



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
E & L COURT PETITION NO. 13 OF 2013
FORMERLY PETITION NO. 2 OF 2011

MARIA SOTI EDUCATIONAL TRUST.....PETITIONER

vs.

REGISTRAR OF TITLES.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

AND

KENYA FOREST SERVICES.....1ST INTERESTED PARTY

KENYA ANTI-CORRUPTION COMMISSION.....2ND INTERESTED PARTY

JUDGMENT

1.0 INTRODUCTION

Maria Soti Educational Trust (**hereinafter referred to as the petitioner**) has brought the instant petition before the honourable court for determination pursuant to article 22, 40, and 50(1) of the Constitution of Kenya against **Registrar Of Titles and The Attorney General of Kenya (hereinafter referred to as the respondents), Kenya Forest Services, and the Kenya Anti-Corruption Commission who were joined as the interested parties** seeking remedies that It be declared that the revocation of title to the Petitioner's property title I.R No. 67900-LR 19054 by the first Respondent violates the petitioner's constitutional rights to protection of private property under Article 40 of the Constitution of Kenya and further, violates the petitioner's right to fair hearing before the petitioner is deprived of its private property in contravention of Article 40 of the Constitution of Kenya. That the said revocation of title to the petitioners property title I.R No. 67900-L.R No. 19054 was and is without a legal basis. She prays for permanent injunction to be granted to restrain the Respondents by themselves, their servants and/or agents from violating the petitioner's constitutional rights guaranteed under the constitution of Kenya by depriving the petitioner of its property Title I.R No. 67900-L.R 19054 and entering or trespassing thereon without the petitioner's consent. The petitioner prays for a permanent injunction be granted to restrain the Respondents by themselves, their servants and/or agents from violating the petitioner's constitutional rights guaranteed under the constitution of Kenya by making any claim to ownership of the petitioner's property Title I.R No. 67900-LR No. 1904 or seeking to limit or restrict the petitioner's enjoyment of the said property. Lastly, a mandatory injunction compelling the First Respondent to cancel the purported revocation of the petitioner's title I.R No. 67900-LR No. 19054 and

that the Respondents do pay the costs of this suit.

2.0 FACTUAL AND LEGAL ANALYSIS

2.1 Petitioners Case

The Petitioner in its petition dated 4th Day of February 2011 has alleged that it is a trust registered under the provisions of trustee (Perpetual Succession) Act Cap 164 Laws of Kenya. In its petition dated 4th day of February 2011 has stated that at all material times it was the registered and absolute proprietor of the suit land within the meaning of section 23 of the Registration of the Titles Act, Cap 281 Laws of Kenya (**repealed**). It is the petitioner case that it has constitutional rights over the suit land by dint of the provisions of article 40 of the Constitution. Petitioner in its petition has averred that the first respondent has deprived it the ownership of the suit land by purporting to revoke its title without giving it a fair hearing and as such infringing the provisions of Article 40 and 50(1) of the Constitution of Kenya 2010.

The petition is supported by the supporting affidavit sworn on 4th day of February 2011 by **Kipyator Nicholas Kiprono Biwot** the trustee of the petitioner. He depones that the petitioner is the lawfully registered owner of the suit property being Title I.R No. 67900-LR No. 1904. To this end the photostat copy of the title is attached and marked 'KNKB 2'. The deponent, Kiprono Biwot has deponed that the foregoing title was issued to the petitioner in accordance with the law under the provisions of section 23 of the Registration of Titles Act, Cap 281 Laws of Kenya. He swears that on advice of his counsel he verily believe that in addition of the petitioners title to the said property under the provisions of the Registration of Titles Act, the petitioner's is further protected under the provisions of Article 40 of the Constitution of Kenya, 2010

The petitioner through Kipyator Nicholas Kiprono Biwot has deposed that without any regard to the said provisions of Article 40 and 50(1) of the Constitution of Kenya, the Respondents have arbitrarily purported to revoke the petitioner's title to the said property and hence depriving the petitioners right to own the same. He has deposed that the 1st Respondent is a public officer and can only exercise powers conferred on him by law and hence the purported revocation of the said title *vide* Kenya Gazette Notice No. 15583 has no legal basis for want of authority as the 1st Respondent purports to exercise powers which he does not have under the law. The petitioner swears further that the said revocation was done without giving the petitioner a fair hearing. The petitioner through deponent has deponed that the petitioner acquired the suit land lawfully in accordance with section 4 of the Forest Act and hence the said suit land (property) duly belongs to the petitioner and is protected under Article 40 of the Constitution.

In his Further Affidavit sworn on 25th Day of November 2014, the trustee of the petitioner, **Kipyator Nicholas Kiprono Biwott**, has deponed that he is the donor and one of the trustee of the petitioner. He deposes that the petitioner is a Charitable Trust. It is deponed further that the property that forms the subject matter of the present proceedings is the property of the Trust and is used solely for the benefit of the trust and that the trustees have no personal interest in this property. It is deponed that when the Trust acquired the property that forms the subject matter of the present proceedings, there was a genuine error in the name that was entered on the Certificate of Title. It is deposed further that upon realizing the said error, and to correct the same, the trustees executed a Deed of Variation on the 17th November 2005 as evidenced by a copy annexed thereto which is now duly registered.

2.2 The 1st and 2nd Respondents Case

The 1st and 2nd Respondents, The Registrar of Titles and the Attorney General respectively are opposed to the instant petition. Through the replying affidavit sworn on 31st July 2014 by E.M Muchiri, the Respondents depose that the excision of the 100 Acres from Kaptagat forest land as had been directed by the former president, **Daniel Torotich Arap Moi** on 27.11.1990 was to be for the benefit of the public land for the setting up settlement and secondary schools. He swears that the area proposed for excision was apparently increased by the District Surveyor without any authority to 161.5 Ha, approximately 400 Acres. It is deponed that although the Minister complied with the provisions of the Forest Act Cap 385

Laws of Kenya by issuing a notice of intention to alter boundaries, and a notice for the alteration of boundaries, the process(es) required for allocation and subsequent issuance of any title to the land under the provisions of the Constitution of Kenya 2010, Government Lands Act, Cap 280 (Now repealed), Trust Land Act, Cap 288, Laws of Kenya, were not complied with and that the alleged title purportedly issued as Grant Number 67900 LR No. 19054 is irregular and invalid and does not in any event comply with the statutory instruments for grants. It is deposed further that the petition before the honourable court is incompetent, misconceived and no cause of action has been disclosed whatsoever against the respondents for the reasons elaborated at paragraph 24 of the replying affidavit.

The respondents deposed that having been advised by counsel on record, advice which they verily believe to be correct that the 1st respondent act in revoking the Title to the alleged land was and is valid, lawful and justified as the suit land had been excised for a public purpose namely the setting up of a public secondary school for Keiyo South Constituency and not for the alleged petitioner. It is deposed further that the parent ministry all along believed and it was clear from the earlier correspondence that the suit land was being exercised for the public purpose of settlement and setting up secondary schools for Keiyo South constituency and not for either the alleged petitioner's private purposes or the trust identified as Maria Soti Memorial Trust.

It is deposed that the entity or person alluded to is one Kipyator Nicholas Kiprono Biwott camouflaging as the petitioner, a non-legal entity for purposes of divesting land legally excised for a public purpose to his private benefit and purposes which was not the intention of the presidential directive given earlier. The respondents swear that the petition does not raise any iota of constitutional issues at all and the petitioner is/was in the extreme an illegal conduit for purposes of diverting the forest/public land. It is further deposed that no notice could have been issued to the Maria Soti Memorial Trust which is the legal entity registered as a Charity Trust in the Trust Deed made on 19-12-1998 and lodged with the Registrar of Documents 22-12-1998 as it was not the entity the alleged grant was issued to. It is deposed that in view of lack of any legal capacity by the petitioner, the issue of deprivation or ownership of the alleged property by the Respondents did not and cannot arise. It is deposed further that the suit land was excised for a public purpose and the land should in any event revert back to the public for intended purpose so as to achieve the objective of the initial excision.

