



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC PETITION NO. 5 OF 2018

(AS CONSOLIDATED WITH :

KITALE ELC PET. NO. 6 OF 2018 – Isaiah Wanyonyi & 42 Others vs National Land Commission, County Government Of Trans – Nzoia, The Principal Secretary, Ministry Of Agriculture and The Attorney General;

And

KITALE ELC PET. NO. 7 OF 2018 Trans National Times Sacco Ltd Vs National Land Commission County Government of Trans – Nzoia, The Principal Secretary, Ministry Of Agriculture and The Attorney General.)

JUSTICE AND PEACE CENTER KITALE.....PETITIONER

VERSUS

NATIONAL LAND COMMISSION.....1ST RESPONDENT

COUNTY GOVERNMENT OF

TRANS-NZOIA.....2ND RESPONDENT

THE PRINCIPAL SECRETARY,

MINISTRY OF AGRICULTURE.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

JUDGMENT

1. This is a judgment on three consolidated petitions successively filed on different occasions but with the common denominator that they all revolve around the constitutionality or legality of the 1st respondent's notice dated **20/6/2018** which they state adversely affects them and which was published in a local daily on **23/7/2018**, and seek that an order of certiorari be issued against it.

2. **Petition No 5 of 2018** dated **9th August, 2018** which was filed on the same date the petitioner herein seeks the following reliefs against the respondents:-

(a) **A declaration that the decision of the 1st respondent embodied in the Notice dated 20/6/2018 published in the newspaper requiring owners of parcel of land known as Kitale Municipality Block 6 and 7 vacate from the said pieces of land within 90 days is null and void.**

(b) **The decision of the 1st respondent embodied in the Notice dated 20/6/2018 published in the newspapers requiring owners of parcels of land known as Kitale Municipality Block 6 and 7 vacate from the said pieces of land pieces of land be removed into this court and quashed.**

(c) **The respondents be condemned to pay costs of this constitutional petition.**

3. **Petition number 6 of 2018** is premised on substantially the same grounds as and prayers no (a) and (b) in that petition are on all fours with the prayers in **Petition Number 5 of 2018**. It seeks one additional prayer, namely an order of prohibition restraining the respondents from having any dealings in the suit lands in any manner whatsoever save the issuance of titles to the petitioners for their respective plots.

4. **Petition Number 7 of 2018** is also based on collectively the same grounds as the other petitions herein above and it seeks the same prayers as **Petition 6 of 2018**.

5. On the **16th October, 2019** this court gave directions as follows:

“For the reason that the petitions relate to land located in the same blocks and that they seek similar prayers, I hereby order that the three petitions be consolidated for the purpose of one unified judgment and that all parties do conclude the filing of their documents in their respective matters so that a judgment date may be issued. The lead file will be Petition No. 5 of 2018 - Justice & Peace Centre Kitale -vs- National Land Commission, County Government of Trans-Nzoia, Principal Secretary, Ministry of Agriculture and The Attorney General. The original headings in the petitions shall all be retained in the respective filed documents, save that the words “as consolidated with Petition ... and ...” shall be added.”

For that reason the word “*Petition*” will be used to refer to all the three petitions collectively. Also, the word “*Petitioners*” will be used to refer to all the petitioners in all the three cases collectively.

The Petitioners’ Case.

6. The decision of the National Land Commission the 1st respondent embodied in the Notice dated **20/6/2018** and published in the daily newspaper of **18th and 23rd July, 2018** prompted the filing of this petition. That Notice notified all and sundry that parcel of land known as **Block 6 and Block 7 Kitale Municipality** were irregularly alienated from the County Government of Trans-Nzoia and Ministry of Agriculture in the National Government; the Notice requires all the owners described therein to submit their documents to the 1st defendant within **14 days** pursuant to **Section 6** of the **National Land Commission Act** and to vacate the said land within **90 days** of the same Notice. The 1st respondent has also in that Notice threatened penalties, revocation of titles and restrictions against titles amongst other actions. It is the petitioners’ position that the 1st respondent’s decision embodied in the Notice is in violation of the rights of occupants of land parcels falling within **Block 6 and 8 Kitale Municipality** to expeditious, efficient, lawful reasonable and procedurally fair administrative action as provided for under **Article 47** of the **Constitution** of Kenya. The petitioners cite **Article 21 (1)** of the **Constitution** and avers that it provides that the State and every State organ have a fundamental duty to observe, protect respect promote and fulfil the rights and fundamental freedom in the bill of rights and yet the 1st respondent has failed to uphold the provisions of **Article 47** in its dealing with the owners of parcel of land affected by the Notice and the affected parties were not given an opportunity to explain how they became the owners or occupiers of the said pieces of land. The notice to vacate irks the petitioners on the ground that it indicates that a decision to have the affected occupants of **Block 6 and 7 Kitale Municipality** removed forcefully from occupation and their ownership documents sanctioned without a hearing and contrary to the rules of natural justice. The petitioner casts doubts on the truthfulness of the complaint by the 2nd defendant whom it states purported to purchase land from private individuals within **Block 7** upon which it is now in the process of constructing referral hospital using public funds. Lastly the petitioner avers that the owners of the affected land parcels were not given a proper and conducive environment for hearing before they were requested to vacate the subject parcels.

7. The petition is supported by the sworn affidavit of **Leonard Barasa Wafula** which reiterates substantially the same facts set out in the petition. That affidavit reveals that besides residential dwellings, there are also students and pupils enrolled in public institutions put up using public funds, such as primary school and a polytechnic who will be affected by the 1st respondent’s decision. Copies of the 1st respondent’s notices, permanent structures alleged to be erected on the suit land in the form of residential dwelling houses and public institutions are exhibited in the applicant’s affidavit as are its certificate of registration and constitution.

8. The petition is opposed. The 1st respondent filed grounds of opposition to the application on **19/10/2018**. The 2nd respondent filed its replying affidavit sworn by *Sifuna Wakofula* its County Secretary on **6/11/2018**. The 3rd and 4th respondents filed grounds of opposition on **26/2/2019**.

The 1st respondent’s response.

9. The 1st respondent’s response is that the petition is imprecise regarding the alleged breach and is an abuse of the constitutional jurisdiction of the court; that the facts revealed by the petitioner do not relate to constitutional matters but disputes in land ownership which can be adjudicated upon under the ordinary environment and land jurisdiction of this court; that pursuant to **Article 161** of Constitution of Kenya the proper remedy of the petitioner lies in **Section 13** of the **Environment and Land Court Act** and that enjoyment of fundamental rights and freedoms under the Constitution by any individual is subject the rights and freedom of others, and public interests overrides any individual interest in this instant case.

The 2nd respondent’s response.

10. In the 2nd respondent’s replying affidavit, the County Secretary depones that the 2nd respondent has no objection to the verifications to the titles of the affected parties to determine their legality; that there is no order sought against the 2nd defendant.

The 3rd and 4th respondents’ response.

11. The 3rd and 4th respondents’ grounds of opposition dated **25/2/2019** state that the petition does not state with clarity the rights alleged to

have been violated and is based on hearsay; that it raises no arguable constitutional matters and is a mere moral lamentation and that in the implementation of the disputed statutory provisions public interests outweighs the private interests represented by the petitioner and **Section 153 (c)** of the **Land Laws Amendments Act 2016** empowers the 1st respondent to issue notifications of evictions in relation to public land and any action taken therefore was within the 1st respondent's mandate.

12. The petitioners filed three sets of written submissions on **29/4/2019, 8th May 2019** and **25/9/2019** respectively. The 3rd and 4th respondents filed their three sets of submissions in respect of the petition **13th May 2019** and on **14/1/2020** respectively. The 1st respondent relied on the submissions of 3rd and 4th respondents while the 2nd respondent filed its three sets of submissions in respect of the consolidated petitions on **1/7/2019** and another two others on **25/11/2019**, separately addressing each of the petitions as they were before consolidation.

DETERMINATION

Issues for Determination

13. The issues that arise in this petition are as follows:

(a) Has the petition met the threshold required of a constitutional petition?

(b) Has the jurisdiction of this court been properly invoked by the petition?

(c) Whether the Notice by the 1st respondent violates the petitioners' constitutional rights under articles 47 and 50 of the Constitution.

(d) Whether an order of certiorari should issue to quash the notice and whether an order restraining the respondents from any dealings with the suit land save issuance of title to parcels located within Block 6 and Block 7 – Kitale Municipality should issue.

(e) Who should bear the costs of the petitions?

The issues are discussed as hereunder.

(a). Has the petition met the threshold required of a constitutional petition?

14. In **Anarita Karimi Njeru -vs- Attorney General, (1979) KLR 154** the court of appeal stated as follows:

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

15. This holding received a further affirmation in the case of **Mumo Matemu -vs- Trusted Society of Human Rights Alliance and others, Nairobi Civil Appeal No. 290 of 2012** where the court stated as follows:

"We cannot but emphasize the importance of precise claims in due process, substantive justice and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not conterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point...Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice as they give fair notice to the other party. The Principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle."

16. Having set out the criteria to gauge the instant petition, I revert to the substantive contents of the petition.

17. It has been pleaded that the respondents are obliged by **Article 21 (1)** of the **Constitution** to observe, protect, respect, promote and fulfil the fundamental rights and freedoms in the Bill of rights including under **Article 47**. The petitioners aver that the terms in the 1st respondent's notice are in breach of the petitioners' rights to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair as is envisaged in **Article 47**.

18. The petitioners have also come under **article 27(2)** which provides for equality and **article 40(1)** which provides that every person has the right either individually or in association with others to acquire and own property of any description and in any part of Kenya and **article 40(3)** which provides that the state shall not deprive a person of his property of any description unless certain criteria are met.

19. In addition the petitioners have cited **article 50(1)** of the constitution which provides that every person has the right to have any dispute that can be resolved by the application of law resolved in a fair and public hearing before a court or other independent and impartial tribunal or body.

20. It can be deciphered from their pleading that the petitioners are aggrieved by the issuance of a notice in the daily press by the 1st respondent which according to them evinces a decision made beforehand, which has that has preclude their prior presentations, and prejudiced them by violating their constitutional rights under **article 47** of the constitution and the **Fair Administrative Action Act**.

21. It is averred that the petitioners acquired their plots legally following a gazette notice issued in **1972** which invited members of the public to apply to be allocated plots and after applications and allocations were done the suit land can not be considered as belonging to the 2nd and 3rd respondents. It is pleaded further that some plots are titled while others are in the process of being issued with title.

22. It is their case that they were not summoned or invited to answer any queries in relation to allegations levelled against them, yet the 1st and 2nd respondents have given them what are termed in the petition as valid documents of ownership for their respective plots.

23. Having regard to the foregoing, this court finds that the petitioners have succeeded in setting out a *prima facie* claim to some interest in the land in question and this court is of the view that they have pleaded their case with reasonable measure of precision and within the threshold required of a constitutional petition.

(b). Has the jurisdiction of this court been properly invoked by the petition?

24. The 1st respondent has responded to the petition by stating that the facts revealed by the petitioner do not relate to constitutional matters but disputes in land ownership which can be adjudicated upon under the ordinary environment and land jurisdiction of this court and that pursuant to **Article 161** of Constitution of Kenya the proper remedy of the petitioner lies in **Section 13** of the **Environment and Land Court Act**.

25. The proper method prescribed for the resolution of a dispute should be followed by a claimant before he seeks to apply an alternative method. In the case of **Speaker of the National Assembly v James Njenga Karume [1992] eKLR** the court stated as follows:

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.”

26. Courts have in the past pronounced themselves on the issue as to whether land ownership disputes ought to be ventilated in a constitutional petition. In the case of **Petro Oil Kenya Limited v Kenya Urban Roads Authority [2018] eKLR** the court (Okongo J) stated as follows:

“A constitutional petition is not an ideal forum for investigating and determining contentious issues of fact as oral evidence is rarely called like in this case. Whether or not the suit property was hived from a road truncation is not an issue which I can determine on the affidavit evidence before me. If it is true that the suit property was hived from a road truncation, the title held by the Petitioner would not be valid since the property was not available for allocation to Wangs from whom the Petitioner purchased the suit property. Article 40 (6) of the Constitution provides that the protection accorded to property does not extend to the property which has been acquired unlawfully. Whether or not the Petitioner acquired the suit property lawfully is an issue that can only be determined in a civil suit and not in a Constitutional Petition. The courts have said over and again that the mere fact that constitutional rights are alleged to have been violated or are threatened does not make the dispute a constitutional one calling for the filing of a petition under Article 22 of the Constitution. The court can still uphold constitutional rights in a normal civil suit.”

27. Whether or not the allocations were validly done many of the petitioners have laid claim to the land, some by way of letters of allotment and others by way of titles, and some of them are in possession of some of the plots. The petitioners exhibited a bundle of documents vide which they claim title as **exhibit “IW2”** in the sworn affidavit of *Isaiah Wanyonyi*, one of the petitioners. The bundle comprises of copies of letters of allotment, rates payments requests; proposed PDPs, rates clearance certificates, certificates of lease, a beacon certificate, receipts and some correspondence.

28. For this court to issue one of the orders sought, namely, an order of prohibition restraining the respondents from having any dealings in the suit lands in any manner whatsoever save the issuance of titles to the petitioners for their respective plots, it would be presuming that the dispute as to whether the lands were properly allocated to the petitioners has been concluded by a court of competent jurisdiction.

29. In the case of **Sanghani Investments Ltd -vs- Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 E.A 354** the Court stated as hereunder:-

“...A declaration does not fall under the purview of judicial review for the simple reason that the court could require viva voce evidence to be adduced for determination of the case on the merits before declaring who the owner of the land is. Judicial Review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application...Whereas it is true that the underlying dispute herein is ownership of the land, Judicial Review proceedings is not a forum where such a dispute can be adjudicated and determined as there would be need for viva voce evidence to be adduced on how the land was acquired and came to be registered in the names of the applicant; whether the title is genuine or not...”

30. In the **Petro case (supra)** the Hon Justice Okongo found that the import of the above dicta in the **Sanghani case (supra)** set out above applies to petitions too and I agree entirely with that view.

31. As seen in the decisions quoted above the dispute concerning title to the suit land should not be ventilated in this petition and certainly those documents exhibited in the bundle marked **"IW2"** mentioned above can not therefore be verified by way of evidence in this case.

32. However in the instant case this court is not satisfied that the claim is regarding ownership of land alone. The alleged **1972** gazette notice is exhibited as **"IW4"** in the affidavit of *Isaiah Wanyonyi* in the petition. The manner of its issuance, and whether it refers to the suit land or part of it are not matters on trial in this petition. The petitioners merely hold it as a banner above their heads to indicate to this court and the respondents what the genesis of their claim of violation of their constitutional rights is.

33. I have stated earlier that whether or not the allocations were validly done, many of the petitioners have laid claim to the land, some by way of letters of allotment and others by way of titles, and some of them are in possession of some of the plots. Based on that unverified claim to ownership, and the actual possession of the suit land, this court is able to pronounce itself as to whether or not some of their constitutional rights apart from rights of ownership have been violated. However any other prayer or claim that may cause this court to express an implicit legal recognition of the petitioners' titles and other documents is misplaced.

34. It is this court's view that the jurisdiction of this court has been properly invoked in so far as the claim for violation of rights is concerned.

(c) Whether the Notice by the 1st respondent violates the petitioners' constitutional rights under articles 47 and 50 of the Constitution.

35. The introductory part of the impugned notice of **20/6/2018** and published in the Daily Nation Newspaper of **23/7/2018** reads as follows in part:

"Upon complaints from the County Government Of Trans Nzoia and the Ministry Of Agriculture, the National Land Commission investigated and confirmed that the under listed properties were illegally and irregularly alienated from the two complainants the subject parcels partly fall within Block 6 and Block 7 within Kitale Municipality starting from the County Commissioner's Office all the way to Kitale National Polytechnic including Lavington Estate and surrounding areas."

36. At the foot of the said notice are the following words:

"Notice is now hereby given that all the above described "owners" and/or occupiers of the same properties should:

(a) submit their ownership documents to the NLC within 14 days of this notice pursuant to section 6 of the NLC Act;

(b) Prepare to vacate the said lands within 90 days of the same notice as required by section 155 of the Land Act 2012 , 152A 152B and 152 C of the Land Laws Amendment Act 2016.

Failure to comply with this notice shall compel the National Land Commission to invoke relevant provisions of the law whose penalties include revocations and restrictions of the said documents amongst other actions.

Chairman, National Land Commission."

37. The main ground relied on by the petitioners in all the petitions is that the 1st respondent's decision contained in the subject notice violates the rights of the petitioners', who are allegedly the owners of parcels of land parcels falling within **Block 6 and 8 Kitale Municipality**, to expeditious, efficient, lawful reasonable and procedurally fair administrative action as provided for under **Article 47 of the Constitution** of Kenya in so far as the affected parties were not given an opportunity to explain how they became the owners or occupiers of the said pieces of land. Notwithstanding their alleged claim to the land, sanctions have been imposed against them without a hearing and contrary to the rules of natural justice. They have stated that they were not given a proper and conducive environment for a hearing before they were requested to vacate the subject parcels. In particular they aver that they have never been served or invited to answer any queries in relation to the complaints levelled against them.

38. **Article 47 of the Constitution** provides as follows:

(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.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.

39. **Section 4 (3) and 4(4) of the FAA** provide as follows:

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the

administrator shall give the person affected by the decision—

- (a) prior and adequate notice of the nature and reasons for the proposed administrative action;
- (b) an opportunity to be heard and to make representations in that regard;
- (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;
- (d) a statement of reasons pursuant to section 6;
- (e) notice of the right to legal representation, where applicable;
- (f) notice of the right to cross-examine or where applicable; or
- (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

(4)The administrator shall accord the person against whom administrative action is taken an opportunity to—

- (a) attend proceedings, in person or in the company of an expert of his choice;
- (b) be heard;
- (c) cross-examine persons who give adverse evidence against him; and
- (d)request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

40. Article 50 of the Constitution provides as follows:

“(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

41. The law that was enacted to give effect to **Article 47(3)** of the Constitution, and for connected purposes is the **Fair Administrative Action Act No 4 of 2015**. It provides as follows at **section 4 (1)**:

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

42. 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.

43. The above mentioned provisions of the constitution and statute insulate citizens from any arbitrary decision making on the part of administrative bodies and officers in the course of their discharge of duties under the law. It is with regard to the above mentioned provisions of the law and the Constitution that the notice issued by the 1st respondent must be measured for its legality.

44. As is evident on the face of the impugned notices the 1st respondent alludes to complaints made to the 1st respondent, an investigation and confirmation that the listed properties were illegally and irregularly alienated from the two complainants, that is, the County Government of Trans Nzoia and the Ministry Of Agriculture.

45. Following the petitioners' claim of breach of the principles of natural justice it behoves this court to examine the response of the 1st respondent to determine whether it has raised a justification for its conduct that would pass muster before this court.

46. It is not disputed that the 1st respondent is mandated under **Sections 5 and 6** of the **National Land Commission Act** to carry out investigations either after receiving complaints or on its own initiative. It also has mandate to manage and administer land held by a county government in trust for the people of the county.

47. The 1st respondents states that among some of its findings were the facts that some of the allottees were allocated the land while they were still minors; that the allottees never tendered their letters of acceptance and they never paid the requisite fees, or paid them within **30** days as stipulated within those letters. The 1st respondent avers in its response that it issued the impugned notices in accordance with the provisions of **Sections 152 A, 152 B and 152 C** of the **Land Act** as amended by the **Land Laws Amendment Act 2016**.

48. The 1st respondent recites the provisions of **Article 40 (6)** of the constitution to the effect that the protection of the right to ownership of property is not absolute and it does not extend to protection of land that has been illegally acquired. However this court fails to see a detailed mechanism by which the 1st respondent established that the suit land had been illegally acquired by the petitioners.

49. The provisions of **Section 6** of the **National Land Commission Act** come into sharp focus now. Those provisions are as follows:

6. (1) The Commission, shall have all the powers necessary for the execution of its functions under the Constitution, this Act and any other written law.

(2) Without prejudice to the generality of subsection (1), the Commission shall have powers to—

(a) gather, by such means as it considers appropriate, any relevant information including requisition of reports, records, documents or any information from any source, including any State organ, and to compel the production of such information where it considers necessary;

(b) hold inquiries for the purposes of performing its functions under this Act;

(c) take any measures it considers necessary to ensure compliance with the principles of land policy set out in Article 60(1) of the Constitution.

(3) In the exercise of its powers and the discharge of its functions, the Commission—

(a) may inform itself in such manner as it may consider necessary;

(b) may receive written or oral statements; and

(c) is not bound by the strict rules of evidence.

50. That **Section 6** of the National Land Commission Act provides that the 1st respondent shall have all the powers necessary for the execution of its functions under the Constitution, the Act and any other written law does not oust the application of the rules of natural justice embodied in the provisions of articles **47** and **50** and **Section 4** of the **FAA**, the latter which has constitutional underpinnings in the mentioned articles. The 1st respondent is obliged to follow a procedure that is fair in its investigation of the complaints, and a detailed description of that procedure must be given in its response to the petition.

51. It is true that previous decades saw grievous maladministration in respect of land issues in Kenya and that nullification of titles has occurred in the past even where holders thereof thought they had legally issued titles. The titles and the letters of allotment held by the petitioners may well be illegally held but the constitution and the Fair Administrative Act emphasize on the need to follow the due process

for the decision and undertaking by the 1st respondent to be upheld by the court.

52. Before a decision is arrived at, the elementary components of the due process is the notification of the complaints to the persons likely to be adversely affected by any decision emanating from an investigation of the complaints, the provision of an opportunity to be heard to those persons, and the giving of reasons for their decision. I do not find any of these elements appearing in the response of the 1st respondent in this petition. In any event, it would be quite inimical to the justice and fairness to have in the same notice the 1st respondent's decision that the allocations in respect of the suit land are illegal and a requirement that the petitioners should both submit their ownership documents under **Section 6** of the **National Land Commission Act** and vacate the land. The Notice does not specify the exact clause in that section which would apply in the circumstances of its notice. In my view, the provisions of **Section 6** of the Act which *could* clearly apply with regard to the requisition for submission of the petitioners' title or other documents are contained in **section 6(2)** which states as follows:

“(2)Without prejudice to the generality of subsection (1), the Commission shall have powers to—

(a) gather, by such means as it considers appropriate, any relevant information including requisition of reports, records, documents or any information from any source, including any State organ, and to compel the production of such information where it considers necessary;

(b) hold inquiries for the purposes of performing its functions under this Act;

53. It is further the opinion of this court that the application of those provisions would come into play at the beginning or during the course of investigations into the issue whether the land belongs to the 2nd and 3rd respondents and not at the conclusion thereof, regardless of whether the investigation is instigated by a complaint or complaints or conducted by the 1st respondent *suo motu*.

54. The 1st respondent's reliance on **Section 152 C** alone for the issuance of the impugned notices is also quite misplaced for the provisions of that section would come into play only after the due process has been followed.

55. In the light of the foregoing the petitioners have in this court's view established that their rights to fair administrative action and a fair hearing under **Articles 47 and 50** of the **Constitution** have been violated by the 1st respondent.

Whether an order of certiorari should issue to quash the notices and whether an order restraining the respondents from any dealings with the suit land save issuance of title to parcels located within Block 6 and Block 7 – Kitale Municipality should issue.

56. The upshot of the foregoing is that this court has found that the 1st respondent's decision embodied in the notice of **20/6/2018** which was published in the newspapers is null void *ab initio* for being unconstitutional and the same is hereby brought into this court and quashed.

57. The last issue arising in this matter is whether an order restraining the respondents from any dealings with the suit land, save the issuance of title to parcels located within **Block 6** and **Block 7 – Kitale Municipality**, should issue.

58. The 1st respondent's mandate was recognized by the petitioners herein when they pleaded that it has mandate to manage public land on behalf of the national and county governments. This court has already indicated that a petition is not the appropriate forum for litigating disputes with regard to title. The petitioners have acknowledged that some of them have no title at the moment; and even for those who may profess to hold title much may await them in future as the Court Of Appeal has observed as follows in **Denis Noel Mukhulo & Another v Elizabeth Murungari Njoroge & Another, CA No. 298 of 2013:**

“While we agree with the appellants that title registered under the Registered Land Act was sacrosanct, we are not able to agree that the Act protected title registered under it in all and sundry cases, irrespective of how the title was acquired. By section 27 of the Act, the registration of a person as a proprietor of land vested in him the absolute ownership of the land together with all rights and privileges belonging or appurtenant thereto, while section 28 of the Act insulated the rights of a proprietor from challenge except in the manner set out in the Act, which really does not afford the blanket protection that the appellants claim it did. Section 143 of the Act, which granted the court power to order rectification of the register provided as follows...The effect of the above provision is that the court had power to order rectification, save in the case of a first registration, where the registration was obtained by fraud or mistake to which the registered person was party.”

59. In the case of **Chemey Investment Limited v Attorney General & 2 others [2018] eKLR** the Court Of Appeal stated as follows:

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

60. In the circumstances it would be improper to issue an order that would curtail the 1st respondent's valid exercise of its power under the

law and the constitution in future. As long as the complaints that led to the notice from which ensued this petition are alive, and as long as the 1st respondent is prepared to follow the law with regard to the investigation and revocation of the titles and allocations, no orders should issue that would interfere with that course of action. For that reason the order of prohibition in this petition shall be denied.

CONCLUSION

(b) What orders should issue?

61. The upshot of the foregoing is that the petitions before me partially successful.

62. I issue the following orders:

(a) A declaration that the decision of the 1st respondent embodied in the Notice dated 20/6/2018 published in the Daily Nation newspaper of 23/7/2018, to the extent that it requires owners of parcel of land known as Kitale Municipality Block 6 and 7 vacate from the said pieces of land within 90 days, is unconstitutional, null and void.

(b) An order of certiorari removing into this court and quashing the decision of the 1st respondent embodied in the Notice dated 20/6/2018 published in the Daily Nation newspaper of 23/7/2018, to the extent that it requires owners of parcels of land known as Kitale Municipality Block 6 and 7 vacate from the said pieces of land pieces of land.

(c) Each party shall bear their own costs of the consolidated constitutional petition.

It is so ordered.

Dated, signed and delivered at Nairobi via electronic mail on this 29th day of May, 2020.

MWANGI NJOROGE

JUDGE, ELC, KITALE.