



**Kenafriic Bakery Limited v National Land Commission & 2 others (Environment and Land Case Civil Suit 469 of 2016) [2022] KEELC 13800 (KLR) (3 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13800 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 469 OF 2016  
JO MBOYA, J  
OCTOBER 3, 2022**

**BETWEEN**

**KENAFRIC BAKERY LIMITED ..... PLAINTIFF**

**AND**

**NATIONAL LAND COMMISSION ..... 1<sup>ST</sup> DEFENDANT**

**KENYA NATIONAL HIGHWAYS AUTHORITY ..... 2<sup>ND</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**Background and Introduction**

1. Vide Plaintiff dated the May 5, 2016, the Plaintiff herein has approached the court seeking for the following Reliefs;
  - i. The sum of Kshs 490,278,866/= Only.
  - ii. Interest on (a) above at the Compounded rate of 18% per annum from April 1, 2015 until payment in full:
  - iii. Costs of the Suit plus Interest;
  - iv. Any other or Further Relief that this Honourable may deem fit and just to grant.
2. Upon being served with the Plaintiff and summons to enter appearance, the 1<sup>st</sup> Defendant duly entered appearance and thereafter filed a Statement of Defense dated the June 14, 2018, wherein the 1<sup>st</sup> Defendant denied and contested the claim by and on behalf of the Plaintiff herein.



3. On the other hand, the 2<sup>nd</sup> Defendant similarly entered appearance and filed a Statement of Defense dated June 14, 2016. It is imperative to note that the 2<sup>nd</sup> Defendant, similarly denied and disputed the claim by the Plaintiff.
4. On behalf of the 3<sup>rd</sup> Defendant, a Statement of Defense was entered/filed on the August 10, 2016. Suffice it to note that the 3<sup>rd</sup> Defendant also denied the claim by the Plaintiff.
5. For completeness, it is appropriate to state that the Plaintiff herein duly filed a Reply to the 2<sup>nd</sup> Defendant Statement of Defense. For coherence, the Reply to the 2<sup>nd</sup> Defendant Statement of Defense is dated the July 5, 2016.
6. The foregoing pleadings reflect the totality of the pleadings filed and exchanged by the Parties in respect of the subject matter.

Evidence by the parties:

a. Plaintiff's Case:

7. The Plaintiff's case is premised on the Evidence of one witness, namely, Hasmukh Gulabchand Gosrani, who testified as PW1.
8. The Witness herein pointed out that same is the Managing Director of the Plaintiff Company and that by virtue of being the Managing Director of the Plaintiff company, same is authorized and mandated to execute pleadings and documents on behalf of the Plaintiff.
9. Similarly, the witness also testified that by virtue of his portfolio, same also has the mandate and authority to attend court and to testify on behalf of the Plaintiff.
10. It was the further Evidence of the witness that the Plaintiff Company is the lawful and registered Proprietor over and in respect of LR No 13562/28, hereinafter referred to as the suit property.
11. On the other hand, the witness pointed out that on or about the December 23, 2011, the office of the Commissioner of Land published a Gazette notice No 16180, whereunder the Commissioner of Land (now defunct) sought to acquire various properties including the suit property herein.
12. Besides, the witness stated that after the issuance/publication of the gazette notice relating to Compulsory acquisition over and in respect of inter-alia, the suit property, the process relating to compulsory acquisition was undertaken culminating into a letter of award being generated and issued in favor of the Plaintiff. For clarity, the witness pointed out that the Letter of award was dated the April 30, 2012.
13. Other than the foregoing, the witness testified that after due consideration, the Plaintiff herein finally accepted the Letter of award and responded thereto vide an acceptance dated the May 7, 2012.
14. Be that as it may, it was the evidence of the witness that upon the execution of the Letter of acceptance, the suit property vested and became the property of the 2<sup>nd</sup> Defendant herein, same being the authority on whose behalf the acquisition was being undertaken.
15. Besides, the witness further testified that after the execution of a Letter of acceptance, same yielded possession of the suit property which comprised of inter-alia Godowns to and in favor of the 2<sup>nd</sup> Defendant.
16. Other than the foregoing, the witness also testified that having parted with both the title and possession of the suit property, the Plaintiff company was constrained to and became obliged to look for



