IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: KIAGE, MUCHELULE & KORIR,

JJ.A) CIVIL APPEAL NO. 257 OF 2020

BETWEEN

TINEK LIMITED.....1ST APPELLANT
ABDINOOR SHARIFF AHMED.....2ND

APPELLANT AND

NATIONAL LAND COMMISSION.....1STRESPONDENT
CHIEF LAND REGISTRAR.....2ND
RESPONDENT THE REGISTAR OF TITLES.....
.....3RD RESPONDENT THE ATTORNEY GENERAL.....
.....4TH RESPONDENT KENYA NATIONAL
HIGHWAYS AUTHORITY.....5TH RESPONDENT KHALIF KURIE
HERIS.....6TH RESPONDENT ENGEN
KENYA LIMITED.....7TH RESPONDENT
PETER NZUKI.....8TH RESPONDENT

(An appeal against part of the Judgment and Orders of the Environment and Land Court at Machakos (O. A. Angote, J.), dated 8th May, 2020

in

ELC Petition No. 60 of 2018

****

*** JUDGMENT OF THE**

COURT

This appeal challenges the judgment of the Environment and

Land Court (O. A. Angote, J.), dated 8th May 2020, by which the learned Judge ordered as follows;

(a) An order of certiorari to remove into this court and quash the decision of the 1st respondent dated 28th April 2017 and Gazette Notice No. 11714 published on 9th November 2018 by the 1st respondent be and is hereby issued.

(b) The Petitioners' title to Land Reference number 337/1645 and the subsequent titles namely: L.R. Nos. 337/3821-3838 (both inclusive) are hereby declared null and void and are cancelled forthwith.

(c) A declaration that the 1st and 5th respondents be directed to enforce an award of Ksh.197,985,519 contained in the letter of 23rd January 2018 in favour of the 1st petitioner with respect to property known as L.R. No. 337/3838 be and is hereby declined.

(d) A declaration that the 1st petitioner be compensated for the loss of the suit property and the resultant sub- divisions to the tune of Ksh.322,790,787 be and is hereby declined.

(e) Each party to bear its/his own costs.

By a petition dated 29th November 2018, and supported by the affidavit of **Abdinoor Shariff Ahmed,** sworn on even date, the petitioners averred that through an agreement for sale dated 20th December 2004, the 2nd appellant purchased the property known as **L.R. No. 337/1645** (the suit property) measuring about 5 acres, which was registered in the name of the 1st appellant, for a consideration of Ksh.5,000,000. The property is situated at Athi River along Nairobi-Mombasa highway. In order

to acquire the suit

property without the need to change the title at the land’s office, the

2nd appellant is stated to have agreed to have the shares of the 1st appellant's directors and shareholders transferred to him and his wife. It was deposed that the 2nd appellant took over possession of the suit property in the year 2004 after making the initial deposit. After clearing payment in the year 2007, the former shareholders of the 1st appellant resigned and handed over the title documents to him. The appellants stated that at the time of acquisition of the property, it was vacant and had no encumbrances. An application for change of user for the property from inoffensive industrial to residential-cum-commercial was made in July 2004 and the 4th respondent approved it through a letter dated 17th December 2007, to the Commissioner of Lands.

The petitioners explained that in the year 2008, the 1st appellant embarked on sub-division of the property after being approached by the 7th respondent to have a portion leased to it to run a petrol station. The petitioners got all the requisite consent, approvals and licences and sub-divided the suit property into eighteen (18) separate plots with independent titles namely; L.R. Nos. 337/3821, 337/3822, 337/3823, 337/3824, 337/3825, 337/3826, 337/3827, 337/3828, 337/3829, 337/3830, 337/3831,

337/3832, 337/3833, 337/3834, 337/3835, 337/3836, 337/3837 and 337/3838. After the subdivision, the mother title was surrendered by the 2nd appellant to the Ministry of Lands and the lease to the 7th respondent was replaced with L.R. No. 337/3838. The 1st appellant proceeded to seek and obtain the requisite approvals for the construction of a petrol station on L.R. No. 337/1645 then branded as Zahra Petrol Station and later in the year 2008, it leased it to the 7th respondent for a period of 10 years. The petitioners averred that they made payments to the Ministry of Lands for land rent in the sum of Ksh.181,320 and a further Ksh.166,490, for sub-division. Later the 1st appellant sold portions of the property namely; L.R. Nos. 337/3823, 337/3832, 337/3833, 337/3835, 337/3836 and 337/3837, to the 6th respondent. The appellants claimed that at no time were they informed by the 2nd, 3rd, 4th or any respondent that the title of the suit property had any defect. Sometimes in the year 2016, however, the 1st appellant received a notification dated 21st January 2016 from the 1st respondent inviting it to attend a hearing on 27th January 2016, by reason of a claim to the property by the 8th respondent. The petitioners averred that they attended

the hearing on the said date

but owing to time constraints, they were not heard and were notified that they would be called on another day. The matter was scheduled for a mention on 4th November 2016, on which date the appellants raised a preliminary objection indicating that the 1st appellant was a *bona fide* purchaser for value without notice of a defect on title. However, they were informed that the family of the 8th respondent was bereaved hence the hearing could not proceed.

It was deposed that on 9th July 2018, the appellants through their advocates wrote a letter to the 1st respondent seeking to know the status of the case and the 2nd appellant personally took the letter to the 1st respondent's office. He presented it to a person who identified himself as Harrison, who forwarded it to a legal officer. The legal officer, allegedly, wrote a note on the said letter informing parties that the matter was pending renewal of the mandate of the 1st respondent, in accordance with **section 14** of the **National Land Commission Act** (NLC Act). The appellants stated that again in October 2018, the 2nd appellant went back to the offices of the 1st respondent where he met the Commission's Vice-Chairperson and sought to know the status of

the case. The Vice-Chairperson allegedly called one Wavinya Ndeti, who is related to the 8th

respondent, and told her that Tinek Limited's *Mzee* (old man) was around and that she would give him her number so that they could discuss the subject under inquiry. The Vice-Chairperson apparently wrote Wavinya Ndeti's number and her name on a piece of paper and handed it to the 2nd appellant. She also assured him that the hearing was yet to take place. However, later, the appellants learnt that **Gazette Notice No. 11714** (the Gazette Notice) of 9th November 2018, was published, under which the 1st respondent directed the 2nd respondent to revoke the title held by the 1st appellant on grounds that the allocation was not supported by any Part Development Plan (PDP).

