



**Cosie Holdings Limited v Cabinet Secretary Ministry of Lands, Housing and Urban Development & 3 others (Environment and Land Case Civil Suit 1250 of 2014) [2023] KEELC 18460 (KLR) (16 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 18460 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 1250 OF 2014  
LC KOMINGOI, J  
MARCH 16, 2023**

**BETWEEN**

**COSIE HOLDINGS LIMITED ..... PLAINTIFF**

**AND**

**THE CABINET SECRETARY MINISTRY OF LANDS, HOUSING AND URBAN DEVELOPMENT ..... 1<sup>ST</sup> DEFENDANT**

**THE CABINET SECRETARY MINISTRY OF TRANSPORT ... 2<sup>ND</sup> DEFENDANT**

**THE DIRECTOR GENERAL KENYA NATIONAL HIGHWAYS AUTHORITY ..... 3<sup>RD</sup> DEFENDANT**

**CHINA ROAD AND BRIDGE CORPORATION ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. By a plaint dated September 19, 2014, the Plaintiff prays for judgement against the Defendants jointly and severally for;
  - a. A permanent injunction be issued against the Defendants restraining them from further encroachment, trespass or building of the road on LR No 209/11802 Mombasa Road, Nairobi along the new Likoni Road.
  - b. A declaration that the Defendants have unlawfully trespassed, encroached and unlawfully acquired LR No 209/11802 Mombasa Road, Nairobi and the action be deemed as compulsory purchase and the Plaintiff be compensated at the current market value of the land plus 15%.
  - c. The Plaintiff be awarded exemplary and aggravated damages since the Defendants have contemptuously disobeyed judgement of Justice Majanja



delivered on June 19, 2012 in petition No 178 of 2011(Consolidated with ELC No 1 of 2012) in so doing, they have frustrated the Plaintiff's commercial purpose of purchasing the suit land to build 24 residential flats of which the building plans and all other relevant approvals had been granted.

- d. Costs of the suit.
  - e. Any other or further relief that this Honourable Court may deem fit and just to grant in the interest of justice.
2. It is the Plaintiff's case that it conducted due diligence on LR No 209/11802 and found that the title was not encumbered ,then purchased it and was issued with a title on May 23, 2009. It averred that it obtained relevant approvals to put up 24 residential flats on the suit land.
  3. It is its case that just when it was about to commence the construction, it was notified vide Kenya Gazette Notice No 10756 by ZA Mabea, Commissioner of Lands, of an intention to acquire the suit land among other adjoining parcels under the Land Acquisition Act(Cap 295) thus it shelved the construction. It further contended that by subsequent Kenya Gazette No 9230 headed 'revocation of land titles' the Commissioner of lands revoked the Plaintiff's title among other adjoining parcels.
  4. The Plaintiff averred that it was prompted to file Misc Elc No 1 of 2012 seeking that the Gazette Notice to revoke its title be declared null. The suit was consolidated with Petition No 178 of 2011 which had been filed by other affected land owners and after full hearing, the Gazette notices revoking title were declared null and the Registrar of titles was directed to publish the orders issued therein which he did vide Gazette Notice No 9815 on July 20, 2012.
  5. The Plaintiff also contended that in a ruling issued on July 24, 2012 in ELC Misc. No 1 of 2012, Justice Majanja ordered that the Registrar of titles abides by the judgement of February 10, 2010 in Petition No 178 of 2011.
  6. It is the Plaintiff's case that in utter disregard of the orders of the court, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants encroached on the suit property and built a roundabout and overpass without following due procedure as laid down in the Land Acquisition Act.

**The 1<sup>st</sup> and 2<sup>nd</sup> Defendant's case.**

7. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed the statement of defence and counterclaim dated February 17, 2015.They denied the allegations contained in the Plaint and contended that the Plaintiff fraudulently acquired title to the suit land as it was Government land set aside for a public utility. It was their case that no part development plan was approved for change of user and no gazetteement was done for private acquisition.
8. They prayed that judgement be entered against the Plaintiff herein for;
  - a. A declaration that the suit property is a public utility under the custody of the Ministry of Transport and infrastructure and the Kenya National Highways Authority and the same cannot be alienated for private use.
  - b. A declaration that the allocation and subsequent registration of Cosie Holdings Limited as proprietor of land parcel known as LR 209/11082 was irregular and tainted with fraud.
  - c. An order cancelling the title known as LR 209/11082.



- d. Costs of this suit and counterclaim.
- e. Any other relief that the court deems fit.

