Ravat & another v County Government of Kisumu & another (Constitutional Petition 10 of 2021) [2022] KEELC 2499 (KLR) (15 July 2022) (Ruling)

Neutral citation: [2022] KEELC 2499 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

CONSTITUTIONAL PETITION 10 OF 2021

A OMBWAYO, J

JULY 15, 2022

IN THE MATTER OF ARTICLES 1,2,3, 10(1) &(2),19,20 (1),(2) & (4),21,22 (1) & (3),25 (C), 27(1) &(2) ,40,43,47 (1) & (2), 50 (1),61(1), 64(B), 67,68,73 (1), 75 (1),(2) &

(3),159,162,176,184 &232 (1) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE ENVIRONMENT AND LAND COURT ACT,2012

AND

IN THE MATTER OF THE LAND REGISTRATION ACT,2012

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT,2015

AND

IN THE MATTER OF THE COUNTY GOVERNMENT ACT,NO.17 OF 2012

AND

IN THE MATTER OF THE URBAN AREAS AND CITIES ACT,NO.13 OF 2012

AND

IN THE MATTER OF THE NATIONAL LAND COMMISSION ACT, NO.5 OF 2012

AND

IN THE MATTER OF THE LEADERSHIP AND INTEGRITY ACT NO.19 OF 2012

AND

IN THE MATTER OF THE PUBLIC OFFICER ETHICS ACT NO. 4 OF 2003

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS), PRACTICE AND PROCEDURE RULES,2013

BETWEEN

ASHISH CHANDRAKANT RAVAT .... 1ST PETITIONER

VINODKUMAR RAMDATMALL PAL .... 2ND PETITIONER

AND

COUNTY GOVERNMENT OF KISUMU .... 1ST RESPONDENT

CITY MANAGER, KISUMU COUNTY .... 2ND RESPONDENT

RULING

BRIEF FACTS

1. The Petitioner filed a Notice of Motion Application dated 24th March 2021 filed under 1,2,3, 10(1) &(2),19,20 (1),(2) & (4),21,22 (1) & (3),25 (c), 27(1) &(2) ,40,43,47 (1) & (2), 50 (1),61(1), 64(b), 67,68,73 (1), 75 (1),(2) &(3),159,162,176,184 &232 (1) of *the Constitution* of Kenya, 2010, Rules 23 and 24 of the *Constitution of Kenya (Protection of Fundamental Rights and Freedoms) Practice and Procedure Rules* 2013,The *Environment and Land Court Act*, 2012,The *Land Registration Act*,2012,The *Fair Administrative Action Act*,2015,The *County Government Act*, No. 17 of 2012, The *Urban Areas and Cities Act*, No. 13 of 2012,The *National Land Commission Act*, No. 5 of 2012,The *Leadership and Integrity Act*, No. 19 of 2012, The *Public Officer Ethics Act* No. 4 of 2003,The *Public Service Commission Act* No. 10 of 2017 and all other enabling provisions of the Law sought the following orders:

    1. Spent.

    2. That pending the hearing and determination of this application a temporary injunction do issue restraining the Respondents whether by themselves, their agents, servants or any person claiming through them from trespassing upon, interfering with, or otherwise interfering with the Petitioners'/Applicants' use and possession of the following parcels of land:

        a) Land Registration Number Kisumu Municipality /Block 6/608;

        b) Land Registration Number Kisumu Municipality /Block 6/609;

        c) Land Registration Number Kisumu Municipality /Block 6/610;

        d) Land Registration Number Kisumu Municipality /Block 6/611;

        e) Land Registration Number Kisumu Municipality /Block 6/612; and

        f) Land Registration Number Kisumu Municipality /Block 6/613.

    3. That pending the hearing and determination of this Petition a temporary injunction do issue restraining the Respondents whether by themselves, their agents, servants or any person claiming through them from trespassing upon, interfering with, or otherwise interfering with the Petitioners'/Applicants' use and possession of the following parcels of land:

        a) Land Registration Number Kisumu Municipality /Block 6/608;

        b) Land Registration Number Kisumu Municipality /Block 6/609;

c) Land Registration Number Kisumu Municipality /Block 6/610;

d) Land Registration Number Kisumu Municipality /Block 6/611;

e) Land Registration Number Kisumu Municipality /Block 6/612; and

f) Land Registration Number Kisumu Municipality /Block 6/613.

4. That pending the hearing and determination of this petition, a mandatory injunction do issue restraining the Respondents whether by themselves, their agents, servants or any person claiming through them from trespassing upon, interfering with, or otherwise interfering with the Petitioners'/Applicants' use and possession of the following parcels of land:

a) Land Registration Number Kisumu Municipality /Block 6/608;

b) Land Registration Number Kisumu Municipality /Block 6/609;

c) Land Registration Number Kisumu Municipality /Block 6/610;

d) Land Registration Number Kisumu Municipality /Block 6/611;

e) Land Registration Number Kisumu Municipality /Block 6/612; and

f) Land Registration Number Kisumu Municipality /Block 6/613.

