



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO 338 OF 2017

IGAINYA LIMITED.....PLAINTIFF

- VERSUS -

NATIONAL LAND COMMISSION.....1ST DEFENDANT

ATTORNEY GENERAL.....2ND DEFENDANT

JUDGMENT

Introduction

1. The dispute in this suit revolves around the question of validity of **Grant Number 87859**, signed by **Mr Sammy Silas Komen Mwaita**, Commission of Lands, on **7/11/2001** and registered as Number **IR 87859/1** on **16/11/2001**. Comprised in the said Grant is **Land Reference Number 209/14521**, situated in Kileleshwa, Nairobi (**the suit property**). There was common ground during trial that, subsequent to the processing and issuance of the said Grant by the defunct Office of the Commissioner of Lands, the Department of Roads developed on the land a public tarmac road known as **Ring Road**. Currently, the suit property is part of the said public tarmac road.

2. Through a plaint dated 18/5/2017, the plaintiff, Igainya Limited, brought this suit contending that they were the registered proprietor of the suit property. They further contended that the Registrar of Titles had through **Gazette Notice Number 9230**, dated **29/7/2011**, irregularly purported to revoke their title. The plaintiff added that the Department of Roads had, in contravention of **Articles 40(3), 47(1) and 50** of the Constitution, illegally deprived them of the suit property by erecting a public tarmac road thereon.

3. Consequently, the plaintiff sought the following verbatim reliefs against the defendants:

1. A declaration that the defendants jointly and severally acted illegally, unfairly, irregularly and contrary to the provisions of Article 40 and 67 of the Constitution of Kenya in arbitrarily depriving the plaintiff of the suit property that had been acquired lawfully.

2. A declaration that Gazette Notice No 9230 Vol. CXIII – No 72 dated 29th July, 2011 is void ab initio and of no force and effect in so far as it purports to revoke Title LR No 209/14521 which lawfully belongs to the plaintiff.

3. A declaration that the plaintiff is the registered owner of the suit property and thus enjoys indefeasible title to the property and by virtue of Article 40 of the Constitution of Kenya, is protected under the law.

4. General and compensatory damages for the losses suffered through the defendant's actions and violation of guarantee of title.

5. An order directing the 1st defendant to formally and promptly initiate the process of compulsory acquisition of the suit property as contemplated under Article 40(3) of the Constitution and thus promptly pay in full, just compensation to the plaintiff.

6. In the alternative and without prejudice to prayer 5 above, an order directing the defendants to avail the plaintiff access to the suit property and to de-gazette the purported cancellation of the titles thereof.

7. Costs of the suit.

8. Such other and/or further remedy as this honourable court may deem fit and just to grant.

Plaintiff's Case

4. The plaintiff's case was contained in the plaint dated 18/5/2017; the evidence of **Engineer Isaac Gathungu Wanjohi**; and the written submissions dated 31/8/2021, filed by the firm of *Githara & Associates Advocates*. In summary, their case was that, through one of its directors, **Mr Isaac Gathungu Wanjohi**, they purchased the suit property from **Mr Francis Karani Elijah** and **Mr George Njoroge Ndiguitha (the vendors)** vide a sale agreement dated 5/2/2002. The said director subsequently caused the suit property to be conveyed to the plaintiff by the two vendors. Subsequently, Government Agencies, including the **Kenya Urban Roads Authority**, entered the suit property and commenced construction of a public road thereon. The plaintiff later discovered that vide **Gazette Notice No 9230**, dated 29/7/2011, the Registrar of Titles had purportedly revoked their title to the suit property, alleging that the title had been irregularly issued. The plaintiff contended that the revocation of their title and the construction of a public road on the suit property was done arbitrarily; constituted a deprivation of property; and contravened their rights under **Articles 40(3), 47(1)** and **50** of the Constitution. Consequently, they sought the above reliefs.

5. Engineer Isaac Gathungu Wanjohi [PW1] testified that he was a director of the plaintiff company. In 2002, he began negotiations on behalf of the plaintiff for purchase of the suit property from the vendors. He visited the suit property and found it "**vacant except for some kiosks which the vendors advised were on site illegally and they would procure their exit to facilitate vacant possession on completion**". He obtained an official search from the Department of Lands, confirming that the suit property was duly registered in the names of the vendors. Subsequently, on 5/2/2002, on behalf of the plaintiff, he entered into a sale agreement with the vendors, pursuant to which he purchased the suit property from the vendors at Kshs 2,700,000. He testified that since the vendors had not met the conditions set out in the Grant, the prior consent of the Commissioner of Lands was sought and obtained before the suit property was conveyed to the plaintiff. The plaintiff company funded most of the requisite payments on behalf of the vendors on the understanding that the same would be deducted from the purchase price.