### **The 3<sup>rd</sup> and 4<sup>th</sup> Defendant's case**

9. A memorandum of Appearance was entered for the 3<sup>rd</sup> Defendant on October 13, 2014 by the firm of Orengo and Odhiambo Advocates and on October 21, 2014 for the 4<sup>th</sup> Defendant by the same firm.
10. The 3<sup>rd</sup> Defendant filed a statement of defence dated October 27, 2014. It averred that the suit parcel of land is located on land that was set aside for the Mombasa Road/Likoni Road/Southern Bypass interchange and is encroaching on the Nairobi Southern By-pass.
11. It pointed out that in early 1970's the Government was engaged in land use planning and acquisitions to allow for the future development and improvement of the Mombasa Road corridor. It averred that in line with its plan for expansion, the Government identified two sets of land along the road corridor being the ones it owned and the ones that were privately owned and the suit land was categorised as Government land in 1972.
12. It contended that further to setting aside land for construction of the southern by pass, the director of physical planning prepared the Nairobi South structure plan on June 5, 1985 and it has not been amended to date.
13. It also averred that the Director of Physical Planning prepared a part Development plan for the area on 9<sup>th</sup> January 1992 and in reliance to the plan, the Government of Kenya in conjunction with Japan International Corporation Agency (JICA) sometime in 1990 developed a detailed design and study for the Southern By-pass, including the interchange which lies on the suit land and the same was submitted to the Chief Engineer, Roads in 1990.
14. The 4<sup>th</sup> Defendant filed a statement of defence dated October 27, 2014. It contended that it was constructing the Southern by pass upon the instruction of the 3<sup>rd</sup> Defendant and was a stranger to the allegations in the Plaintiff.
15. The Plaintiff filed a reply to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' statement defence and counterclaim dated June 15, 2015 reiterating the contents of its plaint.

### **Evidence of the Plaintiff**

16. PW1, Benjamin Odhiambo Ondego, one of the directors of the Plaintiff testified on May 19, 2017. His witness statement dated September 19, 2014 was adopted as part of his evidence in chief. He produced the Plaintiff's bundle of documents dated July 7, 2015 and its supplementary bundle of documents except the valuation report dated March 3, 2011. He told the court that the Plaintiff acquired LR No 209/11802 off Mombasa Road having conducted due diligence by conducting a search at the lands registry, at the survey department records and Nairobi City Council. He produced the sale agreement dated June 20, 2007 and stated that at the time of purchase, the land was vacant but today an interchange has been built.
17. He stated that the vendors were Maxwell Odongo and John Dimo. John Dimo had a power of Attorney from Maxwell Odongo who was the registered proprietor of the suit land. He produced the said power of Attorney and a copy of title issued to Maxwell Otieno Odongo, transfer, drawn by Ombonya & Company Advocates, a copy of the deed plan dated October 18, 2010 obtained from the director of surveys, stamp duty receipts, rates clearance certificate, letter of consent to transfer from the commissioner of lands dated September 6, 2007, rent clearance certificate from the Commissioner



- of lands as well as land rent receipts. He stated that the Registrar of Titles approved the transfer of the suit property to the Plaintiff and he was issued with title and took possession.
18. He produced the letter dated February 22, 2008 from the Ministry of lands which stated that 0.058 ha of the suit property was encroaching on the road reserve .He pointed out that they had asked Mr. Dimo to confirm with the Ministry of Roads to ensure their parcel was not part of the plan for the southern bypass and that they got confirmation that part of it was encroaching on the road reserve.
  19. He produced a copy of the Kenya Gazette Notice dated December 31, 2010 which contains claims for compensation and stated that by that time, they knew the government intended to acquire the suit land and had gone to the ministry with a valuation of ksh 126,500,000/= comprising open market value-65 million, diminution of profits,55.5 million and a compensation for disturbance of ksh 6 million. He further stated that by a notice dated April 6, 2011 from the Commissioner of Lands, the earlier compulsory acquisition notice was revoked.
  20. He further stated that the Plaintiff filed JR Misc No 1 of 2012 to quash the revocation of the compulsory acquisition Notice and the notice was quashed .The Attorney General was ordered to Gazette the orders quashing the revocation Notice which he did. He added that the suit land was also subject of Petition No 178 of 2011 which had been filed by proprietors of adjoining parcels seeking similar orders as in their aforementioned suit and the ruling which was in their favour has not been appealed against.
  21. He produced Nema's and City council of Nairobi's approvals for development of 24 flats on the suit land and told the court that the Plaintiff had intended to develop the suit land but it did not upon realization that the 4<sup>th</sup> Defendant were constructing a road on more than 96% of the suit land leaving out a portion which is minute and unusable. It was his testimony that the Plaintiff followed due process in obtaining title and the validity of its title was reinstated by Justice Mjanja in Petition No 178 of 2011 but his orders were disobeyed.
  22. PW1 also stated that they were not aware that the suit property had been earmarked for future development as while conducting due diligence, there was no mention of the planned future development.
  23. When he was cross-examined, he stated that Tom Ondego is his co-director and his elder bother while their sister Elizabeth Odhiambo was a director but she has since ceased to be. He further stated that that while the Plaintiff purchased the suit property from Maxwell Odongo through John Dimo who had the Power of Attorney, he has never met Maxwell but his brother met him once. He added that they dealt with John Dimo and not him and they intended to call him as a witness.
  24. He stated that they visited the suit property in in late 2006/early 2007 accompanied by his brother Tom and John Dimo who showed them the extent of the land and the beacons which were concrete and had drawings of 'L' shape. He further stated that they did not go with a surveyor during the first visit by they were accompanied by one during the second visit to the suit land and that he assisted them identify the beacons.
  25. He stated that identification of the land is required to be on the basis of the area map but he has not produced any area map to the court. He added that the deed plan was given to them by Director of surveys to confirm the position of the land but they did not write a formal request to seek the deed plan since they sent a surveyor to get it for them. Referred to the plan, he stated that he could see that that there are 5 beacons but he saw 4 on the ground. He further stated that they did not confirm whether the suit parcel has a dispute.



