



The Attorney General (For and on Behalf of the School Management of Eor Ekule Primary School) v Rahab & another (Environment & Land Petition 2 of 2019) [2022] KEELC 12834 (KLR) (4 October 2022) (Judgment)

Neutral citation: [2022] KEELC 12834 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ENVIRONMENT & LAND PETITION 2 OF 2019

CG MBOGO, J

OCTOBER 4, 2022

IN THE MATTER OF ARTICLE 19, 20,22(1) OF THE

CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF

RIGHTS AND FUNDAMENTAL FREEDOMS UNDER

ARTICLES 26,27,28,40 READ WITH 260,47 (1) & 53 OF

THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF VIOLATION OF ARTICLE 10 OF THE

CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTIONS 143 OF THE REGISTRATION

LAND ACT, CAP 300 OF THE LAWS OF KENYA (NOW

REPEALED)

AND

IN THE MATTER OF SECTIONS 26 & 80 OF THE LAND

REGISTRATION ACT, (NO. 3 OF 2012)

AND

IN THE MATTER OF SECTION 26 OF THE LAND ACT, 2012

BETWEEN



**THE ATTORNEY GENERAL PETITIONER
FOR AND ON BEHALF OF THE SCHOOL MANAGEMENT OF EOR EKULE
PRIMARY SCHOOL**

AND

NCHUSHUYA RAHAB 1ST RESPONDENT

THE CHIEF MAGISTRATE, NAROK 2ND RESPONDENT

JUDGMENT

1. The petitioner filed a petition dated January 21, 2019 seeking the following orders: -
 - a. A declaration that the subdivision and allocation of Cis/Mara/Oloombokishi/202 to the respondent which is property of Eor Ekule Primary School was irregular, unlawful, null and void and the same should be repealed while respecting the lawful boundaries and acreage.
 - b. A declaration that land title number Cis/Mara/Oloombokishi/202 was obtained illegally, unlawfully and without following legal procedure and in blatant violation of the law and hence a nullity ab initio.
 - c. A declaration that the title documents created in Cis/Mara/Oloombokishi/202 is illegal and confers no proprietary interest to the respondent as per the provisions of article 40 (6) of the *Constitution of Kenya*.
 - d. A declaration that the allocation of the suit property to the respondent was unlawful, illegal and unconstitutional.
 - e. An order that the title for Cis/Mara/Oloombokishi/202 be revoked.
 - f. An order of *certiorari* be and is hereby issued removing into this honourable court for purposes of quashing the orders of the Magistrate in Narok CMCC Misc Application No 18 of 2009 issued on August 18, 2009 and May 17, 2011 emanating from the Narok central land disputes tribunal and Rift Valley provincial appeals committee respectively to the effect that Rahab Nchusuya was given plot no. 202 by Oloombokishi group ranch and are at liberty to stay and occupy Cis/Mara/Oloombokishi/202.
 - g. An order of permanent injunction restraining the 1st respondent either by herself, agents, servants or by any other person whomsoever from evicting, interfering with the possession, interrupting with the activities on or by howsoever interfering with the activities of Eor Ekule primary school in Cis/Mara/Oloombokishi/202.
 - h. That the respondent be condemned to bear the costs of this petition.
 - i. Any other appropriate relief this honourable court may deem fit to grant.
2. The petition is premised on the grounds that land parcels known as Cis/Mara/Oloombokishi/202 and Cis/Mara/Oloombokishi/202 are subdivisions of a large parcel of land previously owned by Olombokishi group ranch and the group members vide a resolution earmarked plot number Cis/Mara/Oloombokishi/202 (hereinafter referred to as the suit property) as a public facility to be used as a school-Eor Ekule primary school. That in the year 1995, beacons were placed after subdivisions were carried out on the ground for land parcel known as Cis/Mara/Oloombokishi/202 and the



said subdivisions went on until the year 2001. Further, it emerged that without a resolution of the members of the group ranch, that 0.29 hectares reserved for the school had been carved out illegally and fraudulently and allocated to Livingstone Nchoshi who later registered it in the name of the 1st respondent. The petitioner further contended that after subdivisions, the land parcel known as Cis/Mara/Oloombokishi/202 measuring approximately 7.90 hectares was as per the Narok land registry registered as having been reserved for Eor Ekule primary school and the hived off area measuring 0.29 hectares registered as Cis/Mara/Oloombokishi/202 was in the name of the 1st respondent and a title deed issued in the year 2001.

3. The petition is further premised on the grounds that the school has been in actual and physical occupation of the suit property since inception in the year 1984 and has utilised the same as a playground for the pupils, with a permanent water tank, live fence and barbed wire that was fixed by World Vision. Further, the school management has not initiated the process of procuring registration documents because of the 0.29 hectares that was illegally hived off from the school property. Further, in the year 2009, Livingstone Ole Nchoshi filed a dispute at the Narok central land dispute tribunal no 28 of 2009 as next friend of the 1st respondent against the school and the tribunal delivered an undated award which determined that the 1st respondent was the rightful owner of the suit land. The said decision was adopted as judgment of the court on August 18, 2009 by the Senior Principal Magistrate-Narok Law Courts. Thereafter, the school filed an appeal at the land dispute appeals committee against the said decision which was heard and determined in the absence of the school representatives vide a decision dated August 31, 2010 upholding the tribunal's decision. With the said decision, the 1st respondent filed an application at the Chief Magistrate's Court-Narok seeking orders of eviction, the case is pending determination. A restriction was placed by the Land registrar on December 3, 2015 on the suit property.
4. The petitioner contended that the illegal, irregular and fraudulent excision of the school property and the purported proprietary interests derived from the same is a nullity and of no legal consequence. That the constitutional rights provided in article 40 of the Constitution do not extend to property that has been illegally acquired and that the proprietary interests acquired in the suit property are contrary and in breach of article 40 (3) of the Constitution and affords the 1st respondent no legal constitutional protection provided under article 40 (6) of the Constitution. Further, that the acts of the 1st respondent in obtaining, acquiring and getting registered as proprietor of the suit property are in breach of articles 62 (4) and article 62 (2) of the Constitution.
5. The petition is supported by the affidavit of John Lontupu-chairman of Eor Ekule primary school board of management sworn on even date and a further affidavit sworn February 19, 2019.
6. The 1st respondent filed a replying affidavit in opposition to the petition sworn on 4th February, 2019.
7. The matter proceeded for hearing *viva voce* on June 20, 2019 at the site of the suit property. Kipoyi Ole Sina (PW1) testified that he was a member of Oloombokishi group ranch and he was one of the members who donated land to the school which was started in the year 1984 with the nursery school and later the primary school. He further testified that he knows the boundaries of the suit property. He referred the court to beacon number CH2320 which he testified that it was placed by those who constructed the road. He further testified that there has never been any dispute of the suit property until recently as he is not aware of any person who is the owner of any parcel within the school.
8. At the site visit, the 1st respondent testified that she acquired the suit property as a gift from her father-Livingstone Nchoshi who was a member of the group ranch and had been allocated the same measuring 0.29 hectares. She further testified that she started having problems after the court ruled in her favour and that the beacons were on the suit property but they have since been removed. The



1st respondent testified that before construction of the fence, there were trees towards the goal post extending to the water tank. The 1st respondent testified that the suit property is v shaped but is not certain whether the water tanks is on her land because the beacons were removed. Further, she does not know when the tank was constructed and was also not present when her father donated the land to her and neither was she shown the same.

9. The petitioner's case proceeded further for hearing on July 16, 2019. James Mpoke (PW2) testified that he was the Chairman of the group ranch from the year 1972 and that they donated about 20 acres to the school back in the year 1984 which started as a nursery school. Further, that the group ranch allocated land to about four schools namely Eor Ekule Nursery and Primary School, Oloombokishi Primary School and Maasai Technical College. PW2 testified that as the chairman of the group ranch, he has never signed any documents to transfer the school to the 1st respondent and that the transfer which is done by the committee was not done to any other party. PW2 further testified that the signature on the witness statement is not his. On cross-examination, PW2 testified that initially the group ranch had 200 members but the same was increased because children who were qualified by age were also included in the list. Further, that any transfer documents are signed by the chairman, secretary and treasurer and none of them signed the transfer documents. He further testified that he cannot recall the total acreage of the land which was later sub-divided into many portions which members were allocated immediately. That prior to the subdivisions which was done by the surveyor, there were no members who had sold their parcels of land prior to issuance of title deeds and that there were instances where members requested their children to be registered a certain percentage and further that members were allocated different sizes of acres because of the typology of the area and that the smallest allocation was 60 acres. PW2 further testified that widows were allocated land but the 1st respondent did not have any right to be allocated land. Further, he recalls that there was a case at the tribunal but could not recall the decision of the tribunal and that they did not appeal the decision of the said tribunal.
10. The hearing of the petitioner's case proceeded further on September 23, 2019 where PW1 was recalled. PW1 adopted his witness statement dated April 2, 2019 and testified that it was only recently that he heard that someone was claiming the school land whereas as he recalls the first allotment was made to the school and the trading centre as the children used to attend school in far areas. Further, that the committee allocated land to two schools i.e. Eor Ekule primary school and Eor Ekule secondary school and that the 1st respondent could not be allocated land at the time since it was given to the school.
11. On further cross-examination, PW1 testified that it was in 1984 when the group ranch allocated land to the school which was about 20 acres and he is the one who placed beacons on the land but does not recall the surveyor who was present with the government officials when the same was done. Further, that he does not know the number of maps that exist for the group ranch but the school land is shown on the map. PW1 further testified that the transfer documents were signed by Ole Tol Tol and Ole Parmala and he was not among the officials who signed the transfers. Further, that he was not aware of any case at the tribunal involving the petitioner and the 1st respondent. PW1 further testified that all members of the group ranch were allocated land and girls were not allowed to be registered as land owners. A number of the members were allocated land along the Nairobi-Narok Highway and the 1st respondent's father was not allocated any land but his son Ledama was allocated a parcel of land along the road.
12. Further, that all members of the group ranch were allocated land and were required to pay certain fees depending on the size of each members' parcel. The payments were made to the government officials at the Narok land's office. The officials in the land's office used the list provided to them by the officials of the group ranch and before a member collected his title there was a transfer that was signed. He



further testified that he has not seen any transfer documents in favour of the 1st respondent and does not know who signed it.

13. On November 12, 2020 Amos Musyoka (PW4) who is the land adjudication and settlement officer while adopting his witness statement dated April 2, 2019. He testified that his office issued a consent dated January 24, 2000 and hence the group ranch stood dissolved and the sub division of the land commenced. Further, that at the time the consent was given, the registered members were 534. However, before the process begun some public utility land which is about 10% of the land must be set aside and is the first to be isolated and identified. In the instant case, Oloombokishi group ranch had Eor Ekule technical college, Eor Kule primary and secondary school the AIC church and land set aside for roads.
14. Further, that Eor Ekule AIC church was allocated parcel No. 201 and parcel No 202 to the 1st respondent and land parcel No 200 allocated to Eor Ekule Primary School. The process of demarcation and survey began after the dissolution and marking out of public utility land. In the register of members of Oloombokishi group ranch, the gratification of membership was customary rights. The 1st respondent as per the registrar of birth was born on November 14, 1982. However, at the time of dissolution of the group ranch, the 1st respondent was not yet an adult.
15. PW4 testified that the register relied upon by the 1st respondent is typed whereas that of the ministry and the land adjudication officer is hand written and does not bear the name of the 1st respondent. Further, as per the register relied on by the 1st respondent, it appears she became a member on October 26, 1971 which is contrary to her date of birth which is November 14, 1982.
16. On cross examination, PW4 testified that the 1st respondent is allotted parcel No. 202 based on the register that was prepared by the committee who know both the members and allottee acceptees. The area list in the instant case shows parcel number and acreage of the land. That the land parcel No. 202 does appear in the area list and it measures about 0.29 hectares so land parcel No 201 is 11.77Ha and the land parcel 200 is 7.90Ha.
17. The affidavit of Mr John Lontopu sworn on January 21, 2019 and February 19, 2019 was adopted by this court and allowed as the testimony of PW3.
18. The defence hearing proceeded further on May 30, 2022. The 1st respondent while adopting her statement dated February 4, 2019, testified that her parcel number is Cis Mara/Oloombokishi/202 and was issued with original title deed on August 14, 2013, whose size measures approximately 0.29hectares. The 1st respondent further testified that before issuance of the title deed, she signed transfer documents whose signatories were Dickson Tonto, James Ole Mpoke-the Chairman and Julius Ole Paramwaura-Treasurer. Further that the title deed was registered at the Land Registry on May 31, 2001. Before the allocation, the register of Oloombokishi group ranch was used and she was registered as a member number 386 of the group ranch. She disputed the allegation that her parcel of land was excised from parcel number 200 meant for the school. That the primary school was an allottee just like herself.
19. The 1st respondent further testified that she is aware of the longstanding proceedings before the land disputes tribunal which she was a party to. Further, that the Tribunal and the appeals committee confirmed that the land belongs to her.
20. On cross examination, the 1st respondent testified that the title deed was issued on August 4, 2013. The transfer was signed on May 31, 2001 and that the variation in the two dates is because the title deed got burnt. Further that she became a member of the group ranch through her father who was a member. That her father allocated the suit property to her which he had been allocated by the group ranch.



21. The 1st respondent further testified that she does not know when Eor Ekule Primary school was established but has always seen the school existing in the area and in the year 2000, she saw the suit property occupied by the school and is fenced in one compound. The 1st respondent further testified that she does not have the minutes of the resolution admitting her as a member of the group ranch.
22. On re-examination, the 1st respondent testified that she became a member of the Group Ranch in the year 2000 as per the register and that the suit property was initially allocated to her father and that it was on his instructions that it be registered in her name. Further that the name of her father never appeared in the register in respect of the suit property.
23. Dickson Ole Toltol (DW1) while adopting his statement dated April 1, 2019 testified that previously, he was the Secretary of Oloombokishi group ranch in 1995 whose initial members were 133 at the time of its formation and that as per PExhibit No 3, the 1st respondent is member 386 in the group ranch register and her land is parcel number 202.
24. DW1 further testified that demarcation of the group ranch commenced in the year 1998 when they had already closed the register and whose members were 638 less 25. The 25 were community utilities. Further, that Eor Ekule primary school was among the utilities they allocated and it is approximately 30 acres.
25. DW1 further testified that the surveyor was Menati and Langat and their work was to install beacons. Further that the 1st respondent was shown the boundaries of her parcel of land and did not encroach onto the school's property.
26. It was his testimony that as officials, they considered members children as well as persons residing in the group ranch land whom they referred to as "acceptees" and the 1st respondent fell in the category of children of members. Further, that there was nothing to bar women from becoming members as the names of other females do also appear in the register.
27. On cross examination, DW1 testified that he became the secretary of the group ranch in the year 1995 and he received the register of members from the previous secretary. That in 1995, the members were 133 and that more new members, 105 in number were added in the year 1995. He further testified that when they closed the register in 1998, there were 603 members. No new member was admitted after the register was closed. He confirmed that they allocated land as per the government policy that a child of a member who was 18 years old was entitled to be allocated land and that the members were from either gender. DW1 further testified that he did not know how old the 1st respondent was in the year 1998 as they received a request from her father to admit her as a member. He further testified that in admitting the 1st respondent, they approached the registrar in Nairobi to allow them admit 14 children who were below 18 years in 1995 but has not brought to court the written request that they wrote to the Registrar.
28. The petitioner filed written submissions dated June 7, 2022. The petitioner raised the following issues for determination:-
 - i. Whether the petitioner has disclosed reasonable cause of action.
 - ii. Whether the petitioners have pleaded with precision the violation of their rights and contravention of the constitution and the law.
 - iii. Whether the petitioner is the lawful owner of the suit land.



- iv. Whether the 1st respondent was a lawful member of Oloombokishi group ranch.
 - v. Whether the 1st respondent acquired the suit land fraudulently, illegally and un-procedurally.
 - vi. Whether the suit land Cis-Mara/Olombokishi/202 can be revoked, cancelled and declared a nullity.
 - vii. Whether the petition can be allowed.
 - viii. Costs.
29. On the first issue, the petitioner submitted that in considering the petition before court, the court ought to apply the principles of interpretation of the Constitution under article 259 (1) and (3) and that this court has pronounced itself on the proper construction of the Constitution in the case of Njoya & others v Attorney General [2004] AHRLR 157 [KeHC 2004]. Further, that in interpreting the Constitution and developing jurisprudence, the court will always take a purposive interpretation of the Constitution as guided by the Constitution itself as was observed by the Supreme Court of Canada in R versus Big Drug Mart [1985].
30. On the second issue, the petitioner submitted that even though the petitioner has pleaded with precision the violation or threatened violation of their rights and the provisions of the Constitution, the strict insistence on formality in the particularisation of the violations is an antithesis to the spirit and letter of the Constitution in the promotion of human rights and freedoms. The petitioner relied on the case of Mohammed Fugicha v Methodist Church in Kenya (suing through its registered trustees) & 3 others [2016] eKLR.
31. On the third issue, the petitioner submitted that the 1st respondent was not a member of the group ranch and she was not entitled to acquire and purport to become a member against the rules of acquisition of membership under the group ranch. The petitioner submitted that the 1st respondent deposed to the same in her affidavit sworn on February 4, 2019 and it was her testimony during the site visit and the hearing on May 31, 2022. The petitioner further submitted that it was the 1st respondent's evidence that she came to Narok in the year 2000 and hence there was no subdivision and allocation that was taking place in the year 2000 as the register was closed in the year 1995.
32. On the fourth issue, the petitioner submitted that indeed the 1st respondent could not be a member so as to be entitled to allocation of the suit land as a minor is not entitled to own land as the process of acquisition of the suit property began when the 1st respondent was a minor and she knew nothing about the suit property. Further that once a title has been challenged, it becomes the duty of the holder to demonstrate that the title is procedural. The petitioner relied on the cases of Joseph Kuria Kiburu v Attorney General [2018] eKLR, Republic v Minister For Transport & Communication & 5 others ex parte Waa Ship Garbage Collector & 15 others Mombasa HCMCA No 617 of 2003 [2006] 1 KLR [E&L] 563 and Mureithi & 2 others (For Mbari Ya Murathimi Clan) v Attorney General & 5 others Nairobi HCMCA No 158 of 2005 [2006] 1 KLR 443.
33. The petitioner further submitted that title to property that is obtained fraudulently or illegally in violation of the provisions of the statute is and was not sacrosanct and did not enjoy protection of the law under the repealed Act. The petitioner relied on the cases of Denis Noel Mukhulo & Another v Elizabeth Murungari Njoroge & another, CA No 298 of 2013, Chemei Investments Limited versus The Attorney General & others Nairobi Petition No 94 of 2005, Republic v Registrar of Lands in



Kilifi ex-parte Daniel Ricci, Malindi HC JR No 6 of 2013 [2013] eKLR and Kenya Anti-Corruption Commission v Online Enterprises Limited Kisumu ELC No 708 of 2015.

34. On the fifth issue, the petitioner submitted that having proved that the 1st respondent was illegally and unlawfully entered into the register for the purpose of fraudulently seeking to hive off, alienate and acquire a portion of the suit property belonging to the school, indeed the acquisition and registration of the suit property is ripe for revocation and cancellation. The petitioner relied on the case of Alberta Mae Gacie v Attorney General & 4 others [2006] eKLR and Daudi Kiptugen v Commissioner of Lands & 4 others [2015] eKLR. The petitioner submitted that the process leading to the acquisition of the 1st respondent's title is shrouded with fraud, illegality, unlawfulness and misrepresentation and as such the petition ought to be allowed with costs.
35. By the time of writing this judgement the 1st respondent had not filed her written submissions. Be that as it may, I have considered the petition, reply thereof, the evidence of the parties, written submissions by the petitioner and the authorities cited and the issues for determination are as follows:-
- a. Whether there was illegal, unlawful and fraudulent acquisition of public land.
 - b. What remedies are available to the petitioner.
36. The gist of the petition is that the suit property was a subdivision of land that was previously owned by Olombokishi group ranch and was demarcated for use as a public school vide a resolution of members of the group ranch. Further that the school was allocated approximately 20 acres and has been in existence since the year 1984. Through the supporting affidavit of John Lontupu, the petitioner deposed that the school boundary touched the Narok-Nairobi main road and that beacons were placed in the year 1995 after subdivisions were carried out on the ground which process went on until the year 2001. It was during subdivision that it emerged that 0.29 hectares of the parcel of land meant for the school had been illegally curved out and allocated to Mr Livingstone Nchoshi who later had it registered in the name of the 1st respondent.
37. It was the evidence of the petitioner's witnesses that it was not possible for the 1st respondent to acquire land that was reserved for use as a public school for various reasons. First, that according to the procedure of allocation of land, minors could only be allocated land once they are of age and girls were not allocated land. Secondly, the 1st respondent was not a member of the Group Ranch and therefore could not be allocated land.
38. On the other hand, the evidence of the 1st respondent was marred with inconsistencies. She claimed to have been a member of the group ranch and was allocated the suit property by her father who was a member of the group ranch himself. The 1st respondent deposed in her replying affidavit that at no time was the suit property registered in the name of her father. During the hearing, the 1st respondent could not tell how being a minor at the time, she was allocated land owing to the maasai customary rights on allocation of land derived from an adjudication process. The 1st respondent relied on area list of the group ranch where her name is listed therein as an allottee of the suit property. As per a copy of the register of members supplied by the petitioner which appears to have been opened in the year 1971, the 1st respondent was not a member and it could also not be possible for her to be a member if she was born in the year 1982. I have perused the minutes of the meeting held on September 26, 1995 and the name of the 1st respondent does not appear in the list of those who had attained 18 years and were capable of being allocated land.
39. I believe that the register of members which was opened in the year 1971 and closed in the year 2000 informed the decision to dissolve and subdivide the group ranch amongst the registered members



which prompted the next phase of subdivision. It was the evidence of the petitioner as deposed in the affidavit of PW3 that the school management has not initiated the process of procuring registration of documents owing to the 0.29 hectares that was illegally hived off from the school land and that sometime in the year 2017, the 1st respondent entered the school and chased away pupils who were playing and destroyed the fence erected causing disruption of learning and other activities.

40. I will be quick to point out that it is for the petitioner to prove on a balance of probabilities that its fundamental freedoms and rights as protected by or under the Constitution have been violated or are threatened. The petitioner must establish this by not only clearly identifying the relevant and specific articles of the Constitution but availing evidence of such violation as per the required standard set out in respect of constitutional petitions as set out in the case of *Anarita Katimi Njeru v The Republic* (196-1980) KLR 1272 where it was held, in the words of the Justices Trevelyan and Hancox that;

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

41. The petition referred to violation of articles 40 (3), (6) and 62 (2) and (4) of the *Constitution* that the alleged proprietorship of the 1st respondent is unconstitutional as it is derived from illegal allocation and subdivision of public land. Having reviewed the petition and the supporting affidavit, this court is satisfied that the petitioner has provided adequate particulars of the claims relating to alleged violation of the Constitution.

42. Article 40 of the *Constitution* provides as follows:-

- “(1) (1) Subject to article 65, every person has the right, either individually or in association with others, to acquire and own property—
- (a) of any description; and
 - (b) in any part of Kenya.
- (2) ...
- (3) The state shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—
- (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with chapter five; or
 - (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any act of parliament that—
 - (i) requires prompt payment in full, of just compensation to the person; and
 - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.



- (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.
- (5)
- (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

43. The rights of a registered proprietor of land, in addition to being guaranteed by article 40 of the Constitution, are further protected by section 26 of the Land Registration Act which provides:

“26. Certificate of title to be held as conclusive evidence of proprietorship

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

44. Article 40 (6) of the Constitution makes it clear that rights under Article 40 do not extend to any property that has been found to have been unlawfully acquired. While considering the import of article 40 vis-à-vis section 26 of the Land Registration Act, the Court of Appeal stated in Henry Muthee Kathurima v Commissioner of Lands & another [2015] eKLR as follows:

“We have considered the provisions of section 26 of the Land Registration Act in light of the provisions of article 40 (6) of the Constitution and it is our considered view that the concept of indefeasibility of title is subject to article 40 (6) of the Constitution. Guided by the provisions of article 40 (6) of the Constitution, we hold that the concept of indefeasibility or conclusive nature of title is inapplicable to the extent that title to the property was unlawfully acquired. Further, it is our view that the government's title to an un-alienated public land stems from the concept of radical title or eminent domain. Based on radical title, the government has superior title to all un-alienated public land and the appellant cannot challenge radical or eminent title.”

45. To determine the dispute between the parties, the issue of validity of the title herein must inevitably be addressed since if the titles turn out to be void, any judgment in the petitioner's favour founded



on the title will equally be void. In the case of *Macfoy v United Africa Co Ltd* [1961] 3 All ER 1169, Lord Denning stated:

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. ... And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

46. The procedure laid out in ownership of land emanating from an adjudication process ought to be clear and straight forward as it is based on customary rights as opposed to vendor-purchaser transactions. The 1st respondent alleged ownership of the suit property cannot be traced from the register of members of the group ranch all the way to the issuance of title which shows that the title must have only be obtained illegally and unlawfully.
47. In the case of *Evelyn College of Design Ltd v Director of Children’s Department & another* [2013] eKLR the court held as follows, “While I agree that the Commissioner has no right to alienate land which has been reserved for public purpose, the process of such a determination must be through a process recognised by the law. Likewise, if the land has been illegally acquired, then the State must use due process to recover it. The requirement of due process is underpinned by several provisions of the Constitution. First, it is implicit in article 40(2)(a) which prohibits the legislature from passing legislation that arbitrarily deprives a person of any interest in or right over any property of any description. Second, Article 40(6) is clear that rights acquired under this Article do not extend to any property that is found to have been unlawfully acquired. Such “finding” cannot be by any other means other than due process. Third, article 47(1) guarantees every person fair administrative action which includes due process.”
48. Having found that the 1st respondent’s acquisition was illegal and unlawful, the remedies available to the petitioner are provided under article 23 (3) of the *Constitution* and the court may grant appropriate relief in regard to the right so violated or threatened.
49. Arising from the above and being satisfied that the petitioner has a cause of action against the 1st respondent I will proceed to enter judgement in his favour and against the 1st respondent as follows: -
- i. A declaration is hereby issued that the subdivision and allocation of Cis/Mara/Olombokishi/202 to the 1st respondent was irregular and unlawful.
 - ii. The title deed issued to the 1st respondent is hereby revoked.
 - iii. A permanent injunction is hereby issued restraining the 1st respondent either by herself, agents, servants from interfering with the activities of Eor Ekule primary school.
 - iv. The 1st respondent to bear the costs of this petition. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 4TH DAY OF OCTOBER, 2022.

HON. MBOGO C.G.

JUDGE

4/10/2022

In the presence of:-

CA:Chuma

