



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**PETITION 10 OF 2019**

**IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF ARTICLES 2 (1) (2) (4) (5) (6) ARTICLE 3 (1) ARTICLE 20 (1) (2) (3) (4) ARTICLE 21 (1) ARTICLE 22 (1) (3) (4) ARTICLE 23 (1) (3) ARTICLE 24 (1) (2) (3) ARTICLE 40, ARTICLE 50 (1) ARTICLE 60 (1) (b) & ARTICLE 64 (b)**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS OF AN INDIVIDUAL AS ENSHRINED IN ARTICLES 40 & 47 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE LAND REGISTRATION ACT SECTIONS 24, 25 & 26**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE RULES, 2006 AS READ WITH CLAUSE 19 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA TRANSITIONAL CLAUSES AND CONSEQUENTIAL PROVISIONS OF THE SCHEDULE TO THE CONSTITUTION**

**BETWEEN**

**KATANGI DEVELOPERS LIMITED.....PETITIONER**

**AND**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**KENYA RAILWAYS CORPORATION.....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

**Petitioner's Case**

Katangi developers (hereinafter referred to as the Petitioner) has sued the Attorney General (hereinafter

referred to as 1<sup>st</sup> Respondent) and Kenya Railways (hereinafter referred to as the 2<sup>nd</sup> Respondent) and the Ethics and Anti-Corruption Commission was joined as Interested Party.

The Petitioner claims to be the registered proprietor as lessee from the Republic of Kenya of all those parcels of land or plots known as Kisumu Municipality/Block 7/414, 415, 417, 419, 420, 421, 422, 424, 425, 426, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439 and 440.

The Petitioner purchased the said properties from Norlake investments Limited in or about the month of November 1998 and the petitioner was registered as proprietor and issued with certificates of lease on the 13<sup>th</sup> November, 1998. That on the properties, are developed showrooms fronting the main commercial and industrial street in Kisumu City known as Obote Road and OgingaOdinga Road while the plots behind the showrooms are developed with godowns with railway sidings.

According to the petitioner, two (2) of the showrooms on plots Kisumu municipality/Block 433 and 434 are at the moment undergoing reconstruction to modernize and improve their structural aesthetic and commercial value. Four of the godown plots namely Kisumu Municipality/Block 7/419, 420, 421 and 422 are being developed with a customized commercial building comprising inter alia an automobile showroom service bays and office.

The customized commercial building is being developed for Nissan Kenya an international automobile dealer who is due to take partial occupation thereof at the end of September 2019 when the construction will be 70% and take full possession thereof at the end of November 2019 when construction should be 100% complete. The development has so far cost the Petitioner an estimated sum of Kenya shillings One Hundred and Thirty Million (Kshs. 130,000,000.00/=).

The petitioner's properties Kisumu Municipality/Block 7/432, 433, 434, 435, 436, 437, 438, 439 and 440 are located west-eastwards on and front Obote Road. They commence with Block &/440, which is at the junction of Obote Road and OgingaOdingaRoad.

The properties Block 7/440 adjoins the properties Block 7/425, 424 and 422 which front OgingaOdingaroad which runs north-southwards all the way to the Kisumu Port on Lake Victoria.

The properties on which are built the godowns namely Block/425, 424, 426, 429, 430, 431, 414, 415, 419, 420, 421 and 422 can only be accessed via OgingaOdinga road after its junction with Obote road.

The petitioner states that on or about the 6<sup>th</sup> August, 2019 the Petitioner received a letter dated 6<sup>th</sup> August 2019 to the Petitioner under the hand of its Chief Executive Officer, the Ethics Anti-Corruption Commission addressed to the Petitioner thus stating that the commission was investigating allegations of irregular acquisition of public land which was reserved for use by Kenya railways inclusive of the plots irregularly registered in the names of the petitioner

Another letter dated 13<sup>th</sup> August 2019 under the hand of its Chief Executive Officer, the Ethics and Anti-Corruption Commission claimed to be investigating allegations of irregular acquisition of public land which was reserved for use by the Kenya Railways. They claimed that the plots were irregularly registered to Katangi Developer Limited.

The said letters respectively invited the Directors of the Petitioner to attend the offices of the Commission for an interview at Kisumu on 8<sup>th</sup> and 15<sup>th</sup> August 2019 at Kisumu but which was later changed to be at Nairobi on 5<sup>th</sup> September 2019.

The Petitioner's director attended before 2 officers of the Commission at Nairobi on the 5<sup>th</sup> September 2019 recorded a statement in writing and furnished the said officers with documents of title to the said properties.

While at the offices of the Commission persons who identified themselves as officers from the National

Youth Service in the Ministry of Interior and /coordination of National Government and from the Ministry of Transport Infrastructure, Housing and Urban Development and the Kenya Railways Corporation descended on the aforementioned properties of the Petitioner and verbally informed the Petitioner's tenants, employees and or representatives that all properties along and off Obote Road are property of the Kenya Railways Corporation and that they had repossessed the same for and on behalf of the Kenya Railways Corporation the 2<sup>nd</sup> Respondent.

The said officers proceeded in a show of might to dig holes in front of the petitioner's showrooms on Obote Road. The holes indicate that the Respondents intend to fence on concrete poles in front of the showrooms to block egress onto Obote Road. He annexed a sketch of the Petitioner's properties to show the blocked access to the godowns and the dug holes ready to put fencing posts in front Obote Road.

The Petitioner's go downs have only one access being off OgingaOdinga Road past its junction with Obote Road towards the Kisumu Port.

The aforesaid officers of the Ministries of the Kenyan Government and Kenya Railways Corporation have blocked the road to the Kisumu Port by erecting a fence on concrete poles at the junction of OgingaOdinga- Obote Roads thereby blocking all access to the petitioner's godowns.

The petitioner laments that by their said actions the Government of Kenya and Kenya Railways Corporation have effectively deprived the Petitioner of its access to occupation and user of its go downs without any colour of right, notice and without following any due process known to the law.

The Government of Kenya and the 2<sup>nd</sup> Respondent have thereby arbitrarily deprived the Petitioner of its right to the access, occupation and user of its property in brazen violation of the Petitioner's fundamental rights enshrined and protected in Article 40 (3) of the Constitution.

The Petitioner is apprehensive that the Respondents will proceed to fence off its showrooms thereby denying its tenants access to their businesses therein.

The Petitioner is apprehensive that the Respondents will unilaterally proceed to purport to revoke and or cancel its leasehold titles again without any colour of right and without any due process known to the Constitution and statute. If the Respondents proceed to revoke the Petitioner's titles aforesaid it will have been arbitrarily deprived of its twenty –two (22) properties that it acquired for valuable consideration in violation of its rights enshrined, guaranteed, and protected in Article 40 (3) of the Constitution.

