



**Uasin Gishu Memorial Hospital Limited v Moi Teaching and Referral Hospital Board & 2 others (Civil Appeal 184 of 2012) [2017] KECA 96 (KLR) (6 October 2017) (Judgment)**

*Uasin Gishu Memorial Hospital Limited v Moi Teaching and Referral Hospital Board & 2 Others [2017] eKLR*

Neutral citation: [2017] KECA 96 (KLR)

**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL AT NAIROBI**  
**CIVIL APPEAL 184 OF 2012**  
**MSA MAKHANDIA, W OUKO & AK MURGOR, JJA**  
**OCTOBER 6, 2017**

**BETWEEN**

**UASIN GISHU MEMORIAL HOSPITAL LIMITED ..... APPELLANT**

**AND**

**MOI TEACHING AND REFERRAL HOSPITAL BOARD ..... 1<sup>ST</sup> RESPONDENT**

**THE MINISTRY OF HEALTH ..... 2<sup>ND</sup> RESPONDENT**

**HON ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

*(Appeal from the judgment and decree of the High Court at Nairobi (Wendoh and Dulu, JJ.) delivered 19th March 2010 in H.C. Constitutional & Judicial Review Division Misc Civil Case No. 12A of 2006 (OS))*

**Court grants compensation for property which was compulsorily acquired by the State without compensation**

*The appeal related to a challenge on the ownership of the suit premises. The court granted compensation for the property which was compulsorily acquired by the State without compensation.*

Reported by Beryl A Ikamari

**Constitutional Law** - fundamental rights and freedoms - enforcement of fundamental rights and freedoms - form and content of a petition - particulars which need to be pleaded when the enforcement of fundamental rights and freedoms was sought - whether an originating summons filed to enforce fundamental rights and freedoms was competent in the sense that it set out the required particulars - Constitution of Kenya (repealed), sections 70(a), 70(b) & 75; Constitution of Kenya (Supervisory, Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules 2006 (the Gicheru Rules), rules 11, 12 & 13.



**Statutes** - interpretation of the provisions of a statute - definition of a state corporation - where an entity was a company limited by guarantee without share capital - where such a company was not controlled by the Government or a state corporation or established as a state corporation under section 3 of the State Corporations Act - whether such a company fitted into the definition of a state corporation - State Corporations Act (Cap 446) sections 2 & 3.

**Constitutional Law** - fundamental rights and freedoms - right to property - compulsory acquisition of land by the State - proof of ownership of land - change of land registration from the Registration of Titles Act to the Registered Land Act - where there were allegations of compulsory acquisition without compensation - Constitution of Kenya (repealed), sections 70 & 75.

**Constitutional Law** - enforcement of fundamental rights and freedoms - remedies available for a breach of fundamental rights and freedoms - breach of the right to property - compulsory acquisition of property by the State without compensation - circumstances when it would be appropriate to grant compensation as opposed to granting title to acquired land to a litigant - Constitution of Kenya (repealed), sections 75 & 84.

### **Brief facts**

The appellant's main assertion was that it was the registered proprietor of the suit premises on which it operated a hospital, known as Uasin Gishu Memorial Hospital Limited, for the benefit of the public since 1961. Further, the appellant said that via Legal Notice No 78 of 1998, the respondents acquired its assets without following due process of law. The respondents took over the hospital's management and assets. The 1<sup>st</sup> respondent, the Moi Teaching and Referral Hospital Board, was established on the suit premises, as a state corporation under the State Corporations Act.

The Registrar of Companies filed a Legal Notice in the Kenya Gazette of August 20, 2004 which expressed the intention to dissolve the appellant and it was followed by the Legal Notice of February 4, 2005, which struck off the Appellant from the Register of Companies. The appellant was dissolved on February 9, 2005. On March 11, 2005, there was a physical takeover of the hospital in favour of the 1<sup>st</sup> respondent and the takeover was done in breach of a court order issued in 1998.

On November 25, 2005, the appellant's name was restored in the Register of Companies, after the filing of a suit by the appellants (*Miscellaneous Cause No. 350 of 2005*). The court also issued orders for the restoration of the appellant's business, assets and property to the position there were in prior to the appellant's dissolution. After obtaining those orders, the appellant filed an Originating Summons at the High Court which sought declaratory reliefs and conservatory orders, whose intended effect was to reinstate the appellant into the suit premises.

At the High Court the Originating Summons was found incompetent for failure to specifically plead on how the rights to life, liberty, security and protection of the law had been infringed. The High Court also declined to grant the orders sought while declining to make a determination on ownership of the suit premises on the basis that it was a disputed fact which required evidence to be adduced. The appellant lodged an appeal at the Court of Appeal.

### **Issues**

- i. Whether the originating summons was competent in the sense that it adequately set out particulars specifying the fundamental rights and freedoms that had allegedly been violated, the sections of the Constitution which recognized them and the manner in which the alleged violation was committed.
- ii. Whether the appellant was a public or private entity and whether it was a state corporation.
- iii. To which party did the suit premises belong?
- iv. Whether Legal Notice No 78 of 1998, under which the assets, liabilities and management of the suit premises was acquired by the Moi Teaching and Referral Hospital Board, amounted to a violation of the rights of Uasin Gishu Memorial Hospital Limited.
- v. What nature of reliefs was appropriate?



## Held

1. On a first appeal, the duty of the court was to analyse and re-evaluate the evidence on record and reach at its own conclusions. The court would only interfere with the High Court's finding of fact where it was based on no evidence or a misapprehension of the evidence or where the court was shown demonstrably to have acted on wrong principles in arriving at a finding.
2. At the time the Originating Summons was filed, the rules applicable to suits for the enforcement of fundamental rights and freedoms were the Constitution of Kenya (Supervisory, Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules 2006 (the *Gicheru* Rules). Rule 11, 12 and 13 of the Constitution of Kenya (Supervisory, Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules 2006 (the *Gicheru* Rules) stipulated the procedure that governed such claims. Where a person alleged a contravention or a threat of contravention of a right under the Constitution of Kenya (repealed), he or she had to set out the specific right infringed and the particulars of the infringement or threat of infringement.
3. In the Originating Summons, allegations were made that property, the Hospital, was forcefully and illegally acquired in violation of constitutional rights including the right against deprivation of property without compensation recognized under section 75 of the Constitution of Kenya (repealed.) However, there was no prayer for compensation in the Originating Summons. Additionally, the affidavit of the appellant's Company Secretary provided particulars of the appellant's rights concerning the hospital and the suit properties which were infringed.
4. The infringements of sections 70(a), 70(c) & 75 of the Constitution of Kenya (repealed) were adequately defined and the elements essential to a valid constitutional petition were present. To that extent, the Originating Summons was competent.
5. The definition of a state corporation was provided in section 2 of the State Corporations Act. Under that provision, a company registered under the Companies Act was not a state corporation unless it was wholly owned or controlled by the Government or a state corporation or it had been declared a state corporation by the President.
6. The appellant was registered as a company under section 4(1) of the Companies Act (repealed). The appellant's Certificate of Incorporation confirmed that it was registered under the Companies Act (repealed) on August 10, 1961 as a company limited by guarantee and not having share capital.
7. The Government did not hold any position of control and neither was it in control of the appellant and therefore the appellant was not a state Corporation within the meaning of section 2 of the State Corporations Act. Additionally, there was nothing to show that the retired President established the appellant as a state corporation under section 3 of the State Corporations Act.
8. The appellant was neither a government entity nor a state corporation or a local authority. It was a private legal entity, registered under the Companies Act, under the control and direction of its own directors and members, and it was capable of owning its own assets, rights and interests.
9. The suit properties belonged to the appellant. It was uncontroverted that Title No I.R. 2958, being the original title for the suit properties was transferred to the Municipal Board of Eldoret and the District Council of Uasin Gishu as tenants in common for Kshs. 10/=, and on or about October 31, 1961, it was then transferred, again for a consideration of Kshs. 10/= to the appellant, a company limited by guarantee.
10. There was a connection between the titles of the suit properties registered under the Registered Land Act, and the original Title No. I.R. 2958 registered under the Registration of Titles Act. Title No. I.R. 2958 was transferred and registered in the appellant's name on October 31, 1961 and when it was registered under the Registered Land Act, that fact was noted on the register of Title No I.R. 2958. It was still owned by the appellant and the allegations that the suit premises were fraudulently registered in the appellant's name under the Registered Land Act were unfounded.



