Muthaiga North Residents' Association & another v Countryside Villas Limited & 2 others; National Land Commission (Interested Party) (Environment & Land Petition E037 of 2022) [2023] KEELC 21007 (KLR) (19 October 2023) (Judgment)

Neutral citation: [2023] KEELC 21007 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND PETITION E037 OF 2022

AA OMOLLO, J

OCTOBER 19, 2023

BETWEEN

MUTHAIGA NORTH RESIDENTS' ASSOCIATION ..... 1ST PETITIONER

SANJIV SHAH ..... 2ND PETITIONER

AND

COUNTRYSIDE VILLAS LIMITED ..... 1ST RESPONDENT

RUAKA DEVELOPMENTS LIMITED ..... 2ND RESPONDENT

LAVON LAKE LIMITED ..... 3RD RESPONDENT

AND

THE NATIONAL LAND COMMISSION ..... INTERESTED PARTY

JUDGMENT

1. The 1st Petitioner is a residents' association registered under the provisions of the *Societies Act*, Chapter 108, Laws of Kenya and comprises of the residents and land owners of the estate and area located along Kiambu Road, commonly referred to as Muthaiga North Estate. That it is constituted of over fifteen courts and over five hundred residential homes. The 2nd Petitioner is a member of the 1st Petitioner and also the owner of land L.R No 21976/3 situated within Muthaiga North estate.

2. The Petitioners have stated that they have brought the present action under the provisions of Articles 3(1), 22, 23 and 70 of *the Constitution* thus have the capacity to sustain the case.

3. The Petitioners filed a Petition dated 19th September 2022 seeking for the following prayers;

a. A declaration that the suit premises, being plot No. 36, Countryside Villas Estate, Muthaiga North and which is now registered as L.R No.29537, Nairobi, being the title contained in Grant No.143580, is public land under Article 62(1)(c) and (2) of *the Constitution* of Kenya.

b. An order of Mandamus directing the 1st Interested Party to cancel the Grant registered as I.R No.143580 for the suit premises, being plot No.36, Countryside Villas Estate, Muthaiga North and which is now registered as L.R No.29537, Nairobi and revert the same to the Government of Kenya to be held in trust for the use and benefit of the petitioners and the public.

c. An order restraining the Respondents, singularly, jointly and severally, permanently from entering into, constructing upon or in any way interfering with the suit premises, being plot no.36, Countryside Villas Estate, Muthaiga North and which is now registered as L.R No.29537, Nairobi.

d. An order directing the Respondents, singularly, jointly and severally, to remove the structures, fixtures and any construction erected on suit premises No.29537, Nairobi.

e. Cost of this suit.

4. The Petitioners aver that one of the courts that form part of the Muthaiga North Estate is the Countryside Villas where the 2nd Petitioner resident as the owner of LR.No.21976/3 located which was initially Plot. No.34 on the sub division plan submitted by the 1st Respondent over LR.No.12422/7. The 2nd Petitioner avers that he acquired the said parcel by way of purchase for consideration from the 1st Respondent on the terms and conditions set out in an agreement and that one of the terms was that the scheme of sub division would provide for common facilities intended for use by the owners and occupiers for the time being of the portions sub divided.

5. The Petitioners averred that the 1st Respondent caused the original land L.R No.21976 to be sub divided into residential plots measuring 0.5 acres and disposed them by way of sale to third party purchasers who planned and developed it into Countryside Park Villas Estate.

6. Further, the petitioners averred that as part of the express, statutory and/or implied conditions for the sub-division undertaken by the 1st Respondent, it was required to provide and apportion part of the land from the initial whole, by way of a surrender, to cater for roads and other public amenities including playgrounds, recreation, social amenities and other community initiatives. These amenities would be available to the residents of the said court and the entire estate.

7. They pleaded that the portion surrendered would be given a title under the applicable planning regulations and identified in the sub division scheme presented for approval. That the said portion was be held by the Government of Kenya in trust and for the benefit of the all the residents within the estate.

8. It is the Petitioners contention that the sub division plan presented for approval by the 1st Respondent, provided for public utility land being plot No.36, for the construction of a club house for all the residents and the said plot was clearly identifiable on the sub division plan and demarcated as a parcel of land measuring 0.6 Ha adjoining the 2nd Petitioner's land. They further stated that upon approval of and registration of the sub division plan, the said plot no.36 was given L.R No.12422/7. That by operation of the law and or necessary implication, the plot became public land available to the residents of the said Countryside Park Villas and the public as a whole; therefore, not available for allocation for private use.

9. The Petitioners stated that the 1st Respondent being the initial developer of the said Countryside Villas estate transferred to the 2nd Respondent L.R No.12422 and the entire development with Plot No.36 having already been provided and demarcated as a public utility plot and set apart for a community club house. However, the 2nd Respondent unlawfully acquired private title to the plot by way of certificate of title registered as I.R No.70189/97 dated 23rd December 2020.

10. It is their case that as at 11th March 2013, the 2nd Respondent surrendered its title and interest in the suit property to the Government of Kenya in consideration of a change of user and issuance of a new Grant being I.R No.143580 for a term of 99 years from 1/6/1996. That upon this surrender and in terms of article 62 of *the Constitution*, the entire interest and title in the suit property became public land to be used for the public good. However, contrary to the initial undertaking and intention of the Respondents, a new Grant was issued to the 2nd Respondent to hold as its private property and for use/ development of multi-dwelling residential units. This action removed the appropriated land from public use and converted it to private property and the 2nd Respondent then transferred its entire title and interest thereon to the 3rd Respondent.

11. The Petitioners stated that the 3rd Respondent has fenced off the suit property and forcefully demarcated the same with a permanent wall and denied the petitioners, all the residents thereof and members of the public, any access thereto and removed all common fixtures placed thereon for common use despite protestation by the Petitioners.

12. The Petitioners contended that the Respondent's actions constitute a violation of their constitutional rights which they particularized particularized as follows;

    i. the irregular appropriation of public land as defined at Article 62(1)(c) and in breach of the mandatory provisions of Article 62(4) of *the Constitution* of Kenya by irregularly procuring title to the suit property which had already been surrendered to the Government of Kenya,

    ii. interference and destruction of the environment in breach of the Petitioner's right to a clean and heathy environment as provided in Article 42 of *the Constitution*,

    iii. destruction of the naturally existing wetland on the suit property by building thereon,

    iv. acquiring title to the suit property contrary to Article 40(6) of *the Constitution* and provisions of the Physical and Land Planning Act, 2019 and

    v. that the petitioners have also been exposed to security situation.

13. The 2nd and 3rd Respondents opposed the Petition vide a replying affidavit sworn on 3rd October 2022 by David Ruong'o Okelo, described as a director of 3rd Respondent. Mr. Okelo deposed that the 1st Petitioner has no locus standi to bring a suit as against them and that they are not known to the 1st Respondent as alleged.

14. The Respondents averred that the 2nd Respondent was a willing buyer of the property from Garden Drive Villas Limited and not from the 1st Respondent as per the agreement of sale executed on 10th December 2010. He deposed further that L.R No.21976/3 is not located at the Country Villas Park and that there is nothing like Country Villas Park within Muthaiga North Estate, Off Kiambu Road as alleged.

15. The Respondents further averred that L.R No.21976/3 has more than one registered proprietor and that the title and sale agreement appearing as exhibit SS-1 has been interfered with to conceal the right ownership and that the 2nd Petitioners with other undisclosed persons acquired the same from the

1st Respondent on 20th January 1999 therefore the 2nd and 3rd Respondents were never a party to the agreement.

16. The 2nd and 3rd Respondents stated that the suit property is a private property and not public land and was to be utilized by the registered owners as they wish within the legal parameters. They averred that they are strangers to the express, statutory and/or conditions for the subdivision undertaken by the 1st Respondent, or that they were required to provide and apportion part of the land from the initial whole, by way of surrender for roads and public amenities.

17. The 2nd and 3rd Respondents also stated that there is no proof presented before this court that the suit property, plot 36, was converted to public land as per provisions of Article 65 of *the Constitution* and that it was meant for public utility for the construction of a club house. In addition, that the agreement for sale marked SS-1 was entered into 23 years ago and that if there was any breach by the vendors as to the fulfillment of their obligations under the Agreement, the same ought to have been presented within 6 years from the date of the alleged breach.

18. The 2nd and 3rd Respondents stated that as witnessed from "SS-3", the suit property was never surrendered to the Government of Kenya in a bid to convert it into public property and that it clearly indicates that the title in the name of the 3rd Respondent had been surrendered to the government of the Republic of Kenya within the written land in consideration of change of user from a single dwelling user to a private multi-dwelling user and issuance of new grant I.R. No.143580.

19. The Respondent further stated that there has been no evidence produced to demonstrate the breach of the Petitioner's constitutional rights and that the 3rd Respondent has caused or is causing environmental dangers to the Petitioners in utilizing the suit property as alleged. They contended that the Petitioners have in fact trespassed into the suit property and vandalized the 3rd Respondent's properties including breaking locks on the gate towards the entrance of the property which amounts to criminal and tortious acts and a complaint had been lodged with the Police.

20. The 2nd and 3rd Respondents also stated that the 3rd Respondent who is the registered owner of the suit property has no legal relationship with the Petitioners and that they are not privy to the Agreements for sale between the Petitioners and the sellers who sold the same to them. The 2nd and 3rd Respondents contended that if the reliefs sought are granted, they will suffer prejudice and loss.

Submissions

21. The Petitioners filed submissions dated 2nd March 2023 while the 2nd & 3rd Respondents submissions are dated 24th March 2023. The Petitioners outlined the gist of the pleadings and submitted that the suit property was by way of an instrument of surrender, formally yielded back to the government as it shows an entry of the registration of the surrender at pages 44-45 of the petition. They added that the reading of the declaration of surrender and the entry thereof does not indicate that the change of user was to commercial use as alleged by the Respondents.

22. The Petitioners submitted that the suit property surrendered for public use as per Article 62 (1)(c) of *the Constitution* of Kenya and Section 9 of the *Land Act*, 2012 is not available for allocation for private use. In support of this argument, the Petitioner cited the cases of Republic vs Commissioner for lands & 4 others Ex parte Associated Steel Ltd [2014] eKLR; Dorcas Atieno Rajoru & 145 others vs Mjahid Sub Chairman Harambee Maweni Committee & 2 Others [2016] eKLR; Kipsirgoi Investments Ltd vs Kenya Anti-Corruption Commission [2014] eKLR.

23. The Petitioners submitted that the suit property is expressly identified in the agreements of sale mutually executed by the buyers from the developer and which was an undertaking and a mutual

covenant as between the parties as at the time of purchase of the properties arising from the intended sub division of the mother title L.R No.21976.

24. The Petitioners stated that the 2nd and 3rd Respondents pleaded that they purchased the property but have not supplied copies of the agreements of sale that they executed with the 1st Respondent so as to avoid disclosure to the court that they consciously acquired the said suit property reserved for surrender to the government for public use and for construction of a public utility being a club house. It is their submission that their description and pleadings with regard to the history, origin and status of the suit property is uncontested and uncontroverted.

25. The Petitioners relied on the subdivision Certificate and the Letter of Approval dated 24/12/96 which provided a list of the plot numbers that were approved for issuance and plot no. 36 (the suit property), was not among them as the intention to reserve and surrender it for public use had been indicated by the developer from the beginning of the project. That the Respondents only came to the suit property in the year 2022 in a scheme to acquire it back as is the trend where developers who had surrendered public utility plots as part of the planning conditions precedent to sub division and development approval go back to them in collusion with the Land Registrar and procuring fresh Grants and titles thereto. Thereafter dispose them off to unsuspecting third parties and the resultant residential estates are left without any provision for public utility spaces.

26. They put forwarded the argument that to conceal the grand scheme, the 2nd and 3rd Respondents have used the device of registration of multiple related private companies to create the impression of bona fide purchasers for value of the suit property. The Petitioners highlighted that the Respondents have produced undated blank agreement of sale to prove how they acquired the property for consideration of Kshs.66 Million allegedly paid in cash without notice of any defect on the title. Further, in the said agreement, they purport that the suit property and others were bought from Garden Drive Villas Limited, with no proof to demonstrate that the said Garden Drive Villas Limited had ever been registered proprietor of the suit property.

27. The Petitioner submitted that the 2nd Respondent company wholly owns the 3rd Respondent company and that the 2nd Respondent surrendered the title to the suit property to the Government of Kenya in accordance to the approved scheme represented by the plan exhibited at page 41 together with the approval letters at pages 42 and 43 and upon surrender the interest and title became public. In addition, the Petitioner submitted that there is no proof of any process that shows how the 2nd Respondent acquired a new Grant for the suit property as there was no application for allotment, no proof of allocation or payment of stand premium of any statutory payment.

28. The Petitioners submitted that the Respondents have irregularly appropriated public land as defined in article 62(1)(c) and breached the mandatory provisions of article 62(4) of *the Constitution* of Kenya. They also submitted that the Respondent's actions to fence off the suit property and intention to construct thereon multi-dwelling residential houses on the only available open area left in the estate will undermine and destroy a natural habitat to naturally existing flora and fauna in breach of article 42 of *the Constitution*.

29. The 2nd and 3rd Respondents submitted that the crux of the case is the question whether the suit property is public land meant for public utility purposes; and whether the Respondents illegally converted the same to private land; and whether they are unlawfully claiming ownership of the same.

30. They submitted that Petitioners claim over the suit property as public and available to the 1st Petitioner and members as a whole is on the agreement for sale dated 30th March 1999 which the 2nd and 3rd

Respondents are not privy to therefore cannot be dragged to court over the same. They stated that the Petitioners have no locus standi to sue the 2nd and 3rd Respondents on the said Agreement.

31. The 2nd and 3rd Respondents relied on the Court of Appeal deliberation on the doctrine of privity in the case of Savings & Loan (K) Limited vs Kanyenje Karangaita Gakombe & Another (2015) eKLR and further re-emphasized in the case of Mark Otanga Otiende v Dennis Oduor Aduol [2021] eKLR.

32. The 2nd and 3rd Respondents argued that the 2nd Petitioner ought to have brought the claim of the alleged breach of agreement of sale against the 1st Respondent within a period of six (6) years from the date of breach in line with the provisions of section 4(1) of the *Limitation of Actions Act*. This is in consideration of the fact that the suit property was registered under the 2nd Respondent name since 23rd December 2010 while the Petitioners claim is based on the agreement for sale of 20th January 1999. In support, they cited the case of South Nyanza Sugar Company Limited vs Dickson Aoro Owuor (2019) eKLR and Gathoni v Kenya Co-operative Creameries Ltd [1982] KLR 104.

33. Further, the Respondents submit that the suit property is private land and not public land within the meaning of article 64 of *the Constitution*. They added that the surrender of the title to the suit property is indicated to be a change of user and not a surrender to the Government of Kenya. That issuance of a new grant I.R. No.143580 to the 2nd Respondent confirmed that the suit property is indeed private land going by the approvals given by the Nairobi City County, wherefore if the property was public land such approvals would not have been granted. In support, they cited the decision in Chimba Mbeo & 2 others vs Hacienda Development Holdings Ltd & Another [2008] eKLR.

34. The 2nd and 3rd Respondents contended that the petition lacks merit and ought to be dismissed because if the suit property is categorized as public land, the Petitioners failed to join the Nairobi City County (County Government) which is the entity holding the suit property in trust for them. They cited the case of Republic v Commissioner of Lands & 4 others ex parte Associated Steel Limited, High Court at Nairobi, Misc. Civil Suit No.273 of 2007, (2014) eKLR.

35. The 2nd and 3rd Respondents averred that the petitioners have not produced evidence to show that the suit property was illegally acquired and have not demonstrated any breach of their constitutional and fundamental rights by the 2nd and 3rd Respondents. That in fact it is they who have suffered and continue to suffer prejudice, losses and a breach of their constitutional right to property if the petition is not dismissed.

36. In support, the Respondents cited the case of Laban Omuhaka Otumbula v Truphosa Okutoyi [2019] eKLR which state that fraud must be specifically pleaded and proved. They also cited the case of Anarita Karimi Njeru vs The Republic [1976-1980] KLR 1272; and Maina & 4 others v Director of Public Prosecutions & 4 others [Constitutional Petition E106 & 160 OF 2021(Consolidated)) [2022]] KEHC 15(KLR) (Constitutional and Human Rights) (27th January 2022).

37. In responding to Petitioner's submissions at pages 12,13 and 14; the Respondents' submit that on the Petitioners un-procedurally introducing new facts not pleaded in the Petition. For instance, that the Respondents have concealed a grand scheme of incorporating multiple private companies to create the impression of being bona fide purchases for value. In supporting this argument, they cited Re Estate of Ndungu Mwaniki (Deceased) (2014) eKLR which held that written submissions should not be used to introduce new facts. They submitted that introducing new facts is a way of amending their petition and such conduct was admonished in the case of Nelsosn Ntyauma Ndubi v Gekara Ogeto [2021] eKLR.

Analysis and Determination

38. I have read and considered the petition, the replying affidavits together with the accompanying annexures, and the submissions thereof. The gist of the dispute is well captured in the summaries of the pleadings and submissions rendered. The Petitioners have laid a claim to plot 36 and now referenced as L.R. 29537, I.R. No 143580 on the basis that it was surrendered to serve the residents of Country Villas, in Muthaiga North. They argue that the said land which is now fenced by the 2nd and 3rd Respondents was not available for allocation and hence they (Respondents) should be prohibited from interfering with it and or developing the same. The 2nd and 3rd Respondent challenged the Petition on two respects, first denying the suit property is public land. They also contended that they are not privy to the sale agreement between the Petitioners and the 1st Respondent. Finally, the Respondents pleaded that the Petition is time barred.

39. Consequent to the foregoing, I frame the following questions for determination of the dispute;

    a. Whether the suit property was surrendered as public land and therefore unavailable for alienation to the 2nd and 3rd Respondents.

    b. Whether or not the 2nd and 3rd Respondents are bound the conditions for subdivision of the original title L.R. 12422/7

    c. Whether or not the claim is time-barred

    d. Whether the Petitioners' constitutional rights were violated

    e. Who pays Costs?

40. Article 62 of *the Constitution* provides what entails public land as follows;

    (1) Public land is—

        (a) land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date;

        (b) land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease;

        (c) land transferred to the State by way of sale, reversion or surrender;

        (d) land in respect of which no individual or community ownership can be established by any legal process;

41. The Petitioners contended that the 1st Respondent transferred the suit property to the state by way of surrender. In support of this averment, they produced several documents inter alia a copy of the title L.R. 21976/9 and I.R. 199585 annexed as SS3. There is an entry made on this title on 11th March 2013 under presentation no. 540 written thus;

> "surrender to the Government of the Republic of Kenya the within written land in consideration of approval of change of user and issuance of a new grant IR 143580"

42. The 2nd and 3rd Respondents argued that this entry was for purposes of change of user of the suit property to be developed from a single dwelling to multi-dwelling units. However, my plain reading of the entry clearly explain that a surrender was made to the government as a pre-condition to approve the application for change of user and issuance of a new grant. It is also in tandem with the definition

of public land as given under article 62 (1)(c) land transferred to the State by way of sale, reversion or surrender.

43. Going by the certificate of subdivision annexed as SS2 in support of the Petition, the application for approval for subdivision was made on 15th February 1989 when the applicable law was Town Planning Act, Chapter 134 Laws of Kenya and Land Planning Act, Chapter 303 Laws of Kenya (both now repealed) together with the rules and regulations that were made thereunder. Regulation 16(2)(iii) of the Development and Use of Land (planning) Regulations of 1961 under the Land Planning Act provided that land surrendered for the public purposes specified under regulation 11 (2) of these Regulations shall be freely surrendered to the Government and subject to the approval of the Minister, the land surrendered shall be made available for public purposes related to the area generally, as and when required.

44. Regulation 11 stated thus;

> "(1). Every person requiring consent for development shall make application to the interim planning authority for the area in which the land concerned is situated or where no such authority exists for the area, to the Central Authority in such form and such manner as may be prescribed and shall include such plans and particulars as are necessary to indicate the intention of the applicant.
>
> (2) In particular such application shall show the use and density proposed and the land which the applicant intends to surrender for the purposes of -
>
> a. principal and secondary means of access to any subdivisions within the area included in the application and to adjoining land, and
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> b. public purposes consequent upon the proposed development.
>
> (3) For the purpose of this regulation "public purpose" means any non-profit-making purpose which may be declared by the Minister to be a public purpose and includes -
>
> (a) educational, medical and religious purposes;
>
> (b) public open spaces and car parks;
>
> (c) Government and local government purposes."

45. The Petitioners also relied on the provisions made in their purchase agreement where the 1st Respondent had given an undertaking in so far as reserving one plot for common use to be enjoyed by all the people he sold to land which he renamed Countryside Villas. Clause 2 (under whereas) and clause 1 (under "now witnesseth") of the agreement stated as follows;

> " The scheme of subdivision of the said piece of land provide for common facilities Intended for use by the owners and occupiers for the time being of the said portions. The purchase price would be inclusive of the costs of the walls enclosing the land ward boundaries of the said scheme and the construction of a private members club house on the subdivision numbered 36 on the said scheme plan"

46. This provision included in the sale agreement bound the original owner of the land to comply and indeed there was compliance when a surrender was made to the government and an entry registered in consideration for the change of user and issuance of new grants. The 2nd and 3rd Respondents argue that if there was any breach, the same ought to have been brought before the lapse of six years. In

my opinion, the time for breach could only run from the time of interference with the plot that was surrendered since the surrender itself was honoured.

47. In the case of Kepha Maobe and 365 Others versus Benson Mwangi & another (2015) eKLR, the Court of appeal dealt with an issue where the residents of Kimathi Estate in Nairobi sued Nairobi City Council and another after allocation of a plot that had been reserved for special purpose. The Court of appeal in that case while reproducing a part of the contents of the sublease held by the appellants noted that, "the sublease was not simply of the various residential subdivisions and the buildings thereon. They went with various rights and benefits which were also specified."

48. Like in the case of Kepha Maobe and 365 others cited, the sale agreement between the Petitioners and the Respondents had various rights and benefits. These rights were captured in several of the 1st Respondent's documents. For example, there was a write up in the Standard newspaper of 15th November 1998 describing that part of the developer will cater for the interests of the residents (intending purchasers) by making provision for a club house, swimming pool, children's playground and such other utilities. Once the 1st Respondent put the provisions of these amenities as part of the contract executed between him and the Petitioners, it was ceased being a marketing gimmick and translated into a right of the purchasers. The plot designated to cater for these amenities was not available for sale without the consent of the Petitioners and or the beneficiaries of the subdivision of L.R. 129721.

49. The Court of Appeal in the Kepha Maobe and 365 others supra had this to say at paragraphs 35 and 37;

> 35. We think for ourselves that the appellants had rights over the special purpose plot and other open undeveloped spaces by way of easements, both positive and negative. As the Court of Appeal in England stated in Re- Ellenborough Park Re Davies & Others –vs- Maddison and Another (1955) 3ALL ER 667, the right claimed as an easement ought to be reasonably necessary for the better enjoyment of the dominant tenement. In Wheeldon –vs- Burrows (1879) 12 Ch. D. 31 Thesiger, L.J. stated:-
>
> > "We have had a considerable number of cases cited to us, and out of them I think that two propositions may be stated as what I may call the general rules governing cases of this kind. The first of these rules is, that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean quasi-easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted.."
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> 37. .... The development plan approved by GoK had "public spaces" for public purposes, defined under the Land Planning Act (Cap 303) Regulation 11(2)(c) as "non-profit making purpose" (educational, medical, religious, car parks, public open spaces and other social amenities) for enjoyment of the appellants. The other provision in the plan was for "special purpose" spaces. There was no "open space" as referred to by the High Court, which had no particular purpose."

50. Thus, the requirement to make provision for public purpose during subdivision was not out of choice by the 1st Respondent but he was complying with the requirements of the applicable law. The Town Planning Act Cap 134 and Land Planning Act Cap 303 was replaced with the Physical Planning

Act Cap 286 (repealed) together with the rules and regulations made thereunder. The replacing Act contained similar provisions, for instance at section 41 stated thus;

(1) No private land within the area of authority of a local authority may be subdivided except in accordance with the requirements of a local physical development plan approved in relation to that area under this Act and upon application made in the form prescribed in the Fourth Schedule to the local authority.

51. Regulation 15(e) of the Physical Planning (Subdivision) Regulations of 1998 of the Physical Planning Act (now repealed) provided as follows:

> " 15. In any scheme of subdivision of land within the area of a local authority the following conditions shall be complied with;
>
> (e). where required by the local authority and the Director of Physical Planning, land suitable and adequate shall be reserved at no cost to the local authority for open spaces, amenities, recreational facilities, road reserves, public purpose relative to the area to be subdivided and for road widening;
>
> (i). In the proposal shall conform with the provisions of any structure plan, local physical development plan, advisory plan, zoning, or development plan approved by the Minister"

52. The 2nd and 3rd Respondents pleaded and submitted that because they were not privy to the agreement of sale dated 20th January 1999, they cannot be jointly sued with the 1st Respondent in respect to breach of the terms of that agreement. My answer is that since the 2nd and 3rd Respondents trace their title from the 1st Respondent, they are bound by the conditions that were set during the subdivision which created the suit property. This is anchored on the provisions found in the second schedule to the Cap 286 (repealed) thus;

> " When considering applications for subdivisions the local authority or liaison committee may impose conditions of approval in respect of the matter enumerated below, and after implementation of such approval the conditions shall be binding upon the owner, successors and assigns:
>
> 1. The type and form of development to be carried out or permitted and the size, form and situation of holding and the conditions on which such holdings may be transferred.
>
> 2. The reservation of land for roads and public purpose or for other purposes referred to in the Act for which land may be reserved"

53. Further, it is my considered opinion and I so hold, that once the Petitioners had laid a basis that indeed the suit property had been surrendered, the burden shifted on Respondents to provide evidence how the title reverted back to private land. The 1st Respondent did not defend the petition while the 2nd and 3rd Respondents pleaded that they purchased the suit property from Garden Drive Villas Ltd on 10th December 2010. The 2nd and 3rd Respondents annexed a copy of the sale agreement to their replying affidavit but that is all.

54. In the case of in Daudi Kiptugen v Commissioner of Lands & 4 Others [2015] eKLR the court stated that:

> "...the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a Lease or a Certificate of title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein."

55. The 2nd and 3rd Respondents did not present any document to support the root of their title, no copy of the search to confirm the land was indeed registered in the name of the Vendor and was available for sale to them. From the evidence presented by the Petitioners, there is no evidence to contradict that the suit plot which was surrendered in accordance with the planning regulations had been reversed and re-allocated to the 1st Respondent or Garden Drive Villas Ltd to sell to the 2nd and 3rd Respondents. There was no good title that could be transferred to the 2nd and 3rd Respondents.

56. On whether the rights of the petitioners itemized in the Petition have been violated or are likely to be violated, my answer is yes. I state so because the 2nd and 3rd Respondents have not denied putting up a wall fence on the suit property. According to the 2nd and 3rd Respondents, the change of user was from private single dwelling user to a private multi-dwelling user which averment is an expression of an intention of the nature of developments they intended to carry out. It goes without saying that such massive development would interfere with the aesthetic environmental rights of the Petitioners as well as interfere with the natural habitat of the flora and fauna.

57. In addition, unless the declaratory orders sought are granted, the 2nd and 3rd Respondents will continue to lay claim to the suit property reserved for public purpose hinged on the illegally acquired titles.

58. The 2nd and 3rd Respondents stated that the 1st petitioner is an amorphous body lacking locus to bring this petition. The 1st Petitioner described itself as registered under the *Societies Act* and the said Respondents did not bring any document from the Registrar of Societies to confirm that indeed there is no body registered under that name. It is the 2nd and 3rd Respondents who alleged the lack of locus and the burden rested on their shoulders but they failed to discharge it. In any event, if it is true the 1st Petitioner lacks locus, the Petition would still be sustained by the 2nd Petitioner who is human and who pleaded to own the land adjacent to the disputed plot hence his rights and the rights of his neigbours were infringed and are likely to be infringed.

59. In light of my foregoing analysis, I conclude that the Petitioners have made out a case and are entitled to the reliefs sought. The orders are granted as prayed with costs to the Petitioners.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF OCTOBER, 2023.

A. OMOLLO

JUDGE