



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC PETITION CASE NO. 3 OF 2017

1. YAKO SUPERMARKET (K) LIMITED .

2. SUDHIR KHETIA PETITIONERS

VERSUS

1. NATIONAL LANDS COMMISSION

2. THE CABINET SECRETARY MINISTRY OF LAND

HOUSING AND URBAN DEVELOPEMENT

3. THE CHIEF LAND REGISTRAR

4. THE CHAIRPERSON BOARD OF MANAGEMENT

KAKAMEGA PRIMARY SCHOOL

5. THE HON ATTORNEY GENERAL..... RESPONDENTS

JUDGEMENT

The petition herein is brought pursuant to Article 22 (1) of the Constitution of Kenya, 2010. The legal foundation is that, Article 22(1) allows persons to institute court proceedings to claim the violation, infringement or a threat to infringement of a right and/or fundamental freedom in the Bill of rights. Under Article 23 (1) of the Constitution, the High Court has jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to a right or fundamental freedom. Under rule 2 of the Constitution of Kenya (Practice and Procedure Rules), 2013, the High Court is defined to include the Environment and Land court established pursuant to Article 162 (2) (b) of the Constitution of Kenya. In addition, Section 13 of the Environment and Land Court Act, 2011, gives the Environment and Land Court the jurisdiction to handle all disputes relating and touching upon the Environment and Land. Article 19 (1) declares the Bill of Rights as an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies. By virtue of Article 19 92) (a) & (c), the rights in the Bill of rights belong to every individual and are subject to the limitations contemplated in the Constitution. Article 19 (3) (a) provides that fundamental rights are inherent in people by virtue of them being persons and it is not the state which grants these rights and fundamental freedoms.

Article 20 (1) decrees that the Bill of Rights applies to all and binds all state organs and all persons. Every person is entitled to enjoy the rights and fundamental freedoms in the Bill of rights to the greatest extent consistent with the nature of the right or fundamental freedom. Article 20 (3) (b) enjoins this honourable court to adopt the interpretation of the Bill of Rights that most favours the enforcement of a right or fundamental freedom and promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom. Article 21 (1) imposes an obligation on the state and every state organ to observe, respect, protect and fulfil the rights and fundamental freedoms under the Bill of Rights. The respondents being state organs and/or offices are therefore mandated under the Constitution to observe, respect and protect the petitioner's right to property as guaranteed by the Constitution. Article 24 (1) of the Constitution decrees that a fundamental right in the Bill of Right is not to be limited except by law and only to the extent that the limitation is reasonable, justifiable and complies with the dictates of the principles enunciated in Article 24 of the Constitution. Article 27 of the Constitution provides for equal protection and equal benefit of the law. Article 40 as read with Articles 60 (1) (b) and 64 of the Constitution of Kenya provides for the protection of right to property as one of the rights in the Bill of rights. It states that every person has the right to acquire and own property in Kenya. Article 47 provides for the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Article 50 (1) provides for a fair hearing before an independent and impartial tribunal or body.

The Constitution guarantees the right to property and makes it a fundamental responsibility of the state and every organ of the state to observe, respect, protect and promote the property rights and not to arbitrarily deprive a person of its property rights without any basis, due process and prompt payment in full of just compensation. By virtue of Article 40, the respondent herein is enjoined to respect sanctity of title

to private property and not to interfere with the petitioner's proprietary interests in the said suit land. Articles 10 and 232 provide for national values and principles of governance and values and principles of public service which bind all state organs, officers and public servants. The National values and principles of governance include inter alia, the rule of law, equality and human rights contained in the Bill of Rights whereas the values and principles of public service enshrined in Article 232 (1) of the Constitution include inter alia, high standards of professional ethics, accountability for administrative acts, and effective, responsive, prompt, impartial and equitable provision of services. Further, in discharging its mandate, the 1st respondent is enjoined by Article 249 (1) of the constitution to secure the observance of democratic values and principles and promote constitutionalism. Article 249 (2) subjects the 1st respondent's performance of its obligations to the Constitution and the law.

The petitioners submitted that, the 1st petitioner is the registered owner of all that parcel of land known as Kakamega Town Block II/292 (originally LR No. 1407/208 – plot No. 32) and measuring approximately 0.33 hectares and situate in Kakamega District within Kakamega County. The 2nd petitioner is the registered owner of all that parcel of land known as Kakamega/Municipality Block II/252 (originally LR No. 1407/208-plot No. 32) and measuring approximately 0.30 hectares and situated in Kakamega District within Kakamega County. The petitioners acquired the foregoing suit properties for valuable consideration having exercised all due diligence which disclosed that the suit properties were available for sale and/or allocation, free of any encumbrances and without any defects whatsoever.

The 1st petitioner herein avers that on 5th February, 2011, it purchased Kakamega/Municipality Block II/292 for valuable consideration from one Michael Odwoma. On 20th August, 2011, the 2nd petitioner purchased Kakamega/Municipality Block II/252 for valuable consideration from Kito Pharmaceutical Limited. The 1st respondent has since sanctioned the amalgamation of Kakamega Municipality Block II/292, 296, 314 and 252. That the director of survey has purported to issue a deed plan after the amalgamation of the parcels was approved, being Kakamega/Municipality Block II/360. Owing to the contested issues herein, a new title for the amalgamated land has not been issued because the petitioners are still in possession of the original title documents and the original transfers in relation to Kakamega/Municipality Block II/292, 296, 314 and 252. The petitioners aver that upon registration of their proprietary interest in the suit property and/or the endorsement of the certificates of lease by the Registrar of titles, the petitioners became the proprietors of the suit property holding absolute and indefeasible title in terms of section 23 (1) of the Registration of titles Act, Chapter 282 Laws of Kenya (now repealed by the Land Registration Act, No. 3 of 2012 which retains the same principles under sections 24, 25 (1) and 26 (1) of the Act.)

The petitioners aver that as the absolute and indefeasible owner of the suit property, their property rights are guaranteed, respected and protected by Article 40 and secured in accordance with the principle embodied in Article 60 (1) (b) of the Constitution of Kenya. The petitioners further aver that the nature of its business is capital intensive and requires huge finances. The petitioners aver that upon receipt of the titles to the suit property and on the strength of the guarantee of title obtained from the government of the Republic of Kenya through the 2nd and 3rd respondents herein the petitioners used their titles to the suit property to secure business arrangements with local and foreign investors alike. The petitioners aver that they have always remained in possession of the suit properties and has made part developments thereon worth Ksh. 200 Million (Two hundred Million) with the potential of employing at least 200 Kenyans and indirectly supporting a myriad household. The petitioners aver that despite being the registered proprietors to the suit property, they have faced constant harassment and infringement of their proprietary rights and quiet possession from various quarters including that of officers of the 3rd respondent, the 4th respondent and the vice-chairperson of the 1st respondent and/or their agents. The petitioners aver that the officers of the 3rd respondent, the 4th respondent and the vice-chairperson of the 1st respondent and/or their agents are hell bent on expropriating the petitioner's property.

That 17th February, 2012 through Kenya Gazette Notice No. 1619, the Land Registrar of Kakamega District purported to revoke the petitioners' titles of the suit properties on the ground that the suit properties belonged to Kakamega Primary School. The above stated action impelled the petitioners to file Kakamega Judicial Review Case No. 20 of 2012 against the Land Registrar and the Chairman of the School committee of Kakamega Primary School seeking an order of certiorari to quash the decision of the Land Registrar. On 9th May, 2013 the court quashed the Land Registrar's decision to revoke the titles and the subject gazette notice was declared null and void. On 28th June, 2013, the 1st respondent wrote to inform the petitioners that the commission had received a complaint regarding the ownership of the suit properties and that the commission was investigating the grant held by the petitioners to determine the property and legality of the same. The letter further required the petitioners to cease dealing with the suit properties until the case was determined. The petitioners wrote back explaining how they became seized of the suit properties and attached documents supporting the same. On 6th January, 2014, the 1st respondent again wrote to the petitioners stating thus:

“It is our opinion that the said properties are separate and distinct from the surrounding ones. In that regard, we find no justifiable merit to stop any further work that you are undertaking.”

That the 1st respondent wrote to the petitioners on 4th April, 2014 advising that the Commission had commenced a review of the grants held by the petitioners and required the petitioners to make a presentation to the commission on how the petitioners acquired the suit properties. Yet again, by a public notice dated 14th April, 2014 the 1st respondent informed the members of the public that it had received complaints regarding many parcels of land including the suit properties herein and invited the members of the public to present information regarding the same. Pursuant to the notice dated 14th April, 2014, the petitioners again by a letter dated 15th April, 2014 wrote to the 1st respondent and provided all the documentation regarding their ownership to the suit properties. On 18th June, 2014, the 3rd respondent without offering any explanation to the petitioners, entered restrictions on the petitioners' titles to the suit properties barring any dealings with the parcels until the 3rd respondent got directions presumably from the 1st respondent to do so. The petitioners made several appearances for the review hearing and presented all the documentation to show ownership of the suit properties with the last appearance being on 21st November, 2014. During the appearances, the petitioners made numerous requests to have sight of the letter of complaint against them together with the supporting documents but none was forthcoming. After the review hearings, the 1st respondent never delivered any determination in respect of the suit properties despite the numerous letters written to them requesting for the same. After 11 months of the petitioners' last appearance before the 1st respondent and after the petitioners' advocates threatened to take action against the 1st respondent the petitioners received a letter dated 21st October, 2015 and titled “Determination for Review of Grants and dispositions on Kakamega Township Block II/32 and all the subsequent sub-divisions – Block Nos. II/296, II/251, II/292, II/252, II/294” from the vice chairperson of the 1st respondent on behalf of the

chairman, Muhammad A. Swazuri. The same letter was copied to the 3rd respondent, the governor Kakamega County, the Board of Directors Kakamega primary School, the head teacher of Kakamega primary School and the petition and enclosed the determination of the Commission. The petitioner therefore prays that:-

- (a) The honourable court be pleased to hold and declare that the petitioners are the is registered proprietors of Kakamega/Municipality Block II/252 and Kakamega/Municipality Block II/292 measuring approximately 0.33 hectares and 0.30 hectares respectively and situated in Kakamega District, within Kakamega County.
- (b) The honourable court be pleased to hold and declare that under section 14 of the National Land Commission Act, 2012 the 1st respondent can only review grants of public land as defined under article 62 of the Constitution of Kenya and does not extend to private land as defined by Article 64 of the Constitution of Kenya, 2010.
- (c) The honourable court be pleased to hold and declare that since Kakamega/Municipality Block II/252 and Kakamega Town Block II/292 are registered in the names of the petitioners herein the same is private land in terms of Article 64 (b) of the Constitution of Kenya, 2010, the 1st respondent lacks jurisdiction to review the same allegedly under section 14 of the National Land Commission Act, 2012, revoke/or direct the revocation of the certificate of title and that the resultant proceedings, hearing and determination undertaken without jurisdiction and are thus ultra-vires, null and void;
- (d) The honourable court be pleased to hold and declare that since Kakamega/Municipality Block II/252 and Kakamega Town Block II/292 registered in the names of the petitioners herein is private land in terms of Article 64 (b) of the Constitution of Kenya, 2010, the 1st respondent lacks jurisdiction to review the same allegedly under section 14 of the National Land Commission Act, 2012, revoke/or direct the revocation of the certificate of title and that the resultant proceedings, hearings and determination undertaken without jurisdiction and are thus ultra-vires, null and void;
- (e) The honourable court be pleased to hold and declare that the 1st respondent has infringed, infringed and violated the petitioners' inviolable right to a fair administrative action and fair hearing protected under Articles 25, 47 and 50 (1) of the Constitution.
- (f) The honourable court be pleased to hold and declare that the 1st respondent breached the petitioners' legitimate expectation that it would hold its title to the suit property until its title was declared unlawful as by law provided.
- (g) The honourable court be pleased to hold and declare that the 1st respondent has infringed, infringed and/or violated the petitioners' right to property decreed under Articles 40 as read with Article 60 (1) (b) of the Constitution.
- (h) The honourable court be pleased to hold and declare that the report dated 8th October, 2015 is illegal, irregular, unprocedural and unconstitutional and void for all intents and purposes.
- (i) An order of certiorari do issue removing into this honourable court for purposes of being quashed the entire order of 8th October, 2015 to the extent that it revoked the petitioners' titles to Kakamega/Municipality Block II/252 and Kakamega Town Block II/292.
- (j) An order of Prohibition be and is hereby issued prohibiting the 3rd respondent, its servants, agents or in any manner whatsoever from revoking or lodging any caution or caveat or restriction whatsoever on the certificates of lease over Kakamega/Municipality Block II/252 and Kakamega town Block II/292 registered in the name of the petitioners.
- (k) An order of permanent injunction directed at the 1st, 2nd, 3rd and 4th respondents, their agents, officers or any person whosoever or howsoever acting on their behalf from interfering in any way whatsoever with the petitioner's proprietorship or title Kakamega/Municipality Block II/252 and Kakamega town Block II/292;
- (l) The honourable court be pleased to award the petitioners general damages against the respondents jointly and severally for losses and inconveniences suffered by the petitioner;
- (m) The honourable court be pleased to award the petitioners exemplary damages against the 1st respondent for breach of the petitioners' fundamental rights;
- (n) The costs consequent upon this petition be borne by the respondents in any event on indemnity basis;
- (o) The honourable court do award interest on (l), (m) and (n) at the prevailing court rate of 14% from the date of filing of suit till payment in full.
- (p) The honourable court do make any such other or further orders as it may deem just and expedient in the circumstances to remedy the violation of the petitioner's fundamental rights.

The 2nd, 3rd and 5th respondents in response to the petition did file grounds of opposition dated 13th August, 2018 and filed on 24th September, 2018 on the grounds that the petition has no merit and is based on a misconception of the law and particularly the powers of the 1st respondent under the National Land Commission Act, 2012 and the Constitution of Kenya, vexatious and abuse of the court process. That the actions of the 1st respondent in revoking the petitioners title in suit parcels No. Kakamega Town Block II/292 and Kakamega/Municipality Block II/252 were within the law and as per the recommendation of the 1st respondent under section 14 (5) of the

National Land Commission Act, 2012. That the actions of the 3rd respondent in revoking the petitioners title in suit parcels No. Kakamega Town Block II/292 and Kakamega/Municipality Block II/252 were within the law and as per the recommendation of the 1st respondent under section 14 (5) of the National Land Commission Act, 2012.

That Article 68 (c) (v) of the Constitution, the National Land Commission shall within five years of the commencement of National Land Commission Act on its own motion or upon complaint by the National or County Government, an individual review all grants and disposition of public land to establish their propriety or legality. That parcel No. Kakamega/Municipality Block II/252 and Kakamega Town Block II/292 were initially public land reserved for the 4th respondent that were illegally alienated into private property and later acquired by the petitioners herein. That Article 62 defines what public land entails; the same constitution recognizes the fact that there were other definitions of “public land.” Even before its promulgation in the year, 2010.

That the fact that public property is changed to private property and registered does not prevent the National Land Commission from investigating the legality on how the parcel was acquired. That in Japheth Kipkemboi Magut vs. National Land Commission and 2 others (2017) eKLR it was held that:-

“The spirit of Article 67 (3) and Article 67 of the Constitution of Kenya is that all existing grants should be investigated by the National Land Commission and appropriate action taken. This should be read with Article 40 of the Constitution of Kenya and Section 26 of the Land Registration Act which do not protect land title that was illegal acquired. This court thus finds that the power of the National Land Commission to review all grants or disposition of public land entails power to review grants and disposition in respect of land that has been converted from public to private before or after the promulgation of the Constitution is retrospective.”

That the 3rd respondent cannot be faulted for acting upon the recommendation of the 1st respondent to revoke the suit parcels of land as provided for under Section 14 (5) of the Constitution and the same does not amount to violations of the constitutional rights of the petitioner under the Constitution. That the 1st respondent pursuant to the provisions of section 14 (3) of National Land Commission Act, 2012 gave the petitioner notice to appear before the hearing concerning the suit parcels of land and hence there is no breach of Article 47 of the Constitution. That Article 40 (6) of the Constitution does not protect property that is found to have been unlawfully acquired and hence the petitioners are not entitled to the protection of the law.

They submit that, the petition does not disclose any violation of the petitioners right by the actions of the 2nd, 3rd and 5th respondents as the 3rd respondent was only acting upon the recommendation of the 1st respondent as provided for under Section 14 (5) of the National Land Commission Act and hence it should not be faulted.

The 4th respondent submitted that the onus to establish the manner in which alleged rights and fundamental freedoms have been or are alleged to have been violated lies with the petitioner, as espoused in the locus classicus case of Anarita Karimi Njeru (1976-80) 1 KLR 1272. That the said titles the petitioners have since been revoked, consequently non-existent and a decision already made by a constitutional commission, the 1st respondent, in favour of the 4th respondent. That the said titles being asserted by the applicants have since been ordered amalgamated with the 4th respondent’s titles and in favour of the said respondent in tandem with what is appearing on the ground. That the 4th respondent has at all times, since its establishment in 1952, been in physical, actual possession, use and control of the said parcels as referred to in the titles as a play field, a purpose of which the original grant was reserved and in public interest. That there is neither innocence nor demonstrable due diligence on the part of the petitioners in the supposed acquisition of the said parcels of land, and their interests consequently tainted with illegality and irregularities. That the interests of the public must outweigh those of the individual petitioners in respect whereof the interest in the parcels have been protected vide the findings and recommendations of the 1st respondent. That the petition herein thus ought to be dismissed with costs to the 4th respondent.

Analysis and Determination

Upon consideration of the Petition including the supporting and replying affidavits as well as submissions filed herein, the following are the issues for determination:

- Whether or not the title of the suit land held by the petitioners is valid and lawful;
- Whether the Petitioners’ fundamental rights and freedoms have been infringed upon;
- Whether the Petitioner is entitled to Compensation; and
- Who should bear the costs of the Petition?

The petitioners submitted that the 1st petitioner is the registered owner of all that parcel of land known as Kakamega Town Block II/292 (originally LR No. 1407/208 – plot No. 32) and measuring approximately 0.33 hectares and situate in Kakamega District within Kakamega County. The 2nd petitioner is the registered owner of all that parcel of land known as Kakamega/Municipality Block II/252 (originally LR No. 1407/208-plot No. 32) and measuring approximately 0.30 hectares and situated in Kakamega District within Kakamega County. The petitioners acquired the foregoing suit properties for valuable consideration having exercised all due diligence which disclosed that the suit properties were available for sale and/or allocation, free of any encumbrances and without any defects whatsoever. The 1st petitioner herein avers that on 5th February, 2011, it purchased Kakamega/Municipality Block II/292 for valuable consideration from one Michael Odwoma. On 20th August, 2011, the 2nd petitioner purchased Kakamega/Municipality Block II/252 for valuable consideration from Kito Pharmaceutical Limited.

The petitioners submit that since Kakamega/Municipality Block II/252 and Kakamega Town Block II/292 are registered in the names of the petitioners herein the same is private land in terms of Article 64 (b) of the Constitution of Kenya, 2010, the 1st respondent lacks jurisdiction to review the same allegedly under section 14 of the National Land Commission Act, 2012, revoke/or direct the revocation of the certificate of title and that the resultant proceedings, hearing and determination undertaken without jurisdiction and are thus ultra-vires, null and void.

The respondents submitted that parcel No. Kakamega/Municipality Block II/252 and Kakamega Town Block II/292 were initially public land reserved for the 4th respondent that were illegally alienated into private property and later acquired by the petitioners herein. That the 1st respondent has jurisdiction and powers to revoke the title.

Section 14(1) of the National Land Commission Act tasks the 1st Respondent with the mandate to review all grants and dispositions of public land. The said Section states as follows:

“14. Review of grants and dispositions:

(1) Subject to Article 68 (c)(v) of the Constitution, the Commission shall, within five years of the commencement of this Act, on its own motion or upon a complaint by the national or a county government, a community or an individual, review all grants or dispositions of public land to establish their propriety or legality.

(2) Subject to Articles 40, 47 and 60 of the Constitution, the Commission shall make rules for the better carrying out of its functions under subsection (1).

(3) In the exercise of the powers under subsection (1), the Commission shall give every person who appears to the Commission to have an interest in the grant or disposition concerned, a notice of such review and an opportunity to appear before it and to inspect any relevant documents.

(4) After hearing the parties in accordance with subsection (3), the Commission shall make a determination.

(5) Where the Commission finds that the title was acquired in an unlawful manner, the Commission shall, direct the Registrar to revoke the title.

(6) Where the Commission finds that the title was irregularly acquired, the Commission shall take appropriate steps to correct the irregularity and may also make consequential orders.

(7) No revocation of title shall be effected against a bona fide purchaser for value without notice of a defect in the title.”

The Petitioners’ counsel submitted that the suit property is land held by a private entity under leasehold tenure and does not fall under the purview of Section 14(1) of the Act. In the case of *Republic vs. National Land Commission, Ex-parte Holborn Properties Limited (2016) eKLR* as follows:

“Although the Constitution has defined private land to consist land registered under any freehold or leasehold tenure, and whereas Section 14(1) of the National Land Commission Act gives the Respondent the powers to review all grants or disposition of public land, it follows that such a review can only entail land that has been converted from public land to private land. I say so because the Respondent cannot review what is still, according to the records, public land. One must have acquired land that was initially public land and issued with a title document, either as a freehold or leasehold, for a review to be done. It is therefore not true that once land falls under the purview of the definition of “private land”, the same cannot be reviewed. Indeed, it is only such parcels of land that can be reviewed by the Respondent with a view of recommending to the Registrar to revoke the title.”

In the case of *Compar Investments Limited vs. National Land Commission & 3 others (2016) eKLR*, Lenaola J. (as he was then) held as follows:

*“Despite the fact that the Petitioner’s land is currently classified as private land because it holds a 99 years’ leasehold tenure over the same, I do not think that fact alone bars the 1st Respondent from inquiring into its propriety. I say so because, all land in Kenya belongs to the Republic hence the leasehold title held by the Petitioner. The suit property has a history which history tells the procedure of its alienation and hence its legality or otherwise. The Government has powers to alienate its land and grant it to private individuals in forms of grants or leases...But suppose I am wrong in making that finding, I would still arrive at the same conclusion given the provisions of **Section 14(1)** of NLC Act which allows the 1st Respondent, on its own motion or through a complaint lodged by an individual or a community, to review a grant. KURA in its letter dated 5th June, 2013 lodged a complaint to the 1st Respondent over the suit property and requested it to investigate the title of the Petitioner over the suit property and that was a sufficient reason for NLC to act under the law.”*

I find that case law and the decisions of the courts shows that the 1st Respondent has the mandate of looking into the procedures that were followed (or not followed) in the allocation of public land to individuals, before and after the promulgation of the 2010 Constitution. If the correct procedure was not followed in the allocation of public land, then the 1st Respondent is mandated to direct the Registrar of Lands to revoke such grants.

The petitioners submitted that the 1st respondent has infringed, infringed and violated the petitioners’ inviolable right to a fair administrative action and fair hearing protected under Articles 25, 47 and 50 (1) of the Constitution. I have perused the proceedings for the determination of

review of grants and disposition of public land of the 1st respondent signed on the 8th October 2015 for the Chairman of the National Land Commission and find that the petitioners were represented by counsel who produced documentary evidence and made submissions. As regards Block 11/292, on page 9 of the proceedings the petitioners produced the following documents in evidence;

1. Certificate of lease for Block 11/292 in favour of Jemma Khavere Kaisha.
2. Letter of allotment to Jemma Khavere Kaisha dated 22nd February 1994
3. Certified copy of register for Block 11/292 dated 29th September 2004.
4. Lease of Block 11/292 in favour of Jemma Khavere Kaisha.
5. Transfer of lease of Block 11/292 from Jemma Khavere Kaisha to Manase Bismark Etemesi Wandanje.
6. Certificate of lease in favour of Manase Bismark Etemesi Wandanje.
7. Sale of land agreement between Manase Bismark Etemesi Wandanje and Yako Supermarket.
8. NEMA License dated 8th March 2007.
9. Change of user approval advice dated 20th March 2007.
10. Grant to Hindu Trustees dated 22nd February 1958.
11. Plan for LR No. 1407/322 dated 13th February 1956.
12. Plan for LR No. 1407/208 dated 19th June 1961.
13. Plan for 251 – 252
14. Site location plan recommended on 7th July 2004
15. Gazette notice N. 1691
16. Certificate of urgency.
17. Notice of Motion dated 15th March 2012.
18. Statement of Kito Pharmaceutical Limited.
19. Affidavit of Sudhir S. Khetia.
20. Judgment delivered in JR No. 20 of 2012.
21. Decree issued in JR No. 20 of 2012.

For Block II/252 on page 12 -13 the following documents were presented;

1. Certificate of lease for Block 11/252 in favour of Kito Pharmaceutical Limited.
2. Letter of allotment to Bukhungu Women Group.
3. Plot sale agreement between Bukhungu Women Group and Kito Pharmaceutical Limited.
4. Gazette notice N. 1691
5. Certificate of urgency.
6. Notice of Motion dated 15th March 2012.
7. Statement of Kito Pharmaceutical Limited.
8. Affidavit of Sudhir S. Khetia.

9. Judgment delivered in JR No. 20 of 2012.

10. Decree issued in JR No. 20 of 2012.

Counsel for the petitioner made submissions to the Commission and referred to the survey plan and maps relating to the suit property. I find that the petitioners were given a fair hearing before the decision was made. I find that the petitioners' right to a fair administrative action and fair hearing protected under Articles 25, 47 and 50 (1) of the Constitution was not violated.

The Petitioners submit that the 1st respondent has infringed, infringed and/or violated the petitioners' right to property decreed under Articles 40 as read with Article 60 (1) (b) of the Constitution. *Article 40 of the constitution of Kenya states as follows;*

40. (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.

I have carefully perused the proceedings of the 1st respondent during the review proceedings of the suit land in which the petitioners were represented by their advocate. The complainant submitted that the suit parcels of land were illegally hived off land meant for the school play ground by the petitioners. The plots in question were excised from plot number Kakamega Town Block II/32. They stated that they were allocated Kakamega Town Block II/31 and Kakamega Town Block II/32 respectively. The school was originally owned by the Hindu Community. Since the setup of the school they have been using Kakamega Town Block II/32 as a playground. The school has a population of 3000 children and has a section for special education.

Counsel for the petitioners submitted before the 1st respondent that the schools stood on land parcel number Kakamega Town Block II/31 formerly L.R No. 1407/322 whose boundaries were clearly demarcated. The petitioners parcels of land were initially part of Kakamega Town Block II/32 which was a municipal yard which was later subdivided to create the suit parcels. That the school has never used the suit land.

In the instant case, the issue for determination is whether or not the suit land is public or private land and whether there was any irregularity of fraud in the transfer. The petitioners submitted that the 1st Respondent acted *ultra vires* in revoking the title of a *bona fide* purchaser for value without notice. Section 14(7) of the National Land Commission Act which provides as follows:

“(7) No revocation of title shall be effected against a bona fide purchaser for value without notice of a defect in the title.”

The Court of Appeal in *Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura vs. Attorney General & 4 others (2017) eKLR*, in determining who a *bona fide* purchaser for value without notice is cited the case of *Katende vs. Haridar & Company Limited (2008) 2 E.A 173* where the Court of Appeal held as follows:

“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.”

In the case of **Samuel Kamere vs Lands Registrar, Kajiado Civil Appeal Number 28 of 2005** the Court of Appeal held that;

“...in order to be considered a bona fide purchaser for value, they must prove; that they acquired a VALID and LEGAL title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property...”

The 1st respondent in its decision found that the records in respect of the suit land were missing from the registry. They found the he suit land falls within land that was planned for a playing field. The school being a public institution, the land it occupies and utilizes as a playing field is therefore public utility and therefore not available for allocation. That the suit land was unlawfully acquired and made a determination that the titles be revoked.

I find no reason to fault the decision of the 1st respondent. The petitioners were not bonafide purchasers as it was not apparent that the vendors they acquired the titles from had valid titles. The 1st petitioner herein avers that on 5th February, 2011, it purchased Kakamega/Municipality Block II/292 for valuable consideration from one Michael Odwoma. The 4th respondent produced documentary evidence that they had a civil dispute with the said Michael Odwoma from way back in 2004 in High Court Civil Case No. 97 of 2004. The petitioners ought to have conducted due diligence before purchasing the said suit land. Article 62(1) of the Constitution defines public land as:

- (a) land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date;
- (b) land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease;
- (c) land transferred to the State by way of sale, reversion or surrender;
- (d) land in respect of which no individual or community ownership can be established by any legal process;
- (e) land in respect of which no heir can be identified by any legal process;
- (f) all minerals and mineral oils as defined by law;
- (g) government forests other than forests to which Article 63 (2)(d)(i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas;
- (h) all roads and thoroughfares provided for by an Act of Parliament;
- (i) all rivers, lakes and other water bodies as defined by an Act of Parliament;
- (j) the territorial sea, the exclusive economic zone and the sea bed;
- (k) the continental shelf;
- (l) all land between the high and low water marks;
- (m) any land not classified as private or community land under this Constitution; and
- (n) any other land declared to be public land by an Act of Parliament—
 - (i) in force at the effective date; or
 - (ii) enacted after the effective date.

Private land on the other hand is defined by Article 64 as consisting of:

(a) registered land held by any person under any freehold

tenure;

(b) land held by any person under leasehold tenure; and

(c) any other land declared private land under an Act of Parliament.

I find that land parcel No. Kakamega/Municipality Block II/252 and Kakamega Town Block II/292 were initially public land reserved for the 4th respondent that were illegally alienated into private property and later acquired by the petitioners herein. I find the suit land falls within land that was planned for a playing field for the 4th respondent. The school being a public institution, the land it occupies and utilizes as a playing field is therefore public utility and was not available for allocation. The allocation was irregular and unlawful. In the case of Munyu Maina vs Hiram Gathiha Maina, Civil Appeal No.239 of 2009, the Appeal Court held that:-

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to 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.”

For the above reasons I find that the petitioners’ right to property under Articles 40 as read with Article 60 (1) (b) of the Constitution were not infringed in any way. I find that the petition is not merited and I dismiss it with costs to the respondents.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 29TH DAY JULY 2020.

N.A. MATHEKA

JUDGE