



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC PETITION CASE NO. 6 OF 2018

MUNYAO SILA

LINDA CHEPKORIR RUTO.....PETITIONERS

VERSUS

COUNTY GOVERNMENT OF KAKAMEGA

KAKAMEGA COUNTY DEV. CONTROL

& DISPUTES RESOLUTION COMMITTEE.....RESPONDENTS

JUDGEMENT

In a petition dated 9th November, 2018, the petitioners submitted that they are jointly the sole and lawful proprietors of the leasehold title comprised in the land parcel Kakamega Municipality/Block III/7 situated within Kakamega Municipality, which is a lease by the 1st respondent for 99 years from 1st July, 2001, and which land measures 0.2025 Ha (approximately ½ an acre). The petitioners purchased the leasehold title in the land parcel Kakamega Municipality/Block III/7 from its previous registered owner and became registered as proprietors on the 22nd November, 2011. That the said property is adjacent to Kakamega Bukhungu Stadium. That the petitioners have dutifully been paying the land rates and land rents due to the 1st respondent and the 1st respondent recognizes the petitioners as the lawful proprietors of the leasehold title comprised in the suit property. That at the time the petitioners purchased and became registered as proprietors of the suit property, the suit property was vacant and devoid of any developments and did not have any perimeter fencing. That owing to its open nature, its proximity to the Bukhungu Stadium, and to the Kakamega Central Business District, the property was prone to encroachment and trespass by individuals, land grabbers and speculators. That indeed, there was an encroachment on the suit property sometimes in the year 2012, which led to the petitioners instituting in the High Court of Kenya at Kakamega, a case against the encroachers, being Kakamega HCCC No. 266 of 2012, Munyao Sila & Linda Chepkorir Ruto vs. Shem Abuti & Another. That upon the said case being filed, and upon it becoming apparent that the defendants in the said case had trespassed into private property, the said defendants vacated the suit property, and the case is only alive for purposes of assessing damages due to the petitioners (as plaintiffs in the said suit). That after the incident leading to the said suit, it became apparent to the petitioners that there was an urgent need to have a perimeter wall around the suit property, not only to secure it, but also to prepare it for future developments.

That on the 12th October, 2015, the petitioners applied for planning permission to develop a wall around the suit property. That the plan to develop the wall was duly approved by the 1st and 2nd respondents through its officials. That upon approval, the petitioners engaged a contractor, to proceed and erect a permanent stone wall around the suit premises at a cost of Ksh. 2,500,000/=. That in the meantime, the petitioners, with the aim of investing further in the suit property, engaged a registered physical planner, to proceed and apply for a change of user of the suit property from residential to commercial, which change of user was allowed without any problem. That upon completion of the wall, and since the petitioners do not reside in Kakamega, the petitioners engaged one Richard Kubondo, a resident of Kakamega, to look after the property, and also engaged the services of Demo Security Services Company, to safeguard the property. That on 7th December, 2017, some persons who claimed to have been sent by the respondents, descended on the property of the petitioners, tied up the day guard, and started demolishing the wall erected around the suit property. That a report was made to the Kakamega Police Station, and on being confronted, the goons hired by the 1st respondent disappeared, but with a threat that they will be back at a time when the petitioners can do nothing to them. That on the same day, the petitioners through their advocates on record, wrote to the 1st respondent, demanding an explanation on the above acts of demolition, but no response was received and the said letter was ignored. That on 11th December, 2017, at about 6 p.m. in the evening, the 2nd respondent, without any prior notice or letter to the petitioners, placed on the wall of the suit property, a purported “Enforcement Notice”, inter alia stating that the wall was not approved, and giving the petitioners 24 hours to demolish it. That the purported notice was wrongful, illegal, unenforceable, and tainted with bad faith and/or malice.

That on the night of 12th/13th December, at about 1 a.m. the respondents, with the assistance of a bulldozer, and/or their servants/agents, proceeded to demolish the petitioners’ wall in the suit premises. That the destruction of the wall, was illegal, and an act of malice and/or bad faith. That it has indeed become clear to the petitioners that the demolition of their wall had nothing to do with any failure to acquire the

requisite approvals but was part of a larger scheme to expropriate and forcefully take the petitioners' land. That in the month of September/October, 2018, the respondents and/or their servants/agents entered the land of the petitioners, and embarked on construction works therein. That these construction works entailed erecting a wall on one side of the petitioners land so as to annex it to be part of Bukhungu Stadium. The construction works also entailed laying cabro works on the land so as to make it a parking for the Bukhungu Stadium. That when the petitioners got wind of these works, they instructed their counsel on record to write a demand letter to the respondents to stop the said works. The demand letter was ignored and the respondents continued with their construction works. That the petitioners also made a report to the Kakamega Police Station, but no action was taken, the police stating that their hands were tied as the matter is one relating to the County Government. That on the 20th day of October, 2018, during the Mashujaa Day festivities, the respondents permitted the use of the petitioners land as a parking area for the public. That it is now apparent that the respondents have completed a forceful taking of the petitioners' property and have converted the land of the petitioners for use by the general public. That the respondents have essentially and forcefully expropriated the property of the petitioners without following the procedure for compensation as laid down in Article 40 of the constitution, and statute law, specifically Part VIII of the Land Act, 2012. That the actions of the respondents comprise a forceful expropriation and/or constructive expropriation, a taking and/or constructive taking without offering any compensation to the petitioners which is also a breach of fundamental human rights recognized in this land and in international law.

They submit that the Legal Foundation of this petition is as follows; that Article 2 (1) of the constitution, binds all person and state organs including the respondents to adhere by the constitution and its principles. That Article 2 (5) and (6) provide for the observance of general rules of international law and treaties and/or conventions form part of the law of Kenya and the same need to be adhered to which include treaties on fundamental rights and freedoms. That under Article 3 (1) of the Constitution, every person has an obligation to respect, uphold and defend the Constitution. That Articles 10 of the constitution espouses the principles of governance, and pursuant thereto, the respondents are inter alia obligated to exercise good governance, integrity, transparency and accountability. That Articles 19, 20, 21, 22 and 23 of the Constitution, protect the petitioners' fundamental rights and freedoms, and permit the petitioners to seek redress in a court of law, as the petitioners have now done through this petition. That pursuant to Article 27 of the Constitution, the petitioners have a right not to be discriminated against and have every right to be treated equally with others who own property within Kakamega County. That pursuant to Article 28 of the Constitution, the petitioners have a right to dignity and have a right to have that dignity respected and protected. That pursuant to Article 40 of the Constitution, the petitioners have a right to acquire and own property, and have a right to enjoy the same, and further have a right not to have their enjoyment of their property restricted, and further have a right not to be deprived of their property without full compensation. This is also the position in international law, particularly Article 17 of the Universal Declaration of Human rights, 1948 and other international instruments. That pursuant to Article 47 of the Constitutional and the provisions of the Fair Administrative Action, Act, Act No. 4 of 2015, the petitioners have a right to fair administrative action. That pursuant to Article 50 (1) of the Constitution, the petitioners have a right to a fair hearing. That the respondents were in violation of Articles 2 and 3, 10, of the Constitution as they failed to appreciate that the Constitution is the supreme law and failed to uphold the Constitution and further failed to be governed by the principles and provisions of the Constitution before proceeding to demolish the petitioners' wall and before expropriating and/or taking over the property of the petitioners. That the respondents have violated Article 40 of the Constitution by expropriating the property of the petitioners and converting their property into public use without compensating the petitioners.

That the act of demolition of the wall by the respondents and the act of expropriating the property of the petitioners was also in violation of the provisions of the Land Act, 2012 and the Land Registration Act, 2012 and the Common Law, in relation to leases and specifically violated the implied covenants thereto. The acts of the respondents are tantamount to eviction and/or constructive eviction of the petitioners from their property. That as a result of the actions of the respondents, the petitioners are now holding a worthless title for they are completely unable to utilize their land. Their land has now been rendered open for use by the public and to them it is now land that they cannot utilize and enjoy. That the actions of the respondents are acts of eviction and/or constructive eviction and/or a taking and/or a constructive taking of property without full compensation. That if the petitioners are condemned to continue holding the lease, they will not derive any value from it and will in fact have to continue paying rent and rates to the respondents at no benefit. That the petitioner should not be condemned to hold a lease which has already been expropriated and frustrated by the lessor and has rendered the same unusable by the petitioners. That consequently, the petitioners are entitled to full compensation of the property and entitled to surrender the lease to the respondents upon payment of full compensation. That the value of the property is Ksh. 42,900,000/= which the petitioners hereby claim as full compensation, and the petitioners, if this claim is allowed by this honourable court, are ready to surrender the leasehold title to the respondents. The respondents should also pay Ksh. 2,500,000/= for the demolished wall and other expenses and costs incurred by the respondents alongside damages as prayed herein. That in the alternative, the respondents should jointly and/or severally, be ordered to pay full compensation for the demolished wall to the petitioners, and/or be ordered to construct the wall as it was before, and further be ordered to give an undertaking not to interfere with the use of the premises, and further provide security at their own cost to the premises for the duration of the leasehold title and be liable for any further interference on the suit property by any person. That as a further result of the actions of the respondents, the petitioners have been put through great pain, anguish and psychological trauma, for which the respondents ought to compensate the petitioners through payment of general damages. That the petitioners seek the court to make clear, that no authorities are above the law, that no person in Kenya should suffer at the hands of administrative authorities as the petitioners have, and the petitioners further be vilified for the acts of impunity that they have demonstrated. That in any event, the actions of the respondents are actions that should be condemned in no uncertain terms, and ought to invite the payment of exemplary damages. The petitioners pray for the following orders;

A. Main Claim

- (a) A declaration that the respondents abused their office and acted illegally and unconstitutionally in facilitating, the demolition of the perimeter wall to plot No. Kakamega Municipality Bloc III/7.
- (b) A declaration that the respondents, jointly and/or severally, for the reasons stated in this petition, are in violation of Articles 2, 3, 10, 19, 20, 21, 27, 28, 40, 47, 50 (1), of the Constitution and the provisions of the Fair Administrative Actions Act, the Physical Planning Act, the Land Act and land Registration Act, and International Law in so far as the same relate to the petitioners.
- (c) A declaration that the actions of the respondents as outlined in this petition, constitute an eviction and/or a constructive eviction and/or a taking and/or constructive taking of the property of the petitioners for which the respondents are liable to pay full compensation.
- (d) A declaration that the actions of the respondents were actions made by authorities acting in bad faith, maliciously and outside

the bracket of the law.

- (e) An order that the petitioners are entitled to full compensation for the value of the suit property in the sum of Ksh. 42,900,000/= subject only to the petitioners surrendering the leasehold title to the 1st respondent.
- (f) Payment of the sum of Ksh. 2,500,000/= being the costs incurred by the petitioners to put up the wall that the respondents demolished.
- (g) Payment of Ksh. 200,000/= per month as loss of user from the date of demolition of the petitioners' wall to the date of judgment.
- (h) Payment of special damages of Ksh. 60,000/= being payment for professional fees for the valuation report.
- (i) Payment of Exemplary damages jointly and/or severally against the respondents for the illegal demolition of the wall, to be assessed by this honourable court.
- (j) Payment of Exemplary damages jointly and/or severally against the respondents for the illegal expropriation of the petitioners' property without following due process on compulsory acquisition.
- (k) Payment of General Damages jointly and/or severally for pain, anguish, anxiety, suffering and psychological trauma to be assessed by this honourable court.
- (l) Payment of general damages for trespass.
- (m) Interest on the above at court rates.
- (n) Costs of the suit and interest.
- (o) Any other or further relief as this honourable court may deem fit and just to grant.

B. Alternative Claim

That in the event that this honourable court is not persuaded to grant full compensation for the land which is the gist of the main claim, the petitioners seek the following alternative prayers:-

- (a) A declaration that the respondents, jointly and/or severally, for the reasons stated in this petition, are in violation of Articles 2, 3, 10, 19, 20, 21, 27, 28, 40, 47, 50 (1), of the Constitution and the provisions of the Fair Administrative Actions Act, the Physical Planning Act, the Land Act and land Registration Act, in so far as the same relate to the petitioners.
- (b) A declaration be and is hereby issued that the petitioners are the lawful owners of the suit property and are entitled to the quiet enjoyment thereof together with the developments thereon.
- (c) An order against the respondents jointly and/or severally for the payment of the following:-
 - i. Damages for the demolished wall at Ksh. 2,500,000/=.
 - ii. Special damages of Ksh. 60,000/= for the valuation report.
 - iii. Loss of user at Ksh. 200,000/= per month from the date of demolition to the date of this judgment.
 - iv. Interest on the above from the time of filing suit to full payment.
- (d) An order that the respondents do undertake in writing not to interfere with the petitioners reconstruction of the wall, and/or quiet use and occupation of the suit property and a further order for the 1st respondent to provide security to the suit premises for the whole duration of the lease or in the alternative, payment for security services at the rate of Ksh. 20,000/= per month and for the respondents to be made liable or any further damage to the suit property.
- (e) A declaration that the actions of the respondents were actions made by authorities acting in bad faith, maliciously and outside the bracket of the law.
- (f) Payment of Exemplary damages jointly and/or severally to be assessed by this honourable court for the demolition of the wall.
- (g) Payment of general damages jointly and/or severally for pain, anguish suffering and psychological trauma to be assessed by this honourable court.

- (h) Payment of general damages for trespass.
- (i) Interest on (f) and (g) and (h) from the date of judgment till payment in full.
- (j) Costs of the suit and interest.
- (k) Any other or further relief as this honourable court may deem fit and just to grant.

The respondents submitted that, the orders prayed for by the petitioners are not available. That the respondents have in no way violated the petitioner's Constitutional rights as alleged. Though the petitioners have a lease to Kakamega Municipality/Block III/7 the aforesaid lease was fraudulently obtained. The respondents submit that the lease was issued on the 6th November, 2011 after the implementation of the New Constitution and in the process of winding up of the defunct government which were to be taken over by the Counties. There were therefore fraudulent acts and deals by the employees of the defunct government, the issuance of the lease herein being one of them. It follows that since the lease was fraudulently obtained, all the transactions pursuant thereto are all null and void. They relied on the replying affidavit and further affidavit of the respondents and the annexures. The respondents further relied on the following authorities which are persuasive; Solomon K. Songok vs Susan Jepkosgei Eldoret ELC No. 747 OF 2012. The trial court held that "a title issued by way of fraud or misrepresentation of which the holder is proved to be a party, or a title illegally, unprocedurally or through a corrupt scheme is liable to be cancelled". In the case of Moses Okatch Owour & Another vs the Attorney General & Another Nairobi ELC No. 181 OF 2012. The trial court held that; "A certificate of title is an end of a process. If the process that followed issuing the title did not comply with the law, then such a title can be cancelled by the court".

They further submitted that the petitioners' further claim for compensation of destruction of the wall cannot stand. As stated in the respondents' affidavit sworn on the 20th March, 2019, the petitioners were issued Suspension Notice dated 18th November, 2016 and contrary to the aforesaid Notice, before investigations were completed, before the Suspension Notice was lifted, the petitioners gave themselves the right to construct the perimeter wall without the consent from the respondents who are the authorities that issues certificates for such and the aforesaid perimeter wall was constructed without authority. The respondents cannot be held liable for the illegal and premature acts of the petitioners.

On loss of user no loss has been exhibited to this court neither have there been any expected income exhibited to this court to attract an award under this head. It has not been shown that the petitioners have been using the suit land and made any such profits and due to the acts of the respondents, they have been deprived any income.

On the claim for damage for pain, anguish and psychological trauma, it is the respondents' submissions that the petitioners cannot benefit from their own illegal and fraudulent acts. On general damages for trespass; there has been no trespass. As exhibited by a letter from the department of lands, in-charge of land in the entire republic dated 22nd June, 2019, there is no lease on the subject matter herein and therefore there can never be trespass, On exemplary damages, the key issue in this case is the lease which is challenged by the respondents. Any claim cannot arise over a challenged lease. They pray that the court considers the facts, response and issues raised by the respondents in the replying affidavit and further affidavit and dismiss the petition herein with costs.

Analysis and Determination

Upon consideration of the Petition dated the 9th November, 2018 including the supporting and replying affidavits as well as submissions filed herein, the following are the issues for determination:

- Whether or not the title of the suit land held by the petitioners is valid and lawful;
- Whether the Petitioners' fundamental rights and freedoms have been infringed upon;
- Whether the Petitioner is entitled to Compensation; and
- Who should bear the costs of the Petition?

The petitioners submitted that they are jointly the sole and lawful proprietors of the leasehold title comprised in the land parcel Kakamega Municipality/Block III/7 situated within Kakamega Municipality, which is a lease by the 1st respondent for 99 years from 1st July, 2001, and which land measures 0.2025 Ha (approximately ½ an acre). The petitioners purchased the leasehold title in the land parcel Kakamega Municipality/Block III/7 from its previous registered owner and became registered as proprietors on 22nd November, 2011. That on the 12th October, 2015, the petitioners applied for planning permission to develop a wall around the suit property. That the plan to develop the wall was duly approved by the 1st and 2nd respondents through its officials. That upon approval, the petitioners engaged a contractor, to proceed and erect a permanent stone wall around the suit premises at a cost of Ksh. 2,500,000/=. That on 7th December, 2017, some persons who claimed to have been sent by the respondents, descended on the property of the petitioners, tied up the day guard, and started demolishing the wall erected around the suit property. That on 11th December, 2017, at about 6 p.m. in the evening, the 2nd respondent, without any prior notice or letter to the petitioners, placed on the wall of the suit property, a purported "Enforcement Notice", inter alia stating that the wall was not approved, and giving the petitioners 24 hours to demolish it. That in the month of September/October, 2018, the respondents and/or their servants/agents entered the land of the petitioners, and embarked on construction works therein. That these construction works entailed erecting a wall on one side of the petitioners land so as to annex it to be part of Bukhungu Stadium.

The respondent do not dispute that the petitioners are the registered proprietors of the suit land however in the further affidavit of Stephen Chune sworn on 28th June, 2019 they claim that the petitioner's leasehold interest to the suit property was unlawfully acquired. The 1st

respondent in its further affidavit has claimed that the suit property herein was obtained fraudulently. The burden of proof on the allegation of fraud is on the respondents. Section 107 of the Evidence Act stipulates as follows:

(1)Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2)When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Looking at the provisions of Section 107 of the Evidence Act above, the duty of proving that title to the suit land referred to herein had been obtained through fraud lay with the Respondents. In the case of Joseph N. K. Arap Ngok... Vs...Justice Moiwo Ole Keiuwa & 4 Others, Civil Appl. No.60 of 1996, the Court of Appeal held that:-

“It is trite that such title to landed property can only come into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of a title document pursuant to the provisions of the Act under which the property is held.”

The above position was also held in the case of Wreck Motor Enterprise vs The Commissioner of Lands & Others (1997), where the Court of Appeal also held that:-

“Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of title document pursuant to provisions held.”

This is the position held by the Court of Appeal in the case of Dr. Joseph Arap Ngok Vs Justice Moiwo Ole Keiwua & 5 Others (supra), where the Court held that:-

“Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and the law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of title and the entire system in relation to ownership of property in Kenya would be placed in jeopardy”.

In the case of David Peterson Kiengo & 2 Others Vs Kariuki Thuo, Machakos HCCC No.180 of 2011, the Court held that:-

“The Registered Lands Act is based on the Torrens System. Under this system, indefeasibility of title is the basis for land registration. The state maintains a Central Register of land title holdings which is deemed to accurately reflect the current facts about title. The whole idea is to make it unnecessary for a party seeking to acquire interest in land to go beyond the register to establish ownership. The person whose name is recorded on the register holds guaranteed title to the property. Since the state guarantees the accuracy of the register, it makes it unnecessary for a person to investigate the history of past dealings with the land in question before acquiring an interest”.

In the instant case, the certificate of title herein was issued by the lands officials. There was no evidence availed that the petitioners were involved in fraud or irregular registration of the suit property. The petitioners have provided in their further supplementary affidavit sworn on 29th June, 2019, a survey plan. The survey plan shows that the suit land was created in the years 1972/1973, alongside other parcels, which together formed Block III of Kakamega Municipality. The petitioners have provided a register of the suit land which shows that the first leasehold title was issued to one Joseph Kiratu Kioi, on 4th July, 2002 and the sale to the petitioners was in the year 2009 before the Constitution of 2010. Thereafter the petitioners were issued with a certificate of Lease in the year 2011.

Given that the history and root of this title can be traced, the Court finds and holds that the petitioners herein hold a good title to the suit property which title has not been cancelled and/or revoked. In the case of Munyu Maina Vs Hiram Gathiha Maina, Civil Appeal No.239 of 2009, the Appeal Court held that:-

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

In the present case the petitioners have shown and proved how they acquired the property.

The respondent in the further affidavit of Stephen Chune sworn on 28th June, 2019, avers that the lease herein was issued on 16th November, 2011, and further claims that at this time local authorities were being wound up and that there were many fraudulent dealings. No document at all is annexed to demonstrate that these fraudulent dealing. From the evidence before me I find that the lease herein was not acquired in the year 2011 as claimed. What was obtained in the year 2011, was a certificate of lease in the name of the petitioners. The leasehold title has been in existence since the year 2002, when the first allottee became registered as proprietor. All along the respondents have recognized this leasehold title and have been demanding and receiving rates and rents including from the petitioners. I find that the respondents have no evidence to support their claim that the suit land registered in the petitioners' name was fraudulently acquired. This claim of fraudulent title is nothing but an afterthought. I find no evidence of fraud and or misrepresentation on the part of the petitioners. I find that the petitioners are jointly the sole and lawful proprietors of the leasehold title comprised in the land parcel Kakamega Municipality/Block III/7 situated within Kakamega Municipality, which is a lease by the 1st respondent for 99 years from 1st July, 2001, and which land measures 0.2025 Ha

(approximately ½ an acre). I find that this was private land and not public as per the respondents' oral submissions. I also find that from the documentary evidence before me, the respondents did give planning approval for the wall through their letter of 18th November, 2016 and through their conduct, and following the legal doctrine of estoppel, the respondents are estopped from now denying that they did not give any approval. It has not been disputed that, in the month of September/October, 2018, the respondents and/or their servants/agents entered the land of the petitioners, and embarked on construction works therein. That these construction works entailed erecting a wall on one side of the petitioners land so as to annex it to be part of Bukhungu stadium. This to me seems to be a case of compulsory acquisition of land.

Under **Section 24, 25 and 26** of the **Land Registration Act 2012** upheld the indefeasibility of title:

Section 24 stipulates as follows:

Subject to this Act—

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

Section 25 of the act provides:

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

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

Section 26 is to the effect that:

Certificate of title to be held as conclusive evidence of proprietorship

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

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

It has not been proved that the petitioners were guilty of any fraud or misrepresentation or that they obtained the certificate of title illegally, unprocedurally or through a corrupt scheme. For the principle of indefeasibility the court looked at the cases of *Dr. Joseph Arap Ngok vs Justice Moijo ole Keiwua & 5 Others, Civil Appeal No. Nai. 60 of 1997*; **Wreck Motor Enterprises vs Commissioner of Lands & 3 Others (1997) eKLR**; and **Eunice Grace Njambi Kamau & Another vs Attorney General & 5 Others (2013) eKLR**. From the above provisions of the law and cases cited I find that the Petitioners have a disclosed a legal interest capable of protection under the law. It is also evident from the submissions in this case that the respondents have converted the land of the petitioners for use by the general public.

The respondents submitted that the suit land was public land and hence subject to the National Land Commission Act. They submit that the consent from the County Government and the Minister for Lands was not obtained. The petitioners did not also obtain consent on the change of user from the National Land Commission and that the petitioners did not exercise due diligence. That this was public land and between 2010 and 2013 no transactions on public land was to be undertaken. The petitioners have produced a certificate of lease obtained from the County Government of Kakamega land which this court found to be a valid and legal title. Article 64 of the Kenya Constitution states as follows;

“Private land.

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.”

The petitioners’ title is therefore private land and not public. The letters purporting to make it public are dated 2019 while the leasehold title has been in existence since the year 2002, when the first allottee became registered as proprietor.

On the issue of compulsory acquisition Mutungi, J stated in the case of *Virendra Ramji Gudka & 3 Others –v- Attorney General (2014) eKLR*, that,

“Rights of compulsory acquisition are conferred by specific provisions of the law being Article 40 of the Constitution and Sections 107 to 133 of the Land Act, No. 6 of 2012 which replaced the provisions previously contained in the Land Acquisition Act”.

The meaning and intent of the Article 40 (3) of the Constitution. Article 40, reads in part as follows:

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

- (a) of any description; and
- (b) in any part of Kenya.

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

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

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

- (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
- (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—
 - (i) requires prompt payment in full, of just compensation to the person; and
 - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

The Land Acquisition Act (now repealed) provided for the procedure to be followed in the compulsory acquisition of property by the Government of Kenya. When the compulsory acquisition herein began, the Land Acquisition Act Cap 295 Laws of Kenya, Section 3 of the Land Acquisition Act provided as follows:-

“Whenever the Minister is satisfied that the need is likely to arise for the acquisition of some particular land under section 6, the Commissioner may cause notice thereof to be published in the Gazette, and shall deliver a copy of the notice to every person who appears to him to be interested in the land.”

Acquisition by the Government is ordinarily direct and by processes known to the **Land Acquisition Act (now repealed) by the Land Act**. The law governing compulsory acquisition is in Part VIII, Section 107 to 133 of the Land Act 2012. The process of compulsory acquisition was laid down in the decided case of **Patrick Musimba v National Land Commission & 4 others (2016) eKLR** where the court held as follows;

Under Section 107 of the Land Act, the National Land Commission (the 1st Respondent herein) is ordinarily prompted by the national or county government through the Cabinet Secretary or County Executive member respectively. The land must be acquired for a public purpose or in public interest as dictated by Article 40(3) of the Constitution. In our view, the threshold must be met: the reason for the acquisition must not be remote or fanciful. The National Land Commission needs to be satisfied in these respects and this it can do by undertaking the necessary diligent inquiries including interviewing the body intending to acquire the property.

Under Sections 107 and 110 of the Land Act, the National Land Commission must then publish in the gazette a notice of the intention to acquire the land. The notice is also to be delivered to the Registrar as well as every person who appears to have an

interest in the land.

As part of the National Land Commission's due diligence strategy, the National Land Commission must also ensure that the land to be acquired is authenticated by the survey department for the rather obvious reason that the owner be identified. In the course of such inquiries, the National Land Commission is also to inspect the land and do all things as may be necessary to ascertain whether the land is suitable for the intended purpose: see Section 108 of the Land Act.

The foregoing process constitutes the preliminary or pre-inquiry stage of the acquisition.

The burden at this stage is then cast upon the National Land Commission and as can be apparent from a methodical reading of Sections 107 through 110 of the Land Act, the landowner's role is limited to that of a distant bystander with substantial interest.

Section 112 of the Land Act then involves the landowner directly for purposes of determining proprietary interest and compensation. The section has an elaborate procedure with the National Land Commission enjoined to gazette an intended inquiry and the service of the notice of inquiry on every person attached. The inquiry hearing determines the persons interested and who are to be compensated. The National Land Commission exercises quasi-judicial powers at this stage.

On completion of the inquiry the National Land Commission makes a separate award of compensation for every person determined to be interested in the land and then offers compensation. The compensation may take either of the two forms prescribed. It could be a monetary award. It could also be land in lieu of the monetary award, if land of equivalent value, is available. Once the award is accepted, it must be promptly paid by the National Land Commission. Where it is not accepted then the payment is to be made into a special compensation account held by the National Land Commission: see Sections 113- 119 of the Land Act.

The process is completed by the possession of the land in question being taken by the National Land Commission once payment is made even though the possession may actually be taken before all the procedures are followed through and no compensation has been made. The property is then deemed to have vested in the National or County Government as the case may be with both the proprietor and the land registrar being duly notified: see Sections 120-122 of the Land Act.

If land is so acquired the just compensation is to be paid promptly in full to persons whose interests in land have been determined: See Section 111 of the Land Act. This is in line with the Constitutional requirement under Article 40(3) of the Constitution that no person shall be deprived of his property of any description unless the acquisition is for a public purpose and subjected to prompt payment in full of just compensation.

The Constitution dictates that acquisition be in accordance with the provisions of the Constitution itself and any Act of Parliament. The Constitution itself only provides for just compensation being made promptly.

The current procedure for acquisition of land by the State is as outlined above. As can be seen parliament took very seriously its constitutional duty to legislate on the State's powers of deprivation or expropriation. Perhaps conscious of the emotive nature of land issues, the Legislature appeared scrupulous and contemplative.

In the present case, I find that the respondents have not followed the laid down procedure. The action by the 2nd respondent of the 11th December, 2017, at about 6 p.m. in the evening of placing on the wall of the suit property, an "Enforcement Notice", inter alia stating that the wall was not approved, and giving the petitioners 24 hours to demolish it was arbitrary to say the least.

The Universal Declaration of Human Rights has the force of law in Kenya. In the case of R vs Chief Immigration Officer (1976) 3 AER 843 Lord Denning stated thus regarding the Universal Declaration of Human Rights;

"... Among the important rights which individuals traditionally have enjoyed is the right to own property. This right is recognised in the Universal Declaration of Human Rights (1948). Article 17(1) which states that everyone has the right to own property and Article 17(2) guarantees that "no one shall be deprived of his property" The contention of the State counsel negates this right. An intention to provide for arbitrary infringement of human rights cannot be attributed to the legislature unless such intention is unequivocally manifest. When Parliament is enacting a statute, the court will assume that it had regard to the Universal Declaration of Human Rights and intended to make the enactment accord with the Declaration and will interpret it accordingly..."

And Justice G.V. Odunga in Republic v Council of Legal Education Ex-parte Nyabira Oguta (2016) eKLR, phrased it thus:

"Our Constitution embodies the values of the Kenyan Society, as well as the aspirations, dreams and fears of our nation as espoused in Article 10. It is not focused on presenting an organisation of Government, but rather is a value system itself hence not concerned only with defining human rights and duties of individuals and state organs, but goes further to find values and goals in the Constitution and to transform them into reality."

As was stated by Scott L.J, in relation to compulsory acquisition, in the case of Horn-v- Sunderland Corporation (1941) 2 KB 26,40:

"The word "compensation" almost of itself carries the corollary that the loss to the seller must be completely made up to him, on the ground that unless he receives a price that fully equaled his pecuniary detriment, the compensation would not be equivalent to the compulsory sacrifice".

In that regard, in the case of Raticliffe vs Evans (1892) QB 524 with regard to damages, the Court stated that;

“...The character of the acts themselves which produce the damages and the circumstances under which those acts are done must regulate the degree of certainty and particularity with which the damages done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage as is reasonable having regard to the circumstances and to the nature of the acts themselves by which the damage is done to relax old and intelligent principles, to insist upon more would be the vainest pendency...”

In the case of Commissioner of Lands & Another vs. Coastal Aquaculture Ltd Civil Appeal No. 252 of 1996 KLR (E&L 264) the Court of Appeal held that in cases of compulsory acquisition the government is required to strictly adhere to the provisions of the Constitution and the Land Acquisition Act (now repealed). In *Arnacherry Limited v Attorney General* (2014) eKLR the court held that;

“This is indeed a sad and distressing Petition. It is not expected that the State, in this age and time and with a robust Constitution such as ours, can actively participate in acts of impunity such as the forceful take-over of personal property without due compensation. The take-over has lasted 30 years and that makes the said action all the more disturbing.”

If land is so acquired the just compensation is to be paid promptly in full to persons whose interests in land have been determined. This is in line with the Constitutional requirement under Article 40(3) of the Constitution that no person shall be deprived of his property of any description unless the acquisition is for a public purpose and subjected to prompt payment in full of just compensation.

From the above law, cited authorities and my observations, the 1st and 2nd Respondents have not proved in any way how their actions are in accordance with the law hence their actions are illegal. The respondents' actions are in contradiction with Sections 2, 2(4), 3, 10, 40 and 47 of the Constitution of Kenya. The law as discussed above, provides for compensation in cases of compulsory acquisition hence the petitioners have a right to compensation. On the claim of loss of user, I concur with the respondents' submission that no loss has been exhibited to this court neither have there been any expected income exhibited to this court to attract an award under this head. The claim of general damages has also not been proved and the same will not be awarded. Hon. Justice J.L Onguto in the case of *Patrick Musimba vs. The National Land Commission and 5 Others* Petition No. 613 of 2014 stated in the judgment that,

“If land is so acquired the just compensation is to be paid promptly in full to persons whose interests in land have been determined; see section III of the Land Act. This is in line with the constitutional requirement under Article 40 (3) of the constitution that no person shall be deprived of his property of any description unless the acquisition is for a public purpose and subjected to prompt payment in full of just compensation”.

The valuer's report of Mr. Philip Odongo Kabita of Odongo Kabitia & Company Advocates on record dated 22nd December 2017 has ascertained that value of the damaged perimeter wall was kshs 2,400,000/= and the value of the suit land was Kshs 40,500,000/= making a total of Kshs 42,900,000/=. The said valuation has not been rebutted by the respondents. In **Limo vs Commissioner of Lands KLR (E&L) 175** it was also held in this regard as follows:

“In addition to the matters contained in the schedule to the Land Acquisition Act which a court should consider in assessing compensation to be paid to a person whose land has been compulsorily acquired, courts have tended to take into account the nearness of the land in question to the main town and its nearness to the road access.”

In the case of **Kanini Farm Ltd vs Commissioner of Lands (1984) eKLR (1986) KLR** the court pronounced itself on the definition of the market value of property during Compulsory Acquisition as hereunder;-

“The market value as the basis for assessing compensation is the price which a willing seller might be expected to obtain from a willing purchaser, a purchaser who though he may be a speculator, is neither a wild nor an unreasonable speculator.....In determining the amount of compensation which ought to be paid the court should take into account comparable sales and awards on other acquisition of land of similar character”

The suit land is in Kakamega town and adjacent to Bukhungu Stadium Milimani Estate. The petitioners also annexed photos of the said wall before demolition. I am satisfied that the valuation report gives the true value of the land and the demolished wall. As mentioned earlier the other damages were not proved and will therefore not be awarded. I find that the petition is merited and I grant the following orders;

1. A declaration that the respondents acted illegally and unconstitutionally in facilitating, the demolition of the perimeter wall to plot No. Kakamega Municipality Bloc III/7.
2. A declaration that the respondents, jointly and/or severally, are in violation of Articles 2, 3, 10, 19, 20, 21, 27, 28, 40, 47, 50 (1), of the Constitution and the provisions of the Fair Administrative Actions Act, the Physical Planning Act, the Land Act and land Registration Act, and International law in so far as the same relate to the petitioners.
3. A declaration that the actions of the respondents constitute an eviction and/or a constructive eviction and/or a taking and/or constructive taking of the property of the petitioners for which the respondents are liable to pay full compensation.
4. An order that the petitioners are entitled to full compensation for the value of the suit property in the sum of Ksh. 40,500,000/= subject only to the petitioners surrendering the leasehold title to the 1st respondent.
5. Payment of the sum of Ksh. 2,400,000/= being the costs incurred by the petitioners to put up the wall that the respondents demolished.

6. Special damages of Ksh. 60,000/= for the valuation report.
7. Interest on the above from the date of filing this suit to full payment.
8. Cost of the petition to be borne by the 1st and 2nd Respondents.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 25TH SEPTEMBER 2019.

N.A. MATHEKA

JUDGE