



**Ngoje & 6 others v National Irrigation Authority & another (Tribunal  
Case E008, E004, E005, E006, E007, E009, E010 & E011 of 2024  
(Consolidated)) [2024] KELAT 810 (KLR) (14 June 2024) (Judgment)**

Neutral citation: [2024] KELAT 810 (KLR)

**REPUBLIC OF KENYA  
IN THE LAND ACQUISITION TRIBUNAL  
TRIBUNAL CASE E008, E004, E005, E006, E007,  
E009, E010 & E011 OF 2024 (CONSOLIDATED)  
NM ORINA, CHAIR & G SUPEYO, MEMBER**

**JUNE 14, 2024**

**BETWEEN**

**EZRA OPIYO NGOJE ..... CLAIMANT**

**AND**

**NATIONAL IRRIGATION AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

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

**AS CONSOLIDATED WITH  
TRIBUNAL CASE E004 OF 2024**

**BETWEEN**

**PETER ANYUOR MANG'IRA ..... CLAIMANT**

**AND**

**NATIONAL IRRIGATION AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

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

**AS CONSOLIDATED WITH  
TRIBUNAL CASE E005 OF 2024**

**BETWEEN**

**GEORGE ODHIAMBO LAGO ..... CLAIMANT**

**AND**



NATIONAL IRRIGATION AUTHORITY ..... 1<sup>ST</sup> RESPONDENT  
NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT

AS CONSOLIDATED WITH  
TRIBUNAL CASE E006 OF 2024

BETWEEN

SOLOMON OWITI AKURA ..... RESPONDENT

AND

NATIONAL IRRIGATION AUTHORITY ..... 1<sup>ST</sup> RESPONDENT  
NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT

AS CONSOLIDATED WITH  
TRIBUNAL CASE E007 OF 2024

BETWEEN

ISAAC OGAL AKURA ..... CLAIMANT

AND

NATIONAL IRRIGATION AUTHORITY ..... 1<sup>ST</sup> RESPONDENT  
NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT

AS CONSOLIDATED WITH  
TRIBUNAL CASE E009 OF 2024

BETWEEN

PETER ODHIAMBO AKURA ..... CLAIMANT

AND

NATIONAL IRRIGATION AUTHORITY ..... 1<sup>ST</sup> RESPONDENT  
NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT

AS CONSOLIDATED WITH  
TRIBUNAL CASE E010 OF 2024

BETWEEN

PIUS AMOLO OUKO ..... CLAIMANT

AND

NATIONAL IRRIGATION AUTHORITY ..... 1<sup>ST</sup> RESPONDENT



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

AS CONSOLIDATED WITH  
TRIBUNAL CASE E011 OF 2024

BETWEEN

PAMELA ATIENO NYAOKE ..... CLAIMANT

AND

NATIONAL IRRIGATION AUTHORITY ..... 1<sup>ST</sup> RESPONDENT

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

JUDGMENT

**Background and Claimants' Case**

1. The Lower Kuja Irrigation Development Project (the project) which is the subject of these proceedings is a project that was initiated in Nyatike Sub County, Migori County within Lower Kuja River Basin. This project is aimed at providing irrigation to farmers in this region in order to assist them in food production to ensure food security at the local level as well as nationally.
2. There is no doubt that the project was received well by the rice farmers in this region but the same has equally been a subject of complaints relating to its execution and allegations of violations of rights. These complaints have been addressed through various forums among them being the Kenya National Commission on Human Rights (KNCHR) and the Senate.
3. Before us are Eight (8) cases that touch on the project. By consent, the suits were consolidated as they relate to the same issues save for the amount of compensation sought. The suit in TRLAP/E008/2024 (E008) was designated as the lead file. The Claimants before us in the consolidated suits allege violations of their constitutional rights in regard to the manner in which land was acquired for creation of wayleaves for the project and the resultant alleged environmental degradation as a result of the said wayleaves.
4. It is not contended that the Claimants are the registered proprietors of various parcels of land situated within Kanyuor Adjudication Section of North Kadem. The Claimant in E004 (Peter Anyuor Mang'ira) is the registered proprietor of land parcel number North Kadem/Kanyuor/730, the Claimant in E005 (George Odhiambo Lago) is the registered proprietor of North Kadem/Kanyuor/6931, the Claimant in E006 (Solomon Owiti Akura) is the registered proprietor of land parcel number North Kadem/Kanyuor/6176, the Claimant in E007 (Isaac Ogal Akura) is the registered proprietor of land parcel number North Kadem/Kanyuor/646, the Claimant in E008 (Ezra Opiyo Ngoje) is the registered proprietor of land parcel number North Kadem/Kanyuor/602, the Claimant in E009 (Peter Odhiambo Akura) is the registered proprietor of land parcel number North Kadem/Kanyuor/6178, the Claimant in E010 (Pius Amolo Ooko) is the registered proprietor of land parcel number North Kadem/Kanyuor/647, and the Claimant in E011 (Pamela Atieno Nyaoke) is the registered proprietor of land parcel number North Kadem/Kanyuor/634. Hereinafter, the suit properties.