- alternative Business premises. In this regard, the witness testified that the Plaintiff procured and obtained alternative premises on the basis of a lease, which was executed on the November 19, 2012.
17. Notwithstanding the foregoing, the witness testified that despite having parted with both title and possession of the suit property, on the basis of the Letter of acceptance of award, the 2<sup>nd</sup> Defendant took along time to settle the award, which ought to have been paid promptly, timeously and in one lumpsum.
  18. At any rate, the witness added that the Plaintiff herein only received the 1<sup>st</sup> payment on the June 25, 2013, same being more than One year after the execution of the letter of acceptance.
  19. Besides, the witness further testified that thereafter the 1<sup>st</sup> and 2<sup>nd</sup> Defendant made intermittent payments by instalments over a period of time, with the last instalment being made/paid on the February 11, 2022.
  20. Other than the foregoing, the witness testified that as a result of the delayed and intermittent payment, the Plaintiff herein suffered significant loss, in terms of Earnings and as a result of such loss, the Plaintiff is entitled to Compensation on the basis of Interests that accrued during the period of delay.
  21. Be that as it may, the witness also testified that during the period of delay, the Plaintiff herein continuously and variously wrote to the 2<sup>nd</sup> Defendant and protested the delay in processing and paying the award, promptly and timeously.
  22. In any event, the witness added that the Plaintiff similarly intimated to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants that arising from the failure to promptly and timeously pay the award, the Plaintiff would be entitled to Interests computed and reckoned at commercial bank rates, being 18% per annum.
  23. Nevertheless, the witness also added that arising from the delay, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are therefore obligated to pay to and in favor of the Plaintiff accrued and accumulated interests. In this regard, the witness has emphasized that such interests would be payable on the basis of Section 75 of the retired Constitution and on the basis of Article 40(3) of the Constitution 2010.
  24. Premised on the foregoing, the witness contended that the Plaintiff Company is therefore entitled to the sum of Kshs 490, 278, 866/= only plus interests at 18% per annum from the April 1, 2015. Similarly, the witness has also contended that the Plaintiff is deserving of costs.
  25. Other than the foregoing, the witness referred to the witness statement dated November 19, 2019, which the witness sought to adopt. In this regard, the witness statement was thereafter admitted and adopted as Further Evidence in Chief.
  26. Other than the witness statement, the witness herein also alluded to the List and Bundle of documents dated the May 5, 2016 and same sought to adopt the documents as part of his exhibits.
  27. Pursuant to the request, the Documents at the foot of the list dated the May 5, 2016 were admitted in evidence and marked as exhibits P1 to P28 respectively.
  28. On cross examination, the witness stated that by the time of filing the subject suit, the Process of compulsory acquisition had been completed/concluded.
  29. Besides, the witness added that by the time of filing the suit, the Plaintiff had similarly been paid the entire amount which was at the foot of the compensation decreed/awarded by the Commissioner of Land (now defunct).



30. Nevertheless, the witness also stated that though the process of compulsory acquisition had been completed or concluded by the time of filing the suit, the suit property had not vested into the Government/the 2<sup>nd</sup> Defendant herein.
31. In any event, the witness further testified that even after the Plaintiff had received the full payment for compulsory acquisition, the last entry shown and reflected on the title of the suit property showed that the title was charged in favor of Fina Bank Ltd.
32. On the other hand, the witness also admitted that the original title over and in respect of the suit property still remained with and under the custody of the Plaintiff. For clarity, the witness stated that the title had not been surrendered to the Government.
33. Other than the foregoing, the witness confirmed receipt of the letter dated the May 17, 2016 and stated that the purpose of the said letter was to request the Plaintiff to vacate the suit property and thereafter to pave way for the Government to take possession.
34. Essentially, the witness conceded that by the time the letter dated the May 17, 2016, was issued, the Government of the Republic of Kenya and in particular, the 2<sup>nd</sup> Defendant herein had not taken possession of the suit property.
35. Whilst still under cross examination, the witness admitted that the Plaintiff herein continued to use the suit property and same derived income therefrom, even after the Plaintiff had been fully paid the award at the foot of compulsory acquisition.
36. At any rate, the witness conceded that after receipt of the award at the foot of Compulsory acquisition, the land belonged to the Government and not the Plaintiff.
37. In respect of the computation of Interests and Interest rate, the witness pointed out that the monies at the foot of compulsory acquisition ought to have been paid in one lumpsum and not by instalments.
38. However, the witness maintained that because the monies were paid vide instalments, the Plaintiff was therefore entitled to recover interests at the obtaining commercial rates.
39. On cross examination by counsel for the 2<sup>nd</sup> Defendant, the witness clarified that the suit property had previously been the subject of compulsory acquisition and that the acquisition leading to the cause of action herein was the 2<sup>nd</sup> compulsory acquisition. However, the witness pointed out that same was not aware of the acreage pertaining to the 1<sup>st</sup> acquisition.
40. On the other hand, the witness also stated that even after the 1<sup>st</sup> and 2<sup>nd</sup> Compulsory acquisition, there was still a portion of the suit property, which remains the property of the Plaintiff and which has not been acquired by the Government.
41. Further, the witness admitted that the Plaintiff herein did not inform or advise the 2<sup>nd</sup> Defendant that same was vacating and moving out of the suit property.
42. Similarly, the witness acknowledged that the suit property was used to secure a Banking facility from Fina Bank Ltd vide letter of offer issued on the August 6, 2012.
43. However, the witness stated that despite the fact that the suit had been compulsorily acquired by the August 6, 2012, the Plaintiff neither informed nor alerted the Government of Kenya or the 2<sup>nd</sup> Defendant of their intention to use their title of acquiring a Banking facility.
44. Other than the foregoing, the witness indicated that same wrote a letter in 2015 in respect of which the Plaintiff was indicating her desire to vacate and move out of the property.



45. Whist under further cross examination, the witness also conceded that there was a Borehole that had been sunk on the suit property and that the Plaintiff company had employed security guards to take care of the same. In this regard, the witness acknowledged that the Plaintiff remained in possession and continued to use the suit property even as at September 17, 2019.
46. On cross examination by counsel for the 3<sup>rd</sup> Defendant, the witness stated that the Letter of award which communicated the amount to be paid at the foot of the Compulsory acquisition, did not state and or indicate that any Interests would be payable.
47. Other than the foregoing, the witness also stated that the Notice dated the May 17, 2016 relating to the vacation of the suit property was issued long after the monies at the foot of the compulsory acquisition had been paid to and in favor of the Plaintiff.
48. On re-examination, the witness pointed out that after executing the Letter of acceptance of the award, the Plaintiff company sought for alternative premises and same procured a property in the neighborhood of the suit property, which the Plaintiff company leased.
49. In respect of the borehole, the witness acknowledged and admitted that the Plaintiff Company kept the same under her protection by the security guards and that the water therefrom was being used by the Plaintiff company as well as the neighboring community.
50. Further, the witness added that the Plaintiff company used the title in respect of the suit property to secure a Banking facility after the suit property had been compulsorily acquired by the Commissioner of Land, on behalf of the 2<sup>nd</sup> Defendant.
51. Finally, the witness stated that the claim of interests at the rate of 18% is based on the Central Bank Base lending rates.
  - b. 1<sup>st</sup> Defendant's Case:
52. The 1<sup>st</sup> Defendant herein never summoned nor called any witness in support of her case. Essentially, the 1<sup>st</sup> Defendant's case was closed without any witness being called or any documentary evidence being tendered.
  - c. 2<sup>nd</sup> Defendant's Case:
53. The 2<sup>nd</sup> Defendant's case is anchored at the foot of the evidence tendered by one Daniel K Mbuteti, who stated that same is a Surveyor, currently employed by the 2<sup>nd</sup> Defendant herein.
54. It was the further evidence of the witness that the Plaintiff's land, namely LR No 13562/28, was the subject of compulsory acquisition on two occasions. For clarity, the witness pointed out that the 2<sup>nd</sup> compulsory acquisition was at the foot of the gazette notice number 16180 published on the December 23, 2011.
55. On the other hand, the witness further testified that the total amount at the foot of the 2<sup>nd</sup> compulsory acquisition was Kshs 942, 214, 782/= only, which amount was variously paid with the final payment being made on the February 11, 2015.
56. Beside, the witness has testified that even though the monies at the foot of the compulsory award was finally paid out on the February 11, 2015, the suit property which was at the foot of Compulsory acquisition was never taken possession of by the 2<sup>nd</sup> Defendant up to and including May 17, 2016, when the 1<sup>st</sup> Defendant issued and served a notice for taking possession and vesting of the title in the Government.



57. On the other hand, the witness has also added that despite the issuance of the Notice of taking possession, the Plaintiff failed to comply with the terms of the notice and that by the time of filing of the subject suit, the Plaintiff had neither vacated nor handed possession to the 2<sup>nd</sup> Defendant.
58. Be that as it may, the witness has testified that the 2<sup>nd</sup> Defendant herein never entered upon nor took possession of the suit property prior to or before of the full payment of the Purchase price. In this regard, the witness reiterated that the 2<sup>nd</sup> Defendant was therefore not obliged to pay any Interests to and in favor of the Plaintiff.
59. Further, the witness has added that even after the suit property had been compulsorily acquired, the Plaintiff company remained in possession thereof, used the title to secure a Banking facility and even continued to extract benefits therefore.
60. Premised on the foregoing, the witness thus contended that it would be inappropriate for the Plaintiff to seek for payment of interests insofar as same benefited twice over and in respect of the suit property, even after receiving the full payment of the Compensation money.
61. Other than the foregoing, the witness herein adopted the witness statement dated the February 6, 2019 and which Statement was thereafter adopted as the Further Evidence in chief of the witness.
62. On the other hand, the witness also referred to the List and Bundle of Documents dated the February 6, 2019 and sought to adopt the documents at the foot thereof. In this regard, the said documents were admitted as exhibits D1 to D2 respectively.
63. Further, the witness referred to a Supplementary list and bundle of documents dated March 9, 2021 containing four documents.
64. Similarly, the witness sought to adopt and rely on same. In this regard, the said documents were produced as exhibits D3 to D6 respectively.
65. Finally, the witness referred to a Further Supplementary List of Documents dated the November 10, 2021 and sought to rely on same. In this regard, the document at the foot of the Further Supplementary Bundle of Document was produced as exhibit D7.
66. On cross examination, the witness testified that the Notice of taking possession of the suit property was issued by the 1<sup>st</sup> Defendant on May 17, 2016. For clarity, the witness added that by the time the notice in question was issued, the entire compensation money had been paid to and acknowledged by the Plaintiff.
67. Further, witness also stated that as at the May 17, 2016, when the notice was issued, the Plaintiff herein was still in possession of the suit property.
68. Other than the foregoing, the witness also confirmed that up to and including the time of his testimony, the 2<sup>nd</sup> Defendant had not carried out and conducted the final survey in respect of the suit property. For clarity, the witness also clarified that the title in respect of the suit property has also not vested on the Government.
69. Besides, the Witness pointed out that the Plaintiff herein remained in possession of the suit property even by the March 4, 2021.
70. As pertains to payment of Interests, the witness pointed out that no Interests is payable to and in favor of the Plaintiff. In any event, the witness added that if interests is payable then same can only be computed on the basis of simple interests.



71. Finally, the witness pointed out that the suit property is still private property, insofar as same is still registered in the name of the Plaintiff Company.
72. On cross examination by counsel for the Plaintiff, the witness conceded that 2<sup>nd</sup> Defendant took approximately three years in settling/paying the compensation at the foot of the award.
73. Besides, the witness pointed out that the Plaintiff herein was to cease to be the owner of the suit property within sixty days from the date of payment of the compensation money.
74. In any event, the witness also added that the taking of possession of the compulsorily acquired property is a process provided for under the Law and hence the Plaintiff herein could not compel the 2<sup>nd</sup> Defendant to take possession.
75. With the foregoing testimony, the 2<sup>nd</sup> Defendant's case was closed.

d. 3<sup>rd</sup> Defendant's Case:

76. The 3<sup>rd</sup> Defendant herein neither called nor summoned any witness. Consequently, the 3<sup>rd</sup> Defendant's case was closed without calling of any witness.

Submissions by the Parties:

a. Plaintiff's Submissions:

77. The Plaintiff herein filed written submissions dated the June 30, 2022 and same has highlighted and amplified two issues for consideration.
78. First and foremost, counsel for the Plaintiff has submitted that pursuant to Section 8 of The Land Acquisition Act, Cap 295 Laws of Kenya(now defunct), the acquiring authority or better still the authority on whose behalf the land was being acquired was obligated to render full compensation and that same was to be paid promptly to all the persons interested in the land.
79. Similarly, counsel for the Plaintiff has also submitted that under the provisions of Article 40(3) (b) of the Constitution 2010, the acquiring authority was also obligated to make/render prompt payment of Full and Just compensation, as pertains to the compulsorily acquired property.
80. In the premises, counsel pointed out that it was therefore incumbent upon the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to render prompt payments in full and not otherwise to the Plaintiff, immediately the Plaintiff's property was compulsorily acquired.
81. Nevertheless, counsel for the Plaintiff has pointed out that despite the explicit terms and tenor of both the Land Acquisition Act(now repealed), and the Constitution 2010, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants failed to render prompt payment over and in respect of the compulsory acquisition.
82. To the contrary, counsel for the Plaintiff has added that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants staggered the payments over a duration of three years, which ran contrary to the spirit and letter of both the Land Acquisition Act and the Constitution 2010.
83. For coherence, counsel for the Plaintiff has added that the Payments in favor of the Plaintiff were made in instalments and that the last instalments were made/ paid out, on the February 11, 2015.
84. Premised on the foregoing, counsel for the Plaintiff has thus contended that the Plaintiff is therefore entitled to recompense on the basis of accrued/accumulated interests, which was computed and certified in the sum of Kshs 490, 278, 866/= only, as at the time of filing of the suit.



85. Secondly, counsel for the Plaintiff has submitted that the Interests rate ought to be computed and reckoned at the obtaining Central bank of Kenya base lending rates, which stands at 18% per annum.
86. In any event, counsel has added that the award of interests and the rate thereof falls at the discretion of the court and in this regard, counsel for the Plaintiff invited the court to take cognizance of the provisions of Section 26 of the Civil Procedure Act, Cap 21 Laws of Kenya.
87. In support of the submissions made on behalf of the Plaintiff, counsel cited the decision in the case of Patrick Musimba versus National Land Commission & 4 Others (2016)eKLR and Attorney General versus Halal Meat Products Ltd (2016)eKLR.
88. Other than the two issues, which were raised by counsel for the Plaintiff, counsel also submitted on the import and tenor of Section 67 (b) of the Kenya Roads Act and contended that the subject suit was not barred by the said Section, as alleged or contended by the 2<sup>nd</sup> Defendant.
89. In any event, counsel for the Plaintiff added that the provisions of Section 67 (b) of the Roads Act, relates to cases where it is the authority's order, that is being executed and not otherwise.
- b. 2<sup>nd</sup> Defendant's Submissions:
90. The 2<sup>nd</sup> Defendant filed written submissions dated the June 26, 2022 and same has similarly raised two pertinent issues for consideration.
91. Firstly, counsel for the 2<sup>nd</sup> Defendant has submitted that the cause of action, if any against the 2<sup>nd</sup> Defendant arising from and pertaining to the payment of the compensation money accrued on the June 30, 2012, same being sixty days from the date when the award was accepted.
92. In respect of the foregoing submission, counsel for the 2<sup>nd</sup> Defendant has laid emphasis on the contents of paragraph 8 of the Plaintiff.
93. Premised on the foregoing, counsel for the 2<sup>nd</sup> Defendant has therefore submitted that by the time the Plaintiff filed the instant suit, namely, on the May 8, 2016 more than three years and ten Months had accrued/lapsed from the date when the cause of action arose.
94. In the alternative, Counsel for the 2<sup>nd</sup> Defendant has also submitted that assuming that the Plaintiff's Injury on the non-payment of Interests was a continuing injury, then the Plaintiff was obliged to file/commence the suit within a duration of six months from when the injury ceased/abated.
95. In respect of the foregoing submissions, counsel for the 2<sup>nd</sup> Defendant added that it was therefore incumbent upon the Plaintiff to file or originate the suit within six months from the February 11, 2015, same being the date when the last payment/ Installment was made.
96. Using the alternative aspect, counsel for the 2<sup>nd</sup> Defendant has submitted that the Plaintiff's suit, if at all, therefore ought to have been filed at the very latest on or before the August 11, 2015.
97. Either way, counsel for the 2<sup>nd</sup> Defendant has submitted that the Plaintiff's suit is statute barred and thus same offends the provisions of Section 67(b) of the Kenya Roads Act.
98. In support of the foregoing submissions, counsel for the 2<sup>nd</sup> Defendant has cited and relied on the decision in the case of Willmary development Ltd versus National Land Commission & Kenya National Highway Authority (2020)eKLR, John Kibor Kipkorir (suing as the administrator of the Estate of William Kibor Ruto AKA Chibor Ruto/Kenya Rural Roads Authority (2018)eKLR, Republic versus National Land Commission & Kenya national Highways Authority Ex-parte Registered Trustees of



99. The second issue that has been raised and highlighted by the 2<sup>nd</sup> Defendant relates to the point that the Plaintiff herein has not tendered or adduced credible evidence to prove that same was entitled to payment of interest in respect of the delayed payments arising from or attendant to the Compulsory acquisition.
  100. For clarity, counsel for the 2<sup>nd</sup> Defendant submitted that the payment of Interest could only be due and claimable pursuant to the provisions of Section 16(1) of the Land Acquisition Act, (now repealed) and subject to the acquiring authority taking possession of the named property, albeit before full payment of the compensation award.
  101. However, in respect of the subject matter, it was submitted that the acquiring authority, namely, the 2<sup>nd</sup> Defendant never took possession of the suit property prior to or before the Compensation money was paid.
  102. At any rate, it was clarified that the last tranche of the compensation money was paid and acknowledged on the February 11, 2015, but however the notice for taking of possession and vesting of the land in the Government was only issued on the May 17, 2016.
  103. Notwithstanding the foregoing, counsel for the 2<sup>nd</sup> Defendant added that even then the Plaintiff remained in and retained possession of the suit property up to and including March 2021.
  104. In the premises, it was the submissions of counsel for the 2<sup>nd</sup> Defendant that not having taken possession of the suit property before the payments of the compensation money, the claim for the Interests was therefore not tenable, either as claimed by the Plaintiff or at all.
  105. Based on the foregoing, counsel for the 2<sup>nd</sup> Defendant submitted that the Plaintiff's claim was therefore not proved, to the requisite standard or at all.
  106. In respect of the foregoing submissions, counsel cited the decision in the case of *Kiambu County Tenants Welfare Association versus Attorney General & Another (2017)eKLR* and *Broadway Enterprises Ltd versus Ministry of Land, Housing and Urban Development & 3 Others (2015)eKLR*.
- c. 3<sup>rd</sup> Defendant's Submissions:
107. The 3<sup>rd</sup> Defendant filed written submissions dated the July 18, 2022 and same has raised two pertinent issues for consideration.
  108. First and foremost, counsel for the 3<sup>rd</sup> Defendant has submitted that after the issuance of the letter of award and the corresponding acceptance thereof, the compensation money was processed and paid in accordance with the provisions of Section 19 of the Land Acquisition Act, Cap 295(now repealed).
  109. At any rate, counsel for the 3<sup>rd</sup> Defendant has added that the manner in which the payment was processed and made to the Plaintiff did not violate, breach or infringe upon the Plaintiff's rights as prescribed vide Article 40(3) of the *Constitution*, 2010.
  110. In any event, counsel for the 3<sup>rd</sup> Defendant has added that during the period prior to the payment of the compensation award and even after the remittance of the last payment, the Plaintiff herein continued to occupy, use and benefit from the suit property.
  111. Premised on the foregoing, counsel for the 3<sup>rd</sup> Defendant has submitted that the claims that the Plaintiff's Constitutional rights were breached or violated, are therefore misconceived.



112. Secondly, counsel for the 3<sup>rd</sup> Defendant has also submitted that the issue of Interests is discretionary and hence the court should take into account the various circumstance obtaining in respect of the matter herein.
113. For clarity, counsel pointed out that the Plaintiff even charged or used the title of the suit property to secure a Banking facility long after the suit property had been compulsorily acquired.
114. Essentially, counsel for the 3<sup>rd</sup> Defendant therefore underscored that no interests ought to be decreed and paid to and in favor of the Plaintiff.
115. In a nutshell, counsel pointed out that the Plaintiff's suit therefore ought to be dismissed with cost.

**Issues for Determination:**

116. Having reviewed the Plaint dated the May 5, 2016, the Witness statement and the Bundle of Documents filed on behalf of the Plaintiff and having similarly reviewed the statements of defense filed on behalf of the Defendants; and having similarly considered the oral evidence tendered as well as the written submissions filed by the parties, the following issues do arise and are thus pertinent for determination;

- i. Whether the Plaintiff's suit is Statute barred on the basis of Section 67(b) of the [Kenya Roads Act](#).
- ii. Whether the Plaintiff has established and prove a basis to warrant payment of Interests, either in the manner claimed or at all.

Analysis Determination

Issue Number 1

Whether the Plaintiff's suit is sStatute barred on the basis of Section 67(b) of the [Kenya Roads Act](#).

117. It is common ground that the 1<sup>st</sup> Defendant herein issued and published gazette notice number 16180 of December 23, 2011, whereupon same sought to acquire, inter-alia LR no 13562/28, (the suit property), belonging to and registered in the name of the Plaintiff herein.
118. It is also not in dispute that after the publication of the named gazette notice, the office of the Commissioner of Lands(now defunct), proceeded to and compulsorily acquired a substantial portion of the suit property and thereafter generated a Letter of award dated the April 30, 2012.
119. For completeness, there is no gainsaying that the Letter of award was ultimately accepted by the Plaintiff company, who executed and dispatched an acceptance vide letter dated the May 7, 2012. In this regard, the Plaintiff herein accepted and agreed to receive the compensation assessed in the sum of Kshs 942, 214, 782/= only.
120. Suffice it to point out that upon the acceptance of the letter of award, it was incumbent upon the acquiring authority, in this case the 2<sup>nd</sup> Defendant to process and pay the compensation award promptly, timeously and in full, without any delay.
121. Nevertheless, despite the express stipulations contained vide Section 8 of the Land Acquisition Act, Cap 295 Laws of Kenya (now repealed) and Article 40(3) of the [Constitution](#) 2010, the 2<sup>nd</sup> Defendant failed to timeously/promptly pay the compensation money to the Plaintiff.



122. At any rate, there is no dispute that the compensation award was paid via various instalments, with the last instalment being paid out on the February 11, 2015.
123. Given the foregoing factual situation, the question that now arises is when did the cause of action in favor of the Plaintiff accrue as against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein in relation to the failure to promptly and timeously pay the compensation award.
124. Before venturing to answer the question as to when the cause of action accrued, it is imperative to take cognizance of the provisions of Section 67(b) of the *Kenya Roads Act*.
125. For convenience, same is reproduced as hereunder;  
Section 67(b) of the *Kenya Roads Act* provides:  
'Where any action or other legal proceeding lies against an Authority for any act done in pursuance or execution, or intended execution of an order made pursuant to this Act or of any public duty, or in respect of any alleged neglect or default in the execution of this Act or of any such duty, the following provisions shall have effect-
- a)
  - b) Such action or legal proceedings shall be instituted within twelve months next after the act, neglect: default complained of or, in the case of a continuing injury or damage, within Six months next after the cessation thereof.
126. My reading of the said provision(s) denotes that there are two instances, which are relevant and applicable in determining when the cause of action herein arose and or accrued.
127. The first instance, is computed on the basis of twelve months next after the act, neglect or default complained of accrued or arose. In this regard, the act giving rise to the instant matter relates to the Failure to pay the Compensation award timeously and in any Event within 60 Days from the Letter of Award.
128. Using the first limb herein, it is worthy to note that the Plaintiff has contended and conceded that the liability to pay interests on the award commenced or accrued from the June 30, 2012 until such time that the acquiring authority would pay the full compensation awarded together with accrued Interests.
129. Perhaps, it is imperative to reproduce the contents of paragraph 8 of the Plaintiff and in this regard same is reproduced as hereunder;
8. On May 7, 2012, the Plaintiff duly accepted the award in anticipation of prompt and fair payment of the compensation. By dint of Section 19 of the Land Acquisition Act, Cap 295, possession of the acquired land was vested in the 2nd Defendant. The Plaintiff states that by virtue of the provisions of the Land Acquisition Act, Cap 295 (now repealed), the 1st Defendant and its predecessors as well as the 2nd Defendant became liable to pay interest on the award declared from June 30, 2012 until full payment of the compensation awarded and accrued interest.
130. From the contents of paragraph 8 which has been reproduced herein before, it is apparent and evident that the cause of action relating to the liability to pay Interests on the compensation award accrued or arose on the June 30, 2012.



131. If indeed, the liability to pay Interests accrued as contended by the Plaintiff in terms of paragraph 8 of the Plaint, then it was incumbent upon the Plaintiff to commence, originate and file the impugned proceedings within 12 months from the accrual of the cause of action.
132. Using the first limb of Section 67(b) of The [Kenya Roads Act](#), it then becomes common ground that the suit herein ought and should have been filed at the very latest on the June 29, 2013, same being the 12<sup>th</sup> months period stipulated and provided for under the law.
133. Assuming that the complaint by the Plaintiff was a continuing injury and therefore covered by the second limb of Section 67(b) of the [Kenya Roads Act](#), the question would then be when did the continuing injury/damage cease or abate.
134. As pertains to the cessation of the continuing injury/damage, it would be safe and sound to state that same abated when the last tranche/instalment was paid out to and in favor of the Plaintiff. In this regard, evidence abound that the last tranche was paid on the February 11, 2015.
135. Premised on the foregoing, it would then mean that the Plaintiff herein was obligated to file and or commence the subject suit within Six months of the cessation of the injury/damage.
136. My computation of time would then mean that the 6 months period would be reckoned from the February 11, 2015 and thus the last date for filing the subject suit, relied on the second limb of the impugned provisions would be the August 10, 2015.
137. Either way, the Plaintiff's suit as against the 2<sup>nd</sup> Defendant, appears to be caught up by the law of limitation and essentially Section 67(b) of The [Kenya Roads Act](#).
138. In view of the foregoing, what then arises is whether a suit filed/commenced outside the limitation period is legally tenable and capable of being entertained by a court of law.
139. To my mind, a suit that is filed out of time is statute barred and the cause of action is extinguished and rendered redundant and sterile. In this regard, the claimant becomes non-suited.
140. To vindicate the foregoing observation, it is appropriate to take cognizance of the holding in the case of Wilmary Development Ltd versus National Land Commission & Kenya National Highways Authority (2020)eKLR, where the court held as hereunder;

'Under Section 67(b) of the Roads Act, any claim against the 2nd Defendant ought to have been commenced within twelve months from May 29, 2012. Even if we were to assume that interest is a continuing injury, interest continued to accumulate until February 27, 2017 when the principal was paid, then the Plaintiff was expected to file its claim within six months from February 27, 2017 when the principal sum was paid. This suit was filed on April 3, 2018. It was therefore filed outside the statutory period and hence statute barred.'

141. In further amplification of the import and tenor of the Provisions of Section 67(b) of the [Kenya Roads Act](#), it is also appropriate to adopt and reiterate the holding in the case of John Kibor Kipkorir: (suing as the Administrator of Estate of William Kibor Ruto aka Chebor Ruto) Vs Kenya Rural Roads Authority (2018) eKLR. In this suit, the court stated that:

' It is trite la that other than the [Limitation of Actions Act](#) Cap 22, which is a general statute of limitation for actions, specific statutes such as Kenya Roads Act also provide for the periods of limitation factions as. is the case in section 67 of the Act



Having found that the plaintiff did not comply with section 67 of the Roads Act, it follows that this court does not have jurisdiction to hear and determine this case and therefore down my tools. The court cannot go against the grain to hold otherwise on the issue of jurisdiction. Having downed my tools, I therefore uphold the Preliminary Objection and strike out the plaintiff's suit with no orders as to costs.'

142. Other than the foregoing decision, which have addressed the import and implications of Section 67(b) of The *Kenya Roads Act*, the general consequences of the law of limitation, was amplified and well-articulated vide the decision in the case of Deposit Protection Fund Board in Liquidation of Euro Bank Limited (In Liquidation) vs Rosaline Njeri Macharia & Another [2016] eKLR. This Court stated:

' As to whether the suit was statute barred under the *Limitation of Actions Act*, the suit was filed on July 19, 2007. By dint of paragraphs 24, 25, 26, 28, 29 and 30 of the Complaint, the cause of action was pleaded to have accrued on July 27, 1999 when the alleged breach of contract occurred. As the breach was of a contract relating to lending of money whose security instrument is contested, section 4(1)(a) of the Limitations of Actions Act, Cap 22 requires that an action founded on contract may not be brought after the end of six years from the date on which the cause of action accrued. In this appeal, the 'suit' having been instituted in 2007 when the accrual of the cause of action was in July 1999, it was clearly filed outside the six-year period and consequently was time barred, if indeed it was a suit.'

143. Essentially, a suit that is filed outside the statutorily prescribed timeline is invalid and thus a nullity. In this regard, the Court is disbarred from entertaining same.
144. In view of the foregoing observation, it is my finding and holding that the Plaintiff's suit is therefore legally untenable and barred in law.

#### Issue Number 2

Whether the Plaintiff has established and proved a basis to warrant payment of Interests, either in the manner claimed or at all.

145. The compulsory acquisition pertaining to and concerning the suit property was processed and concluded during the lifetime of the Land Acquisition Act, Cap 295 Laws of Kenya (now repealed).
146. Having been proceeded and concluded during the tenor/regime of the Land Acquisition Act, now repealed, it then means that if any Interests was chargeable and payable, then such Interests would only arise and ensue under the circumstances provided for in the said Act.
147. Owing to the foregoing, it is therefore appropriate to consider the circumstances under which Interests would be payable under the Land Acquisition Act, Cap 295 Laws of Kenya. In this regard, the provisions of Section 16(1) of The Act are imperative.
148. For convenience, the provisions of Section 16(1) are reproduced as hereunder;

Section 16(1) of the Land Acquisition Act Cap 295 [Repealed] provides:-

'Where the amount of any compensation awarded is not paid or paid into Court on or before the taking of possession of the land, the Commissioner shall pay interest on the amount awarded at such rate as may be prescribed which shall not be less than six per cent per annum from the time of taking possession until the time of payment or payment into Court.'



149. From the wording of the forecited provisions of the Land Acquisition Act, it is apparent that the incidences of payment of Interests pertaining to and concerning compensation arising from compulsory acquisition, is only provided for in instances where the acquiring authority, in this case the 2<sup>nd</sup> Defendant enters upon and take possession of the suit property before the amount of compensation is paid.
150. However, where the amount of compensation is paid belatedly or by installment, like in the instant case, provided that the acquiring Authority does not take possession, the provision of Section 16(1) of the Land Acquisition Act become irrelevant, inapplicable and same cannot be relied upon by the Plaintiff herein to found a claim for interests.
151. Similarly, it is important to state that the process leading to the compulsory acquisition having been conducted, processed and concluded during the life time of Land Acquisition Act, Cap 295 Laws of Kenya, now repealed, it is the said provisions that are relevant and applicable and not otherwise.
152. Consequently the provisions of the [Land Act](#) which came into operation upon the enactment of the [Land Act](#) on the May 2, 2012 cannot be invoked and relied upon to anchor a claim for payment of Interests in respect of the subject matter.
153. As pertains to the observation about the applicable legal regime, my attention has been drawn to the holding in the case of Patrick Musimba versus National Land Commission & 4 Others (2016)eKLR at paragraph 129 where the court cited the decision in [Five Star Agencies Ltd v National Land Commission \(2014\)eKLR](#) and observed as hereunder;

In that case, Nyamweya J was faced with a situation where the compulsory acquisition process had commenced and had been finalized save for the compensatory award some six years before the repeal of the Land Acquisition Act. The acquiring authority (the National Land Commission) then gazetted a date for inquiry into the appropriate compensation after the repeal of the Land Acquisition Act. The judge faced with the question as to which law (the Land Acquisition Act or the [Land Act](#)) was applicable at the time of making the award correctly invoked Section 23 of the [Interpretation and General Provisions Act](#) (Cap 2). The judge, in our view, correctly held that as the right to compensation in favour of the land owner and the obligation to compensate the land owner had accrued prior to the repeal of the Land Acquisition Act, the applicable law was the repealed statute when she stated as follows:

'The main reason in my view why the repealed Act is applicable is that the law provides for such situations when a lacuna is created by a repealed Act. Section 23 (3) the [Interpretation and General Provisions Act](#) (Chapter 2 of the Laws of Kenya) provides as follows with respect to rights and remedies that were previously provided for under a repealed law:

'(3) Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears, the repeal shall not -

- (a) Revive anything not in force or existing at the time at which the repeal takes effect; or
- (b) Affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed; or
- (c) Affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed; or



- (d) Affect a penalty, forfeiture or punishment incurred in respect of an offence committed against a written law so repealed; or
- (e) Affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made.'

It is my holding that the investigations or legal proceedings provided in this section include the principles governing assessment of compensation that were provided by the repealed Land Acquisition Act, which are thereby saved as they are not provided for in the repealing law.'

154. In respect of the subject matter, evidence was adduced and tendered that the compensation award, though paid vide installment, the final tranche was made/paid on the February 11, 2015.
155. For the avoidance of doubt it is thus crystal clear that by the time the final payment was made and rendered to the Plaintiff herein, the 2<sup>nd</sup> Defendant had neither taken possession nor entered upon the suit property to warrant a claim for payment of interests in the manner sought vide paragraph 13 of the Plaintiff.
156. At any rate, it is common ground that the notice of taking possession and vesting the suit property in the Government and by extension in the acquiring authority, namely the 2<sup>nd</sup> Defendant was only issued on the May 17, 2016. Certainly, the said notice was issued after the compensation award had been fully paid and remitted to the Plaintiff.
157. Other than the foregoing, it is appropriate to recall that evidence was tendered that even as at 2019, the Plaintiff was still in occupation and possession of the suit property. In fact, the Plaintiff's own witness admitted that the property was still under the guard and care of the Plaintiff company who had employed Security guards to take care of the Borehole and other properties of the Plaintiff company.
158. In the premises, the invocation and reliance on the provisions of Section 16(1) of the Land Acquisition Act to anchor a claim for payment of Interests was/is misconceived and legally untenable.
159. Notwithstanding the foregoing, it is also important to note that even after the suit Property had been compulsorily acquired, the Plaintiff herein had used the title to procure and obtain a Banking facility from Fina Bank Ltd, culminating into a charge being registered against the title.
160. In particular, the witness admitted that indeed the title was used to secure a loan with the Bank and the even at the time of testifying before the court, the last entry on the Certificate of title showed that the suit Title was still charged to the Bank.
161. Other than the Charge to the Bank, the Plaintiff's witness also conceded that the Plaintiff continued to draw water from the borehole for purposes of Bakery business and by extension, the Plaintiff extracted benefits and profit arising from the suit property, long after compulsory acquisition.
162. In view of the foregoing observation, it is my finding and holding that the Plaintiff herein would similarly not be entitled to Interests, in the manner sought or at all.
163. To my mind, to decree payment of Interests to and in favor of the Plaintiff (given the circumstances highlighted above) would be tantamount to double enrichment in favor of the Plaintiff.
164. Certainly, such a scenario would be unconscionable, unfathomable and outrightly inequitable.



165. Consequently, it is similarly my finding that other than the import of Section 16(1) of the Land Acquisition Act, now repealed, which does not provide for payment of Interests in the circumstances of the instant matter, I would still be inclined to find and hold that the Plaintiff is not entitled to Interests on the basis of the latter observation.
166. Finally, it is also appropriate to deal with the Interests rate that was propagated by and at the instance of the Plaintiff. In this regard, it is worthy to recall that the Plaintiff had impleaded interests at 18% per annum.
167. However, I wish to point out that the claim for the said interests rate was made in vacuum, insofar as the Letter of award, which was duly accepted by the Plaintiff herein and thus which anchors the relationship between the Plaintiff on one hand and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on the other hand, did not allude to the charging of Interests.
168. On the other hand, having not provided for the charging of interests, by extension the interests rate which has been impleaded and applied by the Plaintiff herein, the Charging of Interest in the manner alluded to, therefore constitutes a foreign element.
169. Premised on the foregoing, even assuming that the Plaintiff would have been entitled to payment of Interests, which I have found to the contrary, the applicable interests rate would be the one that was stipulated and envisaged vide Section 16(1) of the Land Acquisition Act, Cap 295 Laws of Kenya, now repealed.
170. To this end, I would have applied and subscribed to the holding in the case of *Broadway Enterprises Ltd versus Ministry of Land, Housing and Urban Development & 3 Others (2015)eKLR*, where the court stated and observed as hereunder;

14. The law above is crystal clear and it is to the effect that interest rate is ascertained in two ways; as is prescribed, and if has not been prescribed at a rate not less than six percent. In the instant case, no rate had been prescribed but the Petitioner nonetheless claims 14% interest rate. It failed to provide the basis upon which it sought the said interest rate and I have already said that the *Land Act* of 2012 is not applicable. In that regard, the Court of Appeal in the case of *Shanzu Investments Ltd vs Commissioner of Lands (supra)* awarded the Appellant interest at the rate of six percent and taking guidance from the Court of Appeal I shall award the Petitioner interest at 6 % rate of the principle sum payable to it and from the date of award until payment in full.

171. In a nutshell, it is my finding and holding that the Plaintiff herein has not brought herself within the four corners of Section 16(1) of the Land Acquisition Act, to warrant a finding for payment of Interests.
172. Conversely, I also find and hold that to the extent that the Plaintiff continued to use the title for purposes of obtaining and securing a Banking facility, it would be inappropriate and unconscionable to decree an award of Interests.

### **Final Disposition:**

173. Having analyzed and evaluated the pertinent issues that were highlighted and amplified in the body of the Judgment, I come to the conclusion that the Plaintiff herein has neither established nor proved a case to warrant the orders sought.



174. Consequently and in the premises, I am constrained to and do hereby find that the Plaintiff's case has not been proven to the requisite standards as provided for under the law.
175. Suffice it to point out that the Burden of proof laid at the doorsteps of the Plaintiff. See Section 106, 107, 108 and 109 of the Evidence Act, Chapter 80, Laws of Kenya.
176. In a nutshell, the Plaintiff's suit be and is hereby Dismissed. However, as pertains to costs, I decree that either Party shall bear own costs in the spirit of Articles 10 and 40(3) of the Constitution 2010.
177. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF OCTOBER 2022.**

**OGUTTU MBOYA**

**JUDGE**

In the Presence of;

Kevin Court Assistant

Mr. Elijah Mwangi for the Plaintiff

Mr. Mbuthia for the 1<sup>st</sup> Defendant

Mr. Agwara h/b for Mr. Obok for the 2<sup>nd</sup> Defendant

Mr. Motari for the 3<sup>rd</sup> Defendant

