Law Society of Kenya v Kinyua, The Head of Public Service & 5 others; Migot-Adholla & another (Interested Parties) (Environment and Land Petition E029 of 2022) [2022] KEELC 3962 (KLR) (12 August 2022) (Ruling)

Neutral citation: [2022] KEELC 3962 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND PETITION E029 OF 2022

OA ANGOTE, J

AUGUST 12, 2022

BETWEEN

THE LAW SOCIETY OF KENYA ..... PETITIONER

AND

JOSEPH KINYUA, THE HEAD OF PUBLIC SERVICE ..... 1ST RESPONDENT

THE COUNCIL OF THE KENYATTA UNIVERSITY ..... 2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL ..... 3RD RESPONDENT

THE NATIONAL LAND COMMISSION ..... 4TH RESPONDENT

THE PRINCIPAL SECRETARY MINISTRY OF LANDS ..... 5TH RESPONDENT

THE CABINET SECRETARY, MINISTRY OF LANDS & PHYSICAL PLANNING LANDS & PHYSICAL PLANNING ..... 6TH RESPONDENT

AND

PROFESSOR SHEM E MIGOT-ADHOLLA ..... INTERESTED PARTY

PROFESSOR PAUL WAINAINA ..... INTERESTED PARTY

The National Land Commission and County and National Governments are barred from dealing with land held, used or occupied by a State organ

Reported by Kakai Toili

Constitutional Law *– constitutional commissions – National Land Commission (NLC) – powers of the NLC - whether the NLC could allocate land held, used or occupied by a national State organ on behalf of the National or County Governments – what was the rationale for exclusion of the National Land Commission, the National and County Governments from dealing with land held, used or occupied by a national State organ - what was*

the effect of a Cabinet resolution to alienate land belonging to a university - Constitution of Kenya, articles 62(2) and (3); Land Act cap 280, section 12.

Constitutional Law *– constitutional petitions – institution of constitutional petitions - whether an entity which was not part of a university's council had the locus standi to institute a constitutional petition challenging an alienation of the university's land – Constitution of Kenya, article 22 and 258.*

Civil Practice and Procedure *– orders – conservatory orders - what was the nature of conservatory orders.*

Constitutional Law *– fundamental rights and freedoms – economic and social rights – right to housing – when did the right to housing over public land crystallize – Constitution of Kenya, article 60(1)(a).*

Words and Phrases *- locus standi – definition of locus standi- the right to bring an action or to be heard in a given forum - Black's Law Dictionary, 9th Edition.*

Brief facts

The petitioner filed the instant application seeking to stay the enforcement of the directives contained in the letters of July 4 and 7, 2022 and or the sub division, alienation or interference with the ownership of the suit property. The letter of July 4, 2022 informed the Vice Chancellor-Kenyatta University (2nd interested party) that the Cabinet had approved allocation of the suit property to various institutions. The letter, signed by the 1st respondent, requested the University to surrender its title deed to the Ministry of Lands and Physical Planning to effectuate the transfer whereas the letter of July 7, 2022 reiterated what was contained in the earlier letter.

According to the petitioner, the University was the registered owner of the suit property and as such, its proprietary rights were protected and that a university that had been granted a charter was a body corporate capable of acquiring, holding and disposing off immovable property. The petitioner's case was that the 1st respondent's actions were akin to compulsory acquisition of the suit property without following due process and that it was only the 4th respondent, the National Land Commission (NLC) who was mandated to initiate the process of compulsory acquisition of the suit property.

The petitioner further argued that the NLC and the public, pursuant to sections 12 and 14 of the Land Act, should have been involved in the allocation of a portion of the suit property to the World Health Organization (WHO), Africa Centre for Disease Control (ACDC), Kenyatta University Teaching and Referral Hospital (KUTRH) and the Ministry of Lands and Physical Planning to settle the squatters at Kamae.

The respondents took the position that the suit property was public land which was allocated to the University by the Government; that the Government had an unfettered right to compulsorily acquire public land, which acquisition could be done administratively and that the University was not eligible for compensation because it was a public body holding the land in trust for the public.

Issues

i. Whether the National Land Commission could allocate land held, used or occupied by a national State organ on behalf of the National or County Governments.
ii. What was the rationale for exclusion of the National Land Commission, the National and County Governments from dealing with land held, used or occupied by a national State organ?
iii. What was the effect of a Cabinet resolution to alienate land belonging to a university?
iv. Whether an entity which was not part of a university's council had the *locus standi* to institute a constitutional petition challenging an alienation of the university's land.
v. What was the nature of conservatory orders?
vi. When did the right to housing over public land crystallize?

Relevant provisions of the Law

Land Act, cap 280

(1) Whenever the national or county government is satisfied that it may be necessary to allocate the whole or part of a specific public land, the Cabinet Secretary or the County Executive Committee member responsible for matters relating to land shall submit a request to the Commission for the necessary action by way of-

(a) public auction to the highest bidder at prevailing market value subject to and not less than the reserved price;

(b) application confined to a targeted group of persons or groups in order to ameliorate their disadvantaged position;

(c) public notice of tenders as it may prescribe;

(d) public drawing of lots as may be prescribed;

(e) public request for proposals as may be prescribed; or

(f) public exchanges of equal value as may be prescribed.

(2) The Commission shall ensure that any public land that has been identified for allocation does not fall within any of the following categories—

(a) public land that is subject to erosion, floods, earth slips or water logging;

(b) public land that falls within forest and wild life reserves, mangroves, and wetlands or fall within the buffer zones of such reserves or within environmentally sensitive areas;

(c) public land that is along watersheds, river and stream catchments, public water reservoirs, lakes, beaches, fish landing areas riparian and the territorial sea as may be prescribed;

(d) public land that has been reserved for security, education, research and other strategic public uses as may be prescribed; and

(e) natural, cultural, and historical features of exceptional national value falling within public lands;

(f) reserved land; or

(g) any other land categorized as such, by the Commission, by an order published in the Gazette.

Held

1. The term *locus standi* meant a right to appear in court and conversely to say that a person had no *locus standi* meant that he had no right to appear or be heard in such proceedings. The lack of the requisite capacity to bring a suit went to the root of the case, and without *locus standi*, the suit could not stand. The law on *locus standi* in constitutional petitions was envisaged under articles 22 and 258 of the Constitution of Kenya, 2010 (Constitution).
2. Whereas not expressly stated, the issue at hand was within the ambit of public interest. To the extent that the petitioner was questioning the legality of alienation of public land, the petitioner had the requisite locus standi.
3. In determining whether or not to grant conservatory orders, the court had to be careful not to make a final determination about the issues in contention. The starting point was to determine whether the applicant has established a *prima facie* case with a likelihood of success. It was not enough to merely establish a *prima facie* case and show that it was potentially arguable. Potential arguability was not enough to justify a conservatory order but rather there had to be a likelihood of success. The *prima facie* case ought to be beyond a speculative basis.
4. Kenyatta University was a public body and or a State agency and it owned the suit property. Under article 62 (1)(b) of the Constitution, any land that was lawfully held, used or occupied by any State organ, except where it occupied such land as lessee under a private lease, was public land. Section 12 of the Land Act provided the mechanism under which public land could be allocated.
5. The mandate of the National Land Commission (NLC) to administer land on behalf of the National and County Governments was provided for in the Constitution. That mandate was very deliberate and specific. The suit property fell within the category of land held, used or occupied by Kenyatta University, which was a national State organ. The reading of article 62(2) and (3) of the Constitution showed that the Constitution expressly barred the NLC, the County or National Governments from dealing with land held, used or occupied by a State organ in any manner, including allocation of such land.

6. Land held, used or occupied by a national State organ was the only category of public land, pursuant to article 62(2) and (3) of the Constitution, that neither vested in the two levels of Government nor administered by the NLC on behalf of the two levels of Government. If the Constitution did not vest land held, used or occupied by a State organ in the National or County Governments, and excluded the NLC from administering it, the NLC could not allocate such land on behalf of the National or County Governments pursuant to the provision of section 12 of the Land Act. Section 12 was applicable in respect to all other categories of public land defined under article 62(1) except land held, used or occupied by a State organ, in which category the suit property fell.
7. The exclusion of the National Government, the County Government and the NLC from dealing with land held, used or occupied by a national State organ by the Constitution was not accidental. It was a deliberate constitutional imperative to enable State organs to deal with such land pursuant to the laws governing them, and to avoid the past incidences where the Executive would deal with land reserved for State organs in any manner it deemed fit.
8. Section 12 and 14 of the Land Act which provided the manner in which the NLC allocated public land, upon being moved by the National or County Governments, was inapplicable in the instant suit.
9. In view of articles 62(2)(b) and 62(3) of the Constitution, the letters of July 4, 2022 and July 7, 2022 authored by the 1st respondent, and any purported Cabinet resolution, were inconsequential, other than being a request to the 2nd respondent (University Council), just like any request that could be made by a Kenyan, for setting aside the University's land for public purpose and or for the benefit of the University.
10. The question was not whether sections 12 and 14 of the Land Act were complied with by the 1st respondent and the National Land Commission, but whether, by purporting to alienate a portion of its land, the Council of Kenyatta University complied with the provisions of the Universities Act and the Charter of Kenyatta University. The law governing the disposal and use of the suit property was the Universities Act, 2012 and the Charter for Kenyatta University, which (Legal Notice 231 of 2013).
11. From section 48 of the Universities Act, the manner in which a public university dealt with its land was determined by the university itself, subject to any endowment, bequest or donation. Section 60 of the Universities Act provided for the functions of the university council to include managing, supervising and administering the assets of the university in such a manner as best promoted the purpose for which the university was established.
12. The law establishing Kenyatta University allowed the University, through its Council, to dispose of its immovable property, including land. While doing so, the Council had to comply with section 17 (8) of the Charter of Kenyatta University. The Council of Kenyatta University was supposed to administer the assets of the University, including disposing of its land, in the interest of the University and the public at large, and in accordance with the procedures laid down by the Government.
13. A portion of the suit property had been occupied by the squatters since 1984. The University had agreed to alienate that portion in favour of the squatters. The national government in conjunction with the National Land Commission had a constitutional imperative to settle squatters on public land.
14. Where the landless occupied public land and established homes, they acquired not title to the land, but a protectable right to housing over the same. The right to housing over public land crystallized by virtue of a long period of occupation by people who had established homes and raised families on the land. That right derived from the principle of equitable access to land under article 60(1)(a) of the Constitution.
15. Every individual as part of the collectivity of the Kenyan nation had an interest, however indescribable, unrecognizable, or transient, in public land. The landless people occupying public land should be allocated such land, or be compensated if any eviction was to occur. The residents of Kamae informal settlement, who, as admitted by Kenyatta University in *Kenyatta University & 1699 others v Kimani*

Mbugua & 78 others [2021] eKLR and the NLC, had been in occupation of a portion of the suit property since 1984, had to be protected by the court.

