



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

PETITION NO. 2 OF 2015

DIocese OF ELDORET TRUSTEES (REGISTERED).....PETITIONER

VERSUS

NATIONAL LAND COMMISSION.....1ST RESPONDENT

TRUSTEES OF KIPLOMBE KAPTICH SCHOOL.....2ND RESPONDENT

LAND REGISTRAR, UASIN GISHU COUNTY.....3RD RESPONDENT

JUDGMENT

The Registered *Trustees of Diocese of Eldoret* has come to this court vide petition amended on 30.4.2015 against the *National Land Commission, Trustees of Kiplombe Kaptich School* and *Land Registrar, Uasin Gishu County* claiming that at all material times, the Petitioner is the registered owner of parcel of land known as Kiplombe/Kiplombe Block 5(Kaptich)/70 situated in Eldoret West Sub-County in Uasin Gishu County within the Republic of Kenya and was issued with a Title Deed on 21.9.2004 and has been in possession of the said parcel of land from the 1990s even before the issuance of the Title Deed. In mid 2014, the 1st respondent embarked on alleged investigations on the petitioner's title and in late February 2015, the 1st Respondent made a unilateral decision revoking the applicant's title. The 1st respondent has further directed the 3rd respondent to expunge the records of the said parcel and to initiate the process of preparing ownership documents in favour of the 2nd respondent. That the 1st respondent has further directed that the developments on the parcel be demolished.

It is the petitioner's contention that the 1st respondent arrived at the impugned decision unilaterally in cohorts with the 2nd respondent having failed to give an opportunity to the Petitioner to present its case which actions he believes are illegal and unconstitutional as it was not accorded a fair hearing. The Petitioner further contends that the 1st respondent has exceeded its powers and functions as envisaged in the Constitution and the National Land Commission Act, 2012. That the Petitioner's claim is for a declaration that the respondent's action amount to unconstitutional deprivation of property. That the Petitioner's further claim is for a declaration that the respondents' action and process followed at arriving at the decision to revoke the petitioner's title is unconstitutional.

The Petitioner prays for **a declaration** that the respondents' actions amount to deprivation of property without the due process and therefore illegal and unconstitutional. He further prays for **a permanent injunction** restraining the respondents from interfering with the Petitioner's rights to the property Kiplombe/Kiplombe Block 5(Kaptich)/70 and **a declaration that the Petitioner is the rightful owner of the property** known as Kiplombe/Kiplombe Block 5(Kaptich)/70. Last but not least the petitioner prays for general and exemplary damages for destruction of property.

The petition is supported by the affidavit of ***Bishop Cornelius K. Korir*** who states that in the 1990s, a

white settler by the name David Graig also carrying out his activities in the name of Lewa Downs/Lewa Wildlife conservancy sold out his land then L.R. No. 11963/2 to the indigenous residents through the Government of Kenya and donated part of it measuring 50 acres or thereabouts for the construction of a school to be carried out by the Catholic Diocese. He claims that Mr. David Graig donated the said 50 acres on his Will and clearly stated that it was to be supported by the Catholic Diocese. That subsequent to this, the then Public Administration involving the District Commissioner and the Provincial Commissioner and the District Surveyor embarked on allocation and survey of the then L.R. No. 11963/2. He produced the list of the allottees confirming that Graig Secondary School which was to be formed with support of the Catholic Diocese was allocated 18.58 hectares which is approximately 50 acres and that the Land Control Board consent was subsequently obtained. The surveyor subsequently embarked on the survey and the Catholic Diocese thereafter embarked on processing the Title on behalf of the Secondary School which was yet to be established. The Catholic Diocese was subsequently entered in the register and fast tracked the process of issuance of Title and on 21st September, 2004, it was issued with a Title No. Kiplombe/Kiplombe Block 5(Kaptich)/70 now the suit land.

