



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND PETITION NO. 36 OF 2014

**IN THE MATTER OF ARTICLE 2, 10, 19, 20, 21, 22, 23, 24, 27, 40, 165 (3), 258 AND 259 OF THE
CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND PROTECTION
OF RIGHT TO PROPERTY UNDER ARTICLE 40 OF THE CONSTITUTION**

BETWEEN

THE COUNTY GOVERNMENT OF MIGORI PETITIONER

AND

THE REGISTERED TRUSTEES OF

CATHOLIC DIOCESE OF HOMABAY 1ST RESPONDENT

THE HON. ATTORNEY GENERAL 2ND RESPONDENT

THE NATIONAL LANDS COMMISSION 3RD RESPONDENT

RULING

Background;

The petitioner is a county government established under Article 176 of the Constitution of Kenya. The petitioner brought this petition as the legal successor of the defunct South Nyanza County Council that was all material times the registered proprietor of all that parcel of land known as **LR No. Kamagambo/Kanyajuok/71** measuring 8.6hectares (hereinafter referred to as “**the suit property**”). The petitioner has contended that as the legal successor of the defunct South Nyanza County Council, the ownership of the suit property vests in it. The petitioner has claimed that on or about 13th February 2014, the 3rd respondent caused the suit property to be transferred to the 1st respondent without the consent of the petitioner. The petitioner has contended that the transfer of the suit property by the 3rd respondent to the 1st respondent was irregular, fraudulent and illegal. The petitioner has claimed that following the said irregular transaction, the 1st respondent forcefully entered on the suit property on or about 16th October, 2014 and commenced construction of a building thereon without the permission or consent of the petitioner.

2. In its prayers to the court, the petitioner sought the following reliefs:-
 - a. **A declaration that the petitioner is entitled to protection of its right to property pursuant to article 40 of the Constitution.**
 - b. **An order compelling the 3rd respondent to revoke the transfer of the suit property to the 1st respondent and to restore the same to South Nyanza County Council, the previous registered owner thereof.**
 - c. **An injunction to restrain the 1st respondent, whether by itself, its servants, agents and/or servants from trespassing or cutting down trees on the suit property or in any manner interfering with the petitioner's possession, ownership and quiet enjoyment of the suit property or carrying out further construction thereon.**
3. **The application for conservatory orders:-**

Together with the petition, the petitioner brought an application by way of Notice of Motion dated 21st October 2014 under rules 23 and 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 seeking a conservatory order in the nature of an injunction to restrain the 1st Respondent, whether by itself, its servants, agents and/or representatives from trespassing or cutting down trees on the suit property or in any manner whatsoever interfering with the petitioner's possession, ownership, quiet enjoyment of the suit property or carrying out further construction thereon pending the hearing and determination of this petition. The petitioner's application was brought on the grounds set out on the face of the application and on the supporting affidavit of Thomas Kwanga Mboya sworn on 27th October 2014. The application was brought on the same grounds that are set out in the petition which I have highlighted at the beginning of this ruling. In his affidavit, Thomas Kwanga Mboya, the petitioner's legal advisor stated that since the suit property was registered in the name of the petitioner's predecessor and reserved for Kitere Primary School, the 3rd respondent had no power to transfer the same to the 1st respondent without the express consent or authority of the petitioner who is the legal successor to all the assets which were owned by the defunct local authorities falling within its jurisdiction.

