



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO.262 OF 2013**

**BETWEEN**

**SHREE VISA OSHWAL COMMUNITY**

**NAIROBI REGISTERED TRUSTEES.....PETITIONER**

**AND**

**THE ATTORNEY GENERAL.....1ST RESPONDENT**

**THE COMMISSIONER OF LANDS.....2ND RESPONDENT**

**THE CABINET SECRETARY IN CHARGE OF EDUCATION.....3RD RESPONDENT**

**AND**

**HON. GIDEON KIOKO MBUVI.....INTERESTED PARTY**

**JUDGMENT**

**Introduction**

1. The Petitioner, Shree Visa Oswal Community Nairobi Registered Trustees, is a body corporate registered under the **Land (Perpetual Succession) Act (Cap 286 of the Laws of Kenya)**. It has filed this Petition seeking reliefs for alleged violations of its fundamental rights and freedoms enshrined under **Articles 40, 47 and 48** of the **Constitution**. It has also challenged the constitutionality of a letter by the Commissioner of Lands giving the Petitioner 6 months' notice to surrender its land registered in Grant No.18152 as L.R No. 209/5996 (*hereinafter "the suit property"*).

2. In the Petition dated 21st May 2013, it therefore seeks the following orders;

***“(a) A declaration that the Petitioner's fundamental rights and freedoms as enshrined under Articles 40, 47 and 48 have been contravened and infringed upon by the 2nd and 3rd Respondents in their attempt to compulsorily acquire the property known as L.R. No.209/5996 on Mpaka Road situate in the City of Nairobi which is the subject of Grant No.I.R.18152, without following the provisions of Statute and without recognition of the Petitioner's enshrined constitutional rights.***

***(b) A declaration that special condition number 12 under Grant No.18152 for L.R. No.209/6996 is unconstitutional, null, void and ineffective as against the Petitioner by virtue of being contrary to the***

*provisions of Articles 40 and 47 of the Constitution of Kenya.*

*(c) A permanent injunction restraining the 2nd and 3rd Respondents whether by themselves or by their servants, agents or otherwise howsoever from trespassing, alienating and/or in any way whatsoever interfering with the Petitioner's quiet possession over the land situate in the City of Nairobi which is the subject of Grant No.I.R.18152 issued under the Registration of Titles Ordinance, Cap 160, by purporting to invoke the said special condition number 12.*

*(d) A permanent injunction restraining the 2nd and 3rd Respondents whether by themselves or by their servants, agents or otherwise howsoever from purporting to evict the Applicant/Petitioners from all that piece of land known as L.R.No.209/5996 situate in the City of Nairobi which is the subject of Grant No. I.R.18152 issued under the Registration of Titles ordinance, Cap 160, by purporting to invoke the said special condition number 12.*

*(e) An order of compensation for damage suffered by the Respondents as a result of their attempts to exercise special condition No.12 under the said Grant in contravention of Articles 40 and 47 of the Constitution of Kenya.*

*(e) Such other and/or further relief as this Honourable court may deem fit and just to grant.*

*(f) The costs of and occasioned by the Application be provided for”.*

### **Factual background**

3. The facts giving rise to this Petition are set out in the Petition and Affidavit in support thereof sworn by Ramniklal Khetshi Shah, a trustee of the Petitioner, on 21st May 2013, and they are as follows;

4. By a Grant of Lease executed on the 14th April 1961, the Petitioner Trust was conferred with a lease over the suit property issued under the **Registration of Titles Act, (Cap 280)**. The leasehold interest was for a term of 99 years commencing 1st January 1954. A special condition for the said Grant was that the Petitioner would erect buildings for the purposes of a school and one residential house in the suit property within 24 months. The Petitioner duly constructed the school and continued to occupy the same until 1st September 2003, when the City Council of Nairobi forcibly took over the property.

5. Thereafter, the Petitioner filed a suit against the City Council of Nairobi being HCCC No. 1474 of 2005 seeking vacant possession of the property and *mesne* profits, which orders were granted by Nambuye J (*as she then was*) on 20th June 2008.

6. Years later, by a letter dated 4th January 2013, the 2nd Respondent wrote to the Petitioner and *inter alia* stated as follows;

*“The Ministry of Lands has received complaints from the Ministry of Education that the above school, which is being converted to a private/commercial school without any justification whatsoever. In this respect and after consultation with relevant stakeholders and institutions and as a way of ensuring that the school remains public school, the government has decided to invoke special condition No. 12 under Grant No. 18152 for LR. NO. 209/5996 registered in your favour on which the school is constructed”.*

7. The said letter further gave the Petitioner six months' notice from the date of the letter to vacate and surrender all the land in Grant No. 18152 and registered as LR. NO. 209/5996, being the property on which Visa Oshwal Primary School is located.