The petitioner filed a supplementary affidavit showing the history of the parcels of land in contention stating that the 2<sup>nd</sup> Respondent had never owned them. The parcels of land were un-alienated Government lands in 1945 according to the petitioner.

That sometimes in or about the year 1945 a draft Grant of the said land was prepared by the 2<sup>nd</sup> Respondent's predecessor the Kenya and Uganda Railways and Harbours and the draft was sent to the then Registrar of titles for issuance of a Grant. A copy of a letter dated 24/9/1945 by the Chief Engineer of the then Kenya and Uganda Railways and Harbours is attached at page 9 of the bundle. It is instructive that the letter does not say who the Grantee was or was to be.

The then Registrar of Titles successfully processed the Grant as shown in the correspondence between him and the Kenya and Uganda Railways and Harbours and the land given Title Plot No. 1148/21/LV.

That in the same year 1945 the Registrar of Titles granted the said parcel of land to ASEMBO TRADING COMPANY LIMITED who paid to the Registrar of Titles Kshs. 340/= being the cost of the deed, registration and stamp duty vide letters dated 2/11/1945 and 9/11/1945 which are at pages 12-13 of the bundle.

That on or about the 14/11/1945 the title to the land was transferred by the Crown (Colonial Government)

to Asembo Trading Company Limited by a document titled **schedule** which is at page 17 of the bundle. The Transferor is shown as the **crown** and the Transferee is Asembo trading Company Limited.

The petitioner states that among the conditions was that the Grantee would erect on the land godowns warehouses and factory and that a formal title was issued by the Governor and Commander in Chief of the Colony of Kenya on behalf of his Most Gracious Majesty King George the Sixth to Asembo trading Company limited. The Special Condition 1 of the Grant to be fulfilled by the grantee was to construct a suitable plat form at truck floor level on the railway side of the plot to facilitate the loading and unloading of goods.

The petitioner states that it is not in doubt therefore that the land leased to the Grantee and therefore its successors extends upto the railway line and the Grantee by reason of the lease has a right to access the railway line and to have it so desires its goods loaded in to and unloaded from the 2<sup>nd</sup> Respondent's wagons.????

That another Special Condition of the Grant was that only the Governor (now president) could grant the Grantee a further lease upon expiry of the current one and only the Governor could accept a surrender of the Lease.

That on or about the 27/3/1948 the title was transferred to AlibhaiRamji and Sons Limited. That on or about the 2/4/1968 the title was transferred to East African Hardwares (1967) Limited then on or about the 18/10/1970 it was transferred to ManibhaiKishabhai Patel and 10 others.

Earlier on in or about the year 1947 application was made for permission to put up on the land by Kisumu Motor Works Limited buildings to carry on the business of motor garage automobile dealers, motor mechanics and other business of similar nature. Permission was sought from Kenya and Uganda Railways and Harbors, the Commissioner of Lands and the Kisumu Municipal Board (page 27).

That between 12/4/1948 and 8/6/1948 a change of name of the Grantee from AlibhanRamji and Sons Limited to AlibhaiRamjee and Sons Limited was effected by the Registrar of titles.

That from the public records at the Municipality of Kisumu the office of the Commissioner of Lands and the 2<sup>nd</sup> Respondent or its predecessor Kenya and Uganda Railways and Harbours in or about June 1948 the owner of the suit land applied to the three bodies for approval of the building plans for the proposed buildings. The Municipality of Kisumu vide its letter of 4/6/1948 sought approval of the Commissioner of Lands. The Commissioner of Lands escalated the request for approval of Kenya and Uganda Railways East African Railways Administrator vide a letter dated 18/6/1948, which confirmed its approval vide its letter dated 26/6/1948 (pg 32) after which the Commissioner of Lands returned the building plans duly approved to the Municipality of Kisumu vide a letter dated 14/7/1948 (pg 33).

That what followed thereafter is documented confirmation that the suit land is the property of the Government of Kenya and not the 2<sup>nd</sup> Respondent.

That sometimes in the year 1952 the Grantee of the suit land East African Hardwares Limited sought to mortgage the leasehold title to Barclays Bank (D.C80). By a letter dated 10/11/1952 the Commissioner of Lands wrote to the successor of Kenya and Uganda Railways and Harbours the East African Railways and Harbours for consent to the proposed mortgage (pg 35). Paragraph 2 of the said letter says the land is under administration of East African Railways and Harbours.

That by a letter dated 27/11/1952 addressed to the Grantee East African Hardwares Limited (pg 36) consenting to the mortgage instructively in paragraph 1 of the said letter the chief Engineer of the East African Railways & Harbours informed the grantee that:

***“with reference to your letter dated 5<sup>th</sup> November, 1952 addressed to the Special Commissioner and Acting Commissioner of Lands, copy to me I have to inform you that the above plot is***

*administered by Railway on behalf of the crown”*

The lease granted to East African Hardware Limited was later extended to a term of 59 years from 1/1/1946. The memorandum of extension is at pg 41. It is instructive that the registered owner is given as east African Hardwares (1967) Limited and the issuer of the lease is the Registrar of Titles.

That when the Registered Land Act, Cap 300 (repealed) was applied to Kisumu the suit land was brought under the regime (pg 42) and it was given a new number Kisumu municipality/Block 7/6.

That sometimes between the years 1990 and 1991 Lake Investments Limited which had become the leaseholder of the suit land applied to the Commissioner of Lands to sub-divide it into 26 sub plots to create Kisumu municipality/Block 7/414-440.

The petitioner prays for orders that a **declaration that the Petitioner’s Constitutional right to acquire and own property and in particular the property Kisumu Municipality/Block 7/414, 415, 417, 419, 420, 421, 422, 424, 425, 426, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439 and 440, has been violated by the actions of the Respondents jointly and severally.**

**A declaration that the Petitioner’s Constitutional right not to be deprived of its property and more specifically the properties Kisumu Municipality/Block 7/414, 415, 417, 419, 420, 421, 422, 424, 425, 426, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439 and 440 has been violated by the actions of the Respondents jointly and severally.**

**A declaration that the Petitioner has been arbitrarily deprived of its properties Kisumu Municipality/Block 7/414, 415, 417, 419, 420, 421, 422, 424, 425, 426, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439 and 440 by the actions of the Respondent jointly and severally in violation of Article 40 (3) of the Constitution.**

**A declaration that the Petitioner’s enjoyment of its rights in Article 40 (7) (b) to access, occupy, and use its properties Kisumu Municipality/Block 7/414, 415, 417, 419, 420, 421, 422, 424, 425, 426, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439 and 440 and that those rights have been limited and restricted by the actions of the respondents jointly and severally.**

