



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO.302 OF 2013**

**BETWEEN**

**COMPAR INVESTMENTS  
LIMITED.....PETITIONER**

**AND**

**KENYA URBAN ROADS  
.....RESPONDENT** **AUTHORITY....**

**JUDGMENT**

**Introduction**

1. The Petitioner, Compar Investments Limited, is a limited liability Company duly incorporated in Kenya under the **Companies Act (Cap 486, Laws of Kenya)**. It is the registered proprietor of all that parcel of land known as L.R No. 209/12686 (hereafter “the suit property”) situate off Mombasa Road in Nairobi. It acquired a leasehold interest in the suit property by way of purchase and transfer for a valuable consideration of Kshs.70Million. The transfer in the Petitioner's name was registered on 26th June 2001.
2. On 22nd May 2013, the Respondent, the Kenya Urban Roads Authority, a body established under **Section 9** of the **Kenya Roads Act of 2007** with the statutory mandate of having responsibility for management, development, rehabilitation and maintenance of all public roads in cities and municipalities in the country, except national roads, served the Petitioner with a Removal Notice dated 22nd May 2013 requiring it to remove all the developments and all structures erected on the suit property within a period of 30 days failure to which the Respondent would forcibly remove them. Allegedly, the basis of the removal notice was that the suit property was public utility land.
3. The Petitioner has now filed this Petition alleging that the issuance of that removal notice violates its rights to property under **Article 40** of the **Constitution** as well as the right to fair administrative action under **Article 47** of the **Constitution**. In its Petition dated 14th June 2013, it has therefore sought the following orders;

**“(1) A declaration that the Respondent's purported removal notice of buildings and structures erected on the Petitioner's title to L.R. No.209/12686 pursuant to the letter dated 22/5/2013 is unconstitutional and invalid and in breach of Articles 40 and 47 of the Constitution.**

**(2) A declaration that the certificate of title that the Petitioner holds in respect of L.R.**

*No.209/12686 is conclusive evidence of ownership and that the Petitioner is the absolute and indefeasible owner of the property.*

*(3) An order of Certiorari to bring to this Honourable Court for the purposes of being quashed, the Respondent's removal notice dated 22/5/2013 addressed to the Petitioner in so far as it purports to require the Petitioner to remove and/or demolish the buildings and structures erected on the Petitioner's title to all that parcel of land known as L.R. No.209/12686 for being in breach of Articles 40 and 47 of the Constitution.*

*(4) An order of Injunction to restrain the Respondent by itself, servants, agents or whosoever authorised on its behalf from giving effect or implementing in any manner whatsoever the removal notice dated 22/5/2013 addressed to the Petitioner, alienating or in any other manner interfering with the Petitioner's possession of L.R. No.209/12686 or demolishing the developments thereon for being in breach of Articles 40 and 47 of the Constitution.*

*(5) Damages.*

*(6) Cost of and incidental to these proceedings.”*

### **The Factual Background**

4. The facts leading to this Petition are well set out in the Petition, the Affidavit of Minax Karia, a Director of the Petitioner Company, sworn on 14th June 2013, Supplementary Affidavit sworn on 26th July 2013 and written Submissions dated 29th July 2013 and those facts are as follows;
5. After purchase of the suit premises, the Petitioner acquired possession of it and has continued to pay all outgoings, including rent and rates to the defunct City County of Nairobi. It has also developed and/or constructed on the property godowns/warehouses and showrooms. These developments were put up with the express approval of the Commissioner of Lands and the Director of City Planning at the said City Council of Nairobi.
6. The suit property lies at the junction of Mombasa Road and North Airport Road in Nairobi at the point where there is an ongoing construction of a separated interchange at the Eastern road by-pass. This construction is undertaken at the control and direction of the Respondent which is a state agency under the Ministry of Roads.
7. To facilitate that construction, on 27th September 2011, the Commissioner of Lands published in the Kenya Gazette, a Gazette Notice No. 5608 of 2011 under the Provisions of the **Land Acquisition Act (Cap 295 Laws of Kenya now repealed)** giving notice of the government's intention to acquire several parcels of land as listed therein for the purposes of construction of the Eastern by-pass. On the same day, the Commissioner of lands published another Gazette Notice No. 5609 of 2011 communicating the date fixed for holding of enquiries for the hearing of compensation claims by persons interested in the parcels of land earmarked for compulsory acquisition.
8. The properties earmarked for compulsory acquisition are located next to the junction of Mombasa Road and North Airport Road and neighbor the suit property. However, in the Gazette notices, the State did not compulsorily acquire the suit property, but instead issued Gazette Notice No. 9230 published in a Special Issue of the Kenya Gazette dated 29th July 2011 and titled 'Revocation of Land Titles', wherein the Registrar of Titles revoked the suit property's title amongst others because allegedly the same had been reserved for public purposes and their allocation was illegal and unconstitutional.
9. Subsequently, the Petitioner petitioned the High Court challenging the revocation of the titles to the land vide Petition No. 167 of 2011 which was consolidated with Petition No. 178 of 2011, Power Technics Ltd v Attorney General and 2 Others. Majanja J, in his judgment declared the revocation of titles by way of publication of a Gazette Notice as contrary to **Articles 40 and 47(1)** of the **Constitution** and thus null and void and the Registrar of Titles or any other person was restrained from implementing the contents of Gazette Notice No. 9230 of 2011. As a result of that decision, the Registrar of Titles caused to be published the orders made by Majanja J together with an undertaking to comply and implement the said Court orders .

10. However, notwithstanding the judgment in **Petition No. 178 of 2011 (supra)** the Respondent on 22nd May 2013 issued the Removal Notice requiring the Petitioner to remove all buildings and structures standing on the suit property on the basis that the suit property lay on a power line and that a wayleave existed over the title which was therefore public utility land. That Notice is the subject of these proceedings.

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

11. The Petitioner's case is as contained in the written submissions dated 29th July 2013 and the oral submissions made by its Learned Counsel, Mr. Mwangi.
12. Mr. Mwangi submitted that the Respondent does not have the statutory mandate to deal with issues of power line way leave and had no jurisdiction to issue the impugned removal notice. That **Section 49(a)** of the **Kenya Roads Act, 2007** and **Section 91** of the **Traffic Act** do not apply to developments erected on what is alleged to be a power line. Further that the Respondent has no power in law to acquire private land for public purposes as that power is the statutory mandate of the Cabinet Secretary in charge of land matters. It thus claimed that the Respondent is acting outside the scope of its statutory mandate. In any case that any attempts to acquire the suit property through **Gazette Notice No. 9230** had been declared unconstitutional in **Petition No. 167 of 2011 (supra)** and therefore the Respondent, in issuing the removal notice dated 22nd May 2013 acted illegally and in contempt of the earlier judgment by its efforts to circumvent its effect.
13. It was therefore the Petitioner's submission that the Respondent must use the relevant body in any attempt at acquiring its property. It relied on the case of **Kuria Green Limited v Registrar of Titles & Another Petition No. 107 of 2010** where the issue of revocation of title by a Gazette Notice had been addressed.
14. It further alleged that the suit property does not in anyway fall on public utility land as alleged by the Respondent and that its title to the suit premises was created in September 1995 and that the dimensions of the Petitioner's property shown on the Respondent's development plan were lawfully approved by the Commissioner of Lands sometimes in January 1988. It thus claimed that the development plan relied on by the Respondent cannot be the original plan for the suit property and the same has been conveniently electronically superimposed so as to support the Respondent's assertion that the property is public utility land and to avoid to pay compensation for the compulsory acquisition of the property.
15. It was also the Petitioner's position that the Deed Plan in respect of the Petitioner's property issued by the Director of Survey confirms that the suit property is situate way off the power line and as such the Respondent's claim must be viewed with suspicion as it is not supported by available evidence.
16. It was the Petitioner's further submission that if the removal notice were to be given effect, the Respondent would be at liberty to forcibly enter into the Petitioner's property, pull down its developments and evict it without any compensation, which actions would amount to violation of the Petitioner's constitutional right to own property and to be protected against deprivation of property without prompt and just compensation contrary to the express provisions of **Article 40** of the **Constitution**.
17. The Petitioner thus claimed that it holds a valid certificate of title in respect of the suit premises and the validity of its title can only be challenged upon the application of due process. That the Respondent has not commenced any proceedings in a Court of law against the Petitioner and has also not invoked the process established under **Section 14** of the **National Land Commission Act of 2012** which grants the Commission mandate to review grants and depositions of public land with a view to establish their propriety or legality. It relied on the cases of **Kuria Green Limited v Registrar of Titles & Another (supra)** and **Isaac Gathungu Wanjohi & Another v Attorney General & 6 Others (2012) e KLR** in support of that position.
18. It is the Petitioner's further argument that unprocedural interference with a registered title in itself goes against public interest and policy as it puts in jeopardy the entire system of registration of titles, breeds uncertainty in land transactions and is inimical to the economic interests of the country. It does not also encourage optimal utilization of land as an economic resource.
19. The Petitioner in addition, urged the point that its right to fair administrative action as provided for under **Article 47** of the **Constitution** was violated in the following manner;

***“(i) The issuance of a removal notice in respect of the petitioner's property is not lawful. The Respondent as submitted herein above has no legal power to acquire public land. Equally it has no jurisdiction over power line way leaves. In so far as it does not claim to have issued the removal notice in respect of a road reserve or a buffer zone, the purported notice was issued without any jurisdiction in law whatsoever.***

***(ii) The decision to issue a removal notice in respect of the Petitioner's property is wholly unreasonable. It is against the Petitioner's legitimate expectation. The Respondent failed to take into account the adverse effect the revocation would have on the Petitioner's proprietary interest.***

***(iii) The Petitioner was not required by the Respondent to explain its title to the property. It was never given a hearing. There was no procedural fairness which is underpinned by statute by virtue of the provisions of Section 14 of the National Land Commission Act, 2012”***

20. For the above reasons the Petitioner prays for an order of certiorari to quash the Removal Notice, a declaratory order that its rights under **Article 40** and **47(1)** had been violated and prohibitory orders prohibiting the Respondent from interfering with the suit property.

### **The Respondent's case**

21. The Respondent opposed the Petition. Its case is as put by Engineer Joseph N. Nkadayo in his Affidavit in response to the Petition sworn on 23rd July 2013 and written Submissions dated 2nd December 2013.

22. Ms. Wambui presented the Respondent's case and it was her argument that the suit property lies on a power line that was established in 1988 through Approved Development Plan No. 13 of 6th January 1988. She submitted that the suit property was therefore a public utility that was not available for alienation and the Petitioner's leasehold interest was acquired in 2001 after the creation of the way leave and that the registration of the Petitioner's interest was therefore illegal and was in any event obtained unlawfully.

23. It was the Respondent's position that **Article 40(6)** limits the enjoyment of the right to property under **Article 40** of the **Constitution** in that, protection offered under **Article 40** does not extend to property that has been found to have been unlawfully acquired. That on the suit property a power line had been created before title had been issued to the Petitioner and the way leave has never been degazetted to allow alienation for private use and therefore no title could have been procedurally and lawfully acquired with regard to the parcel of land in issue. It relied on the case of **Cycad Properties Ltd v Attorney General & Others Petition No. 70 of 2010** where it was held that the Petitioner in that case was entitled to its property to the extent that it had not encroached upon land that was set aside for a public purpose.

24. Ms. Wambui thus contended that once the property was set aside for public purposes, it was held in trust for the public by the government and any subsequent allocation of the same to a private citizen is null and void *ab initio*. She claimed therefore that the title to the suit property ought to be revoked and relied on the following cases; **(i) Adan Abdirahani Hassan v Registrar of Titles and Others Petition No. 2 of 2012**, where it was held that public land was held by the government in trust for the public. **(ii) Philma Farm Produce and Supplies & 4 Others v Attorney General, Petition No. 9 of 2011**, where it was held that Article 40 protects the right to property and a party must demonstrate that it is entitled to the property in issue. **(iii) James Joram Nyaga v Attorney General & 2 Others, Misc Civil Applic No. 1732 of 2004** where it was held that parties could not claim compensation for compulsory acquisition of their land if they did not have a good title to the suit property.

25. It was the Respondent's further submission that in view of the fact that the Petitioner's certificate of title was illegally, unprocedurally and irregularly acquired, if this Court were to grant the orders sought, then it would in essence be perpetuating an illegality. In that regard, it relied on the case of **Republic v Minister for Lands & Others exParte John Kagonye Ngururi JR ELC No. 111 of 2011** and **Mapis Investment (K) Limited v Kenya Railways Corporation (2006) KLR 189** where it was held that a court cannot protect a title whose validity is in question.

26. The Respondent also urged that once a development plan had been made pursuant to the provisions of **Section 21** of the **Physical Planning Act**, no other development may take place contrary to that plan and that the suit property having been earmarked in 1988 for public utility, the same was not available for alienation subsequently. And also that the developments made by the Petitioners on the suit property are a violation of **Section 49** of the **Roads Act**.
27. It also submitted that under the provisions of **Section 23(2)** of the **Kenya Roads Act**, the Respondent had no obligation to enter into any discussions or negotiations with the Petitioners and that **Sections 22** of the same **Act** mandates the Respondent to deal with land in any appropriate manner for the fulfillment of its mandate and that it was within its mandate to issue the impugned removal notice to the Petitioner.
28. Lastly, it was the Respondent's submission that a declaration of ownership cannot be made through a Constitutional Petition and that **Article 67** has mandated the National Land Commission to deal with management of public lands and the Commission is the only body mandated to deal with this property. That therefore the Petition was wholly without merit and ought to be dismissed with costs.

### **Determination**

29. Having set out the parties' submissions as above, and looking at the issues framed by both Mr. Mwangi and Ms. Wambui, I am of the view that there are three issues for determination and they are the following;

- (i) *Whether the Petitioner is the absolute and indefeasible owner of the suit property*
- (ii) *Whether the Removal Notice of buildings and structures erected on the suit property violates the Provisions of **Article 40 and 47(1)** of the **Constitution**.*
- (iii) *What reliefs if at all are available to the Petitioner?*

### **Whether the Petitioner is the absolute and indefeasible owner of suit property**

30. It is not in dispute that the Registrar of Titles issued Gazette Notice No. 9230 of 2011 revoking *inter alia* the Petitioner's title to the suit property. It is also not in dispute that Majanja J in Petition **No. 178 of 2011** held that revocation of titles by the Registrar of Lands was done in excess of his powers. He stated as follows with regard to the powers of the Registrar under **Section 60** of the **Registration of Titles Act 'RTA' (Cap 281, now repealed but the law in force at the time and under which the suit property is registered)**.

*“A plain reading of Section 60 will show that the powers of the Registrar are limited to correcting errors and misdescription of land or boundaries or where entries or endorsements to any grant or certificate of title are made in error or are fraudulent. This is a limited jurisdiction that does not include cancellation of titles. Even where the Registrar exercises such powers granted to him, the facts that are condition precedent of the exercise of such power must be shown to exist and the party against whom the power invoked must be given an opportunity to be heard. Section 65 empowers the Registrar to do all things that are necessary to ensure that there is a fair hearing before the exercise of this power.”*

31. The Learned Judge went on to state that the provisions of **Section 60**, aforesaid was not applicable to that case as that section did not empower the Registrar to revoke titles issued under the RTA. Having found the Registrar to have acted in excess of his powers, the judge made the following orders;

*“(a) Declaration be and is issued declaring that the revocation of titles issued under the Registration of Titles Act (Cap.281) of the laws of Kenya by the Registrar of Titles, the Commissioner of lands or any other officer authorised by them by way of publication of a*

***Gazette Notice under the provisions of the Government's Land Act(Cap 280) of the laws of Kenya and the Trust Land Act (Cap. 288) or any other law is contrary to Article 40 and 47 (1) of the Constitution and is therefore null and void.***

***(b) A declaration be and is issued declaring that the Petitioners' rights under Article 40 and 47(1) of the Constitution were violated by the publication of Gazette Notices Nos.9330, 7751, 3640 and 13104.***

***(c) A declaration be issued declaring that Gazette Notice Nos.9230, 7751, 3640 and 13104 are null and void and of no effect.***

***(d) The Registrar of Titles be and is directed to cancel, delete and or remove all or any entries giving effect to or made pursuant to Gazette notice Nos.9230, 7751, 3640 and 1304 in the titles to all the properties listed in the said Gazette Notices.***

***(e) The Registrar of Titles, the Commissioner of Lands or any other person authorized by them or on their behalf, be and are restrained from giving effect to or implementing in any manner whatsoever the contents of Gazette Notice nos.9230, 7751, 3640 and 13104.***

***The Registrar of Titles will respect, comply and implement the High Court Orders.”***

The above orders having not been appealed from, set aside or varied are orders of the Court and are binding on the parties and any other person.

Over and above what Majanja J. stated, there has been a chain of authorities from the High Court which have all stated that the Registrar of Titles or Lands as the case may be, has no authority to cancel a title by a mere Gazette Notice - See for example **Kuria Greens Limited v Registrar of Titles and Another (supra)**, and **Sound Equipment v Registrar of Titles and Commissioner of Lands Petition No. 106 of 2010**.

32. In the present case, subsequent to the orders of Majanja J, the Registrar of Titles caused to be published on 20th July 2012 another Gazette Notice No. 9815 giving notice of the orders made in **Petition No. 178 of 2012** and undertaking to respect, comply and implement the High Court Orders. That Gazette Notice read as follows;

**“CANCELLATION OF REVOCATION OF LAND TITLES**

***PURSUANT to the judgment of the High Court of Kenya at Nairobi, Milimani Law Courts Constitutional and Human Rights Division Petition No.178 of 2011 consolidated with:***

***Petitions Nos.167 of 2011,179 of 2011, 186 of 2011, 206 of 2011, 213 of 2011, 214 of 2011, 225 of 2011, 228 of 2011, 229 of 2011, 230 of 2011, 231 of 2011, 241 of 2011, 242 of 2011, 245 of 2011, 257 of 2011, 259 of 2011, 284 of 2011, 285 of 2011, 286 of 2011, 300 of 2011, 303 of 2011 and 329 of 2011***

***AND IN THE MATTER OF GAZETTE NOTICE NOS.3640, 9230, ... 7751 AND 13104***

***POWER TECHNICS LIMITED – (Petitioner)***

***AND***

***THE HON. ATTORNEY GENERAL – (First Respondent)***

***REGISTRAR OF TITLES – (Second Respondent)***

**COMMISSIONER OF LANDS – (Third Respondent)**

**The Honourable Court made the following Orders;**

**(a) Declaration be and is issued declaring that the revocation of titles issued under the Registration of Titles Act (Cap.281) of the laws of Kenya by the Registrar of Titles, the Commissioner of Lands or any other officer authorized by them by way of publication of a Gazette notice under the provisions of the Government Lands Act (Cap.280) of the Laws of Kenya and the Trust Land Act (Cap.288) or any other law is contrary to Article 40 and 47(1) of the Constitution and is therefore null and void.**

**(b) A declaration be and is issued declaring that the Petitioners' rights under Article 40 and 47(1) of the Constitution were violated by the publication of Gazette Notice Nos.9230, 7751, 3640 and 13104.**

**(c) A declaration be issued declaring that Gazette Notice Nos.9230, 7751, 3640 and 13104 are null and void and of no effect.**

**(d) The Registrar of Titles be and is directed to cancel, delete and or remove all or any entries giving effect to or made pursuant to Gazette Notice Nos.9230, 7751, 3640 and 13104 in the titles to all the properties listed in the said Gazette Notices.**

**(e) The Registrar of Titles, the Commissioner of Lands or any other person authorized by them or on their behalf, be and are restrained from giving effect to implementing in any manner whatsoever the contents of Gazette Notice Nos.9230, 7751, 3640 and 13104.**

**The Registrar of Titles will respect, comply and implement the High Court Orders.**

**Dated the 3rd July, 2012.**

**C. W. NGATIA**

**Principal Registrar of Titles”**

33.Despite the above Notice, on 22nd May 2013, the Respondent issued a Removal Notice to the Petitioner requiring it to remove all buildings and structures erected on the suit property and this Petition was then filed principally alleging a violation of the right to property.

34.**Article 40** of the **Constitution** protects the right to own property and provides thus;

**“(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.”**

35. In order to enforce this right, a party must demonstrate that it is entitled to the property in issue and clearly show the proprietary interest sought to be protected. In **Joseph Ihugo Mwaura and 82 Others v Attorney General Petition No. 498 of 2009**, the Court stated as follows;

**“Section 75 of the Constitution contemplates that the person whose property is the subject of compulsory acquisition has a proprietary interest as defined by law. The Constitution and more specifically section 75 does not create proprietary interest nor does it allow the court to create such rights by constitutional fiat. It protects proprietary interest acquired through the existing legal framework.”**

36. The nature and extent of the right to property under **Article 40** has been espoused in **Philma Farm Produce & Supplies & 4 Others v Attorney General & 6 Others, Petition No. 194 of 2011** where the Court stated as follows;

**“Article 40(1) sets out the general right of every Kenyan to acquire and own property. There is no allegation in the pleadings that the Petitioners have been denied the right, either individually or in association with other to acquire or won property of any description in Kenya. In the petitioners' case they were given an opportunity to own land when they were issued with allocation letter but they failed to comply with the terms thereof.**

**Article 40(2) limits the authority of parliament to pass certain types of legislation affecting property. First, legislation that deprives a person of property arbitrarily and second, legislation that restricts enjoyment of any right to property in a manner that is discriminatory in terms of Article 27(4) of the Constitution. The petitioners do not complain of any such breach.**

**Article 40(3) and (4) deal with the deprivation of property by the state on terms specified, that is, for a public purpose or in the public interest and upon payment of compensation. There is no complaint in this matter to trigger the application Article 40(3) or entitle them to compensation.**

**The Petitioner has not made out any case that their property is being acquired in the manner contemplated by Article 40 of the Constitution to trigger application of article 40(3) and (4). I must therefore conclude that there has been no breach of Article 40”.**

37. I agree with the exposition of the law and with the above background in mind, I must agree with the Respondent that reading the provisions of **Section 75** of the **Repealed Constitution** and **Article 40(6)** of the **Constitution, 2010**, the right to property does not extend to any property that has been found to have been unlawfully acquired. The issue therefore is whether in the context of this Petition the Petitioners hold a lawful and indefeasible title to the suit property?
38. The Petitioner's title to the suit property was acquired on 26th June 2001 and is registered under the **Registration of Titles Act, (Cap 281)**. **Section 23** of that **Act** provides for an indefeasible title as follows;

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

*“(2) A certified copy of any registered instrument, signed by the registrar and sealed with his seal of office, shall be received in evidence in the same manner as the original.”*

39. The Respondent alleges that despite the above provisions of the law, the title held by the Petitioner is illegal and was acquired irregularly. Sadly, there are no facts before the Court upon which I can conclude that the Petitioner's properties were illegally or unlawfully acquired. I say so because neither party placed emphasis on that issue and the Respondent limited itself to the development plan and no more. That is not material enough to warrant my delving into that issue not mention that under **Article 165(5)(b)** as read with **Article 162(2)(b)** of the **Constitution**, this Court has no jurisdiction to determine any dispute as to title to land. The Petitioners have filed this Petition seeking to enforce their fundamental rights and freedom and the Respondent has not filed a Cross-Petition or a counterclaim over the Petitioner's title to the suit property. From the material before me, the Petitioners are therefore the absolute and indefeasible owners of the suit property and I so find only to the extent of my duty to enforce **Article 40** of the **Constitution**. I also make this finding without prejudice to any other proceedings where the title may be properly interrogated.

**Whether the Removal Notice of buildings and structures erected on the suit property violates Article 40 and 47(1) of the Constitution.**

40. Having found that the Petitioner's title to the suit premises is indefeasible, I must now turn to consider the effect of the removal notice.
41. The Removal Notice subject to this Petition was issued by the Respondent, Kenya Urban Roads Authority on 22nd May 2013. The notice states that in fulfillment of the Respondent's mandate, it has been overseeing the implementation of the Eastern-by pass road project and has commissioned survey works for the planned interchange at the City Cabanas Junction along Mombasa Road. It then states that the Petitioner's suit property sits on a power line protected by a way leave. Paragraph 6 of subject notice reads as follows;

*“You are reminded as a matter of law that any/all dealings, incursions or meddling that is inconsistent with, or breaches the Powerless Wayleave's reserve and the proposed Interchanges are EXPRESSLY PROHIBITED. And thus you are hereby directed to REMOVE all buildings and/or structures erected on the said Powerline Wayleave, and to desist from any further creation or use of Powerline wayleave reserve FROM/ON/AT the proposed Cabanas interchange of the Eastern Bypass road project as at the close of business on the thirtieth (30) day from the date of this Notice.”*

The issue therefore that I must address is whether the Respondent had the mandate to issue the Removal Notice as purported to do.

42. The Respondent is established under **Section 9** of the **Kenya Roads Act of 2007** and under **Section 10** of the **Act** is responsible for the management, development, rehabilitation and maintenance of all public roads in cities and municipalities in Kenya except where those roads are national roads. Its powers are set out under **Section 10(2)** as follows;

*“Functions of the authority;*

*(1) ...*

*(2) For the purposes of discharging its responsibility under subsection (1) the Authority shall have the following powers and duties-*

*(a) constructing, upgrading, rehabilitating and maintaining roads under its control;*

*(b) controlling urban road reserves and access to roadside developments;*

*(c) implementing roads policies in relation to urban roads;*

*(d) ensuring adherence by motorists to the rules and guidelines on axle load control prescribed under the Traffic Act (Cap.403) and under any regulations under this Act.*

*(e) ensuring that the quality of road works is in accordance with such standards as may be defined by the Minister;*

*(f) in collaboration with the Ministry responsible for transport and the Police Department, overseeing the management of traffic and road safety on urban roads;*

*(g) monitoring and evaluating the use of urban roads;*

*(h) planning the development and maintenance of urban roads;*

*(i) collecting and collating all such data related to the use of urban roads as may be necessary for efficient forward planning under this Act;*

*(j) preparing the road works programmes for all urban roads;*

*(k) liaising and co-ordinating with other road authorities in planning and on operations in respect of roads;*

*(l) advising the Minister on all issues relating to urban roads; and*

*(m) performing such other functions related to the implementation of this Act as may be directed by the Minister.”*

43. As can be seen from above, the Respondent has no express mandate or power to issue the removal notices where a power line way leave is alleged to have been created over a parcel of land even if that way leave is remotely connected to road construction. The Authority relied on the provisions of **Section 49 (1) (a)** in issuing the Removal Notice. This Section provides as follows;

*“No person is permitted to erect, construct or lay, or establish any structure or thing, on or over or below the surface of a Road Reserve or Buffer Zone”*

44. To my mind the Section prohibits any person from constructing, erecting or establishing any structure on or above the surface of a road reserve or buffer zone but where then is the power to enforce a power line way leave? The Section has not given any powers, in my view, to the Authority to issue removal notice in that regard. I have also combed through the provisions of the

**Kenya Roads Act**, and the provision which gives the Authority power to issue removal notices is found under **Section 49(4)** which states as follows;

*“Structures and other works on, over, and below roads or certain;*

(1) ...

(2) ...

(3) ...

*(4) Where a person, without the permission required by subsection (1) or contrary to any permission given thereunder, erects, constructs, lays or establishes a structure or other thing, or makes a structural alteration or addition to a structure or other thing, an Authority may by notice in writing direct that person to remove the unauthorised structure, other thing, alteration or addition within a reasonable period which shall be stated in the notice but which may not be shorter than thirty days calculated from the date of the notice.”*

It is quite obvious that the powers conferred on the Respondent as above, cannot be the basis of the impugned removal notice and I so find.

### **Right to fair administrative action**

45. The Petitioner has alleged that the removal notice violated its right to fair administrative action as provided by **Article 47(1)** of the **Constitution** and which 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.*

*(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—*

*(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and*

*(b) promote efficient administration. ”*

In the case of **Attorney General v Ryath (1980) AC 718**, Lord Diplock held as follows with regard to the right to fair hearing;

*“It has long been settled, that a decision affecting the legal rights of an individual which is arrived at by procedure which offends against the principles of natural justice is outside the jurisdiction of the decision making authority.”*

The right to a hearing has also been examined by David Foulkes in his book, '**Introduction to Administrative Law**' 4th ed (Butterworths) where he stated as follows;

*“In a number of cases, Lord Denning has suggested that whether or not a person is entitled to a hearing depends on whether or not he has some right, interest or legitimate expectation of which it would not be fair to deprive without hearing what he has to say.”*

I am persuaded by the above expressions of the law and even if the Respondent has the right to issue a

removal notice as it did, it must do so in tandem with constitutional provisions. The Petitioner had the legitimate expectation in the proprietorship of the property and it should have been accorded a hearing before the removal notice was issued. The failure by the Respondent to inform and hear the Petitioner before the removal notice was issued was an affront to the Petitioner's right to fair administrative action and I so find.

