



**Barnabas East Africa v County Government of Mombasa & 2 others (Constitutional Petition 29 of 2022) [2023] KEELC 20809 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20809 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**CONSTITUTIONAL PETITION 29 OF 2022**

**LL NAIKUNI, J**

**OCTOBER 12, 2023**

**IN THE MATTER OF: THE JURISDICTION OF THE SUPERIOR COURT UNDER ARTICLE 23(1), ARTICLE 162(1), (2) (B), ARTICLE 165 (2) (D) (II) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: CONTRAVENTION, BREACH AND VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 40 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: ARTICLE 2 OF THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**BARNABAS EAST AFRICA ..... PETITIONER**

**AND**

**COUNTY GOVERNMENT OF MOMBASA ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**NATIONAL GOVERNMENT CONSTITUENCIES DEVELOPMENT**

**FUND ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**I. Preliminaries**

1. The Judgment of this court pertains to the filed Constitution Petition dated 21<sup>st</sup> July, 2022 by “Barnabas East Africa” - the Petitioner herein on 25<sup>th</sup> July, 2022. *The Constitution* Petition was brought



under the dint of the provisions of Articles 2, 23(1), 40, 162(1),(2)(b) and 165 (2) (d) (ii) of the Constitution of Kenya 2010.

2. Upon effecting service, the 1<sup>st</sup> Respondent while opposing the Petition filed their Replying Affidavit dated 11<sup>th</sup> November, 2022. The Honourable Court will be dealing with it at a later stage of this Judgement thereof.

## II. The Petitioner's Case

3. The Petitioner sought for the following orders:-
  - a. A declaration be and is hereby issued that the property known as CR:2283/I PLOT NO.VIMN/809 is a private property owned by the Petitioner.
  - b. A declaration be and is hereby issued that there is no public access and/or public and passing through the property known as CR: 2283/I PLOT NO. VIMN/809.
  - c. A declaration be and is hereby issued that the Respondents herein, the County Government of Mombasa, has breached the Petitioner's constitutional rights to acquire and own property as guaranteed by Article 40 of the Constitution of Kenya, 2010.
  - d. A declaration be and is hereby issued that the Respondents herein, the County Government of Mombasa, has by its acts of creating a public access road as complained of herein, unlawfully encroached and trespassed onto the Petitioner's property knows as CR:2283/I PLOT NO.VIMN/809 situate in Magongo area, Mombasa County.
  - e. A declaration be and is hereby issued that the Respondents herein, be compelled to compensate the Petitioner for the encroachment that was unlawful and a violation of the constitution of Kenya 2010 from the year of the construction of the access road until the determination of this suit.
  - f. There be and is hereby issued an order of permanent injunction to restrain the Respondents herein, the County Government of Mombasa, its agents, assigns, employees, officers and/or any person acting on behalf, authority, instructions and/or directives of the Respondents from trespassing on, stepping onto, visiting, vandalizing, demolishing, and generally interfering with the Petitioner's ownership, rights, use and occupation of the property known as CR:2283/I PLOT NO.VIMN/809.
  - g. There be and is hereby issued an order of mandatory injunction to compel the Respondents to restore the suit property known as CR: 2283/I PLOT NO. VIMN/809 to its original state by covering up and blocking the Carbro road passing through the said property and fencing both ends of the road to prevent any access thereon within 14 days of this order in default of which the Petitioner be at liberty to do so and recover the costs thereof from the Respondents by applying and following the execution process provided for in the Civil Procedure Act Cap.21, Laws of Kenya and the Civil Procedure Rules,2010.
  - h. There be and is hereby issued an order compelling the Respondents to revise the Land rates to the value of the portion not covered by the carbro access road created by the Respondents on the property known as CR: 2283/I PLOT NO. VIMN/809.
  - i. The Officer Commanding Station (OCS) of Changamwe Police Station to ensure compliance with this court's orders herein and that peace and law and order is maintained at all times.
  - j. General and Exemplary damages for trespass to and/or conversion of property, and nuisance.



- k. Mesne profits.
- l. Costs of this Petition be paid by the Respondents.
- m. Any further relief or order that this Honorable Court shall deem just and fit to grant.

### III. The Legal Foundation of the Petition

4. The Petition was founded on the following legal provisions:

- a. Article 40 of *the Constitution* of Kenya 2012, which provides that every person has the right to acquire and own property of any description and that the state shall not deprive a person of property of any description unless the deprivation is carried out in accordance with *the Constitution*. and provides for compensation to be made to property holders, in the event of acquisition of Land by the State. The Respondents had breached the Petitioner's right to own and use the suit property under Article 40 of *the Constitution* of Kenya 2010 by:
  - i. Creating an illegal public access road on the suit property yet the suit property is a private property, is not a road reserve and has no provision for a public road.
  - ii. The Respondents had deliberately made it impossible for the Petitioner to occupy, use, develop and enjoy the suit property by literally blocking the Petitioner, its agents and employees from accessing the suit property.
  - iii. The Respondents had continued to charge the Petitioner land rates at a sum of Kenya Shillings Twenty One Thousand Two Eighty hundred (Kshs. 21,280.00/=) per month for the entire parcel of land even after almost half of the suit property is now a road.
  - iv. The Respondent's actions of creating a public access on the Petitioner's private property was illegal and in violation of the Petitioner's constitutional right to property.
  - v. Further the Respondent's actions of creating a public access road on the Petitioner's private property amounted to compulsory acquisition of the Petitioner's private property for public use without paying any compensation to the Petitioner.
  - vi. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents, its employees and agents had made it impossible for the Petitioner to quietly and peaceably occupy use and enjoy the suit property through the following actions: Creating public access road on the suit property when there was none. Continuing to charge and demand land rates for the entire parcel of land without considering the area occupied by the road and reduce the land rates. Removing barriers and beacons placed on the suit property by the Petitioner to prevent any illegal access and the trespass thereon.
  - vii. By making it impossible for the Petitioner to access, occupy, sue and enjoy its property, the 1<sup>st</sup> and 3<sup>rd</sup> Respondents breached under the provision of Article 40 (3) of *the Constitution* which prohibited the State from depriving a person of property, any interest or right over property.
  - viii. The Respondents violated the provision of Article 40 (3) of *the Constitution* by using the Petitioner's private property for public purposes (public access road) without paying any compensation to the Petitioner.
- b. Article 2 (1) of *the Constitution, the Constitution* is the supreme law of the Republic and binds all State organs including at the level of the County Government. The Respondents acted



against the spirit and letter of Article 2 (1) by illegally taking over the Petitioner's property and creating a public access thereon in a manner that is in breach of Article 40 (3) of *the Constitution*.

#### IV. Brief Facts

5. The brief facts of the case are that the Petitioner is the registered owner of the estate in fee simple of the property known as CR:2283/I PLOT NO.VIMN/809 (hereinafter "the suit property") situate in Mombasa County. . The Petitioner owns the suit property absolutely from 16<sup>th</sup> September 2008 from the Government of Kenya held for an estate in fee simple.
6. On or about sometime in the year 2018, the Respondents, without any color of right and without the authority and consent of the Petitioner, entered onto and trespassed on the suit property and paved a wide carbro works public access road through the suit property. The road was created illegally because the suit property is not a road reserve and has no provision for public access road and the same is not provided for in the official map.
7. The Respondents trespassed on the suit property by illegally accessing the same, entering thereon and creating the public access road. Before creating the impugned access road, the Respondents herein never consulted the Petitioner previously before construction of the access road cutting through the suit property with the sole objective of dispossessing and taking away the suit property from the Petitioner. Further and in addition, the Respondents had been working with the National Land Commission under the guise of unblocking an imaginary and an alleged public access passing through the suit property.
8. The main issue in dispute in this Petition was that the Respondent's action as described in this Petition and more specifically the creation of a public access road on the suit property which was a private property and has no provision for a public road is in breach and violation of the Petitioner's constitutional rights.
9. The Petition was premised on the testimonial facts, grounds and the averments made out in the 11 Paragraphed Affidavit of Macmillan Peter Kioko who averred that:
  - a. Barnabas East Africa is the Registered owner of parcel No.CR:2283/1 PLOT NO.VIMN/809 which is situated in Magongo area within Mombasa County measuring about 0.543 hectares at a valuation of a sum of Kenya Shillings Twenty Seven Million One Fifty Thousand (Kshs. 27,150,000.00/-) only as per the County Government of Mombasa Valuation dated 26<sup>th</sup> February, 2018.
  - b. The Petitioner had been a diligent Land Rate payer and without any annexed in the Petition as "MPK – 2".
  - c. On or about year 2018 the Respondents without color of right and consent road which encroached into the parcel of the Petitioner without any compensation from the Respondents.
  - d. The Petitioner has paid the Land Rates at a rate of a sum of Kenya Shillings Twenty One Thousand Two Eighty Hundred (Kshs. 21,280.00/-) which was never revised after the encroachment of almost half an acre of the Parcel of land.
  - e. The Petitioner was aggrieved by the encroachment and trespass that has affected quiet possession and use of its parcel of land, which was never communicated to the Petitioner as required by law.