5. An interim conservatory order do issue ex parte in the first instance in terms of prayer 2 aforegoing.

6. Costs of this Application be provided for.

2. The Petition was supported by the Affidavit of Vinodkumar Ramdatmall Pal who deposed and stated as follows:

1. That the 2nd Petitioner and him are the registered owners of the leasehold interest in all those properties located near Kibuye Estate described as:

a) Land Registration Number Kisumu Municipality /Block 6/608;

b) Land Registration Number Kisumu Municipality /Block 6/609;

c) Land Registration Number Kisumu Municipality /Block 6/610;

d) Land Registration Number Kisumu Municipality /Block 6/611;

e) Land Registration Number Kisumu Municipality /Block 6/612; and

f) Land Registration Number Kisumu Municipality /Block 6/613.

2. That sometime in the year 2014, the Petitioners applied to the 1st Respondent's for permission to change the use of the properties from single-dwelling to multi-dwelling and paid the requisite fee. The Respondent gave its approval to the development by a letter dated 25th September 2014.

3. That pursuant to the approval of the change of user, the Petitioners prepared the necessary Architectural and Structural Designs which were approved by the 1st Respondent through its Department of Planning after the petitioners paid the requisite fees.

4. That they subsequently engaged a firm of Quantity Surveyors who prepared a Bill of Quantities amounting to Kshs. 63,690,000/= for the construction to completion of the proposed developments in the suit properties.

5. That they subsequently appointed a contractor to undertake the construction of the premises as had been approved by the 1st Respondent.

6. That on or about the 23rd January 2021 the Respondents through its agents and servants without any notice and without their permission or authorization invaded the suit properties and brought down the building that the Petitioners had put up thereon.

7. That the officers of the 1st Respondent acting under the direct authority of the 2nd Respondent did not identify themselves and they did not know who was behind this heinous exercise until on or about 28th January when the Respondents made it public that they were, that they had repossessed and the properties as they were public properties and that they had earmarked them for resettlement of traders currently doing business around a place called Garissa Lodge ,Apindi Street and Gor Mahia Road in Kisumu City and that the suit properties will now be called the New Garissa Lodge Market.

8. That the suit properties are private land and that even if they were not, the process by which the Respondent has evicted them from the suit properties is illegal, null and void.

9. That Kisumu City Board in which the 2nd Respondent serves as officer did not and has not issued any instructions or authorization to the 2nd Respondent to evict them or otherwise take possession to the suit properties for the reason that they have been grabbed or at all. That the 1st Respondent has usurped the legal mandate of the Kisumu City Board and the 2nd Respondent is acting outside and in excess of his authority and mandate.

10. That the Respondents have violated the relevant provisions of *the Constitution* by disrespecting the rule of law and ignoring the petitioners' titles to the suit properties as defined in the law and have behaved in a manner that does not bring honour and dignity to the public offices that they hold.

11. That before the Respondents evicted them from the suit properties and purported to repossess them:

    a) There was no determination by the National Land Commission relating to their eviction from the suit properties and there has been no gazettement and publication thereof of the determination as required by law.

    b) They were denied the opportunity to apply to the court for relief in relation to the threatened violation.

    c) There was no identification at all of those taking part in the eviction. The same was actually carried out over the weekend when the Respondents are officially off-duty and the absence of the Petitioners. They only got to know the Respondents were the people behind the eviction when they issued the press release on 28th January 2021.

    d) Formal authorizations for the eviction were not presented at the time of the evictions. The eviction was carried out on a Saturday when the Respondents are ordinarily closed and in the absence of the Petitioners.

e) The eviction was carried out in a most undignified manner without regard to the safety of the Petitioner's employees who were taking care of the suit properties. The Respondents simply broke into the properties with a bulldozer under armed police escort without warning sending the Petitioners' employees fleeing in al directions and scampering for safety.

f) The eviction was carried out arbitrarily and amounted to a deprivation of property without due process and without payment of compensation.

g) There was no mechanism put in place for the protection of property left behind as consequence of the eviction and as a result the suit properties were vandalized by members of the public unknown to them.

h) The Respondents did not first request the Petitioners to vacate the suit properties. The eviction was therefore unnecessary and the force used was disproportionate to the need to give vacant possession.

i) They were not given the first priority to demolish and salvage the developments in the suit properties.

12. That no reasons were or none have been furnished to them for the action taken against them before such action was taken, notwithstanding the fact that the Respondents were aware that their actions are likely to adversely affect their fundamental rights and freedoms. The Respondents failed to serve on them prior and adequate notice of the nature and reasons for the proposed action and have failed to accord them an opportunity to be heard and to make representations in that regard.

13. That by moving to declare at the behest of the 1st Respondent that the suit properties have been grabbed and then proceeding to demolish the development therein and forcibly repossessing them, the 2nd Respondent acted contrary to and in excess of his mandate as set out in the *Urban Areas and Cities Act* by which he is constituted as an officer of the Kisumu City Board, his primary responsibility being the implementation of the decisions and functions of the Board. Kisumu City Board has made no such resolution and has issued no instructions to the 2nd Respondent to repossess the suit properties and demolish the developments therein.

14. That there is no court order allowing the Respondents to forcibly take over the suit properties and there has been no order declaring that the properties were acquired illegally.

15. That the 1st Respondent has been receiving and continues to receive rates and other levies paid by the Petitioners for the suit properties, have approved requests of development permissions for the properties in accordance with the law and have offered no credible explanation or at all for the declaration that the properties do not belong to the Petitioners.

16. That they have not been compensated or offered any compensation by the Respondents for the forcible acquisition of their property for a public purpose.

17. That after their application for development of the suit properties were approved by the 1st Respondent, they incurred huge expenses in developing the properties and had by the time they were being evicted spent Kshs. 24,918,965.00.

18. That the conduct of the Respondents are a flagrant contravention of their rights and they have suffered huge losses as particularized in the Petition. They acquired the properties for a very specific purpose and we will not be able to find similar properties.

19. That in the event the Respondents go ahead with the threatened settlement of strangers in the suit properties, the character of the properties is likely to be altered permanently and the removal of the strangers from the suit properties in the event this petition succeeds will come at great risk to life, limb, property, environmental damage and the breakage of the law in a manner and in scale that will be unquantifiable and immeasurable in monetary terms. In any case, no person, body or organ should be allowed to trample on the rights of another just because damages are quantifiable and that they have the capacity to pay those damages.

20. That it is easier to have the Petitioners in possession of the properties as we have always done rather than have hundreds of strangers in the properties carrying on business that are unknown to anyone. It will certainly be easier, cheaper and more convenient to deal with the Petitioners in the event the Petition fails rather than try to remove hundreds of people from the same properties in the event this suit succeeds. In the circumstances, the balance of convenience is in favour of granting the orders sought.

3. Michael Abala Wanga in response to the Petition stated as follows:

1. That he opposes the Petition and puts the Petitioners to strict proof.

2. That the Certificate of urgency and the Grounds in the Notice of Motion does not elicit any urgency and the Petitioner is not entitled to any interim orders.

3. That the Petitioners have not demonstrated how they acquired the suit property. The Petitioner has only annexed certificates of lease which they know for a fact were acquired procedurally hence the whole process of acquisition of the suit property is illegal null and void.

4. That the land was initially owned by defunct Municipal Council and was issued to Kisumu Boys and Kisumu Girls by way of presidential directive by letters of allotment on 30th January 2002 and 20th March 2003.

5. That subsequent to the issuance of letter of allotment to the schools the Commissioner of Land through a letter dated 24th June 1996 cancelled previous letters of allotment issued on 19th November 1991 and confirmed that the said parcel of land is jointly owned by Kisumu Boys and Kisumu Girls. The Commissioner of land also reverted the land back to the school a fact that the petitioners are well aware of.

6. That pursuant to the allotment letter the schools went ahead and processed ownership document and were issued with a lease and 99 year lease certificate as from 1st February 2003.

7. That the petitioner has not demonstrated the process of acquisition of the suit property by way of any letters of allotment or sale agreement since he is aware that he acquired the land fraudulently. That the schools encountered fraudulent transaction on the land and even proceeded to put a restriction on the suit property. Transactions that have reasons to believe were attempts by the petitioners grabbed the land.

8. That in response to paragraph 7 of the supporting Affidavit, the Respondents are privy to information as to the ownership to the suit property and have had an access to all the legal ownership document. The Respondent further state that they express permission and authority from the legal owners of the property to take possession of the land.

9. That the 2nd Respondent being a government body with express permission of the 1st Respondent requested the legal owners of the suit property for permission to occupy the suit

property from temporary occupation to resettle the traders within the City of Kisumu, which permission was granted.

10. That in response to paragraph 12 the Respondent avers that the Respondent are land grabbers who invaded a public land known as Kisumu/Minicipality/Block 6/244 and purported to subdivide it to various parcels to mutate the original parcel number. The Petitioners are not entitled to any relief or remedy as alleged since they have not approached the court with clean hands.

11. That the Respondents have demonstrated the historical background of the land and the express person and authority granted by the legal owner and put the Petitioners/ Applicants to strict proof thereof that it acted contrary to the mandate of Kisumu City Board.

12. That the 1st and 2nd Respondent only undertook demolitions in the interest of the public but the Respondent has no intention of laying claim to ownership of the suit property save for the express permission to undertake demolition and possession of the suit property in the interest of the general public, this being a public institution land.

13. That this Honourable court be pleased to dismiss the Applicant's Petition dated 24th March 2021 with costs.

4. On 10th September 2021, Vinodkumar Ramdatmall Pal filed a Further Affidavit pursuant to leave granted on 17th May 2021 and stated as follows:

    1. That in response to the Respondents' challenge to the titles that they hold in respect of the suit properties, I wish to mention the following facts which established during due diligence:

        a) Land Reference Number Kisumu Municipality / Block 6/610 and Kisumu Municipality/ Block 6/611 were acquired M/S Riya Developments Limited and Land Reference Nos. Kisumu Municipality / Block 6/ 612 and Kisumu Municipality / Block 6/ 613 from Cornelius Ogema, Land Reference Numbers Kisumu Municipality/ Block 6/608 was bought from Dipakkumar R. Upadhyay and Hiralm Pandya while Kisumu Municipality Block 6/609 were bought from M/s Omkareshavar Enterprises Limited.

        b) The properties were originally part of two properties described as LR No. Kisumu Municipality/Block 6/548 and Kisumu Municipality/Block 6/549 registered in the names of Richard Shiraho and Elizabeth Khadushi respectively on 2nd December 2001.

        c) The Original properties were sold by the registered Lessees to a company called Omkareshavar Enterprises Limited and transferred to the said company on October 9, 2007. A site /location Part Development Plan showing the actual location of the two properties on the ground was availed showing the actual location of the two properties on the ground was availed showing the actual location of the original properties on the ground.

        d) M/s Omkareshavar Enterprises Limited applied for permission and approval to amalgamate and then sub-divide the original properties which approval and permission was granted by the defunct Municipal Council of Kisumu (who is the Respondent's predecessor), the District Physical Planning Officer and the Director of Survey both of Ministry of Lands.

e) It is the amalgamation and subdivision that gave rise to the titles numbers L.R.No. Kisumu Municipality/Block 6/603-618 which included the Petitioners titles specified in paragraph 2 of the supporting Affidavit.

f) Before the original properties were sold to Omkareshavar Enterprises Limited dealings with the District Land Registrar Kisumu issued an order sometime in June 2004 or thereabouts directing the two proprietors of the original properties to surrender their Certificate of Lease, the intention of the recall being to cancel the two leases.

g) The two proprietors of the original properties protested the action of the Land Registrar as being unlawful and when the Land Registrar appeared not to have acknowledged the illegality of his threatened action, the two proprietors filed Miscellaneous Civil Application No. 285 of 2004 in the High Court at Kisumu against the District Land Registrar Kisumu, the Commission of Lands and the Chief Land Registrar by which they sought orders quashing the directive recalling the Certificates of Lease for the two original properties and prohibiting the three Respondents aforementioned from calling for surrender of or otherwise cancelling the two certificates of Lease or interfering with the two original proprietors' use and enjoyment of the properties and for mandamus compelling the Respondents in that suit to issue the two proprietors and to offer any other assistance that the proprietors may require and are entitled to by virtue of law.

h) The two proprietors of the original properties as Applicants in the said suit served the Respondents in that suit with all the necessary documents that the matter was heard and decided by the court which granted the orders that they had sought in the application on 23rd May 2005.

i) The two proprietors of the original titles through their advocate on record in the said suit severally sought to have the District Land Registrar issue them with official searches but it was not until 15th September 2005 that the Registrar issued searches which appeared to confirm that the Registrar had imposed restrictions on those titles to the original properties.

j) By a letter dated 28th September 2005, the two proprietors of the original properties aforementioned wrote to the Chief Land Registrar demanding the lifting of the restrictions that he had caused to be placed on the two titles for being contemptuous for the court order.

k) The two properties of the original proprietors of the original properties aforementioned caused the court order made on 23rd May 2005 to be served on the Chief Land Registrar once again for the avoidance of any doubt.

l) That when the Land Registrar and the Chief Land Registrar appeared not to be moved, the two proprietors of the original properties took out execution proceedings directed at the District Land Registrar to compel him to comply and on 5th June 2007, the Deputy Registrar ordered the District Land Registrar to remove the restrictions he had placed on the titles to the two original properties and that in default he be arrested.

2. That some of the resultant sub-divisions are still in the names of persons other than the Petitioners. That L.R. No. Kisumu Municipality/Block 6/604 is still in the name of M/s Omkareshavar Enterprises Limited.

3. That the President of the Republic of Kenya did not have power to dish out public land in the manner suggested in paragraph 7 of the Reply to Petition and any such directive, which has not even been exhibited by the Respondent was an illegal act and an abuse of power that cannot be entertained in a democratic society. In any event, the land had already been allocated by the time of the so called-Presidential directive and was therefore unavailable for allocation.

4. That the land has never been owned by the defunct Municipal Council of Kisumu.

5. That there is nothing to show that the two letters of allotment relate to the subject properties. In any case, the allotees did not comply with the terms of the offers of allotment and so the offers lapsed. It is also clear from the terms of the letter of allotment dated 20th March 2003 that the persons who purported to issue the same were aware that the subject property had already been allotted and was probably acting under duress because of the illegal directive from the big man.

6. That the allotment letters do not identify the location of the properties that are being offered for allotment.

7. That the letter dated 24th June 1996 is not authentic, is irrelevant and cannot be relied on by the court for reasons that:

   None of the properties in dispute is block 6/244-Kisumu Municipality.

   There is no proof of any allotment having been made to the addressee of that letter as alleged therein.

   The letter is unsigned.

   The Commissioner of Lands had no power to cancel the allotment in the manner in which he purported to do.

8. That the Lease marked “exhibit 3’ relates to a strange property whose physical location is unknown. The Lease is inconsistent with the allotments and there is no indication of the allotment to which the Lease relates and no evidence of any survey having been undertaken to identify the location and size of the property. That they are unaware that the Commissioner of Lands reverted the subject land back to the unspecified school.

9. That they had nothing to do with the property in 1992 when letter marked ‘exhibit 4’ was written and therefore they cannot be accused of attempting to grab the property back then. There is no explanation for the basis for the restriction as the letter on strength of which the exhibit was written has not been placed before the court. In any case the letter is not proof of the registration of a restriction.

10. That even assuming without deciding that the two schools have any proprietary rights over the property, the terns of the lease restricted the use of the property to ‘residential purposes’ and the alleged allotees have no power or authority to change the purpose of the allotment. The fact that the Respondent has allowed private individuals to set up shops and car-washing facilities on the premises contrary to the terms of the purported allotment, a fat which confirms that there was never any allotment to the schools as alleged.

11. That the 2nd Respondent is the acting City Manager working under Kisumu City Board, a statutory body established under the *Urban Areas &Cities Act*. There is no proof that the Board sat, deliberated and decided to make the unlawful request to one of the schools to permit the Respondents to occupy the land for the unspecified purposes. It is matter of public

knowledge that the 2nd Respondent has become law unto himself, running roughshod over everyone and destroying people's lives in an excited, raw and unmitigated abuse of power that he does not possess. He has placed his friends and other benefactors in the premises for his personal benefit without any benefit to the public who he pretends to protect.

12. That schools are run by Boards of Management in which the Heads only serve as Secretaries. There is no proof that the Boards of Management of the schools resolved to give away the property to a rogue public officer and entity for free. The author of the letter marked 'Exhibit 5' had no power to write the letter dated 14th January 2021.It was a reckless letter which he certainly could not have written on behalf of other school which is claimed to have an interest in the property.

13. That the Respondents have concealed from the court that as recently as the year 2017, Kisumu Girls High School, the National Land Commission and the Chief Land Registrar were in court with them when they attempted to nullify our titles and a determination was made in their favour in a judgment dated 26th June 2019 from which they have filed Civil Appeal No. 198 of 2019 in the Court of Appeal and which is pending.

14. That the decision that they sought to challenge vide the said lawsuit was one in which the National Land Commission, in the exercise of its duty and power to review grants and disposition of public land and upon a complaint filed to it by Kisumu Girls High School that apportion of Land Reference No. Kisumu Municipality/Block 6/244 ha been hived off and appropriated by an individual, purported to direct that the aid parcel of land (Originally Land Reference No. Kisumu Municipality/Block6/608-613) is public land vested in Kisumu Girls High School and reverted it to Kisumu Girls High School.

15. That the decision by the Respondent to make no mention of Kisumu Girls High School and to obtain any documents from them just like they did with Kisumu school despite the fact that the former are alleged to have an equal interest in the property is a ploy designed to circumvent the outcome of the case referred to.

16. That as is clear from the said letter, the National Land Commission had convened a public hearing on the back of a public notice dated 16th September 2016 that was published in the two widely read newspapers, the Daily Nation and the Standard inviting all interested parties to appear before it to make representations regarding allocations of public land affecting their interests. Only Kisumu Girls High School came forward to complain and the school from which the Respondents now claim to have obtained permission to put the land to the current illegal use did not raise any complaint, which explains why the communication from the commission of its finding made zero mention of the said school.

Petitioners' Submissions

5. In their Submissions, the Petitioners gave brief facts of the matter and submitted that the Respondents made the move that they made without any form of notice to the Petitioners. They knew the interests of the Petitioners in the subject property but claim that the authority to demolish was granted by the two schools which also claimed to have an interest in the properties. That the demolition took place over a weekend and the Petitioners did not even know the persons who had undertaken the heinous exercise until of the Respondents issued a press release owning upto the fact that they are the ones who were responsible for the demolition.

6. That the main question will be whether the land in question is Block 6/244 or were what was originally Block 6/548 and 549.The preliminary evidence on record is that the persons (schools) who were

allegedly allotted the former property were never told where it was located. The allotment letter did not identify the property. Block 6/548 and 549 is what was subsequently sub-divided and gave rise to the subject parcels. The process by which this was done was long and intense with the Respondents themselves being fully involved in the process up to the very end.

7. The Petitioners submitted that if the land had been allocated to Kisumu Girls and Kisumu Boys, they wouldn't have surrendered them to the Respondents for the purposes that have been since disclosed. Once land has been allocated for a certain purpose, it cannot be used for any purpose other than the purpose for which it was allocated. The Respondents admitted that they want to bring traders to use the land as a market which is illegal and contrary to the conditions of the Lease. Block 6/244 is certainly a different piece of land and not the one that is in dispute.

8. The evidence on record shows that the same Respondent who now claim that the properties belong to the persons other than the petitioners have been accepting land rate and are the ones who issued approvals for sub-divisions and development. In Constitutional Petition No. E 005 of 2020 *Navichandra L. Shah & another VS County Government of Kisumu,* this court held that the Respondent could not claim that the subject property was unlawfully acquired yet it had been demanding and receiving rates for the same property for the petitioner.

9. In *Johannes Okello Omboto &Another v Kenya Railways Corporation & 4 Others* (2020) eKLR, the court stated as follows:

> "The Respondents' actions amounted to a violation of the Petitioners' rights under Article 40(1) of *the constitution* read with sub articles 2 and 6. Sub Article 6 provides that the rights under this Article do not extend to any property that has been found to have been unlawfully acquired." There must be a finding that the property has been unlawfully acquired before any person takes action. The respondents ought to have come to court to challenge the title held by the petitioners. By demolishing the petitioners' buildings that was the source of their income, the respondents were in breach of their Economic and social rights guaranteed by Article 43 of *the Constitution* of Kenya and by demolishing the petitioners' structures without following any procedure or court order were in breach of Article 47 of *the Constitution*."

10. On the question as to whether the schools owned the properties in the first place, The Petitioners submitted that the two schools are public schools whose management structure is et out in the *Basic Education Act* No.14 of 2013 Section 55 places the management of the schools in the hands of their respective Boards of Management and section 59 sets out some of its functions.

11. The Petitioners further submitted that the nature of the injury that they risk to suffer in the event the application is not granted for reasons that if the Respondents go ahead with the threatened settlement of strangers the character of the properties is likely to be altered permanently and the removal of the strangers from the suit properties and no person, body or organ should be allowed to trample on the rights of another just because damages are quantifiable and payable.

12. The Petitioners submitted that there is no question that the balance of convenience lies in favour of granting the injunction. The Respondents intend to settle traders in the very premises that is in dispute and that no one knows the identities and numbers involved and conditions of such settlement. In the event this petition succeeds, the court and the petitioners will then have contended with claims by these unknown persons, thereby creating room for additional litigation. It is easier to have the Petitioner's remain in possession of the properties as they have always done rather than have hundreds of strangers in the properties carrying on business that are unknown to anyone.

13. The Petitioners therefore urged the court to grant the orders sought.

Respondents' Submissions

14. The Respondents failed to file their submissions as directed by the court. However, through an application dated 8th October 2021 sought for orders to arrest the Judgement slated to be delivered on 12th October 2021.The Application was heard on 13th October 2021 and was allowed and the Submissions were also deemed to be properly on record.

15. The Respondents raised the following issues to be determined:

1. Whether the suit properties are rightfully owned by the Petitioners/Applicants.

. The Respondents submitted that the suit properties were initially owned by the defunct Municipal Council of Kisumu and was issued to Kisumu Boys and Kisumu Girls by way of presidential directive and letter of allotment as evidenced in the Replying Affidavit filed by the Respondents and the suit properties are public land.

That the Petitioners have produced copies of the certificate of lease but produced no agreement nor documents to show that due process was followed in the transfer of the suit properties. The transfer process of the suit properties being public land originally, should have at least necessary proof show such change from public to private land and further change rights of possessions.

2. Whether the conduct of the Respondents amounts to a breach of the Petitioners/Applicants Constitutional Rights and Land Laws relating to evictions.

. The Respondents submitted that the Applicants' property rights were not violated as alleged .Article 40 of *the Constitution* of Kenya protects property rights , this protection does not extend to property unlawfully acquired as provided under its sub-article 6.That the Applicants herein can be inferred as from the Respondents evidence and the Applicants failure to discharge the requisite burden of proof, to have fraudulently acquired rights over the suit properties .By such illegitimate actions, the Petitioners cannot claim that their rights were violated.

That the Petitioners cannot be justifiably claim to have been kept in the dark regarding the issue of City Management on repossessing all public land belonging to the county having been fraudulently and or illegally acquired. On 4th January 2021, there was a press statement on removal of illegal structures by the 2nd Respondent and the press statement on 28th January 2021 was not the first notice as claimed by the Petitioners. That the Respondents followed the due process as evidence by a letter dated 14th January 2021 by the schools allowing the City Management to temporarily occupy the Land.

3. Whether the orders sought by the Petitioners are rightly founded and should be so granted.

16. The Respondents submitted that it is the Petitioners who fraudulently acquired public land and the issue of illegal eviction from the suit properties cannot arise. They relied on *Giella v Cassman Brown & Company Limited* (1973) EA 358, where the court expressed the following conditions that a party must satisfy for the court to grant an interlocutory injunction.

17. On whether the Application meets the threshold for a temporary injunction, the court in *Peter Kairu Gitu v KCB Bank Kenya Limited & Another* (2021) eKLR relied on the decision in Mrao Ltd v First American Bank of Kenya & 2 Others (2003) KLR 125 which was cited with approval in *Moses C.*

Muhia Njoroge & 2 Others vs Jane W Lesaloi and 5 others (2014) eKLR where the court of Appeal defined a *prima facie* case as: -

> A prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case which on material presented to the court, a tribunal properly directing itself will conclude there exists a right which has been infringed by the opposite party as to call for an explanation or rebuttal from the later."

18. The Respondents submitted that the Petitioners have failed to prove an arguable case as the material evidence before the court by the Petitioners and the Respondents indicate that the Applicants fraudulently acquired rights over the suit properties. The Petitioners have claimed that the Respondents destroyed their properties located on the suit properties by demolitions. The injury being prevented has already happened. Such orders of injunction would be pointless at tis time being that the Petitioners' fears had already materialized before the filing of this Application.

19. The Respondents further submitted that what would remain to be an issue for determination is whether the Applicants should be compensated and not injunctive orders at the suit properties are public land. That the balance of convenience would lie on the dismissal of the Apllication.The Respondents have the proper authority over the suit properties. The Applicants fraudulent acquisition of public land and the institution of the Petition in which this Application is contained has only further stated the Developments by the County Government to set up a responsive trading center for the deserving Kisumu Traders.

20. The Respondents relied in the case of *Peter Kairu Gitu v KCB Bank Kenya Limited & Another* (2021) e KLR

> 13. "......... it is trite law that he who comes to equity must come with clean hands and in this case, the applicant cannot be said to have clean hands owing to the existing outstanding debt. I am guided by the decision of Ringera J. (as he was then was) in the case of Showind Industries v Guardian Bank Limited & Another (2002) 1 EA 284 where the Learned Judge stated as follows: -
>
> ".......an injunction is granted very sparingly and only in exceptional circumstances such as where the Applicant's case is very strong and straight forward. Moreover, as the remedy is an equitable one, it may be denied where the Applicant's conduct does not meet the approval of Court of equity or his equity has been defeated by laches"
>
> 14. Having found that the applicant has not established a prima facie case, I find that it will not be necessary to consider if the two remaining conditions for the granting of orders of injunction have been met as it is a requirement that all the three conditions be fulfilled before an order of injunction is granted.

21. The Respondents further submitted that their conduct is in good faith geared towards escalating the market development within Kisumu County to provide a favourable environment for Kisumu Traders. That the Petitioners have failed to satisfy the conditions set out for injunctive orders in entirely and this Application should be struck out in its entirety. The Petitioners' conduct does not meet the approval of the court of equity and prays that this Honourable Court find that the Application for injunctive orders is not merited and to dismiss it with costs to the Respondents.

ISSUES FOR DETERMINATION

22. It is my view that the main issues for determination are;

    a) Whether the orders sought should be granted

ANALYSIS AND DETERMINATION

a. Whether the orders sought in the Application should be granted

23. The Respondents in their Replying Affidavit have alleged that the titles to the suit property registered in favour of the Petitioners were, fraudulently, unprocedurally and illegally acquired and therefore they are null and void. The Respondents have not specifically informed this court how the alleged fraud took place.

24. *Camacho –vs- Automobile Club of Southern California*, Super Ct. NO. BC 315357 (referred to in the case of *John Mbugua Gitau v Simon Parkoyiet Mokare & 6 others* (*supra*)) where the appellate Judges stated thus: -

    "Fraud actions have been classed as “disfavoured” and are subject to strict requirements of particularity in pleading... Accordingly, the rule is everywhere followed that fraud must be specifically pleaded. The effect of this rule is two-fold

    (1) General pleading of the legal conclusion of fraud is insufficient, the facts constituting the fraud must be alleged

    (2) every element of the cause of action for fraud must be alleged in the proper manner (i.e, factually and specifically), and the policy of liberal construction of the pleadings will not ordinarily be invoked to sustain a pleading defective in any material respect”.

25. Article 62(4) of *the Constitution* provides that public land shall not be disposed of or otherwise used except in terms of an Act of Parliament specifying the nature and terms of that disposal or use. Article 62(4) therefore implies that public land can be disposed of in accordance with the act of parliament specifying the nature and terms of disposal or use. Allotment of the suit property was done in the year 1996. The GLA, RTA and RLA were in force at the time.

26. Sections 3(a) and 7 of *GLA* are relevant in the circumstances.

    Section 3(a) provides;

    The President, in addition to, but without limiting, any other right, power or authority vested in him under this Act, may—

    (a) subject to any other written law, make grants or dispositions of any estates, interests or rights in or over unalienated government land;

27. Section 2 of the *GLA* defines unalienated government as Government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment.

28. Section 7 of the *GLA* gives the Commissioner power to execute conveyances lease or license for the occupation of Government lands on behalf of and under the directions of the President.

29. Justice Mbogholi Msagha in the case of *Paul Nderitu Ndung'u & 20 Others –V- Pashito Holdings Limited & Another* (Nairobi HCCC No. 3063 of 1996) (referred to in the case of Kenya Anti-Corruption Commission v Online Enterprises Limited & 4 others [2019] eKLR) held that the Commissioner of Lands had no legal authority to allocate two pieces of land which had been reserved for a Police Post and a Water Reservoir as they had already been alienated.

30. He further stated that

> "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."

31. The Respondents in their Replying Affidavit have stated that the land was initially owned by defunct Municipal Council and was issued to Kisumu Boys and Kisumu Girls by way of presidential directive by letters of allotment on 30th January 2002 and 20th March 2003.That subsequent to the issuance of letter of allotment to the schools the Commissioner of Land through a letter dated 24th June 1996 cancelled previous letters of allotment issued on 19th November 1991 and confirmed that the said parcel of land is jointly owned by Kisumu Boys and Kisumu Girls. The Commissioner of land also reverted the land back to the school a fact that the petitioners are well aware of. That pursuant to the allotment letter the schools went ahead and processed ownership document and were issued with a lease and 99 year lease certificate as from 1st February 2003.

32. On the other hand, the Petitioners in their further Affidavit have stated that the President of the Republic of Kenya did not have power to dish out public land in the manner suggested in paragraph 7 of the Reply to Petition and any such directive, which has not even been exhibited by the Respondent was an illegal act and an abuse of power that cannot be entertained in a democratic society. In any event, the land had already been allocated by the time of the so called-Presidential directive and was therefore unavailable for allocation. The allotees did not comply with the terms of the offers of allotment and so the offers lapsed. It is also clear from the terms of the letter of allotment dated 20th March 2003 that the persons who purported to issue the same were aware that the subject property had already been allotted and was probably acting under duress because of the illegal directive from the big man.

33. This court finds that the alleged presidential directive was contrary to the Law as the land had already been allotted for a different purpose. The Petitioners have been paying rates and also sought approval for change of user and the Respondent have been receiving the requisite fees from the Petitioners and have never realized that the land was allotted for public use.

34. Indeed, in *Kenya Anti-Corruption Commission v Online Enterprises Limited & 4 others* [2019] eKLR the Court stated that

> 'In order to determine the question whether the lease held by the 1st defendant is valid, it must be demonstrated that it was properly acquired. It is not enough that one waves a Lease or a Certificate of Lease and assert that he has good title by the mere possession of the Lease or Certificate of Lease. Where there is contention that a Lease or Certificate of Lease held by an individual was improperly acquired, then the holder thereof, must demonstrate, through evidence, that the Lease or Certificate of Lease that he holds, was properly acquired. The acquisition of title cannot be construed only in the end result, the process of acquisition is material and important especially when there are doubts to the regarding the process.'

35. This court finds that the Petitioners have demonstrated how they acquired the suit property. The mere allegations by the Respondents that the property belonged to the two schools is not true. This court further notes that over the years, the Petitioners have been religiously paying rates to them and during this time, the 1st Respondent has never refused to receive the money paid by the Petitioners. When the Petitioners applied for approval of change of user vide a letter dated 25th September 2014 which the 1st Respondent approved the same upon the Petitioners paying the requisite fees. The 1st Respondent ought to have declined to approve the same on grounds that the suit properties where the Petitioners wanted to develop were public land.

the Court of Appeal stated in *Nguruman Ltd –vs- Jan Bonde Nielsen & 2 Others* (2014) eKLR: -

> In an interlocutory injunction application, the applicant has to satisfy the triple requirements to:
>
> a) Establish his case only at a prima facie level,
>
> b) Demonstrate irreparable injury if a temporary injunction is not granted;
>
> c) Allay any doubts as to (b) by showing that the balance of convenience is in his favour.

36. In *Mrao Ltd –vs- First American Bank of Kenya Ltd & 3 Others* (2003) eKLR, a *prima facie* case was defined as:

> ...a case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

37. The Petitioner in his Replying Affidavit stated that in the event the Respondents go ahead with the threatened settlement of strangers in the suit properties, the character of the properties is likely to be altered permanently and the removal of the strangers from the suit properties in the event this petition succeeds will come at great risk to life, limb, property, environmental damage and the breakage of the law in a manner and in scale that will be unquantifiable and immeasurable in monetary terms. In any case, no person, body or organ should be allowed to trample on the rights of another just because damages are quantifiable and that they have the capacity to pay those damages.

38. *George Odero vs. Lake Victoria Environment Programme & 3 others* [2015] eKLR, the court stated that:

> an applicant for a conservatory order under rule 23 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013must demonstrate that: -
>
> (i) He has a prima facie case.
>
> (ii) Unless the conservatory order is granted, he is likely to suffer prejudice or injury as a result of violation or threatened violation of his constitutional rights or *the constitution*.
>
> (iii) It would be in the public interest to grant the order.

39. *Centre for Rights Education and Awareness (CREAW) & another v Speaker of the National Assembly & 2 others* (2017) eKLR the Court was emphatic that: -

> "A party who moves the court seeking conservatory orders must show to the satisfaction of the Court that his or her rights are under threat of violation; are being violated or will be violated and that such violation, or threatened violation is likely to continue unless a conservatory order is granted. This is so because the purpose of granting a conservatory order is to prevent violation of rights and fundamental freedom and preserve the subject matter pending the hearing and determination of a pending case or Petition."

40. This court finds that the Respondents did not follow the right procedure in evicting the Petitioners from the suit properties. The demolitions were carried out over the weekend, the Respondents did not take into consideration that the properties that were being demolished were worth millions despite them approving the change of user.

41. Although the Respondents have submitted to this Honourable court that the injury being prevented has already happened. This court cannot deny the Petitioners the orders sought since the property is registered in the names of the Petitioners and if the court denies them the orders sought and the Respondents go ahead with the threatened settlement of strangers the character of the properties is likely to be altered permanently. It is also the court's view that the Respondents are acting contrary to the Law because if the Land was allocated for a specific purpose, it is improper for them to settle traders in the suit properties.

CONCLUSION

42. Based on the above the Court finds that the Petitioner's Application has merits and gives the following orders sought in the Application:

    i. That pending the hearing and determination of this Petition a temporary injunction do issue restraining the Respondents whether by themselves, their agents, servants or any person claiming through them from trespassing upon, interfering with, or otherwise interfering with the Petitioners'/Applicants' use and possession of the following parcels of land:

        g) Land Registration Number Kisumu Municipality /Block 6/608;

        h) Land Registration Number Kisumu Municipality /Block 6/609;

        i) Land Registration Number Kisumu Municipality /Block 6/610;

        j) Land Registration Number Kisumu Municipality /Block 6/611;

        k) Land Registration Number Kisumu Municipality /Block 6/612; and

        l) Land Registration Number Kisumu Municipality /Block 6/613.

    43. Costs of this Application be to be in the cause.

DATED AT KISUMU THIS 15TH OF JULY 2022

ANTONY OMBWAYO

JUDGE

This Ruling 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.