### **Relief available to the Petitioner**

46. I have already found that the Petitioner's title to the suit property is indefeasible unless found otherwise by the relevant body mandated by law. As such I doubt that anyone, including the Authority, can direct the Petitioner on what structures or buildings to erect on its property unless the title has been properly and lawfully revoked in which event whatever is on the land would also be termed unlawful.

47. The above notwithstanding, the allegation that the suit property is situated on a power line must be taken with the seriousness it deserves and for a good reason; the residents of Nairobi and the Nation at large have a right to have the planned Interchange at the City Cabanas Junction along Mombasa Road completed as its usefulness to most residents of Nairobi and users of Mombasa Road cannot be overstated. But this Court cannot close its eyes to the Petitioner's rights which must be protected in the context of the wider interests of justice.

48. The Respondent has also raised very weighty issues about the acquisition of the suit property. In **Isaac Gathungu Wanjohi & Another v Attorney General and 6 Others, Petition No. 154 of 2011**, the Court stated as follows;

***“I also hold 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 revocation of the Gazette Notice as the Commissioner of Lands purported to do and definitely not by forceful taking of possession.”***

49. I am in agreement and to my mind, it is not the duty of this Court at this stage and the manner it has been approached to inquire into whether or not the Petitioner's title to property is clothed with illegalities. The Respondent must use the relevant body to so determine. To my mind and noting the existing legal regime, that body is the National Land Commission and the Environment and Land Court. The Commission and the Court would be in my view be able to put to rest all the issues raised and incidental to the ownership of the suit property. I digress.

50. From my findings above, the Petitioner is entitled to protection of the law and if the Respondent wishes to use the suit property for the public good, it must find a lawful way of acquiring it. It has attempted to do so though a revocation notice of the Petitioner's title issued by the Registrar of Titles but Majanja J. stopped that unlawful action. The second attempt is the one in issue presently and I have held that even that action is unlawful and I will here below grant appropriate reliefs to the Petitioner.

### **Conclusion**

51. In the circumstances and for the above reasons, the Petition is allowed in the following terms only;

***“(1) A declaration be and is hereby issued that the Respondent's purported removal notice of buildings and structures erected on the Petitioner's title to L.R. No.209/12686 pursuant to the letter dated 22/5/2013 is unconstitutional and invalid and in breach of Articles 40 and 47 of the Constitution.***

***(2) An order of Certiorari is hereby issued to bring to this Honourable Court for the purposes of being quashed the Respondent's removal notice dated 22/5/2013 addressed to the Petitioner in so far as it purports to require the Petitioner to remove and/or demolish the buildings and structures erected on the Petitioner's title to all that parcel of land known as L.R. No.209/12686 for being in breach of Articles 40 and 47 of the Constitution.***

**(4) An order of Injunction is hereby issued to restrain the Respondent by itself, servants, agents or whosoever authorised on its behalf from giving effect or implementing in many manner whatsoever the removal notice dated 22/5/2013 addressed to the Petitioner, alienating or in any other manner interfering with the Petitioner's possession of L.R. No.209/12686 or demolishing the developments thereon for being in of Articles 40 and 47 of the Constitution.”**

52.Although the Petitioner prayed for damages, it was not demonstrated in any way that any damages are payable and consequently I will not grant that prayer.

53.I also decline to grant any final orders regarding the title held by the Petitioner and that issue may be litigated elsewhere and in proper proceedings.

54.Regarding costs, the Respondent was acting in the wider public interest of creating a road interchange and it cannot be penalised with costs in that regard. Let each party therefore bear its own costs.

55.Orders accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 21ST DAY OF MARCH, 2014**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

Irene – Court clerk

Mr. Mwangi for Petitioner

Miss Wambui for Respondent

**Order**

Judgment duly delivered.

**ISAAC LEANOLA**

**JUDGE**