4. The petitioner's application was opposed by the 1st respondent through a replying affidavit sworn on 8th December 2014 by Father John Abraham Ayieko. The 2nd and 3rd respondents did not respond to the petition and the application before me. In its affidavit that was filed in response to the petition and the application for conservatory order, the 1st respondent contended that it has been in occupation of the suit property since the year 1972 or thereabouts. The 1st respondent claimed that the suit property was donated to it for the establishment of Kitere Catholic Church by the area residents. Following that donation, it constructed and established on the suit property, Kitere Catholic Church, Kitere Primary School and Kitere Technical School which is now known as Kitere Youth Polytechnic. It also established Orthopedic Training and Rehabilitation Centre. The 1st respondent contended that Kitere Primary School and Kitere Youth Polytechnic are now registered as Public Institutions although the same were established and built by the 1st respondent. The 1st respondent contended further that the suit property was registered in the name of South Nyanza County Council as reserved for Kitere Primary School by mistake because Kitere Primary School has its own separate and distinct parcel of land known as **LR No. Kamagambo/Kanyajuok/1244** (hereinafter referred to as "**Plot No. 1244**"). The 1st respondent contended that when the land registrar discovered the said mistake, it took steps to rectify the same. It did this by rectifying the proprietorship section of the register of the suit property by cancelling the name of South Nyanza County Council and inserting the name of the 1st respondent as the proprietor of the said property but reserved for Kitere Catholic Church.
5. The 1st respondent contended that the petitioner's claim over the suit property had been considered and dismissed by Migori County Senior Land Registrar in a ruling delivered on 8th may 2014 which ruling has to date not been appealed. The 1st respondent contended that the building plans for the hostel being constructed by the 1st respondent on the suit property were duly approved by

the petitioner before the construction work complained of by the petitioner commenced. The 1st respondent contended that it has spent its own funds amounting to Ksh.25,000,000/= on the said hostel project and has secured additional funding in the sum of kshs.26,408,000/= from Co-operative Bank of Kenya Ltd. to enable it finish the said project. The loan advanced by the said bank is secured by a charge over the suit property which was registered on 19th September 2014. The 1st respondent contended that it has developed the suit property to the tune of kshs. 55,000,000/= excluding the new hostel whose construction is in progress which developments were carried out with the knowledge and consent of the petitioner's predecessor.

6. The 1st respondent contended that Kitere Primary School on whose behalf the suit property was purportedly held by the petitioner's predecessor has confirmed that the suit property belongs to the 1st respondent and that it has no dispute with the 1st respondent in respect thereof. Kitere Youth Polytechnic which is housed on the suit property has also declared support for the 1st respondent by confirming that the suit property belongs to the 1st respondent. The 1st respondent has contended that in causing the suit property to be registered in the name of the 1st respondent, the Migori County Land Registrar exercised powers conferred upon it by law and as such there was nothing illegal or irregular in his action which is the subject of the petitioner's complaint herein.
7. **The submissions by the parties;-**

On 9th December 2014, the parties agreed to argue the petitioner's application by way of written submissions. The petitioner filed its submissions on 15th December 2014 while the 1st respondent did so on 19th December 2014. In its submissions, the petitioner reiterated the contents of the petition and the affidavit filed in support thereof. The petitioner submitted that it is aggrieved by the fraudulent and illegal manner in which the suit property was transferred from its predecessor, South Nyanza County Council to the 1st respondent and consequently, it has moved the court to seek the protection of the law pursuant to Articles 23, 24 and 40 of the Constitution of Kenya. The petitioner has submitted that since the suit property is public utility land, it will serve public interest if the same is preserved pending the hearing and determination of this petition. The petitioner has submitted that the construction currently being undertaken on the suit property is prejudicial to the petitioner and as such should not be allowed to continue. The petitioner has submitted further that this petition would be rendered nugatory unless the orders sought are granted. The petitioner has submitted further that the transfer of the suit property to the 1st respondent was not sanctioned by the land control board. The petitioner has contended that 1st respondent's claim that the suit property was donated to it by the area residents has no basis.

8. The petitioner submitted further that the transfer of the suit property by the 3rd respondent to the 1st respondent was carried out in violation of the provisions of Article 67 (3) of the Constitution of Kenya and sections 5 (2) and 6 (2) of the National Land Commission Act, 2012. The petitioner submitted further that the land registrar did not comply with section 37 of the Land Registration Act, 2012 in the transfer of the suit property to the 1st respondent in that the suit property could only be transferred to the 1st respondent by the petitioner's predecessor who was the registered proprietor thereof and not otherwise. The petitioner has submitted further that the land registrar did not have power to rectify the register of the suit property in the manner it is alleged to have done. It submitted that the land registrar's power of rectification of the register is limited and does not extend to such rectifications that may materially affect the interest of a proprietor like in the present case.
9. In its submission in reply, the 1st respondent submitted that the petitioner has not established a prima facie case against it to warrant the granting of the conservatory order of injunction sought by the petitioner. The 1st respondent submitted that it is the registered owner of the suit property and that the petitioner has never been in possession of the suit property which has been under the 1st respondent's occupation since 1972. The 1st respondent has contended that South Nyanza County Council held the suit property in trust for Kitere Primary School and did not at any time have ownership rights over the said property. The 1st respondent submitted that since the suit property was held by the defunct South Nyanza County Council in trust for Kitere Primary School, the said council had no proprietary interest in the said property which can form a basis for

these proceedings.

