Mareka & another v National Land Commission & 2 others (Environment & Land Petition 8 of 2021) [2022] KEELC 3541 (KLR) (25 May 2022) (Judgment)

Neutral citation: [2022] KEELC 3541 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT & LAND PETITION 8 OF 2021

A NYUKURI, J

MAY 25, 2022

IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS AS ENSHRINED UNDER ARTICLES 19, 20, 21, 22, 23, 24, 40 & 47 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE LAND ACQUISITION ACT, CAP 295 (NOW REPEALED)

AND

IN THE MATTER OF THE LAND ACT, 2012

AND

IN THE MATTER OF COMPULSORY ACQUISITION OF MAVOKO TOWN BLOCK 64 (GIMU)/508, MAVOKO TOWN BLOCK 64 (GIMU)/509 & MAVOKO TOWN BLOCK 64 (GIMU)/510 IN RESPECT OF ACQUISITION OF PARCELS OF LAND FOR CONSTRUCTION OF SECOND CARRIAGEWAY OF ATHI RIVER-MACHAKOS TURNOFF (A109) ROAD PROJECT

BETWEEN

MIRRIAM LOUISE MAREKA ..... 1ST PETITIONER

GERALD GACHERU WAMBUGU ..... 2ND PETITIONER

AND

NATIONAL LAND COMMISSION ..... 1ST RESPONDENT

NATIONAL HIGHWAYS AUTHORITY. ..... 2ND RESPONDENT

HONOURABLE ATTORNEY GENERAL ..... 3RD RESPONDENT

JUDGMENT

Introduction

1. The Petitioners herein filed the petition dated June 22, 2021 against the Respondents seeking redress for alleged violation of their proprietary rights. The first petitioner is the registered proprietor of a parcel of land known as Mavoko Town Block 64 (Gimu) 508 measuring 0.04Ha, while the 2nd Petitioner is the registered proprietor of the parcels of land known as Mavoko Town Block 64 (Gimu) 509 measuring 0.04 Ha and Mavoko Town Block 64 (Gimu) 510 measuring 0.04Ha; which properties shall hereinafter be referred to as the suit properties.

2. The 1st Respondent is a Constitutional Commission established under Article 67 (1) of the *Constitution* of Kenya as read with the *National Land Commission Act* No 5 of 2012 with mandate to compulsorily acquire land on behalf of the National and County Governments for public use.

3. The 2nd Respondent is a State Corporation established under section 3 of the *Kenya Roads Act* No 2 of 2007, whose mandate include developing, rehabilitating, managing and maintaining all National roads.

4. The 3rd Respondent is the principal legal advisor to the government with the mandate of representing the national government in court proceedings where the national government is a party and having the role of promoting, protecting and upholding the rule of law and defending public interest.

Petitioners' Case

5. The Petitioners claim to be the registered proprietors of the suit properties respectively and that on September 29, 2017, *vide* Gazette Notice Number 9536, the 1st Respondent (National Land Commission) informed the Petitioners and other Persons Affected by the Project (PAPs) of its intention to acquire their parcels of land on behalf of the 2nd Respondent (Kenya National Highway Authority) for the construction of the Second Carriage Way of Athi River-Machakos turn off Road Project in Machakos County. That subsequently a Notice of Inquiry was gazetted in Gazette Notice No 11424 of September 17, 2017. That upon completion of inquiry, letters of awards for compensation dated January 23, 2018 were issued to the Petitioners and other PAPs, who duly accepted the awards. That the 1st Petitioner was awarded Kshs 53,009,200/=, while the 2nd Petitioner was awarded Kshs 208,346,600/=.

6. It was the Petitioners' contention that the compulsory acquisition process occasioned them disruption, resulting in their stopping further development and closure of their respective tenants' businesses in anticipation of the compensation.

7. The Petitioners complained that vide Gazette Notice No 11104 dated October 26, 2018, and a Notice dated February 22, 2019 being Gazette Notice No 1639, the 1st Respondent gave Notice of its intention to delete, add and correct parcels of land specified in the earlier gazette Notices. They also averred that vide Gazette Notice No 1919 of March 6, 2020, the 1st Respondent notified the Petitioners and other PAPs of their intention to delete the parcels of land indicated in the earlier Gazette Notice that led to the compulsory acquisition of the Petitioners' properties, thereby nullifying the awards for compensation made in 2018.

8. They further stated that the Petitioners and other PAPs who had improvements on their land, were issued with new awards dated January 6, 2021. The Petitioners lamented that the new awards were

not accurate as they did not consider the size of the land and the total value of the land acquired and therefore they had not accepted the said awards. Their further grievance was that recent searches on their properties show that the Land Registrar had already made an entry in the register in favour of the government in respect of the area of land to be acquired. Their core complaint is that until now, they have not been justly, fairly and promptly compensated which they contend, is contrary to Article 40 (3) of the *Constitution*. On the basis of Section 122 of the *Land Act*, the Petitioners proposed the acquisition of their entire parcels, as they were of the view that partial acquisition will render the remaining land inadequate for its originally intended use and will severely and disproportionately reduce the value of the remaining land.

9. Therefore, the Petitioners sought for the following orders;

   a) A declaration do issue, declaring as null and void the Gazette Notice No 1919 of March 6, 2020 deleting their parcels of lands acquired compulsorily whilst construction of the road on the said parcels of land is ongoing and copies of official search indicate that the area is intended to be acquired compulsorily for the project.

   b) A declaration do issue that the Petitioners are entitled to compensation by the respondents as per the awards dated January 23, 2018 and in accordance to Gazette Notice No 9536 of September 29, 2017.

   c) An order of permanent injunction do issue restraining the 2nd Respondent, whether through its servants, agents, employees, contractors or any other person acting on its behalf whether directly or indirectly to immediately and unconditionally cease all ongoing road construction works on Mavoko Town block 64 (Gimu)/508, Mavoko Town block 64 (Gimu)/509 and Mavoko Town block 64 (Gimu)/510 and cease from engaging in all construction related activities and processes in respect of the construction of second carriageway of Athi River-Machakos Turnoff (A109) road project which relate to the aforesaid lands without just, fair, prompt compensation and accurate awards.

   d) A declaration do issue that partial acquisition of the petitioners parcels of land Mavoko Town block 64 (Gimu)/508, 509 & 510 will render the remaining land inadequate for its original intended use and will severely and disproportionately reduce the value of the remaining land therefore the 1st and 2nd Respondents should acquire the entire parcels in accordance to section 122 of the *Land Act* 2012.

   e) That the court be pleased to issue any other or further orders and or directions as it may deem fair and just.

   f) That the Respondents be condemned to pay costs of the application and petition.

10. Although the National Land Commission was duly served and indeed acknowledged service by email as shown in the return of service filed, they chose not to participate in these proceedings and did not file any response to the petition.

2nd Respondent's case

11. The 2nd Respondent filed a reply to the Petition as well as a replying affidavit, both dated August 25, 2021. In her affidavit, Milcah Muendo, the Assistant Director, Survey Mapping in the Survey Department of Highway Planning and Design at Kenya National Highways Authority, stated that the 2nd Respondent in the pursuit of its mandate, is presently undertaking construction of the Second Carriageway of Athi River-Machakos Turn-off Road.

12. It was the 2nd Respondent's further averment that the suit properties are located along Athi River-Machakos Turn-off Road. That land parcel Mavoko Town block 64 (Gimu)/508 and Mavoko Town block 64 (Gimu)/509 were hived off from LR No 21801/141 and, parcel Mavoko Town block 64 (Gimu)/510 was excised from LR No 21801/142. She also deposed that LR No 21801/141 and LR No 21801/142 were hived from the original LR No 10426.

13. The 2nd Respondent also stated that an 80 meter wide road reserve with 40 meter measured from the centre of the existing road was acquired by the Commissioner of Lands from LR No 10426 for the alignment of a section of A8 Road from Airport Turn-off to Athi River and a further 0.02 Ha and 0.012Ha was acquired from LR No 21801/141 and LR No 21801/142 respectively through Gazette Notice No 6320 of August 11, 2006, translating to an additional 3.5meter strip of road reserve. That therefore the road reserve at the location in issue is approximately 83.5 meters.

14. It was the 2nd Respondent's position that the Gazetted acquisition of the suit properties vide Gazette Notice No 9536 of 2September 9, 2017 was cancelled through Gazette Notice No 1919 of March 6, 2020 because the road was redesigned to fit into the existing 83.5 meters reserve. That therefore earlier awards became invalid and were cancelled.

15. The 2nd Petitioner also pointed out that the suit properties were not acquired as alleged by the Petitioners but a portion of the Petitioners' structures/developments were located on the road reserve and as the project was funded by World Bank, the 1st Respondent inspected, carried out valuation and issued the Petitioners with compensation for the affected developments so as to comply with the World Bank Operational Policy on Involuntary Settlement. That therefore the Petitioners were compensated for structures erected on the road reserve by virtue of being Persons Affected by the Project and not for land compulsorily acquired.

16. Further that the 1st Respondent independently inspected the petitioners' structures and made awards of Kshs 1,793,073/= and Kshs 3,404,448/= respectively.

17. That the 1st Respondent forwarded a comprehensive Compensation schedule in its letter dated 22nd February 2021, requesting the 2nd Respondent to transfer to their accounts for onward transmission to the Petitioners in regard to their respective amounts. That by its letter of 3rd March, the 2nd Respondents authorized the expenditure of funds for the project earlier transferred to the 1st Respondent's bank account for payment of the Petitioners. That therefore the 1st Respondent discharged its obligation as expected under the World Bank Operational Policy on Involuntary Settlement.

18. The Petition was canvassed by written submissions. The Petitioners filed their submissions on November 11, 2021, the 2nd Respondent filed their submissions on December 15, 2021 while the 3rd Respondent filed their submissions on December 17, 2021.

Petitioners' Submissions

19. Counsel for the Petitioners submitted that the 2nd Respondent failed to adduce sufficient evidence to prove compulsory acquisition as having been done in 2006. Counsel argued that LR No 21801/141 and LR No 21801/142 were not procedurally compulsorily acquired through Gazette Notice No 6320 of August 11, 2006 as the procedure provided for under Part II (Sections 3, 6, 7, 8, 9, 10 and 11) of the repealed *Land Acquisition Act* Cap 295 were not followed.

20. It was also contended for the Petitioners that the award letters issued by the 1st Respondent dated 8th January 2021 for Kshs 1, 793,073 and Kshs 3, 404, 448 were not procedurally issued. Counsel faulted the 2nd Petitioner's position that compensation was not for land acquired but for structures erected

on the road reserve. Counsel argued that the Petitioners had demonstrated that they were issued with title deeds by the Ministry of Lands and that at the point of registration there was no indication by the Ministry of Lands that portions thereof had been acquired by the 1st Respondent in 2006.

21. It was also the Petitioners' position that if the compensation was for developments on a road reserve, then the same were inadequate as there were permanent structures where the Petitioners obtained rental income as they also ran a petrol station and bar and restaurant and have incurred immense loss since the project begun.

22. Counsel also argued that if indeed the 1st Respondent inquired, inspected and determined the compensation payable, then the Petitioners were not afforded an opportunity to be heard contrary to Operation Policy 4.12 of the World Bank, hence infringing on their right to property.

23. It was also submitted that the Respondents infringed the rule of law under Article 10 of the *Constitution* of Kenya. It was argued that cancellation of the awards came 26 months after the award letter was issued. That therefore the Petitioners had legitimate expectation of compensation and proceeded to close down their businesses and remove tenants from their premises. Counsel argued that the Respondents did not inform them of their change of plan to enable them mitigate their losses, yet the Respondents knew they were not going to compensate them.

24. In addition, the Petitioners argued that the new awards came 7 months after cancellation of the earlier awards and without consulting the Petitioners and the Petitioners continued losing income.

25. The Petitioners also emphasized the issue of sanctity of their titles and that improvements made on the suit properties were on the basis of sanctity of title. Counsel argued that the Petitioners were entitled to the orders sought.

2nd Respondent's Submissions

26. Counsel for the 2nd Respondent submitted that the suit properties were not compulsorily acquired for the project as the only reason the Petitioners were offered compensation was because their structures were located on the road reserve, and as the project was funded by World Bank, the 1st Respondent inspected, carried out valuation and issued the Petitioners compensation for the affected structures to comply with World Bank Operational Policy 4.12 on Involuntary Settlement. Reliance was placed on the case of *Kepha Omondi Onjuro & Others v Attorney General & 5 Others* [2015] eKLR, which the court has considered.

27. On the issue of the principles governing compensation in respect to compulsory acquisition of land, Counsel relied on the case of *Patrick Musimba v The National Land Commission & 2 Others* [2016] eKLR, to argue that constitutional provisions on compensation in regard to property that is compulsorily acquired, did not only intend to have the land owner restituted, but also sought to ensure that public treasury from which money is drawn is protected against improvidence.

28. It was further argued for the 2nd Respondent that the Petitioners did not demonstrate that their right to Property was violated as they are the ones who had encroached on a road reserve and the 2nd Respondent had the right to enter the suit properties and carry out roadworks. That the Petitioners had no proprietary right over land set aside for public purpose. Counsel relied on the case of *Kenya National Highways Authority v Shalien Masood Mughal & 5 Others* [2017] eKLR for the proposition that to the extent that the Petitioners had encroached on the road reserve, their title could neither be said to be indefeasible nor entitle them to Constitutional protection under Article 40.

29. Citing the cases of *Anarita Karimi Njeru v Republic* (1979) eKLR, and *Trusted Society of Human Rights Alliance v Attorney General & 2 Others* [2012] eKLR counsel argued that the Petitioners had not made out a case of violation of their constitutional rights.

3rd Respondent's Submissions

30. Counsel for the 3rd Respondent submitted that ownership of the suit property was in issue. Counsel contended that as the evidence on record was not subjected to cross examination due to the Petitioners' failure to bring their suit by way of plaint, there was no opportunity to cross-examine the Petitioners on how they became registered as proprietors of the suit properties. To buttress their argument, reliance was placed on the case of *Joseph Musikali Mutemi v National Land Commission & 2 Others* [2021] eKLR for the proposition that where ownership is disputed, affidavit evidence is not sufficient for the court to determine that issue as *viva voce* evidence ought to be availed. Counsel argued that the Petitioners must first move the court appropriately for determination of ownership of the suit properties, before the issue of compensation can be dealt with.

Analysis and Determination.

31. I have considered the petition, the supporting and supplementary affidavits, the response and replying affidavit as well as submissions and authorities relied upon. It is apparent that the following issues arise for determination;

    a) Whether or not the Respondents compulsorily acquired the suit properties.

    b) Whether or not the Petitioners' rights were violated by the Respondents.

    c) Whether or not the Petitioners are entitled to compensation in respect of the suit properties.

32. Before I embark on addressing the above issues which arose from the pleadings on record, I must point out that a claimant may prove their claim by *viva voce* evidence upon filing plaint or by way of affidavit, or by any other manner that the court may deem satisfactory. I therefore disagree with the 3rd Respondent's argument that the Petitioners' claim ought only to have been commenced by plaint and that the same could only be proved by viva voce evidence.

33. Having said that, I wish to address my mind to the issues in this matter. The Petitioners' case is premised on Article 40 of the *Constitution* of Kenya. That Article provides as follows;

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

        (a) Of any description; and

        (b) In any part of Kenya.

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

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

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

    (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.

34. Section 111 (1) of the *Land Act* provides as follows;

If land is acquired compulsorily under this Act, just compensation shall be paid promptly in full to all persons whose interests in the land have been determined.

35. It is therefore clear that no person shall be arbitrarily deprived of land unless the same is compulsorily acquired by the state for public purposes or in the public interest and such deprivation must be accompanied with just, prompt and full compensation. The protection of the right to own property is limited to property lawfully acquired and does not extend to property that is unlawfully acquired.

36. Both the *Constitution* of Kenya and the *Land Act* state that in compulsory acquisition, the compensation to the land owner must be just. The *Black's Law Dictionary*, 9th Edition defines "just" as "legally right; lawful; equitable." In the case of *Peter Andera Masakhalia v County Government of Kakamega* [2019] eKLR, the court cited with approval the holding by Scott LJ in *Horn v Sunderland* [1994] 2KB 26, 40 where it was stated as follows;

The word "compensation" almost of itself carries the corollary that the loss to the seller must be completely made up to him, on the ground that unless he receives a price that fully equalled his pecuniary detriment, the compensation would not be equivalent to the compulsory sacrifice.

37. Both the *Constitution* and the *Land Act* envisage compensation in compulsory acquisition to be equivalent to the market price of the land in issue and no more or no less. The *constitution* states that compensation must be just which therefore demands that the land owner gets restituted, but at the same time, public coffers are protected from plunder.

38. Part VIII of the *Land Act* No 6 of 2012 provides the procedure for compulsory acquisition. It places the role of determining the persons with interest in the land on the National Land Commission. See section 112 of the *Land Act*.

39. In the instant case, the Petitioners content that as their titles were issued by the Ministry of Lands, which is a government office, then indefeasibility of title means that their title cannot be defeated unless as provided for by law. On the other hand, the Respondents have stated that the earlier awards made pursuant to Gazette Notice No 9536 of September 29, 2017, and inquiry Notice No 11424 of November 17, 2017 were cancelled after it was noted that the land which was being compulsorily acquired had already been compulsorily acquired earlier on in 2006 *vide* Gazette Notice No 6320 of

August 11, 2006. Further that Gazette Notice No 1919 of March 6, 2020 was justifiably issued to cancel the earlier Notice of Intention to acquire and the compensation availed for payment in the respective sums of Kshs 1,793,073/= and Kshs 3,404,448/= were paid as compensation in respect of structures erected on the road reserve by the Petitioners only on account of the World Bank Operational Policy on Involuntary Settlements.

40. I have considered the documents presented by both the Petitioners and the 2nd Respondent. The Petitioners have produced certificates of registration, demonstrating their respective registration as proprietors of the suit properties, Gazette Notices No 9536 of September 29, 2017 and No 11424 of November 17, 2017 showing the 2nd Respondent's intention to acquire their properties compulsorily and inquiry proceedings respectively and Gazette Notice No 1919 of March 6, 2020 cancelling the earlier intention to acquire their property compulsorily as well as the letters of awards.

41. The Petitioners argue that sanctity of title means that their proprietary rights must be protected under the *Constitution* and therefore they cannot be deprived of their property without due process and receiving just, prompt and full compensation. It is the Petitioners' position that their certificates of title were issued by the Ministry of lands which are government offices and that there was no endorsement on the title that the suit properties comprised of road reserves as alleged by the 2nd Respondent.

42. Under section 24 of the *Land Registration Act*, No 3 of 2012, registration of a person as proprietor of land vests in such person the absolute ownership of that land together with all rights and privileges appurtenant thereto. Section 26 of the same *Act* provides that a certificate of title shall be deemed as conclusive evidence that the holder thereof is the absolute and indefeasible owner, only subject to interests endorsed in the certificate.

43. While a certificate of title is prima facie proof of ownership, Article 40 of the *Constitution* denies constitutional protection in respect of land unlawfully acquired. The abuse of the notion of indefeasibility of title culminated in the law and the courts' demand for interrogation of the root of the title; and therefore, for a title to get protection, the title holder ought to be willing, when called upon, to show that the root of their title is clean and the same is not tainted with any form of illegality. Therefore, the argument, put forward by the Petitioners that a title is clean merely because it was issued by the Ministry of Lands, can no longer be sufficient to avail constitutional protection for such title. Its root must also be clean. This situation has arisen because public officers with the mandate to issue clean titles, have been the same persons facilitating issuance of illegal titles, and public land has been the soft underbelly in all these illegal schemes. I associate myself with the position taken by the court in the case of *Republic v Minister for Transport & Communication & 5 Others Exparte Waa Ship Garbage Collector & 15 Others* [2006] eKLR, where it was held as follows;

> Courts should nullify titles by land grabbers who stare at your face and wave to you a title of the land grabbed and loudly plead the principle of indefeasibility of title deed...it is quite evident that should a constitutional- challenge succeed either under the trust land provisions of the *Constitution* or under section 1 and 1a of the *Constitution* or under the doctrine of public trust a title would have to be nullified because the *constitution* is supreme law and a party cannot plead the principle of indefeasibility which is a statutory concept. A democratic society holds public land in trust for the needs of that society. Alienation of land that defeats the public interest goes against the letter and spirit of section 1 and 1a of the *Constitution*.

44. The 2nd Respondent stated that the mother title of the suit properties were parcels LR No 21801/141 and LR No 21801/142 and ultimately parcel LR No 10426. This fact is not contested by the Petitioners. Besides, the 2nd Respondent has questioned the lawfulness of the Petitioners' titles. They produced a legend showing a sketch of the road reserve, the Gazette Notice No 6320 issued on August

11, 2006, Gazette Notice No 9536 of 29th September 2017 and Gazette Notice No 1919 of March 6, 2020. I have considered Gazette Notice No 6320 of August 11, 2006. It shows that land parcel LR Nos 21801/141, LR No 21801/142 and LR No 10426/3 and 10426/8 were Gazetted for compulsory acquisition.

45. The 2nd Respondent has argued that as part of the suit properties were part of the road reserve, which had earlier been compulsorily acquired, then it would be a waste of public funds to re acquire the same. On the other hand, the Petitioners argue that the compulsory acquisition of 2006 was not procedurally done as the acquisition was not noted on the register. I do not agree with the Petitioners' argument that failure to note public interest in the register meant that the land was not compulsorily acquired. In my considered opinion, once land has been compulsorily acquired for a public purpose or in the public interest, it remains public land and the same is not available for alienation or for use for any other purpose apart from the purpose for which it was acquired. Failure to note the acquisition in the register does not in my view negate the fact that the acquisition was done.

46. Government being a body politic, does not function like a private property owner and therefore acquisition of land is one thing and putting the same land to the intended public purpose is another process which requires other processes and factors including budgeting and priorities of the state. If for instance land was acquired for purposes of construction of a public hospital and it takes government 20 years to put up the hospital, it does not mean that public interest should suffer on account of passage of time. Actions of unscrupulous public officers who decide to issue titles for already compulsorily acquired properties whether by default or design, should not be allowed to benefit third parties who obtain title ostensibly without notice that the land was public land as this would be contrary to public policy. Actions of Government officials and public interest do not at all times go hand in hand. That means that where actions of government officials contradict public interest, the later must be upheld. In any event, the innocent holder of an unlawfully acquired property is not without redress as they may claim compensation from the person who sold them the property, if their claim is that of an innocent purchaser for value without notice.

47. Although the Petitioners have questioned the legality of the compulsory acquisition done in 2006, arguing that their title having originated from government is indefeasible, they have not given any evidence to dislodge the 2nd Respondent's evidence that the intended acquisition in 2017 was unnecessary and unlawful as what was sought to be acquired was already public land having been compulsorily acquired in 2006. I am of the view that indeed, the Gazette Notice No 6320 is sufficient evidence that compulsory acquisition was done in 2006 and therefore it would be a waste of the scarce public funds to re acquire the same land in 2017.

48. Faced with similar circumstances, the Court of Appeal in the case of Kenya National Highways Authority v Shalien Masood Mughal & 5 Others [2017] eKLR, held that the fact that there was in existence a road reserve before the suit property came in to being, it was therefore not open for any other authority to alienate it further for private development. The court further stated as follows;

> The whole world ought to have been aware, as was ultimately established, that there was a road reserve of 80 meters and a buffer- zone of 30 meters which did not in law have to be noted in any land register. It is an overriding interest and not an equitable interest.

49. Similarly, in the case of *Cycad Properties Limited & Another v The Attorney General & 4 Others* [2013] eKLR, the court held as follows;

> 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.

50. I therefore find and hold that to the extend that the suit property was part of the road reserve, the same could not be lawfully compulsorily acquired from the Petitioners as it was public land.

51. As regards Gazette Notice No 1919, section 123 of the *Land Act*, empowers the National Land Commission to revoke or withdraw a direction to acquire land which it had earlier shown intention to acquire, and such revocation means that if anyone who had interest in such land suffered damage due to the revocation, then they are entitled to compensation. In my considered view therefore, it was within the mandate of the 1st Respondent to issue the Gazette Notice No 1919 dated March 6, 2020 to revoke Gazette Notices Nos 9536 and 11424. The 2nd Respondent has contended that the revocation was necessitated due to the fact that the suit properties had already been compulsorily acquired and so the state could not reacquire its own property.

52. Indeed, as can be seen from the letter dated February 22, 2021, written by the Acting Chief Executive Officer of the 1st Respondent to the Director of the 2nd Respondent, it appears that a master schedule for compensation having a list of 158 persons, was prepared by the 1st Respondent but had to be verified and subsequently approved by the Ethics and Anti Corruption Commission. This schedule shows that what the Petitioners are to be compensated is in respect of improvements on the road reserve and not for acquisition of land. I must point out that it is unfortunate that the 1st Respondent has to be policed by the Ethics and Anti Corruption Commission for them to execute such an important mandate that has a serious ramification on public coffers. It is therefore clear that the earlier intended payments in respect of Gazette Notices No 9536 and 11424, which had been sanctioned by the 1st Respondent were unlawful and a blatant waste of public funds.

53. The Petitioners have attached copies of official searches showing that part of their land was compulsorily acquired. The evidence of the 2nd Respondent is clear that there was no compulsory acquisition of the titles held by the Petitioners as that was not necessary due to the fact that the suit properties are on a road reserve. In my view therefore, the entries made by the land Registrar on the suit properties titles are of no legal consequence and cannot confer proprietary rights on the Petitioners requiring compensation, because the acquisition was done in 2006 on the mother title and therefore the entries by the Land Registrar are simply misleading and do not show the correct position. If the land Registrar has realized that after the acquisition in 2006, the remaining acreage of the suit properties is less than that which was shown at the time of issuance of the suit titles, then that would not require an entry for compulsory acquisition in the suit titles, as the acquisition was on the mother title.

54. Entitlement to compensation is pegged on proving that the Petitioners have a *bona fide* interest in the suit property. In my view therefore, as the Petitioners' titles are on a road reserve, which is public land as defined under Article 62 (h) of the *Constitution*, they cannot be entitled to compensation under Article 40 (3) of the *Constitution*. I therefore find and hold that the Respondents did not violate the Petitioners' right to property under Article 40 of the *Constitution*.

55. The Petitioners also complained that the change of the earlier award from Kshs 53,009,200/= to Kshs 1,793,037/=, and from Kshs 208,346,600/= to Kshs 3,404,448/= was done contrary to Article 47 of the *Constitution* as they were not accorded fair administrative action because they were not duly involved in the process culminating in the change of their respective awards.

56. Article 47 (1) and (2) of the *Constitution* protects every person's right to a fair administrative action as follows;

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

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

57. In the case of *Multiple Hauliers East Africa Limited v Attorney General & 10 Others* [2013] eKLR, the court cited with approval the reasoning in the case of *Dry Associates Ltd v Capital Markets Authority & Another*, Petition No 328 of 2011, where the court had this to say about Article 47;

Article 47 is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law...but it is to be measured against the standards established by the *Constitution*.

58. Essentially therefore, before an adverse decision is made against any person, they are entitled to be accorded due process and be given reasons for their decision. As the 2nd Respondent has stated that what was being paid was compensation for improvements on the road reserve as provided for under the World Bank Operational Policy for involuntary settlement, then the Petitioners ought to have been given opportunity to be heard and reasons for the change in the awards given to them.

59. I have evaluated the documents produced by the 2nd Respondent, and I note that there is no evidence to demonstrate that the Petitioners were made aware of the reasons for the change of the awards or that their views were sought at any stage in the change of the awards. As the change touched on their fundamental rights to property; being the improvements on the road reserve, the Respondents owed them a duty of letting them know why there was change in the awards. I therefore find that the Petitioners' rights to fair administrative action under Article 47 of the *Constitution* were violated. Since there was no prayer in respect of the said violation, I will say no more in respect of the same.

60. The petitioners argued that the new awards did not take into account the size of the land and improvements thereon and that it was not sufficient. As it is evident that the compensation was in respect to the improvements and not the land, the Respondents were not required to take into account the size of the land. While the Petitioners have complained that the awards made in January 2021 as being insufficient, no valuation or any other evidence was produced by the Petitioners to show that the improvements in issue were worth more than what was offered by the Respondents. They have not even given any figure to show the value of the developments in question. It is trite law that he/she who alleges must prove. They have not proved that they were entitled to more funds than that which was offered by the Respondents.

61. The Petitioners have sought for several orders including declaratory orders that Gazette Notice No 1919 was null and void, that the Petitioners are entitled to compensation in accordance to Gazette Notice No 9536 and that there should be no partial acquisition of the suit properties. As the Petitioners have not proved that their fundamental right to property was violated, they are not entitled to the orders sought in relation to compulsory acquisition. The award made by the Respondents is not under the ambit of compulsory acquisition but the same is pursuant to the World Bank Operational Policy on Involuntary Settlement. As no evidence was presented on why the same was said to be inadequate, there is no basis for the court to interfere with the said amount.

62. In the premises, I find no merit in the petition and the same is dismissed. Each party shall bear its own costs.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 25TH DAY OF MAY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM.

A. NYUKURI

JUDGE

In the presence of;

Mr. Ayieko for the Petitioners

Ms Odonyo holding brief for Ms Alogo for the 2nd Respondent

No appearance for the 1st and 3rd Respondents

Ms Josephine Misigo – Court Assistant