



Gachango & another v National Land Commission & another; Tena Residents Association (Interested Party) (Environment & Land Petition 24 of 2017) [2024] KEELC 3838 (KLR) (30 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3838 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION 24 OF 2017**

MD MWANGI, J

APRIL 30, 2024

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 20, 21, 40, 47 & 67 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND THE PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES 2006

BETWEEN

MUNYAMBU NJUGUNA GACHANGO 1ST PETITIONER

KEZIAH WANGARI MUNYAMBU 2ND PETITIONER

AND

NATIONAL LAND COMMISSION 1ST RESPONDENT

CHIEF LAND REGISTRAR 2ND RESPONDENT

AND

TENA RESIDENTS ASSOCIATION INTERESTED PARTY

JUDGMENT

Background

1. The Petitioners brought this Petition alleging violation of their rights under Articles 20, 21, 22, 40, 47, 67 and 258 of *the Constitution*. The Petition dated 7th June, 2017 and amended on the 7th December, 2021 seeks the following orders:
 - a. That a permanent injunction do issue against the 1st and 2nd Respondents to restrain them by themselves, their agents and/or servants from transferring,



interfering with the Petitioners' ownership, occupation, use and enjoyment of the said parcels of land Nairobi/ Block 82/4284 (0.074 ha), Nairobi/ Block 82/42830(0.0518ha), Nairobi/Block 82/4281 (0.0518 ha), Nairobi/ Block 82/4280(0.0518 ha) situated within Donholm and Tena Estate within Nairobi County.

- b. That a declaration be issued that the Petitioners are the lawful owners of all those properties known as Nairobi/ Block 82/4284 (0.074 ha), Nairobi/ Block 82/42830(0.0518ha), Nairobi/Block 82/4281 (0.0518 ha), Nairobi/ Block 82/4280(0.0518 ha) situated within Donholm and Tena Estate within Nairobi County.
 - c. That an order be issued directing the 2nd Respondent to remove all restrictions registered against the said parcels of land.
 - d. That a declaration be issued that the cancellation of the Petitioners' titles by the 1st Respondent was not only arbitrary but was also illegal, unlawful and unprocedural.
 - e. That in the ALTERNATIVE AND WITHOUT PREJUDICE TO THE FOREGOING, an order directing the 1st Respondent, to forthwith tabulate, assess and compensate the Petitioners the current market value of all those properties known as Nairobi/ Block 82/4284 (0.074 ha), Nairobi/ Block 82/42830(0.0518ha), Nairobi/Block 82/4281 (0.0518 ha), Nairobi/ Block 82/4280(0.0518 ha).
 - f. That this Honourable Court do issue such orders or give such directions as it may deem just and appropriate in all the circumstances of this matter.
 - g. That the costs of this Petition be awarded to the Petitioners.
2. The Petitioners' case is that they are the registered proprietors of the parcels of land known as Nairobi/ Block 82/4284 (0.074 ha), Nairobi/ Block 82/4283(0.0518ha), Nairobi/Block 82/4281 (0.0518 ha), Nairobi/ Block 82/4280(0.0518 ha) situated within Donholm, Tena Estate within Nairobi County (herein after known as the "suit properties"). The Petitioners allege that they bought the suit properties from Continental Developers Limited who held a lease over the said properties for a period of 99 years from 1st January, 1997. The Petitioners paid over Kshs. 25,000,000/=, to Continental Developers Ltd as consideration.
 3. The Petitioners state that upon taking possession of the suit properties, they developed a school thereon known as Eastend Academy.
 4. The Petitioners aver that in October, 2016, they received a Letter from the 1st Respondent in regard to the suit properties save for Nairobi/ Block 82/4282 (0.0518 ha) notifying them that the titles to the said properties had been revoked and reverted to public user following a review under Section 14 of the [National Land Commission Act](#). Consequently, the Petitioners were required to vacate the said parcels as they were illegally occupying the land. The Petitioners in reference to the master title of Block 82, assert that the issue of reversion does not arise as the property was not public land at the time they acquired it.
 5. The Petitioners accuse the 1st Respondent of publicizing the alleged revocation of titles vide Gazette Notice No. 5022 without affording them the right to be heard before the alleged revocation.



6. The Petitioners assert that the suit properties having been surrendered by the Government to Continental Developers Limited, they became private properties. Therefore, no review of ownership could be lawfully handled by the 1st Respondent. The 1st Respondent's actions were not only illegal, irregular and unlawful but also violated the Petitioners' right to property.
7. The Respondents were duly served with Summons to Enter Appearance. However, the 1st Respondent did not file any response to the Petition despite being granted leave to do so by the court.
8. The 2nd Respondent on the other hand entered appearance through the office of the Attorney-General and filed grounds of opposition on the 19th October, 2022.
9. The Interested Party on its part filed a Replying Affidavit deponed by one Jared Aruwa sworn on the 20th June, 2019.

Interested Party's Replying Affidavit

10. The Interested Party through its Chairman avers that the Petitioners are well aware that the suit properties are public land. Citing Sections 2, 3 (a) and 7 of the Government Lands Act, Cap. 280 (repealed) he avers that the Commissioner of Lands had no unilateral authority to alienate Government land without the authority of the President. Thus in the absence of the President's authority, the Petitioners case' is not merited.
11. The deponent averred that alienated Government land which was previously set aside for public utility had been illegally leased to a private party. The suit land remains public utility land reserved for a Children Play Area. He faults the circumstances under which the public utility land was alienated and transferred to a private party. The Certificates of Title issued in the Petitioner's names are illegal. He adduced maps in support of the allegation that suit properties were road reserves. He cites findings in the case of Henry Muthee Kathrima -vs- Commissioner of Lands & Another [2015] eKLR, to support his arguments.
12. The deponent further states that at no given time has the suit land which was reserved for public utility as children play area or its Master Plan been re-planned to make it available for allocation to private individuals. The land had to be surrendered to the Commissioner of Lands before any allocation could be done.
13. He averred that all Government records show that the mother title, LR 212/2/ R in Donholm Estate was to be surrendered to the Government for public utility. He stated that vide a resolution dated 15th October, 1986, the defunct Nairobi City Council reserved the plots for public utility. Further, in the Letter dated 24th April, 2015, the 1st Respondent wrote to the 2nd Respondent seeking to restrict all grants and revocation of title documents after determining that they were public land.
14. In addition, the Letter dated 26th August, 2014 by the Nairobi City County affirmed the Gazette Notice dated 18th July, 2014 that the suit land was a public utility. On 4th February, 2019, the City Council of Nairobi was duly granted authority by the 1st Respondent by issuance of the allotment for various parcels, including the suit land, which were duly recovered as public utilities in Tena Estate. Subsequently, on 18th July, 2014 vide the Gazette Notice Number 5022, the National Land Commission (NLC) published the gazette notice revoking the titles to the suit land.
15. He asserts that on 14th April, 2014, the Petitioners and the public were afforded an opportunity to appear before the commission, present documents and make written presentations and submissions with respect to the suit property prior to the decision of the 1st Respondent communicated vide the Gazette Notice.



Court's directions

16. The matter proceeded by way of viva voce evidence wherein the Petitioners called two Witnesses. The 1st Respondent did not call any witness. The 2nd Respondent and the Interested Party called one witness each.

Evidence adduced by the Petitioners

17. Mr. Munyambu Njuguna Gachango, the 1st Petitioner herein testified as PW1. He stated that the 2nd Petitioner is his wife who had authorized him to testify on her behalf. The witness relied on the amended statement, amended on the 7th December, 2021. He averred that the plots in dispute are Nairobi/ Block 82/4280, 81, 83 & 84 which comprises of the school's playground. He stated that he bought the plots from Continental Developers Limited. The witness produced the documents on the Amended List of Documents amended on the 7th December, 2021, and which were marked as PE1-24" as listed.
18. It was PW1's evidence that Continental Developers Limited had a ranch which they subdivided and from which he purchased the suit properties. The suit properties are therefore not public properties. He averred that the Gazette Notice titled Review of grants or dispositions of public land, which was issued on 18th July, 2014 listed the suit properties as public land.
19. He asserts that he only learnt of the Gazette Notice in the year 2016 when he received a Letter from the National Land Commission informing him about the revocation of titles to his 4 plots. He contends that he had not been invited prior to the notice.
20. In reference to the Map listed by the Interested Party, the witness stated that the map shows open spaces. The suit properties are not indicated therein as open spaces. He denied being a member of Tena Residents Association or any association. He prayed that the caveats placed on the titles by the National Land Commission be removed as they had denied them the opportunity to develop the school, as they had wished to.
21. In cross-examination by Counsel for the 2nd Respondent, PW 1 stated that Plot No. Nairobi/Block 82/4280 is one of the revoked titles by the National Land Commission and a restriction placed over it according to their letter. He confirmed that from the white card presented before him, there is no restriction on Nairobi/ Block 82/ 4280. He confirmed that the search he had produced in the Petitioners' trial bundle is in reference to Nairobi/ Block 82/4284.
22. He averred that the restriction prohibits any dealings unless with the consent of the National Land Commission according to the Letter Reference No. NLC/CF236 dated 23rd September, 2013.
23. During cross-examination by counsel for the Interested Party, PW1 stated that he conducted a search before purchasing the suit property. He stated that he enquired from Continental Developers Limited as to how they acquired the land from the government. He confirmed that he had not produced any Lease between Continental Developers Ltd and the government nor a receipt confirming payment. He had however, attached a Survey Plan.
24. It was PW1's evidence that he had not exhibited a Sale Agreement between him and Continental Developers Limited. In addition, he confirmed to the court that the transfer document he had adduced do not bear the signature by the Land Registrar. He only exhibited a request for RTGS/transfer of the money paid to Continental Developers Limited. He had no evidence whatsoever to confirm that the money was received by Continental Developers Limited.



25. It was his evidence that pursuant to a surrender by the government, the suit properties were leased to Continental Developers Limited. He however had not attached a consent by the government authorizing the sublease to him. He had also not adduced evidence on approval and payment of stamp duty for the transfer.
26. PW1 testified that the Gazette Notice shows that all interested parties had been invited by the NLC vide the National Dailies dated 14th April, 2014. The Extract of the Newspaper is adduced at Page 52 of the Interested Party's Bundle of Documents and his properties are listed therein. He denied being a member of Tena Residents Association nor being informed of any meeting of the association.
27. It was his evidence that the User of the property was residential. Although he has developed a school thereon, he had not adduced any evidence of change of user. Further, he had not attached evidence of payment of rates to the County government, of Nairobi City County.
28. In addition, PW1 stated that he had not adduced any evidence to show how Continental Developers acquired their Lease.
29. In re-examination, PW1 stated that Plot Nairobi/ Block 82/ 4280 is the only one that is not restricted. He averred that the searches confirm restrictions by NLC. He confirmed that they wrote to the NLC before moving to the court as evidenced by the Letter adduced at Page 39 of his bundle.
30. PW 1 further stated that the documents filed by the Attorney-General confirm that the government leased the land to Continental Developers Limited as well as his registration as a proprietor of the suit properties. He also referred to the White Card on Plot 4280 which confirms the transfer from the Government to Continental Developers Limited, then to himself. He stated that the Receipts at Page 63 of his Bundle of documents confirm receipt of monies they had paid to Continental Developers Limited.
31. Mr. Bernard Kingóri Thiga who testified as PW 2 is a Director of Continental Developers Limited. He adopted his Witness Statement dated 20th December, 2021 as his evidence in-chief. He further stated that Continental Developer Limited owned the land measuring 800 acres from the year 1973. The land was subsequently subdivided and all the resulting plots have been sold out. The 1st Petitioner bought 5 of the plots in Tena Estate.
32. PW 2 confirmed receipt of money paid by the Petitioners in their National Bank Account. Receipts were duly issued for the payments effected. He stated that the Registry Index Map from the surveys of Kenya, Nairobi/ Block 82 sheet1 shows that it was part of Donholm Estate, that is Tena Estate, where the suit properties are located. He averred that the Petitioners' plots were not part of the public utilities surrendered to Nairobi City Council.
33. In cross-examination by the Counsel for the 2nd Respondent, PW 2 stated that the suit properties existed as Block No. 82 which was a 100 acres before subdivision. He stated that the Petitioner's titles were not revoked. The Petitioners are still title holders of the 5 plots. He averred that they sent their Counsel to appear before the Commission as per the invitation in the Gazette Notice. The 1st Petitioner was however not invited.
34. During cross-examination by Counsel for the Interested Party, PW2 averred that Block 82 was private property from the beginning. He testified that Continental Developers Limited purchased it from De Souza & Boru Marn who had on their part, purchased it from Donholm Estate. However, he had no evidence before the Court of the said sale.



35. He further stated that the Transfer of Lease at Page 51 does not have a Passport size photo of the directors; neither their ID Numbers; no PIN numbers. Further that there was no signature or designation of the person certifying them.
36. He stated that there was no Sale Agreement between Continental Developers and other buyers. There is no description of the advocate who represented Continental Developers Ltd. All the 7 receipts at Page 63 and 64 of the Petitioners' bundle of documents bear the same date.
37. In reference to the application for Electronic Funds Transfer at Page 48, he did not have evidence to confirm that the money, Kshs. 1Million, was actually paid into the account of Continental Developers Ltd. The witness further referred to the extract of the Daily Nation of 4th April, 2014 as annexed to the interested Party's Replying Affidavit and stated that the Plot Number LR 82/8480 was listed therein. He reiterated that their Lawyers participated in the proceedings before the NLC but he was not aware if they challenged the NLC's decision.
38. In re-examination, PW 2 testified that the land owned by Continental Developers Ltd was sold to many individuals. Although he had testified in a number of cases involving other buyers, none of the titles had ever been revoked. Further that on the 2nd Respondent's white cards, the Lessee is indicated as Continental Developers Limited and the Lessor is the Government of Kenya.
39. It was his evidence that in the year 2013, there was no requirement for Directors to put their passport photos and the company seal on the transfer forms.
40. The 2nd Respondent called one witness, Mr. George Gichere Gitonga a Land Registrar at Nairobi who testified as RW1. He adopted his Witness Statement dated 20th April, 2023 as his evidence in-chief. He produced the documents on the 2nd Respondent's List of Documents dated 22nd November, 2022 and marked as RE 1-5 in the order in which they are listed. He further stated that the suit properties are registered in the name of the Petitioners who had been issued with Certificates of Lease from the Lessee-Continental Developers Limited. He confirmed that parcels 82/4281-4 have restrictions registered on them. There is no restriction on Block 82/4280.
41. He informed the court that the restrictions were registered by the Chief Land Registrar vide a Letter from the NLC dated 23rd September, 2013 in view of the Kenya Gazette Notice No. 5022. He stated that the practice then was that once NLC wrote a Letter they had to comply. That to date, NLC is yet to issue them with a Letter lifting the restriction on the 4 parcels of Land. The restrictions were placed on 1st October, 2013 whereas the Gazette Notice is dated 18th July, 2014.
42. It was his evidence that ordinarily, the decision to place a restriction comes after the hearing. He stated that they are normally instructed by way of a Letter. They do not follow Gazette Notices. He confirmed that the Registrar has not revoked the Petitioner's titles.
43. In cross-examination by Counsel for the Petitioners, RW 1 stated that their office has custody of all Land records. He confirmed that the Government leased the suit properties to Continental Developers Ltd who thereafter sub-leased it to the Petitioners. Amongst others. He stated that it is only NLC which could tell whether the land is private or public land.
44. During cross-examination by Counsel for the Interested Party, RW 1 stated that the Land Register indicates that the Government was the Lessor and Continental Developers Limited as Lessee. There ought to have been a consent from the Government allowing Continental Developers Ltd to sub-lease. He stated that the White Card does not indicate if there was a consent neither had he adduced one before court.



45. RW 1 further testified that the record does not show that Continental Developers Ltd purchased the land from De Souza. The 1st entry on the White Card shows the government as the Lessor and Continental Developers Ltd as the Lessee. The term of the Lease was from 1st January, 1977. He stated that NLC has documents in relation to the history of the property.
46. In re-examination RW1 confirmed that the titles in the Petitioners name had not been revoked. He stated that they acted on a Letter from NLC in placing the restrictions of the titles. Further, that the Documents on issuance of the Leases, that is, the Letter of Allotment are with the NLC.
47. On behalf of the Interested Party, Mr. Jared Ouma Aruwa testified as Interested Party's only witness (IPW 1). He adopted the assertions in his Replying Affidavit deponed on the 20th June, 2019 as his evidence in-chief. He further adduced the documents annexed thereto as exhibits in support of the Interested Party's case.
48. When cross-examined by Counsel for the Petitioners, IPW 1 confirmed that he had not produced any minutes or resolution, nor a list of the members of the association. He had nothing to confirm that he was the Chairman of the association.
49. He stated that the sale of the land to the Petitioners was irregular. However, he could not tell if Continental Developers Ltd were the initial allottees of the Land. He insisted that the sale of the land to the Petitioners was illegal. He had however not sued Continental Developers Ltd. He informed the court that he was challenging the documents adduced by the 2nd Respondent.
50. IPW 1 confirmed that his alleged Petition letter dated 22nd April, 2014 and the Letter dated 26th August, 2014, both addressed to NLC were incomplete as exhibited. He further confirmed that the Letter by NLC dated 4th February, 2019 does not contain a list of the attendees although he maintained that he was present representing the Association.
51. When cross-examined by Counsel for the 2nd Respondent, IPW 1 stated that the maps he had adduced confirms that the plots were reserved for public utility. The plots were reserved as Green Areas at the time of sale.
52. The Court noted that the witness was relying on a site layout plan that was not even certified. The Witness further stated that he had no search to confirm that the suit properties do not exist, as he had alleged.
53. In re-examination, the witness restated that Tena Association attended the proceedings before NLC but he was not aware if the Petitioners attended the said meetings. Although he confirmed that the Official Search adduced by the Petitioners shows a restriction placed on the suit properties, he maintained that vide the Letter dated 23rd September, 2013, the titles to suit properties were revoked as the properties were meant for public utility.

Court's Directions

54. The Court directed parties to file written submissions in support of their respective cases. The Petitioners filed submissions dated 29th February, 2024 while the 2nd Respondent's submissions are dated 27th February, 2024. The Interested Party did not file submissions. The Court has had a chance to read and consider the submissions filed.
55. It is interesting to note that the 2nd Respondent's submissions are in support of the Petitioners' case, despite its grounds of opposition filed earlier on.



Issues for determination

56. I have carefully considered the contents of the amended Petition as well as the supporting affidavit. I have also considered the 2nd Respondent's Grounds of Opposition, the Interested Party's Replying Affidavit, the evidence adduced at the trial and the submissions subsequently filed. I find the issues arising for determination are as follows: -

- A. Whether the Petition discloses a legal interest capable of protection under the law.
- B. Whether the actions of the 1st Respondent amounted to violation or infringement of the petitioner's constitutional rights.
- C. Whether the 1st Respondent can revoke a title.
- D. Whether the Petitioner is entitled to the orders sought in the Amended Petition.

Analysis and Determination

A. Whether the Petition discloses a legal interest capable of protection under the law

57. The right to own and acquire property in Kenya is safeguarded under Article 40 of *the Constitution*. The said Article provides as follows:

“

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

- (a) of any description; and
- (b) in any part of Kenya.

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

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

property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

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

- (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
- (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that:

- (i) requires prompt payment in full, of just compensation to the person; and
- (ii) allows any person who has an interest in, or right over,



that property a right of access to a court of law....”

58. The thrust of Article 40 is that it protects proprietary rights which are lawfully acquired. The Supreme Court in *Rutongot Farm Ltd. – vs- Kenya Forest Service & 3 Others* [2018] eKLR, expressed this position in the following words:

“Once proprietary interest has been lawfully acquired, the guarantee to protection of the right to property under Article 40 of *the Constitution* is then expressed in the terms that no person shall be arbitrarily deprived of property. The same guarantee existed in Section 75 of the repealed Constitution.”

59. Further, the 2nd Respondent submitted that the official searches and the White Cards exhibited in this case confirm that the Petitioners remain the registered owners of the suit properties.

60. It is settled law that the Torrens System is applicable in Kenya. The Court of Appeal in the case of *Charles Karathe Kiarie & 2 Others –vs- Administrators of Estate of John Wallance Muthare (deceased) & 5 others* [2013] eKLR, held as follows:

“The Torrens System of registration emphasizes on the accuracy of the land register which must mirror all currently active registrable interests that affect a particular parcel of land. Government as the keeper of the master record of all land and their owners guarantees indefeasibility of all rights and interests shown in the land register against the entire world and in case of loss arising from an error in registration the person affected is guaranteed of government compensation. This statutory presumption of indefeasibility and conclusiveness of title under the Torrens System can be rebutted only by proof of fraud or misrepresentation which the buyer is himself involved”.

61. The Petitioners averred that they acquired the suit properties for valuable consideration from the previous proprietor Continental Developers Limited; to whom the properties were leased for a term of 99 years from 1st January, 1997 by the Government of Kenya. The Petitioners bought the properties after subdivisions and were subsequently issued with Certificates of Leases produced as PE 5,6, 7, 8 and 9.

62. The courts of this Country have indeed been consistent that a bona fide purchaser will not be bound by any interests of which he or she does not have actual, constructive or imputed notice, as long as he or she did reasonable due diligence before purchasing. See: *Moses Lutomia Washiali v Zephaniah Ngaira Angweye & another*, Civil Appeal No. 139 of 2013.

63. A bona fide purchaser, the courts have maintained, is assured of protection, notwithstanding that previous dealings might be shown to have been mired in fraud. See *Dr. Joseph Arap Ngok V Justice Moijo ole Keiwua & 5 others*, Civil Appeal No. Nai. 60 of 1997.

64. The Ugandan case of *Katende v. Haridar & Company Limited* (2008) 2 E.A.173, has been cited extensively with approval in many local decisions. It developed the following strictures to be satisfied before a conclusion can be drawn that the purchaser is innocent and acquired the property for value and without notice: -

“..... it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that:

- a. he holds a certificate of title;



- b. he purchased the property in good faith;
- c. he had no knowledge of the fraud;
- d. he purchased for valuable consideration;
- e. the vendors had apparent valid title;
- f. he purchased without notice of any fraud;
- g. he was not party to any fraud.

A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.”

- 65. The Court of Appeal of Kenya in the case of Mwangi James Njehia -vs- Jane Wanjiku Mwangi & another [2021] eKLR, while upholding the decision in the Katende case, did away with the word “apparent” in condition (c)(e)” and the condition should read “the vendor had a valid title”.
- 66. There is no suggestion nor was any proof presented of any fraud in the transaction between the Petitioners and Continental Developers Ltd in which the former knowingly got involved. Continental Developers Limited, it was established, had a valid title and it was not demonstrated that the Petitioners did anything or failed to do anything to suggest that they knew of any fraud or mistake, if any. The evidence on record points the Petitioners acting in good faith. To impeach the Petitioners’ titles, the Interested Party had to prove that the title of Continental Developers Ltd was not valid.
- 67. Section 26 (1) of the [Land Registration Act](#), confers to a registered owner an absolute and indefeasible title unless it is shown that it was obtained through fraud or misrepresentation to which the title holder is proved to have been a party to. Section 26 (1) of the [Land Registration Act](#) provides:
 - 1. The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-
 - a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. Where the certificate of title has been acquired illegally, unprocedurally or through

a corrupt scheme.

- 68. From the above provisions it is clear that a title can only be challenged on grounds of fraud or misrepresentation in obtaining the same and in such case, the registered proprietor has to be shown to have been a party to the fraudulent or illegal activities that led to him being registered as owner.



69. Fraud is a serious matter which must be specifically pleaded and proved to the required standard. In the case of *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* [2015] eKLR, the Court held that: -

“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt...”

70. In the present case I find that neither the Respondents nor the Interested Party tendered any evidence to show that the Petitioners acquired the subject suit from Continental Developers Limited fraudulently or through a corrupt scheme.

B. Whether the actions of the 1st Respondent amounted to violation or infringement of the petitioner’s constitutional rights.

71. The Petitioner has produced in evidence the Kenya Gazette Notice Number 5021 of 18th July, 2014. The said Gazette Notice shows that the titles to the suit property, amongst others, were revoked by the 1st Respondent. The reasons for revocation of the title to the suit properties were that the 1st Respondent had undertaken a review of grants and dispositions of public land to establish their legality or otherwise.

72. The Gazette Notice was followed by the Letter dated 12th October, 2016 addressed to the Directors of Eastend by the 1st Respondent confirming revocation of title to the suit properties pursuant to Section 14 of the *National Land Commission Act*. Following the revocation, the School was said to be occupying land reserved for public purpose, hence the notice to vacate.

73. Although the Gazette Notice that purported to nullify the Petitioner’s title to the suit property provides that the suit property was “reserved for public purpose”, the Respondents have not filed any document or evidence to show that indeed the suit property was reserved for public purpose or was acquired by the Petitioners unlawfully. Indeed, the 2nd Respondent, the Chief Land Registrar confirms that the suit properties are private land as they are duly registered to the Petitioners.

74. Furthermore, there is no evidence before this court to show that the Petitioner was heard before the alleged revocation of their title. The 1st Respondent did not produce minutes of the meetings confirming the attendance of the Petitioners. Article 47(1) and (2) of *the Constitution* provides as follows:

“47(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

75. In the case of *Pastoli vs. Kabale District Local Government Council & Others* (2008) 2 EA 300, the court held as follows:

“...Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision...”



76. In Republic –vs- The Honourable Chief Justice of Kenya & Others Ex-parte Moijo Mataiya Ole Keiwua, HCMA No. 1298 of 2004, the court held as follows:

“...The right to be heard has two facets, intrinsic and instrumental. The intrinsic value of that right consists in the opportunity which it gives to the individual or groups, against whom decisions taken by public authorities operate, to participate in the proceedings by which those decisions are made, an opportunity to express their dignity as persons. The ordinary rule which regulates all procedures is that persons who are likely to be affected by the proposed/likely action must be afforded an opportunity of being heard as to why that action should not be taken... As part of a reasonable, fair and just procedure the court has a cardinal duty to uphold the constitutional guarantees, the right to fair hearing which entails a liberal and dynamic approach in order to ensure the rights enjoyed by an individual is not violated...”

77. Considering that the Petitioners have that they were never heard before the 1st Respondent purported to revoke their title, it was upon the Respondents to show that indeed the Petitioners were heard. Having not demonstrated that the Petitioners were heard, this court finds that the Petitioners were not afforded an opportunity of being heard before the purported revocation of their title.

78. In the absence of evidence by the Respondents proving that the Petitioners’ title was procured fraudulently or by misrepresentation, and in view of the provisions of Article 40 (1) which protects the right to property, it is my finding that the 1st Respondent breached the provisions of Article 40(1) of *the Constitution* when it purported to revoke the Petitioners’ title vide Gazette Notice Number 5021 of 18th July, 2016, without affording them the right to a fair hearing.

iii. Whether the 1st Respondent can revoke a title.

79. It was contended that in purporting to revoke the Petitioners’ title, the 1st Respondent acted ultra vires. Article 62 of *the Constitution* of Kenya, 2010, provides the guiding principles of land policy, classifying land into three categories: public, community and private. The Article 62 defines public land, and states how it will be administered:

“(2) Public land shall vest in and be held by a County Government in trust for the people resident in the County, and shall be administered on their behalf by the National Land Commission, if it is classified under-

(a) Clause (1) (a), (c), (d) or (e); and

(b) Clause (1)(b), other than land held, used or occupied by

National state organ.

PARA 2.

Public land classified under clause (1)(f) to (m) shall vest in and be

held by the National Government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission.”

80. Article 67 of *the Constitution* provides for the establishment of the NLC and its functions include:

(a) to manage public land on behalf of the National and County Governments:

(b) to recommend a national land policy to the National Government



- (c) to advise the National Government on a comprehensive programme for the registration of title in land throughout Kenya;
 - (d) to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities;
 - (e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;
 - (f) to encourage the application of traditional dispute resolution mechanisms in land conflicts;
 - (g) to assess tax on land and premiums on immovable property in any area designated by law; and
 - (h) to monitor and have oversight responsibilities over land use planning throughout the country.
- (3) The National Land Commission may perform any other functions prescribed by National legislation.
81. To fulfil the object of Article 67(3) of *the Constitution*, the *National Land Commission Act* was enacted. The NLC Act stipulates the functions on the Commission. In the Matter of the National Land Commission [2015] eKLR, the Supreme Court discussed the purpose of NLC and in conclusion stated that:
- “the Commission was established to, inter alia, provide for the management and administration of public land; The roles of the NLC, according to the NLC Act, are in tandem with its roles in the *Land Act*. These include: allocation of land; disposing of public land; leasing and effecting change of user. These roles are the preparatory steps towards registering a title. Neither of the two statutes gives the NLC the function of registration of title, in express terms.”
82. From the foregoing provisions, it is evident that the 1st Respondent has no power whatsoever to revoke a title. As cited by the 2nd Respondent in its submission, in the case of Robert Mutiso Lelli and Cabin Crew Investments Limited vs National Land Commission & 3 Others (2017) eKLR Aburili J. held that:
- “I reiterate that the National Land Commission must not usurp the powers of a court of competent jurisdiction in as much as it has the power to inquire into how a title or disposition in public land was acquired. In this case, what the National Land Commission did was in effect to remove the pith of litigation from a court of competent jurisdiction and leave only a shell.”
83. Under section 14(4) of the *National Land Commission Act*, the Commission is only mandated to make a recommendation and not a determination on the issue of ownership of land. In the case of Mwangi Stephen Muriithi –vs- National Land Commission & 3 Others (2018) eKLR where the court held as follows:
- “I find that there is no provision empowering the Commission to revoke titles even, where it is established that the same were unlawfully or illegality acquired. The power to revoke title is vested in the Registrar and not the Commission which can only recommend ... in any case., the provisions of Article 67 (2) of *the Constitution* cited above is clear and overrides the provisions of Section 14(4) of the Act which provides that, after hearing the parties in



accordance with subsection (3), the Commission shall make a determination. To the extent that the Commission rendered a determination as opposed to a recommendation, I find that the decision is tainted with illegality.”

84. It is therefore my finding that the 1st Respondent acted beyond its jurisdiction in purporting to revoke the Petitioners’ title vide the Gazette Notice No.5021 of 2016.

iv. Whether the Petitioners are entitled to the orders sought

85. For the Petitioners to seek redress on a matter that involved a reference to *the Constitution*, it was important to not only clearly identify the relevant and specific Articles of *the Constitution* but avail evidence, through affidavit or otherwise of such violation as per the required standard set out in respect of the Constitutional Petition as set out in the case of Anarita Karimi Njeru vs The Republic (196-1980) KLR 1272 where it was held, in the words of the Justices Trevelyan and Hancox that:

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

86. In the instant suit, the Petitioners have set out their complaint with a reasonable degree of precision that their Constitutional rights as envisaged under Articles 40 and 47 of *the Constitution* had been violated by the Respondents herein. The Court has found that the Petitioner hold a valid title hence should be protected under Section 25 & 26 of the *Land Registration Act*.

87. It therefore follows that the Petitioners are entitled to the orders sought in the Petition including the removal of the Restrictions.

Conclusion

88. I find the Petitioners have proved their case on a balance of probabilities as against the Respondents and I enter judgment for the Petitioners in the following terms:-

- a. A permanent injunction is hereby issued restraining the 1st and 2nd Respondents by themselves, their agents and/or servants from transferring, interfering with the Petitioners’ ownership, occupation, use and enjoyment of the said parcels of land Nairobi/ Block 82/4284 (0.074 ha), Nairobi/ Block 82/42830(0.0518ha), Nairobi/Block 82/4281 (0.0518 ha), Nairobi/ Block 82/4280(0.0518 ha) situated within Donholm and Tena Estate within Nairobi County.
- b. A declaration be and is hereby issued that the Petitioners are the lawful owners of all those properties known as Nairobi/ Block 82/4284 (0.074 ha), Nairobi/ Block 82/42830(0.0518ha), Nairobi/Block 82/4281 (0.0518 ha), Nairobi/ Block 82/4280(0.0518 ha) situated within Donholm and Tena Estate within Nairobi County.
- c. A declaration be and is hereby issued that the cancellation of the Petitioners’ titles by the 1st Respondent was not only arbitrary but was also illegal, unlawful and unprocedural.
- d. An order be and is hereby issued directing the 2nd Respondent to remove all the restrictions on the Petitioner’s parcels of land Nairobi Block 82/4284 (0.074 ha), Nairobi/ Block 82/42830 (0.0518ha), Nairobi/Block 82/4281 (0.0518 ha), Nairobi/ Block 82/4280 (0.0518 ha) situated within Donholm and Tena Estate within Nairobi County.



e. Each party shall bear its own costs.

It is ordered.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF APRIL, 2024.

M.D. MWANGI

JUDGE

In the virtual presence:

Ms. Mwangi for the Petitioners.

Ms. Midenga for the Interested Party

Ms. Kubai for 2nd Respondent

Yvette: Court Assistant

M.D. MWANGI

JUDGE

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