10. The 1st respondent submitted further that although the petitioner is the legal successor to the defunct South Nyanza County Council, that fact alone does not confer upon it automatic right to own the assets of the said county council such as the suit property. The 1st respondent contended that it is the Transition Authority that has the mandate to provide mechanism for the transfer of assets of the defunct local authorities to county governments. The 1st respondent contended that the petitioner has not placed any evidence before the court to show that the Transition Authority has approved the transfer of the suit property to the petitioner. The 1st respondent contended that since the period for transition to devolved system of government has not lapsed, the body with the legal mandate to institute proceedings for recovery of land previously held by the defunct local authorities which has been alienated irregularly during the transition period is the Transition Authority. The 1st respondent submitted that the petitioner's alleged ownership rights over the suit property do not exist and as such cannot be protected.
11. The 1st respondent submitted further that it has occupied the suit property for over 40 years with the knowledge of the defunct South Nyanza County Council that approved its developments on the property over the years. The 1st respondent submitted that the building plans for the hostel which is being constructed on the suit property were approved by the petitioner before the commencement of the works which the petitioner now wants to stop. The 1st respondent submitted that the petitioner and its predecessor having approved the developments which the 1st respondent has carried out and is still carrying out on the suit property, the petitioner is estopped from bringing into question the legality of the said developments.
12. The 1st respondent submitted further that before a decision was made to rectify the register of the suit property, the land registrar gave all interested parties including the petitioner a hearing. The 1st respondent contended that whoever was aggrieved by the decision of the land registrar had a right under section 86 of the Land Registration Act, 2012 to appeal to the High Court which right the petitioner did not exercise before instituting these proceedings. The 1st respondent submitted that the petitioner has not given any explanation why it did not exhaust the appeal process before instituting this petition. The 1st respondent contended that in the absence of such explanation, this petition is an abuse of the process of the court. The 1st respondent submitted further that the petitioner has failed to demonstrate that the loss it is likely to suffer if the orders sought are not granted cannot be compensated in damages. This, the 1st respondent submitted is a condition precedent to granting the orders sought by the petitioner.
13. The 1st respondent submitted that even if the petitioner's application is considered on a balance of convenience, the same would tilt in favour of not granting the orders sought in view of the number of years the 1st respondent has occupied the suit property and its investment on the same. The 1st respondent contended that the orders sought if granted would seriously prejudice it. It has contended that it has a church building on the suit property which is serving its members in the area. It also runs the boarding section of Kitere Youth Polytechnic. The orders sought by the petitioner if granted would therefore bar it from accessing the premises to the great prejudice of its activities on the property. The respondent submitted that the petitioner has not explained how it will be prejudiced by the 1st respondent's continued use of the suit property pending the hearing of this petition. The 1st respondent submitted also that as stated above, it started the construction of the new hostel on the suit property after obtaining approval from the petitioner. Following the said approval, it entered into contractual arrangements with third parties in relation to the project which arrangements would be put in jeopardy if the orders sought are granted. The 1st respondent submitted further that the petitioner does not deserve an equitable remedy. The 1st respondent accused the petitioner of coming to court with unclean hands and of concealing and misrepresenting material facts.

14. Analysis of the parties' respective cases and determination of the issues arising:-

Article 22 (1) of the Constitution of Kenya gives every person a right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or is threatened. Sub-section 2 of the same article allows in addition to such person who acts in its own

interest, a person acting on behalf of another who cannot act on in its own name, a person acting as a member of or in the interest of a group or class of persons, a person who acts in the public interest or an association acting in the interest of one or more of its members to institute such proceedings for the enforcement of Bill of Rights. It is clear from the foregoing that the constitution has given legal standing not only to a person who has direct interest in the right or fundamental freedom said to be denied, violated, infringed or threatened to move the court for relief but also to other persons who may be acting among others in the interest of others or in the public interest. In the enforcement of the Bill of Rights, the hitherto strict rule of *locus standi* has been relaxed to give the public enhanced access the justice.