2.3 1st Interested Party's Case

The 1st Interested Party, Kenya Forest Service, is opposed to the instant petition. Through the Replying Affidavit sworn on 23rd July 2014, by Solomon Mibey the 1st Interested Party deposes that the instant petition is incompetent, misconceived, fatally defective and even unconstitutional. It is deposed by the 1st interested party that the petitioner herein lacks capacity to bring these proceedings and that it has no *locus standi*. It is deposed further that even the purported parents of the said Maria Soti Girls Secondary School, the 3rd interested Party have no *locus standi* in this matter.

The 1st interested part swears that the petition is an effort by the petitioner and its trustees including Nicholas Biwott to retain public land they were illegally allocated and that the honourable court has a duty under the Public Trust Doctrine and other relevant law to protect public resources such as Forest and Public Land from encroachment and illegal allocations. It is deposed further that instead of 40 Hectares (100 Acres), the Ministry of Environment and Natural Resources *vide* Legal Notice No. 384 of November 1994 excised 161.54 Hectares (400 Acres) from the said Kaptagat Forest and that the land excised and which is being claimed by the said Maria Soti Memorial Trust through Mr. Nicholas Biwott its trustee comprises of 106 Hectares of mature cypress and pine plantations which belong to the Kenya Forest Service.

The 1st interested party swears that the said degazettement and subsequent excision of 161.54 Hectares (Approximately 400 Acres) of Kaptagat Forest and subsequent allocation to Maria Soti Memorial Trust was irregular, arbitrary and tainted with impropriety and illegality. It is deposed that the contested revocation of the Land Title L.R No. 19054 by the Registrar of Titles *vide* Gazette Notice No. 15583 of 26th November, 2010 is proper and should be upheld. It is deposed by the 1st Interested party that a part from the Notice to sue of the year 2002, a group of residents from the local clans in the year

2003 in their public petition dated 21/10/2003 petitioned the presidential Land Commission in which they accused Mr. Nicholas Biwott of depriving them of their traditional user rights of a large swathe of forestland for his family's use and that the said Mr. Nicholas Biwott had during the funeral of his late mother Maria Soti requested the head of the state for only 100 acres and not 400 acres.

2.4 2nd Interested Party's Case

The 2nd Interested Party, Kenya Anti-Corruption Commission is opposed to the instant petition. Through the Replying Affidavit sworn on 25th October 2013 by Emmanuel Arunga, the 2nd Interested party has deposed that the suit property was already alienated for public use or utility and hence the commissioner of Lands under the Government Lands Act can only alienate un-alienated public land. It is deposed further that the suit property was alienated to the petitioner on the strength of a letter from the District Commissioner and yet the said District Commissioner has no power in Law to alienate public land and hence the said purported alienation to the petitioner by the said District Commissioner, is null and void and conferred no interest whatsoever to the petitioner.

The 2nd interested party through Emmanuel Arunga, swears that the investigations it conducted reveals that proper procedures were not followed or adhered to in alienation of the suit property to the petitioner herein since there was no such authority or grant obtained from the Commissioner of Lands as required by law. It is deposed that since the suit property was not properly, procedurally and lawfully alienated, then the title to it cannot be indefeasible hence the same is null and void *ab initio* and that the same having been unlawfully acquired by the petitioner, a right to it is not therefore protected by the provisions of Article 40 of the Constitution.

2.5 3rd set of Interested Party's Case.

Apparently the 3rd set of Interested parties, Mariam Kesumo Kemboi, Biwot Tarus and Everlin Mwanzo, did not file any reply to the petition.

2.6 Submissions.

Petitioners Submissions

The instant petition was argued by way of written submissions which were highlighted by counsel for the parties. The petitioner through its advocates Shapley Barret & Co. Advocates, relied on their written submissions dated 26th day of November 2014 and filed in court on 27th November 2014. **Mr Karanja**, learned Counsel for the petitioner submitted that the fundamental issue that is raised for determination in this case is whether the revocation of the Title that forms the subject matter of the present proceedings was constitutional. It is submitted that the court should first determine or decide whether the process adopted leading to the revocation of the title to the suit land registration No. I.R No. 67900-L.R No. 19054 by the 1st Respondent was valid or constitutional before dwelling on the merits of the petitioner's title and other issues raised in the petition. Counsel submitted that the said revocation of the title was illegal, null and void and of no effect. To this end counsel relied on the case of **Isaac Gathungu Wanjohi and Another vs. The Attorney General and 6 Others, [2012]eKLR, H.C at Nairobi, Constitutional Case No. 154 of 2011** where it was held *inter alia* that the finding of 'unlawful acquisition' referred to in Article 40(6) of the Constitution must be through a legally established process and not by whim or Gazette Notice as the Commissioner of Lands purported to do and definitely not by forcefully taking of possession. On 4th December 2014 Advocates for the Petitioner also filed Petitioner's List of Authorities dated 3rd December 2014 which comprises the following case law;

Issac Gathungu Wanjohi 7 Another vs. The Hon. Attorney General & 6 Others [2012]eKLR, High Court at Nairobi. Petition No. 154 of 2011, Ibid. Electrical Options Limited v. Attorney General & Another [2012]eKLR, High Court at Nairobi, Petition No. 23 of 2011, where the learned judge Majanja J. cited Article 40 of the Constitution and made a finding to the effect that the state had breached the said article 40 by reversing the acquisition of the suit land without notifying the petitioner. In **Power Technics Limited v. The Hon. Attorney General & 2 Others [2012]eKLR, H.C at Nairobi Petition No. 178 of 2011**,

the learned judge Majanja J. observed that the issue of the constitutionality of the revocation of titles by the registrar was decided in *Kuria Greens Limited v. Registrar of Titles and Commissioner of Lands Nairobi*, [2011]eKLR, H.C Petition No. 107 of 2010, also filed by the petitioner herein, where the learned judge Musinga J. held that the Registrar has no authority under the Registration of titles Act to revoke the titles. In the foregoing case, the Registrar had issued a Notice in the Kenya Gazette titled, Notification of revocation of Land Title' where he purported to revoke certain titles on the basis that they had been reserved for public purpose under the provisions of the Government Lands Act (Chapter 280 of the Laws of Kenya) and the Trust Land Act (Chapter 288 of the Laws of Kenya).

In *Emange Se-Semata Investments Limited v. Attorney General & 4 Others* [2012]eKLR, H.C at *Nairobi, Petition 224 of 2010*, the learned judge Mumbi Ngugi J. held that the 4th respondent in the foregoing case, The District Land Registrar Nairobi, had no power to revoke the petitioners title by way of Gazette Notice and that the said act is unconstitutional null and void for breach the petitioners right to a hearing. However the leaned judge observed that her findings in the foregoing matter were confined to the procedural aspects with regard to the revocation of the petitioner's title by the said Gazette Notice.

In *Republic v. Kisumu District Lands Officer & Another* [2010]eKLR, H.C at *Kisumu Miscellaneous Application 80 of 2008*, the learned judge Ali-Aroni relied on the holding in *Republic v. Knigila Land Registry and Chief Land Registry, Misc. Civil Appeal No. 110 of 2006*, where the learned judge Serгон J. held that land registrar has no power to cancel a title deed which has been issued whether lawfully or otherwise. In *Omondi v. Secretary General Kenya Management Staff Association* [1982]eKLR at 223- 227, the learned judge Nyarangi J. held that the title of the defendant is really a misnomer. The intention of the plaintiff was to sue his employer for wrongful removal from his employment. And lastly the petitioner has relied on the case of *Arjan Sigh Hira Singh Matharu v. Italia Constuction Co. Ltd and Another* [1964]E.A, at 1-2, where the High of Tanganyika held that upon a fair reading of the plaint it was the plaintiff's intention to sue the persons who were the partners in the firm at the material date.

Respondents Submissions

1st and 2nd Respondents through the state law office relied on the written submissions dated 20th January 2015 and filed in court on 21st January 2015. **Mr Odongo** the learned State Counsel strongly submitted on Whether petitioner had capacity to institute or maintain this petition. He submitted that the petitioner did not and does not exist in law or at all due to the fact that the petitioner is presented in the petition as **Maria Soti Educational Trust** which is described as a trust registered under the provisions of the Trustee (Perpetual Succession) Act Cap 164 Laws of Kenya and yet the Trust Deed and Certificate of Incorporation shows that the trust created and incorporated was **Maria Soti Memorial Trust**. It is submitted further that given the fact that the petitioner does not exist, it was unable to purport to allocate or transfer the suit property to a non-existent amorphous body like the petitioner herein. Counsel for the respondents submitted further that allocation of the suit land to the petitioner was irregular, improper, void and nullity *ab initio* as the petitioner was not capable of acquiring the suit property for non-existence. To this end counsel cited and relied on the holding in *Republic v. Senior Registrar of Titles, Mombasa & 2 Others Ex-Parte Comen Ltd, H.C at Mombasa Misc. Application No. 70 of 2010* where according to the counsel the court held that the title that was issued to Comen's Ltd before it was incorporated as a company was issued to a non-existent legal person and hence was *void ab initio*. (This authority was not supplied to the court).

It is submitted further that the petitioner, who was unknown in law, could not and cannot purport to confer on itself proprietary interest and that the petitioner admitted the foregoing irregularity when it sneaked into the record a further affidavit sworn by the said Kipyator Nicholas Kiprono Biwott without the leave of the court. Counsel submitted that the said affidavit together with annexures thereon ought to be expunged forthwith. It is submitted that even if the court declines to expunge the said further affidavit, it is self defeating due to the reasons that the deponent admits that it was wrong to register the suit property in the name of the petitioner who was not a legal person known in law and could not own the suit property and secondly, there was no cogent and reasonable explanation for the delay of registering the Deed of Variation which was executed on 17.11.2005 and registered on 19.11,2014 after the filing of

the instant petition.

Counsel submitted further that the deed of variation itself is fatally defective as it is purportedly signed by a person who is not a duly registered trustee. Counsel for the Respondents has argued in his written submissions that the trust deed made on 19-12-1998 and registered on 13-6-1999 had two trustees namely Kipyator Kiprono Biwott EGH and Manilal Premchand Chandaria while the Deed of Variation alleges that the names of trustees are Kipyator Nicholas Kiprono Biwott EGH and Catherine Johanna Kiprono Biwott. It is submitted that by dint of clause 3 of the Certificate of Incorporation required that the appointment of every new trustee ought to be certified to the Minister for Lands and Housing in writing and yet there is no iota of evidence to explain how and when the said Catherine Johana Kiprono Biwott became a trustee and that consequently she has no capacity to execute the deed of variation.

On *Whether Petition is incompetent and bad in law*, counsel for the Respondents has submitted that the instant petition is fundamentally defective. He submitted that the petitioner failed to annex duly sealed resolutions of the Trust authorizing the petitioner to institute or maintain these proceedings. It is submitted that neither did the petitioner prove that the Trust appointed the firm(s) on record to institute these proceedings nor the Trust duly authorized Kipyator Nicholas Kiprono Biwott to swear the affidavits herein on its behalf. To this end he cited the provisions of Order 4 Rule 1(4) of the Civil Procedure Rules which states that where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company. Counsel submitted that the instant petition and the entire proceedings herein are fundamentally defective and incompetent for lack of capacity on the part of the petitioner and for want of compliance.

On *Whether allocation of the suit property was procedural, lawful and proper?* Counsel for the Respondents has submitted that although the Minister may have complied with the Forest Act in relation to degazettement of the suit property from Kaptagat Forest and hence excising the inflated 140 acres pursuant to section 4 of the Forest Act, the consequential processes that led to issuance of the grant to the petitioner were, to say the least, flawed, irregular and void. It is submitted further that once the said land was reserved for public utility was deemed to have been alienated and was not available for allocation to the petitioner. It is submitted that by dint of the provisions of both the Government Land Act (now repealed) and Physical Planning Act, unalienated government land means 'land which is not for the time leased to any person, or in respect of which the commissioner of lands has not issued any letter of allotment or reservation'. Counsel submitted that it follows therefore that land reserved for a particular public purpose is alienated government land and is not available for the further allocation. To this end counsel relied on the case of *Kipsirgoi Investments Ltd v. Kenya Anti-Corruption Commission, Court of Appeal at Eldoret, Civil Appeal No. 288 of 2010, (Unreported)*.

Counsel submitted further that the Commissioner of lands lacked capacity to allocate public land to the petitioner to advance private rather than the intended public interest. To this end counsel cited the case of *Funzi Island Development Limited & 2 Others v. County Council of Kwale & 2 Others [2004]eKLR, Court of Appeal at Mombasa, Civil Appeal No. 252 of 2005*, where according to the counsel it was held that where it is apparent that the setting apart of the land was obtained by misrepresentation that the land was for public purpose when the real intention was to benefit an individual, the setting apart and grant obtained by such misrepresentation shall be invalid and consequently, no good title can be conferred.

Counsel also cited the case of *Republic v. Land Registrar Kilifi & Another Ex-Parte Daniel Ricci [2013]eKLR, E&LC at Malindi JR Application No 6 of 2012*, where according to the counsel the court held that where public land is allocated to a private person, the court cannot recognize such a title when the public interest in the property outweighs individual's right to own the same property. It is submitted further that even if the suit property was not set apart for public purpose which is not the case, the commissioner of lands cannot purport to allocate such lands to a non-existent entity. Counsel argues that the petitioner failed to demonstrate that indeed it existed at the time of allotment.

It is submitted that the purported allocation violated the mandatory requirement of the Government Lands Act (now repealed). Learned Counsel submitted that the petitioner failed to prove that

it applied for allotment or was issued with a letter of allotment or paid requisite fees or complied with requirements of allocating agricultural land including but not limited to obtaining consent from area Land Control Board. To this end counsel relied on the case of Funzi Island Development Limited & 2 Others v. County Council of Kwale & 2 Others [2004]eKLR, supra, where according to the counsel it was held that non-compliance with mandatory procedural requirements under the Trust Land Act renders the setting apart *ultra vires* and subsequent grant illegal.

It is submitted further that the grant which was issued as a result of the alleged allocation is suspect and defective in form and substance. It is argued that the title allegedly issued to the petitioner was in pursuance of surrender at the Government Lands Registry as L.R No. 6535/12 and yet the petitioner failed to show the alleged surrender document in whose title the Grant IR No. 67900 flows. It is submitted that the suit property arose from a gazetted forest hence no surrender. Counsel urged the honourable court to hold that the purported allocation of the property to the petitioner was irregular, invalid and *void ab initio*.

On Whether a good title was passed? Counsel submitted that the creation of title has to accord with the applicable law. To this end counsel relied on the case of Kipsirgoi Investments Ltd v. Kenya Anti-Corruption Commission, supra, where the Court of Appeal held that no good title passes when an alienated public land is subjected to a further allocation as that land is no longer available for further alienation. Counsel also relied on the case of Republic v. Land Registrar Kilifi & Another Ex-Parte Daniel Ricci [2013]eKLR, H.C E&LC at Malindi JR Application No. 6 of 2012, where the court held that a title deed is an end product of a process and that for a title deed to be protected by Article 40(1) of the Constitution, the holder of the title deed has to establish that he followed the laid down procedure in acquiring it. Counsel relied further on the case of Scott v. Brown (1982) QB 724 where it was held that no court ought to enforce an illegal contract or allow itself to be made an instrument of enforcing obligations alleged to arise out of an illegal transaction, if the illegality is duly brought to the notice of the court.

