



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL SUIT NO. 480 OF 2011

MR. VIRENDA RAMJI GUDKA..... 1ST PLAINTIFF
ADVANCE VENTURES LIMITED2ND PLAINTIFF
WESTERN KENYA LIMITED3RD PLAINTIFF
AAREM LIMITED4TH PLAINTIFF

VERSUS

THE ATTORNEY GENERAL DEFENDANT

(On behalf of Ministry of Roads and Chief Engineer, Roads)

J U D G M E N T

The Plaintiffs by a plaint dated 25th October 2011 filed in court on 4th November 2011 contends that the 1st Plaintiff is the registered owner/proprietor of L.R. NO. 9042/136 Nairobi (hereinafter referred to as “the suit property”) and that as such registered owner his title to the property is indefeasible and by virtue of article 40 of the Constitution of Kenya enjoys protection under the law. The 2nd, 3rd and 4th plaintiffs state they are commercial enterprises and sister companies who were housed in and carried on business in and from the 1st plaintiff’s suit property. The plaintiffs allege that on the night of 17th November 2010 persons acting on the orders and at the direction and instance of the permanent secretary Ministry of Roads and/or the Chief Engineer Roads without any notice to the plaintiffs and in flagrant violation and breach of the constitution of Kenya, trespassed upon the suit property and wantonly demolished substantial portions of the constructed on the suit property buildings causing colossal damage to the plaintiffs goods stored therein and thereby occasioning grave losses and anguish to the plaintiffs.

The 1st plaintiff has sued for declarations that his title to the suit property is indefeasible and that he enjoys protection to property under article 40 of the Constitution and so do the other plaintiffs. The plaintiffs have further jointly and severally sued for special damages, general damages and punitive damages against the Defendant.

The Defendant filed a defence to the plaintiffs suit and denies the contentions by the plaintiffs and in response avers that **L.R.NO.9042/136** (the suit property) which the 1st plaintiff claims ownership of was irregularly allocated to the 1st plaintiff in breach of the procedure set out in the Government Lands Act and the resultant title did not confer any proprietary rights capable of being protected by the court.

Further the Defendant contends that the plaintiffs developments were erected on and encroached on public utility property of which the plaintiffs were notified but failed to remove the structures erected thereon to pave way for the construction of the airport north road. The Defendant denied that the plaintiffs were entitled to the declarations and/or the damages claimed.

The parties framed the agreed issues to be determined by the court as follows:

- a. Whether the 1st plaintiff is the owner of **L.R. NO.9042/136** and if so what are its dimensions.
- b. Whether the said property was surveyed so as to encroach on a road reserve and/or other way leaves. If so, is the first plaintiff responsible therefore.
- c. Whether the Ministry's action in demolishing structures on the said parcel were lawful.
- d. If the answer to (c) is in the negative what damages should be awarded.
- e. Who should pay the costs of this suit.

The plaintiffs in support of their case called two witnesses PW1 **ASHWIN RAMJI GUDKA** a brother to the 1st plaintiff who held a power of attorney from the 1st plaintiff and Pw2 **TAJA SINGH KUDHI** a chartered valuation surveyor. The Defendant called one witness **ABDUL KALID JETHAN** a Chief Surveyor with Kenya Urban Roads Authority (**KURA**) who testified in support of the defence.

The case by the 1st plaintiff is that he was at all material times relevant to this suit the registered proprietor of **L.R.NO.9042/136** (the suit property) which he had developed in accordance with development plans duly approved by the City Council of Nairobi and in respect of which he was issued with a certificate of occupation upon completion of the development. The 1st plaintiff contends that he was lawfully allocated the subject parcel of land and after observing all the legal procedures and requirements was issued with a certificate of title which was duly registered in accordance with the registration of Titles Act Cap 281 Laws of Kenya (repealed). That the suit property before the title was issued by the Commissioner of Lands was surveyed and a Deed plan issued by the Director of Surveys and there was no encroachment to any public utility and/or way leave and the title was issued to the 1st plaintiff free of any encumbrance.

The 1st plaintiff states that the Commissioner of Lands subsequent to issuing the title to the 1st plaintiff has neither recalled cancelled and or revoked the title and accordingly the 1st plaintiff holds an indefeasible title under the provisions of the law and same deserves protection under article 40 of the Constitution. The 1st plaintiff therefore contends the invasion and entry by the agents of the Ministry of Roads onto the property on the night of 17th November 2010 when they demolished 13 godowns on the property together with goods stored thereon all valued at Kshs.712,975,381/- constituted trespass and the actions were in violation of the 1st plaintiff's constitutional rights. In the premises the 1st Plaintiff seeks declarations that he is the lawful owner of the suit property and that he is entitled to protection from arbitrary deprivation of property without compensation and further seeks special and general damages as pleaded in the plaint.

In response the Defendant contends that the parcel of land on which the suit property is located was initially part of the properties acquired by the government in 1971 through Gazette Notice NO. 1105 dated 26th April 1971. The defendant contends that compensation for the acquired land was paid to the owners of the land and henceforth the land formed part of the land compulsorily acquired by the government for development of the airport north the area.

The Defendant avers that the construction of the eastern by-pass was planned in 1972 and when construction commenced in 2003 notices were issued to all persons who had constructed on road reserves to remove the illegal structures and these notices were carried in the Daily Newspapers. The 1st plaintiff moved to court by way of Judicial Review to challenge the notice but the court disallowed the 1st plaintiff's application and the same was determined in favour of the defendant. The Defendant thus contends that to the extent that the suit land formed part of that land compulsorily acquired and alienated and reserved for the development of the airport north area the same was not available to be alienated to

the 1st plaintiff. The Defendant thus avers the allocation and alienation of **L.R. NO. 209/9042/136** to the plaintiff in 1985 was in the circumstances illegal and irregular and could not pass any legal interest in the suit property to the 1st plaintiff.

Mr. A.B. Shah Advocate leading **Mr. Ramesh Sharma Advocate** appeared for the plaintiffs and **Mr. Kuria Thande** Litigation Counsel in the Attorney General's Chambers appeared for the Attorney General for the Defendant. The plaintiffs counsel filed their initial submissions on 30th July 2013 and response submissions to the Defendants submissions on 27th September 2013. The Defendant filed their submissions dated 2nd September 2013 on 6th September 2013. The filed submissions by both parties in addition to evaluating the evidence adduced and the applicable law sought to deal with the issues as framed by the parties. To contextualize the issues that stand to be determined it is necessary to outline what the respective parties evidence is and I will briefly do that hereunder.

Pw1 testified before the court on 20/11/2012 and confirmed having made a witness statement on 25/10/2011 which he identified and confirmed its contents which he adopted and requested that it be taken as forming part of his evidence in chief. The witness made a further witness statement on 3/11/2012 setting out the claim for damages which the plaintiffs claim as per the plaint. Briefly the witness confirmed that the 1st plaintiff was allocated the suit property on 4th July 1985 which property was surveyed and subsequently the 1st plaintiff was issued with a certificate of title after approval of the survey by the Director of Surveys and payment of all dues. The certificate of title was issued on 18th November 1992 and duly registered as **I.R. NO. 57064/1** on 24th November 1992. The witness referred to a certificate of search issued by Registrar of Titles dated 31st July 2012 confirms that the 1st plaintiff was the registered owner of the suit property.

The 1st plaintiff after obtaining the ownership documents sought and obtained approvals to develop an office block of four storeys and 13 godowns on the property which he accordingly developed as per the approved drawings and plans and was issued with an occupation certificate on 16th August 1996 and was in occupation of the property until 17th November, 2010 when the 13 godowns were demolished by the Ministry of Roads. The witness testified that earlier before the demolition of the 1st plaintiffs buildings and structures when the Ministry of Roads were marking the plots that would be affected they marked the 1st plaintiff's plot with an "X" but later came and white washed the cross insinuating that the road was no longer going to pass there but they nevertheless came later and demolished the plaintiff's property as stated earlier without any notice whatsoever.

Pw1 testified that the demolition was wrongful and unlawful as the 1st plaintiff was lawfully and regularly allocated the suit property and the property did not encroach onto any road. There was no notification to the 1st plaintiff that the plot was irregularly allocated to him. The witness testified that the City Council Town Planning Committee Minutes of 4th February, 1980 related to consultations that were ongoing and that the same did not specifically relate to or touch on the 1st plaintiffs property. The witness referred to a google map that was tendered in evidence and was categorical that the same did not show the Eastern bypass and/or any link road on the plaintiff's property and the same would have shown the same if in fact there was such a road.

The witness further testified that following the demolition the plaintiffs instructed **Mr. Singh Kudhi**, a chartered valuation Surveyor to assess and quantify the damages incurred by the plaintiffs as a result of the demolition. The damages and loss were quantified at Kshs. 712,975,381/- and that is the sum the plaintiffs claim against the Defendant.

Pw2 testified and confirmed that he had been instructed by **Ramesh Sharma Advocate** on behalf of the 1st plaintiff the registered owner and his occupant companies to assess damages caused by the demolition of their property on 17/11/2010.

Pw2 testified that he inspected the property on 25/5/2011 when he took photographs and that he was

furnished photographs of the property before the demolition by the 1st plaintiff. The 1st plaintiff also furnished the information on the property to pw2 and further availed all the necessary documents such as the original title, copies of building plans that were approved by the city council of Nairobi. Pw2 prepared his report which he states took him about two months to prepare but was backdated to the date of inspection. The report was produced in evidence and assessed the damages under the various heads as hereunder:-

1. Land, buildings and improvements lost in the course of the demolition exercise
-----Kshs.340,000,000/-
2. Damage to Equipment and future as certified by companies, namely Advance Adventures Ltd, Aarem Ltd, West End Kenya Ltd-----Kshs.1,900,000/-.
3. Loss of stock as at 17th November 2010 of same companies-----Kshs.71,790,000/-.
4. Collateral damage in the form of contingencies and unforeseeable damage including emotional trauma and economic impoverishment that resulted from the sudden demolition and acquisition quantified at 25% of the physical damage-----
Kshs.103,422,675/-
5. Loss of business goodwill, following the severance inflicted by the demolition exercise
-----Kshs.85,000,000/-.
6. Damage caused by infurious affection to earnings and expenses arising from necessity to change of business, including rental payable, hiring of additional security personnel and workers, etc-----Kshs.16,800,000/-
7. Disturbance and other expenses quantified as 15% of the total loss by virtue of the abrupt/compulsory acquisition-----Kshs.92,837,006/-
8. Valuation fees based on the institution of surveyors of Kenya scale fees under the valuers Act Cap 532 Laws of Kenya-----Kshs.1,225,000/-.

Gross Total-----Kshs.712,975,381/-

PW2 further swore an affidavit on 1st November 2012 in further response to the Defendant's case and in answer to the witness statement of **THOMAS GACIRA GACOKI** made on 8th February 2012 and 15th February, 2012 respectively. The affidavit by the witness was admitted as part of Pw2's evidence and essentially in the affidavit pw2 reiterates the evidence as given by pw1 and asserts the 1st plaintiff's title to the suit property was legally issued and has never been withdrawn by the Commissioner of Lands and its authenticity has never been challenged prior to these proceedings. The witness contended that the act by the Ministry of Lands to demolish and damage the plaintiffs properties on the suit property constituted a breach of the constitutional rights to protection of property guaranteed under the constitution and averred that the land owner(s) are entitled to be paid compensation for the damage.

Dw1 Abdul Kalid Jethan, a chief surveyor Kenya Urban Roads Authority testified for the Defence. The witness testified that the Government in 1971 vide Gazette Notice NO. **1105** dated 26/4/1971 acquired several parcels of land for purposes of development and expansion of the Airport which made the acquired land for public utility. Dw1 produced the land acquisition drawing NO. **NBI/C/018** together with the Gazette Notice **1105 as DEXI** and explained the drawing was based on the land references that existed in 1971 and thus the plaintiff's land Reference NO. **9042/136** could not have been on the Gazette Notice as it had not been alienated by then. Dw1 stated that once a property has been alienated for public purpose it cannot be available for private alienation.

Dw1 further testified that the 1st plaintiff's property was on the link road to the Eastern Bypass which the Town Planning Committee had in 1980 resolved to be created to decongest the City. The construction of the Eastern Bypass commenced in 2009 and the plaintiffs structures were found to be on road reserve. The plaintiff was notified to remove the structures and all the affected properties that were marked with

an 'X' signifying they should be removed. Notice was also given through the press and the said markings. The plaintiff challenged the notices in court unsuccessfully. The plaintiffs property was demolished to give way to the construction of the road. The witness reiterated that the plaintiffs land was within the land that was compulsorily acquired and was thus irregularly alienated to the plaintiff. The **KEMSA** building and the **Kenya Airways Headquarters** are government utilities within the Airport area and the Government did not have to demolish them.

Having set out the evidence adduced by the parties I now turn to consider the issues as agreed by the parties for determination. I will consider the first issue as relates to the ownership of **L.R. NO.9042/136** together with the second issue whether or not the property was surveyed so as to encroach on a road reserve, and/or any other way leaves and if so whether the 1st plaintiff was responsible therefore concurrently as I consider the two issues to be intertwined and therefore inseparable.

Pw1 has adduced evidence that he was on 4th July 1985 allocated an industrial plot NO. 43 at Embakasi - Nairobi vide letter of **51776/VII/140** of even date. The plot among others was duly surveyed by the Director of Surveys on the instructions of the Commissioner of Lands and a Deed plan issued on 29th September 1992 renumbering the plot as **L.R. NO.9042/136**. After payment of all the necessary dues the 1st plaintiff was issued with a Grant NO. **I.R. 57064 for L.R. NO. 9046/136** dated 18th November 1992 which was duly registered on 24th November 1992. The 1st plaintiff upon the registration of the Grant in his favour under the provisions of section 23 of the Registration of Titles Act Cap 281 Laws of Kenya (repealed) became the proprietor of the suit property and the absolute and indefeasible owner of the land and his title could only be challenged on the ground of fraud or misrepresentation to which he is proved to be a party. Section 23(1) of the Registration of Titles Act (Repealed) provided as follows:-

23. (1) The certificate of Title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.

The land Registration Act No. 3 of 2012 under section 26 (1) more or less reproduces the provision of section 23(1) of the Registration of Titles Act (**supra**) save that it extends the registration by the registrar to cover registration following allocations as in the instant case and further extends the ground on which a registered title could be challenged to include where the title has been acquired illegally, unprocedurally or through a corrupt scheme.

Section 26 (1) of the Land Registration Act NO. 3 of 2012 provides:-

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

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

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

The plaintiffs in the present suit contend that as owners of the suit property, they are entitled to protection of the law and they seek refuge under article 40 of the constitution and aver that they cannot be arbitrarily deprived of the property by the state without compensation.

Article 40 of the constitution provides thus:-

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,**
- 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 any property of any description or any interest in or right over any property of any description, or

(b) To limit or in anyway 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 rights over that property a rights over that property a right of access to a court of law

(4)-----

(5)-----

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

The plaintiffs argue that the Defendant's act of invading the plaintiffs property and demolishing the plaintiff's buildings and damaging and destroying other properties therein was an act of trespass and was in violation of their rights. The plaintiffs submit that they acquired the property lawfully and there was no notification whatsoever that the property had been compulsorily acquired by the Government. The 1st plaintiff contends that he followed and adhered to all the legal procedures to acquire the title to the suit property and that he sought and obtained approvals for the development of the property and constructed all the 13 godowns and a show room without any objection from anybody.

The contention by the defence is that the allocation of the suit land and the registration of the same in the 1st plaintiff's name was illegal and irregular as the suit land formed part of the land acquired by the Government in 1971 for the development of the Airport area. DW1 produced in evidence **Gazette Notice NO.1105 dated 26/4/1971** which contained various parcels of land out of which respective portions of land were stated to be identified for compulsory acquisition by the Government. There is no clear evidence from which of the parcels the suit land is said to have formed part of. What is definite is that the parcel of land described as **L.R. NO. 209/9042/136** is not shown to be one of the properties that were compulsorily acquired. Whereas the Defence has produced a site plan showing the road corridor and/or path of the road that it is stated was to be constructed to link up with the Eastern Bypass no plan was exhibited to show the parcels of land compulsorily acquired in 1971 and their lay out. Whereas the sketch plan showing the road corridor/link road to the Eastern Bypass shows that it was prepared in 2009 there is nothing to link the same to the 1971 compulsory acquisition by the Government. The google map produced by the plaintiff does not show or indicate the road corridor/link road.

In the premises the issue arises whether indeed the suit premises were compulsorily acquired by the Government as alleged by the defendant and if so whether the plaintiff had notice of any such acquisition. In my view having regard to the circumstances the facts and the evidence tendered I am not able to hold that the Defendant has established the suit premises were compulsorily acquired by the Government in 1971. The Land Acquisition Act Cap 295 of the Laws of Kenya (repealed) sections 17, 18, 19 and 20 place an obligation to have any compulsorily acquired land surveyed and vested in the Government and appropriate notice given to the Registrar of Lands and the fact of the acquisition noted on the land register to serve as notice to all persons dealing with such land.

Section 19 of the Land Acquisition Act (repealed) provides as follows:-

19.(1) After the award has been made, the Commissioner of Lands shall take possession of the land by serving on every person interested in the land a notice that on a specified day which shall not be later than sixty days after the award has been made possession of the land and the title to the land will vest in the Government.

19.(3) Upon taking possession of the land under subsection (1) or subsection (2), the Commissioner shall also serve upon-

(a) the registered proprietor of the land and

(b) the Registrar,

A notice that possession of the land has been taken and that the land has vested in the Government.

(4) Upon taking possession, the land shall vest in the Government absolutely free from encumbrances.

Section 20 of the Act requires that documents of title evidencing the acquired land be delivered to the commissioner of lands for cancellation and/or for recording the portion of land acquired where only a part of the land is acquired and where the documents are not surrendered the Commissioner of lands is empowered to cause an entry to be made against the register recording the acquisition of the land under the Act. The court of Appeal in the case of **COMMISSIONER OF LANDS VS. COASTAL AQUACULTURE LTD C.A NO. 252 OF 1996** held that in the case of land compulsorily acquired all the procedures related to acquisition must be strictly adhered to.

Hon. Justice Musinga (as he then was) in the case of **ONYANGO & OTHERS –VS- TOWN COUNCIL OF AWENDO (2010) IEACA 321** reiterated the position taken by the Court of Appeal when he held that procedural requirements for compulsory acquisition are absolutely necessary and ought to be complied with to effectuate the acquisition. He further held that such acquisitions have to be carried out in strict conformity with the constitutional provisions and in good faith.

This court in a judgment delivered on 10th July 2013 (**unreported**) in the case of **EUNICE GRACE NJAMBI KAMAU & ANOTHER .VS. THE ATTORNEY GENERAL & 5 OTHERS (Nairobi HC ELC NO. 976 OF 2012)** had occasioned to review and consider the application of the procedure of land acquisition as set out in the Land Acquisition Act (repealed). In the said case I expressed myself as follows in regard to compliance with the acquisition procedure under the Land Acquisition Act-

“In my view and having regard to the provisions of the Land acquisition Act (now repealed) the Government has an obligation to execute the process of land acquisition to finality to effectuate title acquisition. The commissioner of Lands and the Land Registrars as regards land acquired by the Government compulsorily have duties and obligations which they are required to execute to ensure such land is properly documented and protected. I believe that was the intention for the elaborate process and procedure set out under the Land Acquisition Act (repealed) and now reproduced under part VIII of the Land Act NO. 6 of 2012 sections 107 to 133-----“

In the present case there is no evidence that the Commissioner of Lands took possession of the acquired land and/or any documentation was done to vest the land in the Government. No survey records have been produced to show that the acquired land was surveyed for purposes of vesting the acquired land in the Government. Indeed it is the Commissioner of Lands who allocated the suit property to the 1st plaintiff and the Director of surveys carried out the survey of the suit land and issued a Deed plan that was duly registered and a grant issued in favour of the 1st plaintiff. If the suit land had been compulsorily acquired and the procedure for compulsory acquisition as laid out under the Act was followed there would have been no question of the suit land being allocated to the 1st plaintiff since the same would have been unavailable as the same would have been taken possession of and would have vested in the Government and there would have been survey records and the Registrar of Lands would have been notified of the acquisition and would have made the appropriate entries against the acquired title.

The fact is there were no records of the acquisition at the Lands registry and/or with the Director of Surveys. In my view a Gazette Notice for the intended acquisition alone cannot effectuate a compulsory acquisition and in order to effectuate the acquisition the procedure for acquisition as under the Act has to be adhered to. The Gazette Notice for the acquisition and the Gazette Notice notifying the payment of the compensation can only affect the parties directly affected such as the registered proprietors at the time the notice of compulsory acquisition is given. Third parties dealing with the acquired land can only be put on notice if the process of acquisition is completed and the provisions of sections 19 and 20 of the Act complied with. It is therefore my finding and holding that the **Gazette Notice NO. 1105** of 26th April 1971 relied upon by the Defendant to prove that the suit land was compulsorily acquired or formed part of the portion compulsorily acquired by the government for the development of the Airport area or construction of road is insufficient to prove the acquisition. The 1st plaintiff had no way of establishing the land had been acquired in the absence of records of survey with the director surveys and/or any notice of the acquisition with the Registrar of lands. The 1st plaintiff cannot be faulted in any manner for accepting the allocation of the property and having a title processed and issued in his name.

Having held that there is no evidence that the suit land was compulsorily acquired as alleged by the Defendant for the purposes of constructing a link road to the Eastern bypass it follows that the allocation of the suit land to the 1st plaintiff cannot be faulted and that the registration of the 1st plaintiff as the owner of the suit property confers upon the 1st plaintiff the rights of a proprietor as provided under section 25 (1) of the **Land Registration Act NO. 3 of 2012** which provides:-

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

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

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

The Defendant has submitted that even though the fact of the acquisition is not noted on the title held by the 1st plaintiff the same can be defeated by reason of the compulsory acquisition that occurred in 1971 and submits that compulsory acquisition is one of the overriding interest that do not require noting on the register under section 28 (e) of the Land Registration Act. The Defendant referred the court to the judgment in **CYCAD PROPERTIES LTD –VS- THE ATTORNEY GENERAL & OTHERS (HCC Petition NO. 70 of 2010** consolidated with **(HC Petition NO. 69 of 2010)** where **Hon. Lady Justice Mumbi Ngugi** held that compulsory acquisition where established would constitute an overriding interest that can defeat a title. I distinguished the **CYCAD PROPERTIES LTD** case (**supra**) in my decision in the case of **Eunice G.N. Kamau & Ano. –vs- The Attorney General & 5 others (supra)** in regard to the issue of compulsory acquisition being an overriding interest. I held the view that the compulsory acquisition of necessity must relate to situations where the Government intends to acquire land

compulsorily for a public purpose which it can do at any time and/or where it is in the process of compulsorily acquiring land but the process has not been completed.

In those situations the interest need not be noted in the land register. In all other situations the government has to comply with the law. Rights of compulsory acquisition are conferred by specific provisions of the law being article 40 of the Constitution and sections 107 to 133 of the Land Act NO.6 of 2012 which replaced the provisions previously contained in the Land Acquisition Act Cap 295 Laws of Kenya. These provisions have to be complied with for the rights of acquisition crystallise. I have already held that the Defendant has not established there was compulsory acquisition of the suit property and thereof the question of overriding interest under section 28 (e) of the Land Registration Act would be inapplicable.

The other cases referred to the court by the Defendant namely **NIAZ MOHAMMED JAN MOHAMMED –VS- COMMISSIONER OF LANDS HCCC NO. 423 OF 1996, JAMES JORAM NYAGA & ANO. –VS- THE ATTORNEY GENERAL & 2 OTHERS HCMISC APPLICATION NO. 1732 OF 2004 and REP –VS- MINISTER FOR LANDS & OTHERS EXPARTE JOHN KAGONYE NGURURU, JR ELC NO. 111 OF 2011** had facts which were distinct and not in any way similar to the facts and circumstances in the present case. The cases dealt with instances where there was clear evidence of property being allocated for a specific public purpose and subsequently realienated to private persons as in the **Jan Mohammed** case (*supra*) for private purposes and as in the case of **John Kagonye Ngururi** there was established case of fraud and/or illegality which would vitiate a contract. Thus these cases are distinguishable from the instant case and are inapplicable.

The 1st plaintiff has by way of evidence established that he is the registered owner of **L.R. NO. 9042/136** and the duly certified search dated 31st July 2012 produced in evidence by the 1st plaintiff confirms that the 1st plaintiff is still the registered owner of the property measuring 1.003 hectares and the Deed plan attached to the Grant does not show any road tranverses the property. The survey of the property was done by the Director of surveys long after the alleged compulsory acquisition by the Government. The registration of the 1st plaintiff as the owner of the suit property conferred him with ownership rights as under section 25 (1) of the Land Registration **Act NO. 3 of 2012** and he is the absolute and indefeasible owner and under section 26 (1) of the Land Registration Act his title can only be challenged on the ground of fraud or misrepresentation to which he has to be proved to be a party or if it is shown he acquired the title illegally, unprocedurally or through a corrupt scheme.

The Defendant has neither alleged any fraud or misrepresentation on the part of the 1st plaintiff and none has been shown or proved. The 1st plaintiff has demonstrated how he acquired the land and it is my finding and holding that no illegality has been shown and neither has it been established that the title was acquired by the 1st plaintiff unprocedurally or through a corrupt scheme. I hold the 1st plaintiff's title to be absolute and indefeasible and deserving of protection under article 40 of the constitution. The Defendant has not established that the 1st Plaintiff's title would be one that would fall within the provision of Article 40 (6) where protection would be denied under the constitution on the basis that the property is found to have been unlawfully acquired.

Having held that the 1st plaintiff's title was valid and therefore indefeasible it follows that issue 'C' of the agreed issues has to be resolved in favour of the plaintiff. The plaintiff was the registered owner of the suit property and was entitled to full protection of the law. The Defendant would not merely put out a notice to remove the structures and descend onto the property to remove the structures if the plaintiffs declined to do so. The Government through the Commissioner of Lands had not withdrawn, revoked or cancelled the title to the property issued to the 1st Plaintiff to entitle the Government to serve the notice for the removal of the structures. The Defendant could only revoke or cancel the title issued to the 1st plaintiff by following due process which it did not do. There are a line of cases that establish that due process must be followed to revoke or cancel a registered title. The case of **OCEAN VIEW PLAZA LTD – VS- ATORNEY GENERAL** (Mombasa HCCC NO. 527 of 2001 'B') Onyancha Judge held that-

“The allotment of land to a citizen or others protected under the constitution which action is symbolized by title Deeds, invests in the allottee inviolable and indefeasible rights that can only be defeated by a lawful procedure under the Land Acquisition Act”.

Hon. Justice Musinga upheld the same view in the case of **KURIA GREENS LTD –VS- REGISTRAR OF TITLES & ANOTHER (Supra)** and so did **Hon. Justice Majaja** in the case of **ISAAC GATHUNGU WANJOHI –VS- ATTORNEY GENERAL & 6 OTHERS (2012) Eklr.**

It is thus my holding that the act of the Defendant descending on the 1st plaintiff’s property on the night of 17th November 2010 and demolishing the plaintiffs godowns and damaging goods and properties thereon constituted trespass for which the Defendant is liable for. It is my finding and holding therefore that the Ministry’s action in demolishing structures on the plaintiffs parcel of land was unlawful and that the Defendant is liable to the plaintiffs in damages.

The evidence as to damages suffered by the plaintiffs as a result of the demolitions by the Defendant was given by pw2 and he produced the valuation/loss assessment report. That the demolitions took place and that it was the Defendant who carried out the demolitions is not in dispute. The 1st plaintiff had approval for the developments on the suit property and had been issued with an occupation certificate by the City Council of Nairobi. The evidence by pw1 and pw2 illustrate the extent of the damage and the photographs annexed to pw2’s report show the magnitude of damage was massive. That the exercise was carried out at night is suggestive of the defendants resolve to inflict swift and maximum damage.

To appreciate the level of investment on the 1st plaintiff’s suit property it is illustrative to note that as per the certificate of official search issued on 31st July 2012 the Kenya Commercial Bank Ltd granted to the 1st plaintiff a loan of Kshs.220,000,000/- which is indicative of the value of the property at the time the charge was registered on 24th February 1997 not long after the City Council had issued its occupation certificate for the development on the suit property on 16th August 1996.

The City Council of Nairobi in approving the development plans must have been satisfied the property was not on a road reserve and further during the course of the development uptill the development was completed the Defendant does not appear to have raised any objection to the development on the basis that the development was taking place on a road reserve or was encroaching on land reserved for the construction of a road. In such circumstances unless there is clear evidence that the 1st plaintiff was party to a fraudulent scheme in obtaining allocation of the land or that there was an unlawful corruption scheme that led to the allocation I would not be prepared to hold the allocation was irregular and/or unlawful and therefore void. There is absolutely no evidence of any fraud and/or corruption and in the circumstances I uphold the sanctity of title and hold the 1st plaintiff’s title to be indefeasible.

The Defendant in his submissions submitted that this court’s jurisdiction is limited by the constitution and statute and the court’s jurisdiction is restricted to determining disputes relating to ownership, occupation and title to land and it has no jurisdiction to award any damages based on the items claimed by the plaintiffs as per the valuation report by pw2.

Article 162 (2) of the constitution establishes the environment and land court and the same provides as follows:-

162.(2) Parliament shall establish courts to hear and determine disputes relating to-

(a) employment and labour relations, and

(b) the environment and the use and occupation of and title to land

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

Parliament pursuant to Article 162(3) of the constitution enacted the Environment and Land Court Act.

Section 13(7) of the Environment and Land Court Act NO. 19 of 2011 provides as follows:-

13.(7) In exercise of its jurisdiction under this Act, the court shall have power to make any order and grant any relief as the court deems fit and just, including-

(a) interim or permanent preservation orders including injunctions,

(b) prerogative orders,

(c) award of damages,

(d) compensation,

(e) specific performance,

(f) restitution,

(g) declaration or ,

(h) costs.

Under section 13(7) (c) it is clear that this court is empowered to award damages as well as compensation under section 13 (7) (d). I do not find that Article 226(5) or Article 232(1) of the Constitution would have any application to the facts and circumstances of this matter as the Defendant urges me to so find and make appropriate orders.

The only matter/issue that remains to be determined is the quantum of damages/compensation that the court should award to the plaintiffs the court having found that the Defendant trespassed onto the 1st Plaintiff's property and carried out the unlawful demolitions thereby occasioning damages to the plaintiffs.

(i) The assessment of damages and the value of damage to the land, buildings and improvements lost in the demolition was not challenged in any meaningful manner by the defendant and I accept the assessment of **Kshs.340,000,000/-** as detailed under item 1 of Pw2's valuation report.

(ii) No evidence was led to establish item (2) in the report and I disallow the same having regard to the fact that special damages have not only to be pleaded but also have to be specifically proved.

(iii) I have considered the further witness statement of **Ashwin Ramji Gudka PW1** dated 3rd November 2012 filed in court on 14/11/2012 and I find that it verifies item (3) of the valuation report. I have considered these were business premises in which business was running and I have accepted Pw1 evidence of the goods/commodities that were stocked as per the annexures contained in the further witness statement of pw1. I admit the claim of **Kshs.71,790,700/-** in favour of the 2nd, 3rd and 4th plaintiffs representing the value of the plaintiffs lost and/or damaged goods.

(iv) I have considered the claims under items **4,5,6 and 7** in the valuation/assessment report and I do not hold the same proved and established and I find no basis to award any of the claims under any of the heads that they are claimed. Instructively different companies were carrying on business in these premises and it is unclear in respect of what business the claims are being made and in what proportion if any.

(v) I have found that the actions of the defendant to enter into the 1st plaintiff's property and carry out wanton demolitions of the plaintiffs property amounted to trespass and I award general damages to the

plaintiffs which I assess at **Kshs.20,000,000/-** having regard to the circumstances and the brutal force employed in the exercise. I make no award for punitive damages as I am urged to do by the plaintiffs as I consider the award of general damages in the circumstances of this case to be adequate compensation for the trespass and aggression.

(vi) I award the sum of **Kshs.1,225,000/-** on account of professional fees for the preparation of the valuation report as I consider the same to be justified for purposes of obtaining an expert's assessment of the loss and/or damage.

In the result and having considered all the evidence and having reviewed the submissions and authorities tendered by the parties I am satisfied that the plaintiffs have on a balance of probabilities proved their case against the defendant. I accordingly enter judgement for the plaintiffs jointly and severally in terms of prayers **(a) (b) (c)** and **(e)** of the plaint.

Additionally I enter judgment against the Defendant for:-

- i. **Kshs.340,000,000/-** in favour of the 1st plaintiff.
- ii. **Kshs.71,790,700/-** in favour of the 2nd, 3rd and 4th Plaintiffs.
- iii. **Kshs.20,000,000/-** being general damages to the plaintiffs.
- iv. **Kshs.1,225,000/-** being on account of valuation fees to the plaintiffs.
- v. Costs of the suit are awarded to the plaintiffs. I certify costs of two counsel for the plaintiffs.
- vi. Interest on the sums awarded under (i) to (iv) to accrue at court rates from the date of this judgment.

I am grateful to all counsel for their industry in this matter and contribution by way of submissions which no doubt assisted the court in reaching a determination on the issues that the court was invited to make a determination on.

Judgement dated, signed and delivered at Nairobi this 14th day of February 2014.

J.M. MUTUNGI

JUDGE

In presence of:

Mr. A.B. Shah and Mr. Ramesh Sharma instructed by the firm of Ramesh Sharma Advocates for the plaintiffs.

Mr. Thande Kuria, Litigation Counsel instructed by the state Law Office for the Defendant.