IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), SICHALE & ODEK, JJA)

CIVIL APPEAL NO. 156 OF 2013

BETWEEN

ELIZABETH WAMBUI GITHINJI.....1ST APPELLANT

KEVIN KARIUKI.....2ND APPELLANT

JOHN MWANGI.....3RD APPELLANT

JONATHAN QUAIL.....4TH APPELLANT

JANE WAIKENDA.....5TH APPELLANT

GERALD MUIGAI.....6THAPPELLANT

DAVID THIGE.....7TH APPELLANT

AUGUSTINE AGHAULOR.....8TH APPELLANT

SUSAN WANGECHI KANYORA.....9TH APPELLANT

JAMES GACHARIA KIRURI.....10TH APPELLANT

IBRAHIM THIAW.....11TH APPELLANT

ANN NJERI NDUMU.....12TH APPELLANT

MICHAEL NDONG'O KANYOGO.....13TH APPELLANT

IAN FERNANDES.....14TH APPELLANT

FRANCIS KIARIE.....15TH APPELLANT

MICROLAND INVESTMENTS LIMITED.....16TH APPELLANT

SAMUEL OMARI.....17TH APPELLANT

DO IT QUALITY MANAGEMENT LIMITED.....18TH APPELLANT

ASAKA NYANGARA.....19TH APPELLANT

RAEL LUMBASI.....20TH APPELLANT

DAVID MUSILA.....21ST APPELLANT

RAJESH JOSHI.....22ND APPELLANT

ATIF DARR.....23RD APPELLANT

LEONARD ANGAINE.....24TH APPELLANT

THOMAS NJUGUNA.....25TH APPELLANT

PILLAMART PROPERTIES LIMITED.....26TH APPELLANT

PATRICK NDIRANGU KIMEMIA.....27TH APPELLANT

PETER NJENGA MUHIKA.....28TH APPELLANT

TEXCAL HOUSE SERVICE STATION LIMITED...29TH APPELLANT

AND

KENYA URBAN ROADS AUTHORITY.....1ST RESPONDENT

THE MINISTRY OF ROADS.....2ND RESPONDENT

THE MINISTRY OF LANDS.....3RD RESPONDENT

KENYA NATIONAL HIGHWAY AUTHORITY.....4TH RESPONDENT

THE ATTORNEY GENERAL.....5TH RESPONDENT

CONSOLIDATED WITH

CIVIL APPEAL NO. 160 OF 2013

BETWEEN

CYCAD PROPERTIES LIMITED.....APPELLANT

AND

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE MINISTER, MINISTRY OF ROADS.....2ND RESPONDENT

THE MINISTER, MINISTRY OF LANDS.....3RD RESPONDENT

THE NATIONAL HIGHWAY AUTHORITY.....4TH RESPONDENT

KENYA URBAN ROADS AUTHORITY.....5TH RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya at Nairobi (Mumbi Ngugi J.) dated 25th April 2013

in

Nairobi Petition No. 69 and 70 of 2010)

****

JUDGMENT OF OUKO, (P)

Just as the sanctity of a person's property in the English common law was recognised in the famous *dictum* that **"an Englishman's home**

(or occasionally, house) is his castle and fortress", the Constitution and land laws in Kenya protect, as fundamental the right to acquire and own property of any description; and in any part of Kenya. This sanctity was so important in the days of old that one Right Honourable, ***William Pitt, 1st Earl of Chatham*** graphically explained it thus;

> ***"The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail - its roof may shake - the wind may blow through it - the storm may enter - the rain may enter - but the King of England cannot enter."***

In Kenya the attachment to land is passionate, emotional and almost fanatical. Nations, neighbours, siblings, spouses and even strangers fight over land. In some instances, the disputes degenerate into bloodshed and death. This Court in **Gitamaiyu Trading Company Ltd v Nyakinyua Mugumo Kiambaa Co. Ltd & 11 others Civil Appeal No. 84 of 2013**, explained why land is such an important asset thus;

> **"Land, no doubt, is not only the most important factor of production but also a very emotive issue in Kenya. Land remains the most notable source of frequent conflicts between persons and communities."**

It is for this reason that most constitutions guarantee the right to property. Nuisance and trespass laws give every property owner the right to use and enjoy his or her property reasonably, without unreasonable interference by others. Not even the Government can interfere with that right and the Bill of Rights guarantees that protection. It is in the context of this protection of the land owner by the law that the contest in this appeal should be understood.

The following are the events leading to the filing of the petition by the appellants in the High Court, the decision from which has given rise to this appeal.

In 2010, the homes of the appellants in Runda Mimosa Estate, Nairobi were earmarked for demolition by the Government to the extent specified in metres by the inscription on their fences on allegations that they were built on a road reserve. Alarmed by this, the 29 appellants in **Civil Appeal No. 69 of 2010** and the sole appellant in **Civil Appeal No. 70 of 2010** (***Cycad***) petitioned the High Court invoking ***Article 40*** of the Constitution and ***section 27*** of the Registered Land Act (now repealed) for protection. In their combined effect both petitions asked the court to declare that;

> ***i. ..... the Petitioners' rights, individually or in association with others, to acquire and own property without arbitrarily being deprived of the same as guaranteed by Article 40 of the Constitution have been and will be contravened if the intended unlawful and illegal demolition is effected***
>
> ***ii. … the decision by the 2nd, 4th and 5th Respondents to illegally and arbitrarily acquire the Petitioners' property is null, void to the extent that it violates the fundamental rights and freedoms of the Petitioners as envisaged under Article 40 of the Constitution.***
>
> ***iii. … the intended action of the Ministry of Roads, whether pursuant to any plans, contravenes the express records at the Ministry of Lands and that the valid documents are those at the Ministry of Lands.***
>
> ***iv. … the Ministry of Lands being the legal and sole repository of land records in Kenya, the Petitioners were not under any duty to check the records or plans of any other Ministry in respect of land.***
>
> ***v. … pursuant to an interpretation of Article 20 of the Constitution, if there is any conflict between two government ministries, the court shall adopt the interpretation that favours the enforcement or protection of a right or fundamental freedom.***
>
> ***vi. … in the alternative, the Ministry of Lands shall make prompt payment in full of just compensation to the petitioners pursuant to the express provision of Article 40 of the Constitution.***
>
> **…."**

The two petitions were consolidated and heard together. It has been the appellants' case that they purchased their respective parcels from the vendors, **Runda Coffee Estate Limited** who had themselves purchased them from the original owners, ***Edith Gladys Cockburn***, ***Estav Limited*** and ***Mimosa Plantations Limited*** on diverse dates; that they only purchased the properties after conducting due diligence and being satisfied that they belonged to those in whose names they were registered as proprietors; and that thereafter they have invested heavily in developing the properties. For instance, ***Cycad*** swore that it has invested in excess of Kshs. 600,000,000.00 in the construction of 19 residential houses, ancillary facilities and a perimeter wall; and that it has sold some of the houses to third parties under long term leases for the unexpired terms of its lease. The other appellants estimate to have expended in excess of Kshs. 35,000,000 also in putting up their respective homes. The appellants also deposed that they sought and obtained all the approvals required by the **National Environment Management Authority** (**NEMA**) and the then City Council of Nairobi before embarking on developing the properties; that if part of the appellants' properties were compulsorily acquired, the acquisition process was incomplete and the fact of acquisition was not reflected in the register at the

Lands Office; that they had not been notified of the intention by the Government to compulsorily acquire their property in accordance with ***Article 40(3)*** of the Constitution; and that the intended demolition would violate ***Articles 40*** and ***64*** of the Constitution and ***section 27*** of the Registered Land Act.

The respondents for their part justified the intended demolition of the appellants' properties on the ground that they encroached by 20 metres

on the road reserve being part of the land the Government had acquired in the 1970s through compulsory acquisition under the repealed Land Acquisition Act, 1968; that this was necessitated by the need to solve the perennial problem of vehicular traffic around the city of Nairobi; that the appellants cannot seek to hold the Government liable they when had been misled by the surveyors they themselves had privately hired; that the specific portions of the appellants' properties that encroach on the road reserve were illegally annexed and therefore not protected by ***Article 40(1)*** of the Constitution; that the survey plans, including one done in 1978 were clear that the width of the road was 80 metres, a fact that was in the public domain, which the appellants or their surveyors, through due diligence could have ascertained; that the sums that the public stood to lose in the contract in the event the proposed construction is stalled was far much more than what the appellants' have invested in their properties.

Parties called evidence. The appellants demonstrated that they hold titles or leases issued by the Government and that these titles have neither been cancelled nor revoked; they relied on the records at the Director of Surveys and the Commissioner of Lands which they contended showed that the approved road reserve along the suit properties is 60 metres which information was obtained at the time of purchasing the suit properties; that they were not the owners of the mother titles at the time of the alleged acquisition; that they did not conduct or commission the impugned subdivision surveys on L.R. No. 7785/9 that placed the beacons "N21" at a point where the road reserve was 60 metres; that they were bona fide purchasers for value, and their titles could only be impugned if fraud, to which they were parties, was proved; and that as there was no valid acquisition of the land in question in 1970 due to failure on the part of the Government to follow the provisions of the Land Acquisition Act, the respondents could not now claim that the appellants had encroached on 20 metres of the road reserve.

The respondents for their part gave evidence to the effect that the subject property was part of Government land duly acquired through the process of compulsory acquisition, way back in the 1970s; that upon identification of the proposed road reserve, consultants were engaged to prepare detailed Land Acquisition Plan Sheets which served to accurately determine the size and dimensions of the land necessary for acquisition for purposes of road reserves; that the Commissioner of Lands caused notices to be issued to the persons interested in the lands earmarked for acquisition; that the Notice was published on 20th November, 1970 in the Kenya Gazette vide Gazette Notice No. 3439 covering inter alia, 6.420 acres from L.R. No. 23 then owned by ***Edith Gladys Cockburn***, 16.061 acres from L.R. No. 7785/9 then owned by **Estav Limited** and 27.984 acres from L.R. No. 7785/10 then owned by **Runda Coffee Estate Limited;** that the Government subsequently published a Notice of Inquiry on 20th November, 1970 and thereafter made compensation payments to the owners of the land acquired; that as a result, the acquired portions of the respective titles reverted back to the Government; that all the Survey Plans presented by the appellants do not reflect a true and accurate position on the ground as the drafters thereof drew up the plans well after the Government acquisition but deliberately omitted to reflect the total area acquired by the Government in 1970; that the appellants, were victims of their own private surveyors impropriety for failing to reflect the total area covered by the Northern Bypass and of the vendors, **Mimosa Plantations Limited**, from whom they purchased the properties; that the compulsory acquisition was finalised in compliance with the law and a survey plan number F/R 141/14 showing the width of the road as 80 metres.

At the end of the hearing and submissions, the court moved to the *locus in quo* in order to form its own impression on the matters in controversy. In the meantime, it directed the Director of Surveys **"to assist the court with the issues in dispute".** According to ***Reuben Mwenda Murugu***, a Senior Assistant Director of Survey in the Ministry of Lands, he carried out the survey in accordance with the directions of the Permanent Secretary, Ministry of Roads who sought of him to clarify **"whether the road in dispute is 60 metres or 80 metres"**. In his report after visiting the *locus* ***Murugu*** stated that L.R. No. 7785/9 neighbours L.R No. 7785/10 to the East and L.R. 12672 (original No. L.R 23) to the West; that in L.R. 7785/10, a provision of 80 metres road reserve for the Northern Bypass was made as shown in Plan Nos. 131/10, 131/14, 131/17 and 131/69 which are dated 1976 and 1979, respectively; that with respect to L.R. No. 7785/9 and L.R No. 12672 a provision of 60 metres was made by ***Mr. Wabaru*** in 1990 and 1993 respectively; and that on the ground, as the road enters L.R 7785/9 from L.R 7785/10, it narrows; that the road cannot have two different widths; and that from his assessment the width of the road at the point of the dispute should have been 80 metres.

The trial court granted leave to the appellants to have the report subjected to further consideration by their own surveyor, and subsequently for both surveyors' evidence to be subjected to cross-examination.

Pursuant to this, the appellants presented their position through ***John Dominic Obel***, a licensed surveyor. According to ***Mr. Obel***, the properties in question L.R. No. 7785/9 and L.R No. 12672 do not encroach on any road reserve as the road width was surveyed as 60 and not 80 metres; that the survey plans confirming this were checked, approved and authenticated by the Director of Surveys as required by the Survey Act and form part of current official survey records of which the Director of Surveys is the sole custodian. As the custodian, the Director was required to have checked and confirmed the correctness of the beacons; that he would have rejected the survey and subdivision plans if the width of the road approved had been 80 metres instead of 60 metres.

Mr. Obel confirmed that in carrying out a survey, a surveyor prepares the plan using survey control points, which are existing beacons. He conceded that in the case of 7785/9, the nearest survey plan existing from which point he would use beacons was the survey plan for L.R 7785/10.

The learned Judge identified the following single question for determination. She said;

> ***"..... the matters before me being petitions alleging violation of the petitioners' constitutional rights, I believe that they call for determination of one main issue: Does the claim by the respondents that the Northern Bypass is 80 metres, and therefore their intended demolition of the petitioners' properties which allegedly encroach on 20 metres of the road reserve, amount to a violation of the petitioners' rights under Article 40 of the Constitution"?***

Before answering that question, the Judge determined whether the appellants could challenge the Government's compulsory acquisition of land which took place in the 1970s, the contest being whether the Government followed and completed the due process of land acquisition as required under the Constitution and the repealed Land Acquisition Act and whether or not the appellants' claims were statute-barred.

The Judge found no merit in the argument that the acquisition process was flawed and incomplete because, in her opinion, her role was limited to determining whether the impugned actions of the respondents in seeking to recover 20 metres of the road reserve from the appellants' properties violated their rights to property. To her, it was a misplaced submission to ask her to go into the history of the acquisition and inquire into a process undertaken many years ago; that, that question ought to have been raised and determined within the time frame specified in the Land Acquisition Act, and only by the parties from whom the land was acquired, who were infact not the appellants; that the appellants not being parties to the compulsory acquisition, were barred by the doctrine of privity of contract and as such, could not question the process of acquisition; and that, in any case the respondents had proved through Gazette Notices Nos. 3439 and 3440 of 1970 that the Government complied with the statutory requirements as to publishing the intention to acquire the land, holding of an inquiry and making of an award. Secondly, the learned Judge found the challenge by the appellants to compulsory acquisition self serving, and wondered why the appellants considered that only the process to acquire the 80 meters for the road reserve was void for incompleteness of the process and not the acquisition of the 60 meters, yet this was one transaction.

On the appellants' contention that they had no notice of the compulsory acquisition, the Judge posed the question whether, with the exercise of due diligence, it was possible to establish the extent of the road reserve for the Northern Bypass. In her view the appellants had themselves to blame for failure to take reasonable steps to establish the status of the suit property before committing themselves. Upon finding that the evidence presented by the appellants regarding the survey maps in respect of the subject property was contradictory, the learned Judge came to the conclusion that the vendors from whom the appellants bought their parcels as well as the surveyors who they had engaged, deliberately encroached upon the road reserve, because L.R. 7785/10 which adjoins L.R. 7785/9 has not encroached on the road reserve, and that the road reserve at that property (L.R. 7785/10) is 80 metres; that the survey plan number F/R 141/14 dated 4th April 1978 shows that the road reserve is 80 metres; that L.R. 7785/9 and L.R. 12672 are the only parcels where the road reserve is 60 metres; that from the survey maps and the oral evidence by Mr. Murugu and Mr. Obel, the key witnesses of the parties, the titles which were registered under the Registration of Titles Act had fixed boundaries which could easily be scientifically established by use of coordinates; that in carrying out a survey, a surveyor prepares the plan using survey control points, which are existing beacons; and that in the case of L.R. 7785/9, the nearest beacon was L.R 7785/10 with a road reserve of 80 metres.

Being persuaded, from the foregoing that there was no proof of violation of the appellants' right to property, the learned Judge ultimately concluded that;

> ***"96. Clearly, the owners of the mother titles to the petitioners' properties, the vendors on whose behalf the surveyors subdivided the mother titles, were aware of, or should have been aware of, the fact that the road reserve was intended to be 80 metres. In the circumstances, it is difficult to accept the contention by the petitioners that the failure by the respondents to complete the land acquisition by having a final survey plan prepared meant that there was no information available that the Government had acquired an 80 metre road reserve from the subject parcels. I take the view that, with the exercise of due diligence, the surveyors who carried out the subdivisions out of which the petitioners' properties were created could, with due diligence, have established the correct width of the road as 80 metres…***
>
> ***102. The burden on the petitioners in a matter such as this is to demonstrate a violation of their constitutional rights. See Anarita Karimi Njeru V. R (1976-80) 1 KLR 1272*** *and* ***Trusted Society of Human Rights Alliance-v- Attorney General & Others High Court Petition No. 229 of 2012. To do this, they would have to show entitlement to the 20 metres road reserve, and this, in my view, they have not been able to do.....***
>
> ***104. It is true that the petitioners have a right to own property, and they are entitled to their properties to the extent that such properties have not encroached upon land that was acquired and set aside for a public purpose..... Public lands acquired through compulsory acquisition are amongst the overriding interests stipulated under section 30 of the Registered Land Act which qualify the indefeasibility of title acquired under the Act as provided in section 28(b) above. The petitioners' titles, to the extent that they comprise land which forms part of the Northern Bypass, are defeasible to that extent.***
>
> ***105. ..... The petitioners are, in my view, unwitting victims of land owners who sold properties to them without having regard to the public interest in the portions of their properties that had been compulsorily acquired for construction of the Northern Bypass corridor, and of surveyors who have prepared subdivision plans either in ignorance or disregard of the existing road corridor. Whatever the case, I can find no basis for alleging violation of the petitioners' constitutional right to property by the respondents".***

Though sympathetic with the plight of the appellants in view of her decision and the large investments they had made in the construction of residential houses, the Judge believed their recourse lay with those who sold the properties to them. The only favour she extended to them was a grace period of ninety (90) days from the date of the judgment **"to surrender the 20 metres of land out of their respective parcels that comprised the road reserve to the respondents"**.

From this passage, it was the learned Judge's view that the vendors who sold the properties to the appellants were aware or " **or should have been aware**" that the width of the road was 80 meters; that failure to conduct a final survey was not fatal as the information of acquisition of 80 meters for road reserve was available elsewhere, had the appellants exercised due diligence; that the appellants had failed to discharge the burden of providing that their constitutional rights had been violated or threatened; that the appellants' titles were subject to the Government's overriding interest, notwithstanding that the compulsory acquisition was not noted on the register; and finally the Judge was herself convinced that the appellants were:

> ***"unwitting victims of landowners who sold properties to them without having regard to the public interest in the portions of their properties that had been compulsorily acquired".***

I will return to these observations shortly. But it is the determination that they did not prove violations of their rights that has displeased the

appellants. Before us they have summarized their grounds of appeal contending that the learned Judge erred in holding that there was a lawful compulsory acquisition of the suit properties and that it could not inquire into the said compulsory acquisition; that the appellants had encroached onto the suit land, which by exercise of due diligence, they would have known that it had been compulsorily acquired for a public purpose.

Highlighting the first ground, counsel submitted that the learned Judge erred in applying the doctrine of privity of contract to issues of compulsory acquisition; that the doctrine of privity of contract as a common law doctrine is applicable only to the law of contract; that to the contrary, the appellants' contention was that there was no compulsory acquisition in so far as they were concerned; that there were no requisite records in the relevant Government offices confirming the fact of acquisition of the properties by the Government; and that if the properties had been acquired then the relevant Government offices would not have issued to the appellants documents of title to those very properties.

Regarding the holding that the appellants could not assert their claims after nearly 40 years from the date of acquisition, the appellants have responded that the limitation of time prescribed under the Land acquisition Act (repealed) does not apply in the circumstances of this case, as the petition sought the protection of the appellants' right to property under the Constitution; and that by questioning the acquisition, the appellants were only asserting the sanctity of their documents of title as guaranteed by the Constitution. In their view therefore, the learned Judge had no basis for concluding that the compulsory acquisition process was completed, or that a compensation award was made as there was no evidence to support that determination. On the same point the appellants contended that the gazette notices relied on were merely, in the first place an expression of intention to acquire and secondly an inquiry as to the amounts for compensation and the persons to be compensated; that consequently the two gazette notices were not in themselves proof of compulsory acquisition; that in addition, the gazette notices did not specify the public body for whom the land was being acquired contrary to the requirements of ***section 6*** of the repealed **Land Acquisition Act**; and further that against the provisions of ***sections 17, 19*** and ***20*** of the **Land Acquisition Act** no final survey was carried out as admitted by the Government Surveyor in his testimony where he stated that **"I am aware that under section 17 of the Survey Act, a final survey plan for the acquisition should have been filed. It was not there.";** that furthermore, the Judge proceeded on an erroneous premise that since the adjoining property, L.R. 7785/10 had a road reserve of 80 meters, then it must follow that the width of the road reserve along L.R. 7785/9 and L.R. 12672 must also be 80 meters; and that that finding contradicted the Judge's own finding of fact at paragraph 75 of the Judgment, that the road reserve at another section of the same Northern Bypass, less than 3km away at the Kiambu Road Junction, was 60 meters.

The respondents, for their part have maintained that the suit properties were compulsorily acquired by the Government in 1970; that since the appellants did not challenge the process of compulsory acquisition in the High Court, they could not do so before this Court; that in any case the appellants lacked *locus standi* to challenge the acquisition considering that they were not in the picture in 1970 when the land in question was compulsorily acquired and the original owners duly compensated as demonstrated in the affidavits filed by the respondents in both petitions; that in terms of ***Article 162(2)(b)*** of the Constitution and ***section 7*** of the Limitations of Actions Act, twelve years stipulated for bringing action to recover land had long elapsed; that the acquisition of the land for the Northern Bypass was an overriding interest that needed not to be noted in the register; and that that being the case the appellants ought to have been aware of the legal position and that their ignorance of the law could not avail them any defense.

Agreeing with the conclusion of the Judge, the respondents submitted that the titles held by the appellants were, under ***Article 40(6)*** of the Constitution of Kenya not protected as they were tainted with illegality; that though the construction of the by- pass is complete, the disputed 20 meters comprised in the appellants' properties was acquired for a public purpose and must remain Government land as was found in the case of **Kenya National Highway Authority v. Shalien Masood Mughal & 5 others [2017] eKLR.**

The foregoing constitutes the summary of the arguments in this dispute. Before undertaking the evaluation of those arguments, evidence and the law, it is apposite at this point to restate that the role of this Court on a first appeal is to re-evaluate the evidence on record before it can determine whether or not the conclusions reached by the learned trial Judge are to stand and to give reasons either way. See the case of **Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212**.

Upon assessment of the pleadings and rival arguments set out above, what has emerged as the single broad issue is whether the width of the road was reserved as 60 or 80 metres. In the process of providing an answer to this question, the other related issues, such as whether the compulsory acquisition was complete; whether the appellants' petitions were barred by the limitation period; whether the appellants' rights to property protected under ***Article 40*** were violated by the respondents and whether the appellants' titles were defeasible to the extent that they formed part of public land, will, in turn be determined.

To begin with the appellants are all holders of titles issued under the Registered Land Act to parcels of land which resulted from the sub-division of Nairobi Block 12/193. It is from this parcel that it is alleged that the Government had in the 1970s compulsorily acquired an 80 metre road reserve from the original holders of the mother title. Subsequently, these properties were acquired by the other appellants in the 1990s, and by ***Cycad*** in 2003. It is common factor that there was a road corridor for the Northern Bypass adjacent to the subject properties. The appellants' only point of contention is that this corridor was 60 metres, not 80 metres as alleged by the respondents. They also agree that the width of the road reserve at the properties neighbouring or adjoining theirs, namely, L.R. 7785/8 and 7785/10, is 80 metres. The respondents insisted that the land comprised in the road reserve of 80 metres was compulsorily acquired and proceeded to earmark the appellants' properties for demolition. The latter petitioned the High Court for protection, arguing that should the threatened demolition proceed, their rights under ***Article 40*** of the Constitution would be violated. That Article provides, where relevant to the issue in consideration that;

> **"40. (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).

.....

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired".

The thrust of ***Article 40*** is to protect proprietary rights which are lawfully acquired. The Supreme Court in **Rutongot Farm Ltd vs. Kenya Forest Service & 3 others [2018] eKLR,** expressed this position thus:

> **"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."**

Such proprietary rights are governed by statutes. For example, in this dispute, the certificates of lease were issued under the **Registered Land Act** (repealed).The appellants have argued that under the Constitution and statute their titles are absolute and indefeasible, only subject to implied and expressed agreements, liabilities and the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and "**to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register"**. It is only those titles that are capable of being protected under ***Article 40*** that cannot be taken away except in accordance with the Constitution and the law. While the respondents do not challenge the validity of the appellants' title to their respective properties, they insist that, to the extent that the appellants have encroached on 20 metres of the by-pass, their titles are defeasible and that they are not entitled to the protection afforded by ***Article 40*** of the Constitution; and that to the extent of that encroachment their properties were to be demolished.

To determine this question the starting point must be the plan drawn for the proposed road reserve between Ruaka Trading Centre and Kiambu Road, through Runda estate, the subject of the dispute. That plan was prepared by ***John and Burrow Consulting Civil Engineers***, the Government appointed consulting engineers, and sets out the dimensions of the proposed road reserve width as eighty (80) metres. It is that plan that formed the basis of the Land Acquisition recommendation.

It is readily obvious from the survey maps that the 25 kilometer stretch from Ruaka to Ruiru Northern by pass has a width of 80 meters and that only at the portions claimed by the appellants and at some 3 kilometers from the suit property does it narrow to 60 meters. This is not in dispute at all as both ***Mr. Reuben Mwenda Murugu*** and ***Mr. John Dominic Obel***, the two surveyors called by parties on both sides found. Equally I do not think anything arises from the question whether or not the owners of the original parcel, ***Messrs. Noral Helen Cockburn***, ***Runda Coffee Estate*** and ***Estav Limited*** were compensated because on record, there is evidence of payment of Kshs 208,060.00 as compensation for the acquired land. But more fundamentally they are not aggrieved and have not complained. That being the case, the burden shifted to the appellants to show the contrary. There was no proof from them that the original owners were not compensated.

It common ground that the appellants engaged licensed surveyors in accordance with the **Surveys Act**. The term "licensed surveyor" is used in the Act in contradistinction to "Government surveyor". The latter is a surveyor in the employment of the Government in the Survey Department of the Government and authorized by the Director of Surveys to perform any survey duty under the Act. A licensed surveyor, on the other hand is therefore a private surveyor.

In the first place, only those who are qualified under the **Surveyors Act**, can be granted a licence by the Land Surveyors Board to practice as such. Because of their qualifications, by ***section 21***, a licensed surveyor is expected to;

> **"....carry out every survey undertaken by him in such manner as will ensure that the survey accords in all respects with the provisions of this Act and any regulations made thereunder, and shall be responsible for the correctness and completeness of every survey carried out by him or under his supervision"** (Emphasis supplied).

Also instructive on personal and professional responsibility of a licensed surveyor is ***Regulation 26*** of the **Survey Regulations, 1994** which provides that;

> **"26. (1) Every licensed surveyor shall be personally responsible for the accuracy, fidelity, and completeness of every survey presented by him for the approval of the Director.**
>
> **(2) It shall be the duty of every surveyor making any survey under these Regulations to record all the relevant information that may aid in securing the accuracy and completeness of every such survey.**

(3) Every surveyor shall perform sufficient work to enable him to apply a thorough check to every part of his survey.

(4) Every surveyor shall present his plan, computations and connected documents of every survey in such a manner as the Director, after consultation with the Board, may require, and if any surveyor forwards to the Director any plan, computation or connected document which does not conform substantially with the appropriate requirements, the Director may, at his discretion, return the plan, computations and connected documents to the surveyor and may refuse to authenticate any such plan, computation or connected document until it has been made to confirm with the appropriate requirements.

(5) All surveys returned to a surveyor shall be re-submitted to the Director without undue delay.

(6) The director of Surveys shall not release the final documents for registration of title without express authority from the licensed surveyor who carried out the survey."

(Emphasis supplied).

Although, like in all professions, the highest standard of competency is required, permissible errors in the measurement is acceptable so long as there is effort to comply with the elaborate procedure laid down under ***Regulations 56***, ***57*** and ***60***, on the method of taking triangulation and fixing of beacons. It is significant to bear in mind the express requirement of ***Regulation 91*** that a surveyor must take into consideration and reflect in his plan properties, including road or railway reserve which have been surveyed and which abut the property being surveyed.

For all these reasons and of immediate relevance and significance to the issues in this appeal, ***sections 21(2), 32*** and ***33*** of the Survey Act are significant in so far as the role of the director of survey is concerned with regard to surveys conducted by licensed surveyor. The former stipulates that;

"Neither the Government nor any public officer shall be liable for any defective survey, or any work appertaining thereto, performed by a licensed surveyor, notwithstanding that any plan relating to such survey or work has been authenticated in accordance with the requirements and provisions of this Act or accepted for registration under any written law for the time being in force relating to the registration of transactions in or of title to land". (Emphasis)

Section 32 on the other hand provides that;

"32. No land shall be deemed to have been surveyed or resurveyed until the plan thereof has been authenticated by the signature of the Director or of a Government surveyor authorized in writing by the Director in that behalf, or by the affixing of the seal of the Survey of Kenya.....

33. (1) Where, before a document or instrument to which an authenticated plan is attached, or in which reference to such a plan is made, is registered—

(a) the plan is found to be inaccurate by reason of any error or omission in the survey; or

(b) the plan does not conform with the terms and conditions subject to which permission to subdivide the land to which the plan relates has been given, the Director may cancel the authentication of such plan and may recall any copies which may have been issued, and in every case the provisions of section 31 shall apply".

So what is to authenticate in the context of the **Survey Act**? ***Section 41*** explains that;

"41(1) A plan shall be deemed to be authenticated and identified for the purposes of sections 39 and 40 if—

(a) it is authenticated, by the signature of the Director or of a Government surveyor authorized in writing by the Director in that behalf and by the signature of the authority by whom the notice is given, to be the land or area to which the notice refers; and

(b) it is identified by a reference number".

Authentication is therefore both by signature and reference number.

Although a licensed surveyor is duty bound to ensure the correctness, accuracy, fidelity and completeness of every survey carried out by him, and even though Government will not be held liable for any defective survey performed by a licensed surveyor, plainly the role of the Director elaborately set out in the above provisions is not merely mechanical. As a regulating office the Director is not expected to approve surveys presented to him as a matter of routine. That is so for these reasons. The Director is required to make sure that all surveys are carried out in accordance with his directions and the law. That is also why, once survey plans and records are deposited with him they become the property of Government. If any surveyor forwards to the Director any plan which does not conform substantially with the appropriate requirements, the Director, at his discretion, may return the plan to the surveyor and for that reason may refuse to authenticate the plan. In addition, if before a plan is registered it is found to be inaccurate by reason of any error or omission in the survey the Director may cancel the authentication of such plan and may recall any copies which may have been issued. But the more emphatic and clear statement that the

Director is required to do more in authenticating the plans is contained in ***section 22*** which imposes a duty on the Director to superintend over all surveys of land. It states that;

> **"22. Any survey of land for the purposes of any written law for the time being in force relating to the registration of transactions in or of title to land (other than the first registration of the title to any land made in accordance with the provisions of the Land Consolidation Act (Cap. 283) or the Land Adjudication Act (Cap. 284)) shall be carried out under and in accordance with the directions of the Director".**

See also **Embakasi Properties Limited & another v Commissioner of Lands** & **another [2019] eKLR.**

Even if the word "authentication" was to be given its literal or dictionary meaning the result will still be the same. To authenticate simply to **"prove or show (something) to be true, genuine, or valid; to verify, validate, prove to be genuine, certify; substantiate, prove, be proof of, give proof of, corroborate, confirm, support, evidence, attest to, bear out, give credence to, back up; document; to validate, ratify, confirm, seal, sanction, endorse, guarantee"** *The Cambridge English Dictionary.*

The Director having authenticated the plans in respect of the suit properties as genuine, any party, including the appellants relying on such document are protected by the provisions of ***section 43*** which states that;

> **"43. (1) All plans authenticated under this Act, purporting to be signed by the Director, or by a Government surveyor authorized by the Director in that behalf, or to be sealed with the seal of the Survey of Kenya, shall be presumed, until the contrary is proved, to have been signed by the Director, said, or or by a Government surveyor authorised as aforesaid, to have been sealed with the seal of the Survey of Kenya, as the case may be".**

It was contended that, from the content of a letter dated 9th November 2010 written on behalf of ***Cycad*** to ***Mimosa Plantations Limited Properties Limited***, ***Cycad*** acknowledged that the latter in selling to it a property which had partly been acquired was in breach of warranties; that with the knowledge that the vendor had no colour of right to sell to it part of the suit land, ***Cycad*** ought to have directed its discontent towards the vendor and not the respondents.

Like the appellants in **Civil Appeal No. 156 of 2013**, by the time ***Cycad*** realized that there was a competing claim by the Government over part of the suit propriety, it had committed itself beyond recall. Again like the other appellants the crux of their argument is that they were innocent purchasers for value and without notice of the defects in the seller's title; that they were expected as prudent purchasers to conduct and did conduct due diligence; that the records at the Ministry of Lands and Directorate of Survey indicated that the width of the road reserve adjoining the suit properties was 60 and not 80 meters; that the width of 60 meters road reserve resulted from concessions left following the subdivision of the mother titles; that indeed to this day the survey maps from the Directorate of Surveys continue to show that the road reserve along the affected properties is 60 meters; that part of the key purpose of ***section 17*** of the **Land Acquisition Act** is to put on notice would-be purchasers of land already compulsorily acquired; and that the documents presented by the 1st respondent as annexures JN-1 and JN-2 to the 1st respondent's replying affidavit could not constitute a final survey in terms of ***section 17*** of the Land Acquisition Act; that the said documents are merely design drawings that do not have the basic components of survey plans; that the so-called plans did not include, for example, dimensions, coordinates, bearings, acreages, a coordinate reference system, datum plans or source information, which a survey plan would ordinarily have. It was therefore, according to the appellants, erroneous for the Judge to regard these drawings as final survey plans.

Based on the foregoing, I believe the essence and most serious part of the complaint by the appellants is that ***sections 17***, ***19*** and ***20(2)(b)*** of the Land Acquisition Act were not complied with; the result being that no final survey was conducted; that the Gazette Notices published in 1970 were defective and inoperative as they did not indicate the public body in whose favour the land parcels in question were being acquired; that inquiry under ***section 9*** of the Land Acquisition Act as to the compensation payable was not conducted; that no evidence of compensation was presented as required under ***section 13*** of the Land Acquisition Act; that the Commissioner of Lands did not take possession of the acquired land as stipulated in ***section 19*** of the **Land Acquisition Act**; that the Commissioner did not demand the surrender of the mother titles pursuant to ***section 20*** of the Act; and that in the circumstances the appellants had no means of knowing that the property had been acquired by the Government in the absence of an entry to that effect in the land register. *Section 17*, in relevant part provides that;

> **"17. Where part only of the land comprised in documents of title has been acquired, the Commissioner shall, as soon as practicable, cause a final survey to be made of all the land acquired.**
>
> **.....**
>
> **19. (1) After the award has been made, the Commissioner shall take possession of the land by serving on every person interested in the land a notice that on a specified day, which shall not be later than sixty days after the award has been made, possession of the land and the title to the land will vest in the Government.**
>
> **.....**
>
> **(3) Upon taking possession of land under subsection (1) or subsection (2), the Commissioner shall also serve upon—**
>
> **(a) the registered proprietor of the land; and**
>
> **(b) the Registrar, a notice that possession of the land has been taken and that the land has vested in the Government.**

(4) Upon taking of possession, the land shall vest in the Government absolutely free from encumbrances.

.....

20. (1) Where the documents evidencing title to the land acquired have not been previously delivered to him, the Commissioner shall in writing require the person having possession of the documents of title to deliver them to the Registrar, and thereupon that person shall forthwith deliver the documents to the Registrar.

(2) On receipt of the documents of title, the Registrar shall—

(a) where the whole of the land comprised in the documents has been acquired, cancel the documents;

(b) where only part of the land comprised in the documents has been acquired, record upon the documents that so much of the land has been acquired under this Act and thereafter return the documents to the person by whom they were delivered and upon such receipts, or if the documents are not forthcoming, cause an entry to be made in the register recording the acquisition of the land under this Act." (Emphasis supplied).

It is common factor that as a preliminary step the Commissioner expressed his intention through a gazette notice of 20th November, 1970 to compulsorily acquire the property in question; that he also published in the Gazette of the same date to interested persons a Notice of Inquiry; and that only part of the original land was intended to be and was in fact acquired for the by-pass. Subsequently, the Government appointed a licensed surveyor, ***John*** and ***Burrow Consulting Civil Engineers*** to set out the dimensions and width of the proposed road reserve. Indeed, it was on the strength of the survey plan prepared by this firm that the acquisition was premised.

The gazette notice of intention to acquire, the Notice of Inquiry and the initial survey constitute what is described in **Part 11** of the **Land Acquisition Act** as "**Preliminaries to Acquisition".** After this preliminary stage, in terms of ***section 17*** aforesaid, the Commissioner was required to conduct a final survey. A final survey by the Government, in exercise of its powers of *eminent domain*, is significant as it is only through it that the exact particulars of the acquired land can be ascertained.

The Commissioner was also required by ***section 7*** of the **Land Acquisition Act**, to mark out and measure the land which was to be acquired and to prepare a plan. Survey marks which under ***section 2*** of the **Survey Act** are made up of **"trigonometrical station, fundamental benchmark, benchmark, boundary beacon, peg, picket mark or pole"** are significant in defining the extent of the land acquired. That is why the law imposes a mandatory duty on every person to protect and not to interfere with the marks on the ground and commands the surveyor to reflect them on the survey plan. There was no proof that the Government erected any form of a mark on the suit property to identify the acquired portion.

This failure only goes to confirm that the Government did not carry out a final survey. As a matter of fact, ***Mr. Reuben Murugu*** the Government Surveyor himself admitted this fact when he stated in his testimony that;

"I am aware that under section 17 of the Survey Act, a final survey plan for the acquisition should have been filed. It was not there.

....

The final survey in the case of a land acquisition is prepared by the Director of survey or a government surveyor on the instructions of the commissioner of lands. The role of the Director of surveys is to confirm that the acquisition plan is in order with respect to compulsory acquisition. There is no letter to prepare a final survey. There is no letter from the Commissioner of Lands instructing the purchaser to carry out a survey."

G.A Hollis, a Government valuer, writing in 1972 advised the Government that it was imperative to conduct a final survey of the acquired land, observing that the road acquisition plans that the Government intended to use were not **"easy to comprehend due to the numerous amendments"** from the time the original plans were submitted to the Lands Department.

Similarly, the allegations that the original documents of title in respect of the acquired property were never surrendered by the owners at the time to the Registrar were not controverted. I reiterate the provisions of ***section 20*** in which it is emphasised that the documents of title of an acquired land under the **Land Acquisition Act** must be delivered to the Registrar upon completion of acquisition process. The Registrar for his part is enjoined, upon receipt of these documents, to cause an entry of that fact to be made in the register. Without an entry in the register recording the acquisition, the consequence was that any party dealing with the land would be justified in assuming that the land still belonged to the original owners.

After the Government has made an award to compensate the owners of the land acquired, it must take possession of the land **"by serving on every person interested in the land a notice that on a specified day, which shall not be later than sixty days after the award has been made, possession of the land and the title to the land will vest in the Government".**

The manner of taking possession is prescribed by ***subsection (1)*** of ***section 19*** **Land Acquisition Act**. Possession is taken **"by serving on every person interested in the land a notice that on a specified day, which shall not be later than sixty days after the award has been made, possession of the land and the title to the land will vest in the Government".** Upon taking possession of land the Commissioner must **"serve upon the registered proprietor of the land and the Registrar",** a notice to the effect that possession of the land has been taken and that the land has vested in the Government. Through possession, the interest of the public body in whose favour the land is being

acquired is safeguarded and the attention of the general public is drawn to the fact that the land is no longer available for alienation.

It is apparent from the record that the respondents did not demonstrate that the requisite notices were served as decreed in law before the Government took possession. Indeed, the only gazette notices exhibited are No. 3439 of 12th November, 1970 in which the intention to acquire the land was expressed and No.3440 also of the same date calling for hearing of compensation claims by all affected persons.

The result was that when LR. 7785/9 was being sub-divided, there was no final survey plans or entries on the title documents showing the excision of the land the Government was claiming to have acquired from LR 7785/9 or LR L.R. 12672. The original documents of title had not been surrendered. The title documents and survey plans resulting from the sub-division were not made subject to the purported acquisition. Survey plans relied on and drawn by ***John Burrows & Partners*** were not authenticated and signed by the Director of Surveys or Government Surveyor authorized by the Director as required in ***sections 30*** and ***32*** of the **Survey Act**. They have no seal of the Survey of Kenya. And finally, there was no possession.

Turning briefly to the issue of the width of the road, the first observation to make is that a purchaser of land abutting the road would ordinarily not be bothered or concern himself or herself with the width of the road. Whether the width of the road is 60 or 80 meters, is a technical question that an ordinary purchaser of land next to a road would not comprehend, leave alone be expected to know. Even the two professionals, ***Mr. Obel***, a licensed surveyor and ***Mr. Murugu***, the Government's Senior Assistant Director of Survey could not agree on the question. This confusion would have been avoided and the width of the road established forever had the Government carried out a final survey. It is indeed likely, as contended by the respondents that the width of the road was reserved as 80 meters. On the other hand, the argument that it was 60 meters is equally plausible. When the trial court inspected the road, it became clear that the width varied in some areas it was 80 meters while in others it was 60 meters. For example, when the trial court moved to the *locus in quo* it noted that at the Windsor Hotel roundabout the width of the road was 60 meters. ***Mr. Obel*** confirmed that it was normal to have, on the same stretch of the road, different road dimensions. He said in his report to the trial court that;

> **"3.8 The width of the road reserves for the entire Northern By-pass is not uniform all through as evidenced by other maps presented to the court by the respondents and maps for adjacent lands. See annexure 4"**

In a report filed in **Kenya National Highway Authority v Shalien Masood Mughal & 5 others [2017] eKLR**, a case similar to this one but involving the Southern Bypass, it was established that the width of the road was at some point 60 meters and at others 80 meters.

The truth, however, is that to this day there is no document maintained by the Director of Survey as "conclusive" proof that the width of the road as 80 meters. On the contrary, the documents available, including maps and plans show the width along the suit properties as 60 meters. During subdivision, surveys conducted in two phases by ***Mr. Wabaru*** on LR 7785/9 in 1989 and in 1990 gave a provision of 60 meters for the road. According to the report dated 7th June, 2012 submitted pursuant to an order of the court by the Director of Survey, ***Mr. Gatome***, a licensed surveyor who was involved in the subdivision of LR 12672 indicated the width of the road as 60 meters.

An affidavit sworn by ***Mr. Obel*** pursuant to an order of the court and further to his report makes the point that ***Mr. Gathuru***, the surveyor who carried out the subdivision of LR 7785/9 computed the road reserve as 60 meters and that, in addition, the Commissioner of Lands in his letter of provisional approval dated 20th April, 1999 gave the road reserve for LR 12672 as 60 meters in width. Some of the appellants, specifically in High Court Petition No. 69 of 2010 are holders of titles arising from subdivision of LR 12672.

It must be remembered, if I understood the appellants' argument, that by raising these matters at the trial stage and before us the appellants are not suggesting that there was no compulsory acquisition at all. I personally cannot arrive at that conclusion when the original owners are not parties to these or earlier proceedings and when they have not complained they were not fully compensated because, as a matter of fact there is evidence that **Estav Limited**, the predecessor in title to **Mimosa Plantations Limited** acknowledged in their letter to the Commissioner dated 22nd December, 1970 having received payments of Kshs. 208,060 in respect of LR 7785/9 and a further payment of Kshs 785,536.

The reason for revisiting the process of acquisition is simply to reiterate and stress that, *ex facie* a third party dealing with the properties in question, even with the exercising of due diligence would never have known that there was a prior Government interest.

The conclusion that one will inevitably reach from all these is that the critical steps precedent to compulsory acquisition of the properties in question were not strictly followed or completed. Significantly, the documents that were required to be registered were not registered. Courts have repeatedly stressed that the process of compulsory acquisition have to be conducted scrupulously and strictly in accordance with the Constitution and law. See: **Virenda Ramji Gudka and 3 others v Attorney General ELC Civil Suit No. 480 of 2011**, the **Commissioner of Lands v Coastal Aquaculture, Civil Appeal 252 of 1996,** and **Shalein Masood Mughai v Attorney General & 5 others,** Petition No. 186 of 2013, **Mutuma Angaine V M'Marete M'Muronga Civil Appeal 123 of 2006.**

In ***Mutuma Angaine*** case (supra) this Court emphasised that point as follows;

> **"....it is trite law that when a person's property is forcefully acquired the Government must fully comply with the law, and follow the laid down procedure strictly and meticulously. No person's property may be acquired compulsorily without due process. Section 6(2) of the Act aforesaid requires that certain critical steps be taken before a person is deprived of his or her property".**

For nearly 40 years from 1970 when the Government expressed an interest to acquire the suit property and paid for it, to 2010 when portions of the appellants' properties were earmarked for demolition, the Government did not take any steps to assert its title.

As if that was not enough, the same Government through the Commissioner of Lands went ahead on diverse dates in the 1990s, earlier and even after, to issue certificates of lease to the appellants' predecessors in title and ultimately to the appellants themselves under the **Registered Lands Act**, granting them indefeasible titles.

Both the Constitution and statute law emphasise the sanctity of title to land. The registration of a person as the proprietor of land vests in that person the absolute ownership of that land subject only to the leases, charges, conditions and restrictions, if any, shown in the register. See: ***Article 40*** of the Constitution and ***sections 27, 28, 30, 32*** and ***143*** of the repealed **Registered Lands Act**. Because of their relevance it is apposite to paraphrase and set out some of these provisions.

Article 40 guarantees every person the right to acquire and own property in any part of Kenya and Parliament is enjoined not to enact any law that permits the State or any person to arbitrarily deprive a person of his or her property unless the deprivation is as a result of compulsory acquisition by the Government for a public purpose or in the public interest and only upon prompt payment in full, of just compensation to the land owner. ***Section 143*** of the **Registered Land Act** underscores the sanctity of title to land by stating in ***subsection (2)*** that;

> **"(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default".**

Such, is the protection granted to a registered proprietor whose registration, as a *bona fide* purchaser, may only be cancelled where it is proved that it was obtained by fraud or mistake, in which the proprietor had knowledge of or was a party or substantially contributed to. The protection of innocent purchasers has been recognized from time immemorial. For example, **Fletcher V Peck, 10 U.S 87 (1810)**, the landmark United States Supreme Court's decision in 1810, is remembered for being the first decision to declare a state law unconstitutional. But for this jurisdiction, the relevance of the decision is its creation of a precedent for the sanctity of legal title to land *vis à vis* innocent third party purchasers. Delivering the opinion of the court Marshall, C. J., said:-

> ***"...original grantees, by the conveyance of the governor, and being in full possession of the legal estate, they, for a valuable consideration, conveyed portions of the land to those who were willing to purchase. If the original transaction was infected with fraud, these purchasers did not participate in it, and had no notice of it. They were innocent. Yet the legislature of Georgia has involved them in the fate of the first parties to the transaction, and, if the act be valid, has annihilated their rights also....***
>
> ***.....If a suit be brought to set aside a conveyance obtained by fraud and the fraud be clearly proved, the conveyance will be set aside, as between the parties; but the rights of third persons who are purchasers without notice, for a valuable consideration cannot be disregarded. Titles which according to every legal test, are perfect are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be, any concealed defect arising from the conduct of those who had held the property long before he acquired it of which he had no notice that concealed defect cannot be set up against him.***
>
> ***He has paid money for a title good at law, he is innocent whatever may be the guilt of others and equity will not subject him to the penalties attached to that guilt. All titles would be insecure, and intercourse between man and man would be very seriously obstructed if this principle be overturned"***

Courts in Kenya have enforced this edict in countless cases and have consistently declined to recognise and protect titles to land, which have been obtained illegally or tainted with fraud. In this regard the decision of the Court in **Chemey Investment Limited v Attorney General & 2 others Civil Appeal No. 349 of 2012** is the latest. In it the Court rejected the invitation to uphold the sanctity of title of the allottees upon finding that allottees applied and were allocated the suit property, which was Government land on which was erected buildings used for public purposes. The allottees had deliberately represented that the suit property was vacant. This, no doubt was a clear case of fraud in which the allottees fully participated.

The courts 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**.

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**.

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."

The appellants in the instant appeal are all purchasers. The question to be decided, in order for them to enjoy protection of the law is whether they were *bona fide* purchasers, for valuable consideration and without notice of the competing Government's claim to the title of the suit property. The learned Judge appreciated in her judgment that the appellants were;

"**.... in my view, unwitting victims of landowners who sold properties to them without having regard to the public interest in the portions of their properties that had been compulsorily acquired for construction of the Northern Bypass corridor, and of surveyors who have prepared subdivision plans either in ignorance or disregard of the existing road corridor".**

The law has never intended to punish the innocent as to punish the innocent would break down all the trust and respect for the law and legal system.

There is no suggestion and no proof was presented that there was fraud in the sale transaction between the appellants and the vendors, in which the former knowingly got involved. The vendors, it was established had apparent valid title and it was not demonstrated that the appellants did anything or failed to do anything to suggest that they knew of the fraud of mistake, if any. The evidence on record points to people acting in good faith. They paid valuable consideration for their properties and there was no indication at all in the lands registry from which they could reasonably be expected to know or to suspect that the Government too had before them vested interest in the land. For fraud to be implied in a transaction of sale and registration of land ***section 2*** of repealed **Registration of Titles Act** requires the following proof;

"Fraud" shall on the part of a person obtaining registration include a proved knowledge of the existence of an unregistered interest on the part of some other person, whose interest he knowingly and wrongfully defeats by that registration."

The 1st respondent in response to the petition in the affidavit sworn by its Director General Engineer ***Joseph Nkadyo***, at paragraph 18 alleged fraud by stating that;

"... From the said plan one can see that the said land owners subdivided the entire Northern corridor for which they had already been compensated by the Government. They illegally processed titles for the road corridor and transferred the same to individuals.

19. THAT the private surveyors hired by the land owners exacerbated the problem by deliberately drawing up survey plans that completely disregarded the 1970 Government Land acquisition."

The 2nd, 3rd and 4th respondents in their submissions to the petition also supported those allegations of fraud. The allegations, to my mind do not amount to proof of fraud and in any case no fraud was pleaded against the appellants.

Further the allegations of fraud by the owners of the mother titles was not proved.

In exercising due diligence, the appellants confirmed, from the lands registry and were satisfied that the vendors were the registered owners; and that no restrictions were registered against the title. There was no indication at all in the register that the Government had acquired the properties. Likewise, there were no signs or marks that the properties belonged to the Government or any other person apart from the vendors. The appellants were not expected, as I have stated earlier, to inspect documents held by the Kenya National Highway Authority. Ordinarily, and in law by the force of ***section 31*** of the Registered Land Act, it is sufficient for a purchaser of land to conduct official search at the lands registry only. That ***section 31*** states that;

"Every proprietor acquiring any land, lease or charge shall be deemed to have had notice of every entry in the register relating to the land, lease or charge and subsisting at the time of acquisition"

If a certificate of lease duly issued by the Registrar is *prima facie* evidence of ownership and if the owner is proved to have exercised due diligence at the point of acquisition, on what basis could the appellants' petition for protection under ***Article 40*** be defeated?

It has long been accepted beyond debate that the land registration process in Kenya is a product of the **Torrens system.** This was acknowledged in, among a long line of decided cases, this Court's judgments in **Dr. Joseph Arap Ngok V. Justice Moijo ole Keiwua & 5 others, Civil Appeal No. Nai. 60 of 1997** and **Charles Karathe Kiarie & 2 Others V Administrators of Estate of John Wallance**

Muthare (deceased) & 5 others, **Civil Appeal 225 of 2006**.

Under that system, the title of a *bona fide* purchaser for value without notice of fraud cannot be impeached; that the land register must mirror all currently active registrable interests that affect a particular parcel of land; that the Government, as the keeper of the master record of all land in Kenya and their owners, guarantees indefeasibility of all rights and interests shown in the land register against the entire world; and that in case of loss arising from an error in registration, the Government guarantees the person affected of compensation. Finally, the statutory presumption of indefeasibility and conclusiveness of title based on the register can be rebutted only by proof of fraud or misrepresentation which the buyer is himself shown to have been involved.

The object of the **Torrens system** was, in very compelling language, explained in the decision of the Privy Council in **Gibbs V. Messer** [**1891] AC 247 P.C.** at page 254 as follows:-

> **"The main object of the Act, and the legislative scheme for the attainment of that object, appear to them to be equally plain. The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validly. That end is accomplished by providing that everyone who purchases, in *bona fide* and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title.".** (Emphasis supplied).

In order to discharge the burden on them and for them to secure their titles, it was enough for the appellants to show that they acquired interests to their properties from the vendors who were registered owners; that they did so in good faith, without notice and did not participate in any fraud. This burden was discharged. It was not their duty to ensure the accuracy of the information contained in the register. They fully relied on the information contained in the register before committing themselves as they did beyond recall. Though not a consideration, the appellants took possession of the suit properties and have invested millions of shillings to put up palatial upmarket properties without knowing the existence of any other interest, through no fault of their own. It must have taken the appellants' considerable period of time, in view of the massive nature of those developments, to compete the construction. All through the Government and its agencies cheered them on. They were granted all the requisite permits and licenses prior to commencing the construction. There is no proof that the respondents raised any objection to their activities.

I reject the argument that under ***section 30*** of the **Registered Land Act**, compulsory acquisition being an overriding interest was not expected to be registered to have effect. To appreciate the argument ***section 30*** provides that;

> **"30. Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register -**
>
> **.....**
>
> **(c) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law; Provided that the Registrar may direct registration of any of the liabilities, rights and interest hereinbefore defined in such manner as he thinks fit".**

For the acquisition process to be complete ***section 20*** of the repealed **Land Acquisition Act**, in a mandatory language compels the Commissioner, where only part of the land has been acquired, as is the case here to record upon the documents the size acquired and thereafter **"cause an entry to be made in the register recording the acquisition of the land".** This requirement is critical in the process as it is only by entering in the register how much of the whole parcel of land has been acquired that all persons dealing with the land would know that fact. ***Section 21*** of the **Land Act**, in more or less the same language goes further than the repealed ***section 20*** and introduces ***subsection (2) (b)*** that directs the National Land Commission to formally write to the persons having original documents of title for the acquired land to deliver them to the Registrar and the latter upon receipt of the documents, to;

> **"(a) cancel the title documents if the whole of land comprised in the document has been acquired**
>
> **(b) if only part of the land comprised in the document of title has been acquired, the registrar shall register the resultant parcels and cause to be issued, to the parties, title documents in respect of the resultant parcels.**
>
> **3. If the documents are not delivered the registrar will cause an entry to be made in the register recording the acquisition of land under this Act".**

It is emphasized that in line with the sentiments of the Court in **Commissioner of Land v. Coastal Aquaculture Ltd** (Supra) that **"all procedures related to compulsory acquisition must not only, be strictly pursued, but must also, appear to be so on the face of the inquiry"**.

Therefore, ***section 30*** aforesaid must be read not in isolation but together with ***section 20*** of the **Land Acquisition Act**. Had the Commissioner complied with the latter section and noted in the register that part of the appellants' properties had been acquired, the appellants would have, no doubt limited their homes to the extent permitted and if they exceeded they would not have been protected by the law.

Article 40 of the Constitution provides for the protection of the right to property and forbids Parliament and the State from arbitrarily depriving a person of his or her property. The key word in the Article is "arbitrarily". The Article defines the extent to which the State can

legitimately regulate private property and the circumstances under which a lawful expropriation of property can take place. While it is uncontested that property rights are not absolute; that they may legitimately be limited to facilitate the achievement of important social purposes, the limitation must not be arbitrary. The deprivation must comply with the requirements of ***Article 40*** and all the laws on compulsory acquisition.

It is the case for the appellants that their rights to property guaranteed by ***Article 40*** of the Constitution were threatened with violation. The doctrine of sanctity of title is anchored on the premises that the registered owner lawfully obtained certificate of title; and that the owner's title is indefeasible unless it is shown to have been unlawfully acquired.

It is now an established principle that anyone who wishes the court to grant a relief for violation of a right or fundamental freedom, must plead the manner of the violation. The courts have reaffirmed as good the principles enunciated in **Anarita Karimi Njeru v Republic (No.1) - [1979] KLR 154**. See: **Meme v. Republic & another [2004] 1 KLR 637)** and also **MumoMatemo v. Trusted Society of Human Rights Alliance Civil Appeal No. 290 of 2012.**

From what I have said in the preceding paragraphs, I have no difficulty in arriving at the conclusion that the appellants discharged the burden placed upon them. They were the registered owners. As far as the evidence before the court goes, they obtained that registration lawfully. Their titles were, in the circumstances indefeasible as there was no proof of fraud.

Article 40(6) of the Constitution, which declares that the protection of the right to property does not extend to properties that are established to have been unlawfully acquired, does not apply to the appellants. No fraud or misrepresentation has been ascribed to them. It has not been demonstrated that they were privy to any such misconduct. They were, as I have said earlier innocent purchasers who had relied on the contents of the land registry records to acquire the properties. It would be contrary to the intent of law and wholly unnecessary for a party seeking to acquire interest in land to go beyond the register to establish ownership and the history of the past transactions involving that land. It must be reiterated further that the only reason why the law requires the keeping of land records is to afford a notice to the whole world of the status of the property. See: **Eunice Grace Njambi Kamau & another v. Attorney General & 5 others ELC Civil Suit No. 976 of 2012**, **Denis Noel Mukhulo Ochwada & Another v. Elizabeth Murungari Njoroge & Another, Civil Appeal. No. 293 of 2013** and **Kenya National Highway Authority v. Shalien Masood Mughal & 5 Others Civil Appeal No. 327 of 2014**.

The argument that the owners of the mother titles to the suit properties and their surveyors knew, or ought to have known the extent of road reserve cannot be a basis to transpose such knowledge if at all to the appellants. In any case all the surveys conducted, whether by licensed or Government surveyors, must be submitted to the Director of Survey and authenticated as such, pursuant to ***Sections 30*** and ***32*** of the **Survey Act**.

The threat to demolish the appellants' properties by respondents was real. The perimeter walls around their properties had been earmarked by the respondents for demolition yet the same respondents were the authors of the confusion.

Clearly, from my conclusion the learned Judge was in error for rejecting the appellants' petition and holding that their property rights were not threatened. The appellants' petition ought to have succeeded.

Accordingly, this appeal succeeds. The decision of the High Court rendered on 25th April, 2013 is set aside and grant costs of this appeal and in the High Court to the appellants.

I have read the dissenting judgment of Odek, JA and the concurring judgment of Sichale, JA. As Sichale, JA is in agreement, this shall be the majority decision of the Court.

Dated and delivered at Nairobi this 7th day of June, 2019.

W. OUKO, (P)

……

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR

FATUMA SICHALE, JA

In the 1970's the Government of Kenya (the Government), in a bid to ease traffic congestion in the city of Nairobi, floated the idea of a construction of a road that now constitutes the Northern By-Pass. Accordingly, a number of privately owned parcels of land were

identified. In furtherance of its intention, the Government published its intended acquisition of **6.420** acres from Land Registration No. **23** (then owned by **Edith Gladys Cockburn), 16.061** acres from Land Registration **No.778519** (then owned by **Efstav Limited)** and **27.984** acres from Land Registration **No. 7785/10** (then owned by **Runda Coffee Estate Limited)** in Kenya Gazette Notices No. **3439** and **3446** of **20th November, 1970.** Simultaneously with the said publication, the Government issued Kenya Gazette Notice No. **3440** of the same date (**20th November, 1970**) pursuant to **Section 9** of the Land Acquisition Act, (now repealed) being a notice of inquiry to hear claims of compensation. Thereafter, the Government commissioned a private surveyor by the name **John Burrow and Partners Consulting Civil Engineers** to delineate the portions of land to be hived off from the identified parcels of land. Subsequently, although the appellants denied this, there is evidence that the Government compensated the owners, the appellants' predecessors in title. However, as the land owners owned much more than what was to be compulsorily acquired, each one of them subdivided the remainder of their portions of land into smaller plots which were then sold to the appellants who are the current holders of titles/leases issued to them by the Registrar of Titles and /or Commissioner of Lands. Suffice to state that the appellants' titles were registered pursuant to **Section 29** of the Registered Land Act (RLA) Chapter 300 of the Laws of Kenya and **Section 23** (1) of the Registration of Titles Act (RTA) Chapter 281 of the Laws of Kenya, (**both Acts are now repealed**). It is common ground that the Northern By-Pass cuts through Runda Estate where the appellants' properties abut the Northern By-Pass.

According to the 1st respondent, some of the subdivided lands purchased by the appellants encroached on the land that had been compulsorily acquired by the Government for the construction of the Northern By-Pass. In an affidavit sworn on **9th December, 2016**, **Engineer N. Nkaango** summed up the 1st respondent's position. He deposed that:

> ***"… the land owners subdivided the entire Northern corridor for which they had already been compensated by Government. They illegally processed titles to the road corridor and transferred the same to individuals."***

It is the respondents' position that the encroachment by the appellants has the effect of reducing the width of the road from 80 metres to 60 metres. The respondents placed reliance on **Article 40 (6)** of the Constitution in support of their contention that the protection of right to property does not extend to property illegally and/or unlawfully acquired. On the other hand, the appellants refute the contention that the width of the Northern By-Pass in the sections abutting their properties is 80 metres. It is their contention that when they carried out official searches at the Lands Registry, the official records did not indicate that their properties had encroached on the road reserve. It was their further contention that they are bona fide purchasers for value without notice.

It would appear that the appellants bought their various plots at different times and enjoyed relative calm (except when they took part in a demonstration against persons who attempted to grab the 60 metres width of road set aside for the construction of the Northern By-Pass) until when the 2nd and 5th respondents earmarked parts, portions or walls of houses belonging to the appellants for demolition for purposes of extension of the road boundaries. It is the respondents' actions that caused the appellants to move to court. The appellants filed two Constitutional Petitions (No. 70 of 2010 and No. 69 of 2010). These two petitions were heard together and in a judgment dated **25th April, 2013**, **Ngugi, J** held as follows:

> ***"[106] It is true that the petitioners have a right to own property, and they are entitled to their properties to the extent that such a properties have not encroached upon land that* was acquired and set aside for public purposes. Their right to property must be exercised within and in accordance with the framework of the law. Public lands acquired through compulsory acquisition are amongst the overriding interest stipulated under Section 30 of the Registered Land Act which qualify the indefeasibility of title acquired under the Act as provided in Section**
>
> **28 (b) above. The petitioners' titles, to the extent that they comprise land which forms part of the Northern by-pass are defeasible to that extent.**
>
> ***[107] I do not therefore see, in the two petitions before me, any violation or limitation of the petitioner's right to property. The petitioners are in my view, unwitting victims of landowners who sold properties to them without having regard to the public interest in the portions of their properties that had been compulsorily acquired for construction of the Northern by-pass corridor and of surveyors who have prepared sub-division plans either in ignorance or disregard of the existing road corridor. Whatever the case, I can find no basis for alleging violation of the petitioner's constitutional right to property by the respondents."***

She ordered that the appellants:

> ***"…. surrender the 20 metres of land out of their respective parcels that comprised the road reserve to the respondents. The titles to all parcels shall be rectified accordingly"***

The appellants were aggrieved by the said outcome thus provoking this appeal. In a Memorandum of appeal dated 15th July, 2013, the appellants listed 22 grounds of appeal which can be summarized as follows: that the learned Judge erred in upholding an alleged compulsory acquisition that did not comply with the Land Acquisition Act (now repealed); erred in failing to find that the width of the road along their properties was 60 metres and not 80 metres; erred in finding that the appellants had no *locus standi* to impugn the

alleged compulsory acquisition; erred in failing to find that there was no way the appellants could have known that the width of the road abutting their properties was 80 metres wide as opposed to 60 metres wide and finally, in failing to uphold the sanctity of title.

The appeal came before us for plenary hearing on **4th December, 2018.** The appellants were represented by two learned Senior Counsel **Mr. Oraro** and Professor **Githu Muigai** who teamed up with learned counsel **Mr. Imende.** The 1st, 2nd and 3rd respondents were represented by learned counsel **Mr. Mutinda** together with **Mr. Marwa** whilst learned counsel, **Mr. Mulekyo** appeared for the 4th and 5th respondents.

In urging the appeal, **Mr. Oraro** contended that the process of the alleged compulsory acquisition by the respondents was not completed; that by failure to complete the process of the acquisition, any prospective buyer had no notice that the width of the road was 80 metres; that the appellants' challenge of the alleged compulsory acquisition was on the basis that the survey plans held by the Directorate of Survey showed that the width of the road was 60 metres and not 80 metres; that the trial judge failed to uphold the sanctity of title and finally, in finding that public land acquired through compulsory acquisition is an overriding interest. Several authorities were cited in support of counsel's submission. I shall refer to some of these authorities later in this judgment.

Prof. Githu Muigai associated himself with **Mr. Oraros's** submissions. It was his view that there was no compulsory acquisition; that the acquisition if any, was flawed and that neither was it completed; that the appellants are bona fide purchasers for value without notice. He reiterated that the records held by the Directorate of Survey and the Ministry of Lands show that the width of the road is 60 metres. He relied on the persuasive High Court decision of **EUNICE GRACE NJAMBI KAMAU & ANOTHER VS. ATTORNEY GENERAL & FIVE OTHERS [2013] eKLR** for the proposition that land that is compulsorily acquired must be vested in Government as it is only then that a third party would know of the Government's interest.

In opposing the appeal, **Mr. Mutinda** contended that the appellants' titles are tainted with illegality; that the appellants' cause of action is time barred under **Section 7** of the Limitation of Actions Act and that the road reserve on the adjoining properties is 80 metres. It was **Mr. Mutinda's** further assertion that Article 40 of the Constitution does not give protection to property unlawfully acquired.

Taking his turn in opposing the appeal, **Mr. Mulekyo** submitted that the Government paid compensation for the 80 metres width road reserve and hence the appellants' claim of the road being 60 metres falls by the wayside. Counsel concluded his submissions with the assertion that the width of the road reserve on the adjoining plots is 80 metres. He placed reliance on this Court's decision of **RAMJI GUDKA vs. MINISTER OF ROADS & ANOTHER EXPARTE VERANDRA RAMJI GUDKA HCCC JR ELC NO. 32 OF 2009,** for the proposition that public interest prevails vis-à-vis private interest, the appellants' interest herein being of a private nature.

The appeal before us is a first appeal hence it is the duty of this Court to re- analyze, re-assess and re-evaluate the record in light of the rival submissions set out above and reach its own findings and conclusions thereon. In **Abok James Odera & Associates vs. John Patrick Machira & Co. Advocates [2013 eKLR,** this Court stated as regards the duty of a first appellate court:

> *"This is a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess, and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of* ***Kenya Ports Authority vs. Kustron (Kenya) Limited [2000] 2 EA, 212*** *where the Court of Appeal held, inter alia, that:*
>
> ***"On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence"***

As stated earlier, it is an undisputed fact that in the 1970s, the Government set out to acquire varying portions of land from the original owners of land within what is now Runda Estate for purposes of construction of the Northern By-Pass. It is also not disputed that notices to this effect were placed in the Kenya Gazette, and an inquiry meeting with a view to compensation was held. The respondents maintained that thereafter payments by way of compensation were made and the portions compulsorily acquired became alienated as a road reserve measuring 80 metres.

The appellants' contention, however, is that the respondents failed to comply with the provisions of the Land Acquisition Act in its intended acquisition of land for the construction of the Northern By-Pass. It was their contention that at the time they purchased their plots, there was no evidence of compulsory acquisition of an 80-meter road reserve. Given this contestation, it is imperative to examine the provisions of the Land Acquisition Act on compulsory acquisition. On my part, I am in agreement with the appellants' assertion that the Land Acquisition Act provided an elaborate procedure of land acquisition. **Section 17, 19 (1) and 20** of the Act provided as follows:

Section 17:

> ***"17. Where part only of the land comprised in documents of title has been acquired, the Commissioner shall, as soon as practicable, cause a final survey to be made of all the land acquired".*** *(Emphasis supplied)*

Section 19 (1):

> ***"(19) (1) After the award has been made, the Commissioner shall*** (emphasis added) ***take possession of the land by serving on every person interested in the land a notice that on a specified day which shall not be later than sixty days after the award has been made, possession of the land and the title to the land will vest in the Government"***

Section 20:

> ***"(20) (1) where the documents evidencing title to the land acquired have not been previously delivered to him, the Commissioner shall*** (emphasis added) ***in writing require the person having possession of the documents of title to deliver them to the Registrar, and thereupon that person shall forthwith deliver the documents to the Registrar.***
>
> ***(2) On receipt of the documents of the title, the Registrar shall – (***emphasis added)
>
> ***(a) Where the whole of the land comprised in the documents has been acquired, cancel the documents;***
>
> ***(b) where only part of the land comprised in the documents has been acquired, record upon the documents that so much of the land has been acquired under this Act and thereafter return the documents to the person by whom they were delivered and upon such receipts, or if the documents are not forthcoming, cause an entry to be made in the register recording the acquisition of the land under this Act'.*** *(Emphasis supplied)*

In the instant appeal, it is common ground that the records held by the Directorate of Survey indicate that the appellants' properties abut a road whose width is 60 metres. It is in view of this that the appellants faulted the respondents for failure to complete the process of compulsory acquisition. The Commissioner of Lands was faulted for failure to cause a final survey of all the land acquired (**Section 17 of the Land Acquisition Act**); for failure to formally take possession of the acquired land (**Section 19** of the **Land Acquisition Act**) and for failure to call for surrender of the title documents (they were to be surrendered to the Land Registrar, **Section 20 (1)** of the **Land Acquisition Act**). They also faulted the Land Registrar for failure to endorse on the titles of the original owners the portions of land hived off from their parcels of land for purposes of construction and setting aside of a road reserve constituting the Northern By-Pass (**Section 20 (2) (b)** of the **Land Acquisition Act).** The Land Registrar was also faulted for failure to make entries in the register attesting to the compulsory acquisition. In the persuasive High Court decision of **EUNICE GRACE NJAMBI KAMAU & ANOTHER VS. THE ATTORNEY GENERAL & 5 OTHERS** (supra), the appellants had moved to challenge gazette notices numbers 3437 and 3438 of 20th November, 1970. These are the same gazette notices that are the genesis of the dispute herein. The issues raised therein are the same issues raised in this appeal. In his findings, **Mutungi, J** held as follows:-

> ***"The language of Section 19 and 20 of the Act is couched in mandatory terms attesting to the significance of the taking of possession and vesting of the acquired land in the government … Quite clearly, observance of Section 19 (3) and Section 20 of the Act would serve to notify third parties that the government has acquired an interest in the subject land particularly because the Registrar of Lands would have been notified and a relevant entry would be made on the land register signifying the interests of the government".***

In another persuasive decision of the High Court, ***VIRENDRA RAMJI GUDKA & 3 OTHERS vs. ATTORNEY GENERAL [2014] eKLR Mutungi, J,*** *rendered himself as follows:*

> ***"The fact is there were no records of the acquisition at the Lands Registry and or with the Director of Survey. In my view, a Gazette Notice for the intended acquisition alone cannot effectuate a compulsory acquisition and in order to effectuate the acquisition, the procedure for acquisition as under the Act has to be adhered to. The Gazette notice for the acquisition and the Gazette Notice notifying the payment of the compensation can only affect the parties directly affected such as the registered proprietors at the time the notice of compulsory acquisition is given. Third parties dealing with the acquired land can only be put on notice if the process of acquisition is completed and the provisions of Section 19 and 20 of the Act complied with."***
>
> *and*
>
> ***"….that the Gazette Notice …… relied upon by the defendant to prove that the suit land was compulsorily acquired or formed part of the portion compulsorily acquired by the government ... is insufficient to prove the acquisition"***

Similar sentiments are found in this Court's decision of **COMMISSIONER OF LANDS & ANOTHER VS. COASTAL AQUACULTURE LIMITED [2006] 1 KLR (E&L) 266. PALL, JA** whilst referring to the judgment of **Ringera, J** (as he then was) from which an appeal arose, at page 269 stated:

> ***"I agree with the learned judge that for a successful compulsory acquisition, <u>the requirements of the Constitution and of the Act must be</u> <u>strictly complied with</u> and that if there is full compliance with the law, compulsory acquisition cannot be interfered with".*** *(Emphasis added)*

Similarly, in this Court's decision of **MUTUMA ANGAINE VS. M'MARETE M'MURONGA [2011] eKLR,** it was stated:

> ***"… it is trite law that when a person's property is forcefully acquired, the government must fully comply with the law and follow the laid down procedure strictly and meticulously. No person's property may be acquired compulsorily without due process".***

Given the above case law, it is clear that the courts have stated that it is not sufficient to gazette notices of an intended acquisition, call for an inquiry meeting with a view to compensation, proceed to compensate those affected and then stop at that without compliance with the mandatory provisions of the Land Acquisition Act. The essence of these mandatory provisions is to put on notice third parties.

Suffice to state, had the Commissioner of Lands called for the titles of the previous land owners and a record made thereof that the land acquired for the construction of the Northern By-Pass was 80 metres, and had the titles of the original owners been recalled to effectuate the necessary changes, this would have served as notice to the appellants and any other third party of the acquisition. The long and short of it is that the appellants herein had no actual or constructive notice of the compulsory acquisition and neither can it also be said that they had imputed notice.

In respect to the survey, it is not in dispute that no final survey was carried out to map out the road reserve vis-a-vis the remainder of parcels of land of the original owners. Indeed, the records held by the Directorate of Survey did not attest to the acquisition of an 80 metres wide road. On the contrary, the survey plans which were approved by the Director of Survey (after the subdivisions on behalf of the original owners) indicated that the width of the road was 60 metres.

In view of the fact that the 3rd respondent and the Directorate of Survey failed to complete the process of compulsory acquisition as provided in the Act, a search at the Lands office could not reveal that the width of the road was 80 metres. The respondents do not deny that the official searches carried out by the appellants and which searches are based on the records held at the Lands Office, indicated that their plots abutted a road reserve whose width was 60 metres. The respondents and in particular, the 3rd respondent having failed to comply with the mandatory provisions of the **Land Acquisition Act** have themselves to blame for the non-compliance. I am therefore, of the persuasion that it would be unjust and unfair to subject the appellants to the harsh realities of inaction and/or malfeasance on the part of public officers. In my view, Government must bear responsibility for failings of its officers and may wish to consider alternative ways of ameliorating the consequences of failure on the part of its officers such as building an over-pass or an under-pass as part of the Northern By-Pass, instead of razing homes belonging to the appellants.

The learned trial Judge was of the view that the appellants ***"…. with due diligence….."*** would …. ***"have established the correct width of the road as 80 metres***…..". She came to this conclusion on the basis that:

> ***"[95] From even a cursory analysis of the various survey maps produced by the parties in support of their respective positions, and from the overall evidence before me, it seems to me that certain facts emerging therefrom make the contentions by the petitioner improbable: that L.R. 7785/10, whose survey was done in 1978, had a road reserve of 80 metres; that the petitioners had access to F/R 141/14 ('KK5') dated 4th April, 1978 with a road reserve of 80 metres; that , as testified by Mr. Murungu and indirectly corroborated by Mr. Obel in his report, titles registered under the Registration of titles Act had fixed boundaries which could be scientifically established by use of coordinates; and as conceded somewhat reluctantly by Mr. Obel in his testimony before the court, that in carrying out a survey, a surveyor prepares the plan using survey control points, which are existing beacons; and that in the case of L.R. 7785/9, the nearest survey plan existing for which the surveyor could use beacons was the one for L.R. 7785/10, (in particular becon 'RK5', which was at the boundary between L.R. 7785/10 and L.R. 7785/9) and has a road reserve of 80 metres".***

With all due respect to the learned judge, it is my view that the appellants were not expected to ascertain the width of the road by checking on the adjoining properties. But even if this was to be the case, there was evidence that the width of the road was not 80 metres on the entire stretch. In particular, the width of the road near **Windsor Golf Hotel** is 60 metres and not 80 metres. The judge appreciated as much when she stated:

> ***"[75] The construction of the Northern Bypass at those portions of it adjacent to the subject property is now complete. The Bypass has an 80 metres reserve in the portions adjoining the petitioners' properties, but 60 metres at the subject property. After the junction with Kiambu Road, the Bypass again narrows to 60 meters. During the site visit, the 5th respondent stated that this difference was accounted for by the fact that the land at the Windsor junction was acquired later and only 60 metres were acquired".***

Given that the 3rd respondent is the legal and sole repository of land records, the appellants cannot be faulted for not ascertaining the width of the road in the adjoining properties as it was sufficient to place reliance on the official searches carried out at the lands office. In any event, and as indicated above, the size of the Northern By-Pass was not uniform on the entire stretch.

There was also the finding by the trial court that the appellants could not challenge the process of compulsory acquisition of 1970 as there was no privity of contract and further that their cause of action (if any) was time barred. It is common ground that, the appellants are purchasers of land abutting the Northern

By-Pass. It is also common ground that they hold titles of these properties abutting the Northern By-pass. As indicated above, (and this was not denied) the official records held by the Director of Survey and the Commissioner of Lands showed that the width of the road where their properties abut the Northern By-Pass is 60 metres. Any attempt to widen the road to 80 metres, would affect the appellants' properties. To this extent, I find that the appellants had every right to challenge the attempt by the respondents to interfere with their respective properties. The appellants did not contest the compulsory acquisition of the 1970s but they resisted attempts to excise parts of their properties so as to have an 80 metres wide road.

Consequently, the contention that their cause of action was time barred is neither here nor there. I am of the considered opinion that the appellants did not need to bring themselves within the doctrine of privity of contract so as to challenge what on their part amounted to an encroachment of their properties which encroachment was a violation of the appellants' constitutional rights to private property as enshrined in **Article 40** of the Constitution.

Tied to this is the 4th respondent's contention that the appellants cannot take refuge in **Article 40** of the Constitution, in view of **Article 40 (6)** which provides that:

> ***"(6) The rights under this Article do not extent to any property that has been found to have been unlawfully acquired".***

The 4th respondent relied on this Court's decision of **MORRIS NGUNDO VS. LUCY JOAN NYAKI & ANOTHER [2016] eKLR** wherein it was held:

> ***"Article 40 of the Constitution provides the right to property. Article 40 (6) provides that the rights under the said Article do not extend to any property that is found to have been unlawfully acquired. Article 40 must be read as a whole so that protection afforded therein which protect the right to property must be held to exclude property found to be unlawfully acquired under Article 40 (6)". (emphasis added)***

How have the courts interpreted the above constitutional provision? In **VEKARIYA INVESTMENTS LIMITED KENYA AIRPORTS AUTHORITY & 2 OTHERS [2014] eKLR,** the Court held that:

> ***"a finding of unlawful acquisition referred to in Article 40 (6) of the Constitution "… must be through a legally established process and not by whim or revocation of the Gazette Notice as the Commission of Lands purported to do and definitely not by forceful taking of possession"***

In the case of **KURIA GREENS LIMITED VS. REGISTRAR OF TITLES & ANOTHER [2011] eKLR, Musinga, J** (as he then was) expressed himself thus:

> "***if the respondents were satisfied that the suit land had been unlawfully alienated and that it was in the interest of the public that the land reverts to the state …. appropriate notice ought to have been given to the petitioner and thereafter the respondents ought to have exercised any of the following options***:-
>
> ***a. Initiate the process of compulsory acquisition of the suit land and thus pay full and prompt compensation to the petitioner; or***
>
> ***b. File a suit in the High Court challenging the petitioner's title and await its determination one way or the other".***

As urged by **Prof. Muigai** on behalf of the appellants, the right to property as enshrined in **Article 40** cannot be taken away whimsically. **Article 40 (6)** provides that "***the rights under this Article do not extend to any property that has been found*** (emphasis added) ***to have been unlawfully acquired***". The wording of **Article 40(6)** is that there must be a '**finding**'. In the absence of a finding, it would be preposterous for the respondents to make such a '**finding'** by themselves and proceed to forceful take the appellant's properties. If this were to be the case, every Kenyan would have every reason to be wary and fearful as no one would know the time and hour when he/she would be visited by a bulldozer purring like a tiger and raring to tear down their homes. If the forceful acquisition were to be sanctioned without any prior 'finding' being made, then the rule of law will be replaced by the rule of the jungle. I find that in the absence of a "**finding**", the respondents' action of earmarking parts of the appellants' properties for extension of the Northern By-pass is premature.

In his submissions on behalf of the 1st, 2nd and 3rd respondent, **Mr. Mutinda** urged us to find that private interest is subservient to public interest. He was of the view that inspite of the road having been constructed to completion, (the built area is now 12 metres), there will be need to expand it in future. He relied on the decision of **PATRICK THOITHI KANYUIRA VS. KENYA AIRPORTS AUTHORITY**

[2017] eKLR wherein this Court in making its determination in respect of land compulsorily acquired for the expansion of Wilson Airport stated:

> "***In this case, the public interest rights of the larger number of people who are likely to use Wilson Airport triumphed the individual right of the appellant to own and enjoy his property under Article 40 of the Constitution."***

As to the contention that public rights have primacy over private rights, case law demonstrates that that is not always the case. In **KENYA NATIONAL HIGHWAY AUTHORITY VS SHALIEN MASOO MUGHAL AND 5 OTHERS, [2017] eKLR, Waki, JA** in reference to **CAPITAL MARKETS AUTHORITY VS JEREMIAH GITAU KIEREINI & ANOTHER [2014] eKLR** stated:

> ***"……. as one of the Judges who decided the case, I correct the impression that there was a general categorical statement on the primacy of individual rights over public interest***".

I agree. It is not always true that public interest takes supremacy over private and/or individual rights, as these are competing rights that must be weighed against each other. Furthermore, in the instant matter, it is clear that there was a flawed and /or incomplete process of compulsory acquisition that cannot be said to have created any public right.

As regards the respondents' contention that there was an overriding interest on the appellant's property, **Section 30 of the RLA** provides as follows:

> ***"30. Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register-***
>
> ***(a) rights of way, rights of water and profits subsisting at the time of first registration under this Act;***
>
> ***(b) natural rights of light, air, water and support;***
>
> ***(c) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;***
>
> ***(d) leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies within the meaning of section 46;***
>
> ***(e) charges for unpaid rates and other moneys which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;***
>
> ***(f) rights acquired or in process of being acquired by virtue any written law relating to the limitation of actions or by prescription;***
>
> ***(g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed;***
>
> ***(h) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law;***
>
> ***Provided that the Registrar may direct registration of any of the liabilities, rights and interest hereinbefore defined in such manner as he thinks fit."***

An acquisition of land under the **Land Acquisition Act** was an interest that was to be registered pursuant to the **Land Acquisition Act**. **Section 20 (2) (b)** of the **Land Acquisition Act** provide:

> ***"20 (2) (b) where only part of the land comprised in … cause an entry to be made in the register recording the acquisition of the land under this Act".***

The said provision expressly provided that compulsory acquisition was a registrable interest. An overriding interest is an interest that does not find itself on the register. It cannot, therefore, be said that since the Government failed to register the compulsory acquisition, the fall back situation is that there existed an overriding interest.

The other ground of appeal raised by the appellants is that the trial court failed to find that they are bona fide purchasers for value without notice and that their titles are indefeasible. The **Black's Law Dictionary 8th Edition** defines a bona fide purchaser as:

> ***"One who buys something for value without notice of another's claim to the property and without actual or constructive notice***

of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims".

As stated earlier, the appellants are holders of 99 year leases and or titles issued under the RTA or the RLA. Section 23 (1) of the RTA provides as follows:

> ***"23 (1) the certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party".***

The Registered Land Act (RLA) made similar provisions as those found in Section 23 (1) of the RTA. Section 28 of the RLA provided:

> ***"The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claim whatsoever, but subject …"***

The indefeasibility of title was also provided in **Section 143** of the RLA which stated thus:

> ***"143. (1) Subject to sub-section (2) of this section, the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake"***

Be that as it may, one of the greatest challenges faced by the Courts has been the doctrine of "***sanctity of title***" as provided in **Section 23** of the RTA, and **Sections 28** and **143 of the RLA** vis-à-vis unlawful and/or irregular acquisition of land. This challenge was aptly summed up by **Nyamu, J** (as he then was) in **MUREITHI & 2 OTHERS** (FOR **MBARI YA MURATHIMI CLAN VS. ATTORNEY GENERAL & 8 OTHERS, NAIROBI H M C A NO. 158 OF 2005 (2006) L KLR 443** when he put forth the question:

> ***"How are the Courts going to deal with land grabbers who stare at your face and wave to you a title of the grabbed land and loudly plead the principles of indefeasibility of title".***

Similar sentiments were expressed by **Waki, J.A** in **KENYA NATIONAL HIGHWAY AUTHORITY VS. SHALIEN MASOOD MUGHAL & 5 OTHERS C.A. NO. 327 OF 2014 (**Supra), when he expressed himself as follows:

> ***"…that the Courts of this country cannot countenance a situation where the public good is subjugated to and sacrificed at the multi furious altars of private interests nor will they sit idly by and see land cartels, brief case investors and speculators*** *(emphasis added)* ***with high connection use public land as tickets to individual largesse in the wake of public pain or inconvenience. Government cannot compulsory acquire land only for it to be gifted or otherwise conveyed to private individuals who have access to the shakers and movers*** *(emphasis added)* ***for purposes of selling them off to line their pockets".***

In **CHEMEI INVESTMENTS LIMITED VS. THE ATTORNEY GENERAL & OTHERS NAIROBI PETITION NO. 94 OF 2005** at para.64, this Court held:

> ***"The Constitution protects a higher value, that of integrity and the rule of law. These values cannot be side stepped by imposing legal blinders based on indefeasibility. I therefore adopt the sentiments of the court in the case of Milankumar Shah and 2 others vs. City Council of Nairobi*** & ***Attorney General (Nairobi HCC Suit No. 1024 of 2005 (05) where the Court stated as follows, "we hold that the registration of title to land is absolute and indefeasible to the extent, firstly, that the creation of such title was in accordance with the applicable law and secondly, where it is demonstrated to a degree higher than the balance of probability that such registration was procured through persons or body which claims and relies on that principle has not himself or itself been part of a cartel*** *(emphasis added)* ***which schemed to disregard the applicable law and the public interest.***

The issue of the rights of an innocent purchaser for value without notice vis- à-vis the phenomenon known in this country as "**land grabbing**", has indeed been a troublesome issue. However, it would appear that the courts are slowly but surely defining a *bona fide* purchaser for value without notice as one who has not been part of, ***"… land cartels, brief case investors and speculators or private individuals who have access to shakers and movers"*** (See **KENYA NATIONAL HIGHWAY AUTHORITY VS. SHALIEN MASOO MUGHAL & 5 OTHERS** (supra) and that whilst relying on the principle of indefeasibility of title, one has to show:

> ***"…that the creation of such titles was in accordance with the applicable law. …that such registration was procured through persons or body which claims and relies on that principle, has not himself been part of a cartel which seemed to disregard the applicable law and public interest".*** (See **CHEMEI INVESTMENTS LIMITED VS THE ATTORNEY GENERAL &**

OTHERS (supra).

In the recent decision of **ARTHI HIGHWAY DEVELOPERS LIMITED vs. WEST END BUTCHERY LIMITED & 6 OTHERS [2015] eKLR**, this Court whilst finding against persons who had been registered as owners stated:

> ***"Kamau testified that he knew about the challenge relating to the Title of the disputed land in December, 2006. It is our finding that he knew about this in March, 2006. For a purchaser who claims that due diligence was carried out at all stages, we find it difficult to believe that there was no explanation sought from the Registrar of Titles about the mysterious disappearance of the original Deed file from the strong room of the land registry. It was common knowledge, and well documented at the time, that the land market in Kenya was a minefield and only a foolhardy investor would purchase land with the alacrity of a potato dealer in Wakulima market. Perhaps the provisions of the new Constitution 2010 and the Land Registration Act, 2012 will have a positive impact for land investors in future. In this matter Arthi was prepared to seek and accept a Deed of Indemnity from the two fraudsters to have the transfer registered urgently.*** *(Emphasis added)*
>
> ***Kamau and the Directors of Arthi were informed by Criminal Investigation Department (CID) officers, "at the end of 2006", that "some Asians from Westlands were claiming the land belonged to them…"*** *(Emphasis added)*
>
> ***"Furthermore, within two months of registration of the Transfer, in February, 2007, the suit was filed and the issues of fraud in respect of the disputed land became clear to Arthi. Despite that knowledge,*** *(Emphasis added).* ***Arthi proceeded with the subdivision and sale of the disputed land to other parties. We do not take seriously its feigned assertion that it was not aware of what was going on in court despite having an Advocate on record throughout. This is the conduct which the trial court deprecated and found it amounted to complicity in the fraud and perpetuation of it.*** *(Emphasis added)* ***There was sufficient basis for that finding and we do not consider it as a new concept unknown to law as submitted by Mr. Mwangi. We do not disturb that finding. Fraud was proved, and Arthi, as well as the Registrar of Titles were party to it. We so find".***

From the above decision, it is clear that the court is bringing out the salient features of what does not constitute bona fides, such as knowledge that there was:

> *"**the mysterious disappearance of the original deed file, …there were Asians from Westlands who claimed the land was theirs, …issues of fraud had been raised in a suit in respect of the land**,"*

and that in spite of all these, the appellants purported to buy the land. It is not difficult to see why the court declined the appellants' invitation that they were bona fide purchasers for value without notice in that appeal (***ARTHI HIGHWAY DEVELOPERS LTD VS. WEST END BUTCHERY LTD & 6 OTHERS*** *(supra).*

In another decision of this Court, **DICKSON NDEGWA MBUGUA VS. CITY COUNCIL OF NAIROBI & 3 OTHERS, NBI CA NO. 254 OF 2010, M'Inoti, JA** in his dissenting judgment stated**:**

> *"Section 143 of the Act provided the circumstances under which the rights of a registered proprietor could be defeated, resulting in rectification of the register. It is apposite to quote the provision in full"*
>
> ***"143(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) was obtained by fraud or mistake"***
>
> ***(2) The register shall not be rectified so as to affect the tittle of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default"*** (Emphasis added*).*

The learned Judge **(M'Inoti, J.A)** proceeded to state**:**

> **"For the court to order rectification of the register, it had to be satisfied that the 3rd and 4th respondents had knowledge of the fraud alleged by the appellant or that they caused or substantially contributed to it by their neglect or default. Having found that they had no such knowledge and did not cause the fraud or substantially contribute to it by their neglect or default, I cannot see how their title can be impeached or nullified under the previous legal regime. To nullify their title, we would have to ignore completely the express terms of section 143(2) of the repealed Act, which I believe we are not entitled to do. This Court did not shy away from nullifying title to land where it was satisfied that the proprietor was a party to the fraud pursuant to which he was registered as proprietor or where he had contributed to the fraud or mistake by his acts of neglect or default, perhaps best encapsulated in the Court's quip in *Athi Highway Developers Ltd Vs. West End Butchery Ltd & 6 Others (2015) eKLR* that 'only a foolhardy investor would purchase land with the alacrity of a potato dealer in Wakulima market.' In *Chemei Investment Ltd Vs. Attorney General & 2 Others, CA No. 349 of 2012,* this Court upheld an order of the High Court nullifying a title after it found that the proprietor was not an innocent purchaser but was instead an active participant in the fraud pursuant to which he was registered as the proprietor of the land earmarked for a public hospital. Similarly, in *Moses Lutomia Washiali Vs Zephania Ngaira Agwenye & Another, CA No. 298 of 2013,* this court upheld the nullification of a title after it found that the proprietor had actual notice that the purported seller did not have good title to the land"**

The dissenting judgment of my brother, M'Inoti, JA, underscores the fact that a purchaser lacks bona fides if he is a party to a fraud, or had knowledge of the fraud or that he/she substantially contributed to the fraud.

The learned Judge (**M'Inoti, J.A**) referred to the decision of ***DENIS NOEL MUKHULO OCHWADA & ANOTHER VS. ELIZABETH MURUNGARI NJOROGE*** & ***ANOTHER, CA NO. 139 OF 2013,*** *wherein* this Court declined to nullify title after it found that the registered owner was not party to the fraud that was perpetrated by the vendor who sold the land to him. In that decision, this Court stated:

> ***"As regards fraud on the part of the 2nd appellant, we are not able to find any evidence on record in that regard. He purchased the property after it was advertised in the East African Standard Newspaper of 13th August 2003. He paid to the 1st appellant valuable consideration of Kshs 650, 000.00. Prior to registration as proprietor, he conducted a search, which showed that the property was registered in the name of the 1st appellant and was free from all encumbrances. ….He took possession of the suit property and developed it with money raised by a charge over the suit property in favour of Standard Chartered Bank Kenya Ltd. Section 143***
>
> ***(2) which prohibits rectification of the register where the proprietor is in possession and acquired the land for valuable consideration without knowledge of, or having caused by his act neglect or default, the omission, fraud or mistake on the basis of which rectification of the register is sought. This protection, as we have already noted, is informed by the guarantee in the Torrens land registration system that the entries in the register are correct and members of the public can freely and securely rely on them. (See Charles Karathe Kiarie vs. Administrators of the Estate of John Wallace Mathare (Deceased) &5 Others, CA No. Sup. 12 of 2013)".***

Closer home in the Uganda Court of Appeal decision of **KATENDE vs. HARIDAS AND COMPANY LIMITED** cited with approval in Kenya High Court Case of **LAWRENCE MUKIRI VS. ATTORNEY GENERAL & 4 OTHERS [2013] EKLR,** the court defined what amounts to a *"bona fide"* purchaser for value thus:

> ***"A bona fide purchaser is 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 the following:***
>
> **vi.** ***He holds a certificate of title,***
>
> ***vii. He purchased the property in good faith,***
>
> ***viii. He had no knowledge of the fraud,***
>
> ***ix. He purchased for valuable consideration,***
>
> ***x. The vendors had apparent valid title,***
>
> ***xi. He purchased without notice of any fraud,***
>
> ***xii. He was not party to any fraud".***

In my view, the appellants herein purchased their properties in good faith.

They purchased them for valuable consideration, the original owners (who were private entities) had apparent valid title, there was no notice of any fraud or third-party interests, no fraud was alleged against the appellants nor was it shown they were active participants in any fraud. The trial judge appreciated as much when she stated:

> ***"[105] ….The petitioners are, in my view, unwitting victims of landowners (emphasis added) who sold properties to them without having regard to the public interest in the portions of their properties that had been compulsorily acquired for construction of the Northern Bypass corridor, and of surveyors who have prepared subdivision plans either in ignorance or disregard of the existing road corridor. Whatever the case, I can find no basis for alleging violation of the petitioners' constitutional right to property by the respondents".***

If it be true that the appellants were not involved in the preparation of the subdivisions of the remaining portions of land (after the intended compulsory acquisition), if it be true that the appellants purchased their various portions of land after the completion of a private survey commissioned by the original ownersand which survey was approved by the Director of Survey and leases/titles issued to the appellants by the Commissioner of Lands and /or the Registrar of Lands and 60 metres thereof set aside as a road-reserve, then the description given to them by the trial judge as ***"unwitting victims"*** aptly defined the appellants. Indeed, nowhere was it suggested that the appellants were land cartels, brief case investors and speculators with high connections and that there have access to shakers and movers of this country. On the contrary, they appear to be ordinary Kenyans who have worked hard and from the sweat of their brows have made heavy investments. On my part, I think we must face the monster of land grabbing vis-à- visa indefeasibility of title by looking at the circumstances

of each case and naming and shaming the land grabbers but not bona fide purchasers for value without notice. However, as stated above, each case must be determined based on its own peculiar circumstances, lest we sanitize illegally acquired land. In **EUNICE GRACE NJAMBI KAMAU & ANOTHER VS. THE ATTORNEY GENERAL, Mutungi, J** expressed himself therein:

> ***" In my view, the determination whether or not a title is illegal or unlawful has to take into account the circumstances and the process through which the title was obtained and/or acquired and provided the title is regularly issued by the duly authorized officers entitled to do so by the government, it is my opinion that such a title can only be impugned under Article 40(6) of the Constitution by it being established that the title was unlawfully obtained or acquired by the person shown to be registered as the owner. The doctrine of the sanctity of title is anchored on the premise that a registered owner of land who holds a certificate of title that is duly registered is prima facie the owner of that property and the title he holds is indefeasible unless the title is shown to have been unlawfully acquired and/or procured. My understanding is that for the title of a registered owner to be impugned on account of fraud such an owner must have had knowledge that the title was fraudulently obtained or procured and/or the owner was party to the fraud. The petitioners have relied on the indefeasibility of the title they hold in respect of title number''.***

The appellants herein conducted searches and found that titles of the original owners were free of encumbrances, that the records held by the Commissioner of Lands and the Survey office showed that the width of the road was 60 metres (and not 80 metres), they took possession of the plots and developed them.

Again, no amount of due diligence would have created a suspicion that the plots that the appellants were buying had been alienated. Why do I say so? It should be remembered that the original registered owners of the land were private entities. The Government moved in the 1970s with intent to compulsory acquire various portions of land belonging to the original owners. However, the process of the intended compulsory acquisition was not completed. The resultant effect is that any search and /or due diligence would reveal that the appellants purchased property from private entities (and at no time had the land, the subject of this appeal been vested in the public), who had caused sub-divisions that demarcated a 60 metre wide road. These subdivisions were approved by the Directorate of Survey and individual titles/leases issued to the respective purchasers by the Registrar of Titles and /or the Commissioner of Lands. It is in view of the above that I have come to the conclusion that the appellants' titles were protected by the repealed Section 23 of the RTA and Section 143 of the RLA.

For the foregoing reasons, I find that the appeal herein is for allowing in terms proposed by Ouko, the President of the Court of Appeal in his Judgment.

Dated and Delivered at Nairobi this 7th day of June, 2019.

F. SICHALE, J.A

……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR

JUDGMENT OF OTIENO-ODEK, JA

1. The determination of the dispute in this appeal lies in the answer to the following straight forward questions: if a person sells you land that is a public road, can you acquire private proprietary interest and title thereto? What if he/she sells you land that is a road reserve? What if you have no knowledge or means of knowing the land is reserved as a public road? In any of these scenarios, does the vendor have any land or proprietary interest to sell? In considering the answers to these questions, it should be borne in mind that it is entitlement to property that gives rise to title to property; it is not title that gives rise to entitlement to property. In any of the above scenarios, the vendor must have entitlement to the land before he/she can pass any title or proprietary interest to a bona fide purchaser for value without notice.

2. This appeal evinces the issue of government affectation of land and quality of an indefeasible title. The central issue is whether or not the appellants' titles to their suit properties is free from government affectation.

3. Government affectation of land is an adverse interest or proposal by government that affects third party proprietary interest in land. Examples include a proposal to compulsorily acquire a right or interest in a parcel of land in whole or part; or proposals for re-alignment, widening, sitting or alteration of the level of a road, railway, airport or other public utility or environment; as well as proposal relating to planning and control of development on land.

4. Quality of title refers to inviolability and marketability of title. A marketable title is a title that is free from any defects or clouds that a reasonable buyer would find objectionable. A title that is free from any encumbrance is of high quality, inviolability and marketability; it is an absolute or perfect title free from any deficiencies. In contrast, a title that has legal deficiencies or questions over its acquisition or a title subject to an encumbrance or government affectation is of low quality and low marketability.

5. The dispute in this appeal is an apparent encroachment by the appellants on a public road reserve that had ostensibly been compulsorily acquired by the Government in 1970. The disputed public road reserve abuts all that parcel of land originally known as **Mimosa Plantation LR No. 7785/9**. The original parcel was sub-divided into 296 plots that now form ***Mimosa Estate*** in Runda within the County of Nairobi. The appellants purchased residential houses in ***Runda Mimosa Estate.*** Collectively, the appellants' individual plots are referred to as the suit properties.

6. The appellants contend that at the time of purchase of their respective plots, records then and now at the Ministry of Lands indicate there was a road reserve measuring 60 meters wide abutting the Estate. The respective title documents to the purchased plots indicate the road reserve measures 60 metres.

7. Contrary to the appellants' contention, the respondents, ***Ministry of Lands*** and ***the Kenya Urban Roads Authority*** informed the appellants that the road reserve is 80 metres wide. Presently, the Ministry of Roads and the Roads Authority have earmarked parts, portions or walls of the appellants houses for demolition in that, parts of the houses encroach on the road reserve. At the time of earmarking the houses for demolition, the Ministry and the Urban Roads Authority intimated the road reserve was required for construction of the Northern by-pass road. At the date of hearing of this appeal, the Northern by-pass road had been completed.

8. Astounded, angered and distressed by the intention of the Ministry and the Kenya Urban Roads Authority to demolish part or portions of their houses, the appellants filed a constitutional petition before the High Court seeking *inter alia* declaratory orders as follows:

> ***"(i) A declaration that the appellants' rights individually or in association with others, to acquire and own property without arbitrarily being deprived of the same as guaranteed by Article 40 of the Constitution has been and will be contravened if the intended demolition is effected.***
>
> ***(ii) A declaration that the intended action of the Ministry of Roads, whether pursuant to any plans, contravenes the express records at the Ministry of Lands and that valid documents are those at the Ministry of Lands.***
>
> ***(iii) A declaration that the decision by the Ministry of Roads to demolish the appellants' properties is null and void to the extent that it violates the fundamental rights and freedoms of the appellants as per Article 40 of the Constitution.***
>
> ***(iv) A declaration that the Ministry of Lands is the legal and sole repository of land records in Kenya and the appellants were not under any duty to check records or plans of any other Ministry in relation to their affected land.***
>
> ***(v) A declaration that, in the alternative, the Ministry of Lands shall make prompt payment in full or just compensation to the appellants pursuant to the provisions of Article 40 of the Constitution."***

9. The respondents in opposing the petition before the High Court filed a replying affidavit dated 4th March 2011 deposed by the then Permanent Secretary in the Office of the President, ***Engineer Michael Mwaura Kamau***. The respondents assert the appellants' residential houses have encroached on the Northern by-pass road reserve; the road reserve is 80 metres wide and not 60 metres as contended by the appellants; the Government compulsorily acquired the land upon which the road reserve is located and positioned; a Notice of intended acquisition of the land was published in the Kenya Gazette dated 20th November 1970 being **Gazette Notice No. 3439**; the Notice was in respect of an intended acquisition by the Government of *inter alia* 6.420 acres from Land Reference No. 23 then owned by ***Edith Gladys Cockburn***; the Government was to acquire 16.061 acres from Land Reference No. 7785/9 then owned by ***Estav Limited*** and the Government was to further acquire 27.984 acres from Land Reference No. 7785/10 then owned by ***Runda Coffee Estate Limited.*** The respondents contend the appellants suit properties encroach on the land compulsorily acquired by the Government vide the foregoing Gazette Notice.

10. The respondents deposed that upon publication in the Gazette of the notice of intended acquisition, a further **Gazette Notice No. 3440** dated 20th November 1970 being a Notice of Inquiry to hear claims to compensation was published to all persons interested in the parcels being acquired. Subsequent to inquiry, the Government made compensation to the owners of the acquired land with the result that titles to all the acquired portions reverted to the Government.

11. On the strength of the compulsory acquisition as aforestated, the respondents assert that parts or portions of the appellants' residential plots and houses have encroached on the road reserve that measures 80 metres wide; and the parts or portions that have encroached the road reserve have been earmarked for demolition.

12. Upon hearing the parties, the learned judge dismissed the appellants' petition and declined to grant any of the declaratory orders sought. In dismissing the petition, the learned judge expressed herself as follows:

> ***"[106] It is true that the petitioners have a right to own property, and they are entitled to their properties to the extent that such properties have not encroached upon land that was acquired and set aside for public purpose. Their right to property must be exercised within and in accordance with the framework of the law. Public lands acquired through compulsory acquisition are amongst the overriding interest stipulated under Section 30 of the Registered Land Act which qualify the indefeasibility of title acquired under the Act as provided in Section 28 (b) above. The petitioners' titles, to the extent that they comprise land which forms part of the Northern by-pass are defeasible to that extent.***

[107] I do not therefore see, in the two petitions before me, any violation or limitation of the petitioners' right to property. The petitioners are in my view, unwitting victims of landowners who sold properties to them without having regard to the public interest in the portions of their properties that had been compulsorily acquired for construction of the Northern by-pass corridor and of surveyors who have prepared sub-division plans either in ignorance or disregard of the existing road corridor. Whatever the case, I can find no basis for alleging violation of the petitioners' constitutional right to property by the respondents."

13. Aggrieved, the appellants have filed the instant appeal citing the following compressed grounds in their memorandum of appeal:

(i) The judge erred in upholding an alleged compulsory acquisition process that did not comply with the Land Acquisition Act, Cap 296 of the Laws of Kenya (now repealed).

(ii) The judge erred in failing to hold the respondents' failure to strictly comply with the provisions of the Land Acquisition Act rendered the alleged compulsory acquisition null and void.

(iii) The judge erred in upholding an unregistered interest relied upon by the respondents to impugn the appellants' registered titles in the face of clear provisions of Sections 30 and 32 of the Registered Land Act, Cap 300 of the Laws of Kenya (now repealed).

(iv) The judge erred in finding the appellants had acknowledged there was a compulsory acquisition of land from the mother titles to their properties being LR 7785/9 and LR 12672 (formerly LR 23).

(v) The judge erred in failing to find the appellants had provided requisite proof that the road reserve along their properties was 60 metres wide based on sub-divisions of the mother titles to the properties as approved by the Commissioner of Lands and not through compulsory acquisition.

(vi) The judge erred in holding she could not inquire into the validity of the alleged compulsory acquisition and further erred in holding the appellants lacked locus standi to impugn the compulsory acquisition.

(vii) The judge erred in relying on the principles of contract to determine the issues raised in the petition in the face of clear statutory provisions governing compulsory acquisition.

(viii) The judge erred in finding the appellants could have with exercise of due diligence been put on notice that the road reserve along their properties was 80 metres and not 60 metres wide.

(ix) The judge erred in failing to find there was no final survey conducted when the alleged compulsory acquisition occurred.

(x) Since the Director of Survey record shows the road reserve as it passes along the appellants' properties is 60 metres wide, the appellants had no way of knowing the road reserve was 80 metres wide.

(xi) The judge having found the appellants were unwitting victims of actions by third parties, the judge erred in failing to fashion a remedy for the appellants.

(xii) By directing the appellants to surrender 20 metres of their respective properties, the judge erred in making an assumption that the respondents' case was that the appellants' properties had encroached onto the alleged road reserve in equal measure.

(xiii) The judge erred in relying on drawings by the respondents that do not meet the threshold for Survey Plans under the Survey Act.

(xiv) The judge erred in abandoning the titles and deed plans issued to the appellants by the Commissioner of Lands and Registrar of Titles, and instead relied on oral evidence by Surveyors.

14. At the hearing of the consolidated appeals, Senior counsel ***Mr. George Oraro***, Senior Counsel ***Prof. Githu Muigai*** and learned counsel ***Mr. Geoffrey Imende*** appeared for the appellants. The Ministry of Lands, Ministry of Roads and the Attorney General were represented by State Counsel ***Mr. Charles Mutinda*** and ***Christopher Marwa*** while learned counsel ***Mr. A. M. Mulekyo*** appeared for the Kenya National Highway Authority and Kenya Urban Roads Authority.

APPELLANTS' SUBMISSION

15. Senior Counsel ***George Oraro*** appearing for ***Cycad Properties Limited***, one of the appellants, urged this Court to allow the appeal. Counsel rehashed background facts to the dispute between the parties. He submitted the Kenya National Highways Authority and the Kenya Urban Roads Authority informed the appellants that their properties had encroached onto an area which the Government had compulsorily acquired for purposes of a public road by 20 metres; the respondents informed the appellants they intend to demolish properties encroaching on the road by the said 20 metres.

16. The leitmotif and gravamen of the appellants' case is if there was any compulsory acquisition in 1970, the process of the alleged acquisition was not completed in accordance with the **Land Acquisition Act**. More specifically, it was urged ***Sections 17*** *and* ***20 (2) (b)*** of the **Land Acquisition Act (Cap. 295 of the Laws of Kenya)** were not complied with. The Sections provide as follows:

"Section 17:

17. Where part only of the land comprised in documents of title has been acquired, the Commissioner shall, as soon as practicable, cause a final survey to be made of all the land acquired. (Emphasis supplied)

Section 20 (2):

20. (1) Where the documents evidencing title to the land acquired have not been previously delivered to him, the Commissioner shall in writing require the person having possession of the documents of title to deliver them to the Registrar, and thereupon that person shall forthwith deliver the documents to the Registrar.

(2) On receipt of the documents of title, the Registrar shall—

(a) where the whole of the land comprised in the documents has been acquired, cancel the documents;

(b) where only part of the land comprised in the documents has been acquired, record upon the documents that so much of the land has been acquired under this Act and thereafter return the documents to the person by whom they were delivered and upon such receipts, or if the documents are not forthcoming, cause an entry to be made in the register recording the acquisition of the land under this Act."

(Emphasis supplied)

17. Senior Counsel ***George Oraro*** submitted that pursuant to the Gazette Notice of 20th November 1970, the Government did not express an intention to acquire the entire parcel of land reflected in the mother title LR No. 12672 (Original LR 23). Rather, the Government expressed intention to acquire part of the land. Having expressed intention to acquire only part of the land, and even if inquiry and compensation was paid, the final process to complete the compulsory acquisition was causing a final survey to be made of all the land acquired. In the instant matter, the Government did not undertake a final survey and thus the process and procedure for compulsory acquisition as required by ***Section 17*** of the **Land Acquisition Act** was not finalized. Had a final survey been done, the width of the road reserve would have been expressed in the resultant titles and the Register of the appellants' properties would have reflected the same. Counsel submitted failure to comply with ***Section 17*** of the Act to cause a final survey to be made of all the acquired land renders the entire compulsory acquisition null and void.

18. The appellants contend that the Government failed to follow the provisions of ***Sections 17*** and ***20 (2) b)*** of the **Act** which would notify any third party dealing with the land that government affectation, by way of compulsory acquisition, had been made. Due to failure to follow the laid down procedure, counsel submitted the Government cannot visit the consequence of such failure upon the appellants.

19. The appellants emphasized that ***Sections 17*** and ***20 (2) (b)*** of the **Land Acquisition Act** underscore the procedure for perfecting acquisition of land and its registration against title. Failure to follow the procedure in the aforestated sections mean the so-called compulsory acquisition was not perfected.

20. A further ground urged in this appeal is the judge erred in holding the appellants could not inquire into the supposed compulsory acquisition of 1970. Counsel submitted that the judge misapprehended the appellants case which was not premised on challenge to the compulsory acquisition but on the basis they were innocent purchasers for value with their respective titles issued under the Registered Land Act based on sub-division plans duly approved by the Director of Survey with respect to the original title in LR No. 12672 (Original LR 23).

21. It was submitted that the trial court erred in erroneously drawing analogy from privity of contract thereby incorrectly finding that the compulsory acquisition having taken place in 1970 between the original land owners and the Government, the appellants could not question the same as they were not parties thereto.

22. The judge was faulted for failing to appreciate the appellants case was grounded on ***Article 40*** of the Constitution and not on compulsory acquisition; the court did not appreciate the Commissioner of Lands not only failed to comply with **Sections 17** and **20 (2)** of the **Land Acquisition Act** but permitted a sub-division of the original mother property and issued new titles under the Registered Land Act covering a portion of the land which the Government claims to have acquired.

23. It was urged that the learned judge misconstrued the appellants case and failed to appreciate the dispute between the parties is neither a claim under the Land Acquisition Act nor a claim in contract law; it is a claim premised on violation of a fundamental right to protection of property as guaranteed by ***Article 40*** of the Constitution. Counsel cited dicta from **Mutume Angaine vs. M'marete M'muroye Civil Appeal No. 123 of 2006 (2011) eKLR** where it was expressed that when a person's property is forcefully acquired, the Government must fully comply with the law and follow the laid down procedures strictly and meticulously. Citing the case of **Commissioner of Lands & another vs. Coastal Aquaculture Limited, Civil Appeal No. 252 of 1997, KLR (E&L) 1264,** counsel submitted that there is need to ensure all procedures relating to compulsory acquisition are not only strictly complied with but must appear to be so complied with on the face of inquiry. (See also **Sea Star Malindi Limited vs. Kenya Wildlife Services, KLR (E & L) 512).**

24. In arriving at her decision, the trial judge stated that "the appellants' surveyors, with a little due diligence would have established that the correct width of the road reserve was 80 metres." Faulting the judge for this statement, Senior Counsel referred to ***Section 39 (1)*** of the **Registered Land Act (RLA)** which stipulates:

"No person dealing or proposing to deal for valuable consideration with a proprietor shall be required or in any way concerned:

To inquire or ascertain the circumstances in or the consideration for which that proprietor or any previous proprietor was registered*."*

25. Relying on ***Section 39 (1)*** of the **RLA**, the appellants urged the registration system in Kenya is derived from the Torrens system whereby a purchaser is not required to look beyond the Register to establish the validity or ownership of property.

26. It was further contended that the trial judge erred by shifting the burden of proof and created a standard of due diligence required of a party acquiring property which had been compulsorily acquired. To buttress submission that the trial court erred in shifting the burden of proof, the case of **Attorney General vs. Kenya Commercial Bank Limited & 3 others (2014) eKLR** was cited. In the case, the court stated:

"….it would be a bad precedent where parties to a transaction in land would not only have to satisfy themselves that the land in question is registered but also trace the history of the land to establish whether or not the title to the said parcel of land was legitimately acquired….

It would also make nonsense of the title deeds issued and guaranteed by the Government in respect of parcels of land owned by individuals."

27. On the issue of due diligence, the appellants pressed that the trial court erred in finding that "while the adjoining parcels of land had a road reserve of 80 metres, the appellants' properties had a road reserve of 60 metres and that with due diligence, the appellants' surveyors would have found that the correct width was 80 metres." The appellants faulted the judge in her evaluation of the evidence thereby arriving at the aforestated erroneous conclusion and determination.

28. It was urged that the judge did not appreciate the import of ***Sections 30*** and ***32*** of the **Survey Act**. The Sections require that all survey plans prepared by a licensed surveyor be deposited with the Director of Survey and no land shall be deemed to have been surveyed or re-surveyed until the plan has been authenticated by the signature of the Director of Survey or a Government Surveyor authorized in writing by the Director.

29. Relying on ***Sections 30*** and ***32*** of the **Survey Act**, the appellants submitted that all survey plans in relation to the appellant's properties were lodged with the Director of Survey and produced before the trial court; the survey plans showed that the width of the road as 60 metres and the plans were duly authenticated by the Director of Survey; that none of the documents provided by the respondents indicated that an 80 metres road reserve had been acquired; no survey plans for the alleged 80 metres road reserve was prepared by a duly licensed surveyor. It was urged that the respondents plan prepared by a private firm of engineers known as ***John Burrow Consulting Engineers*** is not an authenticated plan under **Section 32 of the Survey Act;** and it was not open to the judge to find the survey plans tendered in evidence by the appellants were either in ignorance or were prepared in disregard of the existing road reserve.

30. A pivotal contestation by the appellants is the judge erred in finding public land acquired through compulsory acquisition is an overriding interest under ***Section 30*** of the **RLA**. Counsel submitted failure by the Government to register its interest in relation to the acquired land pursuant to ***Section 17*** of the **Acquisition Act** signifies no interest was acquired by the Government over the road reserve; compulsory acquisition can only be effected by registration consistent with the provisions of the Land Acquisition Act; no overriding interest of compulsory acquisition can be acquired without registration; an overriding interest can only be acquired through provisions of law.

31. Senior counsel ***Prof. Githu Muigai*** representing the individual appellants associated himself with submission made by Senior Counsel ***George Oraro***. ***Prof. Muigai*** restated the judge erred in invoking the doctrine of privity of contract; that the appellants are not seeking to assert any right or to impose any obligation arising from any contract between the government and the original owners; the appellants contend the compulsory acquisition never happened and that is why they hold valid titles to the suit properties; the appellants are bona fide purchasers for value without notice and are holders of valid titles; they petitioned the trial court to protect their constitutional right to property under Article 40 of the Constitution.

32. On the finding by the trial court that the appellants cannot challenge the process of compulsory acquisition made over 30 years ago, Senior counsel submitted the appellants challenge to the compulsory acquisition aims to demonstrate the sanctity of their documents of title; this type of challenge is not envisioned by the **Land Acquisition Act**; there is no limitation period to challenge violation of a fundamental right. Counsel emphasized the appellants case is that the records at the Ministry of Lands and at the Director of Survey indicate that the width of the road reserve is 60 metres and it is the 60 metres the Government is entitled to and not the 80 metres as claimed by the Ministry of Roads and the Urban Roads Authority.

33. Furthering submissions by ***Mr. Oraro***, ***Prof. Muigai*** echoed that the process of compulsory acquisition was not completed and the trial judge erred in reversing the burden of proof to the appellants; counsel cited ***Section 107*** of the **Evidence Act** which enjoins any person who desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. It was urged the Gazette Notices published in 1970 by themselves are not proof of compulsory acquisition. Counsel cited dicta from **Virendra Ramj Gudka & 3 others vs. Attorney General [2014] eKLR** where it was stated:

"The fact is there were no records of the acquisition at the Lands Registry and or with the Director of Survey. In my view, a Gazette Notice for the intended acquisition alone cannot effectuate a compulsory acquisition and in order to effectuate the acquisition, the procedure for acquisition as under the Act has to be adhered to. The Gazette notice for the acquisition and the Gazette Notice notifying the payment of the compensation can only affect the parties directly affected such as the

registered proprietors at the time the notice of compulsory acquisition is given. Third parties dealing with the acquired land can only be put on notice if the process of acquisition is completed and the provisions of Sections19 and 20 of the Act complied with."

34. ***Prof. Muigai*** further urged that the Gazette Notices published in 1970 were defective and inoperative as they do not indicate the public body in whose favour the land parcels were being acquired; further, there is no evidence that an inquiry as required under ***Section 9*** of the **Land Acquisition Act** on the compensation payable was conducted; there was no lawful and complete compulsory acquisition; there is no evidence on record that compensation was paid pursuant to ***Section 13*** of the **Land Acquisition Act;** and no final survey was done. It was urged that the Commissioner of Lands did not take possession of the acquired land as stipulated in ***Section 19*** of the **Land Acquisition Act;** he did not require surrender of the title documents pursuant to ***Section 20*** of the **Act**; the Commissioner has never recalled the documents of title. In support of these submission, Senior counsel cited the case of **Eunice Grace Njambi Kamau & another vs. Attorney General & 5 others [2013] eKLR** where it was stated:

"The language of Sections 19 and 20 of the Act is couched in mandatory terms attesting to the significance of the taking of possession and vesting of the acquired land in the government….. Quite clearly, observance of Section 19 (3) and Section 20 of the Act would serve to notify third parties that the government has acquired an interest in the subject land particularly because the Registrar of Lands would have been notified and a relevant entry would be made on the land register signifying the interests of the government."

35. A spirited submission by the appellants is the faulting of the trial judge's view that LR No. 7785/10 (adjoining property) whose survey plan was done in 1978 had a road reserve of 80 metres and that the appellants' surveyors could have used the adjoining survey plan to establish that the width of the road reserve in LR 7785/9 was 80 metres since these parcels were adjacent.

36. The appellants submitted the foretasted view by the judge is faulty; the judge failed to appreciate that even the road reserve required for another section of the Northern by-pass was 60 metres wide at the Kiambu Road junction; the judge failed to appreciate the appellants were expected in law to conduct due diligence only at the Lands Office and at the Director of Survey; they were not expected to consider adjoining properties; the appellants could not reasonably be expected to conduct any inquiry and searches at the Ministry of Roads or the Kenya Urban Roads Authority. It was urged as bona fide purchasers for value, the appellants had acquired indefeasible titles which are protected from arbitrary deprivation of property under ***Article 40*** of the Constitution.

RESPONDENTS' SUBMISSION

37. The respondents in opposing the instant appeal filed written submissions and list of authorities.

38. Learned counsel ***Mr. Charles Mutinda*** appearing for the Attorney General, the Kenya Urban Roads Authority and the Ministry of Lands opposed the appeal. It was submitted during hearing, the trial court visited the appellants' properties and the road reserve of the Northern by-pass; the trial court caused reports to be prepared by surveyors of the respective parties; the surveyors also testified in court and were cross-examined. Counsel submitted the area of land acquired for the Northern by-pass was 16.061 ha on LR No. 7785/9 which translates to 80 metres width of the road reserve; that earlier survey maps prepared in 1976 for the adjoining parcel of land LR No. 7785/10 show the width of the road reserve as 80 metres. It was urged that comparing the width of the road reserve with the adjoining property, the road reserve in LR No. 7785/9 should be 80 metres. It was further urged that the surveyors who prepared maps for the appellants ought to have used existing survey maps and beacons indicated in FR 141/14 and 17 done in 1976.

39. The respondents urged that the judgment and decision of the trial court is sound and ought to be affirmed; there is ample evidence on record proving the appellants' titles are tainted with illegality; the appellants have encroached on public land and this Court should not sanction illegal encroachment.

40. In urging us to dismiss the appeal, counsel cited the case of **Nelson Kazungu Chai & 9 others vs. Pwani University College [2017] eKLR** where this Court held:

"It is illegal and unfair to compel a victim to compensate a squatter for illegal acts of the squatter done on the victim's property, for no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act."

41. The respondents submitted they had demonstrated the appellants properties encroached on land compulsorily acquired by the Government in 1970; there exists survey maps and beacons that show the existing road reserve corridor is 80 metres wide; the appellants ought to have exercised due diligence to know their titles encroach on the road reserve; the appellants do not have capacity to challenge the 1970 compulsory acquisition and their cause of action, if any, is time barred under ***Section 7*** of the **Limitation of Actions Act** that bar action for recovery of land after 12 years. Counsel urged this Court to follow dicta in **Kenya National Highway Authority vs. Shallen Massod Mughal & 5 others [2017] eKLR**. The respondents urged us to find that the effect of compulsory acquisition of land is to create an overriding interest in the subject parcels.

42. On whether the appellants' property rights protected under ***Article 40*** of the Constitution have been violated, the Attorney General submitted ***Article 40 (6)*** does not protect property unlawfully acquired. The case of **Morris Ngundo vs. Lucy Joan Nyaki & another [2016] eKLR** was cited to support the proposition that **Article 40 (6)** of the Constitution takes away the protection of property that has been unlawfully acquired. In concluding their submissions, the respondents urged us to find the appellants' properties encroached a road reserve and they are not entitled to any declaratory orders.

43. Learned counsel ***Mr. Mulekyo*** for the Kenya National Highways Authority restated the Government compulsorily acquired 16.061 acres

of LR No. 7785/9 for Ksh. 208,060/= and which sum was paid to **Efstav Limited**.

44. Counsel submitted that the only dispute in this matter was the width of the road reserve. Is it 60 metres or 80 metres? It was urged the appellants have not explained how they arrived at 60 metres as the width of the road reserve; that the design and plan for the Northern by-pass shows the width of the road reserve is 80 metres and narrows down to 60 metres where the appellants properties and other neighbouring properties have unlawfully encroached the public land; that the by-pass widens and expands to 80 metres after the encroached area.

45. The 4th respondent submitted that the decision of the trial court was correct in law and should be affirmed. Counsel cited dicta from **Ramji Gudka vs. Minister of Roads & another** *ex parte* **Verendra Ramji Gudka HCCC JR ELC No. 32 of 2009** where it was stated that where there is a conflict between private interest and public interest, public interest must prevail. It was urged the appellants are trespassers on public land. Citing the case of **Gitwany Investments vs. Tajmall Limited & 2 others, 1984) eKLR 761** it was submitted that even a trespasser who is a bona fide purchaser for value without notice is liable for eviction. Citing the case of **Niaz Mohammed Jan Mohamed vs. Commissioner of Lands & 4 others, [1996] eKLR,** it was urged that even unutilized portions of a road reserve would remain road reserve and the road remains a public road vested in the appropriate authority.

46. On due diligence, the 4th respondent urged if the appellants through their surveyors had exercised due diligence, they would have noted the width of the road reserve was 80 metres; the evidence from appellants' surveyors has not demonstrated the basis upon which they concluded the width of the road reserve was 60 metres. It was submitted if the appellants' surveyors had picked the beacons of the adjoining abutting properties, they would have determined the boundary of the appellants' properties and realized the width of the road reserve was 80 metres. Counsel submitted all along, the appellants knew the width of the road reserve was 80 metres; this knowledge is deducible from survey map F/R 141/44 dated 8th November 1978 which was tendered in evidence by the appellants.

47. Commenting on applicability of the concept of overriding interest, the 4th respondent submitted failure by the appellants to tender the original mother title in evidence for scrutiny made it difficult for the trial court to verify compliance with provisions of the **Land Acquisition Act**.

ANALYSIS and DETERMINATION

48. I have considered the grounds of appeal, submission by counsel and the authorities cited. I remind ourselves this is a first appeal. As was said in **Peters vs. Sunday Post Ltd [1958] EA 424,** at P 429 by O'Connor P.

> ***"An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand".***

49. The test in deciding whether to uphold the trial court's conclusions on fact is set out in the quotation from Lord Simon's speech in **Watt vs. Thomas [1947] AC, 484 at p 485** as follows:

> ***"…an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight…"***

50. The appellant's case is grounded on **Article 40** of the Constitution**.** Pursuant to the Article, a person shall not be arbitrarily deprived of interest or right over any property of any description. The Supreme Court in **Rutongot Farm Ltd vs. Kenya Forest Service & 3 others [2018] eKLR,** expressed that:

> **"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."** (Emphasis supplied)

51. In this matter, the appellants contend that the trial court erred in ignoring the survey maps authenticated by the Director of Survey under **Section 32** of the **Survey Act, Cap 299** of the Laws of Kenya. On this submission, we refer to **Section 21 (2)** of the **Survey Act** which provides as follows:

> **21 (2) Neither the Government nor any public officer shall be liable for any defective survey, or any work appertaining thereto, performed by a licensed surveyor, notwithstanding that any plan relating to such survey or work has been authenticated in accordance with the requirements and provisions of this Act or accepted for registration under any written law for the time being in force relating to the registration of transactions in or of title to land.**

52. Grounded on the provisions of ***Section 21 (2)*** **of the Survey Act,** the appellants have no claim against the Government for any defect or error in the survey plans that had been authenticated by the Director of Survey. No liability and claim for compensation can be founded solely on an authenticated survey plan.

53. One of the grounds urged in this appeal is the trial court erred in invoking privity of contract in coming to the conclusion that the

appellants cannot challenge the compulsory acquisition that took place over 30 years ago. The trial court in arriving at its decision expressed as follows:

> **"[84] None of the petitioners were parties to the process of acquisition in 1970. If I may draw an analogy between the relationship between the state and the then land owners and the relationship between parties to a contract, the petitioners would stand in the position of third parties seeking to enforce a contract to which they are not parties, and they would be barred by the *doctrine of privity of contract* with regard to third parties: only persons who are parties to a contract are entitled to take action to enforce it. A person who stands to gain a benefit from the contract (a third-party beneficiary) is not entitled to take any enforcement action if he or she is denied the promised benefit."**

54. The appellants' submission on privity of contract has partial merit. In the trial court's perspective, correctly, there was no contract between the Government and the appellants over the compulsory acquisition made in 1970. To the extent that the trial court was drawing an analogy in contract, this is true. However, the analogy of privity of contract is partially inappropriate. The dispute at hand relates to real property and the correct legal principle the trial court ought to have invoked is privity of estate and unity of estate.

55. Privity of estate, at times referred to as privity of title, involves rights and duties that run with the land if the original parties intend to bind successors. Privity of estate denotes rights that touch, run with and concern the land. In this context, unity of estate means that both the government and the appellants derive and receive their interest/title through and from the same source namely, the mother title. None can acquire more land or better title than that granted and conferred through the mother title.

56. In the instant appeal, the Government compulsorily acquired parts of LR 7785/9 and LR 12672 (formerly LR 23) which are mother titles to the appellants' properties. Both the road reserve and the appellants' properties have one mother title. In this context, both have unity of estate. The road reserve and the appellants' properties have a root of title from the same estate namely LR 7785/9 and LR 12672 (formerly LR 23). The common and shared mother titles gives privity of estate to government interest in the road reserve and the appellants' properties. Under the doctrine of privity of estate, both the government and the appellants can only acquire proprietary rights and interest as was vested in the original owners. In this context, the government cannot own more land than was compulsorily acquired from the original owners of the mother title to the land acquired namely ***Messrs Noral Helen Cockburn***; ***Runda Coffee Estate*** and ***Estav Limited Estav Limited.*** Likewise, the appellants cannot own and acquire more land than that which remained upon excision of the portions acquired by the government in 1970. It is in this regard that we hold the analogy of privity of contract used by the trial judge was partially inappropriate given the facts and dispute between the parties. What conjoin the government's road reserve and the appellants' titles is privity of estate and unity of estate.

57. The appellants further fault the trial court for invoking limitation period in arriving at its decision. The trial court expressed:

> **"88. That being the case, even had the owners of the mother titles attempted to challenge the acquisition at this point in time, the fact that the process was completed more than 40 years ago, and the compensation award made, would have barred them from raising any questions about the acquisition."**

58. The appellants contend that the judge misapprehended their case and erred in invoking limitation issues. It was urged the appellants case is not grounded on challenging the compulsory acquisition that took place over 40 years ago; the appellants are not challenging compensation paid to the then registered owners of the mother titles; rather, the appellants contend that they are bona fide purchasers for value and their titles are indefeasible and ***Article 40*** of the Constitution protects their private property rights. Based on the foregoing, it was urged the trial court erred in invoking limitation issues.

59. I have considered the appellants' submission on limitation. Indeed, a reading of the claims in the Petition and the declaratory orders sought clearly evince the appellants case is grounded on ***Article 40*** of the **Constitution**. The claim is founded on alleged violation of the fundamental right to property. I am alive to the decision of this Court in **Peter N. Kariuki vs. Attorney General [2014] eKLR, Civil Appeal No. 79 of 2012**, where it was held that there is no time limit within which a party can file a claim for violation of constitutional rights. I have considered the persuasive dicta from the High Court in **Kamlesh Mansuklal Damji Pattni & Another vs. Republic 2013] eKLR** where it was expressed the Constitution did not set a time limit within which applications for enforcement of fundamental rights should be brought.

60. Unless expressly stated in the Constitution, the period of limitation does not apply to violation of rights and freedoms guaranteed in the Constitution. The law concerning limitation of actions cannot be used to shield the State or any person from claims of enforcement of fundamental rights protected in the Bill of Rights. (See **Dominic Arony Amolo vs. Attorney General Nairobi HC Misc. Civil Case No. 1184 of 2003 (O.S) [2010] eKLR; Otieno Mak'Onyango vs. Attorney General & another Nairobi HCCC No. 845 of 2003).**

61. In my view, subject to the limitations in ***Article 24*** of the 2010 Constitution, fundamental rights and freedoms cannot be tied to the shackles of limitation period. More specifically in relation to property rights, subject to ***Article 40 (6)*** of the Constitution, the protection of the right to property is guaranteed. Accordingly, I find that the trial judge erred in invoking the concept of limitation as an issue that could bar to violation of property rights under the appellants from asserting their claim **Article 40** of the Constitution.

62. Further in my view, the statement by the trial judge that the appellants could not challenge compulsory acquisition concluded over 40 years ago is an invocation of the doctrine of laches. Delay and laches involve essentially a personal disqualification on the part of a particular applicant (plaintiff). Delay and laches cannot be treated as a stigma on the title to land which once impressed, necessarily descends with the title and affects all succeeding owners. (See **Odoula vs. Ibadan City Council, Supreme Court of Nigeria Suit No. 387 of 1975; 3 PLR 1978/55 SC).** If delay or laches is founded upon a mere delay which does not amount to a bar by any statute of limitation, the validity of the contestation on laches must be considered upon principles which are substantially equitable.

63. In the instant appeal, the dispute involves application of express statutory law provisions embodied in the **Land Acquisition Act**. Unless expressly stated, there is no room for equitable principles to vary or modify express statutory provisions and prescribed procedure for compulsory acquisition under the Land Acquisition Act.

64. A pivotal submission in this appeal is the contestation the trial judge erred in failing to find the process of the alleged compulsory acquisition of parts of LR 7785/9 and LR 12672 (formerly LR 23) was not completed. It is the appellants' contention the process was not completed because ***Sections 17 and 20 (2) (b)*** of the **Compulsory Acquisition Act** were not complied with. For ease of reference and re-collection, the Sections provide as follows:

> **"Section 17:**
>
> **17. Where part only of the land comprised in documents of title has been acquired, the Commissioner shall, as soon as practicable, cause a final survey to be made of all the land acquired.** (Emphasis supplied)
>
> **Section 20 (2):**
>
> **20.(1) Where the documents evidencing title to the land acquired have not been previously delivered to him, the Commissioner shall in writing require the person having possession of the documents of title to deliver them to the Registrar, and thereupon that person shall forthwith deliver the documents to the Registrar.**
>
> **(2) On receipt of the documents of title, the Registrar shall—**
>
> **(a) where the whole of the land comprised in the documents has been acquired, cancel the documents;**
>
> **(b) where only part of the land comprised in the documents has been acquired, record upon the documents that so much of the land has been acquired under this Act and thereafter return the documents to the person by whom they were delivered and upon such receipts, or if the documents are not forthcoming, cause an entry to be made in the register recording the acquisition of the land under this Act."** (Emphasis supplied)

65. The appellants appeal is also founded on non-compliance with ***Section 17*** of the **Land Acquisition Act** *to wit* there was no final survey made of all the land that was acquired. In relation to ***Section 20 (2) (b)***, the non-compliance is no entry was made in the Register recording the acquisition of parts of LR 7785/9 and LR 12672 (formerly LR 23). The appellants further contend there were various non-compliances as follows: the Gazette Notices published in 1970 were defective and inoperative as they do not indicate the public body in whose favour the land parcels were to be acquired; there is no evidence that inquiry as required under ***Section 9*** of the **Land Acquisition Act** as to the compensation payable was conducted; there is no evidence on record that compensation was paid pursuant to ***Section 13*** of the **Land Acquisition Act**; no final survey was done; the Commissioner of Lands did not take possession of the acquired land as stipulated in ***Section 19*** of the **Land Acquisition Act**; the Commissioner did not require surrender of the title documents pursuant to ***Section 20*** of the **Act**; and the Commissioner has never recalled the documents of mother title of LR 7785/9 and LR 12672 (formerly LR 23).

66. I have considered each of the alleged non-compliance. The contention that no compensation was paid for compulsory acquisition pursuant to ***Section 13*** of the **Act** has no merit. ***Section 13 (1)*** of the Act provides:

> **"13. (1) After notice of an award has been served under section 11 on all the persons determined to be interested in the land, the Commissioner shall, as soon as practicable, pay compensation in accordance with the award to the persons entitled….."**

67. On record there is a letter dated 23rd December 1970 addressed to the Chief Engineer of Roads stating that compensation awards had been issued in relation to compulsory acquisition for the extension of road from Ruaka to Kiambu. In the letter, an award of Ksh. 136,280/= was made to ***Noral Helen Cockburn***; Ksh. 150,548/= to ***Runda Coffee Estate*** and Ksh. 208,068/= to ***Estav Limited***. These payees were the original registered proprietors of portions of LR 7785/9 and LR 12672 (formerly LR 23) that were compulsorily acquired as road reserve. There is no evidence on record to challenge the payment of these awards upon inquiry for compensation having been made. For this reason, I find that the award and compensation was paid pursuant to ***Section 13*** of the **Land Acquisition Act**.

68. The appellant contends that no inquiry was made for compensation for compulsory acquisition under ***Section 9*** of the **Land Acquisition Act**.

69. I have considered this contention. **Gazette Notice No. 3440** dated 20th November 1970 was published pursuant to ***Section 9*** of **Land Acquisition Act** inviting registered proprietors amongst others **Closeburn Estate Limited**, **Edith Gladys Cockburn**, **Efstav Limited** and **Runda Coffee Estate** for inquiry and hearing of claims to compensation for portions of their lands compulsorily acquired.

70. There is on record a letter dated 22nd December 1970 from **Efstav Limited** to the Commissioner of Lands accepting the award of Ksh. 208,060 as compensation award for the land acquired in LR 7785/9. In addition, a letter dated 12th August 1972 signed by ***Mr. G.A. Hollins*** confirms compensation has been paid in full and final settlement of all claims. The letter itemizes the Gazette Notices through which compulsory acquisition was made.

71. Based on the **Gazette Notice No. 3440** dated 20th November 1970 and the letter by Mr. G.A. Hollins, I am satisfied that an inquiry was held, hearing for compensation done and an award for compensation made. Accordingly, the contention no inquiry was made in terms of ***Section 9*** of the **Land Acquisition Act** has no merit.

72. A further contestation by the appellants is that **Gazette Notices No. 3439** published in the Kenya Gazette dated 20th November 1970 was defective and inoperative as it does not indicate the public body in whose favour the land parcels were to be acquired. I have perused the subject Gazette Notice. On the face thereof and in relevant excerpt it is stated *"…The Government intends to acquire the following land for road realignment…."* It is manifest the purpose for acquisition is stated as road realignment. The person acquiring is stated to be the Government. At all material times, the legal entity that owns public roads is the Government of Kenya. It is the Government that intended and indeed acquired the parts of the land for road realignment. Accordingly, the contention that the Gazette Notice was defective as the person for whom the land was being acquired was not stated has no merit. For whatever it's worth and for rhetorical purposes, if not for the Government, I wonder in whose favour the road reserve should have been acquired.

73. Two facets of non-compliance alluded to by the appellants is the Commissioner of Lands did not require surrender of the mother title documents pursuant to ***Section 20 (2) (b)*** of the **Land Acquisition Act**; and the Commissioner has never recalled the documents of mother title of LR 7785/9 and LR 12672 (formerly LR 23). Founded on this non-compliance is the contention no entry was made on the register to complete and perfect the process of compulsory acquisition.

74. The respondents concede the mother titles to LR 7785/9 and LR 12672 (formerly LR 23) were never surrender by the original registered owners; it is not disputed there is no entry of the compulsory acquisition in the Register.

75. What is the legal consequence of failure by the Commissioner to recall or require to be surrendered the original mother titles? Does the non-compliance make null and void the entire compulsory acquisition of the portions of land and road reserve for which compensation and award was made?

76. It is not in dispute there was non-compliance with the provision of ***Section 17*** and ***20 (2) (b)*** of the **Land Acquisition Act**. The letter dated 12th August 1972 signed by Mr. G.A. Hollins corroborates this fact. In the letter, Mr. Hollins advises that under ***Section 17*** of the **Land Acquisition Act**, the Commissioner of Lands is required to cause a final survey to be made of all the land acquired and in the instant matter, it remains for individual titles to be rectified. He recommends it is advisable to lodge caveats against the titles as a temporary measure. The advice and recommendation of Mr. Hollins were never implemented. This is corroborated by the absence of any caveat entered on the mother titles and no rectification of the Register was done. The legal issue in this appeal is what is the legal effect of non-compliance with ***Sections 17*** and ***20 (2) (b)*** of the **Land Acquisition Act**? I shall revert, consider and answer the question here below.

77. A further issue urged by the appellants is that the width of the road reserve along their properties is 60 metres and not 80 metres as alleged by the respondents. The appellants submitted that the trial court erred and failed to note that there were other parts of the Northern By-pass where the width of the road was 60 metres. It was submitted that the court erred in finding that "in view that LR No. 7785/10 (adjoining property) whose survey plan was done in 1978 had a road reserve of 80 metres, the surveyors of the appellants' property could have used the beacons of the adjoining property to establish that the width of the disputed road reserve abutting LR 7785/9 was 80 metres since these parcels were adjacent."

78. The appellants further fault the trial court for failing to appreciate that the road reserve at the Kiambu Road junction and the area near Windsor Hotel along the Northern by-pass was 60 metres wide. The judge was faulted in failing to find the appellants were not expected to consider adjoining properties in determining the boundaries of their properties and the width of the road reserve; the judge erred in failing to find the appellants could not reasonably be expected to conduct inquiry and searches at the Ministry of Roads or the Kenya Urban Roads Authority to ascertain the width of the road reserve.

79. I have considered the submission by the parties on the width of the road reserve. The appellants contend that the width is 60 metres and as such, there is no encroachment on the road reserve. Conversely, the respondents contend the width is 80 metres.

80. The trial judge in evaluating the evidence relating to the width of the road reserve made a determination that the width was 80 metres. In so finding, the court extensivley expressed as follows:

> **"[4] The issue in dispute in both petitions is the width of the road reserve adjacent to the petitioners' properties. While the petitioners contend that it is 60 metres according to records from the Ministry of Lands, the respondents counter that it is 80 metres as delineated in the 1970s when the parent parcels were compulsorily acquired by the government…….**
>
> **[19] The petitioners submitted that the road corridor for the Northern by-pass is 60 metres, contrary to the assertion by the respondents that it is 80 metres in width; that all the survey maps from the Director of Surveys show that the road is 60 metres; that the respondents have not produced a single survey map that shows that the road was 80 metres. They therefore assert that the respondents want to deprive them of their property contrary to the provisions of Article 40 and 65 of the Constitution by alleging that the road reserve goes 20 metres into their properties…...**
>
> **[93] The thrust of the petitioners' argument on this issue is that from the information available to them, and from the survey maps available, only a 60 metres road reserve had been acquired. However, the respondents' argument that the vendors from whom the petitioners' bought their parcels as well as the surveyors who carried out the subdivision of the land and drew the subdivision plans deliberately encroached upon the road reserve is lent credence by two things. First, L.R. 7785/9 adjoins L.R. 7785/10. It is common ground that this property has not encroached on the road reserve, and that the road reserve at that property is 80 metres. Secondly, annexure 'KK5', which is survey plan number F/R 141/14 dated 4th April 1978 annexed to the affidavit of the 2nd petitioner, Dr. Kevin Kariuki (whose date of swearing is not indicated but which was filed in court on 22nd December 2010) shows that the road reserve was 80 metres.**
>
> **[94] L.R. 7785/9 borders L.R. 7785/10. It is bordered in turn by L.R. 12672. While L.R. 7785/10 has a road reserve of 80 metres, the adjoining parcels, the mother titles to the petitioners' properties, have a road reserve of 60 metres. The**

petitioners' position is that the government must have acquired 80 metres from one land parcel, but acquired 60 metres from the other two. The totality of the evidence from the documents before the court does not, however, support this argument.

[95] From even a cursory analysis of the various survey maps produced by the parties in support of their respective positions, and from the overall evidence before me, it seems to me that certain facts emerging therefrom make the contentions by the petitioner improbable: that L.R. 7785/10, whose survey was done in 1978, had a road reserve of 80 metres; that the petitioners had access to F/R 141/14 ('KK5") dated 4th April 1978 with a road reserve of 80 metres; that, as testified by Mr. Murugu and indirectly corroborated by Mr. Obel in his report, titles registered under the Registration of Titles Act had fixed boundaries which could be scientifically established by use of coordinates; and as conceded somewhat reluctantly by Mr. Obel in his testimony before the court, that in carrying out a survey, a surveyor prepares the plan using survey control points, which are existing beacons; and that in the case of L.R. 7785/9, the nearest survey plan existing for which the surveyor could use beacons was the one for L.R 7785/10, (in particular beacon 'RK5', which was at the boundary between L.R 7785/10 and L.R 7785/9) and has a road reserve of 80 metres.

[96] Clearly, the owners of the mother titles to the petitioners' properties, the vendors on whose behalf the surveyors subdivided the mother titles, were aware of, or should have been aware of, the fact that the road reserve was intended to be 80 metres. In the circumstances, it is difficult to accept the contention by the petitioners that the failure by the respondents to complete the land acquisition by having a final survey plan prepared meant that there was no information available that the government had acquired an 80 metres road reserve from the subject parcels. I take the view that, with the exercise of due diligence, the surveyors who carried out the subdivisions out of which the petitioners' properties were created could, with due diligence, have established the correct width of the road as 80 metres."

81. I have considered the reasoning and analogy of the trial court as quoted above in finding that the width of the disputed road reserve abutting the appellants' properties is 80 metres. The trial judge based her decision on transposition and comparison that the width of the road reserve along the adjoining properties was 80 metres. In my considered view, this transposition, analogy and comparative approach to determining the width of the disputed road reserve is erroneous. There is no practice that the width of a road or road reserve is uniform and consistent along its entire route or along all properties adjoining and abutting the road. In some areas, the width of a road could be 60 metres, 80 metres or even 88 metres. There is evidence on record that there is no uniformity in the width of the disputed road reserve and no evidence was led to prove such uniformity as a matter of practice in road construction or indeed under any law.

82. A pertinent illustration that the width of a road reserve can change along its route is illustrated by the case of **Kenya National Highway Authority vs. Shalien Masood Mughal & 5 others [2017] eKLR**. In this case, the changing width of the road reserve in dispute was captured by Waki, JA in his judgment as follows:

"[30] … The strongest evidence that there was an existing road reserve for the Nairobi/Mombasa highway was the report filed pursuant to the trial court's own order to establish the physical location of the two properties. It was a non-partisan report from professional surveyors appointed by both sides and there was no reason to second guess it. They confirmed that they applied scientific methodology in arriving at their conclusions. And what did the report say? Take the background information which I may reproduce:

> ***"Parcel No. 209/12258 was surveyed by Mr. Gordon Peter Okumu Wayumba of Geometer Surveys Ltd. The survey is contained in F/r No. 262/89 and Comps. No. 31958.***
>
> ***The Survey left a 60.00m road reserve (Mombasa road) on the southern direction. The road was widened to 80.00m from beacon „L27 as per the approved survey plan (F/R 204/133. A 30.00m buffer strip runs from „MW6 to „C9 on F/R 195/95.***
>
> ***The road reserve then widens from „C9 (F/R 195/95) to „M3 on Likoni road according to the Nairobi Development Plan No. 305 and F/R 178/104. This is the section that L.R No. 209/12258 was excised from."*** (Emphasis supplied)

83. In the instant appeal, there is evidence on record which shows that the width of the Northern by-pass is not uniform along its entire route; it is 60 metres at some parts for example around Windsor hotel area and 80 metres in others. It is thus erroneous to use the width of a road reserve at an adjoining property to deduce that the same width applies to the next adjoining property. The trial court appreciated this when it was stated:

> **"[75] The construction of the Northern Bypass at those portions of it adjacent to the subject property is now complete. The Bypass has an 80 metres reserve in the portions adjoining the petitioners' properties, but 60 metres at the subject property. After the junction with Kiambu Road, the Bypass again narrows to 60 metres. During the site visit, the 5th respondent stated that this difference was accounted for by the fact that the land at the Windsor junction was acquired later and only 60 metres were acquired."**

84. In my considered view, in the instant appeal, the width of the disputed road reserve is immaterial. The width may be 60 metres, 80 metres or even 10 metres. What is material is whether the appellants' properties encroach on parcels of land that had been compulsorily acquired by the government in 1970. Are the appellants' properties and title encroaching on land that had been compulsorily acquired by the government in 1970? Are their properties encroaching into the boundary of parts of land compulsorily acquired?

85. In this matter, the boundary of the road reserve is in issue. Does the boundary of the road reserve extend into parcels of land whose titles are held by the appellants? The appellants allege that their parcels of land do not encroach the road reserve.

86. A person who puts the boundary and identity of land in issue must successfully contradict the defendant's survey plan of the land in dispute otherwise he would fail on that issue. (See **Nigerian case of Nathaniel Ochigbo vs. Idi Umoru, 3PLR/2009/55 (CA))**. In this matter, the appellants have the legal burden to prove the government road reserve does not extend to their properties. Conversely, the respondents have the evidentiary burden to prove the road reserve was compulsorily acquired by the government in 1970 and that the appellants' properties encroach and extend into the road reserve. The respondents' evidential burden are issues of facts.

87. The trial judge in evaluating the evidence relevant to determining if the appellants' properties encroach the road reserve established the following facts:

> ***"[56] The surveyor from the Director of Survey, Mr. Reuben Mwenda Murugu, is a Senior Assistant Director of Survey in the Ministry of Lands. He stated that he had received a letter from the Permanent Secretary, Ministry of Roads dated 20th April 2012. The letter sought to know whether the road in dispute is 60 metres or 80 metres. Mr. Murugu indicated in his report that he had collected all the plans pertaining to the land in dispute and drawn them on one sheet depicting what is on the ground. The plans that he considered were F/R Nos. 131/10, 13/69, 141/14 and 17, Survey Plan No. 163/86, F/R Nos. 297/8, 207/35, 209/68-70 and 207/4.***
>
> ***[57] With regard to the position on the ground, he stated that when he and other officers from the Director of Survey visited the site, they found that L.R. No. 7785/9 neighbours 7785/10 to the East and L.R. 12672 (original No. L.R 23) to the West; that in the subdivision of L.R. 7785/10, a provision of 80 metres was made for the Northern Bypass as shown in Plan No 131/10, 131/69; 131/14 and 17, which are dated 1976 and 1979, respectively. With respect to the subdivision of L.R. No. 7785/9, approved in 1993, a provision of 60 metres was made by Mr. Wabaru in 1990.***
>
> ***62. According to Mr. Obel, the properties previously registered as L.R. No. 7785/9 do not encroach on any road reserve as the road width was surveyed as 60 and not 80 metres. He contended, further, that the survey plans confirming this were checked, approved and authenticated by the Director of Surveys as required by the Survey Act and form part of current official survey records of which the Director of Surveys is the sole custodian.***
>
> ***73. The petitioners acknowledge that, as alleged by the respondents, there was a compulsory acquisition of land from the mother titles to their properties, L.R 7785/9 and L.R. 12672 (L.R. 23) as well as from adjoining properties, L.R. 7785/8 and 7785/10. They submit, however, that while the process of compulsory acquisition commenced, it was not completed, that it resulted in acquisition of a 60 metres road reserve with regard to the mother titles to their property and 80 metres in respect of adjoining properties, and that therefore the attempt by the respondent to extend the corridor 20 metres into their property is an unlawful and arbitrary expropriation of their property, to which they have an indefeasible title, and therefore violates Article 40 of the Constitution.***
>
> ***74. The respondents do not challenge the validity of the petitioners' title to their respective properties. Their assertion is that, to the extent that the petitioners have encroached on 20 metres of the bypass, their title is defeasible and is not entitled to the protection afforded by Article 40 of the Constitution."***

88. On my part, I have re-evaluated the evidence on record. The critical survey map that determines if the appellants' properties encroach the land compulsorily acquired is the plan that delineate the boundary of parcels of land compulsorily acquired in 1970. At paragraph 57 of the trial court's judgment quoted above, it is established as proven that in the subdivision of L.R. 7785/10, a provision of 80 metres was made for the Northern Bypass as shown in Plan No 131/10, 131/69; 131/14 and 17, which are dated 1976 and 1979, respectively.(Emphasis supplied). In my view, the plans prepared in 1976 and 1979 before the dispute arose in this matter have a higher probative value. I endorse and approve these plans and find that indeed, the appellants' properties encroach the 80 metres road reserve that had been compulsorily acquired by the Government in 1970.

89. However, the appellants' properties are not on LR ***7785/10*** but on ***L.R 7785/9.*** The factual and legal question is not the width of the road but whether the portion of land compulsorily acquired by the government in 1970 extends into the appellants' properties which are on the original mother titles.

90. On this question, I have considered the evidence on record and applicable law. The testimony by ***Mr. Reuben Mwenda Murugu***, a Senior Assistant Director of Survey in the Ministry of Lands, is to the effect that the coordinates where the road is 80 metres tally with the land acquired for the road. He testified the coordinates are measured by theodolite and the appellants' surveyor should have used theodolite to establish the dimensions of the land parcels. He also testified that the survey plans that is incorrect is the one for LR 7785/9 and Plan No. 209/70 and 207/35 and further testified the other incorrect survey plan is in respect of LR No. 12672 (LR 23) and the Plan No. is FR/297/8 and 163/86.

91. I have considered the evidence by the respondent as given in the testimony of ***Mr. Reuben Mwenda Murugu***. To controvert the respondents' testimony, the appellants relied on survey report and testimony of ***Mr. John Dominic Obel***, a licensed survey since 1988 who retired in 1997 in the position of Deputy Director of Survey. The testimony of ***Mr. John Dominic Obel*** in relevant excerpts is as follows:

> ***"If there was an acquisition and the surveyor proceeded on the basis of a survey plan and produced a 60m instead of 80m, then the plan would be defective."***
>
> ***"A surveyor in sub-dividing a parcel would use survey data from survey control points which would enable him to survey the neighbouring plots."***

"In the case of 7785/9, the nearest survey plan existing for which he could use beacons was LR 7785/10."

"I did not find the documents for LR 7785/9 in the technical file."

92. My consideration, analysis and evaluation of the expert evidence of ***Mr. Reuben Mwenda Murugu*** and ***Mr.John Dominic Obel*** both licensed surveyors lead me to conclude that the 60 metres width of for the road reserve was inserted by the appellants' surveyors. In my view, in the instant matter, the width of the road reserve is not determined by a private surveyor; the width is determined by the exact land compulsorily acquired by the government in 1970. The boundaries of the land acquired by the government in 1970 is the controlling factor. I am satisfied that portions of the appellants' land encroach the land acquired by the government in 1970. There is no evidence on record to show that the appellants surveyor Mr. Wabaru, who in 1993 sub-divided L.R. No. 7785/9 and created a provision of 60 metres wide road reserve used the appropriate beacon control coordinates in establishing the width of the road reserve. In addition, it is not clear which road he was creating: was he creating a road of 60 metres wide for the sub-divided plots or was he identifying and putting aside the public road compulsorily acquired by the government in 1970. In the absence of such evidence on record, I am satisfied the 60 metres wide road created by the private surveyor in the sub-division of LR N0. 7785/9 did not factor the road reserve compulsorily acquired by the government in 1970.

93. Another issue urged by the appellants is the judge erred in finding public land acquired through compulsory acquisition is an overriding interest under **Section 30** of the **Registered Land Act**. It was submitted failure by the Government to register its interest relating to the acquired land pursuant to ***Section 17*** of the **Land Acquisition Act** imply no interest was acquired by the Government over the road reserve; that compulsory acquisition can only be effected by registration consistent with the provisions of the Land Acquisition Act; no overriding interest of compulsory acquisition could be acquired without registration.

94. The trial judge in considering the issue of overriding interest observed:

"[31] It is the respondents' case that the petitioners' claim of constitutional violations is baseless as the land was compulsorily acquired and such acquisition constituted an overriding interest which cannot be noted in the register under the provisions of section 30 of the Registered Land Act. Furthermore, the respondents argued, Article 40 does not apply to illegally acquired land.

[104] It is true that the petitioners have a right to own property, and they are entitled to their properties to the extent that such properties have not encroached upon land that was acquired and set aside for a public purpose. Their right to property must be exercised within and in accordance with the framework of the law. Public lands acquired through compulsory acquisition are amongst the overriding interests stipulated under section 30 of the Registered Land Act which qualify the indefeasibility of title acquired under the Act as provided in section 28(b) above. The petitioners' titles, to the extent that they comprise land which forms part of the Northern Bypass, are defeasible to that extent."

95. The legal issue for my determination is whether the government claim to land acquired through compulsory acquisition is registrable and if not registered whether such interest is an overriding interest or the claim is extinguished by non-registration.

96. ***Section 20 (2) (b)*** of the **Land Acquisition Act** stipulates that where only part of the land has been acquired, upon compulsory acquisition, if the title documents are not forthcoming the Commissioner shall cause an entry to be made in the register recording the acquisition of the land under the Act. A reading of the Section shows an entry has to be made in the register. In the instant case, no entry was recorded. What is the legal consequence of failure to record and show an entry of the compulsory acquisition in the register?

97. The trial judge held that the consequence of non-registration is the acquisition becomes an overriding interest.

98. The appellants submitted that the legal consequence is that the process of compulsory acquisition is incomplete and as such, the government does not acquire any interest in the land. Founded on this premise, the appellants contend the title deeds to their properties are indefeasible since there was no encumbrance, entry of compulsory acquisition or any government affectation registered against their titles.

99. The respondents contend the consequence of failure by the Commissioner to record and make an entry in the register makes the compulsory acquisition of the road reserve to be an overriding interest that need not be noted on the mother title; that any third party acquiring part or the whole of parcels of land compulsorily acquired by the Government in 1970 do so subject to the overriding interest signified by compulsory acquisition as evidenced by the Gazette Notices of 1970.

100. Waki, JA in **Kenya National Highway Authority vs. Shalien Masood Mughal & 5 others [2017] eKLR** had occasion to consider the issue of overriding interest in relation to compulsory acquisition. He opined as follows:

"[37] …...The fact of the matter is that there was in existence a road reserve before the disputed plot came into being in 2002 and it was not open for any authority to alienate it further for private development. The whole world ought to have been aware, as was ultimately established, that there was a road reserve of 80 meters and a buffer zone of 30 meters which did not in law have to be noted in any land register. It is an overriding interest and not an equitable interest.

[44] ……I have found that the road reserve existed before the disputed plot. It was an overriding legal interest unaffected by the rights of any subsequent purchaser whether such purchaser had notice of it or not….

101. The answer as to whether a proprietary right acquired or in the process of acquirement through compulsory acquisition is an overriding interest lies in the statutory definition of an overriding interest.

102. ***Section 30 (a)*** of **RLA** stipulate rights of way subsisting at the time of first registration is an overriding interest. ***Section 30 (c)*** of **RLA** specify rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law are overriding interests.

103. In the instant matter, the appellants do not dispute that the Government compulsorily acquired parts LR 7785/9 and LR 12672 (formerly LR 23) for purposes of a road reserve. Pursuant to ***Section 30 (a)*** of **RLA** a right of way subsisting at the time of first registration is an overriding interest. The appellants' titles to their respective properties are a first registration after sub-division of the mother title. Their titles and plots came into existence long after the right of way in the road reserve had been created and established. In relation to compulsory acquisition, in the instant matter, once an award or compensation was paid in relation to the land compulsorily acquired vide the **Gazette Notices No. 3440** and **3439** of 20th November 1970, the proprietary interest of the government had arisen over the portions acquired. I find the interest of the government ensuing from compulsory acquisition is recognized and protected as an overriding interest under ***Section 30 (c)*** of the **RLA**. Accordingly, I find the trial judge did not err in holding the government rights over the acquired parcels of land were an overriding interest.

104. Having held that the appellants' properties encroach on the road reserve, the legal issue is whether the appellants can acquire title and proprietary rights to portions of their respective plots that encroach the land compulsorily acquired by the Government in 1970. The appellants contend, yes, they have proprietary rights and interest over these parts or portions because first, they did not know their properties encroached on the road reserve; second, there was no rectification and entry in the Register to warn and notify them the fact of compulsory acquisition and third, they were under no legal duty to conduct search and inquiries at the Ministry of Roads and finally, their titles are indefeasible under ***Section 28*** of the **RLA**.

105. A land compulsorily acquired for public purpose cannot subsequently be diverted to serve private need. If a property is ostensibly acquired for public purpose it remains public land. In the instant case, if the appellants are to be permitted to exercise proprietary rights over portions of land acquired for public purpose as a road reserve, this will be unlawful. This Court can not countenance a situation where land is compulsorily acquired and then sanction the same to be given to private individuals for no-consideration to the Government.

106. At the risk of repetition, the appellants contend that there was non-compliance with the provisions of ***Sections 17*** and ***20 (2) (b)*** of the **Land Acquisition Act** as well as non-compliance with the provisions of ***Section 12 (1) (b)*** of the **RLA.** It is the appellants' contestation that the Commissioner of Lands having failed to undertake a final survey of the land acquired and cause the register to be rectified, the compulsory acquisition was incomplete, null and void.

107. Comparatively, in **Oviawe vs. Integrated Rubber Products Nigeria Limited, 3, NWLR (Pt. 492) 126, SC 142/1992**, the Nigerian Supreme Court in a lead judgment of Mohammed JSC stated that "what is material to the vesting of land in the government under compulsory acquisition is the issuance of notice of intention to acquire the land."

108. I have considered the appellants' contestation. The evidence on record shows there is a Gazette Notice No. 3439 dated 20th November 1970 expressing the intention of the Government to compulsorily acquire the land. There is on record a Gazette Notice No. 3440 dated 20th November 1970 on inquiry to compensation. There is on record evidence proving award of compensation was paid to the then registered proprietors of the parcels of land acquired.

109. Gazettement, inquiry and compensation are *sine qua non* to validity of the process of compulsory acquisition. Failure to comply with these three *sine qua non* is substantial non-compliance with the law on compulsorily acquisition of land. The rest are administrative processes whose non-compliance cannot, without more, nullify rights acquired or extinguished subsequent to gazettement, inquiry and compensation. In my view, the Gazette Notices and payment of compensation in this matter depict substantial compliance with the provisions of the Land Acquisition Act. This substantial compliance renders the compulsory acquisition of the road reserve legal and valid. I hasten to add substantial non-compliance with the *sine qua non* provisions of the Land Acquisition Act would render the acquisition bad and the acquiring authority can neither acquire nor be vested with any interest in land.

110. An issue urged by the appellants is the government did not take possession of the road reserve and as such, there was no vesting of the land in the Government. **Section 19 (4)** of the **Land Acquisition Act** provides that after taking possession of land that has compulsorily been acquired the land vests in the Government absolutely free from encumbrances. It sounds superfluous and rhetorical, but how does a government take possession of a road reserve? What is the consequence of the government not taking possession of land compulsorily acquired? Is the government interest extinguished if there is no possession? Is possession of the acquired land a *sine qua non* to completion and validity of a compulsory acquisition?

111. Without attempting to answer all the questions, I state that there can be no prescriptive right against government land. Even if the government does not take possession of any of its property, its title cannot be extinguished by prescriptive rights. ***Section 41 (1) (a)*** and ***Section 42 (1) (d***) of the **Limitation of Actions Act** is to this effect. (See also India Supreme Court decision in **V. Chandrasekaran & another vs. Administrative Officer & others, Civil Appeal Nos. 6342-6343 of 2012;** see also **Fruit & Vegetable Merchants Union vs. The Delhi Improvement Trust, AIR 1957 SC 344)**

112. Comparatively, the Indian Supreme Court in **Balwant Narayan Bhagde vs. M. D. Bhagwat & Others AIR 1767, 1975 SCR 250,** Untwalia, J. opined that if the property is land over which there is no building or structure, possession becomes complete and effective by going upon the land. He further opined that when a public notice is published stating that the government intends to take possession of the land, then ordinarily and generally there should be no question of resisting or impeding the taking of possession. Delivery or giving of possession by the owner or occupant is not required. In the same case Bhagwati, J, opined that how possession may be taken depends on the nature of the land and there is no hard and fast rule laying down what act would be sufficient to constitute taking of possession of land and merely possession on paper is not enough. (See also **Banda Development Authority, Banda vs. Moti Lal Agarwal & Others, (2011) Civil Appeal No. 3604 of 2011** at para. 34 where it is stated if land acquired is vacant, the act of the state authority going to the spot will ordinarily be treated as sufficient to constitute taking of possession). In the instant matter, I find upon payment of compensation and award to the original registered owners, Government constructively took possession of the portions of land acquired. The Government need not fence

or put up any structure to indicate it has taken possession of any land compulsorily acquired. For clarity, the provisions of **Section 120 of the Land Act No. 6 of 2012** make detailed provision on formal taking of possession by the Government upon compulsory acquisition.

113. In this matter, the appellants contend their titles to their respective suit properties are indefeasible; they acquired their respective titles by transfer. Is it possible in law for the appellants to acquire by way of transfer any interest in the portions of land that were acquired by the Government through compulsory acquisition in 1970? The answer to this question is discernible from the statement by Law, JA in **Commissioner of Lands vs. Essaji Jiwaji & Public Trustee [1978] eKLR** where he expressed himself thus:

> **"When property is compulsorily acquired by the Government, it vests in the Government. The previous owners merely loses his rights and title to the property; he does not in any sense transfer the property."**

114. In the instant case, the previous owners of the road reserve who had been compensated lost their rights, interest and title thereto. Upon the compulsory acquisition, the proprietary rights in the road reserve had vested upon the Government. There is and was no land within the boundaries of the road reserve that was capable of being transferred by anyone to the appellants. It follows the appellants acquired no right or interest in law or equity over land within the boundaries of the road reserve.

115. In further support of the appeal, the appellants sought a declaration that they were not under any duty to check the records or plans of any other Ministry in respect of land; that since the Director of Survey record shows the road reserve as it passes along the appellants' properties is 60 metres wide, the appellants had no way of knowing the road reserve was 80 metres; it was that urged the appellants had exercised due diligence and conducted a search at the Lands Office and there is no entry on an overriding interest or any entry relating to compulsory acquisition. Based on the foregoing, the appellants submitted the judge erred in relying on drawings by the respondents that do not meet the threshold for Survey Plans under the Survey Act; the judge erred in abandoning the titles and deed plans issued to the appellants by the Commissioner of Lands and Registrar of Titles and instead relied on oral evidence by Surveyors.

116. The contestation by the appellants as stated above can be reduced to two issues namely: first, the judge erred in evaluation of evidence on record and second, the record at the Registrar of Lands and in the office of Director of Survey and all records and entries in the Register at the lands office is conclusive proof of the entries thereon and no extraneous evidence can be adduced to challenge the record; that since the register at the lands office does not indicate any encumbrance or road reserve against the appellants' properties, their titles are indefeasible.

117. It is the appellants' contention that they were diligent and did search at the lands office. To be diligent, a buyer is not required to do anything more than follow a normal procedure. At this point, I am minded to cite ***Section 27 (1)*** of the **Survey Act** which provides as follows:

> **"27 (1) It shall be the duty of every grantee to ascertain, within sixty days after he has received his grant, that the survey marks shown on any plan attached to his grant or referred to therein are in place as shown on the plan.**

118. The appellants' titles are RLA titles; this is the Torrens system of land registration. In **Breskvar vs. Wall (1971) 126 CLR** it was stated the Torrens system is not a system of registration of title but a system of title by registration. It is a system which places emphasis on the accuracy of the land register and the register must mirror all currently active registrable interests affecting a particular parcel of land. Under the Torrens system, the Government as the keeper of the master record of all land and its respective owners, guarantee 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 Government compensation. It is in this context that the appellants seek an alternative prayer in their memorandum of appeal that the respondents make prompt payment in full of just compensation to pursuant to the provisions of ***Article 40*** of the Constitution.

119. The statutory presumption of indefeasibility and conclusiveness of title under the Torrens system is rebuttable by proof of fraud or misrepresentation in which the buyer is involved. The object of the Torrens system was summarized in the Privy Council decision in **Gibbs vs. Messer 1891 AC 28 or 248 (Privy Council)** as follows:

> **"The main object of the Act and the legislative scheme for the attainment of that object are equally plain. The object is to save a person dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title and to satisfy themselves of its validity. That end is accomplished by providing that everyone who purchases, in bona fide and for value, from a registered proprietor and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title."**

120. Under the Torrens system, the title of the registered proprietor is cleared of any errors, mistakes or hidden defects, the process of registration acting, if you like, as a publicly funded hospital that remedies the injuries embedded within that title - a purge of past omissions or incorrect additions occurring by fiat of registration.

121. ***Section 23 (1)*** of the Kenya **Registration of Titles Act** (RTA) provides as follows:

> **"23 (1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive of evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party."**

122. **Section 23 (1) of the RTA** has substantially been reproduced as **Section 26 (1) of the Land Registration Act No. 3 of 2012** which repeals the RTA in the schedule thereof. **Section 26 (1) (b) of the Land Registration Act** introduces a new provision where the certificate of title issued by the Registrar is subject to challenge if the title was acquired illegally, unprocedurally or through a corrupt scheme. **Section 26 (1) (b) of the Land Registration Act** is in tandem with **Article 40 (6) of the Constitution.**

123. In Kenya, in C**harles Karathe Kiarie & 2 others vs. Administrators of the Estate of John Wallace Mathare (Deceased) & 5 others [2013] eKLR** this Court affirmed the principles of Torrens System of titles namely: (a) the Government, as a keeper of records guarantees indefeasibility of title against entire world; (b) if anyone suffers loss, the Government compensates; (c) the buyer is not concerned about past irregularities and illegality and (d) a bona fide buyer notwithstanding infirmity of the vendor's title, acquires indefeasible title.

124. Notwithstanding, there is conflicting jurisprudence on indefeasibility of title. This Court, in **Arthi Highway Developers Limited vs. West End Butchery Limited & 6 others [2015] eKLR** struck down as invalid titles transferred to bona fide purchasers, after having found that there was fraud in the initial transfer from the first owner. In contrast, in **Permanent Markets Society & 11 others vs. Salima Enterprises & 2 others [1997] eKLR** it was held that even where it is shown that previous registrations were obtained illegally, the title of the last bona fide purchaser for value is indefeasible. In **Lawrence Mukiri vs. Attorney General & 4 Others [2013] eKLR** it was expressed:

> **"... a bona fide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly."**

125. In the instant matter, there is no evidence on record that the appellants were involved in any fraud in securing their registration as proprietors to their respective plots and parcels of land. There is no evidence on record that there was any misrepresentation by the appellants. The trial judge correctly captured this and stated:

> ***"[105] ….. The petitioners are, in my view, unwitting victims of landowners who sold properties to them without having regard to the public interest in the portions of their properties that had been compulsorily acquired for construction of the Northern Bypass corridor, and of surveyors who have prepared subdivision plans either in ignorance or disregard of the existing road corridor. Whatever the case, I can find no basis for alleging violation of the petitioners' constitutional right to property by the respondents."***

126. I do affirm the trial court's finding that the appellants were unwitting victims. Does this finding entitle the appellants to indefeasibility of their respective titles under the Torrens system as applied in Kenya vide ***Section 28*** of **RLA** and ***Section 23 of the RTA***? Does indefeasibility of title extend to indefeasibility and non-alteration or non-rectification of the boundaries of a parcel of land if the boundary as reflected on the title is mistaken or erroneous?

127. Comparative jurisprudence from Australia, the home of the Torrens system, is illuminating. In **Lukacs vs. Wood (1978) 19 SASR 520**, the intent of the vendor was to transfer three vacant parcels of land to the defendant. There was a mis-description in the contract that saw the defendant receive title to two vacant blocks of land, plus a third title, on which was built an apartment dwelling. It was some two years post settlement that the mistake was realized. The vendors sought to correct the mistake and the defendant responded that indefeasibility of title allowed him to retain title to the land on which the apartments stood. The Supreme Court of South Australia held in favour of the vendors. There was a mistake in the conveyancing process, a total failure of consideration and this rendered the contract void.

128. In **Tutt vs. Doyle (1997) 42 NSWLR 10,** because of a mistake in the transfer process, Tutt received a block of land larger than what was intended. He was aware that a mistake had been made. The New South Wales Court of Appeal saw the question quite simply — was it unconscionable for one party to take advantage of another's mistake. The answer was yes. The transfer was held to be null and void on account of mistake.

129. In the Indian case of **V. Chandrasekaran & another vs. The Administrative Officers & others, [2012] 10 S. C.R. 603** it was held a person who purchases land subsequent to the issuance of a notification of compulsory acquisition with respect to the land is not competent to challenge the validity of the acquisition proceedings on any ground whatsoever, for the reason that the sale deed executed in his favour does not confer upon him any title. The Supreme Court further held:

> **"…. the tenure holders, the person-interested, neither filed objections under Section 5-A of the Indian Land Acquisition Act, nor had they challenged the land acquisition proceedings, so far as the suit land is concerned; instead they chose to withdraw the compensation awarded in 1983 and 1986; after the expiry of about three decades and hence, they cannot be permitted to challenge the acquisition proceedings on any ground whatsoever. The appellants cannot claim title/relief better than what the original vendors were entitled to."**

130. In **Pandit Leela Ram vs. Union of India, AIR 1975 SC2112**, the Indian Supreme Court held that anyone who deals with the land subsequent to a notification of compulsory acquisition being issued, does so, at his own peril. In **Sneh Prabha vs. State of Uttar Pradesh, AIR1996 SC 540**, it was held "the notification for compulsory acquisition gives a notice to the public at large that the land in respect to which it has been issued, is needed for a public purpose, and it further points out that there will be "*an impediment to anyone to encumber the land acquired thereunder."* In **U.P. Jal Nigam vs. M/s. Kalra Properties Pvt. Ltd., AIR 1996 SC 1170,** it was held that purchase of land after publication of notification of compulsory acquisition in relation to such land, is void against the State. In **Ajay Kishan Singhal vs. Union of India, AIR 1996 SC2677; Mahavir & Anr. vs. Rural Institute, Amravati & Anr., (1995) 5 SCC 335; Gian Chand vs. Gopala & Ors., (1995) 2SCC 528;** and **Meera Sahni vs. Lieutenant Governor of Delhi& Ors., (2008) 9 SCC 177,** the Indian Supreme Court categorically held that a person who purchases land after the publication of a notice of compulsory acquisition notification with respect to it, is not entitled to challenge the proceedings for the reason, that his title is void.

131. Comparative jurisprudence from the Indian Supreme Court show that once the land is vested in the State vide compulsory acquisition, free from all encumbrances, it cannot be divested and proceedings under the Acquisition Act would not lapse, even if an award is not made within the statutorily stipulated period. (Vide: **Avadh Behari Yadav vs. State of Bihar &. Ors., (1995)6 SCC 31; U.P. Jal Nigam vs. Kalra Properties (P) Ltd.** (Supra); **Allahabad Development Authority vs. Nasiruzzaman & Ors., (1996) 6 SCC 424, M. Ramalinga Thevar vs. State of TamilNadu & Ors., (2000) 4 SCC 322;** and **Government of Andhra Pradesh vs. Syed Akbar & Ors., AIR 2005 SC 492).17).** The said land, once acquired, cannot be restored to the tenure holders/persons-interested, even if it is not used for the purpose for which it was so acquired, or for any other purpose either.

132. The Supreme Court of India in **Gian Chand -v- Gopala & others (1995) SCC (2)) 528, JT 1995 (2) 513** was faced with an illuminating case. The appellant had entered into an agreement with the respondent on 13.1.78 to purchase 1/3 share of the land belonging to the respondent for a total consideration of Rs. 78,000/- and paid a sum of Rs. 20,000/- as earnest money. The sale deed was to be executed on or before 30.4.78. Later the appellant came to know that notification under Section 4(1) of the Land Acquisition Act, 1894 was published on 3.8.77 which fact was concealed to the appellant, so he had filed the suit for refund of the earnest money. The Supreme Court expressed itself as follows:

> **"Admittedly, since the notification under Section 4(1) of the Land Acquisition Act was already published, the question arises whether the appellant could get a sale deed executed and in its absence whether he is entitled to obtain refund of earnest money paid under the agreement. On publication of notification under Section 4(1) of the Act, though it is not conclusive till declaration under Section 6 was published, the owner of the land is interdicted to deal with the land as a free agent and to create encumbrances thereon or to deal with the land in any manner detrimental for public purpose. Therefore, though notification under Section 4(1) is not conclusive, the owner of the land is prevented from encumbering the land in that such encumbrance does not bind the Government. If ultimately, declaration under Section 6 is published and acquisition is proceeded with, it would be conclusive evidence of public purpose and the Government is entitled to have the land acquired and take possession free from all encumbrances. Any sale transaction or encumbrances created by the owner after the publication of notification under Section 4(1) would therefore be void and does not bind the State. (See also Supreme Court of India Smt. Sneh Prabha Etc – v- State of U.P. & another 1996 AIR, 1996, SCC (7) 426)"**

133. In the instant appeal, persuaded by the comparative jurisprudence, I find the appellants' titles are defeasible to the extent that they encroach on a public road reserve. My finding is fortified by the provisions of **Article 40 (6)** of the Constitution wherein protection of private property does not extend to property unlawfully acquired. I am further guided by the provision of **Section 26 (1) (b) of the Land Registration Act No. 3 of 2012** which stipulates a certificate of title can be challenged if title was acquired illegally, unprocedurally or through a corrupt scheme. In the instant case, the appellants' titles were acquired illegally and unprocedurally. Illegally because public land that has been compulsorily acquired cannot be transferred to private individuals; and the vendor to the appellants had no interest in and no right to transfer any public land. I am further convinced the appellants are not entitled to retain any portion of the road reserve for to do so will be violating procurement laws where public property is given to private individuals without following the procurement process and without any consideration given or paid to the Government.

134. I am also cognizant of the dicta by Maraga, J (now Chief Justice) in ***Republic* vs. Minister For Transport & Communication & 5 Others** *Ex Parte* **Waa Ship Garbage Collector & 15 Others Mombasa HCMCA No. 617 of 2003 [2006] 1 KLR (E&L)** ***563*** where he expressed himself as follows:

> ***"Courts should nullify titles by land grabbers who stare at your face and wave to you a title of the land grabbed and loudly plead the principle of the indefeasibility of title deed...It is quite evident that should a constitutional challenge succeed either under the trust land provisions of the Constitution or under section 1 and 1A of the Constitution or under the doctrine of public trust a title would have to be nullified because the Constitution is supreme law and a party cannot plead the principle of indefeasibility which is a statutory concept. A democratic society holds public land and resources in trust for the needs of that society. Alienation of land that defeats the public interest goes against the letter and spirit of section 1 and 1A of the Constitution."***

135. In the same vein in **Chemei Investments Limited vs The Attorney General & Others Nairobi Petition No. 94 of 2005** at para. 64 it was held:

> **"The Constitution protects a higher value, that of integrity and the rule of law. These values cannot be side stepped by imposing legal blinders based on indefeasibility. I therefore adopt the sentiments of the court in the case of Milankumar Shah and 2 Others -vs- City Council of Nairobi & Attorney General (Nairobi HCC Suit No. 1024 of 2005 (05) where the Court stated as follows, "We hold that the registration of title to land is absolute and indefeasible to the extent, firstly, that the creation of such title was in accordance with the applicable law and secondly, where it is demonstrated to a degree higher than the balance of probability that such registration was procured through persons or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law and the public interest."**

136. I re-affirm dicta by Law, JA in in **Commissioner of Lands vs. Essaji Jiwaji & Public Trustee [1978] eKLR** where he expressed himself as follows:

> **"When property is compulsorily acquired by the Government, it vests in the Government. The previous owners merely lose his rights and title to the property; he does not in any sense transfer the property."**

137. In the instant appeal, the previous owners of the road reserve had lost their rights and title thereto. The rights in the road reserve vested upon the Government, there was no land within the boundaries of the road reserve that was capable of being transferred by anyone to the appellants.

138. The appellants in the alternative prayed for compensation. There is no question of the appellants being compensated by the Goverment. What property of the appellants has been acquired for them to be compensated? The Government cannot compensate twice for the same parcel of land; the Government cannot compensate the appellants for land it owns; this would amount to giving the appellants money for no consideration – what is the Government buying from the appellants? Its own land? The Government cannot re-acquire and re-compensate the same land twice over, the more so the land it already owns. The Government cannot divest itself land compulsorily acquired for a public purpose and confer the same to private individuals at no consideration. Land once acquired for public purpose remains vested in the Government or designated public body for public purpose and no other purpose. In this context, we are cognizant of dicta from the Supreme Court of India in **Collector of Bombay vs. Nusserwanji Rattanji Mistri and Ors, AIR 1955 SC 298**; where it was held Government interest in land cannot be acquired through compulsory acquisition.

139. In **Milankumar Shah and 2 Others vs. City Council of Nairobi & Attorney General (Nairobi HCC Suit No. 1024 of 2005 (05),** it was correctly expressed:

> **"[21] The concept of absolute and indefeasible ownership of land cannot be clothed with legal and constitutional protection if the interest was acquired through fraud, misrepresentation, illegality, unprocedural ways or corrupt schemes. This concept cannot be used to sanitize the commissioner if it allocates or issues title in such manner. In the case of Champaklal Ramji Shah & 3 Anors –v- AG & Anor, HCCC No. 145 of 1997, it was held that the court has a duty to examine the process of acquisition of such title and if it determines that there is an illegality, should nullify the titles as required.**

140. I am convinced and persuaded by the merits and reasoning in the local and comparative jurisprudence that a title under the Torrens system is defeasible on account of mistake, misrepresentation, fraud and illegality. For this reason, it is not sufficient for the appellants to wave an RLA or RTA title and assert indefeasibility. If a mistake is proved or total failure of consideration or other vitiating constitutional or statutory factors, an RLA or RTA title is defeasible.

141. If at all the appellants are entitled to any remedy, the provisions of **Section 81(1) (b) and 85 of the Land Registration Act** comes into play. Section 81

> (1) (b) provides that a person suffering damage by reason of any error in a copy of or extract from the register is entitled to indemnity.

142. Section 85 of the Land Registration Act provides for errors in survey. The Section stipulates:

> *85 (1) A claim to indemnity shall not arise between the national or county government and a proprietor, and no suit shall be maintained on account of any surplus or deficiency in the area or measurement of any land disclosed by a survey showing an area or measurement differing from the area or measurement disclosed on any subsequent survey or from the area or measurement shown in the register or on the cadastral map.*
>
> *(2) As between a proprietor and any person from or through whom the proprietor acquired the land, no claim to indemnity shall be maintainable on account of any surplus or deficiency in the area or measurement above or below that shown in any other survey or above or below the area or measurement shown in the register or on the cadastral map, after a period of six months from the date of registration of the instrument under which the proprietor acquired the land.*

143. The provisions of **Section 110 (2) of the Land Act** No. **6 of 2012** is also instructive. The Section provides:

> *110 (2) If, after land has been compulsorily acquired the public purpose or interest justifying the compulsory acquisition fails or ceases, the Commission may offer the original owners or their successors in title pre-emptive rights to re-acquire the land, upon restitution to the acquiring authority the full amount paid as compensation.*

144. In the instant case, I note that the trial judge made an order that the appellants should surrender 20 metres of their respective portions of land to the government. The judge expressed as follows:

> **"[108] ……. In this regard, and to obviate the need for further action on the part of the respondents for their removal from the part of the road reserve encroached upon, I direct that the petitioners do, within the next ninety (90) days from the date hereof, surrender the 20 metres of land out of their respective parcels that comprised the road reserve to the respondents. The titles to the parcels shall be rectified accordingly.**

145. The order by the learned judge is erroneous. The encroachment on the road reserve is not uniform and equidistance in relation to all plots owned by the appellants. The extent and dimension of encroachment varies from plot to plot. Accordingly, I vary the judgment and final orders of the trial court in so far as it directs each of the appellants to surrender 20 metres of its/his/her plot to the Government. I substitute in its place an order that each appellant is to vacate that part or portion of his/hers/its plot that encroaches on the road reserve that was compulsorily acquired by the Government in 1970. Each appellant shall vacate his/hers/its respective part or portion that encroaches the road reserve within ninety (90) days from the date of this judgment. The fact that construction of the Northern by-pass has been completed is neither an excuse nor reason to fail or decline to vacate the encroaching portions.

146. In the final analysis, the respective title of each appellant is defeasible and encumbered by government affectation arising from the compulsorily acquisition of the road reserve in 1970. For the foregoing reasons and to the extent of variation foretasted, I affirm and uphold the judgment of the High Court dated 25th April 2013 delivered in Petition Nos. 69 and 70 of 2010. The upshot of my re-evaluation of the evidence and applicable law is that this appeal has no merit. However, since Ouko and Sichale, JJ.A are of the contrary view, the final decision of the Court is per orders contained in the Judgment of Ouko, J.A.

Dated and delivered at Nairobi this 7th day of June, 2019

J. OTIENO-ODEK

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JUDGE OF APPEAL