



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC PETITION NO.90 OF 2017

(FORMERLY JUDICIAL REVIEW NO.20 OF 2010)

AND

(FORMERLY NAIROBI ELC CASE NO.822 OF 2012)

IN THE MATTER OF PETITION UNDER SECTION 84 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL UNDER SECTION 70,72,74,75,76 AND 77 OF THE CONSTITUTION AND PROVISIONS OF THE REGISTERED LAND ACT CAP 300 LAWS OF KENYA(REPEALED)

BETWEEN

PETER BUTALI.....1ST PETITIONER

JACKSON MUNGAI MWAURA.....2ND PETITIONER

PAUL NGIGI MUCHAI & 34 OTHERS.....3RD PETITIONER

AND

THE DISTRICT LAND REGISTRAR THIKA DISTRICT.....1ST RESPONDENT

THE CHIEF REGISTRAR OF TITLES.....2ND RESPONDENT

THE PERMANENT SECRETARY,

MINISTRY OF ROADS AND PUBLIC WORKS.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

VIEW LAND INVESTMENTS LIMITED.....5TH RESPONDENT

JUDGEMENT

By a Petition dated 13th August 2010, the Petitioners herein brought this suit against the Respondents seeking for orders that :

a) *A declaration on whether the 3rd Respondent by his wrongful encroachment and trespass upon the Petitioners properties contravened the Petitioners fundamental rights and freedoms and an inquiry as to what damage the Petitioners have suffered and an order for restitution and payment of damages found due and an order for eviction of the 3rd Respondent from the Petitioners properties.*

b) *An order for delivery of vacant possession by the 3rd Respondent of the suit properties and appropriate directions to give effect and secure enforcement of the Honourable Courts orders by use of the Kenya Police and Provincial Administration.*

c) An order for payment to the Petitioners losses, damages and consequential loss of business of such sums as may be found due from the 31st July 2010 by the 3rd Respondent jointly and severally at Court rates until payment in full.

d) The Petitioners be awarded cost of this Petition.

e) The Honourable Court be pleased to make orders or directions within its jurisdiction.

In their statement of Claim, the Petitioners averred that they are registered proprietors under various certificates of leases after the subdivision of L.R No. 12840. They contend that around the **31st of July 2010**, the 3rd Respondent unlawfully trespassed upon their parcels of land and erected beacons and that the same were done without **Notices** to them or their agents. Further that the actions of the 3rd Respondent contravened **Section 75 of the Constitution(former)** and the same was done in a reckless manner without norms and procedure. Further that the actions of the 3rd Respondent were done without the consent, knowledge and Petitioners approval nor were they undertaken under any known legal provisions. Further that 3rd Respondent's actions were done behind their backs and they are apprehensive that they will be deprived of the use of the premises.

That searches at the Land Registry have not revealed any transfer of interests lodged in the name of the Respondents and that there is no evidence by the Respondents to prove ownership of the suit land by the Respondents. That the Petitioners are the registered proprietors of the suit land and have been denied due process and protection of the law and their Constitutional rights have been contravened.

Therefore they have sought for a declaration on whether the Respondents actions exposed them to wrongful and unlawful exercise of statutory power and in the process denying them due process guaranteed by the Constitution and that the Respondents contravened their rights against arbitrary entry upon their properties and from trespass.

In response to the Petition, the Court notes that an Interlocutory Application had been filed and the said Replying Affidavits are what were considered as Responses to the Petition by the 1st – 4th Respondents.

In support of the Petition, the 5th Respondent filed a Replying Affidavit sworn by **Jacinta Wairimu Wanjiru**, sworn on the **20th August 2010**, wherein she averred that on the **6th of April 1981**, the Commissioner of Lands issued a grant to **Gatumaini Farm Company Ltd**, in respect of **L.R No. 12840** vide grant **No. 35361** and registered as **I.R 35361** on **7th April 1981**. Further **Gatumaini Farm Co. Ltd** would later sell and transfer the suit property to **Gatheca Family Company Limited** on **22nd July 1986**, who later sold and transferred the suit property to the 5th Respondent on the **4th day of December 1998**, and the transfer was registered on the **16th of December 1998** as **I.R 35361/5**.

She further averred that they applied for subdivision of the suit property and on **16th October 1998**, approval for subdivision was granted, subject to the condition that they surrender the original in exchange of separate titles for each plot. She alleged that they complied with the said condition and on the **18th of June 1999**, the Commissioner of lands gave them the final approval. Further that the certificates of leases for the sub plots were issued in favour of the 5th Respondent and the Commissioner of Lands executed the leases for each of the subplots and the same were forwarded vide a letter dated **10th December 2003** and the leases were registered in their favour. That thereafter, the 5th Respondent prepared the transfer of leases to the Petitioners who have been in occupation since **1999** and **2003**. That the letter by the Chief Engineer was in reply to a letter written by one of the petitioner and it is clear that the suit property does not encroach on the **Thika-Nairobi Highway**.

The Petition was opposed by the 1st to 4th Respondents and **Thomas Gicira Gacoki** filed a **Replying Affidavit** sworn on the **23rd of May 2012**, and averred that in the **1970's** the government acquired **44.14 acres out of 85.7** acres from land parcel **L.R 7705/2** owned by **Colorado Estates Ltd**, for purposes of construction of **Nairobi-Thika Highway** through negotiation and the full compensation was paid to the said **Colorado Estates**. That the part that was acquired included **10.32 acres** of "severed" land which was renamed as **L.R 12840**, where the Petitioners unlawfully occupy. He alleged that as per their records, **L.R 7705/2**, changed hands to **Gatumaini Farm Company Ltd**, who transferred the land to **Central Kenya Ltd** in **1985** and in the transfer it was clearly stated that the Government had acquired **44.14 acres** of land and that the purchaser would transfer the acquired portion to the government.

The 1st – 4th Respondents denied the allegations that they had trespassed or erected beacons in the suit properties and alleged that it is the Petitioners who had unlawfully occupied the suit property as the same had earlier been acquired by the government for public utility and the titles held by the Petitioners were acquired fraudulently and they are therefore illegal and unconstitutional .

Further that he has been advised by his Advocates on record that the Petitioners fundamental rights have not been violated in any way as it is the Petitioners who have unlawfully occupied the suit property.

The 5th Respondent also filed a further affidavit sworn on **6th June 2012**, in which she averred that **Mr. Gacoki** was referring to a different property from the one that they had bought. It was her contention that **Mr. Gacoki** was referring to **L.R 7705/2**, between **Gatumaini Farm Company Limited** and the Government of Kenya and Central Kenya Limited and that the title for the said property is **I.R 7531**. However the land bought by the 5th Respondent is separate and is **I.R 35361**. She further averred that the transaction involving the suit land were all above board and it is clear that there were no encumbrances in respect of the title of the suit property by the time they purchased it and they were innocent purchasers and they in turn transferred clean titles to the Petitioners.

After various Interlocutory Applications, the matter was finally set down for hearing and proceeded via viva voce evidence wherein the Petitioners called one witness and the Respondents called three witnesses in support of their respective cases

PETITIONERS EVIDENCE

PW1 Peter Butali Sabwami, adopted his witness statement dated **3rd August 2010**, and testified that he resides in View Land Estate located in **L.R No. 12840**, which after subdivision resulted in a number of plots and that the said plots are now wholly developed. It was his testimony that the Petitioners acquired property from **Viewland Investment Company Limited** and the plots were transferred to the Petitioners. He also adopted his list of documents as exhibits. Further that the development of the said plots was approved by the relevant bodies and that none of the approvals were rejected by the approving institutions. That however, some of the plots were later marked for demolition by the 3rd Respondent who alleged that the plots were on a road reserve. It was his testimony that the plots are partly developed and that the Petitioners were issued with certificates of titles and certificates of leases. Further that the Certificates of lease were recognized by banking institutions. However, later on Caveats were placed on the suit plots and that the Petitioners cannot now use them as collaterals. He produced a letter from the Ministry of Roads dated **28th April 2009**, indicating that the suit plots were not on the road reserve. Consequently, he denied that their respective plots were on public land.

On cross examination, he testified that the Petitioners filed this Petition because their properties were marked for demolition. Further that the Petitioners are still occupying the suit property as the demolition was stopped by a Court Order. That they have suffered losses because of the encroachment by the Respondents as they cannot use their own land to obtain loans due to the Caveats on their leases. He further testified that the development on their properties were approved by the approving institutions but later 3rd Respondent marked the Petitioners properties for demolition long after the Petitioners had developed on their respective plots.

