



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

PETITION NO. E003 OF 2021

IN THE MATTER OF

THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF

ARTICLE 2(1) (2) (4) (5) (6), ARTICLE 3(1), ARTICLE 10, ARTICLE 19,

ARTICLE 20 (1) (2) (3) (4), ARTICLE 21 (1), ARTICLE 22 (1) (3) (4),

ARTICLE 23 (1) (3), ARTICLE 24 (1) (2) (3), ARTICLE 40, ARTICLE 50 (1),

ARTICLE 60 (1) (b), ARTICLE 64 (b), ARTICLE 73, ARTICLE 159,

ARTICLE 160, ARTICLE 165, ARTICLE 258 & ARTICLE 259

AND

IN THE MATTER OF

ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS

OF AN INDIVIDUAL AS ENshrined IN ARTICLES 10,19,25 (c),27,28,29,35,

40,43,47,50,60 (1) (b), 73 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER

OF THE LAND REGISTRATION ACT SECTIONS 24,25 &26 THE FAIR

ADMINISTRATIVE ACTION ACT, THE COUNTY GOVERNMENT ACT,

THE URBAN AREAS & CITIES ACT, THE KISUMU COUNTY PUBLIC

PARTICIPATION ACT 2015, THE LEADERSHIP AND INTEGRITY ACT &

THE PUBLIC OFFICER ETHICS ACT

AND

IN THE MATTER OF

**THE CONSTITUTION OF KENYA (PROTECTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE RULES,2013**

BETWEEN

AMALO COMPANY LIMITED.....PETITIONER

AND

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE KENYA RAILWAYS CORPORATION..... 2ND RESPONDENT

COUNTY GOVERNMENT OF KISUMU..... 3RD RESPONDENT

KISUMU LAKEFRONT DEVELOPMENT LIMITED.....4TH RESPONDENT

KENYA URBAN ROADS AUTHORITY..... 5TH RESPONDENT

KISUMU CITY BOARD.....6TH RESPONDENT

RULING

Introduction

Amalo Company Limited (hereinafter referred to as the Petitioner) has come to *this court against*, **The Hon. Attorney General, The Kenya Railways Corporation, the County Government Of Kisumu, Kisumu Lakefront Development Limited, Kenya Urban Roads Authority, Kisumu City Board**, (hereinafter referred to as the respondents) by way of Petition dated 3rd February 2021 and filed in court on 3rd February 2021 is seeking a declaration that the actions of the Respondents are illegal, unlawful and unconstitutional and in contravention of the fundamental rights and freedoms of the Petitioner and therefore null and void.

The petitioner further seeks a declaration that the Petitioner's constitutional rights to human dignity, the rule of law, participation of the people, good governance, fair administrative action and fair hearing as guaranteed by Articles 25 (c),27,28,29,47 &50 of the Constitution have been violated and/or threatened to be violated by the Respondents, their agents, servants, officers and/or employees and a declaration that the Petitioner's enjoyment of its rights in Article 40 and 60 (1) (b) to won, access, occupy and use its properties Kisumu Municipality/Block 3/182-3/186, have been grossly violated and infringed and that those rights have been limited and restricted by the actions of the Respondents jointly and severally and a declaration that the actions of the Respondents severally and jointly to enter into, invade the Petitioner's properties and erect a fence barring access to the properties with the intention of blocking access and egress into and out of the properties and interfering with the quiet enjoyment thereof without its consent, permission or concurrence and against its will protected by Articles 40 &60 of the Constitution is a violation of the Petitioner's Constitutional right to fair administrative action and fair hearing protected by Articles 47 & 50 of the Constitution.

The petitioner further seeks a declaration that the Petitioner's Constitutional right not to be deprived of its properties and more specifically the properties Kisumu Municipality/Block 3/182,3/183,3/184,3/185 and 3/186 has been violated by the actions of the Respondents jointly and severally and a declaration that the Petitioner has been wrongfully, unlawfully, unconstitutionally and arbitrarily deprived of its properties specifically the properties Kisumu Municipality/Block 3/182,3/183,3/184,3/185 and 3/186 by the actions of the Respondents jointly or severally in violation of Article 40 (3) of the Constitution.

The petitioner further seeks a declaration that the Petitioner's enjoyment of its rights in Article 40 (7) (b) to access, occupy and use its properties Kisumu Municipality/Block 3/182,3/183,3/184,3/185 and 3/186 have been violated and those rights have been limited and restricted by the actions of the Respondents jointly and severally and a declaration that the actions of the Respondents jointly and severally to enter into, invade the Petitioner's properties and block or obstruct access thereto without its consent, permission, concurrence and against its will and without following due Constitutional and statutory processes is a violation of the Petitioner's Constitutional right to fair administrative action ad fair hearing protected by Article 47 of the Constitution.

Moreover, the petitioner seeks a prohibitory Injunction be issued prohibiting the Cabinet Secretary for Interior and Coordination of National Government, the Cabinet Secretary for Transport, Infrastructure, Housing and Urban Development, the Managing Director Kenya Railways Corporation, the County Secretary, County Government of Kisumu, Secretary, Kisumu Lakefront Development Limited, the Director General, Kenya Urban Roads Authority and the Kisumu City Board, or any of them by themselves, their subordinates, representatives, agents, servants and/or employees or any other person acting through them or on their instructions or directions from repossessing ,taking possession of, fencing off, developing, constructing on, blocking ingress or egress into or out of the properties of the Petitioner namely Kisumu Municipality/Block 3/182,3/183,3/184,3/185 and 3/186 and from any other way howsoever interfering with the Petitioner's access to occupation and use of the properties.

The petitioner further seeks an order of prohibition prohibiting jointly or severally the Chief Land Registrar, the County or District Land Registrar, Kisumu or any other officer acting under them or on their behalf or instructions or directions or in other way howsoever from

revoking, annulling, cancelling, restricting or in any other way whatsoever or howsoever interfering with the Petitioner's titles to the properties namely Kisumu Municipality/Block 3/182,3/183,3/184,3/185 and 3/186 and a Mandatory Injunction compelling the Cabinet Secretary for Interior and Coordination of National Government, the Cabinet Secretary for Transport, Infrastructure, Housing and Urban Development, the Managing Director Kenya Railways Corporation, the County Secretary, Kisumu County Government and the Kisumu City Board or any of them by themselves, their subordinates representatives, agents, servants and/or employees or any other person acting through them or on their instructions or directions to remove all fences, barriers, blockades, barring, impeding or interfering with access ingress or egress to or from the properties of Petitioner namely Kisumu Municipality/Block 3/182,3/183,3/184,3/185 and 3/186 and to permit the Petitioner open, free and unfettered access and use of its properties.

Last but not least, the petitioner seeks General Damages for trespass to property and for blatant and egregious contravention and violation of the Petitioner's rights and fundamental freedoms and Costs of and incidental to this Petition.

The Petition was supported by the Affidavit of **ANILKUMAR D. SHAH** sworn on 2nd February 2021 and filed on 3rd February 2021 and on the hand, the 2nd Respondent filed an Answer to the Petition and a cross Petition on 14th April 2021. The 5th Respondent herein filed a Replying Affidavit on 23rd April 2021 sworn by ENG. Richard Donde.

Petitioner's Case

It is the Petitioner's case that she is the registered proprietor as the Lessee from the Government of Kenya of all those parcels of land or plots known as Kisumu Municipality/Block 3/182,3/183,3/184,3/185 and 3/186. The Petitioner purchased the said properties from Wagi Enterprises, K. Sang, D.K. Rono, S.J. Ngenyi, Julius Waweru Githua vide Sale Agreements dated 30th December 1995 (Block 3/182 to 185) and 28th June 1996 (Block 186). That the Certificate of Leases were issued by the District Land Registrar pursuant to a 6th March 1996 from the Commissioner of Lands, which letter was copied to the Petitioner and the Town Clerk, Kisumu

The Petitioner stated that it has been faithfully and diligently paying Land rates and rents to the County Government from the date when titles passed to it to date. The County Government has been issuing Certificates of rates and other charges on all the properties of the Petitioner. It is the Petitioner's case that on 23rd January 2017, the Petitioner wrote to the Manager, Kisumu County notifying him of the presence of illegal encroachers on the Petitioner's plots who had put up structures without the Petitioner's knowledge.

On 2nd February 2017, the Petitioner sent a follow up letter and was informed that the County Government of Kisumu through the City Manager had issued a public notice of eviction dated 01/02/2017 asking all the encroachers who had put up structures on the Petitioner's parcels of land to vacate. The Petitioner was verbally informed that the eviction of the illegal encroachers was put on hold until after 2017 elections and the same was captured in the Petitioner's letter dated 15/01/2018 asking the City Manager to proceed with the evictions. The County Government of Kisumu, the 3rd Respondent herein sought and obtained eviction orders from the court issued on 5th March 2018 in Criminal case No. 7 of 2018.

The Petitioner further stated that on 5th September 2019 an officer from the National Youth Service in the Ministry of Interior and Coordination of National Government and from the Ministry of Transport and Infrastructure, Housing and Urban Development and the Kenya Railways Corporation descended on the suit properties and verbally informed the Petitioner's director / representative that all properties along and off Obote Road are properties of Kenya Railways Corporation and that they had repossessed the same for and on behalf of Kenya Railways Corporation's officers proceeded to dig holes and erect fencing poles and a fence which blocked access and egress to the suit properties which are situated on the lakeshore. That the Petitioner's properties have only one access, entry and exit being at the end of Oginga Odinga Road at its junction with Obote Road.

That the Petitioner further stated that the said actions deprived them access to, occupation and user of its properties without any notice, without any colour of right, and without following any due process known to law and in violation of the provisions of Article 47 of the Constitution of Kenya and Section 4 of the Fair Administrative Action Act. The Government and the 2nd Respondent have constructively and literally dispossessed and arbitrarily deprived the Petitioner of its right, title and interest in the properties and to the access, occupation and user of its properties in brazen violation of the Petitioner's fundamental rights enshrined and protected in Article 40 (3) of the Constitution.

The Petitioner alleged that the Respondents were involved in a grave and gross violation of the Petitioner's economic and social rights enshrined in Article 43 (1) of the Constitution. The Petitioner is apprehensive that anytime from now the Respondents will unilaterally proceed to purport to revoke and cancel its leasehold titles without any colour of right, without any notice and without any due process known to the Constitution and Statute. That if the Respondents proceed to revoke the Petitioner's titles, they will deprive the Petitioner five properties that were acquired for valuable consideration.

The Petitioner stated that on 27th September 2019, Kenya Railways Corporation published a Notice in the Daily Nation Newspaper to the effect that those persons allegedly holding illegal title deeds on its land to surrender them before 30th October 2019 and none of the suit properties were listed in the Notice. On 1st October 2019, the 2nd Respondent published the same notice.

In October 2019, the Petitioner's Director was summoned to the Regional C.I.D Offices in relation to the properties where he attended and availed to the officer all documents related to the suit properties and was informed that the 3rd Respondent had requested the Regional C.I.D to carry out investigations to establish the history and status of the properties. The 3rd, 4th, and 6th Respondents have through Kisumu Local Physical & Land Use Development Plans Public Report clearly indicated their intention to arbitrarily deprive and wrongfully and unlawfully utilize the Petitioner's properties in their quest to develop the lake front, without notifying, consulting or engaging with the Petitioner and without initiating and following the procedure for acquisition or payment of compensation.

It is the Petitioner's case that the 4th Respondent has entered into a Memorandum of Understanding with the 5th Respondent under the aegis

of the 3rd & 6th Respondent to construct a 26 Kilometer promenade along Lake Victoria lakeshore to run from Camp David to Dunga Beach which will effectively arbitrarily deprive and wrongfully and unlawfully dispossess the Petitioner of its properties, which are situated on the lakefront and are amongst the properties affected by the demolition of structures at Lwang'ni Beach by the 1st and 2nd Respondents in September 2019. That the 3rd and 6th Respondents published 2 notices through the advertisements carried out in the Daily Nation Newspaper of 18/11/2020. That upon the Petitioner attempting to access the links given in the Notices so as to download the plans, the Petitioner noted that there were no such plans on the websites and this effectively deprived the Petitioner the opportunity to read and understand the plans and proposed developments and to submit objections to the same within the 60 day period.

That the Petitioner's Advocates wrote to the City Manager and CECM in charge of Physical Planning, Lands, Housing and Urban Development pointing out that the plans were not carried out in the links given and requested that they be supplied with the plans which letter was not responded to.

2nd Respondent's Answer to Petition

The 2nd Respondent filed an Answer to the Petition on 14th April 2021 and alleged that the suit land consists of what was part of all that parcel of land comprising of land vested in the 2nd Respondent by operation of the Kenya Railways Corporation (Vesting Land) Order, 1986 contained in Legal Notice Number 24 of 1986 which replaced and revoked the Kenya Vesting of Land Regulations, 1963(L/N.440/1963) which created an exclusive proprietary interest in favour of the East African Railways Corporation, the predecessor of the 2nd Respondent Corporation.

The 2nd Respondent stated that all the Suit Properties fall within the land reserved for Railways Operations within the Kisumu Port and border Lake Victoria as per the Survey Plan No. 43/53 which clearly describes the geographical location of the suit land. That the suit lands or any other part of the land reserved for Railway Operations whose extend and demarcations are as per the said map have been surrendered to the Government of Kenya for allocation to any other party including the Petitioners. That there is no way the titles to the suit lands would have been held by any of the people the Petitioners allege to have purchased from as the subject land has always been Kenya Railways land and any acquisition of title onto such lands by any person other than the 2nd Respondent must have been illegal and fraudulent.

The 2nd Respondent stated that the suit properties being Land reserved for Railways Operations within the Kisumu Port, there is no way the Petitioners could have acquired good title to the same. That if indeed the Petitioners hold legal titles to the suit properties, they ought to willingly present that evidence to the Ethics and Anti-Corruption Commission to clear their names and proof the authenticity of their purported titles and how they were demarcated from Railways Land Reserve.

It is the 2nd Respondent's case that the Petitioner and all other encroachers, trespassers and grabbers on Kenya Railways Land and Reserves had been given sufficient notices to vacate and/ or remove all illegal structures on such lands. That it is clear that the acts complained by the Petitioners are acts of the County Government of Kisumu and the 2nd Respondent cannot be held responsible for the said acts and if it is true that the County Government of Kisumu has an effort to improve infrastructure made plans to construct a road as claimed by the Petitioner, the 2nd Respondent will be duly bound to support such a project that is meant to benefit the General Public.

The 2nd Respondent further stated that the Petitioner has not demonstrated in any way that it deserved the orders sought and prayed for the entire petition to be dismissed with costs.

Cross-Petition by the 2nd Respondent

The 2nd Respondent filed a cross Petition on 14th April 2021 and reiterated the contents of the Answer to Petition and stated that the 2nd, 3rd, 4th, 5th and 6th Respondents prior to 30th December 1995 hatched a scheme with the help of officials from the 7th Respondents to fraudulently acquire and illegally register themselves as proprietors of the suit land and proceeded to sell and or alienate to the 1st Respondent in the Cross Petition in a scheme clearly meant to sanitize some blatant illegalities and enumerated the particulars of fraud of all the Respondents to the Cross-Petition.

The 2nd Respondent herein in the Cross Petition sought for the following orders:

1. An order for dismissal and / or striking out of the main Petition with costs to the Cross- Petitioner.
2. A declaration that the Cross-Petitioner is the rightful owner of the suit land Kisumu Municipality/Block 3/182-186.
3. A declaration that the acquisition of the Cross Petitioner's land Kisumu Municipality/Block 3/182-186 by the 1st to 6th Respondents in the Cross Petition is illegal, null and void.
4. An order compelling the 7th and 8th Respondents in the Cross Petition to cancel the certificate of lease held by the 1st to 6th Respondents and a further order directing the 7th Respondent, to rectify the register accordingly and thereafter register the Cross Petitioner in the Cross Petition as the proprietor.
5. A declaration that the occupation of the suit land by the 1st to 6th Respondents in the Cross-Petition is illegal and an order for eviction against the said Respondents.
6. A Permanent Injunction to restrain the Respondents in the Cross-Petition, their agents and/or servants from interfering in any way

with the Cross-Petitioners use and occupation of the suit land parcel Kisumu Municipality/Block 3/182-186.

7. Costs of the Cross Petition.

Answer to the Cross Petition by the Petitioner/1st Respondent

The Petitioner filed an Answer to the Cross Petition on 25th May 2021 and reiterated the contents of its Petition and averred that the suit lands are individual plots belonging to a private entity and the Cross Petitioner does not and has never owned the said suit parcels which have been in the uninterrupted possession of the Petitioner/ 1st Respondent for 26 years and have never been public and belonging to any public body.

The Petitioner/ 1st Respondent has alleged that the Cross Petition is full of falsehood and is intended to hoodwink the Honourable Court into granting orders that are completely underserving and that the Petitioner in the Cross Petition has not availed the Survey Plan No. 43/53 of the Registry Index Map for Block 3 to show that the suit parcels are within Corporation's land.

That Petitioner/ 1st Respondent in the Cross Petition averred that Article 40 (6) of the Constitution excludes protection to any property that has been found to have been unlawfully acquired does not confer the upon the Cross Petitioner authority to unilaterally declare properties with duly issued certificates of title as illegally or irregularly acquired liable for reclamation and /or possession by the Petitioner in the Cross Petition. The Petitioner / 1st Respondent in the Cross Petition denied each and every allegation of the particulars of fraud or illegality.

The Petitioner/1st Respondent in the Cross Petition stated that Section 107 of the evidence Act provides that he who alleges the existence of facts must prove so that the burden never shifts except under section 112 of the Evidence Act only if it is when that the particular fact or set of facts is within the knowledge or a particular party and therefore the Petitioner in the Cross Petition is not entitled to shift that burden by declaring the suit properties as fraudulently and illegally acquired by proceeding to forcibly take over the suit properties without according the Petitioner/1st Respondent in the Cross Petition a fair hearing.

It is further stated that the subsequent allotments to the 2nd, 3rd,4th, 5th and6th Respondents to the Cross Petition followed due process and the eventual registration of the suit properties in favour of the Petitioner/1st Respondent in the suit property is not fraud and therefore submitted that the Cross- Petition should be struck out and dismissed with costs. The Petitioner in the Cross Petition filed a reply to Answer to Cross Petition on 15th July 2021.

5th Respondent's Case

ENG. RICHARD DONDE, swore a Replying Affidavit on behalf of the 5th Respondent and stated that the 5th Respondent is a State Corporation under the State Department of Infrastructure in the National Government responsible for the management, rehabilitation, construction and development of national urban roads.

It is deposed that the 4th and 5th Respondent executed a Memorandum of Understanding (MOU) to guide the proposed construction of a 26 Kilometers promenade along the shores of Lake Victoria from Camp David to Dunga Beach in Kisumu. That contrary to the Petitioner's allegations of illegality, the said MOU sequently sets out the modalities and roles of the parties from the design, survey, mapping and construction of the proposed promenade along the Kisumu Lake Front, and covenants that these activities shall be undertaken in accordance with the law.

It is further deposed that as per the MOU, the process would be systematic and study guided, beginning with an Environment and Social Impact Study, Survey, Mapping and Design and never was it intended to perpetuate the alleged wrongful, unlawful and arbitrary action. That owing to liquidity challenges, the requisite funding for the initial or preparatory stages of the MOU are not yet available and therefore the 5th Respondent has not begun to implement or undertake assignment or terms of the MOU. That on account of the foregoing and by advice of the State Counsel, the present Motion and Petition are moot and unsubstantiated as far as the 5th Respondent is concerned.

6th Respondent's Case

The 6th Respondent filed a Replying Affidavit on 13th July 2021 where the Michael Abala Wanga swore an Affidavit on behalf of the 3rd,4th and 6th Respondent where he deposed that the 3rd, 4th and 6th Respondents and/or agents did not fence off the suit properties as alleged by the Applicant and that have not procured the services of and /or requested the assistance of the National Youth Service and Kenya Railways Corporation in recovering/repossessing grabbed public land as the 3rd Respondent is capable of doing so on its own.

It is stated that the 3rd,4th and 6th Respondents should not be required to respond on behalf of the National Youth Service which is established by an Act of Parliament capable of suing and being sued on its own name which the Applicant has elected not to prosecute despite claiming that the National Youth Service being the alleged perpetrators of the constitutional violations.

It is the 6th Respondent's case that the suit properties are public lands designated for public purposes and the same have never been available for allocation to private entities. That at the time of the purported alienation was a mandatory requirement before issuance of allotment letters only on account of approved Part Development Plan (PDP). The Applicant cannot enjoy protection under the doctrine of innocent purchaser for value without notice as the alleged sellers had no claim to the suit properties.

That at the time of the alleged acquisition of the Original Title, the procedure for issuance of Government Land and Government Leases was

governed by the provisions of GLA. Consequently, the dispute over the acquisition of the suit properties ought to be resolved using the previous land regime laws and it is therefore the GLA which is operative in the circumstances of this case. Under the GLA, two entities had power to issue Government land and Government Lease. These are the President and the Commissioner of Lands. The powers of the President under section 3 of the GLA reproduced above were delegated to the Commissioner of Lands.

It is further stated that the Commissioner or an officer of the Lands Department may, subject to any general or special directions from the President, execute for and on behalf of the President any conveyance, lease or license of or for the occupation of Government lands, and do any act or thing, exercise any power and give any order or direction and sign or give any document, which may be done, exercised, given or signed by the president under the GLA and relied on the procedure provided by GLA from section 9 to 13.

That there are public policy reasons why the Government hold certain land and it does not give away to private individuals and in so far as town plots are concerned, unless such land ceased to serve as public land, a public function, then such land could not be issued as to private individuals. That public land cannot be offered to private individuals if the public purpose for which the land was reserved still existed especially a health facility.

It was deposed that the suit properties are in the Respondents considered view, owned by the County Government of Kisumu which is a public body and to be used for a public purpose. The Commissioner for Lands had a duty to inquire from the public body and all other stakeholders. That this Honourable Court should declare that the Commissioner of Lands failed to follow through the requisite mandatory procedure to dispose of public land and therefore the Respondents are entitled to redress.

It was further deposed that there is no evidence adduced before this Honourable Court of an Application by the Applicant to be allotted the Suit Property for commercial purposes. That the Commissioner of Lands did not follow the procedure of offering public land for public auction and neither did the Commissioner of Lands offer it to the general public or in any other way. No allotment letter has been produced by the Applicant. The suit properties are public land and any conversion of the space to private property was illegal and unlawful as none of the mandatory statutory procedures were followed.

That the correct procedure for disposal or allocation of the suit property to the Applicant would have been supported by key documents including minutes from the County Council of Kisumu, a Part Development Plan (PDP) and a map to show the location of the suit properties. It is alleged that the Applicants have not provided any evidence of their letter of application addressed to the Commissioner of Lands seeking to be allocated the suit land and the 2nd Respondent has a right to own property and it is entitled to its property only to the extent that the said was acquired and purchased in accordance with the correct procedure and within the framework of the law.

It was further stated that the moment a property is reserved for public use, it remains public utility land incapable of giving rise to a private proprietary interest capable of being protected by a court of law. That this court should not lend its assistance to a party who is guilty of contravention of an express and mandatory statutory stipulation of who is party to a contract which is illegal or contra statute. This court is empowered by Section 80 (1) of the Land Registration Act to order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained by fraud or mistake.

It is further deposed that any dealing in land which is obtained or induced by corruption is illegal from its inception and shall be void and of no legal effect as provided for under section 158 of the Land Act. The Applicant has not established a prima facie case with probability of success as they have not adduced any evidence to show how they acquired public land and the Applicant will not suffer any loss or harm if their Application is dismissed as they are trespassers. That the public has suffered significance loss and will continue to do so if the Application is allowed as the Applicants continue to illegally deny the public the benefits of a Public good. On a balance of probability of convenience this Honourable Court ought to protect the public and the benefits the public will derive from the suit properties which significantly outweighs any benefits of the Applicants.

Petitioner's Submissions

The Petitioner filed its written Submissions on 4th May 2021 where the following issues were raised for determination. Whether the Petitioner's rights under Article 40 of the Constitution have been violated. The Petitioner submitted that Article 40 protects existing private property rights including the right to acquire, use and even dispose off property and no dispossession ought to take place unless there is due process and an accompanying timely, just and equitable compensation. That the evidence availed before this court clearly established that the subject properties were regularly purchased by the Petitioner for valuable consideration.

The Petitioner further submitted that in terms of Section 24 and 25 of the Land Registration Act, the registration of the Petitioner as the proprietor of the suit properties is vested indefeasible rights and privileges for the residue of the terms of the Lease.

The actions of the officers from the National Youth Service on 5th September 2019 without any notice, without colour of any right and without following the due process was unconstitutional and relied in the case of **Republic vs Kisumu District Lands Officer & Another Miscellaneous Application No. 80 of 2010**. The Petitioner's submitted that the deprivation of property rights must be consistent with the provisions of Article 40 (3). If it is not, it ought and should be deemed an arbitrary deprivation in dispossession.

On the right to fair administrative action as provided for under the Article 47 of the Constitution of Kenya, the Petitioner placed reliance in the case of **R vs National Police Service Ex Parte Daniel Chacha Chacha (2016) eKLR** where the court stated as follows:

“Procedural fairness is therefore now a Constitutional requirement in administrative action and the requirement goes further than the traditional meaning of the duty to afford one an opportunity of being heard. It is now clear that even in cases where there is no express requirement that a person be heard before a decision is made, the tribunal or authority entrusted with the mandate of making the decision must act fairly.”

The Petitioner further relied on the case of **Judicial Service Commission vs Mbalu Mutava & Another (2015) eKLR Civil Appeal 52 of 2014**.

The Petitioner further stated that the Urban Centers and Cities Act was established pursuant to Article 184 of the Constitution and submitted that the central concept of public participation is the role of affording the public the opportunity their input in decision making. That the Respondents failed to act with any degree of civility, decorum, respect, fairness and humanity in failing to issue any form of notification or communication to the Petitioner or accord the Petitioner an opportunity to be heard and no notice or formal correspondence of any kind has been received advising whether a process of compulsory acquisition has been initiated.

The Petitioner further placed reliance in the case of **Hellen Wachuka Njoroge vs Attorney General & Another (2016) eKLR** where Justice Onguto observed as follows:

“In my view, where a person is dispossessed of property without notice of even the intention to dispossess, then arbitrary deprivation must be presumed. It is simply inimical to the rule of law as due notification of intended adverse action is part of the rule of law. When the Constitution guarantees he protection of property and then one is deprived of property without notification there must be assumed that the person has acted arbitrarily. Such procedure is unfair and irrational and is contrary to the limitation imposed by Article 40 of the Constitution. Effectively, absence of notification means there is no provision of sufficient reason for the deprivation or dispossession in so far as the proprietor is concerned. A mere attempt to give notice at all and a failed notification once proven amounts to no notice at all and a decision maker must not act once it is shown that notice was not given. If he acts, he must be deemed as being capricious, whimsical and arbitrary.”

It is the Petitioner’s submissions that the 5th Respondents Replying Affidavit does not address the concerns raised in the Petition and has expressly admitted at paragraph 7 that the issue on compensation is on hold.

On whether the Petitioner is entitled to the reliefs sought, the Petitioner submitted that it has tendered copies of the title deeds to the suit properties in its names which confirmed that it is the registered proprietor of the suit properties and relied on section 24 and 26 of the Land Registration Act, 2012. That the Respondents save for the 5th Respondent chose not to defend this suit and therefore the titles to the suit property are not challenged.

The Petitioner further submitted that it is entitled to enjoy rights and privilege associated with the suit property since it is the absolute proprietor. Its evidence has not been challenged and the Respondents’ acts are unlawful. That Article 10 (1) and (2) of the Constitution obligates the Respondents to observe and promote national values and principles of governance but they failed to do so. The Petitioner relied in the case of **Nakuru Industries Limited vs S S Mehta & Sons (2016) eKLR**.

In conclusion of their Submissions, the Petitioner prayed that it be granted the orders sought in the Petition.

2nd Respondent’s Submissions

The 2nd Respondent filed its Submissions on 27th October 2021 and raised the following issues for determination:

a) Whether or not the Petitioner has discharged the burden of proof over the alleged violations as raised in the Petition to warrant issuance of the orders sought.

It is submitted that the Petitioner annexed copies of titles to the suit properties, various agreements for sale, land rent and rates clearance certificate and the Petitioner also alleged that it is a bonafide purchaser for value without any knowledge of fraud and it enjoyed indefeasibility of title under Article 40 of the Constitution as read with section 24, 25, and 26 of the Land Registration Act. That limitation of the right to own property is provided for under Article 40 (6) and the same was held in the case of **Henry Muthee Kathurima vs Commissioner of Lands & Another (2015) eKLR** where the court held as follows:

“We have considered the provisions of section 26 of the Land Registration Act in light of the provisions of Article 40 (6) of the constitution and it is our considered view that the concept of indefeasibility of title is subject to Article 40(6) of the constitution. We hold that the concept of indefeasibility or conclusive nature of title is inapplicable to the extent that title to the property was unlawfully acquired.”

In the case of Funzi Island Development Limited & 2 Others vs County Council of Kwale & 2 Others (2014) eKLR the court stated that a registered owner of land enjoys absolute and indefeasible title to property if allocation was legal, proper and regular. A court of law cannot therefore sanction an illegality in cases where one claims indefeasibility of title if the same was not obtained through lawful means.

In **Republic vs Land Registrar Kilifi & Another ex parte Daniel Ricci (2013) eKLR** the court held that a title deed is an end product of a process. For a title deed to be protected by Article 40 (1) of the Constitution, the holder of the title deed has to establish that he followed the laid down procedures in acquiring it.

It was further stated that for one to enjoy the right to own property under Article 40 of the Constitution, if and when challenged, one has to demonstrate how he acquired title to justify such enjoyment as was held in **Munyu Maina v Hiram Gathiha Maina, Civil Appeal Number 29 of 2009** where the court held as follows:

We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as

proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register’.

*It is the 2nd Respondents’ Submissions that the Vendor in each of the Agreement for sale relied on by the Petitioner lacked capacity to contract and a perusal of Clause 4 of the Agreement for Sale over the suit properties as some funds that constitute consideration were paid to the Commissioner of lands as stand premium. That the 2nd Respondent does not have an idea of whether letters of allotment existed and there is no proof of whether the said funds were disbursed to the Commissioner of Lands as written in the contracts. The 2nd Respondent relied in the case of **Dickson Ngigi Ngugi v Commissioner of Lands (2019) eKLR** where it was held that a letter of allotment is not grant of Lease. The 2nd Respondent also relied in the case of **Dr Joseph M.K. Ng’okys Ole Keiuwa & 4 Others (1997) eKLR**.*

Although the Petitioner claim to have acquired proprietary interest through the said agreements, there is no proof of consideration or capacity of the Vendors to dispose off the suit properties pursuant to a letter of allotment to which the Petitioner has not availed therefore the contract between the Petitioner and the Vendors is void. That as per the survey plan FR/43/53, it illustrates that the suit properties fall within the railway boundary. The 2nd Respondent did not surrender the suit properties to the Government for reallocation to third parties as stipulated under section 14 of the Kenya Railways Corporation Act and therefore the titles to the suit properties were irregularly acquired by the Petitioner and therefore compulsory acquisition cannot arise.

The Petitioner has failed to demonstrate that it is a bonafide purchaser for value and the 2nd Respondent relied in the case of **Katende v Haridar & Company limited (2008) 2 E.A.173** where the court held as follows:

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that:

- a. he holds a certificate of title;***
- b. he purchased the property in good faith;***
- c. he had no knowledge of the fraud;***
- d. he purchased for valuable consideration;***
- e. the vendors had apparent valid title;***
- f. he purchased without notice of any fraud;***
- g. he was not party to any fraud.”***

The 2nd Respondent also relied in the case of **Makula International Ltd vs His Eminence Cardinal Nsuuga and Another (1982) HCB II** and the case of **Macfoy vs United Africa Company Ltd (1961) 3 ALL E.R.1169**.

The Petitioner alleges that its rights have been violated under Article 35 of the Constitution particularly the right to access information over the fencing off of the suit properties effectively denying it access as no notice was issued. It is the 2nd Respondent’s Submission that there is no proof that it participated in the said actions and that if the court finds that the 2nd Respondent was involved in the said acts, there were several notices that were published since 2018 which contained reasons for the actions done by the Officers from the Government. The 2nd Respondent therefore submitted that the Petitioner failed to demonstrate the required standard that the 2nd Respondent infringed on its right to access information.

On the Rights provided for under Article 43 of the Constitution, the Petitioner has alleged that by the Respondents fencing off the suit properties, they infringed on its right to make a living and therefore it subjected it to loss of income. It is the 2nd Respondent’s submission that no evidence has been tendered by the Petitioner to support the claim that the Suit Properties generate income. The Petitioner has also failed to demonstrate the required standard that the 2nd Respondent was involved in fencing off the suit properties.

The 2nd Respondent has also stated in its submissions that for the Rights infringed under Article 47 and 50 of the Constitution, the 2nd Respondent submitted that the Petitioner did not demonstrate how it was denied the right to fair administrative action by denying it access to the suit properties without notice.

On the rights provided for under Article 2,3,10,28,29 of the Constitution, the Petitioner has also failed to prove that the alleged rights were violated.

b) Whether or not the 2nd Respondent has discharged the burden of proof over the alleged violations as raised in the Cross Petition to warrant issuance of the orders sought.

The 2nd Respondent submitted that the suit properties fall within the railway reserve and are properties vested in it. The suit properties were

not surrendered to the Government for allocation to other persons. The Petitioner used fraudulent means to acquire the suit properties and relied in the case of *Kinyanjui Kamau vs George Kamau (2015) e KLR* where the court held as follows:

“It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo v Ndolo (2008) 1 KLR (G&F) 742 wherein the Court stated that:

“...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil

cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”

In the case of *Bullen & Leake & Jacobs, Precedent of Pleadings 13th Edition* quoting with approval the cases of *Wallingford v Mutual Society (1880) 5 App.Cas.685 at 697,701,709*, *Garden Neptune v Occident (1989)1 Lloyd’s Rep.305,308*, *Lawrence v Lord Norreys (1880)15 App.Cas.210 at 221* and *Davy v Garret (1878)7 ch.D.473 AT 489*, it was stated as follows:

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged. The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (i). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice”.

The 2nd Respondent submitted that if indeed the letter of allotment existed, it did not constitute title to be passed by way of an agreement. That the terms of the contract indicate that at the time of execution, the vendors had clearly not accepted the offer from the President of Kenya made on his behalf by the Commissioner of Lands and there is no proof that the sums to be paid to the Commissioner of Lands were made. That the proceedings conducted by the 7th Respondent have no bearing to this suit.

*The 2nd Respondent further submitted that it is entitled to the orders sought in the Cross Petition as it is the legitimate owner of the suit properties which fall within the railway boundary. That the suit properties are vested in it for a specific purpose as set out in the objects of the Act and the court should be guided by the case of *Moses Okath & Another vs The Attorney General & Another (2017) eKLR*.*

c) Whether the Petitioner is entitled to damages and compensation

The 2nd Respondent submitted that in awarding damages in Constitutional Petitions, courts exercise discretion and the awards should be appropriate and just. The 2nd Respondent relied in the case of *Moi Education Centre Co. Ltd v William Musembi & 16 Others (2017) eKLR*.

The 2nd Respondent stated in its submissions that this court should decline to award general damages as it is clear that the foundation of claiming ownership is tainted with illegality and to award damages would constitute justification for wrong done and therefore the Petitioner would be unjustly benefiting for illegally acquiring titles to the suit properties to the detriment of the 2nd Respondent.

d) Who is entitled to the costs of this suit.

The 2nd Respondent submitted that Rule 26 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 provides that this court has discretion to award costs and therefore the Petition should be determined in favour of the 2nd Respondent and dismiss the same with costs. The court should also allow the cross petition with costs to the 2nd Respondents.

1st and 5th Respondents Submissions

The 1st and 5th Respondents filed their Submissions on 27th October 2021 where the following issues were raised for determination:

i. Ownership of the suit property.

The 1st and 5th Respondents submitted that the suit properties in question are meant for public purposes and the Petitioner has not brought forth any evidence showing how the property was legally and procedurally transferred from the 2nd Respondent to private entities. That the process of acquisition of public land was well enumerated in GLA and this procedure was not followed. The 1st and 5th Respondents placed reliance in the case of *Kembi Gitura v National Land Commission & 2 Others (2021) eKLR*.

ii. Whether the Respondents are liable for violations of fundamental rights as alleged.

It was submitted that the 5th Respondent is a Government Authority created under Section 9 of the Kenya Roads Act of 2007 and it therefore

entered into a Memorandum of Understanding with the 4th Respondent for development of promenade to improve access to the lakeshores thus promoting tourism and improving the face of the lakeside city. The MOU has not come into effect as funds are yet to be released for the execution plan and therefore the Petition against the 5th Respondent is premature as it has not performed any role leading to the violation of the rights that the Petitioner is alleging.

That the question that arises is whether the issues raised against the 5th Respondent are justifiable. Reliance was placed in the case of **Ashwander v Tennessee Valley Authority (1936) 297 U.S 288** Reliance was also placed in the case of **John Harun Mwau & 3 Others v AG & 2 Others HCCP No.65 of 2011** where the court stated as follows:

“We also agree with the submissions of Prof. Ghai that this court should not deal with hypothetical and academic issues. In our view, it is correct to state that the jurisdiction to interpret the Constitution conferred under **Article 165(3) (d)** does not exist in a vacuum and it is not exercised independently in the absence of a real dispute. It is exercised in the context of a dispute or controversy”.

It was submitted that construction has not taken place due to challenges that could not be foreseen and therefore the Petition fails against the 5th Respondent as was held in the case of **Wanjiru Gikonyo & 2 Others v National Assembly of Kenya & 4 Others (2016) eKLR**.

On the role played by the officers from the National Youth Service which the Petitioner alleges that the officers were under instruction from various ministries to dig holes and fence the property, it was submitted that NYS is established by section 5 of the National Youth Act and therefore the officers were performing their lawful duties as granted by the Act.

It was further submitted that the Petition is hinged on irregular acquisition of public property hence no Constitutional Right accrue from such an illegality and therefore the Petition be dismissed with costs to the Respondents and the Cross Petition by the 2nd Respondent be allowed.

ANALYSIS AND DETERMINATION

This court has looked at the pleadings filed, the evidence on record and the submissions filed by the parties and the following issues are to be determined:

- a. Whether the Petitioner is entitled to the orders sought in the Petition.
- b. Whether the Petitioner’s rights and fundamental freedoms were violated.
- c. Whether the Cross Petition is merited

Whether the Petitioner is entitled to the orders sought in the Petition;

Article 40 of the Constitution of Kenya provides:

“(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property--

(a) of any description; and
(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person--

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation--

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that--

(i) requires prompt payment in full, of just compensation to the person; and
(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.

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

Section 24 of the LRA provides:

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

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

Section 25 provides:

“25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

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

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

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

Section 26 provides:

“26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

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

The Petitioner has alleged that its rights to own property has been violated by the Respondents as they repossessed the suit properties by sending officers from the National Youth Service who dug holes and fenced the suit properties which blocked access to the suit properties. The Petitioner further alleges that it was not served with notice by the Respondents prior to the said actions by the Respondents the other hand, it is the 2nd Respondent’s case that the Petitioner acquired the suit properties illegally and through fraudulent means as the land belongs to the 2nd Respondent. The 3rd, 4th and 6th Respondents allege that the suit properties are public land and have never been allocated to individuals or private entities.

From the evidence on record, the Petitioner has annexed copies of the Title deeds and the Agreement for Sale drawn between itself and the various Vendors who had acquired the suit properties. This court has looked into the Agreement for Sale for the various Vendors and it is clear that the each and every parcel of land was allocated to different Vendors but the parcels were yet to be registered. There are no letters of allotment to show that the Government of Kenya allotted these suit properties to individuals. The Agreements for Sale also provide that there was requisite fees payable to the Commissioner of Lands to effect registration of the suit parcels, however there is no evidence that the Commissioner of Lands received the requisite fees and effected registration.

The Petitioner has been paying land rent and rates as required to the Kisumu County Government, the 3rd Respondent herein. The Petitioner has been having a peaceful and quiet enjoyment of the suit properties until the officers from the National Youth Service came and dug holes and fenced the entire parcels of land thereby blocking access. The said actions were done without notice as a 26 Kilometer Road was to be constructed along Lake Victoria.

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

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

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

Or

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

In the case of [EVELYN COLLEGE OF DESIGN LTD VS DIRECTOR OF CHILDREN'S DEPARTMENT & ANOTEHR 2013] eKLR, the court held that:

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

Whether the Petitioner's rights and fundamental freedoms were violated.

Article 47 of the Constitution provides:

"(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action."

Section 4(3) of the Fair Administrative Actions Act also provides that where an administrative action is likely to affect the rights and fundamental freedoms of any person, the administrator shall give the person affected prior notice of the proposed action, an opportunity to be heard, right to internal review where applicable, statement of reasons, notice of right to legal representation, right to cross-examine where applicable, and information, materials and evidence forming the basis of the action.

The 2nd Respondent alleges that they issued two notices on March 2018 and on September 2019 while the Petitioners allege that they were not served with the said notices. Due to the construction that was to take place along the Lake Victoria, the suit parcels of land were fenced off blocking access to the Petitioner. The suit parcels were fenced off as the 2nd Respondent maintains that the suit properties belong to them.

The Respondents ought to have followed the right procedure in dispossessing the suit parcels from the Petitioner. The acts by the officials from National Youth Service are unconstitutional.

Whether the cross petition is merited

There is evidence that the suit property vests in the Kenya Railways Corporation vide legal notice number 24 of 1986 wherein it was declared that all land of the East Africa Railways Corporation vested in the corporation by any written law as well as any land conveyed to that corporation or otherwise placed at that corporation's disposal whether such land was in use or reserved for use by that corporation.

The Cross petition is merited since from the legal Notice, it is clear that the suit properties belong to the 2nd Respondent. This court has keenly looked at the copy of survey plan FR/43/53 and the legal notice no 245 of 1963 and 24 of 1986 and do find that the suit property falls within land vesting to The Kenya Railways Corporation. The suit property is part of public land vested to Kenya Railways.

Although the Petitioner claims to be a bonafide purchaser for value, it has failed to demonstrate how it clearly acquired the suit properties since it acquired the suit properties from an entity and individuals who did not have letters of allotment and had not acquired titles to the suit properties.

Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others [2019] eKLR

"The law has never intended to punish the innocent as to punish the innocent would break down all the trust and respect for the law and legal system... It has long been accepted beyond debate that the land registration process in Kenya is a product of the Torrens system... Under that system, the title of a bona fide purchaser for value without notice of fraud cannot be impeached; that the land register must mirror all currently active registrable interests that affect a particular parcel of land; that the Government, as the keeper of the master record of all land in Kenya and their owners, guarantees indefeasibility of all rights and interests shown in the land register against the entire world; and that in case of loss arising from an error in registration, the Government guarantees the person affected of compensation. Finally, the statutory presumption of indefeasibility and conclusiveness of title based on the register can be rebutted only by proof of fraud or misrepresentation which the buyer is himself shown to have been involved..."

The 2nd Respondent has alleged that the suit properties were acquired illegally a declaration that the actions of the Respondents are illegal, unlawful and unconstitutional and in contravention of the fundamental rights and freedoms of the Petitioner proved how the titles to the suit properties were acquired illegally as the Petitioner entered into a contract with the various Vendors who lacked capacity to contract. This court has scrutinized the survey plan and the legal notices which clearly show that the suit properties belong to the 2nd Respondent and it had not surrendered the suit properties to the Government of Kenya for reallocation to private entities or individuals.

In conclusion, this court does find that the Petitioner's rights were violated as she was not given a fair administrative action by the respondents by being given a proper notice and being taken to the proper tribunal or court to determine their rights since she was the registered owner of the property and that the property had not been found to have been unlawfully acquired and therefore, I do grant a

declaration that the actions of the Respondents in evicting the petitioner are illegal, unlawful and unconstitutional and in contravention of the fundamental rights and freedoms of the Petitioner and that she is entitled to compensation however no material has been placed before this court to determine the amount of compensation. The petitioner produced copies of notices to increase rates by the 3rd Respondent herein that showed the current valuation of the land. However, the Petitioner has not informed this court whether the said suit properties had been developed and whether there was any business that was being carried or any buildings that had been put that generated income.

The 2nd Respondent has clearly established that the suit properties were acquired through unlawful means as per their evidence which this court has examined and considered. This court also finds that the Cross Petition is merited as the land belongs to Kenya Railways Corporation and do grant a declaration that the Cross-Petitioner is the rightful owner of the suit land Kisumu Municipality/Block 3/182-186. and that the acquisition of the Cross Petitioner's land Kisumu Municipality/Block 3/182-186 by the 1st to 6th Respondents in the Cross Petition is illegal, null and void.

I do further grant an order compelling the 7th and 8th Respondents in the Cross Petition to cancel the certificate of lease held by the 1st to 6th Respondents and a further order directing the 7th Respondent, to rectify the register accordingly and thereafter register the Cross Petitioner in the Cross Petition as the proprietor and a declaration that the occupation of the suit land by the 1st to 6th Respondents in the Cross-Petition is illegal and an order for eviction against the said Respondents.

Ultimately, I do grant a Permanent Injunction to restrain the Respondents in the Cross-Petition, their agents and/or servants from interfering in any way with the Cross-Petitioners use and occupation of the suit land parcel Kisumu Municipality/Block 3/182-186. Each party to bear its own costs as there is no evidence that the petitioners were involved in the illegality as they were purchasers from alleged allottees, who are likely to have been involved in the illegalities and fraud.

DATED AT KISUMU THIS 25TH DAY OF NOVEMBER, 2021

ANTONY OMBWAYO

JUDGE

This ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

ANTONY OMBWAYO

JUDGE