It is that letter which triggered the present proceedings.

### **The Petitioner's case**

8. The Petitioner contends that Special Condition No.12 in Grant No. 18152 purports to preclude the

application of Statute by stating; '*Notwithstanding anything to the contrary contained herein or in the said Crown Lands Ordinance*'. That the said exclusion is contrary to **Article 40(3) (b)** of the **Constitution** which expressly requires that compulsory acquisition of land must be carried out in accordance with the Constitution and any Act of Parliament. It thus contends that the 2nd and 3rd Respondents neglect in invoking the provisions of the now Repealed **Land Acquisition Act (Cap 295)** and/or **Part VII of the Land Act No. 6 of 2012** or the provisions of the Constitution, in their actions demonstrated that the said provision of the Grant has the effect of extinguishing the Petitioner's constitutional and statutory rights in total. It was its case that the Special Provision in the Grant has also contravened **Article 40(3)** by setting a time line of six (6) months within which to surrender the suit property and without the payment of any compensation. It claimed that the current valuation of the suit land is approximately Kshs.2.1 Billion and therefore it will suffer great loss of the land if acquired without due process being followed. Mr. Oraro who presented the Petitioner's case in that regard referred the Court to the decisions in ***Commissioner of Lands and Another v Coastal Aquaculture Ltd Civil Appeal No. 252 of 1996***, where the Court of Appeal set the conditions for compulsory acquisition of land, and ***Famy Care Ltd v Public Procurement Administrative Review Board and Others Nairobi Petition No.43 of 2012*** where it was held that where there is a clear statutory provision which dictates how a certain legal or statutory procedure should be undertaken, that procedure cannot be overlooked by invoking public interest.

9. It was Mr. Oraro's further submission that even if the Petitioner's school, Visa Oshwal Primary School, was to be deemed a public school, that fact alone cannot quash the Petitioner's rights to protection of property. He also claimed that the foundation of the land tenure system in Kenya is registration which in the suit property is embodied in the common-wealth Torrens-based Registration of Titles Act (RTA), and that all the principles, rules, doctrines and concepts applicable to land law such as indefeasibility (sanctity) of title rest on the Torrens Principle.

10. It was therefore Mr. Oraro's Submission that a certificate of title/grant issued under **Section 23** of the **RTA** is taken as conclusive evidence that the person named therein is the proprietor of the land and is the absolute and indefeasible owner thereof. He thus claimed that the evidence on record was clear that the Petitioner was the original grantee of the suit property and was duly registered as proprietor to the exclusion of all other entities. He relied on the case of ***Wreck Motors Enterprises v Commissioner of Land and Two Others Civil Appeal No. 71 of 1997*** where the Court of Appeal ruled on the effect of **Section 23** of the **RTA**; that it sanctifies and protects the title to land.

11. It was the Petitioner's further contention that in failing to follow the proper statutory provisions for compulsory acquisition of land as set out in the now Repealed **Land Acquisition Act** and in failing to be guided by the principles elucidated in **Part VIII** of the **Land Act (No. 6 of 2012)**, the 2nd Respondent acted in contravention of **Article 47** of the **Constitution**. Reliance was, in that regard, placed on the decision in ***President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 CC, 1123 C-D*** where the South African Constitutional Court stated that to determine whether the right to administrative right has been violated, a Court must consider whether the conduct in question amounts to administrative action and not merely look at the arm of the government to which the actor belongs and the nature of the power the actor is exercising.

12. Mr. Oraro added that the 2nd Respondents' actions in invoking Special Condition No.12 aforesaid amounted to an administrative action and further, that by virtue of the wording of **Article 20(1)** of the **Constitution**, the terms of Special Condition No.12 cannot preclude the application of the Bill of Rights, neither can any statute purport to do so.

13. It was also the Petitioner's submission that the various attempts by the Respondents to invoke Special Condition No.12 has not only violated the Petitioner's constitutional and statutory rights but also its basic common law rights, customarily applied and upheld by implication.

14. The Petitioner also argued that in the judgment dated 20th June 2008, the High Court in ***Civil Case No. 1474 of 2005*** ordered that the City Council of Nairobi should give vacant possession to the Petitioner in respect of the suit property and no stay order has been issued nor has an appeal been preferred in

respect of that judgment. It thus claimed that the Respondents, being part of the Executive, have a responsibility to recognize and respect judicial authority as described in **Chapter 10** of the Constitution and particularly **Article 159** thereof. It thus submitted that by purporting to dispossess the Petitioner of the suit property, the 2nd and 3rd Respondents have sought to punish the Petitioner and extinguish the purpose and effect of exercising its right to access justice as provided under **Article 48** of the **Constitution**. It claimed that by a letter dated 23rd November 2012, the City Council of Nairobi returned possession of the school to the Visa Oshwal Community in compliance with the Court orders and that the 2nd and 3rd Respondents, by failing to recognize the authority of the Court and by disregarding the judgment of the Court, have rendered meaningless the right to access justice and the function of the Judiciary as part of the State.