26. PW1 also stated that the architect they had engaged to carry out the Plaintiff's proposed project advised it to ask the vendor to investigate the title. Following the proprietor's queries, there was a response from government which stated that a portion of the suit land was a road reserve but since the sale agreement was in motion, they completed it and thereafter attended to the Government's concern. He added that they did not ignore the government's concern as they did not plan on that portion claimed by the government and they were willing to surrender it.
27. PW1 averred that the Plaintiff was registered as the proprietor on May 23, 2009 by EG Gachihi, Registrar of Titles and that its acreage is 0.3601 ha, deed plan No.167554 and there is another deed plan for LR No 209/185559(original No 209/11802/2/1) which they had intended to surrender as it is the portion claimed by the government and had asked a surveyor to explore how they could surrender the claimed portion so that the title they would get would comply with what the government had said. He added that deed plan No,286548 was before they became registered.
28. He also stated that on May 2, 2009 when they were purchasing the suit property, they the size of the land had changed but he cannot verify if the subdivision was formally submitted but the deed plan annexed to the Plaintiff's title appears not to exist.
29. PW2, Wilberforce Ojiambo Oundo, a valuer testified on December 18, 2018. He told the court that he was instructed by the Plaintiff to value the suit property on Links Road, Mombasa Road and that they did inspect it and prepared a valuation report dated March 3, 2011 which he produced as exhibit in this case.
30. He stated that the deed plan survey map of the area is in the Plaintiff's approved architectural drawings for three bedroomed apartments at the cost of ksh 40 million. He further stated that his valuation returned the following findings; ksh 65 million for land, diminished value ksh 55 million and ksh 6 million for disturbance.
31. When he was cross -examined, he stated that disturbance value of ksh 6 million should be adjusted to ksh 9.75 million as it ought to be 15% of the value of the land under the regulations at Cap 295. He further stated that the reports concerns valuation for a claim for compensation for compulsory acquisition and that he did not involve a government valuer as it is not a requirement.

### **Evidence of the Defendants**

32. DW1, Thomas Gicheha Gachuki, the 3<sup>rd</sup> Defendant's Deputy Director, Survey testified on May 20, 2019. His witness statement dated October 27, 2014 was adopted as part of his evidence in chief. The 3<sup>rd</sup> Defendant's list of documents dated September 27, 2014 were also produced as exhibits in this case.
33. He told the court that when the Government of Kenya sought to construct what is now referred to as the Southern By-pass Road, it retained the services of John Burrows and Partners, a firm of civil engineers and surveyors to profile parcels of land that were already owned by the Government and those that were in private hands to be acquired compulsorily. He produced survey plan sheet 1 Ref A104—3/1 as Exhibit D1 and told the court that it shows Mombasa road and the suit land is a road reserve.
34. He stated that after development of the said map, there was a gazette of the main highway in 1972 and a process of acquisition took place vide the Gazette Notice dated 1<sup>st</sup> December 1972 and that the plan at page 24 of the 3<sup>rd</sup> Defendants bundle marked DE exhibit 2 shows what was to be acquired. He produced the 1985 physical planning structure as D Exhibit 3 and stated that the structure plan shows the proposed interchange in Mombasa Road , Likoni Road, Industrial area, Southern-Bypass.