5. The Claimants contend that the suit properties are meant to be covered by the project as part of Area B, Block 3, Sagama and is crossed by Main Drain 4 of the detailed design of the project. It is their case that the 1<sup>st</sup> Respondent required to create wayleaves over their land to develop part of the project. This would have required the following of the laid-out procedure in the law and payment of compensation, according to the Claimants.
6. It is alleged that sometime in the month of September 2019, the 1<sup>st</sup> Respondent arbitrarily without following the legal process set out in the Land Act, trespassed on to the suit properties lands and using excavators and earth movers dug trenches, uprooted trees and started to lay thereon an irrigation infrastructure known as Main Drain 4. The Claimants in E004 and E008 further allege that they later discovered in July 2023 that the National Irrigation Board (the predecessor to the 1<sup>st</sup> Respondent) had unlawfully and illegally caused itself to be registered as a proprietor of a wayleave over their parcels of land (North Kadem/Kanyuor/730 and North Kadem/Kanyuor/602). This, it is alleged, happened in the year 2013.
7. As a result of the alleged trespass on the suit properties, it is alleged that the remaining portions of the suit properties have been turned into a canyon and the same have been downgraded to the extent that they cannot support any meaningful economic activities. Furthermore, the Claimants aver, there has been uncontrolled erosion on the suit properties caused by the 1<sup>st</sup> Respondent's trespass.
8. It is alleged that the 1<sup>st</sup> Respondent abandoned the project soon after the said acts of trespass and having caused damage on the suit properties. Consequently, there has been massive erosion resulting in canyons which have formed. This situation, it is alleged, has interfered with the flow of natural storm drains in the area turning the said storm drains into huge seasonal rivers through which water uncontrollably flows and drains into the Claimants' parcels of land and therefore forcing the Claimants to abandon the suit properties which have been rendered derelict. Through the 1<sup>st</sup> Respondent's activities, the Claimants aver, the suit properties which were previously arable and fertile, and were used as grazing areas have been turned into swampy and uninhabitable land divided by a deep canyon.
9. The Claimants pray for the following reliefs:
  - a. A Declaration that absent payment of just compensation and promptly, the purported creation of wayleaves and public rights of way over and in respect of the suit properties in favour of the 1<sup>st</sup> Respondent and or its predecessor did not follow the law, is unconstitutional, illegal, unlawful null and void and is of no effect and ought to be removed from the land at a cost to the Respondents;
  - b. A Declaration be issued to the effect that the Claimants are entitled to prompt and adequate compensation in the sum and amounts as claimed in these proceedings being the value of the portion of land lost;
  - c. A Declaration be issued that policy and regulations affecting the public and rights of the individuals must conform to the Constitution and the relevant statutes in terms of both its content and the manner in which it is adopted and failure to comply renders the policy decision, regulation or acts invalid and that the decision by the 1<sup>st</sup> respondent, National Irrigation Authority to commence construction of MD4 of the detailed design of the project in Area B – Block 3 Sagama, on the Claimants' land without first implementing a Resettlement Action Plan and payment of just compensation to the Claimant, amounts to trespass, is unconstitutional, violates statute law, is illegal, unlawful and therefore null and void.



- d. A Declaration that the now abandoned construction activities of the 1<sup>st</sup> Respondent, at MD4 of the detailed design of the project in Area B – Block 3 Sagama on the on the Claimants’ land without payment of prompt and adequate compensation as provided for by law, has infringed, violated and/or threatened the Claimants’ right to property;
  - e. Special damages;
  - f. General and exemplary damages for trespass to land and for violation of rights to property and the right to clean and healthy environment;
  - g. An Order be issued compelling the 1<sup>st</sup> Respondent to meet the cost of resurvey and marking of the boundaries to the Claimants’ parcels of land by a registered and or licensed surveyor;
  - h. Absent payment of just compensation as is provided for by law being paid to the Claimant, a restoration order in respect of the Claimants’ parcels of land and an order to restore the land to its original state, unless and until a prompt and adequate compensation is paid to the Claimants for the wayleaves as is provided for by law;
  - i. Costs of the suit;
  - j. Any other appropriate reliefs.
10. The Claimants have sought monetary compensation for the value of their parcels of land of different amounts as detailed in the valuation report dated August 2021 and prepared by Ace Appraisal Limited which forms part of the Claimants’ list and bundle of documents. These values are as follows:
- a. Claimant in E004/2024 – Kshs. 1,440,000.00;
  - b. Claimant in E005/2024 – Kshs. 1,120,000.00;
  - c. Claimant in E006/2024 – Kshs. 1,360,000.00;
  - d. Claimant in E007/2024 – Kshs. 1,090,000.00;
  - e. Claimant in E009/2024 – Kshs. 1,360,000.00;
  - f. Claimant in E010/2024 – Kshs. 1,120,000.00;
  - g. Claimant in E011/2024 – Kshs. 1,360,000.00.

### **The 1<sup>st</sup> Respondent’s Case**

11. The 1<sup>st</sup> Respondent opposed this Claim through the Replying Affidavit of Isaac Munga sworn on 20<sup>th</sup> March 2024. Mr. Munga is the Manager of the Lower Kuja Irrigation Scheme. In his Affidavit, Mr. Munga details the background of the projects and depones that the project was executed in compliance with the Detailed Design Report with the full participation of the local community.
12. The 1<sup>st</sup> Respondent objects to this Tribunal’s jurisdiction to issue orders as to declaration of rights and avers that the tribunal’s jurisdiction is limited to questions relating to land acquisition and not land rights. It is the 1<sup>st</sup> Respondent’s contention that questions for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the bill of rights can only be adjudicated by the High Court or courts of equal status.
13. On whether the Claimants’ rights have been violated, the 1<sup>st</sup> Respondent avers that the project has been undertaken with the participation of the local community who still participate in the management of the project. Further, the 1<sup>st</sup> Respondent asserts that it has put in place measures to mitigate and remedy



- any adverse and negative impacts caused by the project to ensure that the environment has not been adversely degraded.
14. The 1<sup>st</sup> Respondent also impugns the report by the Kenya National Commission on Human Rights which is part of the documents relied upon by the Claimants to show alleged violations of rights. The 1<sup>st</sup> Respondent avers that this report is inadmissible as it did not accord the 1<sup>st</sup> Respondent an opportunity to participate in its making.
  15. In regard to the causes of flooding within the project area, the 1<sup>st</sup> Respondent avers that the same originates from River Kuja Migori and other smaller streams such as Gunga and Obware which channel their waters directly to Sagama, Kakumba and Odongo villages as well as the rising lake levels and back flow attributed to it. According to the 1<sup>st</sup> Respondent, this is captured in the report by the Water Resources Authority, whose report is filed in evidence.
  16. Finally, the 1<sup>st</sup> Respondent avers that all the issues contained in the suits filed by the Claimants are pending before the Senate of the Republic of Kenya where a Petition had been filed. To that extent, therefore, the 1<sup>st</sup> Respondent asserts that the Complainants are engaged in a forum shopping exercise which is an abuse of the court process.
  17. In rejoinder, the Claimants filed further affidavits on 2<sup>nd</sup> April 2024. In the Affidavit of Ezra Opiyo Ngoje, the Claimants reiterate that the 1<sup>st</sup> Respondent created wayleaves in execution of the project and the same was not procedural. This aspect, the Claimants aver, has not been addressed in the 1<sup>st</sup> Respondent's response.
  18. The rejoinder further asserts that since the process of acquisition of land for creation of wayleaves was not followed as provided for under the Land Act, the Claimants are entitled to be awarded damages and compensation. Furthermore, the Claimants aver that they are not party to the petition currently before the Senate and in any case the two processes are distinct as a Parliamentary process can only lead to a report of findings while the outcome from a tribunal is different.
  19. The 2<sup>nd</sup> Respondent on its part filed Grounds of Opposition on 10<sup>th</sup> April 2024. In the said grounds of opposition, the 2<sup>nd</sup> Respondent opposes the Claims on the grounds that it has not received any application for creation of a wayleave in regard to the subject matter of these suits and hence it did not play any role in the project.
  20. The 2<sup>nd</sup> Respondent therefore concludes that since it was not involved in this process by the 1<sup>st</sup> Respondent, the Claims do not raise any reasonable cause of action against the 2<sup>nd</sup> Respondent. The 2<sup>nd</sup> Respondent prays that the case against it be dismissed with costs.

