



Offshore Trading Company Limited v Attorney General & 2 others; Kenya Deposit Insurance Corporation (Interested Party) (Environment & Land Petition 4 of 2021) [2025] KEELC 106 (KLR) (23 January 2025) (Judgment)

Neutral citation: [2025] KEELC 106 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION 4 OF 2021
OA ANGOTE, J
JANUARY 23, 2025**

BETWEEN

OFFSHORE TRADING COMPANY LIMITED PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

NAIROBI COUNTY GOVERNMENT 2ND RESPONDENT

NAIROBI WATER AND SEWERAGE COMPANY LIMITED 3RD RESPONDENT

AND

KENYA DEPOSIT INSURANCE CORPORATION INTERESTED PARTY

JUDGMENT

1. Before the Court for determination is the Petitioner’s Amended Petition dated 23rd June 2022. The Petitioner is seeking for:
 - a. A declaration that the Petitioner is entitled to quiet and peaceful possession, use and exercise of full proprietary rights over its land L.R. No. 12979/3 I.R. No. 61844 (hereinafter ‘the suit property’) without any interference, hindrance or permission of the Respondents save as stipulated in the subject title lease.
 - b. A permanent order of injunction restraining the Respondents, their agents, servants or any other persons acting under their direction from interfering with the Petitioner’s ownership, possession and use of the suit property.



- c. A declaration that the Respondents can only deprive the Petitioner of its property through the powers of compulsory acquisition subject to due process as stipulated in the Constitution and applicable law.
 - d. The Honourable Court do grant general damages to the Petitioner against the 1st and 3^d Respondent for contravention of the Petitioner's rights.
 - e. An order quashing Kenya Gazette Notice No. 3829 of 3rd June 2020 in so far as it declares the suit property as a protected area.
 - f. A mandatory injunction directing the Respondents, their agents, servants or any other persons acting under their direction to vacate the suit property and grant the Petitioner quiet possession.
 - g. In the alternative, an order commanding the 1st Respondent to compensate the Petitioner in the sum of Kshs. Fifteen Billion Seven Hundred Million (Kshs. 15,700,000,000) being the cost of the suit property and the consultancy fees incurred by the Petitioner in respect to the development of the suit property.
 - h. Any other order that the Court may deem fit to grant.
 - i. That the Respondents do meet the costs of the Petitioner.
2. The Petitioner averred that it acquired the suit property in 1993 from the Nairobi City Council. In the transaction between the two parties, the Petitioner averred, it surrendered L.R No. 18170 which measured 405.15 hectares to the Nairobi City Council in exchange for the suit property for which it paid Kshs. 15,150,000.
 3. The Petitioner averred that it has been in possession of the suit property since then with no interference from the Nairobi City Council nor its successor the Nairobi County Government.
 4. The Petitioner further averred that on 4th June 2010, the 1st Respondent acting through the registrar of titles attempted to revoke its title vide Kenya Gazette Notice No. 6220; that it instituted Petition No. 51 of 2011 in which a consent order was entered between it and the 1st Respondent and that the order set aside/quashed the Gazette Notice as well as any changes that had been effected in the land/survey records relating to the its land.
 5. The Petitioner stated that the Respondents disregarded the consent order when on the 22nd of April 2020 the Principal Secretary Water, Sanitation and Irrigation, the Principal Secretary Land and Physical Planning and the Cabinet Secretary Interior and Co-ordination proclaimed the seizure and repossession of the suit property which measures 404.58 hectares.
 6. It was averred in the Petition that the repossession was on the ground that the suit property was part of the Dandora Estate Waste Management Plant; that the suit property was given a new number - LR. No. 28707 and that on 3rd June 2020, the Cabinet Secretary Interior and Coordination by Kenya Gazette Notice No. 3829 declared the suit property to be a protected area and evicted all persons including its agents.
 7. The Petitioner stated that the actions of the Respondents amounted to a forceful repossession and deprivation of property contrary to Article 40 of the Constitution of Kenya, and that as per Article 22(1) of the Constitution, it has the right to institute the current proceedings.
 8. The 1st Respondent filed a Replying Affidavit dated 23rd March 2022 and sworn by Dr. (Eng.) Karanja Kibicho, the then Principal Secretary in the Ministry of Interior and Coordination. He averred that



various parcels of land were set aside in different parts of the City of Nairobi for the purpose of water treatment and sewage disposal.

9. According to the 1st Respondent, the suit property (L.R No. 12979/3) was hived off L.R No. 12979 which had been set aside by the government as public utility land for the construction of the Dandora Sewerage Treatment Plant in Ruai; that the first phase of construction started in 1975 and the second in 1985; that the expansions were done in 2012 and 2014 and that the third phase was to commence in 2020.
10. The deponent stated that since the suit property had been set aside as public utility land, it was not available for private alienation. He further stated that the lease that the Nairobi City Council issued the Petitioner was consequently unlawful.
11. Concerning Gazette Notice No. 3829 of 2020, the deponent stated that the same was an effort to stop the grabbing of land earmarked for public works such as the parent suit property which initially measured 4240 hectares but had been reduced to 1637 hectares by grabbers and that it is for the foregoing reasons that the government issued a title to the suit property to the then Ministry of Local Government in 2010.
12. The deponent averred that based on expert advice, the location of the suit property is ideal for the construction of a sewerage treatment plant as it is the lowest point of the city. He further averred that if the land grabbers are allowed to remain on the land, it would be impossible for the government to find another ideal parcel of land.
13. The 1st Respondent filed a second replying affidavit sworn by Dr. (Eng.) Joseph Njoroge the then Principal Secretary in the Ministry of Water, Sanitation and Irrigation, who reiterated the contents of the first affidavit.
14. The 2nd Respondent filed an affidavit dated 22nd February 2022 and sworn by Abwao Eric Odhiambo, the Acting County Solicitor. He deponed that there have been incidences of individuals irregularly acquiring parcels of land that have been set aside for a public purpose.
15. The 2nd Respondent's solicitor general deponed that a perusal of the 2nd Respondent's archives did not yield any records that explains the exchange between L.R No. 1870, I.R No. 58567/1 and the suit property, and that there were no title documents for L.R No. 1870 which was supposedly surrendered to the 2nd Respondent by the Petitioner.
16. Concerning the suit property, the deponent stated that the Petitioner colluded with agents of the 2nd Respondent's predecessor to acquire the same illegally; that at the time the suit property was allocated, the practice was to have the allocation approved by a meeting of the Town Council Planning Committee, and that in the absence of evidence that such a meeting happened, the deponent stated that the Petitioner's title was not validly issued and should be revoked.
17. With regards to the consent entered into in Petition No. 51 of 2011, the deponent averred that the suit was filed against an individual (George G. Gachihi) who was the Registrar of Titles for Nairobi District. In the deponent's view, the said George Gachihi had no locus to enter the consent as an individual nor on behalf of the 2nd Respondent.
18. In conclusion, the 2nd Respondent stated that the Petition as framed discloses no reasonable cause of action against the 2nd Respondent as the Petitioner's allocation of the suit property was irregular and corrupt.



19. The 3rd Respondent filed a Replying Affidavit dated 21st February 2022 and sworn by Stanley Kimani a Survey Coordinator at the 3rd Respondent. He deponed that the suit property was hived off L.R No. 12979 which had been set aside for public utility purpose of constructing a sewage disposal plant.
20. According to the 3rd Respondent, over time, the properties were encroached upon by private individuals who have purported to assert ownership. The deponent called into question the Petitioner's lease over the suit property stating that the Petitioner had not produced any documentary evidence supporting such ownership and should therefore not be protected by the Court.
21. The deponent stated that the growing population in the city has necessitated the expansion of sewage disposal services; that the gazette notice that declared the suit property a protected area was therefore rightfully issued as it will enable the staff of the 3rd Respondent to work on the expansion of the sewer plant without interference and that granting the reliefs sought in the Petition will be contrary to public policy as the failure to improve sewage disposal works will infringe on the right of Nairobi residents to enjoy a clean environment.
22. In conclusion, the deponent stated that the Petition as framed discloses no reasonable cause of action against the 3rd Respondent and should be dismissed.
23. The Interested Party filed a Replying Affidavit dated 23rd May 2022 and sworn by Caroline Mutungi, the Resolution Manager for the Interested Party. She stated that the Interested Party is the current liquidating agent for Post Bank Credit Limited.
24. According to the Interested Party, Post Bank had advanced the Petitioner a facility and charged the suit property; that before the charge was registered on 9th March 1994, a search was conducted and no reservation was noted on the title and that Post Bank acquired a legal interest in the suit property and should consequently be consulted before any action affecting such interest is taken.
25. It was stated that the Petitioner owes the Interested Party Kshs. 19,807,234,251.20. In conclusion, the deponent stated that the declaration of the suit property as a protected area without taking into consideration the interest of the Interested Party was a violation of its rights and a breach of the consent entered into by the parties on 30th April 2013.
26. The Petitioner filed a supplementary affidavit dated 8th May 2022 in response to the affidavits of the 1st and 3rd Respondents. The same was sworn by Shakhhalaga Khwa Jirongo, the Petitioner's General Manager, who deponed that the 2nd Respondent's predecessor leased the suit property to the Petitioner for valuable consideration.
27. The Petitioner's General Manager deponed that the Petitioner was granted several letters of allotment (that have been lost over the years) that were consolidated into one title and that the lease held by the Petitioner over the suit property constitutes a private contract between the Petitioner and the 2nd Respondent.
28. The deponent stated that the 1st Respondent's arbitrary and continued occupation of the suit property has occasioned great financial and contractual losses to the Petitioner and that the 1st Respondent should be ordered to vacate the suit property or in the alternative compensate the Petitioner for the losses valued as follows: Kshs. 15,000,000,000 for the land and Kshs. 700,000,000 for consultancy fees.
29. In conclusion the Petitioner's General Manager stated that the 1st Respondent had not proved that the suit property had been set aside for public use nor had it provided any legal justification for declaring the suit property a protected area.



30. The Petitioner's General Manager filed a further affidavit sworn on 19th January 2023 in which he deponed that the suit property had been recently valued and annexed the valuation report. He also maintained that based on the material presented before the Court, the suit property had been duly allocated to the Petitioner.
31. The Petitioner filed another further affidavit dated 26th February and sworn by Shakhalaga Khwa Jirongo, who deponed that there were correspondences between the 2nd Respondent's predecessor and the Petitioner's advocates concerning the allocation and payment for the suit property.
32. Concerning the swap/surrender, the deponent averred that L.R No. 1870 was located in present day Nyayo Embakasi Estate; that the land was subdivided and allocated to individuals who later sold it to NSSF, and that the Petitioner should not be burdened by the 2nd Respondent's chaotic record keeping.
33. The deponent noted that the suit property's title was issued at a time when the 2nd Respondent's predecessor was run by a commission; that the title was prepared by the said predecessor's advocate and sealed with the Common Seal of the City Council in the presence of its town clerk, Zipporah Wandera; that the minutes of the 2nd Respondent's predecessor and its committees were not kept by the Petitioner, and that the party to produce them would be the 2nd Respondent.
34. The deponent stated that the position set forth by the 2nd Respondent in its affidavit is contrary to that espoused by officers higher in rank than the County Solicitor; that the County Attorney had written a letter noting that he was not opposing the Petition and that this was in line with the position of the previous Town Clerks concerning the ownership of the suit property.
35. Concerning the impugned consent, the Petitioner's General Manager deponed that it was entered into after extensive consultations between the Petitioner, Permanent Secretary Office of the Deputy Prime Minister, Ministry of Local Government, Office of the Attorney General and the Town Clerk Nairobi City County.
36. He further averred that as per the terms of the consent, the National Government acceded to the cancellation of a title issued in its favour as it was discovered that the reversionary title was held by the 2nd Respondent's predecessor who had leased it to the Petitioner.
37. The deponent noted that there was no new circumstance since the consent was entered into that would necessitate or justify the attempted repossession of the suit property.
38. In conclusion, the deponent noted that the 1st Respondent had adopted a position contrary to that stated in its affidavits when on 15th December 2023 it voluntarily revoked the gazette notice that had declared the suit property a protected area.

Submissions

39. The Petitioner's counsel filed submissions on 3rd October 2023. It was submitted that the 1st Respondent, despite opposing the Petition had not produced any evidence to support the claims in their replying affidavits. It was further submitted that the 1st Respondent had not produced documentary evidence of the following: the title to the suit property, the Nairobi Metropolitan Growth Strategy 1973, the part development plan reserving the suit property as a sewerage treatment plan and the expert opinions referred to in the Replying Affidavits.
40. The Petitioner's counsel submitted that at the time of swearing the affidavits and soon after that, the 1st Respondent was aware that the Petitioner was the rateable owner of the suit property and that the 2nd Respondent held the reversionary interest to the suit property.



41. These facts, it was submitted, had been communicated vide letters dated 14th April 2022 and 19th June 2022. The letters were copied to the solicitor general and Dr. (Eng.) Joseph Njoroge. In the Petitioner's counsel's view, the 1st Respondent was consequently aware of that the Petitioner's ownership of the suit property was not unlawful.
42. It was also the Petitioner's counsel's view that the National Government had no locus to interfere with the lessor and lessee relationship between the Petitioner and the 2nd Respondent.
43. Relying on Articles 22, 40, 186 and 189 of the Constitution of Kenya, the Petitioner's counsel submitted that the 1st Respondent had violated the Petitioner's rights by overstepping its mandate to interfere with the dealings between the Petitioner and 2nd Respondent and in the process violating the Petitioner's property rights.
44. The Petitioner submitted that the actions of the 1st Respondent had caused it harm by amongst other things: invading the suit property; declaring the suit property a protected area; posting armed guards on the suit property and causing the Petitioner to halt its development plans. The Petitioner's counsel submitted that an award of Kshs. 1,000,000,000 would be reasonable in the circumstances.
45. In the alternative, the Petitioner's counsel submitted that if the 1st Respondent was keen to compulsorily acquire the suit property, it should pay the Petitioner 125% of the value of the suit property, and that as per a valuation report on record, the value of the suit property was placed at Kshs. 10,000,000,000 and an additional Kshs. 486,567,775 was incurred in land rates and professional fees.
46. The cases of David Gitau Thairu vs County Government of Machakos, Governor, County Government of Machakos & Attorney General [2020] eKLR and Wilfred Juma Wasike, Joseph Wanjala Khaemba, John Wanyonyi Khisa, Isaac Wekesa Makokha, Harrison Wabwire Khisa, William Kundu Ayuma, Stanley Shikuku, Pius Wanyama Mabonga, Josephat Makokha, Constant Simiyu Khaemba, Nashon Wanjala & Pius Walucho (Suing As Members Of Matisi Centre Self- Help Group) vs Ministry Of Interior And Co-Ordination & Attorney General [2022] KEELC 772 (KLR) were relied upon.
47. The 1st Respondent's counsel filed submissions on 24th July 2024. It was submitted that the suit property was public land that had in 1973 been alienated for public use of construction of a sewerage plant.
48. Relying on the cases of Republic vs Commissioner of Lands, Director of Survey, City Council of Nairobi, Cami Graphics Limited & Ntemi Limited Ex parte Associated Steel Limited [2014] KEHC 2498 (KLR), Dorice Atieno Rajoru & 145 others vs Mjahid Suo-Chairman Harambee Maweni Committee Self Help Group, Reichard Baya- Treasurer Harambee Maweni Committee Self Help Group & Moiz Fazle Abbas Tayabali Rajabali [2016] KEELC 554 (KLR) and Kenya National Highway Authority vs Shalien Masood Mughal, Attorney General, Minister of Roads China Road and Bridge Corporation, Chief Engineer (Ministry of Roads) & Commissioner of Lands [2017] KECA 465 (KLR) the 1st Respondent submitted that the suit property could consequently not be alienated for private use.
49. In conclusion, the 1st Respondent submitted that the Petitioner's title to the suit property should be cancelled as it had been irregularly and unlawfully acquired. It was further submitted that the Petitioner had failed to demonstrate how it had acquired a lease over the suit property.
50. Section 26 of the Land Registration Act and the case of Chemey Investment Limited vs Attorney General, Permanent Secretary Ministry of Health & Ethics & Anti-Corruption Commission [2018] KECA 863 (KLR) were relied upon.



51. The 3rd Respondent's counsel filed submissions on 30th January 2024. It was submitted that there was an unexplained link on how the Petitioner came to own the suit property, and specifically how the swap of L.R No. 18170 with the suit property happened.
52. It was further submitted that public utility land is held in trust for the people and should not be alienated for public use. The cases of Dorice Atieno Rajoru (Supra), Kipsirgoi Investments Ltd vs Kenya Anti-Corruption Commission [2011] KECA 326 (KLR) and Daudi Kiptugen vs Commissioner of Lands Nairobi Lands, Chief Lands Registrar Nairobi, The Hon. Attorney General, Heldo Food Stuff Limited & District Land Registrar Eldoret [2015] KEELC 674 (KLR) were relied upon.
53. In conclusion, it was submitted that since the Petitioner had not satisfactorily explained how it acquired the title of the suit property, the same should be revoked.
54. The 2nd Respondent's counsel filed submissions on 30th January 2024. The 2nd Respondent's counsel called into question the Petitioner's ownership of the suit property, specifically the swap that the Petitioner averred happened.
55. The 2nd Respondent noted that no documentary evidence of the swap was produced by the Petitioner. Additionally, the 2nd Respondent's records did not yield any evidence of the same nor of any Town Planning Committee meeting allowing the swap, if at all.
56. The 2nd Respondent's counsel also noted that in the swap, the Petitioner gained land measuring 405.15 hectares and gave away land measuring 404.58 hectares. This was against the law that requires an equal exchange.
57. The 2nd Respondent's counsel submitted that the Petitioner had failed to prove how it acquired L.R No. 18170. It was further submitted that the procedure for exchange that has been espoused by the Petitioner is unknown in the protocols of the 2nd Respondent. In the 2nd Respondent's view, the purported exchange of the above mentioned parcel of land for the suit property was therefore void ab initio.
58. The 2nd Respondent's counsel also submitted that the Petitioner should not be protected under Article 40 of the *Constitution* as the Article does not extend to property that has unlawfully been acquired. The 2nd Respondent maintained that the suit property was unlawfully acquired.
59. Relying on Articles 62 and 66 of the *Constitution* and Section 9(2) of the *Land Act*, the 2nd Respondent submitted that the state is empowered to regulate the use of land for among other things public health and land use planning.
60. The Interested Party's counsel submitted that the Petitioner's ownership of the suit property had been confirmed by the following: a letter dated 9th March 2012 in which the 1st Respondent confirmed the exchange of titles and a letter dated 14th April 2022 in which the 2nd Respondent admitted that the suit property belonged to the Petitioner and the 2nd Respondent would not be opposing the suit property.
61. Counsel also relied on a letter dated 13th March 2014 in which the National Land Commission confirmed the Petitioner as the proprietor of the suit property; a letter dated 9th March 2012 in which the 2nd Respondent's predecessor confirmed that the suit property belongs to the Petitioner and a letter dated 30th March 2012 in which the 1st Respondent acknowledged that the suit property had been issued to the Petitioner and could therefore not be issued to the Ministry of Local Government.



62. It was averred that based on the foregoing, the Respondents are estopped from denying the Petitioner's ownership of the suit property. The case of Republic vs Institute of Certified Public Secretaries of Kenya Ex-parte Mundia Njeru Geteria [2010] KEHC 4103 (KLR) was relied upon.
63. The Interested Party's counsel also submitted that the Petitioner's right to the suit property was determined by a Court order dated 3rd April 2013. This Court, it was submitted, should therefore not reopen the same as it would amount to sitting on an appeal of a Court of concurrent jurisdiction.
64. The cases of Accredo AG, Salama Beach Hotel Limited, Hans Juegen Langer & Zahra Langer vs Stefano Uccelli & Isaac Rodrot [2019] KECA 385 (KLR) and Bellevue Development Company Ltd vs Gikonyo & 3 others; Kenya Commercial Bank & 3 Others (Interested Parties) [2018] KECA 330 (KLR) were relied upon.
65. In conclusion it was submitted that the Respondents taking possession of the suit property was an illegal, unlawful and arbitrary deprivation of the Petitioner's right to property.
66. The Petitioner's counsel filed a reply to submissions on 12th July 2024. It was submitted that the Petitioner had placed before the Court: a letter of allotment dated 30th March 1992; receipts for the allotment for Kshs. 15,150,000 and Kshs. 10,100,000 respectively; a bankers cheque of Kshs. 94, 750, 250 being payment for the allotment of L.R No. 18170; and a lease of ninety-nine years beginning 1st April 1992.
67. The Petitioner's counsel submitted that that the Respondents have not produced any evidence to impeach/dislodge these documents.
68. The Petitioner's counsel submitted that since the consent order has neither been reviewed nor impugned, it acts as a complete bar to the Government preventing it from revoking the Petitioner's title. In conclusion, the Petitioner stated that Gazette Notice No. 16993 of 11th December 2023 amended the earlier Gazette Notice No. 3829 of 2020. The consequence of the amendment, it was submitted, was the removal of the suit property from the proclamation of protected areas.
69. It was submitted by counsel for the Petitioner that security forces had been withdrawn from the suit property. In the Petitioner's counsel's view, this amounts to an admission by the 1st Respondent that the invasion and occupation of the suit property was unlawful.

Analysis and Determination

70. Based on the foregoing, the following issue arises for determination:

Whether the Petitioner has met the threshold for grant of orders under Article 40 of the [Constitution](#).

71. Article 40 of the [Constitution](#) provides as follows:

- “(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
 - (a) of any description; and
 - (b) in any part of Kenya.
- (2) Parliament shall not enact a law that permits the State or any person—



- (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
 - (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).
- (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—
- (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
 - (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—
 - (i) requires prompt payment in full, of just compensation to the person; and
 - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.
- (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.
- (5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.
- (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

72. The Petitioner has averred that it acquired the suit property from the 2nd Respondent’s predecessor in a lawful process where it surrendered another parcel of land and acquired/paid for the suit property.
73. The Petitioner has further averred that it was in uninterrupted occupation of the suit property until 2020 when the 1st Respondent arbitrarily took it over. The 1st and 3rd Respondents have averred that the suit property was unlawfully acquired because it was reserved for the public purpose of construction of a sewerage treatment plant and was consequently not available for alienation.
74. It was further averred by the Respondents that the construction of the sewer treatment plant was a matter of public interest. The 2nd Respondent averred that it did not have any records of the swap referred to by the Petitioner.
75. Additionally, it was stated by the 2nd Respondent that the Petitioner’s acquisition of the suit property was not discussed by the Town Planning Committee as was required by the law then. In view of the foregoing, the 2nd Respondent averred that the Petitioner’s title was unlawfully acquired.
76. For the Petitioner to benefit from the protection of Article 40 of the *Constitution*, the Court first needs to be satisfied that suit property was not unlawfully acquired (see Article 40 (6) of the *Constitution*).



77. Section 26(1) of the *Land Registration Act* provides as follows:

- “(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.”

78. In the case of *Dina Management Limited vs County Government of Mombasa & 5 Others* [2023] KESC 30 (KLR) the Supreme Court stated as follows:

“It is not enough for a party to state that they have a lease or title to the property. In the case of *Funzi Development Ltd & others v County Council of Kwale*, Mombasa Civil Appeal No 252 of 2005 [2014] eKLR the Court of Appeal, which decision this court affirmed, stated that:

“...a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot on the basis of indefeasibility of title sanction an illegality or gives its seal of approval to an illegal or irregularly obtained title.”

Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible. The first allocation having been irregularly obtained, HE Daniel Arap Moi had no valid legal interest which he could pass to Bawazir & Co (1993) Ltd, who in turn could pass to the appellant.

Article 40 of the *Constitution* entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired. Having found that the 1st registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under article 40 of the *Constitution*.”

79. The Respondents have argued that the suit property was unlawfully acquired on two fronts. The first is that the suit property was hived off L.R No. 12979 which was public utility land.

80. The law on public utility land was stated as follows in the case of *Republic vs Commissioner of Lands, Director of Survey, City Council of Nairobi, Cami Graphics Limited & Ntemi Limited Ex parte Associated Steel Limited* [2014] KEHC 2498 (KLR):

“It is thus our holding that the disputed plot having already been set aside as a public utility plot the same was held in trust by the 1st Respondent for the public and public purposes



and was not available for further alienation and could not at any rate be allocated to a private developer as a commercial plot.”

81. Section 107 (1) of the *Evidence Act* provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
82. A finding that the suit property was set aside for a public purpose would render the Petitioner’s acquisition unlawful. However, it was incumbent upon the 1st Respondent, the party who desires the Court to make such a finding, to provide evidence of the same.
83. The 1st Respondent did not produce in evidence any titles nor maps relating to L.R No. 12979. The 1st Respondent did not produce any evidence of the phased construction of the sewerage treatment plant or of the expert’s opinions that the sewerage treatment plant ought to be on the suit property.
84. However, they produced an undated letter written by the Acting Director of City Planning. That letter expressed concern that the land which had been reserved for a public purpose had been encroached upon by a private developer.
85. The Respondents also produced a memo dated 22nd April 2020 and a Gazette Notice dated 3rd June 2020. The memo noted that the government was embarking on an operation to repossess 3000 acres of sewerage treatment land that had been grabbed by private entities. The Gazette Notice declared the suit property a protected area.
86. In my view, the documents produced by the 1st Respondent prove that they took action in 2020 to protect what they perceived was public land. They did not however prove that the suit property was indeed public land. Consequently, the claim that the suit property was unlawfully acquired because it was public land fails.
87. The other claim of unlawful acquisition is by the 2nd Respondent who argued that there was no evidence of the swap referred to by the Petitioner. It was also argued that there was no evidence that a Town Planning Committee meeting was held before the acquisition. Consequently, it was argued, the 2nd Respondent did not alienate the suit property in favour of the Petitioner.
88. The procedure for allocation of unalienated land belonging to the County Government of Nairobi before the devolved government system was stated as follows in the case of *Ikiao & another vs Kamencu* [2024] KEELC 4325 (KLR):

“Moreso, the Plaintiffs submitted that the process of plot allocation before the advent of the devolved system started with the application, followed by deliberations in the town planning and markets committee, and finally, the deliberations of the full council meeting, which would regularize the allocations.”
89. The Petitioner has stated that its title was prepared by an advocate and affixed with the Common Seal of the 2nd Respondent’s predecessor. This process was witnessed by the then town clerk. The Petitioner also averred that subsequent town clerks were of the view that the Petitioner’s title was legitimate.
90. However, as the Supreme Court stated in the *Dina Management Case* (Supra), a title is the end of a process. No evidence was produced to show that the Town Planning Committee meeting which was a requisite part of the process of regularizing the allotment of land was ever held.



91. Additionally, as per the evidence on record, the correspondence about payments between the Petitioner's advocates and the 2nd Respondent's predecessor refers to L.R. No. 18170 and not the suit property.
92. The Petitioner stated that it paid Kshs. 15,150,000 for the suit property. However, the evidence on record shows that that amount was paid for L.R No. 18170. There is no evidence on record of any payments made by the Petitioner for the suit property.
93. Further, the letters of allotment on record are for portions of L.R No. 18170 measuring 250ha. There are no allotments letters for the suit property. The fact that the swap involving such big tracts of land is only evidenced in the title document, without the requisite written agreements or minutes, invalidates the swap, if at all it happened.
94. In view of the foregoing it seems that the Petitioner is waving a title whose process of acquisition is questionable and did not comply with the law that was in place at the time.
95. That being so, I find that the claim of unlawful acquisition of the suit property as raised by the 2nd Respondent has been proven. The Petitioner claimed to have acquired the suit property from the 2nd Respondent's predecessor but failed to prove that the predecessor's processes were followed.
96. While the Respondents had admitted to interfering with the suit property by declaring it a protected area, the Court cannot find that the Petitioner's rights under Article 40 were violated. This is because the Article does not apply to property that was unlawfully acquired.
97. On the issue of the consent that was entered into in the previous suit in respect of the suit property, it is the finding of this court that a consent between parties cannot usurp a constitutional provision, in this case Article 40 (6), and especially where the some of the parties herein were not part of the consent.
98. For those reasons, the court finds the Petition to be unmeritorious, and the same is hereby dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 23RD DAY OF JANUARY, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Pamba for 3rd Respondent

Mr. Koyyoko for Petitioner

Mr. Kamara for interested party

Mr. Menge for 1st Respondent

Court Assistant - Tracy