35. He produced the final design of the road which was designed by JICA in 1990-1991 as D Exhibit 4 and stated that from the said drawing, the suit land is on the road reserve. He also produced the PDP Reference No 42/8/92/1 as D exhibit 5 and stated that it still shows that the suit area was set aside for a road. He produced as D exhibit 6 a letter dated 3<sup>rd</sup> December 2013 from the Director of Physical planning indicating that the structure plan does not include any private developments.
36. DW1 also stated that the suit land was acquired as per the plans made in 1972 and produced a list of the parcels acquired as D Exhibit 7. It was his testimony that there have been attempts to resolve the issues with regard to the titles on the southern bypass. He added that the 3<sup>rd</sup> Defendant wrote to the National Land Commission to revoke the titles on the southern bypass thus the commission's Gazette Notice was to revoke allocation of the suit property as it was an illegal allocation. He produced the copy of Gazette Notice annexed to the affidavit of Milca Muendo as D Exhibit 8 and prayed that the Plaintiff's title be cancelled as it falls on a road reserve which was marked as an interchange.
37. When he was cross-examined stated that he cannot tell which comes first between a grant and a deed plan but the land must be available before the grant is issued. Referred to Grant IR 58373, he stated that the deed plan had already been deposited in the survey of Kenya before the grant was issued and that the land was issued by the President of Kenya. He added that it is the same grant that was transferred to the Plaintiff and that it has no other entries save for the said transfer.
38. When referred to the transfer from Maxwell Odongo to the Plaintiff, the endorsement for stamp duty from Department of lands, rent Clearance certificate, and rates receipts he stated that according to the Plaintiff's documents all the processes were followed and that it appears the commissioner of lands gave consent. He also stated that he does not know how those documents were made but it appears payment was received by the Government of Kenya.
39. When referred to the letter from Chief Engineer Roads dated February 22, 2008 which stated that 0.058ha of the suit land was encroaching on the road reserve, he stated that he did not author the said letter.
40. When referred to the judgement in Petition No 178 of 2011, he stated that the matter went to court and that the court issued an order that the orders issued in that petition be published in the Kenya Gazette. He also stated that there was no encumbrance on the Plaintiff's title.
41. When referred to deed plan No 167554 for title LR 209/11802 dated October 8, 1992 and deed plan No.286549 of 8<sup>th</sup> Mya 2008 for title LR No 209/11082, original number LR 209/11082/1, he stated that a new parcel number was introduced being LR 209/11082/2 area 0.0609 ha Deed plan No 286548 but it is not the same deed plan on the Plaintiff's documents which he claims to have bought from Maxwell O Odongo as the acreage is different also stated that 0.0609ha surrendered from LR 209/11802/2 on May 8, 2008 is not reflected on the main document, thus the plaintiff could not have acquired 0.3601 upon transfer as on LR No 209/11802, the original portion had reduced. He stated that the title should have changed to show the correct acreage as the Plaintiff had knowledge the land was within the road at the time of entering into a sale agreement.
42. When referred to the valuation report, he stated that it has valued 0.0765 ha while the amended deed plans indicate the portion to be 0.0609 hectares thus it does not tally. He added that the Plaintiff wants to be compensated for a portion that had already been surrendered. He averred that that the portion of surrender ought not to have been included as at February 23, 2011 as the road was amended in 2010/2011. He also stated that the National Land Commission has recommended revocation of the said title vide gazette notice No 17/6/2017 after the 3<sup>rd</sup> Defendant complained of illegal allocation of a public utility land.



43. When he was re-examined and referred to the judgement in Petition 178 of 2011, he stated that the court did not say who the owners of the properties were as it only dealt with the issue of Gazette Notices. He also stated that the suit land was acquired in 1973 yet the sale agreement between the Plaintiff and the allottee is dated June 20, 2007 thus the process of acquisition preceded the Plaintiff's claim. He averred that and the 3<sup>rd</sup> Defendant's interest is the fact that it has already put up a road thereon and has not been shown any other document challenging the structure plan.
44. DW2, Wilfred Muchai Kabue, a land surveyor with the Ministry of lands and Physical planning. His witness statement dated September 3, 2021 was adopted as his evidence in chief. He told the court that LR 209/11082 is a resultant new grant parcel measuring approximately 0.3601 hectares and survey records that relate to this new grant survey are; cadastral survey plan F/R No 230/8 survey computations No 27974 deed plan No 167554 issued on October 8, 1992 and that it sits on a road reserve.
45. He further stated that the parcel was subdivided into two on May 8, 2008 to hive off LR 209/11082 which was part of a road reserve and that the subdivision gave rise to LR 209/18555-measuring approximately 0.2990 hectares and LR 209/18556 measuring approximately 0.609 hectares. He testified that the former parcel LR 209/18556 as indicated in the deed plan No 286549 is the resultant remaining parcel whereas LR 209/18556 as indicated in the deed plan No 286548 is the surrendered parcel.
46. It was his testimony that the new numbers should be the ones existing and that the alleged transfer of LR No 209/11082 was carried out on May 23, 2009 according to the certificate of title in favour of the Plaintiff. He testified that as of May 3, 2009, LR No 209/11082 had been subdivided but if the deed plan had not been registered then the old title may exist.
47. When he was cross-examined, he stated that the original mother title does not become invalid upon deed plans being issued. He further stated that once subdivision is done, the registered proprietor would surrender the original title for purposes of registration of the resultant parcels and if one does not surrender then the resultant parcels would not be registered. When referred to deed plan No 286549 in respect of LR 209/22082/1 and the deed plan No 286548 in respect of LR 209/18555 dated May 8, 2009 as well as LR No 209/18556(Original 209/11802/2 he stated that on the face of that deed plan, it is indicated it is a surrender which means that the land was on a road reserve but he is not privy to the information whether it was surrendered or not.
48. When he was referred to the letter dated February 22, 2008 addressed to John Obura Dimo by one Engineer Mwangi Maingi from the Ministry of Roads, he stated that 0.058ha of LR No 209/11802 was encroaching on the road reserve, he also stated that he would not know whether it was obtained fraudulently. He pointed out that the said letter makes reference to the Commissioner of lands letter dated 15<sup>th</sup> November 2007 referenced No 139453/18 yet the Commissioner of Lands' letter of approval ref 139453 dated 3<sup>rd</sup> December 2007 for surrender of land encroaching on the Nairobi Southern Bypass at the Mombasa Rad interchange.
49. DW2 also stated that Engineer Mwangi states in the letter dated February 22, 2008 stated that 0.2990Ha of LR No 209/11802 is not on the road reserve and that the said portion refers to LR No 18555(remainder parcel from the subdivision).
50. When referred to the grant transferred to the Plaintiff, he stated that in 2007, a search would show the original number. When referred to the consent to transfer the suit land to the Plaintiff the rent clearance certificate, and the transfer to the Plaintiff, he stated that he would not know whether the documents are fraudulent.



51. When he was re-examined and referred to the letter dated February 22, 2008 addressed to John Obura Dimo, and the sale agreement dated August 20, 2007 between the said John and one Maxwell Otieno Odongo as vendor and the Plaintiff as purchaser, he stated that as at August 22, 2008, the Plaintiff had signed a sale agreement while aware that a portion of the land was on the road reserve as a dispute already existed.
52. He further stated that the Plaintiff acquired the whole parcel despite the dispute and that what is not disputed is LR No 209/18555 measuring 0.2990 hectares. He added that the survey was undertaken by a private licensed land surveyor one JR Aganyo who was instructed by the registered proprietor. He added that in practice, the registered proprietor would give instructions for subdivision and that he had no record that the government was undertaking compulsory acquisition from the registered owner.
53. DW3, Edwin Munoko Wafula, a Land Registrar with the Ministry of Lands, testified on July 5, 2021. His witness statement dated July 17, 2019 was adopted as part of his evidence in chief. He told the court that the registered owner of LR 209/11082 (IR 58373) is the Plaintiff. He testified that the current deed file was opened by a deed of indemnity registered on July 22, 2008. He further testified that he is not privy to the circumstances under which the property was registered to Maxwell Odongo before being transferred to the current owner.
54. When he was cross-examined stated that the suit property is registered in the Plaintiff's name but Maxwell Otieno Odongo was the initial proprietor who was allocated by the President on March 26, 1993. When referred to the said Grant he stated that it does not refer to any special condition and that it does not indicate that it was earmarked for a road construction and it is duly signed by the Commissioner of lands. He further stated that the search does not indicate any encumbrances and that the deed plan indicates it is 0.3601 hectares.
55. When referred to the letter of consent to transfer from the Commissioner of lands the rent clearance certificate and stamp duty endorsement, he stated that they would not have been approved if the land was encumbered and that the Plaintiff is the registered proprietor to date but he is not privy as to how it acquired the land.
56. When referred to the deed of indemnity registered in 2008, he stated that the file must have been lost or misplaced as the current file is a reconstruction but he had no evidence to support that assertion. He also stated that he had no documents prior to 1993 and that procedure must be followed to acquire a deed of indemnity for a file which was misplaced.
57. When he was re-examined he stated that Plaintiff cannot be an innocent purchaser as it was warned vide the letter dated February 22, 2008 that a portion of the suit land was within a road reserve.
58. Parties filed final written submissions after the close of the oral testimonies.

### **The Plaintiff's Submissions**

59. They are dated June 10, 2022. The Plaintiff raised the following issues for determination;
  - a. Whether or not the Plaintiff holds a good title to the suit property.
  - b. Whether or not the Plaintiff unlawfully acquired the suit property through fraud or mis-representation.
  - c. Whether or not the Plaintiff is entitled to any of the prayers sought.



- d. Whether or not the Plaintiff is entitled to any compensation and if so under what heads in each case.
  - e. Who should pay costs of this suit?
60. It was the Plaintiff's submission that being the registered owner of the suit property, it deemed to be the absolute and indefeasible owner and its certificate can only be challenged if it was acquired through fraud or misrepresentation in which he is found to have been aware and involved as provided under Section 261(a) and (b) of the Land Registration Act, 2012. He pointed out that the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's counterclaim is hinged on fraud but there was no evidence led by the Defendants to prove the allegations of fraud on the part of the Plaintiff.
61. It argued that its title is protected under Article 40 of the constitution therefore the Defendants ought not have arbitrarily deprived it the suit land. It relied on the case of The National Land Commission & others Ex parte vivo Energy Kenya Ltd (2015) e KLR and the case of Isaac Gathungu Wanjohi & Another v Attorney General & 6 others [2012] e KLR.
62. It was also submitted that the Defendants took over and built a road on the Plaintiff's property in contravention of the existing judgement in Petition No 178 of 2011 and without following due process thus their actions were illegal. It put forward the case of Christopher Ndarathi Murungaru v Kenya Anti Corruption Commission and Hon Attorney General (2006) e KLR.
63. The Plaintiff submitted that there is no evidence that it was aware that the suit property had been set aside by the Government for public purpose thus the court should find that its right to property has been braced and award it damages. It pointed out that PW2's evidence was not denied by the Defendants therefore it should be awarded a total of ksh 129,750,000/= which includes a compensation for disturbance at ks 9.75 million being 15% of the value of the suit property which is 65 million plus diminution of profits which was valued at ksh 55million. It also sought ksh 30million as an award for exemplary and aggravated damages.

#### **The 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Submissions**

64. The 1<sup>st</sup> and 2<sup>nd</sup> Defendant's written submissions are dated July 20, 2022. They addressed the following issues;
- a. Whether the plaintiff acquired the title lawfully and he is an innocent purchaser for value.
  - b. Whether the suit land is public land.
  - c. Whether the plaintiff is an innocent purchaser for value.
  - d. Whether the plaintiff is entitled to compensation.
  - e. Costs of the suit.
65. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that at the time of obtaining transfer on 23.5.2009, the suit land LR 209/11802 had ceased to exist with its deed plan and acreage and hence the plaintiff could not ignore the clear facts and proceed to seek a declaration as the lawful owner of the suit land LR 209/11802 as the parcels of land that could exist were LR 209/18555 deed plan 286549 and LR 209/18556 deed plan 286548. They added that title LR 209/11802 is a nullity ab initio and the same be revoked.



66. It was submitted that while Article 40 of the Constitution provides protection for private property, Article 40(6) qualifies protection to land that is lawfully acquired. It was further submitted that Section 26 of the Land Registration Act (No 3 of 2012) provides a title unlawfully acquired can be impeached. The case of *Adan Abdirabani Hassan & 2 others v the Registrar of Titles, Ministry of Lands & 2 others [2013] eKLR* was relied upon to submit that title is not fool proof of ownership.
67. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants also submitted that while Section 25 (1) of the Land Registration Act provides for the rights of a proprietor, are free from all other interests, a proprietor's rights are subject to liabilities, rights and interests as declared by section 28 as not requiring noting on the register such as the rights of compulsory acquisition as one such overriding interest. They relied on the case of *Cycad Properties Limited v The Attorney General & Others, HC Petition No 70 of 2010*.
68. It was also the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's submission that parcels of land that have been compulsorily acquired by the Government for public purpose must be used for the purpose. They relied on the case of *Republic v Registrar of Lands in Kilifi ex-parte Daniel Ricci, Malindi HC JR No 6 of 2013 [2013] eKLR*.
69. They also submitted that the plaintiff has failed to demonstrate that indeed he was an innocent purchaser who will be entitled to compensation and that the overall public interest in the construction of the road outweighs any and all other interests, if any, on the said suit property.
70. On the issue whether the suit land is public land, it was submitted that the National Land Commission vide gazette notice number 9230 upon hearing of the plaintiff and the 3rd defendant herein and upon exercising its mandate under article 67(1) and section 14 of the National Land Commission act did find that the suit land herein is public land and gazzeted the same for revocation.
71. It was also submitted that the Plaintiff is not entitled to compensation on grounds it was aware or ought to have been aware that the suit property had been set aside by the government for a public purpose and as such could not lawfully be allocated or transferred to him in the absence of a formal surrender by the Ministry of Roads of their interest on the suit property.
72. They pointed out that where due process is followed in issuance of the notice, courts have found repossession to be proper. They relied on the case of *Miscellaneous Civil Application No 1732 of 2004; James Joram Nyaga & Another v The Hon. Attorney General*. They added that it would be against public policy for the court to enforce compensation upon an irregularly acquired title.
73. On the issue of damages, it was submitted that approvals from NEMA dated September 27, 2012 and City Council of Nairobi approval dated August 15, 2012 were obtained while the Plaintiff was well aware that the land had a dispute, gazette notices issued declaring the suit land forming part of public land and hence cannot claim to suffer well aware that the area was a disputed portion.
74. It was further submitted that there is no evidence that the Plaintiff embarked on construction of the suit land at all through entering into contracts of works, obtaining approval by NCA so that the court can indeed be convinced that the plaintiff suffered damages thus the claim should be dismissed with costs.
75. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants also pointed out that in the case of *Shalien Masood Mughal in Nrb Elc 302 of 2018*, when faced with similar scenario, where the suit land also fell within the same area of interchange on the similar location with the current suit found that the suit land was public land that ought not to have been allocated and dismissed the plaintiffs claim.



### The 3<sup>rd</sup> Defendant's Submissions

76. They are dated June 22, 2022. The 3<sup>rd</sup> Defendant raised the following issues for determination;
- a. Whether the Plaintiff's title was legally acquired.
  - b. Whether the 3<sup>rd</sup> Defendant is in disobedience of the judgement in Petition No 178 of 2011 consolidated with ELC No 1 of 2022?
  - c. Whether the Plaintiff is entitled to reliefs sought.
77. The 3<sup>rd</sup> Defendant relied on the case of *Niaz Mohammed Jan Mohammed v Commissioner for lands & 4 others [1966]e KLR* and the case of *Cyad Properties Ltd & Another v the Attorney General & 4 others (2013) eKLR* to submit that the Plaintiff's title was illegally acquired having been alienated for the construction of the Mombasa Road/Likoni Road/Southern-Bypass interchange and therefore could not be alienated, transferred or used in any other way than the public purpose for which it was set aside.
78. It submitted that the extent of the illegality done by the Plaintiff's predecessors before transferring the suit property to the Plaintiff is evidenced by the fact that the whole of 0.360ha of the suit land was transferred to the Plaintiff yet according to DW2, the suit parcel was subdivided into 2 parcels and respective deed plans issued which position was confirmed by the letter dated February 22, 2008 from the Chief Engineer, Ministry of Roads and public works .
79. Relying on Civil Appeal No 327 of 2014, Kenya Highway Authority v Shalien Masood Mughal, the 3<sup>rd</sup> Defendant submitted that the structure plan Ref 42-28-85-9 dated June 5, 1985 way made way before the existence of the suit property and therefore the Government has an overriding interest on the suit property.
80. It also relied on the case of *Kenya Hotels Properties Ltd v Willsden invts Limited & 6 others 2013e KLR* to submit that the purpose for which the road is reserved for being construction of a road outweighs the Plaintiff's right over the suit land.
81. On the issue whether the 3<sup>rd</sup> Defendant is in disobedience of the judgement in Petition No 178 of 2011(Consolidated with ELC No 1 of 2012),it submitted that what was before the court for determination was the actions of the registrar of titles to revoke titles of the petitioners therein without according them a fair hearing while this dispute concerns the lawfulness of title to the suit property.
82. I have considered the pleadings and the evidence on record. I have also considered the written submissions and the authorities cited. The issues for determination are:-
- i. Whether the Plaintiff adhered to the proper legal process to acquire title to the suit land.
  - ii. Whether the Plaintiff is entitled to the reliefs sought in the Plaintiff.
  - iii. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are entitled to the reliefs sought in the Counterclaim.
  - iv. Who should bear costs of this suit?
83. The Plaintiff claims ownership of the parcel of land known as LR Number 209/11802. PW1 led evidence of the process of acquisition of the said title. It purchased the same on June 20, 2007 and a transfer was effected on March 12, 2009 from Maxwell Otieno Odongo. DW2 testified that according to records held by the Ministry of lands, the Plaintiff is registered owner of the suit land.



84. The said title was revoked among other parcels on ground that it is public land vide Gazette Notice No 9230 of July 29, 2011. The said actions of G.G Gachihi, Senior Registrar of Titles, Nairobi prompted proprietors of parcels of land whose titles had been revoked to file suits seeking revocation of the actions of the registrar.
85. The Plaintiff argues that its title was upheld by the court in a judgement delivered on June 19, 2012 in *Power Technics Ltd v The Attorney General and Others*, Nairobi Petition No.1 78 of 2011 and the ruling dated July 24, 2012 in JR Elc Misc Civ application No.1 of 2012. Upon perusal of the said decisions of the court, it emerges that the suits concerned the legality of the actions of the Registrar to revoke titles arbitrarily by way of a gazette Notice but it did not dwell on the legality of the said titles. Further, following the said decisions, the actions of the registrar to revoke titles was rescinded. This in my view meant that the registrar was obliged to follow due process if he wanted to revoke the said titles.
86. The Plaintiff contends that its right to property under Article 40 of *the Constitution* has been breached by the Defendants who in disregard of the aforementioned decisions arbitrarily entered upon the suit land and constructed the Mombasa Road/Likoni Road/Southern By-pass interchange.
87. I have gone through the judgment of Hon D Majanja in Petition 178 of 2011 dated June 19, 2012 in paragraph 23. It stated:-
- ' In *Chemei Investments Limited vs The Attorney General & Others*(Supra) the court emphasized that even where property is acquired unlawfully, the finding of unlawful acquisition contemplated in Article 40(6) must be through a legally established process and not by whim or revocation by Gazette Notice (see also *Electrical Options Limited vs The Attorney General & Another* Nairobi Petition No 23 of 2011 (unreported)'
88. In the instant suit the Plaintiff has presented its case and the Defendants have tested it by way of cross examination. The Defendants have also given their version of the state of the suit property. All parties have been heard.
89. The Defendants argue that as much as the Plaintiff has the right to own property, that right does not extend to land that has been set aside for public use. DW1 led evidence that the suit land was planned for the interchange as early as 1985.
90. There is on record a letter dated February 22, 2008 from the Ministry of Roads and public works addressed to the predecessor of the Plaintiff in title. It states that 0.058ha of the suit land is a road reserve while the remaining 0.299ha is not on the road reserve. The letter was authored even before transfer of the suit property to the Plaintiff was effected on March 12, 2009. PW1 also admitted that the Plaintiff was aware of the said letter but since the sale agreement was already in motion, it carried on with the sale. From this evidence, the Plaintiff cannot claim more than 0.299ha of the suit land and it cannot be said to be an innocent purchaser for value without notice as it was aware part of the suit land was a road. It cannot also be said that he lawfully acquired the suit property as the same was set aside for public use way before a title was issued to Maxwell Otieno Odongo.
91. DW1, Thomas Gicheha Gachuki, told the court that the Plaintiff could not have acquired LR NO 209/11082 measures 0.3601 hectares as the original portion had reduced. The title should have been charged to reflect the correct acreage. He also stated that the land that was valued by PW2 was not clear.
92. It was also his testimony that the Plaintiff wants to be compensated for a portion which had already been surrendered to the Government of Kenya.



