REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 1282 of 2000

PERIS WAMBUI MATIRU..... PLAINTIFF

VERSUS

THE COMMISSIONER OF LANDS.....1ST DEFENDANT

PARADISE SAFARI PARK LTD..... 2ND DEFENDANT

EAST AFRICAN MOTOR

SPORTS CLUB..... 3RD DEFENDANT

JUDGMENT

The initial action in this case was started by way of plaint dated 10.08.2000 and failed the same day against the Attorney – General as 1st defendant and Paradise Safari Park Ltd as 2nd defendant. Paradise Safari Park Ltd (2nd defendant) filed defence on 11.09.2000 while the Attorney – General (then 1st defendant) filed defence on 27.10.2000.

Amended plaints were filed on 09.07.01, 31.07.01 and finally on 10.12.02 in all of which the Attorney – General was deleted as 1st defendant and the Commissioner of Lands substituted as 1st defendant alongside Paradise Safari Park Ltd as 2nd defendant and East African Motor Sports Club as 3rd defendant.

The plaintiff's counsel stated in his written submissions filed on 27.11.06 that the plaintiff's case is set out in her amended plaint filed in July, 2001. However, at the end of his examination-in-chief, P.W.2 relied on the Amended Plaint filed on 10.12.02. The court record shows that two amended plaints were filed in July, 2001, i.e. on 09.07.01 and on 31.07.01 Neither of the two plaints is dated. The third amended plaint is dated 10.12.02 and filed the same day. I shall take the amended plaint of 10.12.02, being the latest in the series, to be the ruling plaint. It prays for judgment against the defendants for:-

a) A declaration that the compulsory acquisition of plaintiff's 200 acres of L.R. No.8481 and all resultant parcels is illegal, null and void.

b) A declaration that the allocation of LR. Nos.18118 and 25195 to the 2nd defendant and 3rd defendant is illegal, null and void.

c) A declaration that the portion measuring 200 acres from L.R. Nos.18118 and 25195 should revert to the plaintiff.

d) General damages for loss of user.

e) Costs of this suit.

f) Any other relief as this honourable court may deem fit and just to grant.

When this matter first came up before me on 11.04.05, it was for hearing of the main suit. The plaintiff was represented by learned counsel, Mr. D.K. Thuo. The 1st defendant was represented by learned counsel, Mr D.O. Rabala. The 2nd defendant was represented by learned counsel, Mr R.M. Muthama. No reference was made by any of the parties to the 3rd defendant. The parties represented at the session sought to proceed with hearing of the case, they were allowed to do so and hearing started.

Before highlighting the evidence of the parties to this suit, I consider it useful to record here that the 1st defendant maintained that his acquisition of part of the plaintiff's, land L.R. No.8481 was done lawfully and that in any case the plaintiff's suit is statute-barred. The 2nd defendant likewise maintained that the plaintiff's suit is time-barred and also admitted being the registered owner of L.R. No.18118.

Plaintiff's counsel called two witnesses, i.e. the plaintiff Peris Wambui Matiru who testified as P.W.1 and Amon Matiru Ngwaci who testified as P.W.2.

P.W.1's evidence may be summarized as under. She is wife to P.W.2 who bought L.R.8481 situated at Kasarani, Nairobi in her name. The land measured approximately 344 acres. In 1980 the Government compulsorily acquired the land. She, P.W. 1 donated a General Power of Attorney to her husband, P.W.2 on 01.02.01. P.W.1 produced the Power of Attorney as Plaintiff Exhibit 1. P.W.1 said, however, that her husband knew more about the subject land and its subsequent compulsory acquisition and that he was in a position to elaborate further on the subject.

P.W.2's evidence may be stated as under. He is a businessman at Kikuyu Township. He bought L.R.No.8481 situated at Kasarani, Nairobi from a company called Quarries Ltd and had it registered in the name of his wife, P.W.1. P.W.2 produced as Plaintiff Exhibit 2 a photocopy of the transfer dated 29.12.76 of L.R. No.8481 from Quarries Ltd to P.W.1, Peris Wambui Matiru. Later P.W.2 got a Grant I.R. 10796 of the land in the name of his wife, P.W.1. This witness, P.W.2 produced the Grant as Plaintiff Exhibit 3. It shows the land as measuring 344 acres or thereabouts.

In 1980 the Government acquired part of the land, i.e.294 acres, out of the original 344 acres, leaving 50 acres. The acquisition was gazetted in Gazette Notice No.1550 dated 27.05.80 and published on 30.05.80. P.W.2 produced the Gazette Notice as Plaintiff Exhibit 4. It was P.W.2's evidence that the subject land was acquired <u>for future extension of a national sports complex</u> and that it is on the eastern side of the present Kasarani Sports Complex. P.W.2 said that after the acquisition of 294 acres, the Government took possession of the entire 344 acres and never issued the plaintiff with a title deed for the extra 50 acres. P.W.2 said the Government proceeded to subdivide the entire 344 acres and gave 200 acres thereof to Paradise Safari Parks (Holdings) Ltd. The Government also took 50 more acres from neighbours and also gave them to Paradise Safari Parks Holdings. P.W.2 said, however, that his interest is in the 200 acres taken form his land and given to Paradise Safari Parks (Holdings) Ltd. P.W.2 also said he sued East African Motor Sports Club because they were given part of the 200 acres taken from his land. He referred in the latter regard to letter of allotment dated 01.09.2000 alloting East African Motor Sports Club some 20 hectares of unsurveyed site for motor race track and said that to the best of his knowledge the land compulsorily acquired from the plaintiff was never put to public use, adding that the 2nd defendant and 3rd defendant are private companies.

P.W.2 acknowledged that he was paid on behalf of the plaintiff Kshs.3,100,000/= compensation for the 294 acres taken from the plaintiff, that he asked for a titled deed to the remaining 50 acres but no title was issued, so he retained the original title for the 344 acres. He said he had been authorized to get a surveyor to excise the 50 acres, that he did so and sent the requisite deed plan in order to get a title deed. The response P.W.2 got was a letter of 15.11.99 from the Commissioner of Lands to the effect that the previous letter authorizing him to excise 50 acres had been withdrawn. He produced the letter of 15.11.99 as Plaintiff Exhibit 5. The said letter actually informed the plaintiff that the land in question had squatters and that the letter authorizing him to excise 50 acres had been cancelled. P.W.2 said the land given to Paradise is L.R. No.18118.

P.W.2 reiterated the prayers contained in his amended plaint dated 10.12.02 saying it is the one the court should concern itself with.

During cross-examination by 1st defendant's counsel, P.W.2 essentially told the court as under. He bought the subject land from Quarries Ltd in 1954 and registered it in the name of his wife, P.W.1 because according to the Christian marriage he contracted with his wife, he and the wife are the same. He did not oppose the acquisition but he sought compensation and was given compensation for 294 acres. P.W.2 recalled that the stated purpose for the compulsory acquisition was for future extension of a national sports complex. However, after acquiring the land, the Government gave it to a private company. He noted that 200 acres were given to Safari Parks (Holdings) Ltd on a 45 – year lease from 01.04.91. Note is made here that the size of the land subject of the 45 year lease is given in hectares as 100.1 hectares. P.W. 2 drew attention to condition 5 of the lease which provides that the land and the buildings shall be used only for International Golf Course. He noted that there are buildings on the said leased land put up by Safari Parks (Holdings) Ltd after acquisition of the land. In P.W. 2's view the land which was acquired for a public purpose or utility could not be given to a private company or to an individual since what the individual accrues from the land would be his, not for the public. P.W.2 said he did a search which revealed that the land was to be used for international golf course, which should have been done by the Government. If the course is put up by a private entity, like Safari Parks (Holdings) Ltd, it will not be accessible to members of the public who cannot pay. In P.W.2's view, the sports facilities should have been built by the Government. He said he wants his 50 acres plus 150 acres making the 200 acres given to 2nd defendant refunded to him. He said if the court orders return of the 200 acres to him and orders refund of the compensation plus interest, he would be prepared to make a refund.

During cross-examination by 2nd defendant's counsel, P.W.2 told the court that the land to the 2nd defendant was given in 1991 but he, P.W.2 was not aware of the allocation until 1999 after receiving the Commissioner of Land's letter of 15.11.99 (Plaintiff Exhibit 5) and that he filed the present suit after getting Exhibit 5. P.W.2 said his land is L.R. No.8481; that the land allocated to 2nd defendant is L.R. No.18118; and that L.R. No.18118 is within L.R. No.8481. P.W.2 said the company allocated the land he claims is Paradise Safari Park Ltd; that they applied for the land under the name of Safari Park Hotel; that the grant of L.R. No.18118 is to Safari Parks (Holdings) Ltd; that they have been changing names and are now called Paradise Safari Parks (Holdings) Ltd; and that when he, P.W.2 filed the amended plaint on 10.12.02, they were called Paradise Safari Park Ltd. P.W.2 said he was claiming the 50 acres not given back to him and was also claiming 150 acres excised from his land, totaling 200 acres excised from his land and given to a private company, contrary to the public purpose for the acquisition. It was P.W.2's contention that the mere reference to the golf course as international does not make the usage public – any more than International Life House, Nairobi would be described as public. P.W.2 acknowledged with reference to the purpose given in Gazette Notice No. 1550 of 1980 (Plaintiff Exhibit 4) for the acquisition , i.e. future extension of National Sports Complex, that golf is a sport as is also motor racing. However, he insisted that the 2nd and 3rd defendants are private companies and sports conducted by them are private enterprises. P.W.2 said he was aware that Kasarani Sports Stadium stands on land different from L.R. No.8481 but insisted that the land given to 2nd and 3rd defendants falls within the 344 acres taken from him – he said that the letter of allocation for L.R. No.18118 shows that the land falls within the 344 acres. He said there are buildings on the land which he takes to belong to the 2nd and 3rd defendants. He said he was not aware if there are squatters on the subject land. P.W.2 acknowledged that in 1995 he took out proceedings to excise his 50 acres from where there were no shanties but said he never took out

proceedings to evict squatters. P.W.2 said he has never had direct dealings with the 3rd defendant; that his complaint is against the 1st and 2nd defendants as the 3rd defendant never responded to his summons, so the plaintiff concluded that the 3rd defendant was not interested in this matter.

P.W.2's testimony marked the end of the plaintiff's case.

The next person to testify was Japhet Kimathi Murumbi (D.W.1) who gave evidence on behalf of the 2nd defendant as the witness for the 1st defendant had not arrived. Murumbi's evidence may be stated as under. He worked for Safari Park Hotel as Human Resources and Administration Manager. Safari Parks (Holdings) Ltd own Safari Park Hotel locally. In 1991 Safari Park Hotel applied for land from the Government of Kenya in Kasarani area bordering Moi International Sports Centre within the neighbourhood of the hotel. Land measuring approximately 100.1 hectares was allocated for 45 years for development of a gold course. Later Grant IR.58398 was issued – to Safari Parks (Holdings) Ltd – and the land was registered as L.R. No.18118. Safari Parks (Holdings) Ltd took possession of the land but did not construct the gold course. He said plans to construct the golf course are underway; that financing is being arranged in phases; that already about Kshs.100 million has been sourced; and that the golf course construction project is on course. Murumbi added that the understanding with the Government of Kenya is that Safari Parks (Holdings) Ltd is to develop a golf course to be used as a public utility by hotel guests and Kenyans and any other person wishing to use the course. Murumbi said he did not know the plaintiff herein and was not aware if the land was previously the plaintiff's. Murumbi told the court that Safari Parks (Holdings) Ltd has been payimg to the Government at Kshs.150,000/= per annum. He said he does not know a company called Paradise Safari Park Ltd (2nd defendant) or East African Motor Sports Club (3rd defendant) and that Safari Parks (Holdings) Ltd has not sold any part of the land.

It was Murumbi's evidence that Safari Park Hotel – owned by Safari Parks (Holdings) Ltd locally – is still in the process of building of golf course; that Safari Parks (Holdings) Ltd would suffer massive losses if they don't continue with development of the golf course; and that the plaintiff has no claim against Safari Parks (Holdings) Ltd. Murumbi referred to letter of allotment of and grant subject matter of the present proceedings. He said the said documents are part of the bundle of the 2nd defendant's list of documents and proceduced them as follows:-

1. Letter of allotment dated 21.03.91 – 2nd Defendant's Exhibit ' A'

2. Grant dated 26.03.93 effective from 01.04.91 – 2nd Defendant's Exhibit ' B'

Murumbi's evidence when cross-examined by 1st defendant's counsel may be summed up as follows. He was not in the employment of Safari Park Hotel when the hotel applied for the suit land in 1991 as he joined the hotel in 1993. He acknowledged that the land was given on condition that a public utility in the form of a golf course be constructed but that no golf course has been constructed 15 years down the line. He said, however, that a lot of planning has been put in place although he had not brought any documentary evidence of such planning or that Kshs.100 million has been sourced by the hotel for the golf course. According to him, if the land is taken away, the hotel would incur heavy losses because it has been maintaining the land. He said the hotel has not fenced the land but it has constantly mowed the grass on it and added that he has not seen anybody coming to say he owns the land. He also acknowledged that he had not produced anything to show that the hotel has been paying land rent.

When cross-examined by 2nd defendant's counsel, Murumbi testified as follows. Safari Park Hotel for which he worked is a trading name for Safari Parks (Holdings) Ltd. He acknowledged that the 2nd defendant herein was served with summons to enter appearance. He was referred to the 2nd defendant's defence dated 11.09.2000 and filed the same day and he confirmed that the 2nd defendant admitted vide paragraph 1 its description as Paradise Safari Park Ltd. He acknowledged that his company is a private company. He was referred to Defence Exhibits ' A' and ' B' and he acknowledged that the Deed Plan part of the Letter of Allotment dated 21.03.91 (Defence Exhibit 'B') states that the land is 'PROPOSED SITE FOR GOLF COURSE (Moi International Sports Centre)'. He acknowledged that the grant does not

show that the land was to be put to public use. He said he was not aware if his company has borrowed heavily against the title to the subject land, or used as security for the Kshs.100 million he said had been sourced for the proposed golf course, or whether the land is free. He said there were no buildings on the land as late as the week before he began his testimony (on 21.06.05).

