



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

PETITION NO. 18 OF 2019

**IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLE 23(1),
27(1) &(2),40 (1) AD (2),47 (1),(2) & (3) AND 50 (1) OF THE CONSTITUTION**

AND

IN THE MATTER OF THE LAND ACT

AND

IN THE MATTER OF PARCEL NUMBER KISUMU/MUNICIPALITY

BLOCK 6/392 AND KISUMU MUNICIPALITY BLOCK 6/393

AND

IN THE MATTER OF CONSTITUTIONALISM,

RULE OF LAW, NATURAL JUSTICE & GOVERNANCE

BETWEEN

SARNAGER SINGH HAYER.....1ST PETITIONER

HAYER BISHAN SINGH & SONS LTD.....2ND PETITIONER

AND

THE KENYA RAILWAYS CORPORATION.....RESPONDENT

JUDGMENT

The Petitioners herein *vide* their Petition dated 4th November 2019 and filed in court on 4th November 2019 are seeking the following orders;

1. A declaration that the Respondent's actions are contrary to the provisions of the Constitution and infringe on the rights of the Petitioners.
2. A declaration that the Respondent cannot acquire the Petitioners' property without following due process and without compensation as provided for in the Constitution.
3. A declaration that actions of the Respondent infringes and violates the Petitioners' right to property as provided for under Article 40 of the Constitution and is thus null and void.
4. A conservatory order stopping any further demolition of the Petitioners' properties KISUMU/MUNICIPALITY BLOCK 6/392 and KISUMU/MUNICIPALITY/BLOCK 6/393.

5. An order of mandatory injunction ordering the Respondent to compensate the Petitioners for the damages and loss occasioned on KISUMU/MUNICIPALITY BLOCK 6/392 and KISUMU/MUNICIPALITY/BLOCK 6/393.
6. An order of prohibition against altering the records at the Kisumu Lands registry or removing the Petitioners names from the register without their consent and/or permission or without following due process of the law.
7. In the alternative and without prejudice to the foregoing prayers, the Respondent be expelled to pay the Petitioners adequate compensation for the value of their land plus all expenses and developments on the said parcel of land as provided for in law all amounting to Kshs.400,000,000/= and damages to the property and goods on the plot amounting to Kshs. 89,824,458/=.
8. That costs of the Petition be borne by the Respondent.

The Petition was supported by the Affidavit of **SARNAGER SINGH HAYER** sworn on 4th November 2019 and filed on 4th November 2019 and on the other hand, the Respondent filed an Answer to the Petition and a cross Petition on 6th February 2020.

Petitioner's Case

It is the Petitioners case that the 1st Petitioner and his brother Charanjit Singh Hayer are the registered proprietors of that piece of Land known as KISUMU/MUNICIPALITY BLOCK 6/392 while the 2nd Petitioner is the registered proprietor of KISUMU/MUNICIPALITY/BLOCK 6/393 having acquired it legally and following the due process. That the National Land Commission being the only body constitutionally mandated to inquire into the allocation of any alleged public land did in its gazette notice Number 6862 dated 17th July 2017 publish the list of lands within Kisumu County that it had investigated and ordered cancellation of the same but the said Petitioners' parcels of land were amongst those listed.

The 1st Petitioner and his brother applied had KISUMU/MUNICIPALITY/BLOCK 6/392 allocated to them following the legal procedure for acquisition of such property while the 2nd Petitioner purchased land parcel KISUMU/MUNICIPALITY/BLOCK 6/393 for valuable consideration from Wycliff Musalia who was the registered owner of the said parcel of land in 1992. It is the Petitioners case that the Respondent saw a publication in the newspaper on 20th October 2019 giving notice to persons on parcel number LR No/. 1148/1168 & 1148/1169 Upper Estate in Kisumu County which properties did not concern the Petitioners since it was one of the Petitioners' parcels of land. The Petitioners were called by the security personnel guarding the suit properties that people had been sent by the Respondent and were bringing down the perimeter wall and were also pulling down the building on the plot.

The Petitioners have also alleged that they had developed the plots and had acquired loans from various financial institutions to put up the developments which are valued at Kshs. 400,000,000/=. That the suit properties are charged to the tune of Kshs. 385,000,000 to various institutions to finance contracts being undertaken by the 2nd Petitioner. The Petitioners further stated that they have suffered loss and damage amounting to Kshs. 89,824,458/=.

Respondent's Answer to Petition

The Respondent filed an Answer to the Petition on 30th September 2020 and alleged that the suit land consist of what was part of all that parcel of land comprising of land vested in the Respondent by operation of the Kenya Railways Corporation(Vesting Land)Order, 1986 contained in Legal Notice Number 24 of 1986 which replaced and revoked the Kenya Vesting of Land Regulations, 1963(L/N.440/1963) which created an exclusive proprietary interest in favour of the East African Railways Corporation , the predecessor of the Respondent Corporation. That under the provisions of section 13 and 14 of the Kenya Railways Act, they are empowered to acquire and hold land for the purposes of discharging their duties and performing their operations as provided for under the Act and are also entitled dispose off or alienate in any manner any such lands in their possession either by way of sale, lease or otherwise but in accordance with the provisions of the law.

The Respondent stated that it is the registered owner of land parcel No. KISUMU/MUNICIPALITY/BLOCK 6/95 measuring approximately 9.4295 Hectares (23.29 acres) and that they own the suit land by operation of the law. The Respondent avers that land parcel number KISUMU/ MUNICIPALITY/BLOCK 6/95 was previously registered as a leasehold under the Registered Land Act in favour of the General Manger of the East African Railways and Harbour Administration as LR. No. 1148/1168 and the Respondent is in possession of all ownership and title documents including maps and drawings showing the extends of the boundaries of the said parcel of land and as proof that the same belongs to them.

That in 2019, the Respondent was incorporated into a project management team for the Revitalization of the Kisumu Port and Lake Victoria Transport where the Respondent agreed to Lease their 23.29 acres of land within Kisumu Municipality to the County Government of Kisumu for the development of the Modern Port to resettle the businesses affected at the Lwang'ni Beach and Hawkers within the Kisumu CBD. It is further stated by the Respondent that upon moving in to confirm the boundaries and beacons the Respondent was shocked to realize that there were several encroachments in form of subdivisions on the their land reference as KISUMU/ MUNICIPALITY/BLOCK 6 parcels 393,392,391,397,398,399,400,409 and 517 and out of these parcels, the Petitioners claim to be registered owners of Land Parcel Number KISUMU MUNICIPALITY measuring 2.89 Acres with a lease of 99 years from 1.2.1989 with damages for a certificate of lease issued on the 27/11/1998.

The Respondent further stated that they have never alienated any interests in the whole or part of their land or surrendered to any government agency to make the land available for allocation to any entity or grabbing and therefore the Petitioners herein acquired the suit properties illegally and through fraudulent means. The Respondent further denied that the Petitioners suffered loss and damage as they have benefitted from trespassing, occupying the Respondent's land to the detriment of the Respondent and therefore the Respondent reserve the right to sue for damages for trespass. The Respondent prayed that the entire Petition be struck off with costs.

Cross-Petition by the Respondent

The Respondent filed a cross Petition on 30th September 2020 against the Petitioners and the National Land Commission and reiterated the contents of the Answer to Petition and stated that 3rd Respondent in the Cross Petition illegally created 1.026 Ha and 1.777 Ha by excising the said portions from part of the Cross Petitioner's land and created the suit properties which the 1st and 2nd Respondent hold upon acquiring from the 3rd Respondent. The Cross- Petitioner enumerated the particulars of fraud of all the Respondents to the Cross-Petition.

The Respondent herein in the Cross Petition sought for the following orders:

1. An order for dismissal and / or striking out of the main Petition with costs to the Respondent/Cross- Petitioner.
2. A declaration that the entire parcel of land no. KISUMU MUNICIPALITY BLOCK 6/95 measuring 23.29 Acres belongs to the cross petitioner and any subdivisions to create land parcel number KISUMU/MUNICIPALITY BLOCK 6/392 and KISUMU/MUNICIPALITY/BLOCK 6/393 was illegal, irregular, fraudulent, null and void.
3. An order for cancellation and/or revocation of the titles KISUMU/MUNICIPALITY BLOCK 6/392 and KISUMU/MUNICIPALITY/BLOCK 6/393.
4. A Permanent Injunction to restrain the Respondents in the Cross-Petition, their agents and/or servants from interfering in any way with the Cross-Petitioners or their agents use and possession, transferring, selling, leasing, trespassing, encumbering and /or otherwise dealing with the whole or part of the Plaintiff's land registered as parcel no. KISUMU/MUNICIPALITY BLOCK 6/95.
5. Costs of the Cross Petition.
6. An order for damages for trespass.
7. Any other relief this Honourable court may deem fit to grant.

SARNAGER SINGH HAYER passed on and was substituted by **CHARANJIT SINGH HAYER** who filed a Witness Statement. The matter came up for hearing on and Charanjit Singh Hayer upon being sworn in adopted his statement dated 11th May 2021 as evidence in Chief. On Cross Examination by Miss. Mora Counsel for the Respondent, Charanjit Singh Hayer stated that he applied to be allocated the suit property and the suit property belonged to Kenya Railways. That he obtained title to the property in 1988 and Survey Fees was paid and he has no receipt to show the survey fees was paid but the letter is clear.

He further stated that the property is in the name of Kenya Railways but it was bought in the right way and there is a consent. That he procedurally obtained the title and he bought the property from Musalia Mudavadi at KShs. 2 Million and all the documents are there. He further stated that the demolitions of the properties were done by Kenya Railways and he never reported to the police about the demolitions. She went on to state that the buildings were still under construction and he participated in the proceedings of NLC but Kenya Railways never participated.

On re-examination by Mr. Yogo, he stated that Kenya Railways participated in the process of allocation of land.

MR. GEOFFREY WEKESA a Senior Cartographer at Kenya Railways upon being sworn in adopted his statement as evidence in chief. He stated that KISUMU MUNICIPALITY BLOCK 6/95 was the mother title and that there is no excision of the suit parcels from 6/95 and reserved as a resident plot. That the land was to be used for residential purposes only and there was no application for change of user and there is no record of the same.

That they still retain the title and a certified copy was retained by court. They have the original title of Block 6/95 and the parcel is owned by East Africa Railways and the Commissioner of Lands recalled the original title and cancelled it. The new title was not super-imposed on the old title and that the letter from Kenya Railways does not constitute a surrender and he is not aware of any survey that took place and proper procedure was not followed in the transaction. He stated that Kenya Railways was not party to the proceedings of NLC.

On cross- examination by Mr. Yogo for the Petitioners, he stated that he is not the MD of Kenya Railways and correspondences were never addressed to him. He confirmed that he is not in the Legal Department. That the person responsible with records is in the main records and there is a person in the Survey Department in charge of records.

That the records of Board minutes are kept by the company registry and he confirmed that in 1984-1986 he was not in Kenya Railways. The East African Railways collapsed in 1977. He further stated confirmed that Kenya Railways never made complaints that its letter heads were used illegally and they have never challenged the findings of NLC. There was an approved plan for the Part Development Plan and Kenya Railways never opposed the Part Development Plan. On re- examination, he confirmed that once an approved plan is amended and he has access to the title for Kenya Railways and the title was issued on 8/2/1979.

Petitioner's Submissions

The Petitioners filed their written Submissions on 19th November 2021 where a number of issues were raised for determination. On the issue of whether the process of acquisition of the suit parcels of land followed due process as provided in law to warrant good title; it was submitted that Musalia Mudavadi applied for allocation of the suit parcels of land and the Commissioner of Lands wrote to the Respondent on the intention to allocate the suit parcels of land and the Respondent commissioned a licensed surveyor to carry out survey in terms of the

approved plan of 1984. It was stated that the Respondent actively participated in the process of subdivision and allocation and the Petitioner relied in the case of **Republic vs Land Registrar, Tranzoia & Another Ex parte Mary Odhiambo & Another (2019) eKLR**.

It was further submitted that the National Land Commission carried out investigations as to the acquisition of the suit parcels of land and gave its result by a letter dated 26th March 2016 and published the same as required by law in the Gazette Notice. That there is no official search showing that the suit properties are in the name of the Respondent. The Petitioners relied in the case of **Town Council of Awendo v Nelson O Onyango & 13 Others; Abdul Maik Mohamed & 178 Others (Interested Parties) (2019) eKLR**.

On the issue of whether the Petitioners' constitutional right to property has been infringed; it was submitted the Petitioners acquired the suit parcels legally and reliance was placed in the case of **Funzi Island Development Ltd & 2 Others vs County Government of Kwale & 2 Others (2014) eKLR** where it was held that *a registered owner of land enjoys absolute and indefeasible title if the allocation was legal, proper and regular*.

That the Respondent's actions to demolish the Petitioners' buildings was contrary to the provisions of Article 40 and 47 of the Constitution. The Petitioners relied in the case of **Kassim Ahmed Omar & Another vs Awuor Abel & Others Malindi ELC No. 18 of 2015 and Kenya National Highway Authority v Shalien Masood Mughal & 5 Other (2017) eKLR**.

It was the Petitioners' submission that they did not acquire the title fraudulently or illegally without the consent or knowledge of the Respondent and that the allegations of fraud have not been proved in the face of the documents exhibited by the Petitioners and finding by the National Land Commission. The Petitioners therefore prayed that they be granted the orders sought.

Respondent's Submissions

The Respondent filed its Submissions on 18th November 2021 and raised the following issues for determination:

a. Whether or not the Petitioner has discharged the burden of proof over the alleged violations as raised in the Petition to warrant issuance of the orders sought.

The Respondent stated that the Petitioners have alleged that their constitutional rights have been violated and to prove the same, the Petitioners have to discharge the burden of proof to the required standard as was held in **Kiambu County Tenants Welfare Association v Attorney General & Another 92017) eKLR**.

On the issue of whether the Petitioners have discharged the burden of proof over the alleged violations as raised in the Cross-Petition to warrant issuance of the orders sought; it was the Respondent's submission that every person in Kenya has the right to acquire and own property as stipulated under Article 40 of the Constitution as read with 24, 25 and 26 of the Land Registration Act and this right is not absolute but is subject to limitation as set out under Article 40(6) of the Constitution as read with section 26 of the Land Registration Act and relied in the case of **Henry Muthee Kathurima vs Commissioner of Lands & Another (2015) eKLR** where the court held as follows:

"We have considered the provisions of section 26 of the Land Registration Act in light of the provisions of Article 40 (6) of the constitution and it is our considered view that the concept of indefeasibility of title is subject to Article 40(6) of the constitution. We hold that the concept of indefeasibility or conclusive nature of title is inapplicable to the extent that title to the property was unlawfully acquired."

In the case of Funzi Island Development Limited & 2 Others vs County Council of Kwale & 2 Others (2014) eKLR the court stated that a registered owner of land enjoys absolute and indefeasible title to property if allocation was legal, proper and regular. A court of law cannot therefore sanction an illegality in cases where one claims indefeasibility of title if the same was not obtained through lawful means.

In Republic vs Land Registrar Kilifi & Another ex parte Daniel Ricci (2013) eKLR the court held that a title deed is an end product of a process. 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 procedures in acquiring it.

It was further stated that for one to enjoy the right to own property under Article 40 of the Constitution, if and when challenged, one has to demonstrate how he acquired title to justify such enjoyment as was held in Munyu Maina v Hiram Gathiha Maina, Civil Appeal Number 29 of 2009 where the court held as follows:

We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register'.

It was further submitted that the Petitioners have failed to demonstrate that the suit properties were lawfully and procedurally excised from Kisumu Municipality Block 6/95 and also failed to demonstrate that a surrender of Title Kisumu Municipality Block 6/95 was done prior to issuance of their titles in 1998 with respect to the suit properties. It was further stated that the Petitioners failed to demonstrate payment of survey fees in order to facilitate the survey process to excise the suit properties from Kisumu Municipality Block 6/95. That the Petitioners have failed to prove how they acquired the suit properties as the Respondent still holds the title of Kisumu Municipality Block 6/95.

That the Petitioners have claimed to have acquired the suit properties through lawful means yet the evidence adduced before the court failed to support their assertions and the Respondent prayed that the Petitioners' suit be dismissed and relied in the case of **Makula International**

Ltd vs His Eminence Cardinal Nsuuga and Another (1982) HCB II and the case of Macfoy vs United Africa Company Ltd (1961) 3 ALL E.R.1169.

It is stated that the Petitioners have alleged that their rights to fair administrative action and fair hearing under Article 27,17 &50 of the Constitution however, they have not demonstrated how these rights have been violated. That the Petitioners have also alleged that they suffered damages amounting to Kshs. 400,000,000/= being the value of the suit properties and Kshs. 89,824,458/= being the loss on the damage of the wall and goods and items were lost, damaged and vandalized during the demolition. It is the Respondent's submission that the Petitioners should not be awarded the damages sought as there was no proof that the reports were prepared by a qualified person within the meaning of the Valuers Act. The Respondent further submitted that the sums of Kshs. 260,000,000/= and Kshs. 310,000,000/= being the value of land and buildings ought not to be awarded on the basis that the Petitioner failed to demonstrate lawful acquisition of the suit property.

Submissions on the Cross-Petition

It is the Respondent's submission that it has proved it is the registered owner of Kisumu Municipality Block 6/95 as the acquisition of the said property was not challenged by the Petitioners. The Respondent also produced a survey plan which demonstrates the interest enjoyed by the Respondent and also produced a copy of the search certificate.

That the Respondent has proved the allegations of fraud in the cross petition and relied in the case of *Kinyanjui Kamau vs George Kamau (2015) e KLR* where the court held as follows:

“It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo (2008) 1 KLR (G&F) 742* wherein the Court stated that:

“...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”

In the case of *Bullen & Leake & Jacobs, Precedent of Pleadings 13th Edition* quoting with approval the cases of *Wallingford v Mutual Society (1880) 5 App.Cas.685 at 697,701,709*, *Garden Neptune v Occident (1989)1 Lloyd's Rep.305,308*, *Lawrence v Lord Norreys (1880)15 App.Cas.210 at 221* and *Davy v Garret (1878)7 ch.D.473 AT 489*, it was stated as follows:

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged. The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (I). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice”.

The Respondent further stated that Article 47 of the Constitution guarantees every person in Kenya the right to administrative action that is lawful and procedurally fair and is entitled to enjoy this right and where there is an infringement of the same, the Respondent is entitled to equal protection of the law. That the 3rd Respondent in the cross- Petition unlawfully and unprocedurally the suit properties to the Petitioners without surrender of titles neither were there requisite consents obtained prior to the issuance of the titles.

The Respondent therefore prayed that the Petition be dismissed and the Cross-Petition be allowed with costs.

Analysis and Determination

This court has looked at the pleadings filed, the evidence on record and the submissions filed by the parties and the following issues are to be determined:

- a. Whether the Petitioner is entitled to the orders sought in the Petition.
- b. Whether the Petitioner's rights and fundamental freedoms were violated.
- c. Whether the Cross Petition is merited

Whether the Petitioner is entitled to the orders sought in the Petition;

It is the Petitioners case that the suit properties being land parcel number KISUMU MINICIPALITY / BLOCK 6/392 and KISUMU MUNUCIPALITY/BLOCK 6/393 were legally acquired and registered in their names. That the National Land Commission vide Gazette Notice No. 6862 of 2017 published a list of lands within Kisumu County that it had investigated and ordered cancellation of the same but the suit properties were not part of the properties listed. That the Respondent moved into the suit properties and destroyed developments and properties that were stored in the premises.

On the other hand, the Respondent stated that it is empowered of acquire and hold land for purposes of discharging its duties under the Kenya Railways Corporation Act and that all land that was vested in the East African Railway Corporation by any written law as well as land conveyed to that corporation or otherwise placed at the corporation's disposal .It is the Respondent's case that the suit properties is part of a large parcel of land owned by the Respondent as parcel number KISUMU MUNICIPALITY BLOCK 6/95(LR. NO. 1148/1168 measuring 23.29 acres and vide a grant number I.R.21961, the Respondent was granted a 99 year lease from 1.1.1932 by the President of Kenya.

The Respondent alleged that it has never transferred or alienated the said parcel of land either as a whole or in part and therefore the titles held by the Petitioners were acquired illegally and through fraudulent means.

Section 24 of the LRA provides:

“(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.”

Section 25 provides:

“25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”

Section 26 provides:

“26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

In the case of **Alice Chemutai Too – Vs – Nickson Kipkurui Korir & 2 Others [2015] eKLR** it was stated as follows:

“ ... it needs to be appreciated that for Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.”

The Survey Plan FR 108/112 of 1963 clearly show the boundaries of land parcel number KISUMU MUNICIPALITYBLOCK 6/95.However, it has been alleged by the Respondent that the said parcel of land was encroached and subdivided into several parcels including the suit parcels. I have looked at the List of documents filed by the Respondent and confirm that land parcel number KISUMU MUNICIPALITYBLOCK 6/95 belong to the Respondent. The subdivisions of the suit parcels were carried out by the National Land Commission without the consent of the Respondent.

Section 14(4) and (5) of the Kenya Railways Act provides that: -

‘(4) The Corporation may at any time convey, transfer or surrender any land surplus to both its existing and future

requirements by a conveyance or a deed of surrender either for, or without, consideration: Provided that land which was public land or trust land shall be surrendered to the Government and shall not be conveyed or transferred to any other person unless the Minister responsible for lands shall consent and so direct.

(5) The provisions of subsection (4) shall apply to land vested in the Corporation by any written law, including this Act, as well as to land conveyed to it or otherwise placed at its disposal.'

Although the Petitioners have produced titles to the suit properties, it is not clear how the suit properties were excised from land parcel number KISUMU MUNICIPALITY BLOCK 6/95. Pursuant to the letter dated 20th January 1988, the Petitioners stated that the 2nd Petitioner and Mr. Wycliffe Musalia Mudavadi applied to the Commissioner of Lands to be allocated land within Kisumu Municipality. As per the letter dated 30th June 1988, the Respondent confirmed that for the allocation of land to be finalized, a surrender of title ought to be done by the Respondent and when the matter came to court, the Petitioner stated that the title of land parcel number KISUMU MUNICIPALITY BLOCK 6/95 was surrendered by the Respondent prior to issuance of the titles of the suit parcels in their favour. From the evidence adduced, it is clear that the Petitioners were unable to demonstrate that a surrender of land parcel number KISUMU MUNICIPALITY BLOCK 6/95 was issued. A search conducted by the Respondent indicates that the Respondent is the registered owner of land parcel number KISUMU MUNICIPALITY BLOCK 6/95.

This court finds that although the Petitioners have produced titles to the suit parcels, the suit parcels were acquired illegally and through fraudulent means. Based on the above analysis and the evidence on record, it is clear that the Petitioners did not follow the right procedure in acquiring the suit parcels. The Respondent has demonstrated that it is the registered owner of land parcel number KISUMU MUNICIPALITY BLOCK 6/95 and it has never subdivided the property and if subdivision was to take place, they would have surrendered the Original title. Even though the Petitioners aver the original title was surrendered by the Respondent and upon surrender they paid Survey Fees, they have failed to prove the same.

Whether the Petitioner's rights and fundamental freedoms were violated.

Article 40 of the Constitution of Kenya provides:

“(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.”

Article 47 of the Constitution provides:

“(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.”

Section 4(3) of the Fair Administrative Actions Act also provides that where an administrative action is likely to affect the rights and fundamental freedoms of any person, the administrator shall give the person affected prior notice of the proposed action, an opportunity to be heard, right to internal review where applicable, statement of reasons, notice of right to legal representation, right to cross-examine where applicable, and information, materials and evidence forming the basis of the action.

The Petitioners allege that they are the rightful owners of the suit parcels but have failed to demonstrate how they acquired the said parcels. The Petitioners have alleged that their rights were violated as their developments erected in the suit parcels were demolished and they have suffered loss and damages. The Respondents have confirmed that said demolitions were carried out by a multi-agency Government of Kenya Unit for purposes of rehabilitation of the Kisumu Port. The Respondents have failed to demonstrate whether a Notice was served to the Petitioners informing them that they will carry out a demolition and have also alleged that the Petitioners have benefited from trespassing, occupying the Respondent’s land. Although the Petitioners have produced a Valuers report, they did not produce receipts or documents to show the value of goods that were damaged. This court is not able to ascertain the value of goods that were destroyed and also this court is unable to award damages as the Petitioners acquired the suit parcels illegally .

Whether the cross petition is merited

The Respondent in its Cross Petition alleged that it is the registered owner of KISUMU MUNICIPALITY BLOCK 6/95. That the 3rd Respondent in the Cross-petition illegally created 1.026 Ha and 1.177 Ha respectively by excising the said portions from part of the Cross-Petitioners’ land and created Kisumu Municipality/Block 6/392 and Kisumu Municipality/Block 6/393. The Respondent enumerated particulars of fraud on the part of the Petitioners and the National Land Commission respectively at paragraph 6 of the Cross-Petition.

For one to transfer property from the Respondent, the Law requires that a surrender of title has to be executed as per section 14 of the Kenya Railways Corporation Act and the Petitioners were required to pay survey fees in order for the excision to take place. The 3rd Respondent in the Cross- Petition did not follow the relevant procedure in allocating land to the Petitioner. From the evidence on record, it is clear that no consent of the Commissioner of Lands was obtained over the sub-division of land parcel number KISUMU MUNICIPALITY BLOCK 6/95.

Paul Nderitu Ndung’u & 20 Others –V- Pashito Holdings Limited & Another (Nairobi HCCC No. 3063 of 1996) where it was held that the Commissioner of Lands had no legal authority to allocate the two pieces of land which had been reserved for a Police Post and a Water Reservoir as they had already been alienated. In the Paul Nderitu Ndung’u case Justice Mboghli Msagha said:

“Under the Government Lands Act (Cap 280, Laws of Kenya) the Commissioner of Lands can only make grants or dispositions of any estates, interests or rights in over unalienated government land. (Section 3). In the instant case, the two parcels of land among others had been alienated and designated for particular purposes. It was not open for the Commissioner of Lands to re-alienate the same. So the alienated was void ab initio.”

In the case of **Henry Muthee Kathurima v Commissioner of Lands & another [2015] eKLR** the court stated as follows:

“The Commissioner of Lands had no power to alienate public land and any action taken without due authorization is a nullity. We cite the case of Said Bin Seif v. Shariff Mohammed Shatry, (1940) 19 (1) KLR 9, and reiterate that an action taken by the Commissioner of Lands without legal authority is a nullity; such an action, however, technically correct, is a mere nullity.”

The Respondent has been able to specifically prove the particulars of fraud on the Petitioner and the National Land Commission. The suit parcels being public land, the Petitioners ought to have followed the procedure provided in law in order to have the suit parcels allocated to them. This court has looked into the evidence on record and it is clear that the suit parcels were illegally and un-procedurally acquired by the Petitioners.

CONCLUSION

This court finds that the Petitioners Petition is unmerited and is hereby dismissed with costs. The Cross -Petition filed by the Respondent is merited and this court therefore orders as follows:

1. A declaration that the entire parcel of land no. KISUMU MUNICIPALITY BLOCK 6/95 measuring 23.29 Acres belongs to the cross petitioner and any subdivisions to create land parcel number KISUMU/MUNICIPALITY BLOCK 6/392 and KISUMU/MUNICIPALITY/BLOCK 6/393 was illegal, irregular, fraudulent, null and void.
2. An order for cancellation and/or revocation of the titles KISUMU/MUNICIPALITY BLOCK 6/392 and KISUMU/MUNICIPALITY/BLOCK 6/393.

3. A Permanent Injunction to restrain the Respondents in the Cross-Petition, their agents and/or servants from interfering in any way with the Cross-Petitioners or their agents use and possession, transferring, selling, leasing, trespassing, encumbering and /or otherwise dealing with the whole or part of the Plaintiff's land registered as parcel no. KISUMU/MUNICIPALITY BLOCK 6/95.

4. Costs of the Cross Petition be borne by the Petitioners.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 11th DAY OF MARCH, 2022

ANTONY OMBWAYO

JUDGE

This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.