IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: KIAGE, MUCHELULE & KORIR,

JJ.A.) CIVIL APPEAL NO. E762 OF 2021

BETWEEN

OMAR R. YAKUB .....1ST APPELLANT
ROY HAULIERS LIMITED 2ND

APPELLANT AND

THE HON. ATTORNEY GENERAL.....RESPONDENT

(Being an appeal against the judgment and decree of the Environment and Land Court at Nairobi ***(Eboso, J.)*** *dated 5th August 2021*
in
ELC Case No. 553 of 2009
and
ELC Case No. 552 of 2009)
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JUDGMENT OF THE COURT

1. The appeal herein is in respect of two consolidated suits before the superior court, namely **ELC Case No. 553 of 2009** and **ELC Case No. 552 of 2009**, the lead file being **ELC Case No. 553 of 2009.**

2. In **ELC Case No. 553 of 2009,** Omar R Yakub (the 1st appellant herein) vide the plaint amended on 7th December 2017, asserted that he was on 1st July 1994 registered as the owner of all that property known as L. R. No. 21639 (Grant

No. I R 68678), for a term of 99 years (hereinafter the suit property). L.R No. 21639

was initially made up of L.R No. 20230 and L.R No. 20231, originally allocated to Geoffrey Mukana vide an allotment letter No. 00799/II/233 dated 6th July 1994 and Jane Musandu vide allotment letter No. 00799/II/234 dated 6th July 1994, respectively. Proof of payment for two parcels is evidenced in cheque No. 1086552 and the receipts issued thereof. It was further asserted that, in the year 1995, the 1st appellant acquired the two parcels of land from the original allottees. The transfer was duly registered on 23rd February 1995 for the consideration of Kshs.2,500,000/=. The 1st appellant was represented by the firm of Farouk Adam & Company Advocates, while the original allotees were represented by the firm of J.M Njage & Co. Advocates.

3. The 1st appellant asserted that in the year 1996, he applied for the amalgamation and extension of the two parcels of land. He thus surrendered the two titles, and the amalgamation was approved vide PDP No. 42/31/95/15. He consistently paid all annual land rates and rent as required. He enjoyed uninterrupted ownership and possession of the suit property from 1994 to 2008. He further established a transportation company, based on the suit property.

4. He stated that on 1st November 2008 officials from the Ministry of Roads and Public Works (currently Ministry of Transport, Infrastructure, Housing and Urban Development) wrongfully entered upon the suit property, creating an illegal

by-pass off the

Thika Super Highway, not in the original area Part Development Plan, leading to the demolitions of the buildings on the suit property, notwithstanding existing stay orders issued in **High Court J.R. Misc. Application No. 19 of 2008.**

5. The 1st appellant thus sought judgment inter alia: a declaration that he is the legitimate owner of all that property known as L.R No. 21639 (IR 68678); a declaration that the invasion of the said land by the Ministry of Roads and Public Works (now Ministry of Transport, Infrastructure, Housing and Urban Development) was unlawful; general damages; and the restoration of physical possession of L.R No. 21639(IR 68678) to the 1st appellant. In the alternative: forthwith payment of the value of the suit property valued as at 2nd November 2017 at Kshs. 197,000,000/=; compensation for the value of the demolished buildings valued at Kshs. 65,000,000/=; special damages for medical expenses Kshs. 370,132/=; exemplary damages on account of the wanton, deliberate, and oppressive disregard of the existence of court orders prohibiting the enforcement of the demolition order; interest and costs of the suit.

6. In opposing the suit, the respondent pleaded that the suit property lay on 8369/1, which was acquired by the Ministry of Roads in 1962 for the construction and expansion of the roundabout and other future developments. That the said

portions abutted a police station, the Nairobi-Thika Dual Carriage Highway, the Centre for Regional Mapping, and the Moi

International Sports Center-Kasarani Stadium, and were thus not residential or business areas. It was further pleaded that the 1st appellant's ownership was fraudulent as the suit property was not available for allocation under the law. The respondent contended that the Ministry of Roads owned the suit property, thus an alleged trespass or wanton destruction could not arise.

7. By way of a counterclaim, the respondent pleaded that the 1st appellant knowingly procured an illegal survey and registration of a road reserve and proceeded to trespass on the road reserve. That despite notice requiring him to remove his illegal structures from the road reserve to enable the Ministry to undertake road expansion, the 1st appellant failed to comply with the notice, forcing the Ministry to incur costs in removing the illegal structures. The respondent thus sought judgment inter alia: general damages for trespass onto the road reserve; special damages being the cost of removal of the 1st appellant's illegal structures from the road reserve; a declaration that the 1st appellant's encroachment on and occupation of the road reserve subject matter of this suit was illegal; a declaration that the 1st appellant's title was illegally obtained and that it is null and void ab initio; an order cancelling the 1st appellant's illegal title referred to as L.R. Number 21639 (IR 68678); exemplary damages; and costs of the suit.

8. In response to the defence, the 1st appellant asserted that the suit property was never public utility land at the time of its

purchase. The respondent therefore had no right to trespass on the suit property. It was thus reiterated that the 1st appellant was entitled to sue for the restoration of the suit property or appropriate compensation and damages thereof. In defence to the counterclaim, the 1st appellant reiterated that he was the duly registered owner of the suit property, which was acquired after the requisite due diligence and was therefore not obliged to heed an illegal notice to vacate the suit property. That the alleged expansion of the Nairobi-Thika Highway, in being of public benefit, did not warrant the respondent the right to disenfranchise lawful title holders of their lawfully acquired property without due process.

9. In **ELC Case No. 552 of 2009,** Roy Hauliers Limited (the 2nd appellant herein) set out its case in the further amended Plaint dated 7th December 2017. It contended that at all material times it was the registered lessee of Land Reference Number 21639, comprised in Grant No. IR 68679 (the suit property), registered in the name of 1st appellant. The 2nd appellant averred that it had established a transportation company on the suit property and that all its operations, including workshops, storage of spare parts and fuel, offices, and truck parking, were conducted thereon. It was further stated that on 1st November 2008, officials from the Ministry entered the suit property and carried out acts of unlawful destruction on the multi-million-shilling complex and other buildings erected thereon. It maintained that

the demolition was undertaken despite a court order issued by Hon. Justice Osiemo on 22nd May 2008 in **Nairobi H.C. Misc. Application No. 41 of 2008.** As a result of the alleged actions, it claimed to have suffered loss through vandalism and theft amounting to Kshs 60,632,865.00 and loss of income amounting to Kshs 186,199,117/, bringing the total claim to Kshs.246,831,982/. The 2nd appellant sought judgment inter alia: General damages; Special damages of Kshs.246,831,982; Exemplary damages, on account of the wanton, deliberate and oppressive disregard of the existence of court orders prohibiting the enforcement of the demolition order; interest at court rates; and costs of the suit.

10. In opposing this suit, the respondent, in his statement of defence dated 16th March 2010, denied the claim in its entirety. It was contended that both the 2nd appellant and its lessor were trespassers on the suit property, asserting that the land had been compulsorily acquired in 1962 from M/s Salopia Limited for the expansion of the Nairobi–Thika Highway. It was maintained that upon acquisition, the Ministry took possession through the Chief Engineer of Roads and held the land in trust for the public, pending implementation of the road project. Since the compulsory acquisition had neither been withdrawn nor revoked, the land remained reserved for public use and was not available for allocation.

11. The respondent further asserted that the suit property was never available for alienation, as it had been acquired for a specific public purpose under **section 75** of the repealed **Constitution** and **section 23** of the repealed **Land Acquisition Act.** It was alleged that the purported ownership by the 1st appellant was null and void, claiming that the suit property had been fraudulently acquired. Additionally, it was averred that in 2003 the Ministry issued Gazette and media notices requiring trespassers on public land to vacate, and undertook a survey marking structures on road reserves for demolition. He stated that the 1st appellant's premises were marked "demolish" and that both appellants were given adequate notice approximately four years to vacate and remove their structures before the road reserve was cleared and handed over to the contractor. He maintained that, as a trespasser, the 1st appellant could not confer valid tenancy rights upon the 2nd appellant, denied liability in full, and urged the court to dismiss the suit.

12. During trial, the appellants called a total of five witnesses to prove their claims. Prof. Gordon Wayumba (PW1), a licensed land surveyor and lecturer at the Technical University of Kenya, adopted his statement dated 7 November 2017. He testified that he conducted the amalgamation survey of L.R. Nos. 20230 and 20231 in 1996, resulting in L.R. No. 21639. In his report dated 1 November 2017, he opined that a bypass off Thika Highway traversed the suit property and was not

reflected in the 1994

approved Part Development Plan (PDP), hence was unlawfully created. On cross-examination, he conceded that his survey plan did not indicate the authority under which it was undertaken, that he did not encounter Survey Plan No. IR 105/39 of 21 September 1965, and that the PDP he relied on was supplied by his client. He further acknowledged that a surveyor ought to consider prior surveys and that the Director of Surveys should reflect them upon authentication. In re- examination, he maintained that the PDP was duly approved, that he participated in the initial surveys, that he had not seen any subsequent PDP altering the road alignment, and that no objection was raised to the amalgamation by the relevant authorities.

13. The 1st appellant (PW2) adopted his witness statement and produced documentary exhibits. He testified that he was the registered proprietor of L.R. No. 21639 (Grant No. IR 68678), arising from the 1996 amalgamation of L.R. Nos. 20230 and 20231, which he purchased in 1995 from the original allottees. He stated that the amalgamation and extension were approved, the original titles surrendered, and a new grant issued to him. He averred that he paid land rent and rates, enjoyed possession until 2008, and leased the property to the 2nd appellant, which operated its transport business thereon. He testified that on 1st November 2008, Ministry officials demolished the premises despite subsisting court orders staying the demolition. He

claimed unlawful deprivation of his leasehold interest, business losses to the company, and personal injury resulting in medical expenses.

14. On cross-examination, he conceded that he did not verify the vendors' compliance with allotment conditions, could not recall a formal sale agreement, and financed payment of stand premiums. He admitted to non-compliance with certain grant conditions, the lack of approved building plans, the absence of a company resolution authorizing suit, and uncertainty regarding completion documentation. He acknowledged that the structures had been marked for demolition. In re-examination, he maintained that he acquired the vendors' interests under the letters of allotment, facilitated processing of titles, and that the amalgamated grant was duly issued to him by the Government upon surrender of the original titles.

15. Maureen Nafula Maira (PW3), a land valuer with Joe Musyoki Valuers, produced two valuation reports dated 2nd and 6th November 2017 assessing the value of the suit property and improvements prior to demolition. She testified that the reports were premised on an earlier report by M/s Lloyd Masika. On cross-examination, she stated that she became a full member of the Institution of Surveyors of Kenya in May 2019, was unaware of how instructions for the valuations were received, confirmed that at the time of inspection, the

property was being used as a

road reserve, and acknowledged that the title appeared in the Ndungu Report.

16. Shemir Omar Yakub (PW4) adopted his statement dated 7 November 2017 and produced a lease dated 21st December 1995 and a court order in **Nairobi HC Misc. Application No. 19 of 2008**. He testified that he was a director of 2nd appellant, which leased the suit property from the 1st appellant and operated its transport business thereon. He stated that on 1st November 2008, Ministry officials demolished the company's premises in violation of subsisting court orders staying enforcement of demolition notices. He particularized the company's alleged loss at Kshs.246,831,982 and urged that the reliefs sought be granted. On cross-examination, he conceded that there was no company resolution authorizing the suit; that the lessor, the 1st appellant, was his father, co-director, and majority shareholder; that the lease was unregistered; and that he had no evidence of rent payment. He further acknowledged lack of police reports or abstracts regarding the alleged losses and inability to independently verify the figures claimed, relying instead on a consultant's evidence. In re-examination, he stated that he was unaware of any compulsory acquisition of the property in the 1960s and maintained that the demolition adversely affected the company's operations, including its contract with Shell Tanzania.

17. Jeremy Riro (PW5) adopted his statement dated 14th October 2019 and produced a claim assessment report dated 20th November 2017. He testified that he was a financial analyst and certified public accountant with five years' experience. On cross- examination, he conceded that he had no documentary proof of his qualifications, that he was instructed specifically to prepare a report to support a pending court claim, and that the data underpinning his report was supplied by the 2nd appellant's company's management. He acknowledged that he could not independently vouch for the figures provided and had not been furnished with police occurrence book entries relating to the alleged losses. In re-examination, he maintained that there was no regulatory body for financial analysts in Kenya and reiterated that his mandate was confined to analysing figures supplied by the client.

18. In opposing the suits, the respondent adduced evidence through: Thomas Gicira Gacoki (DW1), Manager in charge of Surveys at the Kenya National Highways Authority, who adopted his witness statements filed in both suits and produced documentary exhibits. He testified that in 1962 the Government compulsorily acquired approximately 8.48 acres from L.R. No. 1012/27 (owned by Salopia Limited) for the expansion of the Nairobi–Thika Road, including the construction of the Kasarani (Roy Sambu) interchange. The acquisition was effected through written agreements,

compensation was paid, and the land was

surveyed as L.R. No. 8369/1 and transferred to the Government in 1967. He stated that the land remained a road reserve vested in the Roads Department and was never available for alienation. He further testified that in 2003 the Ministry issued notices requiring removal of encroachments on road reserves and that, following financing arrangements for the highway upgrade, the Government cleared encroachments and handed over the site to the contractor. He maintained that any subsequent purported allocation or registration was invalid, as the land had already been acquired, and that the appellants' structures were among several removed. He produced survey plans and acquisition documents to demonstrate that the suit property fell within L.R. No. 8369/1 and asserted that PW1's subsequent survey plans were prepared despite the existence of prior registered surveys. On cross-examination, he reiterated that the land was Government property and unavailable for alienation, stated that the 1994 PDP was prepared over an existing road reserve without involvement of the Road's Authority, and indicated that the Ministry of Lands would explain any purported allocation. In re-examination, he maintained that the acquisition purpose remained consistent and that PW1 failed to consider existing survey records.

19. Gordon Odeka Ochieng (DW2), Senior Assistant Director, Land Administration at the Ministry of Lands and Physical Planning, adopted his witness statement dated 15th April

2019 and

produced 31 exhibits. He testified that L.R. No. 21639 (Grant No. IR 68678) was a consolidation of L.R. Nos. 20230 and 20231, which originated from surveys of “Unsurveyed Commercial Plots A and B,” but the allocation, transfer, and amalgamation should not have been authorized because the suit property was not available for alienation. He explained that the property fell within

L.R. No. 8369/1, a parcel of 8.48 acres compulsorily acquired by the Government in 1962 for Nairobi–Thika Road expansion, surveyed as Survey Plan F/R 105/39, and registered as IR 12806/19 in 1967. He stated that there was no record of any lawful application for allocation, that the letters of allotment and grant conditions were not complied with, and that the plots were part of an already surveyed road reserve.

20. On cross-examination, he confirmed that the letters of allotment and subsequent titles were issued and processed by the Commissioner of Lands but faulted the office for the improper alienation. He stated that the 1st appellant, though not involved in the alienation, failed to exercise due diligence before purchasing the land, and he criticized PW1 for disregarding the existing 1960s survey plans. He added that the 1994-Part Development Plan relied upon by the appellants was subject to the pre-existing survey records.

21. In the judgment, the learned Judge considered the following

issues inter alia with respect to **ELC Case No. 553 of 2009**: whether the title held by the 1st appellant, IR No 68678,

comprising L.R. No 21639, was valid; whether the said title related to a road reserve; whether the demolition carried out by the Ministry on the suit property on 1st November 2008 was lawful; whether the 1st appellant was entitled to any of the reliefs sought in the amended plaint dated 7th December 2017; and whether the respondent, on behalf of the Ministry responsible for roads, was entitled to any of the reliefs sought in the counterclaim. With respect to **ELC Case No 552 of 2009**, the learned Judge considered inter alia: whether the 2nd appellant was a lawful registered lessee of the suit property.

22. The learned Judge in dealing with the first two issues inter alia: (whether the title held by the 1st appellant, I.R. No. 68678, comprising L.R. No. 21639, was valid and whether the said title relates to a road reserve) found that the Grant I.R. 68678, held by the 1st appellant and comprising L.R. No. 21639, was null and void. The superior court noted that the land in question had been compulsorily acquired in the 1960s by the Department of Roads for the expansion of the Nairobi–Thika Road and existed as a registered and surveyed road reserve at the time the 1st appellant and others attempted to procure new titles. The superior court further held that the title had been obtained through misrepresentation and fraudulent procurement, including the involvement of the 1st appellant and his surveyor in ignoring prior surveys and registrations. Consequently, the court concluded that the

land was never available for alienation

as unsurveyed commercial plots, and therefore, the title claimed by the 1st appellant could not be recognized as valid.

23. On the third issue of whether the demolition carried out by the Ministry on the suit property on 1st November 2008 was lawful, the learned Judge found that the demolition carried out by the Ministry on 1st November 2008 was unlawful. It was noted that a valid court order, issued in **Nairobi High Court Miscellaneous Application No. 19 of 2008,** prohibited the Ministry from demolishing the structures pending the disposal of a judicial review application and had been properly served on the relevant accounting officer. The superior court observed that, although the project was of public importance and timely execution was desirable, there was no justification for disregarding the court order. The Ministry should have applied for a stay of the order through the respondent if urgent action was necessary. Instead, the Ministry deliberately ignored the court order and proceeded with the demolition, which constituted a breach of the order and rendered the demolition unlawful.

24. As to whether the 1st appellant was entitled to any of the reliefs sought in the amended plaint dated 7th December 2017, it was found that the 1st appellant was entitled only to damages equivalent to the value of the demolished improvements on the suit property, assessed at Kshs.65,000,000/, with interest at the court rate from the

date of judgment. The superior court noted that his claim for declaratory relief regarding the validity of his

title was unavailable because the title was null and void and related to a road reserve. Similarly, claims for restoration to the property, general damages, and other alternative reliefs, including medical expenses, were not granted, as the evidence did not support them and, but for the Ministry's unlawful disregard of a subsisting court order, the 1st appellant would not have been entitled to any relief. The superior court emphasized that the damages awarded were solely attributable to the Ministry's breach of the court order.

25. As to whether the respondent, on behalf of the Ministry responsible for roads, was entitled to any of the reliefs sought in the counterclaim, it was found that the respondent was entitled only to a declaration that the 1st appellant's title was null and void and to an order cancelling the title. The superior court noted that the other reliefs sought, including general and special damages, a declaration of illegal occupation, exemplary damages, and costs of the suit, were not granted because many of the officials involved in the irregular generation of the impugned title were officers within the Ministry of Lands, and the respondent had not produced evidence to support the claims for costs or other damages.

26. As to whether the 2nd appellant was a lawful registered lessee, the learned Judge found that the appellant had not demonstrated, on a balance of probabilities, that it was a lawful registered lessee of the suit property. It was noted that

the lease

presented by the company was unstamped, unregistered, and in the name of a different company. It was also observed that the lease had expired in 2005 and there was no evidence of its renewal. Although the 1st appellant was the majority shareholder and chairman of the 2nd appellant, the company failed to discharge its evidential burden to show that it held a valid registered lease in respect of the suit property. Consequently, it was held that it was not a registered lessee in occupation of the suit property at any material time and therefore was not entitled to any of the reliefs sought against the respondent herein.

27. The learned Judge thus issued the following final orders inter alia:

> ***"89. In the end, the plaintiff's claim in ELC Case No 553 of 2009; the Attorney General's counterclaim in ELC Case No 553 of 2009; and the plaintiff's claim in ELC Case No 552 of 2009 are disposed as follows, in tandem with the respective reliefs sought and the findings of the court on the key issues in the two primary suits and in the Attorney General's counterclaim: -***
>
> ***a) Mr. Omar R Yakub, the plaintiff in ELC Case No 553 of 2009, is hereby awarded Kenya Shillings Sixty-Five Million (Kshs. 65,000,000) as damages equivalent to the value of the improvements that were demolished by the Ministry responsible for roads on 1/11/2008 on Land Reference Number 8369/1,***

which piece of land had been irregularly alienated and registered by

the Department of Lands as Land Reference Number 21639 comprised in Grant Number IR 68678, principally because the said demolition was carried out in contravention of a subsisting court order. Interest shall accrue at court rate from the date of judgment.

b) It is hereby declared that Grant Number IR 68678 in which Land Reference Number 21639 is comprised and which is held by Mr Omar R Yakub was obtained illegally and is null and void because it relates to an already surveyed and registered land that was compulsorily acquired for expansion of Thika Road and was not available for alienation as unsurveyed commercial plots.

c) It is hereby ordered that the Chief Land Registrar shall cause the said Grant Number IR 68678 comprising of Land Reference Number 21639 to be cancelled forthwith.

d) The rest of the reliefs sought in the primary suit and in the counterclaim in ELC Case No 553 of 2009 are declined.

e) The plaintiff's suit in ELC Case No 552 of 2009 is dismissed for lack of merit.

f) Parties shall bear their respective costs in the two primary suits and in the Attorney General's counterclaim."

28. Aggrieved by the above decision, the appellants move this Court on the grounds inter alia:

“1) That the learned Judge erred in law in ignoring the doctrine of indefeasibility of title as

guaranteed by the Government of the Republic of Kenya under the Torrens System of Registration, as the keeper of the master record of all land and their owners as decreed by section 23(1) of the Registration of Titles Act (repealed).

2) ***That the learned Judge erred in law and fact in ignoring the fact that the 1st appellant herein was a bona fide purchaser for value who had no notice of any defect in the title to all that parcel of land known as L.R. No. 21639 prior to purchasing the allotment interest from the original allotees, Mr. Geoffrey Mukana and Mrs. Jane Musandu.***
3) ***That the learned Judge erred in law in holding that the suit property was a road reserve and not available for allocation to Mr. Geoffrey Mukana and Mrs. Jane Musandu.***
4) ***That the learned Judge erred in holding that the 1st appellant's title to the suit property was illegally acquired and bereft of constitutional protection under Article 40 of the Constitution of Kenya.***
5) ***That the learned Judge erred in law and fact in faulting the 1st appellant's surveyor (PW1) for failing to establish whether there was any previous surveys despite evidence showing that no such records were available and that the survey of Kenya registered the 1st appellant's survey.***
6) ***That the learned Judge erred in law and fact in finding that the 1st appellant's surveyor misrepresented the suit property as unsurvey commercial plots despite evidence showing that the basis of the survey was information provided by the director of surveys.***
7) ***That the learned Judge erred in both law and fact in applying the provisions of the Land Registration Act 2012 to the transaction in***

respect of the suit property and impeaching the 1st appellant's title to the suit property only on account of the alleged extraordinary expediency and alacrity from the land office without any proof of participation in the alleged irregularity and impropriety on part of the appellant.

8) ***That the learned Judge erred in law and fact in finding that the 1st appellant and his surveyor are involved in misrepresentation that led to the procurement of the titles.***
9) ***That the learned Judge erred in law and fact in finding that the 2nd appellant was not a tenant on the suit property despite the fact that the 2nd appellant's name was changed from Roy Spares and Hauliers Limited to Roy Hauliers Limited.***
10) ***That the learned Judge erred in law and fact in declining the prayer for compensation of the 2nd appellant for loss of business despite finding that the demolition of the buildings on the suit property was done in contravention of a court order.***
11) ***That the learned Judge erred in descending into the arena of litigation and making sweeping assumptions and conclusions not borne by evidence and or supported by the material placed before the superior court.***
12) ***That in circumstances of this case, the learned Judge abdicated his constitutional, statutory and judicial mandate of fair adjudication and the analysis of facts, evidence and findings and perpetuated and injustice in breach of articles 48 and 159 of the Constitution of Kenya and sections 1A and 1B of the Civil Procedure Act, Cap 21, Laws of Kenya.***
13) ***That the learned Judge erred in law in making orders that violated the Constitution and the due proper administration of justice.***

14) That the learned Judge in delivering the subject judgment, violated the overriding objective

contained in section 3B(1) of the Civil Procedure Act in that his Lordship failed to handle the matter for the purpose of attaining a just determination thereof.

15) ***That the learned Judge subverted the overriding objective contained in section 3A(1) of the Civil Procedure Act which obliged the learned Judge to facilitate a just resolution of the matter before the honourable court.***
16) ***That the learned Judge erred in law in making order that violated the appellant's property rights guaranteed under Article 40 of the Constitution.***
17) ***That the learned Judge erred in reaching a determination without regard to documents, submissions and the evidence led on behalf of the appellant during the hearing of the suit.***
18) ***That the judgment and decree of the superior court issued on 5th August 2021 is unjust and a gross denial of justice to the appellant.***
19) ***That in the circumstances of this case, justice was perverted."***

29. When the appeal came up for hearing, learned counsel Mr. Obuya was present for the appellants, while learned counsel Mr. Eredi was present for the respondent. Both parties had filed written submissions. It was consensual that the appeal be determined on those submissions, with brief highlights.

30. According to learned counsel Mr. Obuya, it was urged that the learned Judge erred in law in finding that the 1st appellant's titles, L.R. Nos. 20230 and 20231, had been acquired by the government for road development. He

argued that the surveyor’s evidence, including a surveyor’s report and the part development

plan, showed clearly that the road did not pass through the suit properties and that the properties were independent and not part of L.R. No. 8369 acquired in 1966 for road purposes. Accordingly, he contended that the Judge wrongly nullified the titles. Regarding the 2nd appellant, Mr. Obuya submitted that the Judge erred in declining to award damages for loss of business, noting that although the lease had expired, **section 62** of the **Land Act** provides that where the landlord continues to accept rent, and the tenant remains in occupation, the lease is deemed to continue. He therefore prayed that the appeal be allowed.

31. In opposing the appeal, learned counsel Mr. Eredi submitted that the trial court was correct in declining the 2nd appellant's claim for compensation because the lease was unregistered, had expired, and was not in the 2nd appellant's name, making any obligations personal and unenforceable against the whole world. Regarding the 1st appellant, he argued that the suit properties were lawfully acquired by the government in 1962 and never surrendered for reallocation, so the appellants' subsequent acquisition of L.R. 20230 and 20231, including the unlawful amalgamation and extension into road reserve and police station land, were invalid. He further contended that the 1st appellant's title was tainted, as the letters of allotment were obtained from individuals who had not complied with their terms and were registered in a single day, emphasizing that indefeasibility under the **Land**

Registration Act and **Article 40(6)** of the

Constitution only protects lawfully acquired titles. He urged the court to uphold the trial court's judgment, reject the appellants' authorities, and dismiss the appeal.

32. It was submitted by the appellants that the 1st Appellant was the lawful registered owner of L.R. No. 21639 (Grant No. I.R. 68678), having held an uninterrupted 99-year lease from 1st July 1994, and that the 2nd Appellant had lawfully occupied the property as a lessee for use as its transport company headquarters. They contended that the title was valid, had never been lawfully challenged, cancelled, or nullified, and that the 1st Appellant had consistently paid land rent and rates to the national and county governments, which continued to demand and accept such payments. They further submitted that all necessary approvals for the amalgamation, extension, and development of the property had been duly obtained and paid for. They asserted that, notwithstanding these facts, officials from the Ministry of Roads and Public Works unlawfully entered the property and demolished the premises on 1st November 2008, in defiance of a subsisting High Court order granting leave to commence judicial review proceedings, which leave was ordered to operate as a stay of the intended demolition. They added that the Permanent Secretary had subsequently been found in contempt of court and fined. The Appellants, therefore, maintained that they were aggrieved by the judgment of the

Environment and Land Court and appealed against the entire decision.

33. As to whether the learned Judge erred in ignoring the doctrine of indefeasibility of title under the Torrens System of registration, it was submitted that the learned Judge erred in disregarding the doctrine of indefeasibility of title under the Torrens System, under which the register is conclusive and a registered proprietor's title is indefeasible save on proof of fraud or misrepresentation to which the proprietor is a party. They relied on ***Fels -vs- Knowles (1906) 26 NZL.R. 604, 620***, which held that the register is everything and that, absent fraud, registration confers an indefeasible title against the world. Citing ***Embakasi Properties Limited & Another -vs- Commissioner of Lands & Another [2019] eKLR***, they emphasized that under **section 26** of the **Land Registration Act** a certificate of title is *prima facie* evidence of absolute ownership and may only be impeached on grounds of fraud, misrepresentation, or illegal and unprocedural acquisition. In ***Dr. Joseph Arap Ngok -vs- Justice Moijo Ole Keiuwa & 5 Others [1997] eKLR***, the Court of Appeal held that title arises upon issuance of a letter of allotment, compliance with its conditions, and issuance of a title document, and that Section 23 of the repealed Registration of Titles Act conferred absolute and indefeasible title subject only to fraud or misrepresentation attributable to the proprietor. That position was reaffirmed in ***Wreck***

Motor Enterprises -vs-

Commissioner for Lands & Others [1997] eKLR., where the Court held that in the absence of fraud, a registered proprietor's title is supreme and sanctified by statute. Similarly, in ***George Cheyne & 20 Others -vs- Robin Munyua Kimotho & 3 Others Civil Appeal No. 272 of 1998***, the Court upheld title where no fraud or misrepresentation by the registered owner was pleaded or proved.

34. The appellants also relied on ***David Peterson Kiengo & 2 Others -vs- Kariuki Thuo Machakos HCCC No. 180 of 2011***, which explained that under the Torrens System the State guarantees the accuracy of the register and a purchaser need not investigate past dealings; and on ***Mike Maina Kamau -vs- Attorney General [2017] eKLR***, where this Court held that absent evidence of fraud and where the root of title is traceable, the proprietor holds a good title. They further cited ***Punda Milia Co-Operative Society -vs- Savings & Loan (K) Ltd Nairobi HCCC No. 273 of 2008***, which affirmed that a certificate of title is conclusive evidence of ownership subject only to fraud or misrepresentation, and ***Commissioner for Local Government Lands & Settlement -vs- A. Kaderbhai (1929-30) KLR***, in which the Privy Council, recognized that the Crown, acting within statutory authority, may dispose of land as a private owner and that no individual has a right to challenge such disposition absent statutory breach. Based on these

authorities, the appellants contended that, no fraud, illegality, or corrupt

scheme having been proved against the 1st appellant, the learned Judge ought to have upheld the sanctity and indefeasibility of the registered title.

35. In conclusion, the appellants submitted that the learned Judge erred in law and fact in declining the 2nd appellant's claim for compensation on the basis that the lease was unregistered and had lapsed. They contended that the lease agreement between Omar Rahimtulla Yakub and Roy Spares and Hauliers was valid and enforceable as a contract notwithstanding its non- registration, its terms being unequivocal. They further argued that the landlord's continued acceptance of rent after expiry of the term gave rise to a recognized tenancy, and by virtue of **section 60(2)** of the **Land Act**, such continued acceptance of rent for two months after termination created a periodic month- to-month tenancy. They maintained that the change of name from Roy Spares and Hauliers Limited to Roy Hauliers Limited did not extinguish the tenancy, and that the learned Judge therefore erred in finding that the 2nd appellant was not a tenant and in declining to award compensation for loss of business, particularly after finding that the demolition was carried out in contravention of a court order.

36. In opposing the appeal, the respondent submitted that L.R. No. 21639 was unlawfully and unprocedurally created out of land originally compulsorily acquired in 1962 for the

expansion of Thika Road, and that the allocation was *ultra vires* the powers of

the Commissioner of Lands under the repealed **Government Lands Act,** as the land remained alienated public land and had never been surrendered back for reallocation. It was contended that the appellants knew or ought to have known, upon due diligence, that no private interest could lawfully pass, particularly in light of Legal Notice No. 3632 of 6th June 2003, warning that encroachments on the road reserve would be demolished. The respondent further alleged that the appellants unlawfully amalgamated and extended the parcels into the road reserve and adjacent public land in collusion with the Commissioner of Lands. It was argued that the demolition formed part of the Nairobi–Thika Highway expansion project funded under an agreement with the African Development Fund and was necessary to remove illegal encroachments hindering a flagship Vision 2030 project, noting that other similarly situated structures were also removed. The respondent maintained that no PDP was required as the land had long been surveyed for road purposes, and that any defect in the survey giving rise to the appellants' title was attributable to the licensed surveyor, for which the Government bore no liability under **section 21(2)** of the **Survey Act.**

37. It was the respondent's submission that the appellants' title to the suit property was not indefeasible because the land which had been compulsorily acquired for public purposes, specifically for the Kasarani traffic interchange, and

remained public land

was incapable of alienation to private persons. It contended that the allocation to the appellants was therefore null and void, citing ***Niaz Mohammed -vs- Commissioner for Lands & 4 Others [1996] eKLR*** and the Supreme Court in ***Town Council of Awendo -vs- Nelson Onyango & 13 Others; Abdul Malik Mohamed & 178 Others [2019] eKLR.***, which held that unutilized portions of land acquired for public purposes remain public and cannot be alienated for private use. The respondent argued that the appellants' actions, including amalgamation and extension of parcels, were fraudulent attempts to conceal illegality, relying on ***Kenya Urban Roads Authority & Another -vs- Belgo Holdings Limited [2025] KECA 764 (KL.R.)*** *and* ***Kenya National Highway Authority -vs- Salien Masood Mugsal & 5 Others [2017] eKLR***. It further cited authorities emphasizing the supremacy of public interest over private gain, including ***Republic -vs- Minister for Transport & Communication & 5 Others ex parte Waa Ship Garbage Collector & 15 Others [2006] 1KL.R. (E&L) 563*** and ***Mureithi & 2 Others [2006] 1 KLR 443***, which condemned diversion of public land for private enrichment. The respondent submitted that the appellants were not *bona fide* purchasers for value without notice, that the letter of allotment was irregularly transferred and not properly accepted, and that they failed to prove compliance with the conditions of the grant or payment of the purchase price, citing ***Munyu Mama -vs- Hiram Gathiha Mania,***

Nyeri CA No. 239 of 2009. Consequently, it contended

that the appellants' registration and purported ownership were

void, illegal, and unenforceable.

38. As to whether the 2nd appellant was entitled to compensation, the respondent submitted that the trial court correctly declined to award compensation to the 2nd appellant because the appellants' title to the suit property was null and void, having been acquired illegally, and that courts cannot enforce claims arising from illegality, relying on ***Moses Okatch Owuor & another -vs- Attorney General [2017] eKLR, Torino Enterprises Limited -vs- Attorney General [2023] KESC 79,*** and ***Funzi Development Ltd & others -vs- County Council of Kwale (Civil Appeal No. 252 of 2005).*** It was argued that the property had been compulsorily acquired in 1962 for the Kasarani traffic interchange and remained public land, unavailable for private alienation, and that the appellants' conduct in processing allotments, transfers, and approvals evidenced collusion and fraud. Reference was made to the following cases: ***Chemey Investment Ltd -vs- Attorney General & 2 others*** **[2018] KECA 863;** ***Redcliff Holdings Ltd -vs- Registrar of Titles & 2 others*** **(2017) eKLR.;** ***Muriithi & 2 Others -vs- Attorney General*** **(2006) 1 KL.R. 443;** ***Dickson Ndegwa Mbugua -vs- City Council of Nairobi,*** **Civil Appeal No. 254 of 2010;** and ***Narok County Government -vs- Livingstone Kunini Ntutu & 2 others [2018] eKLR*****.**

39. It was further submitted that the appellants were not *bona fide* purchasers for value without notice. Reference was made to the cases of ***Katende -vs- Haridas & Co Ltd, Civil Appeal 84 of 2004; Johnson Mugwa Wanganga -vs- Joseph Nyaga Karingi, Civil Appeal No. 4 of 2011***. That any losses claimed, including trade debts or non-repayment of loans, were remote and not a foreseeable consequence of a landlord-tenant breach, as was the case in ***Hadley -vs- Baxendale* 1854**, and therefore the 2nd appellant was not entitled to compensation.

40. This is a first appeal. It is by way of retrial. This Court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. The Court can only interfere with the trial court's findings of fact if it appears either that the trial Judge failed to take into account relevant considerations or has taken into account irrelevant considerations or he was plainly wrong. (See ***Abdul Hameed Saif -vs- Ali Mohamed Sholan [1955], 22 E. A. C. A. 270***).

41. Upon carefully considering the record of appeal, the impugned judgment, the grounds of appeal, the parties' submissions, and the law, we find that this appeal will turn on the following issues, namely; whether the 1st appellant had a valid title over the suit property; whether the learned Judge

erred in finding that there was no existing lease agreement between the appellants herein;

and whether the learned Judge erred in declining to grant compensation to the 2nd appellant's for the loss of business despite holding that the demolitions were done in contravention of an existing court order.

42. On whether the 1st appellant held a valid title, it is our finding that the superior court correctly analyzed whether the Grant I.R. No. 68678, comprising L.R. No. 21639, was valid and whether it related to a road reserve. The superior court found that the land had been compulsorily acquired in 1962 by the Roads Department for the expansion of the Nairobi–Thika Road and existed as a registered, surveyed road reserve at that time. The attempted procurement of a new title by the 1st appellant involved misrepresentation and fraudulent conduct including the disregard of prior survey records and registered interests and was therefore unlawful. As a result, the suit property was never available for alienation as unsurveyed commercial plots, and the title claimed by the 1st appellant could not be recognized.

43. It is settled that land compulsorily acquired for public use cannot be diverted to private use unless the law expressly permits it. The Supreme Court held in ***Town Council of Awendo -vs- Nelson Onyango & 13 Others; Abdul Malik Mohamed & 178 Others [2019]*** that unutilized portions of land acquired for public purposes remain public land and can

only be applied to public use or otherwise only with stringent conditions promoting public interest.

44. Moreover, as held in ***Torino Enterprises Limited -vs- Attorney General*** ***[2023] KESC 79 (KLR),*** titles derived from irregular or unlawful allocation processes are tainted and cannot benefit from the doctrine of indefeasibility of title. Likewise, in ***Chemey Investments Limited vs The Attorney General & Others*** ***[2018] KECA 863***, titles obtained through irregular processing and registration were held to be vulnerable to challenge. In the present case, the title's root was tainted by fraud and irregularity, and therefore could not confer a valid proprietary right.

45. On the lawfulness of the demolition and the reliefs due to the 1st appellant, the superior court found that the demolition carried out on 1st November 2008 was unlawful because it contravened a valid court order in **Nairobi High Court Miscellaneous Application No. 19 of 2008,** which had been properly served on the relevant accounting officer. While the Ministry's project was of public importance, lawful process, including a stay application, should have been followed. The deliberate disregard of the court order rendered the demolition unlawful.

46. However, the superior court correctly limited the 1st appellant's entitlement to damages for the demolished improvements only. Since the title itself was void, declaratory relief against the null title, restoration of the property, or other alternative reliefs could not be granted. The award of

Kshs.65,000,000 with interest

reflects compensation solely attributable to the Ministry's breach of the court order.

47. It is a settled principle of law that a claimant must have a valid proprietary interest to sustain reliefs grounded in title. Where the title is void, relief is limited to quantifiable loss arising from unlawful acts. There is no basis for broader equitable or constitutional relief when the underlying proprietary right is invalid.

48. On the issue of whether the 2nd appellant was a lawful registered lessee, the superior court's finding that it failed to discharge its evidential burden is unimpeachable. The lease was unstamped, unregistered, in the name of a different company, and had expired. There was no evidence of renewal or valid assignment to the 2nd appellant.

49. This Court finds no error in law or fact in the superior court's conclusion that the 2nd appellant was not in lawful possession and therefore was not entitled to any relief against the respondent. Claims for loss of business and compensation cannot stand in the absence of a valid proprietary or leasehold interest: (see ***Funzi Development Ltd & others - vs- County Council of Kwale (Civil Appeal No. 252 of 2005***). Rights cannot be predicated on illegality.

50. Fundamental to this appeal was the appellants' reliance on the Torrens System. It is true that a certificate of title provides *prima facie* evidence of ownership. However, indefeasibility is subject to exceptions such as fraud, misrepresentation, and illegality. Furthermore, the constitutional guarantee of the right to property under **Article 40** does not extend to property that was unlawfully acquired. In the absence of lawful acquisition and compliance with statutory conditions for letters of allotment, the appellants cannot invoke indefeasibility to cure the illegalities identified.

51. This appeal has no merit and is dismissed with costs to the respondents. It is so ordered.

Dated and delivered at Nairobi this 30th day of April 2026.

P.O. KIAGE

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY

REGISTRAR.