During re-examination by his own counsel, Murumbi said he got the information he had given to the court from a Korean Manager he took over from and that the said Manager was no longer in Kenya. He said no time limit was given in the allotment letter and grant for putting up the gold course and that Safari Parks (Holdings) Limited as legal owner is at liberty to borrow on the property

At the conclusion of Murumbi's cross-examination, the 2nd defendant's counsel announced that to be the close of the 2nd defendant's case.

Further hearing was scheduled for 28.07.05. On this latter date there was a new counsel, Mr P.K. Rotich acting for 1st defendant. Mr Rotich said he had just taken over from 1st defendant's previous counsel, Mr Rabala. Mr Rotich sought adjournment to familiarize himself with what had gone on before. The application for adjournment was opposed by plaintiff's counsel but the court granted the adjournment. Counsel for 2nd defendant prayed to be allowed to re-open the 2nd defendant's case at the resumed hearing, to call one Mr Lee who was outside Kenya when D.W.1, Mr Murumbi testified for the 2nd defendant but he (Mr Lee) had returned to the country. The court granted the request for Mr Lee to testify in this case. Further hearing was fixed for 28.11.05. On this latter date the case went before Njagi, J but there was no appearance for the parties and the matter was stood over generally.

The case came to me next on 31.05.06 when 2nd defendant's counsel said the case should have come up for hearing on 20.02.06; that a Mr J.C. Kim came but the parties could not be heard and that they were referred to the Duty Judge for directions; that the plaintiff took 31.05.06 for hearing and served the 2nd defendant on 20.04.06; that attempts by the 2nd defendant to get Mr Kim to come and testify were unsuccessful as he had retired from employment. Counsel for 2nd defendant sought adjournment for 60 days. I adjourned the hearing to 27.09.06. On this latter date the case could not be reached owing to a congested cause list and it was fixed for 08.11.06. No mention was made of Mr Kim or anybody else having to testify for the 2nd defendant. Counsel for the 1st defendant told the court that what was next was the 1st defendant's case and he proceeded to call Mr Mwenda Kinyinga Mbogori (D.W. 2) to testify for the 1st defendant.

Mr. Mbogori's evidence-in-chief may be stated as follows. He was a Land Officer working under the Commissioner of Lands. His (Mbogori's) duties included processing of leases and grants and land allocations. He did not know the plaintiff personally but knew about her through Ministry of Lands records. In 1980 the Government, through the Commissioner of Lands, entered the plaintiff's land and gazetted a notice of acquisition and of inquiry under the Land Acquisition Act, Cap.295 with intent to acquire the land for the Kasarani International Sports Centre. From records available, the acquisition was done in 1981 and the plaintiff compensated to the tune of Kshs.3,436,200/=. The size of the plaintiff's land was 344 acres and the Government acquired 294 acres. Mbogori proceeded to narrate that when one is compensated, the Government gazettes a notice of taking possession and vesting of the land in the Government. The vesting order is then registered in the respective title acquired and the land is now owned by the government. Mbogori said he knew the 2nd defendant, Paradise Safari Park Ltd and the 3rd defendant, East African Motor Sports Club. He (Mbogori) said the Commissioner of Lands became 1st defendant following the amended plaint filed on 31.07.01.

With regard to the 2nd and 3rd defendants, Mbogori said the 2nd defendant was allocated 100 hectares, i.e. about 250 acres; that the 3rd defendant was allocated 20 hectares, i.e. about 50 acres; and that he was not sure if the 100 hectares and 20 hectares falls on the plaintiff's land. He added that the land acquired from the plaintiff forms the land mass acquired for Kasarani Sports Complex. The land allocated to the 2nd defendant was supposed to be used for International Golf Course and Club and related facilities, i.e.

land and buildings. The land allocated to the 3rd defendant was supposed to be used for Motor Race Track and Sports Club. The 2nd and 3rd defendants were issued with titles to the aforesaid lands as follows:-

a) To Safari Park: I.R. 58398/1

b) To East African Motor Sports Club: I.R. 85126/1.

The land allocated to Safari Park is still available for their use – the title is intact. However, the East African Motor Sports Club surrendered their title back to the Government on 02.10.02.

It was Mbogori's contention that the International Golf Course for which the 2nd defendant was allocated the land in question was supposed to serve the public; that there is no record in Lands Office to stop the 2nd defendant from constructing an International Golf Course; and that there is no record that the plaintiff paid back any money to the Government after being paid the compensation of Kshs.3,436,200/= in 1981. Mbogori added that after the Government compulsorily acquires land, there is no legal way the person from whom the land was so acquired can claim and be given back the same land and that in the present case the plaintiff has not sought to be given back the same land. At this juncture, plaintiff's counsel informed this court that an interlocutory judgment was entered against the 3rd defendant, East African Motor Sports Club and that the said defendant no longer has any interest in the present proceedings. And counsel for 1st defendant informed the court that most documents on record are the ones D.W.1, Japhet Kimathi Murumbi had referred to; that there was no dispute about them; that the 1st defendant would not produce any documents but would submit on the documents already produced.

During his cross-examination by 2nd defendant's counsel, Mbogori acknowledged that the land mass for Kasarani International Sports Complex was put together by acquiring several plots, including the plaintiff's land. Allocation to the 2nd defendant was in March, 1991 while allocation to 2nd defendant was in September, 2000 and that both of these allocations were after the main stadium had been built. The land allocated to the 2nd and 3rd defendants was land which remained unused after the main stadium had been built and that there are other allotees to the land which remained unused after the main stadium was built. It was Mbogori's evidence that it is not possible to relate current titles to the previously acquired titles, neither is it possible for the plaintiff to say that what was allocated to 2nd and 3rd defendants falls on the land compulsorily acquired from her. According to Mbogori, the use for which the Government allocated land to the 2nd defendant is a public purpose and that the title is tied to that purpose.

Cross-examined by plaintiff's counsel, Mbogori told the court that he did not know the acreage of Kasarani International Sports Complex and that the plaintiff's land is not the only land compulsorily acquired for the complex. He said he did not know the names of other people in the neighbourhood of the complex. It was Mbogori's evidence that the Government required all the 294 acres acquired from the plaintiff and that the 294 acres were amassed with other land parcels to form the Kasarani International Sports Complex. He did not, however, know how much of the 294 acres acquired from the plaintiff went into the construction of the complex. Likewise he was not sure if the 100 hectares allocated to the 2nd defendant came from the land compulsorily acquired from the plaintiff. In the same vein, he was not sure if the 20 hectares allocated to the 3rd defendant came from the land compulsorily acquired from the plaintiff.

