did not amount to trespass. They insisted that the respondents acquired interest on the land by way of adverse possession. They argued that the Petitioners failed to prove the allegations of breach of their interests on the land and therefore their petition must be rejected and dismissed with costs.

Analysis, Issues and Determination

26. As is apparent from the foregoing I have extensively examined the Petition dated the 21/7/2020 and filed on 7/8/2020, including the supporting affidavit, the annexures, the response to the Petition, as well as the parties' submissions. I find that the following to be the issues for determination:

(a) *Whether the Petition meets the threshold of a Constitutional Petition;*

(b) *Whether the Petitioners owned land, could sue over it and for what reasons*

(c) *Whether Government can acquire land by adverse possession;*

(d) *Whether the Petitioners' fundamental rights were violated so as to entitle them to the prayers sought;*

(e) *Who to bear the costs of the Petition.*

27. The issues are discussed as herein below. But it bears importance to note that at the appropriate stage (below), I will analyze issue number (b) above under a number of sub-issues or sub-headings. Thus, the first issue for analysis is,

(a) **Whether the Petition meets the threshold of a Constitutional Petition**

28. The Respondents raised the issue that the Petition did not meet the threshold in the *Anarita Karimi Njeru* case above cited. By considering the holding of the case first and then relating it to the present facts it will clarify the contention by the Respondents. In the case, the Court of Appeal stated as follows:

“We would however again stress 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 reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”

29. It is vital to note that while analyzing this issue the Court is not called upon to consider the merits of the Petitioner’s claims but ascertain the common denominator as to the clarity and specificity of the claim. How, if the Court were to reject a petitioner’s claim for failure to comply, sits with **Article 159(2) (d)** of the Constitution is worth thinking about. At this juncture, the Court is enjoined to analyze the pleadings. The manner in which the petition must be presented before this court is: it must clearly state the petitioners’ grievance, the provisions allegedly infringed and the manner in which they are said to be infringed.

30. I have analyzed the Petition. That which the Petitioners complain of is the Respondents’ actions of trespass and denial of the Petitioners’ right to own and use private property, contrary to **Article 40** of the Constitution of Kenya. Their cry is that despite being the registered owners of the suit land they were and have been denied its use to earn income which they used to get from it. Thus, in this Court’s view, that which the Petitioners complain of is set out with specificity: a violation of their right to own property coupled with trespass. In essence they state that they were registered, owned and used it before it was taken away from them and by this petition, intended to recover it back from the respondents and use it as envisaged in the Constitution but that right has since been taken away from them by the Respondents’ actions of trespass.

31. Regarding the provisions said to have been infringed, the petitioners cited numerous Articles of the **2010** Constitution in the title to the Petition. These were **Articles 2, 10, 19, 20, 21, 22, 28, 31, 40, 47, 62, 64, 68, 159, 165 (3), 238, 245, 258 and 259**. These Articles are well set out, unless the Respondents were of the view that the Petitioners ought to have explained the meaning of each. But that is a matter of relating the provisions to the evidence the Petitioners rely on, and their submissions: it is not at the stage of examining the Petitioners’ pleadings.

32. About the manner in which the provisions are alleged to be infringed, in my view, the Petition presented them in the form of a narrative accompanied by a supporting affidavit and annexures in evidence. The Petitioners highlighted the specific Articles allegedly violated.

33. I have considered the relevance or otherwise of the Articles of the Constitution the petitioners cited alleging to have been infringed. They include **Article 31** which relates to protection of the right to privacy. In my view, the Article is not relevant here, in so far as it is being sought to be applied to property and actions that were alleged to be committed when the Petitioners were absent from the suit land. **Article 40** which deals with the right to own property, **Article 47** which deals with the right to fair administrative action, **Article 50 (1)** which is about fair hearing and **Article 62** which relates to public land. They also quoted **Article 68** which relates to Legislation on Land, **Article 159** which deals with Judicial Authority, **Article 156 (3)** which relates to the jurisdiction of the High Court, **Article 238** on Principles of National Security, **Article 245** on Command of the National Police Service, **Article 258** which relates to the enforcement of the Constitution and **Article 259** which relates to the construing of this Constitution. Upon my careful consideration and relating the issues raised in the Petition to the provisions cited by the petitioners; it is my considered view that the relevant Articles of the constitution at this juncture are **Articles 40, 47 and 50** of the Constitution; for the rest, this court has taken judicial notice

34. The petitioners have described precisely how their rights were infringed by the respondents herein. They described the violation in their Petition as well as in the supporting affidavit as well as the submissions filed. They have enumerated the prayers that they urge this court to grant in their favour.

35. The Court of Appeal stated as follows in the *Mumo Matemu -vs- Trusted Society of Human Rights Alliance and others, Nairobi Civil Appeal No. 290 of 2012* case:

“We cannot but emphasize the importance of precise claims in due process, substantive justice and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims....We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is

to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point...Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice as they give fair notice to the other party..."

36. Notwithstanding the inclusion of unnecessary provisions in the Articles of the Constitution, and or unnecessary material in it, the instant petition has not fallen short of conveying the manner in which the Petitioners' rights were allegedly infringed as a result of the alleged trespass and illegal occupation of their land by the respondents; for a very long period of time and the loss and damage they suffered for being distracted from the use of their land. They have also stated how the respondents forcefully took possession of their land when they fled from it in **2008** during the post election period and thereafter remaining adamant to move out of their land upon demand letters being served requiring them to vacate the land. Their complaint was that the Respondents being government agencies have applied impunity in denying g them their rights to the use and possession of the land which was taken away from them without their consent or knowledge or authority.

37. From the pleadings on record, most of the factual matters raised by the Petitioners were vehemently denied by the Respondents but this does not necessarily mean that they do not hold any truth. Whether those matters pleaded can be proved by way of evidence will be addressed later in this judgment.

38. For the foregoing reasons this court is of the opinion that the petition before it has met the threshold required of a constitutional petition.

(b) Whether the Petitioners owned land, could sue over it and for what reasons

39. In order to comprehensively consider this issue, the existence of certain basic facts has to be established. This means that the Petitioners have to demonstrate that they were entitled by law to some specific right and that these were either infringed, violated or threatened. I am alive to the fact that some of the points I discuss below may appear to be a repetition in relation to other major issues but this is singled t-out for focused analysis. In my view the Petitioners ought to give facts that support the following sub-issues:-

(i) Whether Petitioners were the registered owners of the suit land.

(ii) whether Petitioners had locus to institute the Petition;

(iii) whether the subject was Private or Public land.

(iv) Whether the Respondents trespassed onto the suit land.

(v) If there was trespass whether it occasioned damage to the Petitioners.

(vi) If so, what damage the Petitioners suffered.

40. It is now easy to consider the broken down aspects of the issue. I delve into the sub-issues as hereunder:

(i) Whether Petitioners were the registered owners of the suit land

41. The Petitioners pleaded that they were the registered owners of the suit land. In evidence, they annexed a copy of the Title deed which showed that they are indeed the registered owners. The title deed was issued to them on **1/10/2003**. It was registered in the name of **Matisi Centre Self-Help Group**, the Group, of which the Petitioners are members. They also annexed a copy of a Certificate of Registration of the Group to prove its existence. A cursory perusal of the certificate showed that it was registered on **17/9/2003** and renewed on **22/6/2020**. The evidence as to the ownership was not rebutted by the Respondents. The renewal is annual. Whilst the respondents admit that the suit land was registered in the name of the Petitioners, they challenged the procedure in which it was obtained. They argued that Petitioners could not obtain the title deed on the **1/10/2003** when it was no-existent. They argued that the group came into existence on **20/6/2020** therefore there was no way it could acquire the property in **2003**. I have perused at the title deed and the registration certificate of the group. My observation is that, the registration date of the group was

17/9/2003 and the 22/6/2020 was a date of renewal of the registration. The title deed was issued on 1/10/2003. The logical conclusion is that the title deed was acquired after the Certificate of Registration was issued hence after the existence of the Group. It therefore follows that since the Group existed at the material time, it could acquire property. The result is that the Petitioners are the legal owners of the suit land. The Respondents did not adduce any evidence about the allegations that the land was acquired illegally and unprocedurally. They also did not pray for and adduce evidence of **any fraud, forgery or that the title was acquired through an illegal scheme**. Thus, the Respondents' arguments are neither here nor there.

(ii) **Whether Petitioners had locus to institute the Petition**

42. On the issue of the Petitioners' *locus standi* or lack of it to bring the Petition, it is evident that the copy of title exhibited the suit land was registered in the name of a Self-Help Group, and this is the Group what the Petitioners show that they are members of. They annexed a copy of the list of members of the Group. It was signed by each of them, and there is no other person claiming the contrary. They also annexed a Letter of Authority to Plead. It is not in doubt that the Petitioners were the members of the Group. Apart from the mere denial by the Respondents that the Petitioners did not prove membership, the Respondents did not adduce any evidence to rebut the petitioners' assertions. Therefore, this court is of the considered view that the Petitioners are the members of the Group.

43. Having proved that they were members of the Group, all that the Petitioners needed to demonstrate was that they had the authority to bring the suit on behalf of the Group. This they did. In support of this view, I am persuaded to rely on the case of **Kipsiwo Community Self Help Group v Attorney General and 6 Others [2013] eKLR** where Munyao J observed as follows regarding identification of petitioners and which I agree with stated:

“The person bringing action has to demonstrate that he has permission to bring the action on behalf of the members of the Group, or on behalf of the people he seeks to represent, if it is a representative suit. The importance of this, is so as to recognize the persons who seek legal redress, and so that orders are not issued in favour or against people who cannot be precisely identified. This may look minor, but it is extremely significant. In litigation, rights and duties will be imposed on the litigants. If the court does not know who the litigants are, then it becomes impossible for the court to enforce its own orders, for it will never be clear, who the beneficiary of the order was, or who had obligation to obey or enforce such order.”