15. Relying on the doctrine of *pact sunt servanda* (agreements must be honoured), the Petitioner contended that Special Condition No.12 is contrary to public policy as it falls foul of **Articles 20, 47, and 65** of the **Constitution** and relied on the case of *Bartkhuizen v Napier 2007 (5) SA 323 (CC)* where it was held that no law is immune from constitutional control and the common law of contract is no exception to that principle.

16. It was also the Petitioner's position that the **Basic Education Act No. 14 of 2013** has clearly defined a private school and that since the Visa Oshwal Primary School fell under that definition, the Petitioner has demonstrated that it established the school, owned it, operated it and thus it cannot be a public school. It relied on the case of *Republic v Aga Khan Primary School & Others Ex Parte Ali Sele & 2 Others HC Misc Applic No. 13 of 2002* in support of that stated position.

17. In light of the foregoing, the Petitioner thus urged the Court to allow the Petition and declare special Condition No.12 under Grant No. 18152 registered as LR. No. 209/6996 as unconstitutional and thus null and void.

### **The Respondents' case**

18. In opposing the Petition, the Respondents filed a Replying Affidavit sworn by Dr. Belio Kipsang, the Principal Secretary in charge of Education at the Ministry of Education, Science and Technology on 16th October 2013. They also filed written submissions dated 24th October 2013.

19. The crux of the Respondent's case is that Visa Oshwal Primary School is by all means a public school.

20. That **Part VIII** of the **Land Act No. 6 of 2012** has clearly stipulated the procedure for compulsorily acquiring land by the Government; the land to be acquired compulsorily must initially be privately owned land and the land upon which the school stands is Trust Land and as such can best be described as community land pursuant to **Article 63(2)(a)** of the **Constitution** and that land cannot be said to be for the exclusive use of the Petitioner as that would be tantamount to discrimination.

21. With regard to the Petitioner's arguments as to the import of Special Condition No.12 under Grant No. 18152, the Respondents contend that under **Section 26** of the **Land Act**, all conditions in a grant are binding on a grantee and **Section 23(1)(b)** mandates the grantee to fulfill those conditions for it to enjoy quiet possession thereof.

22. It was also the Respondents' position that the Petitioner has consistently breached the special conditions including Condition No. 6 of the Grant which states that; ***"The grantee shall not sell, transfer, sublet and charge...the land."*** because it has previously made transactions in total contravention of that clear caveat.

23. That in any event, the Petitioner had not placed anything before this Court to demonstrate that it had bought the piece of land and paid consideration for it and not also have an indefeasible title to the land since it only holds a certificate of Grant as opposed to an absolute title. They therefore cannot claim absolute ownership of that parcel of land and the buildings thereon and submitted that **Section 23** of

the **RTA** applies to purchasers of land only and since the Petitioners did not purchase the land, they cannot invoke the protective provisions of **Section 23** of the **RTA**.

24. With regard to fair administrative action, the Respondents submitted that they complied with the provisions of **Article 47** by the letter dated 4th January 2013 that gave the Petitioner 6 months' notice in consonance with special Condition No.12 aforesaid and therefore there was no violation of **Article 47** of the **Constitution** as alleged. They relied on the case of ***Hasmukh Khetsi Shah v Tinga Traders Ltd Nrb HCCC No. 1281 of 2001*** where the court declined to grant an injunction to the Plaintiff since the special conditions of a lease had not been breached.

25. The Respondents further claimed that they were not party to **High Court Civil Case No. 1474 of 2005** and they are in Court by virtue of **Article 48** that grants them the right to access justice and they have also not disregarded any judgment of the Court as alleged. They also asked the Court to determine the Petition on merit unlike **Civil Case No.1474 of 2005** which was heard and determined *ex-parte*.

26. The Respondents while agreeing with Mr. Oraro's Submission on the principle of *pact sunta servanda* submitted that it is fallacious for the Petitioner to argue that Special Condition No.12 purports to oust the application of Statute while in fact **Sections 23 and 26** of the **Land Act No.6 of 2012** recognize special conditions and implied covenants. And that the actions of the Respondents have been clearly and utterly guided by the law and are not in anyway inconsistent with the Constitution.