The appellants averred that the 1st respondent acted illegally by rendering a decision after its mandate had expired and by not affording all parties interested in the subject property an opportunity to be heard. Further that, the 1st respondent was well aware of the existence of sub-division of the suit property and even made an award dated 23rd January 2018, in favour of the 1st appellant for a sum of Ksh.197,985,519, to facilitate acquisition of

L.R. No. 337/3838 for the purpose of construction of a second

carriageway of Athi-River -Machakos turnoff (A109) Road Project.

The appellants faulted the 1st respondent's recommendation for revocation of the 1st appellant's title asserting that such a move was meant to frustrate its compensation when the 1st respondent had already delivered a notification of the award to it. They explained that before the 1st respondent recommended that the 1st appellant be awarded compensation, an inquiry was made and a notice inviting interested parties to attend hearing issued. The 8th respondent's family, however, never attended or raised any objection over the suit property. It was asserted that the 1st respondent violated the rules of natural justice and the right to fair hearing by not affording all parties interested in the property and the resultant sub-division, an opportunity to be heard and to cross- examine the complainants, which was a violation of **section 4(4)** of the **Fair Administrative Action Act.**

The 1st respondent was faulted for contravening **section 14(7)** of the **NLC Act** by failing to appreciate that the 1st appellant is a *bona fide* purchaser for value without notice of defect of title. Further, for failing to expeditiously inform the appellants of its determination or to publish the same before its mandate to review grants expired. It was urged that the 3rd

respondent should not

have issued the initial title and subsequent titles resulting from the sub-division, if there was a defect. The appellants averred that their constitutional and fundamental right to property had been violated to the extent that the 1st respondent did not give them a hearing before making a decision; their right to property under **Article 40** of the **Constitution** was infringed; the decision was not made by an impartial body; the 1st appellant was denied the right to compensation for the compulsory acquisition of part of its property, as provided under **Article 40(1)(b)** of the **Constitution;** and, by making a decision on 28th April 2017 and publishing it on 9th November 2018, the 1st respondent violated the 1st appellant's right to fair administrative action that is expeditions and reasonable.

In consequence, the appellants sought the following orders;

a) This Honourable Court be pleased to issue an order of certiorari to remove into this court and quash the Gazette Notice No. 11714 published on 9th November 2018 by the 1st respondent recommending the 2nd respondent to revoke the 1st petitioner's title to the suit property known as Land Reference No. 337/1645 that has been sub-divided into 18 titles namely: L.R. Nos. 337/3821, 337/3822, 337/3823, 337/3824, 337/3825, 337/3826, 337/3827, 337/3828, 337/3829, 337/3830, 337/3831, 337/3832, 337/3833, 337/3834, 337/3835, 337/3836, 337/3837 and 337/3838.

b) A permanent injunction be and is hereby issued restraining

the 1st respondent from interfering with peaceful and quiet possession of the 1st petitioner's properties known as L.R. Nos.

337/3821, 337/3822, 337/3823, 337/3825, 337/3826, 337/3827, 337/3828, 337/3829, 337/3830, 337/3831, 337/3833, 337/3834, 337/3838 that resulted from the sub-division of L.R No. 337/1645.

c) An order of prohibition be and is hereby issued forbidding the 1st respondent by itself, its agents, employees and any other persons whomsoever or howsoever acting on, with and or under its instructions from conducting any further review or action in respect of all that parcel formerly known as L.R. No. 337/1645 and the resultant sub-divisions registered as L.R No. 337/3821, 337/3822, 337/3823, 337/3825, 337/3826, 337/3827, 337/3828, 337/3829, 337/3830, 337/3831, 337/3833, 337/3834 and 337/3838 registered in the name of the petitioner.

d) The 1st Respondent and the 5th Respondent be and are hereby directed to proceed and enforce an award of Ksh.197,985,519 contained in its letter dated 23rd January 2018, in favour of the 1st petitioner with respect to the property known as L.R No. 337/3838.

e) A declaration that the 1st petitioner is a duly registered owner of L.R No. 337/1645, and the resultant sub-divisions, with an indefeasible title.

f) In the alternative, the 1st, 2nd, 3rd and 4th respondents be and are hereby ordered to compensate the 1st petitioner for loss of the suit property and the resultant sub-divisions measuring approximately undeveloped 3 Acres at the market rate or the rate of Ksh.41,601,756 contained in award contained in the 1st respondent's letter dated 23rd January 2018, which makes a total sum of Ksh.322,790,787 inclusive of L.R No. 337/3838.

g) The respondents do bear the costs of this Petition jointly and /or severally.

In reply to the petition, the 1st respondent's Director of Legal Affairs deposed that the 8th respondent filed a complaint and written submissions before it in which he claimed to be the rightful owner of all the land comprised in the following numbers; L.R. No. 337/1208, L.R. No. 337/1645, L.R. No. 337/4775, L.R. No.

337/1884, L.R. No. 337/973, L.R. No. 337/1868 and L.R. No. 337/477, which he claimed had been illegally acquired. The 8th respondent thus sought the intervention of the 1st respondent to redress the illegality. The 1st respondent stated that pursuant to **section 14(3)** of the NLC Act, through a public notice appearing in the Star Newspaper on 4th August 2014, and in the Standard Newspaper on 19th January 2015, it invited all interested parties for a hearing on 29th August 2014 and 13th February 2015 at the ACK Bishop Annex, 7th floor, with a view to establishing the legality of the title documents over the suit properties. During the hearings, the 8th respondent through his counsel submitted that he had been in actual occupation and possession of the suit property as unsurveyed plots since 1960, following allocation by the then government, for purposes of carrying out irrigation and

quarry works. That allotment letters were issued in his favour and that of

Elizabeth Nzili Ndeti, for residential plot numbers 3A and 3B in Athi River but he could not process the necessary payments because the file went missing. On 5th July 2013, he was given the authority to pay the requisite fees which he paid vide banker's cheque no. 0444584.

The 1st respondent enumerated the various documents that were submitted before it on behalf of the 8th respondent. It explained that on 27th January 2016, the firm of **Maondo and Malanya Advocates** represented by C.S Maondo and Geoffrey appeared before it on behalf of the appellants for the review proceedings. On 17th February 2016, it was informed that the appellants had filed **Petition No. 57 of 2016** in the High Court at Nairobi, seeking to stay the review proceedings. The 1st respondent continued that, on 23rd February 2016, during the review hearings, Maundo Advocate appeared before it on behalf of the appellants and stated that although they had filed a constitutional petition against it, they were willing to stay the same pending the 1st respondent's hearing and determination of the matter. On 12th October 2016, the 1st appellant filed written submissions before the 1st respondent claiming to have been

allocated the subject parcel

vide grant no. I.R. 60729 dated 18th October 1993. The 1st respondent averred that the 1st appellant failed to present any documents in relation to the initial allocation such as the letter of allotment, authority to allocate and the approved PDP. Moreover, it did not give any explanation on how the allocation was made to them.

The 1st respondent explained that following submissions by the 8th respondent, it observed that the subject parcel being L.R. No. 337/1645 had been allocated to **Elizabeth Nzuki Ndeti's** family and hence not available for allocation to the 1st appellant. Further, there was a moratorium in place restricting disposal of land by any local authority and the National Government pending enactment of the new land laws; and, the approved PDP No. 85 Ref. NRB/891/5 of 12th June 1991 did not correlate with the shape reflected on the deed plan for L.R. No. 337/1645. The 1st respondent also observed that, all the area surveyed as L.R. No. 337/1645, measuring 5.232 ha, did not have an approved PDP; the report from the Senior Planning Records Officer ascertained that the suit property had been committed and not available for allocation; and, that the then Commissioner of Lands issued

authority to the family of **Peter**

Nzuki Ndeti to make late payments for the allotment letters to enable processing of the title. The 1st respondent decided that the title held by the 1st appellant should be revoked and the family of **Peter Nzuki Ndeti** allowed to enjoy quiet possession of their property without interference from the 1st appellant. It was submitted that pursuant to **section 115(2)** of the **Land Act,** the 1st and 5th respondents could not be directed to enforce the award of Ksh.197,985,519 in favour of the appellants when there was a dispute as to the persons entitled to be compensated. The 1st respondent asserted that it had complied with **Articles 47, 50** and

252 of the **Constitution**, provisions of the **Fair Administrative Actions Act** as well as **sections 6** and **14** of the NLC Act.

The 5th respondent answered the petition through an affidavit sworn on 8th April 2019, by **Milcah Muendo,** its Senior Surveyor, Highway Planning and Design Department. It was averred that the 1st respondent's determination vide the Gazette Notice of 9th November 2018, directed the 2nd respondent to revoke titles of L.R. Nos. 337/1884, 337/1645 and 337/1208, for reasons that the allocation was not supported by any PDPs and, the 8th respondent

was the rightful owner. The 5th respondent explained that the

acquisition process of the suit property was still on-going and thus it had not yet paid compensation. Moreover, because of the dispute herein, it had not yet been issued with Notice to take Possession which would cause it to release the award or compensation. The 5th respondent indicated that it was ready to release the compensation to the rightful owner of the parcel of land after the dispute had been resolved.

Through an affidavit sworn on 8th April 2019, the 6th respondent made a reply to the petition claiming that he was the registered owner and title holder of L.R. Nos. 337/3823, 337/3833, 337/3834, 337/3835, 337/3836 and 337/3837, having purchased the properties from the 1st appellant. The said titles were part of the 18 titles that emanated from the subdivision of the suit property which belonged to the 1st appellant. The 6th respondent averred that he did a prior search on the six (6) titles that he purchased and confirmed that the 1st appellant was the registered owner.

Together with the appellants, they executed the transfers dated 30th June 2014 and he took possession of the properties in June 2014. He stated that he applied and was issued with relevant

approvals for the developments and businesses that are now operating on the

properties and that he had been duly paying the land rent and rates for the properties. He was shocked to learn that vide the Gazette Notice of 9th November 2018, the 1st respondent had directed the 2nd respondent to revoke the titles for the reason that the allocations were not supported by PDPs. The 6th respondent claimed that prior to the said Gazette Notice, he was not invited to any hearing by the 1st respondent considering that he was the registered owner of some of the properties that emanated from the subdivision of the suit property.

The 1st respondent was castigated for failing to invite the 6th respondent for a hearing or for the delivery of its determination, contrary to **Article 47** of the **Constitution** and **section 4(4)** of the **Fair Administrative Actions Act.** Moreover, it did not issue him with reasons for the determination. That the 1st respondent gave an award to the 1st appellant for L.R. No. 337/3838, which emanated from the suit property, which showed that the 1st respondent's determination was unlawful. Further, even if the appellants had acquired the property in an illegitimate manner, which was not admitted, pursuant to **section 14(7)** of the NLC Act, the 6th respondent's title should not have been revoked

because he was an

innocent purchaser for value without notice of defect of the titles. Under **section 14(1)** of the NLC Act, the 1st respondent's mandate to review grants was restricted to 5 years of the commencement of the Act, yet the review of the suit property was done beyond that time. To the 6th respondent therefore, the impugned gazette notice was null and void. Moreover, when the review was conducted, subdivision of the suit property had already been done and new titles granted. The 6th respondent averred that to the extent that he was not afforded a hearing by the 1st respondent, his right to property pursuant to **Article 40** of the **Constitution** was violated.

The 7th respondent equally made a reply through an affidavit sworn on 4th February 2019 by **Hassen Zalgaonker,** its Managing Director. It was deposed that the 7th respondent, a company trading in the business of petroleum and petroleum products in Kenya, was desirous of setting up a fuel station along the Nairobi-Mombasa Highway in Mavoko area and in achieving that goal, it identified the suit property which belonged to the 1st appellant. After negotiations with the directors of the 1st appellant, it leased the property for a period of 10 years from 1st

February 2008. That period was extended for a further 5 years to run up to the year 2023. During

the pendency of the lease and with its consent, the suit property was subdivided up to 18 sub-titles. The result of the subdivision was that the land occupied by the 7th respondent, where the fuel station stood, was now L.R. No. 337/3838. The 7th respondent narrated that as an entity it was never involved in the process of acquisition of the suit property. However, before leasing the property, it conducted due diligence and confirmed that the registered owner was the 1st appellant and there were no restrictions or inhibitions that would otherwise limit dealings on the land. It was averred that the 7th respondent incurred substantial costs to the extent that the lease for the initial 10 years cost approximately Ksh.31,500,000 and extension for a further term was Ksh.15 Million. On 22nd January 2016, however, it was surprised to receive a notice from the 1st respondent inviting it to attend a public hearing on 27th January 2016, with respect to the suit property.

The 7th respondent explained that despite the notice issued by the 1st respondent not stating the subject of the hearing, it instructed its lawyers who together with their in-house counsel appeared before the tribunal on the appointed date. When the

matter was called out, its advocate on record, Mr. C.S Maondo, informed the tribunal that he had no idea why the 7th respondent had been invited to the tribunal. In response, the Chair of the tribunal informed him that the proceedings respecting the suit property had been ongoing for close to two (2) years. The tribunal wondered where the 7th respondent had been all through. Counsel for the 8th respondent then rose and informed the tribunal that his client was the complainant and that he would serve the 7th respondent with the complaint immediately. The tribunal while noting that the matter had been ongoing for two (2) years and therefore needed to be concluded, directed that hearing continues on 17th February 2016. It was deposed that despite the 8th respondent's advocate promising to serve the 7th respondent with the complaint promptly, he only did so after repeated reminders. Upon receipt of the complaint, it became evident to the 7th respondent that the 8th respondent sought to have the title of the suit property revoked.

The 7th respondent stated that on 4th November 2016, when the matter came up for hearing, the 1st appellant's advocates filed a preliminary objection challenging the 1st respondent's

jurisdiction

to hear the matter since the 1st appellant was a *bona fide* purchaser for value without notice of defect on title. They also challenged the complaint as lodged in the names of **Peter Nzuki** as the complainant, yet he was deceased. When the complaint was called out for hearing, neither the complainant's family members nor their advocate were present. The Vice-Chairperson of the 1st respondent, who was chairing the hearing sessions, then informed the parties present that she had been called by one of the family members of the 8th respondent, one **Hon. Wavinya Ndeti,** who notified her that she was bereaved. The Vice-Chairperson informed the advocates present that the hearing could not proceed on that day and advised that the 1st respondent would send fresh hearing notices. It was averred that the advocates protested the adjournment and questioned the 1st respondent's impartiality following the Vice- Chairperson's comments, which appeared to show that she was enjoying a good relationship with the complainant's family. The 1st respondent's members present however ignored the protests. The 7th respondent asserted that despite the 1st respondent's promise that they would serve a hearing notice advising parties when the

matter would be heard, they were never served, even after making

repeated follow-ups. However, some time in November 2018, it was informed by the 2nd appellant that there was a Gazette Notice Number 11714 of 9th November 2018 wherein the 1st respondent had directed the 2nd respondent to revoke the title held by the 1st appellant, following a ruling delivered on 28th April 2017.

The 7th respondent complained that save for the hearing of 4th November 2016, they were never notified of any other hearing of the 8th respondent's complaint. That as a result of the ruling, it stood to suffer substantial loss on its lease hold interest which was part of the suit property title and in consequence be deprived of its rights and interests contrary to **Article 40** of the **Constitution.** It was urged that the suit property and the ensuing subdivisions are private property pursuant to **Article 64** of the **Constitution** and therefore the 1st respondent had no jurisdiction to entertain disputes regarding private land. Accordingly, its recommendation as published in the Gazette Notice was null and void. Moreover, even if the 1st respondent had jurisdiction, it was required by **section 14(2)** of the NLC Act to pay due regard to **Articles 40, 47** and **60** of the **Constitution.** The 7st respondent concluded by asserting that the 1st

respondent’s acts were illegal,

unconstitutional, arbitrary, unfair and violated both his interests and those of the appellants.

By way of an affidavit sworn on 5th March 2019, the 8th respondent's Legal Administrator deposed that the court did not have the requisite jurisdiction to entertain the suit in the manner and style in which it was presented. He averred that if the appellants were aggrieved by the decision of the 1st respondent, their cause of action was to either lodge an appeal or file judicial review proceedings. Further, a court cannot find that a judicial body or a body exercising quasi-judicial authority has acted in violation of the fundamental rights and freedoms and neither can it find that a petition can be instituted against it for that violation. While referring to the decision of the 1st respondent of 28th April 2017, pursuant to which it was determined that the suit property was properly allocated to the 8th respondent, it was averred that before arriving at that determination, the 1st respondent had through an advertisement in the newspapers publicised and invited all affected parties to appear before it on the question of ownership of the titles that are in issue herein. Moreover, the appellants having acknowledged that there was a defect on

their title, could

not in the same breath pray for the court to uphold their title as legitimate. The 8th respondent claimed that the suit property was allocated to his late father way back in the 1960s and that he had been in occupation of the same until the 1st appellant illegally and irregularly caused itself to be registered as the owner. Additionally, the appellants had not demonstrated under what authority persons who sold to them the property assumed ownership. It was asserted that the indefeasibility of title is not absolute especially where the title was obtained through fraud and/or misrepresentation.

In a further affidavit, the 1st appellant responded to the foregoing averments by the respondents contending that it is now settled that when the Environment and Land Court is dealing with disputes involving environment and land, it can determine claims of breaches of fundamental rights ancillary and incidental to those matters. Additionally, upon considering the complaint, the 1st respondent was only supposed to make a recommendation to the 2nd respondent but not a determination on revocation of the title of the suit property. The 1st appellant went on to argue that the fact the 1st respondent's determination of 28th April 2017 was

gazetted on 9th November 2018, more than 18 months later, showed

contravention of the rights of the appellants. There was also no evidence of allocation of the suit property to the 8th respondent. It was averred that according to the determination of the 1st respondent, the initial allotee of the property was **Lucy Njeri Mwangi** who is a former shareholder of the 1st appellant and therefore, the 2nd appellant having presented evidence of purchase of the property by way of transfer of shares to him and another, the 1st respondent should not have proceeded to make a determination for revocation of title. It was proffered that instead, the 1st respondent should have found that the 2nd appellant was a *bona fide* purchaser for value without notice. The appellants denied acknowledging any defect in their title. They asserted that the 1st appellant had been in occupation of the suit property since the year 2004 when it bought it, and before then it was held by its former shareholders. It was underscored that the 1st respondent did not give the petitioners an opportunity to be heard including, cross- examining authors of adverse reports, before making the unfavourable findings. The appellants urged that from the determination, the hearing dates are stated as 29th August 2014 and 13th February 2015, which was long before they

received a

formal invitation from the 1st respondent, dated 21st January 2016, to appear on 27th January 2016, confirming that they did not participate in the mentioned hearings.

The matter proceeded by way of written submissions whereupon the learned Judge (O. A. Angote, J.) found the titles for the suit property and the subsequent sub-divisions void and, in the result, that the appellants, the 6th and 7th respondents were not entitled to either the suit property or compensation.

The appellants were dissatisfied with that judgment and preferred an appeal to this Court. The memorandum of appeal comprised a prolix twenty-six (26) grounds of appeal, contrary to **Rule 88(1)** of the Rules of this Court which command that grounds of appeal should be set out concisely without argument or narrative. By way of written submissions dated 24th February 2021, the appellants condensed those grounds of appeal into five (5) issues for determination namely;

a) Were the appellants given the right to fair hearing before the title was cancelled?
b) Were grounds to cancel title pleaded and a prayer for the cancellation made?
c) Were the appellants *bona fide* purchasers for value without notice?
d) Was there evidence of allotment to the 8th respondent?

e) Should the appellants be compensated for the compulsory acquisition of L.R. No.337/3838?

The 6th respondent lodged a notice of cross-appeal on grounds that the learned Judge erred by;

a) Not finding that the 6th respondent was the absolute and indefeasible owner of L.R. Nos. 337/3823, 337/3833, 337/3834, 337/3835, 337/3836 and 337/3837, as provided under section 26 of the Land Registration Act.

b) Finding that there was no evidence to show that the 6th respondent was a *bona fide* purchaser for value.

c) Investigating the validity of the 6th respondent's titles in the absence of *viva voce* evidence.

During the hearing of the appeal, learned counsel **Mr. Kigen** appeared for the appellants. There was no appearance for the 1st to 4th respondents despite service having been affected and neither had they filed written submissions. Learned counsel **Ms. Ochako** appeared for the 5th respondent, **Mr. Adano** for the 6th respondent, **Messrs Luseno** and **Mutunga** for the 7th respondent and **Mr. Otieno** for the 8th respondent. Counsel highlighted their respective written submissions which they had filed prior.

Submitting before us on behalf of the appellants, **Mr. Kigen** faulted the learned Judge for, despite agreeing that the 1st

respondent had not heard the appellants before revoking their title,

proceeding to cancel it. He urged that had the appellants been given an opportunity to be heard, they would have answered the questions concerning acquisition of the title and challenged the 8th respondent's allegations and claim over the property. Counsel castigated the learned Judge for relying on a report from the Ministry of Lands, annexed to the 1st respondent's replying affidavit and found at pages 182 to 260 of the record, in arriving at the decision to cancel the title of the suit property. He argued that the allegations contained in that report were prepared in violation of the appellant's rights under **Article 47(2)** of the **Constitution**, since no written reasons for administrative action were given to the appellants. The report was also prepared in violation of **sections 4(2), (3)** & **4** of the **Fair Administrative Action Act** since the appellants were not given a right to cross-examine the author. It was urged that the learned Judge having appreciated that the 1st appellant's title was revoked without the appellants being heard, the court should not have gone ahead and considered the evidence of the 1st respondent in support of that decision. Emphasizing the import of the right to be heard **Mr. Kigen** cited the decision in ***SCENERIES LIMITED Vs. NATIONAL***

eKLR. Further, on reliance of the decision in ***KINYANJUI KAMAU Vs. GEORGE KAMAU [2015] eKLR*** as cited with approval in ***KURIA KIARIE & 2 OTHERS Vs. SAMMY MAGERA [2018] eKLR,*** counsel

contended that the learned Judge inferred fraud on the basis of an untested report and against established principles on the standard of proof for fraud.

On whether there was a prayer for cancellation of the title of the suit property, counsel submitted that grounds for nullification of the title and in particular the ground of fraud, were not specifically pleaded, particularized or proved by any party to the required standard. To buttress this argument, **Mr. Kigen** referred to the decision in ***VIJAY MORJARIA Vs. NANSINGH MADHUSINGH DARBAR & ANOTHER [2000] eKLR,*** as cited with approval in ***KURIA KIARIE & 2 OTHERS Vs. SAMMY MAGERA*** (supra). It was

urged that the unilateral cancellation of the appellants' title offended **section 26** of the **Land Registration Act**. The Supreme Court of Nigeria decision in ***ADETOUN OLADEJI (NIG) LIMITED Vs. NIGERIA BREWERIES PLC SC 91/2002*** as relied

on in ***DAKIANGA DISTRIBUTORS (K) LTD Vs. KENYA SEED COMPANY LIMITED***

[2015] eKLR, was cited for the argument that parties are bound by

their pleadings. Equally, ***OTIENO, RAGOT & COMPANY ADVOCATES Vs. NATIONAL BANK OF KENYA LIMITED [2020] eKLR,*** for the submission that the court has no power to grant a relief that has not been asked for. Counsel contended that no party prayed for the relief of cancellation of title to the suit property, as issued by the learned Judge.

As to whether the appellants were *bona fide* purchasers for value without notice, the learned Judge was faulted for finding that there was no evidence in form of sale agreements and payment of purchase price, to show that the appellants were *bona fide* purchasers for value, while at the same time acknowledging that there was evidence of purchase. **Mr. Kigen** contended that it was erroneous for the court to delve into issues of payment of purchase price while there was no complaint by the initial allottee against the appellants on that issue. The learned Judge was castigated for failing to appreciate that as innocent purchasers for value without notice of any defect in title, the appellants did not bear the burden of proving payment of premiums, since the 2nd appellant bought the suit property from

third parties and chose to retain title in the 1st appellant's name. It was urged that the burden of proving payment

would have been discharged if the appellants were given an opportunity to be heard before the 1st respondent. The learned Judge was faulted for finding that the 2nd appellant did not state the relationship between the 1st appellant and the letter of allotment that was issued to **Lucy Njeri Mwangi**, when evidence showed that the said **Lucy** was a majority shareholder of the 1st appellant. It was submitted that the letter of allotment of the suit property was first made to **Lucy Njeri Mwangi** on 9th March 1990, and transfer was made to the 1st appellant on 18th October 1993. That contrary to the finding by the learned Judge that no premium was made, the transfer at page 389 of the record, endorsed by the Registrar of Titles, confirms that Ksh.205,000 was paid as stand premium.

It was contended that the learned Judge erred in questioning the way in which the initial allotee transferred the suit property to her company, the 1st appellant, while the said allotee was not party to the suit. Citing ***ANKHAN HOLDINGS LIMITED Vs. KENYA FOREST SERVICE & ANOTHER [2020] eKLR***, it was urged that

the questions that the court raised against the initial allotee would

have been settled if she was added to the suit by the court. The

learned Judge was faulted for failing to recognise that the 1st respondent admitted in evidence that there was an approved Part Development Plan (PDP), the only issue with it being its shape vis-à-vis the one contained in the Deed Plan. We were directed to page 352 of the record where the subject PDP was said to be exhibited.

On whether there was evidence of allotment to the 8th respondent, it was submitted that there was no such evidence on record. **Mr. Kigen** argued that the letter of allotment that was produced in evidence, dated 2nd June 1998, at pages 227 & 231 of the record does not identify the suit property. Further, the letter was issued way after the title for the suit property was granted, on 18th October 1993. It was submitted that the learned Judge failed to appreciate that the appellants took over possession of the suit property in the year 2004, erected a petrol station, and continued to be in possession till the year 2017, when the title was revoked. Counsel contended that the appellants were in possession for a period beyond 12 years, within which an action for recovery of land can be instituted. He argued that failure of the 8th respondent to bring an action within 12 years meant that

even if they had title,

the same was extinguished by operation of law pursuant to **section 17** of the **Limitation of Actions Act.**

As to whether the appellant should have been compensated for the land that was compulsorily acquired, being L.R. No. 337/3838, counsel faulted the learned Judge for failing to address the issue of estoppel raised by the appellants to the effect that an award had been given to the 1st appellant to compensate it for the compulsory acquisition of a portion of its land. In conclusion, counsel urged us to set aside orders (b), (c) (d) and (e) of the impugned judgement and decree and allow prayers 2,3,4,5 and 6 of the petition. Further, that costs of the appeal and those of the trial court be borne by the 1st to 5th respondents.

Ms. Ochako indicated that the 5th respondent was taking a neutral stand in the matter and that it would be comfortable with whatever decision the Court made. Notably, there were no written submissions on record filed by or on behalf of the 5th respondent.

Submitting on behalf of the 6th respondent, in support of the appeal, **Mr. Adano** contended that no party specifically pleaded for nullification of the appellants' and 6th respondent's titles and neither was there a cross-petition praying for those orders.

Reference was made to the decisions in ***VIJAY MORJARIA Vs. NANSING DARBAR & ANOTHER [2000] eKLR*** and ***KURIA KIARIE & 2 OTHERS Vs. SAMMY MAGERA*** (supra) for the argument that allegations of fraud or illegality must be specifically pleaded and distinctively proved. Further, ***BRUCE JOSEPH BOCKLE Vs. COQUERO LIMITED [2014] eKLR*** was cited for the submission that alleged improprieties in the acquisition of title are not attributable to the subsequent buyer and even where the improprieties are proved, the complainant's remedy does not lie in nullification of the title, but in damages. Counsel castigated the learned Judge for proceeding by way of affidavit evidence to nullify the subject titles. He argued that where there are issues of ownership, illegality and/or fraud, the court ought to call for *viva voce* evidence and allow for cross-examination of witnesses.

Citing the criteria espoused in the Ugandan case of ***KATENDE Vs. HARIDAR & COMPANY LIMITED [2008] 2 E.A 173*** on who is a *bona fide* purchaser for value, **Mr. Adano** submitted that the 6th

respondent presented satisfactory evidence showing that he purchased the properties from the appellants and the titles were duly registered in his name. To counsel, the learned Judge erred in

relying on the evidence of the 1st respondent when he had found it to be in breach of **Articles 47** and **50** of the **Constitution** and quashed the gazette notice that encompassed its determination. It was submitted that the learned Judge usurped the 6th respondent's role under **section 14(7)** of the NLC Act, a provision that granted the 1st respondent powers to find, in deserving cases, that an individual is a *bona fide* purchaser for value without notice of any defect. In counsel's view, upon the learned Judge quashing the 1st respondent's decision, he ought to have remitted the matter back to it so that it could conduct a fair administrative process. For this submission **Mr. Adano** relied on the Supreme Court decision in ***PETER NGOGE Vs. FRANCIS OLE KAPARO & 5 OTHERS*** ***[2012]***

eKLR and, **H.W.R. Wade** and **C.F Forsyth**'s **Administrative Law, 11th Edition.** On the strength of the holding in ***PETRO OIL KENYA LIMITED Vs. KENYA URBAN ROADS AUTHORITY*** ***[2018] eKLR,***

counsel asserted that the question of whether or not the appellants and the 6th respondent acquired the suit properties lawfully is one which can be determined in a civil suit and not a

constitutional petition. In the end **Mr. Adano** prayed that we allow the appeal or in the alternative declare that the 6th respondent is the legal

proprietor of L.R Nos. 337/3823, 337/3833, 337/3834, 337/3835, 337/3836 and 337/3837.

Addressing us in support of the appeal, **Mr. Luseno** for the 7th respondent submitted that as at the time of commencing proceedings, the 1st respondent had concluded an inquiry under part VIII of the **Land Act, 2010** and made an award of Ksh.129,760,767 dated 23rd January 2018, which the 7th respondent accepted on 30th January 2018. Counsel asserted that no appeal was preferred against that award and neither was it an issue for determination before the trial court. Citing **section 115** of the **Land Act, 2012** and **Rule 29** of the **Land Regulations, 2017, Mr. Luseno** contended that the 1st respondent was obligated to ensure that the award was settled promptly. To counsel, the holding by the learned Judge that the 7th respondent was not entitled to either the suit property or compensation was made without jurisdiction. In the end **Mr. Luseno** invited us to set aside paragraphs164(b), (c) and (d) of the impugned judgment.

Opposing the appeal on behalf of the 8th respondent, **Mr. Otieno** defended the learned Judge's finding that the appellants

did not have any documents to demonstrate how they acquired title to

the suit property. Counsel submitted that the appellants did not provide an original allotment letter, proof of payment of stand premium or the purchase price and a PDP which is an essential document for issuance of certificate of title. He contended that to the extent that prayer number five (5) of the appellants' petition was for the court to make a determination of their ownership of the suit property, it was well within the purview of the court to arrive at a determination that the appellants had not proved their claim to the suit property. On reliance of the decision in ***MUNYU MAINA Vs. HIRAM GATHIHA MAINA, Civil Appeal Number 239 of 2009***, it

was urged that the appellant could not assume a clean title over the suit property on the basis that they were innocent purchasers from a third party. Counsel asserted that if the original title was defective then only a defective title can be passed over. **Section 26** of the **Lands Act** was cited for the proposition that an illegal title is supposed to be revoked, it cannot be cured by an act of alleged innocence. **Mr. Otieno** placed reliance on the Supreme Court decision in ***DINA MANAGEMENT LIMITED Vs. COUNTY GOVERNMENT OF MOMBASA & 5***

OTHERS

[2022] KESC 24 (KLR) where the Court held that a court should

not sanction an illegality or give a seal of approval to an illegal or irregularly obtained title, on the basis of indefeasibility of title. Further reliance was placed on ***ALICE CHEMUTAI TOO Vs. NICKSON KIPKURUI KORIR & 2 OTHERS*** ***[2015] KEELC 151 (KLR),*** where the court held that an irregularly acquired title cannot transfer a clean title to the property. Counsel cited ***NELSON KAZUNGU CHAI & OTHERS Vs. PWANI UNIVERSITY [2014] eKLR*** for the submission that since the appellants could not demonstrate the process by which the third party from whom they acquired the suit property obtained it, they did not have a clean title and therefore the court was right in holding that the title held by the 1st appellant was illegally acquired. On the question of failing to give the appellants a fair hearing, Counsel insisted that the appellants were accorded an opportunity to be heard by both the trial court and the 1st respondent. He referred to pages 200 to 208 of the record where, he indicated, evidence of public invitations for parties to attend before the 1st respondent were exhibited. Our

attention was further drawn to pages 242 to 254 of therecord where, according to counsel, evidence of attendance by all parties before the 1st respondent was

displayed. **Mr. Otieno** asserted that the appellants submitted their case before the 1st respondent and it was considered when the determination was made. To counsel, the fact that no oral hearing was conducted did not mean that parties were not afforded a fair hearing. Counsel argued that a fair hearing can be achieved as long as parties are granted an opportunity to submit the totality of their case before the administrative body.

Mr. Otieno urged that the primary issue that has been contested in this matter, from the 1st respondent all the way to this Court, was the question of legitimacy of the appellants' title and whether it was legally acquired. Counsel submitted that at all the stages of hearing, the appellants presented documents in support of their claim to the suit property, the documents were considered by both the 1st respondent and trial court, and a decision was made to nullify and revoke the title. It was counsel's submission that the appellants had not presented any new evidence before this Court to demonstrate their claim other than the same documents.

On whether the appellants were innocent purchasers without notice, counsel reiterated that the appellants were not able to

demonstrate allocation of the suit land to themselves; they did not

provide an allotment letter, a PDP, proof of payment of stand premium and a sale agreement to show how they acquired the property. **Mr. Otieno** contended that the 1st appellant was not able to demonstrate how the letter of allotment moved from **Lucy Njeri Mwangi**, its majority shareholder, to its name. He argued that if the allotment letter was issued to the said **Lucy** then any processing of a title would have been done in her name. Referring us to page 236 of the record, counsel asserted that there was no approved PDP on record in relation to the suit property and therefore no title could be generated with respect to the property. It was urged that the suit property was properly vested in the 8th respondent and the appellants and other persons who had a claim over it had engaged in acts of fraud. In conclusion counsel implored us to find that the appellants were unable to prove the root and manner in which they got registered as proprietors of the suit property. The 1st respondent and the court below were right to find that the appellants' title was irregularly acquired and the same should be nullified. In brief reply to the 8th respondent's submissions, **Mr. Kigen** reiterated that the 1st respondent violated **section 14(3)** on the NLC Act by not granting the

appellants an opportunity to be heard.

We have carefully read and considered the rival submissions in light of the entire record, in obedience to our duty as a first appellate court to proceed by way of re-hearing the case with a view to making our own inferences of fact and arriving at independent conclusions after a fresh and exhaustive re-appraisal and analysis of the entire evidence. See ***SELLE Vs. ASSOCIATED MOTOR BOAT COMPANY LTD [1968] EA 123.***

We think, the single issue that is dispositive of this matter is whether the learned Judge erred in ordering the cancellation of the appellants' title to the suit property and all subsequent titles.

The appellants question the learned Judge's order for cancellation of their title to the suit property even after he had agreed with them that they were not heard by the 1st respondent before the decision for revocation of their title was made. They contend that had they been heard, they would have answered all questions concerning their claim over the suit property and challenged the 8th respondent's allegations. The appellants assert that upon the learned Judge quashing the 1st respondent's decision, he ought to have remitted the matter back to it so that a fair administrative process could be undertaken. The 8th

respondent was, however, emphatic that the appellants submitted their case before the 1st respondent and it was considered. He defended the learned Judge's finding that the appellants did not have any documents to demonstrate how they acquired title to the suit property.

As correctly submitted by the appellants, the learned Judge upon considering the issue of whether the appellants were given a fair hearing by the 1st respondent, determined that the appellants, the 6th and 7th respondents were not afforded an opportunity of presenting their case before the 1st respondent made its decision. The court reasoned as follows;

> ***"132. Considering that the Petitioners and the 1st and 2nd Interested Parties have deponed that they were never heard, whether by way of submissions or orally, the 1st respondent should have shown that indeed the Petitioners and the Interested Parties were heard.***
>
> ***133. Having failed to exhibit the proceedings showing how the Petitioners and the Interested Parties were heard, this court finds that the Petitioners, the 1st Interested Party and the 2nd Interest Parties were not afforded an opportunity of presenting their case before the 1st respondent made its decision.***
>
> ***134. The decision of the 1st respondent was tainted by procedural impropriety in that the Petitioners and the 1st and 2nd Interested Parties were not***

afforded an opportunity of being heard before the decision was

made. That decision should therefore be quashed by this court."

It is trite that the right to be heard is a basic natural justice tenet and which, as an aspect of the right to fair trial is by virtue of Article 25 of the Constitution non-derogable. Nyarangi JA in ***DAVID OLOOONYANGO Vs. ATTORNEY-GENERAL***

[1987] KECA 56 (KLR), asserted that a decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. He observed;

"I would say that the principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly…A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at."

The Court was of a similar mind in ***SCENERIES LIMITED Vs. NATIONAL LAND COMMISSION*** (supra) when it reasoned that a

man cannot incur loss for an offence by a judicial proceeding until he has a fair opportunity of answering the case against him.

“The issue that inevitably follows is whether or not the manner in which the Respondents conducted the challenged proceedings amounted to breach of the rules of natural justice. The concept and doctrine of Principles of Natural Justice and its application in

Justice delivery system is not new. It seems to be as old as the system of dispensation of justice itself. It has by now assumed the importance of being, so to say, "an essential inbuilt component" of the mechanism, through which decision-making process passes, in the matters touching the rights and liberty of the people. It is no doubt, a procedural requirement but it ensures a strong safeguard against any Judicial or administrative; order or action, adversely affecting the substantive rights of the individuals.

…

One principle of natural justice is that no man should be condemned unheard or that both sides must be heard before passing any order. A man cannot incur the loss of or liberty for an offence by a judicial proceeding until he has a fair opportunity of answering the case against him. But what is important to be noted is that the applicability of principles of natural justice is not dependent upon any statutory provision. The principle has to be mandatorily applied irrespective of the fact as to whether there is any such statutory provision or not."

We agree with the appellants' submission that the learned Judge having quashed the 1st respondent's decision for being tainted with procedural impropriety, he ought not have proceeded to inquire further into the matter. The 1st respondent's decision was the bedrock of the appellants' petition and since he overturned it, there was nothing more to interrogate.

The appellants also urged that there was no prayer by any

of

the parties for cancellation of the title to the suit property and

neither was there any cross-petition by the respondents for such relief to be granted. Thus, the court did not have the power to grant relief that was not sought by any party. The 8th respondent on the other hand contended that the 1st respondent and the trial court were right to find that the appellants' title was irregularly acquired and should be nullified. It is trite law that a court will not grant a remedy which has not been sought by parties. We hold the view, as this Court did in ***OTIENO, RAGOT & COMPANY ADVOCATES Vs. NATIONAL BANK OF KENYA LIMITED*** (supra) that a court cannot

grant that which has not been sought by parties because in that case, parties are denied the opportunity to address the court on that question before a decision is made. The Court surmised;

> ***"There is no power on the part of the learned Judge to grant a relief that has not been asked for. Had the appellant known that one of the options under consideration was the re-hearing of the reference, may be its approach would have been different? The recourse adopted by the learned Judge meant that the appellant was not given a hearing on the question of whether the reference should be heard afresh. The court granted orders which were not sought and none of the parties addressed it on that question. The upshot then is that the appeal is allowed in its entirety. The decision of the High Court is set aside. The appellant shall have the costs of the 2 appeals."***

Further, in ***DAVID SIRONGA OLE TUKAI Vs. FRANCIS ARAP MUGE & 2 OTHERS*** ***[2014] KECA 155 (KLR)*** the Court held as follows;

> ***"It is well established in our jurisdiction that the court will not grant a remedy, which has not been applied for, and that it will not determine issues, which the parties have not pleaded. In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense."***

In view of the foregoing authorities, we think that the learned Judge erred by ordering that the titles of the suit property and those of the subsequent subdivisions be cancelled, when there was no such prayer from any of the parties to proceedings.

Ultimately, we have come to the conclusion that this appeal and cross appeal have merit. We set aside the judgment and decree of the Environment and Land Court and direct that the

matter be

remitted back to the 1st respondent for hearing. Each party shall bear its own costs.

Order accordingly.

Dated and delivered at Nairobi this 13th day of March, 2026.

P. O. KIAGE
.....
..... JUDGE OF APPEAL

A. O. MUCHELULE
.....
..... JUDGE OF APPEAL

W. KORIR
.....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR