



Paper laid by  
the Hon (Eng) Mwalimu  
on Thur 24/4/14  
*MS*

PARLIAMENT  
OF KENYA  
LIBRARY

ELEVENTH PARLIAMENT

THE NATIONAL ASSEMBLY

(SECOND SESSION)

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RESPONSE TO A STATEMENT REQUESTED BY  
THE HON. DAVID GIKARIA, MP  
FROM THE CHAIRPERSON OF THE DEPARTMENTAL COMMITTEE ON  
TRANSPORT, PUBLIC WORKS AND HOUSING

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April, 2014

**Hon. Speaker,**

On the Wednesday, **March 19<sup>th</sup>, 2014** the Member for Nakuru Town East Constituency, the Hon. David Gikaria, MP, requested for a statement from the Chairperson of the Committee on Transport, Public Works and Housing regarding the construction of the Nairobi-Nakuru Highway by-pass from the Stem Hotel to the Njoro turn off. In particular the member tasked the Committee to inquire into and report on the following:-

1. The length and Route map of the By-pass;
2. Details of designs of the road, the scope of works and the total cost of the project;
3. Whether tender in respect to the project has been awarded and if so, what will be the commencement and completion date of the project; and
4. Number of people who will be displaced by the project and plans of compensating them.

Hon. Speaker, the Committee summoned the Cabinet Secretary for Transport and Infrastructure on the Thursday, **27<sup>th</sup> March, 2014** to appear before it and answer to the Member's request. The Committee also invited the Hon. David Gikaria, MP, for the meeting.

Hon. Speaker, I wish to report to the House as follows:

**That:-**

- i) **Regarding the length and route map of the by-pass.** The tentative estimate of the by-pass is 35 kilometers and is yet to be finalized by the consultant including improving the access roads within the locality. The design of the bypass was temporarily stopped by a court stay brought by Naka residents. However, the ruling was given on 7<sup>th</sup> February, 2014 with instructions to seek consultation with the affects residence. I herby table copy of the summary of letter to Principal Secretary, Ministry of Transport and Infrastructure as well as the petition/ruling. Once consultations are finalized completion of the design will proceed to its logical conclusion.

ii) **As regard to the scope of the consulting Services and the total cost of the project:-**

Preliminary and detailed Engineering design of the Nakuru bypass and proposed Roads will include:-

Eveready Turnoff-Githima-Njoro Junction, Githima-Kaptembwa West Shopping Center, Baringo Street Junction to A104 near Stem Hotel. The total length is approximately 35 kilometers. (Map attached). The total cost of the design by the consultant is approximately **Kshs. 34, 953,468.00 (Kenya Shillings Thirty Four Million, Nine Hundred and Fifty Three Thousand, and Four Hundred and Sixty Eight only).**

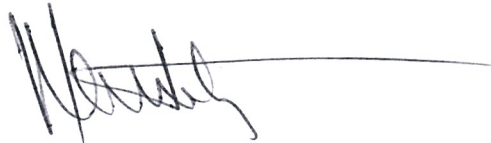
Since the consultant is yet to finalize with the detailed scope of works, the Ministry is unable to provide the exact cost for construction works. However, the Ministry will be ready to provide the total cost once the design is finalized.

iii) **On Whether tender in respect to the project has been awarded and if so, what will be the commencement and completion date of the project,** it was reported by the Principal Secretary that the tender for construction of the works has not been awarded since the designs is yet to be completed.

iv) **On the number of people who will be displaced by the project and plans of compensating them,** it was reported that the number of people who will be displaced has not been established since the final design which will include Project Affected Persons for land and property compensation) is yet to be finalized.

Hon. Speaker, I beg to lay this Statement.

Thank you



The Hon. (Eng.) Mahamud Maalim, M.P.