15. It is not in dispute that the suit property was at all material times registered in the name of the defunct South Nyanza County Council (hereinafter referred to only as “**the council**”) as the proprietor thereof. It is also not in dispute that the petitioner is the legal successor to the council. Under Article 62 (1) (b) of the Constitution, the suit property was at all material times public land. Article 62 (2) of the Constitution vests public land in the county government within whose jurisdiction it is situated to hold in trust for the residents of that county. The 1st respondent has argued that although the petitioner is the legal successor to the council, there is no evidence that the suit property had been transferred to the petitioner. The 1st respondent has argued that since transition to devolved system of government is still in progress, the suit property could only be transferred to the petitioner with the approval of Transition Authority established under The Transition to Devolved Government Act, 2012 and since the petitioner has not tendered any evidence of such approval, the petitioner’s ownership claim over the suit property has no basis.
16. As I have stated above, the suit property was public land the same having been held by the defunct South Nyanza County Council which is a State Organ as at the date of commencement of the constitution. The constitution vests such land in the county government to hold in trust for the public. I am not in agreement with the submission by the 1st respondent that the petitioner can only assume ownership of the suit property upon confirmation that it can do so by the Transition Authority. While I accept the submission by the 1st respondent that one of the functions of the Transition Authority is to prepare and validate an inventory of all existing assets and liabilities of the government and the defunct local authorities and to provide the mechanism for the transfer of such assets during the transition period, I don’t think that the said function extended the mandate of the Transition Authority to validating the proprietary interest of county governments in land previously held by the defunct local authorities the ownership of which was vested upon them by the constitution as aforesaid. I am of the view that as far as the land previously held by the defunct local authorities is concerned; the role of the Transition Authority is to secure the same and ensure that it is transferred to the county governments to hold in trust for the county residents as provided for in the constitution.
17. Due to the foregoing, it is my finding that the suit property was vested in the petitioner by the Constitution to hold in trust for the residents of Migori County and as such the petitioner has sufficient legal interest in the suit property. The petitioner therefore has a right to move the court to protect the said interest. As I have stated above, even if the petitioner had no direct interest in the suit property, it could still institute these proceedings in the public interest, taking into account the fact that the suit property was public land. In the circumstances, I find the 1st respondent’s objection to the petition and the application herein on account of the petitioner’s lack of proprietary interest in the suit property lacking in merit.
18. The petitioner has contended that in violation or breach of its constitutional rights guaranteed under Article 40 of the Constitution, the 3rd respondent caused the suit property to be transferred from the council to the 1st respondent without its consent or approval. The impugned transfer was effected on 13th February 2014. The petitioner has contended that the alienation of the suit property by the 3rd respondent to the 1st respondent was carried out in breach of Article 67 (3) of the Constitution of Kenya and section 5 (2) of the National Land Commission Act, 2012. The petitioner has contended that the 3rd respondent could only have alienated the suit property on behalf and with the consent of the petitioner and not otherwise. The petitioner has contended that since no such consent was sought and obtained, the alienation of the suit property to the 1st respondent was illegal and unconstitutional. It is on account of the foregoing that the petitioner has sought a declaration that it is entitled to protection of its right to property pursuant to Article 40 of

the Constitution and an order compelling the 3rd respondent to revoke the transfer of the suit property to the 1st respondent and to restore the same to the council. The petitioner has also sought an injunction to restrain the 1st respondent from trespassing on the suit property or in any manner interfering with the petitioner's possession, ownership and quiet enjoyment of the suit property.

