



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI MILIMANI LAW COURTS**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. 154 OF 2011**

**BETWEEN**

**ISAAC GATHUNGU WANJOHI.....1<sup>ST</sup> PETITIONER**  
**ISIAH KIRINDI WAMBUGU MUTONYI ..... 2<sup>ND</sup> PETITIONER**  
**AND**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**  
**MINISTER FOR ROADS.....2<sup>ND</sup> RESPONDENT**  
**KENYA URBAN ROADS AUTHORITY.....3<sup>RD</sup> RESPONDENT**  
**CHINA ROAD AND BRIDGE CORPORATION.....4<sup>TH</sup> RESPONDENT**  
**CHIEF ENGINEER (ROADS) MINISTRY OF ROADS..5<sup>TH</sup> RESPONDENT**  
**THE COMMISSIONER OF LANDS .....6<sup>TH</sup> RESPONDENT**  
**ROSALINE NJERI MACHARIA .....7<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. This is another case that concerns land that is situated at the junction of Airport Road and the Mombasa Nairobi Road and is part of land that was intended for construction of the Eastern Bypass. The petitioners' contention is that the trespass upon their land is an infringement of their right to property protected under **Article 40** of the Constitution.

2. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents are represented by the Attorney General. The 4<sup>th</sup> respondent, the corporation contracted to carry out the construction, did not appear in these proceedings and is not represented. Reference to the respondents in this judgment shall be to these respondents *sans* the 4<sup>th</sup> respondent.

**Petitioner's case**

3. The facts relating to the dispute and petitioner's case are set out in the petition dated 6<sup>th</sup> September 2011 and supporting affidavit sworn by the petitioners sworn on the same date. There are two further affidavits filed in response to the respondents' further affidavit sworn jointly by the petitioners on 30<sup>th</sup> December 2011.

4. The petitioners are the duly registered proprietors of the property known as **LR 209/12052** (hereinafter "the suit property"). The petitioners were issued with a title, Grant No. IR 61456 upon purchase of the property from Bach Industrial Limited, the original allottee from the Commissioner of Lands for the sum of Kshs. 18 million.

5. The petitioner avers that since they became owners they have paid all rates to the property to the Nairobi City Council and also paid land rent to the Commissioner of Lands. The petitioners contend that they obtained approval from the City Council of Nairobi in 2009 to construct a showroom and offices.

6. The petitioners aver that in May 2011, the Commissioner of Lands served on the neighbouring property owner a notice under **section 6(2) of the *Land Acquisition Act (Chapter 295 of the Laws of Kenya)*** being a notice of intention to acquire their parcels of land for the purpose of constructing the Eastern Bypass, Mombasa Road –North Airport Road. Such a notice was not issued to the petitioners.

7. The petitioners aver that in or about May 2011, the 2<sup>nd</sup> to the 6<sup>th</sup> respondents began construction of the Nairobi and Eastern Bypass. A notice to that effect was posted on the neighbouring land. On or about 25<sup>th</sup> August 2011, the 4<sup>th</sup> respondent, without consent of the petitioner entered on the suit property started excavating soil from part of the land and bringing stones and crushing them on the land for construction of the Eastern Bypass.

8. It is this trespass and construction that the petitioner contends is in breach of **Article 40** of the Constitution. Accordingly, in the petition dated 6<sup>th</sup> September 2011 the petitioner prays for the following relief;

- (a) *It be declared that the respondents have contravened the petitioners' right to property under Article 40(1) and (3) of the Constitution.*
- (b) *It be declared that the respondents have committed trespass to land.*
- (c) *It be declared that the respondents are in breach of the contract entered into by the petitioners and the state as set out in the grant issued to them.*
- (d) *A permanent injunction restraining the respondents from permitting the said Eastern Bypass, Mombasa Road – North Airport Road, to pass across the said LR No. 209/12052.*
- (e) *A permanent injunction restraining the respondents from interfering with the petitioners' quiet enjoyment of LR No. 209/1252.*
- (f) *A permanent injunction restraining the 2<sup>nd</sup> to 5<sup>th</sup> respondents whether by themselves, their servants or agents from entering into, being on, excavating and taking away soil from or bringing stone and crushing them on the said LR No. 209/12052.*
- (g) *General and exemplary damages.*
- (h) *An order that the costs of this petition be provided for.*

9. Dr Kamau Kuria, who represented the petitioners, was clear that the acts of the respondents were clearly in contravention of **Article 40** of the Constitution. He relied on and adopted the written submissions dated 1<sup>st</sup> December 2011 and supplementary submissions dated 30<sup>th</sup> December 2011.

10. Dr Kuria focused his submissions on the doctrine of indefeasibility of title and the protections afforded by the Constitution to property. He asserted that the Grant issued to the petitioners by the state constituted a contractual obligation by the state which could not be revoked at a whim which without due process. In support of this submission counsel cited the United Supreme Court case of ***Fletcher v Peck* 10 US 87 (1810)**.

11. Furthermore, the title was protected by the provisions of **section 23 of the *Registration of Titles Act (Chapter 281 of the Laws of Kenya)***. Counsel relied on the case of ***Kuria Green Limited v Registrar of Titles and Another Nairobi Petition No. 107 of 2010 (Unreported)*** where the court held that the Registrar of Titles had no authority to cancel a title by way of a gazette notice and only a court can do so when the title has been obtained through fraud and or mistake and only where it is not a first registration. The court in that case held that the Registrar of Titles was in breach of **Article 47** of the Constitution in proceeding in the manner it did.

12. Counsel contended that the only way the state could take the petitioners' property is to comply with the Constitution by compulsorily acquiring the land through application of the ***Land Acquisition Act (Chapter 295 of the Laws of Kenya)***. In this regard the state was required to follow the procedures provided strictly as was held in the case of ***Commissioner of Land & Another v Coast Acquaculture Limited* KLR (E & L) 264**.

13. Dr Kuria submitted that the 7<sup>th</sup> respondent is but a mere busy body in these proceedings as the petitioners' have not encroached on her land. On the contrary, it is the 7<sup>th</sup> respondent is the one who

always wanted to extend her land to the petitioners' property. As the 7<sup>th</sup> respondent has no right that has been infringed, the court must award costs against her as her joinder to this suit has had the effect of increasing costs.

14. Dr Kuria emphasised that the act of the state could not be justified by the nature of the project. It was the duty of the state to comply with the law and in so far as it did not, it must pay damages. Counsel relied on the case of ***Musa Mohammed Dagane v Attorney General and Others Embu Petition No. 56 of 2009 (Unreported)*** and the case of ***Methodist Church in Kenya Trustees v Attorney General Meru High Court Petition No. 4 of 2010 (Unreported)*** where the court issued an injunction against the state and its functionaries to restrain breach of property rights.

15. Counsel submitted that this was a proper case for the grant of exemplary damages as the state had acted arbitrarily and in a high handed manner. He urged the court to award Kshs. 5 million as general damages and Kshs. 2.5 million as exemplary damages. He urged the court to award costs on the higher scale.

### **The 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Respondents' Case**

16. An affidavit sworn by Engineer Michael Sistu Mwaura Kamau on 23<sup>rd</sup> November 2011 was filed on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> respondents. According to the affidavit, the suit property is located at the junction of Mombasa Road/North Airport Road fronting City Cabanas Restaurant.

17. Mr Kamau deponed that the land was, in the 1980's, planned and set aside as a buffer zone for Mombasa Road as evidenced by Development Plan No. 42/14/87/84/59 dated 4<sup>th</sup> December 1987. The zone was intended for the expansion of Mombasa Road in the future.

18. It is the respondents' contention that once the suit property was planned and zoned, any allocation and subsequent dealings and depositions were erroneous, irregular, illegal, unlawful and contrary to public policy and interest and therefore the petitioners do not deserve protection of the Court in accordance with **Article 40(6)** of the Constitution,.

19. It is also the respondents' contention that registration of the petitioners as proprietor of the suit property was fraudulent in light in **section 2** of the ***Registration of Titles Act*** because it knowingly and wrongfully defeated the unregistered interest of the Ministry of Roads to the road buffer zone set aside for Mombasa Road expansion and created by the Physical Planning Department and approved by the Part Development Plan.

20. The respondents have drawn the Court's attention to the existence of litigation between the petitioner and the 7<sup>th</sup> respondent in respect of the buffer zone through ***HCCC No. 450 of 1995***. I shall advert to this case later.

21. The respondents also aver that the title of the suit property was revoked vide **Gazette Notice No. 9230** appearing in the special issue of the Gazette dated 29<sup>th</sup> July 2011 which revoked several titles including that of the petitioners. It is the respondents' argument that once the title was revoked, it was no longer in existence and the procedure for compulsory acquisition of land set out in the ***Land Acquisition Act*** could not apply.

22. The Permanent Secretary avers that the revocation of the title was done after the Government constituted a *Private Sector Working Group on Land Acquisitions for the Nairobi Urban Toll Road and Bypasses* (hereinafter "the Working Group") whose terms of reference were inter alia, the establish a framework for removals and access along Mombasa Road. This group constituted on 26<sup>th</sup> January 2011, was inclusive and representative and it recommended, inter alia, that certain titles be revoked. The revocation of the petitioner's title was pursuant to these recommendations.

23. The respondents aver that the revocation of the title was done through a consultative process and would be of public benefit as the construction of the Mombasa Road far outweighs the private interests of

the petitioners and as such the court should not grant the orders sought in the application.

24. There is an affidavit of Engineer Joseph Nakadony Nkadayo, who is the Director General of the 3<sup>rd</sup> respondent, sworn on 30<sup>th</sup> November 2011, where he confirms that the Working Group report issued in March 2011 recommended the cancellation and or revocation of, inter alia, LR 209/12502. It is the deponent's view that the report is binding on the petitioners and as such the petitioner lacks merit.

25. The respondents further contend that the petitioners were reminded as far back as May 1995 that the suit property was situated on a road buffer zone and it was recommended for nullification by the Nairobi Town Planning Liaison Committee. According to the respondents it is by reason of this report that the Nairobi City Council declined to approve any developments on the property.

26. The respondents case was urged by Mr Mutinda who adopted the written submissions dated on 9th March 2012. In his submission Mr Mutinda made three broad arguments attacking the petitioner's case.

27. Firstly, the counsel submitted that by virtue of **Article 40(6)** of the Constitution, the rights protected under **Article 40** do not extend to any property that is found to have been unlawfully acquired. According to the respondents, the property, as outlined in the replying affidavits, was unlawfully acquired and this court should not sanction the petitioners' interests as this would be contrary to the Constitution. The respondents relied on the case of ***Chemei Investments Limited v Attorney General and Others Nairobi Petition No. 94 of 2005 (Unreported)***.

28. The respondents also asserted that the petitioners' were guilty of misrepresentation and non disclosure of material facts. Firstly, they did not disclose that there were other suits pending in relation to the subject matter of the case. Secondly, it was not disclosed that the City Council of Nairobi had not granted approval for development of the suit property. In this respect counsel submitted that the petitioner was not entitled to the prayers in the petition on account of the failure to make disclosures and these proceedings were therefore an abuse of the court process.

29. Thirdly, counsel submitted that the public interest in constructing a slip road of the Nairobi Eastern Bypass, Mombasa Road over the petitioners' property far outweighed the petitioners' private interest. The respondent relied on the case of ***Verendra Ramji Gudka v Ministry of Roads and Another Nairobi JR ELC No. 32 of 2009 (Unreported)*** and the case of ***Maisha Nishike Limited v The Commissioner of Lands and Others Nairobi JR ELC 66 of 2010 (Unreported)***. The respondents urged the court to dismiss the petition.

### **The 7<sup>th</sup> respondent's case**

30. The 7<sup>th</sup> respondent was granted leave to join these proceedings on 10<sup>th</sup> October 2011. The 7<sup>th</sup> respondent filed a replying affidavit sworn on 2<sup>nd</sup> December 2011 and a supplementary affidavit sworn on 7<sup>th</sup> February 2011. The 7<sup>th</sup> respondent opposes these proceedings as she owns property which borders the petitioner's property.

31. She is the owner of LR No. 209/11293/1 situated at the junction of Mombasa Road and Embakasi Road. According to her, the manner of allocation of the suit property to the petitioners has hindered her from full utility of her property which enjoys frontage to Mombasa Road as a consequence of which the value of her property has diminished considerably.

32. The 7<sup>th</sup> respondent alluded to the fact that there are two suits pending in respect of the suit property namely; ***HCCC No. 450 of 1995 Isaac G Wanjohi & Isaiah Kirindi Wambugu Mutonyi v Rosaline Macharia*** and ***High Court Miscellaneous Civil Application No JR 115 of 2008, Isaac G Wanjohi & Isaiah Kirindi Wambugu Mutonyi v director of City Planning and Rosaline Macharia***. These two suits are still pending.

33. It is the 7<sup>th</sup> respondent's position that the issuance of title to Bach Industries Ltd and the petitioner was irregular and the Court cannot give sanction to this process. Furthermore, giving the petitioners relief

would adversely affect her rights.

34. Counsel for the 7<sup>th</sup> respondent, Mr Abidha opposed the petition and adopted the written submissions dated 29<sup>th</sup> February 2012 whose tenor and effect was similar to those of the other respondents. The 7<sup>th</sup> respondent asserts that this suit is an abuse of the court process as it raises similar issues as those in the pending cases between the petitioners and the 7<sup>th</sup> respondent.

35. Mr Abidha submitted that on the as the land had been irregularly been acquired the property could not be compulsorily acquired as it was already public land. Counsel relied on the case of ***Samson Kegongo Ongeri v Greenbays Holdings and Others Malindi HCCC No. 30 of 2006 (Unreported)***. In addition counsel submitted that the land had been illegally acquired and this court could not sanction something that was illegal as was held in the case of ***Kenya Anti-Corruption Commission v James Raymond Njenga and Another Eldoret HCCC No. 61 of 2008 (Unreported)*** and ***Jimmy Gichuki Kiago and Another v County Council of Nzoia and Others Kitale HCCC No. 2 of 2011 (Unreported)***.

36. Counsel submitted that the petitioners being aware of all the illegalities and irregularities surrounding their purported claim cannot claim relied under the Constitution therefore the claim must be dismissed.

#### **Violation of Article 40 of the Constitution**

37. I have set out the essential facts necessary for determination for the determination of this matter. The only issue for consideration is whether the petitioners' right to property protected under **Article 40** have been violated by the respondents.

38. **Article 40(3)** of the Constitution protects a person from deprivation of property by the state unless the deprivation is for a public purpose or in public interest and is carried out in accordance with the Constitution or an Act of Parliament and prompt payment in full of just compensation. This is achieved through following the procedure set out in the ***Land Acquisition Act***.

39. The question remains whether I should consider granting compensation if I find that the conduct of the respondent was unconstitutional. The answer to this issue hinges on **Article 40(6)** which provides that, ***"The rights under this Article do not extend to any property that has been found to have been unlawfully acquired."*** [Emphasis mine]

40. The petitioner's position is grounded on the fact that it has an absolute and indefeasible under the ***Registration of Titles Act*** that it is capable of being protected under **Article 40**. As the registered owner, it is entitled to protection in accordance with the provisions of **section 23** of the ***Registration of Titles Act***. This position finds support in several cases of our courts; ***Wreck Motors Enterprises v The Commissioner of Lands and Others Nairobi Civil Appeal No. 71 of 1997 (Unreported)***, ***Nairobi Permanent Markets Society and Others v Salima Enterprises and Others Nairobi Civil Appeal No. 185 of 1997 (Unreported)*** and ***Joseph N K arap Ng'ok v Justice Moiwo ole Keiuwa and Others Nairobi Civil Application No. NAI 60 of 1997(Unreported)***.

41. On the other hand, the respondents are of the view that the suit property was illegally and fraudulently acquired and as such, this Court cannot give a seal of approval to the applicant's title. This proposition is supported by the case of ***Milan Kumarn Shah & Others v City Council of Nairobi & Others Nairobi HCCC No. 1024 of 2005 (OS)(Unreported)*** and ***James Joram Nyagah & Another v The Honourable Attorney General and Another Nairobi HC Misc. 1732 of 2004 (Unreported)***.

42. **Article 40** must be read as whole so that protections afforded by **Article 40** which protect the right to property must be read to exclude property found to be unlawfully acquired under **Article 40(6)**. This requirement is an extension of the fact that the Constitution protects higher values which are to be found in preamble to the Constitution and **Article 10**. Values such as human rights and social justice cannot countenance a situation where the Constitution is used to rubberstamp what is in effect unlawful.

43. I take the view stated in the case of ***Chemei Investments Limited v The Attorney General & Others Nairobi Petition No. 94 of 2005 (Unreported)*** at para. 64 that, “*The Constitution protects a higher value, that of integrity and rule of law. These values cannot be side stepped by imposing legal blinders based on indefeasibility. I therefore adopt the sentiments of the court in the case of Milan Kumarn Shah & 2 Others v City Council of Nairobi & Another (Supra) where the Court stated as follows, ‘We hold that the registration of title to land is absolute and indefeasible to the extent, firstly, that the creation of such title was in accordance with the applicable law and secondly, where it is demonstrated to a degree higher than the balance of probability that such registration was procured through persons or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law and the public interest.’”*

44. I also hold that a the finding of “*unlawful acquisition*” referred to in **Article 40(6)** of the Constitution must be through a legally established process and not by whim or revocation of the Gazette Notice as the Commissioner of Lands purported to do and definitely not by forceful taking of possession. Thus, as was held in the case of ***Kuria Green Limited v Registrar of Titles and Another (Supra)***, it must follow that the purported revocation to title LR No. 209/2052 by way of Gazette Notice No. 9230 is illegal, null and void and of no effect.

45. In my view it does not matter that there was Working Group which made certain recommendations regarding the nullification of titles. While such a task force may make recommendations, such recommendations do not have the force of law. And the fact that there was a consultative process cannot be a substitute for due process in taking away the petitioner’s title by way of a Gazette Notice. The Constitution requires that a finding of ‘*unlawful acquisition*’ be done through a process established by law.

46. In this case the petitioner has not prayed for a declaration to annul the purported revocation contained in the Kenya Gazette for the simple reason that the ***Kuria Greens Case*** was declaratory of the law in so far as the revocation of title by way of Gazette Notice by the Registrar of Titles is concerned. It is an action that is unconstitutional null and void and for the avoidance of doubt I so hold.

47. There is evidence that the suit property was part of a road buffer zone whose acquisition would fall within the purview of **Article 40(6)**. The logical consequence of my finding is to give the State the opportunity to test its case in the appropriate forum. I have therefore resisted commenting on other factual issues which may unnecessarily prejudice a fair trial of the matters in that forum.

48. The act of respondents carrying out the revocation of title through a process that lacks legal recognition and thereafter entering the property of the petitioners is clear breach of the petitioners’ due process rights. Even where the Constitution does not recognize rights unlawfully acquired, it does not give the State and its agencies a *carte blanche* to do as it wishes outside the confines of the law.

**The existence of two suits in respect of the subject matter**

49. My approach to this issue is further fortified by the fact that there are two suits pending in this court. The first suit is ***HCCC No. 450 of 1995*** between the petitioners and the 7<sup>th</sup> respondent. By a plaint filed on 14<sup>th</sup> February 1995, the Plaintiffs filed to restrain the 7<sup>th</sup> respondent from committing certain acts of trespass. It prayed for judgment against the defendant for the following;

(1) *An order of injunction restraining the Defendant, her agents or servants from being or remaining on Plot Number L R 209/12052 Nairobi or from continuing with the construction of any fences, buildings or erection of any structures on the said plot or from interfering with the plaintiff’s use and quiet enjoyment of the said plot.*

(2) *An order directing that an inquiry as to damages for trespass be undertaken and the defendant to pay to the plaintiffs such sum as may be found due upon such inquiry together with interest thereon at court rates.*

(3) *Costs of this suit together with interest thereon at court rates.*

50. The 7<sup>th</sup> respondent in that suit filed a defence and counterclaim dated 5<sup>th</sup> September 1995 which denied the trespass but stated that the creation of the petitioners' plot on the buffer zone was irregular and illegal and in the relief it sought the following orders;

(a) *An order of injunction restraining the plaintiffs, their servants and or agents from commencing or attempting to initiate any construction of structures on LR 209/12057 until the determination of this suit.*

(b) *A declaration that the creation of LR 209/12052 by the Commissioner of Lands was irregular and illegal.*

(c) *An order that the plaintiffs do deliver up the Title of LR No. 209/12052 to the Registrar of Lands for cancellation.*

(d) *An order directing that an enquiry as to damages for trespass be undertaken and the plaintiffs be ordered to pay such sum as be due upon such inquiry together with interest and thereof.*

(e) *Costs of this suit plus interest thereon.*

(f) *Any other relief that the Honourable Court may deem fit and just to grant.*

51. This suit is still in existence and at the substance, it requires a determination of the legality or otherwise of the plaintiffs' title and the 7<sup>th</sup> respondent's claim. These are the issues that I am required to determine even if the matter herein is broadly one of determination of fundamental rights and freedoms.

52. There is also pending the application for Judicial Review namely, **JR ELC No. 115 of 2008** where the petitioners are the *ex-parte* applicants. The Nairobi City Council is a respondent in the matter while the 7<sup>th</sup> respondent is an interested party. This application seeks an order of certiorari to quash the decision of the Director of City Planning dated 2008 withdrawing his authority previously granted to the applicants by the letter dated 2<sup>nd</sup> November 2008 to carry out certain developments on the property.

53. In considering the rights of the *ex-parte* applicants, the court may well have regard to the petitioners' rights to the suit property and the issues and arguments that have been outlined in this matter.

54. Both these cases require consideration of the acts of ownership and indeed it is likely that the issue of legality of the petitioners' title will be an issue that is directly and substantially in issue. If I grant the orders sought in the petition I would be in effect, determining the pending suits to the prejudice of the parties in those suits.

### **Conclusions and Disposition**

55. I have come to the conclusion that this is a matter where **Article 40(6)** would apply, it follows that I am unable to declare that the rights of the petitioners have been breached or award damages. In order to make a declaration of breach of **Article 40(1)** and **(3)**, I would have to find the **Article 40(6)** is not applicable. In this respect I would adopt the observations by the court in **Chemei Investments Limited v Attorney General and Others (Supra)** that, “[70] I am mindful that the acts leading to this case took place before the promulgation of our Constitution as such it is the former Constitution that governs the subject of this petition. However, I would be remiss if I did not comment that the process by the Commission in exercise of its statutory mandate. **Article 40** of the Constitution protects the right to property but **Article 40(6)** provides that the rights under the said article do not extend to any property that is found to have been unlawfully acquired. In my view, the Commission has a statutory mandate to initiate proceedings in court for the determination of the unlawfulness of the acquisition.”

56. The state has asserted that the suit property was acquired illegally, in that event it must use due process to establish this position. **Article 40(6)** contemplates that the finding of unlawfulness must be by due process. As part of my jurisdiction to frame appropriate relief under **Article 23** and in order to give effect to the petitioner's right I direct that should the state wish to do so, it must commence such

proceedings within **12 months** from the date of this judgment.

57. I must however state that the petitioners are the holders of the title to the suit property; LR No. 209/2052 and the Gazette Notice No. 9230 is null and void in so far as it purported to revoke that title. It is improper and contemptuous for the respondents to insist that the revocation is valid and that consequently no compulsory acquisition can take place. In view of what I have stated the court cannot continue to assert that the revocation was valid. That action was further aggravated by the trespass into the property by the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondents. The deliberate acts of the respondents which were without legal foundation and which are in breach of **Article 47** and must be sanctioned.

58. I must also consider whether I should grant an injunction in the interim. Such a consideration must be based on the facts as they exist. However, I must comment of the conduct of the State in these matters. In the case of **Joseph Ihugo Mwaura v Attorney General Nairobi Petition No. 498 of 2009 (Unreported)**, the State attempted to justify its action of evicting residents of an informal dwelling on the basis of its obligation to promote development for the overall good, I stated that, *“The Permanent Secretary has argued that the eviction and consequent construction of the law cost housing is necessary for the government to achieve Vision 2030. This argument fails to realise that the foundation upon which we are building a new Kenya is that founded on human rights, social justice and the rule of law. A vision built on impunity, disrespect for court orders and disregard of the values of the Constitution and fundamental rights and freedoms is a vision built on a quick sand!”*

59. Since an injunction is an equitable and discretionary remedy I must weigh the respective interests of the respective parties. I think that the petitioners’ interests must yield to the public interest. I adopt the words of the court in **Maisha Nishike Limited v Commissioner of Lands and Others (Supra)** that, *“The project that has stalled is of great public benefit. There is no denial that the government is likely to pay a considerable amount of liquidated damages due to delay in finalisation of the project. The ex-parte applicant does not stand to gain at all from such delay.”*

60. In the event the court comes to the conclusion that in terms of **Article 40(6)**, the property was not acquired unlawfully then the petitioners will be entitled to full compensation and damages. I am not in doubt that in this event, the state would be able to satisfy the claim for damages.

61. However, in view of the breach of the petitioner due process rights and in particular the revocation of the title to the suit property and the subsequent trespass, I am must award damages for the conduct which I have alluded to and which is a breach of **Article 47** of the Constitution as was held in the **Kuria Greens Case**. I will award the sum of **Kshs. 1,000,000.00** as damages. I must emphasise that this is not compensation but damages to vindicate the petitioner’s right to due process which have been infringed.

62. Having considered the pleadings, depositions and submissions, I make the following orders;

- (a) I declare that **Gazette Notice Number 9230** appearing in the issue dated 29<sup>th</sup> July 2011 in declared null and void.
- (b) I award the petitioners **Kshs. 1,000,000.00** as general damages for the breach of **Article 47** of the Constitution against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondent.
- (c) If the State wishes to commence legal proceedings to establish the legality or otherwise of LR 209/12052, it must do so within **12 months** from the date of this judgment, in default, the petitioners are at liberty to apply to this court for determination of further relief.
- (d) The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents shall pay the petitioners costs.
- (e) There shall be no order as to costs in respect of the 4<sup>th</sup> and 7<sup>th</sup> respondents.

**DATED and DELIVERED at NAIROBI** this 30<sup>th</sup> day of March 2012.

**D.S. MAJANJA**  
**JUDGE**

Dr Kamau Kuria instructed by Kamau Kuria & Kiraitu and Company Advocates for the Petitioner.  
Mr Mutinda, Litigation Counsel, instructed by the State Law Office for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents.

Mr Abidha instructed by Ochieng' Onyango Kibet and Ohaga Advocates for the 7<sup>th</sup> respondent.