It is submitted that in Funzi Island Development Limited & 2 Others v. County Council of Kwale & 2 Others, supra, it was held that in the case of allocated land, a registered proprietor acquires an absolute and indefeasible title if and only the allocation was legal proper and regular. Counsel submitted further that a court of law cannot, on the basis of indefeasibility of title, sanction an illegality or give its seal of approval to an illegally or irregularly obtained title. Counsel argued that section 23 of Cap 281, (repealed), only protects a certificate of title but not a grant. To this end counsel cited the Funzi case, ibid, where the court held that the protection envisaged under section 23(1) of the said Cap 281, refers to a certificate of title issued to a purchaser.

Counsel has submitted that under section 23 of Cap 281 a grant is not an instrument of title and that prior to its registration under section 22 of Cap 281, a grant did not confer any proprietary interest to the holder thereof. To this end counsel cited section 22(1) of Cap 281. It is submitted further that under section 23 of Cap 281, it is only the certificate of title issued under section 22 of Cap 281 that conferred an absolute title if and only the allocation was proper. To this end counsel cited section 23(1) of Cap 281. Counsel submitted further that the petitioner did not hold a title known in law and recognized under section 23 of Cap 281 capable of being protected by Article 40 of the Constitution.

On Whether the 1st Respondent has powers to revoke title through a gazette notice? Counsel for the Respondents has submitted that the petitioner did not hold a title worthy any legal protection and that even if there existed any title thereof, the same was illegally and irregularly acquired and hence could not confer any proprietary interest to the petitioner. To this end counsel relied on the case of Sisters of Notre Dame De Namur Registered Trustee v. Attorney General & 2 Others (2014) eKLR, H.C at Kisumu, Petition No. 151 of 2012, where court held that failure to pass good title, no proper rights under the constitution or any other statute ever existed. Counsel also cited the case of Republic v. Senior Registrar of Titles, Mombasa & 2 Others Ex-Parte Comen Ltd, H.C at Mombasa Misc. Application No. 70 of 2010 supra, where the court held that the act of issuing title to non-existent person was *void ab initio*. Counsel also relied on the case of Macfoy v. United Africa Company Limited (1961) 3 ALL ER 1169, where the court held that an action done without the backing of due process is *void ab initio* and does not require a

court order to declare it so.

It is submitted that the 1st Respondent had every power to cancel or revoke an illegally acquired title. The Government Land Act, Cap 280, under which the gazette notice was issued, was instrumental. To this end counsel cited **section 120 of Cap 280** and noted that the foregoing sections empower registrar to correct errors and supply omissions in the register. Counsel argued that the impugned grant was issued under Cap 281 whereby **section 59(1) of Cap 281** empowered the 1st Respondent to cancel any title issued to a fictitious or non-existent person without reference to court. It is further submitted that the petitioner cannot claim breach of Article 50 of the Constitution since in the first place it did not exist and there is no way the petitioner could be heard and that the 1st Respondent could only have complied with section 60 of Cap 281 if and only the petitioner was an existing legal person. To this end counsel relied on the case of Republic v. Senior Registrar of Titles, Mombasa & 2 Others Ex-Parte Comen Ltd, H.C at Mombasa Misc. Application No. 70 of 2010,ibid.

Counsel submitted further that the holding in Kuria Greens Limited vs. Registrar of Titles & Another (2011)eKLR and all authorities relied upon by the Petitioner can be distinguished from the facts of this case. Counsel argued that in all the authorities relied upon by the Petitioner, a court order was mandatory as the impugned titles therein were registered in the names of existing legal persons unlike in the instant case where the suit property was *prima facie void* as the alleged petitioner did not exist.

And the last issue raised by the Respondents counsel is Whether orders sought should be granted? It is submitted that by allowing this petition, this court will be condoning grabbing of public land by high profiled individuals. Counsel urged the court to dismiss the petition with costs.

1st Interested Party's Submissions

The 1st interested party appears to have been represented by two firms of advocates. This is so because there are two sets of submissions filed by the two different firms appearing for the 1st interested party. The first set of submissions are dated 18/12/2014 filed by Kalya & Co. Advocates on the same date and the second set of submissions are dated 5th day of January 2015 and filed in court on 6th Day of January 2015 by Sifuna & Sifuna Advocates.

Submissions by Kalya & Co. Advocates

It is submitted that the suit property was alienated Government Land for the purposes of the forest development and hence cannot be allocated to individuals and companies unless public interests dictates so. It is submitted that indeed the petitioner admits that the suit property is now a private property which is contrary to the public policy out of which the allocation could be made and that that is the reason as to why the community opposed this acquisition from the very beginning and their opposition should have been respected. It is submitted that the allocation and degazettement of the suit property was grounded by a lot of arbitrary decisions and irregularity and that this court should not assist the petitioner in sealing such an irregular action. To this end they relied on the case of Republic v. Land Registrar Kilifi & Another Ex-Parte Daniel Ricci [2013]eKLR, supra, where the court held that where public land is allocated to a private person, the court has an obligation not to recognise such a title, because as it has been said time and again, public interest in a property will always outweigh an individual's right to own the same property.

Submissions by Sifuna & Sifuna Advocates.

Counsel attacked the petitioners pleadings and submitted that the said pleadings have introduced two contradicting documents. It is argued that there is a deed with trust entity called **Maria Soti Memorial Trust** and also there is a deed of variation of Trust purporting to change the name of the said trust from **Maria Soti Memorial Trust** to **Maria Soti Educational Trust**. It is argued that the further affidavit that introduces the said variation of the said name was filed without the leave of the court and hence contravenes Rule 21(2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013.

It is submitted that this honourable court should not allow a party to panel beat its petition or sneak into the petition new evidence through the back door. Counsel cited the decision in Benjamin Ongunyo Andama v. Benjamin Andola Andanyi & 2 Others [2013]eKLR, H.C at Kakamega Election Petition No. 8 of 2013, where, the High Court being confronted with the similar situation struck out further affidavits. Counsel also cited a Nigerian case, Chief Onwuka Kalu (a.k.a) Okpuzu v. Dr. Kai Johnson Uzor & Others-suit No. CA/PH/EPT/3/7/05, where the court held that parties were bound by their pleadings and were not allowed to set up in court a case which was at variance with their pleadings.

Professor Sifuna of Sifuna & Sifuna Advocates, has tendered his written submissions based on the various issues as outlined here below; **That the Petition is incompetent, misconceived and fatally defective**. It is submitted that the said defects cannot be described as mere technicalities as they are mandatory requirements of the law. It is argued that Article 50 of the Constitution cannot protect the petitioner as the said revocation was not before a court of law or other tribunal body but was done by the registrar as a public officer. It is submitted further that the instant petition is signed by an anonymous human being and yet it is a requirement in law that the directors and or trustees of the trusts for that matter on signing the documents must indicate their names.

That the Petitioner lacks capacity and also locus standi. It is submitted that the petitioner has neither the capacity to bring this proceedings nor the locus standi. It is argued that the petitioner failed to file with the petition any constitutive document in respect to itself, such as trust deed or certificate of incorporation or certificate of registration to show that it is a legal entity with capacity to sue. It is further submitted that a Trust unlike a limited liability company lacks a corporate legal personality of itself lacks capacity to bring proceedings in its own name and may only file proceedings through and in the names of its Trustees. On *locus standi*, it is submitted that from the Grant filed with the petition the grant of land parcel IR No. 67900 was made to Maria Soti Memorial Trust and not Maria Soti Educational Trust and therefore only Maria Soti Memorial Trust could have locus to file this petition, and Maria Soti Educational Trust being a total stranger to the said grant and lacks locus to challenge in court revocation of title in respect of Maria Soti Memorial Trust. Counsel argued that the instant petition was filed by a non-existent entity.

That the excision and subsequent allocation of land parcel LR No. 19054 (Grant No. IR 67900) to the petitioner was irregular and illegal. It is submitted that the instant petition is an effort by the petitioner and its trustee including Nicholas Biwott a former powerful politician to retain public land they were illegally allocated. It is submitted that it is trite law that the courts have held that allocation of public land such as in this case should be for public uses only and not for private entities like in this case Maria Soti Girls Secondary School is registered as a private school which is for profit and not a public school. It is submitted further that this honourable court has a duty under the public Trust Doctrine and other relevant law to protect public resources such as Forests and Public Land from encroachment and illegal allocations. To this end counsel relied on and cited various cases which include the following; in the case of John Peter Mureithi & 2 v. Attorney General & 4 Others [2006]eKLR, H.C at Nairobi, Misc. Civil Appn No. 158 of 2005, where the court held that a title for a grabbed land and more so of a public utility ought to be nullified and thrown into the dustbins. In Republic v. Land Registrar Kilifi & Another Ex-Parte Daniel Ricci, [2013]eKLR, supra, the court held inter alia that the provisions of Article 40(6) of the Constitution with regard to rights of an individual under Article 40(1) do not extend to any property that has been found to have been unlawfully acquired.

That the Grantee breached the Special Conditions of the Grant. It is submitted that after being allocated the said land, the said Maria Soti Memorial Trust ought to have used the land only for the purpose for which it was allocated as per the Grant/Certificate of Title, namely for Agricultural Purposes only and not for educational center as the case herein and hence due to the said failure, the grantee will lose the right to retain title to the land and the grant may be revoked. Lastly, it is submitted that in view of the foregoing reasons, the petitioner is not entitled to any of the Orders sought therein.

2nd Interested Party's Submissions

The 2nd Interested Party, the Kenya Anti-Corruption Commission has filed two sets of

submissions. The first one is dated 10th February 2014 and filed in court on 11th February 2014. The second set is Further written submissions dated 21st January 2015 and filed in court on 22nd January 2015. In the first set of submissions the 2nd Interested party through its counsel **Christine Natome** has submitted that the Kenya Anti-Corruption Commission, the 2nd interested party herein has statutory mandate under section 7(1) (a) (b) (h) of Anti-Corruption and Economic Crimes Act, to investigate any matter or conduct of any person, which may constitute corruption or economic crimes.

It is submitted further that the 2nd Interested Party has also powers to investigate any liability for loss or damages to public property and can institute civil proceedings against any person for recovery of such property and hence such investigations do not infringe the petitioner's right in contravention of Article 40 of the Constitution of Kenya. To this end counsel relied on the case of Anarita Karimi Njeru v. Republic [1976-80] 1KLR 1272, where the court held that if a person is seeking redress from the High Court on a matter which involves a reference to the constitution, it is important, if only to ensure justice is done to his case, that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed.

Counsel has submitted that the Petitioner lacks capacity to lodge this petition. It is argued that the proceedings before this court have been brought by the Petitioner Maria Soti Education Trust and yet there is no evidence that the said petitioner is duly registered under the requisite provisions of Law to bestow on it legal status. Counsel submitted that the certificate for incorporation of Maria Soti Memorial Trust attached to the petition herein is different from the petitioner. It is submitted that the issue of locus goes to the jurisdiction of the court and it is of preliminary importance. Counsel cited the case of Housing Finance Company of Kenya Ltd v. Embakasi Youth Development Project [2004]2KLR 548 where the court stated that only a juristic person, that is an entity endowed with legal personality can have locus standi before the court and be the subject of rights and liabilities as may be declared by the court. The court noted that court orders are not made in vain and are intended to be executed and that such execution is only possible in relation to entities endowed with legal personality. The court held further that the notion that an entity lacking legal personality can seek orders of the court or become the bearer of rights or liability declared by the court, is totally inconsistent with the character and modus operandi of the courts in common law system. Counsel also relied on the case of Outdoor Advertising Association of Kenya v. Nairobi City Council and 2 Others [2005]eKLR, H.C at Nairobi, (Milimani Commercial Court) Case No. 131 of 2003, where the court observed that rules of law must be observed.

It is submitted that the suit property was illegally acquired. Counsel submitted and argued that the suit property which was public property belonging to the Kenya Forest services was illegally alienated. Counsel submitted that in view of the affidavit sworn by Emmanuel Arunga, it is clear that the suit property herein was allocated to the petitioner by the then Senior District Commissioner Keiyo District and yet the said District Commissioner has no powers under the law to alienate public land to anyone. To this end counsel cited the case of Joseph N.K Arap Ngok v. Moiwo Ole Keiwua & 4 Others [1997]eKLR, C.A. at Nairobi, Civil Application No. 60 of 1997, where it was held that landed property can only come into existence after issuance of a letter of allotment.

It is submitted that the illegal alienation of public land vested in a public body could not confer any estate or interest to the petitioner because the allocation, transfer and registration in respect to the suit property to the petitioner were null and void ab initio and is a nullity. To this end counsel relied on the case of Macfoy v. United Africa Company Ltd [1951]3 All E.R 1169, supra where it was stated that if an act is void, then it is in law a nullity and that it is not only bad, but it is incurably bad. Counsel submitted that the property rights under article 40 of the constitution are not absolute but have exceptions under article 40(6). It is further submitted that it would be against public policy for the court to lend a hand to illegal acquisition of public property. It is submitted that the issuance of the title deed to the petitioner was an illegality. To this end counsel cited the case of National Bank of Kenya v. Ayah [2009] KLR, 762 where the court stated that it is public policy that courts should not aid in perpetuation of illegalities.

The 3rd set of Interested Parties

The 3rd set of Interested parties which include Maria Kesumo Kemboi, Biwott Tarus and Everline

Mwanzo filed their written submissions dated 14th January 2014 through Ledisha J.K Kittony & Company Advocates who through Mrs Kipseii submitted that they are some of the parents of the petitioners institution representing the interests of the students and all other parents. Counsel submitted that by dint of the provisions of Articles 53(1)(b) and (2), of the Constitution the students in the petitioners school are entitled to compulsory basic education and hence the attempt by the 1st Respondent to cancel the title documents is a malicious attempt to take away the said constitutional right.

2.7 Issues For Determination

Each party appears to have come up with a litany of issues for determination. Having gone through all the issues raised by the respective parties together with their rival submissions, I find that the following are the salient issues for deliberation and determination;

1-Whether the petitioner has Capacity/Locus Standi to institute the instant Petition?

2-Whether the Petition is fatally defective?

3-Whether the suit property herein was lawfully and legally acquired?

4-Whether the title herein was lawfully and legally revoked?

2.8 Disposition

Whether the Petitioner Has Capacity/Locus Standi to Institute the Instant Petition?

The petitioner *vide* its petition dated 4th day of February 2011 describes itself as a Trust registered under the provisions of Trustee (Perpetual Succession) Act Cap 164 Laws of Kenya. In the Affidavit in Support of the Petition sworn by Kipyator Nicholas Kiprono Biwott who alleges to be the trustee of the the petitioner herein is deponed as follows;

“The petitioner is a Trustee registered under the provisions of the trustee (Perpetual Succession) Act Cap 164 Laws of Kenya. There are produced and shown to me marked as exhibit KNKB 1 true photostat copies of the Trust Deed and Certificate of Incorporation as evidenced to corroborate the said facts.”

A close look at the said Trust Deed dated 19th day of December 1988 reveals that the name appearing therein is **Maria Soti Memorial Trust**. Similarly Certificate of incorporation dated 13th June 1990 is in the name of **Maria Soti Memorial Trust**. The said certificate shows that the registered trustees of **Maria Soti Memorial Trust** is **Kipyator Nicholas Kiprono Biwott** and **Manilal Premchand Chandaria**. The instant petition is filed by **Maria Soti Educational Trust** claiming to be the registered owner of the suit property. It is deponed at paragraphs 7 & 8 of the affidavit in support of the instant petition that the suit property I.R No. 67900 L.R No. 9054 was lawfully acquired and is lawfully owned by the petitioner in accordance with the law.

At paragraph 8 the deponent, Kipyator Nicholas Kiprono Biwott deposed as follows;

“There is now produced and shown to me marked as exhibits KNKB 2 a true photostat copy of the certificate of Title of the above property issued on the 7th December 1995”

Apparently the above stated certificate of title issued under the Registration of Titles Act, Cap 281, (Now repealed), shows that the grant herein in relation to suit property was issued to **Maria Soti Educational Trust**, who is apparently the petitioner. In view of the foregoing it is apparently clear that the documentation of the suit property herein was marred with contradictions. The Deed Trust and the Certificate of Incorporation that led to the procession and issuance of the Certificate of Title/Grant under Cap 281 are all in the name of **Maria Soti Memorial Trust** while the said Certificate of Title/Grant was

issued in the name of **Maria Soti Educational Trust which** appear to be two separate entities.

In trying to explain the discrepancies herein, the petitioner on 27th November 2014 filed further affidavit sworn on 25th November 2015 by Kipyator Nicholas Kiprono Biwott and at paragraph 8 & 9 stated that there was a genuine error in the name that was entered on the certificate of title and that upon realizing the said error, and to correct the same, the trustees executed a Deed of Variation on the 17th November 2005. To this end the deponent annexed a Deed of Variation and marked KNKB 10. Parties in opposition of the instant petition have submitted and argued that the aforestated further affidavit that purports to introduce the said Deed of Variation was sneaked to the court file without the leave of the court and hence ought to be expunged from the court record.

It appears to me that the Petitioner herein **Maria Soti Educational Trust** who is the title holder of the suit land is apparently a different entity from the Trust Deed holder, that is **Maria Soti Memorial Trust**. This begs the question *does the petitioner have locus standi to institute the instant petition?*

Article 22 of the Constitution states as follows;

22. (1) Every person has the right to institute court proceedings Enforcement of Bill claiming that a right or fundamental freedom in the Bill of Rights has of Rights. been denied, violated or infringed, or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

- (a) a person acting on behalf of another person who cannot act in their own name;**
- (b) a person acting as a member of, or in the interest of, a group or class of persons;**
- (c) a person acting in the public interest; or**
- (d) an association acting in the interest of one or more of its members.**

(3) The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that—

- (a) the rights of standing provided for in clause (2) are fully facilitated;**
- (b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;**
- (c) no fee may be charged for commencing the proceedings;**
- (d) the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and**
- (e) an organisation or individual with particular expertise may, with the leave of the court, appear as a friend of the court.**

(4) The absence of rules contemplated in clause (3) does not limit the right of any person to commence court proceedings under this Article, and to have the matter heard and determined by a court.

While Article 258 of the Constitution stipulates that;

258. (1) Every person has the right to institute court proceedings, claiming that this

Constitution has been contravened, or is threatened with contravention.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

- (a) a person acting on behalf of another person who cannot act in their own name;**
- (b) a person acting as a member of, or in the interest of, a group or class of persons;**
- (c) a person acting in the public interest; or**
- (d) an association acting in the interest of one or more of its members.**

On the other hand Article 260 of the constitution defines a person as follows;

“person” includes a company, association or other body of persons whether incorporated or unincorporated;

In view of the foregoing provisions of the constitution, it appears that any person may file a petition for redress of the constitutional rights. Such persons may be incorporated or unincorporated. In the instant case the further affidavit that intends to introduce the Deed of Variation which purports to associate the Trust Deed and the Certificate of Incorporation with the petitioner, having been filed in court without the leave of the court is inconsequential. This is by dint of the provisions of rule 21(2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure rules 2013 which states that;

“A party who wishes to file further information at any stage of the proceedings may do so with the leave of the Court.”

The foregoing notwithstanding, the said Deed of Variation is not in tandem with the Trust Deed that led to the incorporation of the **Maria Soti Memorial Trust** as a Trust entity. This is so because, the trustees mentioned in the Trust Deed of **Maria Soti Memorial Trust** are **Kipyator Nicholas Kiprono Biwott EGH** and **Manilal Premchand Chandaria** while the trustees mentioned in the Deed of Variation for **Maria Soti Educational Trust** are **Kipyator Nicholas Kiprono Biwott EGH** and **Catherina Johanna Kiprono Biwott**. These are two different sets of trustees with different Trust entities. This is so because, there is no explanation given to the foregoing discrepancies. The foregoing leaves the petitioner as a non trust entity given the fact that it is not duly incorporated as such as there is no prove of its incorporation.

However, the fact remains that the suit property is registered in the name of the petitioner and as such owns property as a result of which it alleges that its constitutional right to own property is being infringed. Under the provisions of Article 22 as read together with Articles 258 and 260 of the Constitution, it appears that any person whether incorporated or not can still institute constitutional petition seeking redress for the violation of the constitutional rights. It follows therefore that under the foregoing provisions of the constitution of Kenya 2010, Petitioner is a legal/constitutional entity and hence has *locus standi* and capacity to file a constitutional petition.

Whether the Petition is Fatally Defective?

Counsel for the Respondents in arguing that the petition is defective, submitted that the petitioner failed to annex duly sealed resolutions of the Trust authorizing the petitioner to institute or maintain these proceedings. He submitted further that neither did the petitioner prove that the Trust appointed the firm(s) on record to institute these proceedings nor the Trust duly authorized Kipyator Nicholas Kiprono Biwott to swear the affidavits herein on its behalf He cited the provisions of Order 4 Rule 1(4) of the Civil Procedure Rules which states that where the plaintiff is a corporation, the verifying affidavit shall be

sworn by an officer of the company duly authorized under the seal of the company. He argued that that the instant petition and the entire proceedings herein are fundamentally defective for want of compliance. On the other hand counsel for the 1st interested party submitted that the instant petition is signed by an anonymous human being and yet it is a requirement in law that the directors and or trustees of the trusts for that matter on signing the documents must indicate their names.

The instant petition is filed pursuant to the provisions of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, commonly known as the **Mutunga Rules**. It is my humble view that the substantive and applicable rules of procedure in these regards are the said Mutunga rules. *This begs the question what is a duly qualified procedure for filing a petition? Constitutional petitions seeking the protection of Rights and Fundamental Rights as noted earlier are governed by the 'Constitutional of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013' pursuant to Legal Notice No 117 of 2013 (Legislative Supplement No. 47). They came into force on the 28th June 2013. Rule 4 of the foregoing rules is entitled states* that;

“4. (1) Where any right or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules.”

While Rule 10 states that;

10. (1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.

(2) The petition shall disclose the following—

- (a) the petitioner’s name and address;**
- (b) the facts relied upon;**
- (c) the constitutional provision violated;**
- (d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;**
- (e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;**
- (f) the petition shall be signed by the petitioner or the advocate of the petitioner; and**
- (g) the relief sought by the petitioner.**

(3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.

(4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court.

The general overriding objective of the Constitutional practice and procedure Rules 2013 (Mutunga Rules) is to facilitate access to justice for all persons as required under Article 48 of the Constitution, (See Rule 3(2)). And by dint of Article 159, of the Constitution justice should be administered

without undue regard to procedural technicalities (See Article 159(2)(d). While section 19(1) of the Environment and Land Court Cap 12A states that **“In any proceedings to which this Act applies, the Court shall act expeditiously, without undue regard to technicalities of procedure.”**

As indicated before the Respondent's counsel submitted that the petitioner failed to annex duly sealed resolutions of the Trust authorizing the petitioner to institute or maintain these proceedings. I don't think the petitioner, having made a finding to the effect that it appears to be unincorporated entity by virtue of lacking a Trust Deed, would require any such resolution. However the instant Petition is accompanied by Affidavit in Supporting of the Petition together with annexed documents. Rule 11 of the said Mutunga Rules is entitled **“Documents to be annexed to affidavit or petition”** and it states as follows;

11. (1) The petition filed under these rules may be supported by an affidavit.

(2) If a party wishes to rely on any document, the document shall be annexed to the supporting affidavit or the petition where there is no supporting affidavit.” (See Rule 11 of the Mutunga Rules)

In view of the foregoing Rules it is apparently clear that there is no established clear cut on how to file a petition with regard to the Protection of Rights and Fundamental Freedoms. This is so because Rule 10(3) & (4) states that, **'Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom'** and that **'An oral application entertained under sub rule (3) shall be reduced into writing by the Court'**.

Be that as it may, what is expressly clear is that the said application (petition) be it oral or in writing must be brought in court in accordance with Rule 4 and in conformity with Form A as prescribed by Rule 10(1). This is so because Rule 12 states that the **'Registrar shall cause a prescribed form to be available in the Registry to assist petitioners who bring oral applications to have them reduced in writing'**. It follows therefore that an authorized resolution in the case of incorporated body is not mandatory. Assuming that the Petitioner is a Trust duly incorporated, it may still file a petition without a resolution, in my view. The Mutunga rule appears to be very flexible as compared to other Civil Procedure Rules which are not applicable in this case. In the premises the instant Petition is duly filed in accordance with prescribed Form A under the Mutunga Rules and hence properly filed and hence it is tenable and merited, in my view.

Whether the Suit Property Herein was Lawfully and Legally Acquired

In its petition the petitioner has stated that the suit property herein was lawfully acquired and that the Certificate of Title was issued to the Petitioner in accordance with the law under the provisions of the Registration of Titles Act, Cap 281 Laws of Kenya. Both the Respondent's counsel and the Interested parties counsel has contested that the acquisition of the suit property herein was irregular and unlawfully.

According to the proceedings herein, it is clear that the suit property in question was initially part of the forest (Kaptagat Forest) land and owned by the government. Petitioner in its Affidavit in support of the Petition has deponed that section 4 of the Forest Act, Cap 385 (now repealed) conferred powers upon the Minister to declare that a forest shall cease to be a forest area. Petitioner has deponed that the said allocation of the suit property was lawful and the procedure followed was regular. On the other hand, the respondents contend that although the Minister may have complied with the Forest Act in relation to degazettement of the suit property from Kaptagat Forest and hence excising the inflated 140 acres pursuant to section 4 of the Forest Act, the consequential processes that led to issuance of the grant to the petitioner were, flawed, irregular and void. While the interested parties have contended that allocation of public land such as in this case should be for public uses only and not for private entities like in this case **Maria Soti Girls Secondary School** that is registered as a private school which is for profit and not a public school. This leads as to various questions; one **can the forest land be**

delineated/degazetted and be reallocated to other entities?, if the foregoing question is answered in affirmative, the question that follows is in two folds, what are these entities and what is the procedure to be followed in allocating such land?

It is important to note that the Forest Act, Cap 385 was repealed by The Forest Act, 2005, No. 7 of 2005. (See section 64 of the foregoing Act, No. 7 of 2005). However in the instant suit the applicable law is the repealed Act, Cap 385. Section 4 of the said Cap 385 states as follows;

“4. (1) The minister may, from time to time, by notice in the Gazette-

- (a) declare any unalienated Government land to be a forest area;**
- (b) declare the boundaries of a forest and from time to time alter those boundaries;**
- (c) declare that a forest area shall cease to be a forest area.**

(2) Before a declaration is made under paragraph (b) or paragraph (c) of subsection (1), twenty -eight days notice of the intention to make the declaration shall be published by the minister.” (See section 4 of the Forest Act, Cap 385, now repealed).

The petitioner stated that the due process was followed in declaring the alteration of the Kaptagat Forest boundaries that resulted in creation of the suit land. To this end petitioner relied on the Annextures marked KNKB 5 and KNKB 6. The foregoing annextures are the Gazette Notices apparently issued by the then Minister for Environment and Natural Resources, Hon. J.K Sambu declaring the said alteration in accordance with section 4 of the aforesaid Forest Act, Cap 385. Annexature marked KNB 5 is the Gazette Notice No. 3807 dated the 23rd June, 1994 which gave the 28 days notice before declaration of the alteration of the boundaries while Annexature marked KNKB 6 is the Gazette Notice 384 dated 5th October, 1994 declaring the alteration of the Kaptagat Forest boundaries to exclude 161.5 hectares, known as LR No. 19054.

In view of the foregoing it is important to note at this juncture that there was nothing wrong, in my view, with the foregoing alterations of the forest boundaries as the same was done in accordance with section 4 of the repealed Cap 385. The Respondents counsel has submitted that although the Minister may have complied with the Forest Act in relation to degazettement of the suit property from Kaptagat Forest and hence excising the inflated 140 acres pursuant to section 4 of the Forest Act, the consequential processes that led to issuance of the grant to the petitioner were flawed, irregular and void. On the other hand the petitioner at paragraph 34 of the Affidavit in support of the petition has stated that after the land was legally excised from the forest, the petitioner was granted the Certificate of Title on 7th December 1995. The question that follows therefore is ***was the due legal and lawful process followed in the issuance of the Certificate of Title herein to the Petitioner?***

The opposing parties have contented that the said land was reserved for public utility and hence was deemed to have been alienated and was not available for allocation to the petitioner who is a private entity. According to the pleadings filed herein it is clear that **Maria Soti Educational Trust** though indicated on the Certificate of the title (Annexture Marked KNKB 2) as a body corporate duly registered under the Trustee (Perpetual Succession) Act Cap 164 Laws of Kenya, there is no evidence placed before the court to that effect and hence the said **Maria Soti Educational Trust** remains an unincorporated body and for that matter a private entity. After the Minister delineated the suit land from the Kaptagat Forest, it is my humble view that by dint of the provisions of the Government Land Act, Cap 280, (now Repealed) and the Physical Planning Act, Cap 286 Laws of Kenya, the said land became unalienated Government land. This is so because section 2 of the said Government Land Act(repealed) defines Government land as follows;

“Government land” means land for the time being vested in the Government by virtue of sections 204 and 205 of the Constitution (as contained in Schedule 2 to the Kenya Independence Order in Council, 1963), and sections 21, 22, 25 and 26 of the Constitution of

Kenya (Amendment) Act, 1964;”

On the other hand the foregoing Act defines unalienated government land as

“unalienated Government land” means Government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment ”

While section 3 of the Physical Planning Act defines unalienated Government Land as;

“unalienated Government land” means Government land which is not for the time being leased to any person, or in respect of which the Commissioner of Lands has not issued any letter of allotment or reservation.”

It follows therefore that after the suit land had been legally excised from the Kaptagat Forest, by the Minister in charge by virtue of section 4 of the Cap 385, it subsequently became unalienated government land. The question to be answered is therefore ***How was the unalienated government land to be allocated and or re-allocated and who is qualified for such allocation and or re-allocation?***

Section 3 of the Government Land Act states as follows;

“3. The President, in addition to, but without limiting, any other right, power or authority vested in him under this Act, may—

(a)* subject to any other written law, make grants or dispositions of any estates, interests or rights in or over unalienated government land; ”

In view of the foregoing provision of the law, The powers of the President under paragraph (a) above were delegated to the Commissioner of Lands. It follows therefore that the Commissioner of Lands by then had powers to make grants or disposition of any interests in land. In the instant case the petitioner has not outlined the procedure followed in the said allocation of the suit land that led to it being registered in its name. What the petitioner alleges is that the suit land was lawfully acquired and lawfully owned by the petitioner in accordance with section 4 of the Forest Act, Cap 385 and section 23 of the Registration Titles Act, Cap 281. The Kenya Anti-Corruption Commission, the 2nd Interested Party herein through Emmanuel Arunga deponed that based on their investigations, it was discovered that the suit property was initially part of Kaptagat Forest which was later degazetted and that after the said degazettment of the suit property the same was allocated to the petitioner without any application being made by the petitioner as required by law or any due process being followed.

It is submitted that the suit property was illegally acquired and that the same was public property belonging to the Kenya forest services and hence being illegally alienated. Counsel for the 2nd Interested party, submitted that in view of the affidavit sworn by Emmanuel Arunga, it is clear that the suit property herein was allocated to the petitioner by the then Senior District Commissioner Keiyo District and yet the said District Commissioner has no powers under the law to alienate public land to anyone.

The District Commissioner Elgeyo Marakwet, by the letter dated **3rd January 1995**, informed the Commissioner of Lands of the degazettment of the suit land and requested him to do the needful. This letter has not been contested by the petitioner. In view of the foregoing letter, it is apparently clear that the Commissioner of Lands was being called upon to facilitate the allocation of the said Land to Maria Soti Educational Trust. The said letter is entitled;

“RE: Allocation of LR. No. 19054.”

The letter reads in part;

'...It has been decided that the above mentioned land parcel should be registered in the name

of MARIA SOTI EDUCATIONAL TRUST

Please do the needful”

There is nothing to demonstrate what happened after the foregoing letter. What is produced by the petitioner is the certificate of grant/title vide Grant No. 67900 apparently issued to the petitioner subject to the suit property on 7th December 1995.

In view of the foregoing, it is apparently not clear whether the due process was followed and adhered to in allocating the petitioner the suit property. However, this could only have been established had the respondents followed due process in revocation of the petitioner's titles.

Whether the Title Herein was Legally and Lawfully Revoked.

*The petitioners petition is primarily centered on the sanctity of the title and the protection of the property rights under Article 40 and 50(1) of the Constitution of Kenya 2010. The Petitioner has contested the revocation of the title herein vide Gazette Notice No. 15583 by the first respondent herein issued on **26th November 2010**. the Notice reads as follows;*

“GAZETTE NOTICE No. 15583

NOTIFICATION OF REVOCATION OF LAND TITLES

WHEREAS the parcel of land whose details are described under the schedule herein below were allocated and title issued to private developers, it has come the notice of the government that the said parcels of land were reserved for public purpose under the relevant provisions of the Constitution of Kenya, the Government Lands Act (Cap 280) and the Trust Land Act, (Cap 288). The allocation were therefore illegal and unconstitutional.

Under the circumstances and in view of the public need and interest, the Government revokes the said titles.” (See the Annexure marked KNKB 2, attached to Affidavit in Support of the Petition.)

The suit property being L.R No. 19054 I listed in the said schedule.

Article 40 of the Constitution states as follows;

“40. (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person—

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

(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 just 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) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired. ” (See Article 40 of the Constitution)

The question that comes to our mind at this juncture is **whether it was lawfully for the Registrar to revoke the title herein that was registered in the name of the petitioner arbitrarily without giving the petitioner an opportunity to be heard?**

The suit land is duly registered under the Registration of Titles Act, Cap 281, now repealed, which is the applicable law in this case. Sections 59 and 60 of the said Act stipulates for procedure to be followed in rectifying (or rather revoking for that matter) grant and / or the title thereof. Section 59 states as follows;

“59. (1) In the case of a non-existent or fictitious person being named as proprietor, the name in the register or document of title or other instrument may on the order of the competent authority be cancelled.

(2) In other cases, the rectification of grants, certificates of title and other instruments shall be effected by the addition of further endorsements correcting former endorsements which are found to be insufficient or to have been otherwise made in error. ”

While section 60 stipulates as follows;

“60. (1) Where it appears to the satisfaction of the registrar that a grant, certificate of title or other instrument has been issued in error, or contains any mis-description of land or of boundaries, or that an entry or endorsement has been made in error on any grant, certificate of title or other instrument, or that a grant, certificate, instrument, entry or endorsement has been fraudulently or wrongfully obtained, or that a grant, certificate or instrument is fraudulently or wrongfully retained, he may summon the person to whom the grant, certificate or instrument has been so issued, or by whom it has been obtained or is retained, to deliver it up for the purpose of being corrected.

(2) If that person refuses or neglects to comply with the summons, or cannot be found, the registrar may apply to the court to issue a summons for that person to appear before the court and show cause why the grant, certificate, or other instrument should not be delivered up to be corrected, and, if the person when served with the summons neglects or refuses to attend before the court at the time therein appointed, the court may issue a warrant authorizing and directing the person so summoned to be apprehended and brought before the court for examination. ”

While Article 50(1) of the Constitution states as follows;

“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.”

*In view of the foregoing it is apparently clear that before any correction, rectification and or revocation as in this case of the title or grant issued, it is important that the grant holder or the title holder ought to be summoned and be given a fair hearing. This was not the case in the instant matter. In **Isaac Gathungu Wanjohi and Another vs. The Attorney General and 6 Others, [2012]eKLR, H.C at Nairobi, Constitutional Case No. 154 of 2011** it was held inter alia that the finding of 'unlawful acquisition' referred to in Article 40(6) of the Constitution must be through a legally established process and not by whim or Gazette Notice as the the Registrar of Lands purported to do in the instant case. See also **Electrical Options Limited v. Attorney General & Another [2012]eKLR, High Court at Nairobi, Petition No. 23 of 2011**, supra, where the learned judge Majanja J. cited Article 40 of the Constitution and made a finding to the effect that the state had breached the said article 40 by reversing the acquisition of the suit land without notifying the petitioner. In **Kuria Greens Limited v. Registrar of Titles and Commissioner of Lands Nairobi, [2011]eKLR, H.C Petition No. 107 of 2010**, supra, the learned judge Musinga J. held that the Registrar has no authority under the Registration of titles Act to revoke the titles. See also **Power Technics Limited v. The Hon. Attorney General & 2 Others [2012]eKLR, H.C at Nairobi Petition No. 178 of 2011**, supra. In **Emange Se-Semata Investments Limited v. Attorney General & 4 Others [2012]eKLR, H.C at Nairobi, Petition 224 of 2010**, supra, The District Land Registrar, had no power to revoke the petitioners title by way of Gazette Notice and that the said act is unconstitutional null and void for breach the petitioners right to a hearing.*

In view of the foregoing authorities cited above, it is apparently clear that the revocation of the title herein was irregular and unlawfully due to the fact that the petitioner was not given an opportunity to defend the said title.

In conclusion this court finds for the petitioner and declares that the revocation of title to the Petitioner's property title I.R No. 67900-LR 19054 by the first Respondent violates the petitioner's constitutional rights to protection of private property under Article 40 of the Constitution of Kenya and further, violates the petitioner's right to fair hearing before the petitioner is deprived of its private property in contravention of Article 40 of the Constitution of Kenya. Therefore a permanent injunction is hereby granted to restrain the Respondents by themselves, their servants and/or agents from violating the petitioner's constitutional rights guaranteed under the constitution of Kenya by depriving the petitioner of its property Title I.R No. 67900-L.R 19054 without affording him a hearing and entering or trespassing thereon without the petitioners consent. The court further grants a permanent injunction restraining the Respondents by themselves, their servants and/or agents from violating the petitioner's constitutional rights guaranteed under the constitution of Kenya by making any claim to ownership of the petitioner's property Title I.R No. 67900-LR No. 1904 or seeking to limit or restrict the petitioners enjoyment of the said property without affording him a hearing. Lastly, the purported revocation of the petitioner's title I.R No. 67900-LR No. 19054 is hereby declared a null and void ab-initio and that the Respondents do pay the costs of this petition.

DATED AT ELDORET THIS 24TH DAY OF JUNE, 2015

ANTONY OMBWAYO

JUDGE