16. The evidence before the court showed that the University's Council, *vide* its meeting of July 15, 2022 approved the re-planning of the suit property as suggested by the Cabinet for the allocation of a portion of the University land to KUTRRH, WHO, ACDC and the squatters. The Council did allocate the land in the manner suggested in the letter and gave its reasons for doing so.
17. The court was not shown any evidence by the petitioner, *prima facie*, that the University's Council, which passed the resolution of July 15, 2022, to alienate a portion of the University land for public purpose, was in office illegally.
18. Although the letter by the 1st interested party (who did not file an affidavit to support or oppose the application) showed that the Council rejected the alienation of the University land, that letter could not be equated to a resolution of the Council. The resolution, if it existed at all, should have been exhibited.
19. The main *lacuna* in the instant application was that the same was filed on July 14, 2022, while the resolution of the Council was made on July 15, 2022. That being the case, the court expected the petitioner to file a further affidavit to counter, if at all, the Council's resolution of July 15, 2022. That was not done despite the court having given the petitioner leave to do so when the matter came up for *inter partes* hearing on July 27, 2022.
20. From the minutes of the University's Council dated July 15, 2022, the Council, *prima facie*, justified the allocation of a portion of the University's land, to wit, 30 acres to the WHO; 10 acres to the ACDC; 180 acres to KUTRRH and 190 acres to facilitate the resolution of Kamae Settlement Scheme impasse. The petitioner had not established a *prima facie* case with a chance of success.

Application dismissed.

Orders

No order as to costs.

Citations

Cases

Kenya

1. *Board of Management of Uhuru Secondary School v City County Director of Education & 2 others* Petition 359 of 2015; [2015] KEHC 2174 (KLR) - (Explained)
2. *Kenyatta University v Kimani Mbugua & 78 others* Civil Case 1460 of 2002; [2011] KEHC 2389 (KLR) - (Explained)
3. *Kenyatta University & 1699 others v Kimani Mbugua & 78 others* Environment & Land Case Case1460 of 2002; [2021] KEELC 1793 (KLR) - (Explained)
4. *Koech, Priscilla Jesang v Rebecca Koech & 3 others* Environment & Land Case 27 of 2018; [2018] KEELC 543 (KLR) - (Followed)
5. *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* Petition 3 of 2018; [2021] KESC 34 (KLR) - (Explained)
6. *Mumo, Matemu v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal 290 of 2012; [2013] KECA 445 (KLR) - (Explained)
7. *Mumo, Matemu v Trusted Society of Human Rights Alliance & 5 others* Civil Application 29 of 2014; [2014] eKLR - (Followed)
8. *Munya v Kithinji & 2 others* Civil Appeal (Application) 38 of 2013; [2014] KECA 876 (KLR) - (Explained)
9. *Njau & 5 others v City Council of Nairobi* Civil Appeal 74 of 1982 ; [1983] eKLR; [1983] KLR 625 - (Explained)

10. *Nzuki, Sollo v Salaries and Remuneration Commission & 2 others* Petition 18 of 2018; [2019] KEHC 1511 (KLR) - (Explained)

Texts

Garner, BA., (Ed) (2009), *Black's Law Dictionary* St Paul Minnesota: West Group 9th Edn p 131

Statutes

Kenya

1. Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 53; rules 1, 2, 4 - (Interpreted)
2. Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules, 2013 (Constitution of Kenya Sub Leg) rules 20, 21 - (Interpreted)
3. Constitution of Kenya, 2010 articles 2(1), (2); 3; 10; 19; 20; 21; 22; 23; 27; 28; 35; 40; 47(1)(2); 48; 60; 62(1)(b)(2)(3); 64(4); 153; 159; 258; Schedule 6; section 19 - (Interpreted)
4. Evidence Act (cap 80) section 80 - (Interpreted)
5. Land Act (cap 280) sections 12, 14, 107-133 - (Interpreted)
6. National Land Commission Act (cap 281) In general - (Cited)
7. Physical and Land Use Planning Act (cap 303) In general - (Cited)
8. Universities Act (cap 210) sections 15(1); 20; 48; 60 - (Interpreted)

Advocates

Mr Cohen h/b for *Mr Ahmednassir* Senior Counsel for the petitioner
Mr Mwangi h/b for *Mr Wetangula* for the 2nd respondent
Ms Akello for the 4th respondent
Mr Manwa for the 2nd interested party

RULING

1. In the notice of motion application dated July 14, 2022 brought under the provisions of articles 2(1) and (2), 3, 19, 20, 21, 22, 23, 27, 28, 35, 40, 47(1)(2), 48, 159 of the *Constitution* and section 19 of the sixth schedule of the *Constitution*, sections 107-133 of the *Land Act*, section 15(1) and 20 of the *Universities Act* No 40 of 2012, rules 20 and 21 ofthe *Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2013* and order 53 rules 1, 2, & 4 of the *Civil Procedure Rules, 2010*, the petitioner has sought for the following orders:

    a) That pending the hearing and determination of the petition inter partes, this honourable court be pleased to issue orders restraining all the respondents, their agents, successors and assigns from harassing any employee, officials, agents and or representatives of Kenyatta University in enforcement of the directives contained in the letters of July 4, 2022 and July 7, 2022.

    b) That pending the hearing and determination of the petition inter partes, this honourable court be pleased to issue orders restraining all the respondents, their agents, successors and assigns and or issuing an order staying the implementation of the directives contained in the letters dated July 4, 2022 and July 7, 2022 and/or sub-dividing, annexing, alienating and/or any interference with the ownership and possession of the parcel of land known as LR 11026/2.

    c) That pending the hearing and determination of the petition inter partes, this honourable court be pleased to issue a restraining order preventing the

1st interested party, his agents, successors, assigns from surrendering the title documents to the parcel of land known as LR No 11026/2.

d) That the costs of this application be provided for.

e) Any other relief that this honourable court deems fit to grant.

2. The application is premised on the grounds set out on the face of the motion and supported by the affidavit of Florence Muturi, the Chief Executive Officer of the petitioner, who deponed that Kenyatta University (hereinafter the university) is the legitimate owner of all that parcel of land known as LR No 11026/2 (hereinafter the suit property) and that it has a detailed master plan showing the intended use of the suit property, which plan was acknowledged by the court in ELC Case No 1460 of 2002-*Kenyatta University v Kimani Mbugua & others*.

3. According to the petitioner's Chief Executive Officer, the University faces an imminent threat of being arbitrarily deprived of about 490 acres of the suit property as a result of the actions of the 1st respondent, who, on July 4, 2022 and July 7, 2022, issued illegal directives to the then Vice Chancellor of Kenyatta University to surrender the Title Deed of the suit property to enable the Ministry of Lands & Physical Planning carry out excision of the same as directed by the Cabinet.

4. It was the disposition of the petitioner's Chief Executive Officer that the directive of July 4, 2022 by the 1st respondent usurped the powers of the Kenyatta University Council set out under section 18(2) of the Kenyatta University Charter specifically the role of administering the property and funds of the University in a manner and for the purposes which promote the interests of the University.

5. The petitioner's Chief Executive Officer deponed that the directive of July 4, 2022, inter alia, asked the University Council to submit a letter of authority and/or consent from the University as the title holder to enable officials from the Ministry of Lands to enter the property and carry out a physical planning exercise and provide a written agreement sub-dividing the suit property into four sub-plots.

6. It was deponed by the petitioner's Chief Executive Officer that the four sub-plots were to be allocated to the World Health Organization-30 acres, Africa Centre for Disease Control-10 acres, Kenyatta University Teaching and Referral Hospital-180 acres, and to the Ministry of Land & Physical Planning -180 acres.

7. It was deponed that the University Council was to submit a master plan that takes into account the aforesaid excision and facilitate the requisite resolution for the surrender of the Title Deed and that the said directive was intended to coerce the Kenyatta University Council to hand over part of the suit property.

8. Ms Muturi deponed that apart from the 4th respondent, no other respondent has the authority to initiate or carry out any activities in connection with compulsory land acquisition and that vide his response of July 5, 2022, the Chair of the University Council, the 1st interested party herein, responded to the letter of July 4, 2022 in which he laid out the statutory and constitutional irregularities in the process of attempting to acquire the suit property.

9. It was deponed that the above protestation notwithstanding, on July 7, 2022, the 1st respondent wrote a letter to the Vice Chancellor of the University, the 2nd interested party, stating that the University must surrender the property and that neither the Council of the University nor the general public have ever been called to publicly participate in the allocation of the suit property nor have they been called to raise any issues on compulsory acquisition of the land.