- f. It was in the interest of justice and fairness that this Honorable Court grants the Petitioner the orders sought in the Petition for compensation for the unlawful trespass and construction of an access road on a private property.
- g. The Respondents would not suffer any loss which could not be compensated by way of costs if the orders sought were granted whereas the Petitioner would be occasioned or subjected to extreme prejudice and injustice.
- h. Unless the Orders sought were granted, the Petitioner would suffer irreparable damage and loss.

## **V. The 1<sup>st</sup> Respondent's Case**

10. In response to the Petition the 1<sup>st</sup> Respondent filed a 12<sup>th</sup> paragraphed reply to the Petition dated 11<sup>th</sup> day of November, 2022 sworn by John Wambua Francis, the County Planning Officer where he averred that:-
- a. In response to the contents of Paragraph 4 of the Supporting Affidavit the access road has been in existence for over 26 years. (Annexed and Marked as "JWF – 1" was a Google Earth image map for the year 2008 showing that the road was in existence way before 2018. The Road was also marked X for ease of identification.)
  - b. The roads where the Petitioner's plot was situated are unsurveyed and the locals have been using the said road for easy access. Furthermore the Petitioner also uses the same and other roads which pass through other residents' Plots to access his property.
  - c. The 1<sup>st</sup> Respondent construction of the cabro works was for planning purposes and they were not responsible at all for the existence of the road which had been explained in detail in paragraph 3 above.
  - d. The Petitioner had not been honest with this Honourable Court in that prior to the construction of the cabro road in the year 2018, it fails to acknowledge that it has used the said road for easy access of its land ever since its ownership and it had never complained of trespass.
  - e. The Petitioner, members of the public and all residents of Port Reiz area had enjoyed the easement peacefully and openly as a matter of right thus making it absolute and indefeasible.
  - f. Further to Paragraph 7 above the easement has been legally acquired through adverse possession.
  - g. The Petitioner had never complained of the existence of the road on their land until the year 2018 when the cabro works was constructed.
  - h. The Petitioner was unjustly trying to enrich themselves by seeking for damages from this Honourable Court.
    - i. The Petition was an abuse of the court process and should be dismissed with costs to the 1<sup>st</sup> Respondent.

## **VI. Submissions**

11. On 4<sup>th</sup> May, 2023 upon the close of the cases, the parties were accorded an opportunity to highlighted the Pleadings. The Petitioner filed their written submissions.



12. On 11<sup>th</sup> July, 2023 upon confirming compliance, the Honorable Court reserved a date for the delivery of Judgment on notice accordingly.

**A. The Written Submissions by the The Petitioner**

13. The Petitioner through the Law firm of Messrs. Bennette Nzamba Co. Advocates filed their written submissions dated 18<sup>th</sup> June, 2023. Ms. Nzamba Advocate for the Petitioner submitted that the Petitioner was a church registered under Societies Act CAP 108 Laws of Kenya. The Petitioner was the registered owner of the estate in the fee simple of the property known as CR:2283/I PLOT NO. VIMN/809 (hereinafter “the suit property”) situated in Mombasa County. The Petitioner had enjoyed absolute ownership of the suit property from 16<sup>th</sup> September 2008. However, in the year 2018, the Respondents herein without any color of right and without the authority and consent of the Petitioner, entered onto and trespassed on the suit property and paved a wide carbro public access road through the suit property.
14. According to the road was created illegally because the suit property was not a road - reserve and had no provision for public access road and the same was not provided for in the official map. The Respondents trespassed on the suit property by illegally accessing the same, entering thereon and creating a public access road. It was worth mentioning that at all material time, the Respondents herein never consulted the Petitioner previously before construction of the access road cutting through the suit property with the sole objective of dispossessing and taking away the suit property from the Petitioner. The Respondents had been working with the National Land Commission under the guise of unblocking an imaginary and alleged public access road passing through the suit property.
15. On the issues for determination the Learned Counsel submitted that the Honourable Court had to determine the following:
- a. Whether the Respondents trespassed onto the suit property and violated the Petitioner’s ownership rights by creating a public access road without its consent;
  - b. Whether the Respondents had any legal basis or color of right for entering the suit property and paving a public access road through the Petitioner’s property without any provision for public access road according to the official map;
  - c. Whether the Petitioner was entitled to Injunction remedies and other reliefs the Court might deem fit for the illegal construction of a public access road and costs.
16. On whether the Respondents trespassed onto the suit property and violated the Petitioner’s ownership rights by creating a public access road without its consent, the Learned Counsel argued that through the Supporting Affidavit of Macmillan Peter Kioko dated 25<sup>th</sup> July, 2022 and filed on 25<sup>th</sup> July, 2022, it was averred that the Petitioner was the registered owner of the suit property which is situated in Magongo area within Mombasa County measuring about 0.543 hectares and valued at Kenya Shillings Twenty Seven Million One Hundred and Fifty Thousand (Kshs. 27,150, 000.00/=) as per the County Government of Mombasa valuation dated 26<sup>th</sup> February, 2018. The Supporting Affidavit of Macmillan Peter Kioko further states that the Petitioner had at all material times been a diligent payer of Land rates without any accumulated arrears. It was stated in the Supporting Affidavit of Macmillan Peter Kioko that on or about the year 2018, the Respondents constructed a carbro access road which encroached into the suit property without any consent from the Petitioner or compensation to them.



17. The Learned Counsel further argued that the Petitioner kept on paying land rates amounting to a sum of Kenya Shilling Twenty One Thousand Two Eighty Hundred (Ksh.21,280.00/=) diligently to the 1<sup>st</sup> Respondent despite the encroachment that involved destruction of a fence and beacons used to demarcate boundaries in the suit property. The land rates payable were never revised downwards in consideration of the fact that part of the suit property was now a public access road thus reducing its size and affecting the extent to which the Petitioner could enjoy quiet and peaceful occupation of the suit property. The Petitioner's ownership rights were violated from the trespass and arbitrary construction of an access road without his consent or suitable remedies being paid for the invasion.
18. The Learned Counsel informed the Honourable Court with the help of the Black's Law Dictionary which defined trespassing as:-

“ An unlawful act committed against the person or property of another; especially, wrongful entry on another's real property.”
19. The Learned Counsel further argued that it was well established that trespass on its own in a tort under common law that affected peaceful ownership and enjoyment of property by the owner or individual in its possession. Section 3 (1) of the *Trespass Act*, Cap 294 provides that:

“ Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”
20. From the foregoing, it was clear that the Petitioner is the absolute, rightful and indefeasible owner of the suit property herein, the Petitioner had also shown the Respondents were guilty of encroaching and trespassing onto the suit property. The said encroachment has denied the Petitioner use, occupation, possession and enjoyment of said land. It was this loss of use and all the incidental rights that have been infringed by the Respondents that the validly registered and land rate-paying Petitioner seeks compensation for.
21. The Learned Counsel relied on the case of “Duncan Nderitu Ndegwa – Versus - Kenya Pipeline Company Limited & another [2013] eKLR” which was cited in the case of “Keiyan Group Ranch – Versus - Samwel Oruta & 9 others [2021] eKLR” where P. Nyamweya J. held that:-

“ ...once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff's right to use and enjoy the suit property occasioned by the 1st and 2nd Defendants trespass.”
22. In the Halsbury Laws of England 4th Edition, Vol 45 at para 26, 1503, it is provided as follows:-
  - (a) If the Plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss.
  - (b) If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.
  - (c) Where the Defendant has made use of the Plaintiff's land, the Plaintiff is entitled to receive by way of damages such sum as would reasonably be paid for that use.-



23. On the issue of general damages for trespass, the Learned Counsel submitted that the issue that arose was: what is the measure of it? This question was answered by E. Obaga J in the case of “Philip Ayaya Aluchio – Versus - Crispinus Ngayo [2014] eKLR” cited in the case of “Keiyian Group Ranch – Versus - Samwel Oruta & 9 others [2021] eKLR” where it was held as follows:

“The Plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage? It has been held that the measure of damages for trespass is the difference in the value of the plaintiffs property immediately after the trespass or the costs of restoration, whichever is less See Hostler- VS-Green Park Development Co.986 S.W 2d 500(No.App.1999).”

24. As for General Damages for trespass, the Learned Counsel argued that psychological harm the Petitioner wishes to persuade the Court through the case of “Park Towers Ltd – Versus - John Mithamo Njika et al (2014)eKLR”, cited in “Alex Waigera Mwaura – Versus - Chania Power Company Limited & another [2020] eKLR” where the Court held that:-

“I agree with the learned judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages, The Court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case.”

25. Further, in the case of “Philip Aluchio – Versus - Crispinus Ngayo [2014] eKLR”, cited in “Alex Waigera Mwaura – Versus - Chania Power Company Limited & another [2020] eKLR” the Court held as follows:-

“...The Plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage. It has been held that the measure of damages for trespass is the difference in the value of the Plaintiff’s property immediately after the trespass or the costs of restoration, whichever is less.....”

26. From the foregoing the Learned Counsel believed that this Honorable Court shall award general damages for the trespass and construction of a cabro road across and through the suit property to a quantum that it finds adequate and reasonable in line with the suit property’s valuation of a sum of Kenya Shillings Twenty Million One Hundred and Fifty Thousand (Kshs. 27,150,000/-) by the 1<sup>st</sup> Respondent.

27. It was the Learned Counsel’s assertion that the Respondents herein trespassed into the suit property which was fenced and under private ownership so as to construct the carbroad without its consent back in the year 2018. It was the Petitioner’s finding that no road reserve of a public road or a road of access was indicated to be in existence where the suit property is situated in Magongo and therefore a map could not be amended to create a public road or a road of access at the instance of the Respondents without compliance with the requirements of Section 9 of the *Public Roads and Roads of Access Act*, Cap. 399 without an application being made to the District Roads Board for Mombasa being the area where the land was situated. They were guided by the provision of Section 9 (1) of the aforementioned Act provides:-

“Where any owner or occupier of Land is in respect of his Land so situated in relation to a public road which is passable to Vehicular traffic, or to a railway station or halt that he has not reasonable access to the same, he may make application to the board of the district in which such Land is situated for leave to construct a road or roads



(herein after called a road of access) over any lands lying between his land and such public road or railway station or halt, and every such application shall be made in duplicate in the form and contain the particulars required in the first schedule to this Act.”

28. The Learned Counsel argued that the Petitioner faulted the Respondents for trespassing into the suit property leading to the illegal construction of the carbro road in contravention of the provisions provided for in the Public Roads and Roads of Access Act, Cap 399 in that no application which they were aware of had been made by the Respondents to the District Roads Board of Mombasa and the Petitioner had never been served with the notice to show cause provided for in the provision of:- Section 10 of the Public Roads and Roads of Access Act, Cap. 399. Section 10 (1) provides:-

“On the receipt of such application for leave to construct a road of access, the board shall serve a notice by personal service or by registered post to the last known address of the owner or occupier of Land over which the proposed road of access is to pass, calling upon him to show cause within one month why the proposed road of access should not be granted.”

29. While the above requirements was legally binding and crucial to construction of public roads and roads of access, the Respondents flagrantly chose not to obey any of them. The Respondents instead decided to go ahead with construction of the public access road notwithstanding the fact that the 1<sup>st</sup> Respondent knew who owned the suit property as it regularly received land rate payments from the Petitioner, knew of its address and could easily had served/informed them of the construction plans and notice to show cause.

30. The Learned Counsel relied on the case of “Dellian Langata Limited – Versus - Symon Thuo Muhia, Mary Njoki Thuo, Agricultural Finance Corporation, Nairobi City Council & Council of Legal Education [2018] eKLR” which was cited in the case of:- “Jackson Kipngeny Kipkurere & another – Versus - David Busienei & another [2021] eKLR” in which Justices Koome, (as she then was) Okwengu and Kiage, JJ.A observed;

“On the other hand road of access has connotation of private usage and is characterized by a party having made an application to have an access road constructed to connect or link such party to utilities such as a public road, railway station or a halt.”

31. The Respondents and in particular the 1<sup>st</sup> Respondent having not made such an application as required by law and supported by case law was in violation of not only trespass but arbitrary actions that affect the Petitioner’s right to property and in particular the provision of Article 40 (3) of The Constitution of Kenya, 2010. A surveyor’s report by Edward M. Kiguru Land Surveyors showed the extent of the encroachment into the suit property which had been done through the Respondents instructions/directions. Having addressed the first issue of trespass, unprocedural and illegal construction of a public access carbro road, the Petitioner would move onto the second and third limbs in as far as issues for determination was concerned.

32. On whether the Respondents had any legal basis or color of right for entering the suit property and paving a public access road through the Petitioner’s property without any provision for public access road according to the official map the Learned Counsel submitted that for this issue, she relied on the case of “Johnbosco Muinde Kamali & 5 others – Versus - Stephen Katili



& Another, (2019) eKLR” as cited in “Jackson Kipngeny Kipkurere & another – Versus - David Busienei & another [2021] eKLR” where Justice O. Angote observed;

“If indeed the most convenient road to their properties is parcel number 450, then the procedure for creating a public access road should be followed. That procedure is provided for under the Public Roads and Roads of Access Act or Section 98 of the Land Registration Act. Under section 98 of the Land Registration Act, an owner of the Land can voluntarily grant an easement over his land. The law does not allow the court to compel the owner of the Land to create an easement. If indeed the proposed interested parties are Land locked, which they have admitted they are not, then the court, under the provisions of section 140 of the Land Act, can make an access order in respect of the suit land subject to several conditions including reasonable compensation.”

33. Furthermore, the provision of Section 10 (1) of the Public Roads and Roads of Access Act, Cap 399 provides that upon receiving an application for permission to construct an access road, the board was required to send a notice to the owner or occupier of the land through personal service or registered post. The notice would be sent to the last known address of the owner or occupier, asking them to provide a reason within one month as to why the proposed access road should not be approved. From the above legal provisions that the Learned Counsel relied upon, it was evident that the Respondents acted unilaterally and with disregard to the sanctity and rights of a registered owner of land. The Petitioner noted that argument of easement relied upon in the Affidavit of John Wambua Francis dated 11<sup>th</sup> November, 2022 and filed on the same day, was not only erroneous but inapplicable for this scenario.
34. While the 2<sup>nd</sup> Respondent had powers vested by the provision of Section 143 of the Land Act 2012 to create public rights of way which could be communal rights of way under the proviso in the provision Section 145 of the Land Act, 2012, there was a procedure and laid down process to apply for such communal rights of way which was also not adhered to by the 1<sup>st</sup> Respondent to the detriment of the Petitioner who was a registered owner of the suit property. The 1<sup>st</sup> Respondent through its unilateral actions and with no clear rights and disregard of the law should have made attempts to compensate the Petitioner under the provision of Section 148 (1) of the Land Act, 2012 which provides:

“Section 148 Compensation in respect of public right of way

- (1) compensation shall be payable to any person for the use of land, of which the person is in lawful or actual occupation, as a communal right of way and, with respect to a wayleave, in addition to any compensation for the use of land for any damage suffered in respect of trees crops and buildings as shall, in cases of private land, be based on the value of the land as determined by a qualified valuer.



35. The Petitioner having the legally registered and owner of the suit property was not granted any compensation as stipulated under the provision of Section 148(1) of the Land Act, 2012. Section 148 (4) of the Land Act, 2012 goes ahead to state:

“The duty to pay compensation payable under this section shall lie with the State Department, county government, public authority or corporate body that applied for the public right of way and that duty shall be complied with promptly.”

36. The Petitioner having established that the trespass leading to encroachment and construction of a public access carbro road occurred in 2018, no attempts at compensation or negotiations for compensation have been made by the either the 1<sup>st</sup> or 2<sup>nd</sup> Respondents herein 5 years down the line. This violation of quiet and peaceful occupation of land and arbitrary act by the Respondents should not be allowed to continue as it has negatively impacted the use and enjoyment of ownership rights in relation to the suit property. In a country like Kenya where rule of law and democracy had been the jewel of East and central Africa, constitutionalism should be allowed to grow, expand and thrive. The actions of the Respondents to trespass the suit property and forcefully construct a public access road for communal use/communal right of way without even compensating the Petitioner, violated the provision of Article 10 of the Constitution of Kenya, 2010 in the realm of national values and principles of governance.

37. On whether the Petitioner was entitled to Injunction remedies and other reliefs the Court might deem fit for the illegal construction of a public access road and costs, the Learned Counsel relied on the case of “Sheema Co-operative Runching Society and 31 others – Versus - the Attorney General,(2013) UGHC 35” which was cited in “Nicholas Kiplagat Mibei – Versus - Michael Kirwa Chepsoy & another [2019] eKLR” the court held that the government corporation could not just enter on anybody's land without first acquiring it and paying compensation and the court found that Article 26(1)(2) and Article 237 of the Ugandan Constitution had been violated. Article 40(3) of Constitution of Kenya 2010 prohibited deprivation of private property by the state unless the same was carried out in accordance with the Constitution and any Act of Parliament. The conditions for the grant of such an injunction were long settled in the off-cited case of “Giella – Versus - Cassman Brown & Company Limited (1973 EA 358”, where the court stated thus:

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

38. In this matter, the Petitioner had established “a prima facie case’ which had a high probability of success this was due to infringement and/or contravention of its right to acquire and own property under Article 40 of the Constitution of Kenya,2010.

39. The Learned Counsel concluded that the Petitioner prayed for the following:

- a. A declaration be issued that the property known as CR:2283/I PLOT NO. VIMN/809 is a private property owned by the Petitioner
- b. A declaration that there is no public access and/or public road passing through the property known as CR:2283/I PLOT NO. VIMN/809



- c. A declaration be issued that the 1<sup>st</sup> Respondent herein, the County Government of Mombasa, has breached the Petitioner's Constitutional rights to acquire and own property as guaranteed by Article 40 of *the Constitution* of Kenya, 2010
- d. A declaration be issued that the Respondents herein and particularly the 1<sup>st</sup> Respondent has by its acts of creating a public access road as complained of herein unlawfully encroached and trespassed onto the Petitioner's property known as CR:2283/I PLOT NO.VIMN/809 situated in Magongo area, Mombasa County
- e. A declaration be issued that the Respondents herein, be compelled to compensate the Petitioner for the encroachment that was unlawful and a violation of *the Constitution* of Kenya, 2010 from the year of the construction of the access road until the determination of this suit
- f. There be and is hereby issued an order of Permanent injunction to restrain the Respondents herein; the County Government of Mombasa, its agents, assigns, employees, officers and/or any person acting on behalf, authority, instructions and/or directives of the Respondents from trespassing on, stepping onto, visiting vandalizing, demolishing and generally interfering with the Petitioner's ownership rights, use and occupation of the property known as CR:2283/I PLOT NO.VIMN/809.
- g. That there be and is hereby issued an order of mandatory injunction to compel the Respondents to restore the suit property known as CR:2283/I PLOT NO.VIMN/809 to its original state by covering up and blocking the carbro road passing through the said property and fencing both ends of the road to prevent any access thereon within 14days of this order in default of which the Petitioner be at liberty to do so and recover the costs thereof from the Respondents by applying and following the execution process provided for in the *Civil Procedure Act* Cap 21, Laws of Kenya and the Civil Procedure Rules, 2010.
- h. There be issued an order compelling the Respondents to reverse the Land rates to the Respondents on the property known as CR:2283/I PLOT NO.VIMN/809
- i. The Officer Commanding Station (OCS) OF Changamwe Police Station to ensure compliance with this court's orders herein and that peace and law and order be maintained at all times
- j. General and exemplary damages for trespass to and/or conversion of property, and nuisance
- k. Mesne profits
- l. Costs of this Petition be paid by the Respondents
- m. Any further relief or order that this Honorable Court shall deem just and fit to grant.

#### **B.The Written Submissions by the 1<sup>st</sup> Respondent**

- 40. On 13<sup>th</sup> July, 2023, the Learned Counsel for the 1<sup>st</sup> Respondent, the Law firm of Messrs Elizabeth Kuria for the County Attorney for the County Government of Mombasa filed their written submissions of even date.



41. M/s. Kuria Advocate commenced her submission by providing a brief introduction and the facts of the matter. She submitted that the Petitioner institute this suit via a Petition dated 21<sup>st</sup> July 2022. Thereafter, the 1<sup>st</sup> Respondent responded by way of a Replying Affidavit dated 11<sup>th</sup> November 2022 sworn by JOHN WAMBUA FRANCIS its County Planning officer. The Leraned Counsel indicated that the Honourable Court directed and with the consensus Of all the parties that the Petition be disposed of by way of written submissions.
42. According to the Learned Counsel, from the records, the Petitioner claimed that the 1<sup>st</sup> Respondent had infringed on their constitutional rights under the provision of Article 40 of *the Constitution* of Kenya 2010. This was done through the creation of a cabro works access road onto their land by the 1<sup>st</sup> Respondent. Hence, being an act of trespass as alleged by the Petitioners. However, the Counsel averred that the 1<sup>st</sup> Respondent vehemently denied having been involved in any acts of infringement of the Petitioner's fundamental rights. On the contrary, the 1<sup>st</sup> Respondent stated that the access road had always been in existence before the cabro works road was constructed. Despite all these case, the Petitioner never complained of the existence of the road which the has enjoyed using. It was the Learned Counsel's assertion that the Petitioner was unjustly trying to enrich themselves by illegally seeking for damage through this Honourable Court.
43. To advance her argument further, the Learned Counsel raised three (3) issues to be considered for the determination by this Honorable Court. These were namely:- Firstly, whether the 1<sup>st</sup> Defendant was a trespasser on the suit property. On this issue the Learned Counsel relied on the decision of ELC Appeal no. 285 of 2015 - Abdalla Mohamed Abdalla - Versus - County Government of Mombasa (unreported ) where the Learned Justice C Yano while dismissing the Plaintiff's suit for the Plaintiff's failure to prove his case on a balance of probabilities observed it under Paragraph 36 of the Judgment as follows:-
- “From the foregoing, therefore, it was clear that even prior to the construction of the road by the Defendant using cabro material, the suit properties had for long period been used as an access road by the Plaintiff himself to access his other business and residential premises. It is to be noted that the report (P Exh 13) clearly confirms that if the Plaintiff were to develop the suit properties a number of properties, including those of the Plaintiff himself would have no access.
44. The Learned Counsel averred that the Learned Judge went on to state that:-
- “ordering the Defendant to remove the road and restore the properties to its previous state would be superfluous as the previous state of the properties were also a road albeit an access road with no cabro. I say so because from the Plaintiff's own evidence the suit properties have always been used as a road. From the peculiar circumstances of this case, I would decline to order the defendant to remove the road as the end result would still be a road. That is my finding and order in that regard.
45. In the present case, the Learned Counsel argued that the 1<sup>st</sup> Respondent never trespassed onto the property for the Petitioner as alleged. She opined that by way of a Replying Affidavit sworn by John Wambua Francis, the 1st Respondent's County Planning Officer under the contents of paragraph 3, he deponed that the access road had been in existence for over 26 years as evidenced by the Google Earth Image Map for the year 2008 marked as “JWF – 1” which was also the year that the Petitioner became the owner of the suit land. Accordingly, the 1<sup>st</sup> Respondent constructed the cabro for purposes of planning only as the access road had always been in existence. On this front, the Counsel advanced



two issues, firstly it followed that the successive use of the plot as an access road by the public for a long period rendered the plot public land. Secondly if the owner of the plot was to develop the land a number of properties including theirs would have no access as evidenced by identification of the road marked as X on the Google Earth Image Map.

46. Similarly, the Learned Counsel contended that for the Honourable Court to grant an order of mandatory injunction to compel the Respondents to restore the suit property known as CR 2283/1 PLOT NO. VIMN/809 to its original state by covering up and blocking the Cabro road passing through the said property and fencing both ends of the road to prevent any access thereon within 14 days would be unnecessary as the previous state of the road was also access road way before the Petitioner acquired the plot.
47. The Second issue for consideration raised by the Learned Counsel was whether the 1<sup>st</sup> Respondent had violated the Petitioner's fundamental rights as provided under the provision of Article 40 of *the Constitution* of Kenya 2010. On this issue, the Learned Counsel cited the case of "Civil Appeal No. 114 of 2018 between Abdalla Mohammed – Versus - County Government of Mombasa (2019) eLKR which was an appeal from ELC No. 285 of 2015 Abdalla Mohamed Abdalla – Versus - County Government of Mombasa (unreported). As mentioned above. While dismissing the Appeal the Court of Appeal Judges, Learned Judge Alnashir Visram, W. Karanja and P.O Kiage observed the following:-

“ the Appellant has not shown what prejudice this improvement has caused him. Article 40 (iii) of *the Constitution* of Kenya 2010 provides that the state shall not deprive a person of property of any description, or of any interest in, or right over, property of any description. In this case the property has not been taken away from the Appellant. There is no evidence either that the property's value has dissipated and the court cannot speculate what might happen in future. The Learned Judge found the evidence before the court that the removal of the cabro would be superfluous as the access road would still remain the way it was before only this time in a worse state. We agree with his findings and cannot fault the judge for failing to order removal of the cabro. The Appellant should sit back and enjoy the improvements made on his access road instead of fighting to have it reverted to its former dusty dilapidated state.....we find this Appeal devoid of merit and dismiss it with no orders as to costs.”

48. Accordingly to the Learned Counsel, similarly in the present case the Petitioner's rights under the provision of Article 40 of *the Constitution* of Kenya 2010 had not been violated. In fact, the access road was improved to a cabro road. The Petitioner had not also provided any evidence that the property value had dissipated and so the order seeking that their land rates be revised was absurd.
49. Finally, the Learned Counsel raised an issue as to whether the Petitioner was entitled to the reliefs sought. The Learned Counsel cited the case of "ELC Appeal No. 285 of 2015 Abdalla Mohamed Abdalla (Supra) unreported where the Learned Justice C Yano in Paragraph 38 of the Judgment stated that:-

“ the alternative prayer seeks to compel the Defendant to pay the sum of Kenya Shillings Fifty Six Million (Kshs. 56,000,000/=) to the Plaintiff as compensation for acquiring the suit properties. In my considered view the suit properties remain the properties of the Plaintiff and he is still utilizing it as before to access his other premises. The Plaintiff has not been deprived of the use and benefit of his properties and in my view he has not suffered any loss and damage. The properties have not been acquired by the defendant and I do not think that this court has the power to compel the defendant to acquire it. The suit properties remain



the properties of the Plaintiff and it is up to the plaintiff to decide what he wants to do with it.”

50. On this issue, the Learned Counsel averred that in instant case, the Petitioner had been using the access road since the year 2008 as it had been in existence way before the year 2008. The cabro road was constructed in the year 2018 and the Petitioner was still using it. It had no other way to access their property. Moreover the access road was also used by the other members of the public. In that case then the property still remained the property of the Petitioner. They had not been deprived of the use and benefit of its property. Since they had not suffered any loss and damage they were not entitled to the relief's sought. Besides, the 1<sup>st</sup> Respondent had not acquired the Petitioner's property.
51. In conclusion, the Learned Counsel submitted that having established that the Petitioner's rights had not been violated, the 1<sup>st</sup> Respondent prayed that the Petition be dismissed with costs to the 1<sup>st</sup> Respondent.

## VII. Analysis and Determination

52. I have carefully considered all the filed pleadings pertaining to the Petition dated 21<sup>st</sup> July, 2022, the Supporting and Replying Affidavits by both the Petitioner and the Respondents, the articulate written submissions, the cited authorities provisions of Constitution of Kenya and the Provisions of the law.
53. For the Honorable Court to reach an informed, just, fair and reasonable decision, it has condensed the Subject matter into the following three (3) salient issues for its determination. These are:-
- a. Whether the Petition by the Petitioner meets the threshold for Constitution Petitions.
  - b. Whether *the Constitution* Petition has any merit and, if affirmative, if the parties were entitled to the reliefs sought?
  - c. Who will bear the Cost of the suit.

### ISSUE No. a). Whether the Petition by the Petitioner meets the threshold for Constitution Petitions.

54. Under this Sub heading, for the Court to respond to this query, assessing certain aspects of the concept of Constitutional provision are inevitable. To begin with, under the provision of Article 2 (1) & (4) of Constitution of Kenya defines *the Constitution* as being the Supreme law of the Republic and it bids all persons and all States at all levels. Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency and any act or omission in in contravention of this Constitution is invalid.
55. Additionally, I dare say that a Constitution is a living tissue. Just like all other tissues, it has to be fed and watered. It breathes without oxygen and freshness it will die. I have learnt that these things are not just metaphorical. They are real. As a matter of course, *the Constitution* of Kenya under Article 259 (1) provides a guide on how it should be interpreted as such:-
- a. Promotes its purposes, values and principles;
  - b. Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
  - c. Permits the development of the law; and
  - d. Contributes to good governance.....”
56. This Court must give a liberal interpretation and consideration to any provision of *the Constitution* and have regard to the language and wording of *the Constitution* and where there is no ambiguity attempt



to depart from the straight texts of *the Constitution* must be avoided. It must always be interpreted and considered as a whole with all the provisions sustaining and coordinating each other and not destroying the other.

57. Based on the principles set out in the edit of the Court of appeal case of the “Mumo Matemu – Versus – Trusted Society of Human Rights Alliance & Another (2013) eKLR” provided the standards of proof in the Constitutional Petitions as founded in the case of “Anarita Karimi Njeru – Versus - Republic [1980] eKLR 154” where the court is satisfied that the Petitioner’s claim were well pleaded and articulated with absolute particularity. It held:-

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

Further, in the “Thorp – Versus – Holdsworth (1886) 3 Ch. D 637 at 639, Jesse, MR said in the year 1876 and which hold true today:

“The whole object of pleadings is to bring the parties to an issue and the meaning of the rule.....was to prevent the issue being enlarged which would prevent either party from knowing when the cause came on for trial what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues and thereby diminish expense and delay especially as regards the amount of testimony required on either side at the hearing.”

58. The provision of Article 23 (3) of *the Constitution* empowers a court to grant appropriate reliefs in any proceedings brought under Article 22 where there has been violation or threat of a violation of a fundamental right or freedom. The relief may include a conservatory order.
59. In this Petition, the Petitioner is seeking a declaration that Respondent herein, the County Government of Mombasa, has breached the Petitioner's constitutional rights to acquire and own property as guaranteed by Article 40 of *the Constitution* of Kenya, 2010 and a declaration be and is hereby issued that the property known as Mombasa/M.S/BLOCK 1/1674 is a private property owned by the Petitioner.
60. This Honorable Court must establish the constitutional basis of the Petition which is founded under paragraph 13 to 19 which include:-
- i. Under Article 40 of *the Constitution* of Kenya,2010 (hereinafter “*the Constitution*”), the Petitioner has a right to acquire and own property. The said right includes the right to occupy, use and develop such property. The Respondents have breached the Petitioner’s right to own and use the suit property under Article 40 of *the Constitution* of Kenya 2010 by:
    - a. Creating an illegal public access road on the suit property yet the suit property is a private property, is not a road reserve and has no provision for a public road.
    - b. The Respondent has deliberately made it impossible for the Petitioner to occupy, use, develop and enjoy the suit property by literally blocking the Petitioner, its agents and employees from accessing the suit property.
    - c. The Respondents have continued to charge the Petitioner land rates at Kshs. 21,280.00/=per month for the entire parcel of land even after almost half of the suit property is now a road.
  - ii. The Respondent's actions of creating a public access on the Petitioner’s private property is illegal and in violation of the Petitioner’s constitutional right to property.



- iii. Further the Respondent's actions of creating a public access road on the Petitioner's private property amount to compulsory acquisition of the Petitioner's private property for public use without paying any compensation to the Petitioner.
- iv. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents, its employees and agents have made it impossible for the Petitioner to quietly and peaceably occupy use and enjoy the suit property through the following actions:
  - a. Creating public access road on the suit property when there is none.
  - b. Continuing to charge and demand land rates for the entire parcel of land without considering the area occupied by the road and reduce the land rates.
  - c. Removing barriers placed on the suit property by the Petitioner to prevent any illegal access and the trespass thereon.
- v. By making it impossible for the Petitioner to access, occupy, sue and enjoy its property, the Respondent breached Article 40(3) of *the Constitution* which prohibits the State from depriving a person of property, any interest or right over property.  
The Respondent violated Article 40(3) of *the Constitution* by using the Petitioner's private property for public purposes (public access road) without paying any compensation to the Petitioner.
- vii. Under Article 2 (1) of *the Constitution, the Constitution* is the supreme law of the Republic and binds all State organs including at the level of the County Government. The Respondents acted against the spirit and letter of Article 2 (1) by illegally taking over the Petitioner's property and creating a public access thereon in a manner that is in breach of Article 40 (3) of *the Constitution*. Indeed the argument by the 1<sup>st</sup> Respondent to the effect that despite the construction of the cabro works road the suit property remains to be a private property belonging to the Petitioner is not only absurd, unrealistic but superfluous as the same is now being used for public purposes.

