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

Misc Civ Appli 1732 of 2004

IN THE MATTER OF AN APPLICATION UNDER SECTION 84 OF THE CONSTITUTION OF KENYA FOR THE ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS

AND

IN THE MATTER OF LAND REFERENCE NO. 7741/350 AND THE REGISTRATION OF THE TITLES ACT CAP 281 OF THE LAWS OF KENYA

BETWEEN

JAMES JORAM NYAGA ..... 1ST RESPONDENT

ABIJA JAMES NYAGA ..... 2ND RESPONDENT

VERSUS

THE HON. ATTORNEY GENERAL …..... 1ST RESPONDENT

THE MINISTER FOR PUBLIC WORK,

ROADS AND HOUSING.....2ND RESPONDENT

JUDGMENT

The Originating Summons dated 8th November, 2004 is brought by James Joram Nyaga and Abija James Nyaga under sections 70, 75 and 84(6) of the Constitution of Kenya, Rule 9 of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules, 2001, against the Honourable the Attorney General and the Minister for Public Works, Roads and Housing. The Applicant seeks the following orders:

1) A declaration be and is hereby issued that the Applicants are the lawful owners of all that parcel of land known as LR 7741/350;

2) A declaration be and is hereby issued that the invasion of L.R. No. 7741/350 by employees, agents and all servants of the Respondents was a violation of the Applicants' constitutional rights to property as protected by section 75 of the Constitution of Kenya;

3) A declaration be and is hereby issued that the decision by the 2nd Respondent to order invasion and demolition of structures and the eventual invasion and demolition of structures on L.R. No. 7741/350 was

unlawful and unconstitutional and it violated the Applicants' right to property as protected by section 75 of the Constitution of the Republic of Kenya;

4) A declaration be and is hereby issued that the decision by the 2nd Respondent to order invasion and demolition of structures and the eventual invasion and demolition of structures on L.R. No. 7741/350 is null and void to the extent that it was in violation of the Applicants' rights to property as protected by Section 75 of the Constitution of the Republic of Kenya;

5) A declaration be and is hereby issued that the decision of the 2nd Respondent to invade and demolish structures and the eventual invasion and demolition of structures on L.R. No. 7741/350 violates the Applicants' right to secure protection of the law as protected by section 70 of the Constitution of the Republic of Kenya;

6) A declaration be and is hereby issued that the decision of the 2nd Respondent to order repossession and the purported Repossession of L.R. No. 7741/350 by the Government is whimsical, arbitrary, malicious, mala fides and oppressive of the Applicants and cannot be reasonably justified in a democratic society.

7) The Respondents be and hereby ordered:

(a) To effect a surrender of L.R. No. 7741/350 to the Applicants unconditionally and to pay material damages in terms of the value of the demolished structures on the said parcel of land in the sum of Kshs 2,700,000/-

(b) To pay compensatory damages for the loss of user of all that parcel of land known as L.R. No. 7741/350 and for the inconvenience and anguish caused to the Applicants for the unlawful, unconstitutional, whimsical and illegal conduct of ordering and effecting an invasion and demolition of the Applicants' property being L.R. No. 7741/350 contrary to the Applicants' rights under s 75 as read with s 70 of the Constitution of the Republic of Kenya.

8) In the alternative, an order does issue compelling the Respondents to give full compensation in value of L.R. 7741/350, including the developments undertaken thereon, to the Applicants following the repossession of L.R. No. 7741/350 by the 1st Respondent in the sum of Kshs 6,200,000.00;

9) The Respondents do pay the costs of this action.

The Originating Summons is premised on a supporting affidavit sworn by the first Applicant on 18th November, 2004 and filed in court on 16th December, 2004 and on grounds found in the body of the application. Mr Mohamed Nyaoga and Mr Majanja appeared on behalf of the Applicants. The Originating Summons was opposed and a replying affidavit was filed by Andrew Mondo, Senior Deputy Secretary in the 2nd Respondent Ministry. The Respondents were represented by Mr Ombwayo of the Attorney General's office.

Both counsel for the Applicants and Respondents filed skeleton arguments. Briefly, the grounds upon which the Originating Summons is brought are that the Applicants are the registered proprietors of L.R. No. 7741/350; that the Respondents acted unlawfully, highhandedly, whimsically, mala fides, without due regard to the law, in total breach of the rules of natural justice, in violation of the Applicants rights under s 70 and 75 of the Constitution and against public policy, when they invaded and demolished the structures on L.R. No. 7741/350 which is owned by the Applicants.

The facts giving rise to this suit are largely not in dispute and they are as follows:

In the early 1970s the Government of Kenya designed a link Road to connect Waiyaki way and Lower Kabete Area. On 21st March 1975, the then Commissioner of Lands issued a Gazette Notice of the intention to acquire land for the above purposes, that is, the construction of a link road. It is

Gazette notice 942 of 18th March 1975 (KMOOI). Part of the land acquired under the Land Acquisition Act was L.R. No. 7741/34 measuring 5.0 acres. The Government duly complied with the provisions of s 75 of the Constitution of Kenya and the Land Acquisition Act. Mr Mondo deponed that plot No. 7741/350 was curved out of Original L.R. 7742/34. To that extent the parties agree.

The point of departure according to the Applicants, is this; On 28th November, 2004 the Nairobi City Council Engineering Department wrote to the Director of Physical Planning, Ministry of Lands & Housing giving the opinion that the said plot could be planned for other purposes (JJ M2). On 8th December, 1994, the Ministry of Public Works & Housing through the Permanent Secretary wrote to the Director of Physical Planning in the Ministry of Lands and Settlement stating that the residential plot in Kyuna was no longer feasible for construction of a road and could be re-planned for other purposes and that on 18th December 1997, the Commissioner of Lands offered plot No. 3 Kitusuru the subject of this case, to the 1st Applicant upon his fulfilling certain conditions. The Applicants wrote to the Commissioner of Lands on 15th August 2000 accepting the offer and made payments as required (JJM 4A). On 20th December, 2001 the President of Kenya granted the Applicants a leasehold interest in the land under the Registration of Titles Act. The Applicants commenced developments on the plot and completed in the year 2003. Without notice, on 20th December, 2003 the Applicants saw bull dozers demolishing the house belonging to their neighbour Mr Chepkonga. They then moved to the Applicants' house who were given an hour to remove their valuables. Subsequently, the Applicants got a valuation report of the property by Centenary Valuers and Property Consultants who put the value at Kshs 6,200,000/- (valuation report exhibited (JJM 6)). The Applicants deny having been afforded an opportunity to be heard before the demolition nor was there proof of fraud on the part of the Applicants, nor were reasons for the demolitions given nor was the registration nullified or cancelled and that the demolition was therefore unlawful.

Mr Nyaoga submitted that the Applicants' rights are protected under s 75 of the Constitution which also provides for compulsory acquisition of land and which has to be read in the context of the law applicable. Counsel submitted that the law has structured public interest to maintain law and order. It avoids abuse in the pretext of public interest. He argued that the law must therefore be certain, predictable, respectable and reliable so that it does not lose its credibility and certainty. Counsel urged that the Applicants being registered proprietors of the land in issue, they could only be dispossessed through compulsory acquisition under the Constitution and Land Acquisition Act. The title could only be nullified under s 23 of the Registration of Titles Act on account of fraud or misrepresentation which has not been done, and that the Respondents used a mode of acquisition which the law does not recognise. He argued that if fraud was perpetrated by a Government official, it cannot defeat the Applicants title as he is a purchaser and that section can only be invoked if the Applicants was party to the fraud. For this contention, counsel relied on the case of ***WRECK MOTOR ENTERPRISES v COMMISSIONER FOR LANDS CA 71/1997***. Counsel further submitted that in case of fraud, the standard of proof is higher than the ordinary standards of proof, on a balance of probability. Counsel said that the Respondents acted as accuser, witness, prosecutor and Jury in the Applicants case and denied the Applicants the protection of the law under s 70 of the Constitution. He asked the court to invoke section 84 of the Constitution and grant the prayers sought. He contrasted this case with that of ***DENNIS KURIA & ANOTHER Misc Application No. 663 of 2006*** where the court observed that the land acquired by the Government compulsorily was held on trust for the public. He submitted that there are specific provisions in the Constitution relating to trust land and the court cannot imply a trust to defeat constitutional provisions. He also argued that the Government freely gave the land to the Applicants and if there was any breach of trust, it cannot be visited on the Applicants as the original owners were compensated and the state decided to allocate the land to the Applicants and if it wants to take it away it must be done after compensation to the Applicants.

In reply Mr Ombwayo urged that the land in issue was compulsorily acquired for public purposes and it must be used for the purposes for which it was acquired. Once acquired, it is held in trust by the Commissioner for Lands for the public and there exists the principle of trust so that the Commissioner cannot use it for any other purpose other than Roads, schools, hospitals etc. Counsel submitted that the Land Acquisition Act and the Constitution make the Commissioner a trustee and he cannot allocate the

land for any other use. For this contention, the Respondent relied on the case of N***IAZ MOHAMMED v COMMISSIONER FOR LAND & OTHERS HCC 423 OF 1998*** where land was acquired for construction of Nyali Bridge. The balance of the unused land was allocated to a private person and the original owner challenged that 2nd allocation to a private person. Justice Waki observed in his judgment that the Land had to be used for the Purpose for which it was acquired and use of the land for any other purpose was illegal. The same principle was echoed in ***RE KISIMA FARM LTD (1978) KLR 36*** and ***THE COMMISSIONER OF LANDS v COASTAL AGRICULTURE LTD CA 252/1996***. Mr Ombwayo argued that if land acquired for public use was allocated for private use, it would be contrary to constitutional provisions. He cited the case of ***DAVID MURUMBI M'MBOROKI v THE CHIEF CONSERVATOR OF FORESTS & ANOTHER – Misc Application N. 27 of 2006*** where Nyamu J observed that a title issued under s 28 of the Registered Land Act was subject to challenge for example if the first registration was of a hospital, forest land or wet land as they belong to the public. Mr Ombwayo urged the court to apply the Principle of public trust where for the Government holds Public Land on behalf of the public and weigh the private benefits of Applicants as against the intention of the Government to construct a By-pass Road on the disputed land. Counsel submitted that the Registration of Titles Act does not apply in this case as the land in issue had been compulsorily acquired and it could only have been transferred from the original owner to the Applicants. That after acquisition, the land vested in Government and the title was not recalled. The opening of a new register was a nullity as the land was vested in the Government under s 19 of the Land Acquisition Act. He said that it is the original owner who had an indefeasible title and Acquisition cannot be defeated by issuance of another title and the title by the commissioner was a nullity.

As for remedies, counsel argued that the court cannot order compensation under s 70-83 of the Constitution. He said that under s 75, if procedure is not followed, the Court can order compliance but that this is an eviction as the house that was demolished belonged to the Government and the Applicant lived in it when working as a civil servant. The counsel urged the court to rule as per the ***DENNIS KURIA CASE*** as facts are similar but dismissed the ***WRECK CASE & PATEL CASES*** as relating to fraud which is not an issue before this court.

Mr Majanja in a brief reply, said that upon acquisition, the rights of the owners are extinguished, the land becomes the property of the Government and that the Government can do with it whatever it wishes and since the Applicants were allocated the said land and have paid for it, they must be compensated if the land is compulsorily acquired.

Having taken into account the evidence contained in the affidavits of both parties, annextures thereto and submissions by all counsel, it is common ground that the land in issue was part of land which was compulsorily acquired under the Land Acquisition Act 1968, vide Gazette Notice No. 942 of 21st March 1975, issued by the then Commissioner of Lands J.A. Oloughlin The Notice reads:

"**In pursuance of section 6(2) of the Land Acquisition Act 1968, I hereby give notice that the Government intends to acquire the following land for the Link Road Waiyaki Way (Sclaters Road) – Red Hill Road in the Lower Kabete area Nairobi."**

There followed a list of the properties to be compulsorily acquired which include L.R. 7741/34 from which 7741/350 was curved. The parties have not questioned the process of acquisition of the said land and it will be presumed to have been done in accordance with the provisions of the Constitution and the Land acquisition Act both which provide for compulsory Acquisition of land and which provisions we will consider later in this judgment.

The issues that arise and which we shall consider in this matter are:

(1) Whether there having been a valid Acquisition, the same land can be allocated to other parties for private purposes;

(2) What are the effects of a compulsory acquisition?

(3) **Whether the Commissioner of Lands had authority to issue a title under the Registration of Titles Act;**

- **whether there is need for the Respondents to prove fraud**

(4) whether the Respondent's action of 20th December, 2003 was compulsory acquisition of land or was it eviction/repossession;

- **was due process followed?**

(5) Whether any of the Applicants' fundamental rights have been breached as alleged;

(6) Whether the Applicants are entitled to the remedies sought;

(7) **Who meets the costs of this Originating Summons.**

No doubt, the right to property is guaranteed by section 75 of the Constitution of Kenya, – but there are exceptions to that right under s 75(6). S 75(1) of the Constitution provides for situations in which land may be compulsorily acquired and section 6 of the Land Acquisition Act Cap 295 provides the procedure to be followed in land acquisition.

Section 75(1) of the Constitution provides as follows:

"**No property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired except where the following conditions are satisfied:-**

(a) The taking possession or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property so as to promote the public benefit; and

(b) The necessity therefor is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property; and

(c) Provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.."

Section 6 of the Land Acquisition Act reiterates the contents of s 75(1) of the Constitution and goes further to provide for the procedure of compulsory acquisition of land. Section 6(1) of the Land Acquisition Act reads:

"**Where the Minister is satisfied that any land is required for the purposes of a public body and that –**

(a) the acquisition of the land is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of any property. In such a manner as to promote the public benefit; and

(b) **the necessity therefore is such as to afford reasonable justification for the causing of any hardship that may result to any person interested in the land, and so certifies in writing to the commissioner, he may in writing direct the commissioner to acquire the land compulsorily under this part;**

(2) on receiving a direction under subsection (1) the commissioner shall cause a notice that the Government intends to acquire the land to be published in the Gazette, and shall serve a copy of the notice on every person who appears to him to be interested in the land."

The sections that follow deal with the process of acquisition and compensation. Once land is compulsorily acquired under the above provisions, it becomes the property of the Government. The above provisions stress the fact that the land so acquired is for the public good and benefit not private. The allocation of the disputed land to the Applicants was not for the public benefit or public interest but a private benefit. Can the allocation for a private interest be justified under s 75 of the Constitution and s 6 of the Land Acquisition Act? In the case of ***COMMISSIONER OF LANDS v COASTAL AQUACULTURE Ltd CA 252/1996***, the Commissioner of Lands gave notice of the intention to acquire land that belonged to Coastal Aquaculture Ltd for what he termed "Tana River Delta Wetlands." When the date was set for the 'inquiry' the Respondents objected to the notice on the basis that it did not state the public body for which the acquisition was being made or the public purpose to be served by the acquisition. The court held that the notice of Acquisition should have specified that the Tana and Athi Rivers Development Authority was the public body for which the land was being acquired. It was not enough for the notice to simply state that the Government intended to acquire it for "Tana and Athi River Development Wetlands." The issue in that case was the construction of the acquisition notice. It had to show that the acquisition was for public use or public interest as envisaged under s 75 of the Constitution and s 6 of the Land Acquisition Act. In ***RE KISIMA FARM LTD*** (supra) the court observed that the Minister in acquiring land has to be satisfied that it is acquired for a public body or the particular purpose envisaged in the Land Acquisition Act and s 75 of the Constitution. In the case of ***NIAZ MOHAMED M MOHAMED v COMMISSIONER OF LANDS*** (supra), the land had been compulsorily acquired for purposes of construction of Nyali bridge in 1979. Part of the acquired land was not used up and that portion was allocated to other parties for private use. The plaintiff objected to that allocation and the court held that once land was compulsorily acquired, it must be used only for the purpose for which it was acquired. In that case it was for construction of a public road as in this case at hand. If the land was not utilized then the Local Authority should have held it in trust under the Local Government Act.

In the recent case of ***JOHN PETER MUREITHI & OTHERS v ATTORNEY GENERAL*** (supra) Justice Nyamu observed that the doctrine of public trust is recognized by s 75 of the Constitution, apart from Trust Land which is specifically provided for under ss 114-117 of the Constitution. He further observed that the doctrine also applies to Public Land and protects public resources which include forests, wetlands etc, contrary to Mr Nyaoga's contention that the doctrine of trust cannot be implied in the Constitution when there are specific provisions in regard thereto. We are of the same persuasion as Justice Nyamu, in the above case, that the doctrine of public trust is envisaged under s 75 of the Constitution so that the land compulsorily acquired will only be used for public purposes for which it was acquired and the Government holds such land in trust for its citizens. The same doctrine was recognized by this court in the case of **DENNIS KURIA** (supra) whose facts are nearly similar to this case. The Government had acquired land in Mlolongo Area along Mombasa Road, for purposes of expansion of that Road. The same was subdivided and allocated to private persons who were issued with titles under the Registration of Titles Act. This court allowed the Government to repossess it and pull down the structures constructed thereon. The court recognized the fact that the land was held in trust by the Government on behalf of its citizens. All the authorities considered above do recognise the public trust doctrine and so do we. The Applicants' argument that after compulsory acquisition the Government can do with the land what it wills cannot hold water. We therefore hold that the suit land having been acquired for public purposes, that is, construction of a road, is held in trust for the public and could not have been allocated to the Applicants who are private individuals for their private use.

Under s 75 of the Constitution and s 6 of the Land Acquisition Act, there must be justification for the hardship that will be occasioned to those whose land is compulsorily acquired. Most times, compulsory acquisition does cause hardship and sometimes untold hardship to the original owners that the compensation offered by the Government may never equate or adequately compensate the suffering and inconvenience caused but in those circumstances, the public interest overshadows the private interest. We agree with the observation in the **NIAZ** case, that if the Government were to be allowed to compulsorily acquire land and use it for other purposes other than those envisaged under the Constitution, there is bound to be abuse of those powers by an ill-intentioned Government which would acquire land, compensate the owners with tax payers monies and dispose of it to its friends and cronies. We are of the view that if the acquired land is no longer necessary for the purpose for which it was acquired and it is unnecessary to hold it in trust, then equity requires that the property reverts back to the original owners.

At this juncture we pose the question, did the Commissioner of Lands have the power to alienate the disputed land to the Applicants?

Section 3 of the Government Lands Act Cap 280 vests the power to alienate unalienated land in the President Sect 3 of Government Lands Act reads:-

"**3 The president in addition to but without limiting any other right, power or authority vested in him under this Act, may -**

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

(b) ...

(c) ....f"

Section 7 of the same Act, stipulates what the powers of the Commissioner of Lands and officers in that office are. It reads:

"**7 The Commissioner may, or an officer at the lands department subject to special directions from the president, execute for and on behalf of the president any Conveyance, lease or licence of or for the occupation of Government lands, and do any act or thing, exercise any power and give any order or direction and sign or give any document, which may be done, exercised, given or signed by the president under this Act;**

Provided that nothing in this section shall be deemed to authorize the Commissioner or such officer to exercise any of the powers conferred upon the president by sections 3,12,20 and 128."

The above section clearly limits the power of the Commissioner to executing leases or, conveyances on behalf of the President and the proviso to the section specifically limits the power to alienate unalienated land to the President. We find and hold that the Commissioner of Lands had no authority to alienate the disputed plot to the Applicants as he purported to do vide the letter of 18th December, 1997. That was the preserve of the President. It follows that the Commissioner of Lands could not have made any grant under the Government Lands Act Cap 280 Laws Of Kenya nor could he pass any registerable title under the Registration of Titles Act Cap 281 Laws of Kenya.

It was the Applicants' submission that under s 23 of the Registration of Titles Act Cap 281 Laws of Kenya under which the land was subsequently registered, the title is sacrosanct and indefeasible and can only be challenged on account of fraud or misrepresentation. S 23(1) provides as follows:

23 "(1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the said land is the absolute and indefeasible owner thereof. Subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which he is proved to be a party."

From our finding above, any alienation of land contrary to the provisions of s 75 of the Constitution is unconstitutional and therefore void. The Constitution is the supreme law of the land and the Registration of Titles Act being a statute, is subject to it (s 3 of the Constitution). The Commissioner of Lands cannot have purported to pass any valid title under the Government Lands Act or the Registration of Titles Act when acting contrary to express Constitutional provisions. The question of fraud under s 23 of the Registration of Titles Act does not therefore arise and there would be no need to prove it in this case. The case of ***WRECK MOTORS*** (supra) is therefore irrelevant. Besides, the registered owner of the land is the original owner from whom land was acquired. Once the Government takes over, a vesting order is issued under s 19(1) of the Land Acquisition Act and we do agree with Mr Ombwayo, that the Government

cannot issue another title. The issuance of the title to the Applicants was irregular and a nullity. We do hold that whereas indefeasibility of a title is a concept of statute under the Registration of Titles Act, the same is subject to provisions of s 75 of the Constitution and no title passed to the Applicants.

The Applicants have challenged the process by which the land was repossessed from the Applicants. From our findings above, the Applicants had no title to the land and the result is that the action of the Respondent of 20th December, 2003 was not a compulsory acquisition of that land. The land belonged to the Public and the custodians were the Respondents. Though the Applicants deny it, Andrew Mondo the Senior Deputy Secretary with the 2nd Respondent deponed that a gazette notice No 3632 was issued on 6th June, 2003 requiring owners of illegal structures erected on Road Reserves to remove them within 30 days of the notices and in default they would be demolished. Subsequent to that gazette notice ,another Public notice was issued by the Respondent in the Kenya Times issue of 6th August 2003 urging the public that demolition of all illegal structures on Road Reserves would commence. The said notice was exhibited by the Respondent as KM003. The demolition then commenced on 20th December, 2003, over four months after the last notice and about 6 months since the 1st notice. The Applicants were aware that the suit land had been earmarked as a road reserve. The letter of 28th November, 2004 from the City Hall to the Director of Physical Planning clearly indicates that fact. The user of the plot was allegedly changed but the gazette notice should have put the Applicants on notice to check whether or not their alleged plot was on a road reserve. The notices issued by the Respondent were proper and sufficient time was given for verification for those who might have been in doubt of their titles. We do therefore find that adequate notice having been given by the Respondent, due process was followed in the repossession of the suit land. It was not a question of compulsory acquisition but it was eviction and repossession.

The Applicants claim to have been denied their right to protection of the law, right to privacy of their home and property and of deprivation of property without compensation. Section 70 of the Constitution provides:

"**whereas every person in Kenya is entitled to fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connexion, political opinion, colour, creed or sex, but subject to respect of the rights and freedoms of others and for the public interest, to each and all of the following, namely:**

(a) life, liberty, security of the person and the protection of the law;

(b) ...

(c) protection of the privacy of his home and other property and from deprivation of property without compensation. The provisions of this chapter shall have effect for the purposes of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

Clearly, the rights and freedoms of the individual are not absolute but are subject to other people's rights and the general public interest at large. We have observed earlier in this judgment that the Applicants have no right to the disputed land, the allocation by the Commissioner of lands having been a nullity. The disputed land was therefore not compulsorily acquired and provisions of the Land Acquisition Act as to the process of acquisition could not be invoked. We found that due process was followed by the respondents and there was no denial of the right to protection of the law.

Are the Applicants entitled to the remedies sought? Under s 84 of the Constitution, the court has inherent and unfettered jurisdiction to grant remedies available to ensure that the ends of justice are met. In doing so, the court will endevour to balance the interests of the Applicants as against those of the general public. S 84 reads:

"**(1) Subject to subsection (6) if a person alleges that any of the provisions of section 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him (or in the case of a person who is detained, if another person alleges contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.**

(2) the High Court shall have original jurisdiction;

(a) to hear and determine an application made by a person in pursuance of subsection (1);

(b) to determine any question arising in the case of a person which is referred to it in pursuance of subsection (3), and may make such orders, issue such writs, give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 70 to 83 (inclusive).

(3) .....(7) ....."

The court has the power to award any lawful remedy under the above provision. The Applicants have exhibited a valuation report from Centenary Valuers and Property Consultants which valued the disputed property after the demolition was complete. The property was valued at Kshs 6.2 million for which the Applicants seek compensation. On the contrary, Mr Mondo deponed at paragraph 10 of his affidavit, that the house on the suit land belongs to the Government, and the 1st Applicant resided in it when he worked as a civil servant. The letter dated 28th November, 1994, exhibited by the Applicants does confirm that, it was a residential plot. The Applicants paid a sum of Kshs 90,950/- upon being allocated the house and plot as per the letter of 15th August 2000. The Applicants claim to have completed developments on the said plot in November, 2003 only for bulldozers to move in on 20th December, 2003. Even if the Applicants were entitled to any compensation, may be it would only be Kshs 90,950/- paid after the illegal allotment and they would need to pursue that claim in an ordinary civil court as that claim is not a constitutional issue. They have not justified the sum of Kshs 6.2 million. The disputed plot is public land and includes the residential house and the developments that stood thereon prior to the allotment and the Respondent had the right to demolish what was theirs. If the Applicants had put up any structures, they had the notice period from June till December, 2003 to pull them down and mitigate their losses and if they did not, they have only themselves to blame.

It was the Applicants stance that the demolition was unjustifiable in a democratic society. Some of the features of a democratic Government are that there is public participation in the Government; The society is pluralistic and the Government rules in the interests of all. Consequently there has to be political equality through free and fair elections a transparent and accountable Government and guaranteed political and civil liberties. All these principles are envisaged in sections 1 & 1A of the Constitution of Kenya that declare Kenya a Sovereign Republic and a multi party democracy. The spirit of s 75 of the Constitution read with the above sections is that public land is held by the Government on trust for its citizens and any alienation of land that defeats public interest/policy goes against that spirit. We find that the Respondents have acted within the provisions of the Constitution being the Supreme law of the land.

In conclusion we find and hold that the land in dispute is public land, held by the Government on behalf of the public and the Commissioner of Lands could not purport to pass any title to the Applicants under the Registration of Titles Act. The Applicants were not therefore entitled to any of the declaratory prayers sought. If they have any claim, it will lie in the ordinary civil courts. We accordingly dismiss the Originating Summons. We make no order as to costs.

DATED and delivered at Nairobi this 28TH day of February 2007.

J.G. NYAMU

JUDGE

R. WENDOH

JUDGE