



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

ENVIRONMENT AND LAND COURT CASE NO. 961 OF 2012

**IN THE MATTER OF ARTICLES 2 AND 3 OF THE CONSTITUTION OF THE REPUBLIC OF
KENYA**

AND

**IN THE MATTER OF AN APPLICATION FOR CONTRAVENTION OF THE RIGHT TO
OWNERSHIP**

**AND PROTECTION OF PROPERTY UNDER ARTICLE 40 OF THE CONSTITUTION OF
KENYA**

AND

**IN THE MATTER OF AN APPLICATION FOR THE CONTRAVENTION OF THE RIGHT TO
FAIR ADMINISTRATIVE UNDER ARTICLE 47 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF AN APPLICATION FOR THE ENFORCEMENT OF THE BILL OF
RIGHTS**

UNDER ARTICLE 22 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE REGISTRATION OF TITLES ACT, CAP 281 LAWS OF KENYA

BETWEEN

SHIMONI RESORT.....PETITIONER

VERSUS

THE REGISTRAR OF TITLES.....1ST RESPONDENT

COMMISSIONER OF LANDS.....2ND RESPONDENT

THE MINISTER FOR LANDS.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

AND

AFRICAN BANKING CORPORATION LIMITED.....1ST INTERESTED PARTY

SHEIKH JABIR ALAHMED ALJABIR ALSABAH.....2ND INTERESTED PARTY

JUDGMENT

1. Introduction;

This petition was provoked by the actions of the Minister for lands who vide a Memo dated 21st February 2012 **Ref. No. Min/MOL/GEN/Vol. III (10)** directed to the Registrar of Titles caused the Registrar of Titles to cancel specific entries made against land parcel **IR 89699, LR No. 1870/IV/71** vesting specified interests and rights in various parties. The Registrar of Titles acted in compliance with the Minister directive and on the same date 21st February 2012 made entry number **I.R 89699/6** which was in the following terms:

“Entry Nos, 2, 3, 4 AND 5 ABOVE (CANCELLED VIDE Ministerial Directive vide Memo dated 21st February 2012 Ref. No. Min/MOL/GEN/Vol. III (10).

The entries deleted in pursuance of the Minister’s directive related to:

- i. Entry No. 2 – Transfer to Koibarak Trading Company Ltd registered on 23rd September, 2002.**
- ii. Entry No. 3 – Transfer of Miniscule Investments Ltd registered on 8th November 2002.**
- iii. Entry No. 4 – Transfer to Shimoni Resorts Ltd registered on 8th December 2009; and**
- iv. Entry No. 5 – Charge to African Banking Corporation Ltd registered on 8th December 2009.**

Shimoni Resorts Limited the petitioner in this petition were the registered proprietors of **LR No. 1870/IV/71** at the time the Minister for Lands issued the directive that led to the cancellation of their title. Shimoni Resorts Limited being aggrieved by the Minister’s decision and the act of the Registrar of Titles in cancelling its title brought the present petition.

2. The parties;

1. The petitioner is a Limited Liability Company incorporated in Kenya and was the duly registered owner of the property known and registered as IR 89699 of LR No. 1870/IV/71 situate in Nairobi (hereinafter referred to as “the suit property”) and presents the instant petition as the party whose rights has been infringed in contravention of the provisions of the Constitution of Kenya.

2. The 1st respondent is the Minister for the time being in charge of Land in the Republic of Kenya.

3. The 2nd respondent, the Commissioner of Lands is the officer in control of land, land surveys, land registration and records of titles departments in the Republic of Kenya.

4. The 3rd respondent, the Registrar of Titles is the officer responsible for effecting entries on the register of land under the Registration of Titles Act.
5. The 4th respondent, the Attorney General, is sued in his official capacity as the legal representative of the 1st to 3rd respondents.
6. The 1st Interested Party, African Banking Corporation Limited holds a charge for kshs. 50,000,000/= over the suit property for money advanced to the petitioner on the security of the property.
7. The 2nd interested party, Sheikh Jabir Alahmed Aljabir Alsabab claims ownership of the suit property as the legally registered owner of the property.

3. The petitioner's case:

The petitioner's case is as set out in the petition dated 26th April 2012 filed in court on 4th May 2012 and the affidavit sworn in support of the petition by **Mr. Edward Muriu Kamau**, a director of the petitioner dated 26th April 2012. By the petition the petitioner seeks the following prayers:-

- a. A declaration that the 3rd and 4th respondents have expressly contravened the petitioner's rights to acquire and own property under Article 40 (1) of the Constitution.
- b. A declaration that the 3rd and 4th respondents actions resulting in the cancellation of entries numbers 2, 3, 4 and 5 in particular the entry effected on the 21st February 2012 thus "...entry nos. 2. 3. 4 and 5 above cancelled vide Ministerial Directive vide Memo dated 21st February, 2012 reference number MIN/MOL/GEN/Vol. III (10)..." on the register in respect of LR No. 1870/IV/71 without notice of the petitioner and without following the due process set out by law have contravened the petitioner's right to fair administrative action as enshrined under Article 47 of the Constitution.
- c. A declaration that the 3rd and 4th respondents actions resulting in the cancellation of entries numbers 2, 3, 4 and 5 of the register in respect of LR No. 1870/IF/71 are ultra vires, null and void having contravened the provisions of section 60 and 61 of the Registration of Titles Act, Cap 281 Laws of Kenya.
- d. A declaration that the petitioner having purchased the said property as an innocent purchaser for value and without notice of any defect on the title and without being party to any alleged fraud or misrepresentation is entitled to rights appurtenant to such registration and holds the said title and all rights arising therefrom as envisaged under Section 23 of the Registration of Titles Act.
- e. An order of mandatory injunction directed at the Registrar of Titles to reverse the entry effected on 21st February 2012 cancelling the entries number 2, 3, 4 and 5 on the register and an order to so reinstate the petitioner as registered owner and the charge registered thereon in favour of African Banking Corporation Limited.
- f. An order of permanent injunction restraining the respondents from interfering with the petitioner's rights of ownership and possession over LR No. 1870/IV/71 saving only as the same may otherwise be affected as by law provided.
- g. General damages for breach of the petitioner's rights of ownership under Article 40 of the Constitution.
- h. General damages for contravention of the petitioner's right to a fair administrative action

as envisaged under Article 47 of the Constitution.

i. Exemplary damages for the respondents arbitrary action of cancelling the petitioners registration and the charge over LR No. 1870/IV/71 in direct contravention of the express provisions of law and without notice to the petitioner.

j. In the alternative to prayer E above, an award for the sum of kshs. 2,339,211,790.00 being the loss suffered pursuant to the respondents illegal actions.