Mbogori added that the 344 acres from which 294 acres were compulsorily acquired were initially represented by L.R. 8481 but he was not sure if that land has given rise to resultant parcels 18118 and 25195 as he did not have subdivisions of L.R.8481. He reiterated that the 3rd defendant surrendered the land allocated to it on 02.10.02 and was given alternative land in Ngong. He acknowledged that the 2nd and 3rd defendants are limited liability companies and that the Government has no stake in private companies. He added that whether it is right for the Government to acquire land compulsorily from a

subject and give it to a private company depends on the purpose. He acknowledged that the allocation to the 2nd defendant was in 1991 and that no International Golf Course has been put up by the 2nd defendant on the 100 hectares allocated to the said 2nd defendant. Mbogori conceded that the plaintiff was to retain 50 acres out of the 344 acres, that her interests are still intact in the title she holds, i.e. I.R. 10796 for 344 acres but the Government has entered a caveat on it claiming the 294 acres compulsorily acquired from her.

Re-examined by 1st defendant's counsel, Mbogori said that the land allocated to the 2nd defendant was for a public purpose. It was Mbogori's contention that land surrendered to the Government as in the case of the land allocated to 3rd defendant becomes Government land and the original owner, i.e. plaintiff, would have no role in deciding how the Government uses its land. With regard to Title No.8481, Mbogori said the Government entered a caveat on it to protect Government interest in the acquired portion of 294 acres as by then no survey had been done to excise the 294 acres from the 344 acres. Mbogori confirmed that the plaintiff should not have lost the 50 acres unacquired vide the requisite Gazette Notice, Plaintiff Exhibit 4 and that the 50 acres are available to the plaintiff.

Conclusion of Mbogori's re-examination marked the end of 1st defendant's case and also the end of evidence in this case. The parties asked and were granted leave to file written submissions and they did so. The written submissions may be summarized as under.

Plaintiff's counsel said the plaintiff's case is set out in amended plaint filed in July, 2001. He pointed out that acquisition of the plaintiff's land took place on or about 30.05.80 under the Land Acquisition Act, Cap. 295 and that the said Act derives its validity from section 75 of the Constitution of Kenya. The plaintiff's complaint is that after the land was acquired from her, a portion of about 200 acres was allocated to the 2nd and 3rd defendants which are private ventures which cannot hold land for public use and that, therefore, the allocations to the 2nd and 3rd defendants are unlawful. Plaintiff's counsel also ascribed fraud to the 1st defendant in compulsorily acquiring her land ostensibly for public use, only later to allocate part of it to private companies. Counsel also maintained that the plaintiff's suit is not time-barred because he did not know of the allocations to 2nd and 3rd defendants until she received the Commissioner of Lands' letter dated 15.11.99 and that the plaintiff filed the present suit on 10.08.2000, i.e. within less than a year. Plaintiff's counsel also submitted that the Commissioner of Lands cannot deal with compulsorily acquired land as he pleases. Counsel relied for this proposition on Mohamed -vs- Commissioner of Lands and 4 others, Kenya Law Reports Environment and Land (2006) 217. That case related to the compulsory acquisition of land belonging to the plaintiff, Niaz Mohamed Janmohamed by the Commissioner of Lands for constructing a new access road to Kisauni and Nyali Estate necessitated by the construction of New Nyali Bridge. A portion of the land acquired from Mohamed remained unutilized after construction of the new access road. The Commissioner of Lands, with the connivance, consent or knowledge of the Municipal Council of Mombasa created a new leasehold title from a small portion which remained unutilized for the new access road and allocated the new leasehold title to the defendants. The plaintiff saw the creation of the new leasehold title and its allocation to a third party as interference with his easement rights of access to the new road and its road reserve and also an attempt to unlawfully alienate public land to private developers. Accordingly, the plaintiff filed a suit against the Commissioner of Lands, the Mombasa Municipal Council and the allotees and simultaneously filed an application for an injunction to prohibit the defendants from developing or dealing in the suit land until determination of the case. In its ruling on the application for interlocutory injunction, the High Court (Waki, J – as he then was) held, *inter alia*, essentially that upon compulsory acquisition of land and the consequent vesting of that land in the Government, the land must be used for the purpose for which it was acquired and that since the land in that case was acquired for a specific purpose, i.e. construction of an access road, unutilized portions of the acquired land should remain as a road reserve.

In his submissions, 1st defendant's counsel essentially maintained that once the Government, through the Commissioner of Lands, acquired the plaintiff's land and she received compensation, her rights on the land were extinguished and ownership of the land vested in the Government absolutely. Counsel pointed out that the plaintiff accepted the compensation paid without question and submitted that the plaintiff has

no legal right to question how the Government utilises and allocates land. The 1st defendant's counsel added that there was no illegality or fraud in acquisition of the land, that the plaintiff has failed to establish and prove any claim *vis-a-vis* the 1st defendant and urged this court to dismiss the plaintiff's suit with costs to the 1st defendant.

For his part, 2nd defendant's counsel submitted that the 2nd defendant was wrongfully joined to the suit as it was never involved in the transactions subject matter of the suit. The 2nd defendant's counsel added that in any case the plaintiff's suit is time-barred as against both defendants since section 3 (1) of the Public Authorities Limitation Act, Cap.39 provides that no proceedings founded on tort shall be brought against the Government or a local authority after the end of 12 months from which the cause of action acrrued. Counsel also submitted that since the plaintiff was dispossessed of the land upon its compulsory acquisition in 1980, she should have brought her action in 1992 having regard to section 7 as read with section 9 (1) of the Limitation of Actions Act, Cap.22 which are to the effect that an action for the recovery of land cannot be brought after 12 years and that the right of action accrues on the date of dispossession or discontinuance. It was the 2nd defendant's counsel's contention that the Minister and Commissioner of Lands had power to do what they did, noting that the land allocated to the 2nd defendant was on condition that the land be used for development of International Golf Course and Club and nothing else. Counsel noted that the grant to the 2nd defendant was made under the Registration of Titles Act, Cap.281 whose section 23 (1) provides that the certificate of title thereunder shall not be subject to challenge except on the ground of fraud or misrepresentation to which the holder of the title is proved to be a party. The 2nd defendant's counsel submitted that no evidence of requisite fraud and misrepresentation by the 1st and 2nd defendants had been tendered with regard to the compulsory acquisition. In particular, 2nd defendant's counsel submitted that there was no evidence that the 1st and 2nd defendants were involved in a criminal conspiracy to deprive the plaintiff of her land. Counsel added that no concrete evidence had been tendered to establish that the land comprising L.R. 18118 whose allocation to a third party is being challenged came from L.R. 8481 acquired from the plaintiff. Counsel for 2nd defendant pointed out that what was acquired from the plaintiff was amalgamated with land acquired from other land allotees to form one land mass for the Kasarani Sports Complex. After the complex was built, there was surplus land and from it came the land whose allocation to a third party is being challenged. Counsel pointed out that in any event L.R. 18118 was allocated to Safari Parks (Holdings) Ltd, not to the 2nd defendant.

The 2nd defendant's counsel distinguished Mohamed -vs- Commissioner of Lands & 4 others in that whereas in that case the land was compulsorily acquired for construction of a public road; after construction of the road a piece was left unused and it was allocated to a third party for some unspecified purpose. In the present case the land was acquired for the purpose of developing International Golf Course and Club and it was 2nd defendant's counsel's contention that the golfing facilities, once developed, will be part of the sports complex and serve the purpose for which the land was acquired in the first place. As for the land allocated to the 3rd defendant, counsel for 2nd defendant informed this court that the 3rd defendant surrendered the land back to the 1st defendant.

The 2nd defendant's counsel urged this court to dismiss the plaintiff's suit with costs to the 2nd defendant.

I have given due consideration to the rival pleadings, evidence and submissions of the parties.

Gazette Notice No.1550 dated 27.05.80 (Plaintiff Exhibit 4) used by the Commissioner of Lands (1st defendant) to acquire part of the subject plaintiff's land under the Land Acquisition Act, Cap.295 notified as follows:

'In pursuance of section 6 (2) of the Land Acquisition Act (Cap.295), I give notice that the Government intends to acquire the following land for future extension of National Sports Complex.'

The parcels of land covered by the acquisition notice were 3, all in Kasarani, Nairobi measuring 168 acres, 170 acres and 294 acres, totalling 632 acres. The last of those parcels measuring 294 acres is the one which belonged to the plaintiff and it constituted a portion of the plaintiff's 344 – acre land there.

I frame the main issues for determination in this case as under: -

1. Whether the suit against the defendants is statute/time-barred.

2. Whether the 2nd defendant was wrongly joined to the suit.

3. Whether 200 acres forming L.R. 18118 was taken out of 294 acres compulsorily acquired from the plaintiff's 344 acres forming the then L.R. 8481 and, if so, whether acquisition of the 200 acres is illegal, null and void.

4. Whether allocation of the resultant L.R. Nos.18118 and 25195 allocated to the 2nd and 3rd defendants, respectively, is illegal, null and void.

5. Whether the parcel constituting L.R. 18118 and the parcel constituting L.R.25195 came from L.R. 8481 and whether the said parcels L.R. 18118 and L.R. 25195 should revert to the plaintiff.

6. Whether plaintiff entitled to 50 acres not excised from L.R.8481.

I now turn to the aforementioned issues:-

1. Whether the suit against the defendants is statute/time – barred.

The main proponent of the plea of statute or time – bar was 2nd defendant's counsel who contended that the plaintiff's suit is statute/time – barred as against both the 1st defendant and 2nd defendant. Counsel pointed out that the acquisition took place in 1980 but the suit was filed in 2000. As I understood it, the 2nd defendant's position was that as against the 1st defendant, being a public authority, the suit should have been filed within 12 months of the acquisition, i.e. within 12 months from the 1980 acquisition. For this proposition, counsel relied on section 3 (1) of the Public Authorities Limitation Act. With regard to the 2nd defendant, counsel for 2nd defendant contended that suit should have been filed within 12 years from the 1980 acquisition, i.e. by 1992 instead of 2000.

Section 3(1) of the Public Authorities Act provides that:

'3. (1) No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.'

The compulsory acquisition notice (Plaintiff Exhibit 4) published by the Commissioner of Lands/1st defendant is dated 27.05.80. If we take that to be the date of acquisition, the defendants' contention is that the plaintiff's suit should have been filed as against the 1st defendant by May, 1981, but that the suit was filed on 10.08.2000 instead. This contention ignores the fact that the plaintiff's complaint is not against the initial acquisition. In fact she accepted compensation for the acquisition without any challenge. Her complaint is that after the 1st defendant acquired her land 'for future extension of National Sports Complex' whose construction she understood would be undertaken by the Government, the 1st defendant later allocated some of the land (about 200 acres) acquired from her to private entities. P.W.2, Amon Matiru Ngwaci who is the plaintiff's husband told this court that he and the plaintiff did not become aware of the offending allocation until 1991 after receiving the 1st defendant's letter of 15.11.99 (Plaintiff Exhibit 5). There is some dispute according to the evidence tendered in this case as to whether there are any structures on the land allocated to private entities or not. P.W.2, Amon Matiru Ngwaci told this court that there are buildings on the subject land which he assumed to have been put up by the allottee, Safari Parks (Holdings) Ltd while D.W.1, Japhet Kimathi Murumbi, Human Resources &

Administration Manager with Safari Park Hotel who testified on behalf of 2nd defendant denied existence of buildings on the land allocated to the hotel as at the time he started testifying in this case on 21.06.05. Other than P.W. 2's word of mouth that there are buildings on the subject land, which was denied by D.W.1 also by word of mouth, no corroborative evidence was adduced, e.g. photographs, regarding existence of buildings on the land in question.

The effect of this lacuna is that it has not been established to the satisfaction of the court that any buildings existed on the subject land as at the time of hearing of this suit. I ignore P.W.2's evidence of existence of buildings on the subject land and find that there were no buildings thereon as at 21.06.05. This finding tends to lend credence to P.W.2's contention that he was not aware of the questioned allocation until he received the 1st defendant's letter to the plaintiff dated 15.11.99. I hold that time started running against the plaintiff after the letter of 15.11.99 reached her and P.W.2. and that as far as the 1st defendant is concerned, the suit should have been filed within 12 months of 15.11.99 pursuant to section 3(1) of the Public Authorities Limitation Act. Since the initial plaint was filed on 10.08.2000, which was within 12 months of 15.11.99, I find that the suit was filed within time as against the 1st defendant.

The 2nd defendant, being a private entity, does not of course, enjoy the protection afforded by the Public Authorities Limitation Act. However, the finding that time began to run against the plaintiff from November, 1999 coincidentally also benefits the plaintiff even as against the 2nd defendant in that applicable law on limitation would be section 7 of the Limitation of Actions Act which provides:

'7. An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.'

The finding that time began to run against the plaintiff from November, 1999 means that she had 12 years from then within which to file suit as against the 2nd defendant, which means she had up to the year 2011 by which time to file her suit, which in this case she filed in 2000 – well within the permitted 12 years.

In view of the foregoing, I find that the plaintiff's suit is not statute/time – barred.

With regard to the 3rd defendant, plaintiffs counsel informed this court that an interlocutory judgment was entered against the 3rd defendant and that the said defendant no longer had an interest in the proceedings herein. P.W.2, however, told the court that his complaint is against the 1st and 2nd defendants only as the 3rd defendant never responded to summons and that he, P.W.2. concluded that the 3rd defendant was not interested in this matter. And counsel for 2nd defendant added that the 3rd defendant surrendered the land allocated to it back to the 1st defendant in exchange for alterative land in Ngong.

2. <u>Whether the 2nd defendant was wrongly joined to the suit</u>.

The 2nd defendant's counsel contended that since the land subject matter of the suit is L.R. 18118 comprising 100.1 hectares, estimated at approximately 200 acres, which was allocated by the Government to Safari Parks (Holdings) Limited but the plaintiff sued Paradise Safari Park Limited (2nd plaintiff) instead which is separate legal entity with separate assets, there is misjoinder of the 2nd defendant and that the suit against the 2nd defendant be dismissed as against the 2nd defendant with costs. In this regard, P.W.2 told this court that the company allocated the land he claims was called Paradise Safari Park Limited; that they applied for the land under the name of Safari Park Hotel; that the grant was made to Safari Parks (Holdings) Limited; that they have been changing names and were as at the time P.W.2 was testifying (11.04.05) called Paradise Safari Parks (Holdings) Limited; but that when the plaintiff filed this suit they were called Paradise Safari Park Limited. On the issue of proprietorship of the subject land, i.e. L.R.18118, D.W.1 Japhet Kimathi Murumbi told the court that Safari Parks (Holdings) Limited own Safari Park Hotel locally. I note in this regard that on 21.03.91 the Department of Lands wrote a Letter of

Allotment (Defence Exhibit B) to Safari Park Hotel, Nairobi offering the hotel 'UNS. PLOT-KASARANI' FOR GOLF COURSE. The area of the plot is given as 100 hectares approximately for a term of 45 years from 01.04.91 at annual rent of Kshs.150,000/=. There is also in the court file a photocopy of Grant No. I.R.58398 for a term of 45 years from 01.04.91 at annual rent of Kshs.150,000/= for L.R. No.18118 measuring 100.1 hectares approximately but the Grant is in the name of Safari Parks (Holdings) Limited. D.W.1 who testified before me told the court that Safari Parks (Holdings) Limited own Safari Park Hotel locally and Safari Park Hotel is a trading name for Safari Parks (Holdings) Limited. D.W.1, however, denied knowledge of Paradise Safari Park Ltd, the 2nd defendant herein, but conceded in cross-examination that the 2nd defendant was served with summons to enter appearance in this case and that in its defence it admitted its description as Paradise Safari Park Limited. In this connection, I note from paragraph 2 of the 2nd defendant's defence dated 11.09.2000 that the 2nd defendant admitted being registered owner of the subject L.R.18118 while at paragraph 3 it, *inter alia*, averred that land acquired by the Commissioner of Lands (1st defendant) in 1980 from the plaintiff was acquired for lawful and valid reasons

'**and for good consideration allocated to the Second Defendant after a long period of time in the year 1991.'**

D.W.1. was called by counsel for 2nd defendant. He (D.W.1) told this court that he was working for Safari Park Hotel as Human Resources & Administration Manager and that Safari Park Hotel is a trading name for Safari Parks (Holdings) Limited. I observe that the Golf Course land in question was allotted to Safari Park Hotel but the Grant thereof was issued to Safari Parks (Holdings) Limited. D.W.1., however, denied knowledge of the 2nd defendant, Paradise Safari Park Limited. This raises a puzzling questions: If there existed no relationship between Paradise Safari Park Limited (2nd defendant) and Safari Parks (Holdings) Limited, how could the 2nd defendant admit in its defence to be the registered owner of L.R.18118 which the Grant made on 26.03.93 (Defence Exhibit A) clearly shows to have been issued in the name of Safari Parks (Holdings) Limited? There seems to have been some connection between Paradise Safari Park Limited (2nd defendant), Safari Park Hotel to whom the Golf Course land was allotted and Safari Parks (Holdings) Limited in whose name the Grant of the Golf Course land was eventually issued.

P.W.2. encompassed the puzzle surrounding identity of ownership of the subject land as under:

"*The company allocated the land I claim is Paradise Safari Park Ltd. They applied for it under the name of Safari Parks (Holdings) Ltd. They have been changing names and are now called Paradise Safari Parks (Holdings) Ltd. When we filed suit on 10.12.02, they were called Paradise Safari Park Ltd.'*

No documentary evidence was tendered before me to demonstrate the name of the entity registered as grantee of the subject land at the time of filing of this suit as Paradise Safari Park Ltd. (2nd defendant). However, from the oral evidence of P.W.2. and D.W.1, a clear picture emerges that the entity allotted or allocated the subject land has chameleon characteristics, which appear to have made it difficult for the plaintiff to cope with its colour changes. The admission by the 2nd defendant in its defence dated 11.09.2000 to be the registered owner of the subject land L.R.18118 in September 2000 while the said land was way back in 1993 registered in the name of Safari Parks (Holdings) Limited suggests that there is some relationship between Paradise Safari Park Ltd. (2nd defendant) and Safari Parks (Holdings) Limited in whose name the subject land was registered in 1993 – and I so find. In the event that the final findings herein be in favour of the plaintiff even as against the 2nd defendant, orders made against the 2nd defendant would require to be framed in such a way as to be also against SAFARI PARKS (HOLDINGS) LIMITED.

The upshot is that I find no misjoinder as such of the 2nd defendant to this suit.

3. Whether 200 acres forming L.R. 18118 was taken out of 294 acres compulsorily acquired from the plaintiff's 344 acres forming the then L.R.8481 and, if so, whether acquisition of the 200 acres is illegal,

null and void.

Note is made at the outset that the initial acquisition of the plaintiff's 294 acres out of her 344 acres forming her then L.R.8481 is not being challenged. Indeed the plaintiff through P.W.2 accepted the acquisition for the purpose specified in Gazette Notice No.1550 dated 27.05.80, i.e. for future extension of National Sports Complex, took the compensation offered and went her way. The term 'complex' is defined in Chambers 21st Century (English) Dictionary to mean, *inter alia*, 'composed of many interrelated parts'. It was after the plaintiff discovered upon getting the 1st defendant's letter of 15.11.99 that some 100.1 hectares (about 200 acres) of the land 'acquired for future extension of National Sports Complex' had been allocated to a private company that the plaintiff got miffed and she subsequently brought this suit. The suit was premised on plaintiff's contention that the 200 acres forming L.R.18118 allocated to Safari Parks (Holdings) Limited came from part of plaintiff's L.R.8481. P.W.2, husband to the plaintiff (P.W.1), told this court that he and his wife expected the Government itself to construct the National Sports Complex. They (P.W.1 and P.W.2) read fraud or misrepresentation by the 1st defendant in compulsorily acquiring the land in 1980 ostensibly for a public purpose, only later (in 1991) to turn part of the land over to a private company. The plaintiff ascribed fraudulent intent and misrepresentation on the part of the 1st defendant right from the time of the compulsory acquisition. The question is whether the plaintiff's contention is tenable.

The acquisition notice dated 27.05.80 specified the purpose of the acquisition to be for future extension of National Sports Complex. The notice did not state that construction of the complex was to be undertaken by the Government itself. On 21.03.91 (11 years later) the 1st defendant on behalf of the Government allotted 100 hectares (about 200 acres) of unsurveyed plot at Kasarani, Nairobi to Safari Park Hotel for the purposes of International Golf Course and Club and related facilities in connection therewith. Some 2 years later, i.e. on 26.03.93, the 1st defendant signed a Grant of L.R.18118 (subject land) in the name of Safari Parks (Holdings) Limited. The Grant was duly registered on 30.03.93. I find the unsurveyed plot allotted on 21.03.91 to Safari Park Hotel to be the same land which later became L.R.18118 and granted in March, 1993 to Safari Parks (Holdings) Limited for International Golf Course. According to P.W.2, once the subject land was given to a private company for putting up a Golf Course, such Golf Course if put up by the private company ceases to be for a public purpose because the developer of the Golf Course would make private gain from it. This subject is not without difficulty. One way of looking at the matter is to adopt P.W.2's perspective. An alternative approach would be the following: If the Government perceives a need to have a land bank for future use for some specified purpose beneficial to the public, would it be out of order for the Government to arrange for such land to be reserved for such purpose? And if the Government does not immediately have requisite finances to develop the facilities for attainment of the envisaged public purpose, is the Government precluded from availing such land to a developer who has the means to undertake the development aimed at achieving the envisaged purpose beneficial to the public? It seems to me that as a matter of public policy, the Government should not be so precluded, provided the power to plan, reserve and allocate land for putting up facilities for public benefit is exercised diligently and in good faith. Destro's case *infra* may illustrate the point.

In High Court Civil Case No.2414 of 1979, Riginald Destro & Others –vs- Attorney-General, the plaintiffs who were lessees of land measuring approximately 1,054 acres held on a 999-year agricultural lease from the Kenya Government had their land located in Nairobi compulsorily acquired in 1972 for what the acquisition notice merely described as a public purpose. Earlier correspondence on the matter indicates that the land was required as an extension to Nairobi's Industrial Area. The plaintiffs accepted an award subject to being able to negotiate a 3-year lease back of the residential element in their occupation at reasonable rent, etc. Some 20 acres were, accordingly, leased back to the plaintiffs for residential purposes. Between 1977 and 1979 approximately 100 acres was subdivided and the subdivisions allocated to persons other than public bodies for industrial development. Apart from the 100 acres, the rest of the acquired land remained undeveloped as at the time the plaintiffs filed suit. The plaintiffs challenged the acquisition contending that it was *ultra vires* section 75 of the Constitution. The High Court (Simpson, J – as he then was) noted, correctly, that paragraphs 6(1)(a) and (b) of the Land Acquisition Act stipulating the ingredients of 'purposes of a public body' are derived from section 75 of the Constitution of Kenya. The court found there was material on which the Minister for Lands could

properly be satisfied that, at the time of publishing the acquisition notice, the land was required for the purposes of a public body, that the acquisition was necessary in the interests of town and country planning and the development of property in such manner as to promote the public benefit. The court in Destro's case held that the acquisition was for a bona fide and proper purpose within the meaning of the Land Acquisition Act and dismissed the plaintiff's suit.

In the present case, the acquisition notice specified the purpose for the acquisition as being for future extension of National Sports Complex. Section 6(2) of the Land Acquisition Act under which the acquisition notice was published is tied to subsection (1) of the same section. The ingredients stipulated in section 6(1) as meeting requirements 'for purposes of a public body' include the acquisition being necessary in the interests of town and country planning or the development or utilization of any property in such a manner as to promote the public benefit.

Evidence tendered in this case establishes that the acquisition notice covered 3 land parcels amounting to a total of 632 acres. The 294 acres acquired from the plaintiff contributed less than half of that total land acquired for future extension of National Sports Complex in the Kasarani area of Nairobi. Subsequently, an international sports centre baptized 'Moi International Sports Centre,' was built at Kasarani on part of the land mass realized from merger of the aforesaid 3 parcels of land, including the plaintiff's, acquired for the purpose. Evidence on record indicates that the constructed Moi International Sports Centre (otherwise called the main stadium) did not exhaust the land mass accumulated from the acquired 3 parcels of land. In 1993, i.e. some 13 years after acquisition of the constituent land parcels, the 1st defendant allocated L.R.18118 measuring 100.1 hectares or thereabouts (about 200 acres) to Safari Parks (Holdings) Limited 'for the purposes of International Golf Course and Club and related facilities in connection therewith.' The declared purpose of this allocation is directly in line with the overall purpose of future extension of National Sports Complex for which the plaintiff's 294 acres was partly acquired. Therefore, in principle the allocation cannot be faulted, as was the case in Mohamed -vs- Commissioner of Lands case *(supra)* And the fact that the entity given the task of putting up an international golf course is a private company does not seem to me to detract from the status of the intended golf course as a facility to promote the public benefit within the meaning of section 6(1)(b) of the Land Acquisition Act and section 75(1)(a) of the Constitution of Kenya. It is true that not everybody can afford to participate or may be interested in playing the game of golf, but that does not mean that golf is of no public benefit. Human society routinely forms clusters held together by common interests within different clusters. Each of such clusters then constitutes the 'public' for the specified object of common interest. As the clusters multiply, they generate various 'publics' which when taken collectively form the general public. It is thus permissible to promote the public benefit through providing for clusters of the public. It is instructive to remember that Kenya is renown for her successes in athletics and other sporting activities. Those successes cannot be sustained or improved upon without modern sporting facilities, which cost money. Kenya is not that rich. If the Government were to wait until it accumulates enough finances to put up all sporting facilities required in this country itself, that would be a long wait indeed. I hold that it is justifiable as a matter of public policy for the Government to facilitate the development of required sporting facilities through private sector initiatives.

P.W.2 contended that he expected the Government itself to extend the National Sports Complex. That is a good ideal but the acquisition notice did not tie the extension of the national sports complex to having it necessarily undertaken by the Government itself. And as the notice stands, it has not been violated by the questioned allocation. P.W.2 also ascribed fraud and/or misrepresentation on the part of the 1st defendant in embarking on the challenged acquisition. If the 1st defendant's motive for acquiring the plaintiff's land was fraudulent when the acquisition was undertaken in 1980, why would the 1st defendant have waited for over 10 years before allotting or allocating part of the acquired land? There is no evidence before this court that the 1st defendant colluded with the 2nd defendant or Safari Parks (Holdings) Limited in 1980 for the 1st defendant to acquire the aforementioned parcels of land with the specific purpose of giving part of it to Safari Parks (Holdings) Limited.

Additionally, there is the following evidence. P.W.2 said that after, the Government acquired 294 out of the plaintiff's 344 acres, the Government took the plaintiff's entire 344 acres, subdivided it and allocated

about 200 acres to Safari Parks (Holdings) Limited. P.W.2 further said he asked for a title deed to the surplus 50 acres (being the difference between the plaintiff's 344 acres and the 294 acres compulsorily acquired therefrom by the Government), that he was asked to get a surveyor to excise the 50 acres but when he sent the requisite deed plan for those 50 acres in order to get a title deed for the 50 acres, he was told that the Commissioner of Lands' earlier letter authorizing him to excise the 50 acres had been withdrawn. P.W.2 said he was (on behalf of P.W.1) asking for the 50 acres plus another 150 acres, making the 200 acres given to the 2nd defendant which in his (P.W.2's) view came from the plaintiff's 344 acres. When cross-examined by the 2nd defendant's counsel, P.W.2 stated, *inter alia*, as follows:

'*My land is L.R.8481. Land allocated to 2nd defendant is L.R.18118. I have a map of my land – 344 acres. L.R.18118 is within the title deed. L.R.18118 was given to 2nd defendant in 1991. I now say the map attached to title deed for L.R.8481 does not show L.R.18118 as being within the former (L.R.8481). That information is in a different map which was attached to letter of allotment of L.R.18118.'*

D.W.2, Mwenda Kinyinga Mbogori, a Land Officer told the court essentially as follows:-

The land mass for Karasarani international sports complex was put together by acquiring several plots, including the plaintiff's land. The questioned allocation to 2nd defendant was in 1991 while the questioned allocation to 3rd defendant was in 2000. Both allocations were after the main Kasarani stadium had been built. Land allocated to 2nd and 3rd defendants was land still unused after the main stadium was built. There are other allotees of the land which remained unused after the main stadium was built. It is not possible to relate current titles to the previously acquired titles, neither is it possible for the plaintiff to say that what was allocated to the 2nd and 3rd defendants falls on land compulsorily acquired from her.

No survey maps were produced linking L.R.18118 and L.R.25195 to the plaintiff's former L.R.8481. My conclusion is that the evidence on record does not satisfactorily establish that L.R.18118 allocated to 2nd defendant and L.R.25195 allocated to 3rd defendant came wholly or partly from the plaintiff's then L.R.8481. There is also no evidence of requisite fraud or misrepresentation tendered such as to vitiate the questioned allocation of L.R.18118.

The upshot is that I find there is no valid reason for nullifying or invalidating the allocation of L.R.18118 to the 2nd defendant.

The foregoing finding notwithstanding, I note that the International Golf Course and Club plus related facilities have not been put up some 15 years down the line. Indeed D.W.1 denied existence of buildings on L.R.18118. He told this court that sourcing for funds for development of the golf course has been going on in phases and that so far about Kshs.100 million has been sourced. D.W.1 did not say what the balance required is or when it will be sourced. The same witness also said no time limit was given in the Letter of Allotment dated 21.03.91 for putting up the golf course. The latter statement overlooks special condition 2 in the Letter of Allotment to Safari Park Hotel requiring development within 24 months from the date of registration of lease, on the basis of approved plans. The same special condition is replicated in the Grant of L.R.18118 issued to Safari Parks (Holdings) Limited in March, 1999 and it has equally been violated. While this may justify revocation of the Grant to Safari Parks (Holdings) Limited, it does not necessarily constitute a ground for nullifying or invalidating the initial acquisition of the plaintiff's 294 acres or part thereof. It is incumbent upon the 1st defendant to revisit the said Grant and cause it either to be complied with within a given time frame or revoked. In the latter event, the Government may if in funds itself undertake the putting up of the golf course or get another entity with requisite finances to put up the golf course.

Subject to what is stated in the immediately preceding paragraph, the net result is that I hold that there is nothing illegal or null and void in the compulsory acquisition of 200 acres forming L.R.18118.

4. Whether allocation of the resultant L.R. Nos. L.R.18118 and L.R.25195 allocated to the 2nd and 3rd

defendants, respectively, is illegal, null and void

Special condition 5 in the Grant of L.R.18118 issued to Safari Parks (Holdings) Limited provides that:

'5. The land and buildings shall duly be used for the purposes of International Golf Course and Club and related facilities in connection therewith.'

D.W.2 told this court that the land allocated to the 3rd defendant, East African Motor Sports Club was supposed to be used for Motor Race Track and Sports Club but that 3rd defendant surrendered their aforesaid land to the Government on 02.10.02. Both L.R.18118 and L.R.25195 came from the land mass accumulated from the 3 land parcels in Kasarani area of Nairobi acquired vide Gazette Notice No.1550 dated 27.05.80 for future extension of National Sports Complex. I have already found that the purpose for which L.R.18118 was allocated, i.e. for the purposes of International Golf Course and Club and related facilities in connection therewith fall within the general purpose for which the land mass was acquired. I now also find that the purpose for which L.R.25195 was allocated likewise falls within the general purpose for which the land mass was acquired.

The upshot is that I find no illegality in the allocation of L.R.18118 and L.R.25195 and that the two allocations were validly done.

5. Whether the parcel constituting L.R.18118 and the parcel constituting L.R.25195 came from L.R.8481 and whether the said parcels L.R.18118 and L.R.25195 should revert to the plaintiff.

The evidence of D.W.2, which I accept, tends to negate the plaintiff's contention that L.R.18118 and L.R.25195 necessarily came from L.R.8481. The totality of the evidence tendered before this court does not prove to the satisfaction of the court that the said L.R.18118 and L.R.25195 necessarily came from the then plaintiffs L.R.8481. P.W.2 conceded this '*shingo upande'*, i.e. reluctantly or grudgingly, when he said in cross-examination:

"*I now say the map attached to title deed for L.R.8481 does not show L.R.18118 as being within the former (L.R.8481).'*

Secondly, I have already found that allocation of L.R.18118 and L.R.25195 was within the general purpose for which the plaintiffs 294 acres were acquired.

In view of the foregoing, I find no basis for reversion of L.R.18118 and L.R.25195 to the plaintiff.

6. Whether plaintiff entitled to 50 acres not excised from L.R.8481

There is undisputed evidence to show that the plaintiff's land constituting the then L.R.8481 measured approximately 344 acres and that the Government acquired only 294 acres thereof. D.W.2, Mwenda Kinyinga Mbogori, a Land Officer who testified on behalf of the 1st defendant had this to say on the subject when he was re-examined by 1st defendant's counsel:

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Government registered a caveat to protect its interest on the acquired portion (294 acres) as by then no survey was done to excise the 294 acres from the 344 acres. The 50 acres is available to plaintiff. Plaintiff should not have lost the 50 acres in the first place. She should be in possession thereof.'

In view of the overwhelming evidence in the plaintiff's favour with regard to the 50 acres, the plaintiff is clearly entitled to the said 50 acres.

I make the following final orders:-

1. Prayers (a), (b), (c) and (d) are refused.

2. Under prayer (f), I award the plaintiff the 50 acres in excess of the 294 acres compromised in the 344-acre parcel which formed the plaintiff's L.R.8481 before compulsory acquisition of her aforesaid land.

3. As all parties have partly succeeded and partly lost, the parties shall bear their own respective costs of the suit.

Orders accordingly.

Delivered at Nairobi this 25th day of April, 2008.

B.P. KUBO

JUDGE