93. DW2, Wilfred Muchai Kabue from the Director of Surveys told the court that the suit property was a resultant of a new grant and that part of it sits on the road reserve. Further that the essence of the said subdivision was to hive off part of the road reserve. He also stated that by the year 2009 the Plaintiff was aware that a portion was on the road reserve but went a head to acquire the suit property.
94. DW3, Edwin Munoko Wafula, a Land Registrar told the court that the deed file was opened on July 22, 2008 by a Deed of Indemnity. He explained that this could mean the current file is a reconstruction. The original one having been misplaced. He also stated that there are no documents to show the status of the suit property prior to 1993.
95. I am of the opinion that the Plaintiff was aware that the suit property comprised of a portion which was on the road reserve but went ahead to acquire it.
96. In *Katende v Haridar & Company Limited [2008] 2 EA 173* cited by the Court of Appeal in Kenya in *Lawrence P Mukiri Mungai, Attorney of Francis Muroki Mwaura v Attorney General & 4 others [2017] eKLR* the Court of Appeal in Uganda held that:

' For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, ... (he) must prove that:

- (a) he holds a certificate of title;
- (b) he purchased the property in good faith;
- (c) he had no knowledge of the fraud;
- (d) he purchased for valuable consideration;
- (e) the vendors had apparent valid title;
- (f) he purchased without notice of any fraud;
- (g) he was not party to any fraud.'

97. I agree with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' submissions that by the time of obtaining the transfer the Plaintiff was aware that LR NO 209/11082 had ceased to exist with its deed plan and acreage. In the case of *Kenya National Highways Authority vs Shaliem Masood Mughal & 5 Others [2017] eKLR*, the Court of Appeal stated thus:-

' (37) However, in the case before us, Kenha and the other respondents do not challenge the validity of Mughal's title to the disputed plot. Their assertion is that, to the extent that he has, as confirmed in the report by the surveyors, encroached on the road reserve and buffer zone, his title is defeasible and is not entitled to the protection afforded by Article 40 of the *Constitution*. The Article protects proprietary rights but under the current Constitutional regime those rights are not absolute. They can be limited and one of the limitations appears in Article 40 (6) under which the protection does not extend to any property that has been found to have been unlawfully acquired. One may ask whether the disputed plot in this matter was lawfully acquired but it is unnecessary to go there. One may even wonder whether, with the exercise of due diligence it was possible to establish the extent of the road



reserve for the Nairobi/Mombasa Highway before the disputed plot was created. The fact of the matter is that there was in existence a road reserve before the disputed plot came into being in 2002 and it was not open for any authority to alienate it further for private development. The whole world ought to have been aware, as was ultimately established, that there was a road reserve of 80 meters and a buffer zone of 30 meters which did not in law have to be noted in any land register. It is an overriding interest and not an equitable interest. Indeed it is difficult in the circumstances of this case to accept that Mughal was not aware of these facts noting his evidence that he was literate enough to obtain information about the plot from the internet and further noting the information in the public domain from the Ndung'u report which rang alarm bells about irregular/unlawful plot allocations in the country.'

98. In the instant suit, the Plaintiff did not avail a surveyors report to show the extent to which the suit property was on the road reserve.
99. I find that the Plaintiff has failed to demonstrate that it was an innocent purchaser who should be compensated. I agree with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' submissions that the overall public interest in the construction of the road outweighs all other interests.
100. I find that the Plaintiff has failed to prove its case against the Defendants on a balance of probabilities.
101. The Plaintiff's predecessor transferred to the Plaintiff the whole of 0.360 hectares yet the parcel had been subdivided into two parcels as confirmed by the letter dated 22<sup>nd</sup> February 2008 from the Chief Engineer Roads, Ministry of Roads and Public Works.
102. I therefore dismiss the Plaintiff's suit with costs. The Plaintiff can seek compensation from its predecessor in title.
103. Accordingly, I find that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants counterclaim succeeds. I enter Judgment as follows:-
  - a. That a declaration is hereby issued that the suit property LR NO 209/11082 is a public utility under the custody of Ministry of Transport and Infrastructure and Kenya National Highways Authority and the same cannot be alienated for private use.
  - b. That a declaration is hereby issued that the allocation and subsequent registration of Cosie Holdings Limited as proprietor of land parcel known as LR NO 209/11082 was irregular and tainted with fraud.
  - c. That the Chief Land Registrar is hereby directed to cancel the title known as LR NO 209/11082 in the Plaintiff's name within ninety (90) days from the date of this judgment.
  - d. That the Plaintiff shall bear costs of this suit.
104. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 16<sup>TH</sup> DAY OF MARCH 2023.**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**



Mr. Wanjohi advocate for the Plaintiff

Mr. Motare advocate for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

No appearance for the 3<sup>rd</sup> and 4<sup>th</sup> Defendants

Mutisya- Court Assistant