### **Viva Voce evidence**

21. At the hearing of this matter, the Claimant in E008, Mr. Ezra Opiyo Ngoje appeared as a witness on behalf of the other Claimants. Mr. Ngoje adopted his witness statement as well as the filed documents which he relied on as exhibits in this case. It was Mr. Ngoje's case that his farm as well as the farms of his neighbours were destroyed by the drainage.
22. On cross-examination by Mr. Ochola for the 1<sup>st</sup> Respondent, Mr. Ngoje asserted that the drainage which was done had become too big. However, the witness denies the findings of the Water Resources Authority to the effect that the rising lake levels had caused the soil erosion.
23. On cross-examination by Mr. Karanja for the 2<sup>nd</sup> respondent, the witness confirmed that he had made a complaint to the 2<sup>nd</sup> Respondent to investigate but he was not aware if any money had been remitted by the 1<sup>st</sup> Respondent for compensation or if the 2<sup>nd</sup> Respondent had been involved in any way.



24. The 1<sup>st</sup> Respondent called Mr. Isaac Munga to the stand to testify on its behalf. Mr. Munga indicated to the tribunal that he was the manager for Lower Kuja Irrigation Scheme. He adopted his witness statements and relied on six annexures which had been filed alongside his affidavit.
25. Mr. Munga testified that the project was started in the year 2010 and feasibility studies as well as Environmental Impact Assessment studies were done prior to its implementation. He also testified that farmers have been involved from the beginning in the management of the project to date.
26. In regard to compensation for wayleaves, Mr. Munga testified that this was to be done progressively where primary and secondary infrastructure were to be developed. In his testimony, Mr. Munga indicated that the primary infrastructure are the intake headworks along River Kuja. The main canal of 7 kilometers was to be compensated and this was done, and the canal was completed. Secondary infrastructure which are branch canals (BC1 and BC2) had also been fully compensated. In sum, it was Mr. Munga's testimony that 80% of the wayleaves had been compensated. However, the so-called tertiary or in-field canals – those that serve the farms – were not scheduled for compensation because they are properties of the farmer managed by the irrigation water users association.
27. Mr. Munga further testified that in the design scheme there were natural main drains which were seasonal streams which drain water to the lake. It was his testimony that these drains were incorporated in the design to act as main drain or collector drain. He testified that these are seasonal streams that can hold water for 3-4 months and that surplus or unused water from the irrigation system was allowed to be released to the main drains which would then flow back to the lake.
28. In regard to the claims in this case, Mr. Munga testified that what has affected the Claimants' parcels of land is one of the main drains – MD4. He testified that MD4 is one of the biggest drains in the design of the scheme and that this drain is a river called Obware which existed before the project. Mr. Munga admitted that there is a gulley at the moment at MD4.
29. This gulley, according to Mr. Munga, is caused by natural storm water from River Obware. In his testimony, there is no irrigation that is currently taking place in the area around the suit properties.
30. On cross-examination by Mr. Karanja for the 2<sup>nd</sup> Respondent, Mr. Munga testified that the 1<sup>st</sup> Respondent did not make any application to the 2<sup>nd</sup> Respondent before the wayleaves were created. He however admitted that the 1<sup>st</sup> Respondent needed to inform the Commissioner of lands in 2010 at the inception of the project before the 2<sup>nd</sup> Respondent was established. He further confirmed that the 1<sup>st</sup> Respondent had not deposited any money with the 2<sup>nd</sup> Respondent for compensation.
31. In his cross-examination, Mr. Okong'o for the Claimants took Mr. Munga through the project design and sought his confirmation that there was a need for creation of wayleaves for infrastructural projects. Mr. Munga agreed that the same is provided in the law.
32. On MD4, the witness asserted that the 1<sup>st</sup> Respondent had constructed a dyke in MD4 at a place called Oguta. Mr. Munga however asserted that MD4 is a stream that also acts as a main drain starting from Ndhiwa on the upper side and ending in Lake Victoria.
33. In regard to compensation for tertiary infrastructure, Mr. Munga was referred to Page 133-135 of the Claimants' bundle of documents which showed at page 135 that tertiaries had been compensated.
34. The witness was also referred to correspondences forming part of the Claimants' bundle of documents and specifically the letter at page 70-71 in the Claimant's bundle of documents being a recommendation to the National Land Commission to redress unconstitutional acquisition of





wayleaves. Mr. Munga testified that the 1<sup>st</sup> Respondent had sought consent from the affected parcel owners, but he wasn't sure if all had consented.

