



Mediheal Hospital & Fertility Centre Limited v County Government of Nandi (Environment & Land Petition 5 of 2021) [2023] KEELC 19193 (KLR) (31 July 2023) (Judgment)

Neutral citation: [2023] KEELC 19193 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND PETITION 5 OF 2021**

MN MWANYALE, J

JULY 31, 2023

BETWEEN

MEDIHEAL HOSPITAL & FERTILITY CENTRE LIMITED PETITIONER

AND

COUNTY GOVERNMENT OF NANDI RESPONDENT

JUDGMENT

1. The Petitioner, Mediheal Hospital and Fertility Centre Limited, vide its petition dated 26th October 2020 sued the County Government of Nandi seeking orders that;
 - i. A declaration be made that the Petitioner is the lawful proprietor of Kapsabet Municipality/292, Kapsabet Municipality/293, Kapsabet Municipality 294 and Kapsabet Municipality 295(herein after referred to as the suit properties).
 - ii. A declaration be made that the Petitioner’s fundamental freedom and rights to own property under Article 40 of *the Constitution* of Kenya has been contravened, infringed and violated by the Respondents herein.
 - iii. A declaration be made that the Petitioners fundamental freedom and right to fair administrative action under 47 of *the Constitution* of Kenya has been contravened, infringed and violated by the Respondent herein.
 - iv. A declaration be made that the public notice dated 15th July 2019 declaring Kapsabet Municipality/292, Kapsabet Municipality 293, Kapsabet Municipality/294 and Kapsabet Municipality 295 as public properties was issued in breach of Article 40 of *the Constitution* and Article 47 of *the Constitution* hence null and void abintio.
 - v. An order of prohibition be made to prohibit the Respondent by itself or through any other body from implementing, enforcing or otherwise howsoever effecting the Public Notice dated



15th July 2019 declaring Kapsabet Municipality/292, Kapsabet Municipality 293, Kapsabet Municipality/294 and Kapsabet Municipality 295 as a public land and further prohibiting the Respondent from otherwise declaring or treating the aforementioned parcels of land as public land.

- vi. An Order of permanent injunction be made restraining the Respondent by itself, its servants, employees, agents or any other person or body acting on its behalf from interfering with the Petitioners occupation and possession of Kapsabet Municipality/292, Kapsabet Municipality 293, Kapsabet Municipality/294 and Kapsabet Municipality 295.
 - vii. Any other order or writ that this Court may deem just and appropriate to grant.
 - viii. Costs of the suit.
2. The petition is founded on Articles 40 (1) 40 (3) and 47 of *the Constitution* of Kenya.
 3. It is the Petitioners case that he is the registered proprietor of Kapsabet Municipality/292, measuring approximately naught decimal three three six nine (0.3369) Hectares being a leasehold interest of 99 years from 1st January 1993, at an annual rent of kshs 2,160/-, he is also the registered proprietor of Kapsabet Municipality 293, measuring approximately naught decimal two nine three nine (0.2939) Ha) leasehold interest of 99 years with effect from 1st January 1993 at an annual rent of kshs 2160/=.
 4. The Petitioner further avers being the registered owner of Kapsabet Municipality/294 and Kapsabet Municipality 295 measuring naught decimal six six six five (0.665 Ha) and naught four zero one six (0.4016 Ha) respectively both being leasehold interests of 99 years with effect from 1st January 1993 at an annual rent of kshs 10,800/# and 3,240/= respectively.
 5. The Petitioner having purchased the above properties at a consideration of kshs 25,000,000/= as follows;
 - i. Kapsabet Municipality/292 from Jacob Kipkemoi Rono (2nd Respondent),
 - ii. Kapsabet Municipality 293 from David Kiplagat Kosgei (3rd Respondent),
 - iii. Kapsabet Municipality/294 from Agui Songok (4th Respondent and
 - iv. Kapsabet Municipality 295 from Ruth Jepngetich.
 6. It is the Petitioner further case that it had done its due diligence before the purchase and established that the properties were private land belonging to the vendors who were also the rate payers and it obtained respective consents to transfer with no objection from the 1st Respondent and the National Land Commission.
 7. The Petitioner further avers that the National Land Commission had vide its letter dated 5th July 2016 before transfer of the properties to the Petitioner confirmed that the properties did not constitute public land.
 8. It is the Petitioner further case, that it was in occupation and possession of the suit properties which were valued at an aggregate sum of kshs 50,000,000/= and that is entitled to protection of *the Constitution* in all decisions and subsequent actions of the 1st Respondent, in purporting to cancel and/or revoke titles to the suit properties and/or seize the suit properties.
 9. The Petitioner contends that the 1st Respondent and other state agencies had affirmed and recognized it as the sole and lawful proprietor of the suit properties and the action of the 1st Respondent to issue a Public Notice dated 15th July 2019 titled repossession of unprocedurally acquired public land and



expressing intention to unlawfully reposes the suit properties was in blatant breach of its rights and interests; and the same contravened Article 40 of *the constitution*.

10. The Petitioner particularized the gross violation of its Rights as follows; -
 - a. Arbitrarily and illegally depriving the Petitioner its interest and right over the suit properties without following due process.
 - b. Failing to comply with Article 47 of *the Constitution* prior to the public notice dated 15th July 2019 titled “repossession of unprocedurally acquired public land”
 - c. Neglecting and refusing to respond to the Petitioners letter dated 24th July 2019 in response to the public notice dated 15th July 2019.
 - d. Convening a Nandi County Executive committee meeting and proceeding to declare the suit properties as public land without according the Petitioner fair administrative action as set out in Article 47 of *the Constitution*.
11. It is the Petitioners further case that dint of the above infringements, its enjoyment of its proprietary rights over the suit properties has been limited which action is illegal and contravenes Article 40 of *the Constitution*.
12. The Petitioner further avers that the infringement of its fundamental rights are in breach of the Article 27, 40 and 47 of *the Constitution*.
13. On the strength of the above the Petitioner sought for the prayers set out at paragraph 1 of this judgment.

1st Respondents Reply To The Petition And Cross – Petition:

14. Vide a ruling dated 17th January 2022, the 1st Respondent hitherto the only Respondent was granted leave to file a cross – Petition against 5 Respondents namely Jacob Kipkemboi Rono, David Kiplagat Kosgey, Agui Songok, Ruth Jepngetch and the Nandi County Land Registrar as the 2nd, 3rd, 4th, 5th and 6th Respondents respectively.

In the same said Ruling, Dymphina Chemaiya Tek was granted leave to join the proceedings as the 1st Interested Party. Suing on her behalf and as an Administrator of the Estate of the late Peter Kipserem Tek.
15. The 1st Respondent filed a Replying Affidavit deponed by Solomon Mangira, the then Chief Officer in charge of Lands, Environment and Climate Change of the County Government of Nandi dated 31/5/2021.
16. In the Replying Affidavit, the 1st Respondent depones that the petition did not comply with the mandatory provisions of Rule 10 (2) (d) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) practice and procedure Rules (2013) since it fails to disclose the nature of injury caused or likely to be caused to the Petitioner.
17. In respect of Kapsabet Municipality/292 the 1st Respondent indicates that the said parcel of land is registered in the name of Peter Kipserem Tek on 22/01/2020 and the family of Peter Kipserem Tek are in occupation and possession of the suit property. The 1st Respondent having surrendered occupation, use and possession to Peter Kipserem Tek. Thus the 1st Respondent had no recognizable rights over the suit parcel of land; against it.



18. In respect of Kapsabet Municipality/ 293 the same was registered in the name of the Petitioner having purchased the same from David Kiplagat Kosgei, although there was no lease document executed in favour of said David Kiplagat Kosgei whose registration was thus being allocated the parcel nor there having been a lease executed in his favour. The suit land had been initially allocated to Wilfred Kimalat but no certificate of lease had been issued since the allocation; hence the suit property was public land.
19. In respect of Kapsabet/municipality 294, the same is currently registered in the name of Mediheal Hospital and Fertility Centre, having registered allocated to Agui Songok who sold and transferred to the Petitioner.
It had initially been allocated to one Jacob Ruthiaren, who did not follow up with the issuance of lease and did not comply with terms of the allotment letter.
20. In respect of Kapsabet Municipality/295 the property was registered in name of the Petitioner, and it was initially registered in the name of Ruth Jepngetich who sold and transferred the suit land to the Petitioner. There was no allotment nor a lease document executed in favour of Ruth Jepngetich.
21. The 1st Respondent further deponed particulars of illegality/fraud on the grounds that;
 - a. There was no approval of the president in the allocations as was required by law
 - b. These plots were never advertised for sale through public auction
 - c. The Petitioner had not exhibited any document to show that it was successful bidder or the person who sold the land to it were.
 - d. No allotment letters were issued to either the Petitioner or the persons who sold to it.
 - e. The person who sold to the Petitioner did not comply with conditions prior to the issuance of the title deeds.
 - f. No PDP in respect of the suit parcels of land as required by law before allocation.
 - g. Colluding with vendors to obtain title deeds through a corrupt scheme.
 - h. At time of allocation, some of the vendors were minors.
22. The 1st Respondent equally pleaded particulars of misrepresentation on part of Petitioner.
23. The 1st Respondent further deponed that the areas in which the suit properties were situated were low density residential area set aside for Government pool housing scheme and the Commissioner of Lands therefore did not have power to allocate the suit parcels of land.
24. The 1st Respondent further depones that the Notice dated 15th July 2019 did not repossess the suit parcels of land as it had not commenced the repossession of the suit properties though initiating Court proceedings for nullification of the titles, it had not breached any of the Petitioners constitutional rights expressed in Articles 25,27,40, 47 50 (1) of *the constitution* of Kenya; and the 1st Respondent prayed for dismissal of the petition.
25. By way of a cross petition 1st December 2021, the 1st Respondent reiterated the depositions in the Replying Affidavit dated 31/5/2021 and sought for judgment against the Respondents for;
 - a. Declaration that the Petitioners fundamental freedom and right to own property under Article 40 and 62(4) of *the Constitution* of Kenya on behalf of members of public have been infringed controverted and violated by the Respondents herein.



- b. A declaration that the issuance of leases by the 6th Respondents to the 2nd to 5th Respondents over Kapsabet Municipality 293, 294 and 295 respectively was illegal, null and void ab initio and ineffectual to confer any right interest or title upon the 1st Respondent.
- c. A declaration that the transfer and issuance of certificates of leases over Kapsabet Municipality 293 – 295 to the 1st Respondent was null and void and incapable of conferring a good title to the 1st Respondent.
- d. An order for rectification of Lands Register by cancellation of the leases over Kapsabet Municipality 293 – 295 and the certificates of lease issued to the 1st Respondent so as to restore the suit properties to the Petitioner.
- e. An order that the 1st Respondent do vacate the suit parcels being Kapsabet Municipality 293 – 295 and in default they be evicted therefrom
- f. An order of permanent injunction against Respondents by themselves, their agents, servants or assigns restraining them from leasing transferring, charging, taking possession, developing or in any other manner howsoever dealing with Kapsabet Municipality 293 – 295.
- g. General damages for illegal occupation use and possession of the suit properties.

2nd, 4th, 5th Respondents Case: -

26. The 2nd to 5th Respondents gave authority to Mr. David Kiplagat Kosgei, the 3rd Respondent to depone all affidavits and sign all pleading on their behalf.
27. They thus filed a response to the Petition and cross petition vide the Replying affidavit of David Kiplagat Kosgei, deponed on 2nd July 2022.
28. It is the 2nd, 3rd, 4th and 5th Respondents case that;-
 - i) they were not opposed to the petition dated 26th October 202 but were opposed to the cross – petition.
 - ii) on the cross petition, the 2nd to 5th Respondent deponed that the same was fatally and incurably defective, bad in law and abuse of the Court process which ought to be dismissed.
 - iii) The 2nd to 5th Respondents deponed that they were the registered owners of parcels KAPSABET MUNICIPALITY 292 – 295 till they disposed off the said parcels to the Petitioner, Mediheal Hospital and Fertility Centre.
 - iv) that the National Land Commission had affirmed their ownership status, and had further directed the Land Registrar to lift the restriction they had placed on the suit properties.
29. They had obtained all the necessary consents from the National Land Commission and the County Government of Nandi the 1st Respondent/Cross – Petitioner before effecting transfer to the Petitioner.
30. They denied any illegality, fraud misrepresentations and unprocedurally conduct, on their part; and that the suit properties were not public utilities and that the Notice dated 15th July 2019 was issued arbitrarily and was a gross misuse of powers; thus the cross – petition was unmerited and not deserving grant of any orders.
31. The 2nd to 5th Respondents further particularized violations of their rights, and deponed that the cross – petitioner’s rights were not violated and that cross – petition.



6th Respondents Case:-

32. The 6th Respondent filed a replying affidavit through Judith C. Cherutich the Land Registrar, Nandi County.
33. It was her case that Kapsabet Municipality/ 292, was registered in the name of Peter Kipserem Tek as at 22/01/2020 and was transmitted to Dymphina Chemiayo Tek as at 25/05/2021 pursuant to Kapsabet Succession Cause No. 15/2021. Same is a leasehold for 99 years measuring 0.3369 Ha, from 01/7/1998. while Kapsabet Municipality/ 293, registered in the name of the Petitioner, Mediheal Hospital and Fertility Centre Limited as at 21/02/2017 having initially been registered in the name of David Kiplagat Kosgei as at 22/12/2010. Certificate of lease issued to Mediheal on 21/02/2017. The same measures 0.293 Ha with leasehold of 99 years from 01/01/1993, had no restriction nor caveat.
34. Kapsabet Municipality/ 294 registered in the name of Mediheal Hospital and Fertility Centre Limited as at 21/02/2017 having been initially registered in the name of Agui Songok as at 27/10/2010. The same being a lease hold for 99 years from 01/01/1993 with no restriction or inhibition or caveat.
35. Kapsabet Municipality/ 295 registered in the name of Mediheal Hospital and Fertility Centre at 21/02/2017, the previous owner having been Ruth Jepngetich, measuring 0.4016 Ha, and a leasehold of 99 years from 01/01/1993 with no restriction nor inhibition.
36. The 6th Respondent deponed that there were allegations of fraud although there was no collusion from her office as the registrar's role was limited to statutory functions including;
 - a. Receiving and recording applications for land registration
 - b. Processing of land title searched
 - c. Verifying land registration documents
 - d. Capturing data for land registration purposes
 - e. Verifying scanned titles and other related documents
 - f. Processing application for Land Control Board consents
 - g. Collecting information on public complaints on land matters.
37. The Registrar further deponed that the parcel areas were zoned as low density residential area by the Kapsabet town Development plan in 1978, which means that the area was public land held in trust by the then Nandi county Council, the suit parcel were not set aside as public utility lands hence unavailable for further alienation , but were unalienated public land particularly zoned as low density residential plots thus available for alienation for private or public person for the purpose zoned for.
38. It is the 6th Respondent's further case that, the cross – petitioner was right at paragraph 19 of the petition only to the extent of the Town Development plan, were alienated Government land for which the commissioner of lands had no power to allocate to private individuals, is not correct as per section 53 of the Trust [Land Act](#).
39. The 6th Respondent further case that under Section 115 of the Repealed Constitution, the Councils could set aside Trust Land for Government use including Government pool house pursuant to Section 117 and 118 of the Repealed Constitution a read together with Section 7 and 13 of the TLA, which was not done in this situation.



40. The 6th Respondent further depones that it did not act illegally unprocedurally and fraudulently as claim by the cross – petitioner.

The 1st Interested Party's Case: -

41. The 1st Interested Party, Dumphina Chemaiyo Tek, suing as the administrator of the Estate of the late Peter Kipserem Tek filed a response to the petition dated 13th June 2020.

42. It is the 1st Interested Party case that her late husband Peter Kipserem Tek is the Registered proprietor of Kapsabet Municipality/ 292, which property has not been leased to any other person as the Interested Parties family are in possession and occupation of the same, which property measures 0.3369 Ha and that the Petitioner is not entitled to protection under Article 40 (6) of *the Constitution* since it acquired Kapsabet Municipality/ 292 unlawfully.

43. The Petitioner now 1st Respondent in the cross petition filed a Replying Affidavit in response to the cross – petition deponed by Mr. Godfrey Kipkorir Kiptoo, and Responded as follows;-

- a. That the cross – petition is not deserving of any of the orders sought, and reiterated that it was in occupation and possession of the suit property from the time it was purchased.
- b. In respect of Kapsabet Municipality/ 292 the 1st Respondent states that a certificate of lease dated 21/07/2017 was issued to the 1st Respondent, and an official search dated 13/4/2015 had hitherto confirmed the 2nd Respondent Jacob Kipkemboi Rono, as the registered owner. That the National Land Commission had established the 2nd Respondent as the legal and rightful owner of Kapsabet Municipality/ 292.
- c. On Kapsabet Municipality/ 293, the response to the cross petition, is that the property was acquired by the Petitioner having purchased the same from David Kiplagat Kosgei who was the registered rate payer and the National Land Commission had established as the legal and rightful owner. The relevant consents were obtained by the Petitioner.
- d. On Kapsabet Municipality/ 294, the response to the cross – petition is that the said property belonged to the Petitioner having purchased the same from Agui Songok the 4th Respondent; after confirming from a search from the Ministry of Lands, and confirming ownership from the National Land Commission and obtaining relevant consents to transfer and no objection letters from the cross – petitioner and the National Land Commission.
- e. In Kapsabet Municipality/ 295, the same was bought by the Petitioner from Ruth Jepngetich and the cross – Petitioner's office confirmed Ruth Jepngetich as a rate payer, after confirmation that the property was private property.

44. The Petitioner in respect of Kapsabet Municipality/ 292, states in the reply to the cross petition, that the certificate of lease was unprocedurally, unfairly and illegally issued to Peter Kipserem Tek (deceased) on 22/01/2020 and subsequently transferred to 1st Interest Party on 25th May 2021. That Peter Kipserem Tek had died on 20/4/2016 and could not execute the transfer of lease dated 14/6/2016.

That the 1st Interested Party thus procured registration of Kapsabet Municipality/ 292 using fraudulent documentation.

45. Vide an application dated 26/10/2022 which application was unopposed, the 2nd Interested Party was granted leave to join the proceedings and directed to file his Replying Affidavit.

46. In his replying affidavit, the 2nd Interested Party, Mr. Wilfred Kiptum Kitur Kimalat, depones that;



- a. He is legal owner of parcel number Kapsabet Municipality/ 295, earlier known as residential plot Z, allocated to him in 1978, by the District plot allocation committee meeting held on 8/6/1978.
 - b. An allotment letter, was issued to him and he duly paid the allocation fees; where after payment of survey fee, a survey was prepared. Later on the RIM was amended and the plots were given the current numbers.
 - c. That he had lived on the suit premises from 1981 to date, and did not know the current registered owner Ruth Jepngetich.
47. The Court directed the petition to be heard by way of written submissions; and parties were granted time to highlight the submissions.

Petitioner's Submissions: -

48. The Petitioner identified 7 issues for determination and submitted on each issue.
49. First issue was who is the lawful proprietor of the suit properties. Under this head the Petitioner submits that it purchased the property from the 2nd to 5th Respondents and complied with Section 3 (3) of the Law of Contract Act, and that the Petitioner complied with Section 46 and 55 of the Land Registration Act and was thus the bonafide registered owner and had acquired indefeasible title under Section 25 of the Land Registration Act.
50. The Petitioner places reliance on the decision in Court of Appeal case in Charles Karathe Kiane & 2 others vs Administrators of the Estate of John Wallace Mathare & 5 others, as well as Fanikiwa Limited vs Sirikwa Squatters Group & 17 others civil Appeal 45 and 44 (2017) consolidated.
51. On the second issue whether the Petitioner's right to fair Administrative Action under 47 of the Constitution was violated? Under this head the petitioner submits placing reliance on the decision in Judicial Service Commission vs Mambu Mutava & another (2015) eKLR. The Petitioner submits that it was denied a right to be heard before the public notice was made.
52. That Article 47 guarantees the right of a person to be heard before an adverse decision is taken. The petition cites the decision in the case of John vs Rees (1969) 2 AIIER272.
53. On issue number 3, the Petitioner submits that it had a legitimate expectation that it had legitimately acquired the property, and cites the decision in Communication Commission of Kenya & 5 others vs Royal Media Services Ltd. The Petitioner submits and urges the Court to find the representation by National Land Commissioner, the 6th Respondent and DCI – Nandi County were lawful clear and unambiguous.
54. On issue number 4, the Petitioner submits that the 1st Respondents claim is statue barred as the claim ought to have been brought within 12 years as per Section 7 of the Limitation of Actions act.
55. The Petitioner submits that the 1st Respondent discovered in 1993 that the land had been transferred to 2nd to 5th Respondents. In support of this limb of submissions the Petitioner cites the decision in the case of Edward Moonge Lengusuranga vs James Lanaiyara & another (2019) eKLR. The Petitioner submits that the issue of the suit being time barred is a jurisdictional issue to be dealt with first.
56. Issues 5 and 6, related to the reliefs to be issued, the Petitioner submits that the 1st Respondent having admitted blatant and indiscriminate abuse and misuse of law it is entitled to an order of injunction



against the 1st Respondent to prevent future infringement and violations of the Petitioner Bills of Rights.