**Vice- Chairperson: Transport, Public Works and Housing**

② KAZAMBA  
pls deaf  
FA 27/3



① D/committee

7.5 +

Paper laid  
by Hon (En)  
M. Mutua

# MINISTRY OF TRANSPORT & INFRASTRUCTURE

on Thurs  
24/4/14

Telephone (020) 2722216  
Fax: (020) 2730330  
Email: [ps@infrastructure.go.ke](mailto:ps@infrastructure.go.ke)  
Website: [www.transport.go.ke](http://www.transport.go.ke)

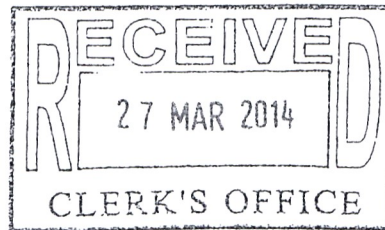
OFFICE OF THE PRINCIPAL SECRETARY  
WORKS BUILDING  
NGONG ROAD  
P.O. Box 52692-00200  
NAIROBI

When replying please quote

Ref No: MOTI/I/A. 24.04 VOL 19/11

26<sup>th</sup> March, 2014

**Mr. Justin K. Bundi**  
Clerk of the National Assembly  
Parliament Building  
Box 41842-00100  
**NAIROBI**



Dear, *Justin*

## MINISTERIAL STATEMENT

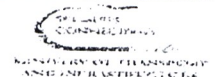
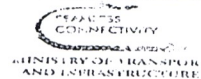
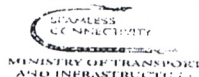
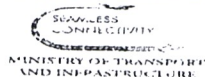
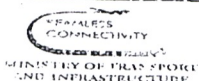
Reference is made to your letter no. KNA/DC.L/CORR/2014/(19) of 20<sup>th</sup> March, 2014 on the above subject matter.

Attached, please find response on the questions asked by Hon. David Gikaria, MP for Nakuru East Constituency regarding the Construction of Nairobi -- Nakuru Highway By- Pass from the stem to the Njoro Turn off for your necessary action.

Yours *Sincerely*

**Eng. John K. Mutonik, EBS**  
**Principal Secretary**

Encls.





## MINISTRY OF TRANSPORT AND INFRASTRUCTURE

### MINISTERIAL STATEMENT

The Member of Parliament for Nakuru East constituency, Hon. David Gikaria, MP, rose on the floor of the House and requested for the statement from the Chairperson of the Departmental Committee on Transport, Public Works and Housing regarding the Construction of the Nairobi- Nakuru Highway By- Pass from the stem to the Njoro Turn off as follows:-

#### QUESTIONS:-

- (i): The Length and Route map of the By-pass?
- (ii): Details of designs of the road, the scope of works and the cost of the project?
- (iii): Whether tender has been awarded and if so, what will be the commencement and completion date of the project.?
- (iv): Number of people who will be displaced by the project and plans of compensating them?

**b) Costs of the Project**

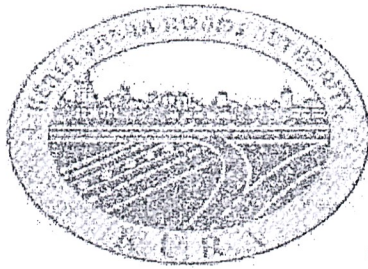
The total Costs of the design by the consultant is approximately **Kshs.34,953,468.00 (Kenya Shillings Thirty Four Million, Nine Hundred and Fifty Three Thousand, Four Hundred and Sixty Eight Only).**

Since the consultant is yet to finalize with the detailed scope of works, we are unable to provide the exact cost for construction works. However, this will be available once the design is finalized.

- (iii)** The tender for construction of the works has not been awarded since the design is yet to be completed.
  
- (iv)** The number of people who will be displaced has not been established since the final design which will include Project Affected Persons (for Land and property compensation) is yet to be finalized.



Eng. John K. Mosonik, EBS  
Principal Secretary  
**INFRASTRUCTURE**  
Encls



## KENYA URBAN ROADS AUTHORITY

*Efficient and safe urban roads*

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Email: [info@kura.go.ke](mailto:info@kura.go.ke) Web: [www.kura.go.ke](http://www.kura.go.ke)

P.O. Box 41727-00100, GPO, NAIROBI

Our Ref: KURA/LEG/15/2 Z (21)

Date: 21<sup>st</sup> February, 2014

Eng. John Kipng'etich Mosonik EBS,  
Principal Secretary  
Ministry of Transport and Infrastructure  
P O Box 30260-00100  
NAIROBI

Dear

RE: NAKURU HCCC PT NO. 29 OF 2012  
JOSEPH NDERITU & 230 ORS VS HON AG & ORS  
CONSULTANCY SERVICES FOR THE NAKURU BYPASS PROJECT

These communication concerns a ruling of the High Court at Nakuru delivered on 7<sup>th</sup> February, 2014 by the Hon. Mr. Justice Mathew Emukule, relating to a challenge to the government's intention to implement the proposed Nakuru Bypass Road Project. [Copy enclosed].