However, in 2012, some individuals claiming to be the residents of Kaptich farm and who have been sued in the suit as the 2nd respondents began laying claim in the suit land and they wrote a letter to the Catholic Diocese through the Attorney General on 11th June, 2012. That in response to their allegations above, they instructed the firm of Kalya & Company Advocates to respond on their behalf. They wrote a letter to the Attorney General and the Attorney General responded confirming that the suit land belongs to the Catholic Diocese vide a letter dated 14th August, 2012. That subsequently, the matter seemed settled and the Catholic Diocese began carrying out constructions in the suit land aimed at putting up the Secondary School as had been Mr. David Graig's Vision. However, the Catholic Diocese received a letter dated 26th November, 2014 from the National Land Commission informing them that the Commission had received a complaint from members of Kaptich community to investigate about a certain parcel of land in dispute between the Catholic Church and the members of Kaptich community. The letter further stated that the Commission visited the site of the said parcel and further that parties from both sides were accorded adequate opportunity to present both oral and documentary evidence. On 15th September, 2014, the Catholic Diocese wrote a letter to the National Land Commission explaining how the suit property was registered for the Catholic Diocese. The Catholic Diocese received a letter from the National Land Commission that it had visited the disputed site and had listened to both parties. The Bishop claims that the petitioner was never informed of the said visit neither did they participate in any of the alleged meeting that took place on the suit land.

The petitioner made inquiries on whether, and if so, how the National Land Commission had made inquiries on the alleged dispute, and whether the same was advertised as the information on the same was not communicated to them. That upon search and investigations of the advertisements as the method normally used by the National Land Commission, they checked a list of the hearings conducted in Uasin Gishu County and the Land in question nor parties were not on record. That before they could even make a step, they were informed that the Commission and the County Land Management Board had visited the site and destroyed or brought down the ongoing construction which destruction was personally led by the National Land Commission Chairman, Muhammed Swazuri and Uasin Gishu Lands Executive, Robert Ngisirei leading the destruction of the ongoing construction. On 26th February, 2015, they received a letter dated 24th February, 2015, addressed to the Land Registrar urging it to expunge the records of the Catholic Church in relation to the suit land and further to initiate the process of preparing ownership documents in favour of Trustees of Kiplombe. That in view of the state of affairs, they instructed their advocate on record to file this suit on their behalf.

In a nutshell the petitioner grievance is that the National Land Commission made a unilateral decision to revoke the title without according them a fair hearing as they never participated in the Commission's exercise and they were not informed on when the Commission would be sitting in order for them to give out views and that the National Land Commission exceeded its powers and functions as envisaged in the Constitution and in view of this, their constitutional rights to property have been violated. The Commission's actions and conduct further amounts to abuse of office and therefore it is their prayer that the actions of the National Land Commission be declared unconstitutional and that the Catholic Diocese be declared as the rightful owners of the suit land.

James Kisorio, the Chairman of Kaptich Farm Community swore a replying affidavit on behalf of the 2nd respondent stating that the suit land is a resultant sub-plot of L.R. 11963/R (Kaptich Farm), another plot is Kiplombe/Kiplombe Block 5 (Kaptich) 55. According to the land officer's report dated 20.04.2010 forwarded to the Commissioner of Land, during subdivision of L.R. 11963/R (Kaptich Farm) the planned utility plots were cattle dip, primary school and secondary school. That further, the report indicated that the suit land was set aside for a Secondary school and the members' register indicated the same too. The report concluded that the inclusion of the petitioner's name was suspicious and recommended that the petitioner surrenders the title to the trustees of the 2nd respondent. The same was echoed in a letter dated 9.2.2012 by the District Land Registrar, Uasin Gishu addressing the issue on grabbing of the suit land.

That the petitioners are referring to a totally different parcel of land, from the sketch map, the school which is in Kaptich farm is located at L.R. No. 11963/R while the petitioners claim is in L.R. No. 11963/2, land that the 2nd respondent has no claim or interest whatsoever and therefore the 2nd respondent was wrongfully enjoined in this matter. The residents of Kaptich farm community lodged complaints against the petitioner. Reference is made to letters dated 4.3.2005 addressed to the Office of the President, letter dated 11.6.2012 from State Law Office, Eldoret addressed to the Bishop Catholic Diocese of Eldoret and letter dated 4.10.2013 to the Bishop Catholic Diocese of Eldoret from County Executive Land, Housing and Physical Planning.

The 2nd respondent is totally unaware on whether L.R. No. 11963/2 was allocated to the petitioner, further it is the 2nd respondent's contention that the original list of allottees was prepared at the District Commissioner and that the list relied by the petitioners is not the original one and the same was fabricated to suit the interest of some few individuals. That the petitioner proceeded to acquire title in a land that was located in a different area as the suit land forms part of L.R. No. 11963/R yet the petitioner obtained consents and title of L.R. No. 11963/2. The two parcels of land are clearly shown in the sketch map. He does not understand why the petitioners are seeking legal redress from an institution that is rightfully in its place.

The petitioner was aware of the investigations carried out on the suit land as shown in a letter dated 26.11.2014 addressed to the petitioner which depicted clearly that the parties were accorded equal opportunity to present both oral and documentary evidence to justify their claims though the petitioner chose to deliberately miss the meetings and participate in any forum regarding the suit land. However, some of its local faithful issued threats to residents of Kaptich Farm, the evening before the 1st respondent visited the land. Further, some of the faithful were present when the 1st respondent visited the land on 3.10.2014. That the visit and destruction of classrooms under construction took place on 25.2.2015 a day after the 1st respondent issued a directive to the 3rd respondent vide a letter dated 24.2.2015 to expunge records of the petitioner relating to the suit land and to initiate the process of ownership in favour of the 2nd respondent.

He believes that public interest in the said parcel of land overrides private benefits and the suit land has been fully established as public land reserved for public school use and therefore the petitioner has no colour of right whatsoever to claim against the 2nd respondent and/or on the parcel of land comprised in title No. Kiplombe/Kiplombe Block 5(Kaptich) 70 and that it is the petitioner who should be restrained from claiming, interfering, selling, leasing, transferring or in any other manner dealing with the suit land. That it is therefore, clear that the petitioner has no legal claim against the 2nd respondent herein and as such the application and suit ought to be dismissed.

In further supporting affidavit, Bishop Cornelius K. Korir depones that the petition herein is in regard to violation of right of property known as Kiplombe/Kiplombe Block 5(Kaptich)/70 which was a resultant of conversion and subdivision of L.R. No. 11963/2. The petitioner herein does not have an interest whatsoever to the parcels the 2nd respondents are alleging belongs to them. He states that the 2nd respondents are rightfully enjoined because in a letter dated 24th February, 2015, which is annexed as CK16 in paragraph 29 of Bishop Cornelius Korir's supporting affidavit and JK5 of James Kisorio's supporting affidavits, the 1st respondent directs the 3rd respondent to expunge the records of the Catholic Church relating to the parcel and further directs the 3rd respondent to prepare ownership documents in favour of the 2nd respondent. That in regard to paragraph 6 above, the 2nd respondent cannot therefore

claim to be wrongly enjoined and any issue of misjoinder raised shall be defended accordingly. That the 2nd respondents are a collection of individuals who have no public interest but to grab the petitioner's property for their selfish. The petitioner retaliates that the suit property was subdivision of LR No. 11963/2 and the 2nd respondent allegations that it was LR No. 11963/R is misinformed. Further, the 2nd respondents' claim that the two parcels are shown on a sketch map which is not annexed nor demonstrated leaves the issue to imagination as to which sketch map is being referred to.

That the 2nd respondents' claim in paragraph 16 that there is public interest in the suit land is misguided because the land was donated by Mr. Craig for establishment of a school to be run by the Catholic Diocese and the Church was already fulfilling Mr. Craig's vision.

The 3rd respondent filed a replying affidavit sworn by **Dorothy Letting, the County Land Registrar, Uasin Gishu County** stating that according to the Green Card in their custody, the current registered owner of Kiplombe/Kiplombe Block 5(Kaptich) 70 is the Diocese of Eldoret Trustee (Registered) who was registered on 21.9.2004 and issued with a title deed on the same date. However, That the member's register for Kaptich farm in their custody indicated that the parcel No. 70 (the suit land) was reserved for a secondary school. The said register was later altered to read Diocese of Eldoret (registered Trustee) and on the right side of the said register there is a note by the Land Registrar indicating that the ownership of the said parcel of land is disputed.

That the 1st respondent has constitutional mandate to initiate investigations into historical land injustices and recommend appropriate redress and the 3rd respondent is bound by the directives issued by the 1st respondent and the Petitioners ought to have applied for judicial review orders instead of filing this petition as no constitutional articles have been cited as having been infringed by the respondents. The Petitioners ought to have filed a civil suit to enable the court hear *viva voce* evidence to establish who is the rightful owner of the suit land and hence prayer (c) in the amended petition ought to be dismissed as the 1st respondent has already made a finding thereto which is against the petitioners position.

That the petitioners were heard before the decision to revoke title as evidence in their letter dated 15.9.2014 ***which is annexure CK11*** in the supporting affidavit sworn by Bishop Cornelius K. Korir sworn on 27.2.2015 a fact which is confirmed by paragraph 1 of the ***annexture CK16*** of the same affidavit. That the Petitioner are not entitled to any general or exemplary damages as they disobeyed the orders of status quo and proceeded to construct in contempt of the National Land Commission orders.

Mr. Birech learned counsel for the Petitioner submits that the land in question was donated and reserved for a Secondary School to be built and named after the wife of the donor and the same was to be sponsored by the Catholic Church and the title was issued in the name of the Registered Trustees of the Church. When the church was ready to do the construction work, the respondents started interfering with the same. He argues that the title issued to the Petitioner is dated 21.9.2004 which was issued under Registered Land Act Cap. 300, Laws of Kenya(**repealed**) and therefore the same was indefeasible in view of the provisions of section 28 of the said Act. In a nutshell, the Petitioner argues that the rights of a title holder are protected by this Act. He further argues that section 3 and 6 of the National Land Commission Act, 2012 do not give the National Land Commission the power to recommend revocation of title. Section 14(1) gives the Commission the power to interrogate complaints in a manner a title was procured. The petitioner submits that law does not act in retrospect and therefore, the National Land Commission does not have power over titles created before it came into existence. The petitioner further argues that the National Land Commission exceeded its powers and thus acted *ultra vires* in purporting the revoke the petitioner's title.

Mrs Rotich learned counsel for the 2nd respondent submits that to challenge the decision and or order by the 1st respondent, the petitioner ought to have filed a judicial review and that the petitioner has not cited the relevant Articles of the Constitution of Kenya which have been infringed. Further, that the orders sought cannot be obtained in a petition as they can only be obtained in a civil suit commenced by way of plaint. Moreover, the petitioner argues that the petition is not accompanied by a verifying affidavit hence it is fatally defective.

On the issue as to who is entitled to the suit land, the 2nd respondent argues that the suit land was reserved for a Secondary School and not for religious purposes. The donor of the said land desired the school to be named after his wife and the Catholic School as the sponsor. The petitioner therefore, acquired title over the suit land irregularly and unprocedurally. Having obtained the title to the property irregularly and unprocedurally, the petitioners are not entitled to exemplary damages.

Mr Ngumbi learned state counsel for the Attorney General on behalf of the 3rd respondent argues that the court should rely on the members register for Kaptich farm which indicated that the suit land was reserved for a Secondary School and not a church and therefore, registration of the same in the name of the church was irregular. Moreover, the Attorney General argues that the decision was made after affording the petitioner a hearing.

Mr. Mitei learned counsel for the 4th respondent argues that cancellation of title was proper in law. To justify this argument, he submits that the suit land Kiplombe/Kiplombe Block 5/(Kaptich)/70 is a public land earmarked for a Secondary school, a public utility. There is an original farm register and map evidencing the same. The National Land Commission found that the land was a public utility and directed cancellation of the petitioner illegally acquired title deed. He cites the National Land Commission Act Cap. 5A, Laws of Kenya. In a nutshell, the 4th respondent argues that the land in dispute is public land which should not be allowed to be held by a private person and should be used by the public for public utility namely a public Secondary School. He argues further that it is the mandate of the County Government to safeguard public land and that the petitioner's reliance on indefeasibly or sanctity of title are untenable at law.

I have considered the petition and the supporting affidavit, the replying affidavit and do find the following issues ripe for determination:-

1-Whether the petitioner was afforded a fair hearing

2-Whether the land in contention is public or private land

3-Whether the petitioner should have filed judicial review

4-Whether sections 3,6,14 of the National Land Commission Act can be applied in retrospect

1-WHETHER THE PETITIONER WAS AFFORDED A FAIR HEARING

Article 47 of The Constitution of Kenya provides for a fair administrative action thus Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. 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. This article is complemented by ***Article 50 of the Constitution*** which provides for Fair hearing thus 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.

The petitioner has alleged through the supporting affidavit and supplementary affidavit of Bishop Cornelius Korir that he was not afforded a hearing by the Chairman National Land Commission. The National Land Commission was served but failed to file a response. It is a disturbing to this court that the National Land Commission who took over from the defunct Commissioner of Lands have taken over the habits of the latter who used ignore summons and never bothered to file replying affidavits. It was expected that the chairman National Land Commission would file a replying affidavit in response to the allegations made by the petitioner. Failure to do so means that the allegations by ***Bishop Cornelius K. Korir on the issue of not being afforded a fair hearing by the 1st respondent are not controverted. An attempt was made by the 2nd respondent to demonstrate that the petitioner was heard but this court cannot rely on the said explanation as the 2nd respondent is an interested party in the outcome of the matter and not an officer of the 1st Respondent.***

It is not demonstrated by the respondents that the petitioner was given adequate notice by the 1st respondent before the hearing of the dispute. The right to be heard is so cardinal that it cannot be wished away. I do agree with Mr Birech that the petitioner was not afforded a fair hearing.

2-WHETHER THE LAND IN CONTENTION IS PUBLIC LAND

There is no dispute that the suit land was a resultant of L.R. 11963/R (Kaptich farm) situated in the Leseru Sub-location, Kamagut location, Turbo Division of Eldoret West District. The land initially belonged to one D. N. Craig, a settler. The total acreage of the land was 1060 acres. During subdivisions, three public utility plots were placed thus a cattle dip Plot No. 69 of 3 acres, a primary school, Plot No. 55 of 12 acres and a secondary school Plot No. 70 measuring 45 acres. I have looked at the list of the persons allocated with plots at the said farm attached in the letter dated 2.5.1990 addressed to the District Surveyor, Uasin Gishu District (Eldoret) and do find that the name of the petitioner does not appear. The plot No. 70 measuring 18.58 acres was allocated to Craig Secondary School and not the petitioner. The letter of consent dated 30.4.1987 transferring 416.9 Ha by way of gift from M/s Lewa Downs Limited to the District Commissioner, Uasin Gishu District of the remainder of unexpired lease does also name the petitioner as a beneficiary of the said gift as the same was being transferred to District Commissioner, Uasin Gishu for a consideration of Kshs.1.5 million. The Diocese of Eldoret (Registered Trustees) appear in the survey computation form, however, it is not explained how the said church was included in the computation form when their name is not in the list of the allottees.

The letter marked as CK2(a) and CK2(b) in the affidavit of Bishop Cornelius Korir is proof that Mr. David Craig donated land to a school to be named after his wife but not the Registered Trustees of the Catholic Church, Eldoret Diocese. Mr. Craig merely suggested that the Catholic Church be a sponsor but the land was to be used for a school. The letter marked CK2(b) is to whom it may concern hence there is a possibility that someone orally requested for the same to be written as it was done and therefore, not reliable. The said letter is not a response to any written request.

The second letter dated 26.1.2004 appears to be contradicting the first letter as the import of the letter was that the school was to be supported by the Catholic Church whilst in the letter dated 18.7.2002, it was a mere suggestion that the church be a sponsor. Both letters appear to have been drafted after the list of Plot owners was prepared. Despite the foregoing, the two letters do not direct that the school property be registered in the name of the Registered Trustees Diocese of Eldoret.

This court finds that the genesis of this matter is the letter dated 1.6.1986 addressed to the District Commissioner, Eldoret by D. Craig where he states:

“David Craig,

c/o Lewa Downs,

P. O Private Bag, Isiolo,

Kenya.

1/6/87

District Commissioner,

Eldoret,

Kenya.

For the attention of Mr. Chelang'a

Dear Mr. Chelang'a,

May I confirm what we discussed last Thursday, 28.5/87. I re-signed the LCB form requesting permission to sell 1030 acres of LR 1963 (formerly 6092) to the DC, Eldoret. "DC.Eldoret." was to be taken as Kenya Government, and it had been agreed by His Excellency the President that Mrs Keino was to have 500 acres and that the balance was to go where and how is His Excellency directed. It was further agreed that the price was to be Shs.1500 per acre and that your good-self would collect the cash and hand it over to us. Finally, it was my pleasure to offer the Government acres 30 (thirty) for a school leaving a balance of 1000 (Shes.1,500,00) to be sold.

Subsequent to our meeting, I met Mrs. Keino who has arranged for Shs.750,000 to be held to my order at her bank in Eldoret. I undertake not to use or transfer this cash until cleared by you. However, it does seem to save double handling of the money and it verifies beyond doubt that Mrs Keino has the cash. If this arrangement is not suitable then I can either have "DC Eldoret" added to the order or do whatever you may wish and instruct.

With one half of the money now in hand, I hope we may finalize the balance as quickly as possible so that it does not become a vacuum again. It is my impression that Mrs. Keino has the cash available to purchase a further 200 acres, if this fell within the Government's interest.

Thank you for your help over this affair.

Yours sincerely,

SIGNED

D. Craig"

This court finds that the land in dispute was meant for a public Secondary School as it is within the land that was purchased by the government of Kenya from Mr Craig and as per the list submitted to the surveyors and that it could have been the wish of Mr. Craig that the Catholic Church becomes the sponsor or supporter but not the owner of the land because the subject parcel of land was purchased by the Government and members of public. It has not been shown how the church obtained title to the land. This court has held before that it is not enough to wave a title deed and claim to be the owner of the parcel of land described therein it is mandatory to establish that the same was lawfully and procedurally acquired a fact that has not been demonstrated by the petitioner.

The issue in this matter concerns the application of Article 40 of the Constitution which provides as follows;

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

(a) of any description; and

(b) in any part of Kenya.

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

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

(b) to limit, or in any way restrict the enjoyment of any right under this Article on

the basis of any of the grounds specified or contemplated in Article 27 (4).

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

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

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

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

(ii) allows any person who has an interest in, or right over, that

property a right of access to a court of law.

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

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

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

The petitioner alleges to have been registered as the proprietor of the property after acquiring the same as a gift from Mr Craig no evidence of such a gift registered by the Registrar of Lands at the lands registry has been shown to this court and therefore the court finds that the property was unlawfully acquired by the petitioner.

Article 61 of the Constitution of Kenya classifies land as **public, community** and **private**. Article 62(1)(c) provides Public land to include land transferred to the state by way of sale, reversion or surrender. It is proper to note that the land in content was bought by the state before it was allocated to squatters and therefore, the remainder of the land allocated remained public land. It is also important to note that the remainder of the land was allocated to the public for public utilities, thus, a primary school, a secondary school and a cattle dip. Nobody including the church can claim private ownership of the three public utility plots. The argument by Mr. Birech that the petitioner is the registered proprietor of the parcel of land requires protection is valid but subject to the finding that the title was legally acquired.

Applying sections 24, 25, and 26 of the Land Registration Act that provide for the effect of registration thus once a person is registered as the proprietor of the parcel of land he obtains absolute ownership and is entitled to enjoy all rights and privileges belonging or appurtenant thereto and cannot be defeated except on the ground of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme, I do find that the petitioner is only protected if the land was legally acquired. In this case, the petitioners have not demonstrated how they acquired the parcel of land. The alleged donation by Mr. Craig as a gift to the petitioner has not been demonstrated on a balance of probability.

Mrs Dorothy Letting the County Land registrar Uasin Gishu in her replying affidavit sworn on 18th June 2015 states at paragraph 4 that according to the Green Card in their custody, the current registered owner of Kiplombe/Kiplombe Block 5(Kaptich) 70 is the Diocese of Eldoret Trustee (Registered) who was registered on 21.9.2004 and issued with a title deed on the same date. However, That the member's register for Kaptich farm in their custody indicated that the parcel No. 70 (the suit land) was reserved for a secondary school. The said register was later altered to read Diocese of Eldoret (registered Trustee) and on the right side of the said register there is a note by the Land Registrar indicating that the ownership of

the said parcel of land is disputed. I do find that the land in dispute was reserved for a public secondary school and therefore is classified as public land

4-WHETHER SECTIONS 3,6,14 OF THE NATIONAL LAND COMMISSION ACT CAN BE APPLIED IN RETROSPECT

The National Land Commission Act 2012 came into operation on the 2nd of May 2012. This is the commencement date which means the day on which the Act comes into force.

It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have retrospective operation. The rule in general is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing legislation.

Section 14(1) of the National Land Commission Act, 2012 affects vested rights by providing that subject to Article 68(c)(v) of the Constitution the commission shall within five years of the commencement of the Act, on its own motion or upon a complaint by the national or county government, a community or an individual, review all grants or dispositions of public land to establish their propriety or legality.

Article 68 (c) (v) of the constitution of Kenya empowered parliament to enact retrospective law on land to enable the review of all grants or depositions of public land to establish their propriety or legality.

According to Section 14(5) where the commission finds that the title was unlawfully acquired, the commission is empowered to direct the registrar to revoke the title. The import of this provision is that the National Land Commission has the power to direct the revocation of all dispositions including those made before the promulgation of the Constitution of Kenya, 2010 and enactment of the Land Act. Land Registered Act and National Land Commission Act. Moreover, the argument by Mr. Birech that the Land Act and sections 24, 25 and 26 of Land Registered Act cannot be applied in retrospect does not hold water as the sections deal with dispositions made illegally and unlawfully before the new laws came into place..

3-WHETHER THE PETITIONER SHOULD HAVE FILED JUDICIAL REVIEW

I do not agree with Mrs. Rotich that the petitioner should have filed a plaint as opposed to a petition as the remedies sought are based on infringement of the right to property. The applicable law is chapter 4 of the constitution of Kenya which provides for the bill of rights. Article 22 of the said constitution is very clear that every person has the right to institute court proceedings claiming that a right or a fundamental freedom in the bill of rights has been denied violated or infringed, or threatened. The Chief justice is empowered under Article 22 sub-Article 3 to make rules providing for the conduct of the court proceedings envisaged under Article 22. The rules envisaged in the sub article have already been made by the chief justice which rules provide for the mode of approaching the court on the enforcement of the bill of rights. IN exercise of the powers conferred by Article 23 and Article 165 (3) of the constitution of Kenya the chief justice made rules that were published in a special issue of the Kenya gazette supplement no 95 being legislative supplement no 47. Rule no 10 thereof makes provision for the filing of a petition as set out in Form A in the schedule with such alterations as may be necessary.

CONCLUSION

In conclusion this court finds for the petitioner that though the 1st Respondent had the jurisdiction to hear the dispute and make a decision as he did, the decision made was tainted with procedural impropriety having failed to afford the petitioner a fair hearing and therefore this court issues a declaration that the respondents' actions amount to deprivation of property without the due process and therefore illegal and unconstitutional.

On the prayer for a permanent injunction restraining the respondents from interfering with the Petitioner's rights to the property Kiplombe/Kiplombe Block 5(Kaptich)/70 and a declaration that the Petitioner is the

rightful owner of the property known as Kiplombe/Kiplombe Block 5(Kaptich)/70 this court finds that petitioner was unlawfully registered as the proprietor of the suit property as the same was public property reserved for a public secondary school. This prayer is dismissed with no order as to costs being a public interest litigation. The upshot of the above is that this court finds that the suit property being public land shall be registered in the name of the Principal Secretary Ministry of Education in trust for Craig Secondary School a public school. Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 1ST DAY OF APRIL, 2016.

ANTONY OMBWAYO

JUDGE