35. On re-examination, Mr. Munga testified that there were some critical tertiary infrastructure that had to pass through people's lands that had been compensated. He further testified that compensation was done through the 1<sup>st</sup> Respondent as the 2<sup>nd</sup> Respondent had not been established yet.

### Analysis and Determination

36. The Claimants and the 1<sup>st</sup> Respondent filed submissions and invited us to address a number of issues which we sum as follows:
- a. Jurisdiction;
  - b. Alleged violations of [the Constitution](#) specifically Article 40(3) and the [Land Act](#);
  - c. The specific claims;
  - d. Remedies, if any.
  - e. Costs

### Jurisdiction

37. The 1<sup>st</sup> Respondent argues that the jurisdiction of the tribunal does not extend to issuance of the declarations sought by the Claimants. In support of this argument, the 1<sup>st</sup> Respondent argues that the tribunal's jurisdiction under Section 133A-G of the [Land Act](#) only extends to questions in relation to land acquisition, and not land rights. In the 1<sup>st</sup> Respondent's considered view, a question touching on Article 23 of [the Constitution](#) of Kenya 2010 is a reserve of the High Court and courts of equal status. The 1<sup>st</sup> Respondent cites the case of Tom Ochieng Wayumba v. Director of Public Prosecutions [2019] eKLR in support of this argument.
38. In response to this argument, the Claimants oppose the proposition that the tribunal lacks requisite jurisdiction to adjudicate over alleged violation of rights by stating that the tribunal has been conferred which such jurisdiction through an Act of Parliament under Section 133C (8) of the [Land Act](#).
39. Our jurisdiction is set out in Section 133C of the [Land Act](#) which we reproduce below:

#### Jurisdiction of the Tribunal

1. The Tribunal has jurisdiction to hear and determine appeals from the decision of the Commission in matters relating to the process of compulsory acquisition of land.
2. A person dissatisfied with the decision of the Commission may, within thirty days, apply to the Tribunal in the prescribed manner.
3. Within sixty days after the filing of an application under this Part, the Tribunal shall hear and determine the application.
4. Despite subsection (3), the Tribunal may, for sufficient cause shown, extend the time prescribed for doing any act or taking any proceedings before it upon such terms and conditions, if any, as may appear just and expedient.
5. If, on an application to the Tribunal, the form or sum which in the opinion of the Tribunal ought to have been awarded as compensation is greater than





the sum which the Commission did award, the Tribunal may direct that the Commission shall pay interest on the excess at the prescribed rate.

6. Despite the provisions of sections 127, 128 and 148 (5), a matter relating to compulsory acquisition of land or creation of wayleaves, easements and public right of way shall, in the first instance, be referred to the Tribunal.
  7. Subject to this Act, the Tribunal has power to confirm, vary or quash the decision of the Commission.
  8. The Tribunal may, in matters relating to compulsory acquisition of land, hear and determine a complaint before it arising under Articles 23 (2) and 47 (3) of *the Constitution*, using the framework set out under the Fair Administrative Act or any other law.
40. There is no doubt in the above provision that Parliament, acting in accordance with its powers under Article 23(2), conferred jurisdiction upon this tribunal to adjudicate over matters for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. The case of Tom Ochieng Wayumba cited by the 1<sup>st</sup> Respondent confirms this position. However, the 1<sup>st</sup> Respondent seems to suggest that the tribunal's jurisdiction is restricted to matters of acquisition and not land rights. In our view this argument is not convincing as it is not possible to separate the two for the reasons we address below.
41. First, the tribunal's jurisdiction flows from Article 40(3) of *the Constitution* which seeks to protect against arbitrary deprivation of property by the State unless it complies with *the Constitution* and written law. The provision further gives access to a court of law for any person whose property is subject to acquisition as per the constitutional provision. Parliament enacted Section 133C to give effect to Article 40(3)(b)(ii) of *the Constitution*.
42. Second, Section 133C (8) of the *Land Act* flows from the power of the legislature under Article 23(2) of *the Constitution* to enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights under *the Constitution*. To provide more clarity, Article 162 of *the Constitution* of Kenya states that the system of courts shall comprise of the Supreme Court, Court of Appeal, the High Court (and Courts of equal status), and subordinate courts established under Article 169 of *the Constitution*. On the other hand, Article 169 lists Magistrates courts, Kadhis' courts, Court martial, and any other local tribunal as shall be established through an Act of Parliament as subordinate courts. This tribunal, as established under the *Land Act*, is a subordinate court and exercises powers as such.
43. Section 133C (8), therefore, empowers the tribunal to listen to grievances of violation of rights in matters that touch on compulsory acquisition of land. Those grievances may emanate from Article 40(3) or any other provision of the bill of rights as long as the same are connected with a matter relating to compulsory acquisition of land.
44. The question of what is a matter relating to compulsory acquisition of land is one we have had previous occasion to address. In Tom Mwachiti Mwero (Suing as a representative of the Estate of Fredrick Johnson Mwachiti (Deceased) vs. Kenya Railways Corporation and National land Commission (TRLAP/E001/2023) we held as follows:

The language used in the *Land Act* is a “matter relating to” compulsory acquisition of land in relation to the Tribunal's jurisdiction under Sections 133C (6) and (8). The Oxford



Learner's Dictionary (online edition) defines "related" as "connected with something." This Tribunal's jurisdiction, therefore, extends to any matter that is connected to the process of compulsory acquisition.<sup>1</sup>

45. We, therefore, dismiss the 1<sup>st</sup> Respondent's argument that we lack requisite jurisdiction to adjudicate over matters that touch on rights in connection with a dispute that relates with compulsory acquisition of land. Section 133C (8) of the [Land Act](#) empowers a party who alleges a violation of rights as a result of the process of compulsory acquisition of land to approach the tribunal, at the first instance.
46. We, however, note that we have also been asked to determine whether we have jurisdiction in regard to matters arising out of the application of the Environmental Management and Coordination Act (EMCA). We have no doubt in our mind that EMCA establishes its own dispute resolution mechanism that does not include this tribunal. In this regard, questions that touch on licensing under Section 125 of EMCA are matters strictly within the jurisdiction of the National Environment Tribunal.

Alleged violation of Article 40(3) of [the Constitution](#) and the [Land Act](#)

47. The second issue for our determination before we go to the specific grievances is whether the Respondent(s) violated Article 40(3) of [the Constitution](#) and the relevant provisions of the [Land Act](#) in creation of wayleaves. As a general point, it has been argued by the Claimants that the 1<sup>st</sup> Respondent did not follow [the Constitution](#) and the [Land Act](#) in the creation of wayleaves in the execution of the project. While the specific allegations will be dealt with below, it is important to lay out the law as it is in regard to creation of wayleaves.
48. It is not in contention that this project started on or about the year 2010. This was prior to the enactment of the [Land Act](#), 2012. At this time the relevant law in relation to the creation of wayleaves was the Land Acquisition Act (repealed) and the Wayleaves Act (repealed). Both these laws were later replaced with the [Land Act](#) which provides a comprehensive procedure for creation of wayleaves. The specific allegations relevant to this case relate to activities on or around the year 2019 when the relevant law in regard to this aspect is the [Land Act](#). In that regard, our analysis will only focus on the procedure for creation of Wayleaves as laid out in the [Land Act](#).
49. Creation of wayleaves is guided by Sections 143-148 of the [Land Act](#). Under Section 144, an application for creation of a wayleave shall be made to the 2<sup>nd</sup> Respondent by a state department, county government or public authority or corporate body. The applicant is required under Section 144(4) of the [Land Act](#) to serve such a notice upon all persons occupying the land upon which a wayleave is sought to be created, the county government, and any other interested person. On its part, the 2<sup>nd</sup> Respondent is required under Section 146(1) of the [Land Act](#), upon receiving the application, to publish the application along the route of the proposed wayleave and thereafter shall, after at least ninety (90) days of the date of service of the notice, consider all representations and objections received pursuant to the said notices. This is the preliminary procedure which culminates in a decision by the Cabinet Secretary on whether or not to create a wayleave after considering the recommendation of the 2<sup>nd</sup> Respondent.
50. Section 148 of the [Land Act](#) deals with compensation and requires that compensation shall be paid for the use of the land as a communal right of way with respect to creation of a wayleave in addition to compensation for the use of the land for any damage to trees, crops and buildings. This compensation shall be based on the value of land as shall be determined by a qualified valuer. Significantly, Section

<sup>1</sup> Para. 16



- 148(4) requires that the compensation shall be paid by 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.
51. It is not in question that this comprehensive procedure for creation of wayleaves is borne out of the scrupulousness of the legislature in giving effect to Article 40(3) of the Constitution which we have referred to above. There is deliberate effort to ensure that deprivation of private property by the State follows a strict procedural requirement as laid out in the Land Act. This is also cemented by the requirement that all the affected persons are compensated promptly. Of significance is also the role played by the 2<sup>nd</sup> Respondent in this process to ensure that the affected parties are identified and the compensation due to them is determined objectively as per Section 148(6) of the Land Act.
52. In the instant matters, there is no doubt that the 1<sup>st</sup> Respondent did not follow any of the procedures laid out in the Land Act for creation of wayleaves. To that extent, the 1<sup>st</sup> Respondent violated Article 40(3) of the Constitution and Sections 143-148 of the Land Act in creation of wayleaves in regard to this project. This determination renders the question whether the Claimants were engaged in public participation moot as the process under the Land Act, as detailed above, is a self-executing process that requires certain steps to be satisfied that include the participation of the project affected persons at different stages. On whether these violations affected the Claimants in this case, the determination on the next issue shall provide an answer.

#### **The MD4 Question**

53. The significant contention upon which the Claimants' cases rest is the question whether the 1<sup>st</sup> Respondent is responsible for the degradation of the Claimants' parcels of land along the so called MD4. Put differently, the question for our determination is whether MD4 is a natural stream as alleged by the 1<sup>st</sup> Respondent or the same is an unlawfully acquired wayleave by the 1<sup>st</sup> Respondent as alleged by the Claimants.
54. Both parties agree that the gully that has formed along the MD4 is as a result of storm water occasioned by flash floods which are common in this area. The point of departure for the Claimants and the 1<sup>st</sup> Respondent is the allegation by the Claimants that MD4 was not an existing natural stream but was dug by the 1<sup>st</sup> Respondent unlawfully without creating the necessary wayleave.
55. From the submitted evidence and the site visit conducted by the Tribunal, it is evident that there is significant degradation of land along this drain. It is alleged by the Claimants that upon the digging of the drain by the 1<sup>st</sup> Respondent, storm water which would ordinarily flow across the fields which are flat in this area now found the drain and in flowing through the drain, soil erosion ensued which was exacerbated by the back flow of the water with a result that a huge gully started forming.
56. On the site as well, there was evidence that the 1<sup>st</sup> Respondent had started constructing gabions along this drain but the same had been abandoned. It is the evidence of the 1<sup>st</sup> Respondent that this was an effort to rehabilitate the drain as well as to build a cross-structural bridge along the drain for movement of persons and vehicles accessing the farms.
57. The uncontroverted evidence of the unlawfully registered 30 metre wayleave over some of the parcels of land that are subject of this suit (North Kadem/Kanyuor/730 and North Kadem/Kanyuor/602) in favour of the 1<sup>st</sup> Respondent's predecessor as evidenced in Annexures PAM 7(a), (b), (c), (d) and (e) however negates the 1<sup>st</sup> Respondent's assertion that MD4 was a natural stream. The 1<sup>st</sup> Respondent does not explain why the said wayleaves had been created over what it referred to as a natural stream.



58. This evidence coupled with google images presented by Claimants which show the status of the area prior to 2019 are an indication that the resultant gully that has been created out of soil erosion was as a result of the unlawful activities of the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent embarked on a project for the benefit of the community but failed to adhere to the procedural requirements of the Land Act for creation of wayleaves and additionally failed to take measures to complete the project to the detriment of the Claimants whose rights to land and a clean and healthy environment have been adversely affected.
59. It is our finding, therefore, that the 1<sup>st</sup> Respondent unlawfully created wayleaves over the Claimants' parcels of land and hence violated their rights under Article 40(3) of the Constitution. This unlawful creation of wayleaves has also resulted to significant environmental degradation of the suit properties through erosion occasioned by storm waters which have been flowing through the trenches dug by the 1<sup>st</sup> Respondent.

## Remedies

60. The upshot of our analysis is that the Claimants have succeeded in their Claims. They are entitled to compensation for the wayleaves which have been unlawfully created on their parcels of land and rehabilitation of the MD4 which has metamorphosed into a canyon with dire environmental risks to the area. The Supreme Court in Attorney General v. Zinj Limited (Petition 1 of 2020) [2021], pronounced itself as follows in this regard:

Under article 22(1) of the Constitution, every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed, or is threatened. Among the reliefs that a court may grant upon proof of violation of a fundamental right, is an order for compensation (article 23 (3)(e)). The quantum of damages to be awarded, depends on the nature of the right that is proven to have been violated, the extent of the violation, and the gravity of the injury caused.
61. As to the quantum of compensation due to each of the Claimants, the appropriate remedy in this case is to order that the 2<sup>nd</sup> Respondent conducts a valuation of the affected parcels of land in order to determine exactly the amount of land affected by the 1<sup>st</sup> Respondent's activities as determined above and the value of that land. Even though the Claimants have pleaded that the totality of their parcels of land have been affected and presented valuation reports for purposes of compensation, we are of the view that the appropriate approach is to order a fresh determination to determine the extent of the wayleave and damage caused to the Claimants' parcels of land. This determination shall be done by the surveyors and valuers of the 2<sup>nd</sup> Respondent with the facilitation of the 1<sup>st</sup> Respondent.
62. We also find that the Claimants are entitled to mesne profits. Having determined that the 1<sup>st</sup> respondent engaged in unlawful activities on the suit properties, it follows that the Claimants are entitled to mesne profits to remedy the violation. As we held in *Sato Nyumbaz Ltd v. National Land Commission* KELAT 670 (KLR) (16 May 2024), "Whether characterized as loss of income or mesne profits or damages for trespass, a party who succeeds in a claim for unlawful occupation of its property may be awarded such damages if pleaded."<sup>2</sup>