61. Thus, in application of these set out legal principles for filing a Constitutional Petition, the Honorable court is fully satisfied that the Petitioner herein has dutifully complied and fully met the threshold of reasonable precision in pleadings for instituting this Petition against the Respondent herein and pleading for the prayers sought.

**ISSUE No. b). Whether the Constitutional Petition has any merit and, if affirmative, if the parties were entitled to the reliefs sought?**

62. Under this sub title it is important for this Honourable Court to analyze the background of this suit. The Petitioner is the registered owner of the estate in fee simple of the property known as CR:2283/I PLOT NO.VIMN/809 (hereinafter "the suit property") situate in Mombasa County. The Petitioner owns the suit property absolutely from 16<sup>th</sup> September, 2008 from the Government of Kenya held for an estate in fee simple. On or about sometime in the year 2018, the Respondents, without any color of right and without the authority and consent of the Petitioner, entered onto and trespassed on the suit property and paved a wide carbro public access road through the suit property. The road was created illegally because the suit property is not a road reserve and has no provision for public access road and the same is not provided for in the official map. The Respondents trespassed on the suit property by illegally accessing the same, entering thereon and creating the public access road. Before creating the impugned access road, the Respondents herein never consulted the Petitioner previously before construction of the access road cutting through the suit property with the sole objective of



- dispossessing and taking away the suit property from the Petitioner. . Further and in addition, the Respondents have been working with the National Land Commission under the guise of unblocking an imaginary and an alleged public access passing through the suit property.
63. But first the Court must establish the constitutional basis of the Petition which is founded under paragraph 13 to 19 which include:-
- a. Article 40 of *the Constitution* of Kenya,2010 (hereinafter “*the Constitution*”), the Petitioner has a right to acquire and own property. The said right includes the right to occupy, use and develop such property. The Respondents have breached the Petitioner’s right to own and use the suit property under Article 40 of *the Constitution* of Kenya 2010 by:
    - i). Creating an illegal public access road on the suit property yet the suit property is a private property, is not a road reserve and has no provision for a public road.
    - ii). The Respondent has deliberately made it impossible for the Petitioner to occupy, use, develop and enjoy the suit property by literally blocking the Petitioner, its agents and employees from accessing the suit property.
64. The Respondents have continued to charge the Petitioner land rates at Kenya Shilling Twenty One Thousand Two Eighty Hundred (Kshs. 21,280.00/=) per month for the entire parcel of land even after almost half of the suit property is now a road. The Respondent’s actions of creating a public access on the Petitioner’s private property is illegal and in violation of the Petitioner’s constitutional right to property.
65. Further the Respondent’s actions of creating a public access road on the Petitioner’s private property amount to compulsory acquisition of the Petitioner’s private property for public use without paying any compensation to the Petitioner. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents, its employees and agents have made it impossible for the Petitioner to quietly and peaceably occupy use and enjoy the suit property through the following actions:
- i. Creating public access road on the suit property when there is none.
  - ii. Continuing to charge and demand land rates for the entire parcel of land without considering the area occupied by the road and reduce the land rates.
  - iii. Removing barriers placed on the suit property by the Petitioner to prevent any illegal access and the trespass thereon.
66. By making it impossible for the Petitioner to access, occupy, sue and enjoy its property, the Respondent breached the provision of Article 40 (3) of *the Constitution* which prohibits the State from depriving a person of property, any interest or right over property.
67. The Respondent violated the provision of Article 40 (3) of *the Constitution* by using the Petitioner’s private property for public purposes (public access road) without paying any prompt, adequate, fair and just compensation to the Petitioner. Under Article 2 (1) of *the Constitution, the Constitution* is the supreme law of the Republic and binds all State organs including at the level of the County Government. The Respondents acted against the spirit and letter of Article 2 (1) by illegally taking over the Petitioner’s property and creating a public access thereon in a manner that is in breach of Article 40 (3) of *the Constitution*.



68. As a matter of course, *the Constitution* of Kenya under Article 259(1) provides a guide on how it should be interpreted as such:-

This Constitution shall be interpreted in a manner that:-

- a. Promotes its purposes, values and principles;
- b. Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
- c. Permits the development of the law; and
- d. Contributes to good governance.....”

69. This Court must give a liberal interpretation and consideration to any provision of *the Constitution* and have regard to the language and wording of *the Constitution* and where there is no ambiguity attempt to depart from the straight texts of *the Constitution* must be avoided. Further, it is important to fathom that *the Constitution* is “a living instrument having a soul and consciousness of its own”. It must always be interpreted and considered as a whole with all the provisions sustaining and coordinating each other and not destroying the other.

70. Based on the principles set out in the edit of The Court of appeal case of the “Mumo Matemu – Versus - Trusted Society of Human Rights Alliance & Another (2013) eKLR” provided the standards of proof in the Constitutional Petitions as founded in the case of “Anarita Karimi Njeru – Versus - Republic [1980] eKLR 154” where the court is satisfied that the Petitioner’s claim were well pleaded and articulated with absolute particularity. It held:-

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

Further, in the “Thorp – Versus – Holdsworth (1886) 3 Ch. D 637 at 639, Jesse, MR said in the year 1876 and which hold true today:

“The whole object of pleadings is to bring the parties to an issue and the meaning of the rule.....was to prevent the issue being enlarged which would prevent either party from knowing when the cause came on for trial what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues and thereby diminish expense and delay especially as regards the amount of testimony required on either side at the hearing”.

71. In application of these set out principles for filing a Constitutional Petition to this case, the Honourable court is fully satisfied that the Petitioner herein has dutifully complied and fully met the threshold of reasonable precision in pleadings for instituting this Petition against the Respondents herein and pleading for the prayers sought. It is not disputed that the Petitioner is the registered owner of the suit property. The Petitioners produced a copy of the title and valuation report marked it as MPK -1a and MPK – 1b.

72. It is trite that under Article 40 of *the Constitution*, the Petitioners have the right to property, which right includes the use of the suit property. Article 40 of *the Constitution* provides as follows:

“40.



- (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
  - (a) of any description; and
  - (b) in any part of Kenya.
- (2) Parliament shall not enact a law that permits the State or any person—
  - (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
  - (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).
- (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—
  - (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
  - (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—
    - (i) requires prompt payment in full, of just compensation to the person; and
    - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.
- (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.
- (5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.
- (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

73. The Respondents have argued that the roads where the Petitioner’s plot is situated are unsurveyed and the locals have been using the said road for easy access. Furthermore, the Petitioner also uses the same and other roads which pass through other residents’ plots to access his property. Legally speaking, the [Land Act](#) 2012 under the provisions of Sections 107 to 133 makes provision as to how compulsory acquisition of land is to be executed. The Respondents did not invoke the provisions of Section 107 of the [Land Act](#) to signify their intention to compulsorily acquire the land they required to construct



the road. If the respondents had intended to compulsorily acquire the land, the County Executive Committee of the Mombasa County would have made a request to the National Land Commission to undertake the process of the acquisition.

74. Section 107(1) of the *Land Act* provides:-

“(1) Whenever the national or County Government is satisfied that it may be necessary to acquire some particular land under Section 110, the respective cabinet Secretary or the County Executive Committee Member shall submit a request for acquisition of land to the commission to acquire the land on its behalf.”

75. Section 110(1) of the *Land Act* provides:-

(1) Land may be acquired compulsorily under this part if the commission certifies, in writing, that the land is required for public purposes or in the public interest as related to and necessary for fulfillment of the stated public purpose.

76. My view is that it is thus clear that if the County Government of Mombasa required a public road to be created cutting across the Petitioner’s land and other persons parcels of land, the county government ought to have invoked the provision of Section 107 (1) of the *Land Act* to set in motion the process of compulsory acquisition of the land. They did not do so but arbitrarily went ahead and created and opened the road which as per the report of the surveyor is now murramed and presumably in use. The Petitioner had a right and was entitled to protest the invasion of his land. The Petitioner’s property rights were violated and there was a clear breach of Article 40 of *the Constitution*. The Petitioner cannot be remediless merely because the respondents forcibly caused the road to be done through his land and the matter is now “fait accompli”.

77. The Surveyors’ report prepared by Edward Kiguru Land Surveyors in conclusion section reads thus:-

“L.R. MN/VI/809 is a private property registered under R.T.A ( Registration of Titles Act) and has NEVER been aside as a public utility. The Cabro Road is therefore an encroachment into a private property.”

