Chege & 4 others v Attorney General & 16 others (Civil Appeal 27, 28, 29, 30 & 31 of 2019 (Consolidated)) [2025] KECA 884 (KLR) (23 May 2025) (Judgment)

Neutral citation: [2025] KECA 884 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 27, 28, 29, 30 & 31 OF 2019 (CONSOLIDATED)

JM MATIVO, PM GACHOKA & WK KORIR, JJA

MAY 23, 2025

BETWEEN

PHARIS NDUNG'U CHEGE ..... APPELLANT

AND

THE ATTORNEY GENERAL ..... 1ST RESPONDENT

NATIONAL LAND COMMISSION ..... 2ND RESPONDENT

GOVERNOR, NAKURU COUNTY ..... 3RD RESPONDENT

NJUGUNA KAMAU ..... 4TH RESPONDENT

JOHN KIHAGI ..... 5TH RESPONDENT

MUTAI MICHAEL ..... 6TH RESPONDENT

ISSAC MUNGAI KAMAU ..... 7TH RESPONDENT

IBRAHIM KARANJA ..... 8TH RESPONDENT

SAMUEL NDUNG'U KIMANI ..... 9TH RESPONDENT

AS CONSOLIDATED WITH

CIVIL APPEAL 28 OF 2019

BETWEEN

MUTAI MICHAEL ..... APPELLANT

AND

THE ATTORNEY GENERAL ..... 1ST RESPONDENT

NATIONAL LAND COMMISSION ..... 2ND RESPONDENT

GOVERNOR, NAKURU COUNTY ..... 3RD RESPONDENT

NJUGUNA KAMAU ..... 4TH RESPONDENT

JOHN KIHAGI ..... 5TH RESPONDENT

PHARIS NDUNG'U CHEGE ..... 6TH RESPONDENT

ISSAC MUNGAI KAMAU ..... 7TH RESPONDENT

IBRAHIM KARANJA ..... 8TH RESPONDENT

SAMUEL NDUNG'U KIMANI ..... 9TH RESPONDENT

AS CONSOLIDATED WITH

CIVIL APPEAL 29 OF 2019

BETWEEN

ISSAC MUNGAI KAMAU ..... APPELLANT

AND

THE ATTORNEY GENERAL ..... 1ST RESPONDENT

NATIONAL LAND COMMISSION ..... 2ND RESPONDENT

GOVERNOR, NAKURU COUNTY ..... 3RD RESPONDENT

NJUGUNA KAMAU ..... 4TH RESPONDENT

JOHN KIHAGI ..... 5TH RESPONDENT

PHARIS NDUNG'U CHEGE ..... 6TH RESPONDENT

MUTAI MICHAEL ..... 7TH RESPONDENT

IBRAHIM KARANJA ..... 8TH RESPONDENT

SAMUEL NDUNG'U KIMANI ..... 9TH RESPONDENT

AS CONSOLIDATED WITH

CIVIL APPEAL 30 OF 2019

BETWEEN

IBRAHIM KARANJA ..... APPELLANT

AND

THE ATTORNEY GENERAL ..... 1ST RESPONDENT

NATIONAL LAND COMMISSION ..... 2ND RESPONDENT

GOVERNOR, NAKURU COUNTY ..... 3RD RESPONDENT

NJUGUNA KAMAU ..... 4TH RESPONDENT

JOHN KIHAGI ..... 5TH RESPONDENT

PHARIS NDUNG'U CHEGE ..... 6TH RESPONDENT

MUTAI MICHAEL ..... 7TH RESPONDENT

ISSAC MUNGAI KAMAU ..... 8TH RESPONDENT

SAMUEL NDUNG'U KIMANI ..... 9TH RESPONDENT

AS CONSOLIDATED WITH

CIVIL APPEAL 31 OF 2019

BETWEEN

SAMUEL NDUNG'U KIMANI ..... APPELLANT

AND

THE ATTORNEY GENERAL ..... 1ST RESPONDENT

NATIONAL LAND COMMISSION ..... 2ND RESPONDENT

GOVERNOR, NAKURU COUNTY ..... 3RD RESPONDENT

NJUGUNA KAMAU ..... 4TH RESPONDENT

JOHN KIHAGI ..... 5TH RESPONDENT

PHARIS NDUNG'U CHEGE ..... 6TH RESPONDENT

MUTAI MICHAEL ..... 7TH RESPONDENT

ISSAC MUNGAI KAMAU ..... 8TH RESPONDENT

IBRAHIM KARANJA ..... 9TH RESPONDENT

((An appeal against the judgment of the Environment and Land Court at Nakuru (D.O. Ohungo, J.) dated 12th October 2018 in Petition No. 20 of 2014))

JUDGMENT

1. This appeal arises from the Judgment delivered on 12th October 2018 by D.O. Ohungo, J. of the Environment and Land Court (ELC) at Nakuru through which he dismissed Petition No. 20 of 2014 filed by Pharis Ndung'u Chege (Pharis), Mutai Michael (Michael), Isaac Mungai Kamau (Isaac), Ibrahim Karanja (Ibrahim) and Samuel Ndung'u Kimani (Samuel) being the respective 1st to 5th petitioners, which petition they had filed against the Attorney General, the National Land Commission, the Governor Nakuru County, Njuguna Kamau and John Kihagi being the respective 1st to 5th respondents. The petition was initially filed in the High Court before being transferred to the ELC, where it retained the same case number. Being dissatisfied with the judgment of the ELC Pharis, Michael, Isaac, Ibrahim, and Samuel (the appellants) filed separate appeals being numbers 27 to 31, all of 2019. As required, they named the respondents in the petition and their co-petitioners at the trial as respondents. Each appeal, therefore, has nine respondents, but the true respondents to the appeals are those named as the 1st to 5th respondents being Attorney General, National Land Commission,

Governor - Nakuru County, Njuguna Kamau, and John Kihagi. We will therefore refer to them in this judgment as the respondents. The appeals were consolidated with the consent of the parties on 19th June 2024.

2. In their memoranda of appeal dated 20th May 2019, the appellants raised similar grounds of appeal as follows:

   i. That the learned Judge erred in law and misdirected himself, by abdication of his Constitutional Mandate, to resolve the actual issues in controversy between the parties, arising from Constitutional Rights.

   ii. That the learned Judge erred in law and in fact; misdirected himself in designing the Judgment on the pre-conceived notion that the subject property, of the Appellant, was unlawfully acquired.

   iii. That the learned Judge erred in law and in fact; misdirected himself in failing to appreciate that exchange of land between the Appellant and Delamere Estates Limited deserved Protection against Interference by all parties, including against the First, Second, Third, Fourth and Fifth Respondents.

   iv. That the learned Judge erred in law and in fact in directing unfounded aspersions against the Appellant whilst the circumstances demonstrated that the Appellant transacted in an exchange, voluntarily between contracting parties, for value.

   v. That the Learned Judge erred in law and in fact; and misdirected himself in failing to find that the Appellant herein, and is, a validly registered owner of the subject property herein and thus his ownership remained unimpeached.

   vi. That the learned Judge erred in law and in fact; and misdirected himself in failing to find that the Appellant had acquired the subject parcels of land lawfully and that he could not be deprived of the same, without his property rights being violated.

   vii. That the learned Judge erred in law and in fact and misdirected himself in not taking into account the evidence adduced on behalf of the Appellant.

   viii. (a) That the learned Judge erred in law and in fact in not considering submissions filed on behalf of the Appellant.

   (b)If the learned Judge did consider the submissions, they misapprehended and/or ignored the thrust, and true weight, of issues raised.

   ix. That the learned Judge erred in law and in fact; misdirected himself in *the Constitution* Rights of the parties, upon the issues placed before him.

   x. That the learned Judge erred in law and in fact; misdirected himself in failing to find, notwithstanding the express, and repeated admissions of the Second, Third, Fourth and Fifth Respondents in that behalf, that the said Respondents had indeed encroached, entered, and remained therein, the Appellant's land.

   xi. That the learned Judge erred in law and in fact; misdirected himself in dismissing the Appellant's case despite the Appellant tendering all materials to support his grievances.

   xii. That the decision was arrived at on consideration, to the extent that this was done, of wrong principles of law.

xiii. That the decision was against the weight of the evidence.

3. A brief background suffices. The appellants filed a petition dated 12th March 2014 seeking:

   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.

4. The appellants' case, as gleaned from the petition and supporting documents, was that on diverse dates between 1995 and 2XX5, the Commissioner of Lands and the Municipal Council of Naivasha (MCN) allocated 24 individuals, the appellants included, parcels of land designated as industrial plots. That before they could use their land, Delamare Estates Ltd (DEL) expressed an interest in using the said parcels as an access road to its parcel. That pursuant to negotiations between DEL, MCN, and the allottees, it was agreed that the allottees would surrender the land to DEL, and they would be resettled on a different parcel of land to be provided by DEL. In 2XX5, DEL donated 26.93 acres to MCN, whereby 22 acres were to be used for the construction of a stadium while 4.93 acres were to be used to resettle the allottees. Subsequently, all the necessary approvals were sought and MCN was issued with its title deed LR No. 234XX11 measuring 22 acres, while the allottees each got their respective titles LR Nos. 28XX1/2-XX. The allottees enjoyed quiet and peaceful possession of the plots until 2013, when the 2nd respondent sought to repossess the parcels by invading them, planting trees, and erecting a perimeter wall. The appellants faulted the 2nd, 3rd, 4th, and 5th respondents for overstepping their mandate and as a consequence, violating their rights under Articles 40, 47, and 50 of *the Constitution*.

5. The 1st respondent did not file any reply to the petition.

6. The 2nd respondent opposed the petition through a replying affidavit sworn on 8th April 2014 by its Director of Legal Affairs and Environment, Margaret Kaptuiya Cheboiwo. The 2nd respondent challenged the High Court's jurisdiction and the competency of the petition. Ms. Kaptuiya averred that the 2nd respondent was moved

   by the numerous requests by the MP for Naivasha, the 5th respondent, to help unearth a scheme that led to the grabbing of a parcel of land which was meant for the construction of the Naivasha Sports Complex. The 2nd respondent's officers visited Naivasha on 24th July 2013, and upon conducting investigations, they discovered irregularities that prompted them to repossess LR 234XX/2, which had since been subdivided and allocated to 24 persons who included the appellants. Giving the history of the parcel of land in question, the 2nd respondent averred that MCN was allocated a parcel of land registered as L.R. 234XX measuring 93 acres through a letter of allotment dated 17th June 1998. The parcel of land which belonged to DEL had been exchanged with a parcel of land belonging to the

government and was meant for the development of a sports complex. DEL later proposed a subdivision of the land into two pieces with a portion being L.R. No. 234XX/1 measuring 22 acres being allocated to MCN while the remainder being L.R. No. 234XX/2 being allocated to the appellants who alleged that they were displaced persons. However, it was later realized by DEL that the appellants had misrepresented facts leading to the subdivision. It was the averment of the 2nd respondent that Pharis who was a former mayor of MCN could not have been a displaced person or a squatter. Further, that there was no resolution by DEL to subdivide the land. The 2nd respondent intimated it was in the process of reviewing the grants issued to the appellants with a view to cancelling the illegal titles issued to persons claiming ownership to the land parcels emanating from L.R. No. 234XX. The 2nd respondent consequently prayed for the dismissal of the petition with costs.

7. The 3rd respondent opposed the petition through the replying affidavit sworn on 8th April 2014 by the County Secretary, Joseph Motari. Like the 2nd respondent, the 3rd respondent challenged the jurisdiction of the High Court to determine the petition while also protesting that the petition was incompetent because the supporting affidavit predated the petition. It was also his averment that the appellants lacked locus standi to institute the petition as their claim was hinged on fraudulently acquired title deeds. According to the 3rd respondent, the 26.93 acres were donated by DEL to MNC for developing a sports complex, and the appellants herein misrepresented facts to DEL by claiming that they had been displaced. Pursuant to the misrepresentation, the parcel of land was subdivided into the suit property, yielding 22 acres for the stadium (LR No. 234XX/1) and 4.93 acres (LR No. 234XX/2), which was allocated to the appellants and others. That DEL later unearthed the misrepresentation and informed Nakuru County of the same. Further, that DEL recanted its approval of the subdivision, citing lack of a Board resolution to that effect. The 3rd respondent maintained that the petition should be dismissed as it was merely a means for frustrating the 3rd respondent and delaying the implementation of a project immensely beneficial to the locals of Naivasha.

8. The 4th respondent swore a replying affidavit in opposition to the petition and averred that he was not involved in the dispute and only attended the tree planting session by the 2nd respondent courtesy of his role as the Chairman of Commerce, Nakuru County with interest in sourcing for investors to ensure the realization of the stadium project.

9. The 5th respondent likewise swore a replying affidavit in opposition to the petition. He averred that he received a complaint from one Stephen Wasonga Maloba who presented documents showing that the stadium project had been altered. After reviewing the documents, he proceeded to the ground where he discovered that 93 acres had been hived off the original parcel of land meant for the stadium construction. He also averred that in 2013, when he visited the land, there was no development save for a Youth Development Center erected by the Ministry of Youth Affairs. He deposed that on 24th July 2013, the 2nd respondent visited Naivasha, conducted a public hearing, and repossessed the land. His account of the irregular acquisition of L.R. No. 234XX/2 by the appellants is similar to that of the 2nd and 3rd respondents and needs no restating.

10. In the trial court, the matter proceeded by way of affidavit evidence. At paragraph 22 of the judgment the learned Judge framed the issues for determination as follows: whether there was a valid petition before the court; whether the petitioners had established that they had rights under Articles 40, 47 and 50 in regard to the suit properties; whether such rights had been breached by the respondents;

and, whether the petitioners were entitled to the reliefs sought. The learned Judge then proceeded to determine the identified issues as follows:

> "28. 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...
>
> 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...
>
> 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.
>
> 56. 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.
>
> 57. 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."

11. Before us, the appeal was heard on 5th March 2025 when learned counsel Mr. Kagucia appeared for the appellants while learned counsel Mr. Biko and Ms. Mvatie held brief for Prof. Ojienda, Senior Counsel, for the 2nd to 5th respondents. There was no appearance from the office of the Attorney General despite service of the hearing notice. Mr. Kaguchia and Mr. Biko sought to rely on their written submissions,

accompanied by brief oral highlights of the submissions in plenary. We summarize the submissions in the succeeding paragraphs.

12. Even though all the appellants filed individual submissions, they are of the same tenor and substance, and were filed by one counsel. Learned counsel, Mr. Kaguchia started off by referring to the holdings in Selle vs. Associated Motor Boat Co. Ltd [1965] EA 123 and Gitobu Imanyara & 2 Others vs. Attorney General [2016] eKLR to underscore the Court's jurisdiction on a first appeal.

13. Turning to the submissions on the substantive appeal, Mr. Kaguchia condensed the issues to two: whether the learned Judge abdicated his duty to resolve the issues in controversy; and whether the learned Judge erred in casting doubts on the validity of the appellants' titles.

14. On the first issue, counsel contended that the learned Judge abdicated his duty. In support of this assertion, counsel submitted that the learned Judge failed to determine the issues in controversy due to an erroneous suspicion that the titles owned by the appellants were irregular. According to counsel, such a finding without proof sanitized the respondents' continued violation of the appellants' rights as complained in the petition. Counsel submitted that the learned Judge also acted contrary to Article 159 of *the Constitution* on judicial authority and that his interpretation of Articles 40, 47, and 50 of *the Constitution* was narrow, thereby failing to appreciate the appellants' longstanding possession of the suit properties.

15. Turning to the second issue, counsel faulted the learned Judge for what he termed as casting doubts on the validity of the appellants' titles thus failing to appreciate the import of section 26 of the *Land Registration Act*, which provides that a certificate of title is to be held as conclusive evidence of proprietorship. According to counsel, the appellants' acquisition of the suit properties was regular, and the authenticity of documents produced to affirm that fact ought not to have been dismissed without proper examination. Counsel maintained that the appellants were entitled to the protection of their property rights under Article 40 of *the Constitution*. He argued that the delay in payment of administrative fees did not invalidate the appellants' ownership of the plots because the Commissioner of Lands acquiesced to the delay by accepting the payments before processing the appellants' respective titles.

16. Mr. Kagucia faulted the trial court's holding that the appellants ought to have waited for the process of invalidation of their titles to be completed before moving the court. According to counsel, the violation of the appellants' rights occurred when they were denied peaceful enjoyment of their respective parcels of land. According to counsel, Article 47 of *the Constitution* was breached when the respondents moved to repossess the suit properties without offering the appellants an opportunity to be heard and by failing to follow the right procedure. Relying on Judicial Service Commission vs. Mbalu Mutava & Another [2014] eKLR, counsel reiterated that the sanctity of the right to fair administrative action should be upheld. Consequently, counsel urged us to allow the appeal as well as the petition.

17. The law firm of Odhiambo and Odhiambo Advocates for the 2nd to 5th respondents, through the submissions dated 9th December 2024, responded to the issues identified by the appellants. As to whether the learned Judge abdicated his duty by failing to address the issues in controversy, learned counsel Mr. Biko asserted that he did not. He argued that the appellants' claim of violation of Articles 40, 47 and 50 of *the Constitution* was flawed, as they did not sufficiently prove the infringement thus failing to meet the requirement in Anarita Karimi Njeru vs. Republic [1979] eKLR that a claim for violation of constitutional rights must precisely set out the complaint, the constitutional provisions infringed and the manner in which the provisions have been infringed. According to these respondents, the appellants' claim to the properties in question was invalid since they were not lawfully acquired. Counsel cited William Musembi & 13 others vs. Moi Educational Centre Co. Ltd & 3 Others [20XX]

eKLR for the holding that Article 40 (6) of *the Constitution* does not extend protection to unlawfully acquired property, urging that significant doubts remain regarding the validity of the appellants' titles. Mr. Biko further argued that the appellants could not prove any infringement of Articles 47 (fair administrative action) and 50 (fair hearing) if the underlying titles were deemed invalid. He pointed out that the 26.93 acres were earmarked for the construction of a stadium and emphasized that no portion of this land was intended for settlement. He maintained that the subdivision initiated by DEL was based on misrepresentation, thereby undermining the appellants' "preconceived notions" of ownership.

18. On the issue as to whether the learned Judge erred in casting doubts on the validity of the appellants' titles, Mr. Biko acknowledged that a certificate of title, as per the provisions of section 26 of the *Land Registration Act*, does indeed broadcast the proprietor of the land as named therein. He, however, submitted that there were exceptions to the rule so that a certificate of title acquired through fraud or misrepresentation or illegally or unprocedurally or through a corrupt scheme cannot pass muster. According to counsel, the learned Judge therefore correctly applied section 26 of the *Land Registration Act* in dismissing the appellants' assertion of validity of their titles. In support of the argument, counsel cited Munyu Maina vs. Hiram Gathiha Maina [2013] eKLR for the holding that a title is inadequate when its validity is disputed, underscoring the need to examine how it was acquired. He pointed out that the allocation's validity was questionable since only a portion was carved out without a legally enforceable instrument. Additionally, counsel referenced Torino Enterprises Limited vs. Attorney General [2023] KESC 79 (KLR), stating that allotment letters alone do not confer ownership without subsequent registration. Counsel therefore, called for the appeal to be dismissed with costs.

19. On a first appeal, we have a duty to re-evaluate, re-analyze, and re-consider the evidence afresh and draw our own independent conclusions. In doing so, we must take cognizance of the fact that, unlike the trial court, we didn't have the opportunity to hear and see the witnesses testify so as to gauge their demeanour. Of course, that caution does not apply in this appeal because the matter proceeded by way of affidavit evidence. For instance, the mandate of this Court on a first appeal was reiterated in Abok James Odera T/A A.J Odera & Associates vs. John Patrick Machira T/A Machira & Co. Advocates [2013] KECA 208 (KLR) as follows:

> "This being a first appeal, we are reminded of our primary role as a first appellate court, namely to re-evaluate, re- assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

20. Alive to this mandate, we have reviewed the record and assessed the rival arguments by counsel. In our view, the following issues determines this appeal: whether the learned Judge adequately resolved the issues in controversy; whether the appellants established infringement of their rights; and who should meet the costs of this appeal. In answering the question as to whether the appellants established infringement of their constitutional rights, we will have answered the second issue identified by the parties as to whether the learned Judge erred in casting doubts on the appellants' titles.

21. The issues are intertwined, and we propose to deal with them simultaneously. Earlier in this judgment, we reproduced extensively the learned Judge's ratio decidendi. A painstaking review of the judgment reveals that the learned Judge appreciated the basic principle established by the Supreme Court in Dina Management Limited vs. County Government of Mombasa & 5 Others [2023] KESC 30 (KLR), and restated in Sehmi & another vs. Tarabana Company Ltd & 5 Others [2025] KESC XX (KLR), that section 26 of the *Land Registration Act*, 2012 draws from Article 40 of *the Constitution* the principle that the right to property does not extend to any property that has been found to have been unlawfully

acquired and under the current legislation, a certificate of title though regarded by courts as prima facie evidence that the person named therein is the absolute and indefeasible owner of the land, the title holder cannot erect the certificate of title as a barrier to an inquiry into its legality or otherwise.

22. With due respect to counsel for the appellants, we find no error in the mode adopted by the learned Judge to adjudicate the petition in the manner he did. It must be recalled that the appellants' case was hinged on the existence of titles upon which the right to property was anchored. Since the validity of the titles was challenged through the replies of the respondents, it was incumbent upon the learned Judge to first assess whether the titles were prima facie valid therefore giving rise to property rights. We therefore decline the invitation to find that the learned Judge abdicated his duty of resolving the controversy. The said controversy having been hinged on the existence of valid titles, it was only proper that the validity or otherwise of the titles be examined.

23. The respondents also opposed the petition, asserting that it did not meet the threshold set in Anarita Karimi Njeru vs. Republic (supra). The Supreme Court in Communications Commission of Kenya & 5 others vs. Royal Media Services Limited & 5 Others [2014] KESC 53 (KLR) crystalized the Anarita Karimi principles as follows:

> "[349] ... Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Annarita Karimi Njeru v. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement..." (Emphasis ours)

24. In our view, assessing the respondents' opposition on the ground that the alleged violation had not been proved, calls for the analysis of the evidence on the record. Since the rights alleged to have been infringed accrued from ownership of LR Nos. 28XX1/2- XX, it is necessary to consider whether the appellants had established the existence of titles that were prima facie valid.

25. Both the appellants and the 2nd to 5th respondents agree that in 1995 or thereabout, DEL donated 26.93 acres to MCN. Their point of departure is whether out of the 26.93 acres donated by DEL, 22 acres were to be used to construct a stadium while 4.93 acres were to be used to resettle the appellants. The 1st appellant, who swore the affidavit in support of the petition, traced his claim to a letter of allotment issued on 24th October 1995. One of the conditions therein was that he was to pay Kshs. 15,8XX within 30 days so as to be allotted plot No. 356. Nelly Wanjiru Ndungu was also allocated plot No. 357 on similar conditions vide a letter of even date as that of Pharis. In the case of Nelly Wanjiru Ndungu, payment was made for plot 357 on 13th October 2XX3, and a receipt dated 17th November 2XX3 was issued to that effect.

26. The respondents had questioned the validity of the appellants' titles on the ground that they had not met the conditions in the letters of allotment. A serious issue concerning the legitimacy of the appellants' titles had thus been raised, and the learned Judge had reason for casting doubts on the appellants' titles after analyzing the evidence placed before him. We say so because the Supreme Court in Sehmi & Another vs. Tarabana Company Ltd & 5 Others (supra) held that an allotment is only complete "upon the fulfillment of the condition/s by the lessee." We do not think it would have been fair for the learned Judge to go ahead and make a definite finding that the appellants' titles were valid or invalid, as the parties had not pleaded anything in that respect. It would also be inappropriate for this

Court to make such a finding. However, it is important to note that the question as to whether Pharis and Nelly Wanjiru Ndungu met the conditions set by the Commissioner of Lands regarding plots No. 356 and 357 lingers, and it would have been inappropriate for the learned Judge to uphold rights based on questionable titles. In Sehmi & Another vs. Tarabana Company Ltd & 5 Others (supra), the Supreme Court while addressing the continued possession of a leasehold land after expiry of the lease and without renewal, held that:

> " [80] ...Where did this cruel reality leave the appellants? What rights, if any did the appellants have over the suit land? It was submitted without constestation at the trial court, that after the expiry of the lease, the appellants continued in possession of the land, while paying the applicable land rates and rent. What then was the legal status of the appellants with regard to the land? Can the appellants be considered as having acquired an equitable interest in the land by virtue of their continued stay upon the same? We think not, since through effluxion of time, and reversion to the Government, the lease had become extinguished for all purposes. No equitable interest over the land could survive such extinction. Whatever remained in favour of the appellants over the land could at worst be regarded as "a tenancy at will" or at best "a mere equity".

27. In Torino Enterprises Limited vs. Attorney General (supra) the Supreme Court emphasized the importance of perfecting the allotment letter by fulfilling the conditions therein when it held that:

> " Suffice it to say that an Allottee, in whose name the allotment letter is issued, must perfect the same by fulfilling the conditions therein. These conditions include but are not limited to, the payment of a stand premium and ground rent within prescribed timelines. But even after the perfection of an allotment letter through the fulfillment of the conditions stipulated therein, an allottee cannot pass valid title to a third party unless and until he acquires title to the land through registration under the applicable law. It is the act of registration that confers a transferable title to the registered proprietor, and not the possession of an allotment letter."

28. Apart from the attack on the appellants' titles on the ground that the conditions in the allotment letters had not been met, there was the averment by the respondents that the appellants had obtained their titles through misrepresentation to DEL that they were displaced persons or squatters. Indeed, there are letters on the record from DEL confirming this assertion. Therefore, the legitimacy of appellants' titles faced headwinds based on one of the grounds found in section 26 of the *Land Registration Act*. The proviso to that section is that a certificate of title acquired through fraud or misrepresentation or illegally or unprocedurally or through a corrupt scheme cannot pass muster. Having been confronted by this defence, the appellants ought to have reconsidered their strategy but they instead soldiered on. In the judgment, the learned Judge correctly found that the appellants had not pleaded for the affirmation of their titles. Now the appellants submit that the learned Judge evaded the issues pleaded by the parties. Did he? In our view, he did not. Even though the appellants had not sought a declaration that they were the rightful owners of the parcels of land, we are of the view that on the strength of the decision of the Supreme Court in Fanikiwa Limited & 3 Others vs. Sirikwa Squatters Group & 17 Others [2023] KESC 105 (KLR), the learned Judge could not have affirmed the titles of the appellants based on affidavit evidence. In the stated case, the Supreme Court held that:

> " 77. This matter entails disputed ownership of land. In other words, there are competing claims as to the ownership of the suit parcels. Therefore, it behoves a court to make a just determination on the same, procedurally. In doing so, it has to, on the basis of the law and evidence before it, decide who the

owner is and thoroughly interrogate how such ownership was conferred. In the present scenario, a trial process involving examination, cross- examination and re- examination of the witnesses is the only way of resolving the competing allegations and counter allegations. We recognize that the superior courts below relied on rule 20(1)(a) of the Mutunga Rules to hear the matter by way of affidavit evidence. However, we are of the view that a court is required to make a special endeavour to unravel all the competing claims and in particular, by calling for viva voce evidence from witnesses, especially those who have sworn depositions, and cross-examination done. This is particularly important because its decision will have a far-reaching impact especially upon the party(ies) whose ownership may end up being nullified. In taking this view, we are fortified by rules 20(3), (4), and (5) of the Mutunga Rules which allow a court to admit oral evidence, examine and cross-examine parties.

78. In the circumstances of this case, therefore, we are not convinced that it was prudent and judicious, considering the highly contentious nature of the claims and circumstances of each of the numerous parties involved to determine this matter by affidavit evidence only. The authors of the said affidavits ought to have been called and cross-examined to test the veracity of the affidavits and documentary evidence. To our minds, this would have presented the best available evidence for the learned trial judge to make his decision fairly."

29. At this point, it is imperative to restate that the appellants claimed that their respective parcels were taken over by DEL in exchange for 4.93 acres of the stadium land. It was only through the calling of witnesses that the appellants could have demonstrated that they had plots which they could exchange with DEL in the first place. We are also faced with a letter dated 12th March 1996 addressed to DEL wherein the Provincial Physical Planning Officer, Mr. R.K. Mbwaga, indicated that the land which DEL would donate for the stadium was 26 acres or 10.87 hectares. Nowhere was there any mention that the parcel of land would be shared with any other party. On XXst December 1998, DEL wrote to MCN where indicating that:

> "...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 construction of the stadium we shall expose this matter publicly and pursue it vigorously."

30. This set of evidence leaves no doubt that when DEL donated the land to MCN, the sole purpose was the construction of a stadium, as indicated in the letter dated 12th March 1996, and the size of the donated land was 26 acres. It must also be recalled that despite DEL carrying out subdivision, thus giving rise to two pieces, this was later recanted, with DEL indicating that it had acted on a misrepresentation of facts by MCN on behalf of the appellants. Like the trial court, we know that what is before us is not a dispute over title but an alleged violation of the appellants' rights under Articles 40, 47, and 50 of *the Constitution*. However, the evidence on record leaves a lot to be desired as to how the appellants acquired their respective titles. There was therefore need to first have a substantive hearing on the legitimacy of the appellants' titles, and it was only after affirmation of the legitimacy of those titles that the issue of violation of constitutional rights in respect to those titles could arise. The route chosen by the appellants was one that was expected to bear the fruits at hand.

31. Following the above finding, it would follow that the appellants' plea of violation of rights under Articles 40, 47, and 50 of *the Constitution* had no foundation upon which to stand. By failing to establish, on a balance of probabilities, that their ownership of the suit properties was regular, the

appellants' petition could not successfully surmount the threshold set in Anarita Karimi Njeru vs. Republic (supra). There could not have been violation of the right to property where that right was based on questionable ownership documents. Consequently, we agree with the learned Judge's finding, more so in paragraphs 56 and 57 of the judgment, which we reproduced earlier in this judgment. We therefore uphold the judgment and dismiss the appeal in its entirety.

32. As for the costs, we do not think that in the circumstances of this appeal it would be just to saddle any of the parties with costs of the appeal. The final order will therefore be that the appeal is dismissed with no order as to costs.

DATED AND DELIVERED AT NAKURU THIS 23RD DAY OF MAY, 2025.

J. MATIVO

JUDGE OF APPEAL

M. GACHOKA C. ARB, FCIARB.

JUDGE OF APPEAL

W. KORIR

JUDGE OF APPEAL