10. It was deponed by the petitioner's Chief Executive Officer that the respondents' actions violate the rights to fair administrative action, legitimate expectation and the principles of Land Policy set out in the *Constitution* and that the directives violate the land laws on compulsory acquisition of land, sections 15 and 20 of the *Universities Act* and the autonomy of Kenyatta University as expressed in section 18(2) of its charter. According to the petitioner, the failure by this court to grant interim orders will be tantamount to rubber stamping the illegal actions of the respondents.

11. In response to the application and the petition, the 1st respondent filed a replying affidavit in which he deponed that the affidavits in support of the application & petition by Florence Muturi are fatally defective having been sworn by a person who is not a member of the Kenyatta University Council and who has no personal knowledge of the facts deponed.

12. It was deponed by the 1st respondent that the petitioner has no locus standi to institute this suit because it has no mandate in the management or disposition of the suit property in question; that all public documents attached to the affidavits by the petitioner should be expunged from the record as they are not documents usually found in the petitioner's custody and that no explanation has been rendered as to their acquisition.

13. The 1st respondent deponed that Kenyatta University is a public university and owns the suit property which is alienated public land granted to the University by the Government at no cost; that the allocation of a portion of the suit property was on the basis of a re-planning and re-organization exercise executed by the Government in which sections of the suit land was allocated to other public entities for the benefit of the University which is also as a public entity.

14. It is the 1st respondent's case that pursuant to article 40(3) of the *Constitution*, the government has an unfettered right to compulsorily acquire any land, whether public or private, for public purposes; that the process of land acquisition can be through compulsory acquisition, by private treaty or administratively and that because the suit property is public land, the principles of compulsory acquisition applicable to private land are inapplicable.

15. It was deponed by the 1st respondent that no compensation is payable to public institutions holding public land; that further, the letters of 4th and July 7, 2022 cannot be said to be unconstitutional because they are as a result of an elaborate consultative process involving all stakeholders and constituted a communication of a cabinet decision earlier initiated by the government to acquire the said property for public purposes.

16. According to the 1st respondent, the government granted the Ministry of Health approval pursuant to section 69 of the Physical Planning and Land Use Act to acquire a portion of the land for strategic health institutions and that the cabinet approved the re-planning of Kenyatta University land on the basis of article 60 of the *Constitution* which requires the utilization of land to be efficient, productive and in a sustainable manner.

17. According to the deponent, the cabinet as the highest executive organ cannot be faulted for granting approval to cede part of the suit property for public purposes as large idle tracts of land at Kenyatta University were not in immediate use; that Kenyatta University Teaching Referral & Research Hospital which was conceptualized by Kenyatta University was delinked from the University and established as a state corporation and that as a state corporation, the hospital requires to secure its own title.

18. It was deponed that the government has also granted the World Health Organization and Africa Centre for Disease Control access to the suit land to construct facilities auxiliary to the University and the Hospital; that additional property is required to regularize the occupation of squatters who are already

on part of the suit property in line with the Supreme Court decisions on the rights of squatters and that the University Council has at all times been consulted on the planned actions.

19. It was the deposition of the 1st respondent that in response to the clarification sought by the University vide its letter of July 5, 2022, the letter of July 7, 2022 drew to the University's attention the cabinet decision made on May 12, 2022 resolving to approve allocation of the land to strategic institutions under the Ministry of Health and that section 18(2)(a) of the Kenyatta University Charter ought to be read together with section 3(2)(b) thereof.

20. It is the 1st respondent's case that vide a meeting of the Kenyatta University Council held on July 15, 2022 at 9 am, the council deliberated on the cabinet resolution of May 12, 2022 which approved the allocation of a portion of LR 11026/2 and approved the surrender of the title to enable re-planning of the land and that the question of public participation is premature and will be dealt with when the *Physical Land Use and Planning Act* No 13 of 2019 is applied as it provides for elaborate public engagement.

21. According to the 1st respondent, sections 15(1) and 20(1) of the *Universities Act* empower the University to own land in its own name and the decision to alienate its land must be done with the approval the University Council and that the alleged resignation of the 2nd interested party is an internal, unrelated matter.

22. The 1st respondent swore that the petition violates the principles set out in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance*[2013]eKLR as the petitioner has not demonstrated with precision how its fundamental rights and freedoms have been threatened and/or violated; that the petitioner is using public documents obtained contrary to the provisions of article 35 of the *Constitution* and section 80 of the *Evidence Act* and that the application does not meet the threshold for the grant of interlocutory injunctions and conservatory orders.

23. The 2nd respondent, through its Deputy Vice Chancellor, Professor Paul Okemo, filed a replying affidavit in which he deponed that it is undisputed that Kenyatta University holds title to the suit property which is public land allocated to the University by the Government of Kenya and that vide its letter of July 4, 2022, the 1st respondent communicated to the University the Cabinet decision of May 12, 2022 approving the allocation of a portion of the suit property to the Ministry of Health for strategic institutions, including the Kenyatta University Teaching and Referral Hospital.

24. According to the Deputy Vice Chancellor, as a result of the decision of the Government, the University was directed to surrender the title to the Ministry of Lands and Physical Planning to facilitate the sub-division of the land and that the 2nd respondent, being the body mandated with the management of the University's assets, sought clarification from the 1st respondent, which clarification was received vide the letter dated July 7, 2022.

25. It was the deposition of the 2nd respondent's Deputy Vice Chancellor that on July 15, 2022 at 9:00am, the 2nd respondent met and deliberated on the contents of the letter of July 7, 2022 after which the 2nd respondent approved the surrender of the title to the suit property for re-planning and re-allocation in the following terms: 30 acres to the World Health Organization; 10 acres to the Africa Centre for Disease Control; 180 acres to the Kenyatta University Teaching and Referral Hospital and 190 acres to the Ministry of Lands and Physical Planning.

26. It is the 2nd respondent's case that the above narration comprises of a communication on the implementation of a public policy decision and being a public institution, the University should comply with the said policy directive.

27. The 4th respondent, through its Director of Legal Affairs, Brian Ikol, deponed that the 4th respondent is an independent Commission established under article 67 (1) of the *Constitution* and operationalized by the *National Land Commission Act* No 5 of 2012 and that section 12 of the *Land Act* vests the 4th respondent with the mandate to allocate public land.

28. The 4th respondent's Director of Legal Affairs deponed that Kenyatta University is the registered owner of land parcel number 110262/2 measuring 447.3 Ha (approximately 1,118 acres) for a term of 99 years from October 1, 1977; that in 1984, through a presidential directive, Kenyatta University Council approved an excision of 30.82 Acres of its land to settle 670 squatters that had informally occupied part of LR No 110262/2 and that the excised portion was surveyed as LR No 11026/4.

29. According to the 4th respondent, a Deed Plan for the excised portion was prepared by the Director of Surveys and issued to the Commissioner of Lands then for titling but before the documentation process could begin, the University Council resolved to add another 10 acres to compensate for the plots falling on riparian land to make a total of 40.82 acres.

30. It was deponed by the 4th respondent's Director of Legal Affairs that a Deed Plan based on the surrendered land was prepared and produced 736 plots ranging from land parcel No 1404 to 2139; that the commission has from the year 2015 been seized of and involved with the suit property based on the Kamae squatters matter and that although the *Land Act* was subsequently amended (Act No 28 of 2016) taking away the commission's power to settle squatters, the administration and management of public land is still the preserve of the commission.

31. According to the deponent, a request by the executive to a public institution to surrender land for another public purpose cannot be said to be unconstitutional because the government ordinarily acts in trust for and for the benefit of the people of Kenya and that the acquisition of land administratively by the government cannot in any way be said to be unconstitutional.

32. The 4th respondent's Director of Legal Affairs deponed that the commission is yet to receive a formal request to allocate portions of the suit property or reserve it for settlement of squatters; that it is undisputed that the University, which is a body corporate, is empowered to own land in its own name and that any request to surrender the University land must be processed and approved in accordance with Kenyatta University's internal policies and procedures.

33. It is the 4th respondent's case that it has not acted in an arbitrary, illegal or unconstitutional manner as alleged by the petitioner; that the petitioner has not demonstrated violation of its fundamental rights and freedoms under the *Constitution* by the commission, nor has it produced any evidence to prove the alleged violations and that the petitioner has not demonstrated a *prima facie* case with a probability of success or that it will suffer irreparable injury which cannot be adequately compensated by way of damages.

34. In support of the application, the 2nd interested party, Professor Paul Kuria Wainaina, deponed that on July 4, 2022, he received a letter addressed to him and to the University Council notifying him that the cabinet held a meeting on May 12, 2022, approving the allocation of part of the University land to the Ministry of Health Strategic Institutions and that the letter directed him to surrender title LR No 11026/2 (Grant No IR 33404) to the Ministry of Lands by close of business on 5th July, 2022.

35. The 2nd interested party deponed that the University Council. through its chair, responded to the said letter on July 5, 2022 categorically stating that the said cabinet decision was unlawful, unconstitutional and was only intended to alienate the University's land and that the council declined to accede to the request for surrender of the University Land.

36. According to the 2nd interested party, on July 6, 2022, he was invited by the 1st respondent to a meeting at Harambee House during which meeting he informed the 1st respondent that he did not have the mandate to make the decisions requested on behalf of the University Council and that the 1st respondent resolved to convene a meeting of the council to further deliberate on the request.

37. It was the deposition of the 2nd interested party that on July 7, 2022, the 1st respondent wrote to him demanding the surrender of the title of the University land to be excised and alienated in the following manner- 30 acres to the World Health Organization (WHO); 10 acres to Africa Centre for Disease Control and Prevention;180 acres to Kenyatta University Teaching, Referral and Research Hospital (KUTRRH); and 190 acres to facilitate resolution of the Kamae Settlement Scheme.