He confirmed existence of a Grant issued to **Gatumaini Farm Company Limited**, and a transfer to **Viewland Investment limited**. He further confirmed that they did their due diligence by going through the Grant at page 2 wherein it was indicated that the plot is **No. 12840** and testified that that was not part of the original number **L.R 7505/2**, which was acquired by the Government.

Further that the construction of Thika Road was completed and the properties were not affected and that no Notices have been issued for any expansion. It was his testimony that when the Notices were issued, they went to the offices of **Viewland Investment Co. Ltd** to complain and thereafter they filed this Petition.

In re-examination, he testified that via letter dated **6th May 2013**, he applied for a loan but he could not obtain the loan as their properties were perceived to be on the public road.

RESPONDENTS' CASE

DW1 Thomas Gicira Gachoki, adopted his witness statement dated **19th November 2018**, and testified that he is the Manager of Survey Department at Kenya National Highway Authority(KENHA). Further that in **1970**, the Government of Kenya planned to do a dual carriage way on

Thika Highway and therefore certain parcels of land were to be acquired for that purpose and one was **L.R No. 7705/2**.

Further that the Government intended to do an interchange to **Thika Town**, and for that purpose, **33.82 acres** was acquired and another **10.32 acres** from the same piece of land was called 'severed' land. That the Government also acquired the 'severed' land and that the disputed area herein is the 'severed land'. Further that the interchange was constructed but the 'severed' land was not used then. However, the same has since been fraudulently acquired but it is still a Government land which should not be allocated to individuals.

On cross examination, he testified that the **10.32 acres** has been allocated to other people. Further that according to the available documents, the land was registered as No. **L.R 12840** before subdivision. That the land was allocated to individuals but he did not know how the said allocation was done as according to the Survey Plans, it still shows acquired by the government. He acknowledged that he did not know if the said allocation was carried out with the consent of the Government as there is evidence that the land had been acquired by the Government and document No.11 confirms the acquisition. Further that Section 2,324 of the document shows that the Government paid for compensation for the acquired portion. That the acquired land was **44.14 acres**, but the document deals with **44.14 acres** and the **10.42** is the 'severed land'.

It was his testimony that the **10.32 acres** was severed in the **1970's** but that he was not aware that it was also allocated in **1986**, by the Commissioner of Lands. That the **L.R No.12840**, on the document is **12840** and the acreage is **4.9 ha** and the land was transferred to **Gatumaini Farm Company Limited** on **1st July 1979**, and transferred in **1981** by the Commissioner of Lands.

On cross examination by Counsel for the Petitioners, he confirmed that the contents of the letter dated **16th October 1996**, is subdivision of **L.R 12840**, the subject matter of the suit herein. He testified that the signatory was the Commissioner of Lands and the land was subdivided. It was his testimony that the land was fraudulently obtained as the Ministry of Works is the one that had acquired the land. Further that the Commissioner of Lands was the one to confirm that the land was available for acquisition and that no criminal proceeding have been instituted against anyone.

In re-examination, he testified that the date of allocation was **16th July 1979**, and the term of the lease was 72 years and 6 months from **1st July 1979**. That the recipient of the Grant was **Gatumaini Farm Company Limited**. That the acreage was **4.96 ha** and when converted to acres it is **12.19 acres** and it is the same area acquired which was **4.171ha** which is about **10.32 acres** being the area allocated to **Gatumaini Farm Company Limited** and therefore it means that 2 acres were taken from the road.

He further testified that clause 4 of the Sale agreement in favour of **Gatumaini Farm Company Limited** referred to clause 2 which refers to **44.14 acres**. Further that during the said agreement, the clause for acquired government land continued to feature and the agreement was never forfeited.

DW2 Silas Kiongora Mburugu, adopted his witness statement dated **9th November 2018**, and testified that he is a Principal Land Administration Officer working with the National Land Commission and that when the issue was brought to his attention, he went through the existing records and found that **L.R No. 7705/2** measuring **8.5 acres** and part of it had been acquired by the government for a road construction and later on part of it around **1979** about **10.32 acres** was allocated to **Gatumaini Farm Company Limited**. That the portions were surveyed and became **L.R 12840**. A conversion was then done from the **Registration of Titles Act** to **Registered Land Act Cap 300 Laws of Kenya** and the owner being **View Land Investment** did subdivisions. Thereafter leases were done for the sub plots and registered in Thika sub county registry.

