



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

CONSTITUTIONAL PETITION NO. 20 OF 2014

IN THE MATTER OF ARTICLES 22, 23, 40, 47, 50 AND

259 1(b) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND

FREEDOMS UNDER ARTICLES 40, 47 AND 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ENCROACHMENT, ENTRY AND PURPORTED

REPOSSESSION OF LAND IN NAIVASHA, NAKURU COUNTY

BETWEEN

PHARIS NDUNG’U CHEGE.....1ST PETITIONER

MUTAI MICHAEL.....2ND PETITIONER

ISAAC MUNGAI KAMAU.....3RD PETITIONER

IBRAHIM KARANJA.....4TH PETITIONER

SAMUEL NDUNG’U KIMANI.....5TH PETITIONER

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

NATIONAL LAND COMMISSION.....2ND RESPONDENT

GOVERNOR NAKURU COUNTY.....3RD RESPONDENT

NJUGUNA KAMAU.....4TH RESPONDENT

JOHN KIHAGI.....5TH RESPONDENT

JUDGMENT

Introduction

1. The proceedings herein pit the petitioners who describe themselves as having been allocated parcels of land by the Commissioner of Lands against the respondents who are either officers holding offices created by the Constitution (1st and 3rd respondents), a commission created under the Constitution (2nd respondent) and two citizens (4th and 5th respondents).

The Petitioners' Case

2. The petitioners moved the court pursuant to Petition dated 12th March 2014 and filed in court on 14th March 2014. The petition was supported by an affidavit sworn by the first Petitioner.

3. It was averred in the petition that the petitioners bring this petition for themselves and on behalf of other persons who are not listed as petitioners. The petitioners further stated that between the years 1995 and 2005, the Commissioner of Lands (hereafter COL) in conjunction with the Municipal Council of Naivasha (MCN) allocated adjoining parcels of land to some 24 persons who included the petitioners. Before the petitioners and the other allottees could develop the land, Delamere Estates Limited (hereafter Delamere) agreed with the allottees and the MCN to have the allottees relocated to another parcel of land to be provided by Delamere, so as to allow Delamere to use the land initially allocated to the allottees as an access to its neighbouring land.

4. The petitioners further stated that around the year 2005, Delamere donated a total 26.93 acres to the MCN out of which 22 acres was for the construction of a stadium and 4.93 acres was to be used to resettle the allottees. Accordingly, each of the 24 allottees including the petitioners were issued with title documents. They proceeded enjoy quiet possession until 11th November 2013 when the respondents purported to repossess and fence off the 4.93 acres which had been allocated to the petitioners and the other allottees.

5. The petitioners stated that the actions of the respondents were contrary to articles 40, 47 and 50 of the Constitution. The petitioners therefore sought judgment as follows:

a) A declaratory order be issued that the petitioners herein and other affected persons not in these proceedings are entitled to their fundamental rights as enshrined in the Constitution of Kenya, specifically, right to fair administrative action, protection of right to property, and right to a fair hearing.

b) An order be issued by this honourable court restraining the respondents from further entering, remaining thereon, interfering, or dealing in any other way with the petitioners' parcels of land without first applying fairness, proportionality as provided in the Constitution.

c) An order be issued that the respondents herein remove themselves, their agents, servants and/or implements within thirty days failure to which the petitioners herein be at liberty to remove them from the suit lands, to the extent of their encroachment.

d) Orders do issue, in appropriate terms, affirming in favour of the fundamental rights of the petitioners.

e) That the cost of these proceedings be borne by the respondents.

Evidence in Support of the Petition

6. As previously noted, the petition was supported by an affidavit sworn by the 1st petitioner. The affidavit was sworn on 11th March 2014. It was deposed in the affidavit that the petitioners bring this petition for themselves and on behalf of other persons who are not listed as petitioners. The petitioners further stated that between the years 1995 and 2005, the Commissioner of Land (hereafter COL) in conjunction with the Municipal Council of Naivasha (MCN) allocated adjoining parcels of land to some 24 persons who included the petitioners. Before the petitioners and the other allottees could develop the land, Delamere Estates Limited (hereafter Delamere) agreed with the allottees and the MCN to have the allottees relocated to another parcel of land to be provided by Delamere, so as to allow Delamere to use the land initially allocated to the allottees as an access to its neighbouring land. A copy of a letter of allotment dated 24th October 1995 and issued to P. N. Chege in respect of Uns. Industrial plot No. 356 Naivasha Township measuring approximately 0.10 hectares was annexed. Another copy of a letter of allotment dated 24th October 1995 issued to Nelly Wanjiru Ndungu in respect of Uns. Industrial plot No. 357 Naivasha Township measuring approximately 0.10 hectares was also annexed. Similarly, copies of payment receipt, banker's cheque and bank slip all dated the year 2003 and said to be in respect of plot 357 were annexed.

7. It was further deposed that around the year 2005, Delamere donated a total 26.93 acres to the MCN out of which 22 acres was for the construction of a stadium and 4.93 acres was to be used to resettle the allottees. Accordingly, each of the 24 allottees including the petitioners were issued with title documents. They proceeded enjoy quiet possession until 11th November 2013 when the respondents purported to repossess and fence off the 4.93 acres which had been allocated to the petitioners and the other allottees. Copies of various letters and certificates of titles were annexed.

First Respondent's Participation

8. Despite being served severally, the 1st respondent neither responded to the petition nor attended court.

2nd Respondent's Response

9. The 2nd respondent opposed the petition through a replying affidavit sworn by Margaret Kaptuiya Cheboiwo, its Director of Legal Affairs and Enforcement. She deposed that at the invitation of the 5th respondent who was then Member of Parliament for Naivasha Town and on its

own motion, the 2nd respondent conducted investigations which revealed various irregularities regarding how land known as LR 23400 measuring approximately 10.0 hectares or 26.93 acres which belonged to MCN was subdivided into LR 23400/1 and LR 23400/2. The initial 26.93 acres had belonged to Delamere and was offered by Delamere in exchange for land belonging to the government for purposes of developing a sports complex in Naivasha. In the subdivision, LR 23400/1 measuring approximately 8.894 hectares was to be used for the sport complex while LR 23400/2 was to be allocated to the petitioners and other allottees. She added that the petitioners had misrepresented facts by claiming that they were displaced persons who needed to be compensated for loss of land. On realising the misrepresentation, Delamere disowned the subdivision.

10. The deponent added that the 1st petitioner could never have been a displaced person since he was a former mayor of Naivasha town. She annexed copies of various letters.

3rd Respondent's Response

11. The 3rd respondent opposed the petition through a replying affidavit sworn by Joseph Motari, a County Secretary in the office of the 3rd respondent. He stated that Delamere's intention was to donate 26.4 acres for a stadium and that they were misled as to the subdivision of LR 23400. He annexed a copy of a letter from Delamere dated 16th January 2014. He added that there are plans to construct the stadium, a project which is at the heart of social and economic development of Nakuru County. He annexed a copy of a document titled "Nakuru County Integrated Development Project."

4th Respondent's Response

12. The 4th respondent filed a replying affidavit which was sworn on 8th May 2014. He generally distanced himself from the allegations by the petitioners and added that he attended the 3rd respondent's tree planting ceremony at the suit property on 11th November 2013 in his capacity as the Chairman of Chamber of Commerce Nakuru County. The interest of the chamber was to source for investors to ensure that the stadium project was realized.

5th Respondent's Response

13. The 5th respondent filed a replying affidavit on 8th May 2014. He deposed that he was the Member of Parliament for Naivasha Town Constituency as at the date of swearing the affidavit. He further stated that the 4.93 acres that the petitioners are claiming to belong to them was acquired by them illegally since the land was allocated to the MCN in 1998 as part of 26.93 acres or approximately 10.9 hectares for purposes of developing a sports complex.

14. He stated that the land initially belonged to Delamere but was exchanged with government land for the said purpose. He annexed a copy of a letter from Provincial Physical Planning Officer, Rift Valley Province, dated 12th March 1996. He added that he became aware of the issues surrounding the suit properties after he received a letter dated 26th July 2013 from the Chairman of Naivasha Stadium Project Stakeholders' Committee. He visited the area around July 2013 and discovered that the land was vacant save for a Youth Development Centre constructed by the Ministry of Youth Affairs. He also went to the MCN to inspect the title for the stadium land and discovered that the new title was for 8.894 hectares as opposed to the original 10.9 hectares which were allocated. He further stated that although the petitioners claim to be displaced persons or squatters, the 1st petitioner could not have been a displaced person since he was a former Mayor of Naivasha Town. In this regard, the deponent annexed a copy of a letter from Naivasha Municipal Council dated 5th September 1996 and signed by the Town Clerk. The 1st petitioner is mentioned therein as the Mayor.

Petitioners' Supplementary Affidavit

15. In a supplementary affidavit sworn by the 1st petitioner and filed on 30th April 2014, the petitioners reiterated that they were displaced persons having been displaced by Delamere.

Hearing and Submissions

16. At the request of the parties, the petition was heard by way of affidavit evidence, written submissions followed by oral highlighting. The petitioners and the 2nd to 5th respondents filed written submissions while the 1st respondent did not file any.

Oral Highlighting

17. In oral highlighting, Mr Kagucia counsel for the petitioners submitted that the petition is not opposed by the 5th respondent since the 5th respondent's replying affidavit was withdrawn on 6th June 2014. Counsel added that the 3rd respondent received the land gratis from Delamere while the transaction between the petitioners and the Commissioner of Lands was for consideration. He added that there was ample evidence that in November 2013 the 2nd to 5th respondents invaded the petitioners' land, fenced it and repossessed it. The respondents' conduct was illegal and amounted to impunity. Regarding the role of the National Land Commission (NLC), counsel submitted that the suit properties herein are private property. NLC could only intervene lawfully by compulsory acquisition or benefit by virtue of a lease interest or transfer, surrender or reversion of interest. In conclusion, counsel submitted that even if the petitioners could have acquired their property irregularly and even if there had been a genuine desire by the state to own the petitioners' property, due process ought to have been followed. Consequently, counsel urged the court to restate sanctity of title.

18. On his part, Mr Biko for the 2nd to 5th respondents submitted that the petition is incompetent since it is dated 12th March 2014 yet its

supporting affidavit was sworn on 11th March 2014. As such, there is no supporting affidavit and consequently no valid petition. Further, counsel submitted that the petitioners purport to bring the petition on their own behalf and on behalf of others who were not specifically joined and in respect of whom no authority was exhibited. Regarding the role of NLC, counsel submitted that NLC had a role as regards land which has a public interest. There was a stadium to be constructed and this gives the land a public tone. NLC was therefore rightly involved. Counsel therefore urged that the petition be dismissed with costs.

Analysis and Determination

19. I have considered the petition, the affidavits filed, the written submissions and the oral highlighting.

20. Although counsel for the petitioners submitted that the 5th respondent's replying affidavit was withdrawn on 6th June 2014, I have not seen evidence of such withdrawal on record. On 6th June 2014 the matter was before my sister R. P. V. Wendoh J. My reading of the handwritten proceedings of that date does not reveal any such withdrawal.

21. Though the third respondent had initially raised a preliminary objection challenging the jurisdiction of the court, the said objection was withdrawn while the matter was still pending before the High Court. The matter was later transferred to this court. No party has challenged the jurisdiction of this court since the transfer.

22. The following issues emerge for determination. Firstly, whether there is a valid petition before the court. Secondly, whether the petitioners have established that they have fundamental rights under **Articles 40, 47 and 50** in regard to the suit properties. Thirdly, if they establish the fundamental rights, whether such rights have been breached by the respondents. Finally, whether the petitioners are entitled to the reliefs sought.

23. While not disputing that a petition has been filed, the respondents have argued that there is no valid petition since the supporting affidavit predates the petition. A perusal of the record herein reveals that the petition is dated 12th March 2014 while its supporting affidavit was sworn on 11th March 2014. It is thus true that the petition predates the supporting affidavit.

24. The procedure for institution of constitutional petitions is found at Part II of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**. Rule 4(1) of these rules provides:

Where any right or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules.

25. Further guidance regarding the manner of commencing proceedings will be found at **Rule 11(1)** of the foregoing rules which provides that a petition **may** be supported by an affidavit. It is thus clear that an affidavit is not mandatory though in practice it is always helpful to file one since it readily places before the court the evidence in support of a petition. In fact, the rules permit commencement of proceedings through "an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom". All these go to show that an affidavit in support of a petition is not a mandatory requirement.

26. The petitioners having chosen to file a supporting affidavit, is the petition rendered fatally defective by virtue of the affidavit predating the petition? I do not think so. I have already demonstrated that it is not a mandatory requirement that a petition be accompanied by a supporting affidavit. Further, I consider the issue of the affidavit being dated earlier than the petition to be one of form or procedural technicality rather than substance. The court is under a duty to ensure that substantive justice is done. There should be no undue regard to procedural technicalities. That is the unambiguous expectation of **Article 159 (2) (d)** of the Constitution.

27. The Court of Appeal has recently restated the court's overall mission to do substantive justice in **Martha Wangari Karua v Independent Electoral & Boundaries Commission & 3 others[2018] eKLR** as follows:

... In this appeal as well, justice should not have been sacrificed at the altar of the procedural requirements ..., particularly because those lapses did not go to the fundamental dispute that was before the court. This does not mean that procedural rules should be cast aside; it only means that procedural rules should not be elevated to a point where they undermine the cause of justice. ...

The elevation and prominence placed on substantive justice is so critical and pivotal to the extent that Article 159 of the Constitution implies an approach leaning towards substantive determination of disputes upon hearing both sides on evidence. ...

28. In view of the foregoing, I find and hold that even though the petition herein predates the supporting affidavit, that alone does not render the petition invalid. Thus, the first issue above is resolved in the affirmative. There is indeed a valid petition before the court.

29. The petitioners' case is hinged upon **Articles 40, 47 and 50** of the **Constitution**. In short, the petitioners claim protection of their right to property, their right to fair administrative action in respect to the properties and right to a fair hearing, also in regard to issues surrounding the subject properties.

30. That the constitution takes a keen interest to ensure protection of property cannot be gainsaid. It is for that reason that **Article 40** of the Constitution provides as follows:

40. Protection of right to property

(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) ...

(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)

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired. [Emphasis supplied]

31. As regards right to fair administrative action, **Article 47** provides in part:

47. Fair administrative action

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

32. The right to fair administrative action goes hand in hand with right to a fair hearing which is provided for under **Article 50** as follows:

50. Fair hearing

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

(2) ...

33. In the context of this case, everything revolves around the properties known as LR No. 28211/22, LR No. 28211/15 alongside the other properties listed at paragraph 16 of the petition (all of which I collectively refer to as suit properties) and whether the rights of the petitioners under **Articles 40, 47** and **50** in relation to the properties have been violated.

34. The petitioners went to great length to explain how they acquired the suit properties. The respondents similarly put a lot of focus on how the properties were acquired.

35. The petitioners' case hinges on their claim to protection of the right to property as provided under **Article 40** of the **Constitution**. It is important to reproduce **Article 40(6)** which provides:

The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

36. If the allotments to the petitioners were procedurally and lawfully done, then the petitioners' title would be protected by **Section 26** of the **Land Registration Act**. Conversely, an unlawful or irregular allotment would render the certificates of title nullities. In **Henry Muthee Kathurima v Commissioner of Lands & another [2015] eKLR** the Court of Appeal stated as follows:

We have considered the provisions of Section 26 of the Land Registration Act in light of the provisions of Article 40 (6) of the Constitution and it is our considered view that the concept of indefeasibility of title is subject to Article 40 (6) of

the Constitution. Guided by the provisions of Article 40 (6) of the Constitution, we hold that the concept of indefeasibility or conclusive nature of title is inapplicable to the extent that title to the property was unlawfully acquired. Further, it is our view that the Government's title to an un-alienated public land stems from the concept of radical title or eminent domain. Based on radical title, the government has superior title to all un-alienated public land and the appellant cannot challenge radical or eminent title.

37. In the above case, the Court of Appeal proceeded to affirm the judgment of the High Court wherein that court had held inter alia that:

.... It has been shown that the suit land was public utility land on which the 2nd respondent has been in occupation. The Petitioner has not been in occupation at any time. I find and hold that he stands to suffer no prejudice if he does not get the land as claimed herein....The conclusion is that the issuance of the title to the Petitioner on the basis of the evidence presented before the court was irregular and a nullity....His title is a nullity and the suit land never passed to him. It still belongs to the Government for public use.

38. In Adan Abdirahani Hassan & 2 Others v The Registrar of Titles, Ministry of Lands & 2 Others [2013] eKLR Angote J. stated as follows:

25. Any alienation of land reserved for public purpose and issuance of a title for the same, whether under the Registration of Titles Act, cap 281 or the Registered Land Act, cap 300 is null and void ab initio. Such a title does not exist in the first place because the land belonged to the Public and was not available for alienation. The cancellation of such a "title," which is not a title as known in law because it should not have been issued in the first place, would be an administrative exercise by the Commissioner of Lands or the Registrar of Titles to rectify the mistake or misrepresentation that was made by the same office.

39. The issue of validity of the petitioners' titles has not been directly put before me for determination. No such prayer is included in the petition and there is no cross petition to that effect by the respondents. Nevertheless, I dare say that I cannot determine whether the petitioners have established that they have fundamental rights under Articles 40, 47 and 50 over the suit properties without looking at the background of the petitioners' titles. The petitioners and even the respondents being aware of this, addressed the issue of the validity of the titles at length. The petitioners' case wholly depends on validity of their titles for even if this court finds in their favour, such a finding is of no consequence if their titles turn out to be nullities. A title that is a nullity is simply a non-existent title.

40. The Supreme Court in Republic v Karisa Chengo & 2 others [2017] eKLR stated as follows:

When an act is void, it is a nullity *ab initio*. It cannot found any legal proceedings and Lord Denning's decision in the Privy Council case of *Benjamin Leonard Macfoy United Africa Company Limited (UK)[1962] AC 152* succinctly makes this point. He stated thus:

*"Court has discretion in matters that are voidable not to proceedings that are a nullity for those are automatically void and a person affected by them can apply to have them set aside *ex debito justitiae* in the inherent jurisdiction of the Court ..."*

And;

"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. ... And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

41. The court can no longer superficially accept every title document that is waved before it and disregard protests that the title was obtained irregularly, more so when the basis of the complaint is that the land was set aside for public use. The court cannot be held hostage simply because such a title is yet to be nullified. Otherwise, the court may unwittingly give a veneer of legality and an extra lease of life to a void title document.

42. The Court of Appeal recently expressed itself as follows in Redcliff Holdings Limited v Registrar of Titles & 2 others [2017] eKLR:

The Judge further appreciated the import of Article 40 of the Constitution which protects the rights of property that is lawfully acquired, thus, a title under section 23(1) of the Registration of Titles Act is no longer held sacrosanct by hook, line and sinker as it was under the Australian law of Torrens system especially when there are allegations of illegalities or irregularities in acquisition of title. In this respect the Judge went on to cite the case of; - Mureithi & 2 Others v. Attorney General 5 Others Nairobi HCMA No. 158 of 2005 [2006] 1 K L R 443 where the courts, even before the promulgation of the Constitution, appreciated that the mere fact that a person had title to land did not mean that such title could not be questioned. The court expressed itself as follows;-

"Should the Land Acquisition Act give shelter to the land grabbers of public land or the courts going to invent equally strong public interest vehicle to counter this? Should individual land rights supersede the communal land, catchments and forests? How for instance are the courts going to deal with land grabbers who stare at your face and wave to you a title of the grabbed land and loudly plead the principle of the indefeasibility of title? Are the courts going to stay away and refuse to rise to the greater call of unravelling the indefeasibility by holding that such a title perhaps issued in order to grab a public utility plot such as hospital by an individual violates the public or national interest and therefore a violation of the Constitution. I venture to suggest that such titles ought to be nullified on this ground and, thrown into the dustbins."

43. I am of the firm view that I cannot determine this petition without looking into how the petitioners acquired the suit properties. As already stated, both sides of this dispute have addressed the matter at length.

44. My analysis of the evidentiary material placed before the court shows that through Letter of Allotment Ref. No. 19447/XXII dated 17th June 1998, the COL allocated to the Naivasha Municipal Council a plot known as “Uns Plot For Stadium – Naivasha Municipality” measuring approximately 10 hectares. Subsequently, the COL issued to the MCN a Certificate of Title in respect of the land which by then was registered as LR 23400 (IR 96423). The size of the land as stated in the Certificate of Title was 10.9 hectares. Mathematically, this translates to 26.93 acres.

45. Sometime around the year 2005, the MCN embarked on a process of subdividing and changing the user of LR 23400 from “Stadium” to “Stadium Cum Residential”. This culminated in two titles being issued to MCN: LR 23400/1 measuring approximately 8.894 hectares and LR 23400/2 for the remainder of approximately 2 hectares. The 2 hectares translates to approximately 4.96 acres. LR 23400/2 was further subdivided to result into the suit properties herein. It is apparent that owing to the change of user and subdivision of LR 23400, the size of the land which was meant for the stadium shrunk by approximately 2 hectares.

46. Though the parties do not disagree on the sequence of the subdivisions, there is a chasm between them as far as the reasons and background of the subdivisions is concerned. According to the petitioners, the 26.93 acres comprised in LR 23400 were donated by Delamere for the specific purpose of 22 acres being used for the construction of a stadium while the remaining 4.93 acres was to be used to resettle displaced persons, the petitioners being among the said displaced persons. The petitioners claim that they had been allocated plots adjacent to Delamere around the year 1995 by the COL. They became displaced persons when Delamere agreed with them that they move to alternative land to enable Delamere get access to its farm. It is as a result of this arrangement that 4.93 acres was carved out of LR 23400 so as to resettle the petitioners and other displaced persons. I find this theory implausible for several reasons.

47. Firstly, though the petitioners claim that they got letters of allotment for their plots around the year 1995, evidence which they have put before the court shows that they paid stand premium and other related plot allocation charges to the COL in the year 2003. Considering that the letters of allotment had a condition that acceptance and payment be made within 30 days, I find this delay of about 8 years in payments not to have been sufficiently explained.

48. Secondly, there is evidence on record that through letter dated 12th March 1996 the Provincial Physical Planning Officer, Rift Valley Province, addressed Delamere in part as follows:

As you are probably aware, Naivasha Municipality does not have a stadium.

Adjacent to the built up area of the municipality, there is a piece of land which according to our records is owned by Delamere Estates Ltd. This site has been found to be quite ideal for the development of a fully fledged (sic) stadium which will include car parking space and shopping facilities.

The Commissioner of Lands has indicated to us that the government has a piece of land lying somewhere within your estates which he would wish to exchange with the site herein recommended for the development of a stadium.

I would therefore appreciate if as a matter of agency (sic) you could study the part development plan enclosed herein and confirm to us if your company would accept the suggestion of the commissioner of Lands proposed above.

Please note that the site to be occupied by the stadium including the car parking space and shopping facilities is approximately 10.87 ha or (26.00 acres). ... [Emphasis supplied]

49. It should be noted that the above letter did not mention any displaced persons or resettlement of such persons.

50. Subsequently in a letter dated 5th September 1996, the Town Clerk of MCN wrote to the General Manager of Delamere as follows:

RE: PROPOSED SITE FOR A STADIUM NAIVASHA MUNICIPALITY

I-IV COMMERCIAL PLOTS

We hope by now you have been informed of the contents of a letter Ref. No. TP 18/1/IX of 16th August, 1996 addressed to your advocates and copied to us among others by the Commissioner of Lands on the above. (Photocopy enclosed for your ease of reference). You also had a discussion with His Worship the Mayor Cllr. Pharis N. Chege.

As a follow up kindly let us know when the boundaries of the stadium plot can be pointed out to the council so that the Provincial Physical Planner could be invited to prepare the physical development plans. This will pave way for development of the stadium. [Emphasis supplied]

51. In a letter dated 21st December 1998, T.P.G. Cholmondeley, a director of Delamere addressed the Town Clerk of MCN as follows:

Thank you for your letter of 17th. Delamere Estates are willing to let you have possession of the land whenever you desire, upon the condition that you erect a fence down the boundary.

In these times of devious manoeuvres by local authorities and land grabbing, please be aware that if the land is used for anything else but the construction of the stadium we shall expose this matter publicly and pursue it vigorously.

52. True to his promise, T.P.G. Cholmondeley, still as a director of Delamere, wrote a letter dated 16th January 2014 to the County Government of Nakuru as follows:

RE: SUBDIVISION OF LR. NO. 23400

We believe we were misled as to the facts about the creation of title deed numbers 23400/1 and 23400/2, and the subsequent subdivision of the plot number 23400.

Our initial aim was to donate 26.4 acres for a stadium as per our letters (copies enclosed). I still stand by my letter of 21st December 1998.

We believe that it will seriously jeopardize the development of a stadium if the original plot is diminished in size.

53. From the foregoing, the size of land and the purpose for which it was sought and granted is clear: approximately 10.87 hectares or (approximately 26 acres) for the development of a stadium including car parking space and shopping facilities. A part development plan had been prepared in that regard. The land had manifestly been set aside for a public purpose.

54. Thirdly, the role of the first petitioner in the whole transaction raises a lot of questions. The respondents have stated that at the time the petitioners purported to acquire the suit properties, the first petitioner was the mayor of Naivasha. He has not denied it. In the letter dated 5th September 1996, which is reproduced above, the Town Clerk of MCN specifically identifies the first petitioner as the mayor. In this context, the correspondence from MCN laying a basis for the titles of the first petitioner alongside the other so-called displaced allottees is quite suspect. I also note that the first petitioner is the main face of this petition. He alone has sworn the affidavits filed on behalf of the petitioners.

55. Similarly, in view of the unambiguous position taken by Delamere through T.P.G. Cholmondeley, some of the letters purportedly from Delamere supporting the claim of the first petitioner and the other allegedly displaced allottees are equally suspect.

56. From the foregoing discussion, I have grave doubt in my mind whether the petitioners have valid titles in respect of the suit properties that can form a basis on which to claim to protection of the right to property as provided under **Article 40** of the **Constitution** in view of the provisions of **Article 40(6)**. Whereas I have not been asked to determine whether the petitioners titles are to be nullified or not and whereas I make no determination on the validity of the said titles, I believe I have said enough to show that I am not persuaded that the said titles form a sound basis on which to claim to protection of the right to property as provided under **Article 40** of the **Constitution**. Issue number two is therefore answered in the negative. The petitioners have not established that they have fundamental rights under **Articles 40, 47** and **50** in regard to the suit properties.

57. The petitioners have not alleged that the respondents have invalidated their titles. Their complaint is that the respondents invaded their properties. The titles are still intact. If and when the process of invalidation of their titles is undertaken, they will no doubt be entitled to fair hearing and fair administrative action. For now I do not see how their rights in regard to the suit properties under **Articles 47** and **50** have been violated. In view of my findings in regard to issue number two, issue number three is also answered in the negative. The petitioners have not established that any of their fundamental rights under **Articles 40, 47** and **50** have been violated in so far as the suit properties are concerned.

58. In the end, I find that the petitioners are not entitled to the reliefs sought. The petition is dismissed. Each party shall bear own costs.

Dated, signed and delivered in open court at Nakuru this 12th day of October 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Kagucia for the petitioners

No appearance for the 1st respondent

No appearance for the 2nd to 5th respondents

Court Assistants: Gichaba & Lotkomoi