4. The petitioner, Shimoni Resorts Limited states that it purchased land parcel LR No. 1870/IV/71 (hereinafter referred to as “the suit property”) in 2009 for the consideration of kshs. 130,000,000/= and avers that before purchasing the property it carried out due diligence which revealed that the property was registered in the name of Miniscule Investments Limited and had no encumbrances. The petitioner entered into an agreement for sale annexed to the supporting affidavit of Edward Muriu Kamau as “**EMK4**” dated 2nd September 2009 whereby the petitioner agreed to purchase the suit property for kshs. 130,000,000/=. An official search of the property annexed as “**EMK3**” dated 16th September 2009 confirmed Miniscule Investments Limited was the registered owner pursuant to a transfer registered on 8th November 2002 as Entry No. 3 against the title. The transfer to Shimoni Resorts Limited, the petitioner herein was registered on 8th December 2009 as Entry No. 4 against the title. The petitioner avers that it borrowed kshs. 50,000,000/= from African Banking Corporation Limited to raise the total purchase price of kshs. 130,000,000/= for the suit property. The charge for kshs. 50,000,000/= in favour of African Banking Corporation Limited was registered the same day as the transfer to the petitioner as Entry No. 5 against the title. The petitioner asserts it acted in good faith in the purchase of the suit property and was a bonafide purchaser for value and deserved protection of the law.

5. The petitioner states that following the completion of the purchase of the suit property the petitioner took occupation and possession of the suit property and has remained in possession and up until the impugned actions of the Minister for lands and the Registrar of Titles at no time did anyone come forth claiming ownership of the suit property and neither has any person including the Minister, the Registrar of Titles or any other authority made any inquiry from or sought any explanation from the petitioner regarding any alleged fraud in the registration of the transfer in favour of the plaintiff.

6. The petitioner avers that the ministerial directive as communicated to the Registrar of Titles vide the Memo dated 21st February 2012 and the Registrar of Titles action of cancelling the petitioner’s title to the suit property was ultra vires and null and void. The petitioner contends that its title issued under the provisions of the Registration of Titles Act, Cap 281 Laws of Kenya (now repealed) was absolute and indefeasible pursuant to Section 23 of the Act and could not be challenged otherwise than on account of fraud or misrepresentation to which the petitioner was shown to have been a party. The petitioner avers that the Minister and the Registrar of Titles did not follow due process in having the petitioner’s title cancelled. The petitioner states that the Minister has no power under the law to direct the cancellation of a registered title on account of fraud and/or on any other basis and further that the Registrar of Titles could not effect the cancellation of a registered title unless there had been compliance with the provisions of sections 60 and 61 of the Registration of Titles Act (repealed) and the court had directed cancellation of the title.

7. The petitioner in consequence contends that the Minister’s and the Registrar of Titles actions were unlawful and illegal and violated the petitioner’s constitutional rights to property under Article 40 which guarantees property rights of every citizen and prohibits arbitrary deprivation of property unless the deprivation was for a public purpose and in which event prompt and just compensation would be made in full by the state. By reason of the Minister’s and the Registrar of Titles actions of cancelling its title the petitioner states it has been prevented from putting its property to the intended use and has suffered loss and damage for which it holds the respondents responsible and liable.

8. The 1st interested party’s case;

The petitioner enjoined the 1st interested party to the petition ostensibly because the petitioner was aware of the interest of the 1st interested party in the suit property as the 1st interested party had advanced to the petitioner a sum of kshs. 50,000,000/= towards the purchase of the suit property. The 1st interested party took a charge over the suit property as security for the loan amount they advanced to the petitioner which charge was duly registered against the property. The 1st interested party's case is as stated in the affidavit sworn in support of the petition by one **Gregory Omusolo** sworn on 16th July 2012. The 1st interested party avers that its charge over the suit property was duly registered by the 1st and 2nd respondents after the bank had complied with all the necessary due diligence and after all the requisite consents and approvals were obtained. The bank avers that it legally acquired an interest over the suit property following the registration of the charge and contends the Minister and the Registrar of Titles were aware and/or ought to have been aware of the bank's interest as at 21st February 2012 when the Minister issued the impugned directive, yet they did not summon or accord the bank any audience before effecting the cancellation of the bank's charge.

9. The interested party contends the respondents had a duty and obligation to respect and protect sanctity of title but the respondents acted callously and in bad faith in effecting cancellation of the petitioner's title and the bank's charge whose effect was to expose the bank to loss as the respondents actions amounted to effectively discharging the bank's security yet the loan advanced was outstanding. The 1st interested party avers that the respondent's actions were unconstitutional and illegal as they were carried out contrary to the law. The interested party supports the petition and avers the reliefs sought by the petitioner are merited.

10. **The 2nd interested party's case;**

The 2nd interested party did not file any replying affidavit to the petition. However through a Notice of Motion application dated 16th October 2013 filed by the law firm of Murgor & Murgor Advocates one Sheikh Mubarak Jabber Al-Ahmad Al-Jabber Al-Sabbah applied to be substituted in the proceedings in place of the late Sheikh Jabir Alahmed Al Jabir AlSabah who hitherto had been named as the 2nd interested party. By the application the applicant who stated he was the eldest son and the duly appointed legal representative of the beneficiaries of the Estate of the late Sheikh Jabir disclosed that the person named in the petition as the 2nd interested party died on 15th January, 2006. The applicant stated that the suit property **LR No. 1870/IV/71** Nairobi still was part of the estate of the late Sheikh Jabir. The applicant alluded that he needed to be substituted to safeguard the interests of the beneficiaries of the estate of the late Sheikh Jabir who were at risk of losing a valuable asset which is the subject of the petition through unlawful and fraudulent acts of third parties as detailed in the replying affidavit of the 1st respondent sworn on 28th January, 2013. Implicitly the 2nd interested party was indicating the suit property was still owned by the 2nd interested party's estate. The application for substitution was granted though the 2nd interested party did not file any replying affidavit, his counsel filed submissions which the court will consider later on in this judgment.

11. **The respondents case;**

The respondents' case is as set out in the replying affidavit sworn by one **Edwin Wafula Monoko**, a Registrar of Titles in the Ministry of Lands on 28th January 2013 and his further affidavit sworn on 5th June 2014. The affidavits by the respondents affirm that the suit property was transferred to the 2nd interested party in 1962 for a consideration of kshs. 125,000/= under a leasehold of a term of 99 years from 1st April 1904. The leasehold interest was extended for a term of 50 years with effect from 1st March 2001. The deponent asserts that the new grant was issued and registered in favour of the 2nd interested party on 29th July 2012 as **IR No. 89699/1** (this should be 7th August, 2002). The transactions entered against the title thereafter have given rise to the instant petition.