44. That said, I now turn to emphasize the issue of *locus* to bring the petition. Courts have often held that without *locus*, a party may not be heard even when they have a case worth hearing. The respondents argued that the petitioners lacked the *locus* to institute the suit for the reason that the Group was not a body corporate capable of owning land in its name. I do not agree with them. The correct position in law is that the group is capable of owning property. The only thing the Group could not and cannot do is to bring a suit or be sued on its own name. If that has to happen, it does so through its members or officials. This was the case here. The Petition was commenced by the Petitioners on behalf of the group. It is my considered view that the respondents' submissions in this regard were misleading, misinformed, wrong, misplaced and of no importance to its case. The petitioners are properly before me.

(iii) **Whether the subject was Private or Public Land**

45. The next point is whether or not the suit land is public or private. There is no doubt that the Group is a private entity. The suit land was registered in its name. There is nowhere in the title to indicate that the Group held the said parcel of land in trust for the Government or other public body. Thus, it is not in any doubt that the land in dispute is private land, registered in the name of the Group which is equated to a “person.” It is not within the scope of Public land provided by **Article 62** of the Constitution as alleged by the respondents.

46. As discussed above, private land cannot be converted to public land by way of asserting adverse possession by the government. As such, private land can only become public land upon compulsory acquisition by the government. This process has a procedure to be followed. I will discuss the issue of compulsory acquisition later in this judgment.

(iv) **Whether the Respondents trespassed on the suit land**

47. I have already found that the property belongs to the Petitioners. It was supposed to be occupied by the Petitioners or such other persons as the Petitioners would authorize legally. But the undisputed facts are that the 1st Respondent erected a police post on the

parcel. The petitioners contend that that occurred after the **2007/08** disputed general Elections. The Respondent claim they did in the year **2000**. I am inclined to agree with the Petitioners who being the owners know well when they parted with the possession of the suit land. From the facts then, it goes without saying that the Respondents' occupation amount to trespass on private property. They are not the owners of the property. It is illegal and unlawful.

(v) *If there was trespass whether it occasioned damage to the Petitioners and which one*

48. As to whether the Petitioners incurred any loss and damage, they averred that they formed the Group with the sole purpose of using it to elevate their lives. They caused the title to be registered in the groups' name and that from the land, they earned income. Although they did not clearly demonstrate how, it is not in doubt that the property belong to them. It is also not in doubt that the occupation and use of the suit land by the 1st Respondent has deprived the Petitioners of the use and occupation of the same. Lack of access and use contrary to the intents and purposes of the property owners amounts to damage suffered. The respondents' illegal and unlawful possession alone is sufficient ground to base compensation. Their contention was that the Respondents illegal occupation on their land caused them loss of income. They pleaded to be compensated the sum of **Kshs. 1,000,000/=** for every year they lost the use of the land. While I agree with them that they have suffered damage as I have stated, I do not agree that the damage can be assessed in terms of what they have asserted. Compensation for loss and damage is a lump sum award that the Court gives based on an assessment of many factors. It is discretionary, unlike special damages which have to be specifically proved. I will make the global award of damages at the end of this judgment.

c) *Whether Government can acquire land by adverse possession*

49. The Respondents argued that they acquired the land by adverse possession thus the Petitioners could not claim it. Their claim was that they have been in occupation of the suit land since the year **2000** thus have acquired it by way of adverse possession. In this Court's view, the doctrine of adverse possession does not work in favour of the government or its agencies in acquiring land from a private person. In this jurisdiction and as by law established, claims of adverse possession may only be instituted by a private person against another private person. But I will discuss this issue deeper.

50. The Respondents argued that they acquired the parcel of land by way of adverse possession. Strange an argument by government and its departments as that may be, this Court is called upon by the parties to determine the issue which seems to lay the basis for a titanic battle like that between Goliath and David of the Bible or as the late President of Iraq once declared at the start of the Gulf War in August **1990** that his country was engaged in the "mother of all battles". I say so because the state which holds the 'ultimate' title which is what is known as "the radical title" (see the Supreme Court of Kenya decision of the *Town Council of Awendo v Nelson O Onyango & 13 others; Abdul Malik Mohamed & 178 others (Interested Parties) [2019] eKLR*) is fighting for a miniature portion of earth located within its territory. I refer to is as miniature because the suit land is both small in size compared to the territory of Kenya and of a different character to the radical title of the state. But even if the suit land was a miniature one as described, if the law permitted it to be taken away legally, the size could not have mattered.

51. This being such a great battle, this Court will clear the ground for it by giving its understanding of the facts as presented. The Respondent's contention is that the police post was put up on the land on the suit land in the year **2000**. They claimed that they had been in continuous uninterrupted occupation of the land for over **twenty (20)** years hence acquired it by way of adverse possession. While there is no specific piece of evidence as to when the police post was erected on the suit land, the point is that even if it is taken that it was put up by **28/02/2008** when PEV ended, as the Applicants deponed, the **twelve (12)** year period required for adverse possession to firm up already elapsed by **07/08/2021** when this Petition was filed. There is no dispute that the copy of the title document given in evidence by the Applicants shows that the title to the land was registered in the name of the Group on **01/10/2003**. Thus, clearly, by the time the period of twelve (**12**) years ended when worked backwards from **August, 2021** the Group was the registered owners of the suit land.

52. In terms of **Section 26** of the **Land Registration Act, Act. No. 3 of 2012**, a certificate of title is held as conclusive proof of proprietorship unless there is evidence of factors which fall under the exceptions provided in the Section, for instance, fraud, misrepresentation, illegal acquisition, or illegality in the procedure followed. That means that absent of the exceptions, the registration of a person or entity as the owner seals the status of the land by conferring to the person or entity absolute and indefeasible ownership status.

53. Under **Article 61** of the **2010 Constitution**, land is classified into three categories, namely, public, community or private. **Articles, 63, 64** and **65** give what constitutes the land falling under the three categories. From them, it is not in doubt that that which

the Group acquired on the suit land, through the registration of the title in their name was private land.

54. Section 7 of the Land Act, Act No 6 of 2012 provides for ways of acquiring land. It stipulates that:

“Title to land may be acquired through-

(a) allocation;

(b) land adjudication process;

(c) compulsory acquisition;

(d) prescription;

(e) settlement programs;

(f) transmissions;

(g) transfers;

(h) long term leases exceeding twenty-one years created out of private land; or

(i) any other manner prescribed in an Act of Parliament.”

55. From the provision, the simple question that requires a quick answer is: from where is the land being acquired, in these instances" The straight answer is that there exists the radical title that is held by the state. From that title come forth all others. That is why, for instance, in relation to an Estate, under the law of succession, when a proprietor of land dies and there are no heirs to inherit, the land reverts to the state since it “the radical title.” That was stated in the *Town Council of Awendo* case above. The issue of the social contract theory in regard to collective surrender by citizens of their resources for management of the same by the state is a matter of academic exercise for constitutional and social foundations of law classes in universities. I will not go into them now.

56. In the instant case, the state claims the suit land by adverse possession. It is not in dispute that the welfare state is the one obligated to protect the life, dignity, property, equality and other rights and freedoms of its citizens. Thus, when the same entity, government, is the same one that sets eyes on the little that its citizens have rightly acquired by sweat or hard work, it raises questions as to the legitimacy of that entity. Citizens do not surrender their power, rights and freedoms to be controlled and used by an entity for their benefit only for that entity to turn to be as the “man eaters of Tsavo” that endlessly mauled railway construction workers during the building of the Kenya-Uganda Railway. The citizens will lose their trust in such an entity and seek to withdraw from the social contract. That would be a harbinger on chaos.

57. I hold the above view for three reasons. I answer two straight away while I will detail the third in discussing the history and import of adverse possession. First, that the state being the holder of radical title should be extremely slow in taking back from the citizens that which it has legally given to them. And even when it has to do so, it should act within the prescribed parameters of laws that have been enacted in a just and open democratic manner and society. That is where the citizens will give their voice in how that which they surrendered to the state through the social contract is exercised and in a process that they approve. That is why **Article 1 (1)** of the **2010 Constitution** is clear that sovereign power belongs to the people of Kenya, not the government or any other entity.

58. Second, adverse possession is one of those methods of acquiring ownership of land which the **Land Act, Act No. 6 of 2012** contemplates, as can be noted from **Section 7** reproduced above. The reason is that it is frowned at by many: it starts from an illegality and ends up being sanitized by time. It is time its application was re-thought and perhaps there be a better way of making it start from legality. May be when someone enters into and starts to use my land, before the period should start running he or she should give a public notice that he/she wishes to use and ‘alienate’ my land and in that notice put a rider that if I raise no objection then time starts to run and after **twelve (12)** years my rights over the land get extinguished.

59. In putting this thought across, I am calling on the legislators to think wider than they do, especially over his issue. This is because, when one holds title and another person settles on that other's land merely because the owner is absent, to my mind that is criminal, it is illegal, and there is a law known as forcible detainer that somehow takes care of such a situation. Where then and how does this illegality become a legality by effluxion of time" For those who care to believe in the Bible, the adverse possession concept is akin to asking the God of the universe assume that a human being who sins should enter the eternal kingdom because he/she committed sins so long ago that by effluxion of time he should not give account of those sins. I understand it is impossible for that to happen.

60. I may conclude that the reason why Parliament has not directly legislated on this concept may be better understood that both the society and their legislative representatives are not comfortable with having it in the statutes. The only instance it can be said that the Land Act may be interpreted as having permitted the acquisition of land through adverse possession is through the wide opening that **Section 7(i)** creates. The Subsection is to the effect that land may be acquired in *any other manner prescribed in an Act of Parliament.*" This then points the searching soul to the **Limitation of Actions Act**, Chapter 22 of the Laws of Kenya. Within the **Act** one finds the acquisition of land through the process provided for under **Sections 13** as read with **Sections 17** and **41**.

61. This contention sets in motion attendant inquiries which must be answered. Where and how did the concept of adverse possession originate" I will do no more than quote the case of *State of Haryana vs Mukesh Kumar & Ors on 30 September, 2011* where in discussing the history of adverse possession the judgment of Justice Bhandari of the Supreme Court of India stated as follows:-

"29. A very informative and erudite Article was published in Nevada Law Journal Spring 2007 with the title 'Making Sense Out of Nonsense: A Response to Adverse Possession by Governmental Entities'. The Article was written by Andrew Dickal. Historical background of adverse possession was discussed in that article.

Historical background

30. The concept of adverse possession was born in England around 1275 and was initially created to allow a person to claim right of "seisin" from his ancestry.

Many felt that the original law that relied on "seisin" was difficult to establish, and around 1623 a statute of limitations was put into place that allowed for a person in possession of property for twenty years or more to acquire title to that property. This early English doctrine was designed to prevent legal disputes over property rights that were time consuming and costly.

The doctrine was also created to prevent the waste of land by forcing owners to monitor their property or suffer the consequence of losing title.

31. The concept of adverse possession was subsequently adopted in the United States. The doctrine was especially important in early American periods to cure the growing number of title disputes.

The American version mirrored the English law, which is illustrated by most States adopting a twenty-year statute of limitations for adverse possession claims. As America has developed to the present date, property rights have become increasingly more important and land has become limited. As a result, the time period to acquire land by adverse possession has been reduced in some States to as little as five years, while in others, it has remained as long as forty years. The United States has also changed the traditional doctrine by preventing the use of adverse possession against property held by a governmental entity.

32. During the colonial period, prior to the enactment of the Bill of Rights, property was frequently taken by states from private land owners without compensation.

Initially, undeveloped tracts of land were the most common type of property acquired by the government, as they were sought for the installation of public road.

Under the colonial system it was thought that benefits from the road would, in a newly opened country, always exceed the value of unimproved land.

33. *The doctrine of adverse possession arose in an era where lands were vast particularly in the United States of America and documentation sparse in order to give quietus to the title of the possessor and prevent fanciful claims from erupting. The concept of adverse possession exists to cure potential or actual defects in real estate titles by putting a statute of limitation on possible litigation over ownership and possession. A landowner could be secure in title to his land; otherwise, long-lost heirs of any former owner, possessor or lien holder of centuries past could come forward with a legal claim on the property. Since independence of our country we have witnessed registered documents of title and more proper, if not perfect, entries of title in the government records. The situation having changed, the statute calls for a change.”*

62. The long and winding history about adverse possession shows that in the olden times when land was vast and people would leave it idle or unused the concept served the purpose well. From this my understanding of history and technology advance, perhaps, in those times it was not easy to trace the owners of the lands to notify them of one’s presence on their land. However, in comparison to modern times where information delivery is virtually instant and widespread, it is time this issue was thought over once more and better ways of dealing with it were laid down by and within the law. That began in the olden era and served them, this is the modern era.

63. Whilst judges in jurisdictions such as ours may not have given the deepest of the thoughts about the effect of adverse possession on the property rights of owners, others have voiced their displeasure over the disproportionate nature of the concept over the constitutionally protected right. In **JA Pye (Oxford) Ltd v. United Kingdom [2005] ECHR 921 (15 November 2005)**, the European Court of Human Rights held that a law providing for ouster of an owner on the basis of failing to act 12 years is "illogical and disproportionate", it would "seem draconian to the owner" and "a windfall for the squatter". That is perfectly expressed: a squatter who effortlessly acquired ownership of land must have surely reaped a windfall.

64. In the instant case, the Respondents urged this Court to find that theirs is land they acquired by way of a gift. Nothing could be further from the truth especially when they do not provide from whom that gift was obtained. In any event, they could not rightly claim the land as a gift and at the same time claim adverse possession thereto. If they claimed ownership of the land by way of a gift, then they are not on the land by virtue of adverse possessory steps, even assuming that their contention would be right. Again, they did not annex to the affidavit in response to the Petition any document of a complete transfer of the “gift” from that alleged source. What that left the Court with was that the Respondents were intent on misleading it and hanging on any reed they would cling to as they sank. Thus, I now turn to the legality of the claim for adverse possession.

65. First, the unique situation here is that it is government that is claiming adverse possession. I am alive that in the United States of America, Courts have held that government (in the federal states) or public institutions can acquire land by adverse possession. Reference is made to the cases of *Chesbro v. Douglas County, No. 98,545, 2008 Kan. App. LEXIS 105 (Kan. Ct. App. Jun. 27, 2008)*, and that of *Pascoag Reservoir & Dam, LLC v. Rhode Island, 217 F. Supp. 2d 206 (D. R.I. 2002), aff’d, 337 F.3d 87 (1st Cir. 2003), cert. den., 540 U.S. 1090 (2003)*. But, it appears to me that to accept this move, without contextually comparing it with our country’s unique legal arena, would end up transplanting decisions which would import application of misaligned concepts. The application of the concept and contention in the US legal system has often been advanced along the argument on whether by applying adverse possession in favour of the states would be a violation of the Fifth and Fourteenth Amendments (to the US Constitution).

66. In the case of our nation, when a state department or agency claims adverse possession of private property, the claim flies past the face of the state’s constitutional mandate to protect the citizen’s property rights. Government cannot be heard to issue proprietary documents to citizens and then go round them to claim the land back without following the constitutionally laid down procedures. In the first place, the rules of natural justice would catch up with the government’s actions or claims herein. This would arise where; in the laws set out by the same government it bars its own citizens from acquiring its land (public land) by way of adverse possession while it is doing the opposite. In Section 41 of the Limitation of Actions Act, it is expressly provided that no one can acquire adverse possession over government land. It states, in part, that **“This Act does not- (a) enable a person to acquire any title to, or any easement over-**

(i) Government land or land otherwise enjoyed by the Government...”

67. My understanding of fairness which is one of the rules of natural justice is that it requires that that which one does to another he/she should expect it to be done unto him. I mean that if the government is beholden of private citizens acquiring any of its lands by way of adverse possession, so it should be beholden of taking private land by way of adverse possession. If government can lay claim over private property by way of adverse possession, it too should be prepared to cede ground by amending the law to permit it

losing its land through the same way. Rules of fairness require playing on level grounds and not taking advantage of others. In essence I am of the view that time has not come, if it ever will, for government to claim private land by adverse possession. There has to be a clear entrenchment of the rules of natural justice in that step if it ever comes to that. I agree with the judges in the *State of Haryana vs Mukesh Kumar & Ors* case above when they held as follows:

“The government itself may acquire land by adverse possession. Fairness dictates and commands that if the government can acquire title to private land through adverse possession; it should be able to lose title under the same circumstances.”

68. Second, the Respondents did not by way of Response to the Petition counterclaim adverse possession. They merely raised the issue as part of their response. To my mind, adverse possession is a sword and not a shield in a claim over property ownership. It is a positive assertion by one, often a squatter or ‘invader’ of another’s property, that he has acquired proprietary rights over the other’s land: it cannot be either a passive or negative assertion. To that extent the Court could not be in a position to make a finding on the same in favour of the Respondents. As I conclude on this issue, I state that the 2010 Constitution has laid down clear ways in which government or the state can take away the property of its citizens. This then turns me to the second last issue to consider.

(d) Whether the Petitioners’ fundamental rights were violated so as to entitle them to the prayers sought

69. The Petitioners argued that their fundamental right to property was violated and that their right to fair administrative action was not observed and promoted by the Respondents. To understand the petitioners’ contention, I start by reproducing Article 40 of the 2010 Constitution. It is the one relevant to the right to property. It provides in part as follows:

“40. 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.”

70. As noted from **Article 40(3)** above a person’s ownership of property shall not be taken away by the state unless the process complies with the steps and actions the Article provides for and operationalized by a law passed by Parliament. In the present circumstances, it is clear that the state has not taken any of the steps or done the things provided for in the Constitution in relation to the suit land. The question that one would have to answer is whether in the circumstances this constitutes a violation of the Petitioners’ rights.

71. I have already found that the Respondents’ occupation and use of the suit land was illegal and unlawful and amounted to trespass on private land. While they defend their position on acquisition of the suit land, the Respondents, by their actions, tend manifest a trajectory of deprivation of the Petitioners’ right to own and enjoy property as provided by **Article 40 (1) and (3)** of the **2010 Constitution**. But for them to succeed they had to place themselves within the path laid down about laying claim on violation of either rights or freedoms under the Constitution.

72. **Article 22 (1)** of the **Constitution** reads as follows:-

“Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.”

73. The Petitioners’ claim was brought under **Articles 2, 10, 19, 20, 21, 22, 28, 31, 40, 47, 62, 64, 68, 159, 165 (3), 238, 245, 258 and 259**. It would seem that the Petitioners wished to catch as many fish as possible for reasons of uncertainty over what provisions could be of avail to them. Therefore, cast the net as wide as they could: they cited or relied on as many Articles some of which I find to be irrelevant as possible. Their submissions addressed only a few of the provisions one of them was **Article 40** which guarantees the Protection of right to property. They also submitted on that their right to fair administrative as envisaged in **Article 47** which goes hand in hand with **Article 50** on the right to fair hearing.

74. I am inclined first to determine whether the petitioners were afforded fair administrative action and whether they were accorded fair hearing and then I ultimately consider the protection of their right to property. I discuss hereunder.

Fair Administrative Action vis-à-vis the procedure to be followed in compulsory acquisition of private land

75. The parent law that now governs how when a government agency wishes to take steps in decisions such as the ones relevant to acquisition of land by the state is the **Fair Administrative Act (FAA) of 2015. Section 2** of the **Act**, defines administrative action to include:

(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or

(ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.

76. The second limb of the definition is relevant in the instant case. Then **Section 4 (4)** of the **Act** clarifies the point. It is to the effect that every person must be accorded fair administrative action. It states as follows:

“(1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) Every person has the right to be given written reasons for any administrative action that is taken against him.

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard; (c) notice of a right to a review or internal appeal

against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable; (notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

The administrator shall accord the person against whom administrative action is taken an opportunity to: attend proceedings, in person or in the company of an expert of his choice; Administrative action to be taken expeditiously, efficiently, lawfully; be heard; cross-examine persons who give adverse evidence against him; and request for an adjournment of the proceedings, where necessary to ensure a fair hearing.”

77. The petitioners claimed that their property was taken away by the Respondents without their consent and knowledge hence their right to be heard infringed. The Respondents did not dispute that fact. Thus, this court agrees with them. The above provisions cited above cater for both the right to fair administrative action as well as the right to be heard. None of the steps in the Act were followed by the Respondents. That amounted to a violation of right to fair administrative action.

78. About how the Respondents acquired the suit land, the petitioners’ evidence that they did not transfer the land to the Respondents was not rebutted. The Respondents indicated that they were gifted the suit land. They do not indicate the person who gifted it to them. Then they argued that they acquired the suit land by adverse possession. I have discussed this concept elsewhere in this judgment. I need not over-emphasize that such a claim was not available to government. Clearly, the actions of government violated the Petitioners’ right to protection of property as provided for under **Article 40 (1) and (3)** of the Constitution. The actions by the state were at best barbaric and archaic and amounted to grave violation of the Petitioners’ constitutional right to own property.

79. In the event that the Respondents or the state wished to acquire the land for public use, they ought to have followed the procedure of acquiring it by way of compulsory acquisition. That would have entailed just and prompt compensation at the fair market price. I agree with the Petitioners in their submissions to that end.

80. The procedure for acquiring private land and converting it to public land is provided by the **Land Acquisition Act (LAA)** Chapter 295 of the Laws of Kenya. **Part II** of the Act provides for Preliminaries to Acquisition of land.

81. **Section 3 of LAA** provides as follows:

“Whenever the Minister is satisfied that the need is likely to arise for the acquisition of some particular land under section 6, the Commissioner may cause notice thereof to be published in the Gazette, and shall deliver a copy of the notice to every person who appears to him to be interested in the land.”

82. **Section 6 (1)** provides as follows:

“Where the Minister is satisfied that any land is required for the purposes of a public body, and that-

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

(b) the necessity therefore is such as to afford reasonable justification for the causing of any hardship that may result to any person interested in the land, and so certifies in writing to the Commissioner, he may in writing direct the Commissioner to acquire the land compulsorily under this Part.

(2) On receiving a direction under subsection (1), the Commissioner shall cause a notice that the Government intends to acquire the land to be published in the Gazette, and shall serve a copy of the notice on every person who appears to him to be interested

in the land.”

83. In terms of the aforementioned provisions immediately above, it is without doubt that the fair administrative action which the 1st Respondent ought to have accorded the Petitioners would entail, **firstly**, being served with a notice of intention to acquire the suit land for public use for the purpose of establishing a police post to provide security in the area. That was to be through the Minister of Lands. **Secondly**, it should have served them with the reasons for the necessity and justification for acquiring the land. **Thirdly**, it should have awarded them compensation for the land. Compensation would take effect only after according the Petitioners an opportunity to give their views on whether they were agreeable to the proposal to give out the land to the government or not. That goes hand in hand with their right to fair hearing. In the hearing, if the petitioners agreed to give up the land to the government, one of the pertinent issues that they would discuss would be fair and just compensation as provided by **Sections 8 and 9** of the **Land Acquisition Act**. The provision stipulates as follows:

“8 Where land is acquired compulsorily under this Part, full compensation shall be paid promptly to all persons interested in the land.

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

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

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

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

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

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

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

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

84. The upshot is that ownership of land and property rights are protected by the **2010 Constitution** as well as statutes. In my considered view, the respondents were in breach of **Article 40 (3)** of the **Constitution** by failing to follow the due process in purporting to acquire the suit land. I am persuaded by the authority of **Evelyn College of Design Ltd v Director of Children’s Department & another [2013] eKLR.**

85. Guided by the above provisions of the law, this court is of the considered view that in the Respondents’ act of unilaterally taking away their property, the Petitioners were not afforded fair hearing and there was no fair administrative action as well. Both of the Petitioners’ rights referenced were violated.

e) What Orders to issue”

86. This Court having found that the Petitioners’ Constitutional rights were infringed, it is now under duty to consider the appropriate relief for them. Under **Article 23** of the **2010 Constitution** the Court can grant a number of reliefs. Clause of the Article states that:

(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including-

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review.

87. The petitioners have prayed for declaratory orders, eviction orders as well as for an award of damages. The award of damages falls under **Sub-clause (e)**. The Respondents' illegal occupation or trespass has been for a long time. The Petitioners were aware of the Respondent's actions and took no steps of seeking a remedy of the situation or appropriate reliefs. In their belief, damages should be assessed depending on the longevity of the trespass. That is a misinterpretation of the law. In assessing damages for the violation herein, this Court is guided by the decision of Gitobu Imanyara & 2 Others -vs- Attorney General [2016] eKLR where the Court of Appeal citing among others, a decision of the Privy Council, stated as follows:

“The relevant principles applicable to award of damages for Constitutional violations under the Constitution was explained exhaustively by the Privy Council in the famous case of Siewchand Ramanoop v The AG of T&T, PC Appeal No 13 of 2004. It was held that a monetary award for constitutional violations was not confined to an award of compensatory damages in the traditional sense.

Per Lord Nicholls at Paragraphs 18 & 19:

“When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.

An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches.

(e m p h a s i s o u r s). All these elements have a place in this additional award. “Redress” in Section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions “punitive damages” or “exemplary damages” are better avoided as descriptions of this type of additional award”. (emphasis ours)”

88. Subsequent to that quotation, the Court put it as follows:

“Consistent with the above judicial experience and philosophy, it seems to us that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court, however, the court's discretion for award of damages in Constitutional violation cases though is limited by what is “appropriate and just” according to the facts and circumstances of a particular case. As stated above the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting

reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration. Public policy considerations is also important because it is not only the petitioner's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy."

89. In the instant case, not much was revealed on the extent the loss of income. It was not proved. Put differently, no evidence was given of how much in earnings the parcel of land used to fetch for the Petitioners. This court is of the considered opinion that had it been that the petitioners accessed the land, they would have utilized it in one way or the other to generate income. They could have made losses as well. There is a difference between gaining profits and income from land and appreciation of the land in value. Doing the best I can, would therefore consider a sum of Kenya Shillings **Two Million (Kshs. 2, 000,000/=)** Only as appropriate compensation for damages for both violation and trespass.

90. Considering the fact that the Applicants submitted elsewhere that if the Respondents still wanted the suit land they needed to follow the legal processes and compensate them justly and fairly, and considering the fact that the Petitioners were in no hurry to ask for the removal of the Police Station from the suit land for a period of over fourteen (14) years, and the taking into account further that it is public knowledge that due to the long period the police post has been in the area of Matisi (I imagine the place where the suit land is situate to be known as such), and public interest and policy of provision of security services, I advise that as the first step, besides compensation for the award of damages as explained and ordered elsewhere in this judgment, the adverse parties herein that the extend an olive branch to each other and negotiate for compensation at market value of the suit land. In so doing and upon agreeing, the parties can move the Court or the right forums appropriately regarding the cancellation and registration of the title.

91. In conclusion, this court finds that the petitioners proved their case on a balance of probabilities. I thereby issue the following orders:

a) A declaration that the petitioners fundamental rights to property and a right of a fair administrative action was violated, transgressed by the respondents by virtue of the illegal trespass to their property by the respondents, their agents and or servants and interference of development and enjoyment of the suit land.

b) A declaration that the respondents have illegally and unlawfully invaded the petitioners land L.R. No. Kiminini/Kinyoro Block 3/Matisi/561 by trespassing thereon and erecting a police post.

c) An award of damages for breach of fundamental rights to protection of property and fair administrative action together with the unlawful trespass by the Respondents to the tune of Kshs. 2,000,000/= as stated in Paragraph 88 above.

d) An order of eviction of the respondents, their agents, and/or servants from the above quoted property

e) In the ALTERNATIVE to Order (d) above, taking into consideration public interest and policy, the Government through the respective Cabinet Secretaries or Ministries be at liberty to negotiate with the petitioners on appropriate compensation at a fair market value with a view of acquiring it by compulsory acquisition.

92. Costs follow the event. As such, the Respondents shall bear the costs of this Petition.

Orders accordingly.

Dated, signed and delivered at **Kitale** via **Electronic Mail** on this **16th** day of **March, 2022**.

DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE



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