38. The 2nd interested party deponed that he was further asked by the 1st respondent to, inter alia, submit a letter of authority and/or consent from Kenyatta University as the title holder of LR No 110226/2 (Grant 33404) to enable the Ministry of Lands and Physical Planning officials enter the land and carry out the physical planning exercise; to provide a written agreement for sub-dividing the subject land parcel into the aforesaid sub-plots and to convene the Kenyatta University Council to meet and make the requisite resolution not later than Monday July 11, 2022.

39. According to the Deponent, the 1st respondent called him for a meeting to be held on July 12, 2022 at 2:00pm at Harambee House to confirm the status on compliance and agree on the next steps; that the meeting was however indefinitely postponed and that the 1st respondent made an arbitrary decision and replaced the entire council of Kenyatta University with a new one.

40. It was the deposition of the 2nd interested party that the said new council was sworn into office at Jogoo House at 11:00am and immediately proceeded to Kenyatta University for their maiden meeting and that it is during this meeting that he was suspended for thirty (30) days and Prof Waceke Wanjohi appointed as the Acting Vice Chancellor.

41. The 2nd interested party deponed that the directives of the 1st respondent have usurped the role of Kenyatta University Council as entrenched under section 18(2) (a) of the Kenyatta University Charter and have further usurped the role of the Council in managing the property of the University as well as promoting the interests of the University.

42. The deposition of the 2nd interested party is that the Head of the Public Service, the Cabinet Secretary of Lands and the Principal Secretary of Lands have violated and contravened article 10 of the *Constitution of Kenya* in making a policy decision without adhering to the set down processes for alienation, expropriation and annexation of property contrary to article 64(4) of the *Constitution of Kenya 2010*.

43. It was finally deponed by the 2nd interested party that there is nothing on record to show that any of the mandatory processes for compulsory acquisition of the suit property were followed by the respondents before issuing the letters dated July 4, 2022 and July 7, 2022 directing him and the council to surrender the University's Title Deed and that the directives constitute an un-lawful deprivation of the University's right to property contrary to article 40(3)(a)(b) of the *Constitution* and section 107 of the *Land Act*.

44. According to the 2nd interested party, the state has an obligation under section 69(d) of the *Constitution* to encourage public participation in the management, conservation and protection of the environment and that the interest of justice dictates that the application be allowed.

Submissions

45. The application proceeded vide oral submissions. SC Ahmednasir Abdullahi, on behalf of the petitioner, submitted that the present dispute was triggered by the 1st respondent's letter of July 4, 2022 seeking the surrender of the title to the suit property and that the letter raises several pertinent and constitutional issues.

46. Counsel for the petitioner submitted that the office of the 'Head of Public Service' is not a constitutional office; that the 1st respondent has no specific constitutional or statutory powers under that head; that the impugned letter was addressed to the 2nd interested party who had no legal powers to comply with the orders therein and that having received the letter, the 2nd interested party was mandated by article 10(1) and (2) of the *Constitution* to determine the legality of the request.

47. Counsel submitted that the Minutes of the cabinet meeting of May 12, 2022 have not been adduced; that the cabinet has no mandate to allocate public land, which mandate lies with the 4th respondent; that the process of allocating public land is set out in the *Constitution* and the *Land Act* and that there is no indication that any of the procedures laid out in section 12 of the *Land Act* have been followed.

48. Counsel submitted that the response by the University Council on July 5, 2022 affirmed that the 1st respondent's letters were contra-statute and stated that the council would not comply with the request and that in blatant abuse of power, the 1st respondent, on receipt of the council's response, issued the letter of July 7, 2022 in which he continued to demand for the surrender of the suit property.

49. With respect to the replying affidavit by the 1st respondent, the petitioner's counsel submitted that the 1st respondent did not indicate in which capacity he swore the affidavit and not being the Cabinet Secretary, did not state whether he sat in the cabinet meeting and that the question of the petitioner's locus standi is well settled in matters of public interest litigation.

50. It was submitted that there is no concept in law known as administrative compulsory acquisition of land and that the suit property is public land as defined under article 62(1)(b) of the *Constitution* and that the suit property can only be allocated pursuant to section 12 of the *Land Act*.

51. According to counsel for the petitioner, section 12(2)(d) of the *Land Act* expressly prohibits the re-allocation of public land of an institution set aside for education and research; that even the National Land Commission has no power to re-allocate such land and that the response by the 4th respondent is at best contradictory and shows an attempt by the 4th respondent to avoid an outright condemnation of the 1st respondent's illegal actions.

52. Counsel for the petitioner submitted that any request to surrender the suit land must be processed and approved in accordance with the Kenyatta University constituting Act; that having failed to acquire the land, the 1st respondent arbitrarily replaced the University Council which met on the day they were sworn in and acceded to the 1st respondent's request and that the petitioner has made a strong prima facie case showing that the 1st respondent has breached the *Constitution*, the *Land Act* and the *National Land Commission Act*.

53. Mr Allan Kamau, counsel for the Attorney General, submitted on behalf of the 1st, 3rd, 5th & 6th respondents. Counsel for the state submitted that the suit property is public land held by Kenyatta University, which is a public institution, on behalf of the national executive and the people of the Republic of Kenya and that it is within the sole discretion of the government to determine how to manage existing resources to ensure optimal deployment for maximum public benefit.

54. The state counsel submitted that the government cannot be faulted for seeking to re-plan and re-deploy the land held by the University for legitimate public purposes; that the *Universities Act* and Kenyatta University Charter affirm that the governing authority of the University is the University Council; that on July 15, 2022, the council met and approved the surrender of the suit land to enable re-planning and re-allocation of the same and that this court cannot second guess the councils' decision.

55. It was Mr Kamaus' further submission that the evidence relied on by the petitioner not having been authored by them or addressed to them, the same was illegally obtained evidence contrary to section 80 of the *Evidence Act* and that the letters that the petitioner is relying on should be struck out. Counsel relied on several authorities which I have considered.

56. The state counsel finally submitted that Kenyatta University is a body corporate capable of suing and being sued in its own name and does not require the Law Society of Kenya to institute a suit on its behalf; that the petitioner has no locus standi in this matter and that the issue of the existence of the office of the Head of Public Service is not an issue in the present case, neither is the manner of disbandment of the council. It was submitted that the council's decision in respect of the allocation of the suit property is clear.

57. Counsel for the 2nd respondent, Mr Wetangula, submitted that Kenyatta University is a public institution fully funded by the Government of Kenya and holding the suit property in trust for the government; that the University is duty bound to adhere to the policy directions of the government; that whereas the *Universities Act* and the Kenyatta University Charter grant the University corporate body status, the powers it exercises with respect to the suit property is subject to the directions issued by the government.

58. It was submitted that the University Council, as evinced by its meeting of July 15, 2022, acceded to the 1st respondent's request and resolved to surrender the land for re-allocation, which decision stands and that the question of what the government intends to do with the land is beyond the mandate of the University Council. According to counsel, the application is unmerited and does not satisfy the grant of an injunction and ought to be dismissed with costs.

59. Ms Akello, submitting on behalf of the 4th respondent, stated that the National Land Commission has been involved in the suit property from the year 2015 based on the Kamae Squatters matter and that previously, the *Land Act* mandated the Commission to implement settlement programs on behalf of the National and County Governments and to provide access to land for shelter and livelihood until 2015 when the Act was amended.

60. Counsel for the 4th respondent submitted that *the Constitution*, the *Land Act* and the *NLC Act* are clear on how public land is allocated; that the commission has not received any formal request to allocate the suit property; that the commission has clear and elaborate procedures guiding its operations which can only be invoked once its powers as a commission have been called upon and that the commission is part of the larger Kenyan government and is part of all decisions of a multi-institutional nature.

61. Counsel for the 4th respondent submitted that the commission is ready to start the process of alienating the suit property once its mandate is properly invoked; that contrary to the petitioner's assertions, the 4th respondent has not in any way acted illegally or unconstitutionally, neither has it violated the petitioner's rights as alleged and that the 4th respondent does not support the issuance of interim orders sought by the petitioner.

62. Mr Manwa, counsel for the 2nd interested party, submitted that the 2nd interested party had no mandate to unilaterally surrender the title to the suit property as requested by the 1st respondent; and that the

letters of July 4, 2022 and July 7, 2022 having been written to the 2nd interested party requesting him to surrender the property aforesaid are illegal, null and void.

63. It was submitted by counsel that whereas the *Universities Act* and charter give the University the mandate to dispose of property, it must do so legally; that the issue in dispute herein is the process of acquisition and surrender of the suit property; that notwithstanding the fact that the University holds the suit property in trust for the public, due process must be followed and that it is apparent that there was no public participation and/or stakeholder engagement with the University Council which the cabinet was constitutionally bound to undertake.

64. The 2nd interested party's advocate finally submitted that the removal of the old council and institution of a new and friendly one to administer illegalities is unconstitutional; that the previous council, through its letter of July 5, 2022, communicated its decision of refusing to surrender the suit property as demanded by the 1st respondent; that the petitioner has established a prima facie case and that the application is merited.

65. In rebuttal, counsel for the petitioner submitted that counsel for the 4th respondent made crucial submissions in which she made several admissions being that the suit property is public land regulated by the *Constitution*, the *Land Act* and the *NLC Act* and that the legal provisions with respect to allocation of public land have not been complied with.

66. It was submitted by the petitioner's counsel that notwithstanding the aforesaid, the 4th respondent's counsel opposed the present application; that it was unfortunate that the 4th respondent, a constitutional commission, can turn a blind eye to a constitutional breach; that a decision was made by the council *vide* its letter of July 5, 2022 categorically refusing to accede to the 1st respondent's request and that the fact that the Council was replaced does not take away the decision aforesaid.

