



**REPUBLIC OF KENYA**

**IN THE ELC COURT OF KENYA**

**AT NYAHURURU**

**PETITION NO 10 OF 2017 (FORMERLY NAKURU PET 66 OF 2015)**

**IN THE MATTER OF ARTICLES 165(3) OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF ALLEGED AND/OR THREATENED CONTRAVENTION OF FUNDAMENTAL**

**ARTICLES 20, 21, 22, 23, 40, 47, AND 60, OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF VIOLATION OF THE RIGHT TO PROPERTY KNOWN AS LAND**

**REFERENECE NO. NYANDARUA/NDEMI/1077 AND IN THE MATTER OF**

**REGISTRATION OF TITLES ACT CAP 281 (REPEALED)**

**BETWEEN**

**ALLAN MAINA.....PETITIONER**

**VERSUS**

**CHIEF LAND REGISTRAR.....1<sup>st</sup> RESPONDENT**

**NATIONAL LAND COMMISSION.....2<sup>nd</sup> RESPONDENT**

**SETTLEMENT FUND TRUSTEE.....3<sup>rd</sup> RESPONDENT**

**PETER JUMA KURIA MWANGI.....4<sup>th</sup> RESPONDENT**

**CHARLES NJENGA KARIUKI.....5<sup>th</sup> RESPONDENT**

**JUDGEMENT**

1. The Petitioner filed his Petition dated the 8<sup>th</sup> October 2015 on the 13<sup>th</sup> October 2015 in the High Court sitting in Nakuru. The court having noted that the subject matter related to title and ownership of land, directed that it be placed before the Environment and Land Court. Subsequently, with the Establishment of this court, the matter was transferred herein and it was registered with the present number.

2. In his Petition, which was supported by an affidavit sworn by the Petitioner on 8<sup>th</sup> October 2015, the Petitioner seeks for the following orders;

a) A declaration that the Petitioner is the legal owner of all those parcels of land known as title No. Nyandarua/Ndemi/8915 and No. Nyandarua/Ndemi/8916 and that the said parcels of land constitute private property.

b) A declaration do issue that the letter of offer dated 3<sup>rd</sup> September 2008 from the Ministry of Lands and Settlement to the 3<sup>rd</sup> Respondent re-allocating title number Nyandarua/Ndemi/1077 contravened the Petitioner's rights under Article 40 and 47 of the Constitution.

c) That an order of Certiorari do issue to quash the letter of offer dated the 3<sup>rd</sup> September 2008 from the Ministry of Lands and

Settlement to the 3<sup>rd</sup> Respondent in respect of title number Nyandarua/Ndemi/1077.

d) An order of Certiorari do issue to nullify the title No. Nyandarua/Ndemi/8915 currently registered in the name of the 5<sup>th</sup> Respondent and title number Nyandarua/Ndemi/8916 currently registered in the name of the 4<sup>th</sup> Respondent.

e) Issuance of a permanent injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup>, Respondents by themselves, servants and agents from constructing, alienating and in any way interfering with the Petitioner's title No. Nyandarua/Ndemi/8915 and No. Nyandarua/Ndemi/8916.

f) An order do issue to the 1<sup>st</sup> Respondent to rectify the lands register by consolidating title No. Nyandarua/Ndemi/8915 and No. Nyandarua/Ndemi/8916 to title No. Nyandarua/Ndemi/1077.

g) An order do issue mandating the 1<sup>st</sup> Respondent to rectify the lands register by canceling the 4<sup>th</sup> Respondent as the owner of land parcel No. Nyandarua/Ndemi/8916 and substitute it with the Petitioner as the owner.

h) An order do issue mandating the 1<sup>st</sup> Respondent to rectify the lands register by canceling the 5<sup>th</sup> Respondent as the owner of land parcel No. Nyandarua/Ndemi/8915 and substitute it with the Petitioner as the owner.

i) Costs of and incidental to the Petition.

j) Any such orders as this honorable court shall deem just.

3. Service was effected on the Respondents and although the Hon. Attorney General entered appearance for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, there were no further documents filed. The 3<sup>rd</sup> Respondent filed his Replying affidavit on the 7<sup>th</sup> November 2017. Indeed all but the 1<sup>st</sup> and 3<sup>rd</sup> Respondents filed their respective responses to the Petition. By consent, parties agreed to dispose of the matter through viva voce evidence and the same was set for hearing on the 16<sup>th</sup> October 2018 on which day there was no appearance for all the Respondents. The matter was adjourned to the 22<sup>nd</sup> January 2019 with costs to the Petitioner.

4. On 22<sup>nd</sup> January 2019, the matter proceeded for hearing in the absence of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents who had not filed any papers despite service. Counsel for the Petitioner then informed the court that they wished to make an application for a site visit and sought for the court's directions. The court informed Counsel that an informed opinion as to whether or not there will be a site visit would only be after the taking of evidence. Secondly, that the application having been without notice, did not accord the court and parties sufficient time to organize themselves before going on to the site.

5. The hearing proceeded with the evidence of the Petitioner who relied on his affidavits sworn on the 8<sup>th</sup> October 2015 and the 11<sup>th</sup> June 2018. He deponed that in the year 1981, he had applied verbally for land with the settlement scheme through the Cabinet Minister Nicholas Biwott and the cabinet Secretary PC Nyachae wherein he got an offer of 50 acres of land known as special plots. That he was given a letter of offer dated the 23<sup>rd</sup> July 1981 herein produced Pf exh 1.

6. That after reading the letter of offer, he had signed a charge to Olklaou Plot No. 7 which charge was prepared by the Settlement Fund Trustee and he executed it. That he was to pay Ksh 2,523/= in 56 installments wherein he had paid 10% of the consideration of Ksh 64,681/= and produced the charge as Pf exh 2. The payment was acknowledged by the Settlement Fund Trustee.

7. After making the deposit, he had written to the Settlement Fund Trustee vide a letter dated the 8<sup>th</sup> April 1992, herein produced as Pf Exh 3, to issue him with the final statement so that he could clear the loan but there was no response.

8. That he had gone and occupied his land immediately and has always remained in occupation. His further evidence was that through corruption, 75 acres of his land was sold for ksh 500,000/=.

9. That in the year 2015, his neighbor had informed him that somebody had sub divided his land and was putting up a fence. He had placed a caveat on the same and had filed this suit thereafter.

10. He further testified that in the year 2008, the 4<sup>th</sup> Respondent had gone to the department of Land Settlement in Nairobi where he sought for an offer vide his letter dated the 3<sup>rd</sup> September 2008 seeking for 30 hectares, an equivalent of 75 acres. That there had been no consideration on the letter of offer thus the same was not valid. That the offer was to be accepted within 90 days starting from 3<sup>rd</sup> September 2008. The 4<sup>th</sup> Respondent had then disappeared but came back in the year 2015, where the Director of Settlement gave him the letter of offer.

11. The Petitioner produced as Pf exhibit 4, a letter dated the 15<sup>th</sup> January 2015 which letter had been written by the District Settlement Officer and addressed to the Director Land Adjudication Nairobi and seeking for advice for reason that the 4<sup>th</sup> Respondent's letter of offer had expired.

12. That pursuant to an affidavit dated the 7<sup>th</sup> November 2017 sworn by the Land Settlement Officer which had deponed allegations challenging his documents, the Petitioner had then gone to the Ministry of Lands to confirm whether his documents were genuine or not. That he also wrote to the Principal Secretary vide letter dated the 5<sup>th</sup> June 2018, herein produced as Pf exh 5, requesting to have his documents authenticated. Vide a letter dated the 7<sup>th</sup> June 2018, herein produced as Pf exh 6, it had been confirmed that his documents had

originated from this office and that they were genuine.

13. He testified that he had been unable to use his land profitably for about 4 years and had lost a lot of profit which he would have got through horticultural farming and selling of stones to the county Government. Stones which were to be mined from one part of his land that was a quarry. He testified that he had lost about Ksh 5,000,000/= and sought that the court grants the prayers in his Petition.

14. In cross examination, the Petitioner confirmed that the land had been shown to him by the Settlement Manager, that he had planted 4 acres of blue gum trees on that land which were still there, that he had also placed one Boniface Mose Mwoko as the caretaker of his land.

15. He further confirmed that he had learnt that 30 hectares of his land had been sold. He also confirmed that he had been mining some stones, and had kept animals, planted trees, which he wanted the court to go and see.

16. Upon the close of the Petitioner's case, the witness for the 3<sup>rd</sup> Respondent, the officer in charge, Land Adjudication and Settlement Department Nyandarua North testified that according to the records in their office, plot No. 1562 was an old number, the new number being 1077 Ndemi settlement scheme. That according to their 'counterbilty' register, the plot had not been allocated.

17. The ground status report had been requested for by the Director of Settlement through a letter dated 15<sup>th</sup> April 2014 herein produced as Df exh1. Wherein they had filed the report through a letter dated the 6<sup>th</sup> May 2014 produced as Df exh 2. That thereafter somebody by name of Peter Kuria Mwangi had appeared before him with a letter of offer dated 3<sup>rd</sup> September 2008 herein produced as Df exh 3. That he did not make the required payments until he realized that the offer had expired wherein DW 1 had written to the Director of Settlement vide his letter dated the 15<sup>th</sup> January 2015, herein produced as Df exh 5, seeking for advice.

18. That the Director of Settlement had responded through a letter dated the 18<sup>th</sup> March 2015 herein produced as DF exhibit 5 authorizing him to receive money from the said Mr. Peter Mwangi who paid Ksh 530,000/= out rightly for the plot and was issued with receipt No 6308409 dated 30<sup>th</sup> March 2015 herein produced as Df exh 6. The payment was communicated to the Director of Settlement through a letter dated the 31<sup>st</sup> March 2015 herein produced as Df exh 7 wherein they had received a discharge of charge bearing the names of Peter Kuria Mwangi who then executed the discharge of charge in his presence on the 8<sup>th</sup> May 2015, as per Df exh 8.

19. On cross examination, the witness, who confirmed that he had worked with the Settlement Fund Trustee for over 20 years, took the court through the motion of allotment of land by Settlement Fund Trustee as follows;

- a. The planning of the land is the first step
- b. Then follows the survey
- c. After the survey, there is the demarcation
- d. Followed by allocation

20. He confirmed that this procedure was followed before the land was allocated to Peter Juma Kuria. That before the said allocation, the file to plot No. 1077 was not existing, there were no records to that land which meant that the plot had not been allocated. However they were still the owners of the land and even if it had been allocated, until it is discharged.

21. He denied having seen Pf exh 1 stating that he was seeing it for the first time. He testified that the basis of his averment in paragraph 8 of his affidavit was that he was denying the Petitioner. He confirmed that Mr. Abongo, one of their officers at the headquarters, had signed the letter produced as Pf exh 6 on behalf of the Director of Settlement which letter had confirmed that the Petitioner's attached documents had originated from the office of the Director of Land Adjudication and Settlement and had been confirmed as authentic by Mr. Abango.

22. That although the letter which was addressed to the District Settlement Officer Nyandarua and copied to Allan Maina and the Provincial settlement officer, referred to the allocation of the settlement plot given to Allan Maina dated 23<sup>rd</sup> July 1981, and the legal documents for plot No. 7 Olkalou Salient scheme, the property it referred to was Olkalou salient not Ndemi which were different areas.

23. He also confirmed that the letter dated the 29<sup>th</sup> April 1993 which had been addressed to the District Settlement Officer had been signed by Mr. Ruheni for Director of Lands Adjudication and was in reference to plot 7 Olkalou Salient contained a correction changing the area from Olkalou Salient to Ndemi.

