IN COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), WARSAME & MAKHANDIA, JJ.A)

CIVIL APPEAL NO. 126 OF 2014

BETWEEN

SHREE VISA OSHWAL COMMUNITY

NAIROBI REGISTERED TRUSTEES.....APPELLANTS

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE COMMISSIONER OF LANDS.....2ND RESPONDENT

THE CABINET SECRETARY

IN CHARGE OF EDUCATION.....3RD RESPONDENT

HON. GIDEON KIOKO MBUVI.....4TH RESPONDENT

(An appeal from the judgment of the High Court Constitutional and Human Rights Division (Lenaola, J.), as he then was, dated7u 28th March 2014

in

H.C Petition No.262 of 2013)

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JUDGMENT OF THE COURT

By a grant dated 14th April, 1961 the Governor of the Colony and Protectorate of Kenya, on behalf of Her Majesty the Queen issued to the trustees of Shree Visa Oshwal Community of Nairobi (the appellants) all that parcel of land measuring approximately 4.14 acres located in Parklands area of today's Nairobi County and known as LR No. 209/5996 (the suit property) for a term of 99 years with effect from 1st January, 1954. The grant was subject to payment of an annual rent of Kshs. 72/=. It was also subject to the provisions and application of the Crown Lands Ordinance and some 12 special conditions. Pertinent to this dispute, those conditions were to the effect that the appellants would erect buildings of approved designs and standard; that the buildings so erected would be used as a school and one as a house for the school principal. It is, however, the application and interpretation of special condition No. 12 that precipitated the action from which this appeal has arisen. Being the nerve of this dispute, it is apposite to reproduce it. It provides that;

> **"12. Notwithstanding anything to the contrary contained herein or in the said Crown Lands Ordinance the Grantee shall on receipt of six months notice in writing in that behalf surrender all or any part of the land required for public purpose without payment of any compensation save in respect of such of the approved buildings as may have been evacuated or demolished".** (Our emphasis).

It was pursuant to this condition that on 1st September, 2003 the then City Council of Nairobi (the Council) compulsorily took over the property, forcing the appellant to bring a suit against the former in HCCC No. 1474 of 2005 for vacant possession and mesne profits. On 20th June, 2008 Nambuye, J (as she then was), before whom the case was placed rendered a judgment in which she declared that the appellants

were the registered lessee of the suit property and that the forcible taking of the school by the Council was not justified. While the learned Judge was persuaded that the appellants were entitled to mesne profits, she was not satisfied that Kshs. 1,000,000 or Kshs 800,000 per month claimed by the appellant was proved. She deferred the determination of that question and ordered the appellants to bring evidence at a later date. It is not apparent to us from the record whether that point was determined or whether Council challenged the decision.

What is clear however, is that, again pursuant to condition No. 12, this time round, the Commissioner of Lands (the 2nd respondent) not the Council, gave notice below to the appellants on 4th January, 2013.

> **"Dear Sirs,**
>
> **RE: VISA OSHWAL PRIMARY SCHOOL – LR. NO.209/5996 – GRANT NO.IR18152**
>
> **The Ministry of Lands has received complaints from the Ministry of Education that the above school, which is classified as a public school and registered as such, is being converted to a private/commercial school without any justification whatsoever.**
>
> **In this respect, and after consultations with the relevant stakeholders and institutions, and as a way of ensuring that the school remains a public school, the Government has decided to invoke special condition No.12 under Grant No.18152 for LR. No.209/5996 registered in your favour and on which the school is constructed.**
>
> **Under the circumstances, you are HEREBY given a 6 months notice with effect from the date hereof, to surrender all the land under Grant No18152 in public interest. Compensation for the buildings, if any, should be discussed and agreed upon with the Ministry of Education within the given period.**
>
> **This notice is however subject to and without prejudice to any ongoing Court cases touching on a similar subject".** (Our emphasis).

It is the allegation that the school standing on the suit property had been converted from public to a private/commercial school contrary to condition Nos. 3 and 4, hence the notice pursuant to condition No.12 to forfeit the suit property that aggrieved the appellants. As a result, they instituted a constitutional petition alleging violation of their rights and fundamental freedoms guaranteed by the Constitution. Specifically they sought the following reliefs;

> **"(a) A declaration that the Petitioner's fundamental rights and freedoms as enshrined under Articles 40, 47 and 48 have been contravened and infringed upon by the 2nd and 3rd respondents in their attempt to compulsorily acquire the property known as L.R. No. 209/5996 on Mpaka Road situate in the City of Nairobi which is the subject of Grant No.I.R.18152, without following the provisions of statute and without recognition of the Petitioner's enshrined constitutional rights.**
>
> **(b) A declaration that special condition number 12 under Grant No.18152 for L.R. No.209/6996 is unconstitutional, null, void and ineffective as against the Petitioner by virtue of being contrary to the provisions of Articles 40 and 47 of the Constitution of Kenya.**
>
> **(c) A permanent injunction restraining the 2nd and 3rd respondents whether by themselves or by their servants, agents or otherwise howsoever from trespassing, alienating and/or in any way whatsoever interfering with the Petitioner's quiet possession over the land situate in the City of Nairobi which is the subject of Grant No.I.R.18152 issued under the Registration of Titles Ordinance, Cap 160, by purporting to invoke the said special condition number 12.**
>
> **(d) A permanent injunction restraining the 2nd and 3rd Respondents whether by themselves or by their servants, agents or otherwise howsoever from purporting to evict the Applicant/Petitioners from all that piece of land known as L.R.No.209/5996 situate in the City of Nairobi which is the subject of Grant No. I.R.18152 issued under the Registration of Titles ordinance, Cap 160, by purporting to invoke the said special condition number 12.**
>
> **(e) An order of compensation for damage suffered by the respondents as a result of their attempts to exercise special condition No.12 under the said Grant in contravention of Articles 40 and 47 of the Constitution of Kenya.**
>
> **(f) Such other and/or further relief as this Honourable court may deem fit and just to grant.**
>
> **(g) The costs of and occasioned by the Application be provided for".**

To determine the controversy, the High Court, (Lenaola, J.), as he then was, identified a single broad issue; whether Special Condition No. 12 of the Grant was in contravention of **Articles 40, 47(1)** and **48** of the Constitution.

He found no material from which to draw a conclusion that the appellants' rights under those provisions were violated. He said;

> **"55. Looking at the Condition against the Constitution and the facts of this case, I am clear in my mind that the Commissioner of Lands and the Respondents are not in violation of the Petitioner's constitutional rights to property. I say so because in issuing the letter of 4th January 2013, the Commissioner of Lands at paragraph 3 stated as follows;**
>
> **'*Under the circumstances, you are hereby given 6 months' notice with effect from the date hereof, to surrender all the***

land under Grant No. 18152 in public interest. Compensation for the buildings, if any should be discussed and agreed upon with the Ministry of Education within the given period.'

56. As can be seen, there is evidence that the Minister gave the Petitioner information that he intended to pay compensation for the buildings which the Petitioner had put up in the suit property. I find that action of the Respondents to be in accordance with the spirit of Article 40 of the Constitution. The Petitioners have a claim over the buildings erected on the suit property and I have shown why elsewhere above. They were invited to a discussion on the compensation to be made, but instead of pursuing the discussion, they chose to file this Petition. It is against that background that I also find that this Petition is premature and was filed in bad faith notwithstanding Article 40(3)(b)(ii)."

On whether Visa Oshwal Primary School was a public or private school, the learned Judge expressed himself as follows:

"45. This means that from the records of the Ministry of Education, the school is a public school as the earlier certificate classifying the school as private was immediately revoked a month later by another certificate classifying the school as public. If that be so, I am constrained to ask myself, why did the Petitioner fail to challenge that nullification. In the absence of any other evidence, I must find that the school has been a public school since its registration and therefore, under Condition No. 4 of the Special Conditions contained in the Grant it was to operate as a public school, and accordingly any change in the functioning of the school as a public school meant that the land would revert back to the Government.

46. But suppose I am wrong I would still arrive at the same decision given that the Petitioner has not controverted the evidence on record that the school has always received teachers from TSC; received monetary support for the free primary school programme; is managed by the PTA; its Headmaster is appointed by the Director of City Education on behalf of TSC and the Director of City Education constituted PTA as a nominee. All these factors would indicate that Visa Oshwal Primary School is a public school and any attempts at converting it to a private school from a purely historical factor is unsupported by the law and the facts before me." *(Our emphasis).*

On whether the appellants' right to fair administrative action was violated, the learned Judge found that the appellants were, as a matter of fact, given reasons in the letter of 4th January, 2013; and that the 2nd respondent had informed the appellants that they would be compensated for the buildings on the suit property.

The dismissal of the petition naturally aggrieved the appellants who now place 13 grounds of appeal before us, subsequently condensed into 3 broad clusters in their written submissions. In highlighting those submissions, Mr. Mwangi, learned counsel contended that the learned Judge erred by finding that special condition No. 12 of the Grant did not violate the appellant's right to property under **Article 40(3)(b)** of the Constitution; that by relying on special condition Nos. 3 and 4 and finding that the school ought to have been operated as a public school, the Judge misapplied the two conditions which only required the land to be used as "a school" without insisting that the school be private or public; that by upholding the terms of condition No. 12, the learned Judge, in effect, sanctioned that the State was entitled to acquire or demand for the surrender of suit property without due process under the law. According to the appellants, the direction in the notice to discuss with the Minister the possibility of compensation was against the threshold established under **section 75** of the former Constitution, **Article 40(3)(b)** of the current Constitution, **section 77(1)** of the Government Lands Act (repealed) and **sections 107** to **118** of the Land Act; and that it was in error for the learned Judge to conclude that the petition for protection of the appellants' right to property was premature when the letter from the 2nd respondent had threatened to violate those rights. Counsel relied on the cases of **Clarke V Sondhi Ltd** (1963) EA 107, **Coastal Aquaculture & Anor V Commissioner of Lands**, Civil Appeal No. 252 of 1996 and **Resley V The City Council of Nairobi** (2006) 2 EA 311.

Opposing the appeal, Mr. Githinji, learned counsel for the 1st, 2nd and 3rd respondents was of the view that the only three issues to be determined in this appeal relate to the classification of the school, public or private; whether the appellant's right to property was violated; and whether the appellant's right to fair administrative action was violated. On the first issue counsel relied on the interpretation of **section 2** of the Education Act which defines a public school to mean, **"a school maintained or assisted out of public funds."** Counsel additionally relied on the provisions of **section 43(1) (a)** of the Basic Education Act which defines a public school as one which is established, owned and operated by the Government and include sponsored schools and private schools operated by private individuals, entrepreneurs and institutions; and that as a sponsor under the Act, the Government has made significant contribution and impact on the academic, financial, infrastructural and spiritual development of the school making it a public school. Counsel concluded on this point that the High Court correctly established that the school was a public entity.

Regarding whether the appellant's right to property was violated, counsel conceded that **Part VIII** of the Land Act provides for the procedure for compulsory acquisition but insists that, for this to happen, the land has to be privately owned in the first place. Accordingly, he submitted, the suit property being trust land or community land in terms of **Article 63(2)(a)** of the Constitution, the Government did not have to invoke the provisions of the Land Act dealing with compulsory acquisition. Relying on the provisions of **sections 26** and **23** of the Land Act, counsel submitted that the law recognizes special conditions under a Grant that cannot be ignored; that the appellants failed to demonstrate that they bought the suit property and paid consideration for it; that they also failed to demonstrate that they had indefeasible title to the land; and that the only title document the appellants have is a certificate of grant which does not give them absolute ownership to the land and the buildings thereon. Finally, counsel submitted that the notice of 4th January, 2013 was in compliance with **Article 47(2)** of the Constitution and the appellants right to fair administrative action was not violated.

On her part, Ms. Mbichire, learned counsel for the 4th respondent submitted in opposition to the appeal that, since the suit property was found to be public land, ownership of the same could not be acquired by a private citizen or entity through a court order; that since the appellant was granted the suit property to hold in trust for the school, it cannot argue that the school was not defined as public or private; that the learned Judge correctly found that the school had been erected on the suit property to be administered under the provisions of the Education Ordinance, 1952 and any departure from that purpose would automatically cause the land to revert to Her Majesty. Counsel cited **Adan Abdikadir Hassan & 2 Others V the Registrar of Titles, Ministry of Lands** HCCC Petition No.7 of 2012 and **James Joram Nyaga** & **Anor V The Attorney General & 2 Others**, Misc Civil Application No.1732 of 2004 to support these arguments.

To recapitulate, the appellants sought a declaration that the special condition No. 12 violated **Articles 40** and **47** of the Constitution in so far as it purported to compulsorily acquire the suit property for a public purpose without payment of any compensation except for buildings that may have been "**evacuated or demolished".** Further, it sought to restrain the respondents by an order of permanent injunction from trespassing, alienating, or interfering with or evicting the appellants from the suit property. As we have pointed out, the dispute was triggered by the 2nd respondent's notice of 4th January, 2013 accusing the appellants of converting the school from a public to private school without any justification. Consequently, the 2nd respondent invoked special condition No.12 under Grant **"as a way of ensuring that the school remains a public school".**

The history of this dispute leading to the institution of the petition is chequered. It will be remembered, for example, that in the year 2003, the appellants moved the High Court by an amended plaint in HCCC No. 655 of 2003 to stop the Council from establishing a committee to manage the school and for a declaration that the school was not a maintained school in terms of **sections 2, 7**, and **9** of the Education Act. Again, we have noted previously that it is not apparent from the record how that action ended. Subsequently, the appellant filed HCCC No. 1474 of 2005 against the Council alleging that the latter had purportedly taken over the school and converted it to a public school. For that reason, they sought in the suit, possession of the suit property, mesne profits at Kshs 1,000,000 per month from 1st September, 2003 until date of possession. The respondents resisted the action in a statement of defence and applied by a counterclaim for the nullification of the appellants' title. The appellants applied for the striking out of both the defence and counterclaim. In granting the prayers on 2nd March, 2007 the Court, (Nambuye, J. as she then was) found no substance in the defence and counterclaim and struck both out. The prayer for mesne profits was set down for hearing.

It is apparent to us that the judgment rendered by Nambuye, J on 20th June, 2008 was pursuant to the orders of 2nd March, 2007. The learned Judge once more stressed that the appellants' title to the suit property could not be defeated without following the law, and ordered the Council to give vacant possession to the appellants. It was as a result of this order that the suit property was restored to the appellants. Assessment of mesne profits was once again deferred. There is no suggestion that the two decisions in HCCC No. 1474 of 2005 were appealed.

It was after these court events that the 2nd respondents then issued the impugned notice of 4th January, 2013 raising the only predominant issue in this appeal; whether the appellants were in violation the terms of the grant, thereby inviting the invocation of condition No. 12. The answer to that question will settle the other related issues as to whether the appellants' rights to property and to fair administrative action were infringed.

In considering this question, we remind ourselves of our duty as a first appellate court under Rule 29 of the Court of Appeal Rules, as has been stated time without end; to re-evaluate the evidence on record and thereafter to draw our own independent conclusions. See **Kenya Ports Authority V Kusthon (Kenya) Limited** [2009] 2 EA 212.

