



**Seventh Day Adventist Church (East Africa) Ltd v National Land Commission & 2 others;
Board of Management Kakiptui SDA Church Primary School (Interested Party) (Environment
& Land Petition 2 of 2021) [2022] KEELC 15329 (KLR) (8 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15329 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND PETITION 2 OF 2021
MN MWANYALE, J
DECEMBER 8, 2022**

BETWEEN

SEVENTH DAY ADVENTIST CHURCH (EAST AFRICA) LTD PETITIONER

AND

NATIONAL LAND COMMISSION 1ST RESPONDENT

COUNTY LAND REGISTRAR, NANDI COUNTY 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

AND

**BOARD OF MANAGEMENT KAKIPTUI SDA CHURCH PRIMARY
SCHOOL INTERESTED PARTY**

JUDGMENT

1. Vide its petition dated July 2, 2021, the petitioner through the firm of Mengich and Company Advocates has sought the following prayers;
 - a. An order of permanent injunction do issue restraining and prohibiting the 1st and 2nd respondents barring themselves or its agents, employees and/or duly authorised representatives from issuing any further directives, restrictions, correspondences letters and/or in whichever way dealing with the suit property known as title No Nandi/kipkaren Salinet/400.
 - b. A declaration that the respondents overstepped their mandate and their respective actions and/or decisions contained in letter dated 7/9/2015 Ref; NLC/NCLMB/ACK/2015/08 signed by one Solomon Kithinji, secretary county lands management board on behalf of the 1st respondent, and the Kenya gazette notice No 228 dated March 12, 2021, were made ultra vires and ought to be quashed.



- c. A declaration is hereby issued that all the proceedings before the NLC in respect of title No Nandi/kipkaren/ Salient/400 which purported to investigate the petitioner's title to the suit property registered in the name of SDA Church East Africa Limited on the basis of a complaint or petition by the chairman of the interested party are null and void *ab initio*.
- d. An order of certiorari shall issue forthwith removing into this court for purposes of being quashed and is hereby quashed all the proceedings by and before the NLC which purported to investigate and review the petitioner's title No Nandi/kipkaren Salient/400 registered in the name of the SDA church East Africa Limited. For avoidance of doubts proceedings include all notice, directives and decisions issued by the NLC to the petitioner and/or the interested party and any other person all concerning or touching on title No Nandi/kipkaren Salinet/400 registered in the name of the SDA church East Africa Limited.
- e. An order of certiorari shall issue forthwith removing into this court for purposes of being quashed and is hereby quashed the entire findings and decisions of the NLC rendered on September 7, 2015 concerning and touching title No Nandi/kipkaren Salinet/400 registered the name of SDA Church East Africa Limited.
- f. The respondents be condemned to meet the costs of the petition.

Petition's case: -

2. The petition is founded on facts interalia that the petitioner is the registered owner of title No Nandi/kikarensalinet/400 and is the sponsor of the interested party a primary school, and its rights are being threatened and/or infringed by the respondents.
3. That petitioner avers that the title No Nandi/kipkaren Salient/400 was issued to it, on 2nd June 1981 after an adjudication process.
4. In exercise of its rights under the title to the suit property, the petitioner has been in exclusive and uninterrupted occupation and possession of the suit land property and has constructed a church and the interested party, a primary school thereon.
5. That in 2015, the 1st respondent, initiated the process of sub-dividing, the suit property and the church members placed a restriction against any dealings with the petitioners property, without the consent of cabinet secretary, ministry of lands.
6. Pursuant to a letter dated September 7, 2015 Ref; NLC/NCLMB/ACK/2015, a recommendation was arrived at, without the participation of the petitioner and which recommended as follows;

“The County Lands Management Board (CMLB) has concluded investigations into the petition presented by the Chairman Board of Management of Kakiptui Primary School and recommends as follows,

1. The church SDA East Africa Limited who are the holders of the certificate of title of land parcel title No Nandi/kipkaren/salient/400 should surrender the same to the county land registrar.
2. New certificates for the parcels should be prepared as per the wishes of the community stakeholders in the following manner.
 - i. 5 acres to be given to the school
 - ii. 2 acres to be given to the church



The school and the church should proceed and acquire ownership documents for the parcels they occupy.”

7. Vide the Kenya Gazette Notice No 2328 dated March 12, 2021, the 2nd respondent gazetted the petitioners property to wit Nandi/kipkaren Salient/ measuring approximately 2.8 Ha (7 acres) for surrender of the land certificate within 30 days for subdivision failure to which the same would be null and void and of no effect.
8. The said gazette notice in the above paragraph was made pursuant to the letter dated Ref; NLC/NLCMB/ACK/2015/09 dated October 12, 2015 alluded to in paragraph 6 above and referred to in the 2nd respondents letter dated 6/7/2019 directed to petitioner to surrender its original land certificate.
9. It is on the basis of this gazette notice that the petitioner has approached this court alleging violations of its fundamental rights in that;
 - i. The 1st respondent investigated and concluded deliberations on its title without inviting them this denying them the right of participation, involvement and/or to give consent to the intended subdivision of the suit property.
 - ii. The petitioners objection and/or request for minutes, rulings and/or information pertaining to the deliberations did not elicit any response from the respondents.
 - iii. The petitioner was excluded and not a party to any deliberators alluded to and/or was privy to the letter informing the decision to gazette the suit property and copied to the management of the interested party to liaise with the county surveyor nandi and county co-ordinator for NLC to start the process of sub-division.
 - iv. That the decision of the 1st respondent is made on the assumption that the suit property is a public land and in breach of procedure for alienation of private land and/or compulsory acquisition process of the Land Act.
 - v. That the petitioners property will be unilaterally and arbitrarily subdivided to the petitioners detriment as the bonafide registered owner in contravention of fair administrative action and right to be heard.
 - vi. That the respondents action are actuated by ill motive, bad faith, and amount to abuse of office.
10. The petition is based on the following constitutional provisions, articles 1 (i), 2 (i) 2 (4), article 3, article 10, 23 article 35 (i), 40. article 47 of the *Constitution*, article 50 and 64. article 258 (i), 258 (2) article 165 (3) (d) article 174. article 259, as well as the *Fair Administration Action Act*.
11. Vide an application dated February 15, 2022, the applicants Julia Jerono, Henry Murrei, Tito Sambutie, Bargeny Kipkemboi Samoei and Sylvester Kurgat sought for a joinder in the petition as interested parties.
12. On March 1, 2022, the joinder application was allowed in terms that the proposed interested parties were deemed as witnesses, and their affidavits admitted as statements, in support the petition, and reply to the cross – petition.
13. It is the petitioner’s case as can be garnered in the further affidavit of Benjamin Tanui, that the there was no agreement in 1977 or thereafter for the petitioner to be allocated any land in exchange for the land within Kakiptui village.



14. That the property was never set aside by the first settlers of Kakiptui or alienated for public use in 1981. That the interested party was built on the suit property with the knowledge that the suit property was private property.
15. That the meetings held between 1981 – 1984 did not yield any resolution and there was no attendance by the petitioner to pass a resolution to gift its land to any party, as the county council of Nandi had no role to set aside land that has been in use by the church as early as 1950's.
16. In their replying affidavits to the cross petition, and in support of the petition, Julia Jerono, Barngetuny Kipkemboi, Samoei, Tito Sambutie, and Henry Murrei, Sylvester Kurgat, all gave the history of suit property. The common thread of history appearing in the affidavits is that;
 - i. The suit property belongs to the petitioner who allowed and gave consent for the construction of the school; which runs as a public institution.
 - ii. The community did not petition the government for allocation of land and neither did not object to the allocation of land to the petitioner when the adjudication process of Kakiptui section was carried out in the 1970's and no land was set aside for a public school.
 - iii. The church location was previously used by a white settler called Derick Heggue, who was the employer of the pioneer church members, and he allowed the church to exist as early in 1954.
 - iv. At time of adjudication, the county council of Nandi was well aware that the property was being used by the church and hence not set aside for any public use.
 - v. The petitioner thus prays that the petition be allowed.

The respondents and the interested parties case and cross petition:-

17. In their response to the petition, the respondents aver that;
 - i. The registration of Nandi/Kipkaren Salieent 400 in the name of the petitioner, was procured, by fraud, mistake, misrepresentation and the title is tainted with fraud and is thus void and nullity ab initio.
 - ii. The respondent further aver that interested party has occupied the suit property from 1966 and it was set aside as a public utility for purposes of a school.
 - iii. The respondent aver that the interested party is a public school, enjoying the coffers of national government, hence does not fall under the control and management of the petitioner.
 - iv. That the school started in 1966 and the property was initially set aside for public purposes and it was therefore alienated government land pursuant to section 2 of both the [Government Land Act](#) (Cap 281) and [Physical Planning Act](#).
 - v. That the petitioner had surrendered the land to the public in 1981.
 - vi. That the petitioner had been summoned to attend the deliberations made on February 2, 2015.
 - vii. That the petitioner was informed of the board's recommendations; and the petitioner did not challenge the recommendation by way of an appeal or review, which recommendation with the 1st respondent; hence the decision to gazette the recommendation for the surrender of land certificate.



- viii. That the land in question was public land hence under the ambit of investigation of the 1st respondent.
 - ix. That the petition does not meet the legal threshold of a constitutional petition as the petition does not disclose the alleged violations of the Constitution to enable the court to grant the relief's sought.
18. The respondent thus prayed for dismissal of the petition and for the cross – petition to be allowed.
 19. The petitioner had also filed a chamber summons application seeking conservatory orders restraining the 1st and 2nd respondent from implementing Kenya Gazette Notice No 2328 dated March 12, 2021 and/or surrender of the suit property; interalia.
 20. On September 29, 2021 the said application was compromised by a consent order that “the status quo prevailing today September 29, 2021, that the petitioner still remains the registered proprietor of the suit premises and that the interested party still occupies a section of the suit premises” was issued by the court.
 21. Parties took directions on the hearing of the petition and the petition was to be heard by way of filing of written submissions.

Petitioners Submission: -

22. The petitioner has identified and framed the following as issues for determination, to wit;
 - a. Who is the registered proprietor of property known as title number Nandi/kipkaren Salinet 400 (The suit property).
 - b. Whether the interested party have any legitimate claim on the suit property in the cross petition.
 - c. Whether the petitioner was afforded an opportunity to be heard prior to the decision and recommendation to sub-divide the suit property.
 - d. Whether the respondents followed the right procedure in setting aside land for use by the interested party.
 - e. Whether the Kenya Gazette Notice No 2328 dated March 12, 2021 by the 2nd respondent is *ultra – vires* and ought to be quashed.
 - f. Who should meet the costs of the application and the petition?
23. With regard to issue number 1, it is the petitioners submission that they are the current registered owner of the Nandi/Kipkaren Salient/400 and as copies confirmed by copies of land certificate and green card bearing their name and issued on June 2, 1981. the copy of the green card reveals that the property was first registered to the government of kenya on February 20, 1974 and to then to the petitioner on March 12, 1979, before a title was issued on June 2, 1981.
24. The petitioner has placed reliance on section 26 of the Land Registration Act on the proposition that a certificate of title issued by the registrar shall be taken by all courts as prima facie evidence that the person names as proprietor of land is the absolute and indefeasible owner.
25. The petitioner in further support of the indefeasible nature of their title have placed reliance on the decisions in the cases of Geoffrey Kanu Kinyua v Commissioner of lands and 11 others (2021) eKLR and Charles Karaithe Kiarie and 2 others v Administrators of the Estate of John Wallace Mathare and



