



Moco Africa Limited v Attorney General & another; National Land Commission & another (Interested Parties) (Environment & Land Petition 10 of 2018) [2024] KEELC 205 (KLR) (23 January 2024) (Judgment)

Neutral citation: [2024] KEELC 205 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND PETITION 10 OF 2018

MD MWANGI, J

JANUARY 23, 2024

IN THE MATTER OF ARTICLES 19, 20, 22(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 27 AND 40 READ WITH ARTICLE 260 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 57, 136, 137 AND 138 OF THE REGISTERED LAND ACT (CHAPTER 300 OF THE LAWS OF KENYA) NOW REPEALED)

AND

IN THE MATTER OF SECTION 136 AND 137 OF THE REGISTERED LAND ACT (CHAPTER 300 OF THE LAWS OF KENYA) NOW REPEALED AND TRANSITIONED AS SECTION 78 OF THE LAND REGISTRATION ACT (NO. 3 OF 2012)

AND

IN THE MATTER OF THE UNCONSTITUTIONAL AND ILLEGAL PLACEMENT OF THE RESTRICTION ON L.R. NO. NAIROBI/BLOCK 93/1418

BETWEEN

MOCO AFRICA LIMITED PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

CHIEF LAND REGISTRAR 2ND RESPONDENT

AND

NATIONAL LAND COMMISSION INTERESTED PARTY



JUDGMENT

1. The Petitioner instituted this suit vide the Petition dated 5th February, 2018. The Petition was subsequently amended on the 4th March, 2022, with the amendments limited only to the joinder of the two Interested Parties. The Petition is supported by the affidavit of Milton Mugai Stanley Gitahi, the Managing Director of the Petitioner seeking the following reliefs:
 - a. A Declaration that the decision to place and the placing of a Restriction by the Respondents over the Petitioner's property L.R. No. NAIROBI/BLOCK 93/1418 without affording the Petitioner a prior opportunity to be heard, and in contravention to settled provisions of section 136 (1) of the Registered Land Act (Chapter 300 of the Laws of Kenya) now repealed, was grossly unconstitutional, it violated the Petitioner's fundamental rights to a legitimate expectation, it violated natural justice and is for the said violations void and of no effect;
 - b. A Declaration that the decision to place and the placing, of a Restriction by the Respondents over the Petitioner's property L.R. No. NAIROBI/ BLOCK 93/ 1418 without following provisions of law (Section 136 (1) of the Registered Land Act (Chapter 300 of the Laws of Kenya) now repealed, obedience to principles of Natural Justice, and yet fettering the Petitioner's right to proprietorship as defined by Section 28 of the Registered Land Act (Chapter 300 of the Laws of Kenya) now repealed transitioned as Sections 24 and 25 of the Land Registration Act, 2012, violated and continue to violate the Petitioner's fundamental right to protection of property then guaranteed by Section 75 of the repealed Kenya Constitution, and presently reserved and guaranteed by Article 40 read with Article 260 of the Constitution of Kenya;
 - c. A Declaration that the decision to place and the placing of a Restriction by the Respondents over the Petitioner's property L.R. No. NAIROBI/BLOCK 93/ 1418 only, for reasons of being a buffer zone and or road reserve, yet not placing any or equal Restriction on the adjacent, similarly surveyed property being L.R. No. NAIROBI/ BLOCK 93/1418 was and grossly discriminatory of the Petitioner and contravenes the Petitioner's right to protection from discrimination guaranteed by Article 27 of the Constitution;
 - d. A Declaration that the decision to place and the placing of a Restriction by the Respondents over the Petitioner's property L.R. No. NAIROBI/ BLOCK 93/1418 only, for reasons of being a buffer zone and or road reserve, yet not placing any or equal Restriction on properties of equidistance with the Petitioner's said property along Mombasa Road, to say from Capital Centre on Mombasa Road, through to the Parkside Towers the tower hosting Tile & Carpet Centre, Panari Hotel, to Standard Group Limited Headquarters to Sameer Business Park, was and grossly discriminatory of the Petitioner and contravenes the Petitioner's right to protection from discrimination guaranteed by Article 27 of the Constitution;
 - e. A writ of Certiorari to remove in to the Honourable Court and to quash the decision to and the placing of a Restriction by the Respondents over the Petitioner's property L.R. No. NAIROBI/ BLOCK 93/ 1418 of 25th November, 2009;
 - f. An Order of Mandatory injunction directed to the Respondents to remove the Restriction entered over the Petitioner's property L.R. No. NAIROBI/ BLOCK 93/1418 of 25th



November, 2009, within seven (7) days of service upon them the Decree of the Honourable Court herein;

- g. General damages for violation of fundamental rights of the Petitioner;
 - h. Any other befitting relief under Article 23 (3) of *the Constitution* of Kenya;
 - i. Costs of this Petition.
2. The Petitioner avers that it is the registered proprietor of the parcel of land known as LR No. Nairobi/ block 93/1418. The Petitioner's case is that sometime back in the year 1996, the Commissioner of Lands allocated the two unsurveyed plots known as A & B in Nairobi South along Mombasa Road as shown on the Part Development Plan(PDP)42/28/95/49 to one Elizabeth Sumukwo. The allocation was subject to approval by the Nairobi Town Planning Liaison Committee and the Ministry of Public Works. The said approvals from the Liaison Committee and the Ministry of Public were duly issued prior to the issuance of Leases. The Petitioner avers that Elizabeth Sumukwo sold the unsurveyed Plot A and B to Mugitun Investment, who later sold the unsurveyed Plot A to the Petitioner herein.
 3. Subsequently, Plot A was registered as LR No. Nairobi/ block 93/1418 in the Petitioner's name whereas Plot B was registered as LR No. Nairobi/Block 93/1419 to some other persons. A Certificate of Lease was thereafter issued to the Petitioner in January, 1999 for a term of 99 years with effect from 1st February, 1996. The Petitioner asserts that consequent to the said registration, it became the absolute owner of the parcel of land known as LR No. Nairobi/ Block 93/ 1418 (hereinafter referred to as 'the suit property').
 4. The Petitioner avers that sometime in September, 2009, during one of the Parliamentary proceedings, a Member of Parliament sought a Ministerial Statement from the Minister of Lands concerning an alleged illegal acquisition of an environmental carbon sink and buffer zone. This was what informed the 2nd Respondent to place a restriction on the Petitioner's title over the suit property.
 5. The Petitioner contends that the 2nd Respondent did not accord it a hearing before placing the Restriction as envisaged under the applicable law then being Section 136 (1) of the Registered *Land Act* (now repealed). No notice of the Restriction was ever issued to the Petitioner as well. The Petitioner wrote to the 2nd Respondent enquiring about the placement of the Restriction on its title but there was no response whatsoever from the 2nd Respondent.
 6. In the meantime, the Ministry of Lands wrote to the Director of Criminal Investigations directing them to investigate how the suit property was allocated. In the year 2015, the Directorate of Criminal Investigation in response to the Ministry of Lands' letter, stated that the Green Card and the White Cards were not forwarded to them hence no investigations were ever launched. They did not therefore place a Caveat on the suit property.
 7. The Petitioner states ever since the Restriction was placed, it has written to all relevant bodies seeking the removal of the Restriction. Its enquiries have been ignored by all and sundry and no explanation has been offered at all.
 8. Regarding the assertion that the suit property was on a buffer zone and or road reserve, the Petitioner avers that before the allotment and processing of the Petitioner's title, the Roads Department of the Ministry of Public Works confirmed that the property was neither a road reserve nor a buffer zone. The Ministry approved the allocation on condition that access to the property should not be through Mombasa Road.



9. Further, the Petitioner avers that the property which in the original allotment was described as plot B and which is adjacent to the Petitioner's property, (now registered as LR No. Nairobi/ Block 93/1419), has not been identified as a buffer zone or a road reserve. The Petitioner accuses the Respondents of discriminating against it since all the other property holders along Mombasa Road and whose properties are at the same equidistance as the Petitioner's property have not been subjected to the same treatment as the Petitioner. There have not been similar allegations against their properties.
10. The Petitioner avers that the suit property is not in any event, identified in the 'Ndung'u Land Report' as a Road Reserve nor a Buffer Zone. The Petitioner further avers that it has diligently at all times paid all the land rates and land rents as demanded by the respective authorities.
11. The Petitioner avers that the Restriction has prevent it from utilizing its property to generate income rendering the company useless, ineffective, futile and unprofitable. This is despite the property having a market value of Kshs. 420 Million as of the year 2016.
12. As a consequence of the foregoing events and the failure by the 2nd Respondent to remove the Restriction, the Petitioner alleges violation of its constitutional rights including the right not to be discriminated against as guaranteed by Article 27 of *the Constitution*, right to protection of property under Article 40 (1) and Article 260 of *the Constitution* and the right not to be condemned unheard as provided under Article 47 (1) of *the Constitution*.

Responses by the Respondents

13. The Respondents opposed the Petition vide the Grounds of Opposition dated 16th July, 2018 as well as a Replying Affidavit of Edwin M. Wafula deponed on the 28th November, 2018 restating the same grounds as in the grounds of opposition. The Respondents contend that the suit land is buffer zone and a road reserve as indicated by Parliamentary records availed by the Petitioner. The suit land should not have been allocated in the first place.
14. The Respondents aver that the allotment to one Elizabeth Sumukwo was subject to approvals from the then Nairobi Town Planning Liaison Committee and the Ministry of Public Works which were not obtained. The purported transfer from Elizabeth Sumokwo to Magitun Investment was null and void for lack of approval from the Liaison Committee. The subsequent transfer from Mugitun Investment to Moco Africa Limited is equally null and void for lack of a good title and lack of the requisite approvals.
15. The Respondents argue that no evidence has been adduced to the effect that the Nairobi Town Planning Liaison Committee ever gave the approval for the allotment of the suit property. Further, that the Green Card and White Card for the suit land do not appear to be genuine on their face. The root of the Petitioner's title cannot be ascertained.
16. The deponent further states that the subject matter herein is the same as in the suit No. HCCC No. 399 of 2010; Moco Africa –vs- The Kenya National Highways & Others which case was dismissed on 2nd February, 2012. The instant suit is therefore an attempt to reinstate the concluded suit.
17. The Respondents aver that on detection of possible fraud, the land registrar is empowered to register a restriction on the land to prevent against any improper dealing. The Respondents assert that where land has been allocated or title issued without due observance of procedure or through fraud, the title therefrom would be null and void.



1st Interested Party's Replying Affidavit

18. The 1st Interested Party, the National Land Commission, filed a Replying Affidavit deposed by one Brian Ikol, on the 30th November, 2018. The deponent avers that upon perusal of the relevant file in relation to the suit property, he realized that the records appertaining the allocation of the suit property are contained in correspondence file number 178898TC. He states that the suit property was allocated to one Elizabeth Sumukwo as Unsurveyed Industrial Plot A-Nairobi, vide Letter of Allotment dated 31st January, 1996.
19. The property was subsequently registered in favour of Moco Africa Limited, the Petitioner, and a certificate of lease issued on 29th January, 1999. A caveat was subsequently registered on 25th January, 2009 restricting dealings on the title until the issue of allocation of public utility is resolved.
20. The deponent confirms that the Petitioner had on various dates written to the Interested Party seeking assistance for the removal of the caveat registered on the suit property. The Interested Party subsequently wrote to the 2nd Interested Party herein and the County Government of Nairobi seeking a clarification on the alleged claim that the suit property is a buffer zone. The 2nd Interested Party did confirm that the parcel encroaches on a road reserve by 6.4 metres on one end and 6.9 meters on the other end.
21. The deponent states that he is also aware that the Petitioner moved Court vide HCCC No. 399 of 2010; Moco Africa –vs- The Kenya National Highways & Others seeking for declaratory orders that it is the bona fide allottee of the suit property. He states that the issues raised in the instant suit ought to be dealt with in the other suit. As such, the Petition has no merit and should be dismissed with costs.

Supplementary Affidavit

22. The Petitioner's Managing Director, Milton Mugai Stanley Gitahi, filed a Supplementary Affidavit deposed on the 6th May, 2019 in response to the Respondents' Affidavit. The deponent avers that contrary to the Respondents' assertion that the Petitioner's title was issued without approval of Liaison Committee, the necessary approval was duly granted pursuant to the Letter dated 10th March, 1997 by the Permanent Secretary for the Ministry of Lands and Settlement addressed to the Director of City Planning, seeking to include the allocation of Blocks in the agenda for the next meeting of the Committee.
23. Further that and pursuant to correspondences between the 1st Interested Party and the Chief Officer-Urban Planning of the Nairobi County Government, the latter confirmed vide the Letter dated 14th July, 2017, that although a Restriction had been placed on the basis that the land falls within a buffer zone between Plains View Estate and Mombasa Road, the buffer zone is no longer in existence as there are other structures that have been developed within the area that was planned as a buffer zone. Since the plot is accessed through Kapiti Road, its development would not interfere with the traffic flow along Mombasa Road. The Letter is adduced as annexure MMSG-3.
24. The Managing Director further adduced Survey Maps marked as MMSG-4 from the Survey of Kenya showing 17 other properties on the same equidistance with the Petitioner's property but no restriction has been placed on them on allegations of being on a buffer zone.
25. Regarding the dismissed suit; Nairobi HCCC No. 399 of 2010, the deponent contends that the suit did not concern the removal of the Restriction, as is the case herein. In any event, the matter was dismissed for want of prosecution hence this matter is not res judicata. The suit herein only seeks for removal of the Restriction.



26. The deponent contends that the Petitioner intends to use the suit property as security to secure an advance to the tune of Kshs. 400 Million and the delay in removing the Restriction is prejudicial to the Petitioner. The Petitioner prays that the matter be expedited for the aforesaid reasons.

2nd Interested Party's Replying Affidavit

27. The 2nd Interested Party filed a Replying Affidavit deposed by one Eliud Munene sworn on the 13th January, 2023. The deponent states that he is aware that the suit property is located at Bellevue along Mombasa Road. He confirms that the 2nd Interested Party was charged with the responsibility of constructing the Nairobi Expressway along Mombasa Road. During the implementation of the Nairobi Expressway, the 2nd Interested Party discovered that several properties had encroached on the reserved buffer zone and the road reserve.
28. The deponent avers that before commencing the project, the 2nd interested Party wrote to the 1st Interested Party attaching a list of parcels of land located in areas where land need to be acquired. He attaches the Letter to the 2nd Interested Party dated 30th April, 2021. The suit property was listed amongst other properties.
29. The deponent states that when no response was received, the 2nd Interested Party did a follow-up Letter. The follow up Letter was equally not responded to by the National Land Commission.
30. The deponent asserts that the 1st Respondent is the entity responsible for inaction and violation of the rights of the Petitioner and should be the one held liable for the prayers sought by the Petitioner.

Further Supplementary Affidavit

31. The Petitioner filed a Supplementary Affidavit deposed by its Managing Director, Milton Mugai Stanley Gitahi sworn on the 19th April, 2023, in response to the 2nd Interested Party's Replying Affidavit. The deponent reiterates his assertions contained in his initial Supplementary Affidavit on the non-existence of the buffer zone.
32. The deponent further avers that the Petitioner, just like the other owners of the adjacent properties, is entitled to protection by the government without any discrimination.
33. The deponent avers that for over 15 years now, the Petitioner has been treated differently from the other proprietors of land in the same area contrary to its right to property under Article 40 of *the Constitution*. He prays for the court's intervention.

Court's directions

34. On 26th June, 2023, the Court directed that the Petition be canvassed by way of written submissions. Only the Petitioner and the 2nd Interested Party complied.

Petitioner's submissions

35. The Petitioner filed its submissions dated 26th July, 2023 it restates its case as pleaded in the Amended Petition. It reiterates the allegations of discrimination contrary to the provisions of Article 27 of *the Constitution*, and submits that other properties along the same strip have not been restricted in any



way. It cites the case of *Matadeen & Another –vs- Pointu & Others* (1998) 3 WLR 18, where the court held that,

“persons should be treated uniformly unless there is some valid reason to treat them differently.”

36. On violation of the fundamental right to protection of property under Article 40 (1) read with Article 260 of *the Constitution*, the Petitioner restates that the requisite approvals were duly issued prior to the allocation of the suit property. Again, the Petitioner states that having been issued with a Certificate of Lease over LR No. Nairobi/Block 93/1418, the illegal placement of a Restriction over the suit property was thus in blatant and gross violation of Article 40 and Article 260 of *the Constitution*.
37. The Petitioner avers that its registration as the owner of the suit property entitles it to protection under Section 24, 25 and 26 of the *Land Registration Act* particularly on the indefeasibility of a Title. The Petitioner submits that for over 14 years now, the state has arbitrarily deprived it of its right to property. The Restriction should therefore be vacated promptly and unconditionally.
38. The 2nd Respondent was obligated under the law to act fairly as enjoined by National Values and Principles of Governance under Article 10, 47 and 50 of *the Constitution* as well as the Fair Administrative Actions Act, 2015. The Petitioner cites the case of *Adan Abdirahani Hassan and 2 Others –vs- The Registrar of Titles & Others* (2013) eKLR, where the court stated that,

“even if the Respondents held the view that the Petitioners had no right to own the suit property because the property was reserved for a public purpose, the Petitioners had legitimate expectation in the proprietorship of the property and they should have been accorded hearing before any administrative action could be taken in respect of the suit property”.
39. Regarding the violation of legitimate expectation, the Petitioner argues that the 2nd Respondent was obligated to act fairly as obligated by National Values and Principles of Governance under Article 10 of *the Constitution* and guaranteed by Article 47 and 50 of *the Constitution* together with the Fair Administrative Actions Act, 2015. The Respondents have by placing a restriction over the Petitioner’s property without due process and without affording him a hearing, violated the Petitioner’s said legitimate expectation.
40. As to whether the present Petition is barred by the doctrine of Res Judicata, the Petitioner submits that the previous suit HCCC No. 399 of 2010; *Moco Africa –vs- The Kenya National Highways Authority & Others*, which was dismissed for non- attendance, and was not concerned with the removal of the impugned Restriction, as the present Petition seeks. Further, the parties in the previous suit were the Commissioner of Lands and the City Council of Nairobi, who are not parties in this petition. The elements of res judicata have not been met hence the doctrine is not applicable herein.
41. The other issue is whether the Petitioner is entitled to General Damages for Violation of its fundamental rights. The Petitioner submits that the suit property is located in a prime area which has over years seen all proprietors of properties that are at the same equidistance with the Petitioner’s property, develop their properties into mega structures. It is further submitted that the Petitioner intended to use the suit property for security in a joint venture. However, the offer lapsed as the Petitioner could not perfect the title within the agreed time.
42. Counsel submits that the Petitioner has suffered damage and there is no reason in principle why appropriate relief should not include an award of damages. The Court should therefore declare the actions of the Respondents unconstitutional and order payment of damages. Taking into



consideration the value of the land, opportunities lost and general inhibitions, as well as the period in question and its impact thereof, a sum of Kshs. 20 Million would be realistic and satisfactory in the circumstances as a reasonable award for damages. The Petitioner therefore prays that the court grants the orders sought in the Petition.

2nd Interested Party's submissions

43. The 2nd Interested Party filed its submissions dated 27th October, 2023. It identifies the issue for determination as whether the 2nd Interested Party is responsible for the placing of a restriction over the Petitioner's property on LR No. Nairobi/ Block 93/1418. The 2nd Interested Party submits that the placing of a restriction over the suit property without affording the Petitioner a right to be heard was in contravention of Section 136 of the Registered *Land Act*, the same was grossly unconstitutional and violated the rules of natural justice. The Restriction was therefore void and of no effect.
44. The 2nd Interested Party further submits that its mandate does not encompass the placement of restrictions over properties as alluded to by the Petitioner. The mandate of the 2nd Interested Party is as set out under Section 4 of the *Kenya Roads Act*, which does not include restrictions. It is submitted that at the time the Petitioner acquired the suit property, the 2nd Interested Party had not yet been established, it can therefore not candidly submit on the question of ownership of the suit property.
45. However, when it sought a confirmation from the 1st Interested Party whether the property was on a buffer zone and the road reserve to ensure that the affected properties could be compulsorily acquired for the construction of the Nairobi Expressway, the 1st Interested Party never responded. The functions of the 1st Interested Party as stated in the *National Land Commission Act*, includes the role of placing restrictions over public land.
46. The 2nd Interested Party further submits that it is the 1st Interested Party which slept on its job by failing to adequately communicate to the Petitioner on the status of the acquisition of the suit property despite being prompted severally by the 2nd Interested Party. The 2nd Interested Party performed its job of constructing the Nairobi Express Way on Mombasa Road and the question of placing a restriction on the suit property and the subsequent acquisition of the land by the state was beyond its mandate and it cannot be blamed for the placement of the restriction.
47. Further, the 2nd Interested Party submits that there is no cause of action that has been disclosed against the 2nd Interested Party. The 2nd Interested Party is therefore not a necessary party to this suit. He cites the case of Jackson Sagligram Baburam & 4 Others –vs- Suereca East Africa Limited & Another (2020) eKLR, where the court held that, 'a party only becomes a necessary party to the proceedings so that it can be bound by the result of the action.'
48. The 2nd Interested Party avers that the suit against it is therefore speculative and should be dismissed with costs.

Issues for determination

49. I have carefully read and considered all the pleadings filed in this matter, the written submissions, cited authorities relied on and the relevant provisions of the appropriate and enabling laws with regard to the Petition. The issues for determination are:
 - a. Whether the Restriction placed over Land Reference Number Nairobi/ Block 93/1418 should be removed;
 - b. Which orders should the court issue?



Analysis and determination

a. Whether the Restriction placed over Land Reference Number Nairobi/ Block 93/1418 should be removed

50. It is not in dispute that Land Reference Number Nairobi/ Block 93/1418 is registered in the name of the Petitioner herein. The Petitioner's claim is that the 2nd Respondent placed a restriction on its title to the suit property without notifying it and without giving him a hearing. The basis of the restriction is that the suit property is a Buffer Zone and/or Road Reserve.
51. The Respondents on the other hand contend that the suit land is a buffer zone and a road reserve as indicated by Parliamentary records availed by the Petitioner. The suit land should not have been allocated in the first place. The first allotment to one Elizabeth Sumukwo was subject to approvals from the then Nairobi Town Planning Liaison Committee and the Ministry of Public Works which according to the respondents were not obtained. The purported transfer from Elizabeth Sumokwo to Magitun Investment was therefore null and void for lack of an approval from the Liaison Committee. The subsequent transfer from Mugitun Investment to Moco Africa Limited is equally null and void for lack of a good title and lack of the requisite approvals.
52. The Respondents argue that no evidence has been adduced to the effect that the Nairobi Town Planning Liaison Committee ever gave the approval for the allotment of the suit property. Further, that the Green Card and White Card for the suit land do not appear to be genuine on their face. The root of the Petitioner's title cannot be ascertained.
53. It is not denied that the Petitioner was not notified or given an opportunity to be heard before the restriction was placed. It is equally clear that the Petitioner herein has numerously made applications to the 2nd Respondent and the relevant authorities complaining of the restriction and seeking its removal. Despite the Petitioner's efforts, the restriction has not been removed necessitating the filing of this suit.
54. Section 76 of the *Land Registration Act*, 2012, which is a replica of Section 136 of the repealed Registered *Land Act*, Cap. 300 Laws of Kenya, provides that:
- “(1) For the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the Application of any person interested in the land, lease or charge, and after directing such inquiries to be made and notices to be served and hearing such persons as the Registrar considers fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge.
- (2) A restriction may be expressed to endure—
- (a) for a particular period;
- (b) until the occurrence of a particular event; or
- (c) until a further order is made, and may prohibit or restrict all dealings or only or the dealings that do not comply with specified conditions, and the restriction shall be registered in the appropriate register.



(2A) A restriction shall be registered in the register and may prohibit or restrict either all dealings in the land or only those dealings which do not comply with specified conditions”.

55. From a reading of the above provisions, it is clear that the Land Registrar has power to register a restriction on land for three reasons:
- i. for the prevention of fraud;
 - ii. to curb improper dealings on land;
 - iii. for any sufficient cause.
56. The law provides that the Registrar may act suo moto or on Application of any persons interested in the land. In an instance where (s)he receives an Application then (s)he is duty bound to direct inquiries to be made, notices to be served and hear such persons as he considers fit, thereafter to make an order prohibiting or restricting dealings with any land. The restriction may be for a particular period, until the occurrence of a particular event or until a further order is made. The Registrar shall give notice in writing of a restriction to the proprietor effected by the restriction.
57. The restriction however is not to be maintained in perpetuity. It should be for a specified period or until the occurrence of a specified event.
58. In the present case and upon perusal of the green card to the suit land, it is clear that the Restriction was placed on the suit land pursuant to an Application by the 1st Interested Party, the National Land Commission. The Restriction was in placed pendency of investigations on the allocation of the suit property following some Parliamentary proceedings where it was alleged that the land may have been irregularly allocated.
59. The Petitioner was however never accorded a chance to be heard before the restriction was placed. Due process was therefore not followed as required by the law. The 2nd Respondent was required to issue a notice to the Petitioner, and accord it a chance to be heard before placing the restriction on its title to the suit property.
60. Further, no evidence has been adduced of fraud or improper dealing on the part of the Petitioner that justified the placement of the Restriction.
61. In the case in David Macharia Kinyur –vs- District Land Registrar, Naivasha & Another, Nakuru ELC Misc. Appl.No.331 of 2016, the Court held that: -
- “.....the purpose of a restriction is aimed essentially at stemming fraud or improper dealings over land. The Land Registrar may also place a restriction where there is other sufficient cause. Restrictions are to endure for a particular time or until the occurrence of an event, or the making of a further order. It is not the purpose of this section of the law to have restrictions remain indefinitely. The reasoning is that a restriction should only hold a property in abeyance as the underlying issue leading to the restriction is being resolved; since restriction by itself does not solve a dispute....”
62. In the case of Matoya –vs- Standard Chartered Bank (K) LTD & Others (2003) I EA 140 the Court held that:
- “A restriction is ordered to prevent any fraud or improper dealing with a given parcel of land and the land registrar does this whether on its own motion or if so asked by way of



an Application by the person interested in that land but before ordering the restriction the registrar is bound by law to make inquiries, send out notices and hear all those other people he may think fit first and he is not to move by whim, caprice or whatever influence personal or otherwise just to impose a restriction since he has a duty to inquire and be satisfied that his duty to order restriction is not hurting a person who was not heard and that indeed the restriction is in general good that frauds and other improper dealings are prevented”.

63. Section 78(2) of the *Land Registration Act* provides that: -

“Upon the Application of a proprietor affected by restriction and upon Notice to the Registrar, the Court may order a restriction to be removed, varied or other order as it deems fit and may make an order as to cost.”

64. It is clear from the above provisions of law that where a restriction has been placed on a proprietor’s parcel of land, the said proprietor needs to give Notice to the Registrar seeking removal of the same. Failure to do so, the said proprietor may apply to Court for such removal and the Court has discretion to order for removal of the said restriction. Of course, the said discretion must be exercised judiciously.

65. In the case of *Susan Sambai Choge & 4 Others –vs- Land Registrar & Another (2016) eKLR*, the Court stated as follows:

“This court finds that the right to be heard is so cardinal that it cannot be wished away and that it is not proper in law to make a decision and to purport to hear the parties thereafter. Section 136 of the Registered *Land Act* (repealed) envisaged all parties interested in the outcome of the decision to place restriction on the parcel of land to be heard before the making of the said decision. This Section provided that for the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, after directing such inquiries to be made and notices to be served and hearing such persons as he thinks fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge. Subsection (2) provides that a restriction may be expressed to endure for a particular period; or until occurrence of a particular event; or until the making of a further order, and may prohibit or restrict all dealings or only such dealings as do not comply with specified conditions and restrictions shall be registered in the appropriate register.

Section 76(1) of the *Land Registration Act* No.3 of 2012 which is a replica of Section 136 of the Registered *Land Act* provides that the foregoing provision envisage the hearing of the persons interested before making a decision but not making a decision to place a restriction on the title before hearing the parties. I do find that the decision by the 1st defendant is tainted with procedural impropriety as it was made without affording the plaintiffs a hearing and therefore illegal.”

66. In the case of *Multiple Hauliers East Africa Limited –vs- Attorney General & 10 Others (2013) eKLR* Mumbi Ngugi J, (as she then was) stated thus:

“ 40. This court has on several occasions emphasized the need for administrative actions to be carried out procedurally. Where a public authority’s actions are likely to deprive individuals of their fundamental rights and freedoms, it is



crucial that such actions be carried out through due process and in respect to the rules of natural justice....”

67. It is evident from the above provisions of law that the Court has power to remove any restriction on a title to land. The Respondents have not adduced evidence as to why the restriction should not be removed even after the proprietor applied for its removal. It has been in existence for 14 years now. Whatever investigations needed to be carried out should have been concluded by now. The restriction cannot exist in reality. For far too long, the property rights of the Petitioner have been infringed by the maintenance of the restriction on the title to its land denying it the right to use and enjoy it as by law entitled to. This Court therefore finds no justifiable reason why the said restriction should remain on the title to the suit property any longer and hereby directs that it be removed forthwith.

b. Which orders should the court issue?

68. The Petitioner has alleged violation of numerous constitutional rights including the right to property, right against discrimination and the right to legitimate expectation. The Petitioner urges the court to find that it had a legitimate expectation to free enjoyment of the suit property, without any curtailment from the government.
69. It is not in doubt that the Petitioner’s right to property as provided under Article 40 of *the Constitution* was infringed upon as the court has already pointed out. It is also evident that the Petitioner has been discriminated against as no other property owner on the same equidistance or along the same strip has been treated as the Petitioner has been by the placement of a restriction on his land.
70. In the case of Council of Civil Service Unions and others –v- Minister for the Civil Service (1985) AC 374 (408 – 409), it was observed that for a legitimate expectation to arise, the decisions of the administrative authority must affect the person by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.
71. The petitioner averred that it intended to use the suit property as security for a loan towards the construction of a gas plant but for the subsistence of the restriction on its title. I note however that the no evidence of the alleged project has been availed before the court.
72. Whereas the Petitioner may be entitled to general damages for violation of his rights, the question is who among the parties sued is liable to pay the damages?
73. It is evident from the proceedings that 2nd Respondent acted on the request from the 1st Interested Party, the National Land Commission (NLC).
74. The 2nd Interested Party strongly submits that the NLC is liable for placing the restriction on the Petitioner’s title and is therefore liable for violation of rights as claimed by the Petitioner.
75. Further, the Letter dated 14th July, 2017 from the Nairobi City County, addressed to the 1st Interested Party, confirmed that the Buffer Zone over the suit property is no longer in existence as there are other structures that have been developed within the area that was planned as a buffer zone. This Letter mandated the NLC to remove the buffer zone, but it did not. It is clear that NLC is to blame for placement and none -removal of the Restriction over the suit property.



76. In the instant proceedings however, NLC was sued as an Interested Party in the Petition; not as a principal party. The Supreme Court in the case of *Methodist Church in Kenya –vs- Mohammed Fugicha & 3 Others* (2019) eKLR, while citing the *Muruatetu* case, determined the extent to which an Interested Party may participate in the proceedings as follows:

“any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties’ before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.

Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An Interested Party may not frame its own fresh issues, or introduce new issues for determination by the Court. One of the principles for admission of an Interested Party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court.”

77. Guided by the above authority, the issues for determination can only be as presented by the principal parties, in this case, the Petitioner and the Respondents. A substantive order for payment cannot therefore lie as against NLC in the instant proceeding as it is not a principal party. Therefore, although the Petitioner would have been entitled to damages, the party liable for payment of the such damages is listed as an Interested Party. Consequently, the Court declines to grant damages.

78. The court therefore issues the declarations sought by the Petitioner as against the Respondents, order the removal of the restriction forthwith and further grants the costs of this petition to the Petitioner against the Respondent.

79. The upshot is that the court finds that the Amended Petition is merited and grants the following prayers:

a. A Declaration be and is hereby issued that the decision to place and the placing of a Restriction by the Respondents over the Petitioner’s property L.R. No. Nairobi/Block 93/1418 without affording the Petitioner a prior opportunity to be heard, and in contravention to settled provisions of section 136 (1) of the Registered *Land Act* (Chapter 300 of the Laws of Kenya) now repealed, was a violation of the Law and was unconstitutional.

b. A Declaration be and is hereby issued that the decision to place and the placing, of a Restriction by the Respondents over the Petitioner’s property L.R. No. Nairobi/ Block 93/ 1418 without following provisions of law (Section 136 (1) of the Registered *Land Act* (Chapter 300 of the Laws of Kenya) now repealed, obedience to principles of Natural Justice, and yet fettering the Petitioner’s right to proprietorship as defined by Section 28 of the Registered *Land Act* (Chapter 300 of the Laws of Kenya) now repealed transitioned as Sections 24 and 25 of the *Land Registration Act*, 2012, violated and continue to violate the Petitioner’s fundamental right to protection of property then guaranteed by Section 75 of the repealed Kenya Constitution, and presently reserved and guaranteed by Article 40 read with Article 260 of *the Constitution* of Kenya.



- c. A Declaration be and is hereby made that the decision to place and the placing of a Restriction by the Respondents over the Petitioner's property L.R. No. Nairobi/Block 93/ 1418 only, for reasons of being a buffer zone and or road reserve, yet not placing any or equal Restriction on the adjacent, similarly surveyed property being L.R. No. Nairobi/ Block 93/1418 was and grossly discriminatory of the Petitioner and contravenes the Petitioner's right to protection from discrimination guaranteed by Article 27 of *the Constitution*.
- d. An Order of Mandatory injunction be and is hereby issued directed to the Respondents to remove the Restriction entered over the Petitioner's property L.R. No. Nairobi/ Block 93/1418 on 25th November, 2009, within seven (7) days of service of the Decree of this court.
- e. The Respondents shall bear the costs of this petition.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF JANUARY, 2024.

M.D. MWANGI

JUDGE.

In the virtual presence of:

Mr. Mukuha h/b for Mr. Bwire for the Petitioner

N/A for the Respondents and the Interested Parties

Court Assistant: Yvette

M.D. MWANGI

JUDGE.