11. Section 70(a), 70(c) and 75 of the Constitution of Kenya (repealed) provided for the right to life, liberty, security of the person and protection of the law and protection of the privacy of his home and from deprivation of property without compensation.
12. The Legal Notice declared under the hand of the retired President that the appellant's hospital and the suit properties be transferred and vest in the 1<sup>st</sup> respondent. Accordingly, in a letter dated February 9, 2005 the 3<sup>rd</sup> respondent directed the 1<sup>st</sup> respondent to take over the appellant's hospital as ordained by the impugned Legal Notice.
13. The purport of the Legal Notice was to take over the appellant's properties as if they belonged to the Government, irrespective of the appellant's rights or interests. It amounted to compulsory acquisition of the appellant's properties in a manner contrary to sections 70 and 75(1) of the Constitution of Kenya (repealed.) The Legal Notice did not accord with the provisions of the Land Acquisition Act that set out mandatory procedures and processes for the compulsory acquisition of land by the Government.
14. In so far as the Legal Notice included a statement that purported to deprive the appellant of the hospital and the suit properties without due process and compensation as stipulated by the law, it was unlawful and illegal, and neither the retired President nor the Government had a right or power to publish an order that would constitute a violation of the appellant's rights.
15. Section 84 of the Constitution of Kenya (repealed) empowered the court to make such order, issue such writ and give such direction as it considered appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 70 to 83 of that Constitution.
16. Given the finding that the appellant had proprietary rights and interests in the hospital and suit premises, it was necessary to declare that to the extent that the impugned Legal Notice purported to vest or transfer the appellant's rights, duties, obligations, assets and liabilities in the hospital and the suit properties to the 1<sup>st</sup> respondent, it was a violation of the appellant's fundamental right to ownership of property under sections 70 (a) and (c) and 75 of the Constitution of Kenya (repealed). It was therefore unconstitutional, illegal, null and void.
17. Considering that several years had elapsed since the takeover of the hospital and related facilities by the 1<sup>st</sup> respondent and appreciating the nature of services rendered by the hospital, it would be unconscionable to grant mandatory prayers whose effect would be to eject the 1<sup>st</sup> respondent and reinstate the appellant. Under the circumstances, the appropriate order was one of compensation under section 75 of the Constitution of Kenya (repealed.)

*Appeal allowed.*

**Citations**

**Statutes**

None referred to

**Advocates**

None mentioned

## JUDGMENT

1. This appeal arises from a dispute between the main antagonists, the appellant, Uasin Gishu Memorial Hospital Limited, a company limited by guarantee and the 1<sup>st</sup> respondent, the Moi Teaching and Referral Hospital Board, a state corporation established under the State Corporations Act. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents are the Ministry for Health and the Attorney General respectively, both of whom represent the Government.



2. The dispute which has had a long, protracted and acrimonious history can be traced back to a Legal Notice Number 78 of 1998 published on 12<sup>th</sup> June, 1998 (the Legal Notice), wherein the retired President of Kenya, Daniel Arap Moi by an order known as “The Moi Teaching and Referral Hospital Board order, 1998” established the 1<sup>st</sup> respondent as a state corporation, and appointed its Board to take over the appellant’s hospital, and properties including rights, duties, obligations, assets and liabilities. At the core of the dispute is Paragraph 5(2) (a) where it was ordered that;

The Board shall, under the direction of the Minister for Health, be responsible for the administration, management and development of the hospital established in Eldoret by the Government, known as the Moi Teaching and Referral Hospital (Hereinafter referred to as “the Hospital”).

(2)

- (a) The Board shall be the successor of the Government in respect of all rights, duties, obligations, assets and liabilities concerning Eldoret District and Uasin Gishu Memorial Hospital existing as at the date of the publication of this Order.
- (b) All such rights, duties, obligations, assets and liabilities shall be automatically and fully transferred to the Board and any reference to the Government or Minister for Health or the Permanent Secretary, Ministry of Health or the Permanent Secretary/ Treasury or the Director, Moi Teaching and Referral Hospital in connection with the hospital in any written law or in any contract or document shall for all purposes be deemed to be a reference to the Board established under this Order.”

3. As a brief background, the appellant is a company limited by guarantee and not having a share capital registered under the Companies Act Cap 486 on 10<sup>th</sup> August 1961 under Certificate of Incorporation number C. 7/61 to carry on the business of a medical facility, known as “Uasin Gishu Memorial Hospital” (the Hospital), and is the registered proprietor of Eldoret Municipality Block 7/125 and Eldoret Municipality 7/126 (the suit properties) upon which the Hospital stands comprising a laboratory, medical wards and rooms, theatres, staff houses, flats and other facilities.
4. The appellant’s case is that following the promulgation of the Legal Notice, the respondents, without following the due process of the law, compulsorily acquired its hospital and the suit properties through unlawful means, by ordering that its assets, rights and interests be transferred and managed by 1<sup>st</sup> respondent under the provisions of the State Corporations Act, Cap 446, which the former President did not have the powers to do.
5. The appellant protested through its advocates, Birech and Company Advocates and Kimaru Kiplagat and Company Advocates in letters dated 20<sup>th</sup> June, 1998 and 13<sup>th</sup> June, 2000 respectively, and when there was no response, it instituted HCCC No. 123 of 1998 seeking temporary orders to restrain the 1<sup>st</sup> respondent from interfering with the Hospital and the suit properties, which orders were duly obtained on 17<sup>th</sup> July 1998.
6. Before the suit could be heard and determined, on 4<sup>th</sup> February 2005 the Registrar of Companies struck off the appellant from the Register of Companies. This was followed by a letter dated 9<sup>th</sup> February 2005, where the 3<sup>rd</sup> respondent informed the 1<sup>st</sup> respondent that nothing in law barred it from taking over the occupation and management of the appellant’s hospital in accordance with the Legal Notice.



7. Pursuant to this advise, on 11<sup>th</sup> March, 2001, the 1<sup>st</sup> respondent forcibly entered the appellant's premises and took over possession of the hospital and the suit properties, and on 30<sup>th</sup> March, 2005 it filed an application to have HCCC No. 123 of 1998, struck out on the basis that the appellant had ceased to exist as a legal entity. HCCC No. 123 of 1998 was subsequently struck out on 15<sup>th</sup> June, 2005.
8. Undeterred, the appellant, filed Miscellaneous Cause No. 350 of 2005, seeking reinstatement on the Companies Register, which orders were obtained on 25<sup>th</sup> November 2005, paving way for the filing of this Originating Summons giving rise to this appeal on 10<sup>th</sup> January 2006, supported by an affidavit of Charles Araap Kesse sworn on 10<sup>th</sup> January 2006 supplementary affidavit sworn on 17<sup>th</sup> January 2006, and a further supplementary affidavit sworn on 10<sup>th</sup> February 2006 seeking;
  - a) a declaration that Legal Notice Number 78 of 1998 in so far as it purports to vest the rights, duties obligation, assets and liabilities of Uasin Gishu Memorial Hospital the premises owned by the Plaintiff being properties namely Eldoret Municipality/ Block 7/125 and Eldoret Municipality/Block 7/126 in that the 1<sup>st</sup> respondent is in breach of the Plaintiff's fundamental right to ownership of property and is illegal, unconstitutional and null and void.
  - b) a declaration that the Plaintiff's fundamental rights as protected and guaranteed by Sections 70 (a) and (c) and 75 of the Constitution of the Republic of Kenya have been or are likely to be contravened in relation to its assets by the said Legal Notice Number 78 of 1998.
  - c) a declaration that there is no lawful basis upon which the Defendants and each of them should or could deprive the Plaintiff of the right to the ownership and/or proprietorship over its assets.
  - d) a declaration that the Defendants and each of them are not entitled to deprive the Plaintiff of the rights over its assets inclusive of cash, Bank Accounts, business and leasehold interest in the properties known as Eldoret Municipality/ Block 7/125 and Eldoret Municipality/Block 7/126.
  - e) a Conservatory Order by way of an order restraining the Defendants by themselves, their officers, servants, agents of otherwise from attempting to obtain the ownership of, threatening to obtain ownership or in any manner whatsoever interfering with the Plaintiff's proprietorship of the properties known as Eldoret Municipality/ Block 7/125 and Eldoret Municipality/Block 7/126, and in any way howsoever dealing with the Plaintiff's said properties until the hearing and determination of the Originating Summons and/or until further orders of the Court/
  - f) a Conservatory order by way of removing the 1<sup>st</sup> Defendant its servants and agents from possession, occupation, custody, and management of the Plaintiff's properties known as Eldoret Municipality/ Block 7/125 and Eldoret Municipality/Block 7/126 until hearing and determination of the Originating Summons;
  - g) a Conservatory order by way of an order restraining the 1<sup>st</sup> Defendant whether by itself, its servants and agents or howsoever from continuing to occupy and manage the Plaintiff's Hospital known as Uasin Gishu Memorial Hospital being premises erected on the Plaintiff's properties namely Eldoret Municipality/ Block 7/125 and Eldoret Municipality/Block 7/126 until the hearing and determination of the Originating Summons or until further Orders of the Court
  - h) a Conservatory Order that by way of an order restraining the 1<sup>st</sup> defendant whether by itself, its servants or otherwise interfering with the management of the Uasin Gishu Memorial Hospital



until the hearing and determination of the Originating Summons or further Orders of the Court.

- i) a Conservatory Order by way of an Order restraining the Defendants from proceeding any further with the implementation of the that Legal Notice Number 78 of 1998 and to freeze all other actions by or on their behalf by themselves, their agents, officers, servants appointees whether by virtue of any Award or direction in so far as it relates in any way to the Plaintiff's properties known as Eldoret Municipality/Block7/125 and Eldoret Municipality/Block 7/126 until the determination of the Originating Summons filed herein.
  - j) A Conservatory Order by issuing such Orders, Directions and writs as may be necessary to safeguard and prevent the violation of the Plaintiff's proprietorship, possession, custody and control of properties known as Eldoret Municipality/ Block 7/125 and Eldoret Municipality/ Block 7/126 and breach of its Fundamental rights and freedoms under the Constitution of the republic of Kenya.”
9. The Summons was premised on sections 70 (a) and (c), 75(1), 84(1) and (2) of the Constitution of Kenya (repealed), (The Constitution of Kenya Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules 2001 (the Chunga Rules), The Judicature Act, Chapter 8 of the Laws of Kenya Order XXXVI Rule 12 of the Civil Procedure Rules, Rule 3(1) and (2) of the High Court (Practice and Procedure) Rules, and the inherent powers of the court.
  10. It was brought on grounds that the appellant was the registered proprietor of the suit properties upon which it had been operating a hospital for the general benefit of the public since 1961; that by the Legal Notice No 78 of 1998 the respondents purported to acquire the appellant's assets without due process of the law and the provisions of the Constitution; that the 1<sup>st</sup> respondent had taken over the possession and management of the suit properties and the appellant's hospital, and in so doing had violated the appellant's rights under the Constitution, and that if the orders sought under the Originating Summons were not granted, the appellant's rights in the hospital and suit properties would be desecrated with impunity.
  11. Mr. Kesse the appellant's Company Secretary deponed that the appellant had operated the hospital on the suit properties since 1961; that it was one of the oldest medical facilities in Eldoret town, initially established in the 1920s as the Eldoret General Hospital; that it was professionally run to the highest ethical standards by a Board of Directors and the management, in compliance with the requirements of the Companies Act, the Medical Practitioners and Dentist Act and the Ministry of Health regulations as a non-profit making facility for the benefit of the public; that as the time it had regularly filed its annual returns in accordance with the requirements of the Companies Act; that at the time of incorporation of the appellant, the memorandum and articles of association specified the directors as, James Drummond Irvin Robertson, William Edward Elwell, Percy Wells Southorn, Lesley Nicholson Evans (Lt. Colonel), George Hewit Carruthers, Johan Fredrick Rousseaux and Nora Gough; and that the appellant was the registered proprietor of the suit properties upon which the hospital was constructed.
  12. It was further deponed that the impugned Legal Notice ordered that the 1<sup>st</sup> respondent would be the “...successor of the Government in respect of all rights duties obligations assets and liabilities concerning Eldoret District Hospital and Uasin Gishu Memorial Hospital...” and that the appellant would be managed by the 1<sup>st</sup> respondent which was in disregard of the appellant's proprietorship of the hospital; that the then President did not have the powers to vest the appellant's assets in the



- 1<sup>st</sup> respondent which had no rights, duties, obligations, assets and liabilities over the appellant or its properties.
13. Mr. Kesse deponed that, on 8<sup>th</sup> February, 2001 the 1<sup>st</sup> respondent confirmed that it had no intention of claiming the appellant's hospital and the suit properties, and would only claim the staff and student quarters developed by the Government; that despite this assurance, the Registrar of Companies published a Legal Notice in the Kenya Gazette of 20<sup>th</sup> August, 2004, indicating its intention to dissolve the appellant which notice was followed by another Legal Notice of 4<sup>th</sup> February 2005, striking off the appellant from the Register of Companies; and that these actions were in furtherance of the 1<sup>st</sup> respondent's intentions to take over the appellant's hospital.
  14. It was also deponed that following dissolution of the appellant, on 9<sup>th</sup> February 2005, one Kipkoech Arap Keter, a Parliamentary counsel of the 3<sup>rd</sup> respondent, authorized the 1<sup>st</sup> respondent to take over the management and occupation of the hospital, and seek the assistance of the Provincial Administration so to do. In furtherance of those instructions, on 11<sup>th</sup> March, 2005, the 2<sup>nd</sup> respondent, together with armed police officers in the presence of its employees, Sister Macrime, Mr. Agnda Achada, Dr Sijenyi Nyakundi and Members of Parliament Hon. David Koros and Hon. Joseph Lagat forcibly and illegally took over and occupied the hospital and all its facilities, dismissed some of the appellant's staff, confiscated the appellant's files, accounting documents and all assets in the hospital, and uprooted and replaced the appellant's signage with one reading "Moi Teaching and Referral Hospital ("Memorial Wing")"; that the events took place in breach of the court order issued in 1998 and without a court order allowing the take over; and that todate the 1<sup>st</sup> respondent remained in occupation.
  15. It was further deponed by Mr. Kesse that on 4<sup>th</sup> April, 2005, the 1<sup>st</sup> respondent obtained orders to strike out the appellant's suit, Eldoret HCCCNo. 123 of 1998, on grounds, inter alia that the suit was instituted by a non-existent legal entity which order was granted by the High Court on 15<sup>th</sup> June 2005. This was followed by a letter of 10<sup>th</sup> of August, 2005 demanding the surrender of cheque books, fixed deposit certificates, documents of accounts, title deeds, grants, log books and related documents, failing which, police intervention was threatened so as to secure the documents; that on the 29<sup>th</sup> August, 2005, the 1<sup>st</sup> respondent filed a suit against the appellant's directors seeking orders to compel them to transfer the titles to the suit properties to it; and on 15<sup>th</sup> December, 2005, the 1<sup>st</sup> respondent obtained an order ex-parte restraining the appellant's directors, from any dealings with the suit properties.
  16. It was deponed by Mr. Kesse that, on 31<sup>st</sup> May, 2005 the appellant filed Miscellaneous Cause No. 350 of 2005 seeking orders of reinstatement of the appellant to the Companies Register, Waweru, J granted the orders in a judgment of delivered on 25<sup>th</sup> November, 2005, where he ordered that the appellant's name be restored to the Register of Companies, and that the business, assets and the property of the appellant do revert and vest in it so as to restore it to the position it was prior to the dissolution.
  17. Mr. Kesse concluded by deponing that the Legal Notice, the illegal and forceful takeover of the hospital and the suit properties, the various threats and suits filed against the appellant's directors, were all intended to deprive the appellant of the right to the proprietorship of the hospital and the suit properties; that the respondents had acted in total disregard of the law and due process and had violated the appellant's rights of proprietorship, possession, custody and control of its properties with impunity which was contrary to the constitutional guarantees entrenched by the retired Constitution; that the respondents have refused to comply with the requirements prescribed by sections 70 (a) and (c) and 75 (1) of the retired Constitution on compulsory acquisition; that the then President had no powers to vest the property of a private company in the 1<sup>st</sup> respondent; and that the Legal Notice was unconstitutional, and ought to be quashed.



18. In a replying affidavit and a supplementary replying affidavit sworn on 6<sup>th</sup> February 2006 and 15<sup>th</sup> February 2006 respectively by Agunda Ochanda, the Deputy Director of the 1<sup>st</sup> respondent, it was deponed that the appellant had no locus standi either statutorily or constitutionally upon which to claim the hospital and the suit properties as its ownership had been challenged by the 1<sup>st</sup> respondent in Eldoret HCCC No. 78 of 2005, which suit should have been determined before this Originating Summons; that in Eldoret HCCC No. 78 of 2005 and Nairobi Misc. Application No. 12 of 2005 the respondents have alleged that the appellant had fraudulently varied the title of the suit properties, by wrongly alleging that it was lost when it was in the custody of the District Commissioner, Uasin Gishu District; that the directors who were not legitimately appointed had attempted to convert the hospital from a public company to a private company, and secretly assigned themselves shares without payment of consideration; and that they therefore had no interest or rights or claim in the hospital or the suit properties.
19. It was further averred that the former President established the 1<sup>st</sup> respondent under the Legal Notice as the Government's successor of all the Eldoret District and Uasin Gishu Memorial Hospitals' rights, duties, obligations, assets and liabilities, including the suit properties currently registered in the name of the appellant, which had since been transferred to the 1<sup>st</sup> respondent.
20. It was also stated that prior thereto, the absolute interests in the suit properties was held by the Government, as the original owner; and that the appellant was a mere lessee under a leasehold interest from the Government; that prior to the surrender, conversion and registration of the suit properties under the Registered Land Act, Chapter 300, the suit properties were registered under the Registration of Titles Act Chapter 281, as L.R No. 2958 where the initial grant was issued by the Colonial Government on 1<sup>st</sup> January, 1924, to the Eldoret General Hospital, the predecessor of the appellant, subject to conditions that the hospital properties and buildings were for the sole purpose of a hospital under the control of the Director of Medical and Sanitation Services for the time being of the colony.
22. It was deponed further that on or about 28<sup>th</sup> January, 1932, the Eldoret General Hospital, the original grantee was wound up and the suit properties transferred to the Municipal Board of Eldoret and the District Council of Uasin Gishu (which at the time the suit was filed were referred to as the Municipal Council of Eldoret and Wareng County Council respectively) as tenants in common in equal shares at a nominal consideration of Kshs. 10/-, and that on 31<sup>st</sup> October, 1961, a transfer of the same land parcel was effected in favour of the appellant by the two councils for a consideration of Kshs. 10/=, and that the appellant, a public company, was to hold it in trust and for the benefit of the public; that the Board of Governors of the Hospital was to be chaired by the District Commissioner, Uasin Gishu District and all the documents were to be retained in his/her custody; that as alleged in Eldoret HCCC No. 78 of 2005, on or about 12<sup>th</sup> January, 1994 one, Dr. Fatuma Faraj the Secretary to the Board of the Hospital falsely swore an affidavit to obtain new certificates of lease, namely, Eldoret Municipality Block 7/125 and 7/126 on the pretext that original title on which the hospital stood was lost.
23. Mr. Ochanda deponed that the appellant's suit Eldoret HCCC No. 123 of 1998 challenging the Legal Notice was dismissed on 15<sup>th</sup> June 2005, and that it has neither been appealed nor reviewed, and the impugned Legal Notice has not been declared illegal, null and void and or quashed; that in view of Eldoret HCCC No. 78 of 2005, this Originating Summons seeking orders to restrain the 1<sup>st</sup> respondent from obtaining proprietorship or dealing with the suit properties and remove it from possession, occupation, custody and management of the Hospital ought not to be determined, as it would be tantamount to the High Court sitting on appeal or review of the its decision in Eldoret. HCCC No. 123 of 1998 and would reinstate the appellant's claims over the suit properties, following the orders obtained in Nairobi HC Misc.Application No. 350 of 2005.



24. It was also deponed that the appellant had not disclosed that since March 2005 the 1<sup>st</sup> respondent was in occupation, possession and proprietorship of the hospital and therefore the conservatory orders to restrain it from interfering with the appellant's proprietorship of the suit properties or entering, or interfering with possession, occupation, custody or management of the suit properties were incapable of being granted, as there is nothing to conserve.
25. Further, it was deponed that, the appellant has not established any basis for its claim of deprivation or seizure of the hospital as the suit properties belong to the Government and the Kenyan public, and that to the contrary, any grant of the conservatory orders at the interlocutory stage would violate its constitutional rights and occasion irreparable injury, loss and damage to the 1<sup>st</sup> respondent of its legitimate expectation in the Hospital and its investment of Kshs. 36 Million for the construction of additional facilities.
26. Finally it was deponed, there was inordinate delay in the presentation of this application, since the 1<sup>st</sup> respondent had secured possession and proprietorship of the premises in March, 2005.
27. In the course of the originating summons proceedings, the 1<sup>st</sup> respondent filed a preliminary objection dated 31<sup>st</sup> January 2006, wherein it asserted that the originating summons offended section 12 of the Civil Procedure Act; that the dispute was res judicata, and that the suit was time barred. The Court (Wendoh, J) dismissed the objection on the basis that the appellant was entitled to file the suit in the High Court in Nairobi, instead of Eldoret, that the suit was not res judicata as the issues for determination in the originating summons were different from those in Eldoret HCCC No.123 of 1998, and that the suit being one of a constitutional nature, the question of limitation did not arise. Instructively, the 1<sup>st</sup> respondent did not appeal against the decision on the preliminary objection.
28. In respect of the originating Summons, after considering the pleadings and the parties submissions the learned judges Wendoh and Dulu, JJ dismissed for reasons that a dispute existed between the appellant and the respondents as to the ownership of the hospital and the suit properties, and the court was not clothed with jurisdiction to determine who the real owner of the suit properties was or the nature of the appellant's interest.
29. The appellant was aggrieved by the decision of the High Court and has appealed to this Court on grounds that; the learned judges failed to appreciate that the issue before them was not a merely a dispute over land ownership, but a constitutional petition challenging the purported exercise of Presidential powers leading to the deprivation of property without due process; in holding that the court had no jurisdiction to adjudicate on a matter concerning a constitutional violation, and instead took into account extraneous matters; in wrongly concluding that the appellant should institute a suit for proprietary interests where viva voce evidence could be tendered, yet the court had clearly found that the suit properties were registered and owned by the appellant; and that it was not open for the learned judges to find that the matter before them was not in the area of public law.
30. Learned Counsel for the appellant, Mr. E. Masika relied on their written submissions of 26<sup>th</sup> April 2017, and highlighted the fact that the dispute was provoked by the Legal Notice, pursuant to which the 1<sup>st</sup> respondent had purported to take over the Hospital and suit properties of the appellant, a duly registered private entity; that the respondents had admitted the appellant's separate legal status in a letter dated 1<sup>st</sup> July 2004 and had opted to consider compensating the appellant; that furthermore, by a letter dated 8<sup>th</sup> February 2001, the 1<sup>st</sup> respondent agreed that it would only take over that part of the suit properties where the staff quarters were developed by the Government, and that finally that it had been admitted, in a letter dated 6<sup>th</sup> May 1999, that the hospital and the suit properties belonged to the appellant.



31. Counsel further submitted that the acquisition of the hospital in the manner it was done, was contrary to the provisions of the retired Constitution and the Land Acquisition Act. Counsel cited the case of *Maharaj vs Attorney General of Trinidad and Tobago* (No. 2) [1978] 2 AER 670 for the proposition that the right to the enjoyment of landed property is subject to the right of the state to acquire it compulsorily on payment of compensation and *Attorney General vs Lawrence* [1985] LCR (Const) 921 where Peterkin, CJ, declared the *St Kitts/Nevis/Anguilla National Bank Limited (Special Provisions) Act 1982* to be unconstitutional, void and of no effect as it contravened section 6 of the Constitution on the fundamental right to protection from deprivation of property. Counsel's submission was that, in the instant case, the acts of degazetting the appellant's company were equally unlawfully and unconstitutional and the letter of 9<sup>th</sup> February 2005 from the Parliamentary Counsel in the Attorney General's Chambers was misguided as the appellant was not a State Corporation to which the State Corporations Act would be applicable.
32. Mr. Katwa Kigen learned counsel representing the 1<sup>st</sup> respondent highlighted the written submissions filed on 9<sup>th</sup> December 2016, and submitted that the ownership of the suit properties required to be ascertained; that the court's jurisdiction was limited to Article 40 of the Constitution. Counsel further submitted that the dispute required that the court hear evidence in order to ascertain who between the appellant and the respondents owned the suit properties and that this was a private law dispute and not a public law dispute. Counsel cited *Kenya Bus Service Limited and others vs Attorney General* [2005] eKLR for the proposition that for the mere fact that a constitutional foundation can be established did not mean that any civil, criminal, private or public matter is a well founded constitutional cause; that the dispute dated back to 1924 when the hospital was designated a European and Indian hospital developed by government and later handed over to the Uasin Gishu and Wareng County Councils.
33. In 1964, counsel submitted, the District Commissioner was made the Chairman of the Board of Directors, and the hospital was run as a government facility for medical students. In 1995, the appellant fraudulently obtained a title under the Registered Land Act, Chapter 300, yet the suit properties were previously registered under the Registration of Titles Act, Chapter 281, that was retained in the respondents' custody.
34. Mr. Nduna Deputy Chief State Counsel representing the 2<sup>nd</sup> and 3<sup>rd</sup> respondents relied on the 1<sup>st</sup> respondent's written submissions. It was counsel's submission that the Government had significantly invested in the hospital and the suit properties since 1924 and was part of the 1<sup>st</sup> respondent's hospital, which was the second largest referral hospital, and school of medicine in the country; that though the hospital was situated on private land, it was of public and national importance. Counsel further submitted that the retired President merely ordered that the 1<sup>st</sup> respondent run the hospital as a parastatal, and concluded that by allowing the appeal, this Court would be handing over the hospital to a private entity, and declare it a private hospital.
35. In reply, Mr. Masika countered that the trial court found that the suit properties were registered in the appellant's name, and it was licenced to operate as such by the Ministry of Health; that investment by Government in the private facility did not afford it the right to take over the hospital and suit properties.
36. PARAWe have considered the parties' pleadings, their submissions and the law, and find that the issues that fall for determination are;
  - i) Whether the Originating Summons was competent;
  - ii) Whether the appellant was a public or private entity;
  - iii) Whether the Hospital and suit properties belonged to the respondents or to the appellant;



- iv) Whether the Legal Notice led to a violation of the appellant's constitutional rights, and if so whether its rights were violated; and
  - v) Whether the appellant was entitled to the reliefs sought.
37. As this is a first appeal, it is our duty to analyze and re-evaluate the evidence on record and reach our own conclusions. We can only interfere with a finding of fact by the High Court where the finding is based on no evidence, or a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in arriving at that finding. (See *Selle vs Associated Motor Boat Co.* [1968] EA 123;

Mindful of the principles, we begin with the first issue whether the Originating Summons was properly before the trial court. In addressing this issue, the learned judges said;

"From our perusal of the Originating Summons and the affidavit in support, the plaintiff has not specifically pleaded on how its rights to life, liberty, security, protection of the law have been infringed. It is now trite law that one approaching the court under section 84 for enforcement of his rights must plead with particularity that which he alleges, the section, paragraph or sub paragraph which has been, is being or is likely to be infringed...."

38. The court further stated that, the onus was upon the appellant to demonstrate its ownership, interest and rights over the hospital and the suit properties.
39. It should be observed at this juncture that, the suit was brought during the life of the retired Constitution, and therefore, the provisions of that constitution were applicable to this suit. In addition, the Chunga Rules were still in operation, and would have been applicable save for the enactment of rule 32 of The Constitution of Kenya (Supervisory, Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules 2006 (the Gicheru Rules) (Legal Notice No. 6 of 17<sup>th</sup> February 2006) which provided that any matter pending under the Chunga rules would be continued under the Gicheru Rules.
40. With the repeal of the Chunga rules, and the enactment of rule 32, it would follow that the Gicheru Rules would govern the suit, which by then had already been instituted as an Originating Summons. That said, under the Gicheru Rules, the procedures that governed these claims were set out at rules 11, 12 and 13 which stipulated, inter alia that;
- 11. Where a contravention of any fundamental rights and freedoms of an individual under sections 70 to 83 (inclusive) of the Constitution is alleged or is apprehended an application shall be made directly to the High Court.
  - 12. An application under rule 11 shall be made by way of a petition as set out in Form D in the Schedule to these Rules.
  - 13. The petition under rule 12 shall be supported by an affidavit."
41. So that, where a person had alleged a contravention or a threat of contravention of a constitutional right under the retired constitution, he or she must set out the specific right infringed and the particulars of such infringement or threat.
42. In the Originating Summons the appellant has alleged that following the promulgation of the impugned Legal Notice by the then President, the respondents on behalf of the Government illegally and forcefully took over its Hospital, including the suit properties in total disregard of the constitution



and the law, which was contrary to the provisions of sections 70 (a) and (c) of the retired Constitution on among other rights, the right against deprivation of property without compensation and section 75 of the retired Constitution on the right to own land. Specific prayers for reliefs both declaratory and conservatory in nature were also sought. But, there was no prayer for compensation.

43. The affidavit in support of the petition sworn by the appellant's Company Secretary, Mr. Kesse provided particulars of the appellant's rights concerning the hospital and the suit properties that were infringed.

44. In the case of *Anarita Karimi Njeru vs The Republic (1976-1980) KLR 1979 Trevelyan and Hancox, JJ*, succinctly pronounced a minimalist approach for filing of constitutional references where it was stated;

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

46. This position was succinctly restated by this Court in *Mumo Matemu vs Trusted Society of Human Rights Alliance and 5 others [2013] eKLR* where it was stated;

"In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point."

47. Bearing these guidelines in mind, we are satisfied that the infringements alleged under sections 70 (a) and (c) and 75 were adequately defined, and that the elements essential to a valid constitutional petition were present. To this extent, we find the Originating Summons to be competent.

48. We now turn to the crux of the dispute, on whether the appellant's constitutional rights were violated by its inclusion in the Legal Notice, and whether it was entitled to the reliefs sought. The High Court observed that for the appellant to have a cause of action, it was expected to establish that it owns, has an interest, or a right over the property. In this regard, the court considered two preliminary issues. First, the appellant's extant legal status relative to the Government and the 1<sup>st</sup> respondent, and second, the question as to whom between the Government and the appellant owned the hospital and the suit properties.

49. On the question of the appellant's legal status and whether it was eligible to be considered a State Corporation as defined by the State Corporations Act, Cap 466, section 2 of the State Corporations Act defines a state corporation and is instructive. It provides;

...state corporation" means

- (a) a state corporation established under section 3;
- (b) A body corporate before or after the commencement of this Act or by or under an Act of Parliament or other written law but not-



- i) the Permanent Secretary to the Treasury incorporated under the Permanent Secretary to the Treasury (incorporation) Act;
  - ii) a local authority established under the Local Government Act;
  - iii) a building society established in accordance with the Building Societies Act
  - iv) a company incorporated under the companies Act which is not wholly owned or controlled by the Government or a state corporation;
  - v) the Central Bank of Kenya established under the Central Bank of Kenya Act;
- c) a bank or financial institution...
  - d) a subsidiary of a state corporation.”

50. Section 2 makes it clear that, a company registered under the Companies Act is excluded from the status of a state corporation, unless it is a company wholly owned or controlled by the Government or state corporation, or has been declared as one by the President as set out in section 3.

51. In the instant case, it is not in dispute that the appellant was incorporated under section 4 (1) of the retired Companies Act which provides that any seven or more persons, or where the company to be formed will be a private company, any two or more persons, associated for any lawful purpose may upon, subscribing their names to a memorandum or articles of association, and complying with the requirements of the Act, register an incorporated company, with or without limited liability. More specifically, under section 4 (2) (b);

...a company having the liability of its members limited by the memorandum to such amount as the members may respectively undertake to contribute to the assets of the company in the event of its being wound up (in this Act termed as a company limited by guarantee);”

52. Indeed, there is a Certificate of Incorporation number C.7/61 that confirms that the appellant’s existence was pursuant to its registration under the retired Companies Act Cap 486 on 10<sup>th</sup> August 1961 as a company limited by guarantee and not having a share capital. It was therefore a separate legal entity within the definition of the landmark decision in the case of *Salomon vs Salomon Co.*[1897] A.C. 22, where the House of Lords held that;

The company is at law a different person altogether from the subscriber.”

53. Was the appellant a Government controlled entity so as to fit within the description of a state corporation? By the time of publication of the Legal Notice the appellant’s memorandum and articles of association show that the directors and members were private citizens, and as rightly observed by the trial court, “... there is no indication of a contribution or involvement by Government or the Ministry of Local Government or Ministry of Health either in the form of shares or otherwise.” Since the Government did not hold any position of control, and neither was it in control of the appellant it can be concluded that it was not a state corporation as defined by the State Corporations Act.

54. Did the inclusion of the appellant in the Legal Notice mean that its status was converted to that of a subsidiary of the 1<sup>st</sup> respondent? Again, since it remained under the control of its directors and



- members as set out in the memorandum and articles of association and in the appellant's annual returns, it was not under the Government's control, and was therefore not a State Corporation within the meaning of the State Corporations Act, and could not be considered as such. There is also nothing to show that the retired President established it as a state corporation under section 3 of the Act.
55. It is evident from the material available that, the appellant was neither a government entity nor a state corporation or a local authority. It was a private legal entity, registered under the Companies Act, under the control and direction of its own directors and members, and capable of owning its own assets, rights and interests.
56. We turn now to the land ownership question, and whether the material that was before the court below was sufficient to demonstrate whether or not the appellant was the registered proprietor of the suit properties.
57. In addressing this issue, the learned judges concluded thus;
- "We have perused the pleadings and considered the devolution of title of the subject land. However the facts do not appear to be in dispute. It was agreed by all the parties that title to the land was initially issued by the colonial government in or about 1924 was a grant under the Registration of Titles Act (Cap 281) for a period of 99 years to Eldoret General Hospital, a company limited by guarantee which was a hospital catering for European settlers and Asians in Eldoret. It also does not appear to be in dispute that on or about 28<sup>th</sup> January 1932 the original grantee was wound up and the land transferred to the Municipal Board of Eldoret (now Municipal Council of Eldoret and the District Council of Uasin Gishu (now Wareng County Council) as tenants in common for Kshs 10/=. It also does not appear to be in dispute that on or about 31<sup>st</sup> October, 1961, a transfer for the same land was effected in favour of Uasin Gishu Memorial Hospital Ltd., a company limited by Guarantee, who is the Plaintiff herein for a consideration of Kshs. 10/=. It is also not in dispute that on or about 12<sup>th</sup> January 1994, Dr. Fatuma Faraj as Secretary to the board swore an affidavit that the titles have been lost. Consequent upon that, new certificates of lease over the two land parcel numbers Eldoret Municipality Block 7/125 and 7/126 were issued in the name of Uasin Gishu Memorial Hospital Ltd. It therefore follows that from 1961, the titles have been in the name of the Plaintiff".
58. From this excerpt it is clear that the learned judges considered the material that was before them, and having taken into account both the appellant's and the respondents' evidence, came to the conclusion that it was not in dispute that the suit properties belonged to the appellant.
59. As stated above, it is our duty as an appellate court sitting on a first appeal to reanalyze the evidence, and reach our own independent conclusion. Our re-evaluation of the evidence leads us to conclude, as did the High Court, that the suit properties belonged to the appellant. Our reasoning is founded on the chronology of the entries in the conveyances and title documents relating to the suit properties. It is uncontroverted that, Title No I.R. 2958, being the original title for the suit properties was transferred to the Municipal Board of Eldoret and the District Council of Uasin Gishu as tenants in common for Kshs. 10/=: and on or about 31<sup>st</sup> October, 1961, it was then transferred, again for a consideration of Kshs. 10/=: to the appellant, a company limited by guarantee.
60. The 1<sup>st</sup> respondent's contention that the titles over the suit properties were fraudulently registered in the appellant's name under the Registered Land Act does not stand to reason. As earlier observed, Title No. I.R. 2958 was transferred and registered in the appellant's name on 31<sup>st</sup> October 1961. When the new titles were issued, the suit properties were registered in the appellant's name, albeit under



the Registered Land Act. An endorsement appearing on Title No. I.R. 2958, read, “TITLE NOW REGISTERED UNDER REGISTERED LAND ACT Parcel No. Eldoret Municipality/Block 7/125 ...” thereby referencing the titles of the suit properties back to the original Title No. I.R. 2958.

61. As far as the respondents’ allegation that the appellant varied the title to the suit properties is concerned, we are not satisfied that this creates a basis for disputing the appellant’s ownership of the titles, as undoubtedly, there was a connection between the titles of the suit properties registered under the Registered Land Act, and the original Title No. I.R. 2958 registered under the Registration of Titles Act. Of fundamental importance is that both titles relate to the same properties, both are registered in the appellant’s name, and it is on these properties that the hospital is constructed. Furthermore, from the time the suit properties were registered in the appellant’s name in 1961, until the promulgation of the Legal Notice, they were not at any time in the government’s name and were at all times registered in the appellant’s name. Based on these findings, the High Court rightly concluded, that the suit properties were registered in the appellant’s name. So that, by the time the impugned Legal Notice was published, they belonged to the appellant, and we so find.
62. This leads us to the next issue of whether the appellant’s rights were violated pursuant to the promulgation of the Legal Notice.
62. It will be observed at this point that, the High Court declined to make a determination on whether a violation had occurred following the declaration vide the Legal Notice. In declining to make a determination the court stated;

... That in our view raises a dispute as to who really is the owner of the disputed land and other assets, whether the plaintiff or the Respondent..... this court is not inclined to take viva voce evidence on matters of this nature and our view of the matter is that the parties would need to adduce evidence to show the original acquisition of the land, and subsequent takeover by the Government. For the issue of ownership to be properly justiciable, it has to be determined by way of extension of evidence of alleged fraud or alleged changes of ownership or acquisition of the property.”

63. Clearly, the court was weighed down by the respondents’ claims that there were other suits between the same parties pending before the High Court which should be heard before the Originating Summons. In particular, HCCC No. 78 of 2005 where the respondents’ alleged that the appellant was a public entity, which the appellant’s directors and members had converted into a private company; that the hospital and the suit properties actually belonged to the Government, but were unlawfully and fraudulently converted into a private property, and registered in the appellant’s name under the Registered Land Act, when it was initially registered in the appellant’s name under the Registration of Titles Act. With respect to the learned judges, the allegations in HCCC No. 78 of 2005, and the other suits were not before them.
64. What was before the court was an Originating Summons involving the government, and a state corporation, where the appellant complained that its constitutional rights to ownership of property were violated following a Government proclamation that alienated its properties. Having already reached a finding that the appellant was not a state corporation or a Government controlled entity, and having also conclusively held that;

...new certificates of lease over the two land parcel numbers Eldoret Municipality Block 7/125 and 7/126 were issued in the name of Uasin Gishu Memorial Hospital Ltd. It therefore follows that from 1961, the titles have been in the name of the Plaintiff...”, it was incumbent upon the court to determine whether or not a violation of rights had occurred



due to the Legal Notice. In failing, to reach a finding on a matter that was central to the dispute, the court failed to fulfill its constitutional mandate, and in so doing, misdirected itself.

65. As a consequence, the issue of whether the promulgation of the Legal Notice resulted in a violation of the appellant's rights falls for determination by this Court.
66. Section 70 (a) and (c) the retired Constitution provided for the right to life, liberty, security of the person and protection of the law and protection of the privacy of his home and other property, and from deprivation of property without compensation.
67. While section 75 (1) of the Constitution stipulated that;
  - (1) No property of any description shall be compulsorily taken possession of, and no interest in or right over the property of any description shall be compulsorily acquired, except where the following conditions are satisfied;
    - (a) the taking of possession or acquisition is necessary in the interests of defense, public safety, public order, public morality, public health, town and country planning or the development or utilization of property so as to promote the public benefit; and
    - (b) the necessity therefor is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property; and
    - (c) provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.”
  - (2) ..every person having an interest or right in or over property which is compulsorily taken possession of or whose interest in or right over any property is compulsorily acquired shall have a right of direct access to the High Court for , inter alia, the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of compensation to which he is entitled and the purpose of obtaining prompt payment of that compensation.”
68. The Legal Notice declared under the hand of the retired President that the appellant's hospital and the suit properties be transferred and vest in the 1<sup>st</sup> respondent. In pursuance of this, by a letter dated 9<sup>th</sup> February 2005, the 3<sup>rd</sup> respondent directed the 1<sup>st</sup> respondent to take over the appellant's hospital as ordained by the impugned Legal Notice. The letter read in pertinent part;

“...the Attorney General has perused the Legal Notice and is pleased to inform you that the board of Management of Moi Teaching and Referral Hospital may proceed to give effect to the legal notice No. 78 of 1998. There is no legal impediment at all in taking over the management of the Uasin Gishu Memorial Hospital in accordance with the Legal Notice.”
69. The letter concluded by stating;

“It is the direction of the Attorney General therefore that you move expeditiously and take over the management of Uasin Gishu Memorial Hospital. You may seek the assistance of the District Commissioner to enable you move in smoothly.”
70. Pursuant to this directive, it was averred in the appellant's affidavit in support of the petition that;



71. In furtherance of the illegal instructions on 11<sup>th</sup> March, 2005 of the 3<sup>rd</sup> respondent and in total disregard of the Laws of the Republic of Kenya, the 1<sup>st</sup> respondent in a covert military style action supported by units of armed police officers and in the presence of its employees Messrs Sister Macrime, Mr. Agnda Achada, Dr Sijenyi Nyakundi and members of Parliament Hon. David Koros and Hon. Joseph Lagat and other hooligans, forcibly and illegally entered the appellant's medical facility and took over the appellant's hospital and all its facilities. In so doing the 1<sup>st</sup> respondent's staff moved in with Wielding machines and cut locks and doors and chased away the appellant's employees. A further contingent of the 1<sup>st</sup> respondent's employees, armed security guards together with the police were brought in using the 1<sup>st</sup> respondent's ambulance on the pretext that they were patients. They thereafter took over the appellant's assets, business, operations, control and management of the appellant's hospital thereby completely shutting out the appellant, its Board of Directors, staff, servants and agents from the day to day control and management of the hospital."
72. In its replying affidavit, the 1<sup>st</sup> respondent admitted that;
- "...since March 2005 and attendant to Court's orders in HCCC No. 123 of 2005, the Moi Referral Hospital has been in occupation, possession and proprietorship of all that property that was initially Uasin Gishu Memorial Hospital and that since March 2005 the Uasin Gishu Memorial Hospital has not been in occupation, possession or proprietorship of the said premises and in the circumstances it is problematic to grant the prayers in the application purportedly conservatory to restrain the 1<sup>st</sup> defendant from interfering with Plaintiff's proprietorship and/or howsoever dealing with the said properties, when infact the 1<sup>st</sup> defendant is on the site, and the plaintiff is wholly out of site. There is nothing in fact to conserve for the plaintiff."
73. As already found, the appellant was not a State Corporation, but is a private company, limited by guarantee and not having a share capital. It is also the registered proprietor of the suit properties.
74. Yet, when the Legal Notice was promulgated, it included a statement to the effect that all rights, duties, obligations, assets and liabilities of the appellant and its hospital were to be automatically transferred to the 1<sup>st</sup> respondent as successor of the Government. In other words, the purport of the Legal Notice was to order the take over by the 1<sup>st</sup> respondent of the appellant and its properties, as if they belonged to the Government, irrespective of the appellant's rights or interests.
75. The inclusion in the Legal Notice of all the appellant's rights, duties, obligations and assets, more particularly the hospital and the suit properties, was tantamount to compulsory acquisition of the appellant's properties in a manner contrary to section 70 and 75 (1) of the retired Constitution. These provisions stipulate inter alia, that, no property of any description shall be taken over, or interest in or right compulsorily acquired unless compensation had been paid.
76. The Legal Notice did not also accord with the provisions of the Land Acquisition Act that sets out mandatory procedures and processes for the compulsory acquisition of land by the government. In particular, it is provided at section 8 that;
- "Where land is acquired compulsorily under this Part, full compensation shall be paid promptly to all persons interested in the land."
77. By the time the Legal Notice was published, the respondents were already in contravention of these provisions as from the available material, nothing demonstrated that the appellant was compensated



for the compulsory acquisition of its rights and interests, either, prior to its publication or following its eviction and dispossession from the Hospital and the suit properties.

78. In the case of *Speaker of National Assembly vs De Lille MP & Another 297/98 (1999) (ZASCA50)*, the appellate Court considered the effect of orders that are inconsistent with the provisions of the Constitution of the Republic of South Africa when it stated thus;
79. This enquiry must crucially rest on the Constitution of the Republic of South Africa. It is Supreme - not Parliament. It is the ultimate source of all lawful authority in the country. No Parliament, however bona fide or eminent its membership, no President, however formidable be his reputation or scholarship and no official, however efficient or well meaning, can make any law or perform any act which is not sanctioned by the Constitution. Section 2 of the Constitution expressly provides that law or conduct inconsistent with the Constitution is invalid and the obligations imposed by it must be fulfilled. It follows that any citizen adversely affected by any decree, order or action of any official or body, which is not properly authorised by the Constitution is entitled to the protection of the Courts. No Parliament, no official and no institution is immune from Judicial scrutiny in such circumstances.”
80. Similarly, the retired Constitution of Kenya was the supreme law of the land at the time until the Constitution 2010 retired it, and, to the extent that any orders or proclamations were inconsistent with its provisions, and led to the infringement of rights of concerned parties, they were illegal and unenforceable. In the circumstances, in so far as the Legal Notice included a statement that purported to deprive the appellant of the hospital and the suit properties without due process and compensation as stipulated by the law, it was unlawful and illegal, and neither the retired president nor the government had any right or power to publish an order that would constitute a violation of the appellant’s rights. As such, we find that the statement including the appellant’s rights, duties, obligations and assets, more particularly the Hospital and the suit properties, in the Legal Notice to be unconstitutional, illegal, null and void.
81. This brings us to the final issue of whether the appellant was entitled to the declaratory and conservatory orders sought. In declining to grant the reliefs the High Court concluded that;
82. Adjudicating or granting any of these two prayers would mean that the court would be determining the issues of ownership of Eldoret Municipality Block 7/125 and 7/126. In effect it would mean that the land and interests therein belongs to the plaintiff. This court does not have jurisdiction under section 84(1) of the Constitution.”
83. The failure by High Court to determine the question of whether the appellant’s rights were violated by the Legal Notice, meant that the appellant was denied any of the remedies specified in sections 75 (2) and 84 of the retired Constitution. Thus it once again falls within the remit of this Court to determine the reliefs available to the appellant, having found as we have, that the appellant’s rights were violated.
84. Section 84 empowers a court to make such orders, issue such writ and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 70 to 83 of the retired constitution.
85. Whilst in the case of *Gairy vs Attorney General of Grenada*[2001]UKPC 30, Bingham LJ, cited the case of *N Nagendra Rao and Co. vs the State of A.P. AIR (1994) SC 2663* where RM Sahai J, stated;  

"No legal or political system today can place the state above the law as it is unjust and unfair for a citizen to be deprived of his property by negligent act of officers of the state without a remedy... The modern social thinking of progressive societies and the judicial approach is



to do away with archaic state protection and place the state protection or the Government at par with any other juristic legal entity.”

86. As earlier stated, the appellant sought both declaratory and conservatory orders against respondents.
87. The declaratory prayers sought were, a) a declaration that the Legal Notice in so far as it purported to vest the rights, duties obligation, assets and liabilities of the Hospital and the suit properties in the 1<sup>st</sup> respondent was in breach of the appellant’s fundamental right to ownership of property and is illegal, unconstitutional and null and void; b) a declaration that its fundamental rights as protected and guaranteed by sections 70 (a) and (c) and 75 of the Constitution were contravened; c) a declaration that there was no lawful basis upon which the respondents deprived the appellant of the right to the ownership and/or proprietorship over its assets, and d) a declaration that the respondents were not entitled to deprive the appellant of the rights over its assets inclusive of cash, bank accounts, business and leasehold interest in the suit properties.
88. In Administrative Law, H W R Wade and F Forsyth, page 482 Tenth Edition, the nature of declaratory orders were particularized as;
- “In administrative law the great merit of the declaration is that it is an efficient remedy against ultra vires action of government authorities of all kinds, including ministers and servants of the crown, and in proper cases even the Crown itself. If the court will declare that some action, either taken or proposed, is unauthorized by law, that concludes the point between the plaintiff and the authority. If then his property is taken, he has his ordinary legal remedies; if an order is made against him he can ignore it with impunity; if he has been dismissed from office he can insist he still holds it. All these flow from the mere fact that the rights of a party have been declared.”
89. In view of our the finding that the appellant held proprietary rights and interests in the hospital and the suit properties, we find it necessary to declare that, to the extent the appellant was included in the Legal Notice that purported to vest or transfer its rights, duties obligation, assets and liabilities of the hospital and the suit properties to the 1<sup>st</sup> respondent such inclusion was in violation of the appellant’s fundamental right to ownership of property under sections 70 (a) and (c) and 75 of the Constitution, and is therefore unconstitutional, illegal, null and void.
90. In the prayers for conservatory orders, the appellant sought to restrain and or remove the 1<sup>st</sup> respondent its servants and agents from possession, occupation, custody, and management of the hospital and the suit properties. Yet, it is undisputed that by the time the suit was instituted, the appellant was already dispossessed of the hospital and suit properties, while the respondents had taken over possession, occupation, custody and management.
92. As equity suffers no wrong, and bearing in mind that several years have elapsed since the take over of the hospital and the related facilities by the 1<sup>st</sup> respondent, and appreciating the nature of the services being rendered by the hospital, it is our considered view that it would be unconscionable to grant the mandatory prayers sought in the Originating Summons, whose effect would be to eject the 1<sup>st</sup> respondent and reinstate the appellant. In the circumstances, the order that commends itself to us is one of compensation under section 75 of the retired Constitution.
92. For the aforesaid reasons, we find that we must interfere with the decision of the High Court of 19<sup>th</sup> March 2010 and allow the appeal in terms of the following;
1. It is declared that to the extent that the appellant was included in Legal Notice Number 78 of 1998 that vested its rights, duties obligation, assets and liabilities of Uasin Gishu Memorial



Hospital Limited including its properties known as Eldoret Municipality/ Block 7/125 and Eldoret Municipality/Block 7/126 in the Moi Referral and Teaching Hospital Board, such inclusion is in violation of the appellant's fundamental rights to ownership of property and is therefore unconstitutional, illegal, null and void and of no effect.

2. Under section 75 of the retired Constitution it is ordered that the respondents compensate the appellant for deprivation of the properties known as Eldoret Municipality/ Block 7/125 and Eldoret Municipality/Block 7/126, the hospital and related facilities.
3. We order the respondents to bear the costs in the High Court and in this Court.

**DATED AND DELIVERED AT NAIROBI THIS 6<sup>TH</sup> DAY OF OCTOBER, 2017.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

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

**Deputy Registrar**