6. PW1 added that he later learnt that Government Agencies, including Kenya Urban Roads Authority, had made a motorable road through the suit property and were contending that the suit property was a public road reserve. When the plaintiff raised the matter with the Commissioner of Lands, the latter wrote a letter dated 8/7/2002, reiterating that their title was genuine and that the user of the suit property was residential. He added that the plaintiff was stunned to discover that the Registrar of Titles had subsequently issued a gazette notice in 2011 purporting to revoke their title.

7. His evidence in cross-examination was that he had not come across any letter by the vendors, addressed to the Commissioner of Lands, seeking allocation of the suit property. He did not know who gave instructions to **Mr Obel** to survey the suit property. He did not know if the allotment was accepted within 30 days. He did not come across any part-development plan which may have formed the basis of the allotment. He did not have evidence relating to payment of purchase price to the vendors. The suit property had kiosks at the time of purchase. He knew **Mr P M Mutwiwa**, the Lands Officer who issued the letter of allotment. It was his evidence that the plaintiff was blaming the Government for their predicament because it allocated the suit property to the vendors and issued the title which was subsequently conveyed to the plaintiff. He added that the suit property was sold to the plaintiff soon after the Registrar of Titles removed a caveat which had been placed against the title by the Registrar of Titles under **Section 65(1)(f)** of the **Registration of Titles Act** (now repealed). When counsel for the 2nd defendant showed him **Part-Development Plan No. 269** dated 27/12/95 and **Survey Plan No. FR No 56/5**, authenticated in 1950, both indicating that the suit property fell within land that had been earlier surveyed and planned as a public road, he stated that he was not in a position to tell whether there was a replanning of the land to change the user of the land from public road reserve to residential and make it available for alienation. He added that the survey plan and the development plan shown to him in court were not available to the plaintiff at the time of purchasing the suit property.

8. In re-examination, he testified that the caveat which had been placed against the title by the Registrar of Titles was removed on 25/1/2002. The sale agreement between PW1 and the vendors was subsequently signed on 5/2/2002. He added that an official search was obtained prior to signing the sale agreement. It was his further evidence that the plaintiff did not fund the payments set out in the letter of allotment. Lastly, he stated that the Gazette Notice dated 29/7/2011 was issued without any prior notice to the plaintiff.

9. In their written submissions dated 31/8/2021, filed through the firm of *Githara & Associates Advocates*, the plaintiff identified the following as the four key issues falling for determination in this suit: (i) Whether the plaintiff is the duly registered owner of LR 209/14521; (ii) Whether the actions of the defendants were unconstitutional; (iii) Whether the plaintiff is entitled to the prayers sought in the plaint; and (iv) What is the appropriate order as to costs?

10. On whether the plaintiff is the duly registered owner of LR No 209/14521, counsel for the plaintiff submitted that the plaintiff had demonstrated, through evidence, that **Grant Number IR 87859** comprising of **Land Reference Number 209/14521**, measuring about 0.4524 hectares, was issued to **Francis Karani Elijah** and **George Njoroge Ndiguitha**, who subsequently transferred it to the plaintiff. Counsel contended that the authenticity of the Grant was not in dispute. Counsel argued that the Grant held by the plaintiff was protected under **Section 26** of the **Land Registration Act**. It was the position of counsel for the plaintiff that once the plaintiff established that they held a title duly issued by the Ministry of Lands, they had no obligation to prove that the title was good. Counsel contended that it was the burden of the defence to demonstrate that the title held by the plaintiff should be nullified on any of the grounds set out under **Section 26** of the **Land Registration Act**. Counsel argued that the Commissioner of Lands had more than six occasions to verify the title prior to registration of the transfer in favour of the plaintiff but elected not to raise any query on the title. It was the position of counsel for the plaintiff that the plaintiff was not involved in the allotment of the suit property. Citing the decision of the Court of Appeal of Uganda in the case of **Katende v Haridar & Company Limited [2008] 2 EA 173**, counsel argued that the plaintiff was an innocent purchaser for value without notice of any defect and their title ought to be taken as conclusive proof of ownership of the suit property.

