**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 70 OF 2010**

**CYCAD PROPERTIES LIMITED.....PETITIONER**

**AND**

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

**THE MINISTER MINISTRY OF ROADS.....2ND RESPONDENT**

**THE MINISTRY OF LANDS.....3RD RESPONDENT**

**KENYA NATIONAL HIGHWAYS AUTHORITY.....4TH RESPONDENT**

**KENYA URBAN ROADS AUTHORITY.....5TH RESPONDENT**

**(AS CONSOLIDATED WITH PETITION NO. 69 OF 2010)**

**BETWEEN**

**ELIZABETH WAMBUI GITHINJI & OTHERS.....PETITIONERS**

**AND**

**KENYA URBAN ROADS AUTHORITY.....1ST RESPONDENT**

**THE MINISTRY OF ROADS.....2ND RESPONDENT**

**THE MINISTRY OF LANDS.....3RD RESPONDENT**

**THE HON. ATTORNEY GENERAL.....4TH RESPONDENT**

**JUDGMENT**

**Introduction**

1. The petitioners have lodged these petitions challenging what they perceive as the arbitrary and unlawful intention by the government to take 20 metres out of their land for the (then) proposed construction of the Northern Bypass Corridor (**'Northern Bypass'**) between Ruaka Trading Centre and

Kiambu Road through Runda Estate. The stretch in question is approximately 21 kilometres starting from Ruaka Trading Centre on Limuru Road and passing through, among others, the petitioners' respective properties (hereafter '**the subject property'**).

2. The subject property is part of what was formerly **L.R No. 7785/9** and **L.R. No. 12672 (original number L.R No. 23)** from which the government of Kenya, according to the respondents, compulsorily acquired 16.061 acres (6.502 hectares) in the 1970s. The remaining part of L.R. 7785/9 and L.R. 23 was subsequently subdivided into smaller units by the registered owners. In both these matters, the petitioners are third generation owners.

3. The petitioners claim that their dispute with the respondents began in early November, 2010, when agents of the 1st and 2nd respondents marked on their respective property fences the marks **"X"** ascribing various numbers of metres and indicating an intention to demolish the structures and or take over their properties to the extent specified in metres by the inscription. The petitioners came to court to assert their proprietary rights as stipulated in Section 27 of the Registered Land Act (now repealed) and Article 40 of the Constitution, and conservatory orders were issued in their favour pending the hearing and determination of the petitions. As the subject matter of the petitions is the same, a decision was made to consolidate the petitions and to hear them together, and this judgment therefore pertains to both petitions.

4. The issue in dispute in both petitions is the width of the road reserve adjacent to the petitioners' properties. While the petitioners contend that it is 60 metres according to records from the Ministry of Lands, the respondents counter that it is 80 metres as delineated in the 1970s when the parent parcels were compulsorily acquired by the government.

**The Petitions**

**Petition No. 70 of 2010**

5. The petitioner, **Cycad Properties Limited** (hereafter referred to as **Cycad**), is a limited liability company incorporated in Kenya under the provisions of the Companies Act, Cap 486 Laws of Kenya. Cycad is the registered proprietor of all that property known as **Nairobi Block 112/193** situated in Nairobi within Runda Estate pursuant to a Certificate of Lease from the government dated 8th December, 2003. The property, which was acquired by the petitioner from Mimosa Plantations Limited, borders the Northern By-pass and was, prior to subdivision, part of the property known as **L.R. No. 7785/9.**

6. In its petition dated 12th November 2010 which is supported by the affidavit of Mr. Vinayak Radia, a Director of Cycad, the petitioner states that it has over the years invested substantially, in excess of Kshs 600,000,000.00 in developing the property. It had, by the time of filing the petition, constructed 19 residential houses, ancillary facilities and a perimeter wall, and has sold some of the houses to third parties under long term leases for the unexpired terms of its lease.

7. Mr. Vinayak Radia depones in his affidavit that at the time of purchase of the property, he instructed a qualified and practising surveyor to inquire from the Survey Department the delineations of the petitioner's property which indicated that the proposed road measures 60 metres wide and not 80 metres. Mr. Radia also depones that the petitioner sought and received all the approvals required by the National Environment Management Authority ("NEMA") and the City Council of Nairobi to enable it develop the property, and that at no time did any government department, including the respondents, intimate that the proposed road was more than 60 metres wide.

8. In the Further Affidavit sworn on 15th December 2010, Mr. Vinayak Radia depones that the petitioner was not opposed to the construction of the Northern Bypass as claimed by the respondents but he maintained that the land reserved for that purpose was only 60 metres wide and not 80 metres; that this width was more than enough for the purposes of construction of the Northern Bypass, and that if the respondents wished to extend the road reserve from 60 to 80 metres, then it ought to initiate and comply with a proper compulsory acquisition process.

9. The petitioner therefore contends that the extension of the proposed road to 80 metres is an arbitrary and illegal expropriation of its property which will result in the complete demolition of a number of houses and partial demolition of others thereby infringing on their constitutional right to property under **Article 40** of the Constitution and **section 27** of the Registered Land Act. It contends further that the proposed unlawful expropriation will cause undue hardship to the petitioners and the residents and will expose the petitioner to suits and claims by the purchasers of the 19 houses erected on the property to be affected by the intended demolition, which hardship cannot be compensated by payment of a fair value for the land expropriated.

10. With regard to the 5th respondent's contention that the sums that the public stood to lose in contract in the event the proposed construction stalled was far much more than what the petitioners had invested in the property, Cycad states that this does not in any way limit the petitioner's rights to ownership of land and protection from arbitrary deprivation of the same nor does it give the respondents carte blanche to illegally expropriate the petitioner's property.

11. The petitioner therefore seeks the following orders from the court:

***i. A declaration that the Petitioner's rights, individually or in association with others, to acquire and own property without arbitrarily being deprived of the same as guaranteed by Article 40 of the Constitution have been and will be contravened if the intended demolition is effected and which intended demolition is unlawful and illegal.***

***ii. A declaration that the decision by the 2nd, 4th and 5th Respondents to illegally and arbitrarily acquire the Petitioner's and the Resident's property is null, void to the extent that it violates the fundamental rights and freedoms of the Petitioner as envisaged under Article 40 of the Constitution.***

***iii. The Honourable court do issue such orders and give such directions as it may deem fit to meet the ends of justice.***

***iv. The costs of the Petition be awarded to the Petitioner.***

**Petition No. 69 of 2010**

12. The petitioners in this matter are residents of Runda Mimosa Estate and holders of Certificates of Lease or Title issued to them by the Registrar of Titles and or the Commissioner of Lands. Their titles arise from sub-divisions of the mother titles to **L.R. 7785/9** and **L.R. No. 12672 (originally L.R No. 23)** (hereinafter "the mother titles"). The owners of the mother titles were Efstav Limited and Edith Gladys Cockburn respectively.

13. The petitioners plead that they purchased residential houses, each costing approximately Kshs. 35,000,000.00, on diverse dates from a housing development on part of what was once Mimosa Plantations. The titles of the 29 petitioners are set out in the further Amended Petition dated 25th November 2010 and include Title Nos. Nairobi/Block 112/4, Block 112/171, Block 112/172, Block 112/173, Block 112/176, Block 112/179, Block 112/193/13, Block 112/193/14 and Block 112/193/15, and L. R Nos. 12672/221, 222, 223, 224 and 225, and L.R. 7785/256 and 257.

14. In the Further Amended Petition dated 25th November, 2010 and supported by the affidavit of **Thomas Njuguna**, the 25th petitioner, and a further affidavit sworn by the 2nd petitioner, **Dr Kevin Kariuki,** and filed in court on 22nd December 2010, the petitioners seek the following reliefs:

***i. A declaration that the Petitioners' rights, individually or in association with others, to acquire and own property without arbitrarily being deprived of the same as guaranteed by Article 40 of the Constitution have been and will be contravened due to the discrepancies at the two ministries if the intended demolition is effected.***

***ii. A declaration that the intended action of the Ministry of Roads, whether pursuant to any plans, contravenes the express records at the Ministry of Lands and that the valid documents are those at the Ministry of Lands.***

***iii. A declaration that the decision by the Ministry of Roads to demolish the Petitioners' properties is null and void to the extent that it violates the fundamental rights and freedoms of the petitioners as captured by Article 40 of the Constitution.***

***iv. A declaration that the Ministry of Lands being the legal and sole repository of land records in Kenya, the Petitioners were not under any duty to check the records or plans of any other Ministry in respect of land.***

***v. A declaration that pursuant to an interpretation of Article 20 of the Constitution, if there is any conflict between two government ministries, the court shall adopt the interpretation that favours the enforcement or protection of a right or fundamental freedom.***

***vi. A declaration that, in the alternative, the Ministry of Lands shall make prompt payment in full of just compensation to the petitioners pursuant to the express provision of Article 40 of the Constitution.***

***vii. The Honourable court do issue such other orders and give such further directions as it may deem fit to meet the ends of justice.***

***viii. The costs of the petition be awarded to the Petitioner.***

**The Petitioners' Case**

15. The crux of the petitioners' argument is that they hold titles or leases issued by the government and that these titles have neither been cancelled nor revoked through any process recognised by law. Until such time comes, the petitioners are entitled to continue enjoying their property rights as safeguarded under **Article 40** of the Constitution. They rely on the records at the Director of Surveys and the Commissioner of Lands which they contend showed and indeed continue to show to-date that the approved road reserve along the suit properties is 60 metres which is the information that the petitioners obtained at the time of purchasing the suit properties.

16. The petitioners maintain that they are not to blame for the fact that the road abutting the subject property was 60 metres. They assert that they were not the owners of the mother titles at the time of the alleged acquisition; that they did not conduct or commission the conduction of the impugned subdivision surveys on **L.R. No. 7785/9** that placed the beacons "N21" at a point where the road reserve was 60 metres. They argue that the land acquisition diagram **Ref: K36/B/AK** referred to by the respondents, was not a survey plan and did not form part of the records of the Director of Surveys or the Commissioner of Lands from whom a surveyor would obtain information about the property being surveyed or the surrounding property.

17. Mr. Zul Alibhai who was on record for the petitioners in Petition No. 70 of 2010, together with Counsel for the Petitioners in Petition No. 69 of 2010, Mr. Mohamed Nyaoga and Mr. Imende, made joint oral submissions on behalf of the petitioners. Counsel relied on the affidavits of Vinayak Radia, Thomas Njuguna and Kevin Kariuki, as well as their respective written submissions. The basis of their submissions was twofold: that the petitioners were bona fide purchasers for value, and their titles could only be impugned if fraud, to which they were parties, could be proved against them. Secondly, they contended that as there was no valid acquisition of the land in question in 1970 due to failure on the part of the government to follow the provisions of the Land Acquisition Act, the respondents could not now claim that the petitioners had encroached on 20 metres of the road reserve acquired for the Northern Bypass.

18. Mr. Alibhai submitted that all the petitioners bought plots from a subdivision of L.R 7785/9 and L.R 23 from a successor of Mimosa Plantations Limited, the original owner of these properties. All the plots

had access to a road, which turned out to be the Northern Bypass. The mother titles, which had been issued under the provisions of the Registration of Titles Act (RTA), had been converted to the Registered Land Act (RLA) and the petitioners therefore hold their respective titles under the provisions of RLA.

19. The petitioners submitted that the road corridor for the Northern Bypass is 60 metres, contrary to the assertion by the respondents that it is 80 metres in width; that all the survey maps from the Director of Surveys show that the road is 60 metres; that the respondents have not produced a single survey map that shows that the road was 80 metres. They therefore assert that the respondents want to deprive them of their property contrary to the provisions of Article 40 and 65 of the Constitution by alleging that the road reserve goes 20 metres into their properties. Mr. Alibhai submitted that there was no compulsory acquisition of the land in 1970 as alleged by the respondents; that if there was such acquisition, it was so badly managed that it was invalid.

20. In his oral submissions, Mr. Nyaoga dwelt, first, on the sanctity of the petitioners' titles and submitted that the petitioners had produced before the court documents that confirm that title and ownership is vested in them. He submitted that Article 60(1) (b) of the Constitution enshrines the principle of security of land rights while Article 64 recognizes private ownership of land. It was therefore, in his view, incumbent on the respondents to justify a limitation of the petitioners' constitutional rights to land.

21. According to the petitioners, their titles were issued under the RLA and the Registration of Titles Act (RTA). Mr. Nyaoga submitted that Section 27 of the RLA created absolute ownership of land upon registration, while section 23(1) of the RTA creates indefeasibility of title. He submitted that the petitioners' titles could therefore only be impugned on the basis of fraud to which the petitioners are shown to be parties as determined by the court in ***Wreck Motors Enterprises –vs- The Commissioner of Lands and Others*** **Nairobi LLR 5066 (Civil Appeal No. 71 of 1997) and** ***Joseph N K arap Ng'ok –vs- Justice Moijo ole Keiuwa and Others*** **Nairobi Civil Application No. Nai 60 of 1997 (Unreported).** Such proof, he contended, had to be on a high standard of proof, higher than on a balance of probability. In this regard, the petitioners relied on the case of **Koinange and 13 others -vs- Koinange [2008] 1 KLR G&F 698 23**where it was stated that allegations of fraud must be strictly proved and that although the standard of proof may not be so higher as to require proof beyond reasonable doubt, it ought to be more than on a mere balance of probability. They also contended that they were bona fide purchasers for value and relied on the decision of the Court of Appeal in the case of ***Gitwany Investments Limited –vs- Tajmal Limited and 3 others, [2006]*** **e*KLR***

22. The petitioners argued further that the respondents had not proved that the petitioners had failed to exercise due diligence with regard to the 80 metre road reserve. They contended that the presence of the beacon, 'RK5" at the corner of the parcel adjacent to L.R. 7785/9, namely L.R. 7785/10, where the road is 80 metres, and that therefore the surveyors should have been cognizant of it when drawing the subdivision plans, could not lead to an imputation of notice on the part of the petitioners. They were not the owners of the mother title, the records at the Director of Survey showed a 60 metre road, and notice on the petitioners needed to be proved by admissible evidence, not by assumptions. They called in aid the decision of Majanja J in **Chemey Investments Limited -vs- Attorney General and Others High Court Petition No. 94 of 2005.**

23. With regard to the compulsory acquisition of the land for the Northern Bypass corridor, Mr. Nyaoga submitted that the petitioners had a right to challenge it as it affects their rights; that at the time they acquired their properties, there was no record of the alleged acquisition either in the Lands Office or in the Survey Office; that the process of acquiring the 80 metre road reserve was never started or completed; that there was no evidence of payment of prompt compensation under section 13 of the Land Acquisition Act except annexure **'MK 3**' in the affidavit of **Michael Sistu Mwaura Kamau** sworn on 4th March 2011 which alleged payment to people other than the petitioners; that there was a list at page 4 of the Gazette Notice No. 3440 indicating payment to the petitioners' predecessors in title but there was no acknowledgement of payment, and, consequently, no payment of compensation was made as alleged by the respondents.

24. Mr. Nyaoga took the court through a detailed analysis of the provisions of the Land Acquisition Act and the ways in which the respondents had failed to comply with it at the time of the land acquisition in 1970: that section 10 of the Land Acquisition Act required that a written award be made, but none had been placed before the court; that notice of the award must be given under section 11, but none had been given; that even where there is an award and notice is given but the parties do not collect the award, Section 13 of the Land Acquisition Act provides for the amount to be deposited in the High Court, but there was no indication that this had been done.

25. Mr. Nyaoga submitted that the requirements of the Land Acquisition Act with regard to the public body and the public purpose for which the land acquisition was intended had not been complied with; nor had the requirement by Section 19(1) that the Commissioner of Lands take possession of the land acquired; the documents of title had not been surrendered in accordance with section 20, nor had a final survey been done in accordance with Section 17 of the Act. According to the petitioners, had these provisions been complied with, third parties would have had notice of the acquisition and extent of the acquired land. As it was, there was nothing on record to support the assertion that the road was 80 metres.

26. Mr. Nyaoga relied on the decision in **Commissioner of Lands and Another –vs- Coastal Aquaculture Ltd Civil Appeal No 252 of 1996** for the proposition that the process of acquisition enshrined in the Constitution and the Land Acquisition Act must be strictly adhered to. He urged the court to be guided by the provisions of Article 23 of the Constitution which requires the court to develop the law to the extent that it does not give effect to a right and to adopt an interpretation that favours the enforcement of a right. He also asked the court not to allow the invocation of public interest to lead to a violation of the rights of the petitioners and relied in this regard on the decision in **Family Care Ltd –vs- Public Procurement Administrative Review Board and Others High Court Petition No 43 of 2012** to the effect 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.

27. Finally, the petitioners through their counsel drew attention to the fact that the Northern Bypass was complete at the time of hearing of their petitions, and that the purpose for which the 20 metres was required was spent. They also drew attention to the fact that the Northern Bypass was not a uniform 80 metres in width, that there were sections such as the Windsor junction with Kiambu Road where the Bypass was 60 metres.

**The Response**

28. All the respondents oppose the petitions and present a case that is fairly straight forward: that the subject property was part of government land duly acquired through the process of compulsory acquisition of land under the then Land Acquisition Act, 1968, way back in the 1970s. According to the respondents, the government needed to come up with road reserves for purposes of road construction to address the problem of traffic jams; that upon identification of the proposed road reserves, consultants were engaged to prepare detailed Land Acquisition Plan Sheets which served to accurately determine the size and dimensions of the land necessary for acquisition for purposes of road reserves. It is then that the Commissioner of Lands caused notices to be issued to the persons interested in the lands earmarked for acquisition.

29. The respondents allege that the Notice was published on **20th November, 1970** in the Kenya Gazette vide **Gazette Notice No. 3439.** It covered, *inter alia,* 6.420 acres from **L.R. No. 23** then owned by Edith Gladys Cockburn, 16.061 acres from **L.R. No. 7785/9** then owned by Estav Limited and 27.984 acres from **L.R. No. 7785/10** then owned by Runda Coffee Estate Limited.

30. The respondents, contend that the government subsequently published a Notice of Inquiry on 20th November, 1970 and thereafter made compensation payments to the owners of the land acquired. As a result, the acquired portions of the respective titles reverted back to the government. The respondents maintain therefore that they adhered to the Constitution and statutory provisions in compulsorily acquiring the parcels of land out of **L. R. Nos. 7785/9** and **23.**

31. It is the respondents' case that the petitioners' claim of constitutional violations is baseless as the land was compulsorily acquired and such acquisition constituted an overriding interest which cannot be noted in the register under the provisions of **section 30** of the Registered Land Act. Furthermore, the respondents argued, **Article 40** does not apply to illegally acquired land.

32. In their response to the two main arguments by the petitioners, the respondents, represented by Mr. Mutinda, Mr. Odongo and Mr. Mulekyo submitted that, with regard to the indefeasibility of the petitioners titles, to the extent that the petitioners had encroached on 20 metres of the road reserve, their titles were unlawful and did not merit protection under Article 40 of the Constitution. With regard to the allegation that the land acquisition was not valid as it did not comply with the provisions of the Land Acquisition Act, the response was, first, that the petitioners, not being interested parties as defined in Section 2 of the Land Acquisition Act, could not challenge the acquisition 40 years after it took place and, secondly, the acquisition had been carried out and completed in accordance with the provisions of the Land Acquisition Act.

33. Mr. Odongo presented the case for the 5th respondent, the **Kenya Urban Roads Authority** (which is the 1st respondent in Petition No. 69 of 2010) as set out in the Replying Affidavit sworn by **Engineer Joseph N. Nkadayo,** the Director General of the 5th Respondent filed on 1st December, 2010. In this affidavit, Mr. Nkadayo depones that the process of acquisition of land for the construction of road bypasses around the City of Nairobi was mooted in the 1970s when the government, keen to address the future challenge of traffic congestion on the city's roads, embarked on a programme aimed at creation of road reserves; that the government set up committees through the Ministry of Roads in order to survey suitable land for road reserves and there followed government surveys in which a number of privately-owned parcels of land were identified for purposes of creation of the road reserve.

34. Mr Nkadayo depones further that a notice of the intended land acquisition was published on 20th November 1970 in the Kenya Gazette vide Gazette Notice No. 3439. The subject of acquisition, according to this notice, was in respect of 6.420 acres from L.R. No. 23 then owned by one Edith Gladys Cockburn, 16.061 acres of land from L.R. No. **7785/9** then owned by Efstav Limited and 27.984 acres from L.R. **No. 7785/10** then owned by Runda Coffee Estate Limited. He further depones that Gazette Notice No. 3440 was published on 20th November 1970 inviting the said interested persons for hearing of claims to compensation and that subsequently, the government paid compensation to the owners of the acquired land titles as a result of which the acquired portions reverted to the government.

35. According to the 5th respondent, all the Survey Plans presented by the petitioners do not reflect a true and accurate position on the ground as the drafters thereof drew up the plans well after the government acquisition but deliberately omitted to reflect the total area acquired by the government in 1970.

36. In their oral and written submissions at the hearing of this matter, the 5th respondent submitted through their counsel, Mr. Odongo, that the petitioners do not in their petition challenge the acquisition of the land for the Northern Bypass in 1970 but the width of the road, and that they only challenged the acquisition as an afterthought. He contended that none of the petitioners were interested parties for the purposes of Section 2 of the Land Acquisition Act as such interested parties would be parties with an interest at the time of the acquisition; that section 9 (1) of the Act creates certain timelines and the matters that the petitioners were now raising should have been raised 40 years ago at the time of the acquisition. The petitioners were therefore deemed to have taken their titles subject to the existing rights.

37. Mr. Odongo referred the court to the affidavit of **Michael Sistu Mwaura Kamau** dated 4th March 2011 and the documents annexed thereto as annexure '**MK 3'.** He contended that these documents, comprising correspondence and Gazette Notices, together with the provisions of section 10 of the Land Acquisition Act, were conclusive evidence of the acquisition and there cannot be a challenge to the acquisition 40 years later.

38. With regard to the width of the road, Mr. Odongo referred to Gazette Notice No 3439 which showed

the acreage that was being acquired from each land parcel. He submitted that a computation of this acreage, which had been done in the affidavit of **Mr. Thomas Gachoki** dated 31st March 2011, showed that the road was meant to be 80 metres.

39. He asked the court to be guided by the decision of the court in **Niaz Mohamed Jan Mohamed –vs- Commissioner of Lands & 4 Others [1996] KLR**for the proposition that even where the land acquired for a public purpose is in excess of the land requirement by the government for the gazetted task, then such surplus nevertheless cannot be used for any other purpose, and it cannot be converted to private use, even by the government.

40. Mr.Odongo distinguished the case of **Coastal Aquaculture vs The Commissioner of Lands** (supra) with regard to the disclosure of the public body for which the land was being acquired by submitting that Gazette Notice 3439 states that the land is being acquired by the government for road realignment; that the public body in this case is the government as bodies such as the 5th respondent were not then in existence; and that Section 2 of the Land Acquisition Act defined the government as a public body. He submitted, further, that a road reserve was an overriding interest under section 30 of the RLA.

41. Mr. Odongo referred the court to the case of **Ramji Gudka –vs- the Ministry of Roads and another ex parte Verendra Ramji Gudka HCCC No. JR. ELC 32 of 2009 (unreported)** for the proposition thatpublic interest must prevail over private interest. He argued that the government had spent over 8 billion on the road and that this amount, when compared with the amount spent by the petitioners and the convenience to the public, made it clear that it was better for the petitioners, who were victims of private surveyors who failed to reflect the total area covered by the Northern Bypass and of the vendors, Mimosa Plantations Limited, from whom they purchased the properties, to be compensated by the vendors and the surveyors so that the public is not prejudiced. To the contention by the petitioners that the road was now complete, Mr. Odongo submitted that the completion of the road does not affect the status of the 20 metres encroached upon.

42. Mr. Mutinda for the Attorney General and the Ministries of Roads and Lands associated himself with the submissions of Mr. Odongo. In presenting the case for the state and the two ministries, Mr. Mutinda relied on the affidavit of **Engineer Michael Sistu Mwaura Kamau**, the Permanent Secretary in the Ministry of Roads sworn on 4th March, 2011. The averments by Mr. Kamau are that the land acquisition process of the property in question was concluded thirty years ago when the government, in trying to address the challenge of traffic congestion in the city, earmarked the road reserve for road construction. Mr. Kamau averred further that the titles held by the petitioners encroached on the land compulsorily acquired by the government for the Northern Bypass and as such it was illegally acquired and not deserving the protection of the law. Mr. Mwaura further depones that the petitioners could not seek to hold the government liable after they had been misled by private surveyors regarding the dimensions of the Northern Bypass, notice of which had been published in the Kenya Gazette.

43. Relying on the above averments, Mr. Mutinda submitted that while Article 40(1) protects property rights, Article 40(6) provides that the rights do not extend to property found to have been illegally acquired. He contended that the petitioners' titles were unlawfully acquired and did not therefore merit protection under Article 40; that their unlawfulness lay in the fact that they were created out of land compulsorily acquired by the government and compensation paid; that the acquisition could not now be challenged by the petitioners as they held no interest in 1970 when the acquisition was done as their titles are sub-divisions of L.R No 23 and 7785/9, and none of the proprietors in 1970 are petitioners in this matter.

44. Mr. Mutinda agreed with Mr. Odongo that in accordance with the principle in the case of **Niaz Mohamed Jan Mohamed –vs- Commissioner of Lands & 4 Others** (supra), land acquired for a public purpose cannot be alienated, transferred or used in any way other than for the public purpose it was acquired for, which in his view placed the petitioners' titles under Article 40 (6).

45. To the petitioners' contention that the rights of acquisition did not accrue to the government as the acquisition was not finalised, and that the government should therefore acquire the petitioners' land if it

wished to have an 80 metre road reserve, Mr. Mutinda submitted that since the petitioners acquired the titles after the compulsory acquisition in 1970, section 30 of the RLA as read with section 31 implied that the government's overriding interest need not be noted on the register and the petitioners are therefore, under section, 31, deemed to have notice, and they cannot therefore argue that the acquisition was not finalized.

46. The respondents submitted, however, that the acquisition was finalised in compliance with the law. They referred in this regard to annexure **'KK5",** which is survey plan number **F/R 141/14,** in the affidavit of **Dr Kevin Kariuki** filed on 22nd December 2010, which shows that the road is 80 metres, and to annexure **'KK6'**, another survey map **FR 207/35** dated 20th September 1989 which shows a 60 metre road where the road on **'KK5,'** which is 80 metres in width, meets the 60 metre road on **'KK6'**. Mr. Mutinda submitted that **F/R 141/14** was done on 8th November 1978 and it has an 80 metre road, while **F/R 207/35** was done in 1989 and shows a 60 metre road. He submitted therefore that the petitioners cannot say that there was no survey showing there was an 80 metre road when there was a 1978 survey map annexed to their own documents showing an 80 metre road; that the existence of the 80 metre road was within the public domain and only required due diligence to ascertain; and that survey map, F/R 207/35 **(KK6)** was done unlawfully by a private surveyor, and such claim as the petitioners had should be against their surveyor as the survey map was as a result of a defective survey for which the government was not liable as provided under section 21(1) and (2) of the Survey Act.

47. To the petitioners' submission that the road was complete and the government does not need the 20 metre, Mr. Mutinda took the view that the government also has rights under Article 40 which should be protected; that the rights extend to an 80 metre road, not 60 metres, and the government may have many uses for the 20 metres as the need arises. He urged the court, in exercise of its jurisdiction to frame an appropriate relief under Article 23 of the Constitution, to issue an order that in so far as the petitioners' properties encroach on public utilities, they should be revoked.

48. Mr. Mulekyo, Counsel for the Kenya National Highways Authority, the 4th respondent in Petition No. 70 of 2010 (which is not a party in Petition No. 69 of 2010) relied on the affidavit of **Mr. Thomas Gachoki,** the Manager, Survey Department, of the Kenya National Highways Authority sworn on 4th February, 2011 and Further Affidavit dated 31st March 2011 in response to Petition no. 69 of 2010 and 70 of 2010 respectively. In his affidavits, Mr. Gachoki depones that the petitioners had failed to prove that they had good title in view of the earlier acquisition by the government and had not come to court with clean hands, and that the petitioners could not dictate the extent and nature of development to be carried out by the Kenya National Highways Authority. According to Mr. Gachoki, the exercise of compulsory acquisition was carried on pursuant to the Land Acquisition Act 1968 and awards issued in connection with the said acquisition and all affected parties property compensated; that upon a survey being carried out in the process of construction of the bypasses, it was found that some persons had encroached on the road reserve as a result of which notices were issued to them.

49. Mr Gachoki dismissed the petitioners' claim that they received approvals from various government agencies at each stage, stating that such approvals were subject to existing law. It was Mr Gachoki's deposition that the original L.R. No. 7785/9 at the time of acquisition was registered in the name of Estav Limited and the area gazetted for acquisition was 16.091 acres (6.5145 ha) for an 80 metre road corridor, and that Estav Limited was paid Kshs 208,060.00 as compensation for the acquired land.

50. Mr Gachoki faulted the cadastral plan; **FR. No. 207/33** relied on by the petitionerscontending that it was erroneous in so far as it indicated that the road corridor was 60 metres wide whereas the area inscribed inside it of 6.106 hectares is for an 80 metre road reserve. He deponed further that the persons who owned the properties bordering the petitioners had not encroached on the road reserve and that the road there measured 80 metres in width and only narrowed at the petitioners' premises due to encroachment by the petitioners.

51. Mr. Mulekyo drew the court's attention to the averments set out in Mr. Gachoka's affidavit as set out above and submitted that the matter was before the court, not because of the compulsory acquisition, but

because of the dispute over whether the road was 80 metres or 60 metres. He observed that the road in question is a 25 kilometres stretch from Ruaka to Ruiru; that the petitioners' premises are roughly 3km from Ruaka; that the road reserve is 80 metres, but in the affected area at the petitioners' properties, it curves in for 20 metres to make it 60 metres for the next 3 km, then widens again to 80 metres.

52. According to the 4th respondent, the purpose of the 80 metre reserve was to add infrastructure, which may include a dual carriageway or a railway to Ruiru, and to bring about sustainability in management of public property. Mr. Mulekyo submitted that the road was and remained public land, and the petitioners' rights could not crystalize on public land and roads as defined in Article 62(h) of the Constitution; that the petitioners could not clothe their encroachment on public land with legality through a declaration of rights that they are not entitled to; and that they were attempting to gain a collateral advantage as explained in the case of **Microsoft Corporation -vs- Mitsumi Computer Garage Limited (2001) 1 EA 127.**

53. Mr. Mulekyo contended that the petitionersknew of the public nature of the land through the Gazette Notices. He referred to annexure **'TG 4'** in the affidavit of Thomas Gachoki of 30th November 2003 which is a notice issued in the ***Kenya Times Newspaper*** warning the public against encroaching on road reserves, including the by-passes. He pointed out that in the case of Cycad, the petitioner in Petition No. 70 of 2010, the property was acquired in December 2003, three months after the notices.

54. Mr. Mulekyo submitted that Cycad in particular knew of the impropriety of its title by its own admission in the affidavit of Vinayak Radia sworn on 12th November 2010, in particular annexure **VR 9**, a letter from the petitioners' advocates, Adeel Haq, dated 9th November 2010 addressed to Mimosa Plantations Limited Properties Limited, the vendor. In this letter, the petitioner was complaining about breaches of warranties of sale in the sale transaction as it had purchased properties which Ministry of Roads officers were proposing to demolish on account of an 80 metre road reserve instead of 60 metres. He contended that the petitioners knew of the situation even before they came to court, and what they were now seeking from the court is a cleaning up of their tainted titles.

**Opinions By Surveyors**

55. Following the conclusion of the submissions by Counsel for the parties on the 29th of March 2012, Mr. Mohamed Nyaoga applied on behalf of the petitioners for the court to visit the site prior to rendering its decision. With the concurrence of all the parties, it was agreed that the court would visit the site on the 18th of May 2012. With this in mind, I requested the office of the Attorney General to arrange for a qualified surveyor from the office of the Director of Surveys to assist the court with the issues in dispute. However, the letter to the Director of Surveys was written by the Permanent Secretary, Ministry of Roads, which is the 2nd respondent in both these petitions. Following objections by the petitioners to the report dated 7th June 2012 by the surveyor, I granted them leave to have the report considered by their own surveyor, and for both surveyors' evidence to be subjected to cross-examination.

56. The surveyor from the Director of Survey, Mr. Reuben Mwenda Murugu, is a Senior Assistant Director of Survey in the Ministry of Lands. He stated that he had received a letter from the Permanent Secretary, Ministry of Roads dated 20th April 2012. The letter sought to know whether the road in dispute is 60 metres or 80 metres. Mr. Murugu indicated in his report that he had collected all the plans pertaining to the land in dispute and drawn them on one sheet depicting what is on the ground. The plans that he considered were F/R Nos. 131/10, 13/69, 141/14 and 17, Survey Plan No. 163/86, F/R Nos. 297/8, 207/35, 209/68-70 and 207/4.

57. With regard to the position on the ground, he stated that when he and other officers from the Director of Survey visited the site, they found that L.R. No. 7785/9 neighbours 7785/10 to the East and L.R. 12672 (original No. L.R 23) to the West; that in the subdivision of L.R. 7785/10, a provision of 80 metres was made for the Northern Bypass as shown in Plan No 131/10, 131/69; 131/14 and 17, which are dated 1976 and 1979, respectively. With respect to the subdivision of L.R. No. 7785/9, approved in 1993, a provision of 60 metres was made by Mr. Wabaru in 1990.

58. Mr. Murugu also indicated that he noted further that a survey of a second phase of L.R No. 12672 has a width of 60 metres, but that the surveyor who carried out the survey for L.R 7785/10 gave a width of 80 metres. He stated that he noted that on the ground, where the road enters L.R 7785/9 from L.R 7785/10, it narrows. He concluded that the road cannot have two different widths, and that from his calculations, the width of the road should have been 80 metres. In his view, the surveyor who carried out the survey of L.R. No. 7785/9 should have communicated with the Ministry of Roads to get the width of the road, and that the survey on 7785/9 should have relied on the earlier survey of 7785/10.

59. Mr. Murugu also testified that when checking subdivision plans at the office of the Director of Survey, the checking is done on the basis of information received from the surveyor, so that if a survey has errors, it will be passed with those errors. He told the court that the private surveyor, who would obtain information from the landowner with regard to the extent of the land, was responsible for the correctness of the survey that he presented as provided under section 21 of the Survey Act. He identified the incorrect plans before the court as being the ones for L.R 7785/9 namely survey plan Nos. 209/70 and 207/35, and survey plan F/R/297/8 and 163/86 in respect of L.R. 12672 (L.R 23). The survey plans for L.R 7785/10 namely plan F/R 141/14 and 131/69 show the width of the road as 80 metres, as did survey plan no. 207/4 for 7785/8. F/R 367/45 in respect of L.R 22 also showed a road width of 80 metres.

60. On their part, the petitioners relied on a report and evidence by Mr. **John Dominic Obel**, a licensed surveyor. Mr. Obel also swore an affidavit on 26th October 2012 filed in court on the same date. The report by Mr. Obel was intended to rebut the evidence presented by Mr Murugu, the Government Surveyor. In his report, Mr. Obel, who supported the position by the petitioners that the process of land acquisition in 1970 had not been completed, outlined the steps to be followed in the process of acquisition as provided in the Land Acquisition Act. These steps are set out in his report filed in court on 6th August 2012. He concluded that even if the compulsory acquisition process was initiated, it was not completed. Mr. Obel's report further noted that according to the subdivision survey plans over L.R. No 7785/9 namely **F/R No 209/70** and **F/R No 207/35,** there is a 60 metre wide road created out of both subdivisions vide Commissioner of Lands letter reference no. 70594/53 of 17th August, 1989.

61. Mr. Obel observed that a Notice of Intention to Acquire Land under the Land Acquisition Act, 1968, Cap 295 was carried in the Kenya Gazette Notice No. 3439 of 12th November, 1970 in which L.R No 7785/9 among others is listed. According to the notice, plans of the affected land were to be inspected at the office of the Commissioner of Lands. He also referred to Gazette Notice No. 3440 of the same date being a Notice of Inquiry under section 9(1) of the Land Acquisition Act which, according to the notice was to be held on 16th December, 1970 for the hearing of claims for compensation by persons interested in L.R No. 7785/9 and others. He argued, however, that the process of acquisition was not completed as a final survey was not done as required under the Land Acquisition Act.

62. According to Mr. Obel, the properties previously registered as L.R. No. 7785/9 do not encroach on any road reserve as the road width was surveyed as 60 and not 80 metres. He contended, further, that the survey plans confirming this were checked, approved and authenticated by the Director of Surveys as required by the Survey Act and form part of current official survey records of which the Director of Surveys is the sole custodian.

63. In his affidavit of 26th October 2012, Mr. Obel clarified that the petitioners' properties arose from subdivisions of L.R. 7785/9 and L.R. 12672. He also produced in the said affidavit a letter dated 20th April 1999 pertaining to the subdivision of L.R. 12672 (original No L.R. 23) and drew attention to the fact that the letter, which was an approval of a sub-division scheme, made reference to a 60 metre road at paragraph v).

64. In his evidence, Mr. Obel stated that the survey plan is authenticated by the Director of Surveys; that the Director of Survey would have checked the correctness of the beacons and the mathematics; that he would have rejected the survey of the land and the subdivision plan if the road approved had been 80 metres while the surveyor had provided 60 metres.

65. With regard to the acquisition, Mr Obel testified that he did not find a final acquisition plan in the Survey of Kenya. He denied that a surveyor who had been instructed to carry out a survey would rely on information from the land owner, stating that in the process of subdivision, a land owner goes to a surveyor for advice; that it is the surveyor who advices the landowner, not the other way round, so the land owners could not inform the surveyor about the land acquisition. He maintained also that there was nowhere that one could find information about the acquisition.

66. Mr. Obel confirmed that in carrying out a survey, a surveyor prepares the plan using survey control points, which are existing beacons. He conceded that in the case of 7785/9, the nearest survey plan existing for which he could use beacons was the survey plan for L.R 7785/10.

**Determination**

67. The two petitions before me allege violation of the petitioners\' constitutional rights. In particular, the petitioners allege violation of their property rights under Article 40 of the Constitution, which provides as follows:

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

***(a) of any description; and***

***(b) in any part of Kenya.***

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

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

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

***(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—***

***(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or***

***(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—***

***(i) requires prompt payment in full, of just compensation to the person; and***

***(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.***

68. The petitioners have also relied on **Section 28** of the Registered Land Act (now repealed) which protected sanctity of title by providing as follows:

***28. The rights of a proprietor, whether acquired on first registration or whether acquired 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) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:***

***Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.***

69. On their part, the respondents counter that there has been no violation of the rights of the petitioners; that it is the petitioners who have unlawfully encroached on government land, and are now attempting to clothe the unlawful encroachment with legality through declarations from this court. They assert that there was a compulsory acquisition by the government of 80 meters of land as a road reserve for the Northern Bypass corridor, and such acquisition is an overriding interest as provided in section 30 of the RLA, which provides as follows:

\'***Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register –***

***(a)…***

***(c) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;***\'

70. From the respective pleadings and submissions of the parties in this matter, and following the site visit to the subject property on 21st November 2012, the following facts emerge with regard to the matters in dispute.

71. The petitioners are all holders of titles issued under the Registered Land Act to parcels of land which resulted from the subdivision of **L.R. Nos. 7785/9** and **L.R. 12672 (L.R. 23).** These properties were acquired in the 1990s, and in the case of Cycad, in 2003.

72. The petitioners do not dispute that there was a road corridor for the Northern Bypass adjacent to the subject property. Their contention is that the road reserve was 60 metres, not 80 metres as alleged by the respondents. They also agree that the road reserve at the properties neighbouring or adjoining theirs, namely, L.R. 7785/8 and 7785/10, is 80 metres.

73. The petitioners acknowledge that, as alleged by the respondents, there was a compulsory acquisition of land from the mother titles to their properties, **L.R 7785/9** and **L.R. 12672 (L.R. 23)** as well as from adjoining properties, **L.R. 7785/8 and 7785/10.** They submit, however, that while the process of compulsory acquisition commenced, it was not completed, that it resulted in acquisition of a 60 metre road reserve with regard to the mother titles to their property and 80 metres in respect of adjoining properties, and that therefore the attempt by the respondent to extend the corridor 20 metres into their property is an unlawful and arbitrary expropriation of their property, to which they have an indefeasible title, and therefore violates Article 40 of the Constitution.

74. The respondents do not challenge the validity of the petitioners' title to their respective properties. Their assertion is that, to the extent that the petitioners have encroached on 20 metres of the bypass, their title is defeasible and is not entitled to the protection afforded by Article 40 of the Constitution.

75. The construction of the Northern Bypass at those portions of it adjacent to the subject property is now complete. The Bypass has an 80 metre reserve in the portions adjoining the petitioners\' properties, but 60 metres at the subject property. After the junction with Kiambu Road, the Bypass again narrows to 60 metres. During the site visit, the 5th respondent stated that this difference was accounted for by the fact that the land at the Windsor junction was acquired later, and only 60 metres were acquired.

76. The parties have, in their oral and written submissions, raised various issues relating to the dispute before the court. However, the matters before me being petitions alleging violation of the petitioners\' constitutional rights, I believe that they call for determination of one main issue: ***Does the claim by the respondents that the Northern Bypass is 80 metres, and therefore their intended demolition of the petitioners' properties which allegedly encroach on 20 metres of the road reserve, amount to a violation of the petitioners' rights under Article 40 of the Constitution?***

77. In determining this issue, I will need to address my mind to several matters which arise from the respective pleadings and submissions of the parties. The first of these issues is **whether the petitioners can challenge the compulsory acquisition of land for the Northern Bypass that took place in 1970.** This is because a critical aspect of their case turns on whether or not the government carried out an acquisition of 80 metres from the mother titles to their properties in the 1970s.

78. The parties have canvassed at length both in their pleadings and their submissions on the validity or otherwise of this acquisition. While the petitioners have vehemently contended that the government failed to follow up and complete the due process of land acquisition as required of it under the Constitution and the Land Acquisition Act of 1968, and that the survey maps from the Ministry of Lands showed that it had reserved a 60 metre wide road reserve, the respondents have maintained that due process was followed in acquisition of the said land and that they are entitled to the 80 metres.

79. In their initial petitions before the court, the petitioners alleged that the respondents were intending to extend the proposed road reserve to 80 metres and were therefore intending to expropriate 20 metres out of the petitioners' property without following the laid down procedure. In subsequent affidavits and in their submissions, the petitioners challenge the compulsory acquisition of 1970, claiming that it was not complete and that it was therefore invalid. This challenge is set out in detail in the affidavit of Dr Kevin Kariuki, the 2nd petitioner in Petition No 69 of 2010, filed in court on 22nd December 2010. In light of this, the respondents have contended that the challenge to the initial acquisition by the petitioners is an afterthought.

80. It is correct, as submitted by the respondents, that the initial pleadings by the petitioners do not impugn the compulsory acquisition that took place in 1970. The petitioners explain this by stating that at the time they sought the injunction, they were not aware of the facts regarding the acquisition and they needed to stop the threatened demolitions. I think they cannot really be faulted for this, and I do not think that anything turns one way or the other on when they raised the issue of the compulsory acquisition.

81. However, the petitioners\' subsequent affidavit in support of the petitions, and in their submissions, both oral and written, contain a strong invitation to the court to inquire into and make findings with regard to the validity of the process of compulsory acquisition carried out in the 1970s. This is an invitation I must decline, for in my view, issues pertaining to the acquisition cannot properly be dealt with in this matter, and at this point in time.

82. I believe the proper function of the court in making its decision on the petitions before me is to determine whether the impugned actions of the respondents in seeking to recover the 20 metres of the road reserve allegedly encroached upon are unconstitutional or in any way breach the rights of the petitioners.

83. It is not the duty of the court to inquire into whether or not the acquisition process undertaken in the 1970s was done in accordance with the law. The validity or otherwise of that process could only have been questioned and determined within the time frame specified in the Land Acquisition Act, and by the parties from whom the land was being acquired. In this regard, I agree with the respondents that the petitioners cannot at this stage question the process of acquisition undertaken more than three decades before they acquired their interests in the subject properties.

84. None of the petitioners were parties to the process of acquisition in 1970. If I may draw an analogy between the relationship between the state and the then land owners and the relationship between parties to a contract, the petitioners would stand in the position of third parties seeking to enforce a contract to

which they are not parties, and they would be barred by the *doctrine of privity of contract* with regard to third parties: only persons who are parties to a contract are entitled to take action to enforce it. A person who stands to gain a benefit from the contract (a third party beneficiary) is not entitled to take any enforcement action if he or she is denied the promised benefit. This principle has long been enunciated in a number of authorities including that of ***Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co*** **[1915] AC 847**, where at page 853, Viscount Haldane said:

***My Lords, in the law of England certain principles are fundamental. One is that only a person who was party to a contract can sue on it. Our law knows nothing of a jus quaesitum tertio [third party right of action] arising by way of contract.***

85. This principle has also been upheld in our courts. In the case of **Kanyenje Karangaita Gakombe -vs- Automobile Association of Kenya (2006) eKLR,** the court stated as follows:

***After giving due consideration to the matters before me, I am satisfied that the agreement dated 20th August 1997 was between the two defendants only. In other words, the plaintiff was not a party to that agreement. In that regard, the doctrine of privity of contract is very clear. As the learned authors of HALSBURY\'S LAWS OF ENGLAND\', 4th Edition, Volume 9(1) state at paragraph 748:***

***\'The doctrine of privity of contract is that, as a general rule, a contract cannot confer rights or impose obligations on strangers to it, that is persons who are not parties to it.\'***

86. Similarly, in my view, the compulsory acquisition transaction, having been between the government of Kenya and the original land owners of the mother titles to the petitioners' properties, there can be no basis for the petitioners to question the process of acquisition and allege that it was breached, and that therefore there was no valid acquisition of 80 metres of land.

87. The respondents have produced documents, including Gazette Notices Nos. 3439 and 3440 of 1970 which show compliance with the statutory requirement to publish the intention to acquire the land, the holding of an inquiry, and the making of an award. Section 10 of the Land Acquisition Act provided that:

***10. (1) Upon the conclusion of the inquiry, the Commissioner shall prepare a written award, in which he shall make a separate award of compensation to each person whom he has determined to be interested in the land.***

***(2) Every award shall be filed in the office of the Commissioner, and, subject to section 75 (2) of the Constitution and sections 18 and 29 of this Act, shall be final and conclusive evidence of—***

***(a) the area of the land to be acquired;***

***(b) the value, in the opinion of the Commissioner, of the land;***

***(c) the amount of the compensation payable, whether the persons interested in the land have or have not appeared at the inquiry.***

88. That being the case, even had the owners of the mother titles attempted to challenge the acquisition at this point in time, the fact that the process was completed more than 40 years ago, and the compensation award made, would have barred them from raising any questions about the acquisition.

89. There is yet another reason why the petitioners\' challenge of the compulsory acquisition is untenable. They challenge the validity of the compulsory acquisition, but concede that there was a 60 metre road reserve acquired. Carried to its logical conclusion, the petitioners' line of argument would lead to the conclusion that there was no acquisition at all, not even of the 60 metres that they acknowledge. If the compulsory acquisition was invalid, then it was not invalid just in respect of the 20 metres in dispute, but of the entire 80 metres. On the basis of the petitioners' argument, it can be properly argued that the respondents, not having complied with the process of acquisition, are not entitled even to the 60 metres

that the petitioners argue is the correct width of the Northern Bypass. Anyone who had acquired a title on any part of the road reserve, (including the undisputed 60 metres, as both the petitioners and the respondents agree had been the case before the titles issued were cancelled), would be entitled to argue that their title is indefeasible for failure by the state to complete the compulsory acquisition process. Clearly, this would be an untenable argument, but it demonstrates the fallacy of the petitioners' argument with regard to the compulsory acquisition of 1970.

90. The petitioners have also argued that they had no notice of the compulsory acquisition as there was no final survey map or plan prepared. The question then is whether, with the exercise of due ***diligence, it was possible to establish the the extent of the road reserve for the Northern Bypass.***

91. The parties have tendered contradictory evidence regarding the accuracy of the various survey maps in respect of the subject property, and whether or not there were any survey maps that the petitioners or the surveyors who carried out the subdivisions of the subject property could have relied on that showed that the road reserve was 80 metres, and not 60 metres. The petitioners insist that the survey maps from the Ministry of Lands prepared by private licensed surveyors reflected 60 metres as the road reserve.

92. On their part, the respondents insist that the maps prepared by the petitioners' surveyors, which were done subsequent to the acquisition of the land, deliberately omitted to include the total area acquired by the government for the Northern Bypass, thereby leading to an illegal annexation of government land each time they made transfers. The respondents point out that the entire road reserve in L.R. 7785/9 had been parcelled out and titles issued, which titles were subsequently cancelled.

93. The thrust of the petitioners' argument on this issue is that from the information available to them, and from the survey maps available, only a 60 metre road reserve had been acquired. However, the respondents' argument that the vendors from whom the petitioners' bought their parcels as well as the surveyors who carried out the subdivision of the land and drew the subdivision plans deliberately encroached upon the road reserve is lent credence by two things. First, L.R. 7785/9 adjoins L.R. 7785/10. It is common ground that this property has not encroached on the road reserve, and that the road reserve at that property is 80 metres. Secondly, annexure '**KK5',** which is survey plan number **F/R 141/14** dated 4th April 1978 annexed to the affidavit of the 2nd petitioner, **Dr. Kevin Kariuki** (whose date of swearing is not indicated but which was filed in court on 22nd December 2010) shows that the road reserve was 80 metres.

94. **L.R. 7785/9** borders **L.R. 7785/10.** It is bordered in turn by **L.R. 12672**. While L.R. **7785/10** has a road reserve of 80 metres, the adjoining parcels, the mother titles to the petitioners' properties, have a road reserve of 60 metres**.** The petitioners' position is that the government must have acquired 80 metres from one land parcel, but acquired 60 metres from the other two. The totality of the evidence from the documents before the court does not, however, support this argument.

95. From even a cursory analysis of the various survey maps produced by the parties in support of their respective positions, and from the overall evidence before me, it seems to me that certain facts emerging therefrom make the contentions by the petitioner improbable: that **L.R. 7785/10,** whose survey was done in **1978**, had a road reserve of 80 metres; that the petitioners had access to **F/R 141/14 ('KK5")** dated 4th April 1978 with a road reserve of 80 metres; that, as testified by Mr. Murugu and indirectly corroborated by Mr. Obel in his report, titles registered under the Registration of Titles Act had fixed boundaries which could be scientifically established by use of coordinates; and as conceded somewhat reluctantly by Mr. Obel in his testimony before the court, that in carrying out a survey, a surveyor prepares the plan using survey control points, which are existing beacons; and that in the case of L.R. 7785/9, the nearest survey plan existing for which the surveyor could use beacons was the one for **L.R 7785/10,** (inparticular beacon **'RK5',** which was at the boundary between **L.R 7785/10 and L.R 7785/9)** and has a road reserve of 80 metres.

96. Clearly, the owners of the mother titles to the petitioners' properties, the vendors on whose behalf the surveyors subdivided the mother titles, were aware of, or should have been aware of, the fact that the road reserve was intended to be 80 metres. In the circumstances, it is difficult to accept the contention by the

petitioners that the failure by the respondents to complete the land acquisition by having a final survey plan prepared meant that there was no information available that the government had acquired an 80 metre road reserve from the subject parcels. I take the view that, with the exercise of due diligence, the surveyors who carried out the subdivisions out of which the petitioners' properties were created could, with due diligence, have established the correct width of the road as 80 metres.

97. The petitioners have also contended that the Northern Bypass is now complete, and that the respondents did not need the 80 metre road reserve. Indeed, the court noted, during the site visit to the subject property, that the Bypass was complete. The question then is: ***whether the fact that the Northern Bypass is now complete makesa difference to the status of the disputed 20 metres.***

98. The respondents on assert that the petitioners have encroached on 20 metres of the road reserve, and even if the road is now complete, there are other uses to which the remainder of the reserve can be put. They ask the court to be guided by the decision in **Niaz Mohamed Jan Mohamed vs Commissioner of Lands & 4 Others** [supra] and find that even if the road is complete, land that has been acquired for a public purpose cannot be used for any other purpose, and cannot be converted to private use.

99. In **Niaz Mohamed Jan Mohamed vs Commissioner of Lands & 4 Others [supra],** the court was confronted by a situation in which the remainder of land compulsorily acquired for a road had been converted to private use and a title for it issued. In determining that title to the property, whose indefeasibility had been stoutly dasserted, was invalid, Waki, J (as he then was) observed as follows**:**

\'***I am persuaded that the land in issue was acquired for a specific purpose which is consonant with the Constitution and the Land Acquisition Act, namely for the construction of a public road. It matters not that the entire portion acquired was not used for that purpose. Unutilized portions in my view would remain as road reserves.***\'

100. The court then went on to observe as follows:

***I am persuaded by the argument that since the acquisition was done for the purpose of making a public road, the road thus made remained a public road or street and vested in the local authority, the Municipal Council of Mombasa, to hold in trust for the public in accordance with the law. Needless to say this included the portion usually utilized for the tarmacked road and the remaining portions which form part of the road reserve. Finally I am persuaded by the argument that as such trust land, neither the local authority nor the government could alienate the land under the Government Lands Act.***\'

100. I agree fully with the reasoning of Justice Waki on this matter. If land was acquired for a public purpose, and in my view the 80 metre road reserve in this case was acquired for such a purpose, even if the entire road corridor was not utilised for the construction of the road, it still remains public land and cannot be alienated for private use.

101. I observe in passing that this does not, in my view, mean that land can never be acquired for a public purpose that ultimately means it ends up in private hands. For instance, it may be necessary to acquire land for the public purpose of settling squatters or for settling indigent residents of informal and slum settlements. In such a case, although the land ends up in private hands, it has achieved the public purpose for which it was intended- the resolution of a social problem in the lack of housing for the poor. This, however, is not the case in this matter.

102. The burden on the petitioners in a matter such as this is to demonstrate a violation of their constitutional rights. See **Anarita Karimi Njeru (1976-80) 1 KLR 1272** and **Trusted Society of Human Rights Alliance-v- Attorney General & Others High Court Petition No. 229 of 2012.** To do this, they would have to show entitlement to the 20 metres road reserve, and this, in my view, they have not been able to do. Consequently, whether or not the bypass is complete, or whether or not the respondents need the entire 60 or 80 metre road reserve is not, in my view, a factor in the determination of whether or not the respondents have violated the petitioners' constitutional rights.

**Disposition**

103. Having ruled that the petitioners have no basis for questioning the compulsory acquisition of the 80 metre road reserve in 1970 as they were not party to it, and taking all factors into account, I can find no violation of the petitioners' fundamental rights under the Constitution. The respondents are not, from their submissions before me, challenging the petitioners' title entirely. Their argument is that to the extent that it has encroached on 20 metres of the road reserve, it is unlawful.

104. It is true that the petitioners have a right to own property, and they are entitled to their properties to the extent that such properties have not encroached upon land that was acquired and set aside for a public purpose. Their right to property must be exercised within and in accordance with the framework of the law. Public lands acquired through compulsory acquisition are amongst the overriding interests stipulated under **section 30** of the Registered Land Act which qualify the indefeasibility of title acquired under the Act as provided in section 28(b) above. The petitioners' titles, to the extent that they comprise land which forms part of the Northern Bypass, are defeasible to that extent.

105. I do not therefore see, in the two petitions before me, any violation or limitation of the petitioners' right to property. The petitioners are, in my view, unwitting victims of landowners who sold properties to them without having regard to the public interest in the portions of their properties that had been compulsorily acquired for construction of the Northern Bypass corridor, and of surveyors who have prepared subdivision plans either in ignorance or disregard of the existing road corridor. Whatever the case, I can find no basis for alleging violation of the petitioners' constitutional right to property by the respondents.

**Conclusion**

106. While I appreciate the large investments that have gone into the construction of the residential houses and sympathise with the situation of the petitioners, I believe their recourse lies in a claim in law against those who sold the properties to them.

107. For these reasons, I decline to grant the prayers sought and dismiss the consolidated petitions with no order as to costs.

108. As I noted above, the petitioners are unwitting victims of those who sold the land to them, and of the surveyors who failed to exercise due diligence in carrying out the surveys of the subject property. While they are not entitled to retain the 20 metres of the road reserve, they ought to be given an opportunity to surrender it to the respondents. In this regard, and to obviate the need for further action on the part of the respondents for their removal from the part of the road reserve encroached upon, I direct that the petitioners do, within the next **ninety (90) days** from the date hereof, surrender the 20 metres of land out of their respective parcels that comprised the road reserve to the respondents. The titles to the parcels shall be rectified accordingly.

109. I am grateful to the Counsel for the parties in this matter for their diligence in prosecuting their respective cases and for the courtesy they accorded each other and to the court during the hearing of this somewhat protracted matter. Their incisive submissions and authorities have been invaluable in assisting the court to grasp the issues in dispute in the matter.

110. I also highly appreciate the assistance of the surveyors, Messrs. Murugu, Obel and Muchoki for their assistance during the hearing and the site visit to the subject property.

**Dated, Delivered and Signed at Nairobi this 25th day of April 2013.**

**MUMBI NGUGI**
**JUDGE**

**Mr. Mohamed Nyaoga, Mr. Imende and Mr. Zul Alibhai instructed by the firm of Mohamed and**

**Muigai Advocates and Anjawalla & Khanna Advocates for the Petitioners**

**Mr. Mutinda instructed by the State Law Office for the 1st 2nd and 3rd Respondents**

**Mr. Mulekyo instructed by the firm of A.M. Mulekyo & Co. Advocates for the 4th Respondent**

**Mr. Odongo instructed by the firm of Ameli Inyangu & Partners Advocates for the 5th Respondent**