Shah & another v Kenya National Highways Authorty (Civil Appeal 20 of 2018) [2023] KECA 404 (KLR) (31 March 2023) (Judgment)

Neutral citation: [2023] KECA 404 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 20 OF 2018

PO KIAGE, F TUIYOTT & JM NGUGI, JJA

MARCH 31, 2023

BETWEEN

ASHOK KHETSHI SHAH ..... 1ST APPELLANT

RASILA ASHOK SHAH ..... 2ND APPELLANT

AND

KENYA NATIONAL HIGHWAYS AUTHORTY ..... RESPONDENT

(Being an appeal from the judgment and decree of the Environment and Land Court at Kisumu (S. M. Kibunja, J.) dated and delivered on 17th January, 2018 in ELC CASE NO. 228 OF 2013)

The Commissioner of Lands did not have powers to convert land reserved for public purpose into private usage

In the instant case a parcel of land previously set aside for public utilities or public purposes was irregularly allocated by the Commissioner of Lands. The court held that it was the President and not the Commissioner of Lands who had the power to allocate alienated and unalienated land. The court further held that the Commissioner of Lands did not have powers to convert land reserved for public purpose to private usage. The court also found that the doctrine of innocent purchaser without notice, did not inexorably operate to permit a successor to a title illegally acquired over land reserved for public utilities to keep the land.

Reported by Kakai Toili

Land Law *- Commissioner of Lands – powers of the Commissioner of Lands - whether the Commissioner of Lands had the power to allocate alienated and unalienated land - whether the Commissioner of Lands could convert land reserved for public purpose into private usage – Government Land Act (repealed), sections 3, 7 and 9.*

Land Law *- doctrine of innocent purchaser without notice – applicability of the doctrine of innocent purchaser without notice - whether doctrine of innocent purchaser without notice applied automatically to permit a successor to a title illegally acquired to keep the land.*

Brief facts

The appellants filed a suit at the Environment and Land Court (the trial court) seeking a permanent injunction restraining the respondent from removing, demolishing and or in any other way whatsoever, interfering with their peaceful occupation of the suit properties. The appellants claimed that they were the registered proprietors of the suit properties, situated along Kisumu – Dunga road and that on July 9, 2013, they received a letter from the respondent notifying them that they had erected an illegal structure on the classified road reserve, C85 (Kisumu – Dunga) and were required to remove it within 60 days. They averred that the said notice was illegal as the respondent had never before informed them about the classification of the road.

The appellants further averred that they would be irreparably prejudiced if the notice was not overturned and/or if the respondent was not restrained from effecting it. The trial court held that the notice by the respondent dated July 9, 2013 did not amount to unlawful acquisition of the appellants' land but was rather an administrative step by the respondent to stop unlawful and unauthorized encroachment onto a public road. The trial court thus dismissed the appellants' case. Aggrieved, the appellants filed the instant appeal and sought the quashing and setting aside of the trial court's judgment.

Issues

i. Whether the Commissioner of Lands could convert land reserved for public purpose into private usage.
ii. Whether the Commissioner of Lands had the power to allocate alienated and unalienated land.
iii. Whether doctrine of innocent purchaser without notice applied automatically to permit a successor to a title illegally acquired to keep the land.

Held

1. As a general principle, an individual would not be inoculated from a declaration of defeasibility of title where it was demonstrated that a parcel of land was set aside for public utilities or public purposes and was subsequently irregularly allocated to an individual for private use or private ownership. The principle applied even where it was not demonstrated that the present holder of title expressly acted illegally and without the necessity to prove culpability on the part of the present holder.
2. The principle that an individual would not be inoculated from a declaration of defeasibility of title where it was demonstrated that a parcel of land was set aside for public utilities or public purposes and was subsequently irregularly allocated to an individual for private use or private ownership, was based on the public policy rationale for protecting lands set aside for public utilities and for public purposes and incentivized prospective land owners to perform their due diligence to determine the root title of the parcel of land they were purchasing. It applied with even more jurisprudential force where there were indicative signs that the property might have been set aside for public utilities.
3. Being a first appeal, the court was required to re-evaluate and re-analyze the evidence presented before the trial court in order to arrive at its own independent conclusions of law and fact, bearing in mind that the trial court had the advantage of seeing and assessing the demeanor of witnesses. In addition, the court must be cognizant of the fact that it should not interfere with the findings of fact by the trial court unless they were based on no evidence or on a misapprehension of the evidence or the trial court was shown demonstrably to have acted on wrong principles in reaching his findings.
4. The conditions under which the appellants' predecessor in title applied to have the un-surveyed plot set aside as a road reserve, to be consolidated with the suit property, were unclear. What, however, seemed clear was that his initial application for the subdivision of the suit property could not be approved unless it was extended to include the un-surveyed plot – perhaps because the original parcel was not of adequate size to permit the subdivisions desired.
5. Beyond the two letters, there was nothing on the record to inform the court the reason for the proposed extension and why the subdivision of the suit property could not be approved unless it was consolidated with the un-surveyed plot. The original parcel was initially granted to Burnt Forest Saw

Mills on July 12, 1938. However, there was no documentary evidence to show how that land parcel changed to the suit property.

6. Section 3 as read with section 7 of the repealed Government Land Act both donated and limited the authority to allocate both alienated and unalienated land to the President only. The obvious implication was that the Commissioner of Lands did not follow the right procedure in allocating the un-surveyed plot measuring 0.332ha to the appellants' predecessor in title and thereby consolidating it with the parent suit property to end up with the land parcel measuring 0.9776. Section 3 vested absolute power to allocate alienated land in the President. The provision made it clear that it was the President and not the Commissioner of Lands that had power to allocate alienated and unalienated land.
7. It was not insignificant that the un-surveyed plot was set apart for a road reserve way back in 1935. The record did not disclose the conditions under which the allocation in 1983 was done. There was no evidence showing that the un-surveyed plot reverted to unallocated land status, thereby rendering it available for conversion to private usage.
8. Section 9 of the repealed Government Land Act provided that the Commissioner of Lands may cause any portion of a township which was not required for public purpose to be divided into plots and disposed of in the prescribed manner. That was not the position in the instant case. Rather, extant evidence showed that the un-surveyed plot had been set apart for a road reserve in 1935 and that position had never been revised. That meant that it was placed beyond the Commissioner's reach for reallocation to private individuals. In essence, the Commissioner of Lands did not have powers to convert land reserved for public purpose into private usage. Therefore, the allocation of the un-surveyed plot by the Commissioner of Lands was in contravention of the law, which rendered acquisition of the un-surveyed plot by the appellants' predecessor in title illegal and unlawful.
9. It did not matter that the illegality was occasioned at the instance of the appellants' predecessor in title and before the appellants' acquisition of the property as far as lands reserved for public utilities were concerned and absent any exceptional circumstances.
10. Article 40(6) of the Constitution provided that the right to acquire and own property did not extend to any property that had been found to have been unlawfully acquired.
11. The documents which were in the appellants' own possession, and which they produced in court, gave the clear history of the parcel of land in contention as un-surveyed land which was irregularly allocated to their predecessor in title. It mattered not that the letter by the predecessor in title identified the public utility as a dumping site or that it was, in fact, a road reserve; the significant point was that there were telltale signs in the history of the suit properties to show the appellants that it was about to acquire interests in property previously reserved for public utilities.
12. The doctrine of innocent purchaser without notice, did not inexorably operate to permit a successor to a title illegally acquired over land reserved for public utilities to keep the land. That would be inimical to public interest. At its most charitable, the doctrine only permitted such a successor in title to look to the predecessor in title or, in exceptional circumstances, to the errant Government agency that was complicit in the illegality for compensation.
13. The acquisition of the suit property by the appellants was only valid and legal to the extent that it excluded the unlawfully acquired un-surveyed plot by the predecessor in title. That meant that, all the succeeding actions taken by the appellants in relation to the un-surveyed plot which was consolidated with the parent title were a nullity.
14. The allocation of the un-surveyed plot by the Commissioner of Lands was unlawful, therefore, the suit property which was subdivided into four parcels, encroached onto the Kisumu – Dunga (C85) road reserve. The perimeter fence constructed by the appellants along land parcels encroached onto the Kisumu – Dunga (C85) road reserve.

15. While the recordation of the proceedings was not ideal, when one read the respondent's witness' testimony in context, the witness intended to, and indeed, did produce "D3" as the survey map for 1935. Even if the survey map of 1935 was not admitted into evidence, the outcome of the case would not have changed. That was because the survey map was not the dispositive factor in the superior court's and the instant court's conclusions that the amalgamation of the suit property with the un-surveyed plot to generate land parcel in 1982 was un- procedural and unlawful.

Appeal dismissed with costs to the respondent.

Citations

Cases

1. Brampton Investment Limited v Attorney General & 2 others Petition 228 of 2011; [2013] KEHC 3949 (KLR) — (Applied)
2. Chemey Investment Limited v Attorney General & 2 others Civil Appeal 349 of 2012; [2018] KECA 863 (KLR)-(Explained)
3. Flemish Investments Ltd v Town Council of Mariakani Environment & Land Case 459 of 2010; [2014] KEELC 92 (KLR) — (Applied)
4. Funzi Island Development Limited & 2 others v County Council of Kwale & 2 others Civil Appeal 252 of 2005; [2014] KECA 882 (KLR) — (Applied)
5. Githinji ,Elizabeth Wambui & 29 others v Kenya Urban Roads Authority & 4 others Civil Appeal 156 & 160 of 2013 ;[2019] KECA 706 (KLR) — (Explained)
6. Kathurima ,Henry Muthee v Commissioner of Lands & Director National Youth Service Civil Appeal 8 of 2014; [2015] KECA 892 (KLR)) — (Applied)
7. Jabane v Olenja (1968) KLR 661 — (Mentioned)
8. Kenneth Nyaga Mwige v Austin Kiguta,Bedan Mbugua & People Limited Civil Case 1930 of 2000; [2008] KEHC 2938 (KLR) — (Mentioned)
9. Kenya National Highway Authority v Shalien Masood Mughal, Attorney General, Minister of Roads China Road and Bridge Corporation, Chief Engineer (Ministry of Roads) & Commissioner of Lands Civil Appeal 327 of 2014; [2017] KECA 465 (KLR) — (Mentioned)
10. Mudhihiri Mohammed & 2 others v Nairobi City Council 2808 of 1998; [2000] KEHC 308 (KLR)-(Explained)
11. Munyu Maina v Hiram Gathiha Maina Civil Appeal 239 of 2009; [2013] KECA 94 (KLR) — (Mentioned)
12. Mureithi, John Peter & 2 others v Attorney General & 5 others Constitutional Petition 398 of 2006; [2007] KEHC 1168 (KLR) — (Explained)
13. National Land Commission v Attorney-General & 5 others; Kituo Cha Sheria & another (Amicus Curiae) Advisory Opinion Reference 2 of 2014 ;[2015] KESC 3 (KLR) – (Followed)
14. Ndung'u , Paul Nderitu & 20 others v Pashito Holdings Limited & another Civil Case No 3063 of 1996- (Explained)
15. Ng'ok , Joseph N.K. Arap v Moijo Ole Keiwua & 4 others Civil Application 60 of 1997; [1997] KECA 1 (KLR) — (Explained)
16. Niaz Mohamed Jan Mohamed v The Commissioner of Lands & 4 others Civil Case 423 of 1996; [2003] KEHC 646 (KLR) — (Explained)
17. Nyaga , James Joram & another v Attorney General & another 1732 of 2004; [2007] KEHC 3679 (KLR) — (Applied)
18. Peter Njoroge Ng'ang'a v Statutory Manager for United Assurance Company Limited & United Insurance Company Limited (Civil Appeal 175 of 2018; [2020] KECA 676 (KLR)) — (Applied)
19. Republic v Minister for Transport & Communication & 5 others ex parte Waa Ship Garbage Collector & 15 othersGarbage Collector & 15 others Civil Appeal 617 of 2003; [2004] KEHC 10 (KLR) — (Followed)

20. Town Council of Awendo v Nelson Oduor Onyango & 13 others Civil Appeal 161 of 2010; [2013] KECA 542 (KLR) — (Explained)
21. West End Butchery Limited v Arthi Highway Developers Limited & 6 others Environment & Land Case 167 of 2007; [2012] KEHC 97 (KLR) — (Mentioned)
22. Wreck Motors Enterprises v Commissioner of Lands,Satpal Singh Bhatti,City Council of Nairobi & Chemomo Enterprises 74 of 1997; [1997] KECA 284 (KLR) — (Explained)

Regional Court

Selle v Associated Motor Boat Co Limited (1968) EA 123- (Mentioned)

Statutes

1. Constitution of Kenya, 2010 — articles 10, 40(3) — (Interpreted)
2. Kenya Roads Act (No. 2 of 2007) — section 45 — (Interpreted)
3. Government Land Act (cap 280) (Repealed)— sections 3, 7 — (Interpreted)
4. Land Registration Act (No 3 of 2012) — sections 25 , 26 — (Interpreted)
5. Traffic Act (cap 403) — section 91 — (Interpreted)

Advocates

None mentioned

JUDGMENT

JUDGMENT OF JOEL NGUGI, JA

1. The basic question presented in this appeal is whether article 40 of the *Constitution* as read with section 26 of the Registered Lands Act protects a holder of a Certificate of Title or Lease of land to a parcel of land previously set aside for public utilities or public purposes but subsequently irregularly allocated by the Commissioner of Lands to a predecessor in title to the present holder of the Certificate of Title or Lease.

2. The answer given to that question by our jurisprudence is that while there is no inexorable rule which applies inflexibly and talismanically in all situations, as a general principle, an individual will not be inoculated from a declaration of defeasibility of title where it is demonstrated that a parcel of land was set aside for public utilities or public purposes and was subsequently irregularly allocated to an individual for private use or private ownership The principle applies even where it is not demonstrated that the present holder of title expressly acted illegally themselves and without the necessity to prove culpability on the part of the present holder. This principle is based on the public policy rationale for protecting lands set aside for public utilities and for public purposes and incentivizes prospective land owners to perform their due diligence to determine the root title of the parcel of land they are purchasing. It applies with even more jurisprudential force where there are indicative signs that the property might have been set aside for public utilities.

3. The facts of the present case are as follows. The Environment and Land Court (ELC) sitting at Kisumu (Kibunja, J) delivered a judgment dated January 17, 2018 dismissing a claim by the appellants herein who sought a permanent injunction restraining the respondent (Kenya National Highway Authority) from removing, demolishing and or in any other way whatsoever, interfering with their peaceful occupation of land parcels namely, Kisumu Municipality/Block 11/114, 115, 116 and 117 (suit properties). They also sought for general damages, costs and interests of the suit.

4. In their plaint dated September 5, 2013, the appellants averred that they were the registered proprietors of the suit properties, situated along Kisumu – Dunga road and that on July 9, 2013, they received a letter from the respondent notifying them that they had erected an illegal structure on the classified

road reserve, C85 (Kisumu – Dunga) and were required to remove it within sixty days. They averred that the said notice was illegal as the respondent had never before informed them about the classification of the road.

5. The appellants further averred that they would be irreparably prejudiced if the notice was not overturned and/or if the respondent was not restrained from effecting it.

6. Additionally, the appellants, through Ashok Khetshi Shah, filed a plaintiff's statement dated September 5, 2013. He averred that: they bought land parcel Kisumu/Municipality/Block 11/86 and later subdivided it into the four land parcels stated herein above; they obtained the lease certificates and upon approval from the Municipal Council of Kisumu, developed them without interfering with the beacons placed by the government through the Ministry of Lands; they obtained approval from the National Environment Authority (NEMA) and the alleged illegal perimeter wall was part of the approved plans for construction and development on the suit properties; to establish whether the suit properties had encroached on the road reserve, they asked the Municipal Council to get them confirmation in this regard from the Kenya Urban Roads Authority (KURA) and their response was that the suit properties did not encroach on the road reserve; the notice given by the respondent did not disclose which side the suit properties encroached the road reserve, nor did they disclose facts, reasons and/or comments to support their allegation; upon receiving the notice, they instructed a surveyor to look into the matter with a view to establishing if they had indeed encroached on the road reserve; the surveyor obtained a letter confirming the true position of the boundaries of the suit properties from the Director of Survey at the Ministry of Lands and also obtained a current survey map/plan showing their boundaries and demarcation; and the Director of Survey did not raise any issue in respect of the road width or otherwise, and confirmed that the widths were unchanged from inception.

7. The respondent opposed the appellants through their statement of defence dated 14 October 2013, and averred that the perimeter fence on the suit properties encroached on the road reserve meant for the expansion of Kisumu – Dunga road, designated as C85. The respondent stated that in 2013, they received a report about the encroachment from the then County Council of Kisumu and upon inspection, they established that the appellants had encroached on the road reserve by building an illegal perimeter wall without the respondent's approval and/or consent as required by law.

8. Subsequently, the respondent issued a notice to the appellants threatening to demolish the structure sitting on the road reserve. They averred that the suit properties originally came as one parcel known as land parcel LR No 1148 measuring 0.6445ha, when it was first surveyed in 1935. Later in 1982, the boundaries of the original land parcel were altered in unclear circumstances, thus amalgamating part of the road reserve, increasing land parcel LR No 1148 to 0.9776ha. Upon the amalgamation, a new title was issued known as Kisumu/Municipality/Block 11/86.

9. The respondent averred that contrary to the appellants' statement that they had not been notified about the encroachment, in 2003, vide a gazette notice dated 26 June 2003, the then Minister for Roads notified everyone to remove all illegal structures that had been erected and/or constructed on road reserves.

10. The respondent further averred that the appellants never sought consent from them and neither did they give consent to the appellants to construct and/or erect the illegal perimeter wall in question.

11. During trial, the 1st appellant reiterated the contents of their plaint and plaintiff's statement as summarized hereinabove. He added that they bought land parcel Kisumu/Municipality/Block 11/86 in 1987 and subdivided it into four parcels in July 1989. During cross examination, he stated that he did not engage the respondent as he had been informed by the Municipal Council that the Kisumu

– Dunga road fell under KURA. He further stated that he had since learnt that the Kisumu – Dunga road is classified under category C and is under the respondent's authority and not KURA.

12. On their part, the respondent called one witness, Leo Wanyonyi, a surveyor in the respondent's office; who testified as DW1. He reiterated the contents of their defence statement as summarized hereinabove. He added that after they had issued the appellant with the notice, the appellant's advocate visited DW1's office and they both went to the appellant's pharmaceutical shop whereby he gave an explanation with regard to the road reserve encroachment. According to DW1, the appellant's advocate appeared to understand the respondent's position but they later filed a suit against them. He further said that the respondent is yet to demolish the illegal parameter fence as the appellant obtained a restraining order from the court.

13. In its decision, the trial court coined five (5) issues of determination, namely: -

    a. Whether the resurvey of land parcel from which Kisumu/Municipality/Block 11/114 to 117 were subdivided from, resulted into increase in size and if so, whether it encroached onto the Kisumu – Dunga (C85) road reserve.

    b. Whether the permanent (masonry) perimeter fence constructed by the plaintiffs along their land parcels Kisumu/Municipality/Block 11/114 to 117 has encroached onto the Kisumu – Dunga (C85) road reserve, and if so, whether the defendant should be restrained as prayed by the plaintiffs.

    c. Whether the defendant is the authority in charge of Kisumu – Dunga (C85) road.

    d. What orders to issue.

    e. Who pays the costs.

14. The trial court took note of the documents produced by the appellants, specifically the letter dated 14 November 1979; letter of allotment dated 8 January 1981; and letter dated 9 August 1983; and observed that the previous owner, one JD Dodhia, made an application to the Commissioner of Lands to extend the then land parcel Kisumu/Municipality/Block 11/57. The letter dated 14th November, 1979, partly read as follows:

> " The area required for extension has been curved out as a result of the realiment (sic) of 18m road reserve. This piece of land is currently being used as dumping ground. I had earlier on applied for the subdivision of the above plot but this could not be approved unless the plot is extended. I would therefore be very grateful if you could grant the proposed extension."

15. The trial court noted that JD Dodhia's request for extension was approved and an allotment letter dated 8th January, 1981 was issued for the then Uns. Plot – Kisumu Municipality that measured 0.263ha on terms that were "co-terminus with the term of land parcel Kisumu/Municipality/Block 11/57". Thereafter the un-surveyed plot (Uns. Plot – Kisumu Municipality) was consolidated with land parcel Kisumu/Municipality/Block 11/57 and became land parcel Kisumu/Municipality/Block 11/86 from which the current suit properties were later subdivided.

16. The trial court also noted that land parcel Kisumu/Municipality/Block 11/57 was initially known as land parcel 1148/5/XLIX (IR4737) under survey plan no 33687 and measured 1.592 acres. Additionally, from the title document attached by the appellants, land parcel 1148/5/XLIX (IR 4737) was initially granted to Burnt Forest Saw Mills on 12th July, 1938. However, there was no documentary evidence from either parties that showed how the land parcel initially described as 1148/5/XLIX (IR 4737) changed to become Kisumu/Municipality/Block 11/57.

17. Drawing from the above noted documents, the trial court held that the fact that the appellants availed copies of documents capturing the history of the original title, its extension and consolidation, they could now not turn around and claim that they did not know about the extension of the land they acquired; and that it had been curved out of Kisumu – Dunga road that is classified C85 and which is now under the authority of the respondent.

18. The trial court also held that there was no evidence availed by the appellants to confirm that the authority in charge of Kisumu * Dunga road (C85) at the material time, had been involved and consented to the portion of the said road reserve being alienated and consolidated into the parent title from which the current suit properties were subdivided. The learned judge noted that when the respondent was informed about the perimeter fence constructed by the appellants, its officers visited the scene and noted the encroachment onto the road reserve, which led to the issuance of the notice dated 9 July 2013. Based on this, the learned judge held that the respondent cannot be faulted on its issuance of the notice. The learned judge also held that the appellants did not challenge the fact that the design of the road reserve had not changed since 1935, and the 1981 alienation and consolidation was done without the knowledge and consent of the respondent. He opined that the letter dated 23 November 2012, by KURA addressed to the Town Clerk, Kisumu Municipality and copied to the appellants could not suffice as evidence of involvement or consent of the roads authority. Additionally, he stated that both parties agreed that the respondent and not KURA, were the ones in charge of the Kisumu * Dunga (C85) road.

19. In the circumstances, the trial court concluded that the notice by the respondent dated 9 July 2013 did not amount to unlawful acquisition of the appellants land but was rather an administrative step by the respondent to stop unlawful and unauthorized encroachment onto a public road. He further held that the appellants recourse would possibly lie against the person(s) who sold them the suit property or the authorities that allocated the extension onto the road reserve. Flowing from the trial court findings, the appellants case was dismissed with costs.

20. Aggrieved by the decision of the trial court, the appellants filed a notice of appeal dated 22 January 2018 and a memorandum of appeal dated 27 February 2018, in which they raised six (6) grounds of appeal. These are that the learned trial judge erred in law and fact by: making a judgment that violated the appellants right as envisioned under article 40 of the *Constitution*; in finding that the appellants did not obtain consent from the respondent that did not exist in 1987 when the appellants purchased land parcel Kisumu/Municipality/Block 11/86; in failing to totally consider the evidence on record adduced by the appellants, more specifically, the letter dated 07/08/1983 from the commissioner of lands confirming that a resurvey had been done on the suit parcel hence arriving at an erroneous decision; in arriving at a decision that the appellants parcel had encroached on a road reserve without any supporting documentary evidence being adduced to that effect; in failing to hold that the appellants had an indefeasible title to the suit property as per the Registration of Titles Act cap 300 (repealed) Laws of Kenya; and imported extraneous considerations and reasons in arriving at the judgment.

21. Consequently, the appellants prayed that the appeal be allowed, judgment of the superior court be quashed and set aside, and the appellants be awarded costs of the suit.

22. During the virtual hearing of the appeal, learned counsel, Mr Onyango appeared for the appellants and learned counsel, Mr Ragot, appeared for the respondent. Both parties filed written submissions and relied entirely on them. Mr Ragot informed the court that he filed a supplementary record of appeal on 21st october, 2022 pursuant to rule 94 of the *Court of Appeal Rules*.

23. The appellants collapsed their grounds of appeal into three points of argument as follows:

a. Whether the appellants' rights to property were violated.

b. Whether the allotee obtained consent before consolidating the parcels.

c. Whether the trial court relied on extraneous evidence in arriving at the judgment.

24. On the first point, the appellants argued that there is no doubt they are the registered proprietors of the suit property which was initially allotted to one JD Dhodhia, from whom the they purchased the property in the year 1987. They contended that since their title has not been cancelled or revoked, section 25 and 26 of the *Land Registration Act* protects them as the absolute and indefeasible proprietors of the suit property. To buttress this fact, the appellants contended that the liabilities being laid upon them by the respondent took place in 1979 before they bought the suit property as purchasers for value.

25. On the second point, the appellants contended that the former owner of the suit property, one JD Dhodhia, made an application to the then commissioner of lands for consent with regard to the consolidation of Plot LR No 1148 and the un- surveyed plot, which was by then being used as a dumping site and had not been utilized for the purpose of which it had been acquired. His request was granted by the commissioner of lands and he was issued with an allotment letter dated 9 August 1983. In this regard, they relied on the case of *Dr Joseph Arap Ngok v Justice Moijo Ole Keiwa & 5 others* (1997) eKLR and *Wreck Motor Enterprises v The Commissioner of Land & others* (1997). They further relied on the case of *Town Council of Awendo v Nelson Oduor Onyango & others* (2013) eKLR for the preposition that government land can revert to private land if such land is not wholly utilized for the public purpose for which it was acquired.

26. The appellants contended that respondent was established in the year 2007, prior to which the commissioner of lands was the custodian of all government land. Therefore, having established the foundation of their title, the appellants argue that they are protected by article 40(3) of the *Constitution*.

27. On the third point, the appellants argued that despite the respondent's allegations that the suit property has encroached onto the Kisumu – Dunga (C85) road reserve, the respondent did not provide the trial court with any documentary evidence or exhibits to show the same. Instead, the trial court misdirected itself by relying on documents by the respondents which were merely marked for identification and were never produced. In this regard, they relied on the case of *Kenneth Nyaga Mwige v 2 others* (2015) eKLR in which this court held that once a document is marked for identification, it must be proved through the production of an exhibit which must be part of the court record; and a foundation must be laid for its authenticity and relevance to the facts of the case.

28. The appellants further argued that the suit property sits in a curve and the respondent never disclosed or indicated where the 0.332ha sat on the map. They claimed that the respondent never produced the resurvey report done in 2013 and neither was it shown to them. They argued that in any event, the said acts were done before the existence of the respondent and the mother titles from which the portion was added has been legitimized by the subdivision of the suit property and the fact that the appellants have been paying land rates.

29. Opposing the appeal, the respondent contended that during trial, the 1st appellant testified that they were not aware of any resurvey done on the suit property; but admitted that they saw some documents dated 1982 by the previous owner, relating to a resurvey that was done in 1982. The respondent also contended that the 1st appellant confirmed that the approval by NEMA was done only with regard to land parcel Kisumu/Municipality/Block 11/117 where they built the three maisonettes; but the

permanent fence covered the other three plots, Kisumu/Municipality/Block 11/114 to 116, which approval they did not get from NEMA.

30. The respondent rejected the appellants assertion that the respondent's intended demolition of the appellants property which has encroached onto the road reserve by 0.331ha amounts to a violation of their right to property as envisaged under article 40 of the *Constitution*. The respondent submitted that while the thrust of article 40 is to protect proprietary rights under the law and while it is not in dispute that the appellants have a right to own property, the appellants are entitled to their property only to the extent that such property does not encroach upon land that was acquired and set aside for a public purpose. The respondent contended that to the extent that the appellants have encroached onto a road reserve by 0.332ha, their titles are defeasible and they are not entitled to the protection afforded by article 40.

31. The respondent argued that by virtue of section 91 of the *Traffic Act* as read with section 45 of the *Kenya Roads Act*, 2007, the respondent has the statutory mandate to remove or demolish the perimeter wall constructed by the appellants, having served the appellants with appropriate notices. It was their contention that the said portion measuring 0.332ha was illegally and fraudulently acquired.

32. The respondent submitted that during trial, DW1 testified that the construction of the perimeter wall began in the year 2011, during which time the Kisumu Municipal Council stopped the intended construction and wrote to the respondent to confirm the extent of the road reserve. DW1 then visited the suit property in 2013 before the perimeter wall was put up and informed the appellants that the intended construction of the wall would encroach on the road reserve but they ignored the warning and proceeded to erect the perimeter wall. Subsequently, the respondents visited the suit property and discovered that it had encroached onto the road reserve by 0.332ha; and issued the appellant with a notice on the same. DW1 further testified that they relied on the 1935 map which showed that the portion known as C85 in which the appellants erected the perimeter wall had already been set apart for road development; which evidence was before the trial court and was not controverted by the appellants. Therefore, given the fact that the appellants had encroached on a road reserve, they are not constitutionally protected by article 40. The respondent added that article 40 must be read together with article 10 and the preamble of the *Constitution* which by extension gives credence that human rights and social justice cannot countenance a situation where the *Constitution* is used to rubberstamp what is in effect unlawful. In this regard, the respondent relied on case of *Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others* (2019) eKLR in which this Court held that where the appellants had encroached on a road reserve, their titles were unlawful and defeasible. The respondent also relied on the case of *Chemey Investment Limited v Attorney General & 2 others* (2018) eKLR in which this Court rejected the invitation to uphold the sanctity of land titles obtained by allottees, upon finding that the allotees applied and were allocated government land which was reserved for public use; and had even erected buildings on the land.

33. The respondent disputed the appellants claim that the consolidation of Kisumu/Municipality/Block 11/57 and the un-surveyed plot was valid and legal since it was approved by the then Commissioner of Lands. According to the respondent, the un-surveyed plot had already been set apart for the purpose of road development way back in 1935. Therefore, the acquisition thereof of the un-surveyed plot by JD Dodhia without any written consent from the respondent was an illegality. The respondent submitted that under section 3 and 7 of the *Government Land Act*, the commissioner of lands could not alienate public land, and more so, where it was not being utilized for its intended purpose and relied on the case of *Niaz Mohamed v Commissioner of Lands and others,* HCC No 423 of 1998 where the court held that land has to be used for the purpose in which it was acquired and use of land for any other purpose is illegal. Thus, if the land was not utilized, then the local authority should have held it in trust

under the Local Government Act. In this regard, the respondent argued that when the government set aside the un-surveyed plot for public use, it became public land held in trust by the commissioner of lands and he had no authority whatsoever to dispose and allocate it to JD Dodhia. In any event, the respondent contended that the said allocation was not de-gazetted from being public land to give room for its transfer to the said JD Dodhia and neither was it surrendered back to the government for re-allocation.

34. The respondent submitted that the question of whether the Commissioner of Lands could legally alienate unalienated public land has been discussed severally before this court and other courts, some of which include decisions in *James Jorum Nyaga & another v Attorney General & another* (2019) eKLR and *Milan Kumar Shah & 2 others v City Council of Nairobi & others*, Nairobi HCCC No 1024 of 2005. In both cases, the court held that under section 3 and 7 of the *Government Land Act*, the commissioner of lands has no power to alienate unalienated land as authority falls only on the President of Kenya. Additionally, the Commissioner of Lands has no authority to make any grant or dispose of any estate, interest or right in or over a portion that was part of public land and therefore not unalienated government land. The respondent also cited the decision in *Paul Nderitu Ndung'u & 20 others v Pashito Holdings Limited & another*, Nairobi HCCC No 3063 of 1996 in which the court held that the commissioner of lands had no legal authority to allocate two pieces of land which had been reserved for a police post and a water reservoir as they had already been alienated.

35. More importantly, the respondent wished to bring to the attention of this court that the thrust of the trial court judgment was that the appellant conducted a survey of their own, using a private surveyor who sought and obtained consent from the Kenya Urban Roads Authority to annex a portion of the then existing road designated as C85, to be part of the appellants plot in the understanding that the said portion had been redesigned by the Authority to be excluded from the road and made a dumpsite; which led to its allocation to the appellant as part of their plot. The respondent stated that this position has not been challenged by the appellants.

36. The respondent further argued that vide a letter dated 28 August 2013, by the Ministry of Lands, Housing and Urban Development, the appellants were informed that the Kisumu – Dunga (C85) reserve road fell under the authority of the respondent and not KURA. Therefore, whatever consent, if all, obtained by the appellants with regard to alienation and consolidation of the two land parcels was a nullity as it was not approved by the rightful authority.

37. Lastly, the respondent rejected the appellants claim that they never availed any documentary evidence before the trial court to prove the respondent's allegation that the suit property had encroached onto the road reserve. The respondent submitted that all the documents they relied on before the trial court were produced and recorded by it as indicated by the proceedings of 10th April, 2017. According to the respondent, the appellants never objected to the production of any of the documents availed through the respondent's affidavits and produced before the trial court.

38. This being a first appeal, this court is required to re-evaluate and re-analyze the evidence presented before the trial court in order to arrive at our own independent conclusions of law and fact, bearing in mind that the trial judge had the advantage of seeing and assessing the demeanor of witnesses. (See *Selle v Associated Motor Boat Co Limited* (1968) EA 123). In addition, this court must be cognizant of the fact that it should not interfere with the findings of fact by the trial court unless they were based on no evidence or on a misapprehension of the evidence or the trial judge is shown demonstrably to have acted on wrong principles in reaching his findings. (See *Jabane v Olenja* (1968) KLR 661).

39. Having considered the pleadings in the record of appeal, the judgment of the trial court, the appellant's grounds of appeal and the rival submissions of the parties, three substantive issues present themselves for determination in this appeal:

    a. First, whether the allocation of the un-surveyed plot by the Commissioner of Lands which led to the consolidation of Kisumu/Municipality/Block 11/57 and the un- surveyed plot set aside for public utilities vide a letter dated 9th August, 1983 to the appellants' predecessor in title was legal and regular.

    b. Second, if the answer to (a) above was in the negative, what are the implications for the ownership of the suit properties (as consolidated) by the appellants?

    c. Third, whether the suit properties (as consolidated) encroached onto the Kisumu – Dunga (C85) road reserve.

40. Respecting the first issue, it is unclear the conditions under which the appellants' predecessor in title applied to have the un- surveyed plot known as Uns. Plot – Kisumu Municipality, set aside as a road reserve, to be consolidated with Kisumu/Municipality/Block 11/57. What, however, seems clear is that his initial application for the subdivision of land parcel Kisumu/Municipality/Block 11/57 could not be approved unless it was extended to include the un-surveyed plot (Uns. Plot – Kisumu Municipality) – perhaps because the original parcel was not of adequate size to permit the subdivisions desired. In this regard, the previous owner of the suit property, one JD Dodhia in a letter dated 14th November, 1979, addressed to the commissioner of lands wrote as follows:

> " Re: Proposed Extension of Plot No 57 – Block II- Kisumu Municipality (Orig: Plot No 5/ XLIX) Enclosed herewith, please find edged red the proposed extension of the above plot. The area being required for the extension has been curved out as a result of the realignment of 18M road reserve. This piece of land is currently being used as dumping ground. I had earlier on applied for the sub-division of the above plot but this could not be approved unless the plot is extended. I would therefore be grateful if you could grant the proposed extension."

41. The Commissioner of Lands responded to this request vide a letter dated August 9, 1983, addressed to the said previous owner in the following terms:

> " Re: Kisumu Mun Block XI/86 – A consolidation of Uns. Plot and Block 11/57
>
> The survey and consolidation of your plot is completed and the new parcel no is Block X1/86. You may let me have the lease for the old parcel no 57 to enable me prepare a consolidated lease for parcel no 86.
>
> I will also require the surrender fee of Ksh 168/-."

42. Beyond the two letters above, there is nothing on the record to inform this court the reason for the proposed extension and why the subdivision of land parcel Kisumu/Municipality/Block 11/57 could not be approved unless it was consolidated with the un-surveyed plot (Uns Plot – Kisumu Municipality). This question is the crux of this appeal. To address this, first and foremost, I have noted, just like the learned judge, that the original parcel was known as land parcel 1148/5/XLIX (IR 4737), under survey plan no. 33687 and it measured 1.592 acres or 0.6445ha. This land parcel was initially granted to Burnt Forest Saw Mills on July 12, 1938. However, there is no documentary evidence to show how the said original land parcel changed from 1148/5/XLIX (IR 4737) to Kisumu/ Municipality/Block 11/57.

43. Secondly, it is not in dispute that land parcel 1148/5/XLIX (IR 4737), which changed to Kisumu/Municipality/Block 11/57, measured 0.6445ha and upon consolidation with the un- surveyed plot (Uns Plot – Kisumu Municipality) in 1983, it became known as land parcel Kisumu/Municipality/Block 11/86 measuring 0.9776ha. According to the respondent, the 1982 resurvey which led to the consolidation and increment of land parcel Kisumu/Municipality/Block 11/57, was un-procedural and illegal as the un-surveyed plot (Uns Plot – Kisumu Municipality) had already been set apart for the purpose of road development way back in 1935. This means that it was not available for alienation by the Commissioner of Lands.

44. The respondent is surely correct in arguing that section 3 as read with section 7 of the *Government Land Act*(repealed) both donated and limited the authority to allocate both alienated and unalienated land on the President of Kenya only.

45. The obvious implication is that the Commissioner of Lands did not follow the right procedure in allocating the un-surveyed plot (Uns. Plot – Kisumu Municipality) measuring 0.332ha to the appellants' predecessor in title and thereby consolidating it with the parent title Kisumu/Municipality/Block 11/57 to end up with land parcel Kisumu/Municipality/Block 11/86 measuring 0.9776. Section 3 of the Government Land Act(repealed) vests absolute power to allocate alienated land in the President. The provision makes it clear that it is the President and not the commissioner of lands that has power to allocate alienated and unalienated land. Our jurisprudence has been categorical in that regard. See, for example, *Henry Muthee Kathurima v Commissioner of Lands & another* [2015] eKLR.

46. In the same vein, in James *Joram Nyaga & another v Attorney General & another* [2007] eKLR, the High Court, in reference to sections 3 and 7 of the Government Lands Act (GLA) held as follows:

> "The above section clearly limits the power of the Commissioner to executing leases or, conveyances on behalf of the President and the proviso to the section specifically limits the power to alienate un- alienated land to the President. We find and hold that the Commissioner of Lands had no authority to alienate the disputed plot to the applicants as he purported to do vide the letter of December 18, 1997. That was the preserve of the President. It follows that the Commissioner of Lands could not have made any grant under the Government Lands Act cap 280 Laws of Kenya nor could he pass any registerable title under the Registration of Titles Act, cap 281 Laws of Kenya."

47. Dissatisfied with the decision of the High Court, the appellants filed an appeal and in *James Joram Nyaga & another v Attorney General & another* [2019] eKLR, this court concurred with the High Court decision, while citing the Supreme Court advisory opinion *In the Matter of the National Land Commission* (2015) eKLR and held as follows:

> "The Learned Judges however found and held, and correctly so in our view, that only the President of Kenya and not the Commissioner of Lands had power to alienate un-alienated Government land by dint of section 3 of Government Land Actand by a reading of section 7 of the same Act. To the extent that it was the Commissioner of Lands who masterminded the process of the allocation and processing of the title of the suit property to the appellants, he acted without jurisdiction and whatever resulted was a nullity....
>
> .....
>
> It follows that the onus was on the appellants to satisfy court that the Commissioner of Lands had requisite powers to grant the suit property to them. The appellants were indeed required to do more in proving that the legal and right procedure was followed in alienating

the suit property to them. Bare denials of fraud on their part in acquiring the suit property or assertions that they acquired the suit property legally above board would not suffice.

48. In the present case, it is not insignificant that the un-surveyed plot (Uns Plot – Kisumu Municipality) was set apart for a road reserve way back in 1935. As I have already stated herein above, the record does not disclose the conditions under which the allocation in 1983 was done. There is no evidence showing that the un-surveyed plot (Uns Plot – Kisumu Municipality) reverted to unallocated land status, thereby rendering it available for conversion to private usage. Section 9 of the Government Land Actprovides that the Commissioner of Lands may cause any portion of a township which is not required for public purpose to be divided into plots and disposed of in the prescribed manner. This was not the position in this case. Rather, extant evidence shows that the un-surveyed plot (Uns Plot – Kisumu Municipality) had been set apart for a road reserve in 1935 and that position had never been revised. This meant that it was placed beyond the Commissioner's reach for reallocation to private individuals. In essence, the Commissioner of Lands did not have powers to convert land reserved for public purpose into private usage. I, therefore, find that the allocation of the un- surveyed plot (Uns Plot – Kisumu Municipality) by the Commissioner of Lands was in contravention of the law, which rendered acquisition of the un-surveyed plot (Uns Plot – Kisumu Municipality) by the appellants' predecessor in title illegal and unlawful.

49. Does it matter that the illegality was occasioned at the instance of the appellants' predecessor in title and before the appellants' acquisition of the property? Our decisional law has relentlessly and categorically answered this question in the negative at least as far as lands reserved for public utilities are concerned and absent any exceptional circumstances. This position is perspicaciously captured by this court in *Chemey Investment Limited v Attorney General & 2 others* [2018] eKLR where the court remarked that:

> "Decisions abound where courts in this land have consistently declined to recognise and protect title to land, which has been obtained illegally or fraudulently, merely because a person is entered in the register as proprietor.... The effect of all those decisions [of this court] is that sanctity of title was never intended or understood to be a vehicle for fraud and illegalities or an avenue for unjust enrichment at public expense."

50. Indeed, article 40(6) of *the Constitution* textually contemplated this direction in our jurisprudence. It provides that the right to acquire and own property does "not extend to any property that has been found to have been unlawfully acquired." See *Peter Njoroge Ng'ang'a v Statutory Manager for United Assurance Company Limited & another* [2020] eKLR. The plethora of cases which the court in *Chemey Investments Limited* case (*supra*) cited for this and the previous proposition that the defeasibility of title to property in Kenya is no longer guaranteed where the property was illegally acquired include: *Niaz Mohamed Jan Mohamed v. Commissioner for Lands & 4 others* [1996] eKLR; Funzi Island Development Ltd & 2 others v County Council of Kwale (*supra*); Republic v Minister for Transport & Communications & 5 others ex parte Waa Ship Garbage Collectors & 15 othersKLR (E&L) 1, 563; John Peter Mureithi & 2 others v Attorney General & 4 others [2006] eKLR; Kenya National Highway Authority v Shalien Masood Mughal & 5 Others (2017) eKLR; Arthi Highway Developers Limited v. West End Butchery Limited & 6 others [2015] eKLR: Munyu Maina v Hiram Gathiha Maina [2013] eKLR and Milan Kumarn Shah & others v City Council of Nairobi & others, HCCC No 1024 of 2005.

51. In the present case, as the learned judge of the Superior court pointed out, the documents which were in the appellants' own possession, and which they produced in court, gave the clear history of the parcel of land in contention as un-surveyed land which was irregularly allocated to their predecessor in

title. It matters not that the letter by the predecessor in title identified the public utility as a "dumping site" or that it was, in fact, a road reserve; the significant point is that there were telltale signs in the history of the suit properties to signal to the appellants that it was about to acquire interests in property previously reserved for public utilities. What this court said of the appellant in *Flemish Investments Ltd v Town Council of Mariakani*, CA No 30 of 2015, an appeal where the appellant who had obtained registration of public property in his name but claimed to be an innocent purchaser for value without notice, can be said of the appellants herein:

> " A bona fide purchaser exercising due diligence would be expected to inspect the property he is buying, to ascertain its physical location, persons, if any, in occupation, developments, buildings and fixtures thereon, among others. If indeed the appellant honestly believed that Plot No. 34 and the cattle dip on it were part of the suit property, he would have rehabilitated the cattle dip as his property, or simply demolished it, not to pester the respondent for its relocation. For a party who was buying a commercial property rather than a ranch, the presence of a cattle dip on the property should have rang alarm bells."

52. In any event, the doctrine of innocent purchaser without notice, does not inexorably operate to permit a successor to a title illegally acquired over land reserved for public utilities to keep the land. That would be inimical to public interest. At its most charitable, the doctrine only permits such a successor in title to look to the predecessor in title or, in exceptional circumstances, to the errant government agency that was complicit in the illegality for compensation.

53. The ineluctable conclusion, then, is that the acquisition of the suit property by the appellants was only valid and legal to the extent that it excluded the unlawfully acquired un-surveyed plot (Uns Plot – Kisumu Municipality) by the predecessor in title. This means that, all the succeeding actions taken by the appellants in relation to the un-surveyed plot (Uns. Plot – Kisumu Municipality) which was consolidated with the parent title were a nullity.

54. Respecting the third issue, having found that the allocation of the un-surveyed plot (Uns Plot – Kisumu Municipality) by the Commissioner of Lands was unlawful, it follows therefore that the suit property Kisumu/Municipality/Block 11/86 which was subdivided into four parcels, namely Kisumu/Municipality/Block 11/114, 115, 116 and 117, encroached onto the Kisumu – Dunga (C85) road reserve. This finding also means that the perimeter fence constructed by the appellants along land parcels Kisumu/Municipality/Block 11/114, 115, 116 and 117 encroached onto the Kisumu – Dunga (C85) road reserve.

55. One final issue I would like to briefly address before proposing my resolution to this appeal, is the complaint by the appellants that the learned judge of the superior court relied on extraneous material to reach his conclusions. The exact document the appellants complain was not produced is the survey map for 1935. During the trial, when the respondent's witness, Leo Wanyonyi was testifying, the following is recorded at page 39-40 of the Record of Appeal:

> This is a copy of the letter MFI (D2). We have traced the plot to the map of 1935 MFI (D3) and stayed like that till 1982 when the extension of the road reserve as marked to with circle MFI (D4). The 1982 plan is different from 1935 on the area the plot touches the road reserve. I produce MFI (D4) as exhibit D2 to D4 as exhibit D2 to D4 respectively.

56. While acknowledging that the recordation of the proceedings was not ideal, when one reads this testimony in context, it is obvious that the witness intended to, and indeed, did produce "D3" as the survey map for 1935. This is what the witness intends by saying: "I produce MFI (D4) as exhibit D2 to D4 as exhibit D2 to D4 respectively". This is strengthened by the fact that the witness had earlier

produced "D1" which is a letter dated 9th September, 2013. The next document is produced as "D5" – a letter dated October 10, 2012. That the Survey Map of 1935 was duly produced is further confirmed by the fact that the appellants' lawyer, Mr Onyango, cross-examines the witness on it – see page 41 of the Record of Appeal. The upshot is that nothing comes out of this complaint by the appellants. Suffice to say that even if the Survey Map of 1935 was not admitted into evidence, the outcome of the case would not have changed. This is because, as demonstrated in this judgment, the Survey Map was not the dispositive factor in the superior court's and this Court's conclusions that the amalgamation of Kisumu/Municipality/Block 11/57 with the un-surveyed plot (uns – Kisumu Municipality) to generate land parcel Kisumu/Municipality/Block 11/86 in 1982 was un- procedural and unlawful.

57. The upshot is that, in my view, the appeal wholly lacks merit. I would propose that it be dismissed with costs to the respondent.

JUDGMENT OF KIAGE, JA

1. I have had the advantage of reading in draft the judgment of Joel Ngugi, JA. I entirely agree with it and have nothing useful to add.

2. As Tuiyott, JA is in agreement, the appeal shall be disposed of as proposed by Joel Ngugi, JA.

JUDGMENT OF TUIYOTT, JA

1. I have had the advantage of reading in draft the judgment of Joel Ngugi, JA, with which I am in full agreement and have nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 31ST OF MARCH, 2023.

JOEL NGUGI

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

Signed

DEPUTY REGISTRAR