The conduct complained of was that of M/S CAS Consultants Ltd who had been procured to undertake Consultancy Works in the nature of a Feasibility Study, Environmental and Social Impact Assessment, Preliminary and Detailed Engineering Design for the Proposed Nakuru Bypass Road's Project.

Acting on a seemingly mistaken notion that the assignment was merely a fact finding mission whose ramifications were of no immediate consequence on any other party other than the employer, the Consultant commenced the survey component thereof devoid of any notice to the general public, and when he encountered resistance from the local populace, called in aid the deployment and presence of armed Administration Police. This development occasioned mass hysteria and panic amongst the local community who in turn sought the protection of none other than their then area MP, the Hon. Lee Kinyanjui, only to find no respite from him either as he was also at the time the Assistant Minister for Roads

The complainants then moved the court as a result and after a trial spanning two years finally got reprieve when the court ruled in their favour finding the Consultant's actions to have violated their rights *inter-alia* to information; security of property; fair administrative action; due process; and privacy.

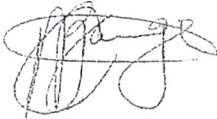
We have thoroughly perused the ruling and issued appropriate instructions that put in place mechanisms and procedure to avert recurrence of the consultant's impugned conduct. We plan to jumpstart the consultancy once again with a view to seeing the same off to its logical conclusion so as to determine the viability or otherwise of the proposed project. We are minded of the court's directive on the 120 days window for consultations with the persons to be affected by the undertaking prior to reinstatement of the consultancy and purpose to be guided accordingly.

Regards,

 21/02/14  
JN

Eng. Joseph N. Nkadayo MBS  
DIRECTOR GENERAL

M (LA)



CLO

 21/2/14



JOSEPH K. NDERITU & 23 OTHERS

REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CONSTITUTION PETITION NO. 29 OF 2012

IN THE MATTER OF ARTICLE 40(3), 47 AND 64 OF THE CONSTITUTION  
AND  
IN THE MATTER OF FUNDAMENTAL RIGHTS OF FREEDOM FROM TORTURE  
AS IN ARTICLE 25 OF THE CONSTITUTION

AND  
IN THE MATTER OF ACCESS TO INFORMATION UNDER ARTICLE 35 OF THE  
CONSTITUTION

AND  
IN THE MATTER OF THE FAIR ADMINISTRATION ACTION UNDER ARTICLE  
47 OF THE CONSTITUTION

AND  
IN THE MATTER OF NAKURU MUNICIPALITY BLOCK 23 KNOWN AS NAKA  
ESTATE

AND  
IN THE MATTER OF PROTECTION AND PARCEL OF LAND UNDER ARTICLE  
64 OF THE CONSTITUTION

JOSEPH K. NDERITU & 23 OTHERS..... PETITIONERS

VERSUS

HON. ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT

MINISTER FOR ROADS ..... 2<sup>ND</sup> RESPONDENT

PERMANENT SECRETARY MINISTRY FOR ROADS ..... 3<sup>RD</sup> RESPONDENT

RULING

1. By an Amended Petition dated 13<sup>th</sup> August 2012, and filed on 14<sup>th</sup> August 2012, the Petitioners sought the following orders -

1. *Conservatory orders restraining the Respondents by themselves, their agents, consultants, servants, employees or any other person(s) acting on their instructions and/or direction from erecting beacons, surveying, demolishing houses, entering, remaining, visiting, constructing by-pass or any other manner whatsoever dealing with any land in Nakuru Municipality Block 23.*
2. *A Declaration that the creation and/or re-routing or any attempt to re-route the Nakuru by-pass from its original design to pass through Nakuru Municipality Block 23 is unlawful, unfair and unjust decision,*
3. *A Declaration that the purported creation and/or re-routing of Nakuru Southern By-pass to pass through Nakuru Municipality Block 23 and/or surveying going on in Nakuru Municipality Block 23 violates Articles 64 and 67 of the Constitution.*
4. *A Declaration that failure by the Respondents to disclose to the Petitioners their vision on creation and/or re-routing the Nakuru Southern By-pass is a violation of the Petitioner's rights to information, notice and participation,*
5. *A Declaration that the erection of the beacons in or around the Petitioners land and use of Administration Police in the process amount to torture, degrading and inhuman treatment,*

- ENV. PL
6. *A perpetual injunction to restrain the Respondents either by themselves, their agents, consultants, employees or any other person(s) acting on their behalf from erecting beacons, demolishing houses entering remaining, erecting and/or re-routing the Southern By-pass through Nakuru Municipality Block 23 also known as Naka Estate and/or in any way dealing with any land within Nakuru Municipality Block 23.*
  7. *General damages*
  8. *Costs*

2. Together with the Petition, the Petitioners also filed a Chamber Summons of even date therewith in which they sought conservatory orders in terms of prayer 1 of the Petition. The Chamber Summons was the subject of my Ruling delivered on 29<sup>th</sup> June 2012, and in which I granted conservatory orders pending the hearing and determination of the Petition.

### 3. THE RESPONDENTS

The Respondents herein are the Attorney General who is sued as the principal legal adviser of the Government in terms of Article 156 of the Constitution of Kenya 2010, and Section 12 of the Government Proceedings Act, [Cap 40, Laws of Kenya], as First Respondent. The Second and Third Respondents are respectively the Cabinet Secretary and Principal Secretary (formerly known respectively as the Minister and Permanent Secretary)

responsible for matters relating to roads. The Fourth Respondent is the Kenya Urban Roads Authority, the government agency responsible for the planning, design and construction of urban roads.

4. In an Affidavit entitled **AFFIDAVIT IN SUPPORT OF REQUEST FOR URGENT DISPOSITION**, sworn on 15<sup>th</sup> November, 2012, the Fourth Respondent urged the court to allocate time and expeditiously dispose of the Petition, or in the alternative, the stay orders, be varied to allow the consultant proceed with the Feasibility Study on the understanding that no demolitions or forced evictions shall be undertaken as per the fear expressed in the Petition, pending the hearing and determination thereof.

5. In the event, the conservatory orders were extended by orders of court made on 25<sup>th</sup> April 2013 pending this Ruling.

#### 6. The PETITIONERS' DOCUMENTS

The Petitioners were represented by Messers L. M. Karanja and B. Kipkoech while the Respondents were represented by Mr. E. N. Njuguna Senior Principal Litigation Counsel. The Petitioners' Counsel relied upon the following documents

1. *the Amended Petition aforesaid,*
2. *the Supporting Affidavits Paul M. Gachoka, sworn on 28<sup>th</sup> June 2012, and the Supplementary Affidavit of the said*

Paul M. Gachoka. (the 3<sup>rd</sup> Petitioner) sworn on 13<sup>th</sup> August 2013.

3. *the Petitioners' Advocates Submissions dated 2<sup>nd</sup> May 2013 and filed on 3<sup>rd</sup> May 2013.*

## 7. THE RESPONDENTS' DOCUMENTS

These were -

1. *The Replying Affidavit of Eng. Daniel Githiria Muchiri, the Regional Manager, South Rift Region of the 4<sup>th</sup> Respondent sworn and filed on 25<sup>th</sup> July 2012.*
2. *The Affidavit of Peter Ogamba Bosire (in support of a request for urgent Disposition of the Petition), sworn on 19<sup>th</sup> November 2012 and filed on 13<sup>th</sup> December 2012.*
3. *the Attorney-General's submissions dated 4<sup>th</sup> November, 2013, and filed on 7<sup>th</sup> November 2013.*

8. I will in the subsequent paragraphs of this Ruling consider the case of the Petitioners and the Respondents respectively, along with their submissions and the authorities cited to me, and thereafter draw my findings before making my final conclusions and subsequent orders.

## THE FACTS.

9. The facts as narrated per the respective Affidavits of the Petitioners and the Respondents are not in dispute.

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10. The Petitioners are all registered owners of parcels of land measuring about 0.25 of acre, all within a parcel of land known as Nakuru Municipality Block 23, and known as **NAKA ESTATE**. Historically the land was known and was owned by Baharini Limited and comprised approximately 244 acres. It was sold by Baharini Limited to Nakuru Farm Limited which proceeded to sub-divide it into quarter (0.25) acre plots and sold those plots to the Petitioners among others. The Petitioners have built and have attached to their Supporting Affidavits pictures of palatial homes they each have erected on those plots of land, and were alarmed when they saw agents of the Respondents practically invade their homes in the company of armed Administration Police Officers and started to erect beacons across their plots, without as much as notice or other courtesy extended to them. The Petitioners therefore came and obtained temporary umbrella of court by way of conservatory orders as stated above, to restrain the Respondents agents from invading their homes pending the determination of their Petition. The petitioners say that the actions of the Respondents and their agents are in violation of their rights to information as guaranteed by Article 35 of the Constitution, to security of their property (as guaranteed by Articles 40 and 64) of the said Constitution, to fair administrative

action (as guaranteed by Article 47), and due process as guaranteed by Articles 40(3) and 67 of the Constitution.

11. The Petitioners say that as long ago as the 1970s that is, more than four decades ago, a Strategic Structure Plan had been muted for Nakuru Town. That plan was the subject of further study sponsored by the Government of Kenya, UNCAS (HABITAT) and the Belgian Development Agency. The Report called Nakuru Strategic Structure Plan July 1999 (SSP) following that study was ratified by the then Director of Physical Planning on 23/3/2000 and was subsequently approved by the Minister for Lands and Settlement on 4/4/2000.

12. The SSP as it was referred to in Annexures Pg 7(b) of the Petitioners' Supplementary Affidavit, proposed -

*.... that the Nakuru transport "veins" be bundled alongside the Mombasa Uganda Transafrica Highway. These would include the Railway, the A104 dual carriage road, Oginga Odinga Avenue and a proposed elevated road (by-pass) above the A104 for heavy carriage transport.*

13. In addition Petitioners argue that there was no participation by the residents of Nakuru on revival of the by-pass through Lake Nakuru National Park (LNNP). Besides the Petitioners argue that a by-pass through LNNP would present serious environment risks should a lorry carrying dangerous chemicals

overturn and spill its contents into the lake, particularly as the northern area of the park (LNNP) has a strong slope towards the lake.

13. The Petitioners also say that as affected residents of the area, they were never accorded an opportunity to comment on the project contrary to Article 10 of the Constitution, that they were shocked when they learned from their then Member of Parliament and Assistant Minister (Hon. Lee Kinyanjui) that a decision had already been made to construct the By-pass through their lands and homes and that they would be compensated. The Petitioners were disappointed when the Minister posted in his facebook -

*“Greetings to the people of NAKA, it was great sharing time with you this evening and also getting your concern over the proposed by-pass. I hope you were able to get my situation. I appreciate emotions are high but if solution is to be found, it must come from all of us. No amount of game will solve the problem. God bless”*

14. Arising from the Respondents action, the Petitioners have concluded that their rights to fair, lawful and just administrative action by Government have been violated, and any decision to demolish their houses remains unlawful, and contrary to Part 8 of the Land Act 2012, and therefore unconstitutional under Article 67 of the Constitution.

15. For those reasons, the Petitioners urge the court to grant and issue the



orders first above referred to.

#### THE RESPONDENTS

16. The Respondents case is well set out in the Replying Affidavit of Eng. Daniel Githiria Muchiri, the 4<sup>th</sup> Respondent's Regional Manager, sworn and filed on 25<sup>th</sup> July 2012, and reiterated by counsel for the Respondents.

17. According to the said Affidavit, 4<sup>th</sup> Respondent was currently overseeing the undertaking of a Feasibility Study, Environment and Social Impact Assessment, Preliminary and detailed Engineering Design for the proposed Nakuru By-pass.

18. For the purpose thereof, the 4<sup>th</sup> Respondent procured the services of M/s CAS Consultants Limited. (the consultants) whose duties per the terms of reference include -

*:Feasibility Study,*

*:Route Identification,*

*:Reconnaissance Survey,*

*:Topographical Survey,*

*:Material Investigations,*

*:Traffic Flow, Study and*

*:Social – Economic and Environment Study*

all for the purposes *inter alia* of -

- *ascertaining Plot Boundaries, and establishing Traverse points and Temporary Benchmarks,*
- *assessing the technical viability of the proposed road corridor,*
- *establishing the most suitable route for the proposed road corridor to accommodate traffic to meet the national standards, and*
- *ultimately determining and/or reaching a rational decision as to whether or not the construction of a road in a certain area is possible, practical and viable.*

19. The Respondents through their Counsel urged the court to find that the compulsory acquisition process referred to by the Petitioners cannot precede the feasibility study and that the Government shall initiate the compulsory acquisition process as stipulated in Part VIII of the Land Act 2012, Article 40 (3) and Article 67 of the Constitution upon identification of the properties affected by the construction of the proposed road. The Respondents consequently deny the Petitioners contention that they, the Respondents have violated any of the Petitioners rights.

#### OPINION

20. I have considered the respective submissions by the Petitioners and the Attorney General on behalf of the Respondents, and set out my opinion in the following paragraphs of this Ruling. There are two critical constitutional issues

for the court to determine in this Petition, and these are whether-

- (a) *The Respondents violated the Petitioners' rights to property*
- (b) *such violation amounted to torture, degrading and inhuman treatment*
- (c) *what are the consequences of such violation*

21. Infrastructure (in this Petition – the construction of roads, urban as well as trunk roads connecting this country's counties, cities, towns as well as rural villages and homes) to the regional capitals of neighbouring trading partners, is a key plank for the country's Vision 2030 Development Plan. The Municipality of Nakuru, within the County of Nakuru is among the centres of that vision particularly as it is reputed to be fastest growing metropolis in East Africa and perhaps beyond. This growth in both human settlement and its requirements of facilities, such as schools, hospitals recreation and other amenities was perhaps not expected to be so rapid by the original planners, and their successors in the last forty (40) or so years. The situation has caught up with us, in particular with the phenomenal increase in motor vehicular travel both intra and transit. There is therefore urgent need to open transit veins away from the centre of the town. This is what the Respondents are trying to do. The Petitioners are not intrinsically opposed to this development. The Petitioners say,

they the Respondents are trying to do so in contravention of both Petitioners interests and in violation of their rights under the Constitution.

22. According to the SSP the Nakuru By-pass was initially to be constructed on the buffer land between Lake Nakuru National Park and NAKA Estate. There was however resistance and objection from both the LNNP authorities and environmentalists who also waded into the debate. The LNNP consequently altered its boundaries and occupied the buffer land. The Respondents in their search of the proper route(s) moved into the area, and in the process and through their consultants entered into the Petitioners' private residences, carried out surveys, and in some homes, erected beacons on their parcels of land, under escort of armed Administration Police.

23. The Petitioners argue that there is a machinery and procedure for the National Government to acquire land compulsorily under Part VIII of the Land Act 2012, and that Articles 22 and 40 of the Constitution confer upon the Petitioners a continuum of fundamental rights, and that where there is a procedure then that procedure ought to be followed.

24. The Respondents acknowledge the right of ownership of the land by the Petitioners as guaranteed under Article 40 of the Constitution, and the protection

of that right of ownership under Article 40(3). The argument by the Respondents' counsel that no right is absolute is not entirely correct, and these are the reasons why that argument is not so correct.

25. Constitutional rights are not absolute and are subject to the qualification set out under Article 24 of the Constitution which provides-

- (1) *A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-*
  - (a) *the nature of the right or fundamental freedom;*
  - (b) *the importance of the purpose of the limitation;*
  - (c) *the nature and extent of the limitation;*
  - (d) *the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and*
  - (e) *the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose,*
- (2) *The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.*

26. Article 40 of the Constitution guarantees every person the right to

property. It protects a person from being **arbitrarily** deprived of his property by the state or a person. This right is not absolute and is qualified by sub-article (3) thereof which recognizes that a person may be deprived of his land by the state only where such 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.*

27. Thus where the state is exercising its right to acquire property under Article 40 (3) it must meet the threshold set out under Article 24 for it to be deemed constitutional and the onus lies on the person who wants to limit it to show reason why it should be limited, and until such reason is shown, that right subsists. This was the holding of this court in HCCC NO. 285 OF 2004 VIJAY MORJAJIA Vs. HARRIS HORNJUNIOR & ANOTHER (U/R) where the court discussing the question of the constitutionality of committal of a judgment debtor to civil jail under Section 38 of the Constitution held that such a limitation on the