11. On whether the actions of the defendants were unconstitutional, counsel for the plaintiff submitted that the plaintiff's rights over the suit property were protected and such rights could only be curtailed or interfered with in strict adherence to the law. Counsel contended that the Registrar of Titles failed to accord the plaintiff a chance to be heard before he purported to revoke their title through **Gazette Notice Number 9230** dated 29/7/2011. Counsel argued that the decision of the Registrar of Titles to revoke the plaintiff's title without according the plaintiff a hearing contravened **Articles 40, 47** and **50** of the Constitution of Kenya 2010.

12. On whether the plaintiff was entitled to the prayers sought in the plaint, counsel for the plaintiff submitted that, based on the preceding submissions, the plaintiff was entitled to the declaratory orders sought in prayers 1, 2 and 3. On the plea for general and compensatory damages (prayer 4), counsel submitted that the Registrar of Titles proceeded to revoke the plaintiff's title by way of a gazette notice in the face of prior unequivocal pronouncements by the High Court to the effect that the Registrar had no powers to do so. Counsel contended that, in the circumstances, this court had powers, under **Articles 22 and 23** of the Constitution, to grant an order for compensation. On the reliefs sought under prayers 5 and 6, counsel submitted that these were alternative reliefs sought by the plaintiff upon taking into account the fact that a public tarmac road had been developed on the suit property. On costs, counsel submitted that under **Section 27** of the **Civil Procedure Act**, costs follow the event, hence the plaintiff was entitled to costs. Lastly, counsel urged the court to award the plaintiff interest on damages.

1st Defendant's Case

13. On 17/1/2020, the 1st defendant filed an undated statement of defence signed by **Ms Cecilia Masinde, Advocate**. They admitted, subject to authentication, correspondence attributed to the defunct Office of the Commissioner of Lands. Further, they admitted, subject to authentication, issuance of rent certificate and consent by the Commissioner of Lands to facilitate transfer of the suit property to the plaintiff. They generally admitted the role played by the defunct Office of the Commissioner of Lands in the transfer of the suit property to the plaintiff. They added that the impugned revocation was carried out by the Registrar of Titles and not the Commissioner of Lands. It was their case that the prayers sought in the plaint could not be issued against them because they played no role in the revocation of the plaintiff's title, adding that revocation of titles was not part of their constitutional mandate. They urged the court not to grant any of the prayers sought against them.

14. The 1st defendant neither led evidence nor filed written submissions. In her address to the court on 6/10/2021, counsel for the 1st defendant informed the court that they were adopting the submissions filed by the Attorney General.

2nd Defendant's Case

15. The Attorney General's case was contained in the statement of defence dated 30/6/2017; the evidence of **Timothy Waiya Mwangi (DW1)**; the evidence of **Abdikadir Ibrahim Jatani**; and the written submissions filed by **Mr Allan Kamau Njoroge, Principal State Counsel**, dated 5/10/2021.

16. In summary, the Attorney General's case was that the suit property was part of a public road reserve and had been illegally acquired. The Attorney General added that because the suit property was a public road reserve that had been illegally acquired, **Article 40(6)** of the Constitution exempted it from the protection accorded to private property under **Article 40** of the Constitution. It was the case of the Attorney General that the Kenya Urban Roads Authority, on behalf of the Government, had the right to enter the suit property and develop a public road thereon because the suit property was a public road reserve.

17. The Attorney General further pleaded that the plaintiff was accorded a chance to be heard through the impugned Gazette Notice. The Attorney General urged the court to dismiss the plaintiff's suit with costs and declare the impugned Gazette Notice as valid.

18. The Attorney General led evidence by two witnesses, **Timothy Waiya Mwangi [DW1]** and **Abdikadir Ibrahim Jatani [DW2]**. In summary, the evidence of Mr Timothy Waiya Mwangi [DW1] was that he was a Deputy Director of Physical Planning, working in the Ministry of Land, Housing and Urban Development. He had worked in the Department of Physical Planning for 34 years. It was his evidence that the suit property was part of Ring Road, located near Kileleshwa Police Station. The suit property was at all material times a road reserve, having been set aside and adopted as a road reserve by the Ministry of Land vide **Base Map Sheet NE 22D**. The said road reserve was subsequently adopted as such through the approved Part Development Plan of the Area, **Reference No 42/23.95.19**. Once the road reserve was established and so declared through a part development plan by the Department of Physical Planning, it ceased to be available for alienation, subdivision or adverse dealing. Unless there was subsequent re-planning of the land where the suit property is located, the alienation of the suit property was irregular and illegal.