24. He also confirmed that a charge on Plot 7 was given to Allan Maina in consideration of Ksh 64,681/= but the acreage was not indicated. When referred to the area list, he testified that they had been furnished with the title mapping and were moving to the registration of the scheme. That the old numbers were provisional houses issued by settlement but after the survey mapping, they now issued new numbers wherein the old and new numbers had been merged.

25. That in the present case, their provincial number was 1562 whereas the new number was 1077 measuring 30 hectares. That Plot No. 1077 was the suit land which was also plot No. 7 Olkalou Salient.

26. He confirmed that the ground status report had been prepared on the instructions of the director. That from the report, it been noted that there were trees in the middle of the plot which was fenced although it was not known who had fenced or planted the trees.

27. He also confirmed that the letter dated 18<sup>th</sup> March 2015 was an authority letter and not a letter of offer. That the 4<sup>th</sup> Respondent paid ksh 530,000/= on the basis of a document attached to the authority letter (the scribbling thereto) wherein they had done the discharge of charge which is document proving that one does not owe the Settlement Fund Trustee any money and which document one can proceed to obtain a title from the Lands Registry.

28. He confirmed that the discharge of charge was done in the year 2015 after which the transfer was done. Further that once land had been allocated to somebody it could be repossessed and became available for allocation to another person if the conditions were not met. That a double allocation should not happen unless it is an oversight.

29. He also confirmed that a person could pay out rightly with the letter of offer but if one decided to pay the 10% then one could pay in installments for a number of years before discharge.

30. When examined by the court, the officer testified that the documents referred to in the letter dated 29<sup>th</sup> April 1993 were not surrendered and therefore there was no re-documentation for plot No. 1562. In short, the Petitioner was not documented for plot No. 1562

31. The 4<sup>th</sup> Respondent relied on his affidavit sworn on the 18<sup>th</sup> May 2018 which he produced as Df exh 9, and testified that he had been sued over his land parcel No. Nyandarua/Ndemi/1077. That he had made an application in 2008 to the land Settlement Fund Trustee for allocation of the land and he had been given a letter of offer dated the 3<sup>rd</sup> September 2008 herein produced as Df Exhibit 10.

32. That at the time, he did not have money and when he got some and went to pay, he had been informed that the letter of offer had expired. He was advised to await a response from the headquarters from where the Settlement Fund Trustee officers had sought for directions.

33. That after almost 6 years, vide a letter dated the 18<sup>th</sup> March 2015 herein produced as Df exh 11, from the headquarters and addressed to both the District Land Adjudication and Settlement Officer, the same had given him clearance to pay Ksh. 530,000/= which monies he had paid and was issued with an official receipt dated 30<sup>th</sup> March 2015 herein produced as Df exh 12.

Thereafter, he was issued with a title for Nyandarua/Ndemi/1077 measuring about 30. Hectares herein produced as Df exh 13.

34. That the 5<sup>th</sup> Respondent had approached him seeking to buy from him a piece of land. That he had subdivided parcel No. Nyandarua/Ndemi/1077 into two with the resultant parcels being No. Nyandarua/Ndemi/8915 measuring 14.8 hectares which he sold to the 5<sup>th</sup> Respondent, and parcel No. 8916 measuring 14.87 hectares, which he kept for himself. The titles to these subsequent parcels of land were produced as Df exh 14(a) and (b).

35. In re-examination, the witness testified that was given a letter of offer dated the 3<sup>rd</sup> September 2008 which was valid for a period of 90 days. That the letter had stipulated that if there was no payment within the stipulated period, the said letter would be invalid without further notice.

36. He conceded that at the time, he did not meet the terms in the letter of offer and the same expired but after 6 years which was in the year 2015. That subsequently, he had been cleared to pay, vide a letter written by one Phillip Abongo whom he did not know. No other letter of offer had been given to him.

37. He also confirmed that before he had made the payments, he had conducted due diligence wherein the records available at the District Land Surveyor's office had showed that the land was available.

38. The testimony by the 5<sup>th</sup> Respondent confirmed that indeed the 4<sup>th</sup> Respondent had sold him a piece of land at a place called Kariamu in the year 2015. That before that, he had conducted due diligence at the Land's office, bought the survey plan, and consulted a land surveyor to confirm whether the same was what he was shown on the ground before he executed the sale agreement, with the 4<sup>th</sup> Respondent, which was not an issue in this case. He confirmed that Df exh 14(b) was his title deed. He testified that he was an innocent purchaser of land for value and therefore the case should be dismissed with costs. The Respondents closed their case and Parties filed their written submissions thereafter.

#### **The Petitioner's submission.**

39. The Petitioner based his submissions on the following points for determination;

- i. Whether the Petitioner was lawfully allotted parcel No. Nyandarua/Ndemi/8915 and No. Nyandarua/Ndemi/8916.
- ii. Whether the 4<sup>th</sup> Respondent acquired his title deed fraudulently and illegally and un-procedurally or through a corrupt scheme contrary to section 26 of the Land Registration Act Cap 300.
- iii. Whether the re-allocation of the suit property to the 4<sup>th</sup> Respondent contravened the Petitioner's right to protection enshrined under Article 40 of the Constitution.
- iv. Whether the 3<sup>rd</sup> Respondent acted in excess of his statutory powers and authority and whether his actions amounted to abuse of office in allocating the 4<sup>th</sup> Respondent title No. Nyandarua/Ndemi/1077.

v. Whether the 5<sup>th</sup> Respondent is an innocent purchaser for value.

40. On the first issue for determination, it was the Petitioner's submission that vide a letter of allotment dated 23<sup>rd</sup> July 1981 from the 3<sup>rd</sup> Respondent, he was allotted parcel of land No. Nyandarua/Ndemi/1077 measuring approximately 50 hectares at a consideration of Ksh 64,681/= which amount was to be paid in 56 consecutive installments of Ksh 2523/=. That he had subsequently executed the charge and taken possession of the suit land which became no longer available for re-allocation.

41. The Petitioner's quiet possession was interrupted by the 4<sup>th</sup> Respondent who appeared on the suit land claiming ownership of the same despite the Petitioner's and documents of ownership having been authenticated as genuine.

42. The Petitioner submitted that having applied for allocation of land and having fulfilled all the requirements, for allocation, it was a party who had private property whose sanctity is recognized and protected under Article 40 of the Constitution. Further, having been notified by the 3<sup>rd</sup> Respondent of the availability of the property, the Petitioner had acquired a legitimate expectation that he had acquired legal proprietary rights in respect of the property to enjoy the quiet possession and the rights to use the said property in furtherance of his interest.

43. On the second issue for determination, the Petitioner submitted that when he conducted a search on the suit properties, he had discovered that the 4<sup>th</sup> Respondent had been issued with a title deed on 8<sup>th</sup> May 2015 and had subsequently subdivided the suit properties into two portions wherein he had sold one portion to the 5<sup>th</sup> Respondent.

44. That by the time the 4<sup>th</sup> Respondent had been allegedly issued with a letter of allotment on the 3<sup>rd</sup> September 2008 by the 3<sup>rd</sup> Respondent for the said property, the said allocation had amounted to double allotment since the Petitioner had already been allotted the same property in 1981.

45. Further, it was clear from the evidence that despite the 4<sup>th</sup> respondent's letter of offer having expired after a period of 90 days from 3<sup>rd</sup> September 2008, he still made payment on the 30<sup>th</sup> March 2015, seven (7) years after the offer had expired. The Petitioner relied on this court's judgment in the case of **E. M Ngure vs District Land Adjudication and Settlement Nyandarua & 2 Others [2017]eKLR** to submit that no new letter of allotment had been issued to the 4<sup>th</sup> respondent in the year 2015, which was a mandatory requirement, to justify the said allocation.

