



Lekan Developers Limited v Cabinet Secretary Ministry of Lands & Physical Planning & 4 others; Wangui & 2 others (Interested Parties) (Suing for themselves and on behalf of Kiangombe Squatters Settlement Scheme) (Environment & Land Petition 3 of 2020) [2022] KEELC 14874 (KLR) (17 November 2022) (Judgment)

Neutral citation: [2022] KEELC 14874 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND PETITION 3 OF 2020**

JG KEMEI, J

NOVEMBER 17, 2022

BETWEEN

LEKAN DEVELOPERS LIMITED PETITIONER

AND

**CABINET SECRETARY MINISTRY OF LANDS & PHYSICAL
PLANNING 1ST RESPONDENT**

CHIEF LAND REGISTRAR 2ND RESPONDENT

**MINISTRY OF INTERIOR & CORDINATION OF NATIONAL
GOVERNMENT 3RD RESPONDENT**

**DEPUTY COUNTY COMMISSIONER THIKA SUBCOUNTY 4TH
RESPONDENT**

ATTORNEY GENERAL 5TH RESPONDENT

AND

MILKA WANGUI INTERESTED PARTY

LAWRENCE MWAURA KAMAU INTERESTED PARTY

TERESIA WAIRIMU INTERESTED PARTY

**SUING FOR THEMSELVES AND ON BEHALF OF KIANGOMBE SQUATTERS
SETTLEMENT SCHEME**



JUDGMENT

Introduction

1. The Petition is averred to have been provoked by the actions of the Respondents who vide a letter dated the 30/6/2020 authored by the Deputy County Commissioner Thika West summoned the Chief Executive Officer of the Petitioner and handed over to him a letter referenced LND16/31 VOL/25;

“R. Kiangombe Village Plot No. TKA/04/032A Approved Plan 365 Refer to Ministry of Land and Physical Planning letter Ref No MOLPP/LND7/18 dated the 9/12/2019 on the above. The said land is said to be reserved for construction of a public school. This is therefore to request you to avoid any interference with the same. Signed Lazarus Obuar (for Deputy County Commissioner – Thika West Sub County).”

The Petitioner’s Case

2. The Petition is based on the facts on its face alongside the various alleged breaches of constitutional rights to wit Article Nos. 2, 3, 19, 20, 21, 22 and 258 of *the Constitution* and Section 26 of the *Land Registration Act* and supported by the Affidavit of 21/7/2020 of Rajesh Kent, the Petitioner’s Managing Director. It reiterated and maintained that this Court enjoys constitutional and statutory exclusive jurisdiction to hear and determine the Petition.
3. The gist of the Petition is that the Petitioner is a registered company incorporated under the *Companies Act* and the registered owner of land parcel number 29746 (IR. No. 175337) Thika Municipality (hereinafter referred to as the suit land) having purchased it from Gladys Wangui Mburu and Lydia Njeri Wangondu. That the purchase price for the suit land was Kshs. 34M *vide* a sale agreement dated 21/12/2016 and the Petitioner took possession thereof upon paying a deposit of Kshs. 3.4M. That the Petitioner carried out the necessary due diligence before the said purchase and satisfied itself of the vendors’ ownership free from any registered encumbrances. That later on December 27, 2019 upon completion of the purchase, the Petitioner paid stamp duty of Kshs.1.5M and obtained all necessary consents from the County Government of Kiambu and paid all relevant rates and obtained the 2019 Rates Clearance Certificate. It is averred that the Petitioner also obtained the Ministry of Lands clearances and consent to transfer the land in its favor where upon the land was registered in its name on the December 27, 2019. Immediately thereafter it embarked on preparing architectural drawings for the construction of a perimeter wall on the suit land. The said drawings were approved by the County Government of Kiambu on 10/5/2017 at a fee of Kshs. 634,000/= and developed a perimeter wall at colossal costs.
4. That to its dismay, the Petitioner received a letter from the Deputy County Commissioner (DCC) Thika West District informing its Chief Officer that according to an alleged letter dated the 9/12/2019 REF; MOLPP/LND/18 from the ministry of Lands and Physical Planning, the suit land was reserved for construction of a primary school and warned them to desist from any further dealing with the suit land. That its attempt to request for a copy of the letter from the Ministry of Lands met with a denial that it was not supposed to be given any copy. That on the ground people who acted allegedly on orders of the said DCC invaded the property and pulled down the perimeter wall and carted away materials.
5. That a demand letter to the Deputy County Commissioner to withdraw the illegal letter of 30/6/2020 was not honored and the Petitioner decries the unlawful conversion of the suit property to describe it as Kiangombe Plot Number NO. TKA/04/03/2A Approved Plan No. 365. The Petitioner maintains



that it was never accorded an opportunity to be heard on the issue of its proprietorship which amounts to breach of its right to own property under Article 40 Constitution of Kenya hence the Petition.

6. According to the Petitioner the letter dated the 30/6/2020 by the Deputy County Commissioner ordered the Petitioner out of the suit land and purportedly appropriated the same for public purposes without any due process, fair administrative action, due compensation and in clear violation of the Petitioner's constitutional rights to ownership of the subject land and accompanying land rights.
7. That the import of the letter aforesaid was that the Respondents had unlawfully illegally described the suit land as Kiangombe Plot No TKA/04/03/2A approved plan No 365. That such an act of conversion of the land, which is designated for industrial user, is intended to deprive the Petitioner its land arbitrarily and contrary to the provisions of Art 40 of *the Constitution*. That this is being done against the background where the Petitioner was declared as the rightful owner by both the County Government of Kiambu as well as the National Land Commission (NLC) vide gazette Notice No 1/3/2019. By the said gazette notice the NLC held that the suit land which belongs to the Petitioner is different from the one the Respondents are claiming to have been reserved for a public school. The Petitioner is aggrieved that the Respondents did not summon it for a hearing before adverse declarations were made against its title.
8. In the Supporting Affidavit, the Petitioner annexed RK1 – copy of the sale agreement dated 21/9/2016; RK2(a) &(b) copies of Allotment letter and Certificate of Title; RK3 copy of the approved development plan from Kiambu County Govt and attendant payment; RK4 copy of Gazette notice declaring the Petitioner as the owner of the suit land; RK5 bundle proof of payment of stamp duty, clearance rates, land rates clearance certificate and consent to transfer the suit land; RK6 – a letter dated 9/12/2019 from the Ministry of Lands indicating that the suit land is reserved for public purposes (not annexed); RK7 a letter by the Petitioner's Advocates to the Deputy County Commissioner and last but not least RK8 a letter dated 10/7/2020 from the Petitioner's Advocates to the National Land Commission.
9. The Petitioner craves for the following reliefs;
 - a. Spent
 - b. A declaration that the following actions of the Respondents, their agents, servants and any other officers acting under their instructions were and are unconstitutional, null and void;
 - i. Purporting to declare and hold that Kiangombe Village Plot NO. TKA/04/03/2A (approved Plan 365) is the same as LR.NO. 29746 Thika Municipality.
 - ii. Purporting and declaring that LR.No. 29746 Thika Municipality, the suit property herein, as erroneously described by the Respondents as Kiangombe Village Plot No. TKA/04/03/2A is reserved for the construction of a public school as contained in the letter dated the June 30, 2020 (sic) Ref No. LND 16/31 VOL.II/25 addressed to the Petitioner by the 2nd Respondent.
 - iii. Purporting to order and direct the Petitioner to cease interfering with, deal with, occupy, exploit or in any way deal with LR No. 29746 Thika Municipality erroneously described as Kiangombe Village Plot NO. TKA/04/03/2.
 - c. A declaration that the Petitioner's constitutional rights to property, Fair Administrative Action and Due Process have been violated by the Respondents herein.
 - d. A declaration that the Petitioner is the lawful owner of the LR No. 29746 Thika Municipality.



- e. A declaration that the said Kiangombe Village Plot No. TKA/04/03/2A is not the same as LR No. 29746 Thika Municipality.
 - f. A permanent injunction restraining the Respondents, their servants, agents or any person acting on their authority express or otherwise from interfering with the Petitioner's ownership, occupation possession and breach of property rights under *the constitution*.
 - g. Costs of the Petition.
10. The Petition is contested. The 1st Respondent filed its comprehensive Replying Affidavit sworn by Mr. Mugendi Geoffrey Moses, a Principal Physical Planner based at Ardhi House. He averred that prior to the enactment of the repealed *Physical Planning Act* Cap 286 of 1999, alienation of land was governed by the repealed *Government Lands Act* Cap 280 (GLA). That the practice for alienating land prior to 1998 was; a request for allocation was made to the Commissioner of Lands under Section 9 *GLA*; Commissioner of Lands would then request the Director of Physical Planning in writing to prepare the Part Development Plan (PDP) including the reasons and purpose for such plan; Commissioner of Lands would also attach a sketch map to the letter authorizing the preparation of the plan indicating the location of the subject site; once the Director of Physical Planning was satisfied to the plan viability, the Director would prepare and circulate the plan for comments; if the comments received were favorable, the Director would submit the PDP to the Commissioner of Lands for approval; upon its approval the Commissioner would refer two copies of the approved PDP to the Director to assign approval number and enter the PDP in the register of approved plans.; the Director would disseminate copies of the approved plans to all consulting authorities and the approved PDP formed the basis for issuance of a letter of allotment by the Commissioner of Lands.
 11. Regarding the PDP for No. TKA/04/03/2A, Approved plan no. 365, the 1st Respondent deposed that it was duly prepared and approved in favor of Kiang'ombe Squatters Housing Scheme based on the authority of the Commissioner's letters Ref. No. TP 10/1/XX/208 dated 29/7/1993 and 9290/XIV/254 dated 21/9/2007 annexed as MGM1 and MGM2 respectively.
 12. That the Commissioner of Lands (CoL) authority in part indicate that the earmarked land was previously planned and allocated to some people but during the consequent survey work, it was discovered that there was an existing village forcing them to retract the allocation of the land and the need to plan the land in favor of Kiang'ombe residents who occupied the land.
 13. That the plan superseded two other plans Ref Nos KBU/93/22 of 19/10/1993 and TKA/04/03/2 of 21/11/2003 that had reserved the land to other uses and left out some portions of land earmarked in 1993 respectively. That the anomaly was communicated to the CoL by the Chairman of Kiang'ombe Squatters Housing Scheme vide a letter dated 5/7/2007 annexed as MGM3.
 14. Additionally, that vide MGM4 – a letter dated 13/5/1999 RefNo. LSC/KIA/62 to CoL by Landscape Surveyors and Consultants, a surveying firm tasked to establish the perimeter boundaries of the settlement discovered overlaps in the previous survey and sought advice from CoL. The CoL issued an advisory letter Ref. No. 7175/IV/214 dated 22/6/1999 – MGM5 that the overlapping parcels had been withdrawn and the allottees issued with alternatives and thus the perimeter boundary be set up without reference to the overlapping survey work. To that end, the Director of Physical Planning prepared the plan, circulated and published it for comments in line with the provisions of the repealed Cap 286 and there being no adverse comments received to the PDP No. TKA/4/03/2A as shown by; MGM6 - Letter dated 27/10/2010 Ref No. LG/5/23/VOL.III/38 from DCC; MGM7 - Letter dated 28/10/2020 RefNo. NEMA/TKA/VOL IV from District Environmental Officer, NEMA; MGM8 – letter dated October 28, 2010 RefNo. DF/THK/1/67 from Thika District Surveyor; MGM9 – Letter



- dated 1/11/2010 Ref No. MWD/TKA/GC/65 Vol.IX(37) from District Water Officer Thika West; MGM10 – Letter dated 13/11/2010 Ref No. MCT3/2/5/87 dated 13/11/2010 from Thika Town Clerk’ MGM11 – Letter dated 8/2/2011 Ref No. LND/TKA/KIA(11) from the Assistant County Commissioner and lastly MGM12 – Letter 31/3/2011 Ref No. PPD/TKA/4/7/VOL.II/70 from the District Physical Planning Officer.
15. He further avowed that the notice of completion of the PDP for Kiang’ombe Scheme was published on 10/6/2011 as demonstrated by copy of notice marked MGM13 and there being no adverse comments was approved on 4/12/2013. See copy of approved plan No.365 marked MGM14. That vide MGM15, copy of letter dated December 11, 2013 Ref No. PPD/4/1/VI(11), the Director of Physical Planning wrote to the National Land Commission (NLC) informing them that the Cabinet Secretary for Lands had approved the said PDP.
 16. Further that *vide* MGM16 – a letter dated November 12, 2015 Ref No. KCG/LHPP/KGBE/22 the County Executive Member for Land, Housing and Physical Planning informed the Director of Physical Planning that the alleged allocation of the parcel of land earmarked for a public primary school in the PDP to an individual and sought revocation of the letter of allotment to that individual. In respond the Director wrote MGM 17 – a letter dated November 23, 2015 Ref No. PPD/4/1/VII/(9) communicating the commencement of the process of revoking the allotment letter. That accordingly the suit land is part of the public land planned for Kiang’ombe Scheme.
 17. In addition, that the Petitioner should have objected prior to the preparation and approval of the plan and follow the procedure laid down in Section 33 of the repealed *Physical Planning Act*. That at the time of approving the plan, Gladys Wambui Mburu and Lydia Njeri Wangondu held a letter of allotment dated 16/6/1992 for the suit land annexed as MGM18 and the process of transferring the suit land to the Petitioner commenced in 2016 three years after the PDP had been approved hence the opposition to the Petition. That inspite of the Director of Physical Planning commencing the process of revoking the letter of allotment as per the provisions of the *Physical Planning Act*, it seems that the allottees went ahead and acquired lease documents for the land. That the issuance of lease documents to the initial allottees cannot be vouched for as the land was already reserved for public use vide the approved plan.
 18. In a supplementary affidavit sworn by Rajesh Kent and dated the October 16, 2020, the deponent stated that the suit land was allocated to Lydia Wangondu and Joseph Mburu on the 16/6/1992. That no evidence of abandonment or cancellations or revocation of original plans was provided by the CoL *vide* the letter dated the 29/7/1993 to satisfy the provisions of the *Physical Planning Act*. That as at the 21/9/2007 there was in place a valid and legally binding PDP for the said Kiangombe resettlement village area. Further he faulted the letter from the Private Surveyor that the issues were best raised by a Government Surveyor. That the purported amendment and withdrawal of the subject development plans are null and void as the said amendments and or withdrawals did not comply with section 19 -22 of the Physical Planning Act. That the PDP No TKA/4/03/2A was approved with conditions which is that nobody would be deprived of land already allocated to them by the CoL through a valid and paid up letter of allotment. That the suit land by 2011 had been validly allocated to Lydia Wangondu and Joseph Mburu on the 16/6/1992 and paid for and as such could not in any event be affected by the said PDP if at all. Therefore the alleged withdrawal is a mere allegation as no cogent evidence was laid before the Court. In any event that no evidence of alternative parcels were issued to the affected people.
 19. Vide an Application dated October 18, 2021, Kiang’ombe Squatters Settlement Scheme (the Scheme) was enjoined in these proceedings as Interested Party on November 11, 2021.



20. The Interested Party's Chairperson Milkah Wangui swore a Replying Affidavit dated November 25, 2021 pursuant to an Authority to Act of even date. She deposed that residents of Kiang'ombe Village were given land measuring approx. 96.4 acres by H.E The President, Mzee Jomo Kenyatta to settle. That they have settled on 67 acres thereof while 28 acres have been grabbed by private developers who hold illegal title deeds. That vide MW1; a letter dated 6/6/2017 the NCL Chairman confirmed that the titles that have been excised over the Scheme include LR No. 4953/4025, 4953/4349, 4953/1926, 25049 and LR 29746. That the Scheme is the rightful owner of LR 29746, the suit land herein. That through MW2; a letter dated 29/7/1993, the CoL indicated that all allocation that fell within the area were cancelled and authorized the re-planning of Kiangombe area from residential purposes and that PDP superseded two earlier plans Ref Nos. KBU/93/22 and TKA/04/03/2 that had reserved the land for other uses.
21. The deponent rehashed the averments of the 1st Respondent's Replying Affidavit in respect to preparation of the PDP and denied that the Petitioners carried out any due diligence at the time of the alleged purchase. The names of the Scheme members were annexed as MW7 alongside minutes of the Thika Municipal Liaison Committee held on 26/6/2012 – MW8. They impugned the Petitioner's title deed as invalid resulting from an irregular and fraudulent process and urged the Court to dismiss the Petition with costs. It was their case that it was highly unlikely that the Petitioners obtained a valid title since the alleged allottees had used and processed a lease title from the allotment letter which had been revoked and therefore had no better title than the alleged allottees had. That the title obtained by the Petitioner's and its vendors in 2016 and 2019 respectively when the PDP that anchored their allotment letter had been revoked and a new PDP registered in 2013 *vide* Thika/4/03/2A Plan No 365
22. On behalf of the 4th Respondent, D.K Tegutwa Deputy County Commissioner Thika West, swore a Replying Affidavit dated 4/4/2022 and deposed that the suit land was open space used as grazing grounds by residents during the 1980s and 1990s and later subdivided and allotment letters issued by the Ministry of Lands. That later the letters were revoked and fresh ones issued in 2003. That the suit land was demarcated by a private surveyor named Kapanga and the subdivision plan was approved by the Ministry of Lands in favour of Kiangombe Squatters Scheme with leasehold titles and some of the spaces were set aside for public utilities.
23. The Honorable Attorney General entered appearance for the Respondents vide a Memorandum of Appearance dated 21/9/2020.
24. He averred that he was aware the suit land has been a subject of dispute at various plenaries including the NLC, Ministry of Lands, County Commissioner Kiambu, Thika DCC, Senate Committee discussions and further the Director Land Administration organized for a site visit to address the irregular allocation as shown by DKT1, letter dated 15/2/2019. That Thika District surveyor gave a report vide DKT2 - a letter dated 25/2/2019 stating the size of the Scheme and proposed development Plan. The total acreage of the land is 27.3 Ha or 67.45 acres. Among the land categorization in the report is a proposed primary school measuring 1.176 Ha or 4.31 acres.
25. Concerning the suit before Court, the deponent was emphatic that the dispute arose between the Scheme and the Petitioner when the members of the scheme asked Thika Town NG-CDF to put up a school within the land identified as TKA/04/03/2A. That this triggered an ownership dispute between the Petitioner and Kiangombe who claimed that the parcel of land was reserved for a school. The position was confirmed by the Deputy Secretary Ministry of Lands and Physical Planning's letter dated 9/12/2019 Ref No. MOLPP/LND7/18 marked as DKT3 which letter requested his office to ensure that the subject parcel of land was preserved for the purpose. That based on the said letter the



- DCC's office wrote to the Petitioner to halt any further development on the land *vide* DKT4, letter dated 30/6/2020.
26. That there were consultations made with stakeholders who included the Thika Lands Office and parties were called upon to provide copies of their land ownership documents to the DCC office. Kiangombe availed duly approved deed plan and ownership documents. Based on the availed documents Thika NG-CDF commenced the construction of the school.
 27. That this prompted the Petitioner to raise a complaint with project committee and on advise of the project chair, the project was suspended pending the resolution of the dispute.
 28. A meeting involving the Scheme, the Petitioner, DCC and Kapanga was then called by the DCC to try and resolve the ownership crisis on 30/6/2020 whereby the private Surveyor, Mr Kapanga maintained that that the suit land had been demarcated and earmarked for construction of a public school. That it was resolved that a government surveyor be engaged to relook into demarcation.
 29. The Sub County Surveyor visited the locus on the 17/7/2020 who later gave a verbal communication in the presence of the parties who included the Petitioner and Kiangombe representatives. That he is yet to get an official report however.
 30. That the names of Gladys and Lydia who purported to sell the suit land to the Petitioner are not in DKT5 - the list of the members of the Kiangombe scheme. Finally he denied that he sent goons to the suit land and termed the allegations as baseless.
 31. In a rejoinder, the Petitioner filed two Supplementary Affidavits dated October 16, 2020 and 11/5/2022. He impugned the survey, demarcation and approvals rehashed by the 4th Respondent for want of proof. That DKT1 (letter dated the 15/2/2019 addressed to the District Land Administration Officer) was never served upon him and in any event no such site visit took place as he was on the suit land on the said date. That as at 21.2.2019, the Petitioner had completed putting up a perimeter wall and any alleged exercise on the suit land would have noticed the developments thereon.
 32. Further that by 25/2/2019 the suit land had been demarcated and issued with a Certificate of Title and could not therefore be part of PDP allegedly issued on 25/2/2019 by the Thika District Surveyor. That a glean of the PDP shows that the area allegedly marked for the three schools is 0.499 Hectares yet the suit land measures 1.575 Hectares confirming that those two are two distinct properties. That by the time the two letters dated the 9/12/2019 and 30/6/2019 were authored the suit land was already issued with a title in favour of the Petitioner. That the Petitioner was not consulted and denied that any of its representatives attend the aforesaid meetings in the DCC office.
 33. The Petition were prosecuted by way of written submissions which I have read and considered.
 34. On behalf of the Petitioner, the firm of Otieno Okeyo & Co. Advocates filed submissions dated 27/6/2022 and List of Authorities of even date.
 35. The Petitioner highlighted the summary of the Petition, the objections and facts of the case. That the Petitioner is the registered proprietor of the suit land following a transfer on the December 27, 2019 duly registered in the Lands Registry. That its title has not been challenged either by way of a cross Petition. That the Petitioner is in occupation of the suit land whose perimeter wall was demolished following the 4th Respondents letter dated the 30/6/2020.
 36. That under Article 40 Constitution of Kenya, the Petitioner has a right own property in part of the country and that it's Title is protected under Section 26 [Land Registration Act](#). That the Petitioner presented evidence of payment of stamp duty, rates clearances and approval of the development plan



- by the Kiambu county Govt. That the NLC dismissed the Interested Party's complaint for want of proof since the Interested Party's land was different from the Petitioner's as shown at page 24 para.19 of RK4.
37. In addition to that, the Petitioner assailed the 4th Respondents letter dated 30/6/2020 for lacking legal basis for failing to show how the plot known as No. TKA/04/03/2A refers to or relates to the suit land herein. This is because as at that date, the suit land had already been registered as LR No. 29746 (IR No. 175337) Thika Municipality. That going by its evidence, the Petitioner has demonstrated beyond doubt that it is the registered and lawful owner of the suit land and no evidence has been tendered to impeach its Title. Reliance was placed on the Court of Appeal of *Charles Karatbe Kiarie & 2 others vs Administrators of the Estate of John Walllace Mathare & 5 others* [2013] eKLR on the indefeasibility of title and prayed for general damages of Kshs. 30M for infringement of proprietary rights and cost of putting up the damaged perimeter wall.
38. The Learned State counsel Ms Elizabeth Mwalozi filed submissions dated 8/7/2022 on behalf of the Attorney General and drew three issues for determination; whether the Petitioner obtained valid title, whether the Petition is merited and whether the Petitioner is entitled to the reliefs sought. It was submitted that no evidence of the Petitioner's incorporation as a company has been availed in Court and neither proof of the payment of the Kshs. 34M purchase price of the suit land as pleaded. That RK2a&b; copy of allotment letter dated 16/6/1992 is in the names of Lydia Wangondu and Joseph Mburu but the Certificate of Title reads Gladys Wangui Mburu and Lydia Njeri Wangondu. That the development plan application invoice dated 8/11/2017 is also in the names of Lydia and Joseph and the process of transferring the suit and to the Petitioner began in 2016, three years after it had been approved in favor of the Scheme. The Court was urged to cancel any title obtained by forgery, deceit or any fraud in line with the CoA decision in *Kenya National Highway Authority vs Shalien Massod Mughal & 5 others* [2017] eKLR.
39. Secondly, the Respondents further submitted that the Petition does not meet the constitutional threshold laid down in the case of *Anarita Karimi Njeru v R* [1976-80] KLR 1272 as affirmed in the case *Mumo Matemu v Trusted Society of Human Rights Alliance & Other* [2013]eKLR. Lastly the Respondents were categorical that the Petitioner is not entitled to any of the reliefs sought as no evidence was adduced for the demolished perimeter wall.
40. Similarly, the Interested Party's filed their submissions dated 15/7/2022 through the firm of Dola, Magani & Co. Advocates. They echoed the Respondents' submissions that impugned the Petitioner's process of acquiring its title and maintained that any part development plan in favor of the Petitioner, was later revoked vide a letter dated November 23, 2015. That the allotment was illegal for want of following the due process. They denied the Petitioner's averment that the dispute involves two distinct parcels of land and explained that the parcel of land is one and the same that is, LR No. 29746 Thika Municipality emanated from the illegal allotment. That the suit land was demarcated as public land for construction of a school and therefore not available for any allocation as envisaged under section 12(2)(d) *Land Act*. To that end the case of *Nelson Kazungu Chai & 9 others v Pwani University* [2014] eKLR was cited and the Interested Party prayed for dismissal of the Petition.
41. The issues for determination, in my view are; Whether the Petition meets the threshold of a constitutional Petition; if yes, whether the Petitioner has proven his case and if so, what orders should the Court make.
42. The Petitioner's case as I comprehend it is that it purchased the suit land for a consideration of Kshs. 34M from the previous owners who were also the first allottees from the Government of Kenya. That upon completion the suit land transferred to it on December 27, 2019 and occupied it thereafter. That



the Respondents move to demolish the perimeter wall and frustrate its quiet enjoyment of the suit land without according him a fair hearing amounts to breach of his constitutional rights mainly the right to own property under Article 40 Constitution of Kenya.

43. The Respondents' and Interested Party's case is that the Petitioner acquired the suit land deceitfully and unprocedurally illegally and fraudulently given that the suit land was earlier on demarcated and earmarked for construction of a public school.

44. The right to property is protected under *the Constitution* under Art. 40 which provides that;

“ 40. Protection of right to property

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



- (5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.”

45. Section 26 *Land Registration Act* also states;

- “26. Certificate of title to be held as conclusive evidence of proprietorship
- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

46. The protection of property under *the Constitution* is not absolute. It is trite that indefeasibility of title is not available where the propriety of the title is in question. Art 40 (6) of *the Constitution* in particular provides that the rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

47. It is trite that he who alleges must prove. The threshold for proving breach of constitutional rights as in the instant case was set out in the case of Anarita Karimi Njeru supra where it was held that;

“We would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.” (emphasis is mine).

48. That principle was affirmed by the CoA in the case of *Mumo Matemu Vs Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR where the Learned Judges emphasized that;

“(41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a Court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated ...”



49. The Court of Appeal further added;

“(43) The Petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19, 20 and 73 of *the Constitution* in its title. However, the Petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the Petition, the 1st Respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the Petition alleged that the Government of Kenya had overthrown *the Constitution*, again, without any particulars. At paragraph 5 of the amended Petition, it was alleged that the Respondents have no respect for the spirit of *the Constitution* and the rule of law, without any particulars.

(44) We wish to reaffirm the principle holding on this question in *Anarita Karimi Njeru (supra)*. In view of this, we find that the Petition before the High Court did not meet the threshold established in that case. At the very least, the 1st Respondent should have seen the need to amend the Petition so as to provide sufficient particulars to which the Respondents could reply. Viewed thus, the Petition fell short of the very substantive test to which the High Court made reference to.”

50. The Petitioner has cited a number of Articles of *the Constitution* to wit; Article 2, 3, 22, 23, 27, 28, 29, 35, 40, 50, 258 and 259 of *the constitution*. It is to be noted that by and large the Petitioner has not expounded on how his rights under the other provisions have been assailed. In other words the particulars of breach of the said Articles have not been disclosed to the Court and by whom.

51. I have carefully read and considered the case and I find that there are a number of arguments and counterarguments to wit; whether the unsurveyed industrial plot disclosed in the letter of allotment of 1992 is the same as the LR No 29746; whether the size of the land is different; whether or not the letter of allotment of 1992 was revoked; whether or not there existed a PDP used to allocate the land to the original allottees in 1992; whether or not the said PDP was revoked and the area re-planned in 2015 ? Whether or not the Petitioner or the predecessor in title were notified of the actions of revocation of the letter of allotment and the PDP; whether the suit land is different from that being claimed by the Interested Parties . In my view these are weighty issues that cannot adequately be determined on the basis of affidavit evidence. They are best left to an ordinary suit so that parties may adduce evidence which evidence may be tested by way of cross examination to determine its veracity.

52. For the Court to determine whether or not the Petitioner is entitled to the declaratory orders as to ownership sought in the Petition the Court must settle the above pertinent questions by both parties.

53. In the end I find that for the interests of justice to be served, the Petition be and is hereby struck out.

54. I make no orders as to costs.

55. Orders accordingly.

DELIVERED, DATED AND SIGNED AT THIKA THIS 17TH DAY OF NOVEMBER, 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE



Delivered online in the presence of:

Petitioner - Absent

Magani for Interested Party

Court Assistant – Kevin