- 5 others and urged the court to find that the property is exclusively owned by the petitioner and the direction to subdivide the case into two portions contravenes section 42 of the Land Act.
26. On issue number 2, the petitioner submits, that the suit property was registered to the petitioner after adjudication and that there was no objection from the school or local community not had it been set aside for public use.
 27. The petitioner submits that the respondents have not established by way of evidence if they complied with provisions of section 7, 8 and 13 of the Trust Lands Act and whether, the county council of Nandi Mosop Land Control Board, as the divisional board, raised any complaint, appeal or objection as per section 13, 26, 26 (a) and 27 of Land Adjudication Act prior to issuance of land certificate.
 28. The petitioner further submits that there is no proof of fraud and/or misfeasance relied upon by the respondents in their cross – petition. That the cross – petition is an afterthought, ill-timed and untenable since the petitioner has been registered for more than 50 years and occupied property.
 29. The petitioner on issue number 3 submits that the 1st respondent in conjunction with county lands management board proceeded with deliberations without the participation, involvement and/or consent of the petitioner.
 30. It is the petitioner's submissions that the petition dated April 2, 2015 was found to have been filed with forged signatures and the school was directed to file a fresh petition which was directed to file a fresh petition which was not filed, thus the decision to subdivide the property was reached had no basis and was thus a nullity.
 31. The petitioner further submits that the right to a fair hearing is loosely intertwined with fair administrative action, and having not been heard on the petition, they were condemned unheard and therefore the Kenya Gazette Notice No 2328 dated March 12, 2021 is *ultra-vires* and ought to be quashed.
 32. The petitioner submits that the gazette notice No 2328 has no basis as the entire process leading to gazettlement of the petitioner property was mired in controversy, circus, lack of transparency, deceitfulness and blatant failure to inform or consult the petitioner.
 33. That the process leading to gazettlement infringed the petitioner's right to be heard and the Kenya gazette notice deprived the petitioner's right to property arbitrarily. On costs the petitioner submits that they be awarded costs.

The respondents and the interested party's submission:-

34. The respondents and the interested parties having similar interests in the suit property, filed a joint set of submissions, in which they framed the following as issues for determinations;
 - a. Whether the 1st and 2nd respondents acted ultra vires.
 - b. Whether the decision of the 1st respondent of 7th September 2015 was made unilaterally.
 - c. Whether the petitioner is entitled to the relief's sought.
 - d. Whether the cross – petition should be allowed?

On issue number 1, the respondent and interested parties have set out the mandate of the commission under article 67 of the Constitution, as well as the NLC Act.



35. The respondent submit that under section 6 of the NLC Act they were duly bound to initiate, investigations on own initiative or on a complaint, into present or historical land injustices and recommend appropriate redress.

Accordingly they submit that they did not act beyond their powers.

36. The respondent and interested party placing reliance on section 109 of the *Evidence Act* submit that there is no evidence before court adduced by the petitioner to show that the petitioner had proved claim of ultra – vires on the part its part.

37. On issue number two, the respondent and the interested party submit that, the petitioners have all along since 1977 known of the dispute and that before the decision made on September 7, 2015, the petitioner was invited and granted an opportunity to be heard.

38. The recommendation was made in 2015 no appeal thereof was made and it was at the implementation stage (execution). The respondent submits that the petitioner was afforded a chance to be heard and were not condemned unheard.

39. On issue number 3, the respondent submits that in so far as the petition is based on the issue of that a decision was made by 1st respondent on September 7, 2015 without according it a chance to be heard. The respondents submit relying on decision in the case of *Leakely Martin Mulonzi and another v Principal Secretary, Ministry of Lands, Housing and Urban Development and 4 others* (2020) eKLR that there was no violation of the plaintiff's rights, thus the petitioner has not discharged its obligations of the burden of proof.

40. On issue number 4, the petitioner submits that they have demonstrated that the suit property is a public land alienated by the nandi county council for purposes of public utility to with, a primary school represented by its BOM. Thus the same was not available for further alienation to private individuals.

41. On the strength of the above, the respondents submit that the cross petition be allowed. In this regard the respondent has placed reliance in Eldoret CACA No 288/2010 *Kipsirgoi Investments LTD v Kenya Anticorruption Commissions*, as well as Civil Appeal No 252/2005, *Funzi Island Development Limited and 2 others v County Council of Kwale*.

42. The respondents thus the court to find that the suit property was wholly public land and that the prayers in the cross – appeal be granted; and that as costs follows the event, they be granted costs.

Issues for determination: -

43. Each party to be case has framed its own issues for determination, the court however frames/the following as the issues for determination from the pleadings, evidence and the submission on record.

44.

- i) Whether Nandi/kipkaren/salinet 400 is a private property as claimed by the petitioner or a public property as claimed by the respondents and Interested Party.
- ii) if it is a private property, did the respondent act ultra vires, and was the gazette notice No 2328 dated March 12, 2021 issued regularly, and has the petitioner proven its case.
- iii. If the same was public property, has the respondent proven the cross petition.
- iv. Who bear the costs of the case?



Analysis and determination: -

45. Based on the title issued to it, the petitioner's case is that the suit property, Nandi/kipkaren Salient/400 is private property belonging solely to it, although there is a school that had been built thereon, being the school represented by the interested party. Towards this end the petitioner cited section 26 of the L.R.A.
46. It is the petitioner's further case, that the Kakiptui SDA Primary School represented herein by its BOM the interested party procured an interim certificate of registration in 2005 and full registration in 2014; while the suit property was registered to it, through an adjudication process on June 2, 1981.
47. That a nurse school had been in existence prior to arrival of settlers which nursery school had began church members of the Kakiptui SDA Church.
48. The County Council of Nandi did not set aside any land for construction of a nursery school in Kakiptui, but only set aside a cattle dip as a public utility on plot number Nandi/kipkaren Salient/401.
49. The affidavits of Julia Jerono, Barngetuny Kipkemoi, Tito Sambutie Henrey Murrei as well as Sylvester Kurgat filed in response to the cross petition, all detail the historic events before the land adjudication process and the existence of the nursery school that the SDA church had built for its members; at the current location where the interested party now stands.
50. In the affidavit of Julia Jerono at paragraphs 17-20 for instance, details that the nursery school had been built on the 7 acres set aside by the white settle before the adjudication process, have the church did not participate in the process of balloting and/or allotment since allocation was special based on the special request of the servants and direct allocation by the white settler.
51. At paragraph 29 – 32 of the affidavit of Julia Cheron, depones that the church property as were other church properties, was not available for balloting and/or allocation since they had been allocated prior to adjudication process.
52. On their part, the respondents and interested party indicate that the suit property had been set aside for public utility (see paragraph 20 (a) of the affidavit of Mr Brian Ikol for the 1st respondent, by the Nandi county council, hence the property was an alienated public land incapable of allocation.
53. With regard to the petition leading to the recommendations, it is the respondents case that the petition related to illegally acquisition of public land by the petitioner, and was rightly under their mandate.
54. I have carefully considered the pleadings, the affidavits on record as well as the submissions by the parties. Whereas the respondents and interested party indicate that the suit property is public land set aside for construction of a public school, by the Nandi county council, i have perused the process of setting aside land for public use, under the repealed Constitution which was applicable during the time.
55. Section 117 of the retired constitution empowered the county councils to set aside an area of trust land for use and occupation by a public today or authority for public purposes.
56. Under section 13 of Trust Land Act, (now repealed) the procedure for setting aside the land is enumerated which included the involvement of the public as well as the divisional board, and the county council would gazette to setting aside.
57. Annextures 3 of the affidavit of Patrick Khaemba suggests that the Mosop Land Control Board met on 17th September 1981 and approved a subdivision of Nandi/kipkaren/salient 400 and 5 acres were to be transferred by way of a gift or by way of reallocation of another property to the petitioner upon the



- petitioner agreeing to sub divide as a gift, to the Primary school. Annexure 1, is a letter from the then District Commissioner to the Provincial Commissioner, where a request was made for reallocation of an alternative plot with Kipkaren Salient area to the petitioners.
58. Other than the two documents all issued after the allocation process had been done, the notice by the county council, reserving the property for public utility as well as the gazette notice, showing that the property had been set aside have not been exhibited before court.
 59. The import of annexure 1 and 3 above is that they suggest that there was to be compensation by way of a reallocation of another property to the petitioner upon the petitioner agreeing to subdivide as a gift to the primary school.
 60. This was effectively a compulsory acquisition process; which was not completed. Consequently if indeed the land had been aside for a public property, there would not have been need for compulsory acquiring the same; by way of reallocation to another property.
 61. In absence of the gazette notice setting aside the property, as well as the notice from the county council of Nandi of the intention to set aside, as well as the minutes of the divisional board setting aside during the allocation process, and given the depositions that his particular property was already occupied by the petitioner even before allocation and was not available for balloting and allocation.
 62. The court finds that this suit property had not been set aside as a public property and the same rightly belonged to the petitioner, it is thus a private property as evidenced by the copy of the tile and green card and official search to in the petitioners list of documents. The compulsory acquisition that had been commenced by the letter Annexure 1 was equally not finalised thus giving rise to the current state of affairs where a public Primary School Kakiptui SDA Church Primary School sits on private land belonging to the petitioner.
 63. The court finds that Nandi/kipkaren Salient/400 is a private property, measuring 7 acres, with 2 acres housing the SDA church and 5 acres housing a public primary school, Kakiptui SDA Church primary School.
 64. Having answered issue number 1 in the affirmative, the court shall proceed to consider issue number 2 as framed at paragraph 44 (ii) above.
 65. The gravamen of this petition is that the 1st respondent acted ultra- vires its statute in its recommendation contained October 12, 2015, and the resulting issuance of the Kenya Gazette Notice No 2328 dated March 12, 2021.
 66. As observed in paragraphs 58 – 61 above, the court has found that LR No Nandi/kipkarensalient/400 is a private property, in its recommendations carried in the letter dated 7th September 2015, which were to be implemented by the Gazette Notice No 2328 dated March 12, 2021; the issue is whether under the NLC Act, the 1st respondent could order and in fact gazette the subdivision of the private property.
 67. The 1st respondent contends and submits that it has power to investigate allegations of illegal allocation and encroachment of public land and that in the petition before it was under the heard and the recommendations made under the said powers hence it acted within the law; and not ultra vires, the Court has however not found any evidence to support the setting aside of the property by way of a Notice to the public issued by County Council of Nandi (Mosop Land Control Board), nor any minutes of the Divisional Board or a Gazette Notice, setting aside the property, hence the 1st respondent while acting in the belief that the suit property was public property actually while it was private property the recommendations made on 12th October 2015 and the subsequent gazette notice yet the 1st respondent does not have mandate over private property.



68. The recommendations and the gazette Notice were thus made outside the mandate of the 1st respondent and were ultra- vires, as the property was private not public.
69. The effect of the recommendation and the gazette notice was thus to infringe the petitioners right to property as enshrined in article 40 of the Constitution.
70. In the petition before court, the petitioner at paragraph 29 thereof, has sought the protection of the court for the right to property. Stating that any proposed subdivision as contained in Gazette Notice number 2328 as well as the letter dated September 7, 2015 would thus infringe their right to property.
71. The respondent and interested party submit that the petition has not particularised the alleged infringements as is required under the decision of AnnaRita Karimi Njeru.
- However the petitioner at paragraphs 22, 27, 29, 30(j) has set out the particulars of the violations of their rights to own property under articles 23, 40 and 64 of the constitution pleaded at paragraph 22 of the petition.
72. The court was therefore able to understand the threats to violations and the violations as having arisen from the letter dated October 12, 2019 and the Kenya Gazette Notice no 2328.
73. The petitioner has thus proven its case on the required standard, as the violations or threats to violations have been pleaded with specificity.
74. Having answered the first two issues in the affirmative, the court will not consider issue number 3, but shall state in passing by the apart from the averments made on behalf of the respondents and interested party respectively, in their joint response to the petition, no evidence was placed before court by the respondents to show that Nandi/kipkaren Salinet/400 had been reserved for public use.
75. The procedure for setting aside was not followed and process of compulsory acquisition was not completed either.
76. Thus the cross petition fails mainly because the respondent and the Interested Party did not discharge their evidential burden to prove the facts as required under section 109 of the Evidence Act, and as was stated in the decision of the case of Civil Aviation Ltd v Crusair Ltd cited (no 1) (1987) KLR 103 cited by the respondents in this case. In that case the court observed as follows;
- “The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath, averments are not made on oath. Averments depend upon evidence for proof of their contents.”
77. No notice by the county council of Nandi setting aside the property, no minutes by the divisional Board, (Mosop Land Control Board) nor a gazette notice setting aside Nandi/kipkaren/salient 400 were exhibited before Court, suffice to say the process of setting aside was not followed nor was the process of compulsory acquisition commenced by the District Commissioner as no land was available for reallocation finalised.
78. On the strength of the above findings the cross petition was not proved and it must fail.
- Disposition:-**
79. The Court takes note of the fact that a public primary school was built on private property, and compulsory acquisition process was commenced but no alternative reallocation was done, in favour of the petitioner, it would not be prudent to disrupt the learning activities of the pupils in the school



which serves a large population, but in the circumstances, the appropriate remedy will be to direct the 1st respondent to complete the compulsory acquisition process as laid down in law and compensate the petitioner promptly.

80. In arriving at the above the court has noted the petitioners particulars of violations and infringement of rights pleaded at paragraph 22 (i) to wit

“The respondent have failed to adhere to the laid down procedure for inquires compulsory acquisition and/or forcible take over without compensation.” and thus following down the laid down procedure for compulsory acquisition is an appropriate remedy to address that violation in the circumstance of this petition.

81. The Court has taken cue in the decision of the Court of Appeal in *Uasin Gishu Mmemorail Hospital Limited v Moi Teaching and Referral Hospital Board and 2 others* (2017) eKLR where in similar circumstances as in the case where a private property had been used as a public property, the court observed “As equity suffers no wrong, and bearing in mind that several years have elapsed since the takeover of the hospital and the related facilities by the 1st respondent and appreciating the nature of services being rendered by the Hospital, it is out considered view that it would be unconsciable to grant the mandatory prayers in the originating summons ,whose effect would be to eject the 1st respondent and reinstate the appellant.”

In the circumstances, the order that commends itself to us is one of compensation under section 75 of the retired constitution.

82. The petition is thus allowed in the following terms;

- i. An order of certiorari hereby issues removing into this court for purposes of being quashed and is hereby quashed the proceedings before the National Land Council which purported to investigate the petitioners title No Nandi/kipkaren/salinet/400.
- ii. An order of certiorari hereby issues quashing the findings contained in the letter dated September 7, 2015 as well as Kenya Gazette Notice number 2328.
- iii. An order of compensation and/or compulsory acquisition of the 5 acres of Nandi/kipkaren Salinet/400
- iv. Upon compensation or compulsory acquisition as ordered in (iii) above the petitioner to execute transfer for the 5 acres, public school is located to the school.
- v. Costs are hereby awarded to the petitioner.

DATE AT KAPSABET THIS 8TH DAY OF DECEMBER 2022.

HON. M. N. MWANYALE,

JUDGE.

In the presence of;

Mr. Letting for the respondents

No appearance for Mr. Mengich for petitioner (duly notified).

