



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 553 OF 2009

OMAR R YAKUBPLAINTIFF

- VERSUS -

THE HON ATTORNEY GENERAL.....DEFENDANT

- CONSOLIDATED WITH -

ELC CASE NO. 552 OF 2009

ROY HAULIERS LIMITED.....PLAINTIFF

- VERSUS -

THE HON ATTORNEY GENERA.....DEFENDANT

JUDGEMENT

1. These two consolidated cases were initiated in the High Court at Nairobi in 2009. Upon establishment of the Environment and Land Court, they were transferred to the newly established court. On 27/10/2015, Gitumbi J consolidated the two cases and designated ELC Case No 553 of 2009 as the lead file. Hearing of the two consolidated cases commenced before me on 14/2/2019. The last witness testified on 14/1/2021.

2. The dispute in the two suits revolves around two broad issues. The first broad issue relates to the legality of the alienation, subsequent survey, and subsequent titling of two plots in Kasarani Area, Nairobi. The State Department for Roads, through the Attorney General, contends that the two plots were part of an already surveyed and titled land compulsorily acquired by the Government in the 1960s for the expansion of the Nairobi-Thika Highway, and that the subsequent alienation, survey and titling of the same land in the 1960s was irregular. The second broad issue relates to the legality of the removal/demolition of structures from the said land in November 2008, to pave way for the construction of the Nairobi-Thika Highway. At the moment, the suit property is part of the Nairobi-Thika Highway.

3. I will summarize the parties' respective cases in the two suits. Thereafter, I will summarize the parties' respective evidence and submissions. My brief analysis and findings on the issues falling for determination in the two consolidated suits will follow. Lastly, I will make appropriate disposal orders.

Case of the Plaintiff in ELC Case No. 553 of 2009

4. The plaintiff in ELC Case No 553/2009 is Omar R Yakub. His case was that one Mr Geoffrey Mukana and one Ms Jane Musandu approached him in 1995 waving **Letter of Allotment Number 00799/II/233** and **Letter of Allotment Number 00799/II/234** respectively. Both letters of allotment were dated 6/7/1994. Geoffrey Mukana's letter of allotment related to what was described as **Unsurveyed Commercial Plot "A" Kasarani, Nairobi**, measuring 0.2 hectares. Jane Musandu's letter of allotment related to what was described as **Unsurveyed Commercial Plot "B" Kasarani, Nairobi**, similarly measuring 0.2 hectares. The duo sold to him the two plots in 1995. The purchase price for the two plots was Ksh 2,500,000. The plaintiff gave the two vendors Kshs 250,000 each, to be defrayed against the sums itemized in the letters of allotment, to facilitate processing of the respective titles. An informal transfer was effected in his favour and two grants were subsequently processed and issued in his name, namely: (i) **Grant Number IR 65698** comprising **Land Reference Number 20230** measuring 0.1999 of a hectare; and (ii) **Grant Number 65699** comprising **Land Reference Number 20231**, measuring 0.2000 hectares.

5. On 2/6/1995, he wrote to the Commissioner of Lands, requesting to amalgamate the two titled plots into one. Further, he requested for "a small extension of the consolidated plot" as shown on a plan prepared by his surveyor, Mr G O Wayumba, measuring 0.0795 of a hectare.

His two requests were granted and his surveyor prepared a fresh survey plan incorporating the two amalgamated plots together with the extension. Ultimately, **Grant Number IR 68678** was issued to him, comprising **Land Reference Number 21639**, measuring 0.4430 of a hectare. He was in possession of the suit property from 1994 (sic) to 2008. He established a transportation company on the suit property. He erected a boundary wall around the suit property. He later leased the suit property to Roy Hauliers Limited, a company where he is the Chairman and his son (PW3) is the Chief Executive.

6. On 1/11/2008, officials from the Ministry of Roads and Public Works (hereinafter referred to as “**the Ministry**”) entered the suit property and demolished the premises thereon without giving him an opportunity to vacate the premises. He contended that the demolition was done when a court order barring demolition subsisted. He suffered trauma during the demolition. He incurred a medical bill of Kshs 370,132 in treating the trauma.

7. Aggrieved, he brought ELC Case No 553/2009, seeking the following verbatim reliefs against the Government:

a. A declaration that the plaintiff is the legitimate owner of the property known as Land Title Number L R No 21639 (IR 68678).

b. A declaration that the invasion of the said land by the Ministry of Roads and Public Works (now Ministry of Transport, Infrastructure, Housing and Urban Development) was unlawful.

c. General damages;

d. Restoration of the physical possession of LR No 21639 (IR 68678) to the plaintiff forthwith

IN THE ALTERNATIVE to (d) above

e. Forthwith payment of the value of the suit property known as LR No 21639 (IR 68678) whose value as at 2/11/2017 stands at Kshs 197,000,000.

f. Compensation for the value of the demolished buildings valued at Kshs 65,000,000.

g. Special damages for medical expenses Kshs 370,132.00

h. Exemplary damages on account of the wanton, deliberate and oppressive disregard of the existence of court orders prohibiting the enforcement of the demolition order;

i. Interest at court rates on (c) (f) (g) and (h) above;

j. Costs of this suit

Attorney Generals Case in ELC Case No 553 of 2009

8. The Attorney General is the defendant in Case No 553/2009. He filed an amended statement of defence and counterclaim dated 9/1/2012. He denied the plaintiff's claim *in toto*. He averred that the suit property was part of **Land Reference Number 8369/1** and was a road reserve compulsorily acquired by the Ministry in 1962 for the construction and expansion of Nairobi-Thika Highway. He contended that there was no change of user from road reserve to business-cum-residential as contended by the plaintiff. He added that the plaintiff's ownership of the suit property was null and void because the land was not available for alienation under the law. He contended that the plaintiff's title was acquired fraudulently and through misrepresentation. He itemized various particulars of fraud and misrepresentation on part of the plaintiff.

9. The Attorney General denied the allegation that the Ministry committed acts of unlawful destruction of property and contended that because the suit property belonged to the Department of Roads, the Ministry properly cleared the road reserve for a road project that had been planned and funded. The Attorney General added that the plaintiff's remedy, if any, lay against the persons who fraudulently sold to him the road reserve. He further averred that the remedy of physical restoration of the suit property to the plaintiff was not available because the intended public project was implemented.

10. By way of counterclaim, the Attorney General pleaded that the plaintiff knowingly procured illegal survey and registration of a road reserve and proceeded to trespass on the road reserve. He added that despite notice requiring him to remove his illegal structures from the road reserve to enable the Ministry to undertake road expansion, the plaintiff failed to comply with the notice, forcing the Ministry to incur costs in removing the illegal structures.

11. Consequently, the Attorney General sought the following reliefs by way of counterclaim against the plaintiff:

a. General damages for trespass onto the road reserve.

b. Special damages being the cost of removal of the plaintiff's illegal structures from the road reserve.

c. A declaration that the plaintiff's encroachment on and occupation of the road reserve subject matter of this suit was illegal.

d. A declaration that the plaintiff's title was illegally obtained and that it is null and void ab initio.

e. An order cancelling the plaintiff's illegal title referred to as LR Number 21639 (IR 68678).

f. Exemplary damages.

g. Costs of the suit.

Case of the Plaintiff in ELC 552/2009

12. The plaintiff in ELC Case No 552/2009 is Roy Hauliers Limited. Their case was contained in the further amended Plaintiff dated 7/12/2017. In summary, their case was that, at all material times, they were registered as lessee in respect of **Land Reference Number 21639** comprised in **Grant No IR 68679**, registered in the name of Omar R Yakub (the suit property). They established a transportation company on the suit property. All their operations, including workshops, storage of spares, fuel, offices and parking of trucks, were based on the suit property

13. On 1/11/2008, officials from the Ministry entered the suit property and committed acts of unlawful destruction of the multi-million shillings complex and other buildings erected on the suit property. The destruction was done notwithstanding an order of the Court issued by Hon Justice Osiemo on 22/5/2008 in **Nairobi HC Misc Application No 41 of 2008**. They suffered the following loss:

a. Loss through vandalism and theft----Kshs 60,632,865.00

b. Loss of income-----Kshs 186,199,117.00

Total claim-----Kshs 246,831,982.00

14. Consequently, they sought the following verbatim reliefs against the Government:

a. General damages

b. Special damages Kshs 246,831,982;

c. Exemplary damages, on account of the wanton, deliberate and oppressive disregard of the existence of court orders prohibiting the enforcement of the demolition order;

d. Interest at court rates on (a), (c) and (d) above; and

e. Costs of this suit

Attorney General's Case in ELC Case No 552 of 2019

15. In answer to the claim by the plaintiff (Roy Hauliers Limited) in ELC Case No 552/2009, the Attorney General filed a statement of defence dated 16/3/2010. He denied the plaintiff's claim *in toto*. He averred that the plaintiff together with their lessor were trespassers on the suit property, contending that the suit property had been compulsorily acquired by the Ministry way back in 1962 from *M/s Salopia Limited* for the purpose of expansion of the busy Nairobi-Thika Highway. The Attorney General added that upon acquisition of the land, the Ministry, through the Chief Engineer of Roads, took possession of the suit property and held it in trust for the public, pending availability of resources for expansion of the Highway. He added that the fact that the compulsory acquisition had neither been withdrawn nor revoked meant that the suit property remained reserved for the purpose for which it was compulsorily acquired and was not available for allocation.

16. The Attorney General further averred that the suit property was never available for allocation because it was compulsorily acquired for a specific public purpose within the framework in **Section 75** of the retired Constitution and **Section 23** of the **Land Acquisition Act** [repealed]. He added that the alleged ownership of the suit property by Mr Omar Yakub was null and void because he acquired the land fraudulently because the land was not available for alienation. He itemized various particulars of fraud and misrepresentation on part of Mr Yakub.

17. It was the Attorney General's case that in 2003, the Ministry issued notices in the Kenya Gazette and in the print media, requiring all trespassers on public land to vacate. In addition, the Ministry embarked on a programme of surveying and marking all structures that lay on road reserves with the word "demolish". He added that Mr Omar Yakub's premises were marked "demolish" and both the plaintiff and Mr Omar Yakub were given sufficient time to vacate the road reserve and demolish their structures. Upon obtaining funding for the road project, the road reserves were cleared and handed over to the contractor to construct the road. The Attorney General contended that the trespassers were given four 4 years from the time the structures were marked for demolition, to relocate to other sites. Lastly, the Attorney General averred that since Mr Yakub was a trespasser, he could not confer any tenancy rights to the plaintiff. He denied liability *in toto* and urged the court to dismiss the plaintiff's suit.

Plaintiffs' Evidence in the two Cases

18. The plaintiffs in the two consolidated cases presented evidence by a total of five (5) witnesses. Prof Gordon Wayumba testified as PW1. He adopted his written witness statement dated 7/11/2017 as part of his sworn evidence-in-chief. In summary, his evidence was that he was a

licensed land surveyor practising under the name *Geometer Survey Limited*. He was also a lecturer in land surveying at the Technical University of Kenya. He was engaged by the plaintiffs' advocates to establish the position of the perimeter beacons of **Land Reference Number 21639** (being an amalgamation of **LR No 20230 and LR No 20231**), located in Kasarani, Nairobi. He prepared a report dated 1/11/2017 in which he made a finding that the bypass created off Thika Highway passed right in the middle of the suit property. The said bypass was not in the original part development plan; hence its creation was not lawfully done. He added that the part development plan which informed the two impugned allocations was signed by both the Director of Physical Planning and the Commissioner of Lands on 13/5/1994 and 17/5/1994 respectively, and the bypass was not in that particular part development plan.

19. During cross-examination, he stated that he first interacted with the suit property in 1996 when he surveyed it for amalgamation. He was not sure if he was the one who prepared the deed plans that generated the two titles that were eventually amalgamated. He was however sure of the amalgamation survey plan which he prepared and presented to the Director of Surveys for authentication in 1996. He stated that the survey plan which he prepared did not bear the authority under which the survey was carried out. It was his evidence that at the point of carrying out a survey, a surveyor is required to take into account all previous surveys relating to the land. He added that during the survey exercise, he did not come across Survey Plan Number IR 105/39 dated 21/9/1965. He added that at the point of authentication, the Director of Surveys ought to have indicated all the previous surveys that affected the suit property. He added that he was familiar with part development plans but he did not know a part development plan was supposed to have an approved plan number. It was his evidence that the part development plan he used was given to him by his instructing client.

20. In re-examination, he stated that the part development plan was duly approved by the Director of Physical Planning and the Commissioner of Lands. He added that he was involved in the initial survey of the two original plots. He had not seen any subsequent part development plan which had changed the orientation of the road. Lastly, he stated that both the Director of Surveys and the Commissioner of Lands did not object to the amalgamation.

21. Mr Omar K Yakub testified as PW2. He adopted his written witness statement as part of his sworn evidence-in-chief. He produced a total of 24 documents itemized as 1 to 15 and 17 to 25 in his bundle of documents. In summary, his testimony was that he was the plaintiff in Case No 553 of 2009. He was a retired businessman. He used to be the Managing Director of Roy Hauliers Limited. He was a director and chairman of Roy Hauliers Limited at the time of testifying. He was the registered owner of **LR No 21639**, comprised in **Grant No IR 68678**, situated in Kasarani, Nairobi. The said title was an amalgamation of **LR No 20230 and LR No 20231** which were originally allocated to Geoffrey Mukana and Jane Musandu in 1994. He acquired the two plots from the two original allottees in 1995 at Kshs 2,500,000 and the two plots were transferred to him. He was issued with titles. He subsequently applied for amalgamation of the two plots and for an extension of the size of the amalgamated plot in 1996. His two requests were approved. He surrendered the two titles and he was issued with an amalgamated title, Grant No IR 68678.

22. He added that since acquiring the suit property, he had been consistently paying land rent and land rates to the relevant authorities. He enjoyed uninterrupted possession of the suit property from 1994 (sic) to 2008. He established a transportation company, Roy Hauliers Limited, on the suit property. The company operated in an office block, godown block, workshop office, workshop shed, and a compressor room within the suit property. He leased the suit property to Roy Hauliers limited. At the time of demolition, Roy Hauliers Limited, had a fleet of trucks which operated across the East African Region.

23. PW2 added that on 1/11/2008, officials from the Ministry wrongfully entered the suit property and committed acts of unlawful destruction of business premises. The trespass and destruction was carried out notwithstanding the existence of a court order issued on **27/3/2008 in Nairobi HC Misc Application No 19 of 2008** in which the plaintiff had been granted leave to initiate judicial review proceedings and the said leave was to operate as a stay of the demolition notice by the Ministry. The said court order had been served. The demolition was done without him being given an opportunity to vacate the suit property. He suffered trauma to the lower back when a bulldozed wall fell on him. As a result, he incurred medical expenses totaling Kshs 370,132.

24. He stated that he had been unlawfully deprived of possession and leasehold interest in the suit property. Further, Roy Hauliers Limited had suffered severe loss and inconveniences, in addition to the losses occasioned by vandalism, theft and cancellation of contracts by the company's clients.

25. In cross-examination, he stated that the vendors approached him on Grogan Road towards the end of 1994 and asked him if he was interested in the two plots. The vendors worked in Government but he did not know the specific departments where they worked. At that point, he did not establish if the vendors had paid the monies itemized in the letters of allotment. He did not establish how the letters of allotment were procured. They did not furnish him with copies of their applications for allocation. Subsequently, the vendors brought him the titles in April 1995. After they took to him titles bearing his name, he paid them balance of the purchase price. He could not remember if there was a formal agreement for sale between him and the vendors. He instructed Prof Wayumba to survey the suit property.

26. In further cross-examination, he stated that the company (Roy Hauliers Limited) did not make a resolution to file ELC Case No 552 of 2009). He did not have approved structural designs and approved architectural plans relating to the structures on the suit property. He did not have evidence to demonstrate that the agreement with Swaminarayan (**the contractor**) was implemented. He did not know if there was a certificate of completion relating to the developments. He was the one who gave Mr Mukana the money relating to stand premium. He was also the one who gave stand premium money to Jane Musandu. He added that he did not comply with special condition numbers 1 and 2 in the Grant, relating to approval by the Commissioner of Lands and submission of building plans within 6 months.

27. PW2 further testified that the structures on the suit property were marked "**X**" at the time of road expansion. He was not aware the suit property was in the Ndungu Report. He had not considered suing Mr Mukana and Ms Musandu for a refund of the money paid to them.

28. In re-examination, he testified that what he acquired from Mr Mukana and Ms Musandu were their interests contained in the letters of allotment. He gave each of them an initial sum of Kshs 250,000 to enable them process the titles. The letters of allotment originated from the Office of the Commissioner of Lands. The subsequent surrender relating to amalgamation was made to the Government and the Government in turn issued a new grant to him.

29. Maureen Nafula Maira testified as PW3. She said she was a land valuer working at Joe Musyoki Valuers. She was a full member of the Institution of Surveyors of Kenya. She produced as exhibits the two reports prepared by the Firm of Joe Musyoki on 2/11/2017 and 6/11/2017, relating to the value of land and the value of the improvements on the land prior to the demolition. She stated that the reports were based on a previous report by M/s Lloyd Masika.

30. In cross-examination, she stated that she became a certified full member of the Institution of Surveyors in May 2019. She did not know how the firm received instructions relating to the two valuation reports. At the time of inspection, the suit property was used as a road reserve. They had indicated in their valuation report that the title relating to the suit property appeared in the Ndungu Report.

31. Shemir Omar Yakub testified as PW4. He adopted his witness statement dated 7/11/2017 as part of his sworn evidence-in-chief. He produced the lease dated 21/12/1995 and the court order relating to Nairobi HC Misc Application No 19 of 2008 as exhibits. His testimony was that he was a director of Roy Hauliers Limited. Roy Hauliers Limited was a lessee of Omar R Yakub, the registered proprietor of the suit property. Roy Hauliers Limited established a transportation company on the suit property. All the company's operations, including workshops, storage of spares, fuel, offices and parking of trucks were based on the suit property.

32. He added that on 1/11/2008, officials from the Ministry entered the suit property and committed acts of unlawful destruction of the multi-million complex and other buildings erected on the suit property. The destruction was carried out in violation of a court order issued by Justice Osiemo on **22/5/2008** in **Nairobi HC Misc Application No 41 of 2008** in which the company had been granted leave to initiate judicial review proceedings and the said leave was to operate as a stay of enforcement of the demolition notices by the Ministry. As a result of the demolition, the company suffered loss and special damages totaling Kshs 246,831,982. He particularized the loss and the special damages. He urged the court to grant the company the reliefs sought in the plaint relating to ELC Case No 552 of 2009.

33. In cross-examination, he stated that he was a director of Roy Hauliers Limited. He did not have a resolution from the company authorizing the filing of the suit. Omar R Yakub was his father and a co-director of Roy Hauliers Limited. Omar R Yakub was a majority shareholder in Roy Hauliers Limited. The lease dated 21/12/1995 between Omar R Yakub and Roy Hauliers Limited was not registered. He did not have evidence of payment of rent to Omar Yakub. The lease between Amarco and Roy Hauliers Limited was similarly not registered.

34. He added that he did not have any Police Occurrence Book Number relating to any report made in relation to the items set out in the plaint. He did not have any police abstract relating to the lost items. He was not in a position to verify the figures set out in paragraph 9 of his witness statement. He was relying on the evidence of the consultant [PW5].

35. In re-examination, he stated that from the evidence put to him in cross-examination, the suit property became government property in the 1960s. He was not aware of the compulsory acquisition of the suit property by the Government in the 1960s. The lease with Amarco related to two properties which were subsequently amalgamated. Their operations were affected by the demolition. Their contract with Shell Tanzania was affected by the demolition.

36. Jeremy Riro testified as PW5. He adopted his witness statement dated 14/10/2019. He adopted his written witness statement dated 14/10/2019 as part of his sworn evidence-in-chief. He produced his claim assessment report dated 20/11/2017 as an exhibit. In summary, he stated that he was a financial analyst, a certified public accountant, and a graduate of the University of Nairobi. He had been a financial analyst for 5 years as at the time of testifying.

37. In cross-examination, he stated that he did not have any documentary evidence to demonstrate that he was a qualified financial analyst. At the time of engaging him, the plaintiff in ELC Case No 552/2009 made it clear that the report was required to support a claim pending in court. The information he used to prepare the report was given to him by the management of the client company. He added that the figures in the report could not be vouched for because they were provided by the client. He was not provided with any police occurrence book entries (OB) relating to lost or destroyed property.

38. In re-examination, he stated that Kenya did not have a professional regulatory body in charge of financial analysts. He reiterated that the documents he used to prepare his report were provided by the management of the client company. lastly, he stated that his mandate was limited to looking at the values provided by the client.

Attorney General's Evidence

39. The Attorney General led evidence by two witnesses. Thomas Gicira Gacoki testified as DW1. He adopted his written witness statement dated 1/11/2018 and filed in ELC Case No 552 of 2009 as part of his sworn evidence-in-chief. He also adopted his written witness statement dated 10/2/2012 and filed in ELC Case No 553 of 2009 as part of his sworn evidence-in-chief. In summary, his evidence was that he served as manager in charge of surveys at the Kenya National Highways Authority (**KENHA**) at all material times. From the records held by the Department of Roads, the Department needed land for expansion of the Nairobi-Thika Road. Consequently, in 1962, the Ministry of Roads and Public Works (the Ministry) identified various parcels of land for compulsory acquisition. Among the identified lands were 9.11 acres out of Land Reference Number 1012/27, then owned by M/s Salopia Limited. The lands were required for the construction of a traffic interchange at Kasarani, commonly known as Roy Sambu Roundabout and for future improvement of Thika Road. At the time, the now repealed **Land Acquisition Act** had not been enacted and the compulsory acquisition was carried out by way of written agreements between the Government and the concerned parties, among them, Salopia Limited. Vide a letter dated 31/7/1962, the acreage was changed from 9.11 acres to 8.48 acres.

40. He added that the relevant acquisition and surrender agreements were drawn and executed and the assessed consideration amounting to Kshs 18,714 was paid to Salopia Limited in or about August 1962. Subsequently, survey plans relating to the acquired and surrendered land were prepared and authenticated. The acquired and surrendered portion of the land was surveyed as **Land Reference Number 8369/1**. The acquired land was conveyed to the Government vide a memorandum of registration of transfer of land dated 24/5/1967 from Salopia Limited to the President of the Republic of Kenya in respect of LR No 8369/1. Since 1962 when the land was acquired, it remained a road reserve vested in the Department of Roads and the relevant departmental agency.

41. DW1 further testified that on 6/6/2003, the Ministry published Legal Notice No 3632 giving notice to all and sundry requiring them to remove all structures encroaching on the road reserves and warning them that in default, demolition would be carried out at the cost of the encroachers. It was his evidence that the plaintiffs knew that demolition would be carried out if they did not remove the encroaching structures. He added that the plaintiffs were aware that the Ministry's rights in the suit property which were acquired in 1962 had not been extinguished and that no private interest could pass to them.

42. DW1 further testified that in November 2007, the Government of Kenya entered into an agreement with the African Development Bank for the improvement of the Nairobi-Thika Highway. At the planning stage, it was established that numerous illegal encroachments would be a hindrance to the road construction works. Further, it was noted that the purpose for which LR No 8369/1 and several other road reserves were compulsorily acquired was now being actualized. On 4/12/2007, the Permanent Secretary to the Treasury wrote to the Permanent Secretary in the Ministry of Roads and Public Works, urging an expeditious execution of the works. On 14/11/2008, the Government contracted *China Wu Yi Company Limited* to undertake the works. Under the contract, the Ministry was obligated to remove the encroaching structures and hand over the site to the contractor. Consequently, the site was cleared and handed over to the contractor.

43. It was DW1's evidence that the Ministry had never been asked to release the land to any person. Besides, the land having been compulsorily acquired and payment made, it could not be legally registered in any other person's name and any such purported registration could not confer a valid title and could only be fraudulent. He added that the plaintiffs' structures were not the only ones targeted for demolition, adding that all encroaching structures were removed to pave way for the road construction. He further testified that the suit property had been utilized for the purpose for which it was compulsorily acquired and it was not available for restoration to Mr Omar Yakub. It was his evidence that the plaintiffs were not entitled to the reliefs sought in the two primary suits because granting the reliefs sought would be tantamount to compelling the Government to use tax-payers' money to pay for land which it acquired at a consideration in 1962.

44. DW1 testified that the deed plans relating to LR No 20230 and LR No 20231 were prepared by G. O Wayumba (PW1). Similarly, the survey plans and deed plan relating to the subsequent amalgamated title in respect of LR No 21639 were prepared by G O Wayumba. He added that at the time PW1 prepared the above survey plans and deed plans, there existed registered survey plans and deed plans relating to the road reserve which had been surveyed as LR No 8369/1. He urged the court to grant the prayers sought in the Attorney General's counterclaim. He produced a total of 37 documents, including previous survey plans showing that the suit property was part of LR No 8369/1 and documents relating to acquisition of the suit property by the Government in the early 1960s.

45. During cross-examination, he stated that the suit property was acquired from Salopia Limited and upon acquisition it became Government land. He added that the part development plan dated 13/5/1994 was not drawn to scale and that the suit property was set aside for road expansion and was not available for alienation. His evidence was that the part development plan relied on by the plaintiffs related to an already surveyed land that was a road reserve and was not available for alienation.

46. DW1 further testified that he did not know if there existed a court order barring demolition. He did not know if the order was served on KENHA. Lastly, he testified that the Ministry of Lands was the one to explain why it alienated a road reserve which had been acquired by the Government for the expansion of Thika Road.

47. In re-examination, he stated that the purpose for which the land was acquired was clear all through. He added that the part development plan dated 13/5/1994 was prepared when the suit property existed as a road reserve and the Ministry responsible for roads was not involved in its preparation. He added that PW1 [Prof Wayumba] failed to take into account existing survey plans.

48. Gordon Odeka Ochieng testified as DW2. He adopted his written witness statement dated 15/4/2019 as part of his sworn evidence-in-chief. He produced 31 exhibits. In summary, his evidence was that he worked in the Ministry of Lands and Physical Planning as Senior Assistant Director - Land Administration. LR No 21639 was a consolidation of LR No 20230 and LR No 20231 and was registered as Grant No IR 68678. LR No 20230 and LR No 20231 were created as a result of survey of "Unsurveyed Commercial Plots "A" and "B". The allocation, transfer, processing of titles, and the subsequent amalgamation should not have been authorized because the suit property was not available for alienation.

49. It was his further testimony that the suit property was originally part of LR No 8369, part of which an area measuring 8.48 acres was acquired by the Government in 1962 for the expansion of the Nairobi-Thika Road. Upon survey of the acquired land, the Director of Surveys assigned the acquired parcel LR No 8369/1 as per Survey Plan No F/R 105/39. Deed Plan No 83301 relating to the surrendered portion (LR No 8369/1) was subsequently prepared by the Director of Surveys and forwarded to the Commissioner of Lands vide cover letter reference CR/197/1604 – dated 6/4/1966. The surrender document relating to LR No 8369/1 was ultimately processed and registered as IR 12806/19 on 24/5/1967. It was his evidence that the title held by Mr Omar Yakub registered as IR 68678 in which LR No 21639 was comprised fell within LR No 8369/1 which was acquired by the Government for the purpose of expansion of Thika Road hence was not available for alienation and should not have been allocated.

50. Shown the letters of allotment, he stated that there was no record of any application for allocation of the suit property to any individual. He added that plots "A" and "B" mentioned in the letters of allotment were part of an already surveyed land and could not be described as unsurveyed commercial plots. He stated that the conditions set out in the letters of allotment were not adhered to because there was no payment within 30 days. Similarly, the conditions in the grant were not adhered to. He added that he had not seen the part development plan relating to the extended portion that was surveyed as part of the amalgamated parcel.

51. During cross-examination, he confirmed that the two letters of allotment were issued by the Commissioner of Lands and the two titles and the subsequent amalgamated title were processed by the Department of Lands. He faulted the Commissioner of Lands for the alienation. He stated that although Mr Omar Yakub had no role in the alienation, he failed to carry out proper due diligence before purchasing the land. Shown the court order, he stated that he was not aware of breach of the said court order. He faulted Mr Yakub's surveyor (PW1), contending that he knew or he should have known the suit property had been surveyed in the 1960s and there existed a survey plan for the suit property. He added that the part development plan on which the two plots appeared was subject to survey records.

The Plaintiffs' Submissions

52. The plaintiffs in the two consolidated cases filed written submissions dated 24/2/2021 through the firm of TrippleOKlaw LLP. Counsel submitted under the following heads: (a) Whether the demolition was done in contempt of court orders in High Court Misc Application No 19 of 2008; (b) The indefeasibility of the plaintiff's undisputed title to the suit property; (c) Measure of damages; (d) Whether the defendant proved allegations of fraud, misrepresentation, mistake or illegality on part of the plaintiff; (e) The evidence; and (f) The defence and counterclaim.

53. Counsel argued that the demolition was carried out in contempt of a conservatory order issued on 27/3/2008 by Kubo J in Nairobi HC Misc Application No 19 of 2008 and urged the court to condemn the defendant for the high handedness through an award of exemplary and aggravated damages. Citing the Court of Appeal decision in **Dr. Joseph Arap Ngok v Justice Moiwo Ole Keiwua & 5 Others [1997]eKLR**, counsel submitted that under **Section 23** of the now repealed **Registration of Titles Act**, Mr Yakub's title was indefeasible. On damages, counsel cited **Mcgregor on Damages (15th Edition at page 10)** and submitted that the object of an award of damages is to give the plaintiff compensation for the damages, loss or injury he has suffered.

54. Relying on the Court of Appeal decision in **Ratital Gordhambhai Patel v Lalji Makanji [1957]EA 314**, counsel submitted that allegation of fraud must be strictly proved. Counsel argued that the Attorney General had failed to discharge the obligation to specifically prove fraud on part of the plaintiffs. On the totality of the evidence before the court, counsel submitted that DW2 had admitted that Mr Yakub held a valid title to the suit property; PW1 had testified that the road did not exist on the original part development plan; PW4 had testified on the market value of the land and the improvements thereon; and PW1 had confirmed that the suit property was not part of the road reserve.

55. On the Attorney General's defence and counterclaim, counsel submitted that the Attorney General had failed to prove that the suit property is part of the road reserve. He added that the Attorney General had failed to prove illegality, mistake or misrepresentation on part of the plaintiff. Counsel urged the court to allow the plaintiffs' claim and dismiss the Attorney General's counterclaim.

Attorney General's Submissions

56. The Attorney General filed written submissions dated 26/4/2021 through Mr Njoroge Allan Kamau, Senior State Counsel. Counsel submitted under the following two heads: (a) Whether the plaintiff lawfully acquired the suit property; and (b) Whether the plaintiffs are entitled to compensation. On the first head, counsel submitted that Mr Yakub's title lay on LR No 8369/1 surveyed in the 1960s on Survey Plan Number F/R 105/39. He added that the suit property was a sub-division out of Original Land Parcel **No 1012/27** and the Ministry acquired it in 1962 for the expansion of Roysambu Roundabout and for the future development of the road and was not available for alienation in 1994. He added that Mr Yakub was complicit in the fraud and misrepresentation leading to the title that he holds because he contributed money for payment of stand premium relating to the two allocations. Counsel added that the part development plan which Mr Yakub had relied on was not an authentic plan because it did not have a plan number and it was prepared on an already existing surveyed land, LR 8369/1. He added that the suit property had been listed in the Ndungu Land Commission Report. The Learned Senior State Counsel added that Mr Yakub was complicit in the fraud because on 2/6/1995 he wrote a letter seeking an extension of the consolidated plot by 0.0795 of a hectare and procured the same without an allotment letter. Citing various decisions of the superior courts on the validity of titles relating to public land that was irregularly acquired, counsel argued that the title held by Mr Yakub was not lawfully acquired and urged the court to annul it.

57. On whether the plaintiffs were entitled to compensation, counsel submitted that no award of damages should be granted to the plaintiffs because Mr Yakub's title was null and void on account of illegality. Citing various decisions of the superior courts, counsel submitted that Mr Yakub was not an innocent purchaser for value without notice and is not entitled to damages. Counsel added that the plaintiffs had failed to discharge their duty to specifically plead and prove the claim for special damages because PW4 had failed to give the basis of her valuation and PW5's evidence was totally discounted on cross-examination. Counsel urged the court to dismiss the plaintiffs' suits and grant the Attorney General's counterclaim.

Analysis and Determination

58. I have considered the parties' respective pleadings, evidence and submissions. I have also considered the law and the comparative jurisprudence relevant to the key issues falling for determination in the two suits. Parties did not agree on a common set of issues falling for determination in the two consolidated cases.

59. Based on the pleadings, evidence and submissions presented to the court, the following are the six key issues falling for determination in the lead file, ELC Case No 553 of 2009: (i) *Whether the title held by Mr Omar Yakub, IR 68678, comprising LR No 21639 is valid;* (ii) *Whether the said title relates to a road reserve, Nairobi-Thika Highway;* (iii) *Whether the demolition carried out on the suit property on 1/11/2008 was lawful;* (iv) *Whether Mr Omar Yakub is entitled to any of the reliefs sought in the amended plaint dated 7/12/2017;* (v) *Whether the Attorney General, on behalf of the Department of Roads, is entitled to any of the reliefs sought in the counterclaim;* and (vi) *What order should be made in relation to costs of the suit and the counterclaim.*

60. The two key issues falling for determination in ELC Case No. 552 of 2009 are: (i) *Whether Roy Hauliers Limited was a lawful registered lessee on the suit property;* and (ii) *Whether Roy Hauliers Limited is entitled to any of the reliefs sought against the Attorney General.* I will first dispose the issues in ELC Case No 553 of 2009.

61. The first and second issues in ELC Case No 553 of 2009 are related. I will therefore dispose them simultaneously. The first issue is whether the title held by Mr Omar Yakub, IR No 68678, comprising LR No 21639, is valid. The second issue is whether the said title relates to a road reserve. The position of Mr Yakub is that the title he holds is valid and indefeasible. The position of the Attorney General is that the said title relates to land that was compulsorily acquired for expansion of Thika Road in the 1960s; relates to a road reserve; was procured

through fraud and misrepresentation on part of Mr Yakub; and is null and void for all intents.

62. I have considered the evidence presented to the court, including the relevant survey plans and deed plans. The suit property is located at what used to be called Roysambu Roundabout and is now called Roysambu Interchange. Much of it has been constructed as part of the Nairobi-Thika Highway. From the uncontroverted evidence presented to the court, in 1962 the suit property existed as part of **LR No 1012/27** owned by M/s Salopia Limited. In 1962, the Ministry responsible for roads decided to acquire about 9.11 acres out of LR No 1012/27 for the expansion of Nairobi-Thika Road. The required acreage eventually changed to about 8.48 acres. Survey plans were done through which LR No 8369 was parceled out. Further survey was done parceling out LR No 8369/1, measuring 8.48 acres. LR No 8369/1 was eventually compulsorily acquired from M/s Salopia Limited by the Department of Roads for expansion of Thika Highway. Because the now repealed **Land Acquisition Act** had not been enacted, the compulsory acquisition was effected through an agreement between the Government and the private property owner, Salopia Limited. The survey plans relating to the compulsorily acquired land were duly registered and M/s Salopia Limited executed a memorandum of transfer of land, conveying the 8.4 acres to the President of the Republic of Kenya at a consideration of Kshs 18,000.

63. It is therefore clear that as at 6/7/1994 when Geoffrey Mukana and Jane Musandu procured the two letters of allotment that led to the generation of the amalgamated title held by Mr Omar Yakub, the suit property existed as a registered and a surveyed land. Secondly, it existed as a surveyed road reserve. Thirdly, it existed as public utility land that had been compulsorily acquired for the expansion of Thika Road. It was not an unsurveyed and unalienated Government land that was available for planning and alienation as unsurveyed commercial plots. It had already been registered, planned, surveyed and reserved for the expansion of Thika Road. It had been given to the Department of Roads for that purpose. What was not available at the time was the funding for the expansion of the Road. Procurement of letters of allotment relating to the suit property as an unsurveyed commercial plots was therefore a misrepresentation on the part of those involved in the procurement of the letters of allotment.

64. It does emerge from the evidence presented before this court that Mr Yakub was involved in the perfection of the procurement of the two allotments. I say so because he got involved in the transaction before Mr Mukana and Ms Musandu had acquired any interest capable of transferring to him. They had not accepted the allotments. They had not paid the sums specified in the letters of allotment. It is Mr Omar Yakub who provided the money and procured a form to be executed by the Commissioner of Lands purporting to consent to an informal transfer of the two allotments to him. Two titles were eventually generated in his name as the first grantee. The deed plans which generated the two titles were prepared by his private surveyor, Prof G O Wayumba

65. Soon after procuring the two titles in his name, he embarked on an amalgamation exercise. At that stage, he directly procured an additional piece of land measuring 0.0795 of a hectare which was surveyed as part of LR No 21639 (the suit property). His letter requesting for the additional alienation was written on 2/6/1995, delivered to the Commissioner of Lands on the same day, and responded to on the same day. His two requests were granted on the same day without any prior part development plan or formal letter of allotment relating to the additional 0.0795 of a hectare.

66. It does also emerge from the evidence before this court that Mr Yakub's surveyor (Prof G O Wayumba-**PW1**) was involved in the preparation of the deed plans that generated the original two titles and the amalgamated title that contained the additional 0.0795 of a hectare. It was PW1's responsibility as an agent of Mr Yakub to establish whether there existed any previous surveys relating to the suit property. He elected to ignore the fact that the land in respect of which he was purporting to draw deed plans as unsurveyed commercial plots were part of an already surveyed and registered land that had been compulsorily acquired for the expansion of Thika Road.

67. The totality of the foregoing is that there was misrepresentation in the procurement of the title which Mr Yakub holds. Secondly, it is clear from the evidence before this court that Mr Yakub was directly (through acquisition of 0.0795 of a hectare) and indirectly (through his surveyor) involved in the misrepresentations that led to the procurement of the title he is waving. Thirdly, the title he is waving relates to a road reserve that existed as a surveyed and registered land at the time he, together with others, purported to procure fresh surveys and titles relating to the suit property. The suit property was not available for alienation as unsurveyed commercial plots.

68. Our courts have umpteen times laid down and reiterated the law relating to titles relating to irregularly acquired public utility land. In **Kenya National Highways Authority v Shalieh Massod Mughal & 5 others [2017]eKLR** the Court of Appeal was confronted with a similar title that had encroached on a road reserve compulsorily acquired by the Government in the 1970s. The Court of Appeal [Waki JA] said the following about the title:

“Mughal was entitled to his property to the extent that such property did not encroach upon land that was a public purpose. It would otherwise be unlawful to superimpose a grant/certificate of title on land which is already lawfully alienated for public purpose”

69. Kiage JA rendered himself on the said title in the following words:

“It is nothing short of scandalous that in a case such as the one before us, (and it is by no means unique or unprecedented) a title holder, in this case the 1st respondent, finds himself deprived of the land itself and has title rendered worthless paper because, lo and behold, the land in question sits squarely within public land, being a road reserve. It did not become a road reserve by some recent action of Government. Rather, it turns out it was compulsorily acquired from an entity, of only historical significance now, called Villa Franca Dairies, back in the 1970s. The purpose for which it was acquired was the expansion of Mombasa Road.....

What creates a mental dissonance and assaults all logic is that though the disputed land was clearly part of public land, acquired by tax payers' money and set aside for a laudable public purpose, the Commissioner of Lands, by a Grant No 90629 dated 3rd December 2002, leased the same to some two people, Peter Njuguna and Beatrice Wanjiru as tenants in common for a period of 99 years from 1st March 1999.....

....courts of this country cannot countenance a situation where the public good is subjected to and sacrificed at the multifarious altars of private interests. Nor will they sit idly by and see land cartels, briefcase investors and speculators with high connections use public land as tickets to individual largesse in the wake of public pain or inconvenience. Government cannot compulsorily acquire land only for it to be gifted or otherwise conveyed to private individuals who have access to the shakers and movers for purposes of selling them off to line their pockets”

70. In **Chemey Investment Limited v Attorney General & 2 Others [2018]eKLR** the Court of Appeal said the following about titles relating to public land that was irregularly alienated:

“Decisions abound where courts in this land have consistently declined to recognise and protect title to land, which has been obtained illegally or fraudulently, merely because a person is entered in the register as proprietor. See for example Niaz Mohamed Jan Mohamed v. Commissioner for Lands & 4 Others [1996] eKLR; Funzi Island Development Ltd & 2 Others v. County Council of Kwale (supra); Republic v. Minister for Transport & Communications & 5 Others ex parte Waa Ship Garbage Collectors & 15 Others KLR (E&L) 1, 563; John Peter Mureithi & 2 Others v. Attorney General & 4 Others [2006] eKLR; Kenya National Highway Authority v. Shalien Masood Mughal & 5 Others (2017) eKLR; Arthi Highway Developers Limited v. West End Butchery Limited & 6 Others [2015] eKLR: Munyu Maina v Hiram Gathiha Maina [2013] eKLR and Milan Kumarn Shah & Others v. City Council of Nairobi & Others, HCCC No. 1024 of 2005. The effect of all those decisions is that sanctity of title was never intended or understood to be a vehicle for fraud and illegalities or an avenue for unjust enrichment at public expense.”

71. In light of the foregoing, my finding on the first issue is that Grant No IR 68678 held by Mr Omar Yakub and in which LR No 21639 is comprised is null and void. My finding on the second issue is that the said title relates to a road reserve that had been acquired by the Department of Roads for the expansion of the Nairobi-Thika Road in the 1960s and was never available for alienation as unsurveyed commercial plots.

72. The third issue in ELC Case No 553 of 2009 is whether the demolition carried out by the Ministry on the suit property on 1/11/2008 was lawful. The case of the plaintiff is that the demolition was carried out in blatant violation of a court order that had been issued in **Nairobi High Court Misc Application No 19 of 2008**. The order barred the Ministry against demolishing the structures that were on the suit property, pending the disposal of the judicial review application. I have looked at the order. On its face, there is evidence that it was received by the Ministry on 2/4/2008. It was contended without any contestation that following the Ministry’s disregard of the order, the relevant accounting officer was found guilty of contempt and penalized by the court. Further, there was no dispute about service of the order on the relevant accounting officer.

73. DW1 testified that the public project works which necessitated the clearance of the site related to one of the flagship projects in the Vision 2030; the project was of paramount importance to the Government; the works had to begin in a timely manner; and the funds had to be utilized expeditiously to achieve the desired social and economic goals. While I agree with the Attorney General that there was need for the site to be given to the contractor and for the project to commence promptly, there cannot be a justification for disregarding a court order. All that the Ministry needed to do was to request the Attorney General to swiftly move the court for an order of stay of the court order in the public interest. Our courts are expected to remain alive to the fact that where a court order exposes the public interest to injury, a motion seeking a stay of the order should be considered and disposed promptly. The recourse of stay of the court order is what the Ministry should have pursued.

74. What emerges from the evidence placed before this court is that the Ministry decided not to pursue the legal redress avenue available. They decided to disregard the court order and proceeded to demolish the structures that were on the suit property. This was certainly unlawful. It is therefore my finding that the demolition carried out on the suit property on 1/11/2008 was done in contravention of a court order and to that extent, it was unlawful.

75. The fourth issue in ELC Case No 553 of 2009 is whether Mr Omar Yakub is entitled to any of the reliefs sought in the amended plaint dated 7/12/2017. The plaintiff prayed for four principal reliefs. The first two are declaratory orders relating to the validity of the title held by Mr Omar Yakub and the legality of the demolition. The third relief related to general damages. The fourth relief is a plea for an order restoring the plaintiff into the suit premises. In addition, the plaintiff sought alternative reliefs including compensation equivalent to the value of the suit property as at 2/11/2017, being Kshs 197,000,000; compensation for the value of the demolished buildings in the sum of Kshs 65,000,000; medical expenses in the sum of Kshs 370,132; exemplary damages; interest and costs of the suit.

76. I have considered each of the above reliefs, taking into account the fact that I have already made a finding to the effect that the plaintiff’s title is null and void; at issuance the title related to a road reserve; and that the demolition that was carried out by the Ministry on 1/11/2008 was unlawful to the extent that it was done in breach of a valid court order. Evidence was tendered to the effect that much of the suit property is now a fully developed and motorable public road (Nairobi-Thika Highway). The tenor and import of the foregoing is that prayers (a) (d) and (e) are not available.

77. Because the Ministry elected not to pursue the legal route of removing the plaintiff from the suit property and disregarded the existing court order, the Kenyan tax payers will bear the burden of compensating the plaintiff by way of damages equivalent to the value of the structures that were demolished by the Ministry in disregard of the court order. The compensation sum was placed at Kshs 65,000,000. This assessment is supported by the report and valuation done by *M/s Joe Musyoki Consultants Limited*. It was produced as evidence. There was no controverting evidence tendered to challenge the valuation. I will in the circumstances award the plaintiff damages equivalent to the value of the demolished improvements in the sum of Kshs 65,000,000.

78. The plaintiff sought other limbs of damages. The view I take is that were it not for the disregard of the court order, the plaintiff would not have been entitled to any of the reliefs sought against the Ministry. I say so because there is evidence to the effect that the Ministry published a Gazette Notice requiring encroachers to vacate road reserves. Secondly, the Ministry published a notice in the print media reiterating the above. Thirdly, the Ministry marked the structures for demolition. I would in the circumstances not grant the plaintiff the other limbs of

damages over and above the damages awarded to him as a result of the fact that the demolition was effected in contravention of a subsisting court order.

79. The plaintiff sought medical expenses in the sum of Kshs 370,132. He contended that he was present and suffered a trauma when a bulldozed wall fell on him. However, no medical evidence was led to demonstrate that indeed the plaintiff suffered the alleged injury and that the invoices and/or receipts presented are related to the demolition. The court is therefore not satisfied that the plaintiff has made out a case for medical expenses of Kshs 370,132.

80. My finding on the fourth issue therefore is that the plaintiff, Mr Omar Yakub, is entitled to damages equivalent to the value of the demolished improvements in the sum of Kshs 65,000,000 because the demolition was carried out in contravention of a subsisting court order. The award will attract interest at court rate from the date of this Judgment.

81. The fifth issue in ELC Case No 553 of 2009 is whether the Attorney General, on behalf of the Ministry responsible for roads, is entitled to any of the reliefs sought in the counterclaim. The Attorney General sought: (a) general damages for trespass on the road reserve; (b) special damages being costs of removing the plaintiff's structures from the road reserve; (c) a declaration that the plaintiff's occupation of the road reserve was illegal; (d) a declaration that the plaintiff's title was null and void; (e) an order cancelling the plaintiff's title; (f) exemplary damages; and (g) costs of the suit. Bearing in mind the court's findings on the preceding issues, it follows that the title held by the plaintiff stands to be annulled. Consequently, the Attorney General is entitled to prayers (d) and (e). I will not grant the Attorney General the other reliefs on the principal ground that many of the key players in the generation of the impugned title were officers in the Ministry of Lands. They include the Commissioner of Lands, the Director of Surveys, and the Director of Physical Planning. They were the ones who purported to plan; allocate as unsurveyed plots; and survey a road reserve that was already surveyed and titled. This should never have happened. It is also noted that no evidence was tendered by the Attorney General to support the plea for costs of removing the structures from the suit property. It is therefore my finding that the Attorney General is in the circumstances only entitled to orders nullifying the title held by Mr Omar Yakub.

82. The issue relating to costs in ELC Case No 553 of 2009 will be disposed alongside the same issue in ELC Case No 552 OF 2009. I now turn to the two key issues in ELC Case No 552 of 2009.

83. The first issue in ELC Case No 552 of 2009 is whether Roy Hauliers (the company) was a lawful registered lessee of the suit property. The claim of the company was predicated on the fact that the company was a registered lessee in occupation of the suit property. Paragraphs 3, 5 and 6 of the further amended plaint which contains the foundation of their claim reads thus:

3. At all times material hereto, the plaintiff was registered as a lessee from Omar R Yakub, the registered proprietor of all that piece of land situated in the City of Nairobi measuring nought decimal four four three nought (0.4430) hectares comprised in the title number LR No 21639 (IR 68678) registered at the Land Registry in Nairobi within the Republic of Kenya (hereinafter referred to as "the suit property)

5. The Plaintiff established a transportation company within the premises. all operations including workshops, storage of spares, fuel, offices and parking of trucks was based on LR No 21639.

6. On the 1/11/2008, officials from the Ministry of Roads and Public Works wrongfully entered upon the said piece of land and committed acts of unlawful destruction of the multi-million shillings complex and other buildings erected thereupon.

84. Was Roy Hauliers Limited a registered lessee in respect of the suit property? My answer to the above question is that the plaintiff in ELC Case No 552 of 2009 [Roy Hauliers Limited] did not demonstrate, on a balance of probabilities, that it was a registered lessee of the suit property. The company produced three exhibits; (i) a lease agreement dated 21/12/1995; (ii) court order issued in Nairobi HC Misc Application No 19 of 2008; and (iii) claim report prepared by M/s Geomatrix Consulting. The lease was dated 21/12/1995. Firstly, the lease did not bear any entry indicative that it was registered. Secondly, it was unstamped. Thirdly, the exhibited lease was between Omar Rahemtulla Yakub (as landlord) and **Roy Spares and Hauliers Limited** (as the tenant). The plaintiff in ELC Case No 552 of 2009 [Roy Hauliers Limited] was not the tenant named in the lease. Fourthly, under clause 4, the said lease was for a term of ten (10) years from the date of execution. The ten-year period lapsed on 26/12/2005. There was no evidence of extension of the lease, which in any event related to a different company. In the absence of evidence of a registered lease and in the absence of any conclusive documentary evidence of a lease between Mr Omar Yakub and M/s Roy Hauliers Limited, it cannot be said that the plaintiff in ELC Case No 552 of 2009 has established a basis upon which the Kenyan tax payers would be condemned to carry the burden of meeting the claim presented by the plaintiff in the said case. It is not lost to the court that evidence was tendered to indicate that Omar Yakub was the majority shareholder in Roy Hauliers Limited and that he was the chairman of the company. Having chosen to bring a parallel claim, it was the obligation of the company to demonstrate that it held a registered lease relating to the impugned title and it was on the suit property on account of the registered lease. That evidential obligation was not discharged. It is therefore my finding that Roy Hauliers Limited failed to prove, on a balance of probabilities, that it was a registered lessee in occupation of the suit property at all material times.

85. Because the plaintiff in ELC Case No 552 of 2009 did not prove that it was a registered lessee in occupation of the suit property, it is my finding that it is not entitled to any of the reliefs sought against the Attorney general.

86. With regard to costs of the two suits and the Attorney General's counterclaim, it is noted that the two suits were heard simultaneously. The plaintiffs in the two suits were represented by the same law firm although separate trial bundles were prepared, filed and served. The Attorney General was the defendant in both suits. The claim of the plaintiff in ELC Case No 553 of 2009 has partially succeeded. Similarly, the counterclaim by the Attorney General in ELC Case No 553 of 2009 has partially succeeded. Further, the key authors of this dispute, such as the Government departmental heads who were behind the impugned alienation, together with the original allottees, are not parties to this suit. Taking the above circumstances into consideration, I order that parties to the two suits and to the counterclaim shall bear their respective costs.

Summary of Findings

87. In summary, my findings on the key issues in ELC Case No 553 of 2009 are that: (i) Grant Number IR 68678 held by Mr Omar Yakub and in which Land Reference Number 21639 is comprised is null and void; (ii) The said title relates to a road reserve that had been compulsorily acquired by the Department of Roads for expansion of the Nairobi-Thika Road in the 1960s and was not available for alienation as unsurveyed commercial plots; (iii) The demolition carried out by the Ministry on the suit property on 1/11/2008 was done in contravention of a court order, and to that extent, it was unlawful; (iv) Mr Omar Yakub is only entitled to damages equivalent to the value of the demolished improvements on the suit property in the sum of Kshs 65,000,000 because the demolition was carried out in contravention of a subsisting court order; (v) The Attorney General is entitled to orders nullifying the title held by Mr Omar Yakub; and (vi) Parties in ELC Case No 553 of 2009 shall bear their respective costs of the suit.

88. My findings on the key issues in ELC Case No 552 of 2009 are that: (i) Roy Hauliers Limited has failed to prove, on a balance of probabilities, that it was a registered lessee in occupation of the suit property at all material times; (ii) Because Roy Hauliers Limited has not proved that it was a registered lessee in occupation of the suit property, it is not entitled to any of the reliefs sought in the plaint; and (iii) Parties to ELC Case No 552 of 2009 shall bear their respective costs of the suit.

Disposal Orders

89. In the end, the plaintiff's claim in ELC Case No 553 of 2009; the Attorney General's counterclaim in ELC Case No 553 of 2009; and the plaintiff's claim in ELC Case No 552 of 2009 are disposed as follows, in tandem with the respective reliefs sought and the findings of the court on the key issues in the two primary suits and in the Attorney General's counterclaim:

a. Mr Omar R Yakub, the plaintiff in ELC Case No 553 of 2009, is hereby awarded Kenya Shillings Sixty-Five Million (Kshs 65,000,000) as damages equivalent to the value of the improvements that were demolished by the Ministry responsible for roads on 1/11/2008 on Land Reference Number 8369/1, which piece of land had been irregularly alienated and registered by the Department of Lands as Land Reference Number 21639 comprised in Grant Number IR 68678, principally because the said demolition was carried out in contravention of a subsisting court order. Interest shall accrue at court rate from the date of judgment.

b. It is hereby declared that Grant Number IR 68678 in which Land Reference Number 21639 is comprised and which is held by Mr Omar R Yakub was obtained illegally and is null and void because it relates to an already surveyed and registered land that was compulsorily acquired for expansion of Thika Road and was not available for alienation as unsurveyed commercial plots.

c. It is hereby ordered that the Chief Land Registrar shall cause the said Grant Number IR 68678 comprising of Land Reference Number 21639 to be cancelled forthwith.

d. The rest of the reliefs sought in the primary suit and in the counterclaim in ELC Case No 553 of 2009 are declined.

e. The plaintiff's suit in ELC Case No 552 of 2009 is dismissed for lack of merit.

f. Parties shall bear their respective costs in the two primary suits and in the Attorney General's counterclaim.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5TH DAY OF AUGUST 2021

B M EBOSO

JUDGE

In the Presence of: -

Mr Obuya for the Plaintiffs

Mr Allan Kamau for the Defendant

Court Assistant: June Nafula