REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 613 OF 2014

PATRICK MUSIMBA.....PETITIONER

VERSUS

THE NATIONAL LAND COMMISSION……1ST RESPONDENT

THE KENYA RAILWAYS CORPORATION…….2ND RESPONDENT

THE NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY……..3RD RESPONDENT

THE ATTORNEY GENERAL…….4TH RESPONDENT

AND

CHINA BRIDGE AND CONSTRUCTION COMPANY……INTERESTED PARTY

JUDGMENT

Introduction

1. Human endeavour whether through mutual or unilateral physical development often leads to conflict. There is always therefore a need for provision to ensure that disputes and conflicts do not evolve out of any individual or national endeavors. National endeavors geared towards development will naturally touch on public as well as private property and with it an obligation to protect any proprietary rights.

2. With a view to enhancing its transportation system and connectivity, the Kenya Government through the 2nd Respondent embarked on a multi-billion shilling development in the form of a standard gauge railway track. The standard gauge railway is to run from the coastal town of Mombasa through the hinterland and to the shores of Lake Victoria. In the course of such connectivity, the standard gauge railway (“SGR”) is bound to affect both land and the environment. The land , most of it privately owned, has to be acquired. It is the effect of the SGR

on both land and environment that triggered this Petition.

3. The Petition seeks to highlight the alleged systematic failures by the respondents in implementing and undertaking the SGR project. It seeks to highlight alleged denials of and breaches of fundamental freedoms and rights under the Constitution.
4. The Petition is essentially about the protection and enforcement of the basic, fundamental and human right to property. The Petition focuses on the rather inalienable right to just compensation when the State has to deprive a person of his property. The other right which the Petition calls to scrutiny is the right to a clean and healthy environment.

The Parties

5. The Petitioner is the elected member of Parliament for Kibwezi West Constituency. He is also a landowner within his constituency. He pleads having brought the Petition on behalf of both himself and his constituents whom he represents in the National Assembly.
6. The 1st Respondent, the National Land Commission, is a constitutional commission. It is constituted under Article 67 (2) of the Constitution as read together with the National Land Commission Act, Act No. 5 of 2012. The 1st Respondent's role in the SGR project includes the compulsory acquisition of land, including land within Kibwezi West Constituency, where the SGR rail-line is to be laid.
7. The 2nd Respondent, the Kenya Railways Corporation, is a state corporation. Together with the Government of the Republic of Kenya, the SGR project is being undertaken under the 2nd Respondent's care.
8. The 3rd Respondent the National Environment Management Authority is statutory body enjoined with the responsibility of integrating the environment. The 3rd Respondent as the chief inspector of the Environment is expected to undertake an Environmental Impact Assessment (EIA), approve of and authorize the SGR project.
9. The 4th Respondent , the Attorney General of the Republic of Kenya has been impleaded pursuant to Article 156 of the Constitution.
10. The Interested Party is the main contractor for the Standard gauge Railway Project. The Interested Party also undertook the feasibility study of the project and presumably the first environmental impact assessment of the project.

Brief Litigation history

11. The Petition was originally filed at the Environment and Land Court Machakos. The Petitioner then sought no less than twenty substantive reliefs.
12. On 12 November 2014,following the parties' representations, Justice C. M. Kariuki certified the Petition as raising a substantial question of law pursuant to the provisions of Article 165(4) of the Constitution. The petition was then referred to the Chief Justice for the empanelment of an uneven bench of judges. The bench was constituted in December 2014 but had first to deal with the issue of jurisdiction. The jurisdictional issue was finalized in June 2015.
13. All the parties subsequently filed written submissions and on two separate days the Parties highlighted the submissions.

The Petitioner's case

14. The Petitioner's case is that the 1st, 3rd and 4th Respondents have abdicated their responsibilities.
15. The 1st and 2nd Respondents according to the Petitioner are duty bound to compensate the Petitioner and all other parties whose parcels of land have been acquired or are to be acquired for purposes of construction of the Standard Gauge Railway. This duty, the Petitioner says, has

not been observed as dictated by both the Constitution and the law.

16. The 3rd Respondent on the other hand is accused by the Petitioner of failing to undertake or ensure that an appropriate environmental and social impact study of the Standard Gauge Railway project is undertaken in accordance with the Constitution and the law.
17. With regard to the process of compulsory acquisition the Petitioner contends that Articles 40, 60 and 47 of the Constitution have been violated. The Petitioner also claims that the procedures provided for under the Land Act, No 6 of 2012 have not been observed.
18. The Petitioner also contends that the Respondents have not acted with a view to protecting the environment. That the Respondents, it is stated, have not observed Articles 42, 69 and 70 of the Constitution as well as Sections 58 and 59 of the Environment Management and Coordination Act. The latter sections dictate that physical development projects be undertaken only after an Environmental Impact Assessment Study(EIAS) has been undertaken and the report given to any affected person.
19. The Petitioner further contends that if an EIAS was undertaken, the Petitioner as well as all the other affected parties on whose behalf the Petition has been filed did not participate in the process contrary to the provisions of the Constitution and other relevant law, in particular the Environmental (Impact Assessment and Audit) Regulations.

The Respondents' case

The 1st Respondent's case

20. The 1st Respondent's case is contained in the Replying Affidavit of Margaret K Cheboiwo filed in court on the 12th day of August 2015.
21. The 1st Respondent was and is mainly concerned with the process of compulsory acquisition of parcels of land required for purposes of the Standard Gauge Railway's construction.
22. The 1st Respondent contends that it has fully complied with the law and observed the relevant requirements of the Constitution. The 1st Respondent states further that most if not all of the persons on whose behalf the Petition has been filed have been fully compensated. Finally, the 1st Respondent states that it is the Petitioner who has been the hurdle in the entire process.
23. The 1st Respondent further states that much wherewithal and time have been invested in the process of compulsory acquisition and the wider public interest now dictates that the Standard Gauge Railway project is left to be finalized unhindered. The 1st Respondent also contends that the Petition does not raise any constitutional issue of merit and that in any event none has been demonstrated or proven by the Petitioner. In particular, the 1st Respondent states that all concerns which have been raised by the Petitioner had been fully addressed.

The 2nd Respondent's case

24. The 2nd Respondent's case is contained in the three affidavits sworn on behalf of the 2nd Respondent on 30th October 2014, 16th July 2015 and 27th August 2015.
25. It is the 2nd Respondent's case that the Petitioner has not demonstrated that he is entitled to the reliefs sought either on his own behalf or on behalf of his constituents. The 2nd Respondent contends that all the requisite preliminaries in conducting an environmental and social impact study and assessment were conducted properly through the 3rd Respondent. That the process was open and all relevant parties participated. The 2nd Respondent also contends that the process of compulsory acquisition has been undertaken smoothly and that within the Petitioner's constituency of Kibwezi West, most of the affected residents have surrendered their respective parcels of land to the 2nd Respondent following proper compensation by or through the 1st Respondent. The 2nd Respondent contends that the fact that over 80% of the persons on whose

behalf the Petitioner purports to have acted have been fully compensated demonstrates that the process (of compulsory acquisition) has been conducted in accordance with the Constitution and the law.

26. The 2nd Respondent further states that the wider public interest outweighs the narrow private interest of the Petitioner in the circumstances of the case. The 2nd Respondent states that the Standard Gauge Railway projects runs across the country and the contract having not only been executed but partially performed, any setback in the form of restraining orders would expose the Respondents to unnecessary litigation and expenses.

The 3rd Respondent's case

27. The 3rd Respondent's case can be gleaned from the two affidavits filed on behalf of the 3rd Respondent by Zephania Ouma on 27th October 2014 and by Prof. Geoffrey Wakhungu on 16th July 2015.
28. The 3rd Respondent's position is that the Standard Gauge Railway project is not harmful to the environment and further that the public at large as well as the individual persons who were likely to be affected by the project were fully and wholly involved in the process of assessing the environmental and social impact of the project.
29. The 3rd Respondent states that it approved of the Standard Gauge Railway project in February 2014 as required by the law. The 3rd Respondent further contends that no violation of any provision of the Constitution or law has been proven.

The 4th Respondent's case

30. The 4th Respondent's case which can be gathered from the Grounds of Opposition filed in court on 3rd November 2014 is that the Petitioner has not demonstrated how the Constitution or any law has been violated. In particular, the 4th Respondent contends that the Petitioner and the persons on whose behalf the Petition is alleged to have been brought are only entitled to fair and just compensation based on valuations and current market prices of their land, and not on speculative values.
31. The 4th Respondent also contends that the 4th schedule to the Land Acquisition Act (Cap 295) (now repealed) is not unconstitutional as Section 7 of the 6th Schedule to the Constitution as read together with Section 24 of the Interpretations and General Provisions Act (Cap 2), Laws of Kenya preserves the same.
32. The 4th Respondent avers that the Petition ought not to succeed in view of the wider public interest and policy which dictate that public funds ought not to be lost due to delays and penalties in contractual arrangements where the Government is involved.

The Interested Party's Case

33. The Interested Party is the lead contractor of the Standard Gauge Railway project. The Interested Party filed an affidavit through one Hu Zhaoguang on 5th November 2014.
34. The Interested Party states that its own feasibility study revealed that the Standard Gauge Railway project was attainable and further that the design of the project took into consideration all relevant environmental factors to ensure minimal environmental impact. The Interested Party states further that it has already performed a substantial portion of the project contract based on the Environmental Impact Assessment licence issued by the 3rd Respondent and any stoppages would have far and wide reaching financial, social and economic ramifications.
35. The Interested Party finally supports the Respondents' consensual stand that the Petition is an abuse of the process of the court.

Issues

36. Before considering in detail the parties submissions, we would want to point out that this court had earlier held that as constituted it had a concurrent and coordinate jurisdiction with the Environmental and Land Court to handle and dispose of the Petition herein. In our view, the Petition raised issues regarding the violation or alleged violation of Articles 10, 28, 35, 40, 42, 47, 60, 69 and 70. We left the determination as to whether there had been an actual violation or threat of violation or further violation for the hearing of the main Petition.
37. The Petitioner seems to have now settled only two issues. The Petitioner states the issues as :

    a. ***Whether the compulsory land acquisition process has been conducted in accordance with the Constitution and the law, and***
    b. ***Whether the Standard Gauge Railway project, its environmental impact assessment study and report and the licence comply with the Constitution and the law.***

38. The 1st, 2nd and 4th Respondents as well as the Interested Party concur save that they have each framed the issues with more emphasis as to whether or not there have been any infringement of the Petitioner's Constitutional rights and fundamental freedoms.
39. Having heard the parties and read the pleadings , we were able to isolate three core issues and we shall return to them in a short while.

Arguments in court

40. The Petition was urged through the medium of written submissions which were subsequently highlighted by counsel.

The Petitioner's submissions

41. Ms. Kethi Kilonzo whilst referring to the affidavits in support of the Petition submitted that even though the Standard Gauge Railway project is a mega development project, development per se is not and should never be a proviso to human rights. Rights, she added, as guaranteed by the Constitution must never be violated and in these respects the cost of the Standard Gauge Railway project which runs into billions of shillings should not be a consideration once it is shown that the Petitioner's rights were being violated. All and sundry, including development projects must be subservient to the Constitution. Ms. Kilonzo then added that besides the Constitution, the Government in undertaking development projects must always take into account the principle of sustainable development in relation to the environment.
42. Counsel then pointed out that the Environmental Impact and Assessment and Study report (EIAS) had identified the negative impacts of the Standard Gauge Railway project including the issue of involuntary resettlement but this had not been addressed.
43. Next, the Petitioner's counsel submitted that there was the issue of property valuation and compensation which was not being attended to by the Respondents, in particular the 1st Respondent. In this respects, counsel submitted that there was not only a violation of the relevant legislation but Article 40 of the Constitution was also being infringed.
44. The Petitioner's counsel also pointed out that there had not been any public participation or public awareness in the process of compulsory acquisition as well as in the process of the environmental impact assessment study. With regard to the latter, Ms. Kilonzo submitted that the Respondents' assertion that there was public participation could not possibly be true as the Respondents attached a list for a meeting held in 2014 yet the Environmental Impact Assessment and Study report (EIAS) was generated in the year 2012.

45. With regard to Article 40, it was the Petitioner's submission that both substance and procedure needed to be observed. The process leading to compensation needed to be adhered to and in the instant case there having been non-observance of the prescribed procedure the compulsory acquisition was a nullity. The Petitioner pointed out that no notice was given to the Petitioner or his constituents prior to the compulsory acquisition.
46. The Petitioner wound up by asking that the orders sought be granted by the court with a view to protecting the Petitioner's rights.

The 1st Respondent's submissions

47. Ms. Omuko for the 1st Respondent submitted that Article 40 of the Constitution is not absolute as the Constitution itself under clause 3 of the said Article allows and provides for compulsory acquisition. Ms. Omuko submitted that the process is triggered by a request to the 1st Respondent sent by the relevant government department. According to Ms. Omuko, all procedures were duly observed. The 1st Respondent published the intention to acquire. Thereafter, between July 2014 and July 2015, the 1st Respondent also notified the affected property owners of the date for inquiry when the parties were expected to make any representations with regard to compensation.
48. According to Ms. Omuko, the Petitioner and his constituents were all given the opportunity to make their presentation on the compulsory acquisition of their respective parcels of land. Some stated their cases, others did not. Most have however since been compensated.
49. Ms. Said, also advocating for the 1st Respondent, added that the Petitioner as well as his constituents, was made fully aware of the entire process of acquisition. This was done not just through Public Gazette Notices but also through a personal and private letter drafted to the Petitioner by the 1st Respondent.
50. On the issue of compensation, Ms. Said asserted that all the Petitioner's constituents who were affected by the compulsory acquisitions have been justly and fairly compensated and most have accepted their awards.
51. For completeness, Ms. Said submitted that of the 472 Kilometers required for the Standard Gauge Railway line over 440 Kilometers had been acquired. Finally, Ms. Said stated that if the Petitioner as an individual was not satisfied with the intended compensatory award, then the Petitioner had a forum to lodge his complaint and had indeed done so before the Environment and Land Court in suit ELC. No. 776 of 2015.
52. The 1st Respondent then asked the court to take into consideration the socio-economic impact of the project on the public at large and the various individuals already involved in the project.

The 2nd Respondent's submissions

53. The 2nd Respondent's submissions were made by Mr. Agwara.
54. Referring to the Replying Affidavit sworn and filed on behalf of the 2nd Respondent by Mr. A.K. Maina, counsel submitted that the Petitioner and his constituents were made aware of the project as well as the intended acquisition besides the environmental impact assessment study well in advance. This was done through gazette notices and thereafter meetings, to which the Petitioner's constituents were invited. Mr. Agwara submitted that the Petitioner had not tendered any evidence that the environmental concerns had not been addressed. Indeed, the study had been undertaken; the concerns indentified and conditions to help address the concerns imposed.
55. The 2nd Respondent also urged the court to take note of the undisputed fact that the National Environmental Management Authority continues, as demanded by the Environmental Management and Coordination Act, to audit the Standard Gauge Railway project.
56. On the issue of public participation, Mr. Agwara submitted that there was overwhelming evidence

that the public was involved in all aspects.

57. Mr. Agwara urged the court to dismiss the Petition for want of evidence.

3rd Respondent's submissions

58. Mr. E. Gitonga urged the 3rd Respondent's case.
59. Mr. Gitonga submitted that the purpose of the Environmental Impact and Assessment Study is not to eradicate totally any negative impacts but rather to assist the relevant authorities and departments in providing the requisite mitigation measures. Counsel added that besides the Environmental Impact and Assessment Study, the 3rd Respondent is obligated to conduct random or scheduled inspections of any approved project. In the instant case, no accusation has been made that this was not being done. Referring to the case of **Okiya Omtata Okoiti & 2 Others –v- The Attorney General & 3 Others [2014] eKLR** , Mr. Gitonga submitted that the court had already determined that the Standard Gauge Railway project was not detrimental to the environment. That finding, according to Mr. Gitonga, still stands.
60. On the issue of public participation, Mr. Gitonga submitted that the public, including the Petitioner was involved. There were notices, advertisements, meetings and deliberations on both the Standard Gauge Railway project at large and the Environmental Impact and Assessment Study in particular.

The 4th Respondent's submissions

61. Mr. Thande Kuria, advocating on behalf of the Attorney General, submitted that the law had been fully complied with in regard to the process of compulsory acquisition. Mr. Kuria stated that pursuant to Section 24 of the Interpretation and General Provisions Act (Cap 2), the Respondents were perfectly entitled to use the regulations provided for under the repealed Land Acquisition Act (Cap 295) in the absence of any regulations under the recently legislated Land Act,No 6 of 2012. According to Mr. Kuria, what mattered in compulsory acquisition was "just compensation" and the National Land Commission was fully empowered to look into "just compensations".
62. Mr. Kuria urged that the Petition be dismissed as the Petitioner had an alternative avenue to pursue compensation.

The Interested Party's Submissions

63. Through Mr. Ondieki, the Interested Party submitted that the relevant procedure had been followed in the process of land acquisition. Referring to the case of **Five Star Agencies Ltd –v- National Land Commission [2014] eKLR,** counsel submitted that the procedure was as provided for under the repealed Land Acquisition Act (Cap 295), since no regulations had been promulgated under the Land Act. Mr. Ondieki supported the contention that all the respondents had discharged their duties in accordance with both the law and the Constitution.
64. With regard to the alleged non-compliance with environmental laws, counsel submitted that as far as the project was concerned the court in the **Okiya Omtata Okoiti & 2 Others –v- Attorney General & 3 Others (Supra)** had already determined that it was environmentally compliant. To the Interested Party, if there were any subsequent questions arising then only the National Environmental Tribunal, established under the Environmental Management and Coordination Act (Cap 387) Laws of Kenya, had the capacity to now audit and deal with the same.
65. Finally, Mr. Ondieki submitted that the Petitioner had not only failed to particularize how there had been a breach of the Constitution and the Environmental Management and Coordination Act (Cap 387), but had also failed to prove even the generalized allegations. He therefore asked for a

dismissal of the Petition.

Rejoinder by the Petitioner

66. In a pithy rejoinder on behalf of the Petitioner, Ms. Kilonzo submitted that the case of **Okiya Omtata Okoiti & 2 Others –v- Attorney General(supra)** could be distinguished from the instant Petition as the court never had the benefit of an Environmental Impact and Assessment Study report. Secondly, Ms. Kilonzo also stated that the instant Petition was also inviting the court to determine what "just compensation" under Article 40 (3) (b) meant.
67. Finally, Ms. Kilonzo stated that the existence of two Environmental Impact and Assessment licences raised doubt as to whether the project was environmentally compliant.

Discussion and Determinations

68. We have carefully analysed the pleadings, the written submissions and legal authorities as well as all the other documents filed in court. We have also considered the oral arguments advanced by the respective counsel in support of and in opposition to the Petition.
69. In arriving at our decision below we have been guided by the deep recognition of the fact that the constitutional provisions at the core of this Petition must be reviewed and understood within the context of the Constitution and its values as a whole. We are also conscious of the rather emotive approach placed by the ordinary citizens to matters concerning land. We are called to determine the controversy before us by considering Articles 30,35,40,47,60 and 69 of the Constitution.
70. Before settling and resolving the main issues in this Petition, we would wish to also point out that the principles of constitutional interpretation are with time becoming neater and clearer. A brief précis is as follows.
71. Foremost, the Constitution has itself set out at Article 259 a guide on how it should be construed. Simply put, the Constitution must be construed in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms and permits not only the development of the law but also contributes to good governance.
72. Next, we are conscious of the fact that while we must give a liberal interpretation and consideration to any provisions of the Constitution: see **Karua -v- Radio Africa Ltd & 2 Others [2006] 2 EA 117,** we must have due regard to the language and wording of the Constitution and where there is no ambiguity attempts to depart from the straight texts of the Constitution must be avoided: see **Republic –v- El Mann [1969] E A 357** and **Joseph Mbalu Mutava –v- Attorney General & Another [2014]eKLR.**
73. Finally, we are also conscious of the principle that as "a living instrument having a soul and consciousness of its own" (see **Ndyanabo –v- Attorney General [2001] 2 EA 485),** the Constitution must always be interpreted and considered as a whole with all the provisions sustaining and coordinating each other and not destroying the other: see **Olum –v- AG [2002] 2 EA 508** and **Tinyefunza –v- Attorney General UCCA No. 1 of 1997.**
74. These principles could not have been laid out better than was done in the case of **Advocates Coalition for Development and Environment & Others --v- Attorney General & Another [2014] 3 E.A 9,** where the Ugandan Constitutional Court held that the :

"The principles which govern…… the construction of constitutional provisions… include the following:

a. ***The widest construction possible in its context should be given according to the ordinary meaning of the words used, and each general word should be held to extend to all***

ancillary and subsidiary matters. In certain context, a liberal interpretation of the constitutional provision may be called for.

b. ***A constitutional provision containing a fundamental right is a permanent provision intended to cater for all times to come and therefore, should be given a dynamic progressive and liberal flexible interpretation, keeping in mind the ideals of the people and their social, economic and political-cultural values so as to extend fully the benefit of the right to those it is intended for. (South Dakota –v- North Carolina, 192, US 268 1940 LED 448).***
c. ***The entire Constitution has to be read together as an integrated whole and with no one particular provision destroying the other, but rather each sustaining the other. This is the rule of harmony, completeness and exhaustiveness and the rule of paramountcy of the written Constitution.***
d. ***No one provision of the Constitution is to be segregated from the others and be considered alone, but all provisions bearing upon a particular subject are to be brought into view and be interpreted as to effectuate the greater purpose of the instrument.***
e. ***Judicial power is derived from the people and shall be exercised by courts established under the Constitution in the name of the people and in conformity with the law and with the values, norms and aspirations of the people and courts shall administer substantive justice without undue regard to technicalities.***
f. ***The Constitution is the Supreme law of the land and forms the standard upon which all other laws are judged. Any law that is inconsistent or in contravention of the Constitution is null and void to the extent of the inconsistency.***
g. ***Fundamental rights and freedoms guaranteed under the Constitution are to be interpreted having general regard to evolving standards of human dignity***"

75. Bearing the above principles in mind we now proceed to consider the issues in this Petition.
76. We start by pointing out that even though the Petitioner's claims were not pleaded with absolute particularity, we were able to painlessly ascertain the Petitioner's complaints and rule out the application of the edict in **Anarita Karimi Njeru v Republic [1980]KLR 154** .In our view, the threshold of reasonable precision in pleadings had been met. It was apparent to us that three core issues stood out for determination.
77. The three main issues raised may be isolated and stated as follows:

a. ***Whether or not the compulsory acquisition process of land within the Petitioners constituency was or is inconsistent with and or in contravention of Articles 40 of the Constitution and/or any written law.***
b. ***Whether or not the Standard Gauge Railway project is being undertaken in full compliance with the relevant environmental laws and principles both under the Constitution and under the Environmental Management and Coordination Act(Cap 387).***
c. ***Whether there has been a breach of the Petitioner's right to information under Article 35 of the Constitution.***

78. In determining the above issues, we would also have answered two other related issues. First, whether there was public participation as demanded by under Article 10 of Constitution and secondly, who should bear the costs of the Petition.

Of land, compulsory acquisition and the Constitution

79. In answering the first core issue we have considered the meaning and intent of the Article 40 (3) of the Constitution. Article 40 ,reads in part 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.

80. Compulsory acquisition by the State for public purposes is ordinarily a creature of statute. In these respects, the courts have been rather astute in imposing strict construction on statutes allowing the appropriation of private property by the State: see **Taggart *"Expropriation, Public purpose and the Constitution,"* in The Golden Metrand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade, 1998, co-ed Forsyth & Hare, p. 91.**
81. There is also no doubt that no citizen is to be deprived of his land by the State or any public authority against his wish unless expressly "*authorized by law and public interest also decisively demands so*": per **Lord Denning MR** in **Priest –v- Secretary of State [1982] 81 LGR 193,198.** This universally acceptable principle of constitutional law may be international in origin but is now well grounded locally and duly captured under Article 40(3) of the Constitution.
82. As the taking of a person's property against his will is a serious invasion of his proprietary rights, the application of constitutional or statutory authority for the deprivation of those rights requires to be most carefully scrutinized. In short, in our view, there must always exist a presumption against an intention to interfere with vested property rights as the legislative and constitutional intention is always the protection rather than interference with proprietary rights.
83. The statutory framework for compulsory acquisition is founded under Part VIII of the Land Act, No 6 of 2012.
84. With a view to ensuring that there was a real, rather than a fanciful or remote connection between the compulsory acquisition and the State's developmental needs, Part VIII was drafted in detail. History in the practice of compulsory acquisition prompted such detail. Not only was the State to keep its right to compulsorily acquire but the citizen too was to be protected from wanton

and unnecessary deprivation of his private property.

Process of compulsory acquisition

85. In summary, the process of compulsory acquisition now runs as follows.
86. Under Section 107 of the Land Act, the National Land Commission (the 1st Respondent herein) is ordinarily prompted by the national or county government through the Cabinet Secretary or County Executive member respectively. The land must be acquired for a public purpose or in public interest as dictated by Article 40(3) of the Constitution. In our view, the threshold must be met: the reason for the acquisition must not be remote or fanciful. The National Land Commission needs to be satisfied in these respects and this it can do by undertaking the necessary diligent inquiries including interviewing the body intending to acquire the property.
87. Under Sections 107 and 110 of the Land Act, the National Land Commission must then publish in the gazette a notice of the intention to acquire the land. The notice is also to be delivered to the Registrar as well as every person who appears to have an interest in the land.
88. As part of the National Land Commission's due diligence strategy, the National Land Commission must also ensure that the land to be acquired is authenticated by the survey department for the rather obvious reason that the owner be identified. In the course of such inquiries, the National Land Commission is also to inspect the land and do all things as may be necessary to ascertain whether the land is suitable for the intended purpose: see Section 108 of the Land Act.
89. The foregoing process constitutes the preliminary or pre-inquiry stage of the acquisition.
90. The burden at this stage is then cast upon the National Land Commission and as can be apparent from a methodical reading of Sections 107 through 110 of the Land Act, the landowner's role is limited to that of a distant bystander with substantial interest.
91. Section 112 of the Land Act then involves the landowner directly for purposes of determining proprietary interest and compensation. The section has an elaborate procedure with the National Land Commission enjoined to gazette an intended inquiry and the service of the notice of inquiry on every person attached. The inquiry hearing determines the persons interested and who are to be compensated. The National Land Commission exercises quasi-judicial powers at this stage.
92. On completion of the inquiry the National Land Commission makes a separate award of compensation for every person determined to be interested in the land and then offers compensation. The compensation may take either of the two forms prescribed. It could be a monetary award. It could also be land in lieu of the monetary award, if land of equivalent value, is available. Once the award is accepted, it must be promptly paid by the National Land Commission. Where it is not accepted then the payment is to be made into a special compensation account held by the National Land Commission: see Sections 113- 119 of the Land Act.
93. The process is completed by the possession of the land in question being taken by the National Land Commission once payment is made even though the possession may actually be taken before all the procedures are followed through and no compensation has been made. The property is then deemed to have vested in the National or County Government as the case may be with both the proprietor and the land registrar being duly notified: see Sections 120-122 of the Land Act.
94. If land is so acquired the just compensation is to be paid promptly in full to persons whose interests in land have been determined: See Section 111 of the Land Act. This is in line with the Constitutional requirement under Article 40(3) of the Constitution that no person shall be deprived of his property of any description unless the acquisition is for a public purpose and subjected to prompt payment in full of just compensation.
95. The Constitution dictates that acquisition be in accordance with the provisions of the Constitution

itself and any Act of Parliament. The Constitution itself only provides for just compensation being made promptly.

96. The current procedure for acquisition of land by the State is as outlined above. As can be seen parliament took very seriously its constitutional duty to legislate on the State's powers of deprivation or expropriation. Perhaps conscious of the emotive nature of land issues, the Legislature appeared scrupulous and contemplative.
97. The Petitioner has challenged both the procedure adopted by the 1st Respondent as well as the alleged compensation and compensatory awards offered by the 1st Respondent. Before considering and determining what is a just, full compensation and the promptitude in payment, we would wish to determine whether the compulsory acquisition of various parcels of land belonging to the Petitioner and his constituents were legal.
98. It is common ground that compulsory acquisition of land including the Petitioner's land was necessary for the development of the Standard Gauge Railway. There is also no controversy that the Standard Gauge Railway project is meant to serve and benefit the public at large. The acquisition was certainly for a public purpose. The choice as to whose land to acquire was inevitably to be made by the National Government and this was linked to the Standard Gauge Railway project's blue-print. The Petitioner has however disputed the procedure adopted in the process of acquisition.
99. The affidavits of the Petitioner, Agnes Mbeke Munyao, John Ndambuki, Jonah Fred Mulatya, Jones Mulandi Mbare, Joseph K. Kiema, Stellah Mbelete and Stephen Kimilu all filed on 15th October 2014 in support of the Petition as well as the Petitioner's Further Affidavit filed on 6th August 2015 all list an array of alleged breaches of the provisions of the Land Act.
100. The Petitioner and the other deponents state that no gazette notices were served either of the acquisition or of the award and offer of compensation contrary to the provisions of the Land Act. Secondly, it is alleged that in an acquisition involving a portion of school land (Kiboko Primary School) the school management and parents were not given any opportunity for public participation. Thirdly, it is stated that no notice was given when the 1st and 2nd Respondents' representatives visited the various parcels of land which had been earmarked for acquisition.
101. The Petitioner's counsel Ms. Kethi Kilonzo, having detailed the alleged breaches of process, further submitted that the Respondents invoked an inapplicable and indeed, repealed law as all the Gazette notices in support of the compulsory acquisition process stated that the process was being undertaken pursuant to Section 162 of the Land Act and the repealed Land Acquisition Act. For this the Petitioner contended that in applying a repealed statute the process was consequently not conducted in accordance with the law and the Constitution.
102. The Respondents denied that there was any provision of the Constitution or law contravened in the process of acquisition. In support, the Respondent made reference to the various Gazette Notices as well as to Section 15(1) of the Kenya Railways Corporation Act (Cap 397). The latter section was relied upon to demonstrate that the 2nd Respondent was entitled to take possession of the land compulsorily acquired.
103. The various Gazette Notices exhibited by the Petitioner to his Further Affidavit of 5th August 2015 would confirm that there should exist no controversy that the Petitioner was always aware of the compulsory acquisition of the various parcels of land. The Gazette Notices were specific. They were public notices regarding the acquisition of land. We have no doubt that the Petitioner as well as his constituents were made aware of the intended acquisitions pursuant to Section 107 of the Land Act.
104. We notice that all the notices were stated and titled to have been issued under the Land Act, No. 6 of 2012. In the body of the Gazette Notices too specific references are not only made to the Land Act but also to the Land Acquisition Act (Cap 295) now repealed. On the applicability, if at all of the said Land Acquisition Act we shall shortly revert.
105. The Petitioner also lamented that there was no public participation in the process of acquisition.

This was especially in respect to a basic education institution known as Kiboko Primary School. It is unclear whether this institution is a public or private one. The Petitioner gave no indication on this. The Petitioner needed to establish that the school sat on private land and was indeed private property. The Petitioner did not do so. As compulsory acquisition only applies where the Government is acquiring private property for a specified public purpose, we will refrain from discussing and determining the issue of public participation in relation to compulsory acquisition of the institution.

106. The Petitioner also raised issue with the fact that the Respondents never notified the Petitioner and his constituents before the Respondents descended upon the various parcels of land for purposes of survey or possession. The Respondents contest this allegation. The 2nd Respondent moves a step further and justifies entry on the basis of Section 15 of the Kenya Railways Corporation Act (Cap 397).
107. Once again it is unclear from the Petition when the alleged trespass was committed by the Respondents. Was it before the inquiry as to compensation was made pursuant to Section 112 of the Land Act or after the inquiry" It is to be noted that under Section 120 of the Land Act, possession ought to be taken by the 1st Respondent only after the amount of the first offer has been paid and an appropriate notice given to the land owner specifying the date of possession. Section 120(2) of the Land Act however also allows possession to be taken in cases of urgency or if acquisition by following normal procedure would lead to a delayed acquisition. In such cases, the 1st Respondent may take possession notwithstanding the fact that no compensation has actually been made.
108. The Respondents further contend that in all instances of taking possession, the requisite notices were given. In his second Further Affidavit filed in court on 31st August 2015, A.K. Maina on behalf of the 2nd Respondent has exhibited various letters forwarding the Vesting notices to several of the Petitioner’s constituents. There are also exhibited letters and affidavits of service of notices to vacate served upon the Petitioner’s constituents. We are satisfied that it was for the Petitioner to demonstrate exactly when the alleged illegal entries or acts of trespass took place. The Petitioner did not and has not. Rather the Respondents have, in the circumstances, been able to satisfy us that necessary notices were served upon the various land owners before possession was taken.
109. Before considering the substance of compulsory acquisition which is the requirement of prompt, just and full compensation, we wish to point out that the Petitioner also contended that there was no inquiry on the payable compensation and hence the process was null and void.
110. Inquiry as to compensation is a mandatory process for the simple reason that compensation is the essence of compulsory acquisition. We have sighted various Gazette Notices exhibited by the Petitioner in his Further Affidavit filed in court on 7th August 2015. The notices severally invite land owners to make representations on the awards or compensation. The Respondents contend that the Petitioner did not participate in any inquiry as to compensation and when he did, the Petitioner only incited the other land owners not to accept any awards. We are satisfied that the 1st Respondent accorded the land owners with the requisite notices on inquiry. Many obliged participated and were paid. Some have not obliged. We do not hold the view that the 1st Respondent failed to let the land owners know of the inquiry process.
111. We now consider the issue as to prompt just and full compensation and whether the constitutional principle in this regard has been violated or is threatened with violation.
112. The Petitioner has alleged and further argued that the Respondents have contravened or threaten to contravene the Petitioner’s (and his Constituents) right to just compensation under Article 40(3) of the Constitution. The point raised by the Petitioner is simply not about the quantification of the compensation payable to the Petitioner and the affected residents of Kibwezi West Constituency in respect of the compulsory acquisition of land necessary for development purposes. The Petitioner has also taken issue with the process adopted and applied by the

Respondents towards such compensation.

113. There exists, no doubt, an overarching right to compensation under Article 40 (3) of the Constitution where a person is deprived of his property for a public purpose or in the public interest.
114. The power to expropriate private property as donated to the State by both the Constitution and statute law (the Land Act) leaves the private land owner with no alternative. The power involves the taking of a person's land against his will. It is a serious invasion of his proprietary rights through the use of statutory authority. The private land owner has no alternative but wait for compensation. It is consequently necessary that the court must remain vigilant to see to it that the State or any organ of the state does not abuse the constitutional and statutory authority to expropriate private property. It is on this basis that courts have consistently held that the use of statutory authority to destroy proprietary rights requires to be most carefully scrutinized: see ***Commissioner of Lands v Coastal Aquaculture Limited*** **[1997]1 KLR (L&E) 264**. See also the Australian case of **R & R Fazzolari Pty Ltd –v- Parramatta City Council [2009] HCA 12** where the court held the view that such scrutiny must invite and also involve common law as well as statutory protections. Just compensation is consequently mandatory.
115. It is for the court consequently to ensure that the process is free from any rebuke and in this regard; the statutory provisions must be followed and be adhered to strictly.
116. The law allows compensation to take the form of either an alternative parcel of land or cash in lieu: see Section 114(2) of the Land Act.
117. With regard to the instant case, the compensation was to take the form of monetary payments. We can only point out what the framers of the Constitution had hoped to achieve by making provision for compensation.
118. In our view, a closer reading of Article 40(3) of the Constitution would reveal that the Constitution did not only intend to have the land owner who is divested of his property compensated or restituted for the loss of his property but sought to ensure that the public treasury from which compensation money is drawn is protected against improvidence. Just as the owner must be compensated so too must the public coffers not be looted. It is that line of thought that , under Article 40(3), forms the basis for "prompt payment in full, of just compensation to the person" deprived of his property though compulsory acquisition. As was stated by Scott L.J, in relation to compulsory acquisition, in the case of **Horn-v- Sunderland Corporation [1941] 2 KB 26,40:**

"The word "compensation" almost of itself carries the corollary that the loss to the seller must be completely made up to him, on the ground that unless he receives a price that fully equaled his pecuniary detriment, the compensation would not be equivalent to the compulsory sacrifice".

119. Effectively Lord Scott's statement gave rise to the unabated proposition that the compensation of compulsorily acquired property be quantified in accordance with the principle of equivalence. A person is entitled to compensation for losses fairly attributed to the taking of his land but not to any greater amount as "*fair compensation requires that he should be paid for the value of the land to him, not its value generally or its value to the acquiring authority"**:*** see **Director of Buildings and Lands –v- Shun Fung Wouworks Ltd [1995] AC 111,125.**
120. We see no reason why the same approach should not be adopted locally. The Constitution decrees "**just compensation**" which must be paid promptly and in full. The Constitution dictates that the compensation be equitable and lawful when the word "just" is applied as according to Black's Law Dictionary 9th Ed page 881 the word "**just**" means "***legally right; lawful; equitable***". In our view, the only equitable compensation for compulsory acquisition of land should be one which equates restitution. Once the property is acquired and there is direct loss by reason of the acquisition the owner is entitled to be paid the equivalent. One must receive a price equal to his pecuniary detriment; he is not to receive less or more. This can be achieved to the satisfaction of

the owner of land by reference to the market value of the land.

121. Both the Land Act as well as the Constitution have laid a basis for this. The Land Act expects the State and in this respects the National Land Commission to be astute enough and detect any collusive attempts by land owners to manufacture artificially high compensatory prices on compulsory acquisition. The statute consequently provides that the National Land Commission will originally assess the value and make the offer. An inquiry, if there is a dispute on the value is then made.
122. The Respondents have demonstrated that inquiries were held. The Respondents have also demonstrated that payments have been made to some land owners. For others, payment still awaits them. If dissatisfied they will have an avenue to challenge the same.
123. In answer therefore to what "prompt payment in full, of just compensation" means under Article 40(3) of the Constitution, we would agree with Mr. Kuria for the 4th Respondent and hold that prompt full and just compensation does not mean any speculative value of the land but an equivalent value which could be the contract value or market value: see also **Kanini Farm Ltd –v- Commissioner of Lands [1996] KLR 1**. Such equivalent value may be attained when the National Land Commission makes the award for compensation as it is enjoined to and where the land owner is dissatisfied the inquiry provided for under Section 112 of the Land Act is undertaken.
124. With a view to demonstrating that the Petitioner as well as the Petitioner's constituents would not be fully and justly compensated contrary to provisions of the Constitution, the Petitioner's counsel stated that the 1st Respondent was applying outdated laws and regulations. This was in reference to the Land Acquisition Act (Cap 295) (Repealed).
125. The 1st Respondent conceded that it applied various regulations of the repealed statute. It is for that reason too that the notices were issued and intituled both under the Land Acquisition Act and the Land Act.
126. The Land Acquisition Act was repealed on 2 May 2012. In its stead the Land Act was enacted. The provisions of the Land Act running from Section 107 through Section 133 deal with compulsory acquisition. They effectively replaced the provisions of the Land Acquisition Act. As was stated by Mutungi, J in the case of **Virendra Ramji Gudka & 3 Others –v- Attorney General [2014]eKLR.**

"Rights of compulsory acquisition are conferred by specific provisions of the law being Article 40 of the Constitution and Sections 107 to 133 of the Land Act, No. 6 of 2012 which replaced the provisions previously contained in the Land Acquisition Act".(emphasis)

127. We agree entirely with the learned Judge's exposition. The Land Acquisition Act (Cap 295) was repealed in 2012. No interest or liability had accrued to any party herein under the said Act. We are unable to forecast how a repealed statute can be applied to any given circumstances if no rights or obligations had accrued prior to its repeal: see also Section 23(3) of the Interpretation and General Provision Act (Cap 2) Laws of Kenya.
128. Counsel for the Interested Party, Mr. Ondieki made a copious reference to the case of **Five Star Agencies Ltd –v- National Land Commission NBI ELC. Case No. 445 of 2014 [2014]eKLR** to try and demonstrate that the provisions of the Land Acquisition Act were still applicable in compulsory acquisition matters.
129. We have read the decision in **Fivestar Agencies Ltd – Vs National Land Commission (*Supra*).** In that case, Nyamweya J was faced with a situation where the compulsory acquisition process had commenced and had been finalized save for the compensatory award some six years before the repeal of the Land Acquisition Act. The acquiring authority (the National Land Commission) then gazetted a date for inquiry into the appropriate compensation after the repeal of the Land Acquisition Act. The judge faced with the question as to which law (the Land

Acquisition Act or the Land Act) was applicable at the time of making the award correctly invoked Section 23 of the Interpretation and General Provisions Act (Cap 2). The judge, in our view, correctly held that as the right to compensation in favour of the land owner and the obligation to compensate the land owner had accrued prior to the repeal of the Land Acquisition Act, the applicable law was the repealed statute when she stated as follows:

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

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

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed; or

(c) affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed; or

(d) affect a penalty, forfeiture or punishment incurred in respect of an offence committed against a written law so repealed; or

(e) affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made."

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

130. In so far as the application of the principles governing assessment of just compensation is concerned, the 1st Respondent herein is expected under Section 111(2) of the Land Act to prescribe when to regulate such assessment. The rules or regulations are yet to be prescribed or determined. Under the repealed statute, the regulations were set out in the schedule to the Act. They constituted subsidiary legislation.
131. Section 24 of the Interpretation & General Provisions Act provides that where an Act or part of an Act is repealed, subsidiary legislation issued under or made by virtue thereof shall, unless a contrary intention appears, remain in force, so far as it is not inconsistent with the repealing Act, until it has been revoked or repealed by subsidiary legislation issued or made under the provisions of the repealing Act, and shall be deemed for all purposes to have been made there-under.
132. As was correctly submitted by Mr. Kuria for the 4th Respondent and by virtue of Section 24 of the Interpretation and General Provisions Act (Cap 2), such subsidiary legislation as read together with Section 7 of the Sixth Schedule to the Constitution would continue to apply until such time as the 1st Respondent prescribes rules to regulate and guide assessment of just compensation.
133. In conclusion, we hold and find that the Schedule to the Land Acquisition Act applies to

compulsory acquisition undertaken by the State through the National Land Commission until such time as the National Land Commission promulgates rules and regulations outlining the principles for the assessment of just and full compensation. We further hold that the procedure for compulsory acquisition since 7th May 2012 is as provided for under the Land Act and in particular Sections 107 to 133 thereof. The repealed Land Acquisition Act (Cap 295) cannot otherwise apply.

134. In the instant case consequently, the Respondents were perfectly entitled to make reference to both the Land Act and the Land Acquisition Act. As the Petitioner has not established or shown to us any substantive section of the Land Acquisition Act that was allegedly applied by the Respondents in the process of compulsory acquisition, we find no fault on the part of the Respondents.
135. We conclude that there was no violation of Article 40.
136. We now come to the question whether the project's Environment Impact Assessment study and the EIA licence comply with the Constitution.
137. Before us, the Petitioner's counsel submitted that the project was contrary to the express nature and spirit of the Constitution with regard to the environment and the principle of sustainable development. We must state that in these respects the Petitioner's submissions, just as the pleadings have been drafted, were rather generalized. We however understood the Petitioner to state that the Standard Gauge Railway project is not fully compliant with the provisions of the Environmental Management and Co-ordination Act (Cap 387).
138. We hold the view that the Petitioner's concerns and allegations were adequately addressed by the Affidavits of A.K. Maina and Prof. Geoffrey Wakhungu.
139. The two affidavits fully addressed the issue of the Standard Gauge Railway projects impact on the environment. The affidavits detail the process of undertaking an Environmental Impact Assessment study. The affidavits also detail how the public was involved in the process.
140. We have no doubt that the State under Article 69 of the Constitution is enjoined to ensure sustainable development: see also the Preamble to the Constitution. The State is also to ensure that every person has a right to a clean and healthy environment. However physical development must also be allowed to foster to ensure that the other guaranteed rights and freedoms are also achieved. Such physical development must however be undertaken within a constitutional and statutory framework to ensure that the environment thrives and survives. It is for such reason that the Constitution provides for public participation in the management, protection and conservation of the environment. It is for the same reason too that the Environmental Management and Coordination Act (" the EMCA")has laid out certain statutory safe guards to be observed when a person or the State initiates any physical development.
141. At the core is the Environmental Impact Assessment and Study which is undertaken under Section 58 of the EMCA and the regulations thereunder. Under Regulation 17, the Environmental Impact Assessment Study must involve the public. The inhabitants of any area affected by a physical development must be given an opportunity to air their views on the effects of any such development. After the Environmental Impact Assessment Study report is compiled, the same report must be circulated to the affected persons.
142. The Petitioner argues that the 3rd Respondent never involved the Petitioner or his constituents either before or during the compilation of the Environmental Impact Assessment Study report. The Petitioner states that the report was only circulated or sent to Mombasa County where the Standard Gauge Railway project origins can be traced. Thirdly, the Petitioner argues that the report itself as well as the attendant licence were faulty as two licences, instead of one, were issued
143. The 3rd Respondent reply is that the petitioner has not demonstrated that any provision of the Constitution or the relevant statute has been violated or breached. The 3rd Respondent contends that all the requisite procedures were followed by the 3rd Respondent and that the Environmental

Impact Assessment was conducted within the law and procedurally for that matter. The 3rd Respondent also states that the public was fully engaged through public hearings and other avenues of public participation.The 3rd Respondent finally argues that all the concerns raised by stakeholders as well as the public including but not limited to the Kenya Forest Service and the Kenya Wildlife Service were fully addressed by the 3rd Respondent and a condition embedded in the EIA licence that the project be undertaken in full liaison with such named stakeholders.

144. We have reviewed the affidavit evidence availed. On the issue of involving the Petitioner and the Petitioner's constituents prior or during the compilation of the Environmental Impact Assessment Study report, we are satisfied that the Respondents met the threshold.
145. For starters, we must point out that contrary to the Petitioner's claims that there was no Environmental Impact Assessment Study report or Environmental Impact Assessment licences, there was indeed an Environmental Impact Assessment Study undertaken and a report generated. Two Environmental Impact Assessment licenses were also apparently issued. This latter fact preoccupied much of the Petitioner's submissions on the issue of the environment. .
146. On whether there was public participation prior to the Environmental Impact Assessment report we are also satisfied from the evidence availed that the 2nd and 3rd Respondents performed their constitutional and statutory compulsions and involved the public.
147. The law with regard to public participation as has been laid out in a series of cases is relatively clear. When an entity or person is enjoined to involve the public in governance or any decision making or legislative process the person so enjoined is under a duty to ensure that adequate facilitation for such public participation is made. The public need not only be invited but must also be given adequate opportunity to participate. As to whether the public participates and their views taken, is truly another sphere . It is however not intended to be a mere cosmetic exercise as the spirit behind the constitutional requirement that the public be involved in governance and decision making as awell as legislative exercise is that the end product be deemed owned by the same public. In **Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)** this position was appreciated as follows:

"If legislation is infused with a degree of openness and participation, this will minimise dangers of arbitrariness and irrationality in the formulation of legislation. The objective in involving the public in the law-making process is to ensure that the legislators are aware of the concerns of the public. And if legislators are aware of those concerns, this will promote the legitimacy, and thus the acceptance, of the legislation. This not only improves the quality of the law-making process, but it also serves as an important principle that government should be open, accessible, accountable and responsive. And this enhances our democracy."**(emphasis)**

148. In the same case, it was also held that

"The phrase "facilitate public involvement" is a broad concept, which relates to the duty to ensure public participation in the law-making process. The key words in this phrase are "facilitate" and "involvement". To "facilitate" means to "make easy or easier", "promote" or "help forward". The phrase "public involvement" is commonly used to describe the process of allowing the public to participate in the decision-making process. The dictionary definition of "involve" includes to "bring a person into a matter" while participation is defined as "[a] taking part with others (in an action or matter); . . . the active involvement of members of a community or organization in decisions which affect them". According to their plain and ordinary meaning, the words public involvement or public participation refer to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process. That is the

plain meaning of section 72(1)(a). This construction of section 72(1)(a) is consistent with the participative nature of our democracy. As this Court held in New Clicks, "[t]he Constitution calls for open and transparent government, and requires public participation in the making of laws by Parliament and deliberative legislative assemblies." The democratic government that is contemplated in the Constitution is thus a representative and participatory democracy which is accountable, responsive and transparent and which makes provision for the public to participate in the law-making process."

149. We need say no more on the law on public participation as the above approach as propounded in the South African cases of **Doctors for Life International -v- Speaker of the National Assembly and Others (supra) and Matatiele Municipality and Others -v- President of the Republic of South Africa and Others (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC)** , has been neatly and positively embraced and followed within our jurisdiction. See the cases of **Robert N. Gakuru & Others vs. Governor Kiambu County & 3 Others [2014] eKLR, Richard Dickson Ogendo & 2 Others –v- Attorney General & 5 Others [2014] eKLR** and **Samuel Thinguri Waruathe & 2 others v Kiambu County Government & 2 others [2015] eKLR.** See also the case of **Nairobi Metropolitan PSV Saccos Union Ltd & 25 Others v County of Nairobi Government & 3 Others Petition No. 486 of 2013** where Lenaola J held that the fact that the views given by the attendees at a public forum are all not taken into consideration does not vitiate the fact that there has been compliance with the requirement for public participation.
150. In the instant case there was facilitation. The public and other relevant stakeholders were involved as the 3rd Respondent undertook its statutory mandate. There is undisputed evidence (see paragraph 5 of the 3rd Respondents affidavit sworn by Zephania Ouma on 27th October 2014) that the Kenya Wildlife Service, the Ministry of State for Planning, the Kenya Forest Service and the National Museums were all involved. These were all stakeholders with different interests.
151. There is also adequate evidence that pursuant to Section 21 of the Environmental Impact Assessment and Audit) Regulations, LN No. 101 of 2003, the 2nd and 3rd Respondents caused to be published in the newspapers of 6th November 2012 and 13th November 2012 notice to the public inviting comments within 60 days from the public on the project. The said notices which were also published in the Kenya Gazette also disclosed the anticipated impacts and proposed mitigation measures. The notices were all published prior to the Environmental Impact Assessment licence being issued and some comments were indeed received, taken into account and acted upon by the 3rd Respondent.
152. In the case of **Okiya Omtata Okoiti & 2 Others –v- Attorney General & 3 Others HCCP. No. 68 of 2014,** the court was faced with an identical issue as to whether the Respondents therein in undertaking the Standard Gauge Railway project had taken into account environmental considerations, Justice Lenaola held, after a full review of the evidence, as follows:

"[106]…In addition, the Government had conducted an autonomous environmental impact assessment on the Standard Gauge Railways project and concluded that the Standard Gauge Railway project should proceed. It is thus my finding with that evidence before me that the contention by the Respondents [sic] that the Standard Gauge Railway is detrimental to the environment lacks merit".

153. We can only affirm the learned Judge's finding by stating that, likewise, on the evidence before us, the Respondents took into account, all environmental considerations including sustainable development.
154. With the finding that there was indeed an Environmental Impact Assessment Study Report and

that the constitutional provisions and requirements were observed by the Respondents in obtaining the Environmental Impact Assessment Study report, two minor issues related to the Standard Gauge Railway and the environment remain for determination.

155. First, the Petitioner attempted to poke holes into the Environmental Impact Assessment Study report and urged that we disregard the same. Secondly, the Petitioner also stated that the existence of two Environmental Impact Assessment licences meant that the Standard Gauge Railway project was not beyond rebuke in so far as protection of the environment was concerned.
156. On these two issues, we are satisfied that the court should not arrogate itself jurisdiction. The Court of Appeal in **Republic –v- N.E.M.A *Ex parte* Sound Equipment Ltd CACA 84 of 2010 [2011] eKLR** made it clear that challenges to Environmental Impact Assessment Study Reports and or Environmental Impact Assessment Licences should be made to the National Environmental Tribunal established for under Section 125 of the EMCA. Rather than come to this court, the tribunal should have been given the first opportunity and option to consider the matter. We agree with Mr. Gitonga for the 3rd Respondent that the tribunal is the specialized body with the capacity to minutely scrutinize the Environmental Impact Assessment Study Report as well as any licenses.
157. Suffice to point out that this court sitting as a Constitutional Division of the High Court was only investigating and interrogating alleged violations of constitutional rights and freedoms and where there is procedure for redress available elsewhere that redress must be pursued within the rubric provided. This Court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute. Such has been the gist of such cases like **The Speaker of the National Assembly -v- Karume (2008) 1 KLR 426.** In **Narok County Council v Trans Mara County Council and Another, Civil Appeal No. 25 of 2000**, the Court of Appeal expressed itself as follows in that regard;

"Although Section 60 of the Constitution gives the High Court unlimited jurisdiction, it cannot be understood to mean that it can be used to clothe the High Court with jurisdiction to deal with matters which a statute has directed should be done by a Minister as part of his statutory duty; it is where the Statute is silent on what is to be done in the event of a disagreement…Where the Statute provides that in case of a dispute the Minister is to give direction, the jurisdiction of the Court can be invoked only if the Minister refuses to give a direction or in purporting to do so, arrives at a decision which is grossly unfair or perverse. In the latter, his decision can be challenged by an application to the High Court for a writ of certiorari because under the relevant Section the decision is to be made on a fair basis. But if the Minister simply refuses to discharge his statutory duty, his refusal can also be challenged in the High Court by way of mandamus to compel the Minister to perform his statutory duty but not by way of a suit … If the Court acts without jurisdiction, the proceedings are a nullity …

158. The Court concluded as follows as regards the jurisdiction of the High Court;

"Where the law provides for procedure to be followed, the parties are bound to follow the procedure provided by the law before the parties can resort to a Court of law as the Court would have no jurisdiction to entertain the dispute."(emphasis)

159. There is then the final issue of whether the Respondents have violated the Petitioner's right of access to information under Article 35 of the Constitution. In these respects, the Petitioner's claim was that the Respondents have failed to provide the Petitioner with information on the standard gauge railway project. There was no specificity on the information held by the Respondents and sought by the Petitioner. The Respondents denied the allegation, simply

terming them as “wild”.

160. It is critical for any party alleging a denial of access to information to more specifically plead the nature of the information sought and to then prove that the information is held by the a respondent. Prove can actually be by way of evidence of the specific demand. Both were in the instant case lacking and we must quickly state that there is no merit on this aspect of the Petitioner’s claim.

Conclusion and disposal

161. On the basis of the evidence before us we are unable to return the verdict sought by the Petitioner that there are violations or threatened violations of the Constitution. No sufficient evidence has been tendered by the Petitioner, who had the burden, to show that Articles 10,30,35, 40,47,69 and 70 of the Constitution have been violated. The Petitioner failed to discharge the burden to the required standard. On the contrary, the Respondents have availed sufficient evidence to confirm that in matters environment the relevant provisions of the Constitution and other relevant legislation were observed.
162. We answer the reserved issues as follows:

(i)Whether or not the compulsory acquisition process of land within the Petitioner’s constituency was or is inconsistent with and or in contravention of Articles 10, 28, 40 and 47 of the Constitution and/or any written law.

The answer is no.

(ii)Whether or not the project is being undertaken in full compliance with the relevant environmental laws and principles both under the Constitution and under the Environmental Management and Coordination Act(Cap 387).

The answer is yes

(iii)Whether there has been a breach of the Petitioner’s right to information under Article 35 of the Constitution.

The answer is no

163. The Petition must be dismissed. It is dismissed.

Costs

164. The issue of costs is within our discretion. The Petitioner genuinely believed there were possible violations. We see no reason to condemn him to any cost noting that the Petition was also filed on behalf of persons not in a position to act for themselves.
165. There will be no order as to costs.

Dated and signed at Nairobi this 29th day March, 2016

I. LENAOLA M.NGUGI L.ACHODE G.V. ODUNGA J.L.ONGUTO

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Delivered and dated this 30th day of March 2016

J.L.ONGUTO

JUDGE