<sup>2</sup> Para. 51.



63. This position has been stated by the Court of Appeal in *Christine Nyanchama Oanda v Catholic Diocese of Homa Bay Registered Trustees* [2020] eKLR:

The damages so awarded are intended to return the party back to the position he or she was in before the wrongful act was committed. Halsbury's Laws of England 4<sup>th</sup> Edition Volume 45 para 26 1503 provides as follows on computation of damages in an action for trespass:

- 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 an amount as would reasonably be paid for that use
- d) Where there is an oppressive, arbitrary or unconstitutional trespass by a Government official or where the Defendant cynically disregards the rights of the Plaintiff in the land with the object of making a gain by his unlawful conduct, damages may be awarded
- e) If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, general damages may be increased"

64. The prayer for special damages, however, fails as the same is not supported by evidence as required by law. For this prayer to have succeeded, it was incumbent upon the Claimants to present the receipts for the valuation and the EIA report as claimed. We are guided by the Court of Appeal in *Hahn V. Singh*, Civil Appeal No. 42 Of 1983 [1985] KLR 716, where it was held:

Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.<sup>3</sup>

65. We hereby make the following final orders:

- a. A Declaration be and is hereby issued that the 1<sup>st</sup> Respondent has violated the Claimants' rights under Article 40(3) of *the Constitution*;
- b. A Declaration be and is hereby issued that the 1<sup>st</sup> Respondent has violated the Claimants' rights under Article 42(b) of *the Constitution*;
- c. An Order be and is hereby issued directing the 2<sup>nd</sup> Respondent to conduct a survey and valuation of the suit properties to determine the extent of the wayleave, the resultant degradation including destruction of crops and grazing lands on each of the Claimant's parcel of land and the amount of compensation payable. This exercise shall be facilitated by the 1<sup>st</sup> Respondent and shall be undertaken with the participation of the Claimants;
- d. An Order be and is hereby issued directing the 1<sup>st</sup> Respondent to meet the costs of resurvey and marking of the boundaries to the Claimants' parcels of land following the exercise in (c) above;

<sup>3</sup> Page 717.



- e. An Order be and is hereby issued directing the 1<sup>st</sup> Respondent to promptly pay the determined compensation in (c) above;
- f. An Order be and is hereby issued directing the 1<sup>st</sup> Respondent to undertake a rehabilitation of the MD4 and specifically to construct gabions along this infrastructure to prevent further soil erosion and degradation of the environment and the parcels of land adjacent to the infrastructure;
- g. An Order be and is hereby issued directing the 1<sup>st</sup> Respondent to construct cross-structural bridges along the MD4 to enable the residents of the area to cross over from one side of the MD4 to the other with ease;
- h. Orders (c) to (g) shall be implemented within a period of sixty days from the date hereof;
- i. An Order be and is hereby issued directing the 1<sup>st</sup> Respondent to pay mesne profits amounting to Kshs. 200,000/= per Claimant;
- j. Orders (i) shall be effected within twenty one (21) days of the date hereof;
- k. Costs of this suit shall be borne by the 1<sup>st</sup> Respondent;
- l. Interest on the payments herein shall accrue at court rates from the date hereof until payment in full;
- m. The 1<sup>st</sup> Respondent shall file a report within ninety (90) days detailing steps it has taken to comply with the above orders.

66. We wish to thank counsel for all the parties for their meticulous conduct in this matter which has greatly assisted the tribunal in reaching this determination.

**DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 14<sup>TH</sup> DAY OF JUNE 2024.**

.....

**DR. NABIL M. ORINA - Chairperson**

.....

**MR. GEORGE SUPEYO - Member**

**Before: -**

Mr. Okong'o for the CLaimants

Mr. Ochola for the 1<sup>st</sup> Respondent

N/A for the 2<sup>nd</sup> Respondent

Everlyne – C/A