19. In response to the petitioner's complaint, the 1st respondent has contended that the suit property was lawfully and regularly transferred to it. The 1st respondent has contended that the suit property was transferred to it not by the 3rd respondent but by the County Land Registrar, Migori County. The 1st respondent has contended that the suit property was registered in the name of South Nyanza County Council ("the council") as the proprietor thereof by mistake. The 1st respondent has contended that the suit property was donated to it by Kitere village residents for the establishment of Kitere Catholic church and as such the same should have been registered in the name of the 1st respondent instead of council. The 1st respondent has contended that when this mistake was brought to the attention of the County Land Registrar Migori, it took steps to correct the same under section 79 of the Land Registration Act, 2012. The 1st respondent has contended that the County Land Registrar heard all persons who were interested in the suit property before it made a decision to rectify the register of the suit property by cancelling the name of council as the proprietor of the same and replacing it with the name of the 1st respondent.
20. The 1st respondent has argued that the Land Registrar carried out the said rectification of the register in exercise of the powers conferred upon it by the Land Registration Act, 2012 and as such the exercise was lawful. The 1st respondent has argued that it assumed ownership of the suit property through rectification of the land register and not through transfer and as such the issue of the consent of the land control board or of the petitioner not having been obtained does not arise. The 1st respondent has argued further that the petitioner has no genuine grievance against the 1st respondent. The 1st respondent has submitted that the suit property was reserved for Kitere Primary School and was only registered in the name of the council to hold in trust for the said school. The 1st respondent has submitted that Kitere Primary school on whose behalf the suit property was held by the council is no longer in occupation of the suit property having moved to another parcel of land which is separate and distinct from the suit. The 1st respondent has submitted that the chairman of Kitere Primary School has sworn an affidavit to the effect that the school has no interest in the suit property. The 1st respondent has submitted further that the other occupant of the suit property, Kitere Youth Polytechnic has also disowned the petitioner and has through its chairman of the Board of Governors sworn an affidavit in support of the 1st respondent's title over the suit property. The 1st respondent has submitted that it has occupied the suit property for over 40 years while the petitioner has never been in occupation of the same. The 1st respondent has submitted that the petitioner will not be inconvenienced in any way by the 1st respondent's continued occupation and use of the suit property.
21. What I need to determine at this stage is whether the petitioner has made out a case for granting the conservatory order sought. The principles which guide the courts while considering applications for conservatory orders are now well established and include the following:
 - i. Conservatory orders are only issued in exceptional circumstances.
 - ii. An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the order, there is real danger that he would suffer prejudice as a result of the violation or threatened violation of the constitution.
 - iii. Before granting a conservatory order the court has to consider public interest.
22. In the Supreme Court case of **Gatirau Peter Munya –vs- Dickson Mwenda Kithinji & 2 Others**, **Supreme Court of Kenya Petition No. 2 of 2014** the court stated as follows on conservatory orders:-

“Conservatory orders, bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold

the adjudicatory authority of the court in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private party issues as “the prospects of irreparable harm” occurring during the pendency of a case or “high probability of success” in the applicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

23. The petitioner has not sought a “conservatory order” strictly so called. What the petitioner has sought is an interlocutory injunction. Considering the reliefs sought by the petitioner in the petition, I am of the view that although the petitioner has cited several provisions of the constitution that are said to have been violated by the respondents, the petitioner should have sought redress against the respondents through a normal civil suit. It should be noted that every civil wrong is a violation of some provision of the constitution and as such the mere fact that some provision of the constitution has been violated or infringed does not elevate a dispute which is purely of a civil nature to that for the enforcement of Bill of Rights. The foregoing notwithstanding, I would not shy away from determining the issues raised by the petitioner herein.
24. I am of the view that where a litigant brings a purely civil dispute to court through a constitutional petition, the principles to be applied to an application for interlocutory injunction brought in that petition would be the same as those that apply to applications for interlocutory injunctions sought in normal civil suits. However, since the applications for interlocutory injunctions which are anchored in constitutional petitions normally raise issues of violation of constitution rights, the court will in determining such applications take into consideration issues such as public interest and constitutional values mentioned in the case of **Gatirau Peter Munya vs. Dickson Mwenda Kithinji and 2 others (supra)**. As the parties have submitted, an applicant for an interlocutory injunction must establish a prima facie case with a probability of success and must also demonstrate that he stands to suffer irreparable harm which cannot be compensated in damages unless the order is granted. If the court is in doubt as to the above, the application would be considered on a balance of convenience. See, **the case of Giella vs. Cassman Brown & Co. Ltd. [1973]EA 358** which both parties have cited and the case of **Mrao Ltd. vs. First American Bank of Kenya Ltd. & 2 others [2003]KLR 125**.
25. On the material before me, I am satisfied that the petitioner has established a prima facie case with a probability of success against the respondents. It is not disputed that the suit property was at all material times registered in the name of the petitioner’s predecessor, South Nyanza County Council (hereinafter referred to only as “**the council**” where the context so admits). It is also not disputed that the suit property was transferred from the council to the 1st respondent on 13th February 2014. I am satisfied on a prima facie basis that this transaction was irregular, illegal, and unconstitutional. It is common ground that the transition to devolved system of government is still in progress. According to section 2(1) of the Transition to Devolved Government Act, 2012, the first phase of transition ended on 4th March 2013 while the 2nd phase would end on 4th March 2017. Section 35 (1) of the Transition to Devolved Government Act, 2012 imposed a moratorium on transfer of assets and liabilities of State Organs, public office, public entities and local authorities during the transition period save, in case of land (immovable property); where such transfer is approved by the Transition Authority. A copy of the register for the suit property which is a common document between the parties shows that the suit property was transferred to the 1st respondent. The words “Trans” appear against the 1st respondent’s name in the register in the column “consideration and remarks”. These words mean that the 1st respondent acquired the suit property through transfer. It is not clear from the record as to how the suit property was transferred to the 1st respondent. As the petitioner has rightly submitted, the suit property could only be transferred by the council that was the registered owner thereof. There is no evidence that any approval was sought and received from the Transition Authority for this transfer to be effected. Section 35 (4) of the Transition to Devolved Government Act, 2012 provides that any transfer of assets or liabilities effected during the moratorium period without the necessary approval mentioned above shall be invalid.
26. The 1st respondent has submitted that it acquired the suit property from the County Land

Registrar, Migori County through the process of rectification of the register under section 79 of the Land Registration Act, 2012. This submission is contrary to the evidence on record. As I have stated above, the register of the suit property shows that the 1st respondent acquired the suit property through transfer and not through rectification of the register as claimed by the 1st respondent. Secondly, the land registrar had no power under section 79 of the Land Registration Act, 2012 to transfer land from one proprietor to another through rectification of the register. As correctly submitted by the petitioner, the land registrar's powers to rectify the register are limited to specific situations. The land registrar has power to correct errors and omissions in the register only in formal matters and in cases where such correction does not materially affect the interest of any proprietor of land and, where all the affected parties consent to the correction. It has been submitted by the 1st respondent that the council was registered as proprietor of the suit property erroneously and that the land registrar was simply correcting an error by cancelling the name of council and replacing it with that of the 1st respondent. This is an outrageous submission. What the land registrar was engaged in here was an act of impunity and abuse of public office in its raw form.

27. When the land registrar purported to rectify the register of the suit property by transferring the suit property from the council to the 1st respondent, the council had held the suit property for over 36 years! When was the so called mistake or error discovered? When and how was it communicated to the land registrar? Considering the manner in which the whole transaction was carried out, the petitioner's contention that there was an element of fraud cannot be wished away. The land registrar had no power to cancel a title that was in the name of the council and purport to transfer or to register the suit property in the name of the 1st respondent in the guise of correcting an error in the register. The transaction was an absolute nullity. In the process, the land registrar violated the basic tenets of fairness which require that before a decision is made that would affect the interest of a person, that person must have notice and must be afforded an opportunity to be heard before the decision is made. The action by the land registrar violated the provisions of Article 10 of the Constitution on national values and principles of governance and Article 47 on fair administrative action.
28. The 1st respondent has contended that the petitioner was given a hearing before the decision was made to transfer the suit property to the 1st respondent and that it had a right under section 86 of the Land Registration Act, 2012 to appeal against the decision. This submission is baseless and out rightly false. As I have stated above, the suit property was transferred from council to the 1st respondent on 13th February 2014. The purported hearing was conducted by the land registrar on 23rd April 2014 after he had already cancelled the title of council. In its decision made on 8th May 2014, the said land registrar purported to declare the title held by the 1st respondent that was of his own creation as "valid" and the 1st respondent's ownership of the property "genuine and absolute". I wonder whether he had the power to make these declarations. The decision that was made by the land registrar on 8th May 2014 was not what informed his action on 13th February 2014 when he transferred the suit property to the 1st respondent. The petitioner who is challenging the decision that was made on 13th February 2014 without notice or consultation cannot therefore be told that it ought to have appealed the decision of 8th May 2014 first before coming to court. The case of **Republic –vs- National Environmental Authority [2011] eKLR** that was cited by the 1st respondent is distinguishable. The same is not applicable to the circumstances of this case.
29. The 1st respondent has also submitted that it has been on the suit property for the last 40 years and that it has developed the same over the years with the approval of the petitioner's predecessor and that the construction of the hostel being undertaken on the suit property was approved by the petitioner. All these averments are not contested. The issue however is this; did the 1st respondent's occupation of the suit property for that length of time justify the illegal and irregular manner in which the property was transferred to it? The answer is no. The law provides for the procedure of acquiring titles by adverse possession. The 1st respondent had to follow the due process if it felt that it had acquired any rights over the suit property as a result of its long occupation of the same. In view of the foregoing, I am persuaded that the petitioner has

established a prima facie case of violation of its constitutional rights.

30. Since the petitioner has sought an injunction, other considerations come into play as I have stated earlier in this ruling. Although the petitioner has established a prima facie case, injunction will not issue in his favour unless it satisfies the court that it stands to suffer irreparable harm which cannot be compensated for in damages unless the injunction is granted. According to the valuation report that was submitted to court, the value of the suit property (land and developments) was kshs. 55,000,000/= as at 18th August 2014. I have noted that the petitioner has charged the suit property to Co-operative Bank of Kenya Limited to secure a loan of kshs. 26,408,000/=. There is no evidence on record that the 1st respondent is capable of compensating the petitioner for the value of the suit property if the property is sold by the 1st respondent or by Co-operative Bank of Kenya Limited. The petitioner therefore deserves some measure of protection against such eventuality. The petitioner has also sought injunction to restrain the 1st respondent from entering the suit property and from in any manner howsoever interfering with the petitioner's possession or quiet enjoyment of the property. The petitioner has also sought an order stopping further construction on the suit property. According to the material before me, neither the petitioner nor its predecessor has been in possession of the suit property. The occupants of the suit property have been Kitere Catholic Church, Kitere Youth Polytechnic and Kitere Primary School. It has been claimed that Rongo University College also occupies a portion of the suit property. There is no evidence however before me of their occupation of the property. Kitere Primary School moved out of the suit property to a separate and distinct parcel of land. This left Kitere Catholic Church which is under the 1st respondent and Kitere Youth Polytechnic a section of which is run by the 1st respondent as the only occupants of the suit property. The petitioner and its predecessor having neither occupied nor used the suit property for over 40 years, I am not persuaded that the petitioner would suffer irreparable harm if the 1st respondent who has a church on the suit property and a hostel is not prevented from continuing with its activities on the suit property pending the hearing and determination of this petition. Regarding the ongoing construction of a hostel, I see no way in which the petitioner would suffer if the same is allowed to continue. The plans for the said hostel were approved by the petitioner. I don't think therefore that the said hostel is out of character with the suit property or its surroundings so as to qualify as a waste on the suit property. In the circumstances, it is my finding that whereas the petitioner has established a prima facie case against the respondents, it has failed to demonstrate that it will suffer irreparable harm which cannot be compensated in damages if the 1st respondent's current activities on the suit property are not stopped.

31. Conclusion

In conclusion, I am satisfied that the petitioner's application for injunction pending the hearing of the petition herein has merit. The injunction shall however not issue as prayed in the petitioner's application for the reasons that I have given above. I therefore allow the application dated 21st October 2014 on the following terms:-

- i. The 1st respondent by itself or through its agents, servants, employees or any person deriving title from the 1st respondent is hereby restrained from selling, transferring, leasing (save for the hostel), creating a further charge or mortgage, carrying out construction of new buildings (save for the ongoing construction of a hostel) or cutting down any trees on the suit property pending the hearing and determination of this petition.
- ii. The petitioner shall have the cost of the application.

Delivered, signed and dated at KISII this 20th day of March, 2015.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Agure Odera for the petitioner

N/A for the 1st respondent

N/A for the 2nd and 3rd respondents

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE