



**Board of Trustees of the National Social Security Fund v Attorney General
of the Republic of Kenya (Environment & Land Case 146 of 2011)
[2023] KEELC 20436 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20436 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 146 OF 2011
LN MBUGUA, J
SEPTEMBER 28, 2023**

BETWEEN

**THE BOARD OF TRUSTEES OF THE NATIONAL SOCIAL SECURITY
FUND PLAINTIFF**

AND

**THE HONOURABLE ATTORNEY GENERAL OF THE REPUBLIC OF
KENYA DEFENDANT**

JUDGMENT

1. The Plaintiff is a body corporate established under the *National Social Security Fund Act*, while the defendant is the legal representative and legal advisor to the Government of the Republic of Kenya. The suit was filed vide a plaint dated 5.4.2011, where the plaintiff claims that pursuant to an agreement dated 25.1.1995, it purchased 13 parcels of land for ksh.300 million.
2. It outlined the said parcels as **LR No. 12715/430, 12715 /431,12715/432, 12715/545, 12715/407, 12715/408, 12715/26, 12715/530, 12715/529, 12715/579, 13302/5, 180641 and 17645** and stated that they are all aligned next to each other in the sequence of their plot numbers, located in Mlolongo area.
3. The plaintiff claims to be the absolute and indefeasible owner of the above mentioned suit parcels.
4. It is pleaded that despite the said parcels being private properties, the Government of Kenya embarked on a project of construction of a dual carriage way between Embakasi and Athi River and alleged that parcel **LR 17645** had encroached on the road reserve consisting of plots the Government of Kenya acquired vide Kenya Gazette Notice No.1887 and 1888 under the land Acquisition Act.
5. The plaintiff therefore seeks judgment against the Defendant in the following terms;



- a. *A declaration that the Plaintiff is the indefeasible proprietor of the properties known as **LR Numbers 12715/430, 12715/431, 12715/432, 12715/545, 12715/407, 12715/408, 12715/26, 13302/5, 180641 and 17645/1.***
 - b. *An order that the Defendant does indemnify the Plaintiff against any claims arising from the purchasers, lessees, assignees, tenants and or any other person claiming title through or under the Plaintiff over the purchase of the whole or portions of **LR Numbers 12715/430, 12715/431, 12715/432, 12715/545, 12715/407, 12715/408, 12715/26, 12715/530, 12715/529, 12715/579, 3302/5, 180641, 17645/1 and 17645/2.***
 - c. *A conservatory order over the properties known as **LR Numbers 12715/430, 12715/431, 12715/432, 12715/545, 12715/407, 12715/408, 12715/26, 12715/530, 12715/529, 12715/579, 13302/5, 180641 and 17645/1,** protecting the Plaintiff, its successors, nominees, transferees, lessees, tenants, assignees and all those claiming title through or under it from loss of investment (financial or otherwise) related to the land subject to the government offering and paying adequate, open market compensation for their land or portions thereof that the government may want to acquire.*
 - d. *In the alternative, compensation of the equivalent of the market value (as set out in paragraph 25 of the plaint) for all the properties known as **LR Numbers 12715/430, 12715/431, 12715/432, 12715/545, 12715/407, 12715/408, 12715/26, 12715/530, 12715/529, 12715/579, 13302/5, 180641, and 17645/1** or some of the said properties or portions thereof as the government may want to compulsorily acquire for public use after due regard to the provisions of the Land Acquisition Act and any other relevant law.*
 - e. *Damages.*
 - f. *Costs of this suit and interest on the costs at court rates.*
6. The Plaintiff's claim is denied by the Defendant vide its statement of defence dated 15.6.2011 where it avers that in 1972, the government of Kenya through the then Ministry of works identified land required for the construction of the Nairobi Airport turn-off Athi River Road along Embakasi-Athi –River Section.
 7. The land was then earmarked and acquired vide **gazette notice No. 1887**, of which the affected parcels were; **LR Numbers 337, 1388, 1504/6, 1504/7, 7149/5, 7149/7, 7149/8, 7149/9, 9741, 11895 and 11933**, and the requisite payments in compensation were made.
 8. That the Government then embarked on construction of a dual carriage way and associated service roads along the Nairobi Airport-turn off Athi River section which area also holds the Athi river weighbridge axle which is due for expansion and modernization. It states that the land cannot be transferred for private individual use.

The Evidence

9. The Plaintiff's case was advanced by one witness, **Kennedy Omolloh Ayakoh (PW1)**, who introduced himself as the Plaintiff's property management officer. He adopted his witness statement dated 7.6.2012 and filed on 8.6.2012 as his evidence. He produced the documents in their bundle prepared on 8.6.2012 as exhibits.
10. In his witness statement, Pw1 reiterated the averments set out in the plaint, that they had purchased the suit parcels in 1995. He avers that in the year 2006, the Government of Kenya embarked on a project of improving and building a dual carriage way between Embakasi and Athi River, of which the contracts



to carry out the works were duly awarded. Subsequently, the government approved and authorized the demolition of structures that had encroached on the road reserve set aside for the construction of the dual carriage way.

11. PW1 contends that parcel **LR Number 17645** was among other unspecified parcels of land erroneously earmarked for demolition for allegedly having encroached on the road reserve. He states that by a grant made by the then Commissioner of Lands, Mr. Wilson Gachanja on the 27.9.1994 under the Registration of Titles Act (cap 281), the President of the Republic of Kenya granted **LR 17645** to Makueni Holdings Ltd. The instrument of Grant was thereafter registered in the Registry of Titles as **I.R.NO. 1634841/1**.
12. Subsequently, by a transfer registered against the title on 31.1.1995, the property was transferred to Kingorani Investments Limited, who in turn transferred that land to the Plaintiff in January 1995.
13. PW1 contends that the 1972 Gazette Notices Number 1887 and 1888 do not relate to parcel **LR No. 17645** which has no relationship with parcels **LR No. 7149** and **1504/7**.
14. He also states that by a letter dated 14.11.2005, the Plaintiff commissioned independent surveyors to determine the exact position of **LR 17645** as relates to the road reserve and in his report contained in a letter dated 16.11.2006, the surveyor advised that the boundaries of **LR No. 17645** did not encroach on the road reserve and the position was confirmed by the director of survey in his letter dated 12.7.2006.
15. He avers that the Plaintiff caused the property known as **LR Number 17645** to be subdivided into 2 portions being **LR No. 17645/1** and **17645/2** and sold **1765/2** measuring about 1.5 acres to Oilcom Limited which has built a petrol station.
16. He adds that upon the request of the Plaintiff, the chief land valuer on 15.12.1997 valued the suit property known as **LR No. 17645** at Ksh.27,000,000 million and further that Oilcom Limited has asserted that the improvements on development of a portion of the property is in excess of ksh.60 million as at the year 2006. However, all the properties mentioned are worth Ksh. Two billion.
17. He avers that being aggrieved by an administrative order of the Ministry of Roads directing the demolition of structures on **LR No. 17645/2**, Oilcom Limited filed a Judicial Review application in 2006 against the ministry of Roads and public works in which Oilcom obtained orders staying execution of the directive that its property be demolished.
18. PW1 also states that **LR 12715/529**, **12715/579** and **12715/530** have already been transferred to Prime land (K) Limited who in turn transferred to other entities.
19. He adds that the Plaintiff continues to receive land rent and rates demands which it has dutifully paid and that the properties are of immense economic investment value and are held on behalf of the workers of Kenya, hence are public properties.
20. PW1 also avers that no restriction, reservations or question have been raised by either the Registrar of Titles or the Commissioner of lands regarding the propriety of the Plaintiff's titles thus it is a purchaser for value without notice of defect of the titles and exercised due diligence and prudence in investigating the titles.
21. Upon cross-examination, PW1 stated that he did not have a valuation report to show that the suit properties are worth 2 billion, however, he still wants the Plaintiff to be declared the indefeasible owner of the suit properties. He further stated that the Plaintiff is no longer the registered owner of the properties referred to in the schedule to his witness statement at page 2, as it sold them to 3rd parties.



22. He further stated that the titles thereof are not in the Plaintiff's custody save for LR 17645 which has been subdivided into **LR No. 17645/1** and **LR 17645/2**. He added that **LR 17645/2** was sold to Oilcom Limited which has sued the government in respect of the same issues. In that regard, the only title under proprietorship of the Plaintiff is **LR No. 17645/1**.
23. He also stated that he does not know any purchaser who is not on his land, but in case of an adverse ruling in this case, there are likely to be other suits, but they did not file this case out of fear, they just wanted to protect the suit properties as it is a pension scheme which holds the properties for the public.
24. He stated that before they purchased the suit properties in 1995, they conducted searches, though they are not in the Plaintiff's documents. They have no survey plans either done as part of due diligence.
25. Referred to page 47 of his bundle, he stated that he can see there are plots between old and new Mombasa Road, that the current status of title **17645/1** is that it is vacant and fenced and it is in between old Mombasa road and new Mombasa road and there are no other properties in the middle of the road save the weigh bridge and he does not agree that this is public utility land.
26. Referred to page 49 of his bundle, he stated that it has a decision of the Court of Appeal in **Case No.303 of 2006** and it deals with parcel **17645/2** which land was sold to Oilcom Ltd. PW1 is not aware that the said case was dismissed.
27. Upon re-examination, PW1 stated that at paragraphs 18-20 of the plaint, they have pleaded that some properties were sold. For **LR 17645/1**, the threat is that just as they saw in the survey map, the Government via the ministry of roads would want to acquire it, and is in the process of applying for cancellation of that title as being part of the road.
28. The defence case was advanced by two witnesses. **DW1** was **Joseph Nanzala Munyendo**, a land surveyor with the Ministry of Lands, Housing and Urban Development deployed at Department of survey. He adopted his witness statement dated 16.1.2013 as his evidence. He produced the documents in their bundle running from page 24 - 60 as their exhibits. DW1 states that on or about 30.6.1972, the Commissioner of lands issued a notice of intention to acquire land vide **Gazette Notice No. 1887** under the Land Acquisition Act 1968 to the affected registered owners of **LR 337, LR 1338, LR 1504/6, LR 1504/7, LR No. 7149/5, LR No. 7149/7, LR No. 7149/8, LR No. 7149/9, LR No. 9741, LR No. 11895 and LR No. 11933**.
29. The Commissioner of lands then issued a notice vide the Kenya **Gazette Notice No.1888 of 30.6.1972** for purposes of hearing claims for compensation. Subsequently, the Commissioner of lands duly compensated the persons whose parcels of land were acquired as per the acquisition schedule of **1972**. The affected proprietors of the aforementioned parcels of land have not asked for further compensation. That it is those entities who acquired the suit parcels illegally who are seeking compensation from the government.
30. He further states that the road alignment cuts across **LR No. 1504, LR No. 7149/9**, however, parcel **LR No. 17645** lies within the acquired road reserve because it was illegally hived off from the aforementioned two parcels and it is hence not a good title.
31. He states the Government could not have acquired the suit land **LR No. 17645** as the same did not exist in 1972 when the land acquisition took place, and the government reserved the land for purposes of road realignment. That at no time did the government ever advertise or offer that particular parcel of land for private ownership. He adds that **LR No. 17645** came about in year 1992.
32. DW1 stated that a Judicial review suit **No. 701/2006** was filed involving the illegal owner i.e. **Oil Com Ltd v Permanent Secretary Ministry of Roads** in relation to the alleged parcel of land **LR 17645/1**



- and that the said case was dismissed on **2.3.2012** by lady Justice Githua. The claimant obtained a stay on appeal but the matter was never prosecuted by Oil Com Ltd.
33. He also states that the Plaintiff's claim that it was a purchaser for value without defect defeats logic as they have not shown any due diligence done and it has not enjoined the parties it purchased the land from who could demonstrate the root of their title.
 34. DW1 also avers that the Director of survey clarified his letters stating that **LR No. 17645** does not encroach on the road reserve from survey point of view.
 35. Upon cross-examination, DW1 stated that for the documents at page 26 - 60 of the Defendant's bundle of documents, he does not have the actual custody but in 2013, he interacted with the said documents but he has not certified them.
 36. He further stated that the documents at page 26-60 of the Defendant's bundle show that valuation of the suit plots was done and awards were given. However, he did not have the valuation report in court.
 37. With regard to the Judicial review case involving Oil com Limited, he stated that he does not have particulars of the case and he is not aware that the decision was overturned at the Court of Appeal.
 38. He stated that he stands for the position that **LR 17645** lies on an acquired road reserve and he has survey plans to show that **LR 1504/7** is same as **LR 17645** but they do not have a survey report to that effect.
 39. In re-examination, DW1 stated that the case mentioned at paragraph 7 of his witness statement exists, its ruling is at page 79 of the Plaintiff's bundle. It is **Civil Appeal No. 303 of 2006** which emanates from **HCCC Misc Civil Application No. 701 of 2006**.
 40. He further stated that with regard to Gazette Notice No. 1887 and 1888, reference is made to **LR 1504/7** and owner is Margaret Wamaitha Humprey and at page 25, it is shown that it was 38.9ha and that is where part of **LR 17645** lies.
 41. DW2, one **Gildine Karani**, a Principal Land Registrar with the Ministry of Lands and Physical planning, Ardhi house adopted her witness statement dated 24.10.22 as her evidence. She reiterates the averments in the witness statement of DW1. She added that during the pre-work survey in readiness for construction of the dual carriage road, the Ministry of Roads encountered encroachment by trespassers on the land acquired for construction of road facilities among them the weighbridge.
 42. Upon cross - examination, DW2 stated that as per paragraph 3 of her witness statement, the government acquired the land for its own use. She further stated that her averment was informed by a correspondence file which has all the details but it was not in court. That acquisition was a process ending with compensation, it was not an event.
 43. Referred to page 53 of the Defendant's bundle, she stated that there is evidence of compensation for **LR 1504/7** which was the original parcel but there is no evidence of delivery of the cheque referred to in the letter.
 44. She stated that the Defendant has not filed a counterclaim seeking cancellation of the Plaintiff's title and that she is not aware of any criminal proceedings against the Plaintiff due to the illegal hiving off of the land.
 45. She also stated that Makueni Holdings Ltd was the owner of the land, then it sold the same to Kingorani, then to the Plaintiff and the same was subdivided, but the subdivisions have not been registered. She stated that for **Parcel 17645**, she has not come across allegations of fraud.



46. DW2 further stated that the map will show that parcel 17645 owned by the Plaintiff falls in **LR 1504/7**. She added that every L.R. No. has an I.R. No. To this end, she has **I.R. No. 63484** for **L.R. No. 17645**.
47. When re-examined, DW2 stated that the letter at page 53 of the Defendant's bundle is addressed to Margaret Wamaitha Humphrey and reference is parcel **1504/7**. She was to receive compensation, the amount is indicated and there is a cheque number, so she was paid and she is not claiming that she was never compensated.

Submissions

48. The submissions of the plaintiff are dated 1.3.2023. It is argued that the plaintiff is entitled to judgment on admission, in that the Defendant is estopped from denying the existence of its title to **LR No. 17645/1 (Grant I.R. No. 63484)** having itself, through its very own Ministry of Lands and Officers, issued the said title to the Plaintiff's predecessors in title. To this end, reference was made to the case of **Synergy Industrial Credit Limited v Oxyplus International Limited & 2 others [2021] eKLR**.
49. It points out that correspondences at page 32-33 9, 40, 61-64, the deed plan at page 41-42 and minutes of the consultative meeting to discuss a **land parcel (LR 17645)** situated in Mavoko Municipality contained at page 68-71 of its bundle are the evidence that the Government of Kenya acknowledged their title.
50. The Plaintiff argues that there is no evidence that **LR No. 17645** is the same as, part of, or encroaches upon the Defendant's **LR No. 7149/9** and or **LR No. 1504/7** as the Gazette Notices produced into evidence relate to other properties distinct from the Plaintiff's parcel **LR No. 17645**.
51. It submits that the Commissioner of lands has not been called to rebut the presumption of the validity of its title and there is no counterclaim seeking cancellation of its title yet courts have held that a title can only be cancelled by dint of a court order. It cites the case of **Republic v The Registrar of Titles Mombasa & 2 Others Exparte Emfil Limited [2012] eKLR** and **Republic v Kisumu District Lands Officer & another [2010] eKLR** to buttress its arguments.
52. It was further submitted that the plaintiff is a bonafide and innocent purchaser for value without notice, thus their registration as the owners of the land is guaranteed by the state. To this end, reference was made to the provisions of Section 25,26, 80 and 81 of the [Land Registration Act](#) as well as the cases of **Embakasi Properties Limited & another v Commissioner of lands & another [2019] eKLR**, **Elizabeth Wambui Githinji & 29 Others vs. Kenya Urban Roads Authority & 4 Others (2019) eKLR**, **David Peterson Kiengo & 2 others v Kariuki Thuo [2012] eKLR**, **Shimoni Resort v Registrar of Titles & 5 others [2016] eKLR** and **Weston Gitonga & 10 others v Peter Rugu Gikanga & another [2017] eKLR**.
53. The Plaintiff also argues that it has a right to acquire and own property and the right to be protected from arbitrary deprivation of property without compensation under Article 40 (1) and 40 (3) of [the Constitution](#).
54. The cases of **Kinyanjui Kamau v George Kamau [2015] Eklr**, **Vijay Morjaria v Nansingh Madhusingh Dardar & another [2000] eKLR** as well as the case of **Central Bank of Kenya Limited v Trust Bank Limited & 4 others [1996] eKLR** were proffered to buttress the point that no fraud was pleaded or proved against their title.
55. The Defendant did not file any submissions as per the court's directions.



DETERMINATION

56. Having regard to the pleadings, the rival evidence and the submissions of the plaintiff, I find that the issues falling for determination are;

1. Whether Any of the plaintiff's parcels no. **LR No. 12715/430, 12715 /431, 12715/432, 12715/545, 12715/407, 12715/408, 12715/26, 12715/530, 12715/529, 12715/579, 13302/5 ,180641 and 17645** were compulsorily acquired or were threatened with such acquisition.
2. Whether the plaintiff should be declared as the indefeasible owner of the above mentioned parcels of land.
3. Whether the plaintiff should get compensation equivalent to the market value in respect of the above mentioned parcels of land.
4. Whether the plaintiff is entitled to damages.
5. Who should pay costs of the suit.

57. The protection of right to own property is anchored under **Article 40 (1) of *the Constitution***. However, the state has powers to compulsorily acquire land through the eminent domain theory. In the case of **Town Council of Awendo v Nelson O Onyango & 13 others; Abdul Malik Mohamed & 178 others (Interested Parties) [2019] eKLR**, the court stated that;

“ The provisions relating to the doctrine of “Eminent Domain” as are enshrined in Article 40 of the 2010 Constitution, and Part VIII, of the *Land Act* (Sections 107 to 133), mirror those of Section 75 of the retired Constitution, and Section 6 of the Land Acquisition Act (now repealed) with a few modifications. Towards this end, Section 110 (1) of the *Land Act* provides that: “Land may be acquired compulsorily under this Part if the Commission certifies, in writing, that the land is required for public purposes or in the public interest as related to and necessary for the fulfillment of the stated public purpose.”

58. The said Constitution does not condone arbitrary acquisition of land by the state; See decision of the Supreme Court of Kenya in **Attorney General v Zinj Limited (Petition 1 of 2020) [2021] KESC 23 (KLR) (Civ) (3 December 2021) (Judgment)**. In the case of **Mutuma Angaine v M'marete M'muronga [2011] eKLR**, it was stated that:

“ ... it is trite law that when a person's property is forcefully acquired, the government must fully comply with the law and follow the laid down procedure strictly and meticulously. No person's property may be acquired compulsorily without due process”.

59. However, the provisions of **Article 40 (6) of *the Constitution*** stipulate that;

“The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

60. At the commencement of this suit, the Plaintiff claimed ownership of 13 parcels known as **LR No. 12715/430, 12715 /431, 12715/432, 12715/545, 12715/407, 12715/408, 12715/26, 12715/530, 12715/529, 12715/579, 13302/5, 180541 and 17645**. At paragraph 3 of the plaint,



the Plaintiff states that they purchased the 13 parcels on **25.1.1995**. At paragraph 10 thereof, they give an account of how a **Grant I.R. No. 61484** was issued by the president to an entity known as Makueni Holdings Limited on 27.9.1994. Further at paragraph 11 the plaintiffs state that the land was subsequently transferred to Kingorani investments Limited on 31.1.1995.

61. The agreement at page 20 of the plaintiffs' bundle indicates that the plaintiffs bought all the 13 properties from Kingorani investments on **25.1.1995** of which the interest thereon was leasehold of 99 years from 1.11.1983 and 1.6.1992.
62. At the trial, it emerged that the Plaintiff had sold all the parcels save **LR 17645**. However, Plaintiff claims to have subdivided the same into **LR 17645/1** and **2** and sold the latter parcel to Oil Com Limited.
63. On its part, the Defendant argues that Government carried out compulsory acquisition of parcels **LR 337, LR 1338, LR 1504/6, LR 1504/7, LR No. 7149/5, LR No. 7149/7, LR No. 7149/8, LR No. 7149/9, LR No. 9741, LR No. 11895 and LR No. 11933 in 1972** for road realignment vide **Gazette Notices No.1887 and 1888 in 1972**.
64. It further argues that according to survey plans, **LR 17645** is contained in **LR 1504/7**, which lies within the acquired road reserve and that the said parcel **LR No. 17645** was never in existence in 1972 during the acquisition of **LR 1504/7**, adding that parcel **17645** came about in 1992.
65. What I discern from the foregoing analysis, and as buttressed by documents availed by both protagonists is that the planning of the road in the subject area commenced way back in 1971. The Gazette notice of **30.6.1972** relating to the compulsory acquisition is to be found at page 58 of plaintiff's bundle as well as at page 24 of defence bundle. The parcels mentioned by the plaintiff are not mentioned in the Gazette notice.
66. For parcel **L.R. 17645**, the grant was apparently issued in 1994 as per testimony of PW1 although the defence claims it was issued in 1992. The title availed by plaintiff at page 138 of their bundle indicates that the title was issued in 1992. Regardless of whether parcel **17645** came to be in **1992** or **1994**, the bottom line is that the same did not exist in **1972** when the Government acquired land in the subject area.
67. During cross examination, Pw1 had this to say in relation to the sketch in their bundle of documents;

“On page 47 of my bundle there is L.R. No. 17645/ 1 & 2, what I can see are plots between old road and new road. The status currently of title 17645/1 is that it is vacant and fenced and is between old Mombasa road and new Mombasa road. There are no other properties in the middle of the road save the weigh bridge.”
68. While the Defendant did not provide evidence to show that **LR 17645** was hived from **1504/7** and or **LR 7149**, it is clear that the sketch plan for **LR 17645** shows that the parcels in question **17645/1 & 2** are right in the middle of a road. This analysis gives credence to the assertion by the defence witnesses that the title (s) of the plaintiff were hived off from the land acquired by the Government in **1972**, otherwise why would such land be found in the middle of the road!.
69. It is not fathomable that the government had made elaborate steps to secure land for road expansion way back in 1972 only for the said land to fall back into private hands. However, the fact remains that by the time the Plaintiff acquired the suit land particularly parcel **L.R. 17645**, the Government had already acquired this land which was set aside for public use.



70. I note that the cross examination of the defence witnesses by the plaintiff was primarily hinged on the legality of the land acquisition process of 1972. However, in view of the foregoing analysis, the plaintiff has no basis to cast aspersions on the nature and extent of the said process as the title(s) did not exist during those yester years of 1970s.
71. In **Kenya National Highways Authority v Shalien Masood Mughal & 5 others [2017] eKLR**, the Court of Appeal stated that:
- “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.”**
72. Another point of concern relates to the reason behind the filing of this suit. Pw1 testified that; “**I know of no purchaser who is not on their land**” in reference to the parcels sold by the plaintiff. However, the basis of filing the case was that in the event of an adverse ruling in this case, there are likely to be other suits. Is that not a tell tale sign that the plaintiffs had doubts of their title(s)?.
73. Further, the plaintiff has given a lengthy account of how they learnt that the road in the subject area was to be built. And in the words of PW1, “**Our fear is that our property may fall on public road and public utilities**”. I pose the question; Did that fear come to pass?. DW2 has urged this court to take judicial notice that the road exists. And indeed it is in the public domain that the road project was done, where one can see with the naked eye the dualing of the road with weigh bridges on either side of the expansive road at Mlolongo area. In such circumstances, one would have expected the plaintiff to move from the realm of fear to reality and amend their pleadings accordingly. After all, with the road now in place, the plaintiffs would have been better placed to point out the actual nature and extent of the effect of the road project on the suit properties. As the matter stands, the plaintiffs pleadings have remained intact.
74. It is pertinent to note that the titles to other properties other than parcel 17645 appear to have been issued in 1983.
75. This far I find that none of the properties of the plaintiff were compulsorily acquired as the titles in question did not exist in 1972 when the government acquired its land for road expansion and utilities.
76. On indefeasibly of the titles allegedly owned by the plaintiff, the court cannot vouch for the legalities of the said titles when some of them are to be found in the middle of the road!. What more, the plaintiff avers that they sold all the suit parcels except **L.R. No. 17645**. Thus the issue of declaring the plaintiff as the indefeasible owners of the 12 titles does not arise.
77. For parcel **17645**, the plaintiff contends that they subdivided the same into two; **17645/1** and **17645/2** of which they sold the latter to an entity known as Oil com. There is evidence that Oilcom Kenya Limited was granted interim stay for demolition of a petrol station erected on **LR No. 17645/2** by the Court of Appeal in **Civil Appeal 303 of 2006 Oilcom Limited v Permanent Secretary Ministry of roads and public works and the Hon Attorney General**. The said orders were made in the interim. The plaintiffs were mute on what the final orders were. However, the defence has stated that the said case was dismissed on **2.3.2012**. This means that plaintiffs have been less than candid on the fate of litigation relating to the parcel sold to Oil com Limited.



78. It is not lost to this court that the agreement for sale of land by the plaintiff to Oil com dated 25.10.2005 relates to parcel **L.R. 17645** and not parcel **L.R. 17645/2**. I have not seen any amended agreement. This would in essence indicate that the plaintiffs have no land at all left since they had apparently sold all the other parcels.
79. Another point of interest is that plaintiff has given a detailed account of how they sold three properties namely 12715/529, 12715/579 and 12715/530 to Prime Land (K) limited, thus only 4 parcels have been accounted for as having been sold. The plaintiff was mute on the status of the other 9 parcels.
80. The manner in which the suit parcels were bought and sold is yet another red flag that all was not well. In their pleadings and even in the witness statement of PW1, the plaintiffs have given an account of how the suit parcels came into existence. For the Grant for **L.R. No. 17645**, it was made by the Commissioner of lands to Makueni Holdings of which the title was duly registered in the Inland Registry as Nairobi **L.R.1634841/1** on **30.9.1994**.
81. That by way of a transfer, the land was registered to Kingorani Limited 4 months later on **31.1.1995**. Still in their pleadings and evidence, the plaintiffs are consistent that they bought all the 13 parcels of land in one batch on **25.1.1995** from Kingorani limited and this is captured in the agreement at page 20 of plaintiffs bundle. There is no rocket science needed to discern that the sale of land by Kingorani to the plaintiff 6 days before the land was transferred to Kingorani does not make sense!. The claim by the plaintiff that they were bonafide purchasers without any defects on the titles is therefore unmerited.
82. It is worthy to note that the suit properties was allegedly registered in favour of the plaintiff on 26.1.1995, a day after the sale agreement. While speed is a hallmark of efficiency, it becomes a pointer to illegalities and irregularities in land matters taking into consideration that registration of properties is a process and not an event. There are intricate steps to be undertaken including valuation of the properties. For properties worth sh. 280 million as at 1995, there was certainly need to exercise due diligence at every step instead of hastily registering the suit properties.
83. What more, there is no evidence to demonstrate that the plaintiffs actually inspected the suit properties and the titles before purchasing the same. In the case of **Torino Enterprises Limited v Attorney General (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment)** the SCOK had this to say in relation to the question of innocent purchasers:

“ An innocent purchaser would also denote one was aware of what they are purchasing by inspecting the suit premises....”

84. In the case of **Republic vs Minister For Transport & Communication & 5 Others Ex Parte Waa Ship Garbage Collector & 15 Others Mombasa HCMCA No. 617 of 2003 [2006] 1 KLR (E&L) 563** cited in **Kenya Anti-Corruption Commission v Online Enterprises Limited & 4 others [2019] eKLR, Maraga, J** (now retired Chief Justice) expressed himself as follows:

“ ... A democratic society holds public land and resources in trust for the needs of that society. Alienation of land that defeats the public interest goes against the letter and spirit of section 1 and 1A of *the Constitution*.”



85. While in **Chemey Investment Limited v Attorney General & 2 others [2018] eKLR**, the court cited a raft of decisions whose effect was that the sanctity of title was never intended or understood to be a vehicle for fraud, illegalities or un just enrichment at public expenses. The court stated thus;

“ Decisions abound where courts in this land have consistently declined to recognize and protect title to land, which has been obtained illegally or fraudulently, merely because a person is entered in the register as proprietor”.

86. Similarly, this court cannot uphold the titles of the plaintiff when the roots of such titles are unknown to this court. It follows that the quest by the plaintiff to be compensated is not merited and the claim for damages fails.

87. The defendant did not put forth a counterclaim. Thus the court will say no more on the issue of the titles allegedly held by the plaintiffs save to state that any of such title which is on public land remains a mere paper title.

88. On costs, it is not clear as to how the process of issuance of the titles in question was birthed, but it was certainly midwived by the Commissioner of lands, an entity which is now defunct. In the circumstances, I direct that each party shall bear their own costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF SEPTEMBER, 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Lubulellah for the plaintiff

Motari for the Defendant