67. It was submitted that the 1st respondent had no powers in law to make the request it made; that the question of who the 1st respondent is a key question and that even if he legally exists, any attempts to acquire the suit property by him is an attempt to usurp the 4th defendant's powers. it was submitted that the issue of the disbandment of the council is a live matter and that when a breach of law occurs, there must be consequences.

Analysis and Determination

68. Upon reading the pleadings and the submissions by the parties, the issues that arise for determination in the two applications are as follows:

    a. Whether the petitioner has the *locus standi*.

    b. Whether conservatory orders should issue pending the hearing and determination of the petition.

69. It is the 1st respondent's contention that the petitioner has no mandate in the management or disposition of the suit property in question and therefore has no *locus* to institute the present application and the petition. According to the 1st respondent, the affidavits in support of the application and the petition are fatally defective having been sworn by a person who is not a member of the Kenyatta University Council and who has no personal knowledge of the facts deponed thereto.

70. *Locus standi* is defined by the *Black's Law Dictionary*, 9th Edition as;

    " The right to bring an action or to be heard in a given forum."

71. The court in the case of *Alfred Njau & others v City Council of Nairobi* (1982) KAR 229, defined *locus standi* thus;

> " The term locus standi means a right to appear in court and conversely to say that a person has no *locus standi* means that he has no right to appear or be heard in such proceedings."

72. It is trite that the lack of the requisite capacity to bring a suit goes to the root of the case, and without *locus standi*, the suit cannot stand. This was aptly expressed by the court in the case of *Priscilla Jesang Koech v Rebecca Koech & 3 others* [2018] eKLR as follows:

> " *Locus standi* is the cornerstone of any case. Before a party files a case, he or she must be certain that they are clothed with the requisite capacity to sue and be sued. In the case of BV Law society of *Kenya v Commissioner of Lands & others,* Nakuru High Court, Civil Case No 464 of 2000. It was held that:
>
> If a party has no *locus standi*, then the said party cannot bring a suit to court. The issue of *locus standi* goes to the root of any suit and the said issue of *locus standi* is a point of law which is capable of disposing of a matter preliminarily."

73. The law on *locus standi* in constitutional petitions is envisaged under article 22 and 258 of the *Constitution*. Article 22 of the *Constitution* provides that:

> " 22. Enforcement of Bill of Rights
>
> (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
>
> (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by-
>
> a) a person acting on behalf of another person who cannot act in their own name;
>
> b) a person acting as a member of, or in the interest of, a group or class of persons;
>
> c) a person acting in the public interest; or
>
> d) an association acting in the interest of one or more of its members."

74. Whereas article 258 of the *Constitution* provides as follows:

> " (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.
>
> (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
>
> (a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members."

75. Speaking to the law on *locus standi*, the Court of Appeal in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR stated thus;

> "Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under article 10 of the *Constitution* by necessity and logic broadens access to the courts. In this broader context, this court cannot fashion nor sanction an invitation to a judicial standard for *locus standi* that places hurdles on access to the courts, except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. In the case at hand, the petition was filed before the High Court by an NGO whose mandate includes the pursuit of constitutionalism and we therefore reject the arguments of lack of standing by counsel for the appellant. We hold that in the absence of a showing of bad faith as claimed by the appellant, without more, the 1st respondent had the locus stand to file the petition. Apart from this, we agree with the superior court below that the standard guide for *locus standi* must remain the command in article 258 of the *Constitution*, which provides that:
>
> 258.
>
> (1) "Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention
>
> (2) in addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by - ...
>
> (c) a person acting in the public interest..."

76. Similarly, in the case of *Sollo Nzuki v Salaries and Remuneration Commission & 2 others* [2019] eKLR, a member of the public filed a petition on behalf of High Court judges and judges of courts of equal status. The court, while placing reliance on several decisions, held thus:-

> "It is therefore clear that over time the issue of standing, particularly in public law litigation has been greatly relaxed and in our case the *Constitution* has opened the doors of the courts very wide to welcome any person who has bona fide grounds that the *Constitution* has been or is threatened with contravention to approach the court for an appropriate relief. In fact, since article 3(1) of the *Constitution* places an obligation on every person to respect, uphold and defend the *Constitution*, the invitation to approach the court for redress as long as the person holds bona fide grounds for believing that the *Constitution* is under threat ought to be welcome....
>
> In this case the petitioner not only contends that there is not only a threat to the violation of the *Constitution* but that the *Constitution* has in fact been violated by the respondents. In light of such allegations I cannot fault the petitioner for instituting these proceedings and I hold that he was within his right to commence these proceedings. As to whether his case

is merited is another matter. *Locus standi* is a totally different thing from the merits of the petitioner's case."

77. In the present circumstances, the petitioner has challenged the allocation of a portion of the suit property belonging to Kenyatta University, which property constitutes public land, by the government. It is the petitioner's assertion that the procedure which was followed by the Executive in the acquisition of the suit property violates the *Constitution* as well as other laws.

78. Undoubtedly, the petition is premised upon articles 22 and 258 of the *Constitution* which grant every person the right to institute court proceedings claiming that a fundamental freedom in the Bill of Rights has been denied, violated or threatened. Whereas not expressly stated, the issue at hand is clearly within the ambit of public interest whose essence was expounded on by the Supreme Court in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2014] eKLR as follows:

> " Public Interest Litigation plays a transformational role in society. It allows various issues affecting the various spheres of society to be presented for litigation. This was the *Constitution*'s aim in enlarging *locus standi* in human rights and constitutional litigation. *Locus standi* has a close nexus to the right of access to justice. In instances where claims in the interest of the public are threatened by administrative action to the detriment of constitutional interpretation and application, the court has discretion on a case by case basis, to evaluate the terms and public nature of the matter *vis a vis* the status of the parties before it. The discretion is drawn from the command of article 259(1) to interpret the *Constitution* in a manner that promotes its values and purposes, advances the rule of law, human rights and fundamental freedoms, permits the development of the law and contributes to good governance."

79. In view of the foregoing, and to the extent that the petitioner is questioning the legality of alienation of the suit property, which is public land, there can be no doubt that the petitioner has the requisite locus standi to move this court in the manner that it has done.

80. The petitioner is seeking for conservatory orders pending the hearing and determination of the petition. The implication of conservatory orders in constitutional petitions was discussed by the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR, as follows:

> " Conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the applicant's case for orders of stay."

81. In the *Board of Management of Uhuru Secondary School v City County Director of Education & 2 others* [2015] eKLR it was stated that:

> " Foremost, the applicant ought to demonstrate a prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice....
>
> It is in my view not enough to merely establish a prima facie case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order but

rather there must also be evident a likelihood of success. The *prima facie* case ought to be beyond a speculative basis....

Once the applicant has established to the court's satisfaction a prima facie case with a likelihood of success the court is then to decide whether a grant or a denial of the conservatory relief will enhance the constitutional values and objects of the specific right or freedom in the Bill of rights....

Thirdly, flowing from the first two principles, is whether if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory. It is indeed the business of the court to ensure and secure so far as possible that any transitional motions before the court do not render nugatory the ultimate end of justice....

The fourth principle which emerges from the various cases and is well captured by the Supreme Court of Kenya in the case of *Gatirau Peter Munya v Dickson Mwenda Githinji & 2 others* [2014] eKLR is that the court must consider conservatory orders also in the face of the public interest dogma.

Finally, the court is to exercise its discretion in deciding whether to grant or deny a conservatory order. The court must consequently consider all relevant material facts and avoid immaterial matters. The court will consider the applicants credentials, the prima facie correctness of the availed information, whether the grievances are genuine, legitimate and deserving and finally whether the grievances and allegations are grave and serious or merely vague and reckless."

82. In determining whether or not to grant conservatory orders, the court is alive to the fact that it must be careful not to make a final determination of the issues in contention.

83. The starting point is to determine whether the applicant has established a prima facie case with a likelihood of success. The parameters of what constitutes a prima facie case in a constitutional petition were aptly expressed by the court in the case of *Board of Management of Uhuru Secondary School v City County Director of Education & 2 others* (*supra*) as follows:

> "It is in my view not enough to merely establish a *prima facie* case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order but rather there must also be evident a likelihood of success. The *prima facie* case ought to be beyond a speculative basis..."

84. The petitioner herein is seeking to stay the enforcement of the directives contained in the letters of July 4, 2022 and July 7, 2022 and or the sub division, alienation or interference with the ownership of the parcel of land known as Land Refence Number 11026/2 (the suit property).

85. The letter of July 4, 2022 titled "Surrender of Title Deed for Kenyatta University" was addressed to the Vice Chancellor-Kenyatta University, who is the 1st interested party herein, informing him that the Cabinet in its meeting of May 12, 2022 had approved allocation of the suit property to the Ministry of Health Strategic Institutions and the Kenyatta University Hospital.

86. The said letter, signed by the 1st respondent, requested the University to surrender its Title Deed to the Ministry of Lands and Physical Planning to effectuate the transfer whereas the letter of July 7, 2022 under the head, "Replanning of Kenyatta University Land" reiterated that a cabinet decision had been made approving the allocation of the suit property to various institutions and asked the University Council to facilitate the surrender of the University's Title Deed to enable excision of the aforesaid portions.

87. According to the petitioner, the University is the registered owner of the suit property and as such, its proprietary rights are protected by article 40 of the *Constitution*; that further, section 15(1) and 20 of the *Universities Act* provide that a University granted a charter is a body corporate capable of acquiring, holding and disposing off immovable property while of section 60 the *Universities Act* as well as section 18(2)(a) of the Charter of Kenyatta University mandate the University through its Council, to manage the suit property.

88. The petitioner's case is that the 1st respondent's actions are akin to compulsory acquisition of the suit property without following due process as set out in the*Constitution* and in the *Land Act* and that in any event, it is only the 4th respondent who is mandated to initiate the process of compulsory acquisition of the suit property; that there was no discussion prior to the cabinet decision to allocate the suit property and that the cabinet decision in that respect contravened the rights to fair administrative actions and legitimate expectations.

89. On its part, the 1st, 2nd, 3rd, 5th and 6th respondents have taken the position that the suit property is public land which was allocated to the University by the Government of Kenya; that the government has an unfettered right to compulsorily acquire public land, which acquisition can be done administratively and that in any event, the University is not eligible for compensation because it is a public body holding the land in trust for the public.

90. It is the respondents' case that the cabinet derives its mandate to approve the re-planning of the suit property from articles 60 and 153 of the *Constitution* and that the University, being a public body, is under executive direction and bound to implement cabinet decisions. It is the respondents' case that the portion of the suit property sought to be acquired is needed for strategic public purposes which complement the core mandate of the University.

91. It was the deposition of the 2nd respondent's Deputy Vice Chancellor that on July 15, 2022 at 9:00am, the 2nd respondent (the Council of Kenyatta University) met and deliberated on the contents of the letter of July 7, 2022 after which it approved the surrender of the title to the suit property for re-planning and re-allocation in the following terms: 30 acres to the World Health Organization; 10 acres to the Africa Centre for Diseases Control; 180 acres to the Kenyatta University Teaching and Referral Hospital and 190 acres to the Ministry of Lands & Physical Planning.

92. It is the 2nd respondent's case that the above narration comprises of a communication on the implementation of a public policy decision and being a public institution, the University should comply with the said policy directive.

93. The 4th respondent (the National Land Commission) while conceding that it has the mandate to manage and allocate public land, deponed that a request by the executive to a public institution to surrender land for another public purpose is not unconstitutional; that Kenyatta University is the registered owner of land parcel number 110262/2 measuring 447.3 Ha (approximately 1,118 acres) and that in 1984, through a presidential directive, Kenyatta University Council approved an excision of 30.82 Acres of its land to settle 670 squatters, with an additional 10 acres being added to take care of the riparian land.

94. What is not in dispute is that Kenyatta University is a public body and or a state organ and owns land reference number 110262/2 measuring 447.3 Ha (approximately1,118acres). Under article 62(1)(b) of the *Constitution*, any land that is lawfully held, used or occupied by any state organ, except where it occupies such land as lessee under a private lease, is public land.

95. The petitioner has argued that to the extent that the suit property is public land, it can only be allocated in accordance with the provisions of section 12 of the *Land Act* which provides as follows:

> " 12.
>
> (1) The commission may, on behalf of the National or county governments, allocate public land by way of-
>
> (a) public auction to the highest bidder at prevailing market value subject to and not less than the reserved price;
>
> (b) application confined to a targeted group of persons or groups in order to ameliorate their disadvantaged position;
>
> (c) public notice of tenders as it may prescribe;
>
> (d) public drawing of lots as may be prescribed;
>
> (e) public request for proposals as may be prescribed;
>
> (f) public exchanges of equal value as may be prescribed.
>
> (2) The commission shall ensure that any public land that has been identified for allocation does not fall within any of the following categories—
>
> (a) public land that is subject to erosion, floods, earth slips or water logging;
>
> (b) public land that falls within forest and wild life reserves, mangroves, and wetlands or fall within the buffer zones of such reserves or within environmentally sensitive areas;
>
> (c) public land that is along watersheds, river and stream catchments, public water reservoirs, lakes, beaches, fish landing areas riparian and the territorial sea as may be prescribed;
>
> (d) public land that has been reserved for security, education, research and other strategic public uses as may be prescribed; and
>
> (e) natural, cultural, and historical features of exceptional national value falling within public lands;
>
> (f) reserved land; or

(g) any other land categorized as such, by the Commission, by an order published in the Gazette."

96. Section 12 of the *Land Act* provides the mechanism under which public land may be allocated. The provision gives the National Land Commission, on behalf of the National or County Governments, the mandate to allocate public land by way of public auction to the highest bidder at the prevailing market price or by way of application confined to a targeted group of persons or by public notice of tenders, public drawing of lots, public request for proposals as may be prescribed; or by way of public exchanges of equal value as may be prescribed.

97. Section 14 of the *Land Act* provides that the commission shall, before allocating any public land under the Act, issue, publish or send a notice of action, to the public and interested parties, at least thirty days before offering for allocation, a tract or tracts of public land. The notice is supposed to include the terms, covenants, conditions and reservations which are to be included in the conveyance document and the method of allocation.

98. Section 14 (3) of the *Land Act* provides that the notice issued under section 14 (1) shall provide a period of 15 days from the date of its issuance within which the public and interested parties may comment, and at least 30 days prior to the allocation of public land, the commission is required to send a notice to the governor in whose county the public land proposed for allocation is located.

99. According to the petitioner's counsel, to the extent that Kenyatta University's land is reserved for education and research, its land cannot be alienated under any circumstances pursuant to the provision of section 12(2)(d) of the *Land Act*. It is the petitioner's case that the public was not involved in the allocation of the suit property in complete disregard of the law.

100. The mandate of the National Land Commission to administer land on behalf of the national and county government is provided for in the *the Constitution*. That mandate is very deliberate and specific. To contextualize the provisions of section 12 and 14 of the *Land Act*, and the mandate of the National Land Commission in the allocation of public land vis a vis land held, used or occupied by a state organ on behalf of the two levels of government, I shall reproduce the provision of article 62 of the *Constitution*. The said article provides as follows:

" Public land 62

(1) Public land is—

(a) land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date;

(b) land lawfully held, used or occupied by any state organ, except any such land that is occupied by the state organ as lessee under a private lease;

(c) land transferred to the state by way of sale, reversion or surrender;

(d) land in respect of which no individual or community ownership can be established by any legal process;

(e) land in respect of which no heir can be identified by any legal process;

(f) all minerals and mineral oils as defined by law;

(g) government forests other than forests to which article 63(2)(d)(i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas;

(h) all roads and thoroughfares provided for by an Act of Parliament;

(i) all rivers, lakes and other water bodies as defined by an Act of Parliament;

(j) the territorial sea, the exclusive economic zone and the sea bed;

(k) the continental shelf;

(l) all land between the high and low water marks;

(m) any land not classified as private or community land under this Constitution; and

(n) any other land declared to be public land by an Act of Parliament-

(i) in force at the effective date; or

(ii) enacted after the effective date.

(2) Public land shall vest in and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission, if it is classified under-

(a) clause (1)(a), (c), (d) or (e); and

(b) clause (1)(b), other than land held, used or occupied by a national state organ.

(3) Public land classified under clause (1)(f) to (m) shall vest in and be held by the national government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission (emphasis mine).

(4) 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."

101. The suit property falls within the category of land held, used or occupied by Kenyatta University, which is a national state organ. Article 62(2)(a) and (b) of the *Constitution* provides that other than land held, used or occupied by a national State organ, public land shall vest in and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission.

102. The reading of article 62(2) and (3) of the *Constitution* shows that the *Constitution* expressly bars the National Land Commission, the county government or the national government from dealing with land held, used or occupied by a state organ in any manner, including allocation of such land.

103. In fact, the reading of article 62(2)(b) and (3) of the *Constitution* clearly shows that land held, used or occupied by a state organ neither vests in the national government nor the county government, and

the National Land Commission has no role in its management, which would include allocation or alienation of such land on behalf of the national and/or county government, as the case may be.

104. Indeed, land held, used or occupied by a national State organ is the only category of public land, pursuant to article 62(2) and (3) of the *Constitution*, that neither vests in the two levels of government nor administered by the National Land Commission on behalf of the said two levels of government.

105. If the *Constitution* does not vest land held, used or occupied by a State organ in the national or the county government, and excludes the National Land Commission from administering it, it follows that the National Land Commission cannot allocate such land on behalf of the national government or the county government pursuant to the provision of section 12 of the *Land Act*. Section 12 of the *Land Act* is applicable in respect to all other categories of public land defined under article 62(1) of the *Constitution* except land held, used or occupied by a state organ, in which category the suit property falls.

106. The exclusion of the national government, the county government and the National Land Commission from dealing with land held, used or occupied by a national State organ by the *Constitution* was not accidental. It was a deliberate constitutional imperative to enable State organs to deal with such land pursuant to the laws governing them, and to avoid the past incidences where the executive would deal with land reserved for state organs in any manner it deemed fit. It would appear that this glaring provision of the *Constitution* escaped the minds of all the advocates on record.

107. Considering that articles 62(2)(b) and 62(3) of the *Constitution* expressly bars the national government and the National Land Commission from dealing with land held, used or occupied by a national state organ, which includes the suit property, the provisions of section 12 and 14 of the *Land Act* which provides the manner in which the National Land Commission allocates public land, upon being moved by the national or the county government, is inapplicable in this case.

108. That being the case, the argument by the petitioner that the National Land Commission and the public, pursuant to sections 12 and 14 of the *Land Act*, should have been involved in the allocation of a portion of the suit property to the World Health Organization, Africa Centre for Disease Control, Kenyatta University Teaching and Referral Hospital and the Ministry of Lands & Physical Planning to settle the squatters is erroneous because the *Constitution* at article 62(2)(b) expressly prohibits the National Land Commission from dealing with the suit property, at least not until the same is surrendered.

109. In fact, in view of the provisions of article 62(2)(b) and article 62(3) of the *Constitution* which do not vest land held, used or occupied by a national State organ in the national government, the letters of July 4, 2022 and July 7, 2022 authored by the 1st respondent, and any purported cabinet resolution, are inconsequential, other than being a request to the University Council, just like any request that can be made by a Kenyan, for setting aside the University's land for public purpose and or for the benefit of the University.

110. Having contextualized the provisions of article 62 of the *Constitution* and sections 12 and 14 of the *Land Act*, the question that this court should be asking itself in the current application is not whether the provisions of sections 12 and 14 of the *Land Act* were complied with by the 1st respondent, the Council of Kenyatta University and the National Land Commission, but whether, by purporting to alienate a portion of its land, the Council of Kenyatta University complied with the provisions of the *Universities Act* and the Charter of Kenyatta University.

111. The question is critical because 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. In the circumstances of this case, the law governing the disposal and use of the suit property is the *Universities Act*, 2012 and the Charter for Kenyatta University which was gazatted as Legal Notice No 231 on December 30, 2013.

112. Section 48 of the *Universities Act* provides as follows:

> " 48. Vesting of property
>
> All immovable property, shares, funds and securities as may from time to time become the property of the public university shall be in the name of the university and shall be dealt with in such manner as the institution may from time to time determine, subject to the conditions upon which any grants are made from public funds for capital or recurrent purposes and the conditions upon which any endowment, bequest or donation is made for any purposes connected with the institution."

113. From the above provision, it is clear that the manner in which a public university deals with its land is determined by the University itself, subject to any endowment, bequest or donation. Section 60 of the *Universities Act* provides for the functions of the University Council to include managing, supervising and administering the assets of the university in such a manner as best promotes the purpose for which the university is established.

114. The Charter for Kenyatta University provides at section 3 as follows:

> " 3.
>
> (1) There is hereby established a university to be known as Kenyatta University in accordance to the provisions of this charter.
>
> (2) The University shall be a body corporate with perpetual succession and a common seal, and shall in its corporate name be capable of–
>
> (a) suing and being sued;
>
> (b) taking, purchasing or otherwise acquiring, holding, charging and disposing of movable and immovable property"

115. The law establishing Kenyatta University allows the University, through its council, to dispose of its immovable property, including land. While doing so, the council must comply with the provision of section 17(8) of the Charter of Kenyatta University which provides as follows:

> " Subject to this charter, the council shall be the governing body of the University through which the University:-
>
> a. shall administer the property and funds of the University in a manner and for the purposes which shall promote the interest of the University; but the council shall not charge or dispose of immovable property of the University except in accordance with the procedures laid down by the Government of Kenya"

116. The totality of the above provisions of the law is that the Council of Kenyatta University is supposed to administer the assets of the University, including disposing its land, in the interest of the University and the public at large, and in accordance with the procedures laid down by the government. Does the alleged subdivision and alienation of the suit property, prima facie, meet the above criteria?

117. The 2nd respondent, through its Deputy Vice Chancellor, Professor Paul Okemo, filed a replying affidavit in which he deponed that that vide his letter of July 4, 2022, the 1st respondent communicated to the University the Cabinet decision of May 12, 2022 approving the allocation of a portion of the suit property to the Ministry of Health for strategic institutions, including the Kenyatta University Teaching and Referral Hospital.

118. According to the Deputy Vice Chancellor, as a result of the decision of the Government, the University was directed to surrender the title to the Ministry of Lands & Physical Planning to facilitate the sub-division of the land and that the 2nd respondent, being the body mandated with the management of the University's assets, sought clarification from the 1st respondent, which clarification was received vide the letter dated July 7, 2022.

119. It was the deposition of the 2nd respondent's Deputy Vice Chancellor that on July 15, 2022 at 9:00am, the 2nd respondent met and deliberated on the contents of the letter of July 7, 2022 after which the 2nd respondent approved the surrender of the title to the suit property for re-planning and re-allocation in the following terms: 30 acres to the World Health Organization; 10 acres to the Africa Centre for Diseases Control; 180 acres to the Kenyatta University Teaching and Referral Hospital and 190 acres to the Ministry of Land and Physical Planning to settle the squatters who were in occupation of a portion of the suit property.

120. The 1st respondent echoed the sentiments of the Deputy Vice Chancellor of Kenyatta University. According to the 1st respondent, a portion of the suit property is currently unutilized and is needed for other immediate and strategic public purposes which will also compliment the core mandate of Kenyatta University, and that the cabinet being the highest executive organ deriving its mandate from article 153 of the *Constitution* cannot be faulted for granting approval to cede part of the suit property for public purpose.

121. The respondents have annexed on the 1st respondent's affidavit a request by the Kenyatta University Teaching Referral and Research (KUTRRH) Hospital for 200 acres of the suit property signed by the Chairperson of the Board of Directors. In the said letter, it has been suggested that the said land will be utilized as follows:

    i. 66.54 acres: built up area with the current hospital facilities;

    ii. 28.6 acres: for the children hospital;

    iii. 10 acres: for women hospital;

    iv. 10 acres: for breast cancer center of excellence next to the women hospital;

    v. 10 acres: for a research and genomics center;

    vi. 12.6 acres: for expansion of other hospital facilities like workshops, motor vehicle yard and students accommodation;

    vii. 2.9 acres: for pharmaceuticals manufacturing plant and

    viii. 10 acres: for construction of staff houses and riparian reserve.

122. In the same letter, the Chairperson of KUTRRH stated that the World Health Organisation (WHO) has been allocated 30 acres for the construction of a Regional Emergency Hub. According to the letter, the Hub will comprise warehouses for stock piling of emergency supplies for the region, an office block, an Infectious Disease Unit and a model simulation village.

123. The Chairperson of the Board of Directors of KUTRRH stated that the Africa Center for Disease Control (ACDC) has been allocated 10 acres to construct its offices and laboratories. I will briefly discuss the role of these three organizations, as I understand them.

124. According to its website, Kenyatta University Teaching, Referral & Research Hospital (KUTRRH)) is a National Referral Hospital with a 650-bed capacity. The hospital is equipped to offer specialized Oncology, Trauma and Orthopedics, Renal, Accident & Emergency, among other services. However, the oncology center is its flagship project.

125. The website of KUTRRH shows that the Management of Kenyatta University led by the then Vice Chancellor, Professor Olive Mugenda, conceptualized the hospital project in 2008 and embarked on writing a proposal for it. The proposed project was meant to be an innovative and unique research and treatment centre to fill the gaps in medical service provision in Kenya.

126. This proposal was presented to the Ministry of Health, appealing for funding to set up a Teaching, Research and Referral Hospital. With the support of the then Kenyatta University Council, and the Government of Kenya through various Ministries and their Permanent Secretaries, the idea came to fruition with the signing of a M.O.U on Thursday, 21 April, 2011 between the Chinese Government and the Government of Kenya.

127. The construction of this state-of-the-art facility started in the year 2011. The construction process involved the creation of the hospital, a medical school, tuition block, student hostels, laboratories, staff quarters and installation of modern medical equipment which was completed in 2016. The hospital was officially opened by the President on 10th of September 2020 although it had been in operation since October 2019.

128. According to its website, the hospital is currently constructing an integrated molecular imaging center which should help in the treatment and diagnosis of cancer. Legal Notice No 4 of 2019 issued on 25 January, 2019 created KUTRRH as a state corporation, and it exists to date as such. In that respect, KUTRRH is a public entity.

129. Both the World Health Organization (WHO) and the Africa Center for Disease Control (ACDC) are primarily concerned with public health. WHO, at an international level, and ACDC within Africa. The WHO constitution states that its main objective is "the attainment by all people of the highest attainable standard of health.

130. WHO is concerned with global governance of health and disease and in this respect provides technical assistance to countries, sets international standards and collects data on global health issues. ACDC on the other hand is a specialized technical institution of the African Union established to support public health initiatives to Member States.

131. ACDC's major concern is strengthening capacity and capabilities of Africa's public health institutions to detect, prevent, control and quickly respond to disease threats and outbreaks. ACDC's website further provides that the centre supports African Union Member States in providing coordinated and integrated solutions to inadequacies in their public health infrastructure, human resource capacity and disease surveillance. In a nutshell, the two international institutions support public health initiatives.

132. The fourth purpose for which the University was asked to alienate a portion of the suit property is for the settlement of Kamae squatters who are occupying a portion of the suit property. The Director of Legal Affairs of the National Land Commission deponed that indeed, the University had agreed way back in 1984 to allocate a portion of its land being occupied by Kamae squatters to the squatters.

133. According to the 4th respondent, a Deed Plan for the excised portion known as LR NO.11026/4 was prepared by the Director of Surveys and issued to the Commissioner of Lands then for titling but before the documentation process could begin, the University Council resolved to add another 10 acres to compensate for the plots falling on riparian land to make a total of 40.82 acres.

134. It was deponed by the 4th respondent's Director of Legal Affairs that a Deed Plan based on the surrendered land was prepared and produced 736 plots ranging from land parcel No 1404 to 2139; that the Commission has from the year 2015 been seized of and involved with the suit property based on the Kamae squatters' matter and that the process of allocating the portion of the suit property to the Kamae squatters is at an advanced.

135. Indeed, this court is aware of the several cases that have been filed by different groups claiming to be entitled to a portion of the suit property as squatters. One of such cases is *Kenyatta University & 1699 others v Kimani Mbugua & 78 others* [2021] eKLR which was a consolidation of ELC case number 1460 of 2002, ELC case number 2088 of 2007, ELC No 1038 of 2012 (OS) and ELC case number 922 of 2007.

136. In her Judgment which was delivered on September 23, 2021, Komingoi J, while dismissing the claim by the squatters, held as follows:

> " 84. It is on record, that the plaintiff (KU) has already donated 30.82 acres for the settlement of the 670 squatters as per the list of 1984. This is the only portion the plaintiff is ready to donate to accommodate the original squatters."

137. The decision by the court in the above suits confirms the position taken by the National Land Commission that indeed a portion of the suit property has been occupied by the squatters since 1984, and that the University had agreed to alienate that portion in favour of the squatters. The judgment of the court further acknowledged that despite the order of the court, the squatters have continued developing the portion of the suit property that they are occupying.

138. Section 134 of the *Land Act* provides the role of the national government in settling squatters as follows:

> "(1) The National Government shall implement settlement programmes to provide access to land for shelter and livelihood.
>
> (2) Settlement programmes shall, for the purposes of this Act, include, but not be limited to provision of access to land to squatters, persons displaced by natural causes, development projects, conservation, internal conflicts or other such causes that may lead to movement and displacement.
>
> (5) The commission shall reserve public and for the establishment of approved settlement programmes, and where public land is not available, the board of trustees shall purchase or acquire land for such purposes.

139. The constitutional imperative of the national government in conjunction with the National Land Commission to settle squatters on public land was restated by the Supreme Court in the case of *Mitu-*

Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) (Petition 3 of 2018) [2021] KESC 34 (KLR) (11 January 2021) (Judgment) as follows:

> "151. While we are in agreement with the submission to the effect that, an illegal occupation of private land, cannot create prescriptive rights over that land in favour of the occupants, we don't think the same can be said of an "illegal occupation" of public land. To the contrary, we are of the considered opinion, that where the landless occupy public land and establish homes thereon, they acquire not title to the land, but a protectable right to housing over the same. Why, one may wonder, should the illegal occupation of public land give rise to the right to shelter, or to any right at all? The retired Constitution did not create a specific category of land known as "public land". Instead, the *Constitution* recognized what is referred to as "un-alienated government land". The radical title to this land was vested in the president, who through the Commissioner of Lands, could alienate it, almost at will. The consequences of this legal regime have been adequately recorded for posterity elsewhere. The 2010 Constitution has radically transformed land tenure in this country by declaring that all land in Kenya belongs the people of Kenya collectively as a nation, communities and individuals. It also now creates a specific category of land known as public land. Therefore, every individual as part of the collectivity of the Kenyan nation has an interest, however indescribable, however unrecognizable, or however transient, in public land."
>
> 152. The right to housing over public land crystallizes by virtue of a long period of occupation by people who have established homes and raised families on the land. This right derives from the principle of equitable access to land under article 60(1)(a) of *the Constitution*. Faced with an eviction on grounds of public interest, such potential evictees have a right to petition the court for protection. The protection, need not necessarily be in the form of an order restraining the State agency from evicting the occupants, given the fact that, the eviction may be entirely justifiable in the public interest. But, under article 23(3) of the *Constitution*, the court may craft orders aimed at protecting that right, such as compensation, the requirement of adequate notice before eviction, the observance of humane conditions during eviction (UN Guidelines), the provision of alternative land for settlement, etc.
>
> 153. The right to housing in its base form (shelter) need not be predicated upon "title to land". Indeed, it is the inability of many citizens to acquire private title to land, that condemns them to the indignity of "informal settlement". Where the government fails to provide accessible and adequate housing to all the people, the very least it must do, is to protect the rights and dignity of those in the informal settlements. The courts are there to ensure that such protection is realized, otherwise these citizens, must forever, wander the corners of their country, in the grim reality of "the wretched of the earth".

140. From the above decision of the Supreme Court, it is now settled that where the landless occupy public land and establish homes thereon, they acquire not title to the land, but a protectable right to housing over the same. It is the position of the Supreme Court, which decision is binding on this court, that the right to housing over public land crystallizes by virtue of a long period of occupation by people

who have established homes and raised families on the land. This right derives from the principle of equitable access to land under article 60(1)(a) of the *Constitution*.

141. According to the Supreme Court in the *Mitu-Bell* case (*supra*), every individual as part of the collectivity of the Kenyan nation has an interest, however indescribable, however unrecognizable, or however transient, in public land. According to the Supreme Court, the landless people occupying public land should be allocated such land, or be compensated if any eviction is to occur.

142. That being the case, the residents of Kamae informal settlement, who, as admitted by *Kenyatta University in Kenyatta University & 1699 others v Kimani Mbugua & 78 others* [2021] eKLR and the National Land Commission, have been in occupation of a portion of the suit property since 1984, must be protected by the court. Otherwise, as stated by the Supreme Court in the Mitu-bell case, "these citizens will forever wander the corners of their country, in the grim reality of "the wretched of the earth."

143. The Supreme Court decision in the Mitu-Bell case, read conjunctively with the provision of section 134 of the *Land Act* suggests that the allocation of a portion of the suit property to the squatters of Kamae informal settlement, who, according to the National Land Commission and the decision of Komingoi J, have been on the land since 1984, is for public purposes.

144. From the deposition of the Director of Legal Affairs of the National Land Commission and the submission of its counsel, the issue of the allocation of a portion of the suit land to the three organizations to offer health services to the University community and the public, and the Ministry of Lands and Physical Planning to settle the squatters who have been on the land since 1984 has not been presented to the Commission.

145. The evidence before this court shows that the Council of Kenyatta University, the 2nd respondent, vide its meeting of July 15, 2022 approved the re-planning of the suit property as suggested by the Cabinet for the allocation of a portion of the University land to KUTRRH, WHO, ACDC and the squatters. In the Minutes of July 15, 2022, the Council of the University, made up of nine members, noted as follows:

> " The council acknowledged that the re-planning exercise would result in the establishment of auxiliary institutions and services that would argument the university's academic and research programmes. At the same time, the re-planning would secure the university's collegial enjoyment of its property with the neighbouring Kamae settlement, with the remaining land still being available for support of the university's future expansion plans."

146. The Kenyatta University Council further noted as follows:

> " The council noted that the hospital, which was conceptualized from the University has created a niche in the cancer care and treatment space, as to invariably result in the further specialization of the university's medical training and research programmes, which will ultimately lead to an augmenting of Kenya's standing as a regional hub for not only medical training and tourism, but also Africa's leading hub for science, technology and innovation."

147. According to the council, the replanning process outlined in the letter of July 7, 2022 by the 1st respondent, on behalf of the cabinet, "was for the benefit of the University, the hospital, the area residents and the greater national interest."

148. As I have stated above, the letters of July 4, 2022 and July 7, 2022, and any purported cabinet resolution, are inconsequential, other than being a request to the University Council, just like any request that can

be made by any Kenyan, for setting aside of the University's land for public purpose and or the benefit of the university. The author of the said letters cannot be said to have alienated the suit property.

149. It would appear that having considered the said letters, and having looked at the request, as the body mandated to manage the University's land, the council did allocate the land in the manner suggested in the letter, and gave its reasons for doing so.

150. I have not been shown any evidence by the petitioner, *prima facie*, that the Kenyatta University Council, which passed the resolution of July 15, 2022 to alienate a portion of the University land for public purpose was in the office illegally. Indeed, no proceedings have been placed before me to show that the appointment of the council that passed the resolution of July 15, 2022 on behalf of Kenyatta University to alienate a portion of the suit property was in the office illegally.

151. In fact, the petitioner did not annex the resolution of the previous council, if at all, indicating its reservation on the contents of the letters by the 1st respondent requesting the University to alienate a portion of its land for the four purposes enumerated therein.

152. When the court asked counsel for the 2nd interested party if there was in existence a resolution by the council refusing to alienate the suit property, counsel for the 2nd interested party admitted that no such resolution was passed.

153. Although counsel for the petitioner submitted that the letter by the 1st interested party (who did not file an affidavit to support or oppose the application) shows that the council rejected the alienation of the University land, it is the finding of this court that the letter by the 1st interested party cannot be equated to a resolution of the council. The resolution, if it existed at all, should have been exhibited.

154. The main lacuna in the current application is that the same was filed on July 14, 2022, while the resolution of the council was made on July 15, 2022. That being the case, I expected the petitioner to file a further affidavit to counter, if at all, the council's resolution of July 15, 2022. This was not done despite the court having given the petitioner leave to do so when the matter came up for inter partes hearing on July 27, 2022.

155. In fact, even the 2nd interested party who swore his replying affidavit on August 4, 2022 neither impugned the council's resolution of July 15, 2022 nor the manner in which the council was appointed. The 2nd interested party did not inform the court what was illegal about the appointment of the council that passed the resolution of July 15, 2022.

156. In conclusion, it is the finding of this court that from the Minutes of the Council of Kenyatta University (the 2nd respondent) dated July 15, 2022, the Council, *prima facie*, justified the allocation of a portion of the University's land, to wit, 30 acres to the World Health Organisation (WHO); 10 acres to the Africa Center for Disease Control (ACDC); 180 acres to Kenyatta University Teaching, Referral and Research Hospital (KUTRRH) and 190 acres to facilitate the resolution of Kamae Settlement Scheme impasse.

157. Having analysed the purposes for which the parcels of land in issue are supposed to be utilized for as captured by the 2nd respondent (the Council of Kenyatta University), and in view of the public purposes that the said land, *prima facie*, will be used for, and the justification given by the Council of Kenyatta University in its meeting held on July 15, 2022, it is my finding that the petitioner has not established a *prima facie* case with chances success.

158. For those reasons, the application dated July 14, 2022 is dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 12TH DAY OF AUGUST, 2022.

O. A. ANGOTE

JUDGE

In the presence of:

Mr. Cohen holding brief for Mr. Ahmednassir (S.C) for the Petitioner

Mr. Allan Kamau for the 1st, 3rd, 4th, 5th and 6th Respondents

Mr. Mwangi holding brief for Mr. Wetangula for the 2nd Respondent

Ms Akello for the 4th Respondent

No appearance for the 1st Interested Party

Mr. Manwa for the 2nd Interested Party

Court Assistant - Tracy