**A declaration that the actions of the respondents jointly and severally to invade the Petitioner’s property and block or obstruct access thereto and to interfere with its quiet enjoyment thereof without its consent, permission and concurrence and against its will and without following due constitutional and statutory processes is a violation of the petitioner’s Constitutional rights to Fair Administrative action protected in Article 50 (1) of the Constitution.**

**A prohibitory Injunction be issued prohibiting the Cabinet Secretaries for Interior and Co-ordination of National Government, the Cabinet Secretary for Transport, Infrastructure, Housing and Urban Development and the Managing Director Kenya Railways corporation or any one of them by themselves, their subordinates representatives, agents or any other person acting through them or on their instructions or directions from repossessing, taking possession, fencing off, blocking ingress or egress into or out of the properties or premises of the Petitioner namely Kisumu Municipality/Block 7/414, 415, 417, 419, 420, 421, 422, 424, 425, 426, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439 and 440 and from in any other way howsoever interfering with the Petitioner’s access to occupation and use of the buildings thereon.**

**An order of prohibition prohibiting jointly or severally the Chief Land Registrar, The County or District Land Registrar, Kisumu or any other officer acting under them or on their behalf or instructions or directions or in any other way howsoever from revoking, annulling, cancelling, restricting or in any other way whatsoever or howsoever interfering with the Petitioner’s titles to the properties namely Kisumu Municipality/Block 7/414, 415, 417, 419,**

420, 421, 422, 424, 425, 426, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439 and 440.

**A mandatory injunction compelling the Cabinet Secretary for Interior and Coordination of Nation Government, the Cabinet Secretary for Transport, Infrastructure, Housing and Urban Development and the Managing Director Kenya Railways Corporation by themselves, their subordinates, agents, representatives and any other person acting on their instructions or directions to remove all fences, barriers, blockades, blockages, beacons, beacon marks and any other objects hitherto blocking, barring, impeding or interfering with access ingress or egress to or from the properties of the Petitioner registered as Kisumu Municipality/Block 7/414, 415, 417, 419, 420, 421, 422, 424, 425, 426, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439 and 440.**

**Costs of and incidental to this petition.**

***Counsel for the petitioner submits*** that the petitioner is the sole and legal proprietor of the suit parcels of land and therefore protected by sections 24, 25 and 26 of the Land Registration Act. Moreover, that the petitioner's rights under Article 40 of the constitution of Kenya have been violated.

Moreover, that Article 40 guarantees every person the right to acquire and own proper in any part of Kenya and that Parliament is enjoined not to enact any law that permits the State or any person to arbitrarily deprive a person of his or her property unless the deprivation is as a result of compulsory acquisition by the Government for a public purpose or in the public interest and only upon prompt payment in full, of just compensation to the land owner.

In seeking redress for violation of its right enshrined under Article 40 as the sole proprietor of the said twenty-two (22) plots, the petitioner relies on the provisions of Article 40 (6) which provides that:

***“(6) The rights under this Article do not extent to any property that has been found to have been unlawfully acquired”.***

The courts have also interpreted this provision several times, consistently and in one voice giving it life and necessary protection in law, and specifically intertwining Article 40 (6) with Article 47 of the constitution of Kenya thereby entrenching the need for due process.

The petitioner further relies on Article 47 of the Constitution which provides that Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and that If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

In the case of **KURIA GREENS LIMITED VS REGISTRAR OF TITLES & ANOTHER [2011] eKLR**, Musinga J (as he then was) expressed himself thus:

***“If the respondents were satisfied that the suit land had been unlawfully alienated and that it was in the interest of the public that the land reverts to the state... appropriate notice ought to have been given to the petitioner and thereafter the respondents ought to have exercised any of the following options:-***

***a. Initiate the process of compulsory acquisition of the suit land and thus pay full and prompt compensation to the petitioner;***

***Or***

***b. File a suit in the High Court challenging the petitioner's title and await its determination one way or the other”.***

In the case of **[EVELYN COLLEGE OF DESIGN LTD VS DIRECTOR OF CHILDREN'S**

DEPARTMENT & ANOTEHR 2013] eKLR, the court held that:

***“It is clear that even where property is said to be illegally acquired; it cannot be dispossessed without due process. Such dispossession cannot be effected by preventing the petitioner from enjoying the incidents of ownership of the land. Since the issue in this case concerns due process, I have exercised circumspection in commenting on the veracity or otherwise of the claims of illegal acquisition because, the state has the right to assert this position in the proper forum”.***

Further in subsequent classic case of **VEKARIYA INVESTMENTS LIMITED KENYA AIRPROTS AUTHORITY & 2 OTHERS [P2014] eKLR**, the Court affirmed the above positions that:

***“a finding of unlawful acquisition referred to in Article 40 (6) of the Constitution”... must be through a legally established process and not by whim or revocation of the Gazette Notice as the Commission of Land purported to do and definitely not by forceful taking of possession”.***

It is the Petitioner’s submission that it does not matter the quantity of allegations or the quality of suspicion, but Article 40, Article 47, Article 50, clearly entrench the rule of law, right to property, right to fair administrative action and the unlimited right to fair hearing.

It is the petitioners submission that it was incumbent upon the Respondent to follow the due process that respects the rights of all parties having interest in the plots. However, the Respondent did not care to explain why they were trespassing on the Petitioner’s land, they forcefully took over the properties.

The high handed and coercive acts of the Respondent’s compare with the circumstances in **JOSEPH K. NDERITU & 23 TOEHRS VS ATTORNEY GENERAL & 2 OTHERS [2014] EKLR** in which Emukule J. observed;

***“The situation was aggravated where the act of trespass (“for that is what it was”) was aided and abetted by the presence of the coercive elements of state (armed Police Officers) whose presence was clear – ‘fanyafujouone’ (“make trouble and you will see trouble or trouble will visit you”). This is intimidation and reeks of complete and utter disregard of the law and the Constitution apart from common decency and courtesy by a stranger to say “hodi” to this house and state the purpose of his visit, even if that stranger is an agent of the all-powerful government. This was no ordinary visitation. It demands more than the customary “hodi” and “karibu” courtesies. It boded more. It had the potential to take away the Petitioners’ homes and property. Their Member of Parliament had warned them. They would be compensated. But that was in the future”.***

The Petitioner maintains that it holds good and lawful title to the said properties which titles it acquired through due diligence and due process and that since the Respondents were the ones who via their letters dated 6<sup>th</sup> August, 2019 and 13<sup>th</sup> August, 2019 sought to impugn the authenticity of the petitioner’s Certificates of Leases to the suit properties, Section 107 of the Evidence Act places the burden of such proof on them. However, the respondents have not proved the allegation that the said titles were irregularly acquired and therefore this Honourable Court is therefore entitled to presume that the titles produced by the Petitioner which are duly signed by the Land Registrar are genuine by dint of Section 83 (1) And (2) Of The Evidence Act provides that the Court shall presume to be genuine every document purporting to be a certificate, certified copy or other document which is Declared by law to be admissible as evidence of any particular fact; Substantially in the form and purporting to be executed in the manner, directed by law in that behalf; and Purporting to be duly certified by a Public Officer” “The Court shall also presume that any officer by whom any such document purports to be signed or certified held, when he signed it, the officer character which he claims in such document”.

