



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENTAL & LAND DIVISION**  
**ELC CIVIL SUIT NO. 976 OF 2012**

**IN THE MATTER OF ARTICLES 3, 19, 20, 21, 22 AND 23  
OF THE CONSTITUTION**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS  
AND FREEDOMS UNDER ARTICLES 1, 3, 27, 28, 40, 47 AND 50 OF THE CONSTITUTION**

**AND IN THE MATTER OF THE LAND ACQUISITION ACT CAP 195 OF THE LAWS OF  
KENYA AND GAZETTE OF 20<sup>TH</sup> NOVEMBER 1970**

**IN THE MATTER OF THE PROPOSED FORCIBLE ACQUISITION AND/OR DEMOLITION  
OF PREMISES ON LAND PARCELS NAMED KIAMBAA/RUAKA 1588 AND  
KIAMBAA/RUAKA/1532 FOR PURPOSES OF NAIROBI NORTHERN BY PASS**

**BETWEEN**

**EUNICE GRACE NJAMBI KAMAU.....1<sup>ST</sup> PETITIONER**

**DAVID HENRY KARANJA MBUGUA .....2<sup>ND</sup> PETITIONER**

**AND**

**THE HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**THE COMMISSIONER OF LANDS.....2<sup>ND</sup> RESPONDENT**

**THE CHIEF LANDS REGISTRAR.....3<sup>RD</sup> RESPONDENT**

**THE DIRECTOR OF SURVEY..... 4<sup>TH</sup> RESPONDENT**

**KENYA NATIONAL HIGHWAYS AUTHORITY....5<sup>TH</sup> RESPONDENT**

**KENYA URBAN ROADS AUTHORITY..... 6<sup>TH</sup> RESPONDENT**

## JUDGEMENT

1. The Petitioners who are husband and wife have lodged this Petition challenging what they regard as the arbitrary and unlawful intention of the Government acting through the Respondents to deprive them of land that they lawfully have title to. The Petitioners are jointly registered as the proprietors of land parcels Kiambaa/Ruaka/1588 and Kiambaa/Ruaka/1532 and have constructed 14 apartments and 3 shops flats on parcel Kiambaa/Ruaka/1588 situate at Ruaka Township adjacent to Limuru Road.
2. The subject properties namely L.R. Kiambaa/Ruaka/1588 and L.R Kiambaa/Ruaka/1532 it is the Respondents position were comprised in and formed part of parcels compulsorily acquired by the Government of 1970 namely parcel numbers Kiambaa/Ruaka/468 and Kiambaa/Ruaka/14 owned by Muhu Kigoto and Kariuki Muchiri respectively.

The Petitioners re-amended petition dated 7<sup>th</sup> February, 2012 seeks the following orders:-

1. That a declaration be issued to declare that the Petitioners are the lawful owners of L.R. No. Kiambu/Ruaka/1588 within the meaning of Article 40 of the Constitution.
  2. That a declaration be issued to declare that the forcible entry, seizure, possession and impending demolition of the Petitioner premises on L.R. No. Kiambaa/Ruaka/1588 amounts to violation of their rights to protection of property under Article 40 of the Constitution.
  3. That a permanent injunction be issued to restrain the Respondents either severally and jointly from entry into, seizure, confiscation, occupation, alienation and demolition of premises on Land Parcel L.R No. Kiambaa/Ruaka/1588 pursuant to the Notice dated 13<sup>th</sup> October, 2011 or any other Notice of communication.
  4. That an order of prohibition be issued to restrain the Respondents severally and jointly from entry into, seizure, confiscation, occupation, alienation and from taking possession of L.R. No. Kiambaa/Ruaka/1532 unless and until the Government has compulsorily acquired it under the Land Acquisition Act, Cap 295 and complied with Article 40 of the Constitution.
  5. That a declaration be issued to declare that the Respondents jointly and severally are liable to acquire L.R. No. Kiambaa/Ruaka/1588 in accordance with the Land Acquisition act, Cap 295 and Article 40 of the Constitution.
  6. That declaration be issue to declare that the Respondents are jointly and severally liable to compensate the Petitioners by way of damages for the loss of user and other infringements of their rights and privileges as registered owners of Plot no. L.R. No. Kiambu/Ruaka/1588 on account of the declared intention to demolish the premises thereon for purposes of Nairobi Northern by-pass.
  7. That a declaration be issued to declare that under Article 40 of the Constitution the Petitioners' premises on parcel L.R. No. Kiambaa/Ruaka/1588 cannot be taken possession of by the Respondents either jointly or severally and/or demolished unless and until this Honourable Court has found that the title to the said plot is a nullity or invalid.
  8. That a declaration be issued to declare that the sixth Respondent's Notice dated 13<sup>th</sup> October, 2011 is unlawful for contravention of the Petitioner's rights under Articles 27, 40, 47 and 50 of the Constitution.
  9. General damages for breach of the petitioner's rights and freedoms under Articles 27, 28, 40, 47 and 50 of the constitution.
  10. That the Respondents be ordered to bear the costs of this Petition in any event.
3. The petitioners rely on the supporting affidavit of the 2<sup>nd</sup> Petitioner sworn on 24<sup>th</sup> September, 2010 and the Supplementary Affidavit sworn by the 1<sup>st</sup> Petitioner on the 30<sup>th</sup> December, 2010 and filed on 31<sup>st</sup> December, 2010. The petitioners have further filed skeleton submissions and a list of authorities in support of their case.
  4. The 5<sup>th</sup> Respondent has filed a replying affidavit through Eng. Meshack Kidenda the Director General of the 5<sup>th</sup> Respondent and submissions in response and opposition to the petitioner's petition and submission. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> Respondents have filed a replying affidavit though Francis Muthusi Kiminza the manager (surveyors) of the 6<sup>th</sup> Respondent and submissions in response and opposition to the petition and submissions by the petitioners.

## THE PETITIONER'S CASE:

5. It is the Petitioners' case that on or about 17<sup>th</sup> September 2010, public officers from the ministry of roads went around Ruaka township earmarking buildings for demolition that they claimed were lying on the path of the link road connecting the Nairobi Northern Bypass to Limuru Road.
6. The Petitioners have averred that neither of the 2 parcels of land falls within the land acquired by the government vide gazette notices no. 3437 and 3438 published in the Kenya Gazette of 20<sup>th</sup> November 1970 for purposes of construction of the Nairobi Northern Bypass. The Petitioners have averred that as the registered proprietors of the 2 plots, Article 40 of the Constitution protects their rights to property which cannot be defeated or compromised by past dealings in the land by the government and its officials. Further, the Petitioners have stated that since the only property without protection under Article 40 is unlawfully acquired property, the government has no power to takeover possession or demolish their premises unless it can demonstrate that the Petitioners' titles were unlawfully acquired.
7. The Petitioners have contended that under Article 27 of the Constitution, their right to equality and freedom from discrimination guarantees them the right to equal protection before the law and as title holders, the government has no better claim to the property than their own and further, that the government has no right to use state powers to dispossess them without due process of the law. The Petitioners have stated that under Article 47 of the Constitution, they have a right to fair administrative action which includes a notification that their plots allegedly fall wholly or partly within the boundaries of the link road connecting the Northern Bypass to Limuru Road. It is the Petitioners contention that under Article 50 of the Constitution, their right to have any dispute over their plots resolved by application of the relevant law in a fair and public hearing before the High Court is guaranteed and further, that Article 1(3) and 3 enjoins the Respondents to perform their functions in accordance with the constitution.
8. The Petitioners have alleged that the government and the Respondents have by their own actions, omissions and compromises lost their right to challenge or deny the Petitioners' proprietary rights in the 2 plots having failed to mark out, secure and take possession of the acquired land under the Land Acquisition Act, Registered Land Act and the Survey Act. According to the Petitioners, the government compromised legal notices no. 3437 and 3438 of 20<sup>th</sup> November 1970 when it agreed to shift Limuru Road from its original path to the existing area which had the effect, inter alia, of shortening the link road between the Northern Bypass and Limuru road. The Petitioners insist that having acquiesced and compromised the said gazette notices, the government is now estopped from pleading innocence about the effect of its actions and omissions within the vicinity of Ruaka Shopping center.
9. Further, the Petitioners contend that upon the Commissioner of Lands failing to formally take possession of the acquired land as required by section 19 of the Land Acquisition Act, the acquired land did not vest and has not vested in the government and therefore, the Respondents cannot escape liability for subsequent dealings in the land and adjoining parcels in conflict with the gazette notices to the detriment of subsequent purchasers including the Petitioners. The Petitioners aver that owing to non compliance with the Land Acquisition Act, the government is now enjoined to start afresh the acquisition of all land parcels to provide for the link road connecting Limuru Road to the Northern Bypass.
10. The 1<sup>st</sup> Petitioner filed a supplementary affidavit sworn on 30<sup>th</sup> December 2010 where she annexed a valuation report prepared by Lloyd Masika Limited and dated 3<sup>rd</sup> December 2010 which indicated the value of Kiambaa/Ruaka/1588 as Kshs 30,000,000.00
11. In a further affidavit sworn by the 2<sup>nd</sup> Petitioner on 24<sup>th</sup> October 2012, the Petitioners aver that by a letter dated 11<sup>th</sup> October 2010 which has been attached as evidence, the District Surveyor Kiambu informed the registered proprietors of specified parcels, including the suit properties, that

there would be re-survey for purposes of amendment of the existing Registry Index Map lodged at the Director of Surveys, Nairobi. Further, the Petitioners, have stated that the 6<sup>th</sup> Defendant through a letter dated 13<sup>th</sup> October 2011 notified all concerned persons to demolish/remove premises allegedly built on road reserves allocated for construction of a slip road to connect the Nairobi Northern By Pass to Limuru Road. The removal notice is annexed to the affidavit as evidence.

12. The Petitioners have contended that the notice dated 13<sup>th</sup> October 2011 was issued in the wake of the completion of the link road between Nairobi Northern Bypass and Limuru Road through another route, besides the initial route that precipitated the filing of the instant petition in September 2010. It is the Petitioners case that the effect of the 6<sup>th</sup> Respondent's notice was to precipitate a second exodus of tenants of the affected premises including those of the Petitioners and further, that the value of the property has been diminished in terms of securing tenants, rent payable and good will in addition to loss of resale value since the property has been projected as a public property.
13. The Petitioners have annexed a letter dated 18<sup>th</sup> October 2011 from and authored by their advocates, Messrs Kinoti Kibe & Company Advocates seeking confirmation from the 6<sup>th</sup> Respondent on her intention to construct the slip road cutting across the petitioners premises in view of the completed re-route that allows for the connection of the 2 roads. While refuting the 6<sup>th</sup> Respondent averment in the replying affidavit of Francis Muthusi Kiminza sworn on 16<sup>th</sup> May 2012 that their property is not protected by the Constitution, the Petitioners have maintained that no court or tribunal has found that the property was unlawfully acquired and therefore, that the court cannot declare the titles null and void.
14. The Petitioners filed submissions dated 23<sup>rd</sup> October 2012, where counsel argued that under the law, the Petitioners have a constitutional right to be notified that the government wants to take possession of their plot and a reasonable notice to vacate and pave way for demolition in order to allow construction of the Bypass link. Counsel submitted that no reasonable notice was given and any demolitions would amount to breach of the Petitioners' right to human dignity as well as breach of their right to protection of law.
15. It was submitted for the Petitioners that their rights over the suit properties are protected by Article 40 of the Constitution and the state has no power to deprive them unless it complies with Article 40(3) of the Constitution. Counsel for the Petitioners argued that the state cannot lawfully defeat the Petitioners' right to property under Article 40 as their title is indefeasible and cannot be compromised by past government dealings on the said parcels unless it is demonstrated that their titles were acquired unlawfully. Further, counsel stated that by virtue of Article 27 of the Constitution, they have a right to the same protection of the law and equal benefit of the law that other title holders are entitled to under the Constitution and other laws. Counsel contended that since the Petitioners are title holders, the government has no better claim over the properties and therefore has no right to use state powers to dispossess the Petitioners without regard to due process of the law.
16. The Petitioners argued that upon the Commissioner of Land failure to formally take possession of the acquired land, the said land did not vest in the government and that the Commissioner is now enjoined by section 19 of the Land Acquisition Act to serve a notice to each of the current registered proprietors of affected parcels that he will formally take possession of their land and that on a specified date, title to the properties will vest in government. Counsel for the Petitioners relied on the case of **Fletcher -vs- Pecks** 10 U.S 87(1810) as well as the case of **Onyango & others -vs- Town Council of Awendo(2010)EALR 321** where the court held that compulsory acquired land ought to be used for the designated purpose only and unutilized portions should be surrendered back to the persons from whom the land was compulsorily acquired. Reliance was placed on the case of **Commissioner of Lands -vs- Coastal Aquaculture Ltd CA No. 252 of 1996** where the court of appeal held that all procedures related to compulsory acquisition must be

strictly adhered to. The Petitioners also relied on the case of **Kuria Greens Ltd -vs- Registrar of titles & anor (2011)eKLR** where it was held that the 1<sup>st</sup> Respondent could not purport to arbitrarily revoke the title of the Petitioner who was not party to fraud or misrepresentation, without following the due process of law.

17. While submitting that Article 47 and 50 of the Constitution guarantees a right to fair administrative action and fair hearing respectively, it was argued that the 1<sup>st</sup> Respondent ought to have given the Petitioners an opportunity to state their case before reaching the decision that has far reaching ramifications. Counsel for the Petitioners relied on the case of **R -vs- Devon County Council ex parte P. Baker(1995)1All ER** as well as the case of **Council of Civil Service -vs- Minister for Civil Service(1984)3All ER 935**. Reliance was placed on the case of **Isaac Gathungu Wanjohi & anor -vs- The Hon. Attorney General & 6 others (2012)eKLR** where the court held that Article 40(6) of the Constitution contemplates that the finding of "**unlawful acquisition**" must be by due process.

#### **RESPONDENTS CASE:**

18. The 6<sup>th</sup> Respondent in a Replying Affidavit sworn by her Manager Surveys, Mr. Francis Muthusi Kiminza on 16<sup>th</sup> May 2012 opposed the petition and stated that the process of acquisition of land for construction of road Bypasses around the city of Nairobi began 30 years ago whereof surveys were commissioned, suitable lands were identified and acquisition plans were drawn. A copy of a plan prepared by John Burrow & Partners Consulting Civil Engineers setting out the dimensions of the proposed slip road as well as a copy of the gazette notice dated 20<sup>th</sup> November 1970 have been annexed as evidence. According to the 6<sup>th</sup> Respondent, a public inquiry culminated in the compensation of the affected parties and a copy of a letter dated 23<sup>rd</sup> December 1970 from the Commissioner of Lands addressed to the Chief Engineer roads confirming the issuance of compensatory awards has been attached.

19. It is the 6<sup>th</sup> Respondent contention that the planned Bypass project could not be implemented at the time and that the funds became available after a period of nearly 30 years and while taking advantage of the delays, unscrupulous individuals engaged in irregular subdivisions and re-subdivisions of the acquired parcels and purported to alienate them to 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> parties contrary to public policy and interest. The 6<sup>th</sup> Respondent has stated that Kiambaa/Ruaka/1532 and 1588 belonging to the Petitioners are resultant parcels of previous plots no. 468 and 14 acquired by the government from Mr. Muhu Kigoto and Kariuki Muchiri and a sketch showing the encroachments has been annexed as evidence.

20. The 6<sup>th</sup> Respondent has maintained that public notification by way of press adverts and identification by way of indelible markings to encroaching properties did issue before the implementation of the first phase of the project commenced and the Petitioners with other affected parties rallied around the government and admitted its ownership while seeking time to recoup their losses and relocate. While admitting that she issued the notice dated 13<sup>th</sup> October 2011 to the Petitioners, the 6<sup>th</sup> Respondent has reiterated that there were renewed admissions of the government ownership by the Petitioners and other affected parties with requests for extension of time within which to relocate.

21. It is the 6<sup>th</sup> Respondent's case that to the extent the parcels held by the Petitioners encroach upon the acquired public utility land, they are not protected in law by virtue of Article 40 of the Constitution which also protects public land and therefore, that the titles are null and void. Further, the 6<sup>th</sup> Respondent has stated that by virtue of Article 23, the court has power to make pronouncements revoking and declaring the Petitioners alleged titles null and void.

22. The 5<sup>th</sup> Respondent opposed the petition through a replying affidavit sworn by Eng. Meshack O.

Kidenda, the Director General of the 5<sup>th</sup> Respondent on 27<sup>th</sup> November 2012. The 5<sup>th</sup> Respondent has contended that she is responsible for the management, development, rehabilitation and maintenance of national roads as classified under part A of the first schedule of the Kenya Roads Act, No. 2 of 2007. The 5<sup>th</sup> Respondent has maintained that it is the 6<sup>th</sup> Respondent who is responsible for the management, development, rehabilitation and maintenance of all public roads, except national roads, in the cities and municipalities.

23. It is contended by the 5<sup>th</sup> respondent that the petition is premised on a notice issued by the 6<sup>th</sup> Respondent for the removal of property allegedly built on a road reserve allocated for the construction of a slip road to connect the Nairobi Northern Bypass to Limuru Road. While admitting that she is in charge of the construction of the Northern Bypass which is a national road, the 5<sup>th</sup> Respondent has stated that the slip road is not a national road and does not fall within her mandate but solely under the authority of the 6<sup>th</sup> Respondent. The 5<sup>th</sup> Respondent has contended that she is wrongly joined in this suit and is a stranger to these proceedings which she has urged the court to strike out as against her with costs.
24. In submissions dated 22<sup>nd</sup> October 2012 and filed in court on 24<sup>th</sup> October 2012, the Respondents submitted that although Article 40 of the Constitution guarantees the right to acquire and own property, sub article 6 does not protect property found to have been unlawfully acquired. While rebutting the Petitioners' assertions that only the court can find that the title to the suit property is a nullity or invalid, counsel for the Respondents submitted that Article 10, imports authority to all state organs, state officers, public officers and all persons to give Constitution a broad and purposive interpretation.
25. Counsel for the Respondents argued that to the extent that the titles held by the Petitioners encroach upon the acquired public land, they are not protected by law by dint of Article 40(6) of the Constitution and are therefore null and void and cannot be protected by the court. The Respondents through their advocate submitted that the parcels of land had been earmarked for public use as spelt out in Article 40(3) of the Constitution, and the affected parties were compensated.
26. While arguing that he who comes to equity must come with clean hands, counsel submitted that the Petitioners' hands are not clean as the titles they hold are questionable and further, that the Petitioners are capitalizing on a lapse in the memory of the government. It was submitted for the Respondents that in acquiring the suit parcels, the government was pursuing the interests of the nation and posterity pursuant to Article 10(2)(d) which aims at ensuring sustainable development while preserving the environment both for the present and future generations to come. Lastly, it was submitted that it is *malafide* on the part of the Petitioners to approach the court seeking to protect an illegality.

## **DETERMINATION**

27. The issue that falls to be determined is whether the Petitioners properties were compulsorily acquired by the Government and whether the acquisition process was valid. Save for pleading that neither of the 2 properties in dispute fall within the land acquired by the government through gazette notices 3437 and 3438 of 20<sup>th</sup> November 1970, the Petitioners have not provided any evidence to substantiate their claims. The Petitioners Positions as I understand it seems to be that they are the registered proprietors of Land parcel Title Numbers Kiambaa/Ruaka/1532 and 1588 and that these parcels were not included in the Gazette Notices 3437 and 3438 of 20<sup>th</sup> November, 1970 and hence were not part of the acquired land. On the other hand, the 5<sup>th</sup> Respondent has through the replying affidavit of Mr. Francis Muthusi Kiminza stated that the disputed parcels which are known as Kiambaa/Ruaka/1532 and 1588 are resultant parcels (following subdivision) of previous plots no. 468 and 14 acquired by the government through gazette notices 3437 and 3438 of 20<sup>th</sup> November 1970. The Respondent has annexed evidence of the gazette notice as well as a sketch map, and this evidence has not been rebutted by the Petitioners.

28. In fact, the government's acquisition is acknowledged by the Petitioners who have challenged the acquisition process at length insisting that the government lost its rights to challenge or deny their title in the suit properties having failed to take possession of the acquired land under the Land Acquisition Act. The Petitioners are not the original land owners from whom the government acquired land as can be deciphered from gazette notices 3437 and 3438 of 20<sup>th</sup> November 1970. Secondly, whereas the government acquired the land in 1970, title deeds annexed in the Petitioners' lists of documents indicate that the Petitioners were registered as owners to Kiambaa/Ruaka/1532 and 1588 on 13<sup>th</sup> February 2004 and 5<sup>th</sup> May 2004 respectively way after the acquisition process had been completed.
29. It is necessary to determine whether the petitioners two parcels of land actually were part of the lands acquired by the Government in 1970. The court has reviewed the sworn affidavit of Francis Muthusi Kiminza on behalf of the 6<sup>th</sup> Respondent and in particular the annexure marked "FMK-1" being the plan prepared by John and Burrow Consulting civil Engineers setting out dimension of the proposed slip road near the convergence of the Northern Bypass and Limuru Road at Ruaka Shopping Centre and "FMK-4" being a sketch showing the encroachment. The said Francis Muthusi Kiminza states that the process of acquisition was completed and the affected persons paid compensation as confirmed by the commissioner of lands letter dated 23<sup>rd</sup> December, 1970 marked "FMK-3" in his replying affidavit. However, despite the preparatory the Government did not commence the planned by pass project as funds for the project were not allocated until recently (after over 30 years). Mr. Muthusi in paragraph 7 of his replying affidavit states that parties took advantage of the governments delay in executing the project to cause the affected parcels to be irregularly subdivided and re-subdivided and to be alienated to 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> parties contrary to public policy and interest. Mr. Muthusi further depones that title parcels Kiambaa/Ruaka/1532 and 1588 belonging to the petitioners herein were established from the original parcels plot Nos. 468 and 14 that the government acquired from M/s Muhu Kigoto and Kariuki Muchiri. Upon a careful look at annexures "FMK-1" and "FMK-4" it does become evident that the petitioners two parcels of land did in fact form part of the original land parcels Kiambaa/Ruaka/14 and Kiambaa/Ruaka/468 owned by Kariuki Muchiri and Muhu Kigoto respectively and as per the sketch plans the petitioners said parcels of land lie on the path of the link road or at least portions of the parcels do. The petitioners have not rebutted this assertion and the court accepts the assertion that indeed Title land parcels Kiambaa/Ruaka/1532 and 1588 were part of the original land parcels 468 and 14 and that portions and/or whole parcels fell within or on the path of the earmarked slip road.
30. The 6<sup>th</sup> Respondent states that the public was given notification by way of press adverts and those properties that were encroaching were marked before the commencement of the first phase of the project implementation. The 6<sup>th</sup> Respondent states that in response to the notifications the petitioners among other affected parties sought the indulgence of the government including seeking, a consideration of the re-designing of the slip road such that it is relocated from the acquired and plotted path so that the affected parties are spared the losses they were bound to incur in case the project proceeded as contemplated. The government did not accede to the entreaties and as per the averments of the 6<sup>th</sup> respondent the government is committed to complete the construction of the slip road as it is intended to also do a dual carriage of the Northern Bypass and this precipitated the issuance of the Notice referred to at paragraph 18 of the Re-amended petition from the 6<sup>th</sup> Respondent Authority of 13<sup>th</sup> October, 2011 to the Petitioners and other affected persons.
31. The petitioners filed a list of authorities while the Respondents did not make any reference to any authority in their submissions and relied on the affidavit evidence and their written submissions. In the case of **COMMISSIONER OF LANDS VS. COASTAL AQUACULTURE LTD CA No. 252 of 1996** the Court of Appeal expressed the view that in the case of land compulsorily acquired all procedures related to acquisition must be strictly adhered to. Honourable Justice Musinga (as he then was) in the case of **ONYANGO & OTHERS VS. TOWN COUNCIL OF AWENDO [2010] IEACA 321** reiterated this position when he held that observance of the procedural requirements for compulsory acquisition are absolutely necessary and that such acquisitions have to be carried out in strict conformity with the constitutional provisions and in good faith. Hon.

Justice Musinga yet again in the Case of **KURIA GREENS LIMITED VS. REGISTRAR OF TITLES & ANOTHER [2011] ECLR** while expressing himself as regards the plight of innocent purchasers expressed himself thus:-

***“Even assuming there was fraud or misrepresentation in alienating the suit land to the original registered proprietor, the petitioner was not party to such fraud or misrepresentation. The petitioner lawfully purchased the suit land from Riangi Estates Limited and obtained all the necessary consents and invested heavily on the suit land.***

***The 1<sup>st</sup> Respondent could not therefore purport to arbitrarily revoke its title without any notice and mostly importantly, without following the due process of law. Due process must be adhered to by all the state and its citizens.***

***Whereas unlawful acquisition of public property by citizens must be lawfully resisted, the court will be filing in its constitutional duties if failed to protect citizens from unlawful acquisition of their property by the state through unlawful decisions taken by public officers. If the respondents were satisfied that the suit land had been unlawfully alienated and that it was in the interest of the public that the land reverts to the state or to the Kenya Agricultural Research Institute, appropriate notice ought to have been given to the petitioner and thereafter the respondents ought to have exercised any of the following options:-***

- a. ***Initiate the process of compulsory acquisition of the suit land and thus pay full and prompt compensation to the petitioner or***
- b. ***File a suit in the High Court challenging the Petitioner’s title and await its determination one way or the other.***

***Short of that the respondent’s purported action of revoking the petitioner’s title is an affront to private proprietary rights which are guaranteed by our constitution and such an action must be frowned upon by the Law”***

32. Having regard to the interpretation that the courts have variously given to Article 40 of the Constitution I take the view that Article 40 of the Constitution upholds and protects the sanctity of property and that the primary consideration is that the title to the property is lawfully obtained. The only instance where title to property cannot be protected is where it is shown that the title was unlawfully acquired and/or procured such that under article 40(6) such title cannot be protected. I agree with Honourable Justice Majanja’s observation in the case of **ISAAC GATHUNGU WANJOHI & ANOTHER VS. ATTORNEY GENERAL & 6 OTHERS [2012] eCLR** when he stated at paragraph 42 thus:-

***“Article 40 must read as a whole so that protections afforded by Article 40 which protect the right to property must be read to exclude property found to be unlawfully acquired under Article 40(6). This requirement is an extension of the fact that the constitution protects higher values which are to be found in preamble to the constitution and Article 10. Values such as human rights and social justice cannot countenance a situation where the constitution is used to rubberstamp what is in effect unlawful”.***

33. Whereas various land commissions such as the Njonjo Land Commission and the Ndungu Land Commission have in their reports documented what they referred to as land grabbing and/or the acquisition of title to land illegally and unlawfully there is no definite definition of who a land grabber is and what constitutes an illegal and/or an unlawful title. In my view the determination whether or not a title is illegal or unlawful has to take into account the circumstances and the process through which the title was obtained and/or acquired and provided the title is regularly issued by the duly authorized officers entitled to do so by the government, it is my opinion that such a title can only be impugned under Article 40(6) of the Constitution by it being established that the title was unlawfully obtained or acquired by the person shown to be registered as the owner. The doctrine of the sanctity of title is anchored on the premise that a registered owner of

land who holds a certificate of title that is duly registered is prima facie the owner of that property and the title he holds is indefeasible unless the title is shown to have been unlawfully acquired and/or procured. My understanding is that for the title of a registered owner to be impugned on account of fraud such a owner must have had knowledge that the title was fraudulently obtained or procured and/or the owner was party to the fraud.

34. The petitioners have relied on the indefeasibility of the title they hold in respect of title number Kiambaa/Ruaka/1588 and place reliance on Section 28 of the Registered Land Act Cap 300 Laws of Kenya which has since been repealed and replaced by Section 25 of the Registration of Land Act 2012. Section 28 of the Registered Land Act provided thus:-

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

- a. ***To leases, charges and other encumbrances and to the conditions and restrictions, if any shown in the register; and***
- b. ***Unless the contrary is expressed in the register to such liabilities, rights and interests as affect the same and are declared by Section 30 not to require noting on the register.***

***Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as trustee.***

35. The Land Registration Act No. 3 of 2012 under Section 26 provides for indefeasibility of a proprietor's title that has been lawfully acquired and clearly provides for the instances when title can be challenged. Section 26 provides thus:-

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

- a. ***On the grounds 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.***

36. In the present petition no evidence of fraud or any misrepresentation has been tendered to link the petitioners with any fraud or misrepresentation in regard to the acquisition of the subject title. Equally no evidence has been put forward to suggest that acquisition of the title was illegally procured. It is my view that the Respondents would need to demonstrate and establish the acts by the petitioners that would constitute illegality in the acquisition of the title. The petitioners claim they are bonafide purchasers of the suit property without any notice of any defect in title. The petitioners have cited the case of **FLECTCHER VS. PECK 10 U.S 87 (1810)** to illustrate how other jurisdictions have handled the issue of sanctity of title and the plight of innocent third parties. In the said **FLETCHER VS. PECK** case **Supra Marshall J** had this to say:-

***“If a suit be brought to set aside a conveyance obtained by fraud and the fraud be clearly proved, the conveyance will be set aside, as between the parties; but the rights of third persons who are purchasers without notice, for a valuable consideration cannot be disregarded. Titles which according to every legal test, are perfect are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be, any concealed defect arising from the conduct of those who had held the property long before he acquired it of which he had no notice that concealed defect cannot be set up against him.***

***He has paid money for a title good at law, he is innocent whatever may be the guilt of others and***

**equity will not subject him to the penalties attached to that guilt. All titles would be insecure, and intercourse between man and man would be very seriously obstructed if this principle be overturned”**

37. I am in agreement with this observation by Marshall J and I think the principle of bonafides in the case of third parties dealing with property is equally applied by the courts in this country where circumstances permit. Whereas an intending purchaser of a property ordinarily is expected to carry out due diligence to verify the details and particulars of the property, it cannot be expected that the scope of such due diligence would be extended beyond what the law provides as being sufficient e.g. official searches and inspection of survey records unless there is on the face of it an apparent need to carry out further investigation.

38. The Petition before me alleges violation of the petitioners constitutional rights and specifically the petitioners allege violation of their property rights under Article 40 of the Constitution that provides as follows:-

**40(1) subject to Article 65, every person has the right either individually or in association with others to acquire and own property:-**

- a. **Of any description; and**
- b. **In any part of Kenya**

**(2) Parliament shall not enact a law that permits the state or any person –**

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

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

- a. **Results from an acquisition of land or an interest in land or a conversion of an interest in land or title to land in accordance with chapter five, or**
- b. **In 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 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.**

39. The Petitioners have forcibly argued that since the commissioner of Lands failed to formally take possession of the land the Government acquired vide the Gazette Notice of 20<sup>th</sup> November, 1970 as required under Section 19 of the Land Acquisition Act the acquired land did not vest in the government absolutely free from encumbrances. The petitioners have argued the Notices of November, 1970 became invalid and/or compromised to the extent of the failure by the Commissioner of Lands to comply with Section 19(1) of the Land Acquisition Act Cap 295 Laws of Kenya.

40. The Petitioners further contend that as the Commissioner of Lands failed to comply with Section 19(3) of the Land Acquisition act which required him to serve notice on the registered proprietors of the acquired land and the Registrar of Lands that possession has taken place and that the land

has vested in the government the Respondents cannot escape responsibility for the subsequent dealings with the acquired land. Such dealings include dealings as the ones undertaken by the petitioners as purchasers for value without any notice of any defect in the title of the properties they purchased.

Section 19(1) of the Land Acquisition Act provides as follows:- **19.(1) after the award has been made, the Commissioner 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;**

**19 (4) upon taking of possession, the land shall vest in the Government absolutely free from encumbrances.**

41. Section 20 of the Land Acquisition 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.

42. The Land Acquisition Act under the Section referred to (19 & 20) set an elaborate procedure and process for the Government to follow to take possession and have the acquired land vested in the Government. The language of Section 19 and 20 of the Act is couched in mandatory terms attesting to the significance of the taking of possession and vesting of the acquired land in the government. The essence of the process and procedure for taking possession and vesting of the acquired land in the government is not difficult to understand and appreciate. Quite clearly observance of Section 19(3) and Section 20 of the Act would serve to notify third parties that the government has acquired an interest in the subject land particularly because the registrar of lands would have been notified and a relevant entry would be made on the land register signifying the interests' of the government.

43. Section 17 of the Land Acquisition Act requires a survey to be carried out where only part of the land is acquired so that the acquired land is separated from the other land. The section provides thus:-

**17. Where part only of the land comprised in documents of title has been acquired. The commissioner shall as soon as practicable, cause a final survey to be made of all the land acquired.**

44. 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 of 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 Section 107 to 133. In regards to the present petition, had the relevant government officers acted as required under the Law and appropriate notification would have been issued by the Commissioner of Lands to the Land Registrar and the necessary entries would have been made against the Register of the Acquired title and hence the petitioners would not have found themselves in the situation they find themselves today. The petitioners purchased land title Kiambaa/Ruaka/1588 in 2004 over 30 years from the date the acquisition was done by the government and there was nothing at the lands

Registry to put them on notice that that parcel was part of the land acquired by the government. The survey map sheet No. 14 annexed as 'DHKM2' to the affidavit of David Henry Karanja Mbugua sworn on 24<sup>th</sup> September, 2010 does not show the subject plot to be on any road reserve and I accept the averment by the petitioners that they were purchasers for value without any notice of any defect in the title. **How would they have known that the plot was on the slip road or road reserve when there was no notice at the Lands Registry and/or at the survey Department?**

- 45.If the Commissioner of Lands had done what he was supposed and expected to do under the provisions of the Land Acquisition Act there would have been notice with the Land Registrar and the survey records would have been amended and a simple due diligence on the part of the petitioners would have revealed the subject plot was unavailable as it would have been shown to have been acquired by the government. The situation was not made any easier by the fact that the same land Registry and the survey office who were supposed to have had notice of the acquisition were the ones who processed the subdivisions and subtitles of the original lands that had been acquired.
- 46.On my part I see no justification whatsoever to hold that the titles held by the petitioners are irregular and/or unlawful when there is no demonstration that the petitioners acted fraudulently in obtaining the titles they hold and that they had notice of the acquisition of the subject land by the government. The petitioners have stated that they carried the requisite searchers on the property before purchasing the property and only purchased the properties when the searches revealed they had no encumbrances. I cannot fault them and I instead fault the Commissioner of Lands for failing to follow through the acquisition process. My view is that Sections 17 to 20 of the Land Acquisition Act were intended to serve the purpose of ensuring land compulsorily acquired by the government was secured. By failing to comply with those provisions the Commissioner of Lands exposed the government to third party claims that could arise owing to non observance and compliance with the said provisions.
- 47.In the present petition it has not been suggested and/or even intimated that the petitioners acted in concert and in connivance with the original owner from whom the government acquired land to obfuscate the fact of the acquisition. It is the petitioners contention that they lawfully acquired the subject parcel of land and that they followed due process and to that extent the constitution ought to protect their lawfully and properly acquired property and for that they seek solace under article 40 of the Constitution though curiously the Respondent also seeks refuge under Article 40 (6) to contend that the constitution cannot and does not protect property that has been found to have been unlawfully acquired.
- 48.In the case of **Commissioner of Lands & another vs. Coastal Aquaculture Ltd Civil Appeal No. 252 of 1996 (KLR (E&L 264)** the Court of Appeal held that in cases of compulsory acquisition the government is required to strictly adhere to the provisions of the Constitution and the Land Acquisition Act (now repealed). Referring to the judgment of Hon. Justice Ringera from which the Appeal arose Hon. Justice Pall had this to say:-

**“I agree with the learned Judge that for a successful compulsory acquisition, the requirements of the constitution and of the Act must be strictly complied with (emphasis mine) and that if there is full compliance with the law, compulsory acquisition cannot be interfered with”**

- 49.In the instant petition the issue arises whether it can be said the requirement as per the constitution and as per the Act had been strictly adhered to so as to ensure the property acquired was safeguarded under the provisions of the Land Acquisition Act. The honest answer must be in the negative as the Commissioner of Lands, omitted to comply with critical provisions of the Land Acquisition Act following the Gazettement and issue of the compensation awards. There was no notification to the Land Registrar and neither did the Commissioner of Lands move to take possession of the land acquired as required under the Act. The notification of the Land Registrar and taking of possession would have led to the surrender of the original titles and survey and delineation of the acquired land. This did not happen and it is the real genesis of the current

- problem.
50. In the recent case of **Cycad Properties Ltd vs. The Attorney General & others H.C. Petition No. 70 of 2010 consolidated with Elizabeth Wambui Githinji & others vs. The Urban Road Authority & 3 others H.C Petition No. 69 of 2010** Hon. Lady Justice Mumbi Ngugi in a decision rendered on 25<sup>th</sup> April, 2013 held that third parties could not challenge a compulsory acquisition that was carried out by the government in 1971 whereby the original owners had been compensated and inter alia the Hon. Judge held the third parties had no privity of contract as they were not party to the acquisition. Additionally the Hon. Judge held that public lands acquired through compulsory acquisition would fall among the overriding interests stipulated under Section 30 of the Registered and Act that need not to be noted on the register, and would operate to qualify the indefeasibility of a registered proprietor's title acquired under the Act as provided in Section 28(b) of the Act.
51. I have considered the judgment by Hon. Lady Justice Mumbi Ngugi in the Cycad **Properties Ltd case (supra)** in the context of the facts and circumstances in this petition and note that in the **Cycad properties case** the Judge found that the petitioners had not acquired a lawful title having found that the government had completed the process of compulsory acquisition and that the government's rights of acquisition were overriding rights within the meaning of Section 30 of the Registered Land Act Cap 300 Laws of Kenya (now repealed).
52. In this petition I have expressed the view that to the extent the Commissioner of Lands failed to carry through the acquisition process as envisaged under the Land Acquisition Act and third parties without any notice acquired interests in the acquired property such third parties interests deserve to be protected.
53. As to whether the third parties interests can be defeated by the invocation of overriding interests within the meaning of Sections 28(b) and 30 of the Registered land Act (repealed) which provisions are mirrored under Sections 26 and 28 of the land Registration Act No. 3 of 2012 it is my view that the reference to overriding interests under the referenced provision of necessity must mean the government has an overriding interest and can compulsorily acquire any registered land at any time if it is required for a public purpose. Those interests need not be noted in the land register. I do not understand overriding interests within the context of the provisions and in regard to compulsory acquisitions to mean land that has already been acquired by the government except of course land that has been acquired and the process of acquisition has not been completed within the context of the provisions for compulsory acquisition of interests in land under the provisions of the Land Act No. 6 of 2012. Rights of compulsory acquisition are conferred by specific provisions of the law (the constitution and now Sections 107 to 133 of the Land Act of 2012) and these provisions have to be complied with for the rights to crystallise.

## **DECISION**

### **Whether the Petitioners rights to property as enshrined in the constitution have been infringed.**

54. The Petitioners have alleged that the intended forcible entry seizure possession and demolition of the petitioners premises on L.R. No. Kiambaa/Ruaka/1588 amounts to a violation of their rights to protection of property under Article 40 of the Constitution. Having ruled that the petitioners lawfully acquired the subject property they having not had any notice of the compulsory acquisition of the subject land by the government I hold and find that it would be a violation of the Petitioners rights to protection of property contrary to Article 40 of the Constitution if the respondents were to proceed with the intended demolition of the petitioners premises without making the appropriate compensation to the petitioners. I have come to the conclusion that the property L.R. Kiambaa/Ruaka/1588 was not acquired unlawfully by the Petitioners and therefore Article 40(6) of the Constitution would be in applicable so as to defeat the claim by the Petitioners and hence in the circumstances if the government has to construct the slip road to the Northern Bypass though this property which would necessitate the demolition of the petitioners premises then the petitioners will be entitled to full compensation as envisaged under Article 40(3) of the Constitution. The Respondents/Government may nonetheless consider a redesigning of the slip road such that it skirts the Petitioners premises which is fully developed.
55. There are indications both from the petitioners and the Respondents that there was such a

consideration to have the slip road redesigned.

56. The 5<sup>th</sup> Respondent has protested that it has been wrongly enjoined to these proceedings as a party citing its mandate under the Kenya Roads act No. 2 of 2007 which entails the management, development, rehabilitation and maintenance of all public roads in cities and municipalities in Kenya except where those roads are national roads. The slip road through the Petitioners subject property would fall under the charge of the 6<sup>th</sup> Respondent.

57. The Notice for demolition pursuant to which the Petitioners petition is premised was issued by the 6<sup>th</sup> Respondent and in the premises there is no basis for the 5<sup>th</sup> Respondent to be enjoined to these proceedings and I hereby order that he 5<sup>th</sup> Respondent be struck out from these proceedings.

After review and consideration of all the material placed before the court, the pleadings, submission and authorities, tendered by the parties I have come to the conclusion and I am satisfied that the petitioners have proved their case and I consequently allow the petition and grant the following orders and declarations:-

- a. That the acquisition by the Petitioners of Land parcel L.R No. Kiambaa/Ruaka/1588 was lawful and in accordance with the law and therefore deserving of protection under Article 40 of the Constitution.
- b. That the forcible entry, seizure, possession and impending demolition of the petitioners premises on L.R. No. Kiambaa/Ruaka/1588 amount to violation of their rights to protection of property under Article 40 of the Constitution.
- c. That an order of prohibition be and is hereby issued to prohibit the Respondents severally and jointly from entry into, seizure, confiscation, occupation, alienation and from taking possession of land parcel L.R. No. Kiambaa/Ruaka/1588 unless and until there has been compliance with the compulsory acquisition provisions of the Land Act No. 6 of 2012 and Article 40 of the Constitution.

The Petitioners prayed for damages under payers (f) of the petition but it was not demonstrated that any damages are payable and I will consequently not grant that prayer.

The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> Respondents will bear the 5<sup>th</sup> Respondent's and the Petitioner's costs for this Petition.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10<sup>TH</sup> DAY OF JULY 2013.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

..... **for the 1<sup>st</sup> Petitioners**