27. In response to the issue of the classification of the school, it was the Respondents' contention that Visa Oshwal Primary School is a public school given the definition available under the **Education Act (Cap 211)** and also **The Basic Education Act of 2013**. They claimed that the Government has for that reason made significant contribution and impact on the academic, financial, infrastructural and spiritual development of the school which demonstrates that it is a public school.

28. The Respondents thus urged the Court to find that Special Condition No.12 is not unconstitutional and the same has statutory backing and if the Court would find that the Conditions stipulated are unconstitutional, then it would in essence be declaring **Sections 26 and 23** of the **Land Act of 2012** as unconstitutional which would be an error. They therefore urged the Court to dismiss the Petition.

### **The Interested Party' s case**

29. The Interested Party, **Gideon Kioko Mbuvi**, is the Senator of Nairobi County under whose area the suit property is situated.

30. In his Affidavit sworn on 15th August 2013 in response to the Petition, he claims that the suit property was at all material times public land registered in the names of the Petitioner. That the issuance of the grant was subject to adherence of the special conditions mentioned therein and that one of the conditions was that the grant was issued for the provision of a school under the control of the government, and the school has constantly been run by the guidelines issued by the Ministry of Education with regard to Public Schools and that the restrictions contained in the grant cannot therefore apply to a private school.

31. Further, that the school being a public school has always been managed by a Parent's Teachers Association (PTA) school committee pursuant to the Education School Committee Regulations, **Legal Notice No. 190 of 1978**; all teachers were employed by the Teachers Service Commission (TSC); and a Headmaster appointed by the Director of City Education on behalf of TSC and the Director of City Education in the Office of the City Council has always attended the PTA as a nominee.

32. He claimed that the Petitioner had failed to disclose how it acquired the suit property because it was Crown land and tenure on crown land was granted for specific purposes and periods of time and that Crown leases contain conditions and covenants that require developments to be undertaken in accordance with the agreed development plan. That the special conditions encompassed the requirements held under the Crown Lands Ordinance administered under Part II (Management of Public Land) of the **Land Act of 2012**.

33. As regards the applicability of **Article 40(3)** of the **Constitution**, the Interested Party contends that the rights enshrined therein are the classification of land under **Articles 61** and **62** thereof as well as the explicit special conditions under which the grant was issued and is currently held. He claims that the notice issued to the Petitioner had demanded it to submit an approved report of developments for consideration prior to compensation, which the Petitioner neglected to do but instead filed this Petition and submitted the valuation report to the Court. It was therefore the Interested Party's submission that the Petitioner is seeking to re-write the grant through the use of the Court, and this Court has no mandate to do so. He referred the Court to the case of *Passaglia Giuseppe v Attorney General & 7 Others Malindi HCC No. 15 of 2005* where the Court held that the Constitutional Court should not be used as a substitute for general legal procedures.

34. Regarding the judgment in *Civil Case No. 1464 of 2005*, the Interested Party contended that the said judgment cannot be applied to the instant case because the City Council of Nairobi has never claimed ownership or possession of the School, and that the judgment does not extinguish the rights of the Government which is the custodian of the suit property. He argued that the Government had no intention of dispossessing the Petitioner of its leasehold interest in the suit property had it maintained the conditions of the Grant but the rigorous intentions of the Petitioner to convert the school into a private facility and claiming private rights had jolted the Government into prohibiting the illegal acquisition of the public property. That the Petitioner holds the suit property at the wishes of the Grantor and the Government is the custodian of all public land and has the duty to prohibit unlawful acquisition. He referred the Court to the decisions in *Adan Abdikadir Hassan & 2 Others v The Registrar of Titles and Anor, Petition NO. 7 of 2012* and *Joram Nyaga & Another b Attorney General & 2 Others Misc Civil Applic No. 1732 of 2004* where it was held that the Commissioner of Lands cannot have purported to pass any valid title under the Government Lands Act (GLA) or RTA while acting contrary to constitutional provisions in that regard.

35. He thus prayed that the Petition should be dismissed with costs.

### **Determination**

36. Having set out the parties' submissions as above and looking at the facts leading to this Petition again, it is clear to my mind that the single issue for determination in this Petition is, whether Special Condition No.12 in Grant No.18152 is unconstitutional and whether the Respondents, by their actions, have violated the Petitioner's fundamental rights as contained under **Article 40** of the **Constitution**. I will also determine whether the Petitioner's rights to fair administrative action and access to justice as provided for under **Articles 47(1)** and **48** of the **Constitution** have been violated as alleged and if there is a violation established what relief(s), if at all, should be granted.

### **Whether Special Condition number 12 under Grant No. 18152 for L.R. No. 209/6996 is unconstitutional**

37. It is clear that the facts leading to the instant Petition are not contested. The Trustees of the Petitioner namely, Bharmal Rajshi Shah, Vershi Mepa Shah and Keshaval Fulchland Shah were conferred with a lease over all that piece of Land known as L.R. No. 209/5996 (suit property) situate in the City of Nairobi and which is the subject of Grant No. I.R 18152 issued under the Registration of Titles Ordinance. The Grant of lease stipulated that it was for a term of 99 years from 1st January 1954. The Grant also had 12 Special Conditions contained therein. The Petitioner thereafter constructed a school on the suit property from its own funds in accordance with Special Conditions 1, 2 and 3 of the Special Conditions contained in Grant No. I. R 18152. By a letter dated 4th January 2013, the 2nd Respondent while invoking Special Condition No.12 of the Grant gave notice to the Petitioner to vacate the suit land within 6 months of the notice. It is this condition that the Petitioner claims is unconstitutional and thus null and void in so far as it amounts to compulsory acquisition of its property without compensation and is thus contrary to the provisions of **Article 40** of the **Constitution**.

38. Special Condition No.12 of the Grant No. I. R 18152 states as follows;

***“Notwithstanding anything to the contrary contained herein or in the said Crown Lands Ordinance the Grantee shall on receipt of six months notice in writing in that behalf surrender all or any part of the land required for public purpose without payment of any compensation save in respect of such of the approved buildings as may have been evacuated or demolished”.***

Mr. Oraro claims that the above mentioned Special Condition in the Grant has contravened **Article 40(3)** of the **Constitution** by setting a time line of six (6) months within which to surrender the suit property and without the payment of any compensation contrary to the principles of compulsory acquisition of land as set by the law.

39. The right to property is protected under **Article 40(1)** and **(2)** of the **Constitution** which states as follows;

***“(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).”***

**Article 27(4)** for avoidance of doubt is the general non-discrimination Clause in the Constitution and which prohibits all forms of discrimination on any ground including the grounds specifically mentioned therein. The question therefore is whether the suit property has been compulsorily acquired by the Respondents without compensation and thus violating the Petitioner's rights to property. To answer that question I will address myself to the provisions of **Article 40(3)** which provides as follows;

***“(1) ...***

***(2) ...***

***(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”.***

40. On a deep consideration of the matter and applying the criteria established by **Article 40(3)** as set out above to the instant case, I do not think there was a violation of the Petitioner's right to property and for reasons to be seen shortly.

41. I say so because, it is not in issue that the Petitioner was granted the suit property by the Crown and it contained certain special conditions that were to be adhered to. The Respondents as well as the Interested Party contend that the acquisition of the suit property was for public interest, the establishment of the Visa Oshwal Primary School, for a public purpose and the school has always been a public school receiving monetary support from the Government, teachers employed by TSC, managed by a Parent's Teachers Association (PTA) school committee pursuant to the Education School Committee Regulations, Legal Notice No.190 of 1978, and it has a headmaster appointed by the Director of City Education on behalf of TSC and finally that the Director of City Education in the Office of the City Council has always sat on the PTA as a nominee.

42. On the other hand, the Petitioner contended that Visa Oshwal Primary School has been at all material times a private school because the Petitioner has always constructed buildings and learning facilities on the property from its own funds and the management of the School has always been through a School Management Committee of Shree Visa Oshwal Primary School which Committee has always been appointed by the Management Committee of the Petitioner.

43. To my mind, the issue whether Visa Oshwal Primary School is a private or public school is very crucial in the determination of this Petition because a reading of Special Condition No.4 contained in the Grant I.R states that the school must be used for the purposes for which it was established. This condition states as follows;

***“If the school erected on the land shall cease to function as such under the provisions of the Education Ordinance 1952 then the term hereby created shall ipso facto also be determined and the land shall be deemed automatically to have reverted to Her Majesty as from the date of such cessation without the necessity of any formal surrender thereof”.***

This condition literally means that the school must be used for the purpose for which it was erected and if not then it must be surrendered back to the Crown (*now the Government of Kenya*). This condition cannot be wished away.

44. I have seen the Certificate of Registration of the Visa Oshwal Primary School dated 11th February 1954 which classifies the school merely as a Primary school and not whether it was a public primary school or a private primary school. There is another certificate of registration **annexture RS 4A** in the affidavit of Ramniklal Khetshi Shah dated 9th July 1997 which classifies the school as a private school. In his Affidavit, he stated that the Ministry of Education thereafter purported to nullify that certificate of registration of 9th July 1997 by issuing another Certificate of Registration dated 12th August 1997 classifying the school as 'public'. That certificate was annexed as **annexture RS4B** in the affidavit of Ramniklal Khetshi Shah.

45. This means that from the records of the Ministry of Education, the school is a public school as the earlier certificate classifying the school as private was immediately revoked a month later by another certificate classifying the school as public. **If that be so, I am constrained to ask myself, why did the Petitioner fail to challenge that nullification?** In the absence of any other evidence, I must find that the school has been a public school since its registration and therefore, under Condition No. 4 of the Special Conditions contained in the Grant it was to operate as a public school, and accordingly any change in the functioning of the school as a public school meant that the land would revert back to the Government.

46. **But suppose I am wrong?** I would still arrive at the same decision given that the Petitioner has not controverted the evidence on record that the school has always received teachers from TSC; received monetary support for the free primary school programme; is managed by the PTA; its Headmaster is appointed by the Director of City Education on behalf of TSC and the Director of City Education constituted PTA as a nominee. All these factors would indicate that Visa Oshwal Primary School is a public school and any attempts at converting it to a private school from a purely historical factor is unsupported by the law and the facts before me.

47. In addition to the above, the definition accorded to public school by the **Education Act** as well as

the **Basic Education Act** bears me out. Under **Section 2** of the **Education Act** a public school is defined to mean; **“a school maintained or assisted out of public funds”**

The **Basic Education Act No. 14 of 2012** then categorises Basic Educational institutions as follows;

**“(a) Public Schools which are schools established, owned or operated by the Government and includes sponsored schools.**

**(b) Private schools as those established, owned or operated by private individuals, entrepreneurs and institutions”.**

**Sections 2** of the same **Act** defines a **“sponsor”** as follows;

**“A person or institution who makes a significant contribution and impact on the academic, financial, infrastructural and spiritual development of an institution of basic education’**

48. I have made the above finding notwithstanding the fact that the Petitioner has argued that it has constructed all buildings and learning facilities on the suit property from its own funds and therefore it is the absolute owner of the school. Sadly, Conditions 1, 2 and 3 of the Special Conditions in the Grant I. R 18152 defeat the Petitioner's arguments. The purpose of the Grant as can be seen from these 3 conditions was for the purposes of erecting a school. These conditions states as follows;

**“(1) The grantee shall erect for occupation within twenty four months of the commencement of the term buildings of approved design on proper foundations constructed of stone burnt-brick or concrete with roofing of tiles or other permanent materials approved by the Commissioner of Lands and shall maintain the same (including the external paintwork) in good and substantial tenantable repair and condition.**

**(2) The buildings shall not be erected until plans (including block plans showing the positions of the buildings and a system of drainage for disposing of sewage surface and sullage water on the land) drawing elevations and specifications thereof shall have been approved in writing by the Local Authority and the Commissioner of Lands. Such plans drawing elevations and specifications shall be submitted in triplicate to the Local Authority within three months of the commencement of the term.**

**(3) The land and buildings shall only be used for the erection of a school and for one house for the accommodation of the Principal employed in connection therewith.”**

49. The above conditions obligated the construction of buildings and in my view therefore Visa Oshwal Primary School was a project undertaken by the Petitioner for the benefit of the public and as a sponsor as opposed to owner. Indeed the Petitioner in its Petition states at paragraph 1.7 as follows;

**“The Visa Oshwal Primary School is the first public benefit project undertaken by the Petitioner. As a result of this educational project, sixty thousand (60,000) students have received their primary school education to conclusion at the said learning institution, under the Petitioner's management”.**

That is all there is to say in respect of the ownership of the school. The above statement is in line with its obligations under the Grant and should it surrender the land under Condition No.12, the remedy available to it is set out in the same Condition; it shall be compensated for such of the approved buildings as may have been evacuated or demolished. It has no right to the land and cannot be compensated for it but can and must be compensated for the buildings on that land.

50. I now turn to examine the place of Special Condition No. 12 of Grant I.R 18152 and whether it is unconstitutional as alleged by the Petitioner.

51. The Respondents claim that the Petitioner has purported to change the school from a public one to a private one and that is why they decided to invoke Special Condition No. 12 of the Grant. The letter

dated 4th January 2013 to the Petitioner giving them notice to surrender the suit property states as follows;

**“Ref:43424/11/44**

**Shree Visa Oshwal Community Nairobi**

**Registered Trustees**

**P.O. Box 40638-00100**

**NAIROBI.**

**Dear Sirs,**

**RE: VISA OSHWAL PRIMARY SCHOOL – LR. NO.209/5996 – GRANT NO.IR18152**

**The Ministry of Lands has received complaints from the Ministry of Education that the above school, which is classified as a public school and registered as such, is being converted to a private/commercial school without any justification whatsoever.**

**In this respect, and after consultations with the relevant stakeholders and institutions, and as a way of ensuring that the school remains a public school, the Government has decided to invoke special condition No.12 under Grant No.18152 for LR. No.209/5996 registered in your favour and on which the school is constructed.**

**Under the circumstances, you are HEREBY given a 6 months notice with effect from the date hereof, to surrender all the land under Grant No18152 in public interest. Compensation for the buildings, if any, should be discussed and agreed upon with the Ministry of Education within the given period.**

**This notice is however subject to and without prejudice to any ongoing Court cases touching on a similar subject.**

**Yours faithfully,**

**C. W. NGATIA**

**FOR: COMMISSIONER OF LANDS**

**CC The Permanent Secretary**

**Ministry of Lands**

**Ardhi House**

**NAIROBI**

**The Permanent Secretary**

**Ministry of Education**

**P.O. Box 30040-00100**

**NAIROBI**

**The Permanent Secretary**

**Ministry of Local Government**

**Jogoo House**

**The Attorney General**

**Attorney General's chambers**

**Sheria House**

52. Mr. Oraro's strongest argument before me was that Special Condition No.12 is unconstitutional, null and void to the extent that it does not allow compensation for compulsory acquisition of the Petitioner's property. I have elsewhere above touched on that question.

53. In addition, the **Constitution at Article 40** is in certain terms that no person's property shall be arbitrarily deprived unless it is intended to be used for a public purpose with prompt compensation being paid. The conditions to be meant in the process of compulsory acquisition have been set by the Court of Appeal in the case of Coastal Aquaculture & Another v Commissioner of Lands (supra) where it held as follows;

***“I agree with the learned judge that for a successful compulsory acquisition, the requirement of the Constitution and of the Act must be strictly complied with and that if there is full compliance with the law, compulsory acquisition cannot be interfered with.***

***I also agree with the learned judge that Section 75 of the Constitution provides protection and safeguards to the owner of the land sought to be compulsorily acquired against and arbitrary acquisition of his property. Before the Minister decides to compulsorily acquire a land he must be satisfied that (a) the land is required for the purposes of a public body (b) specified in Section 75(1)(a) of the Constitution and (c) the necessity for the acquisition outweighs the hardship to the owner. The Minister, if satisfied about these preconditions, so certifies in writing to the Commissioner and directs him to acquire the land compulsorily. The Commissioner then publishes the Gazette notice under Section 6(2) of the Act and serves a copy of the notice on every person who appears to him to be interested in the lands. Upon publication of the notice the process of acquisition is virtually complete apart from assessment and payment of compensation and the right of appeal under Section 75(2) of the Constitution.***

***The person having interest in the land, is entitled to the right of direct access to the High Court in order to challenge the legality of the taking possession by the Commissioner or acquisition of his land, if he so wishes. Unless the notice of acquisition reflects the necessary ingredients of the Minister's certificate, the person interested in the land has no means compulsorily is justified or not. I, therefore, agree with the learned judge that in order to give concrete meaning to the aforesaid constitutional safeguards and protection, the notice of acquisition under Section 6(2) of the Act must reflect the material contents of the Minister's certificate. In other words the Gazette notice must disclose the name of the public body for whom the land is being acquired and the public purpose for which it is being acquired. If it fails to do so, it is ultra vires the provisions of the Constitution and the Act. Consequently the Commissioner or the other person or persons appointed by the Minister to conduct the inquiry under Section 9(3) of the Act shall not have jurisdiction to inquire. I am of the view that Re Kisima Farm Ltd (1978) KLR36 is good law.”***

54. The acquisition in that case was under the provisions of the **Repealed Constitution** but holds true under **Article 40** of the **Constitution, 2010**. In the instant Petition, the Respondents in issuing the letter dated 4th January 2013 were acting pursuant to Special Condition No.12 which for emphasis provided that;

***“Notwithstanding anything to the contrary contained herein or in the said Crown Lands Ordinance the Grantee shall on receipt of six months notice in writing in that behalf surrender all or any part of the land required for public purposes without payment of any compensation save in respect of such of the approved buildings as may have to be evacuated or demolished”.***

55. Looking at the Condition against the Constitution and the facts of this case, I am clear in my mind that the Commissioner of Lands and the Respondents are not in violation of the Petitioner's constitutional rights to property. I say so because in issuing the letter of 4th January 2013, the Commissioner of Lands at paragraph 3 stated as follows;

***“Under the circumstances, you are hereby given 6 months notice with effect from the date hereof, to surrender all the land under Grant No. 18152 in public interest. Compensation for the buildings, if any should be discussed and agreed upon with the Ministry of Education within the given period.”***

56.As can be seen, there is evidence that the Minister gave the Petitioner information that he intended to pay compensation for the buildings which the Petitioner had put up in the suit property. I find that action of the Respondents to be in accordance with the spirit of **Article 40** of the **Constitution**. The Petitioners have a claim over the buildings erected on the suit property and I have shown why elsewhere above. They were invited to a discussion on the compensation to be made, but instead of pursuing the discussion, they chose to file this Petition. It is against that background that I also find that this Petition is premature and was filed in bad faith notwithstanding **Article 40(3)(b)(ii)**.

57.Having found so, I also do not think that Special Condition No. 12 of the Grant No. 18152 excludes the applicability of the statute. **Section 26** of the **Land Act No.6 of 2012** states as follows;

***“Covenants and conditions binding on persons claiming under grant, lease or licence.***

***Every covenant or condition, whether expressed or implied, in a grant, lease or licence under this Act which is binding on a grantee, lessee or licensee shall, unless otherwise expressly provided in the grant, lease or licence, be binding upon all persons claiming an interest in the land that is the subject of the grant, lease or licence, and whose title is derived through or under the grantee, lessee or licensee”.***

The same Act at **Section 23(1)** provides that;

***“Implied covenants and conditions by grantor or lessor.***

***(1) In every grant or lease relating to public land, unless the grant or lease expressly provides otherwise, there is an implied covenant by the grantor or lessor—***

***(a) that the grantor or lessor has full power to grant the land or lease; and***

***(b) that the grantee or lessee, paying the rent and fulfilling the conditions of the grant or lease, shall enjoy quiet possession of the premises without interruption by the grantor or lessor or any person claiming under the grantor or lessor, except so far as the laws for the time being in force may permit.***

***(2) ...”***

All the conditions in the grant must be read and interpreted wholistically since they all form part of the grant and none of the conditions can stand and be read in isolation. I say so because looking at the two sections quoted above, the Land Act recognizes those Special Conditions and they must be complied with.

58. The Petitioner also alleged a violation of its right to fair administrative action as provided for under **Article 47(1)**and **(2)**.

This Articles states as follows;

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

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

59. It is clear that a person has a right to be given reasons if they are likely to be affected by an administrative action. Looking at the letter dated 4th January 2013 and the Special Condition No. 12

again, I am clear in my mind that this right was not violated. Having found the condition to be constitutional, the Minister was entitled to give the Petitioner notice to surrender the school and seek compensation. But as stated above, the Petitioner chose to file this Petition prematurely. I therefore find that the attempts to invoke Special Condition No.12 did not violate the Petitioner's right to fair administrative action. In the case of Republic v Aga Khan (supra) the court stated as follows;

***“There are situations where hearing would be unnecessary and even in some cases obstructive. Each case must be put on the scales by the Court and there cannot be a general requirement for hearing in all situations. There will be for example situations where the need for expedition in decision making far outweighs the need to hear the other side and in such situations, the Court has to strike a balance.”***

I agree with the sentiments of the Court and in the present case, while the Petitioner was given an opportunity to state its case, it refused to do so and it cannot now be heard to be saying that the administrative action was unfair. The Court in striking a balance finds fault with it and not the Respondents.

60. It was also the Petitioner's case that its right to access justice was violated. Looking at the facts of this case and the parties' contentions, I cannot find any violation of that right and I will not belabour the issue.

61. For the above reasons, it is obvious to me that the Petition before me lacks merit and is hereby dismissed.

62. The Petitioner will bear the Respondents' costs in any event.

63. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF MARCH, 2014**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

Irene – Court clerk

Mr. Oraro for Petitioners

Mr. Opondo for 1st Respondent & 2nd Respondent & 3rd Respondent

Mr. Oduol holding brief for Mr. Minyire for Interested party

**Order**

Judgment duly read. Copies of the judgment to be supplied today.

**ISAAC LENAOLA**

**JUDGE**

**Mr. Oraro**

I seek a conservatory order pending appeal. The conservatory order is to stay the effect of the judgment.

**ISAAC LENAOLA**

**JUDGE**

**Mr. Opondo**

I have no objection.

**ISAAC LENAOLA**

**JUDGE**

**Mr. Oduol**

No objection.

**ISAAC LENAOLA**

**JUDGE**

**Order**

A conservatory order staying the implementation or effect of this judgment is granted for 30 days pending the fixing of a formal Application.

**ISAAC LENAOLA**

**JUDGE**