12. The respondents replying affidavit chronicles the sequence of the transactions against the title of the suit property thus:-

- i. **On 23rd September 2002 a transfer to Koibarak Trading Company Limited was registered as IR No. 89699/2 for a consideration of kshs. 1,000,000/=.**
- ii. **On 8th November 2002 Koibarak Trading Company Limited transferred the suit parcel to Miniscule Investment Limited for a consideration of kshs. 1,300,000/= and the transfer was registered as IR No. 89699/3.**
- iii. **On 8th December 2009 Miniscule Investment Limited transferred the suit property to Shimoni Resort Limited for the consideration of kshs. 130,000,000/= and the transfer was registered as IR No. 89699/4.**
- iv. **On the same day 8th December 2009 Shimoni Resort Limited charged the suit property to African Banking Corporation to secure a loan of kshs. 50,000,000/= . The charge was registered against the title as IR No. 89699/5.**

13. The respondents deposes that the purported transfers to Koibarak Trading Company Limited and Miniscule Investment Limited must have been fraudulent as investigations had revealed that the registered owner, the ruler of the State of Kuwait had not participated in the alleged transactions. Respecting the transfer to Shimoni Resorts Limited, the petitioner herein, the respondents stated the transaction was questionable as the same was effectuated by persons who had acquired ownership of the suit property fraudulently. The respondents averred that the embassy of the State of Kuwait had lodged a complaint with the Director of Criminal Investigation Department (CID) Nairobi respecting the “fraudulent transfer” of its land parcel **LR No. 1870/IV/71** and that investigations had established the transfer to Koibarak Trading Company Limited was fraudulent as the embassy of the State of Kuwait was not involved. Conversely, the respondents stated that Shimoni Resorts Limited could not acquire a valid title from a party who did not possess a valid title.

14. The respondents deposed that the Embassy of the State of Kuwait, Nairobi upon discovering that land parcel LR No. 1870/IV/71 owned by Sheikh Jaber Alahmed Aljabir Alsabah the ruler of the State of Kuwait had been illegally transferred to Shimoni Resorts Limited, requested for investigations by the CID to establish in what circumstances the property was transferred out. The respondents depose that the investigations revealed that the transfers of the property to Koibarak Trading Company Limited and to Miniscule Investment Limited were fraudulent and so was the transfer by Miniscule Investment Limited to Shimoni Resorts Limited.

15. The respondents state that the Embassy of the State of Kuwait raised the issues of the fraudulent transfers of the property with the Ministry of Lands. The permanent secretary, Ministry of Lands called for urgent investigations by the CID of the complaints by the State of Kuwait regarding the alleged fraudulent transfer of its property. The respondents further state based on the complaint by the Government of Kuwait of fraudulent dealings respecting its property and the apparent view that fraud had been committed in effecting the initial transfer of the property to Koibarak Trading Company Limited, the Minister for lands vide a Memo MIN/MOL/GEN/VOL III (10) dated 21st February 2012 directed that the ownership of the suit property be reinstated and restored to the State of Kuwait. The respondents state the Registrar of Titles acted as directed by the Minister of Lands and cancelled entries 2, 3, 4 and 5 made against the title to the suit property and effectively restored the ownership of the suit property to the 2nd interested party.

16. The act of the Registrar of Titles of cancelling the petitioner’s title aggrieved the petitioner triggering the institution of the present petition. The respondents aver the claim by the petitioner of damages in the sum of kshs. 2,339,211,790/00 is exaggerated, speculative and unjustified. The said Edwin Munoko Wafula swore a further replying affidavit on 5th June 2014 on behalf of the respondents where he annexed copies of the instruments that were used to convey the suit property to the various parties. He however deposes the various transfers dated 23rd September 2002, 8th November 2002 and 8th December 2009 were fraudulent ostensibly because Sheikh Jabir Alahmed Aljabir Alsabah though stated to have been a party to the transfer dated 23rd September, 2002 did not execute the same and therefore this initial transfer

was fraudulent. In consequence therefore the respondent contends the consequent transfers including the transfer to the petitioner could not be valid.

17. Submission by the parties;

Petitioner's submissions

The parties agreed to canvass the petition by way of written submissions and all the parties exchanged their submissions. The parties counsel highlighted their submissions before me on 11th February, 2015, 6th May 2015, 26th June, 2015, 3rd July 2015 and 31st July 2015. Senior counsel Paul Muite assisted by Mr. Munge Advocate highlighted the submissions made on behalf of the petitioner.

18. The petitioner's submissions were principally two pronged. Firstly, the petitioner challenged the act of the Minister for Lands directing the deregistration of the petitioner's title to the suit property and contended the Minister's action was an affront to the provisions of the Constitution in that the petitioner was through the acts of the Minister arbitrarily deprived of its property without any compensation. The petitioner submitted that the Minister's actions were in violation of the petitioner's rights under Article 40 of the Constitution regarding the right to own property anywhere in Kenya. The actions were further in contravention of Article 47 of the Constitution as regards the petitioner's right to fair administrative action. The petitioner thus contended the Minister's actions were **ultra vires** the Constitution and consequently were a nullity.

19. Secondly, the petitioner submitted that the petitioner was an innocent and bonafide purchaser for value of the suit property without any notice of any defect in the title and that its title was indefeasible and deserved the protection of the law. Mr. Muite, Senior counsel submitted that the petitioner was as at 21st February 2012 when the Minister for Lands issued the impugned directive the registered proprietor of the suit property having validly purchased the same for valuable consideration from Miniscule Investment Limited for the sum of kshs. 130,000,000/=. The transfer in favour of Shimoni Resorts Limited was registered on 8th December 2009 as Entry No. 4 while a charge for kshs. 50,000,000/= in favour of African Banking Corporation Ltd was also registered as Entry No. 5 on the same date against the title. The petitioner explained that it borrowed the sum of kshs. 50,000/= from African Banking Corporation Limited to finance part of the purchase price for the suit property.

20. The petitioner submitted that before purchasing the suit property it carried out due diligence by conducting the requisite search at the lands office and as per the search the suit property had no encumbrances and there was nothing that could have put the petitioner on inquiry in regard to the title of the suit property. The petitioner avers that it entered the transaction in good faith and was therefore a bonafide purchaser for value without any notice of any defect in the title it purchased. Mr. Muite Advocate submitted that what was in issue in the instant petition was the sanctity of the registered title and it was his position that once the petitioner demonstrated that it was the registered proprietor of the suit property and it had not acquired the title fraudulently the title was in terms of Section 23 (1) of the Registration of Titles Act, Cap 281 Laws of Kenya (now repealed) absolute and indefeasible. Mr. Muite Advocate submitted that sanctity of title was derived from the Torrens System of Registration where essentially the State guarantees the indefeasibility of registered title. The repealed Section 23 (1) of the Registration of Titles Act (RTA) and the new Section 26 (1) of the Land Registration Act, No. 3 of 2012 embody the doctrine of indefeasibility of title as envisaged under the Torrens System of registration which in his submission applies to Kenya as these legal provisions depict.

21. Section 23 (1) of the Registration of Titles Act provides as follows:-

23 (1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive of evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.

Although the Registration of Titles Act together with other Acts were repealed following the enactment of the Land Registration Act No. 3 of 2012, Section 107 of the Land Registration Act, 2012 provided that any right, interest, title, power or obligation acquired, accrued or established under the repealed Acts would continue to be governed by the law applicable to it immediately prior to the commencement of the new Act. The petitioner's rights and interests to the suit property having been acquired before the coming into force of the Land Registration Act would therefore stand to be construed under the provisions of the Registration of Titles Act.

22. Even the new Land Registration Act, No. 3 of 2012 under Section 26 (1) embodied the principle and doctrine of indefeasibility of title as established under the Torrens System of Registration such that the title of a registered proprietor remains indefeasible unless it is shown the title was obtained through fraud or misrepresentation to which the title holder is proved to have been a party to. Section 26 (1) of the Land Registration Act provides:-

26 (1) The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-

a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or

b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

23. The petitioner emphasized that the title of the registered proprietor can only be challenged on grounds of fraud or misrepresentation in obtaining the title and in such case the registered proprietor has to be shown to have been a party to the fraudulent or illegal activities that led to him being registered as owner. Counsel for the petitioner further submitted that the rectification of the register in regard to a registered title can only be effected if fraud is proved under Section 80 of the Land Registration Act, 2012. Section 80 (1) provides thus:-

80 (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained made or omitted by fraud or mistake.

(2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

24. The petitioner further submitted that although the respondents have averred through the affidavits of Edwin Wafula Munoko, Land Registrar that the transfers to Koibarak Trading Company Limited and to Miniscule Investment Limited were fraudulent no evidence of any fraud has been tendered to connect the petitioner with any fraud if indeed there was fraud. The petitioner was the third transferee of the suit property and paid a price of kshs. 130,000,000/= for the property. The petitioner has given account of how they came to purchase the property and even obtained an affidavit from one, Jitendra Brahmhatt a director of Miniscule Investment Limited who sold the property to the petitioner who explained how they came to own the property and eventually sold the same to the petitioner. The petitioner maintained they were innocent buyers of the suit property and never participated in any fraudulent dealing and hence their title cannot be subject to challenge on account of fraud.

25. The petitioner urged the court to be guided by the decision of Hon. Justice Professor Ngugi in the case

of **Peterson Kiengo & 2 Others –vs- Kariuki Thuo [2012] eKLR** where the court held that even though a fraudster had gotten himself registered as proprietor of a parcel land, the bonafide purchaser who bought the land from him acquired a good title and his title was indefeasible as he was not aware of the fraud. Regarding the application of Article 40 (6) of the Constitution which provides that the protection of property rights does not extend to any property that has been found to have been unlawfully acquired the petitioner submitted that this provision of the Constitution must be interpreted in relation to the person who is holding the title. Counsel submitted that it is that person who must be shown to have acquired the specific property unlawfully. In support of this submissions, the petitioner referred the court to the case of **Isaac Gathungu Wanjohi & Another –vs- Attorney General & 6 Others [2012] eKLR** where the court held that where the State contended a property was acquired illegally the state must follow due process to establish such illegality. The petitioner further cited the case of **Kuria Greens Limited –vs- Registrar of Titles & Another [2011] eKLR** to buttress its argument that the Minister’s directive and the Registrar of Titles action of cancelling the petitioner’s title to the suit land was unconstitutional, null and void and that the same ought to be rescinded.

26. Mr. Munge Advocate highlighted the submissions on behalf of the 1st Interested Party and materially adopted and supported the submissions made on behalf of the petitioner. Mr. Munge submitted that the respondents had in their affidavit in response to the petition admitted that they cancelled the petitioners’ title and the charge of the 1st interested party following directive of the Minister meaning that there was no notification either to the petitioner or the 1st interested party yet they were the parties who were to be adversely affected by the respondents actions. He further reiterated that the petitioner’s title was absolute and indefeasible under section 23 (1) Registration of Titles Act and was protected under Article 40 of the Constitution. The Minister did not follow due process to have the title and charge cancelled and his actions were therefore unlawful and unconstitutional.

27. Counsel submitted that the bank did all it was required to do before taking the charge over the suit property and in the absence of any fraudulent dealing on the part of the bank its charge over the property cannot be impeached. Counsel further submitted that the Torrens System of registration has been held to be applicable in Kenya in the Court of Appeal case **Petition No. 29 of 2012 and Civil App. No. 12 of 2013 Charles Karathe Kiarie & 2 Others –vs- Administrators of the Estate of John Wallace Mathare (deceased) & 5 Others [2013] eKLR** where the court held that a title in the absence of fraud is absolute and indefeasible. Counsel submitted in the present case it has neither been proved nor shown that the petitioner or the 1st interested party acted fraudulently and no party has been arraigned in any court on charges of fraud.

28. Respondents submissions;

Mr. Allan Kamau, Litigation Counsel of the Attorney General’s Chambers highlighted the submissions on behalf of the respondents. Mr. Kamau submitted the petition raises both issues of ownership of the suit property and breach of fundamental rights as enshrined under the Constitution. He asserted that for the petitioner to claim breach of fundamental rights must of necessity establish their right of ownership of the suit property. He averred that the petitioner has predicated the petition on the basis that the petitioner was an innocent purchaser for value and it was therefore incumbent on the court to consider and determine ownership of the property. He further submitted that the constitutional court where the matter was initiated as a petition acknowledged the petition raised issues touching on the ownership of the suit property and on that account transferred the matter to the Environment and Land Court where the issue of ownership could be canvassed. The parties elected to proceed with the matter as a petition before this court. He asserted that for the court to be able to determine the issues raised in the petition, the court would require to make a determination on the issue of ownership of the suit property which both the petitioner and the respondents have canvassed in their respective pleadings.

29. Mr. Kamau conceded in his submissions that the issues of facts as set out in the affidavits are highly contested noting that the petitioner claims to have been a bonafide purchaser for value of the suit property and therefore the holder of an absolute and indefeasible title. The respondents on the other hand contend the petitioner held an illegal and irregular title the same having been fraudulently obtained by the predecessors of the title. The respondents view is that both Koibarak Trading Company Ltd and

Miniscule Investment Limited having obtained fraudulent titles could not pass a good or valid title to the petitioner. Mr. Kamau was of the opinion that the petitioner, if it was the Minister's decision they found fault in for failure to follow due process, then the petitioner ought to have approached the court by way of judicial review for the court to interrogate the decision making process to find whether the decision was arrived at fairly. As it is, the petitioner came to court by way of petition and the court is placed in a position where it may not be able to adjudicate on the contested facts on the basis of affidavit evidence only without hearing oral evidence from the parties.

30. Additionally, Mr. Kamau submitted the petitioner makes claim for losses allegedly incurred by the petitioner in undertaking feasibility study for the project it intended to undertake and other consequential losses for non user of the suit property which are in the nature of special damages and which ought to be specifically pleaded and proved. A petition, Mr. Kamau argued cannot be a suitable forum to ventilate a claim for damages as put forth by the petitioner. The respondents argued the damages claim is speculative and appeared to be grossly exaggerated and prayed that the same be dismissed.

31. The respondents submitted that as there was evidence the suit property had been fraudulently transferred to Koibarak Trading Limited who in turn transferred the property to Miniscule Investment Limited from whom the petitioner purchased the property, no good title passed to the petitioner and in the premises the respondents had a duty and obligation to restore the title to the 1st interested party who was defrauded. Mr. Kamau conceded the Minister and the Registrar of Titles may not have used due process in cancelling the petitioner's title but urged the court in the face of the apparent fraud to adopt the position taken in the case of **Chemey Investments Limited –vs- Attorney General and Another (Nairobi HC Petition No. 94 of 2005)** where Majanja J, in spite of holding the petitioner's title had been revoked without following due process declined to grant the declarations sought by the petitioner observing thus:-

“...I am alive to the fact that the suit may be subject to a further proceeding including those of a criminal nature hence my restrained approach to making any findings as to the contested facts so as not to prejudice the parties respective positions. What is clear to me though is that the evidence discloses a serious case of fraud and illegality in the acquisition of the suit property. These are matters that will be subject to due process to verify the facts. In my opinion, it would not be proper at this stage to grant the declaration sought even if I were so minded. To do so, would be to grant a seal of approval on the acts of the applicants and other parties and remove them from the purview of a lawful investigation by competent legal authorities. The constitution cannot be used to promote impunity. To grant the declarations in the originating summons would be to undermine the constitution it.”

32. 2nd interested party's submissions;

Mr. Philip Murgor Advocate, highlighted the submissions filed on behalf of the 2nd interested party. He submitted that the 2nd interested party is acknowledged as the party who was the registered owner of the suit property prior to the impugned transfer of the property to Koibarak Trading Company Limited in September 2002 and the subsequent transfers to Miniscule Investment Limited and Shimoni Resorts Limited. Mr. Murgor advocate asserted the transfer allegedly from the 2nd interested party to Koibarak Trading Company Ltd was without any doubt fraudulent and the failure by the petitioner to enjoin the Koibarak Trading Company Limited and Miniscule Investment Limited from whom they purchased the property was intended to obscure the fraudulent transactions. Mr. Murgor submitted that there were pointers to the petitioner having been party to the fraud that was perpetrated in the transfer of the suit property. For instance he pointed out that even though the initial title after the renewal of the grant was made to the 2nd interested party and that under special condition (6) of the grant required the consent of the Commissioner of Lands to be obtained before any transfer of the title could be effected there was no evidence of such consent having been given to support the transfers effected to Koibarak Trading Company, Miniscule Investment Limited and to the petitioner. He further questioned the amounts paid as consideration for the transfers to Koibarak and to Miniscule and ultimately the consideration of kshs. 130,000,000/= paid by the petitioner to Miniscule. He averred that the petitioner did not demonstrate how and to whom it paid the said consideration.

33. Mr. Munge Advocate for the petitioner and 1st interested party loudly objected to the submissions by Mr. Murgor Advocate arguing that the 2nd interested party having not filed any affidavit cannot interrogate the facts deponed to by the petitioner in the affidavit in support of the petition through submissions. This prompted the court to caution Mr. Murgor Advocate to confine himself to issues of law and not the facts as his client never filed any affidavit to controvert any facts deponed to by the petitioner.

34. Mr. Murgor advocate faulted the petitioner for not enjoining the vendor to them as party to the petition arguing that if the petitioner had no complicity in the fraud they would have endeavoured to seek indemnity from Miniscule Investments Limited when the Minister revoked their title. As further evidence to possible complicity to fraud Mr. Murgori pointed out that the bank statements annexed to the petitioner's affidavit did not provide any support for payment of the purchase price and further pointed out that even though there was a valuation report that gave the value of the property at kshs. 170,000,000/= the property was sold to the petitioner at kshs. 130,000,000/= and there is no explanation for the variance in price.

35. Mr. Murgor in regard to the petitioner's claim for damages submitted that the claim of upto kshs. 2.3Billion is baseless and is unsupported having regard to the fact that the intended project was never implemented by the petitioner. The damages required proof which the petitioner had not done. In concluding his submissions on the law Mr. Murgor submitted that the Torrens System of registration was tempered with by Article 40 (6) of the Constitution which exempts from protection any title that is found to have been unlawfully acquired. He argued the title to the suit property held by the petitioner was unlawfully acquired placing reliance on the respondents' statement and averment that the title of the suit property was fraudulently transferred from the 2nd interested party's name to Koibarak Trading Company Ltd and to Miniscule Investments Limited before being transferred to the petitioner. He urged the court to uphold the 2nd interested party as the true owner of the suit property as opposed to the claim of ownership by the petitioner.

36. **Petitioner's reply;**

Mr. Munge advocate made a reply to the submissions by the respondents and the 2nd interested party on behalf of the petitioner and the 1st interested party. He reiterated the earlier submissions made by Muite, Senior Counsel and himself on behalf of the petitioner and the 1st interested party in support of the petition. In response to the respondents submissions that the petitioner cannot on the basis of the petition be granted the reliefs it seeks, as they are not suited to a petition as presented by the petitioner, Mr. Munge advocate submitted that the petitioner in the petition is seeking a declaration that the actions of the respondents contravened Articles 40 and 47 of the constitution and that under Articles 22 and 23 of the Constitution the court can properly give the remedies sought by the petitioner in the petition. He submitted further that the facts in the case of **Chemey Investment Limited –vs- Attorney General & Another** (Supra) referred to by the respondents and the case of **Suleiman Rahemululla Omar & Another –vs- Musa Hersi Fahiyeh & 2 Others [2014] eKLR** referred to by the 2nd interested party were distinguishable to the facts in the present case. In the **Chemey Investments** case he stated the action was brought by way of originating summons and the declarations sought could not be granted on the basis of the affidavit evidence while in the **Suleiman Rahemululla Omar** case what was in issue was the validity of the sale transaction. He reiterated that the issue in the petition is whether the 3rd respondent acted lawfully when he revoked the petitioner's title. The issue in the petition, he further submitted, is not whether the petitioner was a bonafide purchaser but whether the 3rd respondent applied due process in taking the action that he did.

37. Mr. Munge advocate further responding as to why the petitioner did not bring a judicial review action stated that under Order 53 of the Civil Procedure Rules there was limitation as to the reliefs that could be granted in a judicial review action whereas in a constitutional petition such as the present one the court can grant judicial review orders in addition to other remedies and cited the case of **Kuria Greens Limited –vs- Registrar of Titles & Another [2011] eKLR** to support this submission. On the issue of non joinder of Koibarak Trading Co. Ltd and Miniscule Investments Limited Mr. Munge reiterated that

the petitioner was not making any claim against them. He stated that even though the respondents alluded there was fraud in the transfer of the property to Koibarak Trading Company Ltd no evidence was tendered to show the petitioner was party to any fraudulent dealing.

38. Analysis and determination;

I have set out the respective cases of the petitioner, the respondents and the interested parties and I have in summary form set out the submissions by the parties. The petition as I understand it is about the protection of property rights under Article 40 of the Constitution. The petitioner contends that its property rights relating to ownership of property have been contravened through the acts of the respondents unlawfully and arbitrarily cancelling its title in respect of LR No. 1870/IV/71. The petitioner avers the respondents acts were effected in contravention of Article 47 of the Constitution that entitles the petitioner to fair administrative action. The respondents appear to justify their actions of cancelling the petitioner's title on the basis that they believe the initial transfer of the suit property to Koibarak Trading Company Limited was fraudulent such that the subsequent transfers of the property to Miniscule Investments Limited and to the petitioner lacked validity and were therefore void. The petitioner counters this by stating that he was bonafide purchaser for value of the property and as the registered owner its title was absolute and protected under the law.

39. The issues for determination in this petition are as follows:

- i. Whether the respondents acts of cancelling the petitioner's title contravened Article 47 of the Constitution.
- ii. Whether Article 40 of the Constitution was violated.
- iii. Whether the petitioner is entitled to the reliefs sought in the petition.

40. Contravention of Article 47 of the Constitution;

Article 47 of the Constitution is in the following terms;-

47 (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right of fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3)

The 3rd respondent authored the memo dated 21st February 2012 which directed and authorized the 1st respondent to cancel Entry Nos. 2, 3, 4 and 5 registered against land title **No. IR 89699 of LR No. 1870/IV/71**. The 1st respondent acted on the directive of the 3rd respondent and effected the cancellation of the said entries against the title. Entry No. 4 related to the registration of the transfer in favour of Shimoni Resorts Limited the petitioner herein and entry No. 5 related to the registration of the charge in favour of African Banking Corporation Ltd, the 1st interested party herein. There is no doubt that the petitioner and the 1st interested party stood to be affected adversely by the respondents' actions of cancelling their acquired rights and interests in the suit property. In terms of Article 47 (1) and (2) the respondents had a duty and obligation to ensure the petitioner and the 1st interested party were given an opportunity to be heard before any action that was adverse to their rights and interest was taken. The petitioner has stated that they were not given any notice before the action was taken. The respondents do not dispute that no notice was given to either the petitioner or the 1st interested party before the cancellations were effected. The respondents argue that they cancelled the aforesaid entries because they discovered the transfer of the property had been fraudulently made from the 2nd interested party to Koibarak Trading Company Ltd.

41. Under Article 10 of the Constitution which embodies the national values and principles of governance all state organs, state officers, public officers and all persons are bound to apply the rule of law whenever they interpret any law and/or make or implement any public policy decisions. Applying the rule of law would have entailed the petitioner being given a chance to be heard before its title was cancelled. The cardinal rule of natural justice is that no person should be condemned unheard. There is no evidence the petitioner was accorded a chance of being heard before its title was cancelled.

42. Under Section 60 of the Registration of Titles Act, Cap 281, Laws of Kenya (now repealed) the registrar is required to summon the holder of a title in respect of which an erroneous entry has been made or a fraudulent title has been issued to deliver the title for correction failing which the registrar has to apply to the court for such person to be summoned. The registrar can only cancel or correct a title pursuant to an order of the court under Section 61 of the Registration of Titles Act (repealed).

43. Having regard to the provisions of Section 60 and 61 of the Registration of Titles Act (repealed) which I find hold were applicable to the parties in this petition by virtue of Section 107 of the Land Registration Act, 2012, the Registrar of Titles had no power to cancel the entries against the title of the suit property as he did. The registrar's actions were unlawful and *ultra vires*. The Registrar of Titles could only cancel the title if the procedure set out under Section 60 and 61 of the Registration of Titles Act (repealed) had been followed. The Minister had no power to direct the Registrar of Titles to cancel the entries. In doing so the Minister was acting in excess of his authority. The directive was unlawful and illegal.

44. In appropriate cases the court under Section 64 of the Registration of Titles Act (repealed) has power to direct the registrar to cancel and/or correct any entry on the title register. Section 64 provides thus:

64. In any proceedings respecting any land or in respect of any transaction or contract relating thereto, or in respect of any instrument, caveat, memorial or other entry affecting any such land, the court may, by order, direct the registrar to cancel, correct, substitute or issue any memorial or entry in the register, or otherwise to do such acts or make such entries as may be necessary to give effect to the judgment or order of the court.

It is now settled law that a registrar has no power to cancel title. See the cases of **Kuria Greens Ltd –vs- Registrar of Titles & Another [2011] eKLR** and **Isaac Gathungu Wanjohi & Another –vs- Attorney General & 6 Others [2012] eKLR**. The cancellation of the petitioner's title by the Registrar of Titles consequently was null and void and of no effect.

45. I am satisfied the acts of the respondents of cancelling the petitioner's title were totally highhanded and denied the petitioner a fair chance to defend its title. The respondents did not follow due process where the petitioner would in terms of Article 50 (1) of the Constitution have been afforded a fair hearing. Article 50 (1) provides thus:-

50(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or; if appropriate, another independent and impartial tribunal or body.

The upshot of what I have discussed above is that I am in agreement with the petitioner's submission that the memo by the Minister dated 21st February 2012 directing the cancellation of entries 2, 3, 4 and 5 in respect of title **LR No. 1870/IV/71** was *ultra vires* and therefore unlawful and contravened Article 47 of the Constitution for failure to afford the petitioner fair administrative action and consequently the same cannot stand.

46. Violation of Article 40 of the Constitution;

Article 40 (3) provides as follows:

(3) The state shall not deprive a person of property of any description, or of any interest in, or

right over property of any description, unless the deprivation-

(a) Results from an acquisition of land or an interest in land or a conversion of an interest in land or title to land, in accordance with Chapter five; or

(b) Is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that-

(i) Requires prompt payment in full, of first compensation to the person; and

(ii) Allows any person who has an interest in, or right over, that property a right of access to a court of law.

(4)

(5)

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

47. Having already held and found that the respondents acts that led to the cancellation of the petitioner's title to the suit property were *ultra vires* and therefore unlawful the issue whether Article 40 of the Constitution was violated may be moot as the effect of my holding is in essence to rescind the actions which would result in the restoration of the cancelled entries to the register effectively restoring the petitioner as the owner of the suit property. However, as considerable argument and submissions were made by the parties on the question of ownership of the suit property as between the petitioner on the one part and the 2nd interested party on the other part. I set out the rival legal arguments in my summary of the parties submissions.

48. The petitioner's position is that as the registered owner of the suit property its title is absolute and indefeasible under Section 23 (1) of Registration of Titles Act (repealed) and that the same is protected under Article 40 of the Constitution. There are a line of cases that support this position. See the cases of **Charles Karathe Kiarie & Others –vs- Administrators of Estate of John Wallace Mathare (deceased) & 5 Others [2013] eKLR**, **Dr. Joseph Arap Ngok –vs- Justice Moiwo Ole Keiwa & 5 Others Civil Appeal No. Nai 60 of 1997**, **Njilux Motors Ltd –vs- KP&L & Another Civil Appeal No. 206 of 1998**, **Russel & Co. Ltd –vs- Commercial Bank of Africa Ltd [1986] KLR 633**, **Wreck Motors Enterprises –vs- Commissioner of Lands Nairobi, Civil Appeal No. 71 of 1997 (unreported)**, **Permanent Markets Society & 11 Others –vs- Salima Enterprises & 2 Others Civil Appeal No. 185 of 1997** and **David Peterson Kiengo & 2 Others –vs- Kariuki Thuo [2012] eKLR**. In all these cases the courts have upheld the sanctity of title holding that it is only where the registered owner is proved to have acquired title fraudulently would the title be impeached.

49. The respondents and the 2nd interested party take the position that to the extent the title is shown to have been fraudulently transferred to Koibarak Trading Company Ltd the petitioner did not acquire a good title. The respondents refer the court to the cases of **Chemey Investments Limited –vs- AG & Another Petition No. 94 of 2005**, **Milan Kamaru Shah & Others –vs- City Council of Nairobi HCCC No. 1024 of 2005 (OS) (unreported)** and **James Joram Nyagah & Another –vs- The AG & Another HC Misc. 1732 of 2004 (unreported)**. The interested party referred the court to this court's decision in the case of **Esther Ndegi Njiru & Another –vs- Leonard Gatei [2014] eKLR** where the court considered the question of bonafide purchaser in the face of proven fraud in the acquisition of title by the party who sold the property to the registered owner and held no valid title had passed and proceeded to cancel the title held by the registered owner. The facts in the **Esther Ndegi Njiru** case are distinguishable to the facts in the instant case as in the case, the plaintiff had sought orders that the registered owner's title had been fraudulently acquired and the cancellation of the same.

50. In the instant petition, the petitioner in addition to seeking orders declaring the acts of the respondents

cancelling its title *ultra vires* and null and void sought damages for contravention of articles 40 and 47 of the Constitution. The respondents in responding to the petition alleged fraud in the acquisition of the property by the petitioner. The 2nd interested party supported the respondents' position in his submissions. The petitioner's reply was that it was a bonafide purchaser for value of the suit property and as the registered owner its title was absolute and indefeasible under Section 23 (1) of the Registration of Titles Act (repealed) now reproduced under Section 26 (1) (a) and (b) of the Land Registration act, 2012. The above provisions which I reproduced earlier in this judgment apply the "**Torrens System**" of registration which recognizes the sanctity of title in this country such that the title of a registered owner will be held to be absolute and indefeasible unless it is shown that the registration was obtained through misrepresentation or fraud and/or that the title was obtained through a corrupt scheme to which the registered owner was a party.

51. The Court of Appeal in the case of **Charles Karathe Kiarie & 2 Others –vs- Administrators of Estate of John Wallance Muthare (deceased) & 5 others** (Supra) restated that the Torrens System was applicable in Kenya and acknowledged that under the system the title of a bonafide purchaser for value without notice of fraud could not be impeached. The judges in the case observed thus:-

"The Registration of Titles Act is entirely a product of the Torrens System of registration. The word "Torrens" is derived from Sir Robert Torrens, the third premier of South Australia and pioneer and author of a simplified system of land transfer which he introduced in 1958. This system emphasizes on the accuracy of the land register which must mirror all currently active registrable interests that affect a particular parcel of land. Government as the keeper of the master record of all land and their owners guarantees indefeasibility of all rights and interests shown in the land register against the entire world and in case of loss arising from an error in registration the person affected is guaranteed of government compensation. This statutory presumption of indefeasibility and conclusiveness of title under the Torrens System can be rebutted only by proof of fraud or misrepresentation which the buyer is himself involved."

52. The Court of Appeal decision in the above case upheld the position taken by Hon. Prof. Justice Ngugi in the case of **David Peterson Kiengo & 2 Others –vs- Kariuki Thuo** (Supra) where the judge held that a defrauder who had acquired title fraudulently could pass a good title to a bonafide purchaser. The judge in the case observed thus:-

"14. Practically, the principles of indefeasibility has two implications for the instant case. It means that if the parties who acquired interests to the properties from Njendu can demonstrate that they did so in good faith, without notice and did not participate in Njendu's fraud, their titles will be secure and guaranteed by the state. They were not obligated to do anything more than search the official register to establish ownership. If, as it turned out, the register was inaccurate the reason of malfeasance by land officials, the second implication is that the parties deprived of their property by such inaccuracy or malfeasance may bring an action against the state for recovery of damages but not for possession or ownership of the property."

53. It has been suggested and Hon. Justice Majanja appears to have taken this view in the case of **Isaac Gathungu Wanjohi & Another –vs- AG & 6 Others** (Supra) that Article 40 (6) which provides that, **"The rights under this article do not extend to any property that has been found to have been unlawfully acquired"** watered down the doctrine of sanctity of title such that as any title that is found to have been procured unlawfully is not protected notwithstanding when the fraud was committed and by whoever. Literally interpreted this constitutional provision would appear to suggest even the title of a bona fide purchaser for value without any notice of fraud would not be protected if a predecessor of the title is found to have acquired the property unlawfully and/or fraudulently. For my part, I would fault such interpretation as it would mean the same constitution that protects the fundamental rights of all persons would be infringing the rights of the bonafide purchaser. The constitution should be interpreted under Article 259 of the Constitution in a manner that best promotes the object of the constitution. Article 259 (1) of the Constitution provides thus:

259 (1) This Constitution shall be interpreted in a manner that-

- a. Promotes its purpose, values and principles.**
- b. Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights.**
- c. Permits the development of the law; and**
- d. Contributes to good governance.**

Sections 26 (1) (a) and (b) of the Land Registration Act, 2012 was enacted after the promulgation of the Constitution 2010 and clearly provided the title of a bonafide purchaser cannot be impugned unless the title holder is proved to have been a party to the fraud or misrepresentation that led to the registration of the title. In my view the most appropriate interpretation of Article 40 (6) of the Constitution would be that it would apply to a defrauder and there would be no intention to deprive an innocent buyer of his property. Thus Article 40 (6) of the Constitution in my considered opinion would only apply to registered owners who are found to have acquired the properties unlawfully. It is such property that would not be protected under Article 40 of the Constitution. The property in the hands of a bonafide purchaser would be protected even if it is shown that at some point in the past before the bonafide purchaser acquired the property the same had been fraudulently transacted.

54. The title of the petitioner in the circumstances would only lose protection of the constitution if the petitioner is proved to have acquired the property fraudulently and/or had knowledge of the fraud. The respondents have alleged the transfer to Koibarak Trading Company Limited was fraudulently effected as the 2nd interested party who was then the registered owner has stated he did not execute such transfer. The respondents have not tendered any evidence to show that the petitioner acquired the property from Miniscule Investments Limited fraudulently or were aware that Miniscule Investments Limited acquired the property fraudulently from Koibarak so that it can be said they had knowledge of the fraud. The petitioner has demonstrated they purchased the property for valuable consideration and its transfer was duly registered. They have stated they were bonafide purchasers without any notice of any fraud. This assertion by the petitioner has not been rebutted. The petitioner denied having been fraudulent in the purchase of the property. I am not satisfied any evidence was availed to show they acted fraudulently or were party to any fraud.

55. The petition as presented was not an appropriate avenue to try issues of fraud which were clearly contested as between the parties. The standard of proof in fraud cases is such as would invite oral testimony where the veracity of the parties evidence is tested through cross-examination. However, in the present petition the parties would not have had the opportunity to ventilate the fraud allegations as the petition clearly was challenging the acts of the respondents to cancel the entries against the title held by the petitioner. The issue for determination at the outset was whether the respondents acted lawfully in executing the acts that they did and having found and held that they acted unlawfully there was no basis to proceed to consider whether they were justified to cancel the petitioner's title. The respondents' acts were null and void abinitio.

56. Reliefs sought by the petitioner;

The petitioner has prayed for the several reliefs set out in the petition under part D in the petition running from A to J. In the face of the contested ownership of the suit property between the petitioner and the 2nd interested party and the fact that the court cannot on the basis of the pleadings and the evidence as adduced make any definitive findings on the allegations of fraud, the court cannot make a declaration that the petitioner was an innocent purchaser for value without any notice of any defect of title as sought by the petitioner. That could be the subject of further proceedings particularly as between the 2nd interested party and the petitioner. The fact, however, that the petitioner was the registered owner of the suit property on 21st February, 2012 when the impugned acts of the respondents were carried out, prima facie casts the petitioner as the absolute owner of the property and its title could only be impeached if it was

proved to have been acquired fraudulently and the petitioner shown to have been party to such fraud.

57. However having held that the Minister acted unlawfully in issuing the directive dated 21st February 2012 on which the Registrar of Titles acted and cancelled entry numbers 2, 3, 4 and 5 in the register in respect of LR No. 1870/IV/71 it is my finding that the 1st, 2nd and 3rd respondents did not follow due process and hence contravened the petitioner's right to fair administrative action and in that regard contravened Article 47 of the Constitution. Although the petitioner in alternative to prayer E in the petition prayed for damages which were in the nature of special damages in the sum of kshs. 2,339,211,790.00 on account of loss suffered resulting from the actions of the respondents, my view is that apart from the bulk of the damages being speculative the same were not specifically proved.

58. The petitioner has prayed for damages for contravention of Article 47 of the Constitution. The court has held that the respondents breached the petitioner's right to due process in cancelling its title in contravention of Article 47 of the Constitution. It is not clear why the respondents did not see it fit to give notice to the petitioner before they acted in the manner they did. As I stated elsewhere in this judgment the respondents actions were high handed and no doubt caused the petitioner considerable discomfort. Under Articles 22 and 23 of the Constitution among the reliefs the court can grant include injunctions, compensation and judicial review. The court therefore can award the petitioner damages for the respondents' unlawful conduct/acts. I will award damages of kshs. 2,000,000/= for this conduct of the respondents which I consider vindictive. In the case of **Isaac Guhungu Wanjohi & Another –vs- Attorney General & 6 Others** (Supra) Majanja, J. awarded damages of kshs. 1,000,000/= for breach of Article 47. In the instant case in consider the acts of the respondents to have been aggravated taking account of the manner in which they were executed and therefore merit a higher award. I do not consider that any damages would be awardable for breach of Article 40 of the Constitution in view of the fact that the petitioner's ownership would be restored.

59. In the result therefore I find the petition proved and I enter judgment for the petitioner in the following terms:-

- i. The cancellation of entries numbers 2, 3, 4 and 5 pursuant to the Ministerial directive vide Memo dated 21st February 2012 ref. number MIN/MOL/GEN/VOL. III(10) on the register in respect of LR No. 1870/IV/71 is hereby declared null and void for contravening Article 47 of the Constitution.**
- ii. The Registrar of Titles is hereby directed to reverse the entry effected on 21st February 2012 cancelling entries number 2, 3, 4 and 5 on the register of LR No. 1870/IV/71 and is ordered to reinstate the petitioner as the registered owner and the charge registered in favour of African Banking Corporation Limited.**
- iii. I award the petitioner damages of kshs. 2,000,000/= as general damages for breach of Article 47 of the Constitution against the respondents jointly and severally.**
- iv. I award the costs of the petition to the petitioner to be paid by the respondents.**

Judgment dated and signed at Kisii this 8th day of April, 2016.

J. M MUTUNGI

JUDGE

Judgment delivered at Nairobi this 15th day of April, 2016.

S. OKONG'O

JUDGE

In the presence of:

Mr. Munge for the petitioner

Mr. Kamau for the 1st, 2nd, 3rd and 4th respondents

Mr. Munge h/b for Luseno for the 1st interested party

Mr. Murgor and Mr. Ouma for the 2nd interested party

Kajuju Court Assistant

S. OKONG'O

JUDGE