



**Paragon Electronics Limited v Chief Land Registrar & 2 others;
Ngum & 2 others (Interested Parties) (Environment & Land Petition
1 of 2021) [2025] KEELC 3209 (KLR) (8 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3209 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND PETITION 1 OF 2021

OA ANGOTE, J

APRIL 8, 2025

**IN THE MATTER OF: ARTICLES 3(1), 10, 19, 20, 21, 22, 23, 47, 48, 50(1),
65, 159, 165(6) & (7), 258, & 259 OF THE CONSTITUTION OF KENYA 2010**

AND

IN THE MATTER OF: FAIR ADMINISTRATIVE ACTIONS ACT

AND

IN THE MATTER OF: SECTIONS 46, 80, 107(3) OF LAND REGISTRATION ACT

AND

IN THE MATTER OF: THE STAMP DUTY ACT

BETWEEN

PARAGON ELECTRONICS LIMITED PETITIONER

AND

CHIEF LAND REGISTRAR 1ST RESPONDENT

THE HON ATTORNEY GENERAL 2ND RESPONDENT

KENYA REVENUE AUTHORITY 3RD RESPONDENT

AND

OUSAINOU NGUM INTERESTED PARTY

KHADIJATOU FRANCESS NGUM INTERESTED PARTY

MWANIKI GACHOKA INTERESTED PARTY



JUDGMENT

1. The Petitioner has through an Amended Petition dated 19th May 2021, prayed for the following orders:
 1. Declaratory orders declaring that:
 - a. The 1st Respondent is in violation of Article 65 of *the Constitution* by registering a lease of 999 years in the name of the 1st and 2nd Interested Parties both of whom are non-citizens.
 - b. The 1st Respondent is in breach of the Petitioner's rights under Article 47 of *the Constitution* by refusing or otherwise inordinately delaying in taking a decision and communicating to the Petitioner his or her decision on the Petitioner's letters dated 23 April 2018 and 21 October 2020.
 - c. The 1st Respondent, the 1st Interested Party and the 2nd Interested Party are in breach of the Constitutional principles of good governance, integrity and transparency provided for under Article 10(1)(c) of *the Constitution* by allowing and/or participating in influence peddling and corrupt registration of the lease over the suit property in the name of the 1st and 2nd Interested Parties.
 - d. The 1st Respondent is in breach and will be in breach of the Petitioner's right to fair hearing in the Arbitration by withholding the original lease for Apartment Number 11, Fifth Floor/Penthouse, block A1 of 'Remax Terrace Apartments' on Land Reference Number 330/355 and also by refusing to cancel it on account of irregularities and illegalities.
 - e. The petitioner's right to own and enjoy property under Article 40 of *the Constitution* is threatened by the possibility of the 1st Respondent handing over the original lease of the suit property to the 1st and 2nd Interested Parties.
 2. A permanent injunctive order restraining the 1st and 2nd Interested Parties from transferring, selling or otherwise alienating any interest in respect of Apartment Number 11, Fifth Floor/Penthouse, Block A1 of "Remax Terrace Apartments" on Land Reference Number 330/355 and restraining the 1st Respondent from registering or otherwise approving or allowing any transfer, sale, or alienation of any interest in respect of Apartment Number 11, Fifth Floor/Penthouse, Block A1 of "Remax Terrace Apartments" on Land Reference Number 330/355 in the name of the 1st and 2nd Interested Party and in the alternative to return the purported lease dated 4th April 2016 to the Petitioner.
 3. An order of mandamus directing the 1st Respondent to cancel the registration of the lease dated 4th April 2016 over Apartment Number 11 Fifth Floor/ Penthouse, Block A1 of "Remax Terrace Apartments" on Land Reference Number 330/355 in the name of the 1st and 2nd Interested Party in the alternative to return purported lease dated 4 April 2016 to the Petitioner.
 4. An award of general damages against the 1st Respondents and the 1st and 2nd Interested Parties jointly and severally for breach of the Petitioner's constitutional rights.
 5. An order of costs on full indemnity basis against the 1st Respondent and the 1st and 2nd Interested Party jointly and severally.



6. Such further and other orders and reliefs as the Honourable court deems fit to grant.
2. In the Supporting Affidavit sworn by Bulent Gulbahar, a director of the Petitioner, it is asserted that the Petitioner is the registered owner of Land Reference Number 330/355 on which it has built Remax Terrace Apartments, which apartments are for sale and that Apartment Number 11, located at the Fifth/Penthouse at Block A1, on the suit property is the subject of an ongoing arbitration between the Petitioner and the 1st and 2nd Interested Parties before Mwaniki Gachoka Advocate as the Arbitrator.
3. The Petitioner's director deponed that the issue in dispute before the Arbitrator is whether the 1st and 2nd Interested Parties fully paid for the apartment when they contracted to buy it from the Petitioner vide a Lease Agreement dated 25th June 2013 and that the arbitration notwithstanding, the Petitioner discovered a number of fraudulent, illegal, unlawful and unconstitutional issues surrounding the execution and registration of the lease for the apartment by the Interested Party, which illegalities the arbitrator refused to address himself to.
4. The illegality and constitutional issues pleaded by the Petitioner are that:
 - a. The 1st and 2nd Interested parties are noncitizens of Kenya yet the leasehold was registered for a period of 999 years in breach of Article 65 of *the Constitution* and Section 107(3) of the *Land Registration Act*.
 - b. The 1st and 2nd Interested Parties have corruptly destroyed or disregarded the record at the Ministry of Lands, in particular the original Lease and Stamp Duty Declaration, Assessment and Pay-in-Slip, document serial no. 2647697, dated 9 February 2016, in breach of the *Stamp Duty Act*.
 - c. The 1st and 2nd Interested Parties admitted to have uttered a fabricated and fraudulent instrument, Lease for Apartment A1-11, dated 4 April 2016, for registration to the Ministry of Lands.
 - d. The 1st and 2nd Interested Parties admitted under oath that they subsequently procured the registration of the lease corruptly.
 - e. The 1st and 2nd Interested Parties admitted having corrupted the valuation of the property at market value as required under the *Stamp Duty Act* to deprive the Government of Kenya of the stamp duty that is lawfully due for the registration of the lease.
5. The Petitioner asserted that on the basis of these illegalities and constitutional issues, it surrendered the lease to the 1st Respondent for cancellation; that it is apprehensive that the 1st and 2nd Interested Parties may have already or may be in the process of alienating the Apartment to its detriment and that seeing as the 1st and 2nd Interested Parties have not fully paid for the apartment, the Petitioner's right to own and enjoy property under Article 40 of *the Constitution* is under threat.
6. The Attorney General filed Grounds of Opposition to the Petition dated 30th March 2022. The Attorney General averred that the grant of the reliefs sought by the Petitioner will not serve to advance constitutional values and principles of the rule of law and governance as required under Article 259 of *the Constitution* and that the Petition is an abuse of the court process as the transaction between the Petitioner and the 1st and 2nd interested Parties was contractual in nature and the 1st Respondent was not privy to the transaction.
7. It was contended by the Attorney General that the 1st Respondent does not have the mandate to cancel a lease or title of a registered proprietor unless under the express order of this court as per Section 80 of



the Land Registration Act and that Article 65(2) of the Constitution is a self-executing provision which required no further formalities to be operational.

8. The Hon. Attorney General stated that the registration of the lease in favour of the Interested Parties was based on the documents that were signed by both parties and presented at the registry for registration and that issues of fraud and illegality are to be determined in a normal suit where witnesses will be called to testify.
9. The Attorney General quoted the Court of Appeal case of Westmontpower Kenya Ltd & Another T/ A Continental Traders & Marketing [2003] KLR 357 where it was held that issues of alleged fraud can only be determined with finality during a proper trial and not on conflicting affidavit evidence.
10. The Attorney General argued that the Petitioner's claim is unmerited and does not disclose or demonstrate any threat or violation of the Constitution or any other laws and should be dismissed with costs to the Respondents.
11. The 1st and 2nd Interested Parties opposed the Petition by filing a Replying Affidavit dated 7th June 2023 sworn by Ousainou Ngum who deposed that the Petition violates the test of specificity as established in the case of Anarita Karimi vs Republic (No. 1) (1979) 1 KLR 154 as well as the doctrine of exhaustion of alternative remedies, and that the Petition should be struck out or dismissed in limine.
12. It was deposed that there is no reason why this suit has been filed as a Petition and not as an ordinary suit; that this Petition amounts to gross abuse of court process as the Petitioner has filed another suit, being ELC No. 215 of 2017: Paragon Electronics Ltd v Ousainou & Khadijatou Ngum, in which the Petitioner seeks orders to enforce compliance with the terms of the very same lease which it disputes herein as illegal.
13. It was deposed that in ELC 215 of 2017, the Petitioner has raised the following grounds as the basis for seeking the orders before the court:
 - (a) failing to pay the balance of the purchase price;
 - (b) making alterations on the premises without written consent from the Petitioner and
 - (c) failing to abide by the agreement for lease, lease and car parking licence.
14. The 1st Interested Party stated that him and the 2nd Interested Party are the lawfully registered and valid proprietors of the suit property. He deposed that the arbitration between the parties that began in 2016 was scuttled by the Petitioner's tactics of filing many frivolous applications in court seeking temporary stay orders and disqualification of the arbitrator and that the arbitrator was eventually appointed to be a Court of Appeal judge after more than 5 years of arbitration.
15. Ousainou Ngum deposed that the Petitioner has filed many other suits and applications, some of which are still pending hearing and determination touching on the same issues as in this Petition, namely:
 - i. ELC MISC No. 234 of 2017: Paragon Electronic Ltd v Ousainou & Khadijatou Ngum [Formerly HC Misc. Application N0. 653 of 2017].
 - ii. ELC No. 215 of 2017: Paragon Electronics Ltd v Ousainou & Khadijatou Ngum
 - iii. ELC Misc No. 59 of 2019: Paragon Electronics Ltd v Ousainou & Khadijatou Ngum.
 - iv. ELC Misc. No. E048 of 2020: Paragon Electronics Ltd v Mwaniki Gachoka & Ousainou Ngum & Khadijatou Frances Ngum.



- v. ELC No. 37 of 2020: Paragon Electronics v Ousainou Ngum & Khadijatou Frances Ngum.
 - vi. HC Misc. Application No. E569 of 2021: Paragon Electronics Ltd v Mwaniki Gachoka and Ousainou & Khadijatou Ngum [interested parties].
 - vii. Misc. Criminal Case No. E2434 of 2021: Bulent Gulbahar & Paragon Electronics Ltd v Ousainou Ngum, Khadijatou Ngum, the Director of Public Prosecutions & Directorate of Criminal Investigations.
16. He asserts that in Criminal Case No. E2434 of 2021, the Petitioner sought to institute a private prosecution against the 2nd Interested Party and himself over the same subject matter as this Petition and that the Petitioner's application for leave to institute private prosecution was rejected by the Hon. Magistrate upon which the Petitioner has appealed to the High Court.
 17. The 1st Interested Party asserted that the lease with respect to the suit property was prepared and registered by the Petitioner himself through his lawyer, Messrs Anjarwalla and Khanna Advocates; that no law was breached in the registration of the suit property in the name of the Petitioner and that it was not true that they destroyed or disregarded the records at the Ministry of Lands as alleged.
 18. The 1st Interested Party deponed that the termination letter dated 28th June 2016 was neither issued in accordance with the agreement for lease between parties and it could not revoke their rights to a lease which had at that time, been duly registered in their names by the Petitioner himself and that the Petitioner registered the suit property in the names of the Interested Parties after confirming for itself that it had received the purchase price.
 19. According to the 1st Interested Party, it is the Petitioner who gave them lawful possession of the suit property which they enjoy to date. Further still, he deposed, the valuation of the suit property for purposes of assessment of stamp duty was undertaken by the Ministry of Lands and not by the Interested Parties.
 20. According to Ousainou Ngum, no irregularities or illegalities were ever established in the arbitration to have been committed by either the 2nd Interested Party or himself or at all.
 21. This suit was canvassed through written Submissions.

Submissions

22. The Petitioner's counsel submitted that this suit was initially filed at the High Court as Constitutional Petition No. E428 of 2020 and was transferred to this court pursuant to the orders of the High Court on 24th February 2021. They also relied on a Bundle of Documents dated 10th December 2020.
23. Counsel submitted that the Petitioner's factual allegations against the Respondents have not been rebutted as the Respondents have not filed an affidavit in response and in answer to the allegations of corruption and procedural impropriety against them.
24. He contended that the Grounds of Opposition filed by the Respondent do not serve as an answer to evidence by affidavit. Counsel relied on the case of Daniel Kibet Mutai & 9 Others vs Attorney General [2019] eKLR on the probative value of Grounds of Opposition.
25. The Petitioner's counsel submitted that a multiplicity of suits by itself does not render a matter an abuse of court unless such a matter is to be adjudged sub judice or res judicata and that the mere fact that a person is taking full advantage of legally permissible forums for ventilating its claims cannot be



- the basis for the court to castigate such a party, as this would amount to unfair curtailment of their right of access to justice, guaranteed under Article 48 of *the Constitution*.
26. It was submitted that the other cases do not deal with the constitutional questions raised in the Petition herein; that there is a variance in some of the parties; that this is the first time that the Petitioner has sued the Respondent in relation to the suit property and that none of the suits were ever determined on their merits and the arbitration was terminated upon the resignation of the arbitrator, which led to the withdrawal of the other suits, which arose directly from the arbitration.
 27. The Petitioner submitted that some of the cases were filed to seek interim relief pending arbitration under Section 7 of the *Arbitration Act*; that others were filed challenging interim awards by the arbitrator under Section 35 of the *Arbitration Act* and others were filed under Section 14 of the *Arbitration Act* for the removal of the Arbitrator.
 28. The Petitioner submitted that the Interested Parties are not Kenyan citizens and that the registration of a leasehold of 999 years is unconstitutional and that Article 65(2) only cures contractual provisions as drawn inter se and it does not authorize the registration of such a leasehold as the 1st Respondent has done.
 29. It was submitted by the Petitioner's counsel that the Registrar was duly notified of the irregularity of the purported execution of the lease, which was executed on 4th April 2016, on a date when the director of the Petitioner was out of the country; that the lease was a product of fraud and forgery and that the 1st Respondent was duty bound to provide documents it relied on to verify that the execution by the Petitioner's director was duly done.
 30. Counsel relied on the cases of Lucy Wanjiku Mwangi (Suing as the legal representative of the estate of Benson Mwangi Macharia) vs Chief Land Registrar & 2 Others [2022] eKLR and Susan K. Baur & another vs Shikant Shamji Shah & 2 Others [2017] eKLR.
 31. The Petitioner's counsel further submitted that there are various irregularities demonstrated to have occurred in respect of the assessment of the stamp duty payable on the lease including that the two different stamp duty pay-in-slips in respect of the same property; that the first is serial number 2647697 dated 9th February 2016, which describes the lease as dated 15th January 2016, declares the property to be valued at Kshs. 24 million and reflects the stamp duty assessed as Kshs. 960,040 and that the second is serial number 2594475 dated 22nd April 2016, which describes the lease as dated 4th April 2016, does not declare the value of the property and does not reflect the value of the property but reflects the stamp duty assessed at Kshs. 983,300.
 32. The Petitioner's counsel submitted that the lease itself on its face bears a valuation of USD 241,000 yet the *Stamp Duty Act* does not permit valuation in foreign currency; that there is no indication that the applicable exchange rate was applied to assess stamp duty. Counsel relied on Section 11 of the *Stamp Duty Act*.
 33. The Petitioner's counsel contended that these irregularities in the stamping of the lease are in breach of Section 46 of the *Land Registration Act* which provides that an instrument required by law to be stamped shall not be accepted for registration unless it is stamped in accordance with the *Stamp Duty Act*.
 34. It is the Petitioner's counsel's contention that to the extent that the Respondents accepted and authorised the registration of the lease in the face of the glaring stamp duty irregularities, they acted in contravention of the law and in breach of principles under Article 10 of *the Constitution*. Counsel



- relied on the case of Brookshill Limited & Another vs County Government of Kwale & 3 Others' Mwadzugwe & 2 Others (Interested Parties) [2023] KEELC.
35. It was submitted by the Petitioner's advocate that the irregularities in the registration of the Lease were brought to the 1st Respondent's attention as far back as 26th April 2018 and a reminder was sent on 21st October 2020; that the 1st Respondent ignored the Petitioner's correspondence and that under Article 10,35 and 47 of *the Constitution*, the 1st Respondent had a duty to respond to the letters and to act on them.
 36. The Petitioner counsel urged this court to order for the cancellation of the lease on the grounds of unconstitutionality and that a title acquired through unlawful and corrupt means is a nullity. They relied on the holding in Embakasi Properties Limited & Another vs Commissioner of Lands & Another [2019] eKLR.
 37. It was submitted that the lease should be returned to the Petitioner if the court finds that there are no irregularities, the lease having been surrendered to the 1st Respondent in 2018 based on a genuine and reasonable belief of fraud. Counsel relied on the case of Law Society of Kenya & 7 Others vs Cabinet Secretary for Health & 8 others; China Southern Co. Airline Ltd (Interested Party) [2020] eKLR on the power of a court to grant appropriate reliefs under Article 23(3) of *the Constitution*.
 38. The Honourable Attorney General on behalf of the Respondents, submitted that this Petition is based on a conveyancing transaction involving the Petitioner and the 1st and 2nd Interested Parties and that the Chief Land Registrar has been sued for registering the lease instrument that was willingly presented for registration by the parties to the transaction.
 39. The Attorney General submitted that Section 80 of the *Land Registration Act* gives the Court the power to order for rectification of the register and that while the Petitioner has pleaded that the registration of the lease in favour of the 1st and 2nd Interested Parties was a result of fraud, the Petitioner has not proved these particulars.
 40. The Attorney General relied on the case of Consumer Federation of Kenya vs Toyota Motors Corporation & 4 others [2022] eKLR where the court noted that under the principle of constitutional avoidance, the jurisdiction of the constitutional court is limited to protecting and enforcing constitutional rights and not to determine concerns of contractual obligations which can be properly canvassed under civil law without the need to invoke the constitutional jurisdiction of the court.
 41. According to the Honourable Attorney General, the instant Petition does not raise any constitutional question ripe for determination by this court and does not qualify as a constitutional matter under the principles set out in the Anarita Karimi case, which required that a party seeking a constitutional remedy is required to set out with reasonable precision that which is complained of, noting to stipulate which constitutional provisions have been infringed and how they have been infringed.
 42. The Attorney General submitted that the wording of Article 65 (2) of *the Constitution*, which provides that any agreement conferring on a non-citizen an interest in land greater than a ninety-nine year leasehold interest shall be regarded as only conferring a ninety-nine year leasehold interest, self-executing and requires no further formalities to be operational.
 43. It was submitted that such a lease is an automatic conversion from a freehold to a leasehold interest. Counsel relied on the case of Koome Mwambia & 3 Others vs Dushun Properties Company Limited & 4 Others [2014] eKLR.
 44. The Interested Parties' Counsel submitted that this Petition is an abuse of the process of the court. Counsel asserts that the Petitioner falsely alleged that its right to own and enjoy property under Article



- 40 of *the Constitution* is threatened by the possibility of the Respondent handing over the original lease of the property to the Interested Parties.
45. Counsel asserted that the Petitioner sold the suit property to the Interested Parties vide an agreement for lease dated 25th June 2013; that the Petitioner was represented in the sale transaction by Messrs. Anjarwalla & Khanna Advocates while the Interested parties were represented by Prof. Albert Mumma and Company Advocates and that the Petitioner through its advocates Messrs. Anjarwalla and Khanna Advocates drew and duly registered the lease dated 4th April 2016.
 46. It was submitted that pursuant to clause 3.1 of the lease, the Petitioner acknowledged receipt of the full purchase for the suit property and therefore, the Petitioner has no rights or interest in the property which is capable of being threatened as the suit property belongs to the Interested Parties.
 47. It was submitted by the Interested Parties' Counsel that the termination letter was issued on 28th July 2016, long after the lease had been registered by the Petitioner's advocates pursuant to the Petitioner's instructions and that the termination letter was not issued in accordance with the provisions of the agreement for lease, which provides for steps in terminating the agreement beginning with issuance of a letter specifying the default and requiring that the default be remedied within 14 days.
 48. As to the allegation that the Respondent is in violation of Article 65 of *the Constitution* by registering a lease for 999 years in the name of the interested parties who are noncitizens, counsel submitted that the courts have had occasion to interpret Article 65 of *the Constitution* in *Ephantus Githae & Another vs National Land Commission & Another* [2020] eKLR and in *Koome Mwambia & 3 Others vs Deshun Properties Company Limited & 4 Others* [2014] eKLR.
 49. It is Counsel's submission that it is not clear from the Petition how Article 65 has been or is being threatened with violation because Article 65(2) of *the Constitution* is clear that a 999 year lease held by a non-citizen shall be deemed as a 99 year lease. They therefore submit that this is not a genuine constitutional issue or question for interpretation.
 50. Counsel for the Petitioner and the Interested Parties highlighted their submissions in court on 27th February 2026. The court has considered the said arguments.

Analysis and Determination

51. Having carefully considered the Petition and submissions filed by the parties, the issues that arise consideration by this court are as follows:
 - a. Whether this matter was properly filed as a Petition.
 - b. Whether 1st and 2nd Interested Parties' lease to the suit property was registered unconstitutionally.
 - c. Whether the 1st Respondent and Interested Parties acted fraudulently and illegally.
52. This matter was initially filed in the High Court as Constitutional Petition No. E428 of 2002. It was transferred to this court pursuant to the orders of the High Court on 24th February 2021. The Petitioner then filed an Amended Petition dated 19th May 2021. The Petition challenges the registration of a lease between the Petitioner and the Interested Parties, by the 1st Respondent.
53. The Petitioner contends that the 1st Respondent's registration of the lease was unconstitutional and that contrary to Article 65 of *the Constitution*, the lease grants the Interested Parties a 999 year lease yet they are foreigners and that the 1st Respondent did not verify the documents submitted to it supporting the registration of the lease and have never given reasons for this failure.



54. According to the Petitioner, the 1st Respondent is also in breach of Article 47 of *the Constitution* by failing to respond to its complaints with respect to the lease. The Petitioner also contends that the registration of the lease was unconstitutional as the Interested Parties have admitted to having obtained the lease through fraud and corruption.
55. Both the Honourable Attorney General and the Interested Parties have challenged the Petition on the grounds that it is an abuse of court process as it concerns the transaction between the Petitioner and the 1st and 2nd Interested Parties; that the questions of fraud and illegality are to be determined in a normal suit rather than in a Petition and that the grant of reliefs sought will not serve to advance constitutional values and principles.
56. It was submitted that Article 65(2) is a self-executing provision which requires no formalities to operate; that the Interested Parties are the lawfully registered owners of the suit property and that the Petition violates the test of specificity as established in the case of *Anarita Karimi vs Republic* (No. 1) (1979) 1 KLR 154 as well as the doctrine of exhaustion of alternative remedies.
57. The Interested Parties also submitted that this Petition amounts to gross abuse of court process as the Petitioner has filed ELC No. 215 of 2017 in which it has sought orders to enforce compliance with the terms of the very same lease which it disputes herein is illegal. The Interested Parties submitted that the Petitioner is a vexatious litigant who has filed multiple suits with respect to the dispute between the parties.

Whether this suit was properly filed as Petition

58. The Respondents and the Interested Parties have opposed the filing of this Petition on the grounds that it ought to have been filed as a normal suit or as a civil suit, rather than as a Petition.
59. The Respondent and the Interested Parties are opposing this Petition on the doctrine of constitutional avoidance, which propounds that although a constitutional court could take up a matter, if there is another mechanism which could resolve the dispute, a court will not determine a constitutional issue.
60. The Supreme Court in *Communications Commission of Kenya & 5 Others vs Royal Media Services Limited & 5 Others* [2014] KESC 53 (KLR) defined the principle of avoidance in the following words:

“The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v. Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (*Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936)).”
61. The Petitioner’s suit concerns the contractual agreement between itself and the Interested Parties, which it seeks to rescind. This is evident from the nature of the reliefs sought by the Petitioner.



62. Apart from the declaratory orders, which are couched in constitutional language, the Petitioner has sought for a permanent injunction restraining the 1st and 2nd Interested Parties from transferring or selling their interest in the suit property.
63. The Petitioner has additionally sought for a mandatory injunction directing the 1st Respondent to cancel the registration of the lease dated 4th April 2016 over the suit property as well as damages from the 1st Respondent and the Interested Parties for the alleged infringement of its constitutional rights.
64. From the disposition by the Petitioner, and the prayers sought in the Petition, it is clear that the dispute can be addressed under the law of contract, which makes provision for rescission of contracts and payment of damages for breaches of contract, if any.
65. Furthermore, the Petitioner's claim that the registration of the lease was marred by fraud and illegalities, including non-payment of stamp duty contrary to the provisions of the *Stamp Duty Act* would best be determined in a normal civil suit, after a full trial, where witnesses would be examined and cross examined.
66. Further, it is trite that fraud must be pleaded, particularized and strictly proved. As the modus operandi in Petitions tends to be through affidavit evidence and written submissions, like in this case, it is an unsuitable forum for the Petitioner to ventilate its case.
67. The court will however consider the issue of whether suit property was registered unconstitutionally and fraudulently as argued by the Petitioner.

Whether 1st and 2nd Interested Parties' lease to the suit property was registered unconstitutionally

68. The Petitioner has raised several grounds challenging the constitutionality of the registration of the lease dated 4th April 2016. Primarily, they assert that the 1st Respondent violated Article 65 of *the Constitution* by issuing to the Interested Parties a lease of 999 years.
69. The Attorney General and the Interested Parties argue that this is not a constitutional issue as Article 65(2), which is a self-executing provision, provides that any document which purports to confer to a foreigner an interest in land exceeding 99 years shall confer a ninety-nine-year leasehold interest, and no more.
70. The Petitioner has opposed this view and stated Article 65(2) only cures contractual provisions as drawn inter se and it does not authorize the registration of such a leasehold as the 1st Respondent has done.
71. Article 65 of *the Constitution* reads as follows:
 - “(1) A person who is not a citizen may hold land on the basis of leasehold tenure only, and any such lease, however granted, shall not exceed ninety-nine years.
 - (2) If a provision of any agreement, deed, conveyance or document of whatever nature purports to confer on a person who is not a citizen an interest in land greater than a ninety-nine year lease, the provision shall be regarded as conferring on the person a ninety-nine year leasehold interest, and no more.”
72. Section 107 (3) Of the *Land Registration Act* similarly provides that any lease granted to a noncitizen shall not exceed ninety-nine years. Courts have pronounced themselves on the meaning of Article



65 (2). In *Koome Mwambia & 3 Other vs Deshun Properties Company Limited & 4 Others* [2014] KEHC 8633 (KLR), the court held that:

“The wording of Article 65(2), in my view is a self-executing provision which requires no further formalities to be operational. Therefore, it is automatic conversion from a freehold to a leasehold interest.”

73. In *Abdulrahman vs Mungai & 4 others* [2024] KEELC 7192 (KLR) the court stated that:

“By dint of Article 65 (2) of *the Constitution* and in regard to the issue of ownership of land in Kenya by a non-citizen, the best that can happen in the circumstances of this case is for the plaintiff’s freehold tenure to be converted to a ninety – nine year lease.”

74. Lastly in the case of *Kenya Sunny Industries Company Ltd vs Ocharo & 2 Others* [2024] KEELC 39 (KLR), the court held that the import of Article 65 of *the Constitution* is that any interest in land held by a non-citizen that is greater than 99 years would be converted to 99-year leasehold. The court on this basis declared that the interest held by the 2nd Defendant in the suit land was deemed to be a lease hold of not more than 99 years which it has capacity to hold.

75. This court affirms the position that Article 65(2) of *the Constitution* is a self-executing provision which automatically converts an interest of a foreigner holding a lease in excess of 99 years into a 99year lease interest. Contrary to the Petitioner’s argument, this does not only apply to the agreement between the parties, but to the conveyance instrument itself, including the lease.

76. The self-executing function of Article 65 (2) of *the Constitution* is critical because historically, the majority of the 999 year leases were issued in the colonial era. Article 65(2), which took effect upon the promulgation of *the Constitution* on 27th August 2010, effectively addressed an unfair monopoly in land ownership in Kenya by limiting leases held by foreigners to 99 years, in a bid to effect equity and justice.

77. On this basis, the operation of Article 65(2) therefore automatically converts the lease dated 4th April 2016 to a 99 year lease. There are therefore no grounds to find the registration of the lease by the 1st Respondent in favour of the Interested Parties to be unconstitutional under Article 65 of *the Constitution*.

78. A further argument propounded by the Petitioner is that the 1st Respondent is in breach and will be in breach of the Petitioner’s right to fair hearing in the arbitration by withholding the original lease of the suit property, and by refusing to cancel it on account of irregularities and illegalities.

79. Section 80 of the *Land Registration Act* prescribes that:

1. Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
2. The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”



80. From this section of the law, the Registrar cannot on his own motion rectify, cancel or amend a title unless he is ordered to do so by a court of law. This is so because the matters of fraud in land registration are complex and require an investigation of fact and law to determine the correct position.
81. It is only in non-contentious matters of an error which does not materially affect the interests of any proprietor and with the consent of all affected parties, that a Registrar can rectify the register, as indicated under Section 79 of the [Land Registration Act](#).
82. In the Petition before this court, the issues raised by the Petitioner are in respect of the purported illegalities and fraud by the Interested Parties and the 1st Respondent in the registration of the lease, which, ironically, it signed and was registered by its own advocate.
83. As held by the court in *Esther Ndegi Njiru & Another vs Leornard Gatei* [2014] KEHC 8290 (KLR), a court would only order for rectification of a title, including a lease that has been registered, where it has been proved that the title was obtained illegally, un procedurally or through a corrupt scheme.
84. So, did the 1st Respondent breach the Petitioner’s right under Article 47 by declining to cancel the lease or to respond to its letters which had requested for the cancellation of the lease?
85. Article 47 of [the Constitution](#) prescribes that:-
- “(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
 - (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
 - (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall--
 - (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
 - (b) promote efficient administration.”
86. Article 47 is echoed by Section 4(1) of the [Fair Administrative Action Act](#), which states that:
- “Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.”
87. The evidence shows that it is by the letter dated 26th April 2018 that the Petitioner surrendered the original lease of the suit property to the Chief Land Registrar. While doing so, the Petitioner stated that it had recently discovered that the Interested Parties were both foreigners and held the leasehold tenure of 999 years contrary to the express provisions of Article 65(1) of [the Constitution](#). The Petitioner thereby surrendered the original lease for the Chief Land Registrar’s action as “stipulated, required and mandated as per the law”.
88. Through the letter dated 23rd October 2020 to the Chief Land Registrar, the Petitioner clarified its request and sought that the Chief Land Registrar either cancel the lease and inform the parties of the cancellation, or in the alternative, return the lease to the Petitioner to enable them to surrender it to the arbitrator.



89. The Petitioner asserts that the 1st Respondent has never communicated his decision on its request. This position has not been rebutted by the 1st Respondent. However, this court has already made a finding, and it is clear from the Grounds of Opposition filed by the 1st Respondent, that the Land Registrar does not have the mandate to cancel lease of title to land.

90. The issue of a breach of Article 47 and 10 of *the Constitution* does not therefore arise.

Whether the 1st Respondent and Interested Parties acted fraudulently and illegally

91. In its Petition, the Petitioner raised several claims of illegalities and fraud on the part of the Interested Parties. It was submitted by the Petitioner that various irregularities occurred in respect of the assessment of the stamp duty payable on the lease; that there are two different stamp duty pay-in-slips in respect of the same property; that the lease on its face bears a valuation of USD 241,000 yet the *Stamp Duty Act* does not permit valuation in foreign currency and that there is no indication that the applicable exchange rate was applied to assess stamp duty.

92. This court takes due notice that the lease was in fact drafted and presented for registration by the Petitioner's advocates.

93. It is trite that the standard of proof with respect to fraud in civil cases is above that of on a balance of probabilities. The Court of Appeal in the case of in the case of Kinyanjui Kamau vs George Kamau [2015] eKLR expressed itself as follows;-

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs Ndolo (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”
In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

94. It is also trite that it was upon the Petitioner, as the claimant in this matter, to discharge the burden of proof upon it. Accordingly, beyond alleging the irregularities raised in the Petition and the production of the documents in the bundle of documents, the Petitioner should have gone a step further to adduce expert reports and affidavits to support its claim that the documents they have challenged are indeed fraudulent. Without such evidence, this court finds that the Petitioner failed to discharge the burden of proof that was upon it.

95. In conclusion, this court has found that the Petitioner has not established any constitutional breach on the part of the 1st Respondent and the Interested Parties, and has failed to meet the required standard of proof to establish fraud on the part of the Respondents and the Interested Parties.

96. The Amended Petition is therefore wholly without merit and is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 8TH DAY OF APRIL, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Ms Ochieng holding brief for Mr. Ataka for Petitioner.



Mr. Obok for 1st and 2nd interested Party

No appearance for Respondent

Court Assistant: Tracy