78. The surveyor recorded the actual size of land available after the cabro road encroachment is 0.4297 Ha. Or 1.061 Acres. Under Article 23(3)(e) the court in enforcement of the Bill of Rights has power to make an order for compensation where breach has been established. In the instant petition, I am satisfied the Petitioner’s constitutional rights relating to protection of property were violated and his land was appropriated without due process of the law. The petitioner was deprived of the use of a portion of his land when the Respondents appropriated the land to construct a road which is presently in use by members of the public. If due process was followed and it was found the land was required for a public purpose, the petitioner would have been compensated for the portion of his land deemed necessary for the construction of the road. The valuer has made an assessment of what would have been the appropriate compensation.

79. Additionally, the Honorable Court finds that actions by the Respondents amounted to trespass and hence were criminal in nature and actionable.



80. Trespass is defined under the provision of Section 3 (1) of *Trespass Act* Cap 294 as follows:-
- “Any person who without reasonable excuse enters, is or remains upon or erects any structure on or cultivates or grazes stock or permits stock to be on private land without the consent of the occupier therefore shall be guilty of an offence”.
81. From the book “Clark & Lindsell on Torts 12<sup>th</sup> Edition” Paragraph 113, defines trespass as follows:
- “trespass to land consists in any unjustifiable infusion by one person or property upon land in the possession of another”
82. Thus trespass is an intrusion by a person into the land of another, especially wrongful entry on another’s real property who is in possession and ownership. While ‘Continuous trespass’ is trespass in the nature of permanent invasion on another’s rights, such as a sign that overhangs another’s property”.
83. In the case of “Lutaaya – Versus- Sterling Civil Engineering (Supra) the court stated as follows regarding the tort of trespass to land:-
- “Trespass to land occurs when a person makes unauthorized entry upon land and thereby interferes or portends to thereby, therefore with another’s lawful possession of that land. Needless to say, the tort of trespass to land is committed not against the land but against the person who is in actual or constructive possession of the land. As common law, the cardinal rule is that only a person in possession of the land has capacity to sue in trespass. Thus the owner of unencumbered land has such capacity to sue, but a land owner who grants a lease of his land does not have capacity to sue because he partakes with possession of land”... where trespass is continuous, the person with the right to sue .....subject to the law on limitation of action exercise the right immediately after the trespass commences or any time during its continuous or after it has ended.”
84. Further according to Clerk & Lindsell on Torts, 19<sup>th</sup> Edition the writer states at Paragraphs 9 - 13:-
- “Proof of ownership is Prima Facie of possession, unless there is evidence that another person is in possession but if there is a dispute as to which of the two persons are in possession the presumption is that the person holding title to land is in possession.”
85. It is now well established that trespass to land is actionable per se (without proof of any damage). See the case of “Park Towers Limited – Versus - John Mithamo Njika & 7 others (2014) eKLR” where J.M Mutungi J. stated:-
- “I agree with the Learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case.....”.
86. Indeed, the Respondents had not demonstrated any lawful or better entitlement/ right to Plot No. MN/VI/809 that superseded the Petitioner’s interest over the suit property. For these reasons, therefore, the Petitioner is entitled to damages and reliefs sought, since the law provided that where trespass was proved, a party need not prove that he/she suffered any specific damage or loss to be awarded damages. In such circumstances, the Court proceeds to assess the damages awardable based on the facts and



circumstances of this case. Hence, the Court finds that the Respondents are fully liable to pay damages for the trespass into the Petitioner's suit property.

87. I dare say that there exists a major distinction and contrary position of facts between the case and/ authority extensively cited by the Learned Counsel for the 1<sup>st</sup> Respondent of ELC. Appeal No. 285 of 2015 Abdalla Mohamed Abdalla (Supra) to the facts and circumstances in this case. These are enumerated herein below:-
- a. While in that case there already existed an access road before the construction of the Cabro works in the instant case there was none in existence.
  - b. In that case the land was public road reserve in this case the land is private land belonging to the Petitioner.
  - c. In that case there was need to create road to be utilized by the republic in the instant case it was not clear the purpose for taking up the road.
  - d. In that decision the court ordered for the removal of the Cabro material which court found to be superfluous as the previous state of the properties were also a road albeit an access road with no Cabro. In the Instant case, there existed no road at all and what the Petitioner are seeking is for prompt, just, fair, and/or adequate compensation as provided for by the provisions of law.
  - e. While the other case there was no prejudice shown by the construction of the Cabro access road in the instant case the fundamental Rights of the Petitioner under Article 40 (3) of Constitution of Kenya 2010 where their rights to private property was violated denied and/ threatened by their land being taken away by the 1<sup>st</sup> Respondent and its value dissipated and not to be valued again by them.
88. On the issue as to whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order, I find that it will be served better by preserving the Petitioner's title until issues of whether or not the Respondent has trespassed by making an access road across the suit property are heard and determined.
89. The provision of Article 165 (3)(b) of *the Constitution* grants this court the jurisdiction to determine whether a fundamental right or freedom has been denied or threatened or violated to the interpretation of *the Constitution*.
90. The law as to what amounts to a substantial question of law is now well settled. In the case of "Sir Chuntalal – Versus - Mehta and Sons Ltd – Versus -The Century Spinning and Manufacturing Co. Ltd 1962 AIR 1314" the Supreme Court of India defined the elements of a substantial question of law were stated as follows;

“The proper test for determining whether a question of law raised in the case is substantial would in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this court or by the Privy Council or by the Federal Court or not free from difficulty or calls for discussions of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of the law.”



91. Similarly, in the case of “Maina Kiai & 2 Others – Versus - Independent Electoral and Boundaries Commission & Another (2017) eKLR” the court outlined the ingredients that determine whether a matter is a substantial point of law.
92. Accordingly, a substantial question of law is one that is of general public importance or one that affects the rights of a large cross section of the public. A party seeking certification must lay a basis for the certification.
93. The Petitioner has demonstrated to the Court that the Petition raises a substantial point of law whose determination will have a significant bearing on the public interest. Being that the access road is for public use and if the Respondent erroneously trespassed to have it there the members of the public using it will be affected.
94. I take note that the Petitioner specifically prayed for mesne profits in the Petition dated 21<sup>st</sup> July, 2022 submitting that it is entitled to the mesne profits. Section 2 of the Civil Procedure Act Cap 21 of the Laws of Kenya defines mesne profits as follows:-

“mesne profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession;

95. Order 21 Rule 13 of the Civil Procedure Rules provides as follows:-

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

- (a) for the possession of the property;
- (b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits;
- (c) directing an inquiry as to rent or mesne profits from the institution of such suit until—
  - (i) the delivery of possession to the decree-holder;
  - (ii) the relinquishment of possession by the judgment- debtor with notice to the decree-holder through the court; or
  - (iii) the expiration of three years from the date of the decree, whichever event first occurs.

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

96. The Court of Appeal in the case of “Attorney General – Versus - Halal Meat Products Limited [2016] eKLR” considered when mesne profits could be awarded. The court stated as follows:-

“It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another. See McGregor on Damages, 18thEd. para 34-42.”



97. The court in the case of “Rajan Shah T/A Rajan S. Shah & Partners – Versus - Bipin P. Shah [2016] eKLR” had this to say in considering an issue of whether the Plaintiff had established a case for mesne profits:-

“In *Bramwell vs. Bramwell*, Justice Goddard stated that “... mesne profits is only another term for damages for trespass, damages which arise from the particular relationship of landlord and tenant.” Similarly, in an Australian case, *Williams & Bradley v Tobiasen* it was stated that these words: “Mesne profits are the pecuniary benefits deemed to be lost to the person entitled to possession of land, or to rents and profits, by reason of his being wrongly excluded there from.

The wrongful occupant is a trespasser, and the remedy rests on that fact. The action is based on the claimant’s possession, or right to possession, which has been interfered with.

A more useful description of mesne profits can be found in *Halsburys Laws of England*, which defines mesne profits as an action by a land owner against another who is trespassing on the owner’s lands and who has deprived the owner of income that otherwise may have been obtained from the use of the land. The landlord may recover in an action for mesne profits the damages which he has suffered through being out of possession of the land. Mesne profits being damages for trespass can only be claimed from the date when the defendant ceased to hold the premises as a tenant and became a trespasser. The action for mesne profits does not lie unless either the landlord has recovered possession, or the tenant’s interest in the land has come to an end.

*Halsburys*, op. cit, 4<sup>th</sup> Edition, above, suggests that where mesne profits are awarded they usually follow the previous rent rate and in the absence of that, a fair market value rent.

The *Black’s Law Dictionary* defines mesne profits as: - “the profits of an estate received by a tenant in wrongful possession between (2) two dates.” The *Concise Oxford English Dictionary* defines mesne profits as: - “the profits of an estate received by a tenant in wrongful possession and recoverable by the Landlord.”

The term ‘mesne profits’ relates to the damages or compensation recoverable from a person who has been in wrongful possession of immovable property. The Mesne profits are nothing but a compensation that a person in the unlawful possession of others property has to pay for such wrongful occupation to the owner of the property. It is settled principle of law that wrongful possession is the very essence of a claim for mesne profits and the very foundation of the unlawful possessor’s liability therefore. As a rule, therefore, liability to pay mesne profits goes with actual possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits.

Mesne profits are awarded in place of rents, where the tenant remains in possession after the tenancy agreement has run out or been duly determined. A landlord claiming for mesne profits is claiming for the profits intermediate from the date the tenant ought to have given up possession and the date he actually gives up possession.

After the service of a written notice or at the end of the term granted and the tenant holds over without the permission of the landlord, the tenant is liable to pay mesne profits for the use and occupation of the premises till he delivers up possession.

In the present case, there was no written lease. The case leading to this appeal was filed by the tenant (the Respondent) against the land lord (appellant) in 2007 challenging a proclamation issued by auctioneers against him under the instructions of the appellant and



also seeking an injunction against the Respondent. The initial defense filed by the appellant dated 18<sup>th</sup> October 2007 was a denial of the averments in the plaint. The respondents claim as enumerated in the plaint discloses a rent dispute. An amended defense was filed on 9<sup>th</sup> August 2010 whereby the Appellant cited a notice dated 3<sup>rd</sup> March 2008 in which he communicated to the Respondent that he had terminated the lease and sought vacant possession. The Respondent through his advocates replied to the said letter and wrote inter alia as follows:-

“..... the alleged tenancy/lease herein between our client and yours is the subject matter in Nyeri CMCC No. 585 of 2007.....The issues your clients are raising .....are the same issues already in court. Your clients notice of termination of lease ....is therefore inconsequential.”

Thus, the above notice was challenged on the above grounds. There is no further communication on record on the issue. The appellant never wrote back to dispute the Respondents response. It is important to point out that Mesne profits are nothing but a compensation that a person in the unlawful possession of others property has to pay for such wrongful occupation to the owner of the property. It is settled principle of law that wrongful possession is the very essence of a claim for mesne profits and the very foundation of the unlawful possessor’s liability therefore. As a rule, therefore, liability to pay mesne profits goes with actual illegal possession of the land. That is to say, generally, the person in wrongful possession and enjoyment of the immovable property is liable for mesne profits provided the occupation is illegal.

For starters, it should be noted that the concept of mesne profits is a remedy available to the Landowner/Landlord in the event that a contractual tenancy ceases to exist and the tenant/occupier thereafter continues to occupy the premises as a trespasser.

Thus, where a landlord/tenant relationship existed like in the present case, it must be demonstrated beyond doubt that the tenancy was terminated legally and that the termination notwithstanding the tenant remained in occupation as a trespasser. Where a tenancy is created by operation of law, the tenant does not become a trespasser until the tenancy has become duly determined according to law. This position was reiterated by the apex court of Nigeria which stated:-

“Because a claim for ‘Mesne profits’ is based on trespass and is inappropriate in respect of lawful occupation as a tenant, it can only be maintained when the tenancy has been duly determined and the tenant becomes a trespasser...where a tenancy is created by operation of law, the status of trespasser will not arise, until the tenancy is duly determined according to law... however, the lawful use and occupation of the land and premises implies an agreement to pay damages for use and occupation of the land and premises. It is a quasi-tenancy which the law recognizes...”

98. It is my humble opinion that the Petitioner has not tabled evidence before this court to enable the court make a determination on the same. It is noteworthy that the murrum public road did not generate any income hence the mesne profits are not applicable in this instant petition.



### **ISSUE No. c). Who will bear the Costs of the Petition**

99. On the issue of the costs of the Petition, the Black Law Dictionary defines “Cost” to mean, “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”. The provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow events. The issue of Costs is the discretion of Courts. In the case of “Reids Hewett & Company vs Joseph AIR 1918 cal. 717” and “Myres vs Defries (1880) 5 Ex. D. 180”, the House of the Lords noted:-

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

100. From these provisions of the law, it means the whole circumstances and the results of the case where a party has won the case. The events in the instant case is the Petitioner has succeeded in his case. For that very fundamental reason, therefore, the costs of this suit will be made to the Petitioner by the Respondents herein jointly and severally.

### **VIII. Conclusion and Disposition**

101. In the long run, having intensively and thoroughly deliberated on all the framed issues herein, this Honorable Court arrives at the finding that the Petitioner has succeeded in all the prayers sought from their filed Petition.

102. For avoidance of doubt, I allow the Petition dated 21<sup>st</sup> July, 2022 and specifically make these orders:-

- a. That Judgment be and is hereby entered in favour of the Petitioner in its entirety.
- b. That a declaration be and is hereby issued that the property known as CR:2283/I PLOT NO.VIMN/809 is a private property owned by the Petitioner.
- c. That a declaration be and is hereby issued that there is no public access and/or public road passing through the property known as CR: 2283/I PLOT NO. VIMN/809.
- d. That a declaration be and is hereby issued that the 1<sup>st</sup> Respondent herein, the County Government of Mombasa, has breached the Petitioner’s constitutional rights to acquire and own property as guaranteed by Article 40 of *the Constitution* of Kenya, 2010.
- e. That a declaration be and is hereby issued that the 1<sup>st</sup> Respondent herein, the County Government of Mombasa, has by its acts of creating a public access road as complained of herein, unlawfully encroached and trespassed onto the Petitioner’s property known as CR:2283/I PLOT NO.VIMN/809 situate in Magongo area, Mombasa County.
- f. That it is hereby ordered that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein jointly and severally pay to the Petitioner a sum of Kenya Shillings Twenty Seven Million One Fifty Thousand (Kshs. 27,150,000/=) within the next ninety (90) days from the date of this Judgement being prompt, adequate, just and fair compensation for the land compulsorily acquired and/or appropriated for the construction of a road through the Petitioner’s said land and trespass without following the due process of the law.



- g. That there be and is hereby issued an order of permanent injunction to restrain the Respondents herein, the County Government of Mombasa, its agents, assigns, employees, officers and/or any person acting on behalf, authority, instructions and/or directives of the Respondents from trespassing on, stepping onto, visiting, vandalizing, demolishing, and generally interfering with the Petitioner's ownership, rights, use and occupation of the property known as CR:2283/I PLOT NO.VIMN/809.
- h. That there be and is hereby issued an order of mandatory injunction to compel the Respondents to restore the suit property known as CR: 2283/I PLOT NO. VIMN/809 to its original state by covering up and blocking the Carbro works road passing through the said property and fencing both ends of the road to prevent any access thereon within 14 days of this order in default of which the Petitioner be at liberty to do so and recover the costs thereof from the Respondents by applying and following the execution process provided for in the Civil Procedure Act Cap.21,Laws of Kenya and the Civil Procedure Rules, 2010.
- i. That there be and is hereby issued an order compelling the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein to revise the Land rates to the value of the portion not covered by the carbro access road created by the Respondents on the property known as CR: 2283/I PLOT NO. VIMN/809.
- j. That the Honourable Court do hereby issue an order for the Officer Commanding Station (OCS) of Changamwe Police Station to ensure compliance with this court's orders herein and that peace and law and order is maintained at all times.
- k. That costs of the Petition to be borne by the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Respondents herein jointly and severally.

It Is So Ordered Accordingly.

**JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS SIGNED AND DATED AT MOMBASA THIS 12<sup>TH</sup> DAY OF OCTOBER, 2023.**

.....

**HON. JUSTICE L.L NAIKUNI (JUDGE)**

**ENVIRONMENT AND LAND COURT AT, MOMBASA**

Judgement delivered In the presence of:-

- a. M/s. Yumna – the Court Assistant.
- b. Mr. Gitahi holding brief M/s. Nzamba Advocates for the Petitioner
- c. M/s. Kuria Advocates for the 1<sup>st</sup> Respondents
- d. No appearance Advocates for the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents

JUDGMENT ELC PET. 29 OF 2022 Page 19 of 19 JUSTICE L.L. NAIKUNI (JUDGE)