The petitioner therefore urges this Court to find that the petitioner holds valid titles to the suit property and is therefore entitled to protection of its rights thereto as provided under Article 40 and 47 of the constitution and is entitled to prayers as sought.

## 1<sup>st</sup> Respondents Case

The 1<sup>st</sup> Respondent filed a reply through Wanjiku A. Mbiyu, Deputy Litigation Counsel, stating that it is a matter in public domain that the Government of the Republic of Kenya is currently implementing the Big Four Agenda and one of the major infrastructural projects under the Big Four Agenda is revival/revitalization of the Kisumu Port which is being implemented by the State Department of Infrastructure in the Ministry of Transport, Infrastructure, Housing and Urban Development.

That from the information shared between the Ministry, the State Department of Infrastructure in the Ministry of Transport, Infrastructure, Housing and Urban Development, the Kenya Railways Corporation, arising out of the implementation of the Kisumu Port revitalization, that in an endeavour to enhance the Kisumu Port efficiency, the National Government commenced clearing of illegal structures which had been erected on the Kenya Railway Corporation lands within the Kisumu Port area, and also repossession of railway Houses, pursuant to issuance of formal notices to vacate having been circulated.

That several suits were filed in the year 2019 and by dint of the Cabinet Secretary, Ministry of Interior having been assigned the role of implementation, the Legal Unit which he is heading was served with a number of the suit papers. The Attorney General invited the Honourable court to take Judicial Notice of the suits, a majority of which were voluntarily withdrawn by the litigants with others including this Petition pending hearing and determination.

That as a background to aid the court appreciate the National Government actions, it is in the public domain that Kenya Railways was incorporated vide an Act of Parliament following the break-up of the East Africa Community in 1977.

That pursuant to the break up, the East Africa Community Mediation Act No. 4 of 1984 and the Agreement thereunder facilitated the distribution of the Community Assets among the three partner states.

That subsequently the Government of the Republic of Kenya took over all the assets set out under the Mediation Agreement which Agreement was ratified by the East Africa Community Mediation act No. 7 of 1987.

That arising from the above, the legal identity of the Kenya railways Corporation came into existence following the enactment of the Kenya Railways Corporation act Chapter 397 Laws of Kenya.

That the property including land formerly owned by the east Africa Community was redistributed and all the lands within the former East African Railways Corporation were vested to the Kenya Railways Corporation which position has obtained since the EAC break up.

That touching on this Petition, counsel for the Attorney General confirmed that in the Month of November 2019, the Legal Unit received a letter from the General Manager, Legal Services, Kenya Railways submitting a survey report undertaken by the Kenya Railways Surveyors on the contested /suit lands namely, KISUMU/MUNICIPALITY/BLOCK 7/422, 425, 429, 430, 433, 435, 438, 439, 426 AND 440 (Suit property) and which report noted the existence of encroachments and illegal alienation and registration of the 2<sup>nd</sup> Respondent's lands to private entities.

The gravamen of the 1<sup>st</sup> respondent's submissions is that it is clearly demonstrated that the suit property in question belongs to Kenya railway Corporation having inherited the same from the former East African Railways Corporation.

Both Kenya Railways corporation (KRC) who are the 2<sup>nd</sup> Respondent herein and Ethics and anti-Corruption Commission in their affidavits have also attached the relevant maps as evidence that the said parcels lie within the land owned by KRC. They have never surrendered the said land to the Commissioner of land for allocation to third parties. The Attorney General poses the question. ***“How did the petitioners obtain ownership, documents for land which was not available for allocation?”***

The mere fact that one holds a Certificate of Lease is not full proof that he is the lawful owner of the property. The procedure used to acquire that certificate of Lease/title should be above board.

The 1<sup>st</sup> Respondent associates himself with the submissions of both the 2<sup>nd</sup> Respondent and Interested Party that the Certificate of Lease held by the Petitioners was acquired irregularly and cannot confer any rights of ownership.

The 1<sup>st</sup> Respondent submits that the Petitioner is un-procedurally holding Certificate of Lease and the same should be cancelled by this Honourable Court. The position of the Petitioner is that since he holds title, the same must be protected. The 1<sup>st</sup> Respondent submits that this cannot be the case. The Constitution of Kenya, 2010 under Article 40 (6), provides that a title that has unlawfully been acquired cannot be protected. This is evidenced at Section 26 of the Land Registration act, 2012.

One of the grounds for cancellation of title is, if the same was acquired illegally, un-procedurally or through a corrupt scheme. On this point, it does not have to be proved that the Petitioner was a party to the illegality, lack of proper procedure or corruption.

The Attorney General cites the case of **KASSIM AHMED OMAR AND ANOTHER VS AWUOR AHMED ABEL & OTHERS, MALINDI ELC NO. 18 FO 2015**, the court held that:

***“A certificate of Title is an end product of a process, it the process that followed in issuing the title did not comply with the law, then such a title can be cancelled by the court.”***

And the case of **MOSES OKATH OWUOR & ANOTHER VS THE ATTORNEY GENERAL & ANTOEHR (2017) eKLR** where Justice L. Gacheru while finding that the Plaintiff’s registration was obtained irregularly held,

***“Further the Court proceeds to declare that the said parcel of land belongs to the Kenya Police as there was no evidence that there was any consultation within the Kenya Police when this land which was reserved for public purpose that is a Police Station was allocated to the Plaintiff herein.”***

The 1<sup>st</sup> Respondent further submits that the Court must weigh the Public interest involved visa a viz the private interest and cites the case of **SUSAN WATHERA KARIOUKI & 4 OTHERS VS THE TOWN CLERK, CITY COUNCIL OF NAIROBI & OTHERS (2011) eKLR** it was held,

***“Where there is a conflict between the public interest and the private interest, the public interest must prevail.”***

Similarly in the case of **ETHICS AND ANTI-CORRUPTION COMMISSION VS NJUGUNA MACHARIA, NBI HCC ELC NO. 310 OF 2014 (2015) eKLR**, the court was referred to the case of Milan Kuman Shah & 2 Others vs City Council of Nairobi & Others, NBI HCC NO. 1024 OF 2005 where in addition to holding that the Public Right takes precedence over private rights, the Court declared that the 3<sup>rd</sup> Plaintiff did not have an absolute and indefeasible title having acquired the same through a process that was a violation of the Government Land Act (now repealed).

## **SECOND RESPONDENTS CASE**

The second Respondent states that the suit parcels of landfall within the larger parcel of land on the Kisumu Port owned by Kenya railways, but held and occupied by the Petitioners/subject to a long term lease granted by the 2<sup>nd</sup> Respondent. Any development on the suit property can only be undertaken subject to the consent of the 2<sup>nd</sup> Defendant. The Attorney General states that the titles held by the Petitioner were obtained illegally.

Further that it is well within the 2<sup>nd</sup> Respondent’s knowledge that all land that was vested in the East

African Railway Corporation by any written law as well as any land conveyed to that corporation or otherwise placed at that corporation's disposal vests in the Kenya Railways Corporation and that it is well within the 2<sup>nd</sup> Respondent's knowledge that vide the survey of Kenya plan FR 43/53 of 1935, the Kenya Uganda Railway and Harbours was vested with parcels of land within Kisumu municipality approximately 237 acres which parcels constitutes the suit parcel KSUMU Block 7.

The suit parcels KISUMU MUNICIPALITY/BLOCK 7/414-440 belong to the 2<sup>nd</sup> Respondent. That Kisumu municipality Block 7 is principally a Railways operational area composed of the port, railways station, staff quarters and port area.

the Petitioners' illegally acquired title the 2<sup>nd</sup> Respondents' land. Therefore the titles held by the Petitioners over the suit parcel are creatures of fraud, void and of no legal effect.

The suit lands have never been surrendered to the Government of Kenya for allocation to other entities including the Petitioners.

### **INTERESTED PARTY'S CASE**

In the Replying affidavit of the Interested Party sworn by Charles Kiptanui an Investigator with the E.A.C.C., it is stated that the several parcels of land located within Kisumu County had been illegally excised and alienated despite being reserved for the use and benefit of the Kenya railways Corporation, which is a public body.

That among the issues of interest was land reserved for the railway purposes which was land situate within the then Administrative District Kisumu – Londiani Province (Railway Reserve) and captured the Plan of K. U. R & H which was surveyed on or about 24<sup>th</sup> August, 1935 and set apart for railway purposes and which map clearly shows that the land is untampered with.

That pursuant to the investigations undertaken, the investigations have revealed that the petitioner obtained the suit property without following the laid down legal procedures and contrary to the provisions of the Government Lands Act. (Now repealed). The Petitioner obtained a lease without the consent of the Kenya railways Corporation in that:

The property falls within the land that was previously reserved and vested in the General Manager for the East African Railways and Habours Administration vide Legal Notice No. 440 of 1963 issued under the Kenya (Vesting of Land) Regulations of 1963 for the administration and control of railway and harbour services.

The said land was subsequently vested in the defunct East African railways Corporation (E.A.R.C) vide legal Notice No. 20 of 1969 issued under the East African Railways Corporation act, 1967 upon the division of the assets of the Administration as between the east African Railways Corporation and the east African Habours corporation.

Following the dissolution of the East African Community in 1977 all the assets of the E.A.R.C including the suit property, were vested in the Kenya Railways Corporation vide Legal Notice No. 24 of 1986 issued under the Kenya Railways Corporation Act, Chapter 397 of the Laws of Kenya. (Annexed and marked RKB 4 is a copy of the relevant legal Notice.)

Having been so reserved, the land was not available for alienation by the Commissioner of Lands or any other entity as the land did not fall under alienated Government land as defined by the repealed Government Lands Act.

The allocation of the land was therefore irregular as the Commissioner of Lands did not have the powers to allocate such land.

That the investigation also revealed that the land within Kisumu Municipality vested in the Kenya Railways did not fall within un-alienated land and was therefore not available for allocation to private persons and if such consideration was contemplated the same could not be done without the knowledge and consent of the Kenya Railways Corporation.

That the investigations revealed that subsequently irregular and illegal excisions and alienation were undertaken leading to the creation of Kisumu Municipality Block 7/422, 424, 425, 429, 430, 433, 435, 438, 439, 426 and 440 capturing the parcels within the land set aside for railway purposes.

That in view of the forgoing matters, the purported alienation of the property Kisumu Municipality Block 7/422, 424, 425, 429, 430, 433, 435, 438, 439, 426 and 440 to the Petitioner are suspected to have been fraudulent and irregular as the same was legally vested in the Kenya railways Corporation and was therefore not available for alternative allocation.

The Commissioner of Lands had as early as 2020 detected the irregularity in the allocations of a number of these parcels and had initiated a process of recovery of the parcels falling within Kisumu Municipality Block 7 (being the land reserved for Kenya Railways Corporation) and these were revoked by the Ministry of Lands and Physical Planning vide Kenya Gazette Notice No. 15577 dated 26<sup>th</sup> November, 2020. The process of recovery is still on-going.

The investigation has revealed that subsequent to the investigations, the Commissioner of Lands upon realizing the illegality of the Petitioner obtaining a lease over the property had written to several allottees stating that the offer of the suit properties had been withdrawn since the land belonged to Kenya railways Corporation.

That the Commissioner of Lands in the aforesaid letter mentioned in paragraph 7 asked the allottees to surrender the documents concerning the properties for cancellation for reasons being that the suit properties belonged to Kenya railways Corporation.

That as a measure to safeguard the Kenya Railways Corporation, an Amended Registry Index Map (RIM) was subsequently prepared by the Director of surveys consolidating all the Kenya Railways land including the illegally and irregularly alienated and allocated parcels of land subject of the Petition within the railway land and creating one consolidated parcel and a lease in respect of Parcel No. 7/567 measuring 72.38 Hectares has since been processed in favour of the Kenya railways Corporation and the same registered at the lands registry at Kisumu.

investigations have revealed that the purported transfer of parcels Kisumu Municipality Block 7/414, 415, 417, 419, 420, 421, 422, 424, 425, 426, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439 and 440 were transferred from Lake Investments Limited to Norlake Investments Limited and eventually to Katangi Developers Limited.

That ongoing investigations have revealed that Norlake Investments Limited is a non-existent entity as the Business Registration Service of the Office of the Attorney General & Department of Justice has confirmed that it does not appear in its data base or registered business/companies and was therefore incapable of transacting any business let alone transferring any interest to the Petitioner.

That an investigation of the ownership/shareholding of the Petitioner, Katangi Developers Limited is by Gordon Investments Limited and Milborne Investments Limited. A search at the Business registration Service has confirmed that the Milborne Investments Limited does not appear in its data base or registered business/companies and was therefore incapable of transacting any business let alone owning/transferring any interest in or to the Petitioner. That in view of the forgoing matters, the purported alienation of the suit properties to the Petitioner is tainted with illegality and irregularity which the Interested Party has been investigating with a view to taking further action which may include both civil and criminal proceedings against those involved.