There is no dispute whatsoever that the appellants were granted a certificate of incorporation and registered as trustees in 1965 following two resolutions of the Visa Oshwal Community in 1961 and 1962, respectively. They were to hold in trust for the community several properties described in the schedule to the certificate. The suit property was one of the properties listed in the schedule. Likewise, there is no controversy that the Grant to the suit property was issued to the appellants on 14th April, 1961 by the Acting Commissioner of Lands, James Aloysius O'Loughlin, on behalf of the Governor; that the grant was issued under the Registration of Titles Ordinance for a term of 99 years from 1st January, 1964; that the Grant, as we have said earlier was subject to, one, payment of the annual rent, two, the provisions of Crown Lands Ordinance, and, three, the 12 special conditions aforesaid. The Crown Lands Ordinance was repealed and replaced by the Government Lands Act, just as the Registration of Titles Act, replaced Registration of Titles Ordinance. Both the Government Lands Act and the Registration of Titles Act have since also been repealed by the Land Registration Act, 2012.

While the respondents accused the appellants of being in breach of a term of the special conditions that "prohibits" them from converting the school from public to private, the appellants have maintained that the school has all along been run as a private entity and that the Grant did not restrict them to a specific category of school. The terms of the Grant are therefore key in deciding this appeal. In the result, we reproduce condition Nos. 3 and 4 of the Special Conditions which constitute the centre board of this dispute.

> **"(3) The land and buildings shall only be used for the erection of a school and for one house for the accommodation of the Principal employed in connection therewith**." (Our emphasis).
>
> **"If the school erected on the land shall cease to function as such under the provisions of the Education Ordinance, 1952 then the terms hereby created shall *ipso facto* shall also be determined and the land shall be deemed automatically to have reverted to Her Majesty as from the date of such cessation without the necessity of any formal surrender thereof."**

Our plain reading of these two conditions is that the suit property was to be used only for the construction of a school and one residential house and that should it cease to function as such under the provisions of the Education Ordinance, 1952 it would be repossessed. The key words in the two conditions are, **"a school'**, **"the school"**, **"as such"**. What was to be erected on the suit property was **"a school"**. It was a condition of the Grant that if **"the school"** constructed on suit property ceased to be a school, then the Grant to the appellants would be surrendered. It is apparent that the condition did not specify the category of school, private or public, day or boarding, IGCSE or 8-4-4.

It was therefore erroneous, in the first place for the 2nd respondent, to base the notice of 4th January, 2013 on the breach of a condition that did not exist. With respect, the learned Judge was similarly drawn into this very error and considered the wrong question; whether the school was a private or public and thereby came to the wrong determination; that the appellants were in breach the Grant hence the notice of forfeiture and surrender of the suit property was properly issued. We reiterate that whether the school was run as a private or public entity was immaterial in so far as the appellants' lease was concerned. It was an administrative issue. We have come to this conclusion because when the school was registered in 1954, the registration certificate issued on 11th February, 1954 described the school only as **"primary"** school. Several years later on 9th July, 1997 the Ministry of Education, Science and Technology issued another registration certificate which

classified the school as **"private".** That certificate was expressed to have canceled the 1954 certificate. Subjects to be taught at the school were specified as 8-4-4 and IGCSE curriculum. Then one month later, on 12th August, 1997, another certificate superseding the one of 9th July, 1997 was issued. This time the school was categorized as "**public**" and offering 8-4-4 curriculum. Clearly for us, whether the school was operated as a private or public entity was not a condition upon which the appellants' lease depended, otherwise, how does one explain the oscillation in one month between **"private" and public"** school. It can even be argued that it was not the appellants that converted the school to a private entity, having been so described by the Ministry by the Ministry itself at inception. Likewise, it was the Ministry that christened it "**public**". We do not think that the Legislature in enacting special condition Nos. 3 and 4 intended there to be a distinction between private, public or day or boarding schools. Those conditions, in our assessment were aimed at discouraging lessees from departing from the use specified in the lease. For instance, in the matter before us, if the appellants were to construct a temple instead of a school on the suit property, or convert the existing school into a shopping mall, then the lessor would be justified to recall the Grant. There are of course schools that offer both IGCSE and 8-4-4 curriculums depending on the parents and students preference and charging difference school fees.

If, as we have found, the appellants were not in breach of the terms of the Grant. We now turn to answer the question whether their rights and fundamental freedoms under **Articles 40, 47** and **48** were infringed upon by the respondents in giving notice of forfeiture of the suit property; whether special condition No. 12 was inconsistent with the Constitution and therefore void and ineffective as against the appellants; and whether for those reasons the appellants were entitled to protection.

The effect of registration under the Land Registration Act either as a proprietor of land or of a lease shall vest in the latter:—

> **"(a) .....**
>
> **(b) ... the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease".** (Our emphasis). See **section 24** of the Land Registration Act.

On the other hand it is an implied covenant and condition by the lessor under **section 23** of the Land Act that;

> **"23. (1) (a) .....**
>
> **(b) .... the lessee, paying the rent and fulfilling the conditions of the lease, shall enjoy quiet possession of the premises without interruption by the lessor or any person claiming under the lessor, except so far as the laws for the time being in force may permit".** (Our emphasis).

Bearing in mind these guarantees, we are left in no doubt that the registration of the appellants as the proprietor of a lease vested in them, leasehold interest described in the lease, including a guaranteed that, so long as they remained within the terms of the lease they would hold the suit property for 99 years.

We have already determined that there was no evidence that the appellants had contravened condition 4 or any of the special conditions contained in the lease. Even if there was contravention of any of the terms of the lease, **section 31** of the Land Act, 2012 which was already in force at the time the impugned notice was issued provides for the procedure for forfeiture. It reads;

> **31. (1) If any part of the rent or royalties reserved in a lease under this Act is unpaid for a period of twelve months after becoming due, or if the lessee breaches any express or implied covenant, the Commission may—**
>
> **(a) serve a notice upon the lessee, specifying the rent or royalties in arrears or the covenant of which a breach has been committed; and**
>
> **(b) commence an action in Court for the recovery of the land at any time at least one month after serving the notice contemplated in paragraph (a).**
>
> **(2) In an action commenced under subsection (1)(b) on proof of the facts, the Court shall declare the lease forfeited, subject to relief upon such terms as may appear just.**
>
> **(3) If the Court has declared a lease to be forfeited under subsection (2), the Commission may re-enter upon the land".** (Our emphasis).

Considering the principle of sanctity of title and bearing in mind the length of the lease, (99 years), the procedure set out above is intended to cushion lessees against arbitrary deprivation of property. In the words of **Article 40(2)** Parliament cannot enact any law that would permit the State or any person to arbitrarily deprive another person of his property or of any interest in, or take away his right over any property of any description. The suit property being land held by the appellants under a leasehold tenure is, by dint of **Article 64(b)** of the Constitution, private land. Therefore, the appellants could only be dispossessed of it in the public interest and even then in accordance with the law. The Constitution and the law require, *inter alia,* the prompt payment in full, of just compensation to the property owner or lessee, who in turn has a right to challenge in a court of law any decision that compromises his interest or right over the lease and to question the legality of any alleged deprivation of that interest. See **Article 40** and **sections 111** to **119** of the Land Act.

To the extent that the 2nd respondent purported to invoke special condition No.12 of the Grant, citing violation of a non-existent or undisclosed term to demand the surrender of the suit property and; for the reason that the notice merely gave the appellants 6 months notice to surrender the suit property without following the procedure laid down in **section 31** aforesaid and; without giving them a fair hearing, the

learned Judge ought to have declared that the appellants' rights and fundamental freedoms guaranteed in **Articles 40**, **47** and **48** were infringed.

The impugned notice, without particulars merely relied on an allegation that the Ministry of Lands had received complaints from the Ministry of Education that the school, was **"being converted to a private/commercial school"**. It then went ahead and purported to invoke special condition No.12 on the basis of which it demanded that, within 6 months from the date of the notice, the appellants should surrender the entire suit property for public use. It also made it clear that if any compensation for the buildings, was to be made it would be subject to discussion and agreement with the Ministry of Education. The demand to the appellants to surrender the suit property in the way we have explained was indeed the real grievance in the dispute.

Section 4 of the Fair Administrative Action Act assures everyone of an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair; that apart from being given written reasons why any administrative action is, is being or has been taken against him, the person likely to be adversely affected must;

> **"(b) have an opportunity to be heard and to make representations in that regard.....and the administrator shall accord the person against whom administrative action is taken an opportunity to-**
>
> **(a) attend proceedings, in person or in the company of an expert of his choice;**
>
> **(b) be heard;**
>
> **(c) cross-examine persons who give adverse evidence against him".**

With respect, we do not accept as correct the conclusion by the learned Judge that special condition No. 12 did not infringe the appellants' rights and fundamental freedoms when it expressly and in contravention of the law we have cited, purported to automatically deprive the appellants of the suit property at the expiration of the notice period without hearing them. It is only by an action in the High Court for the recovery of the suit property that the appellants' lease over the suit property can be declared as forfeited, and the 2nd respondent allowed to re-enter upon the suit property. It must always be remembered that when Parliament confers powers on public authority with a clear framework of how those powers are to be exercised, there is an obligation on the public authority concerned to strictly comply with that procedure in order to render its decision valid. See: **Cullimore vs Lyme Regis Corporation** (1962) I Q B 718 and **Jacqueline Resley V. The Nairobi City Council** H.C Misc. Application No. 1517 of 2001.

Apart from **Article 40** providing the right for every person to acquire and own property of any description in any part of Kenya, it prohibits Parliament from enacting a law that permits the State or any person to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description, unless, among other things the deprivation 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".** (Our emphasis).

Similarly, the learned Judge erred in not declaring that special condition No. 12 was contrary to the Constitution and the law. Condition No. 12 has infact been superseded by more progressive laws that take into account due process.

As soon as the Council or the 2nd respondent issued a notice to the appellants threatening their title, **Article 258** of the Constitution permitted them **"to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention".**

As a consequence of the threats by the 2nd respondent, and there being no basis for requiring the appellants to surrender the lease, the appellants deserved some measure of protection in the form of a permanent injunction to restrain the 2nd and 3rd respondents from interfering with their quiet possession of the suit property by purporting to invoke the said special condition No. 12 and to stop the respondents from trying to evict the appellants from the suit property on the basis of special condition No. 12.

In their petition the appellants prayed for compensation for damage suffered as a result of the respondents' **"attempts to exercise special condition No.12"**. By **Article 23** the High Court may, in any proceedings in which it is alleged that a person's right or fundamental freedoms have been denied, violated or threatened, grant, *inter alia-*

> (a) a declaration of rights;
>
> (b) an injunction;
>
> (c) a conservatory order;
>
> (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under **Article 24;**

(e) an order for compensation; and

(f) an order of judicial review.

In **Gitobu Imanyara & 2 others V Attorney General,** Civil Appeal No. 98 of 2014, the Court considered what would be appropriate remedy for injuries arising out of the violation of constitutional rights and fundamental freedoms of an individual by the State. It explained that the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the constitutionally guaranteed rights and prevent or deter future infringements. A declaration by the court will articulate the fact of the violation, but if the person wronged has suffered damage, the court may award him compensation. In **Tamara Merson v Drexel Cartwright and Ag (Bahamas)** Privy Council Appeal No. 61 of 2003 cited with approval in **Gitobu Imanyara & 2 others V Attorney General,** the Privy Council opined that in some cases, a suitable declaration may suffice to vindicate the right which has been breached.

Turning to the matter before us, it ought to be pointed out that, unlike HCCC No. 1474 of 2005 where the Council was said to have dispossessed the appellants of the school for sometime, for which the appellants sought compensation, the situation here is different. Here the appellants only received a notice. They have not demonstrated the nature of damage they have suffered as a result of the notice to warrant an order of compensation. In accordance with **Article 23** a declaration of rights and an injunction are in themselves appropriate relief and it is so ordered.

Accordingly we allow this appeal with no orders as to costs.

Dated and delivered at Nairobi this 22nd day of February, 2019.

W. OUKO, (P)

…….

JUDGE OF APPEAL

M. WARSAME

…….

JUDGE OF APPEAL

ASIKE – MAKHANDIA

…….

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR