



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

PETITION 9 OF 2018

(CONSOLIDATED WITH PETITION 126 OF 2017)

IN THE MATTER OF ARTICLES 61, 62(1)(A),62(4),174(D) AND 35 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTIONS 6 AND 14 OF THE NATIONAL LAND COMMISSION

AND

IN THE MATTER OF AN EXERCISE OF A STATUTORY DUTY BY PUBLIC ENTITIES

BETWEEN

SAMUEL WAINAINA KIOI.....1ST P ETITIONER

ANNE WANGECHI KIMANI.....2ND PETITIONER

(Suing as Vice Chairman and Secretary respectively of Mwalimu Farm

Owners Association on behalf of its members)

VERSUS

THE REGISTERED TRUSTEES, CAPUCHIN

FRANSISCAN FATHERS KENYA.....1ST RESPONDENT

COUNTY GOVERNMENT OF KIAMBU.....2ND RESPONDENT

NATIONAL LAND COMMISSION.....3RD RESPONDENT

THE LAND REGISTRAR, THIKA.....4TH RESPONDENT

THE HON ATTORNEY GENERAL.....5TH RESPONDENT

JUDGMENT

There are two Petitions for determination. The first Petition is the one dated **11th June 2018**, filed by the Petitioners herein against the

Respondents seeking for the following orders;

- i. A declaration that the purported transfer and allocation of Land Parcel No. Ruiru East Block 3/244, is illegal.*
- ii. A Declaration that the said land parcel number belongs to Mwalimu Farm Owners Association and the same should be held in trust by its officials for public use.*
- iii. A cancellation of the title held by the 1st Respondent and a correction of the register removing the 1st Respondent and replacing it with the officials of Mwalimu Farm Owners Association to hold in trust for its members by the 4th respondent.*
- iv. A permanent Injunction restraining the 1st Respondent from disposing off, subdividing, excavating, erecting buildings or in any other way interfering with all that land parcel known as Ruiru East Block 3/244.*
- v. Costs incidental to this Petition.*

In their Petition, the Petitioners averred that at the time of its establishment, the Association owned **1100 acres in Juja**, which some part thereof was allocated for public utility. They further averred that the suit property was among the properties set apart for public utility for the construction of a **Primary and Secondary Schools**. That the Petitioners learnt that the 1st Respondent intended to alienate the suit property for personal use albeit for construction of a **school** and that the Petitioners lodged a complaint. Further that the 3rd Respondent called for a hearing with regard to the suit property at **Thika Town hall** and it was adjudged that the suit property belonged to **Mwalimu Farm Owners Association**, to hold in trust for the benefit of community of Mwalimu Farm.

Further that in contravention of the said ruling made during the public hearing, the 3rd Respondent issued a Gazette Notice dated **17th July 2017**, allocating the suit property to the 1st Respondent and the 4th Respondent then issued a title deed to the 1st Respondent. It was their contention that the suit land is at risk of being disposed off to other parties or converted to private use, which would be detrimental to the community and members of **Mwalimu Farm Owners Association**. It was their further contention that the right to public land as guaranteed by the Constitutional provisions they relied on have been violated by the **illegal, unlawful and irregular allocation** of the suit property to the 1st Respondent by converting it to private use to their detriment. Further that the circumstances under which the suit property was allocated to the 1st Respondent and upholding the title have not been disclosed.

They averred that the 1st Respondents acts were a gross violation of **Articles 10, 61(4) and 35** of the Constitution.

The 2nd Petition is by the 1st Respondent being **Petition No. 126 of 2017**, and filed vide Amended Petition dated **18th December 2018**, wherein the said Petitioner sought for the following orders;-

- a) A declaration that the Respondents have jointly or severally contravened the petitioner's right to property under Article 40, 46 and 47 of the Constitution.*
- b) A declaration that the Petitioner is the legal and rightful owner of the suit property and holds an indefeasible title to the suit property.*
- c) An order of prohibition bringing into the Honorable Court for purpose of prohibiting and restraining the Respondents' decision, proceedings, meetings and actions and activities and any further or attendant actions including but not limited to procuring gazettelement, deregistration, cancellation and re allocation of the Petitioners suit property Title Numbers Ruiru /Ruiru East Block 3/244, for being in breach of the Constitution, in particular Articles 40 ad 47 of the Constitution.*
- d) The Respondents be prohibited and permanently restrained either by themselves, their agents / servants or any other Land officer acting through them from interfering with the Petitioners' ownership, occupation, use, proprietorship and quiet enjoyment of the rights to the suit property.*
- e) In the alternative to prayers b, c and d above and considering that title Number Ruiru/ Ruiru East Block 3/244, which was originally purchased by the Petitioner be and is hereby re allocated back to the Petitioner.*
- f) Compensation for damages to the Petitioner as a result of infringement of it fundamental right and freedoms.*
- g) The Respondents be condemned to pay jointly and severally, the Petitioners costs of and incidental to this Petition.*
- h) The Court to make, issue and give such further and consequential orders, writs and directions as it may consider just, expedient and or appropriate to grant.*

In its Petition, the Petitioner averred that it is the registered owner of the suit property. That in **1983**, one **Mr. Salesio Njuki Munwameru**, purchased **L.R Ruiru/ Ruiru Block 2533**, comprising of 6 acres from **Mwalimu Investment Company Limited** for **Kshs. 12, 480/=**. That on **28th February 1983**, the 1st Respondent made an Application to the Company to be allocated land and it was invited for an interview which was successful and the Company informed the Petitioner that it had been allocated **ten acres** of land at **kshs. 50,000/=**. Further that **Mr. Selasio Njuki** agreed to sell his **6 acres** to the Petitioner and by a letter dated **20th November 1985**, the Petitioner requested the Company to amalgamate the **ten and six acres**. Further that the Petitioner was issued with a title deed for **L.R 3/2700** on **29th September**

1995. However, that in 2008, the Company approached the Petitioner and informed it that **L.R 3/2700**, was earmarked for public utility for the construction of a bridge and proposed to exchange the suit property with another property. That when the Petitioner examined the suit property, it agreed to the swap and was reallocated the suit property and has since been in possession and paid the requisite rates to the 2nd Respondent.

It was further averred that the Petitioner received funding and commenced preparations for construction of a boundary wall to secure the suit property, but was stopped when **Enforcement Notice** was issued. Further that the **National Land Commission**, called for a public hearing which was attended by all the parties and made a decision which was published in the **Kenya Gazette** dated **17th July 2017**, and its Certificate of title to the suit property was upheld. It was further averred that the Petitioner then proceeded to commence construction of a **Secondary School** and **Hospital**, in the suit property upon acquiring the necessary approval. However, in 2018, the 1st Respondent (Petitioner) erected bill boards on the suit property thus interfering with the construction.

Further that there has been no finding that the suit property is public land hence its rights to peaceful possession of the suit property is being curtailed and therefore illegal and unconstitutional. It was also averred that the title deed is conclusive evidence of ownership and makes one an **absolute** and **indefeasible** owner of the land and the intended cancellation of its title is in violation of its rights. It was the Petitioner's contention that the Respondents have violated its right to acquire and freely own property. As a consequence, thereof, it has been denied meaningful use of its property.

Both Petitions are contested and the parties filed various Affidavits in support and opposition of the Petitions.

The 1st Respondent in opposing the Petitioner's Petition through **brother Joseph Sifuna Bukanja**, swore a Replying Affidavit dated **17th December 2017**, and averred that the 1st Respondent is the owner of the suit property. He also averred that in **1983**, one **Salesio Njuki Munwameru** purchased **L.R Ruiru/ Block /2533**, comprising of **6 acres** from **Mwalimu Investment Company** (now known as Mwalimu Farm Owners Association) for **Kshs.12,480**. That on **28th February 1983**, the 1st Respondent made an Application to the Company to be allocated a parcel of land and by a letter dated **9th March 1983**, the 1st Respondent was invited for an interview before the Board of Directors of the Company. He further averred that the 1st Respondent's representative, **Father Caesar** appeared before the Board of Directors and by a letter dated **14th April 1983**, the Company informed the 1st Respondent that it had been allocated **ten acres** of land for **Kshs.50,000/=**. That in fulfillment of its part of the bargain, the 1st Respondent paid the purchase price of **Kshs. 50,000/=** for the purchase of the 10 acres. Further that sometime in **1985**, **Mr. Selasio Njuki**, agreed to sell his parcel of land to the 1st Respondent. That by a letter dated **20th November 1985**, the 1st Respondent requested the Company to amalgamate the two parcels of land to form **16 acres** and by a letter dated **25th November 1985**, the Company confirmed to the 1st Respondent that the **16 acres** would be registered in its name. However, the Company took an inordinate period to effect the transfer to the 1st Respondent.

He further averred that on **31st August 1994**, the 1st Respondent executed the transfer of land form and paid the stamp duty and it was issued with a Title Deed for **L.R Ruiru/Ruiru East Block 3/2700**, on **29th September 1995**, for the sixteen acres of land to which the 1st Respondent enjoyed quiet possession until **2008**, when the Company informed it that **L.R Ruiru/Ruiru East Block 3/2700**, was earmarked for public utility being the construction of a bridge. That the Company then provided the 1st Respondent with a letter dated **14th November 1984**, indicating that the government through a Company known as **Sapamo Consultants**, intended to construct a bridge on the property.

It was his contention that the Company had wilfully concealed the material fact and in admitting its error, the Company proposed to swap **L.R 3/2700**, with the suit property to the 1st Respondent to which the 1st Respondent conducted due diligence and took possession and was issued with a title deed on **29th August 2011**. He also averred that sometime in **2016**, the 1st Respondent commenced preparations for construction of a hospital and school. However, upon erection of a boundary, the Petitioners trespassed on the suit property and maliciously destroyed the boundary wall that the 1st Respondent had erected. That the 1st Respondent duly made a report to the Police and before the 1st Respondent could commence construction, the 3rd Respondent published a **Notice** in the **Daily Nation Newspaper** dated **18th January 2017**, in which it required the proprietor of **L.R3/224**, to attend a public hearing for review of the grant of property indicating that the suit property was reserved for construction of a Secondary School.

Further that by a letter dated **30th January 2017**, the 1st Respondent clarified to the 3rd Respondent that the 1st Respondent was the proprietor of **L.R 3/244** and not **L.R 3/224** as indicated in the Daily Nation Newspaper, but that the 1st Respondent nonetheless attended the public hearing convened on **31st January 2017**. That upon conclusion of the hearing, the 3rd Respondent delivered its determination by a letter dated **6th June 2017**, and upheld the 1st Respondent's title and also held that the construction carried out by the 1st Respondent was in tandem with the intended use. He further averred that the said determination was published in the Kenya Gazette **Vol CXIX No. 7** dated **17th July 2017**. That the 1st Respondent sought for intervention of the 3rd Respondent to gain approvals by the 2nd Respondent and when the Petitioners were invited to a collaborative meeting, they did not raise any objection to the 3rd Respondent's determination. He further averred that the 2nd Respondent indicated that although it had no objection to the exchange, it had embarked on covering **L.R 3/2700**, with a view to constructing a public secondary school on the parcel as was initially intended. That the 1st Respondent paid for rents and rates for the suit property and was issued with clearance certificate after it tendered a development Application and carried out a survey on the suit property.

It was his contention that the 1st Respondent acquired the suit property through legal means and that its title cannot be challenged. Further that the construction of a **hospital, Secondary School** and **Chapel** by the 1st Respondent, is in tandem with the **intended use** and the allegations by the Petitioners that the suit parcel of land is public land does not lie as it does not meet the threshold set out under the Constitution. It was his further contention that the Petitioners have not proved that the said **Mwalimu Owners Association** is the owner of the suit property. He alleged that by erecting structures and/ or interfering with the 1st Respondent's development on the suit property, the Petitioners have breached the 1st Respondent's right to own property under **Article 40 of the Constitution**.

The 2nd Respondent through its Sub County Planner, Ruiru Sub County, **Alice Menya**, swore a Replying Affidavit on **10th April 2017**, in opposition to the 1st Respondent's Petition and averred that around **19th January 2017**, they received complaints from members of the public on the construction of a boundary wall around **L.R No. RUIRU/RUIRU EAST BLOCK 3/244**, which is land set aside for public purpose as an education facility. That due to the fact that their planning offices had not received an application for the parcel of land **L.R No. RUIRU/RUIRU EAST BLOCK 3/244**, they issued an enforcement notice on **20th January 2017**. That they required the developer to stop further construction of the boundary wall for failing to seek necessary approval.

She further averred that on further investigations, it emerged that the suit property was set aside for public purpose, more specifically reserved for a secondary school. She also averred that she has been informed by her Advocate on record which information she believes to be true that the purported exchange of parcels of land **L.R No. RUIRU/RUIRU EAST BLOCK 3/2700**, measuring **6.475 hectares** and **L.R No. RUIRU BLOCK 3/244**, measuring **5.814 hectares**, between the Petitioner and the 1st Respondent was irregular and illegal as **L.R No. RUIRU BLOCK 3/244**, belong to the 2nd Respondent and has been set aside for public purpose.

That the 2nd Respondent then wrote to the 3rd Respondent who commenced the review of grant of the Petitioners title and that it was evident from the Petitioner's Petition that they participated in the said hearing and were thus accorded with an opportunity to be heard on the manner in which they obtained their title. She further averred that the County records were created pursuant to information provided by the 1st Respondent and not at the instance of the of the 2nd Respondent. That despite existence of the suit property in the county records, the said property was irregularly allocated and an account created. However, the said payment of rates does not cure the irregularity.

It was her contention that any infringement on the Petitioners right to property was occasioned by the Petitioners failure to conduct due diligence, failure to confirm that the transfer of the land for the parcel of land **L.R No. RUIRU/RUIRU EAST BLOCK 3/2700**, dated **26th August 1994**, is duly signed and dated by all parties. That the Petitioner's failure to follow the laid down procedures for inquiry into how the 1st Respondent acquired the parcel of land before purchasing it from them which involves first, acquiring an approved Part Development Plan, issuance of an allotment letter based on the part development plan and having a survey for purpose of issuance of a certificate of lease. That she has been advised by her Advocate on record which information she believes to be true that the responsibility of conducting due diligence before purchasing property solely lies with the buyer, and thus if the Petitioners had conducted proper due diligence before purchasing the suit property from 1st Respondent, then they would have known that the suit property is part of public land set aside for public purpose and in particular reserved for a Secondary School. Further that the 1st Respondent is not authorized or mandated to acquire, own, transfer or deal with land set aside as a public use. It was her contention that the right to property cannot be protected where an individual/group of individuals purport to excise public land for private use without following due process.

The 4th and 5th Respondents filed **Notice of Preliminary Objection** dated **27th November 2018**, and averred that the Petitioners have merely listed in their Petition the rights they purport to have been violated, but that they did not enumerated the manner in which the same have been violated. That indeed, the land was owned by the Petitioners and was meant for a school and the 1st Respondent is meeting that public utility. Further that it would appear that the 1st Respondent is a purchaser for value and that there is no evidence that has been produced that would suggest that the suit property is at risk of being wasted and that the Petitioners would have filed a Cross-Petition in **ELC Petition 126 of 2017**, instead of filing a new Petition.

The 1st Respondent through **Brother Joseph Siguna Bukanja**, filed a Supplementary Affidavit sworn on **15th March 2019**, and averred that **Mwalimu Owners** is an Unlawful Society, as it is neither a registered society nor is it a society exempted from registration. He further averred that the Application form annexed is neither dated nor was it filed with the registrar of Societies. He averred that the title deed in respect of the suit property had already been issued to the 1st Respondent and that the Constitution of Mwalimu Owners Association stipulates different office bearers from the ones who are suing in their capacity as officials. Therefore, the suit herein is incompetent having been brought in the names of person who did not have *locus standi* to institute the proceedings. He averred that **Mwalimu Sukari Company Limited**, is the entity that replaced **Mwalimu Investment Company Limited** and that the 1st Respondent paid the title deed fees in respect of **L.R 3/2700** to **Mwalimu Sukari Limited**.

That the transaction leading to the issuance of the title document in respect of **L.R 3/2700**, to the 1st Respondent in the year **1995**, were undertaken by **Mwalimu Sukari Limited**, being the entity that replaced Mwalimu Investment Company Limited. He further averred that the request for swap was made by **Mwalimu Sukari Company limited**, that owned the two properties and had legal capacity to transfer the same. That the letter dated **21st August 2017**, by the County Government of Kiambu is superseded by the letter dated **22nd March 2018**, in which the County Government stated that it had no objection to the exchange. He contended that the property was lawfully transferred to the 1st Respondent as a bonafide purchaser and that no person has any legal remedies over the suit property and the 1st Respondent being a private entity ought to be declared the legal owner and absolute proprietor of the suit property as private land.

Anne Wangechi, the Petitioner's Secretary also filed a Supplementary Affidavit on **12th March 2019**, and averred that the Association is registered under the Societies Act and that the Petition was brought on behalf of its members. She also averred that he suit property lies in area vested under **Mwalimu Farm Owners Association** as the overseers and that the suit property was surrendered by members of the Association pursuant to the subdivision regulations that require land owners to set aside at least 10% of the land for public utility. She further averred that the 3rd Respondent disregarded the participation and input of the Community and County to uphold an illegal allocation of public land.

It was her contention that during the public hearing, the 3rd Respondent held that the suit property is public land, but later went ahead to publish a Gazette Notice stating the contrary. She contended that the Petitioners raised various objections to illegal allocation of public land to a private entity. She further averred that the Commission disregarded that there was no public participation as required by the Constitution and the procedure of acquiring the land was never adhered to. She averred that the 1st Respondent's Petition is an abuse of the Court process and that the same should not be entertained by the Court.

Samuel Wanaina Kinoi the Chairman of the Petitioners herein swore a Replying Affidavit dated **10th April 2019**, and averred that he relied on his Supporting Affidavit dated **11th June 2018**, and Supplementary Affidavits dated **11th September 2018**, and **12th March 2019**. He also averred that **Mwalimu Farm Owners Association** is a duly registered Association and that it submitted all the necessary documents. It was his contention that though the Association was registered in 2011, any public land within the locality of Mwalimu Farm was owned by the public and was in the custody of the said owners and the registration of the Association was merely to protect those interest. It was his contention that the Petitioners have **locus standi** to institute the suit and that it made a change of officials as evidenced by the certificate of change of officials. He denied that **Mwalimu Sukari** replaced **Mwalimu Investment Company Limited**

He further averred that if the 1st Respondents purchased **L.R 3/2700**, from **Mwalimu Investment Company Limited**, then payments made to **Mwalimu Sukari Limited Company** by the 1st Respondent were out of its own negligence. Further that **Mwalimu Sukari Company Limited** had no capacity to conduct the alleged swap of **L.R 3/2700 to L.R 3/244**, as they have never owned the land. That the 1st Respondent cannot purport to be an innocent purchaser as it failed to exercise due diligence and that no evidence has been produced to the effect that **Mwalimu Sukari** owned the land. That no change of user has ever been done to convert the suit property from a public land to a private land as required by law. That the issuance of the title was therefore through an illegal and corrupt means.

It was his contention that in spite of the 3rd Respondent publishing a Gazette Notice to the fact that the land is legally owned by the 1st Respondent, the decision was in total disregard of the submissions presented by the 2nd Respondent and the Petitioners. That the 2nd Respondent's letter of **22nd March 2018**, is a mere afterthought upon such improper and illegal gazettelement by the 3rd Respondent. That the 3rd Respondent has never submitted minutes of the meeting held during the process in spite of numerous requests by the Petitioner.

The parties filed written submissions which the Court has now carefully read and considered together with the two Petitions, the Affidavits by the parties, the annexures thereto and renders itself as follows;

It is not in doubt that the 1st Respondent is the registered owner of the suit property. The 1st Respondent alleges that it bought **L.R 3/2700**, from **Mwalimu Investment Company Limited**. That after some years the said **Mwalimu Investment Company Limited** that had changed its name to **Mwalimu Sukari Company Limited** informed them that the land that they had bought was a public land and as such they needed to swap the land for the suit property. Further it is not in doubt that the land was then swapped and a title deed issued to the 1st Respondent.

However therein arose a dispute, and the 3rd Respondent called for a review into the suit property and a hearing date for the said review was called. The Petitioners then attended the **public hearings** together with the 1st and 2nd Respondents and vide a letter dated **6th June 2017**, the 3rd Respondent rendered its decision and upheld the 1st Respondent's title. In their decision that was publicized in the Kenya Gazette dated **17th July 2018**, the 3rd Respondent held that though the suit property was public land, the 1st Respondent were victims of a fraudulent swap, but they were using the land for what it was intended for, and therefore their title to the suit property was legal and the same was upheld.

It is this determination that has formed the basis of the instant Petition. While the Petitioners are of the opinion that the suit property is public land and as the same was set aside for a school education, it cannot be allocated by the 3rd Respondent. The 2nd Respondent however is of the opinion that it was a bonafide purchaser for value, and therefore it should be allowed to enjoy peaceful occupation of its property as it is also developing the suit property for the good of the community. Further, it is the 1st Respondent's contention that there is no evidence that the suit property was ever surrendered to the government by the time that it was issued with a title deed. The 1st Respondents has also contended that the Petitioners do not have **locus standi** to bring the suit as they are not officials of the **Mwalimu Farm Owners**.

The 2nd Respondent had initially opposed the 1st Respondent's Petition and alleged that they had not issued them with the necessary approval and therefore the suit property being public land could not be alienated. However, in its submissions dated **11th July 2019**, the 2nd Respondent changed tune and averred that the 3rd Respondent had since convinced it that the occupation of the 1st Respondent into the suit property was necessitated by the fact that the same was an illegal swap of the suit land and therefore the Commission was pursuing the other suit property which was still not developed and that was owned by the officials of the Company that initiated the illegal swap. Therefore, the 2nd Respondent submitted that it had no objection to the upholding of the 1st Respondent's title.

The above being the facts of the case, the Court finds the issue for determination are;

- 1. Whether the Petitioners have locus standi to bring the instant Petition.**
- 2. Whether the suit property was surrendered to the government and therefore public land.**
- 3. Whether the National Land Commission was right in upholding the 1st Respondent's title to land.**
- 4. Whether the Petitioners are entitled to the orders sought in Petition dated 11th June 2018.**
- 5. Whether the 1st Respondent is entitled to the orders sought in Amended Petition dated 18th December 2018.**
- 6. Who should bear the costs of the Petition.**

1. Whether the Petitioners have locus standi to bring the instant Petition

The 1st Respondent have alleged that the Petitioners' alleged officials do not have any *locus standi* to bring the instant suit as the **Mwalimu Farm Owners** is an unlawful society as it is neither a registered society nor is it a society exempted from the Registration. However, the Petitioners have produced a Certificate of registration that confirms that indeed it was registered in 2011. Furthermore, the Petitioners have also produced in evidence a copy of change of officials dated 22nd April 2016 and 3rd October 2018, indicating the officials and it is clear that the two officials that have sued on their behalf are officials of the said Company and thus, they have capacity to sue on the behalf of its members.

Though it is the 1st Respondent's contention that receipts evidencing that the said officials had been changed had not been annexed to confirm that the change was paid, for, it is not in doubt that the 1st Respondent has not produced any evidence to the contrary. It is a fact that he who alleges must prove, and therefore the 1st Respondent had the onus of proving that what was averred was false.

Furthermore, the instant suit is a Constitution Petition. **Article 258 of the Constitution** provides as follows:

- (1) *Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.*
- (2) *In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—*
 - (a) *a person acting on behalf of another person who cannot act in their own name;*
 - (b) *a person acting as a member of, or in the interest of, a group or class of persons;*
 - (c) *a person acting in the public interest; or*
 - (d) *an association acting in the interest of one or more of its members.*

The Petitioners whether registered or not have a right to bring any Petition if they have grounds to believe that the Constitution has been breached and further even as individuals, the Petitioners could still bring the Petition as long as the same is not frivolous. Having gone through the instant Petition, the Court is satisfied that there are bonafide concerns as to whether or not the Constitution was strictly followed. See the case of **Sollo Nzuki ... Vs... Salaries and Remuneration Commission & 2 others [2019] eKLR** where the Court held that;

“It is therefore clear that over time the issue of standing, particularly in public law litigation has been greatly relaxed and in our case the Constitution has opened the doors of the Courts very wide to welcome any person who has bona fide grounds that the Constitution has been or is threatened with contravention to approach the Court for an appropriate relief. In fact, since Article 3(1) of the Constitution places an obligation on every person to respect, uphold and defend the Constitution, the invitation to approach the Court for redress as long as the person hold bona fide grounds for believing that the Constitution is under threat ought to be welcome. I must however hasten to add that the liberal interpretation does not mean that the rule on locus standi is no longer relevant in constitutional petitions. Where it is clear that the Petitioner has completely no business in bringing the matter to Court to permit such proceedings to be litigated would amount to the Court itself abetting abuse of its process.

The Court therefore finds and holds that the Petitioners have the requisite *locus standi* to bring the instant suit.

2. Whether the suit property was surrendered to the government and therefore public land.

The 1st Respondent has submitted that there is no evidence that has been adduced as regard to the date of the alleged surrender of the suit property to the government and as a consequence, it is purely speculative to state that as at 29th August 2011, when it was issued with the title to the suit property, the suit property was public land.

It is not in doubt that when **Mwalimu Investment Company** acquired its property and before its subdivision, there was a requirement that a certain percentage must be left for the public utility. Therefore, that meant that at the time of the subdivision and when the subdivision occurred, then the suit property was already surrendered to the government. Further the **National Land Commission**, the 3rd Respondent herein recognized that the suit property was public land and the fact that the **Registry Index Map (RIM)** from Survey of Kenya indicated that the suit property was public utility land meant for a Secondary School, then that meant that the suit property was already surrendered to the government and recognized as public land and it is therefore a public land.

The subdivision of the original suit property occurred in the 80's. It is not in doubt that upon the implementation of the subdivision of the suit property, then automatically the land was surrendered to the government and became public land regardless of who was still registered as the owner of the suit property. See the case of **National Land Commission v Afrison Export Import Limited & 10 others [2019] eKLR where the Court held that:**

“The 1st, 2nd and 11th Interested Parties contended that there was no surrender because no instrument of surrender was executed and registered in respect of the public utility plots. We do not agree with that view. Our understanding of the physical planning laws at that time is that once the subdivision scheme was approved and implemented on the ground, then the public utility plots were deemed to have been surrendered for the designated public amenities. The proponent of the subdivision scheme cannot rely on his failure to execute the surrender instrument to defeat the public purpose for which the plots were planned.

153. *Our determination on the question of the construction, effect and validity of the title over L.R. No. 7879/4 therefore is that,*

although L.R. No. 7879/4 is still registered in the names of the 1st and 2nd Interested Parties, the title is held subject to the interest of the Government in the public amenity plots, which interest crystallised upon the Government's approval of the 1st and 2nd Interested Parties' subdivision scheme and subsequent implementation of the scheme on the ground. The public amenity plots include the land on which Drive In Primary School and Ruaraka High School sit. Similarly, the title is held subject to the interest of the State in the land occupied by the GSU. It is therefore our finding that the two schools sit on public land. Further, it is our finding that being public land, the land on which the two schools sit could not be the subject of compulsory acquisition under Part VIII of the Land Act."

Article 62 of the Constitution defines public land as;

- (1) **Public land is—**
- (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.

The suit property having been surrendered to the government in the 1980's, then it became public land and upon the implementation of the subdivision, remained a public land. The Court finds and holds that the suit property was surrendered to the Government upon subdivision in the 80's and therefore is a public land.

3. Whether the National Land Commission was right in upholding the 1st Respondent's title to land.

As already stated above, it is not in doubt that the 1st Respondent are the registered owners of the suit property and that their title to the suit property was upheld by the 3rd Respondent. The Petitioners have contended that it was wrong for the 3rd Respondent to uphold title that was acquired irregularly. The 1st Respondent have however alleged that they are innocent purchasers for value and they should be allowed to enjoy the peaceful occupation of the said suit property.

The Court will first determine whether the 1st Respondent are innocent purchasers for value. It is not in doubt that the 1st Respondent acquired proprietorship of the suit property after the same was swapped with their originally bought property. The 1st Respondent traced the root of their title and produced as evidence letters indicating how they acquired the suit property. They have also produced in evidence receipts evidencing the purchase of the property from the **Mwalimu Investments Company**, and further produced receipts evidencing the purchase of the **6 acres** by **Mr. Selasio**, to which they afterwards bought the same. Therefore, the Court is satisfied that with regards to **L.R 3/2700**, the 1st Respondent were bonafide purchasers for value and therefore entitled to the same.

The 1st Respondent have further alleged that their originally owned property was swapped with the suit property by **Mwalimu Sukari Company Limited**, and they were informed that their original property was earmarked as a public property. Though the Petitioners have alleged that **Mwalimu Investment** and **Mwalimu Sukari** are two separate entities, the Court has carefully perused the annexures before it and noted that the same person who signed the letters from **Mwalimu Investment** is the same person who signed the letter from **Mwalimu Sukari**. Further the address that was used by the two Companies is the same. Though the Petitioners have further averred that they are strangers to the **Mwalimu Sukari Company** and that the two are different entities, in their submissions to the **National Land Commission**, they stated that;

".....the function of apportionment and issuance of title deed was then passed to an entity by the name Mwalimu investment Company to carry out the exercise on behalf of Mwalimu Cooperative . However for reasons not known by the

Mwalimu farm Owners Association, the management went to some hands and the Mwalimu Cooperative Society later distanced itself from the Company.....”

From the above, it is not in doubt that the **Mwalimu Investment Company** did change and the contention by the 1st Respondent that it changed to **Mwalimu Sukari** are found to be correct and upheld by this Court.

Consequently, the Court finds and holds that **Mwalimu Investment Company Limited** changed to **Mwalimu Sukari Company Limited** and the same is the Company that sold the property to the 1st Respondent.

The question that begs answers is whether or not the said Company had authority to swap the suit property with **L.R 3/2700**.

The Court has already held that the suit property was surrendered to the government upon subdivision. Further, it is not in doubt that at that time, it was only the Commissioner of Lands that had the powers to allocate public land and the suit property being public land, then **Mwalimu Sukari Company Limited**, had no authority over the said property even though it still might have been the registered owner.

The **Black’s Law Dictionary** defines bonafide purchaser as:-

“One who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller’s title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”

Further in the case of *Weston Gitonga & 10 others v Peter Rugu Gikanga & another [2017] eKLR* the Court of Appeal in quoted the Ugandan case of *Katende v. Haridar & Company Limited [2008] 2 E.A.173* held that:-

“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.*

[Emphasis added].

A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.”

In this case, the vendor did not have apparent valid title and given that the vendor did not have title, it then follows that the 1st Respondent could not be a bonafide purchaser for value with regards to the suit property. See the case of *Kenya Anti-Corruption Commission V Ahmed Karama Said & 2 Others [2011] eKLR* where the Court held that;

*“The same principle is expressed in *Champaklal Ramji Shah & 3 Others v. The Attorney-General & Another, Mombasa HCCC No. 145 of 1997 (Waki, J.)*, in which the following passage occurs:*

“... the concept of indefeasibility should not indiscriminately be allowed to camouflage unlawful activities towards the acquisition of such title, in the process courting disorder in planning ...

From the evidence at this stage, the suit land was a road reserve, but the Municipal Council converted it to privately-owned land, contrary to the provisions of the Local Government Act (Cap. 265), s. 185. It is the unlawful conversion which led to subsequent “transfer” of the suit land to 2nd defendant.

Although 2nd defendant has taken the position that it was an “innocent purchaser for value without notice of irregularity”, that principle is, in my opinion, incapable of protecting the land acquisition. Generally, as already noted, the innocent purchaser for value without notice of defect of title, will be treated as the darling of equity, and will be allowed to retain ownership. But this is subject to the qualification that the creation of the title itself is not in flagrant breach of statute law, so that it amounts to a nullity

ab initio. The Municipal Council, which is a public authority, ought to have complied with the governing law, and its non-compliance with the Local Government Act, led to the creation of a void property title; the Municipal Council could not breathe life into that title by purporting to pass it on to 2nd defendant who could only claim title on equitable principle. The ground was not set, in this instance, for the play of equity in favour of 2nd defendant. It follows that 2nd defendant, in these circumstances, cannot claim an indefeasible title by virtue of the Registered Land Act (Cap. 300), or any other property statute.”

From the above, it is not in doubt that the 1st Respondent cannot lay a claim of indefeasible title over the suit property as the very essence of its allocation of the said property by **Mwalimu Sukari Company Limited** was unlawful.

The 3rd Respondent upheld the 1st Respondent’s title and averred that it will embark on reclaiming the other title that the 1st Respondent had swapped. The question that begs answers is whether the suit property could be allocated as the Petitioners have averred that the said property was not available for allocation. The rationale upon which the 3rd Respondent upheld the 1st Respondent’s title was that the use by the 1st Respondent was in tandem with the intended use. It is not in doubt that the 1st Respondent is a **private entity** and therefore its use of the suit property though may be used by the public can not in this Court’s considered view be termed as public as the property still belongs to a private entity.

The mandate to allocate public land both belonging to the National and the County government has been given to the **National Land Commission**. The **Land Act**, under the provisions of **Section 9** allows for the conversion of land from public to private. Further **Section 12 of the Land Act** provides that;

(1) The Commission may, on behalf of the National or county governments, allocate public land by way of—

(a) public auction to the highest bidder at prevailing market value subject to and not less than the reserved price;

(b) application confined to a targeted group of persons or groups in order to ameliorate their disadvantaged position;

(c) public notice of tenders as it may prescribe;

(d) public drawing of lots as may be prescribed;

(e) public request for proposals as may be prescribed; or 2012 Land No. 6

(f) public exchanges of equal value as may be prescribed.

(2) The Commission shall ensure that any public land that

has been identified for allocation does not fall within any of the following categories—

(a) public land that is subject to erosion, floods, earth slips or water logging;

(b) public land that falls within forest and wild life reserves, mangroves, and wetlands or fall within the buffer zones of such reserves or within environmentally sensitive areas;

(c) public land that is along watersheds, river and stream catchments, public water reservoirs, lakes, beaches, fish landing areas riparian and the territorial sea as may be prescribed;

(d) public land that has been reserved for security, education, research and other strategic public uses as may be prescribed; and

(e) natural, cultural, and historical features of exceptional national value falling within public lands;

(f) reserved land; or

(g) any other land categorized as such, by the Commission, by an order published in the Gazette.

From the above provisions of law, it is clear that though the Commission has powers to allocate land, its powers to allocate the said public land is however limited. It could not allocate land that was set aside for education, in which case the instant suit property was set aside for the building of a school thus education, and the same could not be allocated. The Court recognizes the intention of the Commission and it is the Court’s considered view that though the intention was noble, as the instant case would have been akin to an exchange of the suit property with the other property which might have been in equal value, the law is clear that a property set aside for education cannot be allocated for private use. In this instant, the Court concurs with the Petitioners that the suit property was not available for allocation as the same had been set aside for the construction of a School.

If the suit property had been set aside for any other purpose other than the Limitations set out under **Section 12 (2) of the Land Act**, then the Court’s may be would have found that the findings by the Commission would have been in order

For the above reasons, the court finds and holds that the Commission was not right in upholding the 1st Respondent’s title.

4. Whether the Petitioners are entitled to the orders sought in Petition dated 11th June 2018.

In their Petition, the Petitioners have sought for various orders including a declaration that the allocation of the suit property was illegal, a cancellation of the 1st Respondent's title and a correction of the registered, Having held that the title to the suit property was not illegal and that the 3rd Respondent was wrong to uphold the 1st Respondent's title, it is thus the Court's considered view that the said Petitions is merited.

The Petitioners have further sought to be declared the owners of the suit property and that the Court to have the property transferred to them. However, the suit property is public land and the Law is clear that Public land will either vest in the **National Government** or the **County Government** and the same is managed by the 3rd Respondent on their behalf. For this reason, the said Prayers are **not** merited and are consequently disallowed.

5. Whether the 1st Respondent is entitled to the orders sought in Amended Petition dated 18th December 2018.

In their Petition, the 1st Respondent have sought for a declaration that their right to own property had been infringed upon. The Right to own land under **Article 40** does not extend to unlawful acquired property and as the Court has already held, that the suit property was unlawfully swapped to the 1st Respondent, the said prayer is thus found **not** merited. Consequently, the court cannot term them as the legal owners of the suit property and cannot issue an order of prohibition.

The 1st Respondent has however sought to have its initial title reverted back to them. The 2nd and 3rd Respondents have in their communication indicated that they are in the process of reclaiming **L.R 3/2700**. The Court having gone through the evidence adduced before it, has seen the receipts that the 1st Respondent used to buy the said property. Further the Court has also noted that the **Mwalimu Investment Company Limited**, had mandate and authority to sell the property being **L.R 3/2700**. No party has disputed that the 1st Respondent initially owned the property which they swapped but said swap was unlawful. Therefore, it is only proper given that the land is not being used, then the same should be returned to the legitimate owners, who are the 1st Respondents herein.

Further the Court notes that the 1st Respondent in its Petition erroneously indicated the initial property as **L.R 3/244**, as opposed to **L.R 3/2700**. In the interest of Justice and the Court while recognizing its powers under **Section 3A** of the **Civil Procedure Act** will accordingly grant the orders with regards to **L.R 3/2700**.

6. Who should bear the Costs of the Petition

It is not in doubt that costs usually follow the events. The Petitioners have partially succeeded in their Petition and so has the 1st Respondent. With regards to the Petitioners, it is not in doubt that the actions of the 3rd Respondent are what led to the filing of this Petition. Consequently, the court finds that the 3rd Respondent should bear the costs of the Petitioners' suit.

With regards to the 1st Respondent, the parties who either caused the commission or omission on their part are not parties to this suit as no nexus has been shown between **Mwalimu Farmers Owners Association** and **Mwalimu Sukari Company Limited**. Therefore, the Court finds that, each party should bear its own costs of the suit.

The Upshot of the foregoing is that the Petitioners and the 1st Respondent have partially proved their cases on the required standard of balance of probabilities.

Consequently, the Court makes the following orders;

- a) A declaration that the purported transfer and allocation of Land Parcel No. Ruiru East Block 3/244 to the 1st Respondent is illegal.*
- b) An order of cancellation the title held by the 1st Respondent and a correction of the register removing the 1st Respondent.*
- c) A permanent Injunction restraining the 1st Respondent from disposing off, subdividing, excavating, erecting buildings or in any other way interfering with all that land parcel known as Ruiru East Block 3/244 (aka 2700).*
- d) An order that title Number Ruiru/ Ruiru East Block 3/2700, which was originally purchased by the 1st Respondent be and is hereby re allocated back to the 1st Respondent.*
- e) The 3rd Respondent will bear the cost of the Petitioners Costs.*
- f) On the 1st Respondent's Petition, each party to bear its own costs.*

It is so ordered.

Dated, signed and Delivered at Thika this 16th day of July 2020

L. GACHERU

JUDGE

Court Assistant – Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via zoom

M/s Kivindu for the 1st and 2nd Petitioners

M/s Nyaga for the 1st Respondent

M/s Mbugua for the 2nd Respondent

No consent for the 3rd Respondent

No consent for the 4th Respondent

No consent for the 5th Respondent

L. GACHERU

JUDGE

16/7/2020