



**Wanyange & another (Suing as the legal representatives of the Estate of the Late Francis John Wanyange - Deceased) v National Land Commission & 2 others (Civil Suit 196 of 2003) [2026] KEELC 1783 (KLR) (5 March 2026) (Judgment)**

Neutral citation: [2026] KEELC 1783 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
CIVIL SUIT 196 OF 2003  
AA OMOLLO, J  
MARCH 5, 2026**

**BETWEEN**

**CATHERINE WAIRIMU WANYANGE ..... 1<sup>ST</sup> PLAINTIFF  
JAMES ISAAC MWANGI WANYANGE ..... 2<sup>ND</sup> PLAINTIFF  
SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE  
FRANCIS JOHN WANYANGE - DECEASED**

**AND**

**THE NATIONAL LAND COMMISSION ..... 1<sup>ST</sup> DEFENDANT  
DIRECTOR OF PHYSICAL PLANNING ..... 2<sup>ND</sup> DEFENDANT  
RIVER VIEW PLAZA LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiffs, acting as Administrators of the Estate of the late Francis John Wanyange, filed this suit against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants vide Complaint dated 25<sup>th</sup> February 2003 amended on 8<sup>th</sup> April 2003 and further amended on 20<sup>th</sup> June 2017 seeking the following orders;
  - 1a. An order declaring that the river and road reserve between L.R. 1870/1/193 and Mwanzi Road was never available as unalienated Government Land.
  1. An order declaring planning and allocation of L.R. 209/12828 to the 3<sup>rd</sup> Defendant unconstitutional, illegal, null and void ab initio, and the said road and river reserve do remain public land with the Plaintiffs having unlimited access to the road and river.



2. Orders directed to the Commissioner of Lands, 1<sup>st</sup> Defendant, ordering it to allocate L.R. 209/12828 to the Plaintiffs if the area is available for allocation on payment of the necessary fees.
  3. Damages quantum to be determined by the Court to be provided for.
  4. Costs of this suit are to be provided for.
2. The Plaintiffs contend that L.R. No. 209/12828 was originally designated as a road and river reserve fronting their property, L.R. No. 1870/1/193, under various survey plans between 1949 and 1988. They state that when the deceased purchased L.R. No. 1870/1/193 in 1986, it had full frontage to the road and river reserve, ensuring access to a public road.
  3. The Plaintiffs allege that in 1995, the Defendants unlawfully and secretly re-planned and allocated the road and river reserve, without advertisement or due process to the 3<sup>rd</sup> Defendant, thereby creating L.R. No. 209/12828. This allocation allegedly blocked access to the Plaintiffs' land, rendering it landlocked and denying them the benefit of the river reserve. They further claim that while neighbouring plots were granted extended access to Mwanzi Road through the reserve, their property was excluded, amounting to unconstitutional and discriminatory treatment.
  4. That although earlier cases filed by the deceased were struck out or withdrawn on procedural grounds, the Plaintiffs maintain that those proceedings do not bar the present suit, as they now assert personal rights arising from the alleged unlawful allocation. They argue that the subdivision, survey, and allocation of the road and river reserve were unconstitutional, illegal, and null and void ab initio.
  5. The Plaintiffs seek court intervention to halt ongoing developments on L.R. No. 209/12828, including canalisation and construction, which they contend will permanently deprive them of access and unlawfully interfere with the river reserve adjoining their land.
  6. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed a statement of Defence dated 20<sup>th</sup> September 2010 admitting only to the ownership of L.R. No.1870/1/193 in favour of the Plaintiff. They stated that parcel LR No.209/12828 lies on the part of the old Mwanzi road that was re-planned to create the suit property and other plots.
  7. That the re-planning, survey and Allocation of that Plot L.R No.12828, registered as grant No. LR 67806 was erroneous as it denies the Plaintiff access to his plot. He stated that the land forming the road and river reserve ought not have been alienated, as that is public land that should at all times remain as such. Therefore, LR.209/12828 should be re-planned to allow the Plaintiff enough passage onto his land and also provide for the riparian reserve.
  8. The 3<sup>rd</sup> Defendants filed a further amended defence and counterclaim dated 17<sup>th</sup> January 2018 seeking the following orders;
    - a. The sum of Ksh.103,124
    - b. General damages for trespass
    - c. Costs of this suit by way of Counterclaim plus interest thereon;
    - d. Any other relief that this Honourable Court may deem just and fit to grant.
  9. The 3<sup>rd</sup> Defendant denied the Plaintiff's averments that the area where LR 209/12828 is situated was planned for a road reserve. They contend that they were allocated LR No. 809/12828 to hold for a term of 99 years from 1st December,1995, and that a certificate of Title was duly issued in its favour.



That the said allocation was normal and was precedent upon all necessary procedures being undertaken before the allocation.

10. Further, that the 3<sup>rd</sup> Defendant was duly authorised by the City Engineer, Nairobi City Council, to canalise the stream through its property LR. No.209/12828 and denied interfering in any way whatsoever with the Plaintiff's property LR. No.1870/1/193.
11. They contended that the Plaintiff had previously filed HCCC No.659 of 1996 against the Commissioner of Lands and 4 others, including the 3<sup>rd</sup> Defendant, over the same subject matter of this suit and seeking similar injunctive reliefs.
12. The 3<sup>rd</sup> Defendant averred that on 8<sup>th</sup> February 2009, the Plaintiff partially demolished the boundary wall, dug up their car park and pulled down the car shed on the 3<sup>rd</sup> Defendant's property. The wall destruction resulted in a substantial loss of business due to interference with customers' car parking and associated security threats. In addition, the 3<sup>rd</sup> Defendant was forced to incur costs of Ksh—103,124, which they claim from the Plaintiff.
13. The 3<sup>rd</sup> Defendant stated that the Plaintiff's action amounted to trespass, and they suffered damage as a result of the trespass.
14. The Plaintiff filed a response to the 3<sup>rd</sup> Defendant's further amended defence and defence Counterclaim dated 20<sup>th</sup> February 2018, reiterating the contents of the further amended plaint. He denied all the allegations in the 3<sup>rd</sup> Defendant counterclaim and denied demolishing any boundary wall, digging up the Defendant's car part or pulling down his car shed. He also denied trespassing on the 3<sup>rd</sup> Defendant's property.

## **Evidence**

15. Pw1, Francis John Wanjange Mwangi, the Plaintiff herein, testified in support of his case, adopting his witness statement as evidence in chief. He stated that he purchased the sought property in the early 1980s and applied to the Nairobi City Council to have the lease extended. He was granted a 45-year lease running from 1<sup>st</sup> July 1985 and issued with a grant No. I.R 40504, which had a deed plan No. 125014 dated 22/11/85. He further stated that the parcel came from a larger parcel LR.No.1870/1/136 (Plot No. 136), which was subdivided to give rise to 4 plots; 1870/1/193, 194, 195 and 196.
16. That a road was reserved and referred to Plan Folio No.63, Register No.155, which shows Plot Nos. 193, 194, 195, and 196. He stated that it can be seen in the plan that Plot Nos. 194 and 196 have road truncations, while Plot Nos. 193 and 195 have no such because they had direct access to the main road at the time of subdivision. It is his evidence that there is a river running parallel to the road above the North Eastern part of the plot, being no.193 and 195. To access the road, the owners of plots 193, 194, 195, and 196 had to build bridges over the river.
17. He stated that the survey plan Folio No. 288 relates to parcel Nos. L.R 209/12828 and L.R 209/12829, but he is concerned with L.R 209/12828, which the 3<sup>rd</sup> Defendant now owns. Initially, it was reserved for the road reserve and blocked the Plaintiff's suit property. He further stated that the grant of the 3<sup>rd</sup> Defendant's plot was issued on 6/12/1995 without any notice of the allocation, and when he complained to the Nairobi City Council, he was not helped.
18. He then filed a case in 1996, which failed due to a technicality. PW1 added that the Attorney General filed a defence for the Commissioner of Lands and Director, admitting in paragraphs 5 and 6 that there was an error in the planning and creation of Plot No. 12828, which is now developed.



19. DWI, Teddy Mulusa Mudaka, a land surveyor working with the Survey of Kenya, Ministry of Lands, testified stating that he prepared a ground status and survey report dated 5/12/2023 and that it touches on L.R No.1870/1/193 and 209/1/2828. That he visited the suit properties pursuant to a court order to confirm if there is an access road for 1870/1/193. His report annexes copies of photos of the plots in dispute, which show that LR No. 209/1/2828 is the result of a new grant survey conducted adjacent to 1870/1/193, and that a canalised river passes through the same.
20. DW1 stated that the plot L.R 209/1/2828 does not affect the river reserve, but affects plot 193 because they share a common boundary on the northern side. The replanning affected the access road to plot 193, which is developed with some units, and that outside plot 193 is where plot 12828 is. That also, access for 193 exists on the ground but not on the map, and if access is to be created on the map, it will affect 12828, with the road size to be implemented (6 or 9 meters), but his recommendation is 9 meters.
21. DW2, Loise Wairange, an advocate of the High Court of Kenya and coordinator of the 3rd Defendant, testified, stating that he made a witness statement dated 7/2/2025, which details her engagement in this matter and adopts it as evidence in chief. She also produced a list of documents dated 21<sup>st</sup> March 2012 filed by the 3rd Defendant as Exhibits 1-16. She testified that the 3rd Defendant is the owner of land LR 209/12828, and a copy of the title was produced. The fact that the 3rd Defendant was registered on 6/12/1995 and on pages 25-39 constitutes evidence of payment of land rent. She added that the decision to replan in 1995 was made by the National government, and it was a public decision, and that the 3rd Defendant was one of the beneficiaries.
22. DW2 disagreed with the Plaintiff's claim that the river reserve outside of the land is theirs and stated that what crosses their land is a stream. In order to develop the 3rd Defendant's land, they had to canalise the stream within 3 months of receiving a letter of no objection from Nairobi City Council on 21/1/2003, and the works were completed in Nov 2003.
23. She further testified that in 2010, they wrote to the Commissioner of Lands for the provision of a title as shown on pages 58 and 61, and the application for replacement was gazetted and payment made as seen on pages 62-63. Since 1995, they have not received any communication from the government that the title created was through illegal replanning. No notice of revocation has been served on them, nor any notice of reassignment. She stated that they filed a counterclaim against the Plaintiffs for demolishing their wall to create access to the plot, noting that they had access through the adjacent road. Page 55 gives a quotation for repairing the wall at Ksh. 103,121, as paid at page 57, and they also claim the interest.
24. On cross-examination, the witness confirmed that her testimony is based on the documents filed and acknowledged that the quotation and invoice were addressed to Nakumatt Holdings and there is no document produced to show that River View, the 3rd Defendant, authorised Nakumatt to pay on its behalf. That further receipts at pages 21-30 for payments bear the name of Nakumatt Investments. She mentioned that one of the directors in the 3<sup>rd</sup> Defendant is also a director in Nakumatt Investments. She also confirmed that anyone accessing the Plaintiff's land trespasses through the 3<sup>rd</sup> Defendant's land. She stated that the letter on page 25 of the 3rd Defendant is addressed to Ukey Estate Ltd, which was working with the 3rd Defendant and owns an adjacent plot.

#### Submissions

25. The Plaintiffs filed submissions dated 9<sup>th</sup> October 2025 while the 2<sup>nd</sup> Defendants and 3<sup>rd</sup> Defendants filed submissions dated 8<sup>th</sup> December 2025 and 3<sup>rd</sup> November 2025 respectively. They submitted that, upon purchasing LR No. 1870/1/193 in 1986, the property enjoyed clear frontage to a road and a



- river reserve. However, in 1995, a survey plan approved by the Director of Surveys created LR No. 209/12828 out of the road reserve, without providing access to his land.
26. That significantly, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants admitted in their Further Amended Defence dated 17<sup>th</sup> January 2018 that the re-planning, survey, and allocation of LR No. 209/12828 was erroneous, as it denied the Plaintiff access and unlawfully alienated public road and river reserve land. Further, they even sought orders for re-planning to restore access and the riparian reserve; however, the 3<sup>rd</sup> Defendant denied any illegality and counterclaimed for alleged property damage.
  27. The Plaintiff stated that their evidence was clear and largely uncontroverted. He testified that his fully developed property, with permanent residential buildings constructed before the creation of LR No. 209/12828, could only be accessed through what became the 3<sup>rd</sup> Defendant's parcel. The Plaintiffs stated that the Defendants suggested an alternative access route through a neighbour's land, but this would require demolition of existing buildings and obtaining a wayleave, an impractical and unreasonable proposition.
  28. They stated that a court-appointed team of surveyors and planners visited the site and confirmed in their report that LR No. 209/12828 completely blocks LR No. 1870/1/193, denies it access, and has taken over the river reserve. Photographic evidence showed that the river had been canalised and covered beneath a parking area operated by the 3<sup>rd</sup> Defendant, and that there was no other viable access to the Plaintiff's land.
  29. The Plaintiffs cited Article 40 of *the Constitution*, which protects the property right but expressly excludes protection for unlawfully acquired property under Article 40(6) submitting that their evidence demonstrated that public land specifically a road and riparian reserve was excised and allocated to a private entity without lawful process or public participation. That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants themselves admitted that parts of the road and river reserve ought not to have been alienated, as such land is public and must remain so. The allocation therefore contravened constitutional principles governing public land and violated the Plaintiff's right of access to his property.
  30. They added that titles unlawfully acquired are liable to cancellation and in support cited *Saima Jepkemboi v National Land Commission & 6 Others*, where the Court cancelled a fraudulently issued title and emphasized that courts will not hesitate to nullify titles obtained through illegal means. Similarly, in *Kenya Railway Corporation v Adan Intalo Ali & Another*, the Court, citing *Kenya Industrial Estates Limited v Anne Chepsir & 5 Others*, held that public land reserved for roads, schools, or other public purposes cannot be allocated to private individuals unless it has ceased to serve a public function and the statutory process, including public auction under the Government Lands Act, has been strictly followed. That Public land is held in trust for the public and cannot be unlawfully alienated.
  31. The Plaintiffs also submitted that the 3<sup>rd</sup> Defendant's counterclaim was unsupported, as receipts produced were in the name of Nakumatt Holdings, which lacked standing to sue on its behalf. The weight of the documentary evidence, site inspection report, photographs, and admissions by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants overwhelmingly demonstrated that the impugned title was unlawfully acquired and liable to cancellation under Article 40(6) of *the Constitution*.Top of FormBottom of Form
  32. The 2<sup>nd</sup> Defendant submitted that their witness, DW1 Mr Teddy Mulusa, a Land Surveyor from the Director of Surveys, testified and produced a survey report confirming that LR No. 1870/1/193 originally had access through a road reserve along its northern boundary (beacons 2d and 3x). He stated that although there exists an access neck on the neighbouring LR No. 1870/1/194, it is private and does not serve the Plaintiff's parcel. Crucially, he confirmed that LR No. 209/12828 was excised from the



- road reserve and that its survey plan does not provide any entry point for LR No. 1870/1/193, thereby technically denying it access as earlier provided under F/R No. 63/155. The court-appointed survey report and photographic evidence further established that LR No. 209/12828 blocks the Plaintiff's land and that the canalised river (approximately 6 metres wide) was excluded from the parcel but effectively covered, reinforcing the claim of landlocking and obstruction.
33. They stated that under Section 32 of the *Survey Act* (Cap 299), no survey is valid unless authenticated by the Director of Surveys. Although DW1 acknowledged that the 1995 plan for LR No. 209/12828 was authenticated, authentication alone does not cure illegality or procedural defects. That Sections 33 and 39-41 of the Act permit cancellation of inaccurate or non-compliant plans, and the Survey (Electronic Cadastre Transactions) Regulations, 2020 require strict compliance with standards, verification, and proper deposition.
  34. Further, Sections 2 and 140 of the *Land Act*, 2012 guarantee equal recognition of land rights and provide for access orders where land becomes landlocked, while Section 98 governs the formal creation and registration of easements. If LR No. 1870/1/193 has been deprived of lawful access, the Court is empowered to grant an access order creating an easement over the servient land to preserve the dominant owner's rights.
  35. Additionally, Section 26(1)(b) of the *Land Registration Act* renders even an innocent purchaser's title impeachable if obtained illegally, unprocedurally, or through a corrupt scheme. In support they relied on the case of Elizabeth Wanjiku Mbugua v Stephen Kariuki & 12 Others, citing Elijah Makeri Nyangw'ra v Stephen Mungai Njuguna & Another, where the Court emphasized that illegality vitiates title regardless of innocence. Similarly, in Funzi Development Ltd & Others v County Council of Kwale, the Court of Appeal held that indefeasibility of title arises only where the allocation was legal, proper, and regular, and that courts cannot sanitise an illegality.
  36. The 2<sup>nd</sup> Defendant submitted that applying these principles, if LR No. 209/12828 was created through irregular excision of a road or riparian reserve and resulted in depriving LR No. 1870/1/193 of access, the Court may declare the allocation null to that extent, order restoration of reasonable access under Section 140 of the *Land Act*, recognize and register an easement under Section 98, or direct a fresh lawful survey to rectify the defect. Top of Form
  37. The 3<sup>rd</sup> Defendant on the other hand opposing the suit and relying on its Defence, documentary evidence (DEX 1–16), and the witness statement of DW1, Ms. Loise Wairange submitted that although roads and rivers fall within public land under Article 62(1)(h) and (i) of *the Constitution*, such land may lawfully be surveyed, converted, and registered as private land in accordance with Article 64. They argued that LR No. 209/12828 was created through a lawful re-planning process undertaken in 1995 under the *Survey Act* (Cap 299), and that the Plaintiff has not provided particulars of fraud, illegality, or procedural impropriety to justify cancellation. It further emphasises that the Plaintiff did not specifically plead for the revocation of its title, rendering the sought-after relief structurally defective.
  38. In support of the validity of its title, the 3<sup>rd</sup> Defendant produced the Deed Plan, authenticated survey maps, parcel file records, and evidence of payment of land rent and rates (DEX 1, 3, 7, 15, 16). It maintains that the survey plan was authenticated by the Director of Surveys pursuant to Section 22 of the *Survey Act* and that the Plaintiff never challenged its authenticity, save for disputing the access point. The 3<sup>rd</sup> Defendant contends that the alleged access was wrongly depicted because the Plaintiff constructed buildings at the legitimate access corner shown in earlier survey plans (1954 and 1985), and then sought to create entry through the middle of the common boundary wall. It also relied on Nairobi



City Council's 2003 approval of canalisation works on the stream traversing LR No. 209/12828 as confirmation of official recognition of its ownership.

39. On the issue of ownership and payments made by Nakumatt Investments Limited, the 3<sup>rd</sup> Defendant tendered company records (DEX 4) demonstrating that Nakumatt acquired 99% of its shares in 2001, thereby explaining why the majority shareholder paid rent and rates. It argues that no law requires land rent or rates to be paid exclusively by the registered company itself, so long as the property is not in arrears. The 3<sup>rd</sup> Defendant further submitted that under Section 11(2) of the Land Act, 2012, the National Land Commission is empowered to manage sensitive public land. That conversion of previously reserved land is permissible if undertaken lawfully. It contends that the Plaintiff failed to prove that the re-planning and allocation process contravened statutory requirements or environmental safeguards.
40. They relied on Section 26(1) of the Land Registration Act, which provides that a certificate of title is prima facie evidence of absolute and indefeasible ownership unless obtained through fraud, misrepresentation, illegality, or a corrupt scheme. Citing the Supreme Court decision in *Harchan Singh Sehmi & Another v Tarabana Company Limited & 5 Others*, it argues that even land previously classified as public or reserved cannot be cancelled unless the root title is proven illegal or fraudulent. The Defendant also invokes the principle that indefeasibility protects registered proprietors absent proof of statutory exceptions, and submits that the Plaintiff has not discharged this burden.

#### **Analysis and Determination:**

41. I have read and considered the pleadings filed, the evidence adduced by each of the parties, and the submissions made. From my reading, I discern that there is no dispute that the 3<sup>rd</sup> Defendant is the registered owner of the suit title LR No. 209/12828. What is in dispute, and which forms the question for determination, is whether the said title LR.No.209/12828 was public land (access road and river reserve), and therefore not available for allocation to the 1<sup>st</sup> Defendant.
42. It is the Plaintiff's evidence that L.R. No. 209/12828 was originally designated as a road and river reserve fronting their property, L.R. No. 1870/1/193, under various survey plans between 1949 and 1988.
43. Mr Teddy Mulusa, a witness from the Survey department, gave evidence as DW1 and produced his report in evidence. The report summarised by the 2<sup>nd</sup> Defendant in their submissions stated thus;
  - i. Land reference No. 1870/1/193 originally No.136/1 Nairobi provided for a Northern boundary on this parcel and its abuttal, and that an earlier survey of the same area also provided for the same road reserve.
  - ii. There is a common boundary with parcel L.R No. 1870/1/194 Nairobi (org 136/2). This common boundary has an access-neck on L.R. No. 1870/1/194, Nairobi (org. 136/2), which is part of the land parcel and serves only as a private access point.
  - iii. Further from the Survey LR.No.1870/1/193(ORG 136/1) derives its Access from the road reserve provided along its Northern boundary, beacons 2d and 3x only.
  - iv. Whereas LR. No.209/12828, Nairobi, which was exercised from the road reserve as per the survey map, and further, the canalised river, about (6m) wide, indicated on the plan, is not included as part of this parcel of land and was left out.



- v. The survey does not provide an entry point of access to its only abutting plot, L.R. No. 1870/1/193 (org 136/1), Nairobi. Technically, it denies the earlier survey (FR No. 63/155 for L.R. No. 1870/1/193 (org No. 136/1), Nairobi) access to its plot.
44. This witness confirmed that the suit title was issued following a new grant survey, which is confirmed by DW3, who testified on behalf of the 3<sup>rd</sup> Defendant. The 3<sup>rd</sup> Defendant, in support of their case, produced inter alia, ....
45. It is the 3<sup>rd</sup> Defendant's case that since their registration in 1995, they have never received any letter from the government stating that their title was created through an illegal replanning. It is this court's opinion that the absence of communication from the government would not legalise an otherwise unlawful process. In this case, the Plaintiff argued that there was no land available to be re-planned and subsequently allocated to the 3<sup>rd</sup> Defendant on the basis that the impugned space was a public road and a river reserve.
46. It is trite law that only unalienated public land can be allocated to private entities. This position has been upheld several times by the Superior Courts: any land that has been alienated for a public purpose is not available for allocation, and where such allocation is made, the process is deemed null and void. For example, the Supreme Court in the case of *Dina Management Limited vs the County Government of Mombasa and two others* [2023] KESC 30 (KLR);
15. Where the registered proprietor's root title was under challenge, it was not enough to dangle the instrument of title as proof of ownership. It was the instrument that was in challenge, and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal, and free from any encumbrance, including interests that would not be noted in the register.
16. Under the repealed Government Lands Act (GLA), a PDP had to be drawn and approved by the Commissioner of Lands or the Minister for Lands before any unalienated Government land could be allocated. After a PDP had been drawn, a letter of allotment based on the approved PDP was then issued to the allottees. It was only after the issuance of the letter of allotment, and the compliance with the terms therein, that a cadastral survey could be conducted for the purpose of issuance of a certificate of lease."
47. The burden of proof was laid on the shoulders of the Plaintiff to demonstrate that there was no land available to be replanned, hence the 3<sup>rd</sup> Defendant's title was invalid. To prove their point, the Plaintiff relied inter alia on paragraphs 6 and 7 of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' statement, where it is pleaded as follows;
- "6. ...that the replanning, survey and allocation of that plot L.R. No 12828 registered as grant number 67806 was erroneous as it denies the Plaintiff access to his plot.
7. ...that parts of the land forming the road and river reserve ought not to have been alienated as that is public land that should at all times remain as such."
48. Further, the evidence of DW1 supports the plaintiff's case when he confirmed first that the access neck on the neighbouring plot L.R. No 1870/1/194 does not serve the Plaintiff's land. This witness affirmed that the suit parcel L.R. No. 209/12828 was excised from the road reserve. The fact that it was excised from a road reserve indicates that the land had already been alienated for public purposes.



49. To mitigate the alienation, the burden then shifted to the 3<sup>rd</sup> Defendant to justify that the remaining land was sufficient to serve as a road. However, it finds itself in a scenario where the government surveyor avers that the suitland 209/12828 blocks the Plaintiff's land and it has also canalized the river meaning that the plot also ate into the river reserve.
50. The 3<sup>rd</sup> Defendant in its submissions affirm that roads and rivers fall within public land under article 62(1)(h) and (i) of *the Constitution* but argues that such land may lawfully be surveyed, converted and registered as private land in accordance with article 64 of *the Constitution*. Article 62 cited states thus
62. Public land is-
- (h) all roads and thoroughfares provided for by an Act of Parliament;
  - (i) all rivers, lakes and other water bodies as defined by an Act of Parliament.
64. Private land consists of -
- (a) registered land held by any person under any freehold Tenure
  - (b) land held by any person under leasehold tenure; and
  - (c) any other land declared private land under an Act of Parliament.
51. The 3<sup>rd</sup> Defendant argued that the Plaintiff did not provide evidence of fraud, illegality, or procedural impropriety to justify the cancellation. However, the 3<sup>rd</sup> Defendant's evidence itself speaks to the illegality of the acquisition of the title when it admits that a road constitutes public land. It follows that the space was already alienated government land, making it unavailable for allocation to private use. It could only be replanned if it was no longer required for the purpose for which it was re-allocated.
52. The 2<sup>nd</sup> Defendant stated that authentication alone does not relieve a defect in boundaries, or in defining access rights, if the plan is inaccurate, or was not deposited or identified correctly, or if there was a failure of notice or due process in re-planning affecting road or river reserve. Under the *Survey Act* section 33, upon finding that a plan is inaccurate or not in conformity, authentication may be cancelled, and all relevant parties notified. In this case, they support the Plaintiff's case for the grant of the reliefs sought.
53. Article 40(6) of *the Constitution* provides that the rights under this Article do not extend to any property that has been found to have been unlawfully acquired. Thus, despite the authentication of the 3<sup>rd</sup> Defendant's survey plan, it was subject to whether the land was lawfully acquired, which in this case it was not because the land was not unalienated.
54. The 3<sup>rd</sup> Defendant submitted that the Plaintiff did not pray for cancellation of its title, rendering the reliefs sought structurally defective. I think this is a matter of semantics as prayer (1) of the plaint sought a declaration that the river and the road reserve between L.R No 1870/1/193 amnd Mwanzi road was never available as unalienated government land. The second prayer seeks to declare the planning and allocation of L.R. No. 209/12828 illegal, null, void, and unconstitutional. If these prayers are granted, the foundation of the 3<sup>rd</sup> Defendant's title sinks, and all that would remain holding is a piece of paper, and there is nothing to stop the court from making an order for its cancellation.
55. In conclusion, I am satisfied that the Plaintiff has made a case that the replanning and allocation of the land described as L.R. 209/12828 was unlawfully done because the land was already alienated as a road and river reserves.
56. The result is I enter judgment for the Plaintiff as prayed as follows;



1. An order is hereby issued declaring that the river and road reserve between L.R. 1870/1/193 and Mwanzi Road was never available as unalienated Government Land.
2. I do hereby issue an order declaring that the planning and allocation of L.R. 209/12828 to the 3<sup>rd</sup> Defendant was unconstitutional, illegal, null and void ab initio, and the said road and river reserve do remain public land with the Plaintiffs having unlimited access to the road and river.
3. The consequence of order 2 is that the title held by the 3<sup>rd</sup> Defendant is ordered revoked/ cancelled.
4. Costs of this suit to the Plaintiff.

**DATED, SIGNED AND DELIVERED AT KISII, VIRTUALLY THIS 5<sup>TH</sup> DAY OF MARCH, 2026**

**A. OMOLLO**

**JUDGE**

