

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC PETITION NO. E003 OF 2020

BETWEEN

RADO DEVELOPMENT COMPANY LIMITED.....PETITIONER

AND

THE COUNTY GOVERNMENT OF KISUMU.....1ST RESPONDENT

ABALA WANGA, KISUMU CITY MANAGER.....2ND RESPONDENT

JUDGMENT

The Petitioner brought this petition against the Respondents on 16th December 2020. In its petition of the same date, the Petitioner sought the following orders;

1. Conservatory orders directed at the Respondents restraining them from entering upon or attempting to demolish all that property known as Title No. Kisumu Municipality/Block 9/111(hereinafter referred to as “the suit property”) in pursuance of the impugned notice or otherwise interfering with the Petitioner’s quiet possession and enjoyment of the property.
2. Prohibitory Order directed at the Respondents restraining them from claiming, entering upon, or attempting to demolish the structures on the suit property in pursuance

of the impugned notice or otherwise, howsoever interfering with the Petitioner's possession and quiet enjoyment of the property.

3. A declaration that the purported Public Notice dated 9th December 2020 is null and void and of no legal consequences to the extent that it relates to the suit property.
4. A declaration that the Respondents' police have threatened, infringed upon, and violated the Petitioner's fundamental rights to privacy, property, and fair administrative action.
5. A declaration that by their actions, the Respondents have acted capriciously and arbitrarily, and have abused and exceeded their lawful powers.
6. A declaration that, as a result of the Respondents' actions aforesaid, the Petitioner has suffered damage and loss and is entitled to exemplary damages.
7. An order for compensation to be assessed and quantified by the court.
8. General damages.
9. Costs of the petition.

The Petitioner averred that it was the registered leasehold proprietor of the suit property. The Petitioner averred that it purchased the suit property in 2012 from the County Council of Kisumu (hereinafter referred to only as “the Council”) at a consideration of Kshs. 31,000,000/- after the Council obtained all the necessary approvals to sell the property by tender to defray its debts. The Petitioner averred that it participated in the tender and emerged as the winner, after which it entered into a formal agreement of sale with the Council on 14th June 2012. The Petitioner averred that after fulfilling its part of the agreement for sale, the suit property was transferred to it on 3rd September 2012, and it was issued with a certificate of lease. The Petitioner averred that its leasehold interest in the suit property was for a term of 69 years, from 1st April 1985, and was still subsisting.

The Petitioner averred that it enjoyed quiet possession of the suit property from 2012, with the full knowledge of the Respondents, to which it had paid land rates over the years and received approvals for the developments it had carried out on the property. The Petitioner averred that on 14th December 2020, the Respondents caused a notice dated 9th January 2020

to be affixed on the main gate of the suit property. The Petitioner averred that the said notice required the Petitioner and its tenants on the suit property, numbering 74, to vacate the suit property in less than 48 hours, in default of which the 1st Respondent would forcibly evict them and raze the suit property to the ground.

The Petitioner averred that through its advocates on record, it wrote to the Respondents explaining that it was the lawful owner of the suit property and, as such, was lawfully in occupation thereof. The Petitioner averred that despite receipt of the letter, the Respondents refused to withdraw the said notice. The Petitioner averred that the Respondents were determined to carry out an arbitrary, illegal, and unconstitutional eviction of the Petitioner from the suit property and demolition of its structures thereon. The Petitioner averred that the value of the suit property, inclusive of the developments thereon, was Kshs. 155,000,000/-. The Petitioner averred that the Petitioner and its tenants would suffer colossal loss and irreparable damage should the court not intervene and halt the Respondents' illegal acts complained of.

In response to the petition, the Respondents filed grounds of opposition dated 20th January 2021. The Respondents averred that the petition was unmerited and should be dismissed. The Respondents averred that the petition was based on irrelevant and inadmissible evidence. The Respondents averred that the suit property, which was public land, was acquired by the Petitioner illegally. The Respondents averred that the title to the suit property held by the Petitioner, having been acquired illegally, did not enjoy the protection of the law. In addition to the grounds of opposition, the Respondents filed an answer to the petition and a cross-petition on 9th February 2022. In their answer to the petition, the Respondents denied all the averments in the petition and reiterated that the suit property was public land which the Petitioner acquired corruptly, irregularly, illegally, and fraudulently in collusion with corrupt public officials. The Respondents denied that the Petitioner acquired the suit property through an open competitive tender as claimed in the petition. The Respondents averred that the mandatory statutory procedures were not followed in the conversion of the suit property from public land to private land. The Respondents denied violating or threatening to violate the

Petitioner's fundamental rights and freedoms. The Respondents averred that the Petitioner had based its petition on illegal and immoral conduct. The Respondents averred that when the Petitioner acquired the suit property in 2012, the property was public land held by the Kisumu County Government in trust for the county residents. The Respondents averred that Section 36(1) of the Land Act 2012 was not complied with during the acquisition of the suit property by the Petitioner. The Respondents averred that the rights, if any, held by the Petitioner over the suit property were not absolute. The respondents averred that the same were limited by Article 24(1) (d) of the Constitution and were also subject to Section 26 of the Land Registration Act 2012. The Respondents averred that the 1st Respondent, as the owner of the suit property, had a constitutional right to hold the same and to make it available for its intended purpose, which was public use.

The Respondents averred that Section 35(1) of the Transition to Devolved Government Act 2012 barred state organs, public entities, or local authorities from transferring assets and liabilities during the transition period. The Respondents averred that under Section 35(4) of the said Act, any transfer of assets

or liabilities made in contravention of the Act shall be invalid. The Respondents averred that the purported transfer of the suit property to the Petitioner by the County Council of Kisumu (the Council) during the transition period was invalid. The Respondents averred that the suit property was public land and was held by the 1st Respondent in trust for the public. The Respondents reiterated that the property was not lawfully and procedurally transferred to the Petitioner. The Respondents averred that the Petitioner did not acquire a valid title in the suit property capable of protection by the law. The Respondents averred that the Petitioner had not demonstrated that it was deserving of the orders sought in the petition. The Respondents urged the court to dismiss the petition.

In their cross-petition, the Respondents contended that the Petitioner acquired the suit property, which was reserved for public use, unprocedurally, illegally, and fraudulently. The Respondents averred further that the Petitioner had denied the public access and use of the property. The Respondents averred that sometime in 2012, just before the General Elections, which would have placed the assets of the former Kisumu Municipal Council under the Kisumu County

Government, the Petitioner hatched a corrupt scheme with the help of the outgoing officials to fraudulently acquire the suit property and register it in its name. The Respondents averred that the Petitioner ensured that the disposal of the suit property did not go through the allotment process as provided under Section 9(2) of the Land Act 2012 and the approval of the National Assembly. The Respondents averred that the approval of the transition authority was mandatory for the sale of the suit property by the County Council of Kisumu to the Petitioner. The Respondents averred that the transaction was invalid for violating Section 35(1) of the Transition Act. The Respondents averred that the Petitioner had orchestrated a well-planned scheme to fraudulently and illegally acquire land reserved for public use. The Respondents averred that the Petitioner had violated Articles 10, 23(1), 40, and 62 of the Constitution. The Respondents averred that the court had power under Section 80 of the Land Registration Act 2012 to order the rectification of the register of the suit property by directing the cancellation of the registration of the Petitioner as the owner of the suit property if satisfied that the registration was obtained or made by fraud or mistake. The Respondents

prayed for the following orders against the Petitioner in the cross-petition;

1. A declaration that the 1st Respondent was the rightful owner of the suit property.
2. A declaration that the Petitioner's purported acquisition of the suit property was illegal, null, and void.
3. Rectification of the register for the suit property by cancellation of the registration of the Petitioner as the owner thereof and registration of the 1st Respondent as the owner of the property.
4. A declaration that the Petitioner's occupation of the suit property was illegal and an order for its eviction from the property.
5. A permanent injunction to restrain the Petitioner from interfering with the Respondents' use and occupation of the suit property and from transferring, selling, and encumbering the said property.
6. Costs of the cross-petition.

On 13th February 2023, the court directed that the petition be heard through oral evidence. PHILEMON JOS ORIGA (PW1), who gave evidence on behalf of the Petitioner, told the court that he

was the chairman of the Petitioner's Board of Directors. He adopted his witness statement dated 28th June 2024 as amended as his evidence in chief. He thereafter produced as exhibits 1 and 2, respectively, the documents attached to the Petitioner's list of documents dated 25th June 2023 and further list of documents dated 3rd July 2024.

On cross-examination, PW1 stated that the suit property was owned by the County Council of Kisumu when the Petitioner acquired it. He stated that the County Council of Kisumu had advertised the property for sale. He stated that he was not aware whether the National Assembly, the National Land Commission, or the Transition Authority was involved in the sale of the suit property to the Petitioner.

After the close of the Petitioner's case, MICHAEL ABALA WANGA (DW1) gave evidence on behalf of the Respondents. He told the court that he was the manager of Kisumu City and had the authority of the 1st Respondent to testify on its behalf. DW1 wholly adopted his witness statement dated 29th February 2024 as his evidence in chief. On cross-examination, DW1 was referred to the public notice dated 9th December 2020, which was issued to those occupying public parking/playground within

Kisumu City to vacate the same within 7 days, failure to which they would be evicted by the Respondents. DW1 denied issuing the notice. He stated that the notice did not mention the suit property, and that the Respondents had no intention of demolishing the structures on the suit property. He stated that at the material time, there were several notices of that kind circulating in Kisumu. He stated that he did not issue any notice to the Petitioner and wondered why the petition was filed. DW1 stated that he was aware that the Kisumu County Council sold the suit property through tender. He admitted that the sale was open to the public but claimed that there were objections to the sale. He stated that the sale was shrouded in mystery and mired with corruption. He admitted that he had no proof that the suit property was acquired corruptly. He stated that he had no evidence of corruption. He stated that he was aware that the Petitioner purchased the suit property at Kshs. 31,000,000/-, which was paid to the County Council of Kisumu. DW1 stated that what the Respondents were challenging was the process through which the suit property was sold. He stated that the suit property belonged to the 1st Respondent.

On re-examination, DW1 stated that the National Land Commission and the Transition Authority had to be involved in the sale of the suit property, and since they were not involved, the sale was flawed. DW1 stated that the mere fact that the sale was conducted through public tender did not make it legal.

After the close of evidence, the parties filed written closing submissions.

The Petitioner's submissions

The Petitioner gave a summary of the Petitioner's and the Respondents' cases and framed four issues for determination, namely;

1. Whether the Respondents had the power to revoke or extinguish the Petitioner's title or rights and interest in the suit property.
2. If the answer to the first question is in the negative, whether the Respondents violated the Petitioner's constitutional rights.
3. Whether the Respondents have proved their cross-petition.

4. Whether the Petitioner is entitled to compensation should its title to the suit property be revoked.
5. Who should pay the costs of the petition and cross-petition?

The Petitioner submitted that it was the registered owner of the suit property. The Petitioner submitted that the Respondents served it with a notice on 14th December 2022 to vacate the suit property, failure of which the Respondents were to evict it and demolish its structures on the property. The Petitioner submitted that through the said notice, the Respondents purported to extinguish the Petitioner's title and interest in the suit property. The Petitioner submitted that the Respondents' renunciation of the said notice at the trial was an afterthought. The Petitioner submitted that soon after the said notice was served upon the Petitioner, the Petitioner's advocates on record wrote to the Respondents to withdraw the same, but the Respondents never responded to the letter. The Petitioners submitted that, in any event, the Respondents seemed to be justifying the said notice in their cross-petition in which they contended that the Petitioner's title to the suit property was acquired fraudulently. The Petitioner urged the court to find

that the said notice was issued by the Respondents and that the evidence of DW1 was not credible. The Petitioner submitted that the Respondents had no power to cancel or revoke the Petitioner's title even if, in their opinion, the same was acquired unlawfully and irregularly. The Petitioner cited several authorities in support of this submission, which the court has considered. The Petitioner submitted that, in any event, the Respondents had no power to declare that the Petitioner's title had been acquired irregularly and fraudulently. The Petitioner submitted that in purporting to revoke the Petitioner's title and interest in the suit property on the ground that they were acquired illegally and fraudulently, the Respondents violated the Petitioner's rights to property, fair administrative action, and fair hearing.

On the Respondents' cross-petition, the Petitioner submitted that it was the registered owner of the suit property and that its title could only be impeached on the grounds of fraud, misrepresentation, or illegality, none of which the Respondents had established. The Petitioner submitted that the sale of the suit property by the County Council of Kisumu to the Petitioner was above board and satisfied the requirements of the

substantive law and procedure. The Petitioner submitted that the Respondents should not be allowed to come up after 8 years to feign ignorance of the transaction from which it had benefited through the levying of rates and development approval fees. The Petitioner submitted that the Respondents should not be permitted to approbate and reprobate at the same time. The Petitioner urged the court to find that the cross-petition was not proved. The Petitioners submitted that if its title to the suit property were to be revoked as urged by the Respondents, it would be entitled to compensation by the Respondents for the current market value of the suit property, which it put at Kshs. 155,000,000/-.

On the issue of costs, the Petitioner cited Section 27(1) of the Civil Procedure Act and submitted that costs are at the discretion of the court and, as a general rule, costs follow the event unless ordered otherwise for good reason. The Petitioner submitted that it was forced to come to court to protect its interest in the suit property, and as such, it was entitled to the costs of the petition and cross-petition.

The Respondents' submissions

The Respondents filed submissions dated 20th June 2025. The Respondents submitted that the Petitioner's case was that it acquired the suit property lawfully through allocation(sic), while the Respondents' case was that the 1st Respondent was the lawful owner of the suit property, which was reserved for public use, and that the Petitioner acquired the same fraudulently, and as such, its title was subject to challenge. The Respondents framed four issues for determination, namely;

1. Whether the Petitioner acquired the suit property lawfully.
2. Whether the 1st Respondent was the lawful owner/proprietor of the suit property.
3. Whether the register of the suit property should be rectified.
4. Whether the Respondents violated the Petitioner's constitutional rights.

The Respondents submitted that the Petitioner acquired the suit property fraudulently through a flawed process. The Respondents submitted that by virtue of Article 62(1)(a) and Article 62(2) of the Constitution, the 1st Respondent, as the successor of the Municipal Council of Kisumu, was the trustee of the suit property, which was public land. The Respondents

submitted that the procedure for converting public land to private land was not followed in relation to the purported sale of the suit property to the Petitioner. The Respondents submitted further that the suit property was sold to the Petitioner during the period of transition from unitary government to a devolved system of government, during which the assets of local authorities were protected and could only be transferred with the approval of the Transition Authority, which was not done in this case, thereby rendering the transaction void. The Respondents submitted that the disposal of the suit property to the Petitioner violated the law and, as such, was invalid. In support of this submission, the Respondents relied on Sections 5 and 26 of the Land Registration Act 2012, Sections 9(2)(a), 9(3), 14, 26, and 36(1) of the Land Act 2012, Section 24 of the Physical Planning Act, Chapter 286 Laws of Kenya, Section 144(5) of the Local Government Act, Chapter 265 Laws of Kenya and Section 35 of the Transition to Devolved Government Act 2012. The Respondents cited several authorities in support of their submission that a title acquired illegally and fraudulently cannot enjoy the protection of the law, which I have considered. They included Alberta Mae Gacci v.

Attorney General & 4 others[2006]eKLR, Elijah Makeri Nyangwara v. Stephen Njuguna & another[2013]eKLR, and Chemei Investments Limited v. The Attorney General & others, Nairobi Petition No. 94 of 2005.

On whether the 1st Respondent was the lawful owner of the suit property, the Respondents submitted that they had established that the Petitioner was not the lawful owner of the suit property. The Respondents submitted that a certificate of lease was not sufficient to prove ownership of land when the title itself is contested. In support of this submission, the Respondents cited Munyu Maina v. Hiram Gathiha Maina[2013]eKLR, which was affirmed by the Supreme Court in Supreme Court Petition No. 5(E006) of 2012. The Respondents submitted that the Petitioner's title was acquired unprocedurally through a corrupt scheme and, as such, could not be protected under Section 26 of the Land Registration Act 2012. In support of this submission, the Respondents cited Elijah Makeri Nyangwara v. Stephen Mungai Njuguna & another(supra). The Respondents urged the court to declare the 1st Respondent as the rightful owner of the suit property and order the rectification of the register by cancellation of the

name of the Petitioner as the owner of the suit property and substitution thereof with the name of the 1st Respondent pursuant to the provisions of Section 80 of the Land Registration Act 2012.

On whether the Respondents violated the Petitioner's constitutional rights, the Respondents submitted that rights to property and fair administrative action were not absolute. The Respondents submitted that their action of repossessing public land did not amount to a violation of the Petitioner's right to property, but rather a lawful enforcement of the public's interest.

The Respondents submitted that they were entitled to the orders sought in their cross-petition, while the Petitioner was not entitled to the prayers sought in the petition.

Analysis and determination

I have considered the petition, the affidavit filed in support thereof, the answer to the petition and cross-petition, the evidence tendered, and the submissions by the advocates for the parties. What is before this court is a constitutional petition and a cross-constitutional petition brought under the

Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013. Both the Petitioner and the Cross-Petitioner had a duty to demonstrate that their rights or fundamental freedoms were violated or threatened with violation. Article 22(1) of the Constitution provides as follows:

“Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.”

Article 23(3) of the Constitution, which deals with remedies for violation of or threat to fundamental rights or freedoms, provides as follows:

“In any proceedings brought under Article 22, a court may grant appropriate relief, including--

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

- (e) an order for compensation; and**
- (f) an order of judicial review.”**

In Anarita Karimi Njeru v. Republic [1979] eKLR, it was stated that:

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

In Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 others [2013] eKLR, the court stated as follows:

“We cannot but emphasize the importance of precise claims in due process, substantive justice and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not conterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak

particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point...Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice as they give fair notice to the other party. The Principle in *Anarita Karimi Njeru* (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle.”

I am of the view that the issues that I need to determine in the petition and the cross-petition are the following;

1. Whether the Petitioner’s fundamental rights or freedoms were denied, violated, infringed, or threatened by the Respondents.
2. Whether the Petitioner is entitled to the orders sought in the petition.
3. Whether the Respondents’ fundamental rights or freedoms were denied, violated, infringed, or threatened by the Petitioner.

4. Whether the Respondents are entitled to the reliefs sought in the cross-petition.
5. Who should pay the costs of the petition and cross-petition?

Whether the Petitioner's fundamental rights or freedoms were denied, violated, infringed, or threatened by the Respondents.

It is common ground that the Petitioner is the registered leasehold proprietor of the suit property. The Petitioner purchased the suit property from the County Council of Kisumu on 14th June 2012 at a consideration of Kshs. 31,000,000/-. The property was registered in the name of the Petitioner on 3rd September 2012, on which date the Petitioner was also issued with a certificate of lease. This petition was prompted by a public notice dated 9th December 2020, said to have been issued by the 2nd Respondent under the County Government Act 2012 and the Urban Areas and Cities Act 2011. The public notice, which was on the letterhead of the 1st Respondent, stated as follows in part:

“IN EXERCISE of the powers conferred upon the County Government of Kisumu by the acts herein above mentioned. Notice is hereby given to all occupants of

public parking/playground within city of Kisumu to vacate within seven days (7).

Take further NOTICE that in the event of none compliance within the stipulated time frame, the County Government itself shall, remove any structure/development without further reference to the owners and at their own risk as to costs incidental thereto.

Do ensure compliance.

Signed

ABALA WANGA (Mr.)

Ag. CITY MANAGER

The Petitioner averred that this notice was affixed at the entrance to the suit property on 14th December 2020. It is not disputed that the notice required those in occupation of public parking and/or playgrounds within the City of Kisumu to vacate the same within 7 days, failure to which the Respondents were to evict them and demolish any structures standing thereon. The Respondents denied that they issued the notice. I am satisfied from the pleadings and evidence on record that the Respondents issued the impugned notice and affixed it at the entrance of the suit property. The Petitioner produced in evidence a letter written by its advocates on record to the 1st

Respondent to the attention of the 2nd Respondent on 15th December 2020, a day after the notice was affixed at the Petitioner's entrance to the suit property. In the letter, the Petitioner's advocates acknowledged receipt by the Petitioner of the said notice and explained to the Respondents how the Petitioner acquired the suit property. The Petitioner's advocates pointed out to the Respondents that the suit property was private land and that their notice was illegal, null, and void to the extent that it concerned the suit property. The Petitioner's advocates demanded that the Respondents withdraw the notice as it concerned the suit property; failure to which the Petitioner would seek legal redress to protect its interest in the property. The Petitioner's advocates' letter was hand-delivered to the 2nd Respondent's office on the same day it was written. It is common ground that the Respondents never responded to the said letter, as a consequence of which this petition was filed on 16th December 2020. If it were true, as claimed by the Respondents, that the impugned notice was not issued by them, nothing would have stopped them from informing the Petitioner as much in response to the said letter by the Petitioner's advocates, and this petition would not have been

brought. As correctly submitted by the Petitioner, the Respondents in their cross-petition have also attempted to justify the impugned notice. This did not stop there. Even in their submissions, the Respondents have justified the notice as “a lawful enforcement of the public’s interest”. If they had not issued the impugned notice, it would not have been necessary to justify the same.

It is common ground that the suit property is developed and occupied by the Petitioner and its tenants. In the said public notice, the Respondents claimed that the suit property was a public parking/playground and required the Petitioner and the said tenants to vacate the property, failure to which they would be forcibly removed therefrom.

Article 40 of the Constitution provides as follows:

“40. Protection of right to property

(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person—

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).

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

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.

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

As I have stated earlier, it is not disputed that the Petitioner is the registered owner of the suit property. As the registered owner of the suit property, the Petitioner was protected against arbitrary deprivation of the property. The Respondents' impugned notice declaring the suit property a public parking/ playground and requiring the Petitioner to vacate the property, failure of which the Respondents were to evict the Petitioner and demolish the structures thereon, was a threat to the Petitioner's constitutional right to own property.

I agree with the Respondents that under Article 40(6) of the Constitution, the constitutional protection of the right to property does not extend to a property that has been acquired unlawfully. I am of the view, however, that the Respondents had no power to determine whether or not the Petitioner's title to the suit property was acquired unlawfully. That is a jurisdiction which is excisable only by a court of law. I share the views of Majanja J. in Evelyn College of Design Ltd v.

Director of Children's Department & another [2013] eKLR,
where he stated as follows:

"I would once again emphasise that a finding of "unlawful acquisition" referred to in Article 40(6) of the Constitution must be through a legally established process and not by forceful occupation of property by State institutions or by preventing a person from enjoying the incidences of ownership of the property. Thus, it was held in the case of Adan Abdirahani Hassan and 2 Others v The Registrar of Titles and Others Nairobi Petition No. 7 of 2012 [2013]eKLR that," Even if the Respondents held the view that the Petitioners had no right to own the suit property because the property was reserved for a public purpose, which view they were entitled to hold being the custodians of public land, the Petitioners had legitimate expectation in the proprietorship of the property and they should have been accorded a hearing before any administrative action could be taken in respect of the suit property."
In view of what I have stated, it is clear that even where property is said to be illegally acquired; it cannot be dispossessed without due process. Such dispossession cannot be effected by preventing the petitioner from enjoying the incidents of ownership of the land. Since the issue in this case concerns due process, I have exercised circumspection in commenting on the veracity or otherwise of the claims of illegal acquisition because,

the State has the right to assert this position in the proper forum.”

The Respondents did not have a right to violate or threaten to violate the Petitioner’s rights over the suit property because, in their opinion, the property was acquired illegally, unprocedurally, and through a corrupt scheme. From the evidence on record, one wonders when the Respondents discovered that the Petitioner, who paid Kshs. 31,000,000/- for the suit property acquired the suit property illegally and corruptly. There is evidence on record that on 24th April 2017, the Respondents approved the change of name of the owner of the suit property in their records from Kisumu County Council to the Petitioner, Rado Development Co. Limited. There is also evidence that the Respondents approved the construction of stalls on the suit property by the Petitioner and issued the Petitioner with annual trading permits for the business the Petitioner is carrying out on the suit property long before the said notice to vacate. The Respondents could not interfere with the Petitioner’s proprietary interest in the suit property without following due process, which they themselves blame the Petitioner for not following while acquiring the suit property.

The Respondents have accused the Petitioner of acquiring the suit property during the transition from the unitary system of government to the devolved system of government without the approval from the Transition Authority under the Transition to Devolved Governments Act 2012. The Act provided an avenue for challenging such transactions. It had regulations, the Transition to Devolved Government (Transfer of Assets and Liabilities) Regulations 2013, which provided for a challenge to any transfer of assets or liabilities during the transition without the approval of the Transition Authority. The Transition Authority had the power to cancel any transaction concluded in breach of the Act on its own motion or upon being moved by any person aggrieved with the transaction. There is no evidence that the Respondents took their complaint to the Transition Authority, while the County Council of Kisumu, which they claim sold the suit property to the Petitioner illegally during transition, existed and could defend itself. Even after the term of the Transition Authority came to an end and the County Council of Kisumu was taken over by the Respondents, the Respondents still had the right to go to court to challenge the transaction if they so wished. They had not done so 8 years

after the Petitioner acquired the property; at the time, they were purporting to dispossess the Petitioner of the suit property.

Article 50(1) of the Constitution provides as follows:

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

The Petitioner had a right to have the dispute the Respondents had with it determined before a court of law or any other body or tribunal. The Respondents could not be judges in their own cause.

In the impugned notice, the Respondents purported to have been acting pursuant to the powers conferred upon them under the County Government Act 2012 and Urban Areas and Cities Act 2011. This means that the Respondents purported to be exercising administrative powers. In the purported exercise of those powers, the Respondents had a duty to act fairly. Article 47 of the Constitution of Kenya provides that:

“47. Fair administrative action

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

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

Section 4 of the Fair Administrative Action Act 2015, enacted pursuant to Article 47 of the Constitution, provides as follows:

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

(2) Every person has the right to be given written reasons for any administrative action that is taken against him.

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

- (a) prior and adequate notice of the nature and reasons for the proposed administrative action;**
- (b) an opportunity to be heard and to make representations in that regard;**
- (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;**
- (d) a statement of reasons pursuant to section 6;**
- (e) notice of the right to legal representation, where applicable;**

- (f) notice of the right to cross-examine or where applicable; or**
- (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.**

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

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

The Petitioners had a constitutional right to be heard before the suit property was declared a public parking/playground by the Respondents and ordered to vacate the property, failure of which the structures on the property were to be demolished. By exercising administrative power arbitrarily, the Respondents violated the Petitioner’s right to a fair administrative action.

In Evans Odhiambo Kidero & 4 Others v. Ferdinand Ndungu Waititu & 4 Others [2014] eKLR, the Supreme Court stated as follows:

“Fair hearing, in principle incorporates the rules of natural justice, which includes the concept of audi

alteram partem (hear the other side or no one is to be condemned unheard) and nemo judex in causa sua (no man shall judge his own case) otherwise referred to as the rule against bias.”

In Harlsbury’s Laws of England, 4th Edition at page 76 paragraph 64, the authors have stated as follows regarding the rules of natural justice:

“Implicit in the concept of fair adjudication lie two cardinal principles namely, that no man shall be a judge in his own cause (nemo judex in causa sua), and that no man shall be condemned unheard (audi alteram partem). These principles, the rules of natural justice, must be observed by courts, tribunals, arbitrators and all persons and bodies having a duty to act judicially, save where their application is excluded, expressly or by necessary implication.”

For the foregoing reasons, it is my finding that the Petitioner has established that the Respondents threatened to violate its right to property guaranteed under Article 40 of the Constitution. The Petitioner has also established that its rights to a fair hearing and fair administrative action guaranteed under Articles 50 and 47 of the Constitution were violated.

Whether the Petitioner is entitled to the orders sought in the petition.

Concerning the orders sought by the Petitioner, prayer 1 is spent. Given my findings above, the Petitioner is entitled to the orders sought in prayers 2, 3, 4, and 5 of the petition. The Petitioner has not demonstrated that it suffered any loss or damage as a result of the threatened violation and violation of its rights. It is therefore not entitled to the damages sought in prayers 6 and 8 of the petition. A case has also not been made for the compensation sought in prayer 7 of the petition, as the suit property has not been taken away from it. The Petitioner is also entitled to the costs of the petition.

Whether the Respondents' fundamental rights or freedoms were denied, violated, infringed, or threatened by the Petitioner.

I am of the view that the issues raised by the Respondents are purely of a civil nature. I am of the view that this is not the appropriate forum for interrogating and determining such issues. The Respondents' complaint in their cross-petition is that the Petitioner acquired the suit property illegally, fraudulently, and corruptly, and as such, its title should be

cancelled and the property registered in the name of the 1st Respondent. As stated earlier in the judgment, if the Respondents were aggrieved that the Petitioner acquired the suit property illegally and corruptly, they had a right to file a civil suit against the Petitioner for the recovery of the suit property. A suit for the recovery of land acquired illegally, fraudulently, and corruptly does not fall within the jurisdiction of this court conferred by Articles 22 and 23 of the Constitution. The claim cannot be said to be intertwined with the claim in the petition, for it is not an answer to the petition. As mentioned earlier, even if the Petitioner acquired the suit property illegally, that was not an excuse for the Respondents to violate its constitutional rights. The Respondents should lodge their claim in a civil court where the claim would be subject to the law and procedures guiding civil claims.

In Uhuru Muigai Kenyatta v. Nairobi Star Publications Ltd. [2013] e KLR, the court stated as follows:

“...I need say no more. Where there is a remedy in Civil Law, a party should pursue that remedy ... My mind is clear however that not every ill in society should attract a constitutional sanction and as stated in AG vs S.K. Dutambala Cr. Appeal No.37 of 1991 (Tanzanian Court of

Appeal), such sanctions should be reserved for appropriate and really serious occasions.”

That position was emphasised in Leonida Aloo Odhiambo v. Attorney General & another [2020] eKLR where the court stated as follows:

“Further, it is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be invoked at all. The court will pronounce on the constitutionality of an action only when it is necessary for the decision of the case to do so and that if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights.”

In Communications Commission of Kenya & 5 others v. Royal Media Services Limited & 5 others [2014] eKLR, the Supreme Court stated that:

“[256] The appellants in this case are seeking to invoke the “principle of avoidance” also known as “constitutional avoidance”. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v. Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ,

articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

[257] Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936)).

[258] From the foundation of principle well developed in the comparative practice, we hold that the 1st, 2nd and 3rd respondents' claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright infringement claim and it was not properly laid before that court as a constitutional issue.”

For the foregoing reasons, I will decline to entertain the Respondents' cross-petition, which is of a pure civil nature. The allegations of fraud, illegality, and corruption in the acquisition of the suit property by the Petitioner, which paid Kshs. 31,000,000/- for the property sold through a public tender would be better handled by a court exercising civil jurisdiction. The Respondents are at liberty to invoke this court's civil

jurisdiction for the grievances it has against the Petitioner's title. I have noted that even if I were to entertain the Respondents' cross-petition, the orders sought, if granted, would affect a third party not before the court. The evidence before the court shows that the suit property is charged to Bank of Africa Limited to secure a loan of Kshs. 16,000,000/- that was advanced to the Petitioner. Bank of Africa Limited has an interest in the suit property. It has a right to be heard before the Petitioner's title and its charge is nullified.

Whether the Respondents are entitled to the reliefs sought in the cross-petition.

For the reasons given, the Respondents are not entitled to the orders sought in the cross-petition.

Who should pay the costs of the petition and cross-petition?

The Petitioner has proved a violation and threatened violation of its constitutional rights, while the Respondent's cross-petition is not properly before this court. In the circumstances, the Petitioner has succeeded in its petition while the Respondent's cross-petition has failed. The Petitioner is therefore entitled to the costs of the petition and cross-petition.

Conclusion

In conclusion, I hereby make the following orders in the matter;

1. Judgment is entered for the Petitioner for;
 - (a) A prohibitory order prohibiting the Respondents jointly and severally, restraining them by themselves or through their servants or agents from entering upon or attempting to demolish the structures on the suit property, Title No. Kisumu Municipality/Block 9/111 pursuant to the notice dated 9th December 2020 or otherwise, howsoever, interfering with the Petitioner's quiet possession and enjoyment of the suit property.
 - (b) A declaration that the Public Notice dated 9th December 2020 is null and void and of no legal consequence to the extent that it relates to the suit property.
 - (c) A declaration that the Respondents threatened and violated the Petitioner's constitutional rights to property and fair administrative action.
 - (d) A declaration that the Respondents acted capriciously, arbitrarily, and abused and exceeded their lawful powers.
 - (e) The costs of the petition.

2. The Respondents' cross-petition is dismissed with costs.

**Delivered and signed at Kisumu on this 30th day of
October 2025**

**S. OKONG'O
JUDGE**

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of;

Mr. Ogola for the Petitioner

Ms. Odhiambo h/b for Mr. Mongeri for the Respondents

Ms. Anne-Court Assistant

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