The second respondent submits that the allegations of blocking the road to the Kisumu Port by fencing it

off at the junction of OgingaOdinga – Obote roads thereby blocking all access to the Petitioner’s go down are very serious allegation that needed to be strictly proved. Unfortunately, no cogent or any evidence was tendered in support of the allegation.

The 2<sup>nd</sup> respondent submits that there is no single evidence to show that the acts complained of were done by the second Respondents herein and therefor the Petitioner cannot allege that their rights under Article 40 (3) have been violated by the 2<sup>nd</sup> Respondents. Articles 40 (5) of the Constitution mandates the second Respondents to promote and protect the intellectual property rights of the people of Kenya. And that is exactly what the second Respondent have always promoted.

The Petitioners’ did not prove how the second Respondents have deprived them of the suit lands, their interest in the property, or right over the property. In the prevailing circumstances, we honestly opine that the second Respondents have promoted and protected the intellectual property rights of the Petitioner herein. No evidence was tendered to suggest otherwise. Neither did the Petitioners report any suspicious act to the relevant authorities that would warrant investigations. Had the Petitioners proved that the officers from the second Respondents were either arrested and or charged with trespass on the petitioner’s land or at least proved that the acts complained of were done by the second Respondents then that would make sense.

The 2<sup>nd</sup> respondent therefore urges this Honourable court to find that the above allegations were never proved. The 2<sup>nd</sup> respondent refers to the Halsbury’s Laws of England, 4<sup>th</sup> Edition (Re-issue) Vol. 8 (2) at paragraph 265 provides as follows: -

**“the protection under the Constitution of the right to property does not obtain until it is possible to lay claim in the property concerned.....an applicant must establish the nature of his property right and his right to enjoy it as a matter of domestic law.”**

According to the second respondent, the Applicant must prove that he owns the property. As to the Applicants title the 2<sup>nd</sup> Respondent maintains that the suit land falls within a large parcel of land owned by the Kenya Railways corporation and further all the suit lands listed are held and occupied by the petitioners’ subject to long term lease granted to them by the second respondent and for which the Petitioners pay annual rent. Lastly, the 2<sup>nd</sup> Respondent maintains that the suit lands have never been surrendered to the Government of Kenya for allocation to third parties including parties including the Petitioners.

That vide the survey of Kenya plan FR 43/53 of 1935 it is not in dispute that the second Respondent was vested with parcels of land within Kisumu Municipality which parcels constitute the suit parcels. Similarly vide the RIM for Kisumu block 7, the East African Railways & Harbours Kisumu General Layout plan and the Kisumu Municipality development plan no. 103 clearly show the boundary of the properties held by the 2<sup>nd</sup> Respondents herein, one wonders how the petitioners herein acquired the suit parcels in the middle of those parcels vested in the second Respondent, we invite the court to look at copies of the Uganda Railway plan 1902 and 1908 marked as SG-4 a & b in the second Respondents’ further replying Affidavit dated 9/1/2020.

They urge this court to find that, the Petitioners ought to channel their misplaced and or misguided apprehensions to the relevant authority if any and that the petitioners having participated in the illegal and or fraudulent acquisition of the second Respondents, suit properties, it is clear that the titles and or leases herein are a nullity and cannot confirm any interest in the suit property to the Petitioners herein. It is trite law that everything that flows from a nullity is itself a nullity and therefore the Petitioner’s titles cannot be allowed to stand.

Thus that the Petitioners’ title and or leases are not protected by the provisions of section 26 (1) of the Land Registration Act and the same is liable to impeachment.

It is not in dispute that there is no evidence tendered by the Petitioner to the effect that officers from the

2<sup>nd</sup> Respondent are responsible for the fencing, erecting barrier and that the Petitioner has also failed to adduce evidence with any precision on how the 2<sup>nd</sup> Respondent compromised its human dignity.

### **INTERESTED PARTY'S CASE**

Interested Party's submits that Sections 3 and 7 of the GLA (repealed) 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 un-alienated land for the President.

Therefore, even if for arguments' sake it could be conceded that the land was available for alienation, there can be no doubt that the Commissioner of Lands had no legal authority to make the grant in the circumstances of this case.

The grant was not being made for educational, religious, charitable or sports purposes or under any of the exceptions that would entitle the Commissioner to make the grant under Section 3 of the GLA. As per the letter of allotment and the special conditions attached to the grant, the grant as made for industrial purposes and therefore the Commissioner of Lands had no power to allocate and make the grant.

The argument of indefeasibility of title cannot be used to condone impunity and to protect illegally obtained public property.

This was emphasized by Justice Ojwang in Mbsa. HCCC No. 300 of 2007; Kenya Anti-Corruption Commission versus Ahmed Karama Said and 2 others. At page 13 the Judge observed;

**“Although the 2<sup>nd</sup> Defendant has taken the position that it was an “innocent purchaser for value without notice of irregularity”, that principle is, in my opinion, incapable of protecting the land acquisition. Generally, as already noted, the innocent purchaser for value without notice of defect of title, will be treated as the darling of equity, and will be allowed to retain ownership. But this is subject to the qualification that the creation of the title itself is not in flagrant breach of statute law, so that hit amounts to a nullity ab initio. The Municipal Council of Mombasa, which is a public authority, ought to have complied with the governing law, and its non-compliance with the Local Government Act, led to the creation of a void property title; the Municipal Council could not breathe into life that title by purporting to pass it on to 2<sup>nd</sup> defendant...”**

Some Judges have found that titles to certain properties were null and void ab initio and refused to set aside revocation by the Land Registrar. They were able to see that either the process of allocation was patently illegal or that the property so acquired was undoubtedly public land and found that title to the same in private lands was rightly revoked.

**The interested party relies On the case of Eld. HC. Judicial Review case no. 10 of 2008; Re public vs the Commissioner of Lands and another ex parte Lima Ltd** that concerned the High Court Land at Eldoret, the Petitioner appeared before the Judge ex parte (ostensibly on the grounds that the Respondents had been served but failed to attend court) and obtained orders to quash the revocation of the Petitioner's title without disclosing that the subject property comprised the High Court land. Justice Mwilu allowed the application for Judicial review but upon an application to set aside the same, the Judge was furious that the Petitioner did not disclose to her that the land comprised the High Court land and censored the Advocate on record. She proceeded to set aside the orders. As a result, title to the suit property stands revoked.

The comparison between the High Court land and the suit property in this case is clear. Both concern public land which has been in actual occupation of the public institution for years. Important buildings and structures are on the respective properties. It is our submissions that the court should recognize that the purported title t the suit property in the premise, in the words of Justice Nyamu in the *Kenya Gurads Allied Workers Union case (supra)*, 'ought to be thrown to the dust bin'.

Similarly, Mbsa. HC Misc. Civil Appl. No. 70 of 2020; Republic vs the Senior Registrar of Titles, Mombasa and 2 others *ex parte* Comen Ltd concerned the property popularly known as 'Uhuru Gardens' next to the iconic elephant tusks along Moi Avenue, Mombasa. Title to the same in the name of the *ex parte* Petitioners had been revoked by the Registrar of titles. The court declined to quash the revocation citing patent illegalities in the acquisition of the same. The court rightfully found that the title was a nullity and no wrongdoing can be attributed to the Land Registrar.

In the course of investigations by the Interested Party, available evidence on record *prima facie* discloses illegality in the acquisition of the suit properties. This Honourable Court is urged to take note that at the conclusion of investigations, the Interested Party intends to take further action including instituting legal proceedings, which may include both civil and/or criminal proceedings against concerned parties and should not be curtailed from undertaking its constitutional and statutory mandate by way of the declarations sought by the Petitioner.

Indeed a search as to the ownership of the Petitioner has returned results that indicate inconclusive results. Who are these persons that we are dealing with? One Norlake Investments Limited that allegedly transferred its interests to the Petitioner is non-existent and does not appear in the database of the Business Registration Services of the Attorney General's office. Similarly, Milborne Investments Limited said to be a major shareholder of the Petitioner is non-existent. How were non-existent entities able to transact and allegedly transfer interest in the suit property?

The upshot of the foregoing submissions is that the transactions leading up to the alienation of the suit property and the transfer to the Petitioners was null and void *ab initio*. Nobody can derive any benefit therefrom. Because the grant was null and void 'ab initio', meaning from the beginning, the Land Registrar or the Registrar of Titles cannot be faulted for 'undoing' something that did not exist in the first place. His actions must be seen from the point of view that innocent third parties who might be duped into purchasing interests from the same need to be protected.

In *Macfoyvs United Africa Company Ltd* (1961) 3 ALL E.R. 1169, Lord Denning at page 1172 states:

If an act is void, then it is in law a nullity. It is not only bad, but it is incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is funded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.

### ANALYSIS AND DETERMINATION

I have considered the petition, all affidavits on record and do find that the supplementary affidavit by Dipak Panachand Shah filed on 8<sup>th</sup> November 2019 has not been controverted on the facts that a draft grant was prepared in respect of the suit property in 1945 by the chief Engineer of the colonial predecessor of the 2<sup>nd</sup> respondent. The grant was processed by the registrar of titles and the plot given title no 1148/21/LV and granted to Asembo Trading Company Limited who paid the relevant charges.

on or about the 14/11/1945 the title to the land was transferred by the Crown (Colonial Government) to Asembo Trading Company Limited to erect godowns warehouse and factory. A formal title was issued by the colonial government to Asembo Trading Company Limited and it was a condition for the company to construct a suitable platform truck floor level on the railway side of the plot to facilitate the loading and unloading of goods.

The parcel of land was transferred to Alibhai Ramji and Sons limited on 27<sup>th</sup> March 1948, to East Africa Hardwares (1967) limited on 2<sup>nd</sup> April 1968 and to Manimbai Kishabai Patel and 10 others on 18<sup>th</sup> October 1970. All developments on the site were approved by the Municipality of Kisumu in consultation with the government and the colonial predecessor of the 2<sup>nd</sup> respondent.

In the year 1952 the lease hold title was mortgaged to Barclays bank with the consent of and it was stated that the land was being administered by the colonial predecessor of the 2<sup>nd</sup> respondent.

The lease granted to East African Hardware Limited was later extended to a term of 59 years from 1/1/1946. The issuer of the lease was the Registrar of Titles.

That when the Registered Land Act, Cap 300 (repealed) was applied to Kisumu the suit land was brought under the regime and it was given a new number Kisumu municipality/Block 7/6.

That sometimes between the years 1990 and 1991 Lake Investments Limited which had become the leaseholder of the suit land applied to the Commissioner of Lands to sub-divide it into 26 sub plots to create Kisumu municipality/Block 7/414-440.

**“Legal Notice No. 440 of 1963 issued under the Kenya (Vesting of Land) Regulations of 1963 for the administration and control of railway and harbour services provided that In exercise of the powers conferred by section 11 of the Kenya Order in Council 1963, the Governor hereby makes the following Regulations:-**

- 1. These Regulations may be cited as the Kenya (Vesting of Land) Regulations, 1963, and shall be deemed to have come into operation on the 1<sup>st</sup> June 1963.**
- 2. The land described in the First Schedule to these Regulations is hereby vested in the General Manager of the east African railways and Harbours Administration.**
- 3. The land described in the Second Schedule to these Regulations is hereby vested in the Central Land Board.**

#### **FIRST SCHEDULE**

**All land which, immediately before the 1<sup>st</sup> June 1963, either was un-alienated Crown land or was vested in the Trust Land Board, and which was then in use, or reserved for use, by the East African Railways and Harbours Administration for-**

- (a) Premises used for the administration and control of the services provided by the Administration;**
- (b) Railway lines (including marshalling yards and sidings);**
- (c) Railway stations;**
- (d) Workshops and training schools;**
- (e) The operation of ports and harbours including the berths, wharves, piers, jetties and other installations comprised therein;**
- (f) The navigation of vessels, and aids thereto, in respect of any part or harbour, together in each case with the curtilage thereof or other land then enjoyed therewith.”**

vide legal Notice No. 20 of 1969 issued under the East African Railways Corporation Act, 1967 provided that **in exercise of the powers conferred by Section 4 (1) of the East African Railways Corporation Act 1967, the Authority hereby determines-**

- (a) That the fixed assets of the General Manager of the East African Railways and Harbours Administration which are recorded as Railways assets in the classification of Assets of the East African Railways and Harbours Administration as at 31<sup>st</sup> May 1969 and for which**

provision for depreciation and amortisa made in the estimates (1<sup>st</sup> June, 1969) to 31<sup>st</sup> December approved by the Board of Directors shall be transferred vest in the East African Railways Corporation on the api day and the corresponding loan liabilities of the General Manager of the East African Railways and Harbours Administrate reduced by sinking fund provisions accumulated up to the appointed day shall be deemed to have become liabilities of the East African Railways Corporation on the appointed day subject to the certification by the Auditor-General of the accounts of the East African Railways and Harbours Administration for the period 1<sup>st</sup> January, 1969 to 31<sup>st</sup> May, 1969 and such accounts shall be divided in all respects to show such Harbours and Railways assets and liabilities separately; and

(b) All other Railways assets and liabilities of the General Manager of the East African Railways and Harbours Administration as at 31<sup>st</sup> May, 1969 shall be transferred to and vest in the East African Railways Corporation on the appointed day in accordance with the arrangements agreed between the Board of Directors of the east African Railways Corporation and the Board of Directors of the East African Harbours Corporation at the joint meeting held on 28<sup>th</sup> November, 1968 as recorded in minutes 66/68 and 676/68 and subject to the certification by the Auditor – General of the accounts of the east African Railways and Harbours Administration for the period 1<sup>st</sup> January, 1969 to 31<sup>st</sup> May, 1969 and such accounts shall be divided in all respects to show such Harbours and Railways assets and liabilities separately.

#### LEGAL NOTICE NO. 24

In exercise of powers conferred by Section 95 (4) of the Kenya Railways Corporation Act, the Minister for Transport and Communication makes the following order:-

#### **THE KENYA RAILWAYS COPORATION (VESTING OF LAND) ORDER, 1986**

1. This order may be cited as the Kenya Railways Corporation (vesting of Land) Order, 1986.
2. The Land described in the schedule is this Order shall rest in the Kenya Railway Corporation.

#### **SCHEDULE**

All land of the East African Railway Corporation vested in that Corporation by any written law as well as any land conveyed to that Corporation or otherwise placed at that Corporation's disposal, whether such land is in use or reserved or use by that Corporation and includes-

- (a) Premises used for the administration and control of the services provided by the Administration;
- (b) Railway lines (including marshalling yards and sidings);
- (c) Workshops and training schools;

Together in each case with the curtilage thereof or other land then enjoyed therewith.

3. The Kenya (vesting of Land) Reregulation's, 1963 are revoked.

The two legal notices did not affect the property because the same had already been alienated to private persons by the crown with the consent of the East Africa Railways and Harbours by dint of a grant and transfer.

The upshot of the above is that the petitioner holds a valid title to the property the same having been transferred by the Norlake LTD. This court visited the disputed parcels of land and found that the same had been fenced and that the petitioners could not access the land and that in an act of impunity the second respondent had even secured a title for the suit properties in its names despite the fact that the suit was pending hearing.

Article 40 of the Constitution of Kenya provides:

**“(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.**

**(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”**

Section 24 of the LRA provides:

**“(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and**

**(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.”**

Section 25 provides:

**“25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for**

valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”

Section 26 provides:

“26. (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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

Section 84 to LRA provides:

“84. If any funds are paid by way of indemnity under this Part, the Cabinet Secretary shall be entitled to recover by suit or otherwise the amount so paid from any person who has caused or substantially contributed to the loss by fraud or negligence, and to enforce any express or implied agreement or other right which the person who has been indemnified would have been entitled to enforce in relation to the matter in respect of which the indemnity has been paid.”

I do find that the act of cancelling the petitioners title without hearing the petitioner was unconstitutional and in breach of Article 47 and 50 of the constitution of Kenya 2010. The right to be heard is cardinal and cannot be wished away by brute and impunity.

The Act of forcibly taking the petitioners property by registering the same in the 2<sup>nd</sup> respondents name was in breach of the provisions of Article 40 of the constitution of Kenya 2010.

The upshot of the above is that the petition is well founded on Articles 40, 47 and 50 of the Constitution of Kenya 2010. It is even worrying that Respondents have caused the parcel of land to be included in the giant parcel of land that was registered in the title of the 2<sup>nd</sup> Respondent. It is worrying that Kenyans deliberated so hard to enact a constitution that has been billed as the best in the world only for government agencies to disregard it and to act with impunity against its citizens, I do grant the following declarations namely: -

**1. a declaration that the Petitioner’s Constitutional right to acquire and own property and in**

particular the property Kisumu Municipality/Block 7/414, 415, 417, 419, 420, 421, 422, 424, 425, 426, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439 and 440, has been violated by the actions of the Respondents jointly and severally.

2. A declaration that the Petitioner's Constitutional right not to be deprived of its property and more specifically the properties Kisumu Municipality/Block 7/414, 415, 417, 419, 420, 421, 422, 424, 425, 426, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439 and 440 has been violated by the actions of the Respondents jointly and severally.

3. A declaration that the Petitioner has been arbitrarily deprived of its properties Kisumu Municipality/Block 7/414, 415, 417, 419, 420, 421, 422, 424, 425, 426, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439 and 440 by the actions of the Respondent jointly and severally in violation of Article 40 (3) of the Constitution.

4. A declaration that the Petitioner's enjoyment of its rights in Article 40 (7) (b) to access, occupy, and use its properties Kisumu Municipality/Block 7/414, 415, 417, 419, 420, 421, 422, 424, 425, 426, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439 and 440 and that those rights have been limited and restricted by the actions of the respondents jointly and severally.

5. A declaration that the actions of the respondents jointly and severally to invade the Petitioner's property and block or obstruct access thereto and to interfere with its quiet enjoyment thereof without its consent, permission and concurrence and against its will and without following due constitutional and statutory processes is a violation of the petitioner's Constitutional rights to Fair Administrative action protected in Article 50 (1) of the Constitution.

6. A prohibitory Injunction be issued prohibiting the Cabinet Secretaries for Interior and Co-ordination of National Government, the Cabinet Secretary for Transport, Infrastructure, Housing and Urban Development and the Managing Director Kenya Railways corporation or any one of them by themselves, their subordinates representatives, agents or any other person acting through them or on their instructions or directions from repossessing, taking possession, fencing off, blocking ingress or egress into or out of the properties or premises of the Petitioner namely Kisumu Municipality/Block 7/414, 415, 417, 419, 420, 421, 422, 424, 425, 426, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439 and 440 and from in any other way howsoever interfering with the Petitioner's access to occupation and use of the buildings thereon.

7. An order of prohibition prohibiting jointly or severally the Chief Land Registrar, The County or District Land Registrar, Kisumu or any other officer acting under them or on their behalf or instructions or directions or in any other way howsoever from revoking, annulling, cancelling, restricting or in any other way whatsoever or howsoever interfering with the Petitioner's titles to the properties namely Kisumu Municipality/Block 7/414, 415, 417, 419, 420, 421, 422, 424, 425, 426, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439 and 440.

8. A mandatory injunction compelling the Cabinet Secretary for Interior and Coordination of Nation Government, the Cabinet Secretary for Transport, Infrastructure, Housing and Urban Development and the Managing Director Kenya Railways Corporation by themselves, their subordinates, agents, representatives and any other person acting on their instructions or directions to remove all fences, barriers, blockades, blockages, beacons, beacon marks and any other objects hitherto blocking, barring, impeding or interfering with access ingress or egress to or from the properties of the Petitioner registered as Kisumu Municipality/Block 7/414, 415, 417, 419, 420, 421, 422, 424, 425, 426, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439 and 440.

The cost of the petition to be borne by the Respondents.

**DATED AT KISUMU THIS 11<sup>th</sup> DAY OF FEBRUARY, 2021**

**ANTONY OMBWAYO**

**JUDGE**

**This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2019.**

**ANTONY OMBWAYO**

**JUDGE**