



Green Two Estate Owners and Residents Association Represented by Hassan Ahamedunur Baricha & 6 others v Chief Land Registrar & 5 others (Environment and Land Constitutional Petition 3 of 2020) [2022] KEELC 2255 (KLR) (2 June 2022) (Judgment)

Neutral citation: [2022] KEELC 2255 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 3 OF 2020**

JO MBOYA, J

JUNE 2, 2022

BETWEEN

**GREEN TWO ESTATE OWNERS AND RESIDENTS ASSOCIATION
REPRESENTED BY HASSAN AHAMEDUNUR BARICHA 1ST PETITIONER
ABDIWALI MOHAMED 2ND PETITIONER
ABDULAHI MAKTAL 3RD PETITIONER
HASSAN ALI HAM 4TH PETITIONER
MOHAMED ALI SIME 5TH PETITIONER
BADOUR AHMED MOHAMED 6TH PETITIONER
IBRAHIM WARFA 7TH PETITIONER**

AND

**CHIEF LAND REGISTRAR 1ST RESPONDENT
NATIONAL LAND COMMISSION 2ND RESPONDENT
LIMBANI DISPENSARY PROJECT GROUP 3RD RESPONDENT
FRANLIN MUTHOKA MUMU 4TH RESPONDENT
DIRECTOR OF CRIMINAL INVESTIGATION 5TH RESPONDENT
ATTORNEY GENERAL 6TH RESPONDENT**



JUDGMENT

1. Vide Petition dated the 30th July 2020, the Petitioners approached the Honourable court seeking the following Reliefs:
 - a. The Petition commencing these proceedings and this Application for Conservatory and Interim orders are certified as Urgent and may be heard Ex-Parte in the first instance.
 - b. Pending the hearing and determination of this Application Inter-Partes an Ex-Parte conservatory order is issued restraining the 1st Respondent and the 1st Respondents' servants and workmen from in any manner whatsoever interfering with the Petitioners' registered titles to the Petitioner's parcels of land and residences within Green Two Estate, South C, City County of Nairobi numbered and commonly known as Green Two Estate 1A-50A and Green Two Estate 1B-50B and RAF University Plot.
 - c. Pending the hearing and determination of this Application Inter-Partes and Ex-Parte Interim injunction is issued to restrain the 3rd Respondent, Limbani Dispensary Project Group, its servants and workmen from entering upon the Petitioners' properties at Green Two Estate, South C, City County of Nairobi, interfering with the properties quiet enjoyment of their properties, and from pulling down or suffering to be pulled down the dwellings and commercial premises constructed on those properties owned and occupied by the Petitioners or leased out or licensed to the Petitioners' tenants or licensees, which properties are mentioned in the Petition and are the subject of hearing of the interlocutory motion in the Petition and the Petition being the properties numbered commonly known as Green Two Estate 1A-50A and Green Two Estate 1B-50B and RAF University Plot, and from removing any buildings and other improvements erected by the Petitioners, and selling or otherwise disposing of the material whereof the said properties are comprised.
 - d. Pending the hearing and determination of this Application Inter-Partes and Ex-Parte interim injunction be issued restraining the 4th Respondent, Franlin Muthoka Mumu, from in any way enforcing the notice dated the 16th March 2020 delivered to the security gate at the Petitioners premises and affecting the property known as L.R No. 209/10772 said to be situate in South C, Mugoya Phase Four Nairobi.
 - e. A Conservatory Orderdo issue restraining the 1st Respondent and the 1st Respondents servants and workmen from in any manner whatsoever interfering with the Petitioners registered titles to the Petitioners parcels of land and residences within Green Two Estate, South C, City County of Nairobi, pending the hearing and determination of these proceedings.
 - f. A Conservatory Order of stay, pending the hearing and determination of these proceedings, of the decision of the 2nd Respondent contained in Gazette Notice No. 11714 of 2018 published in the Special Issue of the Kenya Gazette on the 9th November 2018 and brought to the attention of the Petitioners' by the 5th Respondent following the letter DCI/IB/LFIU/SEC/2/16/VOLXIII/223 of 20th November 2019, the Petitioners never having participated in the proceedings that gave rise to the 2nd Respondent's decision which adversely affects and concerns the Petitioners constitutional and statutory rights, the subject of these proceedings.
 - g. An Order of Temporary Injunctiondo issue, pending the hearing and final determination of these proceedings, to restrain the 3rd Respondent Limbani Dispensary Project Group, its



servants and workmen from entering upon the Petitioner's properties Green Two Estate, South C, City County of Nairobi, interfering with the Petitioners' quiet enjoyment of their properties, and from pulling down or suffering to be pulled down the dwellings and commercial premises constructed on those properties owned and occupied by the Petitioners or leased out or licensed to the Petitioners' tenants or licensees, which properties are mentioned in the Petition, being the properties numbered and commonly known as Green Two Estate, South C, City County of Nairobi numbered and commonly known as Green Two Estate 1A-50A and Green Two Estate 1B-50B and RAF University Plot, and from removing any buildings and other improvements erected by the Petitioners and from selling or otherwise disposing of the materials whereof the said properties are comprised.

- h. An Order of Temporary Injunction do issue pending the hearing and determination of these proceedings, restraining the 3rd Respondent, Limbani Dispensary Project Group, from in any way enforcing the Notice to Vacate Land bearing the date May 2020 and delivered to security gate at the Petitioners premises purporting to be issued under regulations 63(1), 64(1) and 65(1) and 65 of the Land Regulations, 2017 and addressed to the "Members of Green Estate Residents Association" and to "Hassan Baricha the to the Chairman of the Association, notwithstanding that the 3rd Respondent's Notice to Vacate Land does not relate to the Petitioners' properties but to L.R No.209/10778/10778(Now L.R No. 209/16432 and 209/16433 nairobi Area-South -C)"
- i. An Order of Temporary Injunction do issue restraining the 4th Respondent Franlin Muthoka Mumu from in any way enforcing the notice dated the 16th March 2020 delivered to the security gate at the Petitioners premises and affecting the property known as L.R No. 209/10772 said to be situate in South C Mugoya Phase Four Nairobi, pending the hearing and determination of these proceedings; the proceedings of National Land commission to which the Notice refers and which proceedings the 4th Respondent assumes concern the Petitioners having been initiated and concluded in violation of the time lines set by Sections 14 and 15 of the National Land Commission Act, 2012 if at all the proceedings related to the Petitioners.
- j. A Conservatory Order of Stay do issue, pending the hearing and determination of these proceedings, prohibiting the 5th Respondent from acting on or continuing to act on the summons dated 20th November, 2019 Reference No. DCI/IB/LFIU/SEC/2/16/VOLXIII/223 addressed to the Chairman, Green 2 Estate Security Committee for the attention of Mr. Hassan Baricha, the summons suggesting that the Petitioners are resident and owners and occupiers of properties at Green 2 Estate South C, Nairobi are or were involved in land fraud involving L.R No. 209/107772 (Now L.R No. 209/16432 and L.R No. 209/16433) which now is the subject of this courts proceedings in terms of Section 26 of the Land Registration Act and Section 13 of the Environment and Land Court Act, 2011 and under Article 22, 23, 40, and 162, 165 and 258 of the Constitution of Kenya 2010.
- k. A Declaration that the 2nd respondent, the National Land Commission does not have no jurisdiction to investigate the private properties of the Petitioners situate at Green Two Estate, South C, City County of Nairobi, the properties being private land under Articles 64 of the Constitution of Kenya 2010 and not being subject to the 2nd Respondents jurisdiction under Articles 68(c) (v) and Section 14 of the National Land Commission Act, 2012.
- l. A Declaration that the 2nd Respondent failed to summon the Petitioners or any of them to its proceedings that culminated in the decision published in the Gazette Notice No. 11714 of 2018 touching on land parcels L.R No. 209/16432 and L.R No. 209/ 16433 while knowing



or having the opportunity to know that the Petitioners properties are subdivisions of land parcels L.R No. 209/ 16432 and L.R No. 209/ 16433; therefore, the 2nd Respondent's decision published in Gazette Notice No.11714 of 2018 on 9th November 2018 touching on land parcels L.R No. 209/ 16432 and L.R No. 209/ 16433 is null and of no effect for being inconsistent with Articles 47 of the Constitution of Kenya 2010, the Fair Administrative Actions Act, 2015 and the Limitation of Actions Act under section 14 and 15 of the National Land Commission Act, 2012 derived from Articles 68 (c) (v) and 67(3) of the Constitution of Kenya 2010.

- m. A Declaration that the Petitioners are the registered proprietors of their properties in Green Two Estate, South C, City County of Nairobi and the properties are private land under Articles 64 of the Constitution of Kenya 2010 and are not public land under Articles 62.
- n. A Declaration that the Petitioners are the registered proprietors of their properties in Green Two Estate, South C, City County of Nairobi, acquired the properties as innocent purchasers without notice of any irregularity, if there was any and the properties were lawfully acquired by them and without any corruption in which any of them was involved.
- o. A Declaration that the Petitioners are the registered proprietors of their properties in Green Two Estate, South C, City County of Nairobi after the year 2006 and any complaint or challenge to their titles or to the subdivisions of L.R No. 209/ 16432 and L.R No. 209/ 16433; that resulted in 2006 in the Petitioner titles was not admissible before the 2nd Respondent as a complaint or challenge based on historical land injustice for the purpose of Article 67(3) or Section 15(3) of the National Land Commission Act, 2012; and any such challenge or complaint through the courts is barred by Section 7 of the Limitation of Actions Act, Cap 22 of the Laws of Kenya.
- p. A Judicial Review Order Of Prohibition do issue to prohibit the 5th Respondent from pursuing the Petitioners as the proprietors and residents or occupants of the properties at or comprising Green Two Estate, South C, City County of Nairobi following the summons reference number DCI/IB/LFIU/SEC/2/16/VOLXIII/221 dated the 20th November 2019 concerning the history of the parcels of land described by the 5th Respondent as L.R No. 209/107772 (now L.R No. 209/16432 and L.R No. 209/16433) the investigation by the 5th Respondent being inconsistent with the tenor of the constitution of Kenya, 2010 the National Land Commission Act 2012 the land Act 2012 and the land Registration Act 2012 on investigation and correction of historical land injuries or offenses under the revised, consolidated and rationalized land laws post the constitution of Kenya 2010.
- q. An Order of Injunction do issue to restrain the 3rd Respondent Limbani Dispensary Project Group, its servants and workmen from entering upon the Petitioner's properties Green Two Estate, South C, City County of Nairobi, interfering with the Petitioners' quiet enjoyment of their properties, and from pulling down or suffering to be pulled down the dwellings and commercial premises constructed on those properties owned and occupied by the Petitioners or leased out or licensed to the Petitioners' tenants or licensees, which properties are mentioned in the Petition, being the properties numbered and commonly known as Green Two Estate, South C, City County of Nairobi numbered and commonly known as Green Two Estate 1A-50A and Green Two Estate 1B-50B and RAF University Plot, and from removing any buildings and other improvements erected by the Petitioners and from selling or otherwise disposing of the materials whereof the said properties are comprised.



- r. A Declaration that the form LA 57 used as the Notice to Vacate Land issued by the 3rd Respondent and expressed to be under regulations 63(1), 64(1) and 65 purportedly of the land regulation 2017 and left at the guard house at the Petitioners premises Green Two Estate, South C, City County of Nairobi is inconsistent with the *land act*, 2012 the registration Act, 2012, Section 28 of the *Interpretation and General Provisions Act* Cap 2 of the laws of Kenya."
2. Vide cross petition dated the 22nd September 2020, the 3rd Respondent herein has implored the court to grant the following Reliefs;
- I Pending hearing and determination of this Petition inter-partes this court do issue Eviction Orders against the Petitioners, their agents, employees, proxies and representative for reason that they are unlawfully in occupation of the 3rd Respondent's land known as parcel of land L.R No. 209/107772 (Now L.R No. 209/16432 and L.R No. 209/16433) Nairobi Area – South C).
- II Pending the hearing and determination of the Petitioners Application inter-partes, this court be pleased to issue an Order of Temporary Injunction restraining the Petitioners by themselves, servant or workmen, agents and/or assigns from entering, remaining, constructing thereon, and/or continuing to occupy or in any way interfering with the 3rd Respondents quiet possession of all that parcel of land L.R No. 209/107772 (Now L.R No. 209/16432 and L.R No. 209/16433) Nairobi Area – South C).
- III Pending the hearing and determination of this Petition, this court be pleased to issue an Order of Temporary Injunction restraining the Petitioners by themselves, servant or workmen, agents and/or assigns from entering, remaining, constructing thereon, and/or continuing to occupy or in any way interfering with the 3rd Respondents quiet possession of all that parcel of land L.R No. 209/107772 (Now L.R No. 209/16432 and L.R No. 209/16433) Nairobi Area – South C).
- IV. A Declaration that the 3rd Respondent is the rightful owners/proprietor of all the parcel of land known as L.R No. 209/107772 (Now L.R No. 209/16432 and L.R No. 209/16433) Nairobi Area – South C), including the encroached
3. The Petition herein is supported by the affidavit of one Hassan Hamid Nuur Baricha, who state that same is the chairman of the Green Two Estate Owners and Residents Association, namely, the Petitioner herein and to which affidavit the deponent has attached various annexures running from pages 76 to 319 of the bundle.
4. Upon being served with the Petition, the Respondent herein variously entered appearance and thereafter filed their Responses in opposition to the Petition.
5. In respect of the 1st, 5th and 6th Respondent same entered appearance and thereafter filed a Replying affidavit sworn on the 22nd March 2022. However, it is imperative to note that the said Replying Affidavit was filed and/or lodged outside the prescribe timeline and same was the subject of a Ruling of the Court rendered on the 23rd March 2022.
6. On the other hand, the 2nd Respondent herein entered appearance and filed their Replying affidavit in respect of which same substantially supported the case of the 3rd Respondent.
7. The 3rd Respondent herein entered appearance and thereafter filed a Reply to the Petition and a Cross Petition dated the 22nd September 2020, in respect of which same essentially sought, inter-alia, to be declared as the lawful and legitimate owner of the suit Properties.



8. On his part, the 4th Respondent herein entered appearance and thereafter filed a Replying affidavit sworn on the 21st September 2020, which essentially opposed both the Petition and the Application which was seeking for various Reliefs, inter alia, Conservatory orders.

Depositions by the Parties:

The Petitioners' Case

9. Vide Supporting Affidavit sworn on the 30th July 2020, one Hassan Hamed Noor Baricha herein after referred to as the deponent has averred that same is the chairman of Green Two Estate Owners and Residents Association and that by virtue of being the said Chair person, same has been authorized to swear the affidavit for and/or on behalf of the Petitioners.
10. On the other hand, the deponent has further averred that the rest of the Petitioners and himself, are owners of various Properties, whose details have been elaborated vide paragraph 45 and 46 of the Petition and that to the extent of being the registered owners of the suit properties, the Petitioners are entitled to exclusive occupation, possession and use of the suit Properties.
11. Further, the deponent has averred that the suit Properties herein, which are currently registered in the names of various Petitioners arose from the sub-division of L.R No. 209/16432 and L.R No. 209/16433, respectively.
12. Besides, the deponent has also averred that the previous parcels of lands, namely L.R No. L.R No. 209/16432 and L.R No. 209/16433, hitherto belonged to and were registered in the name of one, Abdi Rahiman Abdi, who caused the properties to be sub-divided and thereafter transferred same to and in favor of the various Petitioners
13. Based on the sub-division, alienation, transfer and registration of the resultant parcels of land in favor of the various Petitioners, the deponent has averred that the various Petitioners thus acquired lawful rights and interest over the resultant parcels of land, whose details have been enumerated vide paragraphs 45 and 46 of the Petition.
14. Nevertheless, the deponent has further averred that despite being the lawful proprietors and/or owners of the suit properties, the 3rd Respondent herein proceeded to and issued Eviction Notices, whereby the 3rd Respondent demanded vacant possession in respect of the suit Properties, which are occupied by the Petitioners herein.
15. On the other hand, the deponent also avers that other than the Eviction Notices, which were issued and served on behalf of the 3rd Respondent, same have also received summonses from the 5th Respondents, alleging that the titles held by the Petitioners, were acquired and/or procured vide fraud.
16. It is the deponent's further averment that the 5th Respondent herein has indeed invited the Security committee of the Petitioners to visit the 5th Respondent's offices with a view to recording statements, pertaining to the circumstances leading to the acquisition of title in respect of the impugned properties.
17. Other than the foregoing, the deponent has also averred that the 2nd Respondent herein also purported to carry out and/or undertake review of the grant in respect of L.R No. 209/10772, albeit without notice to and involvement of the Petitioners herein.
18. As concerns the actions and/or activities by the Respondents, the Petitioners have averred that the suit properties belonging to and registered in the name of the Petitioners, constituted Private properties and not Public property.



19. In the premises, the deponent has averred that by virtue of being Private properties, the 2nd Respondent herein was not lawfully seized of the powers to interrogate and/or review the Petitioners' titles.
20. In any event, it is the deponent's further averment that the 2nd Respondent could not purport to carryout and/or undertake review of the Petitioners' title, insofar as the 2nd Respondent herein, was constituted, outside the statutory Duration provided for under Article 67(2) of the Constitution, 2010.
21. On the other hand, the deponent has further averred that based on the fact that same are the lawful and legitimate Proprietors over and in respect of the suit properties, the Eviction notice issued by and/or on behalf of the 3rd Respondent, which sought to recover the suit Properties was therefore illegal and unlawful.
22. At any rate, the deponent has further averred that if the Eviction Notices issued by and/or on behalf of the Respondent herein, are not vacated and/or quashed, the Petitioners who are the registered proprietors of the suit Properties shall suffer undue loss and/or prejudice.
23. Other than the foregoing, the deponent has also averred that the issuance of the Eviction notice by the 3rd Respondent against the Petitioners herein, who claim to be owners of the suit properties, will lead to the Petitioners being deprived of the suit Properties, contrary to and in violations of their Lawful Rights to Property.
24. Consequently, the deponent has further avers that to the extent that an eviction notice could issue against the suit properties, connotes that the Eviction notices therefore constitute a threat to the Constitutional protection guaranteed under the constitution2010.
25. In view of the foregoing, the deponent has thus invited the court to find and hold that the Notices of eviction were illegally issued by the 3rd Respondent and in any event, Sections 152E and 152 F of the [Land Act](#), 2012 (2016), have also been contended to be illegal and hence ought to be declared as such.
26. Based on the foregoing, the deponent has thus sought for a plethora of reliefs, whose details have been enumerated and captured at the onset of this Judgment

Response by the 1st,5th & 6th Repondents':

27. The 1st, 5th and 6th Respondent filed a Replying affidavit sworn the 22nd March 2022 by one Seargent Gerald Kanyithia, from the Directorate of the Criminal Investigations.
28. However, it is imperative to note that the court gave various directions, inter alia, directions on the filing of responses to the Petition. Besides, the court also gave directions on the filing and exchange of written submissions.
29. For clarity, the 1st, 5th and 6th Respondents were granted liberty to file and serve the Replying affidavit, on or before the 26th October 2021.
30. Nevertheless, the 1st, 5th and 6th Respondents did not file their Replying affidavit within the stipulated timeline at all. In the meantime, the Petitioners and the rest of the Respondents proceeded to and filed their written submissions.
31. Be that as it may, when the matter came up for mention of the 23rd March 2022, Learned counsel Mr. Allan Kamau, Principal Ligation Counsel appearing on behalf of the 1st, 5th and 6th Respondents intimated to the court that same had just filed and served their Replying affidavit as well as written submissions.



32. At this juncture, Mr. S M Mwenesi, Learned Counsel appearing for the Petitioners applied to have the Replying affidavit filed on behalf of the 1st, 5th and 6th Respondents to be struck out and/or be expunged from the record of the court.
33. Upon hearing the submissions of the Parties, the Honourable Court rendered a Ruling and the Court proceeded to and found that the subject Replying Affidavit would substantially prejudice the proceedings and the Parties, insofar as the Parties had filed and served their Submissions.
34. Consequently, the Court ordered and directed that the impugned Replying Affidavit be struck out and expunged from the Records of the Court. In short, the Replying Affidavit under reference was indeed expunged and hence same does not form part of the record of the Court.
35. In the premises, the 1st, 5th and 6th Respondents are deemed to not have filed any Response or Replying affidavit, to the Petition herein.

Response By The 3Rd Respondent:

36. Vide Response to Petition and Cross Petition dated the 22nd September 2020 and verified vide the verifying affidavit sworn on even date, the 3rd Respondent has averred that same is a Society duly registered under the *Society Act*, Chapter 108, Laws of Kenya.
37. On the other hand, it has also been averred that on or about the 13th July 1984, the 3rd Respondent herein set out to acquire a parcel of land, namely L.R No. 209/107772 (Now L.R No. 209/16432 and L.R No. 209/16433), respectively, situate within South C area.
38. Further, it has been contended that pursuant to a Letter made by and on behalf of the 3rd Respondent, the office of the commissioner of land granted a Letter of allotment issued on the 14th April 1989, where by the 3rd Respondence was duly allocated the suit property.
39. On the other hand, it has been averred that upon being allocated the suit property, the 3rd Respondent herein proceeded to and paid the stand premium as well as the incidental charges, as indicated vide the Letter of allotment.
40. Further, it has been stated that upon the payment of the stand premium and related charges, the 3rd Respondent herein was issued with Certificate of Title/Grant showing that same was now the legitimate owner and/or proprietor of L.R No. 209/107772 (Now L.R No. 209/16432 and L.R No. 209/16433).
41. Be that as it may, the 3rd Respondent has averred that on or about the year 2005, when her agents were in the process of clearing the property by cutting down the bushes and working the Road networks within the suit properties, someone whom the 3rd Respondent later came to know and who is otherwise referred as the Vendor by Petitioners, proceeded to the suit property and violently chased away the 3rd Respondent's agents.
42. As a result of the actions and/or activities by the person named as the Vendor, the 3rd Respondent herein was deprived of the Suit property.
43. Notwithstanding the foregoing, it has been averred that in a bid to protect her rights over and in respect of the property, the 3rd Respondent lodged and/or filed a Complaint with the 2nd Respondent, which Complaint is stated to have been entertained and/or adjudicated upon by the 2nd Respondent, culminating into a Decision disseminated vide letter dated 18th April 2018.



44. Further, it has been averred that pursuant to the Decision vide letter dated 18th April 2018, it was found that the allocation, alienation and registration of L.R No. 209/10772 in favor of one Abdi Rahiman Muhamed Abdi, was illegal.
45. On the other hand , it has also been averred that the 2nd Respondent nevertheless directed that the said Abdi Rahiman Muhamed Abdi, should thus compensate the 3rd Respondent for having unlawfully deprived same of the suit property and that pending such compensation, the Chief Land Registrar was ordered to restrict the title in respect of L.R No. 209/16432 and L.R No. 209/16433), respectively.
46. Besides, it has also been averred that despite the Decision of the 2nd Respondent, the said Abdi Rahiman Muhamed Abdi, has failed to compensate the 3rd Respondent over and in respect of the suit properties.
47. On the other hand, it has been averred that the said Abdi Rahiman Muhamud Abdi proceeded to and subdivided the suit property, known as L.R No. 209/10772, in two portions, leading to the creation of L.R No. 209/16432 and L.R No. 209/16433, respectively.
48. Further, it has been averred that the subsequent titles namely L.R No. 209/16432 and L.R No. 209/16433, have been subdivided and illegally transferred to the Petitioners herein. However, it has been averred that the Petitioners herein, did not acquire any lawful title and/or rights over the suit properties or at all.
49. To the contrary, it has been averred that the suit property/ properties, herein lawfully remains the property of the 3rd Respondent and hence the claim by the Petitioners herein are not only misconceived, but legally untenable.
50. Based on the foregoing, it has been averred on behalf of the 3rd Respondent that same proceeded to and issued Eviction Notices against persons who were/ are in occupation of the suit properties.
51. Besides, it has been averred that the Eviction notices, which were issued by and/or on behalf of the 3rd Respondent were issued in accordance with the law and same were therefore lawful and legitimate, for all intents and purposes.
52. In a nutshell, the 3rd Respondent has therefore implored the court to dismiss the Petition, but to allow the Cross Petition and grant liberty to the 3rd Respondent to recover vacant possession of the suit properties.

Response By The 4th Respondent:

53. Vide Replying Affidavit sworn on the 21st September 2020, the 4th Respondent has averred that same was lawfully allocated all that parcel of land known as L.R No. 209/10772, situate within South C, Mugoya Phase 4, within the city of Nairobi.
54. Further, the deponent has averred that following the allocation and alienation of the suit property to and in his favor, same complied with the terms of the Letter of allotment and thereafter, the suit property was duly and lawfully registered in his name.
55. Be that as it may, the deponent has averred that upon the registration of the suit property in his name, same applied to the Director of City Planning and Architecture for approval to sub-divide the suit property and the requisite notification of approval were duly issued and/or granted.
56. Notwithstanding the foregoing, the deponent herein has averred that one Abdi Rahiman Abdi, proceeded to his, (4th Respondent's) house, situated at Madaraka Estate, FM38, House number 2 and



- forcefully took away the original certificate of title in respect of the suit property and the supporting Documents.
57. On the other hand, the deponent has averred that following the illegal and unlawful actions by Abdi Rahiman Abdi, same was constrained to and indeed lodged a Complaint at Nyayo Police station and the Complaint was duly recorded and booked as OB No. 19/18/1/2005.
 58. Nevertheless, the deponent has further averred that despite lodging a Complaint against Abdi Rahiman Abdi for theft and seizure of the Original Title in respect of the suit property, the said Abdi Rahiman Abdi, was neither arrested nor prosecuted at all.
 59. On the other hand, the deponent has averred that Abdi Rahiman Abdi, thereafter proceeded to the Ministry of Land Headquarters at Ardhi house and while at the Ministry of Lands headquarters, same destroyed the Green Card and all records which were in the Strong room relating to the suit property.
 60. It is further averred that after the destruction of the Green card and all the Records in respect of the suit property, Abdi Rahiman Abdi thereafter procured and/or obtained Fake title over and in respect of the suit property, which same caused to be registered in the name of Kenya Africa National Union (Kanu).
 61. On the other hand, it has been averred that after Abdi Rahiman Abdi obtained the Fake Title in the name of Kanu, same is indicated to have fraudulently acquired and/or caused the suit properties to be transferred from Kanu and to himself.
 62. Later, it is averred that Abdi Rahiman Abdi then proceeded to and illegally caused the suit property to be subdivided, namely, L.R No. 209/10772 into Two portions, leading to the creation of L.R Nos. 209/16432 and L.R No. 209/16433.
 63. Besides, it has been averred that the said Abdi Rahiman proceeded to and erected illegal structures on the suit property and which Illegal structures are still standing on the suit property todate.
 64. Nevertheless, it has been averred that despite the illegal activities by Abdi Rahiman Abdi of procuring and obtaining Fake title from the Ministry of Land, same however, did not interfere with the record obtaining at the Offices of the Director of Survey.
 65. Other than the foregoing, the deponent has averred that the alleged title which was issued in favor of Kanu was illegal and this was confirmed by one, Njee Muturi, vide a Replying affidavit sworn on the 1st September 2008, wherein Njee Moturi, who was the Executive Director of Kanu, clarified that Kanu had never owned the suit property.
 66. Be that as it may, that deponent has also averred that in a bid to perpetuate the Fake title and the acquisition of the suit property, one Abdi Rahiman Abdi, attempted to kill him (4th Respondent), but by virtue of being a skilled and trained soldier, same was able to evade attempted killing.
 67. On the other hand, the deponent has averred that Abdi Rahiman also attempted to have the deponent prosecuted vide Criminal proceedings, but same were dismissed by the Court.
 68. Based on the foregoing, the deponent has averred that the titles which were issued to Abdi Rahiman Abdi, were thus irregular, unlawful and illegal.
 69. Other than the foregoing, it has also been averred that the 3rd Respondent herein only tried to mimic the name of the Organization, to correspond with his, namely, the 4th Respondent's organizations, bearing a similar name.
 70. Notwithstanding the foregoing, it has been averred that upon the lodgment of a Complaint touching on and/or concerning ownership of the Suit property by the 3rd Respondent, the 2nd Respondent



herein rendered a Decision concerning the suit property which found that Abdi Rahiman Abdi, acquired the suit property illegally and unlawfully.

71. At any rate, the 4th Respondent has further averred that the said Abdi Rahiman Abdi, was ordered and/ or directed to compensate the 3rd Respondent in the sum of Kshs. 3, 154, 254, 500 Only.
72. In any event, the 4th Respondent has also averred that the payment of the compensation, was to be made, before the title in favor of the said Abdi Rahiman Abdi, could be regularized.
73. In the premises, the 4th Respondent has averred that the title in favor of Abdi Rahiman Abdi, was illegally and unlawfully procured and/or acquired.
74. Besides, the deponent has further averred that the 3rd Respondent herein is non-existent and hence the same cannot purport to own the suit Property herein or at all.
75. Based on the foregoing, the 4th Respondent now contends that the suit property/ properties herein, lawfully belongs to himself and not otherwise. Consequently, the 4th Respondent has sought to be declared as the Owner of the same.

Submissions by the parties:

76. The subject matter came up for hearing of the Petition on the 26th October 2021 when directions were given pertaining to and/or concerning the Petition. For clarity, it was mutually agreed that the Petition be canvassed on the basis of affidavit evidence, as well as submissions to be filed and exchanged by the Parties
77. Pursuant to the foregoing directions, the Petitioners ultimately filed their written submissions on the 21st March 2022, while on the other hand, the 1st, 5th and 6th Respondents filed their submissions on the 22nd March 2022.
78. On her part, the 3rd Respondent filed her submissions on the 11th February 2022, while the Written submissions by the 4th Respondent were filed on the 21st February 2022.
79. It is imperative to note that the written submissions by and/or on behalf of the Parties herein, forms part and parcel of the record of the court and same have been duly appraised, taken into account and/ or considered.
80. Briefly, it was the Petitioners submission that L.R No. 209/16432 and L.R No. 209/16433, now subdivided lawfully belonged to Abdi Rahiman Abdi, who thereafter sub-divided same and thereafter sold and disposed of the resultant sub-divisions to and in favor of the Petitioners.
81. It was further submitted that upon the sale, transfer and registration of the resultant sub-divisions in favor of the Petitioners, the Petitioners acquired lawful and legitimate title to the resultant subdivisions and hence same have lawful rights to the suit Properties.
82. Secondly, it has been submitted that the acquisition, transfer and registration of the sub-division that arose from L.R No. 209/16432 and L.R No. 209/16433, respectively, by the Petitioners was done without of any Notice of defect in the title of the Vendor and without same having been Party to any fraud, irregularity or otherwise.
83. In the circumstances, the Petitioners have thus contended that their titles to the suit properties are therefore indefeasible, same having been lawfully acquired on the basis of Bona fide from the Vendor.



84. Thirdly, the Petitioners have submitted that by virtue of being the registered Proprietors of the suit properties, same cannot not be served with Eviction notices to vacate the suit properties as proposed by the 3rd Respondent.
85. At any rate, the Petitioners have submitted that any Eviction notice(s) which is issued against the Land owner, in this case, the Petitioners, would be illegal null and void.
86. Fourthly, the Petitioners have submitted that the Eviction notices which were issued and served by the 3rd Respondent, whereby same demanded vacant possession in respect of the suit properties, were not legally tenable, insofar as the ,3rd Respondent did not have any ownership rights over the suit properties, to warrant the issuance of the Eviction notices.
87. Fifthly, the Petitioners have also submitted that the Eviction notices and the form of Eviction notices which was used by the 3rd Respondent, were illegal and therefore ought to be nullified.
88. Sixthly, the Petitioners have also submitted that Sections 152E and 152F of the *Land Act*, 2012, which allows for issuance of Eviction notice by a party, like in the instant case, are unconstitutional, insofar as the impugned notices were meant to interfere with the Petitioners' lawful rights and interests over the suit properties.
89. Besides, the Petitioners have also submitted that the summons by the 5th Respondent , who is seeking to interrogate the circumstances leading to the creation of the titles of the suit properties and threatening to arrest and prosecute, the Petitioners herein are unlawful and illegal and thus ought to be quashed.
90. Further, the Petitioners also contended that the claims by the 3rd and 4th Respondents, touching on and of concerning ownership of the suit Properties, are legally untenable. For clarity, the Petitioners have submitted that the claims by the 3rd and 4th Respondents are not anchored on any legitimate title documents.
91. Based on the foregoing, the Petitioners have thus implored the court to find and hold that same are the legitimate owners of the suit properties and that the impugned Eviction notice(s), which were issued the 3rd Respondent, were/ are a nullity in law.
92. In the circumstances, the Petitioners have thus sought that the Court be pleased to grant the Reliefs outlined at the foot of the subject Petition.
93. On behalf of the 1st, 5th and 6th Respondents, it has been submitted that the Eviction notices which were issue and served on behalf of the 3RD Respondents were not only lawful, but legitimate. For clarity, it has been pointed out that the said Eviction notices were issued in line and accordance with the provisions of Sections 152 E and 152 F of the *Land Act*, 2012.
94. Secondly, it has been submitted that the National Land Commission herein was authorized to undertake investigations in respect of the circumstances surrounding alienation of public land and to review such disposition. In this regard, it has been submitted that the 2nd Respondent had rights to investigate on behalf of a Complainant upon receipt of such complaint.
95. Thirdly, it was further submitted that the jurisdiction of National Land commission was not limited to Reviewing only public land. For clarity, it was submitted that same extended to cover Public land which had already been alienated and thus became private land.
96. In view of the foregoing, the 1st, 5th and 6th Respondents have submitted that the contention that by virtue of being Private Properties, the Titles of the Suit Properties could not be Reviewed by the National Land Commission, was misleading and erroneous.



97. In support of the foregoing submissions, 1st, 5th and 6th Respondents have referred to the Decisions in the cases, namely, of *Republic versus National Land Commission & Another; Ex-parte Muktar Saman Olow* [2015] eKLR and *Republic v National Land Commission Ex-Parte Holon Property*, [2016] eKLR.
98. Other than the foregoing, the 1st, 5th and 6th Respondents have also submitted that once a Letter of allotment was duly issued to and in favor of the 3rd Respondent and upon compliance with the terms stipulated under the Letter of allotment, the suit property, which was at the foot of the Letter of allotment, stood alienated and was thus not available for further or otherwise, second alienation.
99. In this regard, the 1st, 5th and 6th Respondents have therefore submitted that the allocation and/or alienation of the suit property in favor of the 3rd Respondent therefore made it impossible for the said property to be re-alienated in favor of any other Third Party or at all. Consequently, it was contended that the suit property lawfully belongs to the 3rd Respondent.
100. In support of the foregoing submissions, Learned counsel for the 1st, 5th and 6th Respondents have placed reliance on the case of *Dr. Joseph N. K Arap Ngok versus Moijo Ole Keiwua and 4 others* [1997] eKLR and *Rukaya Ali Mohamed v David Gikonyo Nambacha & Another*, Kisumu HCC No. 9 of 2004.
101. Other than the foregoing, the 1st, 5th and 6th Respondents have also submitted that the 5th Respondent, namely, the Directorate of Criminal Investigations, is allowed under the law to carryout and/or undertake investigations in respect of any matter where there exists reasonable basis to warrant such investigations.
102. In this regard, it was submitted that the prayer seeking for prohibition of the 5th Respondent from investigating the circumstance leading to the Petitioners title, cannot therefore be granted.
103. Other than the foregoing, the 1st, 5th and 6th Respondents have also submitted that the Provisions of Section 152E and 152F of the *Land Act*, 2012 (2016), as well as Form LA57 issued pursuant to Regulations 61(1), 64(1) and 65 of the Land Regulations 2017 are Constitutional and lawful.
104. In any event, it has been submitted that there is a presumption of constitutionality of Legislations and that where a Party contends that the impugned Legislation is unconstitutional, it behooves the Party challenging the constitutionality of the Legislation, to prove such unconstitutionality.
105. In support of the forgoing submissions, Learned counsel has referred to the decision of the Supreme Court of Kenya; *In the Matter of the Interim Independent Electoral Commission, Advisory Opinion* No. 2 of 2011 [2011]eKLR.
106. Finally, on the issuance of Conservatory orders, the 1st, 5th and 6th Respondents, have submitted that the Petitioners herein have not established and/or satisfied the threshold for the grant of the Conservatory orders sought.
107. In the premises, Learned counsel has therefore contended that the Petitioners are thus not entitled to any Conservatory orders, either as sought or at all.
108. In this regard, Learned Counsel has referred to the holding of *Gitarau Peter Munya v Dickson Mwenda Kithingi* [2014] eKLR and *Okiya Omutata Okiiti & Another versus The President of Kenya & 2 others* [2016] eKLR.
109. On her part, the 3rd Respondent has submitted that same was lawfully and legally issued with a Letter of allotment over and in respect of the suit property and upon receipt of the Letter of allotment, same



proceeded to and complied with the terms contained thereon, including payment of the stand premium in the sum of Kshs.1, 136, 367/= only.

110. It was further submitted that upon compliance with the terms and conditions contained in the Letter of allotment, the 3rd Respondent was duly and lawfully issued with a Certificate of Title and hence same became the lawful and legitimate proprietor over the suit property. In this regard, the 3rd Respondent has placed reliance on the Provision of Sections 24 and 25 of the [Land Registration Act, 2012](#).
111. Secondly, the 3rd Respondent has further submitted by virtue of being the registered proprietor over and in respect of the suit property, same was entitled to issue and serve the Eviction notices against the unlawful occupants on the suit property, the Petitioners herein, not excepted.
112. Besides, the 3rd Respondent has also submitted that in issuing and serving the Eviction notices, same complied with and or adhered to the provisions of Section 152 E of the [Land Act, 2012](#), which stipulates and/or prescribes the terms of an Eviction notice and the duration to be provided.
113. In the circumstances, the 3rd Respondent has submitted that the Eviction notices which were issued and served upon the Petitioners herein, were lawful and valid. Consequently, the Petitioners herein are obliged to comply with same.
114. Thirdly, the 3rd Respondent has submitted that to the extent that the suit property belongs to and is registered in the name of the 3rd Respondent, any occupation thereon without the consent of the 3rd Respondent, would therefore tantamount to Trespass.
115. Owing to the foregoing, the 3rd Respondent has thus submitted that the Petitioners herein are Trespassers of the suit property, to the extent that the occupation thereon has not been consented to and/ or sanctioned by the 3rd Respondent.
116. In support of the foregoing submissions, the 3rd Respondent has invoked and relied in the case of [Dr. Joseph Arap Ngok v Moiwo Ole Keiwua & 5 Others](#) [1997] eKLR and [Arthi Highway Developers Ltd v Westend Butchery & Others](#) [2015] eKLR.
117. Fourthly, the 3rd Respondent has further submitted that the Petitioners herein have not established and/or proven that same have any valid or lawful title. Consequently, it has been contended that the Petitioners are therefore not entitled to the Reliefs sought.
118. Finally, the 3rd Respondent has submitted that having lawfully been registered as the owner of the suit property, which position was vindicated vide the Decision of the 2nd Respondent issued on the 18th April 2018, same are therefore entitled to the Reliefs sought at the foot of the Cross- Petition.
119. At any rate, the 3rd Respondent has also contended that having been deprived of the use and benefit arising from the suit property, the 3rd Respondent is therefore entitled to compensation on account of Damages for a Trespass. In this regard, the 3rd Respondent has submitted that same is entitled to the sum of Kshs.1, 000, 000, 000/= only.
120. On his part, the 4th Respondent has submitted that the suit property was lawfully allocated to and in his favor and that following the allocation thereof, vide letter of allotment issued by the Office of the Commissioner of Lands on the 1st July 1998, same complied with the terms thereof, culminating into the issuance of a Certificate of title in his favor.
121. For clarity, the 4th Respondent contends that the Certificate of Title was issued on the 23rd December 1991.



122. Based on the foregoing, the 4th Respondent has thus contended that same is therefore the lawful and legitimate owner of the suit property. Consequently, the 4th Respondent has implored the court to find and hold that he is the bona-fide owner of the suit property and not the Petitioners nor the 3rd Respondent.
123. On the other hand, the 4th Respondent has also submitted that the Burden of proof, namely, in proving that the Petitioners are the registered owners of the suit properties laid on the shoulders of the petitioners. However, the 4th Respondent has submitted that the Petitioners failed to prove their Ownership over and in respect of the suit Properties.
124. In support of the foregoing submissions, the 4th Respondent, has relied on the decision in the case of *Dr. Samson Gwer and 5 others versus Kenya Medical Research Institute & 3 others* [2020] eKLR.
125. Secondly, the 4th Respondent has submitted that the Petitioners herein have not shown and/or exhibited Evidence and /or due diligence that was taken out, prior to and/or before purchasing the Suit properties.
126. In any event, the 4th Respondent has further submitted that the Petitioners herein have not disclosed and/or availed evidence relating to the Sale Agreements at the foot of the purchase and acquisition of the suit properties and neither have the Petitioners disclosed the details of the Vendor, if any, who sold the suit properties unto to them.
127. In the premises, the 4th Respondent has submitted that the Titles in favor of the Petitioners were thus acquired irregularly, unlawfully and fraudulently, with the knowledge of the Petitioners.
128. Thirdly, the 4th Respondent has submitted that the National Land Commission, namely, the 2nd Respondent herein had the Competence and Jurisdiction to undertake investigations either on its own behalf or upon receipt of a Complaint.
129. In any event, it has also been submitted that the jurisdiction of the 2nd Respondent was Articulated vide Article 68 (c) of the Constitution 2010 as read together with Section 14 of the *National Land Commission Act*, 2012.
130. Besides,, it has also been pointed out that power of the 2nd Respondent, included the mandate to Review Grants and/or Dispositions relating to Private land, which were hitherto public land.
131. In support of the foregoing submissions, the 4th Respondent has relied in the Decision in the case of *Copar Investment Ltd v Kenya Urban Roads Authority* [2014] eKLR.
132. Other than the foregoing, the 4th Respondent has similarly submitted that the National Land Commission lawfully and legally undertook review of the grant and/or disposition relating to the suit property and after carrying out the review, same rendered a decision on the 18th April 2018, whereby the National Land Commission pronounced itself on the issue of Ownership of the suit property.
133. Fourthly, the 4th Respondent has also submitted that the 5th Respondent herein, namely, the Directorate of Criminal Investigations, is authorized to carry out and/or undertake any investigations, provided that there exists reasonable suspicion and/or basis, to suspect that a Crime has been committed or is about to be committed and that subject to such investigations, to forward their findings to the Director of Public Prosecution for appropriate action.
134. At any rate, the 4th Respondent has submitted that prior to and/or before an order of prohibition can issue as against the 5th Respondent, it is incumbent upon the Petitioners to lay a basis and/or show that



the impugned investigations are being carried out and/or undertaken contrary to the law, which has neither been proven nor established.

135. Fifthly, the 4th Respondent has submitted that the provisions of Section 152 E and 152 F of the [Land Act](#), 2012, (2016), are not unconstitutional. In any event, the 4th Respondent has further submitted that there is a presumption of constitutionality in favor of every legislation and the burden to prove that any legislation is unconstitutional is on the person of who alleges as much.
136. In respect of the subject matter, the 4th Respondent has submitted that the Petitioners have not laid any basis to warrant a finding and holding that the impugned Sections, namely, Sections 152 E and 152F of the [Land Act](#), 2012, are unconstitutional.
137. In a nutshell, the 4th Respondent has therefore implored the court to find and hold that the Petitioners herein have not proved their case and hence same should be dismissed with Costs.

Issues for Determination:

138. Having reviewed the Petition dated the 20th July 2020, the Supporting Affidavit thereto, the Cross-Petition, as well as the Responses filed by and/or on behalf of the Respondents and having similarly considered the elaborate submissions filed by the Parties herein, the following issues do arise and are thus germane for determination;
 - a. Who is the lawful and legitimate owner of L.R No. 209/107772 (Now L.R No. 209/16432 and L.R No. 209/16433)
 - b. Whether the Eviction Notices issued by and/or on behalf of the 3rd Respondent were Valid and Lawful.
 - c. Whether the 3rd Respondent is entitled to Compensation as sought or at all.
 - d. Whether the Provisions of Section 152E and 152F of The [Land Act](#), 2012 (2016) are Unconstitutional
 - e. Whether the Petitioners have laid a basis to warrant a Declaration that the 5th Respondent cannot carryout and/or undertake any investigations pertaining to illegality and/or irregularity in the acquisition of Land.
 - f. What Reliefs ought to be granted.

Analysis and Determination

Issue Number 1 Who is the Lawful and legitimate owner of L.R No. 209/107772 (Now L.R No. 209/16432 and L.R No. 209/16433)

139. The suit property, namely L.R No. 209/107772 (Now L.R No. 209/16432 and L.R No. 209/16433) is being claimed by three persons and/or groups. Consequently, it is incumbent upon the court to interrogate the claim by and/or on behalf of each group and thereafter endeavor to ascertain which claim is legitimate, lawful and thus valid.
140. To be able to do so, it is thus imperative to analyze each individual claim, based and/or premised on the totality of the documents presented.
141. In the premises, I propose to start with the claim by and/or on behalf of the 3rd Respondent. For clarity, I propose to do so for obvious reasons that the 3rd Respondents had hitherto lodged a complaint with



the 2nd Respondent, pertaining to the ownership dispute over the suit property between herself and one Abdi Rahiman Muhamud Abdi, who is not a Party to the subject Suit.

142. It is important to note that the 3rd Respondent herein stated that same applied to be allocated a parcel of land situated at South C Area, within the city of Nairobi. For clarity, the application letter was produced and marked as annexure “CB 1” to the verifying affidavit sworn by one Chillion Bosire.
143. It was further contended that following the application for allotment of land, the Office of the Commissioner of land proceeded to and indeed issued a letter of allotment to and in favor of the 3rd Respondent vide Letter of allotment dated the 14th April 1998.
144. Subsequently, the 3rd Respondent contended that upon the issuance of letter of allotment, same complied with the terms thereof, culminating into the issuance of Certificate of lease.
145. Based on the Certificate of lease which was issued to and in favor of the 3rd Respondent, same has averred and thus contended that the suit property lawfully belongs to and is registered in her name.
146. In the premises, the 3rd Respondent has therefore impleaded and relied on the provisions of Section 23 of the Registration of Title Act, Chapter 281 Laws of Kenya (now repealed). For convenience, the provisions of Section 23 of the Registration of Title Act, Chapter 281 Laws of Kenya (now repealed), provides as hereunder;

“ 23.

- (1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.
- (2) A certified copy of any registered instrument, signed by the registrar and sealed with his seal of office, shall be received in evidence in the same manner as the original.

147. At any rate, the import and tenor of the foregoing provisions have been the subject of various legal pronouncements, including the holding in the case of Dr Joseph N.K Arap Ngok vs Justice Moiwo Ole Keiwua & 5 Others CA No. 60 of 1997 which interpreted the said section 23 of the RTA as thus;-

“Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title holder under the Act. It is our law and law takes precedence over other alleged equitable rights of title”

148. Up to and including this juncture, it would have been easy to make a finding and/or pronouncement of ownership in favour of the 3rd Respondent. However, there is yet another legal obstacle to be surmounted, before the court can conclusively make a determination.



149. It is worthy to recall that faced with a dispute over and in respect of ownership in respect of the suit title, the 3rd Respondent herein filed and/or lodged a Complaint before the 2nd Respondent, to interrogate the Title which was allegedly held by one Abdi Rahiman Muhamud Abdi and the one held by the 3rd Respondent and to authenticate, which of the Titles was valid.
150. Pursuant to the lodgment of the Complaint, the 2nd Respondent herein, namely, National Land Commission, carried out and undertook investigations pertaining to and/or concerning the title in respect of the suit property and after extensive review, the 2nd Respondent rendered a determination vide letter dated 18th April 2018. For coherence, the 2nd Respondent rendered herself;
- “The commission found that Mr. Abdi obtained L.R No. 209/107772 illegally acquired and letter subdivided it into L.R No. 209/16432 and L.R No. 209/16433. The land was legally allocated Iimbani Dispensary Project and they have never relinquish their rights to it.
- The commission ordered that Mr. Abdi compensates Iimbani Dispensary Project Group for the land and loss of income after a valuation by our office.
- The chief land registrar is requested to place restrictions on titles L.R No. 209/16432 and L.R No. 209/16433 until Mr. Adbi Rahiman Muhamud Abdi compensates Iimbani Dispensary Project Group.”
151. My understanding of the decision and/or verdict of the 2nd Respondent herein vide the letter dated 18th April 2018, which verdict was thereafter gazetted vide Gazette notice number 11714 of 9th November 2018, is that even though the suit property was found to have been lawfully allocated to the 3rd Respondent, the 2nd respondent ordered that same be compensated after a valuation was done by the commission.
152. In my considered view, by ordering and/or directing that the 3rd Respondent herein be compensated, the Commission thus negated the 3rd Respondent’s ownership and in this regard the 3rd Respondent’s Stake in respect of the suit property was thereafter premised on the compensation and not otherwise.
153. In any event, it is worthy to note that upon the delivery and/or rendition of the decision of the 2nd Respondent, which I have reproduced herein before, the 3rd Respondent herein was contented with the said Decision and thus no challenge and/or review was mounted.
154. On the other hand, it is also imperative to note that subsequent to the delivery of the decision and/or verdict by the 2nd Respondent herein, the 3rd Respondent herein filed Civil Proceedings vide Milimani ELC Misc. Application No. 195 of 2019 between Iimbani Dispensary Project v Abdul Rahaman Muhamed Abdi, whereby same sought enforcement of the decision and/or award of the National Land Commission vide letter dated 18th April 2018.
155. Suffice it to observe, that the said proceedings were thereafter prosecuted and this Honorable court, namely, Hon Justice Oguttu Mboya, Judge, proceeded to and rendered a decision vide ruling dated the 7th October 2021, in respect of which the court adopted the award and decreed compensation in favor of the 3rd Respondent herein.
156. Pursuant to the ruling of the court vide Milimani ELC Misc. Application No. 195 of 2019, the 3rd Respondent herein now holds a valid and lawful decree as against Abdul Rahaman Muhamed Abdi, which decree is premised on Compensation for the loss or better still, forfeiture of the suit property.
157. Based on the fact that the 3rd Respondent herein has a valid decree for compensation in lieu of ownership of the said property, it is my considered view that the 3rd Respondent herein, cannot



- similarly now revert to court and seek to stake a claim on ownership of the suit property, at the same time.
158. In any event, civil proceedings vide Milimani ELC Misc. Application No. 195 of 2019, was filed and/or lodged on the 12th November 2019 and therefore same was known to and within the knowledge of the 3rd Respondent herein at the time of mounting the Answer to Petition and the Cross Petition in respect of the subject matter.
 159. Suffice it to point out, that it behoved the 3rd Respondent and or her officials, to make full and frank disclosure to the court, particularly, as concerns any previous and/or pending proceedings, if any which would have a bearing on the subject matter.
 160. Be that as it may, the 3rd Respondent herein, chose not to disclose the existence of the previous suit vide Milimani ELC Misc. Application No. 195 of 2019 and in respect of which same has a valid decree in the sum of Kes.3, 154, 500, 000/= as against Abdi Rahaman Muhamed Abdi.
 161. In view of the foregoing, the 3rd Respondent's only recourse as pertains to the subject dispute, would be recovery of the decretal sum as against the Judgment Debtor and not to revert and stake a claim to ownership of the suit property.
 162. Consequently and in the premises, it is my finding and holding that the 3rd Respondent's claim to and in respect of ownership of the suit property, is not only untenable, but is geared towards attracting unjust enrichment.
 163. As concerns the claim by the 4th Respondent, it is imperative to note that his claim to the suit Property is premised and/or predicated upon a Letter of allotment dated the 1st July 1988 and which is alleged to have been addressed to;

Iimbani Dispensary,
Box 30124,
Nairobi.
 164. From the letter of allotment, what becomes so evident is that same replicates and/or duplicates the Letter of allotment dated the 14th April 1988 and which was issued to a similar organization/group and which letter similarly shared the same Reference number. For clarity, both the Letter of allotment alluded to by the 4th Respondent and the one relied upon by the 3rd Respondent shared the same Reference number 120682/4.
 165. Other than the similarity in the Reference number, one other thing that is worthy to note is that the Letter of allotment relied upon by the 4th Respondent does not have the authority minutes/ Number at the foot thereof, to authenticate same.
 166. Notwithstanding the foregoing, what becomes critical and paramount to address is whether upon the issuance of the Letter of allotment dated the 14th April 1988, whose terms were subsequently complied with, the Office of the Commissioner of Land could generate and issue a Second/Further letter of allotment over and in respect of the said property.



167. Suffice it to note, that the Office of the Commissioner of Land could only alienate vide a Letter of allotment, un-alienated Government land and not otherwise. For clarity, un-alienated Government Land is defined vide Section 2 of the [Government Land Act](#), Chapter 280 Laws of Kenya as hereunder;
- “unalienated Government land” means Government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment.
168. In this respect, having alienated the un-surveyed Plot B-C-R Nairobi South C, vide Letter of allotment dated the 14th April 1988, the said plot stood duly alienated and/or allocated and hence same could not be the subject of a Second or Further letter of allotment.
169. In any event, if the Office of the Commissioner of Land was minded to issue a Second or Further letter of allotment relating to the same property and/or plot, it was incumbent upon the said Office to ensure that the prior Letter of allotment was validly and lawfully recalled, canceled and/or nullified.
170. To my mind, having lawfully and duly issued and signed the Letter of allotment dated the 14th April 1988, which remained valid and in existence, the Office of the Commissioner of Land was incapacitated from purporting to issue the further Letter of allotment, namely, the one upon which the 4th Respondent’s claim is anchored.
171. To vindicate the foregoing statement, it is appropriate to adopt and endorse the holding in the case of [Gitwany Investment Limited -v- Tajmal Limited & 2 Others](#), (2006) eKLR, where the Court observed as hereunder;
- “it is our considered view that the trial court did not err in upholding the 1st, 2nd and 3rd respondents’ title to the suit property and cancelling the appellant’s title. The alienation to the 1st, 2nd and 3rd respondents is the grant [that] takes priority; at the time another grant was being made to the appellant, the suit land had already been alienated; there was nothing for the 5th respondent to allot and alienate to the original allottees.”
172. Other than the foregoing decision, the fate of a subsequent Letter of allotment, issued during the existence of a previous and valid letter of allotment was also deliberated upon by the Court of Appeal, whose finding and holding reiterates the decision in the case of [Gitwany Investment Limited -v- Tajmal Limited & 2 Others](#), (2006) eKLR (Supra).
173. In this respect, it is appropriate to refer to the decision in the case of [Benja Properties Limited v Syedna Mohammed Burbannudin Sabed & 4 others](#) [2015] eKLR, where the Court of Appeal held as hereunder;
- “25. In arriving at our decision, we note that an interest in land cannot be allotted, alienated or transferred when the specific parcel of land allotted is not in existence. Allotment of an interest in land is a transaction in rem attaching to and running with a specific parcel of land. In the instant case, the allotment by the Commissioner of Land to the original allottees did not attach in rem to any land since there was no parcel upon which the allotment could attach. What the 5th respondent, the appellant and the original allottees did was to engage in paper transactions without a parcel of land upon which any interest in land would attach and vest – it was paper transactions without any parcel of land as its substratum.



174. Other than the fact that the Letter of allotment being relied upon by the 4th Respondent was subsequent to the previous letter of allotment, it is also imperative to note that the letter of allotment under reference was not addressed to the person of the 4th Respondent, but it was instead addressed to an organization known as Iimbani Dispensary, which the 4th Respondent contends to have registered.
175. Be that as it may, for the Letter of allotment to have been issued in the name Iimbani Dispensary, at the prompting and instance of the 4th Respondent, it would mean that the 4th Respondent had prior to the application for the allocation of the land, registered such an organization.
176. Put differently, the 4th Respondent could not have applied to be allocated and/or allotted the suit plot, in the Name of the Organization, say by 1st July 1988, before registering Iimbani Dispensary.
177. Nevertheless, the 4th Respondent herein has proceeded to and availed to the court a copy of the Certificate of registration of Iimbani Dispensary. However, what is worthy to note is that the Certificate of registration shows that this Organization was only registered on the 6th November 2013.
178. In the premises, the question that begs the answer is whether a Letter of allotment could issue in favor of a non-existent Organization, at the material time.
179. In my humble view, it is apparent and/or evident that the registration of Iimbani Dispensary on the 6th November 2013, if at all, was a belated, albeit subtle attempt by the 4th Respondent to plug some loose ends that were evident in his claim of ownership in respect of the suit property.
180. Other than the foregoing, it is also worthy to note that though the Letter of allotment being relied upon by the 4th Respondent was issued in the name of Iimbani Dispensary, the Certificate of title, which the 4th Respondent has exhibited to the court is issued in the names of the 4th Respondent, albeit without any connecting document to show how the transaction moved from Iimbani Dispensary to the 4th Respondent.
181. Clearly, there would have been a letter assigning the interests of Iimbani Dispensary to the 4th Respondent and same, if any, ought to have been exhibited.
182. Notwithstanding the foregoing, there is yet another issue which remains unresolved. Assuming that the certificate of title relied on by the 4th Respondent was genuine and legitimate, one would have expected the said title to be certified by the office of the Registrar of Titles or Chief Land Registrar.
183. However, the certificate of title in question has not been certified and hence its authenticity or validity remains in doubt.
184. Be that as it may, I beg to point out that where a certificate of title is under challenge, it is not enough for the holder of the title, in this case, the 4TH Respondent, to wave same on the face of the court, without speaking to the process that culminated and/or resulted in the issuance of the impugned title.
185. In support of the foregoing statement, I find succor in the holding in the case of *Munyu Maina v Hiram Gathiba Maina* [2013] eKLR, where the Court of Appeal held as hereunder;

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is



required of him and no evidence was led to rebut the appellant's testimony. We find that a trust exists in relation to the suit property."

186. Based on the foregoing, I am afraid that the 4th Respondent's claim to and in respect of ownership of the suit property is shaky and built on Quicksand.
187. Notwithstanding the foregoing, it is also worthy to note that the 4th Respondent contended that Abdi Rahaman Abdi, illegally and unlawfully seized his title and thereafter proceeded to the Land registry and caused same to be altered into his name.
188. It is also worthy to note that the illegal seizure and/or confiscation is said to have taken place on or about the 18th January 2005.
189. If indeed Abdi Rahaman Abdi, forcefully and illegally confiscated the 4th Respondent's title and then proceeded to fraudulently alter same, culminating into the issuance of title in favor of Abdi Rahaman Abdi, then it was incumbent upon the 4th Respondent to mount a suit challenging the fraud and seeking recovery of vacant possession in respect of the Suit Property.
190. To my mind, if the 4th Respondent was defrauded of the suit property in the manner adverted to in paragraph 37 of the Replying affidavit, namely, forcefully and under the threat of a gun, then a cause of action founded on fraud arose and ought to have been mounted within three years of accrual. See Section 4 (2) of the *Limitation of Actions Act*.
191. Other than the foregoing, it is also common ground and the 4th Respondent admitted as much in his Replying Affidavit, that the suit property is substantially developed by third Parties other than the 4th Respondent.
192. In the premises, if Abdi Rahaman Abdi defrauded the 4th Respondent of the suit property, fraudulently altered the title and thereafter assumed possession thereof, it was incumbent upon the 4th Respondent to pursue recovery thereof within 12 years from the date of the offensive activity.
193. Whichever cause of action that the 4th Respondent would have wished to ventilate as against to Abdi Rahaman Abdi, it is evident that by the time of filing the Subject Petition and the attendant Responses, the time for mounting any such claim by and/ or on behalf of the 4th Respondent, stood extinguished upon the lapse of Three (3) years for fraud and twelve years for recovery of vacant possession, respectively.
194. In short, by the time the subject Petition was being filed, the 4th Respondent would not legally be able to ventilate a claim thereof on account of Limitation of actions and particularly, based on the Provisions of Sections 4, 7, 13 and 17 of the *Limitations of Actions Act*, Chapter 22, Laws of Kenya.
195. The importance and significance of limitation is that same extinguishes a claim and thus deprives the claimant of a cause of action. Consequently, the claim, if any, is rendered sterile and redundant.
196. To buttress the foregoing observation, the court adopts and endorses the holding in the case of *Moffat Muriithi Muchai (suing on behalf of the Estate of the Late Milka Njoki Muchai (Deceased)) v Wanjiru Wanjohi Gatundu & 2 others* [2019] eKLR, where the court stated as hereunder;

" 34. Section 7 of the *Limitation of Actions Act*, provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued. This means that the Plaintiff's mother having bought the suit land in the 1990's and thereby claiming ownership in the same, he could



seek to recover it from the 1st Defendant, but only if he did so within twelve years from the date on which the right of action accrued to him.

35. There is no doubt that a period of about sixteen years have lapsed from the date on which the right of action accrued to the date when this suit was filed. No leave for extension of time to file the suit outside the twelve-year period has been exhibited before this court. The Plaintiff needed to commence his claim within the time prescribed under Section 7 of the *Limitation of Actions Act*. It follows therefore that by the time he filed this suit, the claim was statute barred."
197. Finally, even assuming that the 4th Respondent herein had established a legitimate claim to and in respect of the suit property, it is worthy to note that same had conceded that Abdi Rahaman Abdi, who is not a party to the subject suit, had forged his title and had thereby been issued with parallel titles.
198. If the foregoing position was correct, then one would have expected the 4th Respondent to mount a Cross- Petition and thereby seek to impeach the alleged fraudulent titles, arising from the alleged fraudulent actions by the said Abdi Rahiman Abdi.
199. However, it is common ground that the 4th Respondent herein only filed a Replying affidavit, which the court has treated as an Answer to the Petition without more.
200. Taking into account the foregoing observation, the question that is begging an answer is whether the 4th Respondent would have attracted and/or procured any positive order in his favor, albeit without there being any precipitate pleadings challenging the Petitioners Titles.
201. I am afraid that Parties are bound by their pleadings and to that extent, the Court can only be guided by the pleadings filed by and/or on behalf of the Parties.
202. To vindicate the foregoing statement, one may not require any case law. But however, for clarity, it suffices to take cognizance of the holding in the case *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR, where the Court of Appeal observed as hereunder;
- “...it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”
- Other judges on the case expressed themselves in similar terms, with Judge Christopher Mitchell J.S.C. rendering himself thus;
- “In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”
203. In a nutshell, I am not persuaded that the 4th Respondent has established that same held any lawful or legitimate rights over and in respect of the suit property.
204. In any event, if the 4th Respondent ever held any such right (which I have found to the contrary) then such rights stood extinguished upon the passage of twelve-year period, reckoned from 18th January 2005, when it was alleged that his certificate of title was forcefully seized from himself by Abdi Rahaman Abdi.



205. Having dealt with the claims by and/or on behalf of the 3rd and 4th Respondent, what now remains to be addressed and/or dealt with is the claim by the Petitioners.
206. As concerns the Petitioners, it was contended that same bought and or purchased portions of L.R No. 209/16432 and L.R No. 209/16433 and thereafter same were issued with Certificates of title.
207. Whereas there was a contest as to whether or not the certificates of title which were exhibited by the Petitioners, showed that the resultant subdivisions had been transferred and registered in their names, that dispute to that effect was resolved vide ruling of Hon Justice K Bor rendered on the 7th June 2021. For clarity, the said ruling was never appealed against.
208. Based on the foregoing, it is my finding and holding that the resultant sub-divisions were duly transferred and are currently registered in the names of the Petitioners. In any event, even though the face of the certificate of title reflects the name of Abdi Rahiman Abdi, there are the usual endorsements, which confirm the transfer and registration variously in the name of the Petitioners.
209. On the hand, there was also the issue that the Petitioners did not disclose the names and the details of the vendor, namely, the person from whom same bought and/or acquired the resultant subdivision which arose from the suit Property.
210. Despite the said allegation, it is imperative to note that the Certificates of titles which have been exhibited by the Petitioners, showed and/or point out that the predecessor in title was one Abdi Rahiman Abdi. Consequently and without belaboring the point, it is therefore obvious that the vendor in respect of the sale and transfer of the resultant titles to and in favor of the various Petitioners was Abdi Rahiman Abdi or anyone who acquired title from same.
211. In the premises, I come to the conclusion that the Petitioners herein were purchasers who bought and/or acquired portions from a known and disclosed seller, who was seized and/or possessed of title at the time of the alienation.
212. On the other hand, it is also worthy to note that the Petitioners herein came to the picture long after L.R No. 209/107772, had already been subdivided and thereby leading to the creation of L.R No. 209/16432 and L.R No. 209/16433, both of which were registered in the names of Abdi Rahiman Abdi.
213. In the premises, by the time the Petitioners entered into the fray, the registered proprietor over and in respect of L.R No. 209/16432 and L.R No. 209/16433 was Abdi Rahiman Abdi, with whom the Petitioners dealt with.
214. Based on the foregoing, it is therefore imperative to observe that the Petitioners bought, purchased and/or acquired their respective portions and titles as Bona-fide Purchasers for value without Notice of any defect or at all. In this regard, the Petitioners are entitled to protection under the Doctrine of Bona-fide Purchase without notice of any defect.
215. In support of the foregoing observation, I adopt and reiterate the holding of the Court of Appeal in the case of *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* [2015] eKLR, where the Court of Appeal held as hereunder;

“ ... a bona fide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following:

- a. He holds a certificate of Title.



- b. He purchased the Property in good faith;
- c. He had no knowledge of the fraud;
- d. The vendors had apparent valid title;
- e. He purchased without notice of any fraud;
- f. He was not party to any fraud.

A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.”

- 216. In any event, by the time the 2nd Respondent herein rendered her decision vide letter dated 18th April 2018, touching on the legality or otherwise of the acquisition of title to and in respect of L.R No. 209/10772 (now L.R No. 209/16432 and L.R No 209/16433), the said parcels of lands had long ceased to exist.
- 217. On the other hand, it is also imperative to note that by the said date, the Petitioners herein had long acquired their titles and hence the imputation of illegality on Abdi Rahaman Mohamed Abdi by the 2nd Respondent, cannot retrospectively invalidate the Petitioners titles.

Issue Number 2 Whether the Eviction Notices issued by and/or on behalf of the 3rd Respondent were valid and lawful.

- 218. The 3rd Respondent herein proceeded to and extracted and thereafter issued eviction notices as against various named persons, including the Petitioners herein.
- 219. Pursuant to the eviction notice dated the 30th May 2020, the 3rd Respondent contended that the addressees of the Notice(s) were unlawfully in occupation of L.R No. 209/107778 (Now L.R No. 209/16432 and L.R No. 209/16433) respectively.
- 220. It is imperative to observe and note that the original title which is alluded to and enumerated on the face of the notice, L.R No. 209/107778, is actually separate and distinct from the title which the 3rd Respondent herein claimed belonged to and was registered in her name. For clarity, the title that was claimed by the 3rd Respondent was L.R No. 209/10772.
- 221. Based on the foregoing observation, it is therefore apparent that the Eviction notice which principally alluded to is L.R No. 209/107778, referred to and/or concerned a parcel of land that did not belong to the 3rd Respondent.
- 222. Secondly, even though the Eviction notice also alluded to and included L.R Nos 209/16432 and 209/16433 respectively, it is also imperative to note that neither the said parcels of land belonged to and/or bore the name of the 3rd Respondent as the owner(s) thereof.
- 223. Suffice it to note, that Eviction notice(s) can only be issued by and/or on behalf of a legitimate owner of a designated parcel of land belonging to that named owner.
- 224. In view of the foregoing, it thus follows that if the person originating and/or issuing the Eviction notice is not the registered or legitimate owner of the land, then the resultant Eviction notice is ipso jure,unlawful.



225. On the other hand, it is also imperative to note that where ownership of land is contested or there exist two or more parallel titles, like it was in respect of the subject matter, then an Eviction notice under Section 152E of the *Land Act*, 2012 [2016], cannot legally issue.
226. In view of the foregoing observations, it is my finding and holding that the Eviction notice dated the 30th May 2020 and which was issued by and/or on behalf of the 3rd Respondent was thus invalid.
227. Notwithstanding the foregoing, it is also important to recall that by the time the 3rd Respondent was generating and issuing the impugned Eviction notice, same was already aware of or privy to the decision of the 2nd Respondent awarding to same compensation in lieu of ownership.
228. Similarly, the 3rd Respondent was also aware and/or knowledgeable of the fact that by the time of issuing the impugned Eviction notice, same had already approached the court vide Milimani ELC Misc. Application 1195 of 2019, seeking to enforce the compensation award.
229. Based on the foregoing, I come to the conclusion that the impugned Eviction notice which was generated and issued by and/or on behalf of the 3rd Respondent, was a nullity ab initio.
230. Consequently, the impugned Eviction notice dated the 30th May 2020, was unlawful. In the premises, same be and is hereby recalled, rescinded and nullified for being a nullity in law.

Issue Number 3 Whether the 3rd Respondent is entitled to Compensation as sought or at all.

231. Vide the Cross Petition dated the 22nd September 2020, the 3rd Respondent herein has sought for inter-alia, compensation on account of General damages. For clarity, the 3rd Respondent even went ahead and quantified the Damages in the same of Kes.1, 000, 000, 000/= only.
232. It is common ground that had the 3rd Respondent established and/or proved title to and in respect of the suit Property, same would have been entitled to General damages even without proof of loss and/or injury.
233. Simply put, the law on award on Damages for Trespass is well settled. For clarity, trespass is actionable per se.
234. In respect of the foregoing statement, it suffices to refer to *Halsbury's Law of England*, 4th ed, Vol 45, at para 26, 1503 which provides as follows on computation of damages in an action of trespass:
- (a) If the plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss.
 - (b) If the trespass has caused the plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.
 - (c) Where the defendant has made use of the plaintiff's land, the plaintiff is entitled to receive by way of damages such a sum as would reasonably be paid for that use.
 - (d) Where there is an oppressive, arbitrary or unconstitutional trespass by a government official or where the defendant cynically disregards the rights or the plaintiff in the land with the object of making a gain by his unlawful conduct, exemplary damages may be awarded.
 - (e) If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased.



235. Nevertheless, in respect of the subject property, it suffice to note that the 2nd Respondent, namely, National Land Commission, had indeed decreed and/or awarded compensation in favor of the 3rd Respondent vide decision rendered on the 18th April 2018.
236. Other than the foregoing, the 3rd Respondent herself has since approached this court vide Milimani ELC Misc. Application No. 195 of 2019 and has since procured a favorable decision vide ruling rendered on the 7th October 2021.
237. In the premises, to decree and/or make any further award on compensation in respect of the subject matter, would be tantamount to Double – Jeopardy. In short, I decline to make any award in favor of the 3rd Respondent

Issue Number 4: Whether the Provisions of Section 152E and 152F of The Land Act, 2012 (2016) are unconstitutional

238. The Petitioners herein have invited the court to find and hold that the provisions of Section 152E and 152F of the Land Act, 2012 (2016) are inconsistent with the Constitution, 2010 and are thus unconstitutional.
239. Before venturing to address the threshold question, namely, whether the impugned Sections are inconsistent with the Constitution, 2010, it is imperative to reproduce the said sections verbatim. For convenience, same are hereby reproduced as hereunder;

“ 152E. Eviction Notice to unlawful occupiers of private land (1) if, with respect to private land the owner or the person in charge is of the opinion that a person is in occupation of his or her land without consent, the owner or the person in charge may serve on that person a notice, of not less than three months before the date of the intended eviction. (2) the notice under subsection (1) shall — (a) be in writing and in a national and official language; b) in the case of a large group of persons, be published in at least two daily newspapers of nationwide circulation and be displayed in not less than five strategic locations within the occupied land; (c) specify any terms and conditions as to the removal of buildings, the reaping of growing crops and any other matters as the case may require; and (d) be served on the deputy county commissioner in charge of the area as well as the officer commanding the police division of the area.

152F. Application to Court for relief (1) Any person or persons served with a notice in terms of sections 152C, 152D and 152E may apply to Court for relief against the notice. (2) The Court, after considering the matters set out in sections 152C, 152D and 152E, may— (a) confirm the notice and order the person to vacate; (b) cancel, vary, alter or make additions to the notice on such terms as it deems equitable and just; (c) suspend the operation of the notice for any period which the court shall determine; or (d) order for compensation.”

240. My reading of the impugned provisions is such that before the owner of the Private land, pounces on an illegal occupier, it behooves the owner to issue to the illegal occupier a prescribed notice, which is the forerunner of the imminent and impending Eviction.
241. On the other hand, the Eviction notice is also issued in a prescribed manner, so as to contain salient and pertinent features, inter-alia, the title of the property in question and same also stipulates the duration of the Notice.



242. Other than the foregoing, the Recipient of the Notice, is also provided with a window and/or latitude to approach a Court of law, with a view to challenging and/or impeaching the Eviction notice on various grounds, where appropriate.
243. For coherence, the Eviction notice provides notice to a person who is thereafter able to approach court to vindicate his/her rights. In this regard, it is essential to observe that the Eviction notice underscores the Recipient's Right of Access to justice in line with Article 48 of *the Constitution*, 2010.
244. Other than the foregoing, it is also common ground that in being afforded a Right to access court and to challenge the Eviction notice, the recipient is being afforded a forum to ventilate his/her position and/or grievances. Clearly, the impugned Sections accord with Articles 10 (2) and 50(1) of *the Constitution*, 2010.
245. To my mind, it is the impugned Eviction notice that cajoled the Petitioners herein to move to court and file the subject Petition towards and in vindication of their rights. Consequently, the Eviction Notice herein provided a basis upon which the Petitioners approached the Court and have thus vindicated their Property Rights.
246. In my humble view, if it were not for the impugned Eviction notice, underpinned by the provisions of Section 152 (E) of the *Land Act*, 2012 (2016), the Petitioners would have been subjected to wanton destruction and substantial loss, before even accessing the Jurisdiction of the Court.
247. Consequently and in the premises, One would have expected the Petitioners herein to be at the forefront of vindicating the importance, significance and constitutional moment, that flows from the impugned sections.
248. However, the Petitioners herein are seeking to invalidate the impugned sections, under the premise that same are unconstitutional. Unfortunately for me, I am not prepared to return a verdict that this very imperative provisions of the *Land Act*, 2012 [2016], which have brought some sanity in the manner Evictions are being carried out, are unconstitutional.
249. In any event, it behooves me to look back and to take cognizance of the manner in which Evictions were being conducted, carried out and/or undertaken prior to and before the amendment of the *Land Act* 2012 and particularly, the enactment of the impugned provisions.
250. Besides, it is not lost on this court that the enactment of the impugned provisions followed a prolonged cry, not only from Kenyans of goodwill, but also the International community of which Kenya is a member. For clarity, the provisions of Sections 152 (E) and 152 (F) of the *Land Act* are actually an embodiment of the International Recommendations, contained in the U.N Guidelines on Evictions; General Comment No.7, issued by the U.N Office of the High Commissioner for Human Rights.
251. Based on the foregoing, I am compelled to decline the invite to return the country and the people of Kenya to the dark days, when Evictions were levied in the wee hours of the morning and without any or any adequate Notice at all.
252. In this regard, it is not lost on this Court that Members of Mitumba Village, within the City of Nairobi were subjected to forceful and forcibly eviction, culminating into Loss of Properties and extensive violation of Human Rights. For clarity, the events alluded to in this regard, culminated into the filing of a case, whose outcome has illuminated the Law as pertains to Evictions.



253. Suffice it to recall and take cognizance of the decision in *Mitu-Bell Welfare Society v ersus Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* [2021] eKLR, where the Supreme Court of Kenya observed as hereunder:

“(142) The U.N Guidelines, General Comment No. 7 do not in our view qualify as general rules of international law, which have a binding effect on members of the international community. However, the Guidelines are intended to breathe life into the Right to Dignity and the Right to Housing under the ICCPR and the ICESCR respectively. They therefore constitute soft law in the language of international jurisprudence. In the instant case, while the trial Judge cannot be faulted for having referred to the Guidelines per se, being soft law, as opposed to general rules of international law, the learned Judge ought not to have elevated them to the status of Article 2 (5) of the Constitution.

However, given the fact that the learned Judge, was interpreting and giving life to the Bill of Rights, specifically the Rights to Dignity, Property, and Housing under the Constitution, she could have been in order to refer to the Guidelines as an aid in fashioning appropriate reliefs during the eviction of the appellants. Rather than offending the Constitution, the Guidelines actually do fill the existing lacuna as to how the Government ought to carry out evictions.

254. Other than the foregoing, it is also imperative to note that before a finding of un-constitutionality of an Act of Parliament can be returned, the claimant must indeed lay down and establish the features of the legislation that are said to be inconsistent with the Constitution.

255. For the avoidance of doubt, though the Petitioner has contended that the impugned Sections are Unconstitutional, same has failed to pinpoint in what manner same are inconsistent with the Constitution, or otherwise.

256. It is worthy to note that in determining whether an Act of parliament is unconstitutional, the court is called upon to consider inter-alia the objects, purpose and intendment of the legislation under reference.

257. Certainly, the impugned sections, were meant to avert the surprise Eviction, which were being undertaken without notice and which exposed the victims to untold sufferings, including loss of limbs and properties.

258. To buttress the foregoing observation, it is worthy to take cognizance of the holding in the case of *Murang'a Bar Operators & Another v Minister for State For Provincial Administration and Internal Security & 2 others* [2011] eKLR, where the court referred to the decision in the case of *The Queen v Big M. Drug Mart Limited* and observed as hereunder;

“Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation’s object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation’s object and thus the validity.”



259. Simply put, the impugned sections, which the Petitioner seeks to have declared unconstitutional were enacted to serve a critical purpose and essentially, to mitigate the suffering that had hitherto been exacted upon victims of surprise evictions. In this regard, the object and purpose of the impugned sections was calculated to offer protection to private properties and afford victims of imminent eviction an opportunity to salvage their properties prior to destruction.
260. In the premises, I find and hold that the provisions of Sections 152 (E) and 152 (F) of the Land Act, 2012 (2016) and the Regulations made pursuant thereto are not only constitutional but are lawful.

Issue Number 5 Whether the Petitioners have laid a basis to warrant a Declaration that the 5th Respondent cannot carryout and/or undertake an Investigations pertaining to illegality and/or irregularity in the acquisition of land.

261. The Petitioners have also contended that despite the powers of the Director of Criminal Investigation to investigate any crime or offense relating to land, however, the provisions of Section 26 of the Land Registration Act are such that where an allegation is made that land has been irregularly, illegally and unlawfully acquired by corrupt means, the interrogation to ascertain such allegation ought only to be carried out by the Environment and Land Court and not otherwise.
262. Put differently, the Petitioner herein seems to suggest that the Directorate of Criminal Investigations should not undertake and/or carryout any investigations in matters involving land, where it is contended that the title was acquired irregularly, illegally and unlawfully.
263. Based on the foregoing contention, the Petitioners have implored the court to issue a Declaration, whose import and tenor is to bar the Directorate of Criminal Investigations from undertaking such investigations and in particular, from investigating the process leading to the subdivision, transfer and registration of the Petitioners' title to the suit properties.
264. Whereas, the court has found and held elsewhere that the Petitioners herein bought and acquired the suit properties from a disclosed owner and were therefore Bona-fide Purchasers' for value, it is not possible to stop and/or prohibit the 5th Respondent from undertaking and/or executing statutory mandate particularly, where same has reasonable basis to warrant such investigations.
265. In any event, should the 5th Respondent summon the Petitioners for purposes of investigations of whatsoever nature, it behooves the Petitioners, just like other citizens of the Republic of Kenya to comply and to avail such information as the 5th Respondent may deem fit, just and expedient.
266. Be that as it may, it is also open to the Petitioners at the opportune time to access a court of law and to seek appropriate Reliefs and/or remedies, should same deem it that their Fundamental rights and liberties, are being violated, infringed upon and/or threatened in any manner whatsoever.
267. However, at this juncture, the court cannot enter into the fray and seek to usurp the Statutory mandate of a Constitutional and Statutory body, based on mere apprehension, albeit without any credible basis. Suffice it to say, that in the course of executing her mandate, the 5th Respondent is also obliged to adhere to and comply with the provisions of the constitution 2010.
268. Notwithstanding the foregoing, there is yet another outstanding aspect to this matter. Whereas the Petitioners herein have anchored the intended declaration to bar investigations pertaining to issues of land, the bigger picture turns on the exercise and execution of the 5th Respondent's mandate.



269. In this regard, the question that does arise is whether the declaration sought, which is intended to bar the 5th Respondent from carrying out investigations, which is her Statutory mandate, falls within the jurisdiction of this Court or otherwise.
270. To my mind, the declaration being sought relates to whether the 5th Respondent would be acting within her mandate or otherwise and such an issue can only be dealt with in line with Article 165 (3) (d) (1),(2), & (3) of the Constitution 2010.
271. Consequently, it is my finding and holding that the declaration sought by and at the instance of the Petitioners and whose effect is to prohibit the exercise and/ or execution of powers by the 5th Respondent, are outside the Jurisdiction of this court. Consequently, same are legally untenable.
272. Suffice it to note, that the Jurisdiction of this court is constitutionally circumscribed and hence the Court cannot expand her jurisdiction and thereby transgress into a sphere that belongs to another Superior Court.
273. In a nutshell, I am constrained to invoke and restate the observation of the Supreme Court of Kenya in the case of *Samuel Kamau Macharia v Kenya Commercial Bank & Another* [2012]eKLR, paragraph 68 where the court held as hereunder;

“(68) A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

274. Finally, it is also imperative to note that whereas this Honourable court is vested with Jurisdiction to interrogate and/or deal with instances where title has been procured irregularly, illegally, un-procedurally and/ or through a Corrupt scheme, there are aspects of such illegality or Corrupt scheme that espouse Criminal inclinations and are therefore within the purview of the criminal process.
275. Consequently, in such situations, which exhibits aspects of Crime or Criminal offence, and act may found a basis for Civil proceedings, as well as Criminal prosecution, without infringing on the Constitutional Right of a citizen.



276. To vindicate the foregoing observation, I adopt and endorse the holding of the Court in the case of Republic v Attorney General & 4 Others Ex-parte Kenneth Kariuki Githii [2014]eKLR, where the Court observed as hereunder;

“The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail, it has been held time and again, is not a ground for halting those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process. That an applicant has a good defence in the criminal process is a ground that ought not to be relied upon by a Court in order to halt criminal process undertaken bona fides since that defence is open to the applicant in those proceedings. However, if the applicant demonstrates that the criminal proceedings that the police intend to carry out constitute an abuse of process, the Court will not hesitate in putting a halt to such proceedings.

The fact however that the facts constituting the basis of a criminal proceeding may similarly be a basis for a civil suit, is no ground for staying the criminal process if the same can similarly be a basis for a criminal offence. Therefore the concurrent existence of the criminal proceedings and civil proceedings would not, ipso facto, constitute an abuse of the process of the court unless the commencement of the criminal proceedings is meant to force the applicant to submit to the civil claim in which case the institution of the criminal process would have been for the achievement of a collateral purpose other than its legally recognised aim. In the exercise of the discretion on whether or not to grant an order of prohibition, the court takes into account the needs of good administration.”

277. Flowing from the forgoing observation, it is my considered view that the Directorate of Criminal Investigations, would be at liberty to carryout and/or undertake any Criminal Investigation, irrespective of the existence of Civil proceedings, provided however that the intended investigations are not driven by ulterior motives and/or meant for collateral purposes other than for achieving their legal aim.

278. Simply put, I am not persuaded to grant the Declaration to prohibit the 5th Respondent from carrying out the investigation, subject to adherence with the provisions of the Constitution 2010 and the observations pertaining to the Legality of the Titles, made elsewhere herein before.

Final Disposition:

279. Having reviewed the issues for determination which were outlined hereinbefore, it is now appropriate and/or expedient to render the final and Dispositive Orders.

280. Consequently and in the premises, the Court now make the following Orders;

- a. A Declaration that the Petitioners are the registered proprietors of their properties in Green Two Estate, South C, City County of Nairobi and the properties are private land under Articles 64 of the Constitution of Kenya 2010 and are not public land under Articles 62.
- b. A Declaration that the Petitioners are the registered proprietors of their properties in Green Two Estate, South C, City County of Nairobi, acquired the properties as innocent purchasers without notice of any irregularity, if there was any and the properties were lawfully acquired by them and without any corruption in which any of them was involved.



- c. An Order Of Injunctiondo issue to restrain the 3rd Respondent Limbani Dispensary Project Group, its servants and workmen from entering upon the Petitioner’s properties Green Two Estate, South C, City County of Nairobi, interfering with the Petitioners’ quiet enjoyment of their properties, and from pulling down or suffering to be pulled down the dwellings and commercial premises constructed on those properties owned and occupied by the Petitioners or leased out or licensed to the Petitioners’ tenants or licensees, which properties are mentioned in the Petition, being the properties numbered and commonly known as Green Two Estate, South C, City County of Nairobi numbered and commonly known as Green Two Estate 1A-50A and Green Two Estate 1B-50B and RAF University Plot, and from removing any buildings and other improvements erected by the Petitioners and from selling or otherwise disposing of the materials whereof the said properties are comprised.
- d. An Order of Temorary Injunctiondo issue pending the hearing and determination of these proceedings, restraining the 3rd Respondent, Limbani Dispensary Project Group, from in any way enforcing the Notice to Vacate Land bearing the date May 2020 and delivered to security gate at the Petitioners premises purporting to be issued under regulations 63(1), 64(1) and 65(1) and 65 of the Land Regulations, 2017 and addressed to the “Members of Green Estate Residents Association” and to “Hassan Baricha the to the Chairman of the Association, notwithstanding that the 3rd Respondent’s Notice to Vacate Land does not relate to the Petitioners’ properties but to L.R No.209/10778/10778(Now L.R No. 209/16432 and 209/16433 Nairobi Area-South -C)”
- e. An Order of Judicial review in the nature of mandamus be and is hereby issued directing the 1st Respondent to protect the title and records of the Petitioners registered private land parcels at Green Two Estate, South C City County of Nairobi and to observe the Law and the Constitution of Kenya 2010 in dealing with the property and the title thereto.
- f. The Cross- Petition by and/or on behalf of the 3rd Respondent be and is hereby Dismissed.
- g. The rest of the Reliefs/Declarations which have not been expressly granted are deemed as declined.
- h. Costs of the Petition and Cross- Petition are awarded to the Petitioners jointly and/or severally.

281. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF JUNE 2022.

HON. JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

Kevin Court Assistant



Ms. Wanjiru h/b for Mr. S. M. Mwenesi for the Petitioners
Mr. Mbakaya h/b for Mr. Muchemi for the 3rd Respondent
Mr. Mugambi for the 4th Respondent
Mr. Allan Kamau for the 1st, 5th and 6th Respondents