46. That the Petitioner had not surrendered the suit land for the purpose of sub division and for any other purpose and therefore the title deed held by the 4<sup>th</sup> Respondent was acquired fraudulently, illegally, un-procedurally or through a corrupt scheme contrary to the provisions of Section 26 of the Land Registration Act.

47. On the third issue for determination, the petitioner submitted that the re-allocation of the suit property to the 4<sup>th</sup> Respondent contravened the Petitioner's right to protection enshrined under Article 40 of the Constitution. That at the time of the purported allocation to the 4<sup>th</sup> Respondent, the 3<sup>rd</sup> Respondent had no such land to allocate. Further the allocation to the Petitioner took priority over the 5<sup>th</sup> Respondent's allocation since the Petitioner had acquired a good title. The Petitioner relied on the case of **Norbixin Kenya Ltd vs. Attorney General [2015] eKLR** to buttress his submission.

48. While relying on the decided case of **Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura vs Attorney General & 4 Others [2017] eKLR**, the Petitioner submitted that the 5<sup>th</sup> Respondent was not an innocent purchaser for value, for reasons that he did not produce before the court the written agreement for sale of land between him and the 4<sup>th</sup> respondent which in itself was a violation of Section 3 of the Law of Contract Act, hence he lost the protection of being an innocent purchaser for value. The Petitioner sought for his Appeal to be allowed.

#### **The 4<sup>th</sup> and 5<sup>th</sup> Respondents' submission.**

49. The combined submission of the 4<sup>th</sup> and 5<sup>th</sup> Respondent's was whether the Petitioner was entitled to the prayers as sought in his Petition. The submission was that the Petition was misconceived, ill-advised in bad taste and an abuse of the court process.

50. That the dispute fell squarely on the National Land Commission in terms of Article 67(2) (e) of the Constitution to deal with historical injustices. That the Petitioner's testimony was to the effect that he had been allotted the suit land by the then cabinet Minister the late Hon. Nicholas Biwott and the then Permanent Secretary Hon Simeon Nyachae after making an application to them. That pursuant to the said allotment, although the Petitioner had testified that he had made the deposit, he neither produced the receipts of the said deposit nor provided any evidence that he had paid any installments as required by the charge. In short, the Petitioner had not met the requirements contained in the charge before taking possession of the suit land to which the land reverted back to the 3<sup>rd</sup> Respondent as testified by the 3<sup>rd</sup> Respondent. Reference was made to the case of **E. M Ngure(Supra)**.

51. That although the Petitioner had testified that he had taken immediate possession of the suit land, this testimony was challenged by the 3<sup>rd</sup> Respondent's evidence that the plot had never been occupied. Further the Petitioner's evidence that he had written many letters requesting for details to enable him complete the payments was not supported by any evidence as the only letter produced was dated the 8<sup>th</sup> April 1992. He did not explain his inaction for 11 years from the date of allocation.

52. That indeed the evidence of the 4<sup>th</sup> Respondent showed his persistence vigilance in that after his letter of offer had lapsed, he followed up the matter from the year 2008 to the year 2015, when he was given the go ahead to pay for the suit land before he finally secured its title.

53. That there was contradiction in the acreage of the subject suit in that whereas the Petitioner testified that he had been allotted 50 hectares, it was actually 50 acres which land could not have been the same land as that which the 4<sup>th</sup> Respondent was issued, because he had been allotted land measuring 30 acres. No explanation was given on this discrepancy.

54. The Respondents further submitted that although the Petitioner had sought for the cancellation of their titles pursuant to the provisions of section 26 of the Land Registration Act, for such orders to issue, it had been imperative to prove that the impugned titles were acquired illegally, un-procedurally, or through a corrupt scheme. The Petitioner did not tender any evidence to support that indeed the titles were acquired illegally, un-procedurally, or through a corrupt scheme.

55. That indeed the 5<sup>th</sup> Respondent acquired his title from the 4<sup>th</sup> Respondent as an innocent purchaser for value without notice and no evidence was adduced to the contrary.

56. That a period of 36 years had lapsed since the Petitioner was allotted the land, yet he offered no explanation of the lapse of time from the time he was allocated the suit land to the time of filing of the present Petition. That further, a period of 16 years had lapsed since the Petitioner had discovered that the Respondents had acquired titles to the suit land and the filing of the present suit. No explanation was given for the delay. The Respondents prayed for the Petition to be dismissed.

### **Analyses and Determination.**

57. I have carefully considered the content of the Petitioner's Petition as well as the supporting affidavit. I have also considered the Respondents' replying affidavits and the submissions of Counsel as well as the relevant provisions of the law and Authorities herein cited. I find that three issues arise for determination as follows:-

- i. Whether the Petition discloses a legal interest capable of protection under the law.
- ii. Whether the Petitioner's rights under Article 40 of the Constitution had been infringed.
- iii. Whether the Petitioner was entitled to the orders sought in the Petition?

58. On the first issue for determination, the Petitioner must establish this, not only clearly identifying the relevant and specific Articles of the Constitution but availing evidence, through affidavit or otherwise of such violation as per the required standard set out in respect of the Constitutional Petitions as set out in the case of **Anarita Karimi Njeru vs The Republic (196-1980) KLR 1272** where it was held, in the words of the Justices Trevelyan and Hancox that ;

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

59. From the above captioned Petition, the Petitioner has alleged, by setting out with a reasonable degree of precision that his Constitutional rights envisaged under Articles 40, of the Constitution had been violated by the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Respondent herein. For ease of reference, I shall set out the said provisions of the law as;

60. Article 40 of the Constitution provides a follows

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

*(a) of any description; and*

*(b) in any part of Kenya.*

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

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

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

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

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

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

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

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

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

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

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

61. From the pleadings and documents filed in this suit, it is clear that the Petitioner is challenging the allocation of parcel of land No. Nyandarua/Ndemi/1077 to the 4<sup>th</sup> Respondent by the 3<sup>rd</sup> Respondent while the suit property was already allocated to him.

62. The Petitioner has also taken issue with the 3<sup>rd</sup> Respondent's action which resulted into the 4<sup>th</sup> Respondent sub-dividing the said parcel of land into two being No. Nyandarua/Ndemi/8915 and 8916 and thereafter disposing one part by a deed of sale agreement to the 5<sup>th</sup> Respondent.

63. All these actions, according to the Petitioner, amounted to the deprivation of his Constitutional Right to property as enshrined in Articles 40 of the Constitution. It was the Petitioner's case that since the 4<sup>th</sup> and 5<sup>th</sup> Respondents' titles were obtained fraudulently, in collusion with the 2<sup>nd</sup> Respondent herein, that the same ought to be cancelled.

64. The genesis of the matter briefly was that the Petitioner herein was allotted the suit property on the 23<sup>rd</sup> July 1981 by the 3<sup>rd</sup> Respondent. That vide a charge dated the 19<sup>th</sup> September 1981, the consideration of the property was Ksh 64,681.00/= wherein the principal amount had to be paid in 56 consecutive half yearly installments of Ksh 2,523/=.

65. That he had taken immediate possession of the suit property by despite several reminders to the 3<sup>rd</sup> Respondent requesting for details to enable him complete the payments, non was forthcoming

66. That later on, he came to learn that the 4<sup>th</sup> Respondent had obtained title to the suit land and had already subdivided it and sold one half to the 5<sup>th</sup> Respondent.

67. The petitioner's lamentation was that he having accepted the offer of allocation and having signed the charge, that he had acquired absolute and indefeasible rights over the suit land rights which were capable of being protected by the law and therefore the 4<sup>th</sup> and 5<sup>th</sup> Respondents' titles ought to be cancelled for having been obtained illegally, un-procedurally, or through a corrupt scheme.

68. It is based on this line of evidence and or submission that I need to consider whether the Petition discloses a legal interest capable of protection under the law and whether the said legal interest was infringed. .

69. This court in the case of **E. M Ngure (Supra )** held as follows:

*The process of allotment of land includes and is not limited to the issuance of the letter of allotment which is an agreement/contract between the lessor and lessee and binds the lessee to meet the conditions set therein.*

*Violating the contract through non-payment of legal fees in the stipulated time, wrong usage of the land or non-payment of fees like land rent and rates are some of the conditions that will lead to a penalty and the land will revert to the government for allocation to another party.*

*After the letter of allotment is issued, a lease document is then prepared. The lease is finally registered in the County Land Registry and a Certificate of lease (title) issued to the lessee.*

70. In the case of **Joseph Tobiko Kelemu vs. Co-operative Management Committees of Emparnet Farmers Dairy Co-operative Society Ltd [2017] eKLR** the court held that letters of allotment were not title to property.

71. In the case of **Joseph Arap Ng'ok –vs- Justice Moiwo Ole Keiwua NAI Civil Application No. 60 of 1997** the Court of Appeal observed as follows:

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

72. In the present case although the Petitioner claimed that he was allotted the suit land herein No. Nyandarua/Ndemi/1077, by the 3<sup>rd</sup> Respondent, yet upon the consideration of both the oral and documentary evidence adduced in court, it comes out clearly that the Petitioner herein did not produce any letter of allotment or acceptance letter to which effect therefore there was no evidence adduced confirming that he had abided by the conditions set at the back of the said letters of allotment which conditions form the agreement/contract between the lessor

and lessee and binds the lessee thereof.

73. Indeed there was also no evidence of the payments of the rates, usually indicated on the allotment letter that had been submitted by the Petitioner. In fact to confirm further that there was no transfer of the suit land to the Petitioner, the copy of the search certificate herein produced by the Petitioner as well as the green card filed in court on the 13<sup>th</sup> October 2015 is very clear that as per the 2<sup>nd</sup> April 1992 the original parcel of land No Nyandarua/Ndemi/1077 was still registered to the Settlement Fund trustee wherein it was transferred to the 4<sup>th</sup> Respondent on the 8<sup>th</sup> May 2015 and a title deed issued. I therefore find that the Petitioner has not disclosed any legal interest capable of protection under the law.

74. Indeed the provisions of Section 26 (1) of the Land Registration Act of 2012 provides as follows:-

*“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon 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.*

75. It thus follows that in order to challenge the Respondents' titles so as to have them cancelled as prayed by the Petitioner, evidence according to Section 26 of the Act ought to have been led to prove that the Respondent's title to parcels No Nyandarua/Ndemi/8915 and No Nyandarua/Ndemi/8916 were acquired fraudulently, through misrepresentation, illegally, unprocedurally, or through a corrupt scheme. It was not sufficient to testify and/or allege that the Defendant herein obtained title to the parcels of land through fraudulent means. The onus was on the Plaintiff to prove those allegations. Fraud is a serious matter which must be proved to the required standard as was held in the case of **R.G Patel vs Lalji Makanji 1957 E.A 314**, where the Court of Appeal stated as follows:

*“Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required”.*

76. I find that there was no evidence led that inferred either directly or indirectly that the Respondents had fraudulently and illegally presented conveyance to register themselves as owners of parcels No Nyandarua/Ndemi/8915 and No Nyandarua/Ndemi/8916. In brief, what I am saying is that there is no evidence upon which I can cancel the Respondent's title.

77. Having found as herein above, I find that the Petitioner's Petition herein lacks merit and the same is dismissed with costs to the Respondents.

**Dated and delivered at Nyahururu this 29<sup>th</sup> day of October 2019.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**