Attorney General & 2 others v Kenya Joinery Limited & 2 others (Civil Appeal E885 of 2022) [2025] KECA 727 (KLR) (2 May 2025) (Judgment)

Neutral citation: [2025] KECA 727 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E885 OF 2022

W KARANJA, WK KORIR & GV ODUNGA, JJA

MAY 2, 2025

BETWEEN

ATTORNEY GENERAL ..... 1ST APPELLANT

THE MINISTRY OF LANDS AND PHYSICAL PLANNING ..... 2ND APPELLANT

THE CHIEF LAND REGISTRAR ..... 3RD APPELLANT

AND

KENYA JOINERY LIMITED ..... 1ST RESPONDENT

THE NATIONAL LAND COMMISSION ..... 2ND RESPONDENT

KENYA AIRPORTS AUTHORITY ..... 3RD RESPONDENT

(Being an appeal from the Judgement and Decree of the Environment and Land Court at Milimani, Nairobi (E. O. Obaga, J.) delivered on 29th June 2022 in ELC Constitutional Petition No. 14 of 2019)

JUDGMENT

1. The suit from which this appeal emanates, was triggered by a report prepared by the 2nd respondent, the National Land Commission, in January 2019, in which it was recommended that the titles held by, among others, the 1st respondent be revoked and the lease periods be reduced from 99 years to shorter periods under sub-leases as may be decided by Kenya Airports Authority, the 3rd respondent. The report, titled "Report on the Inquiries of Titles Within Jomo Kenyatta International Airport (JKIA) Public Land LR. No. 21919", followed complaints from the 3rd respondent that some 118 individuals

and entities held titles which were within its land known as LR No. 21919 measuring 4674.60 hectares. In its report, the 2nd respondent found that:

> "...the KAA is the registered proprietor of LR No. 21919 having been issued with a title in 1996. The Authority has never caused or applied for the subdivision of the JKIA property. There is also no evidence that the land has been subject of a re- planning. The title to Kenya Airports Authority takes precedence over all other titles as it was issued in 1996. Any claims prior to the 1996 survey and allocation were overtaken and therefore subsidiary to the reservation (vesting) orders/gazettement of 1953 and 1971. It was confirmed that the Commissioner of Lands allocated and issued lease documents to the disputed parcels of land within the land reserved for JKIA. However, since there was no authorised or official re-planning or subdivision of the LR No. 21919 the subdivision and allocations were prepared irregularly from the property belonging to the KAA. This amounted to double allocation and where such double allocation is established, the first title talks precedence and should be protected. In line with the High Court judgement [in Vekariya Investments Limited v Kenya Airports Authority & 2 Others [2014] KLR], the Commission is not in a position to conclusively find that the disputed properties were unlawfully acquired" (as envisaged under Article 40(6)) by the grants holders. The inquiry did not provide adequate grounds to establish unlawful acquisition, through a corrupt scheme involving fraud, illegality or corruption. The law implies that if the grants holders acquired the properties in good faith, without notice and did not participate in fraud they may suffer irreparable damages on account of inaccuracy and malfeasance by land officials. The Commission also took cognisance of a further implication regarding damages claims. The parties if deprived of their properties may bring an action against the state for recovery of damages but not for possession. The grant holders may seek damages for incompetence and negligence in issuing a title without cancelling the prior title held by KAA.

2. The 2nd respondent therefore recommended that:

> "...all long term (99 years) grants affecting the KAA land be cancelled/revoked and be replaced by short term subleases in accordance with the terms and conditions approved by KAA."

3. This report provoked the 1st respondent who, as the petitioner, filed a petition before the Environment and Land Court at Milimani, Nairobi, being ELC Constitutional Petition No. 14 of 2019 in which it contended: that after conducting a search that confirmed that M/s Steka Holdings was the registered proprietor of LR No. 23964 (the suit property), it entered into an agreement for sale and did purchase the suit property) from M/s Steka Holdings Limited at a consideration of Kshs. 25,885,600; that the Commissioner of Lands had confirmed to Steka Holdings that the suit property was not within the land held by Kenya Airports Authority, the 3rd respondent; that the 1st respondent, similarly, sought and obtained confirmation from the Commissioner of Lands that the suit property was outside the land held by the 3rd respondent; that it was an innocent purchaser for value as it was not aware of any defects in title more so, after having been assured by the Commissioner of Lands that the suit property was outside the land held by the 3rd respondent; that since the title held by it was not illegally or fraudulently acquired, it was entitled to compensation for the suit property at the market price; and that since the allocation of the suit property to the original allottee was through a mistake on the part of Commissioner of Lands, as admitted by the 2nd respondent, the successor of the office of the Commissioner of Lands, the 1st respondent was entitled to compensation based on the decision in Gitwany Investments Limited v Tajmall Limited & 2 Others [2006] KLR and Benja Properties Limited v H H Syedena Mohammed Burhannudin Sahed & 4 Others [2015] **eKLR**.

4. It was the 1st respondent's case: that the 2nd respondent had no jurisdiction to investigate any complaints on the validity or otherwise of the title to the suit property and to make recommendations to the 3rd appellant to revoke the same title to the suit property, its mandate to do so having expired on 1st May 2017; and that, based on the decision in Republic v Kenya Revenue Authority exp Aberdare Freight Service Ltd & 2 Others [2004] 2 KLR 530, the 2nd respondent had no inherent power to entertain the complaint by the 3rd respondent.

5. The 1st respondent, therefore, contended that its constitutional right to own property under Article 40 of *the Constitution* had been violated and sought the following reliefs:

   a. A Declaration that the Petitioner (the 1st respondent in the appeal) being the holder of title deed over LR No. 23964, a title obtained innocently as a third party purchaser for value, without knowledge of any defects and without knowledge of, or participation in any fraud, the Petitioner (1st respondent) is the indefeasible proprietor of the suit property with rights of proprietor under sections 24 and 25 of the *Land Registration Act*, 2012, and ultimately Article 40 of as read with Article 260 of *the Constitution*;

   b. A Declaration that the Petitioner (1st respondent in the appeal), having been registered as proprietor of LR No. 23964, if there be any defects in its title, leading to divestiture of the property from the Petitioner, is first entitled to compensation from the Respondents, of the market value of the property together with incidental losses incurred as a result of the loss of property by the divestiture;

   c. A Declaration that presently, by dint of expiry of period mandate under section 14(1) and 15(3) of the *National Land Commission Act*, 2012, the 4th Respondent (the 2nd respondent in the appeal) has no jurisdiction to conduct hearings in to validity and legality of dispositions of public land and or historical injustices in allocations of public land and has correspondingly no jurisdiction to make decisions for revocation or recommendations for revocation of title deeds;

   d. A writ of Certiorari to bring into the Court and quash the decision of the 4th Respondent (the 2nd respondent in the appeal) dated 21st January 2019 and conveyed to the 2nd Respondent (the 3rd appellant in the appeal) vide a letter dated 8th February 2019, recommending revocation of the Petitioner's (the 1st respondent in the appeal) title deed over LR 23964;

   e. An Order of Permanent injunction against the 2nd Respondent (the 3rd appellant in the appeal) restraining the Respondent (sic) whether by himself, agents, nominees, or any Land Registrar from cancelling the title deed of the Petitioner (the 1st respondent in the appeal) over LR No. 23964 without an Order of this Honourable Court directing him to do so;

   f. An Order directed at the 1st and 2nd respondents (2nd and 3rd appellants in the appeal) jointly and severally to pay to the 1st respondent the sum of Kshs 900,000,000/- being the market value of the suit property as compensation in consideration of the 1st respondent (appellant in the appeal) yielding the suit property to the interested party (3rd respondent in the appeal), with interest thereon at court rates from the date of judgement until payment in full.

   g. An Order of General Damages for violation of fundamental rights of the Petitioner (1st respondent in the appeal).

   h. An Order of Damages as compensation for incidental losses to the Petitioner (1st respondent in the appeal) over the suit property.

   i. The costs of the petition to be borne by the Respondents (in the suit), on indemnity basis.

j. Any such or further orders as the court may deem just and expedient in the circumstances to remedy the violation of the Petitioner's (1st respondent in the appeal's) fundamental rights.

6. In opposing the petition, the appellants' case was: that, under section 6 of the National Commission Act (the Act), the 2nd respondent had jurisdiction to undertake an investigation; that the 2nd respondent was aware that its mandate to review grants as provided under section 14 of the Act had expired hence, in accordance with the decision of Kenya Civil Aviation Authority v National Land Commission & 3 Others [2021] eKLR, its decision to proceed under section 6 of the Act; that, on the authority of the case of Redcliffe Holdings Limited v Registrar of Titles & 2 Others [2017] KLR, Article 40 of *the Constitution* does not protect title which has been found to have been unlawfully acquired; that, on the basis of Gitobu Imanyara & 2 Others v Attorney General [2016] KLR, the 1st respondent had not adduced any evidence to show that it had suffered loss as to call for award of damages.

7. In his judgement, the learned Judge found: that from the manner in which the case was presented, it was apparent that the 1st respondent had given up on the suit property and it was only interested on compensation; that the court would not deal with the issue touching on indefeasibility of title to the suit property and attendant reliefs seeking to divest ownership of the 1st respondent; that the only issue that remained for determination was whether the 2nd respondent had jurisdiction to make a report which it did and whether the 1st respondent was entitled to compensation; that, as per the notice issued to the public and the affected persons and the letter that forwarded the report to 3rd appellant, the 2nd respondent, on the authority of the case of Kenya Civil Aviation Authority v National Land Commission & 3 Others [2021] KLR, being aware of the expiry of its mandate, undertook its inquiry and made its report pursuant to section 6 of the Act and not section 14 thereof which deals with review of grants; that the end result of the report clearly showed that the recommendations made were not for revocation of the titles held by the 1st respondent and others, but for re-issuance of subleases for a shorter period of time than the 99 years, by the 3rd respondent; and that the 2nd respondent had jurisdiction under section 6 of the Act to carry out the investigation which it undertook.

8. It was further held: that the 2nd respondent did not find any evidence that the titles held by the 1st respondent were obtained through a corrupt scheme; that to the contrary, the 2nd respondent found that the said titles were obtained as a result of incompetence and negligence of the Commissioner of Lands who issued titles without first cancelling the 3rd respondent's title; that the 2nd respondent found that the title holders were innocent and, therefore, there was no basis for impeaching the titles under Article 40(6) of *the Constitution*; that on the authority of the cases of Benja Properties Limited v H H Syedena Mohammed Burhannudin Sahed & 4 Others (supra) and Gitwany Investaments Limited v Tajmall Limited & 2 Others (supra), the 2nd respondent was right in recommending to the 3rd appellant that the 1st respondent's title be revoked which recommendation was based on double issuance of title to the same property in which case the 3rd respondent's title, being the first in time, had to prevail; that as the 1st respondent or the 1st allottee was not found to have been involved in any corrupt scheme or fraud, the 1st respondent was an innocent purchaser for value without notice of any defect in the title and could not be deprived of its property without compensation; that the predecessor of the 2nd respondent was negligent and incompetent as its successor found in the report of January 2019 hence the 1st respondent was entitled to compensation as it was protected under Article 40 of *the Constitution*.

9. On the issue of damages, the learned Judge found: that the 1st respondent had lost prime property of over 5 acres, strategically located along Mombasa Road near the Standard Gauge Railway for which the 1st respondent had embarked on an application for change of user with the intention of putting up a hotel; that the property had appreciated in value over time and on the valuation of Highlands

Valuers' report dated 28th February 2019, Kshs.900,000,000 was reasonable; and that there was no basis to award general damages in addition to the amount of compensation for the market value of the land.

10. In his deposition, the learned Judge declared that the 1st respondent having acquired the suit property LR No. 23964 as an innocent purchaser and the original allottee having been found innocent of any fraud and as the property had reverted to the 3rd respondent, the 1st respondent was entitled to compensation. The learned Judge ordered the appellants to compensate the 1st respondent by paying Kshs 900,000,000. The costs of the petition were to be borne by the appellants.

11. Dissatisfied with the judgement, the appellants challenged the decision on the grounds that the learned Judge erred in law and in fact: in finding that the 1st respondent was an innocent purchaser for value and that the original allottee was innocent of any fraud during acquisition of the suit land yet the learned Judge indicated that he would not and did not deal with the issues touching on indefeasibility of title to the suit property; in finding that the 1st respondent was entitled to compensation by virtue of ownership of the suit land, without interrogating whether the process of acquisition of the same was procedural, legal and irregular; in finding that the 1st respondent, as a purchaser, was entitled to compensation by the appellants yet the said claim should have been directed to the vendor for refund of the purchase price; in finding that the 2nd respondent found no evidence that the titles held by the 1st respondent were obtained through corrupt scheme or fraud contrary to the replying affidavit sworn by one Brian Ikol on 26th May 2021; in finding that the suit land had been reverted to the 3rd respondent to entitle the 1st respondent to compensation, when there was neither pleading to that effect nor was evidence led in that regard; in finding that the 1st respondent was only interested in compensation yet the 1st respondent sought many reliefs including, but not limited to, an order of certiorari to quash the decision of the 2nd respondent recommending revocation of the 1st respondent's title; in ordering the appellants to pay compensation to the 1st respondent yet the learned Judge had already held that it was the Commissioner of Lands, the predecessor to the 2nd respondent, who was negligent in issuing a title on a property which already had another title; by ordering the 1st appellant to pay compensation yet the 1st appellant had been sued as the principal legal adviser to the Government of Kenya and its mandate does not include allocation of land and/or issuance of titles to land; in awarding costs against the appellants yet the filing of the petition was occasioned by the decision of the 2nd respondent; and that the decision occasioned a miscarriage of justice against the appellants.

12. We heard the appeal on the Court's virtual platform on 11th December 2024 when learned counsel, Mr Denis Motari, appeared with Ms Ndundu for the appellants, learned counsel, Mr Miller Bwire, appeared for the 1st respondent, while Ms Masinde appeared for the 2nd respondent. Learned counsel present informed the Court that they would rely on their written submissions which they briefly highlighted. Although on that date there was no representation for the 3rd respondent, we were later notified that the hearing notice had not been served on its counsel. Consequently, on 13th March, 2025, with the concurrence of the parties, we admitted the submissions filed on behalf of the 3rd respondent.

13. On behalf of the appellants, it was submitted: that having proceeded to deal with the issue of indefeasibility, the learned Judge was under obligation to interrogate the legality of the process of acquisition from the time of allocation which he failed to do leading to the wrong conclusion that the original allottee was innocent of any fraud during acquisition of the suit land; that in so doing the learned Judge ought to have taken note of the fact that there was no letter requesting for allocation of the suit land, no letter of allotment was produced, no evidence that the conditions given by the Commissioner of Lands, if any, had been complied with and no evidence of the necessary approvals prior to the impugned survey of the 3rd respondent's title; that there was no evidence led to show that the suit property, which had been alienated to the 3rd respondent for public purposes, was de-

gazetted from public land in order to be available for the Commissioner of Lands to re-allocate it to private individuals; that the 2nd respondent found that the titles resulted from the sub-division of the 3rd respondent's title LR No. 21919, subdivisions that were not caused or applied for by the 3rd respondent; that the titles resulting from the subdivision including the suit property were therefore invalid; that the Commissioner of Lands did not pass any registrable title to the suit property to the original allottee and consequently, the 1st respondent, to whom the suit property was sold, also had no valid title; that the findings of negligence upon the Commissioner of Lands in allocating the suit land to the original allottee did not sanitise the acquisition by the 1st respondent; that, on the basis of the holding in Funzi Development Ltd & Others v County Council of Kwale [2014] eKLR, the original allottee having not transferred any registrable interest, the 1st respondent could not rely on the doctrine of indefeasibility because the process of allocation to the original allottee was not proper or regular; that on the authority of Dina Management Limited v County Government of Mombasa & 5 Others Attorney General and Others [2023] eKLR, a title is the end product of a process and the doctrine of indefeasibility cannot be relied on by a party who holds a title whose process of issuance did not comply with the law.

14. It was contended: that there was no legal or factual basis for the court's conclusion of the innocence of the original allottee; that, pursuant to the decision in the case of Katende v Haridar & Co. Limited [2008] 2 EA 173, the 1st respondent did not qualify as an innocent purchaser for value since an innocent purchaser for value must prove among other requirements that the vendors had apparent valid title; that on the authority of the case of Dina Management (supra) an innocent purchaser must prove that he went beyond the title and carried out due diligence; that the letter to the Commissioner of Lands seeking confirmation as to whether the suit property fell within the Airport land did not constitute due diligence since that was not the allocating authority in respect of the land that had already been alienated; that the allocation of land involves several public offices including Physical Planning, the Commissioner of Lands and Survey Department, yet the 1st respondent neither sought confirmation from these offices, nor sought confirmation from the 3rd respondent or any other public office; that there cannot be two parallel titles over the same property and any allocation without alienating, surveying and hiving off the portion from the already alienated land amounts to illegal acquisition as was found by the 2nd respondent; and that, on the authority of the holding in Attorney General v Torino Enterprises Limited [2022] KECA 78 and Torino Enterprises Limited v Attorney General Petition No. 5 (E006) of 2022, the protection of Article 40(6) of *the Constitution* on the right to property does not extend to property that has been found to have been illegally acquired.

15. Further, it was submitted: that the power to allocate land was given to the Commissioner of Lands, the predecessor of the 2nd respondent, which took all liabilities of the office of the Commissioner of Lands; that the appellants, who were held liable by the court, are not in charge of allocation of public land and the registration of the original allottee and the 1st respondent, as owners of the suit land, was based on the documents received from the Commissioner of Lands; that having found that it was the predecessor of the 2nd respondent who was negligent in the allocation leading to the registration of the 1st respondent, the learned Judge erred in condemning the appellants to compensate the 1st respondent without evidence pointing to their negligence and; that contrary to the decision in Commonwealth v Pharmacy Guild of Australia 1989 91 ALR 65, 68, the learned Judge failed to maintain consistency in the judgement leading to a miscarriage of justice that will require a re-trial of the entire suit.

16. It was contended: that the 1st respondent did not plead or adduce evidence that the 1st respondent had ceded the suit property to the 3rd respondent which, likewise had not admitted that the 1st respondent had ceded the suit property to it; that no evidence was adduced by any party to show that the 1st respondent's title had been cancelled or that the same had reverted to the 3rd respondent to entitle them

to compensation; that the issue of ceding the suit property ought to have been pleaded and ascertained through production of documentary evidence since the grant annexed to the supporting affidavit did not contain any entry of the surrender of the suit property to the government and no deed of surrender was produced; that the issue of ceding of the suit property was only raised in the judgement; and that the learned Judge erred in making a finding that was not pleaded contrary to the decision of this Court in Henry Njagi Muruariua v A. O. Okello, District Commissioner Mbeere District & Another [2014] KLR.

17. It was submitted: that the 1st appellant, the Attorney General, was sued in his capacity as the principal legal adviser to the government pursuant to Article 156(1) of *the Constitution*; that in the judgement, the learned Judge made an order compelling the 1st appellant to compensate the 1st respondent in the sum of Kshs 900,000,000; that in so doing the learned Judge erred since the 1st appellant, whose responsibility is to represent the government in legal proceedings, cannot be held liable for acts or omissions committed or omitted by state officers at the Ministry of Lands or the defunct Commissioner for Lands; that the 1st appellant's responsibility does not include allocation of land and issuance of titles to land; and that, on the authority of the cases of James Samuel Mburu v Attorney General & Another ex parte Orbit Chemicals Limited [2017] eKLR, the learned Judge erred by ordering the Attorney General to compensate the 1st respondent yet the 1st respondent had not sought for an order of compensation against the 3rd respondent.

18. On costs, the appellant submitted: that despite not finding the appellants guilty of any negligence, the trial court awarded costs to the 1st respondent as against the appellants without giving any reasons, contrary to section 4(2) of the *Fair Administrative Action Act* and the case of Supermarine Handling Service Ltd v Kenya Revenue Authority [2010] KLR; and that in so deciding, the learned Judge failed to exercise the discretion under section 27(1) of the *Civil Procedure Act* judiciously; that on the authority of the case of Mbogo & Another v Shah [1968] EA 93 as adopted in Benja Properties Limited v H H Syedena Mohammed Burhannudin Sahed & 4 Other (supra), this Court ought to interfere with the wrongful exercise of the discretion.

19. The submissions on behalf of the 3rd respondent were to the effect: that not even the Commissioner had the powers to alienate land that had already been alienated and registered in favour of the 3rd respondent and then purport to allocate it to the 1st respondent without the knowledge and consent of the 3rd respondent; that it has never surrendered its land so as to allow for the excision; that the 3rd respondent proved that the title to the suit property was issued in 1999 well after the survey over its own land LR No. 21919 had been conducted and the grant issued in 1996; that the suit property is inside the boundary of LR 21919 hence the 1st respondent's title was null and void; that nowhere in either the pleadings or submissions by the 1st respondent does it appear that the 1st respondent ceded the suit property to the 3rd respondent as found by the learned Judge; that this fact needed to have been obtained by the court either in the pleadings or in evidence before the court; that the court ought to have made a decision on the indefeasibility of title and to have made a specific order for cancellation/revocation of the title held by the 1st respondent and for the property to revert back to the 3rd respondent and issued an order dismissing the petition with costs so that the 3rd respondent would be at liberty to implement the recommendation in the 2nd respondent's report; that the 1st respondent could not rely on the concept of indefeasibility of title as its title was acquired through unlawful and illegal means as the property was not available for allocation; that the finding that the 1st respondent and the original allottee were innocent purchasers for value who did not participate in any fraud or corrupt scheme in the acquisition of the suit property directly relates to the concept of indefeasibility of title; that it was therefore contradictory for the trial court to make such finding after having held that it would not deal with the issue touching on indefeasibility of title; that by finding that the original allottee and the

1st respondent did not participate in any fraud or corrupt scheme meant that the 1st respondent's title was indefeasible and could not be revoked and since the 1st respondent did not cede the suit property back to the 3rd respondent, it would be difficult for the 2nd and 3rd respondents to implement the recommendation of cancelling the title to the suit property; that since the title would still remain with the 1st respondent, it would mean that the dispute would not have been resolved with finality; that since the land was not available for alienation, based on the decision in Dina Management Limited v County Government of Mombasa & 5 Others [2023] eKLR, the 1st respondent's title cannot be said to have been indefeasible; that there is an elaborate process of acquiring public land which was not followed by the original allotee and as such no valid title could have been passed to it or to the 1st respondent since on the authority of Dina Management Case (supra), a registered proprietor acquires a valid title only if the original allocation was legal; that there cannot be an award of compensation on an illegally acquired property and the only remedy available is for the 1st respondent to seek refund of the purchase price from the people who sold the land to them; that the award of Kshs 900,000,000 was unjustified and grossly excessive in the circumstances since the suit property is vacant, undeveloped and not even connected to the main utilities; that since its purchase price was Kshs 25 million in 2006 there is no way this would have escalated to Kshs 900,000,000 in thirteen years; and that considering the issues for determination, the dispute ought to have been dealt with by plaint in which case the parties would have been at liberty to adduce viva voce evidence.

20. The 1st respondent's submissions were: that it purchased the suit property after due diligence and after confirmation on official searches that the 1st respondent's predecessor in title validly owned the property and that the 3rd respondent had no claim over it; that in its investigation, the 2nd respondent found that the grantees of the property including the 1st respondent had no culpability, either in fraud or negligence and that it was the Commissioner of Lands who erred in excising off land originally intended for the 3rd respondent; that upon the 2nd respondent's recommendation, the 1st respondent's title was cancelled and the property forcefully taken over by the 3rd respondent; that on the authority of Dr Joseph N. K. Ngok v Moija Ole Keiwua & 2 Others Civil Appeal No. 60 of 1997, the 1st respondent being an innocent purchaser for value of the suit property, it obtained all indefeasible rights of a proprietor under section 23(1) of the repealed Registration of Titles Act now transitioned as sections 24 and 25 of the *Land Registration Act*; that with the infrastructure of the Torrens System, the entire land ownership and transactional capacity in Kenya would be seriously jeopardised if the indefeasibility of title is not respected; that the right acquired by the 1st respondent in the circumstances was protectable under Article 40(1) of *the Constitution*; that when members of the public such as the 1st respondent rely on the formal assurances of the Commissioner of Lands and the 2nd and 3rd respondents' presentation, and alter their position to their detriment, then in the event of such a person losing the property, the appellants are estopped from denying obligation for redress; and that having established the actionable error of the Commissioner of Lands and the appellants, in excising the property, it was no longer tenable for the trial court to vest the property to the 1st respondent, the sensible relief being to award compensation to the 1st respondent as an alternative relief sought in the petition.

21. According to the 1st respondent, under Article 23(3) of *the Constitution* the court had jurisdiction to issue appropriate relief even if not pleaded; that since there is no longer the office of the Commissioner of Lands, the suit was properly issued in the name of the Attorney General for malfeasance of the non-existing office of the Commissioner of Lands, as a liability of the Government of Kenya; that whilst the 2nd respondent became successor to some of the functions hitherto performed by the Commissioner of Lands, remedies claimed and sought to be enforced for actions of the Commissioner of Lands were never transitioned to the 2nd respondent and section 32(1) of the *National Land Commission Act* does

not apply to that liability; that while the Commissioner of Lands was dealing with both public and private land, Article 67(2) of *the Constitution* designates the 2nd respondent to deal with public land and not private land leaving the role of private land to the Ministry of Lands; that the suit property is private land over which the 2nd respondent would have no right to administer; that the law applicable at the time of the accrual of the right of claim by the 1st respondent was the Government Lands Act and the Registration of Titles Act under which laws the Chief Lands Registrar under the Ministry of Lands kept the land register and signed official searches to certify under deed that the suit property was available for purchase by the 1st respondent hence they are responsible for their actions, jointly and severally; that, on the authority of Gitwany Investment Limited v Tajma Ltd and 3 Others (2006) eKLR, David Peterson Kiengo and 2 Others v Kariuki Thuo (2012) eKLR and Vekariya Investments Limited v Kenya Airports Authority & 2 Others [2014] KLR, it is the obligation of the Commissioner of Lands (presently devolved to the appellants) to pay and compensate for titles issued as a result of the negligence or mistake of the Commissioner of Lands, Chief Lands Registrar and the Ministry of Lands; that costs follow the event under section 27(1) of the *Civil Procedure Act* and the trial court having found the appellants culpable, issuing costs against them was logical and lawful; and that if the appeal succeeds as sought by the appellants, the 1st respondent would suffer egregiously, its property would be lost without any alternative compensation and the Court would have aided the violation of fundamental rights protected under the Bill of Rights and statute in contravention of its obligation under Article 10(1) and (2), 20(3), 23(3), 47(1) and 259 of *the Constitution*.

22. We were urged to dismiss the appeal with costs.

23. We have considered the appeal and the submissions made before us. In the petition, the appellants sought: that the appeal be allowed; that the judgement by Hon. Justice E. O. Obaga delivered on 29th June 2022 be set aside in its entirety; that the costs of the appeal be awarded in favour of the appellants; and any other order that the Court may deem fit and convenient to grant. The appellants did not expressly pray that upon allowing the appeal we should proceed to dismiss the petition. While at the end, the appellants prayed that the petition be dismissed, at paragraph 33 of the appellants' submissions it was submitted that:

> " the learned Judge failed to maintain consistence in the judgement leading to a miscarriage of justice that will require re-trial of the entire suit."

24. Similarly, the 3rd respondent, in its submissions stated that:

> "...on hindsight and taking into account that the issue before the Superior Court turned out to be about compensation, one even wonders whether the suit before the Superior Court could have been commenced by way of a constitutional petition or via a plaint where parties would have given evidence for the court to determine the issue of legality or otherwise of the 1st respondent's title and then the issue of compensation would flow on determination of this issue as the court will appreciate, the superior court proceeded on the basis of submissions based on the pleadings filed."

25. Based on the foregoing submissions, it is necessary to deal with the issue whether, on the submissions filed, this appeal is one that ought to be remitted back to the trial court for re-hearing or one that can be determined by this Court. That determination is important because in circumstances where the Court remits a matter back to the trial court, save for directions on the conduct of the re-hearing, this Court ought not to express itself on the issues that fall within the province of the trial court in order to avoid embarrassing the trial court or tying the hands of that court.

26. Order 21 rule 4 of the Civil Procedure Rules provides that:

> Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.

27. Rule 5 of the same Order provides that:

> In suits in which issues have been framed, the court shall state its finding or decision, with the reasons therefor, upon each separate issue.

28. This Court in the case of Mohammed Eltaff & 3 others v Dream Camp Kenya Limited [2005] eKLR emphasised the need to deal with all the issues placed before the court when it held that:

> " ...it is indeed a substantial objection to a judgment if it does not dispose of the questions that were presented by the parties for determination by the trial court or that the judgment has left certain issues unresolved."

29. Similarly, in Agnes Nzali Muthoka v Insurance Company of East Africa [2001] 1 EA 143, the Court held that:

> " It is elementary that a judge has to hear parties, record down as fully as possible what they submit on, crystallise the issues, answer them as fully as possible and eventually hand down a decision."

30. Kwach, JA in Kukal Properties Development Ltd v Tafazzal H. Maloo & 3 others [1993] eKLR expressed himself as

hereunder:

> " Nineteen issues were framed for decision by the judge. In his judgment, the judge only dealt with 9 issues leaving 10 undecided. It was the submission of Mrs Dias, for the respondents, that the issues that the judge did not deal with explicitly he had covered by implication. With respect this is not borne out by a perusal of the judgment and in any event this would constitute a violation of the express provisions of order 20 rule 5 of the Civil Procedure Rules...Once issues were framed, the judge was obliged to decide each and every one of them and in failing to do so he committed a serious breach of procedure. This ground of appeal accordingly succeeds."

31. The consequences for failure by the lower court to deal with issues properly placed before it were set out by the Supreme Court in Geo Chem Middle East v Kenya Bureau of Standards [2020] KESC 1 (KLR) in which it was held that:

> " As is the practice in all other disputes, where an Appellate Court holds that a lower Court has wrongly declined to determine a matter in the "mistaken" belief that it lacks jurisdiction to do so, the Court has to remit that matter to the lower Court, directing it to exercise its jurisdiction. Only after the lower Court has complied with such an order would a substantive appeal lie to the Appellate Court."

32. Similar position was adopted in Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators- Kenya Branch [2019] KESC 11 (KLR), the Supreme Court held

that:

> "Without a firm decision by the Court of Appeal on that issue, we cannot but direct that the matter be remitted back to that court to determine whether the appeal before it meets the threshold explained in this Judgment or in the words of Kimondo, J, the "journey was a false start"."

33. In the matter before us, the 1st respondent's case was that it acquired the suit property from Steka Holdings Limited which had received confirmation from the Commissioner of Lands that the suit property was not part of the 3rd respondent's land. According to the 1st respondent, it received a similar confirmation from the same office. On the other hand, the position adopted by the appellants and the 3rd respondent was that the suit property was not available for allocation to any other party since it was the 3rd respondent's property. The process by which the suit property was alienated was also challenged. In those circumstances, it was clear that the process through which the 1st respondent acquired its title was placed in issue. It was therefore incumbent upon the learned Judge to interrogate the root of the 1st respondent's title since as was held in Dina Management Limited v County Government of Mombasa & 5 Others (supra), a title is the end product of a process and the doctrine of indefeasibility cannot be relied on by a party who holds a title whose process of issuance did not comply with the law. It was therefore held by this Court in Munyu Maina v Hiram Gathina Maina [2013] eKLR that:

> "...when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument that is under challenge and the registered proprietor must go beyond the instrument and prove legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant's testimony."

34. In the case of Funzi Development Ltd & Others v County Council of Kwale (supra) this Court, in a decision that was affirmed by the Supreme Court, stated that:

> "...a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot on the basis of indefeasibility of title sanction an illegality or gives its seal of approval to an illegal or irregularly obtained title."

35. There is a plethora of authorities that hold that where there is a dispute over ownership of a suit property with two or more titles, the court must investigate the root of each title in order to find out how it was acquired. In this case two titles were issued in respect of the same parcel of land. It was necessary for the process of acquisition to be interrogated by delving into the root of the title. However, the learned Judge was of the view that:

> "From a look at the submissions by the Petitioner, it is apparent that the Petitioner has given up on the suit property. It is only interested on compensation. In this regard, I will not deal with the issues which touch on indefeasibility of title to the suit property and attendant reliefs seeking to vest ownership of the Petitioner. The only issue which arises for determination is whether the 4th respondent had jurisdiction to make a report which it did and whether the petitioner is entitled to compensation."

36. With due respect to the learned Judge the approach taken was not in tandem with the pleadings. Even if the 1st respondent was no longer keen in pursuit of the suit property, and we have no evidence of that, the issue of compensation was tied to the validity of the 1st respondent's title and could not be delinked from the latter's determination. It was only after making a finding on the validity of the 1st respondent's title that the issue of compensation could be delved into. Otherwise, it would amount to putting the cart before the horse.

37. The manner in which the learned Judge then proceeded to determine the issues, which in his view fell for determination, vindicates our view that compensation was not an isolated issue. According to him:

> "As the petitioner or the 1st allottee were not found to have been involved in any corrupt scheme or fraud, the petitioner who was an innocent purchaser for value without notice of any defect in the title cannot be deprived of its property without compensation...The petitioner is clearly entitled to compensation as Article 40 of *the Constitution* protects the petitioner. The petitioner having been absolved of any blame and there having been no adverse findings on the part of the original allottee, I find that the petitioner has proved that its constitutional right to own property has been violated."

38. In our view by finding that the 1st respondent was protected under Article 40 of *the Constitution*, the learned Judge was, in effect, upholding the indefeasibility of title, a path he had decided to avoid. The issue of indefeasibility of title, however, could not be based on the 2nd respondent's inconclusive findings but on the evidence presented by the parties. We say so because, according to the 2nd respondent's report:

> " The Commission is not in a position to conclusively find that the disputed properties were unlawfully acquired' (as envisaged under Article 40(6)) by the grant holders. The inquiry did not provide adequate grounds to establish unlawful acquisition, through a corrupt scheme involving fraud, illegality or corruption. The above implies that of the grants holders acquired the properties in good faith, without notice and did not participate in fraud they may suffer irreparable damages on account of inaccuracy and malfeasance by land officials."

39. Our understanding is that the 2nd respondent was unable, based on the material placed before it, to find that there was unlawful acquisition through a corrupt scheme involving fraud, illegality or corruption. That is not the same thing as saying that there was, in fact, no such wrongdoing. The learned Judge seemed to have taken the inconclusive opinion of the 2nd respondent as a finding of fact, which it was not, and based thereon, abdicated his role as a fact-finding tribunal mandated to interrogate and determine the issue of indefeasibility.

40. Apart from that the learned Judge, without any evidence and relying on the impression created by the submissions of the 1st respondent, stated:

> " I have also considered the submissions filed herein. From a look at the submissions by the petitioner, it is apparent that the petitioner has given up on the suit property. It is only interested on compensation...As it has ceded the suit property to the 1st interested party, it is entitled to compensation for the negligence of the Commissioner of Lands who issued a title on a property which already had another title."

41. We respectfully disagree with the learned Judge. The 1st respondent approached the court seeking, inter alia, to quash the decision of the 2nd respondent which recommended that its title should be cancelled and he be issued with a sub-lease. In other words, the 1st respondent was dissatisfied with

the recommendation to cancel its title. Nowhere in the case was this position altered. There is no evidence that the title was, in fact, cancelled. The net effect of the judgement was to compensate the 1st respondent who would still be having the title to the suit property.

42. In our view, the judgement not only failed to deal with the issue placed before the trial court but was lacking in internal coherence. As a consequence, we agree with the 3rd respondent that the decision of the learned Judge did not resolve all the issues. It, instead, opened other fronts for litigation. For instance, should the 1st respondent be paid the compensation and decline to cede the title without an express order by the learned Judge nullifying the 1st respondent's title, the 3rd respondent would have no recourse.

43. We have said enough to show that the judgement not only failed to determine the issues, was incoherent and difficult to implement. The 3rd respondent seems to be of the view that a proper hearing in which viva voce evidence is adduced ought to have been resorted to. We wish not to make a determination on the issue one way or the other only to note in passing that such a course may well have been prudent where the amount stated in the valuation report is contested. We wish to state that the decision in Vekariya Investments Limited v Kenya Airports Authority & 2 Others (supra) is not helpful since in that case, the learned Judge did not deal with the allegations of fraud, illegality and corruption.

44. In order to do justice to all the parties and in the interests of properly canvassing all the issues raised, the order that commends itself to us and which we hereby issue is that the appeal be and is hereby allowed, the matter be remitted to the ELC for hearing de novo before any Judge other than Obaga, J. Such hearing to be prioritised in light of the age of the matter.

45. We make no order as to the costs of this appeal.

46. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF MAY 2025.

W. KARANJA

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

G.V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.