57. The Petitioner submits that the 1st Respondent is not deserving of the General damages it has sought in the cross –petition.

58. Issue number 7, the Petitioner seeks costs of the petition.

1st Respondents/Cross – Petitioner’s Submissions: -

59. The 1st Respondent/Cross Petitioner framed 5 issues for determination and submitted on the same.

60. Issue 1, whether the County Government of Nandi breached/violated and/or infringed the Petitioner’s constitutional right to property.

61. The 1st Respondent/Cross Petitioner submits that the Notice dated 15th July 2019 was clear and in no uncertain terms that “the parcels of land which are suspected to have been acquired unprocedurally are to be repossessed for public interest/sue.” Thus the 1st Respondent only expressed intention to repossess but had not repossessed the same, hence the infringement of Article 40 (I) of *the Constitution* of Kenya had not crystallized since the process of repossessing the suit properties were yet to be put in motion.

62. The 1st Respondent/Cross petitioner submits that the petitioner I enjoying the rights of possession and registration of the suit properties and hence its rights under Article 40 have not been infringed.

63. The 1st Respondent/Cross Petitioners thus submits the petition was filed prematurely; and urges the Court to dismiss the petition.

64. The 1st Respondent/cross Petitioner submits on issue No. 2 as to whether there was a proper allocation of the suit parcels to 2nd to 5th Respondents, as follows, that the suit parcels are public property and were reserved for existing low density residential area under key zone 03 according to the Kapsabet Town Development plan of 1978.

65. The 1st Respondent submits that the suit parcels of land were alienated government land for which the commissioner of lands had no powers to allocate to private individuals without the consent and request of the Petitioners herein. Consequently, since the parcels of land had been set aside for public use they were not available for reallocation to other persons without following the laid down processes. Thus the root of titles is tainted with illegalities, so submits the 1st Respondent/cross Petitioner. In support of this limb of submissions the 1st Respondents/ Cross Petitioner had cited the decision in the case of Nelson Kazungu Chai & 9 others vs Pwani University (2014) eKLR.

66. The cross Petitioner sums up the allocation process that for a Government land to be allocated, there must be a valid allotment letter followed by a Part Development Plant, thereafter the compliance with the terms of the allotment.

67. The cross Petitioner further reliance on the decision in the case of Munyu Maina Hiram Gitih Maina, as well as James Muigai Thungu vs County Government of Trans Nzoia

68. On issue number 3, the cross Petitioner submits on whether the 2nd to 5th Respondents could pass valid title to the Petitioner, in which the cross Petitioner submits that the titles for the 2nd to 5th Respondents were acquired illegally were thus null and void and they could not pass a valid title to the Petitioner. In support of this limb of submissions, the cross- petitioner places reliance on the case of Raphael Ngugi (2022) eKLR.



69. The cross – Petitioner further submits that the Petitioner cannot claim to be a bonafide purchase for value, since the titles it acquired were tainted with illegality in the first place and cites the decision in case of Alice Chemutai Too vs Nickson Kipkurui Korir & 2 others and the decision in Arthi Highway Developers vs End Butchery.
70. On the Interested Parties, case the Cross – Petitioner submits that the Interested party have allotment letters but could not take possession of the suit properties and that the Court cannot make substantive orders either in favour of them or against them.
71. On reliefs, the cross Petitioner submits that the Petitioner be dismissed and judgment be entered against the Petitioner, as prayed for in the Cross – Petition.

2Nd To 5Th Respondents Submissions: -

72. The 2nd to 5th Respondents submissions 2nd to 5th Respondents have framed the following as issues for determination and submitted on the same; -
 - i) who is the legal owner of the suit land.
 - ii) Whether the suit lands are public land or private land
 - iii) Whether the Petitioner holds a good title.
 - v. Whether the 1st Respondent violated the Petitioner’s right to legitimate expectation doctrine of Estoppel
 - vi. Doctrine of approbation and reprobation
 - vii. Fraud
 - viii. Whether cross petition is merited
 - ix. So appropriate relief
73. On issue number 1 the 2nd to 5th Respondents, submit that they are the genuine and bonafide registered owners of the suit properties as evidenced in the white cards annexed to their affidavits, they urge the Court to find and hold so.
74. With regard to the 2nd interested party case, the 2nd to 5th Respondent submit that the 2nd Interested Party has no proprietary interest as he only had an allotment letter while the 5th Respondent had a certificate of title which the National Land Commission and the DCI had confirmed the authenticity. They have cited the decisions in Marcus Mutua Muluvi & another vs Philip Tonui & another (2012) eKLR, Lilian Waitera Gachuhi vs David Shikuku Mzee (2005) eKLR and Philma Farm Produce & Suppliers & 4 others vs the A.G. (2012) eKLR.
75. On whether the suit properties are public or private properties, the 2nd to 5th Respondent, submit that the basis of the cross – petitioners suit is that the suit properties were indicated as “existing low density residential area” which does to amount to alienated Government land.



76. The 2nd to 5th Respondent submit that under Article 62 of *the Constitution*, public land is defined as “land which at the effective date was alienated Government land as defined by an Act Of parliament in force on the effective date.”
- “Land lawfully held, used or occupied by any state organ, except any such land that is occupied by the state organ as lessees under a private land”
77. The 2nd to 5th Respondent submit that the National Land Commissions had indicated that the suit land were not public land. They urged the Court to hold that the suit land is not public land.
78. On issue 3, the 2nd to 5th Respondents submits that they hold good title to the suit properties. The 2nd to 5th Respondents submit relying on the decision in the case of Communication Commission of Kenya and 5 others vs Royal Media Services, that their rights to legitimate expectation were violated. Since they acted on representation made by Government Agencies as the authenticity.
79. The 2nd to 5th Respondents have also relied on the doctrine of Estoppel and place reliance on Section 120 of the *Evidence Act*, and submit that in so far as the 1st Respondents offices gave clean bill of health on the transfers, they are estopped from pleading otherwise.
80. Closely related to the above issues of Estoppel and Legitimate expectation, the 2nd to 5th Respondent equally submit on the doctrine of approbation and reprobation and cite the decision Republic vs Institute of Certified Public Secretaries of Kenya Exparte Mundia Njeru Geteria (2010) eKLR. The decision in the case of RVS Kenya Revenue Authority Exparte Aledare Freight Services Limited as well as Behan & Okero Associates vs National Bank of Kenya 2007 (eKLR) in support of the submissions on the 1st Respondent having approbated and reprobated.
81. The 2nd to 5th Respondents have submitted on fraud and submit that the 1st Respondent has not proved as is required as proof of knowledge of the existence of an unregistered interest on the part of some other person, whose interests he knowingly and wrongfully defeats by the at registration.
82. The Respondents submits that the National Land Commission had by its letter dated 5th July 2016 GKK 15, stated that the suit properties as per the approved plans pf Kapsabet Town PDP NO. 126/65/1 and PDP/126/00/14 OF 2001 held that the properties were not public properties.
83. The 2nd to 5th Respondent submit that the cross petition has not been proved and it ought to be dismissed.
84. On reliefs, the Respondents submit that the Court finds the Petitioner has proven the petition and allow it costs.

The 6th Respondent Submission: -

85. The 6th Respondent has identified 4 issues for determination as follows;
- a. Whether the parcels of land in question were alienated public lands unavailable for further alienation.
 - b. Whether the 6th respondent acted ultra vires
 - c. Whether the Petitioner is entitled to the reliefs sought
 - d. Whether the cross – petition should be allowed.



86. On issue number 1, the 6th Respondent placing reliance on the Section 2, of the Repealed Government Lands Act, submits that “unalienated Government land, means being leased to any other person, or in respect of which the commissioner had issued any letter of allotment.
87. The same meaning is given under Section 3 of the Physical Planning Act, cap 206 Laws of Kenya. The 6th Respondent submits that the suit parcels were zoned for existing low density residential area hence could not have been set aside for Government pool houses since they were existing houses.
88. The 6th Respondent submits that the procedure of setting aside land for public use, is provided for under Section 13 of the Repealed Trust Land Act which was operational then.
89. In a nutshell the said Section required a proposal to the divisional board to set apart land, informing council of the proposal, bringing the proposal to the people of the area concerned, hearing representation by the Divisional Board, recommendation in writing by Divisional Board recommendation by the Council, and gazetting of the recommendation.
90. On issue number 2, the 6th Respondent submits that it did not act against her mandate, and that the 1st Respondent/cross Petitioner did not prove the same.
91. The 6th Respondent submits that the cross petition has not been proved and ought to be dismissed.
92. The 6th Respondent further submitted on the limited scope of the interested parties in proceedings and cites the decision in Petition 14/2014 Communication Commission of Kenya vs Royal Media Services.

1st And 2nd Interested Parties Submission: -

93. The interested parties have framed two issues for determination.
 - i) Who is the lawful owner of Kapsabet/municipality/292 and Kapsabet Municipality 295?
 - ii) Whether there was a misjoinder of parties
94. On Kapsabet Municipality /292 the 1st interested party submits that she is the lawful owner of the suit property and details the acquisition journey of the property, starting 1974 where the Nandi plot allocation committee allocated to the late Peter Kipserem Tek, who took possession of the same. An allotment letter was issued to the late Mr. Tek, a lease document was issued to him and was registered as the owner thereof.
95. The 1st Interested Party submits thus she is the lawful proprietor whose title should be protected under Section 25 of the Land Registration Act.
96. On his part of the 2nd Interested party seeks for a declaration that he is the rightful owner.
97. It is his (2nd Interested Party) submission that he was allocated the parcel number Kapsabet/municipality/295 by the Nandi District Allocation Committee in 1978, and issued with an allotment in 1981. The 2nd Interested Party submits that the 5th Respondent acquired title fraudulently and that could not pass the same to the Petitioner.
98. On misjoinder of parties the Interested Parties submit that the National Land Commission should have been joined the proceedings by the cross Petitioner.

Issues For Determination: -

99. The Court has analysed the pleadings, and the submissions of the parties, in both the Petition and the Cross – Petitions and has framed the following as the issues for determination;



- i) Whether or not the Notice dated 15th July 2019 was regularly and validly issued?
- ii) Whether or not the suit properties to with Kapsabet Municipality/292, Kapsabet Municipality/293, Kapsabet Municipality/294 and Kapsabet Municipality/295 were public properties?
- iii) Whether or not the interested parties have established interests in Kapsabet Municipality 292 and Kapsabet Municipality 295.
- iv) What are the appropriate reliefs to issue in view of the success or otherwise of the petition and the cross petition?
- v) Who bears the costs of petition and the cross petition?

Analysis And Determination: -

100. The gravamen of the petition before Court is the publication of the Public Notice dated 15th July 2019 titled “Repossession of un-procedurally acquired public land” The said public notice is pleaded at paragraph 24 of the petition but the said notice was not exhibited before Court, in the petition nor affidavits.
101. The Petitioners state that the publication of the said Notice was done unprocedurally and deprived it of its rights to own property under Article 40 and was made in contravention of Article 47 of the Constitution thus infringing its rights.
102. During the highlighting of the submissions, the Court pointed out to the parties that it had dealt with a similar notice in Kapsabet ELC JR NO. 6/2021 (formerly Eldoret ELC JR NO. 3/2019) R vs the CEC Land, Environment, Natural Resources and Climate Change County Government of Nandi and 2 others and asked the parties to confirm whether the Notice was the same and file submissions with regard to whether the decision in Kapsabet ELC JR NO. 6 of 2021 had a bearing in this petition.
103. Only the Petitioner filed the supplementary submissions on this issue, the rest of the parties stating that they opted not to file supplementary submissions but to rely on the submissions previously filed.
104. At paragraph 4 of their supplementary submissions, the Petitioners confirm that the public notice that was subject of the proceedings in Kapsabet ELC JR no. 6/2021 is similar to the public notice dated 15/07/2019.
105. I have perused the decision in Kapsabet ELC JR NO. 6/2021, the Notice quashed in that case was the minutes of the Nandi County Executive Committee Resolution of 7/6/2019 minute Number CEC/EC/MIN/41/2019 and among the properties listed therein include KAPSABET/MUNICIPALITY 292, Kapsabet Municipality 293, Kapsabet Municipality 294 and Kapsabet Municipality 295. It is the minute CEC/EC/MIN/41/2019 that undoubtedly gave rise to the public notice dated 15th July 2019 subject of this petition.
106. In the judgment in ELC JR NO. 6/2021 Kapsabet, this very Court issued orders of certiorari quashing the Minute CEC/EC/41/2019 the root and basis of public notice dated 15th July 2019.
107. The minutes giving rise to the public notice dated 15th July 2019 was thus quashed and the consequent public notice equally stood quashed having no foundation to stand on.
108. Is the decision in Kapsabet ELC JR No. 6/2021 applicable in this case?, the answer would be yes, as observed in the decision in Japheth Nzila Mwangi vs Kenya Safari Lodges and Hotels Ltd, a decision quoted in the case of Abubakar G. Mohammed vs Independent Boundaries and Election Commission,



which defined a judgment in Rem, the Court held “it is trite law that ordinarily a judgment binds only the parties to it. This is known as a judgment in persona. A judgment may also be conclusive not only against the parties to it, but also against all the world. This is known as a judgment in Rem. This is a judgment which declares, defines, determines the status of a person or of a thing i.e. the jural relation of the person or thing to the world generally.”

109. Thus Kapsabet ELC JR No. 6/2021 having quashed the minutes that led to the public notice dated 15/7/2019 is thus a Judgment in Rem and is applicable in this case and I say no more. Thus issue number 1 is answered in the negative.
110. On issue number 2, as to whether the suit properties are public properties. The process of setting public land as set out in Section 13 of the Repealed Trust *Land Act*, cumulates with a gazette notice of the Area set aside, the cross – petitioner did not avail a copy of the gazette notice, setting aside key zone 03 for government pool housing.
111. This Court had occasion to interrogate the Kapsabet Town Development Plan in the case of Professor Josephat Kiprono Yego and another vs Kapsabet Municipal Board and 6 others, Kapsabet ELC Case No, 129/2021 (formerly Eldoret Case No. 64/2019) in the judgment delivered in that case at paragraph 77 and 122 of that decision, it was held that the Government pool houses in Kapsabet Town had been reserved under key zone 04 which were public properties.
112. In our present case the suit properties are in zone 03. In the Town Development Map of Kapsabet Zone 03 is named as “existing low density houses” while key zone 04 is names as “proposed low density houses.” The National Land Commission had equally vide their letter dated 5th July 2016 annexure GKK `5, indicated that the suit properties were not public properties.
113. Thus the proprietors reserved for Government Pool Houses appearing in key zone 04 were alienated government properties as was held in the Professor Josephat Yego decision above which in nature would be a judgment in persona, which binds the 1st Respondent /cross Petitioner who was a party therein.
114. The suit properties being in Zone 03 of the Kapsabet Town Development, were unalienated public land and were available for allocation.
115. The Court finds that the suit properties were not public properties in answer to issue number 2.
116. With regard to issue number 3, this Court is aware of the limited scope of interested parties in proceedings as was stated by the Supreme Court in Francis Kariuki Muruatetu vs Republic and Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others.
117. In both the said decisions the holding is that an interested party cannot seek precipatory orders against the principal parties in a matter.
118. The 1st interested party case is that she is the registered owner of Kapsabet Municipality/292. In support of this, she exhibited before Court minutes of Nandi Plot Allocation Committee, a letter confirming allocation to her late husband, the allocation minutes and the letter were issued on 7th and 9th November 1974 payments for the plot were made on 12/11/1974. DCT 10, and a letter of allotment dated 16/7/1998 was also exhibited. A lease was issued and forwarded to the husband of the Interested Party vide the letter dated 19/6/2019 exhibited in Court, the lease was registered and a copy of the register opened. The copy of the white card exhibited by the Interested Party and the 6th Respondent both confirm the register was opened on 22/1/2020 with the late Peter Tek as the first Registered Owner. On its part the Petitioner in relation to Kapsabet Municipality 292, exhibited a certificate of



lease; and letters from National Land Commission confirming the Petitioner was the owner. The Cross Petitioner equally confirms the property is registered in the name of the late Peter Tek.

In the decision in the case of Nelson Kazungu Chai vs Pwani University the Court stated the process of allocation of unalienated government land as follows; -

“ it is trite law that under the repealed Government Lands Act, a PDP plan must be drawn and approved by the Commissioner of Lands or the Minister of Lands before any alienated Government land could be allocated. After a PDP, has been drawn a letter of allotment based on the approved PDP is then issued to the allottees..... it is only after the issuance of letter of allotment and compliance of terms therein, that a cadastral survey can be certificate for the purpose pf a certificate of lease. The 1st interest party has demonstrated compliance with the said procedure, whereas the Petitioner only relies on the certificate of lease which has no letter of allotment not a lease to back the same.”

119. As was observed by the Court of Appeal in the case of Munyu Maina vs Hiram Gathitha Maina (2013) eKLR “We state that when a registered proprietor’s rout of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this same instrument of title that is unchallenged and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show the acquisition was legal formal and free from any encumbrances including any one all interested which need not be noted in the register.”
120. With no letter of allotment nor a lease in respect of Kapsabet Municipality/292 the 2nd Respondent has failed to demonstrate how he acquired the same and could not pass good title to Petitioner and the 1st Interested party having, demonstrated the process of acquisition and the property having been registered it in the name of the late Peter Tek, whose administrator is the 1st Interested Party, the Court finds that the 1st Interested party has demosnt5rated her interest in Kapsabet Municipality/292.
121. With regard to Kapsabet/municipality/295, the Petitioner relies on a certificate of lease, and letter from National Land Commission as well as an agreement for sale between itself and the 5th Respondent. The 2nd Interested Party, on his part has exhibited, the minutes of the District Allocation Committee as well as an allotment letter. The 2nd Interested Party does not have a lease, but had paid for the allotment; yet the 5th Respondent was registered as the owner.
122. The 2nd Interested Party was duly allocated the property, while the 5th Respondent has not exhibited the Allotment letter and lease, but only the certificate of lease, which is under challenge. As observed in the Hiram Gatwitha Maina case the certificate of title being under challenge is not sufficient proof of ownership.
123. The 5th Respondent submit that an allotment letter does not confer ownership while the 2nd Interested Party submits that he was duly allocated Kapsabet Municipality/295.
124. In deed an allotment letter does not confer ownership, but once a property has been allocated it is not available for reallocation as was held in the decision in Rukeya Ali Mohamed vs David Gikonyo Nambacha.
125. It follows therefrom tat the 5th Respondent could not have been validly allocated the suit property and pass good title to the Petitioner as the 2nd Interested Party had exhibited compliance with terms of the letter of allotment. The Court finds that the 2nd Interested Party has equally demonstrated beneficial interested over Kapsabet Municpality/295, over the 2nd Respondent and the Petitioner.



126. With regard to Kapsabet Municipality 293 and Kapsabet Municipality 294, no previous allotment and compliance with terms of allotment to other parties was exhibited and proved before Court, hence the plots were available for reallocation to other parties.
127. Issue number (v) on what appropriate relief are to issue?
- The Court has found that the suit properties are not public properties hence the cross- petition fails. With regard to the petition, the Court has found that the public notice dated 15/7/2019 was quashed by an order of certiorari, issued in Kapsabet ELC JR NO. 6 of 2021, and it cannot thus quash what was already quashed.
128. The Court finds further that the petition was filed as a result of the publication of the public notice dated 15/7/2019 which was to be followed by a Court process for the repossession which process was had not been done, thus there was no infringement of the Petitioner's rights to property under Article 40 (i) of *the Constitution*, but the right to fair administrative action was infringed.
129. The Interested Parties having demonstrated, proprietary rights over Kapsabet Municipality 292 and beneficial interests over Kapsabet Municipality/295 by the 1st and 2nd Interested Parties respectively. It follows that the Petitioner is entitled to a protection of its interests in Kapsabet Municipality/293 and Kapsabet Municipality 294 only the same having being found not to be public properties.

Disposition: -

130. Accordingly, judgment is entered in favour of the Petitioner in terms that; -
- i) The Petitioner is the lawful proprietor of Kapsabet Municipality 293 and Kapsabet Municipality 294.
 - ii) The Petitioner fundamental freedoms and rights to fair Administrative action under Article 47 of *the Constitution* were violated by the 1st Respondent
 - iii) The Public Notice dated 15/7/2019 having been quashed in Kapsabet ELC JR NO 6/2021, there remains nothing to be quashed.
 - iv) The cross petition is hereby dismissed.
 - v) On costs the 1st Respondent shall bear the costs of the petition and cross petition

DELIVERED AND DATED AT KAPSABET THIS 31ST DAY OF JULY 2023.

HON. M. N. MWANYALE,

JUDGE

In the presence of;

Ms. Karuga for the Petitioner

Mr. Sambu for 1st Respondent/Cross Petitioner

Mr. Kwame for 6th Respondent

Ms. Chirchir for 2nd to 5th Respondent

Miss. Lelei Koech for 1st to 2nd Interested Parties