On cross examination by Counsel for the 5th Respondent, he testified that the agreement between Central Kenya and Government was signed by the Commissioner of Lands, one **Raymond James Njenga** on **9th April 1985**. He however acknowledged that the date he was referring to was between **Central Kenya Ltd** and **Gatumaini Farm Company limited**. That the acreage was **85.7 acres** and what was acquired by the government was **41.56 acres**. That subsequently the Commissioner of lands entered into another agreement with **Gatumaini Farm Company Limited** by way of allocating them **10.32 acres** of the suit land on **16th July 1979**, and the same Commissioner of lands signed for the Government. He confirmed that he was relying on the available records and that there was no forgery that was involved.

Further that the allocation was in **1979** and the agreement is dated **1985**. He stated that relevant consents were later granted and the land was subdivided after the application of subdivision was done by **Gathecha Family Company Limited**. He confirmed that the approval was in **1998**. It was his testimony that the Commissioner of Lands made the approval and gave the conditions to be fulfilled and once the conditions were fulfilled, the approval was to be given. That the approvals were given after fulfilment of the conditions and that he was aware that title deeds were issued and the duration of the leases was for **52 years** and **6 months** from **1st July 1999**. He confirmed that the period had not lapsed.

On cross examination by the Counsel for the Petitioners, he testified that there was no question by the Commissioner of Lands and the Director of Survey.

On re examination, he acknowledged seeing the Deed Plan and that the shape is the same and the land was acquired by the government and that it is the same that was allocated to **Gatumaini Farm Company Limited**. That the acquired acreage is **41.56 acres** and that the government did not invite anyone to apply for allocation. Further that the allocation and acquisition of an acquired government land was not proper. He testified that the letter of allotment was issued on **16th July 1979**, and there was an Applicant and the process was followed but the land had been acquired for road expansion.

DW3 Jacinta Mary Wanjku relied on her affidavit and testified that she is the representative of the 5th Respondent. It was her testimony that the 5th Respondent acquired the suit property from **Gathecha Family Company Limited** in **1998**, having bought it and that they had the intentions of subdividing and selling the resultant subdivisions. That by the time they purchased the suit property, the approvals had not been given but the application had been made as evidenced by the letter dated **16th October 1996**. Further that one **Mr. Mogaka** the District Land Registrar gave the approval on behalf of the Commissioner of Lands. That after fulfilling the relevant conditions, they proceeded to subdivide the land and sold the plots to the Petitioners. That the Ministry of Lands issued the titles for the suit plots.

On cross examination by the Petitioners advocate, she acknowledged that they sold the suit land to the Petitioners after they obtained consent to subdivide from the Commissioner of Lands between **1998 to 1999**. Further that during the process of sale, they paid for everything that was required and there was no question by the Chief Engineer, Director of Survey and that the whole transaction was done above board. She denied that the transaction was fraudulent and that the 5th Respondent's representative visited the lands office and there was no Caveat. Further that the letter dated **25th April 2009**, refers to letter dated **20th March 2009**, that stated that the Petitioners' parcels of land had not encroached on the **Thika- Nairobi Highway**. It was her testimony that if the land belonged to **KENHA**, then there would have been a Caveat.

On cross examination by Counsel or the 1st to 4th Respondents, she denied selling to the Petitioners land that was meant for public utility. She further testified that the suit land is next to the interchange and in **1985** the interchange was not there. Further that she sold the land together where the interchange was constructed. That she was not aware that the land was meant for the interchange and that it was a Government land or private land.

That the 5th Respondent acquired the land in **1998**, and the Deed Plan was issued on **10th September 1966**. Further that she was shown the agreement signed in **1970**, and the one for **1994** and that there was a claim in the agreement that the land was acquired for the Government. She stated that the said acquisition was to be respected by future owners of the suit land. She further testified that the 5th Respondent purchased the land and subdivided and sold the subdivided plots to the Petitioners and Petitioners have developed all over the properties. She denied that the land belonged to the Government. Further that the Government allowed them to subdivide and sell the land and that they would not claim from the persons who sold the land to them. It was her testimony that the land was not meant for road expansion and also denied that the 5th Respondent committed fraud.

On reexamination, she testified that the 5th Respondent carried out a search before purchasing the land that was owned by the **Gathecha Family Company Limited** and before then, the land was owned by **Gatumaini Farm Co. Ltd**. Further that the government authorized the subdivision and the lease was for 72 years and after the subdivision the leases were reduced to 52 years.

The Parties were then directed to file written submissions and in compliance with the said directives, the Petitioners through the **Law Firm of G.N Thiongo & Company Advocates** filed their written submissions on the **9th of April 2019**, and submitted that the suit property is separate and distinct from the one that was acquired by the government. It was further submitted that the state has not produced any formal objection to the validity of their Certificates of Leases and the Petitioners hold indefeasible titles to the suit land. The Petitioners relied on various provisions of law and decided cases and urged the Court to enter judgment in their favour.

The 1st to 4th Respondents filed their submissions on the **12th of March 2019**, and relied on various provisions of law and decided cases. It

was submitted that there was no trespass on the Petitioners parcels of land as the land was part of **L.R 7705/2**, that was acquired by the Government lawfully and that the said acquisition by the Government is an overriding interest.

It was further submitted that the Petitioners misrepresented to government officials that the suit land was available for allocation and failed to notify them of the mistake of receiving revenue as alienated land is set aside for public use and it is not available for allocation. It was also submitted that the Petitioners have not proved that the two parcels of land are distinct and separate. Further that the Petitioners' certificate of leases are void and they are not entitled to any damages and that the public interest outweigh all other interests.

The 5th Respondent filed its submissions on the **25th of March 2019**, and submitted that there is no evidence that the title they acquired was acquired fraudulently and since the 1st to 4th Respondents have not pleaded **fraud** nor particularized fraud in their pleadings, then they cannot claim it. It was further submitted that the transactions were above board and the Petitioners have no cause of action against the 5th Respondent. They relied on various decided cases and provisions of law and urged the Court to allow the Petition with costs to them.

The Court has now carefully read and considered the pleadings by the parties, and the written submissions and finds that the issues for determination are;

- i. ***Whether the suit property formed part of the portion of land acquired by the Government.***
- ii. ***Whether the Petitioners hold good title to their respective parcels of land.***
- iii. ***Whether or not the Petitioners unlawfully acquired the suit property and/or their respective parcels of land?***
- iv. ***Whether or not the action of the officers from the Ministry of Roads were unlawful?***
- v. ***Whether the Petitioners are entitled to the orders sought?***

i. Whether the suit property formed part of the portion of land acquired by the Government.

The 1st to 4th Respondents have averred that the suit property forms part of the portion of land that was acquired by the government for purposes of expansion of the road. It is their allegation that the government had allotted the land, but the same was later compulsorily acquired and compensation paid out and therefore the Petitioners had no right claiming the same. To this effect the 1st – 4th Respondents have produced documentations to prove the said acquisition. The Court has carefully gone through the said documentations and it is clear that **L.R 7705/2**, was the one that was allocated to **Colorado Estates**, who would later sell the same to **Gatumaini Farm Company Limited**, who would later sell the same to **Central Kenya**. The Grant of the said parcel of land bears the **I.R No. 7531**.

The 5th Respondent who sold the suit land to the Petitioners has however refuted this claim that the government ever compulsorily acquired the suit land. She averred that certificates of leases were issued to the Petitioners by the Ministry of Lands after approval of subdivisions of the land by the Commissioner of Lands. That the 1st – 4th Respondents are referring to a property that is distinct from the suit property. To this effect they have produced a transfer document from **Gatumaini Farm Company Limited** to **Gatheca Family Company Limited** who in turn sold the land to the 5th Respondent which they subdivided and sold to the Petitioners herein. From the documents produced in Court, the suit land was initially **L.R 12840** and its **I,R No.35361**. A close look at the said documents show that these are two distinct parcels of land as the two parcels bear different **L.R and I.R numbers**. Further from the 1st to 4th Respondent's List of documents, the Survey Map produced indicates that the two parcels of land are separate and there is no documents that have been produced before this Court that proves that **L.R 7705/2 and L.R 12840**, are one and the same land. In the absence of any evidence to prove the above, this Court finds and holds that the suit land is not the same as **L.R 7705/2**.

While the 1st to the 4th Respondents have claimed that the suit land was acquired for expansion of the road for the interchange, via a letter dated **28th April 2009**, the Chief Engineer confirmed that the parcels of land that were resultant subdivisions of the suit property were not encroaching on any other parcel of land unless it has been set aside for any other public use. The 1st – 4th Respondents have failed to prove that the suit land was ever set aside for any public use and further that the same was ever compulsorily acquired and therefore this Court holds and finds that the suit land was never acquired by the government.

This Court also notes that in her ruling dated **12th July 2013** Hon. **Justice Mary Gitumbi** did also find that the suit property is distinct from that which was acquired by the government.

ii. Whether the Petitioners hold good title to the suit land and/or their respective parcels of land.

For the court to make a finding as to whether the Petitioners have a good titles to the suit property, the Court has to establish whether the root of the Petitioners titles is traceable.

The Petitioners have alleged that they bought the suit properties from the 5th Respondent. The 5th Respondent have alleged that they bought the suit land from **Gatheca Family Co. Ltd** who had bought the land from **Gatumaini Farm Company Limited**. It is not in doubt that the said **Gatumiani Farm Co. Ltd**, were allocated the suit land by the Government and a Grant dated **6th April 1981**, was issued which was an exhibit in court. Further the said **Gatumaini Farm Co. Ltd** would later sell the suit property to **Gathecha Family Co. Ltd** who later

transferred the suit land to the 5th Respondent, who subdivided the same and sold the resultant subdivisions to the Petitioners.

The Petitioners have produced certificate of leases which confirm indeed that they are the registered proprietors of the resultant subdivisions or their respective parcels of land. Though the 1st to 4th Respondents had alleged that the government had acquired the suit property for purpose of expansion of the **Nairobi-Thika Highway**, the Court had already held and found that there was no evidence of such acquisition because the suit land is distinct from the land that had been acquired by the government for public utility.

The 5th Respondent has also produced a letter dated **16th October 1998**, from the Commissioner of Lands allowing provisional approval for subdivision after the suit land was transferred to them on the **16th of December 1998**. Further via a letter dated **26th October 1998**, the 5th Respondent wrote back and confirmed having fulfilled the given conditions. It is not in doubt that the 5th Respondent sought for approvals for subdivision of the suit property before the same was subdivided and later sold to the Petitioners. The said approvals is evident from the letter dated **16th October 1998**, by the Commissioner of Lands and a final approval was granted on the **18th of June 1999**.

In his testimony DW2 acknowledged that going by the records in place, the process through which the suit land being **L.R 12840** was allocated to **Gatumaini Farm Company Ltd** and later to the 5th Respondent and subsequently to the Petitioners has been well documented and there has been no complaints by any party. This Court therefore holds and finds that as the process through which the Petitioners land was acquired has been explained and the Court being satisfied that the root of the Petitioners' certificates of leases is traceable, which is free from any contradictions, then the court will not hesitate to hold and find that the Petitioners hold good titles to their respective parcels of land.

Further the Petitioners have testified that before developing on the suit properties, they sought for necessary approvals which approvals were granted to them by the approving institutions without any query and these approving institution are public bodies. The said government institutions cannot turn around and allege that what they approved were plots lying on public utility land.

iii. Whether or not the Petitioners unlawfully acquired the suit property and/or their respective parcels of land.

The 1st to 4th Respondents had alleged that the Petitioners acquired the suit properties through fraud and therefore their titles are illegal as the suit property had been acquired by the Government. From the foregoing analysis by this Court, it is clear that the court has already held and found that the original suit property which resulted in the Petitioners' parcels of land has never been acquired by the government and further that the root of the Petitioners' titles is traceable and therefore the Petitioners hold good titles.

Being the registered owner of their respective parcels of land, the Petitioners are deemed to be the **absolute** and **indefeasible** owners of this suit property and/or their distinct parcels of land. However, the said certificates of leases can be challenged if the same were acquired through **fraud** or **misrepresentation** in which the Petitioners are found to have been aware and involved. **See Section 23(1) of the Registration of Titles Act (now repealed) and repeated in Section 26(1)(a)&(b) of the Land Registration Act 2012**, which states:-

“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.

*Though the 1st to 4th Respondents have averred that the suit properties were acquired through fraud, no evidence of the alleged fraud was ever tabled before this Court. On the contrary DW2 who was their witness confirmed that as per the documentations held by **National Land Commission**, they showed that there was no misrepresentation of any kind and that all due process was followed when the parties sought for approvals to subdivide and that the approvals were equally obtained. The 1st – 4th Respondents have alleged that the Petitioners misled government officials. It is this Court's opinion that the government is the custodian of documents pertaining to land and it must be the Government officials who give guidance to the public on the contents and validity of documents and not the other way round and therefore these allegations cannot hold water and are far from the truth. Further **‘he who alleges must prove’**. That allegation was never proved by the 1st – 4th Respondents and will only remain as a mere allegation.*

The Certificates of titles were issued by the land officials and since none of the said officials came to Court to give evidence that the said certificates of leases were issued irregularly or were acquired fraudulently, or disputed the existence of the original title, then the Court cannot find and holds that the said certificates of leases held by Petitioners are regular and are lawfully and legally held by them.

Fraud is a serious allegation and the same must be strictly pleaded

*and proved. See the case of **Urmilla W/O Mahendra Shah..Vs...Barclays Bank International Ltd & Another (1979) KLR 76**, where the Court held that:-*

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

*Further in the case of **Davy...Vs...Garrette (1878) 7 ch.473 at Pg 489**, the Court held that:-*

“In the common law courts, no rule was more clearly settled than that fraud must be distinctly proved and that it was not allowable to leave fraud to be inferred from the facts...”

This Court finds that the 1st - 4th Respondents have failed to discharge their duty of proving fraud. There was no evidence led by the said Respondents herein to prove the allegations of fraud especially on the part of the Petitioners. The 1st – 4th Respondents therefore failed to discharge their duty as provided by Section 107 of the Evidence Act, which provides:-

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.

Allegations of fraud being extremely serious and which must be strictly proved, the Court finds that the 1st – 4th Respondents herein failed to discharge their onerous duty as provided by Section 109 of the Evidence Act, which states as follows:-

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”.

Therefore this Court finds and holds that there was no evidence availed to prove that the Petitioners Certificates of leases were acquired through **fraud, misrepresentation** and/or **mistake**. The Court consequently comes to a conclusion that the Petitioners titles are absolute and indefeasible.

iv. Whether or not the actions of the officers from the Ministry of Roads were unlawful.

It is not in doubt that the Petitioners hold Certificates of leases to their respective parcels of land which emanated from the suit property and which the Court has already held and found are indefeasible and absolute. The Petitioners have alleged that the officers from 3rd Respondent went to their premises and marked their houses for demolition and erected beacons and were it not for a Court Order, then their structures would have been demolished. Further that they have been unable to deal with their respective land parcels such as taking loans as there are caveats placed on their respective plots and that Petitioners were never notified of the impending actions by the said Ministry officials.

There was no evidence produced to show that the Petitioners were ever given Notices before their structures were marked for demolition and or beacons placed. Without such Notices, then the court finds that the said marking of the premises and placing of beacons was irregular and without basis.

The Ministry of Roads had a duty to issue sufficient and reasonable Notice to the Petitioners as provided by **Section 49(1)** of the Kenya Roads Act 2007, which provides as follows:-

“Where a person without the permission required by Subsection (1) or contrary to any permission given hereunder, erects, Constructs, lays or establishes a structure or other thing, or makes a structural alteration or addition to a structure or other thing, an authority may be Notice in writing direct that person to remove the unauthorized structure, other thing, alteration or addition within a reasonable period which shall be stated in the notice but which may not be shorter than thirty days calculated from the date of the notice”.

From the above provisions of law, it is clear that there was need to give the Petitioners a reasonable **Notice of 30 days** to remove the allegedly illegal structures and failure to remove the said structures, then the said officials could have marked the premises. There is no evidence of such **Notice** and therefore the 3rd Respondent’s officials’ actions were unlawful.

Though the 1st – 4th Respondents have alleged that the Petitioners parcel of land were acquired **fraudulently** and therefore did not fall under the protection of **Article 40 of the Constitution**, it is clear that the above provisions of law is available in instances where the property is found to have been unlawfully acquired. However the only way that a property can be found to be unlawfully acquired is through due process of law. The Petitioners herein have never been found to have acquired this property unlawfully by any court of law or any legally established institution. See the case of **The National Land Commission & Others Ex parte vivo Energy Kenya Ltd (2015) eKLR**, where the Court held that:-

“The impugned Gazette Notice seems to suggest that there was an illegality, involved in the registration of the suit land in the name of the Applicant. No doubt under the provisions of Article 40(6) of the Constitution, property rights protected under Article 40 of the Constitution do not extend to any property that has been found to have been unlawfully acquired. Therefore, there must be a finding that the property in question was unlawfully acquired”.

There was no finding herein by any legally recognized institution, that the Petitioners property was unlawfully acquired and therefore the Ministry of Roads officials were not within the law in marking and placing of the

beacons on the Petitioners’ parcels of land. Further in the case of **Isaac Gathungu Wanjohi & Another...Vs... Attorney General & 6 Others (2012) eKLR**, the court held that:-

“Where the state contended a property was acquired illegally, the state must follow due process to establish the illegality”.

Having found that the Petitioners have **absolute** and **indefeasible** titles which have not been cancelled, then they are entitled to protection by the Constitution. This protection is accorded by Article 40(2)(a) which provides:-

(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.

Further, Article 40(3) of the Constitution provides:-

(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.

From the analysis of the facts herein, it is clear that the Ministry of Roads officials did not observe or follow the due process while carrying out the said markings and placing of beacons on the Petitioners respective parcels of land. Failure to follow the due process rendered the whole process **illegal** and **unlawful**.

Further this Court has already held that the certificates of leases held by the Petitioners were lawful and the suit land was never compulsorily acquired by the government for purposes of public utility and that the Petitioners were duly compensated. There was no reason to mark the said premises.

v. Whether the Petitioners are entitled to the orders sought

The Petitioners have sought for various declarations and have alleged that their rights under the Constitution were breached. The Court has held and found that the Petitioners are the **absolute** and **indefeasible** owners of their properties and therefore the actions of erecting beacons on their respective properties amounted to an action of trespass and encroachment on the Petitioners parcels of land.

Trespass has been defined by *Clerk and Lindsel on Torts, 18th edition at Pg.23* as;

“any unjustifiable intrusion by one person upon the land in possession.”

The Court is satisfied from the material placed before it that the Petitioners are the registered proprietors of their respective parcels of land. The Petitioners have accused the 1st to 4th Respondents of encroaching upon their land by placing beacons thereon. The 3rd Respondents having entered onto the Petitioners’ parcels of land without any lawful or justifiable cause while the Petitioners were in possession, then the said 1st – 4th Respondents are trespassers.

As to whether the Petitioners are entitled to Damages for trespass, the court will be persuaded by the findings in the case of **Park Towers Limited versus John Mithamo Njika & 7 others (2014)eKLR**, where the Court held that:-

“I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages awardable depending on the unique facts and circumstances of each case.”

Further, in the case of **Philip Aluchio...Vs...Crispinus Ngayo [2014]eKLR**, the Court held as follows:-

“..... The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage. It has been held that the measure of damages for trespass is the difference in the value of the Plaintiff’s property immediately after the trespass or the costs of restoration, whichever is less”

The plaintiff herein did not adduce any evidence as to the state of his property before and after the trespass. It therefore becomes difficult to assess general damages for trespass....”

The Petitioners did not provide the value of their respective land before the alleged trespass. Therefore the Court will award each of the Petitioners a nominal figure of **Kshs.100,000/=** as general damages for trespass.

The Upshot of the foregoing is that the Petitioners have discharged their burden of prove on a balance of probability and the Court finds that their Petition is merited and the same is allowed entirely with each of the Petitioners being awarded a nominal General Damages of **Kshs. 100,000/=**.

Consequently, the court enters Judgment for the Petitioners against the 1st – 4th Respondents in terms of prayer No.(a), (b), (c) and (d). In regard to prayer No.(c) each of the Petitioners is awarded **Kshs.100,000/=** as general damages. However, the court finds that the 5th Respondent was not responsible for the actions that were perpetuated by the 1st – 4th Respondents upon the Petitioners. Therefore, there will be no blame that will be apportioned to the 5th Respondent, since it acquired the suit property through purchase and duly sold the same to the Petitioners. However the 5th Respondent is awarded costs which costs shall be borne by the 1st – 4th Respondents.

It is so ordered.

Dated, Signed and Delivered at Thika this 8th day of November, 2019.

L. GACHERU

JUDGE

8/11/2019

In the presence of

M/S Muhia holding brief for Mr. Thiongo for the Petitioners

No appearance for the AG for the 1st Respondent

2nd Respondent

3rd Respondent

4th Respondent

Mr. Kinga for the 5th Respondent

Jackline - Court Assistant.

L. GACHERU

JUDGE

8/11/2019