19. DW1 added that by dint of **Sections 22 and 27** of the **Physical Planning Act, Cap 296** of Kenya [now repealed], any amendments or alterations of an assigned user of property from a road reserve to residential property would only be valid with authorization by the Director of Physical Planning. The Department of Physical Planning had never approved any amendments to the original physical plan of the land. He added that there was no evidential materials placed before the court by the plaintiff to show how the suit property was converted from public land [public road reserve] to residential private land. It was the evidence of DW1 that the purported acquisition of the suit property by the vendors and the subsequent transfer of the land to the plaintiff were suspect, erroneous, irregular, illegal and contrary to public interest and void *ab initio*. He added that by dint of **Article 40(6)** of the Constitution, the plaintiff did not deserve protection. He stated that cancellation of the plaintiff's title was informed by the fact that the title was obtained fraudulently. It was the evidence of DW1 that the plaintiff had no legitimate right in the suit property and as such, no right to property had been violated by the defendants. He added that the plaintiff's claim for damages should be directed at the people who sold the suit property to them. DW1 added that the document attached to the letter of allotment was not a part development plan.

20. In his evidence in cross-examination, he testified that the Director of Physical Planning would prepare a part development plan at the request of the Commissioner of Lands. He added that it was the responsibility of the Commissioner of Lands to ensure that the process of alienation was followed.

21. On his part, Abdikadir Ibrahim Jatani [DW2] testified that he was a manager in charge of surveys at the Kenya Urban Roads Authority [the KURA]. The KURA had the statutory mandate of managing, developing, rehabilitating and maintaining all public roads in cities and municipalities. In 2011, the Government of Kenya decided to construct Ring Road to improve the transport system in Kilimani and Kileleshwa. At that point, it emerged that various people had encroached on the road reserve which measured 30 metres by procuring titles relating to the road reserve. With particular regard to this case, it emerged that the suit property which was part of the road reserve had been surveyed as LR No 209/14521 and a title had been issued under unclear circumstances. The suit property had been hived out of the road

reserve without any prior re-planning of the area to change the user of the land from public road reserve to residential property. In view of the encroachment, the Government, vide Gazette Notice No 9229, dated 29/7/2011, revoked all titles that were issued in relation to the public road reserve, terming the alienation of the public road reserve as illegal and unconstitutional. The general public was advised to remove all structures encroaching on the public road reserve. It was the evidence of DW2 that the plaintiff's claim that the suit property was compulsorily acquired was ill-advised and incorrect because the suit property was a public road reserve.

22. DW2 added that prior to 2011, the suit property was part of a planned public road reserve which did not have any structure thereon. It was his further evidence that there was an existing public tarmac road on the suit property. He produced Survey Plan No FR 56/5 which had been examined on 3/3/1950 and authenticated on 15/3/1950. He relied on Part Development Plan Number 269 dated 27/12/1995.

23. Through his written submissions dated 5/10/2021, **Mr Allan Kamau Njoroge**, the **Learned Principal State Counsel** appearing for the 2nd defendant, itemized the following as the issues falling for determination in this suit: (i) *Whether the suit property is a road reserve;* (ii) *Whether the suit property was lawfully alienated for private use;* and (iii) *Whether the plaintiff is entitled to the reliefs sought.*

24. On whether the suit property is a road reserve, counsel submitted that the 2nd defendant had placed before the court evidence demonstrating that the suit property was part of a public road reserve measuring 30 metres in width. Counsel submitted that Survey Plan Number FR 56/5 dated 15/3/1950 and Base Map Sheet NE 22D indicated that the land was set aside as a public road reserve in 1950 and measured 30 metres in width. He added that **Part Development Plan Ref Number 42.23.95** indicated that the suit property was part of the 30 metre road reserve. Counsel argued that the plaintiff had failed to lead evidence to demonstrate that there was physical replanning to change the user of the public road reserve so as to confer private rights in the public road reserve.

25. Counsel submitted that under **Section 42** of the repealed **Physical Planning Act 1996**, the suit property could not be legitimately alienated without an approved physical development plan. It was the position of counsel for the 2nd defendant that the title held by the plaintiff was illegal because it was procured in contravention of the requirements of **Section 42** of the Physical Planning Act 1996 (now repealed).

26. On whether the suit property was lawfully alienated for private use, counsel submitted that alienation was a process that had to comply with the requirements of the law. Counsel argued that the suit property having been planned as a road reserve, it could not be properly alienated without a re-planning.

27. On whether the plaintiff is entitled to the remedies sought, counsel submitted that the plaintiff would be entitled to the remedies sought only if the court were to find that its right to property had been violated. Counsel argued that the right to property is afforded only to legitimate owners of property. Citing the decision of the Court of Appeal in **Kenya National Highways Authority v Shalien Masood Mughal & 5 others [2007] eKLR**, counsel submitted that because the title held by the plaintiff related to a road reserve, the plaintiff was not entitled to the reliefs sought. Counsel added that the persons whom the plaintiff should pursue for relief are the vendors who sold to them the suit property.

28. Counsel argued that the title held by the plaintiff was acquired irregularly, unprocedurally, and through a corrupt scheme because: (i) it was processed without a part development plan; and (ii) immediately after the title was processed, a restriction was registered on the title only for it to be removed solely for the purpose of transferring the suit property to the plaintiff. Counsel argued that the restriction registered on the title was a red flag which should have served as a caution to the plaintiff. Relying on the Court of Appeal decision in **Chemey Investment Limited v Attorney General & 2 others [2018] eKLR** and **Funzi Island Development Limited and 2 others v County Council of Kwale & 2 others [2014] eKLR**, counsel urged the court not to give a seal of approval to an illegality by awarding the plaintiff compensation on the basis of the illegal title.

29. On the plaintiff's plea to the court to find unconstitutional the Gazette Notice revoking the plaintiff's title, counsel submitted that the circumstances of this case permitted this court to decline to grant to the plaintiff all the reliefs sought in the plaint. Counsel urged the court to dismiss the plaintiff's suit with costs to the defendants.

Analysis and Determination

30. I have considered the parties' pleadings, evidence and submissions. I have also considered the relevant legal frameworks and jurisprudence on the key issues falling for determination in the suit. Parties did not file an agreed common statement of issues falling for determination in the suit. Having looked at the parties' pleadings, evidence and submissions, the following are the four key issues falling for determination in this suit: (i) Whether Grant Number IR 87859, comprising of Land Reference Number 209/14521, held by the plaintiff, relates to a public road reserve; (ii) Whether the alienation of the said land and the procurement of the said Grant were lawful; (iii) Whether revocation of the said Grant by the Registrar of Titles through Gazette Notice No 9230 of 29/7/2011 was procedurally done; and (iv) Whether the plaintiff is entitled to the reliefs sought against the defendants. I will make brief sequential pronouncements on the four issues in the above order.

31. Issue number (i) and issue number (ii) are intertwined. I will therefore analyse the two issues and dispose them simultaneously. There is common ground that the Grant in this suit relates to land that currently forms part of Ring Road and is located near Kileleshwa Police Station. There is also common ground that through an allotment letter dated 1/10/1998, a **Mr P N Mutwiwa**, on behalf of the Commissioner of Lands, allocated the suit property to **Francis Karani Elijah Ndiguitha** and **George Njoroge**. The land was designated in the Letter of Allotment as **Plot No C Kileleshwa, Nairobi**.

32. A perusal of the letter of allotment reveals that in alienating the said land, the Commissioner of Lands was acting on behalf of an undisclosed **County Council**. The land is located in Nairobi. At that time, Nairobi existed as a city established under the Local Government Act (now repealed); it did not exist as a county council. On that note alone, it does emerge that the letter of allotment was irregular because there was no existing county council that authorized the Commissioner of Lands to alienate the land.

33. The plaintiff did not lead evidence by the allottees of the suit property to demonstrate the physical planning status of the land at the time they procured the allotment letter. The plaintiff did not, similarly, join the said allottees as parties to this suit, to demonstrate to the court the circumstances under which they procured the alienation and the impugned grant. Further, the plaintiff did not present evidence relating to any approved physical plan (part development plan) which formed the basis of the alienation of the land.

34. On his part, the Attorney General led evidence by DW2 who produced Survey Plan No FR 56/5 [Folio No 56 and Register No 5] bearing a road reserve on which the suit property is located. In addition, DW1 produced Part Development Plan Number 269 duly approved and bearing the said road reserve on which the suit property is located. DW1 testified that the suit property was part of Ring Road located near Kileleshwa Police Station. He added that the suit property was surveyed out of land that had been set aside and planned as a public road reserve. Further, DW1 stated that once the land was reserved as a public road reserve and so declared through an approved part development plan, it ceased to be available for alienation, subdivision or adverse dealing. The evidence of DW1 and DW2 was not, in my view, controverted. All the plaintiff did was to wave the impugned Grant and blame the Department of Lands for alienating the land and registering the transfer in their favour.

35. In my view, the totality of the evidence presented to the court by the Attorney General sufficiently demonstrates that the suit property was a public road reserve at the time the allottees procured an allotment letter in their favour. Similarly, the suit property was a public road reserve at the time the allottees procured a deed plan culminating in the generation of the impugned Grant which the plaintiff is now waving. It does therefore emerge that a public road reserve was alienated and a grant relating to the public road reserve procured by the allottees without regard to the mandatory requirements of **Sections 22, 27 and 42** of the Physical Planning Act 1996 (now repealed). For avoidance of doubt, **Section 42** of the said Act provided as follows:-

“(1) Subject to the provisions of the Government Lands Act (Cap. 280), the Trust Land Act (Cap. 282) and any other written law relating to the administration of land, no subdivision, consolidation, lease or renewal of lease of an unalienated Government Land or Trust Land or of a private land shall be effected without due regard being had to the requirements of the relevant physical development plan.”

36. The effect of procuring alienation of a planned and surveyed public road reserve without a fresh physical plan within the requirements of Section 42 of the Physical Planning Act 1996 is that the alienation was illegal and the resultant title was and remains a nullity. The suit property was and remains a public road reserve not available for alienation except in accordance with the law.

37. The plaintiff is waving the impugned grant and contending that once they have established that the grant was issued by the Department of Land, they have no other evidential obligation. I do not agree with that view. The plaintiff having come to court with a grant that was procured in relation to what was contended to be a public road reserve at the time of initiating the suit, they had the burden of demonstrating that the alienation and the grant they were waving were procedurally and lawfully procured. Indeed, the Court of Appeal in **Munyu Maina-Vs- Hiram Gathina Maina (2013) eKLR**, outlined the following principle regarding the duty of the holder of an impeached title:

“When a registered proprietor’s proof of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership; the registered proprietor must go beyond the instrument and prove the legality on how he acquired the title and show that the acquisition was lawful, formal and free from any encumbrances”

38. In **Chemey Investment Limited v Attorney General & 2 others [2018]eKLR**, the Court of Appeal outlined the following principle regarding the fate of a title that is obtained fraudulently or in violation of the provisions of the statute:

“Decisions abound where courts in this land have

consistently declined to recognize and protect title to land, which has been obtained illegally or fraudulently, merely because a person is entered in the register as proprietor. See for example Niaz Mohamed Jan Mohamed v Commissioner for Lands & 4 others (1196)eKLR; Funzi Isaland Development Ltd & 2 others ex parte Waa Shi Garbage Collectors & 15 others KLR (E&L) 1, 563; John Peter Mureithi & 2 Others v Attorney General 7 4 Others (2006) eKLR; Kenya National High Authority v Shalien Masood Mughal & 5 Others (2017)eKLR; Arthi Highway Developers Limited v West End Butchery Limited & 6 Others (2015) eKLR; Munyu Maina v Hiram Gathina Maina (2013)eKLR and Milan Kumarn Shah & Others v City Council of Nairobi & Others, HCCC No 1024 of 2005.

The effect of all those decisions is that sanctity of title was never intended or understood to be a vehicle for fraud and illegalities or an avenue for unjust enrichment at public expense.”

39. In **Kenya National Highways Authority v Shalien Masood Mughal & 5 others [2017] eKLR**, the Court of Appeal stated the following about the status of a title procured in relation to an illegal encroachment on a planned public road reserve:

“The fact of the matter is that there was in existence a road reserve before the disputed plot came into being in 2002 and it was not open for any authority to alienate it further for private development. The whole world ought to have been aware, as was ultimately established, that there was a road reserve of 80 meters and a buffer zone of 30 meters which did not in law have to be noted in any land register. It is an overriding interest and not an equitable interest.”

40. For the above reasons, it is the finding of this court that Grant Number IR 87859, comprising of Land Reference Number 209/14521, relates to a public road reserve. Further, it is the finding of this court that alienation of the land comprised in the said Grant and processing and issuance of the said Grant were not lawfully procured because the requirements of **Sections 22, 27 and 42** of the Physical Planning Act 1996 [repealed] were not complied with in the sense that there was no prior approved replanning to change the user of the land from public road reserve to any other user. I now turn to the third issue.

41. The third issue is whether revocation of the said Grant by the Registrar of Titles through Gazette Notice No 9230 dated 29/7/2011 was procedurally done. Revocation of the Grant was done after the promulgation of the Constitution of Kenya 2010. At that time, the plaintiff held a Grant which had been issued by the Department of Land. Article 47 of the Constitution of Kenya 2010 provided for the right to fair administrative action and defined fair administrative action as one which was expeditious, efficient, lawful, reasonable and procedurally fair. The import of this is that, notwithstanding the fact that the Grant held by the plaintiff was illegal, the plaintiff was entitled to due process.

42. The impugned revocation was carried out before the Land Registration Act 2012 was enacted. The 2nd defendant did not demonstrate any law which at that time gave the Registrar of Titles powers to revoke a title without following the due process. Indeed, superior courts have been categorical that prior to the enactment of the Land Registration Act, the Registrar of Titles and the Land Registrar had no powers to unilaterally revoke a title after the title had been issued. They had to follow the due process which at the time entailed obtention of a court order.

43. Secondly, there is no evidence to demonstrate that the plaintiff was given any hearing prior to the issuance of the Gazette Notice revoking the title. In my view, the revocation was unprocedural. That is my finding on the third issue. However, because I have found that the Grant held by the plaintiff was and remains illegal and a nullity, I will not nullify the impugned Gazette Notice. I will only award the plaintiff reasonable nominal general damages for the unprocedural revocation of the title, assessed at Kshs. 2,000,000/- [Two Million]. I now turn to the fourth issue.

44. The fourth issue is whether the plaintiff is entitled to the reliefs sought against the defendants. I have considered the eight prayers set out in the plaint. Having made the above findings, it follows that except for the nominal general damages arising from the unprocedural revocation of the said title, the plaintiff is not entitled to the other reliefs set out in the plaint as against the defendants. The plaintiff knew the people who procured the illegal alienation of the public road reserve together with the title which has been found to be a nullity. Regrettably, the plaintiff elected not to join the said persons as defendants in this suit. The two individuals who procured the illegal alienation of the public road reserve and procured the illegal title are the ones the plaintiff should pursue for relief, if indeed the plaintiff paid them consideration for the title. It is therefore my finding that the only relief the plaintiff is entitled to is an award of nominal general damages for the unprocedural revocation of the title which has now been adjudged to be illegal, null and void. The nominal general damages are assessed at Kshs. 2,000,000/- [Two Million].

Disposal orders

45. In the end, this suit is disposed in the following terms:-

a. The plaintiff, Igainya Limited, is hereby awarded nominal general damages of Kshs 2,000,000/- as a consequence of the Registrar of Titles unprocedural revocation of Grant Number IR 87859 comprising of LR No. 209/14521.

b. All the other prayers sought by the Plaintiff are rejected on the grounds that the said grant relates to a public road reserve; was issued irregularly and illegally; and is illegal, null and void.

c. Parties shall bear their respective costs of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 17TH DAY OF

JANUARY, 2022

B M EBOSO

JUDGE

In the Presence of: -

Mr Wamai for the Plaintiff

Ms Masinde for the 1st Defendant

Ms Fatma for the 2nd Defendant

Court Assistant: Phyllis Mwangi

NOTE:

This suit was fully heard before me when I was stationed at Nairobi (Milimani) Environment and Land Court Station. Subsequent to that, I was transferred to Thika Environment and Land Court Station. This is why, upon filing of submissions by the parties, the Presiding Judge of the Court directed that the file be transmitted to me to write and render a judgment.

B M EBOSO

JUDGE