



**Patel v Kenya Railways Corporation & 4 others (Constitutional Petition
E006 of 2021) [2022] KEELC 2523 (KLR) (15 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2523 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

CONSTITUTIONAL PETITION E006 OF 2021

A OMBWAYO, J

JULY 15, 2022

**IN THE MATTER OF ENFORCEMENT OF RIGHTS AND FUNDAMENTAL FREEDOMS
UNDER CHAPTER 4, ARTICLES 22 AND 23 (1) OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE
40,43 AND 47 OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF THE LAND ACT, NO. 6 OF 2012

AND

IN THE MATTER OF LAND PARCEL KISUMU MUNICIPALITY BLOCK 7/530

BETWEEN

BABUBHAI CHAGANBHAI PATEL PETITIONER

AND

KENYA RAILWAYS CORPORATION 1ST RESPONDENT

KISUMU CITY BOARD 2ND RESPONDENT

COUNTY GOVERNMENT OF KISUMU 3RD RESPONDENT

NATIONAL LAND COMMISSION 4TH RESPONDENT

NEW KISUMU DISTRICT COOPERATIVE UNION LTD 5TH RESPONDENT



JUDGMENT

Brief Facts

1. The Petitioner herein filed a Petition dated 25th February 2021 seeking a declaration that the Petitioner is the *bonafide* registered proprietor of land parcel number Kisumu Municipality Block 3/121 to the total exclusion of the 1st, 2nd and 3rd Respondents. Moreover, a declaration that the decision by the 1st Respondent for the destruction the buildings constructed on land parcel Kisumu Municipality/Block 3/121 and its acquisition from the Petitioner is unlawful and in violation of the Petitioner's social and economic rights under the *constitution*. A permanent injunction do issue restraining the 1st, 2nd and 3rd Respondents, their agents, servants and or whomsoever acting on their instructions from forceful acquisition, trespassing into or proceeding with demolition of the Petitioner's property situate on land parcel Kisumu Municipality/Block 3/121. The O.C.S Kisumu Police Station to ensure compliance of the order by protecting the Petitioner's property from demolition or the eviction of the Petitioner and maintain law and order. Costs of the Petition; and Any other orders that the Honourable Court may deem just and fit to grant.
2. The Petition was supported by the Affidavit of Babubhai Chaganbhai Patel sworn on 25th February 2021 and filed on the same date and on the other hand, the Respondent filed an Answer to the Petition and a cross Petition on 19th April 2021.

Petitioner's Case

3. It is the Petitioner's case that the Respondents have violated his right to own property under Articles 40, 43 & 47 of *the Constitution* of Kenya and are in breach of the *Kenya Ports Authority Act*. That the Petitioner the registered proprietor of all that land parcel known as Kisumu Municipality/Block 3/121 and that he developed the property with a workshop and commercial office space where he undertook construction of his business.
4. The Petitioner purchased the property from the 5th Respondent who was the one allocated by the Government of Kenya and prior to the purchase he undertook the due diligence to confirm the authenticity of the ownership by the 5th Respondent.
5. The Petitioner proceeded with the transfer and payment of stamp duty and all processes towards acquisition of his certificate of lease that he charged the property to his bank to raise sufficient revenue for his development. That ever since the acquisition, he has been paying the 2nd and 3rd Respondents land rates without a problem.
6. The 1st Respondent visited his premises and marked it for demolition. It is apparent that they not only want to destroy it but also take it away from him and he is not aware that the Government of Kenya is planning to compulsorily acquire his property and has not received a y such notice.
7. That the conduct of the 1st, 2nd and 3rd Respondents is clear that they may move any time to unlawfully evict him and destroy his heavy investment that runs to hundreds of millions of Kenya Shillings and in the event he is evicted, his property destroyed, he stands to lose his livelihood.
8. It is also the Petitioner's case that they stand to suffer irreparable injury if the 1st, 2nd and 3rd Respondents are not stopped from further destructions and it is just and proper that all the reliefs sought in their application are granted.



9. That he is positive that he has a *prima facie* case with high probability of success and it is a proper and fit case to grant the orders sought.

1st Respondent's case

10. The 1st Responded filed an Answer to Petition and a Cross Petition on 19th April 2021.
11. In response to the Petition, the 1st Respondent stated that the named parcels Kisumu Municipality Block 3/121 allegedly owned by the Petitioner, is part of the large parcel of land owned by Kenya Railways Corporation which has never been surrendered to the Government of Kenya for purposes of allocation either to the Petitioner or any other person and if indeed the Petitioner holds any titles(s) to the suit land, the same must have been acquired irregularly and the process of acquisition ought to be subjected to thorough investigations.
12. That the land vested in the 1st Respondent was delineated in all early maps and record issued by the survey of Kenya of the Ministry of Lands and Settlement and the suit land falls within a larger parcel of land vested in Kenya Railways Corporation by operation of the Kenya Railways Corporation (Vesting Land) Order , 1986 contained in Legal Notice number 24 of 1986 which replaced and revoked the Kenya Vesting Land Regulations, 1963(L/N.440/1963) which created an exclusive proprietary interest in favour of the East African Railways Corporation, the predecessor of the Respondent herein.
13. It was stated the vide plan of KUR &H FR No. 43/53, the suit land falls within the 1st Respondent's industrial parcels within Kisumu and from the ground survey conducted between 1st March to 3rd March 2021, the demolished wall had encroached on a railway line diamond comprising safety and train operations between the new Kisumu station and the port line and the suit land or any other part of the land reserved for Railways Operations whose extend and demarcations are as per FR No. 43/53 have never been surrendered to the Government of Kenya for allocation to any other party including the Petitioners.
14. It is the 1st Respondent's case that there is no way the title to the suit land would have been held by any of the people the Petitioners allege to have purchased from as the suit land is and has always been Kenya Railways Land. That the 1st Respondent was not involved in the transfer of the suit land to the Petitioners herein, the unnamed previous owners nor to new Kisumu District Cooperative Union Limited and therefore the acquisition of the title by the Respondent is illegal, fraudulent, null and void.
15. That the allegations that the 1st Respondent without notice or laid down procedure of the Constitution and written law, marked the Petitioner's property for demolition and forceful take over as alleged. It was further stated that the Petitioners and all other encroachers, trespassers and grabbers on the Kenya Railways Lands and Reserves had been given sufficient notices to vacate and /or remove all illegal structures on such lands.
16. The 1st Respondent stated that it is common public domain that the acts the Petitioner has complained about are acts of a Multi Agency Government of Kenya Unit mandated to fast track the rehabilitation and construction of the Kisumu Port and the revamping of existing Nakuru-Kisumu meter gauge line in which process even the Respondents are to cede their lands around the Kisumu Port and therefore the 1st Respondent as a State Corporation is duly bound to support such a project which is meant to benefit the General Public.
17. It is the 1st Respondent's case that if the Petitioner holds any titles to the suit lands the nature of which is different from long term leases granted by the 1st Respondents, the same must have been irregularly



acquired because the 1st Respondent have never surrendered any of their land adjacent to the Kisumu Port to the Government of Kenya for allocation to other parties including the Petitioners

18. It was further stated that the Petitioner in his Petition and evidence has not exhibited any evidence to show that it is actually the 1st Respondent's servants and /or agents who were involved in the acts complained of and therefore short of any evidence, the Petitioner's complaints against the 1st Respondent remain mere allegations. That if indeed the Petitioner has good title to the suit property and is apprehensive of their revocation and illegal acquisition, then the Petitioner ought to direct his claims elsewhere as the 1st Respondent lack capacity in law to compulsorily acquire land and/or revoke titles.
19. The 1st Respondent averred that the letter dated 18/01/2021 is not evidence as to how public land ended up in private ownership. That the Petitioner is not entitled to the prayers sought in the Petition.
20. The 1st Respondent filed a Cross Petition on 19th April 2021 and reiterated the contents of the Answer to Petition and stated that the suit property fall within a larger parcel of land reserved for Railways operations within Kisumu Port bordering Lake Victoria as per the Survey Plan and the suit lands or any part thereof which lie within Block 3 in Kisumu Port whose extend and demarcations are as per the said map have never been surrendered to the Government of Kenya for allocation to any party.
21. It was the 1st Respondent's case in the Cross- Petition that between 1/05/1979-26/01/2005, the 3rd Respondent herein illegally created 0.1957 Ha by excising the said portion from land vested in the Cross Petitioner for which portion created Kisumu Municipality/block 3/121 and which title the 1st Respondent holds upon purchasing the said portion from the 2nd Respondent. The 1st Respondent enumerated the particulars of fraud of each of the Respondents in the Cross Petition and prayed for the following orders:
 1. An order for dismissal and / or striking out of the main Petition with costs to the Cross-Petitioner.
 2. A declaration that the Cross-Petitioner is the rightful owner of the suit land Kisumu Municipality/Block 3/121.
 3. A declaration that the acquisition of the Cross Petitioner's land Kisumu Municipality/Block 3/121 by the 1st and 2nd Respondents in the Cross Petition is illegal, null and void.
 4. An order compelling the 3rd Respondents in the Cross Petition to cancel the certificate of lease held by the 1st and 2nd Respondents and a further order directing the 3rd Respondent, to rectify the register accordingly ad thereafter register the Cross Petitioner in the Cross Petition as the proprietor.
 5. A declaration that the occupation of the suit land by the 1st and 2nd Respondents in the Cross-Petition is illegal and an order for eviction against the said Respondents.
 6. A Permanent Injunction to restrain the Respondents in the Cross-Petition, their agents and/ or servants from interfering in any way with the Cross-Petitioners use and occupation of the suit land parcel Kisumu Municipality/Block 3/121.
 7. Costs of the Cross Petition.
22. The Cross Petition was supported by the Affidavit Godfrey Wekesa.
2nd, 3rd, 4th and 5th Respondent's Case



23. On 23rd March 2021, the Petitioner herein filed a Notice of Withdrawal of Petition against the 2nd, 3rd, and 5th Respondents. The 4th Respondent on the hand did not file any response to the Petition nor submissions.

Petitioner's Submissions.

23. The Petitioner filed his submissions on 25th April 2022 where he stated that the Respondent is infringing on his Constitutional rights under Article 40, 43 & 47 of the Constitution and that the Petition has invoked the provisions of Chapter 4 of the Constitution and in particular Article 22 and 23 (1) for the court to enforce and protect his rights.
24. It was stated that the Petitioner has demonstrated that he is the registered proprietor of the suit property and reliance was placed on the provisions of section 24 and 26 of the Land Registration Act. Although the Respondents have alleged that the suit property belongs to them through a copy of the Vesting Order and the ground survey done between 1st - 3rd March 2021. That the Respondent has failed to justify how the ground survey can legally bequeath a property to someone.
25. It was further submitted that the Respondent has failed to furnish the court with ownership documents and the map produced does not prove legal ownership of the suit property. It was further submitted that the current map with the Ministry of Lands supersedes the old 1935 map that the Respondent is relying on. It was further submitted that the Respondent's claim that the Petitioner's parcel is posing a danger to the Respondent's train and other users of the road crisscrossing the railway line is unproven as the survey report shows that the suit property is not part of the railway land since it is isolated with its own title and distinct features.
26. The Petitioner stated that he was entitled to notice and a form of compensation if he loses the suit property to the Respondent or public utility. That the move to demolish the Petitioner's property where he lives and earns a living without compensation will condemn the Petitioner to a life of servitude with no source of income to earn a living and therefore this move threatens the Petitioner's socio-economic rights as enshrined in Article 43 of the Constitution.
27. It was further submitted that the Respondent did not issue the Petitioner with any notice prior to demolishing the Petitioner's perimeter wall which was contrary to section 155 of the Land Act. That the unlawful demolition attracts compensation which the Respondent did not provide to the detriment of the Petitioner's rights. The Petitioner submitted that if the Respondent desired the Petitioner's property to revamp the existing meter gauge railway, it ought to have complied with the legal provisions of compulsory acquisition by compensating the Petitioner.
28. On the Cross Petition, the Petitioner reiterated his submission on ownership of the suit property as the Respondent failed to prove the allegations of fraud. The Respondent failed to avail ownership documents that rivals that of the Petitioner and he prayed that the counterclaim by the Respondent should be dismissed with costs.
29. The Petitioner prayed that the Petition be allowed with costs.

Respondent's Submissions.

30. The 1st Respondent filed its Submissions on 22nd February 2022 and raised the following issues for determination:
- a) Whether or not the Petitioner has discharged the burden of proof over the alleged violations as raised in the Petition to warrant issuance of the orders sought.



31. The 1st Respondent stated that the Petitioner has alleged that his constitutional rights have been violated and to prove the same, the Petitioner has to discharge the burden of proof to the required standard as per the provisions of section 107 and 109 of the Evidence Act as was held in Kiambu County Tenants Welfare Association v Attorney General & Another [2017] eKLR.
32. On the issue of whether the Petitioner has discharged the burden of proof over the alleged violations as raised in the Cross-Petition to warrant issuance of the orders sought; it was the 1st Respondent's submission that every person in Kenya has the right to acquire and own property as stipulated under Article 40 of the Constitution as read with 24, 25 and 26 of the Land Registration Act and this right is not absolute but is subject to limitation as set out under Article 40(6) of the Constitution as read with section 26 of the Land Registration Act and relied in the case of Henry Muthee Kathurima vs Commissioner of Lands & Another (2015) eKLR where the court held as follows:
- “We have considered the provisions of section 26 of the Land Registration Act in light of the provisions of Article 40 (6) of the constitution and it is our considered view that the concept of indefeasibility of title is subject to Article 40(6) of the constitution. We hold that the concept of indefeasibility or conclusive nature of title is inapplicable to the extent that title to the property was unlawfully acquired.”
33. In the case of Funzi Island Development Limited & 2 Others v County Council of Kwale & 2 Others [2014] eKLR the court stated that a registered owner of land enjoys absolute and indefeasible title to property if allocation was legal, proper and regular. A court of law cannot therefore sanction an illegality in cases where one claims indefeasibility of title if the same was not obtained through lawful means.
34. In Republic v Land Registrar Kilifi & Another ex parte Daniel Ricci [2013] eKLR the court held that a title deed is an end product of a process. For a title deed to be protected by Article 40 (1) of the Constitution, the holder of the title deed has to establish that he followed the laid down procedures in acquiring it.
35. It was further stated that for one to enjoy the right to own property under Article 40 of the Constitution, if and when challenged, one has to demonstrate how he acquired title to justify such enjoyment as was held in Munyu Maina v Hiram Gathiba Maina, Civil Appeal Number 29 of 2009 where the court held as follows:
- “We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”
36. It was further submitted that the Petitioner has failed to demonstrate that the suit property was lawfully and procedurally acquired. Although the Petitioner has attached documents to prove how he acquired the suit property, it is uncertain whether the allocation of the property was lawfully undertaken as required under the Government Lands Act and there is no proof of whether the contents of the letter alleged to have been issued to Kisumu District Cooperative Union Limited were complied with.
37. It was stated that the green card in respect to the suit property indicates that title was issued in favour of Kisumu District Cooperative Union Limited in 1895. It also shows that title was issued in favour of



New Kisumu District Cooperative Union Limited in 1997 and therefore the two are different entities. It was further stated the while the survey process was undertaken, the 1st Respondent was not involved in the process and there is no evidence before the court to prove that a proper survey process was carried considering the fact that the suit property falls within the visibility diamond.

38. That the Petitioner has claimed to have acquired the suit properties through lawful means yet the evidence adduced before the court failed to support their assertions and the 1st Respondent prayed that the Petitioner's suit be dismissed and relied in the case of *Makula International Ltd v His Eminence Cardinal Nsuuga and Another* [1982] HCB II and the case of *Macfoy v United Africa Company Ltd* [1961] 3 ALL E.R.1169.
39. It is stated that the Petitioner has alleged that their rights have been violated under Article 43 and 43 of *the Constitution* however, he has not demonstrated how these rights have been violated.
40. On the Cross-Petition; it is the Respondent's submission that it has proved it is the registered owner of Kisumu Municipality Block 3/121 as the acquisition of the said property was not challenged by the Petitioner. The 1st Respondent also produced a survey plan which demonstrates the interest enjoyed by the 1st Respondent and also produced a copy of the search certificate.
41. That the 1st Respondent has proved the allegations of fraud in the cross petition and relied in the case of *Kinyanjui Kamau v George Kamau* [2015] e KLR where the court held as follows:

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

...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”
42. In the case of *Bullen & Leake & Jacobs, Precedent of Pleadings* 13th Edition quoting with approval the cases of *Wallingford v Mutual Society* [1880] 5 App.Cas.685 at 697,701,709, *Garden Neptune v Occident* (1989)1 Lloyd's Rep.305,308, *Lawrence v Lord Norreys* [1880]15 App.Cas.210 at 221 and *Davy v Garret* [1878]7 ch.D.473 AT 489, it was stated as follows:

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged. The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (I). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice”.
43. The 1st Respondent has alleged a violation of its rights to fair administrative action as the Respondents in the Cross Petition jointly colluded to deprive the Corporation property vested in it when it had not surrendered the same for reallocation as required under section 14 of the *Corporation's Act*.



44. On the issue of damages and compensation, it was the 1st Respondent's submission that courts in awarding damages in Constitutional Petitions exercises discretionary powers as the awards should be just and appropriate. Reliance was placed in the case of *Gitobu Imanyara & 2 Others v AG* (2016) eKLR and *Moi Education Centre Co. Ltd v William Musembi & 16 others* [2017] eKLR.
45. It was the 1st Respondent's submission that should not award general damages to the Petitioner as it is clear that the Petitioner acquired the suit property illegally. That there is no evidence that has been provided to prove that the Petitioner is entitled to compensation.
46. The 1st Respondent therefore prayed that this court should dismiss the Petitioner's suit with costs allow the Cross Petition with costs.

Analysis and Determination

47. This court has looked at the pleadings filed, the evidence on record and the submissions filed by the parties and the following issues are to be determined:
 - a. Whether the Petitioner is entitled to the orders sought in the Petition.
 - b. Whether the Petitioner's rights and fundamental freedoms were violated.
 - c. Whether the Cross Petition is merited

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

48. It is the Petitioner's case that he is the registered owner of land known as Kisumu Municipality Block3/121 having bought it from the 5th Respondent herein who was allotted the same by the Government in 1979. That the 1st Respondent marked the Petitioner's property for demolition without notice or laid down procedure and that they not only want to destroy the property but also take it away.
49. On the other hand, the 1st Respondent stated that it is empowered of acquire and hold land for purposes of discharging its duties under the *Kenya Railways Corporation Act* and that all land that was vested in the East African Railway Corporation by any written law as well as land conveyed to that corporation or otherwise placed at the corporation's disposal .It is the Respondent's case that the named parcels Kisumu Municipality Block 3/121 allegedly owned by the Petitioner, is part of the large parcel of land owned by Kenya Railways Corporation which has never been surrendered to the Government of Kenya for purposes of allocation either to the Petitioner or any other person and if indeed the Petitioner holds any titles(s) to the suit land, the same must have been acquired irregularly and the process of acquisition ought to be subjected to thorough investigations.
50. The Respondent alleged that it has never transferred or alienated the said parcel of land either as a whole or in part and therefore the title held by the Petitioner was acquired illegally and through fraudulent means.

Section 24 of the *LRA* provides:

- “(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and



expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.”

Section 25 provides:

“25.

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
 - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”

Section 26 provides:

“26.

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

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

“... it needs to be appreciated that for Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of



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

52. The Petitioner herein has annexed the title to the suit property BCP-1 which shows that the suit property is registered in his name and title was issued to him in 2005. However, as per the Plan KUR & H FR No. 43/53 and maps annexed by the 1st Respondent, it is clear that the suit property falls within the 1st Respondent’s industrial plots. Based on the above provisions of the law, the Petitioner has failed to prove how acquired the title to the suit property as it is clear from the Green Card annexed as BCP-3 shows that title was issued in favour of Kisumu District Cooperative Union Limited in 1985 and also issued in favour of New Kisumu District Cooperative Union in 1997 which entities are separate and distinct from each other. Since the suit property belonged to the 1st Respondent, there was no consent obtained from the 1st Respondent so that the registry index map could be amended, creating a register and issuing a title to the suit property.
53. It is clear from the 1st Respondent’s survey plan that the suit property falls within the 1st Respondent industrial plots while the Petitioner’s survey report shows that the suit parcel does not encroach the 1st Respondent railway reserve.

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

“(4) The Corporation may at any time convey, transfer or surrender any land surplus to both its existing and future requirements by a conveyance or a deed of surrender either for, or without, consideration: Provided that land which was public land or trust land shall be surrendered to the Government and shall not be conveyed or transferred to any other person unless the Minister responsible for lands shall consent and so direct.

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

54. Based on the provisions of section 14 of the [Kenya Railways Act](#), it is clear that the 1st Respondent did not surrender the suit property to the Government for reallocation. Pursuant to a letter dated 18th January 2021 from the Ministry of Lands to the Petitioner herein, the Ministry of Lands confirmed that as per their records, the suit property was allocated as unsurveyed plot “G” to Kisumu District Cooperative Union Limited vide allotment letter dated 3rd May 1979 and the said Cooperative accepted the offer through payment of fees. The letter also confirmed that survey work was done and a lease was prepared in favour of the Cooperative.
55. This court is of the view that the letter dated 18th January 2021 from the Ministry of Lands attached the letter of allotment issued to Kisumu District Cooperative Union Limited but the Petitioner herein failed to annex the same. I am unable to establish whether the terms in the Letter of Allotment issued to Kisumu District Cooperative Union were complied with.

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

56. Article 40 of the [Constitution](#) of Kenya provides:

“



- “(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property--
- (a) of any description; and
 - (b) in any part of Kenya.
- (2) Parliament shall not enact a law that permits the State or any person--
- (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
 - (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).
- (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation--
- (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
 - (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—
 - (i) requires prompt payment in full, of just compensation to the person; and (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.
- (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.
- (5) The State shall support, promote and protect the intellectual property rights of the people of Kenya. (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

Article 47 of the *Constitution* provides:

- (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

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



58. The Petitioner has alleged to be the lawful and registered owner of the suit property and that the 1st Respondent has marked the suit property for demolition as the 1st, 2nd and 3rd Respondents have been carrying out demolitions in Kisumu County. The 1st Respondent on the other hand has confirmed that said demolitions were carried out by a multi-agency Government of Kenya Unit for purposes of rehabilitation of the Kisumu Port. The 1st-4th Respondents have failed to demonstrate whether a Notice was served to the Petitioners informing them that they will carry out a demolition.
59. This court is of the view that although the Petitioner has alleged that his rights under Constitution were violated, he has not proved that his property has been destroyed and the Respondents have not in any way interfered with the Petitioner's property. This court has established that the Petitioner is apprehensive that his property will be demolished by the Respondent however the said property has not in any been destroyed by the Respondents as alleged by the Petitioner herein.
60. Although the Petitioner has alleged that he stands to lose his source of livelihood in the event his property is demolished and that he will suffer irreparable injury, this court has established from the evidence on record that the suit property belongs to the 1st Respondent. The Petitioner in his submission has stated that he is entitled to notice and compensation if he loses the suit property to the 1st Respondent and that the 1st Respondent has not demonstrated that it will compensate him. The Petitioner in his submissions also stated that the property belongs to him and in the event the 1st Respondent acquires the property by the doctrine of compulsory acquisition, he should be compensated as required by the law. I am of the view that the Petitioner is not entitled to any compensation as the buildings erected in the suit property have not been demolished and I have also established that the suit property belongs to the 1st Respondent and there is no way the Petitioner will be compensated by the doctrine of compulsory acquisition.
61. This court is of the view that the 1st Respondent herein and the relevant government stakeholders should issue a proper and adequate Notice to the Petitioner requiring him to vacate the suit property as it has been clearly established that the suit property does not belong to the Petitioner. It is also evident that the 1st Respondent and other Government stakeholders are carrying out rehabilitation of the Kisumu Port and since there have been demolitions being carried, the 1st Respondent and other Government stakeholders should carry out the said demolitions as required by the law so as to avoid parties coming to court to seek for compensation and damages.

Whether the cross petition is merited

62. The 1st Respondent in its Cross Petition alleged that it is the registered owner of Kisumu Municipality Block 3/121. The 1st Respondent enumerated particulars of fraud on the part of the Petitioners and the 4th Respondent respectively at paragraph 8 of the Cross-Petition.
63. For one to transfer property from the 1st Respondent, the Law requires that a surrender of title has to be executed as per section 14 of the Kenya Railways Corporation Act and the Petitioner was required to pay survey fees in order for the excision to take place. The 3rd Respondent in the Cross- Petition did not follow the relevant procedure in allocating land to the Petitioner as there is no evidence to show that it gave authority to the National Land Commission authorizing the 3rd Respondent to allocate land to private individuals.

Paul Nderitu Ndung'u & 20 Others v Pashito Holdings Limited & Another (Nairobi HCCC No. 3063 of 1996) where it was held that the Commissioner of Lands had no legal authority to allocate the two pieces of land which had been reserved for a Police Post and a Water



Reservoir as they had already been alienated. In the Paul Nderitu Ndung'u case Justice Mbogholi Msagha said:

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

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

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

65. The 1st Respondent has been able to specifically prove the particulars of fraud on the Petitioner and the National Land Commission. The suit parcel being public land, the Petitioner ought to have followed the procedure provided in law in order to have the suit parcel allocated to him. This court has looked into the evidence on record and it is clear that the suit parcel was illegally and unprocedurally acquired by the Petitioner.

Conclusion

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

1. An order for dismissal of the main Petition with costs to the Cross- Petitioner.
2. A declaration that the Cross-Petitioner is the rightful owner of the suit land Kisumu Municipality/Block 3/121.
3. A declaration that the acquisition of the Cross Petitioner's land Kisumu Municipality/Block 3/121 by the 1st and 2nd Respondents in the Cross Petition is illegal, null and void.
4. An order compelling the 3rd Respondents in the Cross Petition to cancel the certificate of lease held by the 1st and 2nd Respondents and a further order directing the 3rd Respondent, to rectify the register accordingly ad thereafter register the Cross Petitioner in the Cross Petition as the proprietor.
5. A declaration that the occupation of the suit land by the 1st and 2nd Respondents in the Cross-Petition is illegal and an order for eviction against the said Respondents.
6. A Permanent Injunction to restrain the Respondents in the Cross-Petition, their agents and/or servants from interfering in any way with the Cross-Petitioners use and occupation of the suit land parcel Kisumu Municipality/Block 3/121.
7. Costs of the Cross Petition to the cross- petitioner.

DATED AT KISUMU THIS 15TH DAY OF JULY 2022.

ANTONY OMBWAYO

JUDGE



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

