Taj Mall Limited v Kenya Urban Roads Authority & 2 others; National Land Commission & 3 others (Interested Parties) (Environment & Land Petition 62 of 2019) [2024] KEELC 13454 (KLR) (20 November 2024) (Judgment)

Neutral citation: [2024] KEELC 13454 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND PETITION 62 OF 2019

OA ANGOTE, J

NOVEMBER 20, 2024

BETWEEN

TAJ MALL LIMITED ..... PETITIONER

AND

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

MINISTRY OF LANDS AND PHYSICAL PLANNING ..... 2ND RESPONDENT

ATTORNEY GENERAL ..... 3RD RESPONDENT

AND

NATIONAL LAND COMMISSION ..... INTERESTED PARTY

COUNTY GOVERNMENT OF NAIROBI ..... INTERESTED PARTY

COMMISSION ON ADMINISTRATIVE JUSTICE ..... INTERESTED PARTY

ADMINISTRATIVE JUSTICE ..... INTERESTED PARTY

JUDGMENT

Background

1. Before the Court for determination is a Petition dated 13th November 2019 and filed on 15th November 2019. The Petitioner is seeking for the following orders:

    a. A declaration that the Certificate of Title held by the Petitioner in respect of L.R No. 9042/694 (hereinafter 'the suit property') is conclusive evidence of the Petitioner's bona fide ownership of the suit property and the Petitioner has an indefeasible title against the 1st Respondent and the whole world.

b. An order of injunction be issued restraining the Respondents or any of them from trespassing, cancelling, revoking the title to and/or dealing in any manner whatsoever with the suit property.

c. An order of mandatory injunction be issued compelling the 1st Respondent to remove from the Petitioner's land the road illegally built thereon.

d. In the alternative to prayers a, b and c above, an award of damages in the sum of Kshs. 164, 749,000 being the last valuation of the suit property together with interest accruing thereon at court rates from 11th January 2018 until payment in full.

e. The costs of the Petition be borne by the Respondents in any event.

2. In the Petition, the Petitioner averred that it purchased the suit property measuring approximately 0.4460 Hectares from Autoexpress Limited (formerly known as Nyanza Petroleum Dealers Limited) who had initially bought the same from the original owner, Rev. Arthur Kinyanjui, on 14th December 1995. It was averred that a transfer was duly registered in the name of the Petitioner on 24th January 2014.

3. The Petitioner averred that prior to 1999, the suit property was registered as L.R No. 9042/601 under grant IR No. 68598 measuring approximately 0.6060 Hectares; that in January 1999, Nyanza Petroleum applied for rectification of an anomaly of the acreage on the suit property and that the rectification was effected sometime in 2001.

4. Consequently, it was averred, Nyanza Petroleum surrendered Grant IR 68598 and was issued with Grant IR 85486 on 2nd February 2001 and continued to pay the requisite land rates and rents.

5. According to the Petitioner, sometime in May 2010, Autoxpress Limited realized that part of the suit property was going to be affected by the construction of the Eastern Bypass and expansion of Outering Road and that an enquiry was made to the 2nd Respondent who replied stating that the suit property was encroaching on the Eastern Bypass.

6. It was averred in the Petition that Autoxpress Limited sought to find out from the 2nd Respondent what area of the suit property was encroaching on the Eastern Bypass but the 2nd Respondent was not forthcoming with the information and that Autoxpress Limited informed the 2nd Respondent that it would no longer pay the land rates until the issue was resolved.

7. When the Petitioner bought the suit property, it was averred, it cleared the land rates owed (Kshs. 55,200); that it also applied for and was issued with a construction permit and building approval by the 2nd Interested Party and that subsequently, the 1st Respondent lodged a complaint with the 1st Interested Party sometime in 2014 seeking the review/revocation of the Petitioner's grant in the suit property.

8. It is the Petitioner's case that investigations by the 1st Interested Party were concluded in favour of the Petitioner; that the 1st Respondent sought a confirmation from the 1st Interested Party if the determination was authentic and that the 1st Interested Party confirmed that it was.

9. According to the Petitioner, the 1st Respondent maintained that the suit property was compulsorily acquired by the Government in 1960 and that based on the conduct of the 1st Respondent, the Petitioner is apprehensive that it will lose the suit property which was valued at Kshs. 164,749,000 on 11th January 2018.

10. The Petitioner averred that the actions of the 1st Respondent, violated its right to own property as enshrined in Article 40 of the Constitution; that the title to the suit property had existed for 17 years before the 1st Respondent filed a complaint and that the delay violated its right to fair administrative action as enshrined in Article 47 of the Constitution.

11. In response to the Petition, the 1st Respondent's Deputy Director for Surveys deponed that having erected the Taj Mall, the Petitioner Managing Director approached the 1st Respondent seeking to know if it was okay to acquire the suit property for purposes of a car park for its demolished mall and that he was informed that the land was within Outer Ring Road reserve which had been acquired in 1960.

12. It was deponed that the Petitioner was aware of the public utility nature of the suit property as far back as 2010 which he disregarded and proceeded to acquire in 2014 by way of a transfer.

13. In response to the Petition, the 2nd Respondent filed a Replying Affidavit sworn by a land surveyor working with the Director of surveys who deposed that the records held at the survey records office relating to L. R. No. 9042/694 are represented in cadastral plan number F/R 384/146 held by the Director of surveys.

14. It was deposed that the said survey plan was approved and authenticated by the Director of surveys on 9th October, 200 and a new deed plan number 232392 dated 12th October, 2000 issued and that the records shows that the parcel of land L. R. Number 9042/694 measures approximately 0.4460 Ha.

15. It was deposed by the 2nd Respondent's surveyor that L. R. No. 9042/694 is a resultant of re-survey of L. R. No. 9042/601 which had been survey vide cadastral plan number F/R 290/107; that Deed plan number 201958 dated 22nd December, 1995 was issued by the Director of surveys and that the land measured O.6060 Ha.

16. It was deponed that the re-survey of parcel of land L. R. 9042/601 was found necessary when the registered proprietor of the land on 14th January, 1999 discovered that the parcel of land as originally surveyed encroached on a road reserve at the southern boundary.

17. According to the 2nd Respondent, L.R. No. 9042/601 as originally surveyed was located between railway reserve to the North and a road Grid intersection to the south; that in order to make provision for an adequate and suitable road truncation at the Southern boundary of L. R. number 9042/601 and to avoid the land encroaching onto the road reserve, part of the parcel was then required to be excised to form part of the road to avoid the encroachment onto the road.

18. It was deponed that the authority to undertake the re-survey which resulted into the creation of Deed Plan F/R No. 384/146 was the commissioner of lands letter dated 12/06/1992; approved part development plan number 42/14/92/3 dated 5th June, 1992 and the commissioner of land's letter dated 29th January, 1999.

19. It is the 2nd Respondent's case that L. R. No. 9042/601 was surveyed out of L. R. No. 3955/3 (original number 3955/2) and that the two parcels of land are represented in F/R No. 75/7 dated 25th July, 1996.

20. According to the 2nd Respondent, parts of L. R. 3955/3 (measuring 255 acres with 200 ft wide road traversing through the land covering 14 acres), together with parts of L. R. No. 7075/12, L.R No. 39/1 and L. R. No. 212/2 were identified for compulsory acquisition for road and railway developments and expansion between 1864 and 1995 and that the specific parts of the affected parcels of land were identified via land acquisition plan number L.D. No. 36414/29A and S/37/30 – sheets.

21. It was deponed that surveys of the affected land were executed by the Director of surveys vide F/R No. 107/10 and F/R No. 107/11 approved on 28th July, 1996.

22. It is the 2nd Respondent's case that the Petitioner is not entitled to the suit property the same having been acquired compulsorily. The 2nd Respondent's Principal Physical Planner deponed that a part Development plan reference number 42/14/92/3 was prepared on 30th April, 1992 and assigned development plan number 273 and that the approved plan was in respect of a proposed site for petrol station and not a parking.

23. The Petitioner's Director filed a further affidavit in which he deponed that there is in existence a part Development plan ref. 42/14/87/5A of 1988 showing the properties that had encroached on the road reserve and that the Petitioner's L R. No. 9042/694 was not affected.

Hearing and evidence

24. Ramesh Chondra Govind Gorasu, the Managing Director of the Petitioner, testified as PW1. He adopted his supporting affidavit sworn on 8th November 2019 and his further affidavit sworn on 28th March 2022 as his evidence-in-chief.

25. In the affidavit sworn on 8th November 2019, the deponent reiterated the contents of the Petition as set out above. He stated that the Petitioner is a bona fide purchaser for value without notice of defects on its title and therefore has an indefeasible title against the world.

26. According to PW1, the Petitioner had a legitimate expectation that its rights would be protected when the 2nd Interested Party issued it with construction permits/approvals and the 1st Interested Party determined the complaint lodged by the 1st Respondent in its favour and that the Respondents should bear in mind the fact that the suit property is different from L.R No. 209/13938 which housed the demolished Taj Mall building.

27. According to PW1, the Petitioner's title was acquired through a lawful process sanctioned by the relevant government institutions including the 2nd Respondent and the 2nd Interested Party who issued the transfer and construction approvals respectively.

28. This fact, it was stated, was corroborated by the 1st Interested Party in its determination of the complaint submitted to it; that as per the 1988 Part Development Plan, the suit property was not among the properties that had encroached on the road reserve and that the compulsory acquisition process relating to the predecessor's title to the suit property(L.R. No. 3955/3) was never concluded.

29. On cross-examination, PW1 stated that the two affidavits bore different signatures but both of them were his; that he had produced the transfer but not the sale agreement because that came later and that the only sale agreement he had was between Rev. Kinyanjui and Nyanza Petroluem.

30. PW1 stated that the purchase price was Kshs. 9,000,000 but did not have any proof of payment and that he obtained a letter of allotment for the suit property which was issued in 1992 but had no clear date.

31. The witness acknowledged that there was a surrender of about half an acre that had happened before the Petitioner purchased the suit property. He stated that while it was noted in the title he exhibited, he did not have the surrender in his possession.

32. It was the evidence of PW1 that the rest of the land (1 acre) was okay; that he did a search to confirm this but he did not have the search in his possession; that he dealt with Ardhi surveyors but later conceded that the survey was done before the purchase by the previous owner, and that the survey related to

L.R No. 9042/607 of which an acre remained after the surrender. The witness acknowledged that the surveyor noted that L.R No. 9042/607 was a road reserve.

33. When questioned about the gazette notice relating to L.R 9042/601, he stated that it was the previous number before the surrender; that as at 22nd January 2016, the Petitioner was the owner of the suit property and that the valuation had been done in 2018 placing the value of the land at Kshs. 164, 749,000.

34. The witness clarified in re-examination that the gazette notice referred to L.R No. 9042/601 which was surrendered while the Petitioner's parcel is L.R 9042/694 which is what remained after the surrender. PW1 stated that the survey could not establish the extent of the road reserve and that nothing in the report showed that compulsory acquisition had been completed.

35. Wilfred Muchae, a Land Surveyor with the 2nd Respondent testified as DW1. He adopted his replying affidavit dated 23rd September 2020 as his evidence-in-chief and produced his bundle of documents as exhibits. In his affidavit he stated that records held at the Survey Records office relating to the suit property indicate that the suit property measures 0.4460 ha.

36. According to DW1, the suit property was as a result of the resurvey of L.R No. 9042/601 which measured 0.6060ha and that the re-survey (and excision) was necessitated by the realization on or about 14th January 1999 that the parcel as surveyed encroached on the road reserve at its southern boundary.

37. The deponent stated that L.R No. 9042/601 was surveyed out of parcel L.R No. 3955/3 which was originally part of L.R No. 3955/2; that the surveys were approved in 1956 and a deed plan issued for registration purposes in 1957 and L.R No. 3955/3 measured 255 acres less the provision for an un surveyed road reserve.

38. It was stated by DW1 that parts of L.R No. 3955/3 were identified for compulsory acquisition for road and railway development/expansion in 1964 and 1965 and that the plans for the railway and road acquisition were consequently prepared.

39. However, it was averred by DW1, that the survey for purposes of acquisition of L.R No. 3955/3 was delayed because there were negotiations with the registered owners and that L.R No. 9042/601 was created on 22/12/1995; that the excision was done post 1995 for a road and that the excision reduced the size of the land from 0.6060ha to 0.4460ha.

40. DW1 stated that the excision was authorized by letters dated 12th June 1992 and 9th October 1999 and a P.D.P dated 5th June 1992 and that he did not have any of the documents but acknowledged that they were part of the Petitioner's exhibits and that as per the above stated documents, the land available on the ground was 0.48ha and not 0.6060ha and that the letters did not allude to a road reserve.

41. Referring to the acquisition plan for L.R No. 3955/3, the witness stated that the suit property lies in an area (shaded grey in the plan) that was set for compulsory acquisition to facilitate road and railway expansion; that the suit property was to be acquired for road expansion and the necessary drawings were prepared by the Ministry of Roads and that the survey was deferred to allow for negotiations with the registered owners.

42. The witness stated that the survey was never completed and did not know whether any compensation was done; that as per the letter on page 16 of his affidavit, L.R No. 3955/3 was not among land that was to be acquired and that L.R No. 3955/2 was cancelled with a comment stating, 'not needed'.

43. In conclusion, DW1 stated that the Petitioner's title was issued based on the P.D.P dated 5th May 1992 which was part of Mr. Mbahe's affidavit.

44. On re-examination, the witness stated that L.R No. 3955/3 was private land that was to be acquired; that the suit property fell therein; that the land in the letter of allotment was 'un surveyed'; that this was the same land that was part of L.R No. 3955/3, and that the difference in acreage was because part of the land was being used as a road.

45. Abdulkadir Ibrahim Jatani, Director of Surveys for the 1st Respondent testified as DW2. He adopted his replying affidavit dated 16th December 2019 as his evidence-in-chief. In the affidavit he deponed that the 1st Respondent oversaw the construction of the Eastern Bypass as part of its mandate.

46. DW2 stated that the Petitioner owned Taj Mall (which was eventually demolished) which was located on an adjacent property; that the Petitioner's managing director informally approached the 1st Respondent seeking to acquire the adjacent property for a parking lot and that the Petitioner was however informed that that property was within the Outer Ring Road reserve as per a 1960 survey.

47. Referring to documents at pages 46-49 of the Petitioner's bundle, the witness stated that there were letters showing that the Petitioner was aware of the public utility nature of the suit property as far back as 2010 but still went ahead to acquire it in 2014.

48. In cross-examination, DW2 stated that he had not produced any documents but was relying on DW1's exhibits. He acknowledged that he appeared before the 1st Interested Party and presented evidence of the acquisition. He however stated that the 1st Interested Party found in favour of the Petitioner stating that the 1st Respondent did not present evidence showing that the land was paid for.

49. Arthur Kinyanjui Mbatia, Assistant Director of Physical Planning at the 2nd Respondent testified as DW3. He adopted his replying affidavit dated 23rd September 2021 as his evidence-in-chief. In his affidavit, he set out the process of land alienation before 1998.

50. It was the evidence of DW3 that the Part Development Plan relating to the suit property (Ref. No. 42/14/92/3) was prepared on 30th April 1992 and approved on 5th June 1992 and assigned Approved Development Plan Number 273; that the PDP was then entered in the register in respect of Embakasi 42/14, and that the approved plan was in respect of a petrol station and not a parking.

51. In cross-examination by the Petitioner's advocate, the witness stated that PDP No. 42/14/92/3 went through the requisite processes; that a ground check was undertaken and no adverse comments were made to show that the land was committed for road expansion but there was no record showing such allocation.

Submissions

52. The Petitioner filed submissions on 9th May 2024. It was submitted that the Petitioner is the registered owner of the suit property as per Grant of Title IR. 85486. It was further submitted that although the Respondents had tried to state that no title could have been issued on L.R No. 9042/601 as it was part of L.R No. 3955/3 which was private land, they had failed to explain how processes relating to public land such as the preparation and approval of Part Development Plans were conducted on private land.

53. It was submitted that acts done by public authorities such as the preparation of the above stated plans are presumed to be accurate unless proven otherwise and that the Respondents have not rebutted the presumption nor proven that the Petitioner's title is invalid.

54. The Petitioner's advocate submitted that the suit property was not compulsorily acquired as stated by the 1st Respondent; that DW1 acknowledged that although acquisition plans and drawings were prepared in the 1960s, the subject land was not acquired according to the requisite procedure and that

DW3 testified that a Part Development Plan for the suit property was made on 5th June 1992 in respect of petrol station.

55. It was submitted that this position contradicts the 1st Respondent's claim about compulsory acquisition because a PDP would not have been issued in respect of land that had been compulsorily acquired for a public purpose such as road/railway expansion and that DW2 made claims of compulsory acquisition but failed to produce any evidence of the same.

56. The Petitioner's advocate further submitted that the 1st Respondent's claim of compulsory acquisition was dismissed for lack of evidence by the 1st Interested Party and that the Petitioner had a legitimate expectation that its right to property under Article 40 would be respected.

57. The 2nd Interested Party filed submissions on 28th June 2024. It was submitted that the 2nd Interested Party was wrongly enjoined in the suit as the reliefs sought by the Petitioner are not applicable to it; that the 2nd Interested Party collects land rates as part of its statutory mandate, and that in doing so, it relies on information about land ownership provided by the 2nd Respondent. The 2nd Interested Party can therefore not be held to account if such information is invalid.

58. The 3rd Respondent filed submissions dated 27th July 2024. The 3rd Respondent submitted that the Petitioner did not lawfully acquire title over the suit property. It was submitted that even where the defence fails to adduce evidence, the burden of proof is still with the Petitioner.

59. It was further submitted that as per the Petitioner's own evidence (a survey report), the surveyor noted that the suit property was a road reserve and the remaining portion could only be issued with a temporary lease after the road construction was complete.

60. The 3rd Respondent submitted that the suit property had been alienated for a public purpose (specifically road construction) and could therefore not be allocated to the Petitioner nor its predecessors in title. The 3rd Respondent asserted that the Petitioner was not a bona fide purchaser for value.

61. The 3rd Respondent also called into question the Petitioner's claim of ownership based on the fact that the Petitioner did not adduce any sale agreement between itself and the previous owner, Autoxpress Limited. Section 3(3) of the Law of Contract Act and the cases of Peter Mbiri Michuki vs Samuel Mugo Michuki [2014] eKLR and Leo Investment Ltd vs Estuarine Estate Ltd [2017] eKLR were relied upon.

62. The 3rd Respondent submitted that the documents from the 1st Interested Party that were relied upon by the Petitioner did not have any probative value because they were neither dated nor signed by the 1st Interested Party, and that the decision of the 1st Interested Party that the Petitioner seeks to rely upon was not gazetted nor published in newspapers with nationwide circulation as required by law.

63. It was submitted that it is only the decision calling for the revocation of the title for L.R No. 9042/601 that was published and that the Petitioner could not have a legitimate expectation as far ownership of the suit property goes because the title he holds is not anchored in law.

Analysis and Determination

64. The Petitioner has asked the Court to declare it as the owner of the suit property which it has maintained it acquired legally. The Respondents have averred that the Petitioner did not acquire the suit property legally because the suit property could not have been available for allocation having been compulsorily acquired for a public purpose, specifically for road expansion.

65. It was further argued by the Respondents that the Petitioner cannot be termed a bona-fide purchaser because he did not acquire the suit property through legal process, moreso in the absence of a sale agreement between itself and Autoxpress Limited.

66. The right to own land and the circumstances under which such right can be limited are set out as follows under Article 40 of the Constitution of Kenya, 2010:

> "(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
>
> (a) of any description; and
>
> (b) in any part of Kenya.
>
> (2) Parliament shall not enact a law that permits the State or any person-
>
> (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
>
> (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).
>
> (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—
>
> (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
>
> (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—
>
> (i) requires prompt payment in full, of just compensation to the person; and
>
> (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.
>
> (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.
>
> (5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.
>
> (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired."

67. The Respondents have claimed that the suit property was not available for allocation to the Petitioner nor to the previous owners because it had been set aside for a public purpose (road expansion) in 1965.

The Court in Evelyn College of Design Ltd vs Director of Children's Department & Another [2013] eKLR stated as follows as regards acquisition of land by the government.

> " While I agree that the Commissioner has no right to alienate land which has been reserved for public purpose, the process of such a determination must be through a process recognised by the law. Likewise, if the land has been illegally acquired, then the State must use due process to recover it. The requirement of due process is underpinned by several provisions of the Constitution. First, it is implicit in Article 40(2)(a) which prohibits the legislature from passing legislation that arbitrarily deprives a person of any interest in or right over any property of any description. Second, Article 40(6) is clear that rights acquired under this Article do not extend to any property that is found to have been unlawfully acquired. Such "finding" cannot be by any other means other than due process. Third, Article 47(1) guarantees every person fair administrative action which includes due process."

68. The Respondents have asserted that the suit property was part of L.R No. 3955/3 which was hived out of L.R No. 3955/2 and set aside for a public purpose. A perusal of the Respondents' exhibits shows a letter dated 30th August 1965 written by the state surveyor and addressed to the Commissioner of Lands.

69. The said letter listed properties that were affected by the road acquisitions. Among the properties listed is L.R 3955/2. However, there is a line crossing that particular land reference and the words 'plot needed' alongside the line. As to whether that amounted to a removal of the stated parcel of land from the list is not clear to this Court. The passage of time and the fact that the document on record is a copy makes such determination difficult.

70. The Respondents have also stated that L.R No. 3955/3 was among parcels identified for compulsory acquisition for road and railway expansion. There is a letter dated 8th December 1964 on record. It was written by the Director of Surveys and addressed to the Commissioner of Lands.

71. The letter enclosed some drawings and a request for the survey of parcels that were to be affected by the acquisition. L.R 3955/3 was listed among those parcels. There is another letter dated 5th August 1965 that relates to the acquisitions. It stated as follows concerning L.R No. 3955/3:

> " As negotiations are now in progress for the resumption of L.R .3955/3, I would suggest that the question of survey be left until such times as we shall have known the results of our negotiations."

72. There is a subsequent letter dated 28th July 1966 written by the Commissioner of Lands and addressed to the Director of Surveys. The letter listed the parcels that had been approved for acquisition for road and railway expansion. L.R NO. 3955/3 was not among those parcels.

73. The import of the Respondents' evidence is that some parcels were set to be acquired for road and rail expansion. What amounted to due process at the time was prima facie followed as evidenced by the correspondence on record. However, the evidence excludes L.R No. 3955/3 from those that were approved for compulsory acquisition.

74. According to the documents, negotiations concerning the said land were said to be ongoing and there is no evidence on record to the effect that the said negotiations were completed or that they resulted in compulsory acquisition.

75. This court has gone through the maps that the Petitioner's surveyor annexed on his report, and the maps produced by DW1. The said maps show the intended acquisition of the land as per the report

of the surveyor. However, there is no evidence before this court to show that the land was actually acquired by the Government.

76. Indeed, this issue of whether the government acquired the land in 1960 or not was before the National Land Commission. In its finding dated 18th July, 2016, the National Land Commission stated as follows:

> " it is well settled principle of law that he who overs must prove. The onus of proving that there was compulsory acquisition carried out by the Government in 1960 and that the procedure for compulsory acquisition was strictly adhered to, squarely had with the complainant ... without formal proof of the acquisition, the commission cannot find in favour of the complainant on the issue of compulsory acquisition. In absence of this, it is our view that the subject parcel was acquired in a lawful manner."

77. The Respondents have never challenged the decision of the National Land Commission. Indeed, the Respondents have not produced any correspondence to show that the process of compulsorily acquiring the suit property was ever followed.

78. What is puzzling is that even after allegedly acquiring the entire parcel of land in the 1960's, the government went ahead to survey a portion of land known as L. R. 9042/601 in 1995. According to DW1, the survey plan for L. R. 9042/694 (the suit property) was approved on 9th October, 2000, which is a resultant of L. R. No. 9042/601.

79. DW2 informed the court that L. R. 9042/694 was created after it was found necessary to re-survey L. R. No. 9042/601 in 1999 when it was discovered that the parcel of land as originally surveyed (L. R. No. 9042/601), encroached on a road reserve at the southern boundary.

80. What this deposition means is that it is only a portion of L. R. No. 9042/601 that was encroaching on the road reserve, and this problem was resolved by curving out the suit property. That is what the 2nd Respondent's surveyor told the court.

81. Indeed, the creation of L. R. No. 9042/601 Seems to have been preceded by a Part Development plan number 273 dated 5th May 1997 which was signed by both the Director of physical plan and the Commission of Lands. The said P.D.P was produced in evidence by the 2nd Respondent, meaning that it emanated from its office.

82. To support the preparation and issuance of the said P.D.P, the 2nd Respondent's principal physical planner deposed as follows:

> " 6. that a part Development Plan Reg. No. 42/14/92/3 was prepared on 30th April, 1992 and approved on 5th June, 1992 and assigned approved Development Plan No. 273 ... that the approved Part Development Plan Ref. No. 42/14/92/3 was in respect of a proposed site for petrol service station and not a parking."

83. Having issued a Part Development Plan in 1992, the 2nd Respondent did caution to the allotee that the land was available for allocation. That is what must have informed the issuance of the letter of allotment to one Rev. Arthu Kinyanjui 9th June 1992 and the subsequent survey and creation of L. R. No. 9042/601, which mutated to L. R. 9042/694.

84. The evidence on record shows that Rev. Kinyanjui sold the unsurveyed land to Nyanza Petroleum Dealers Limited which charged its name to Autoxpress Limited.

85. Based on the foregoing I find that while the Respondents showed that some parcels were compulsorily acquired, they have failed to prove on a balance of probabilities that L.R No. 3955/3 from which the suit property was hived was compulsorily acquired.

86. The Petitioner's title can therefore not be challenged on the ground that the suit property had been compulsorily acquired. That assertion was not proved by the Respondents to the required standards.

87. As per DW1's affidavit, the suit property was resurveyed based on P.D.P No. 42/14/92/3 dated 5th June 1992. This was the basis for the issuance of the allotment of letter in the Petitioner's possession. DW3 testified that Part Development Plans are only issued for unalienated government land, and not private land. He also stated that before a P.D.P is issued, due diligence is carried out to ascertain that the land that is the subject of the P.D.P is not reserved for a public purpose.

88. The Court in the case of Kenya Veterinary Vaccines Production Institute (KEVEVAPI) vs Attorney General & 15 Others; Warsama & 90 others (Interested Party) (Environment & Land Petition 939 of 2014) [2023] KEELC 16912 (KLR) stated as follows:

> " There is a presumption that all acts done by a public official have lawfully been done and that all procedures have been duly followed. The onus is thus upon the opposing party to prove otherwise. This position was propounded by the Supreme Court in the 2013 Presidential Election case, Raila Odinga & 5 Others vs Independent Electoral and Boundaries commission & 3 Others [2013] eKLR:
>
> > " Where a party alleges non-conformity with the electoral law, the Petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections ...This emerges from a long-standing common law approach in respect of alleged irregularity in the acts of public bodies. Omnia praesumuntur rite et solemniter esse acta: all acts are presumed to have been done rightly and regularly. So, the Petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the law."

89. The Respondents have not denied that the P.D.P originated from them. In fact, DW3 stated that the P.D.P was number 273, a fact that the Petitioner had been unable to prove. The existence of the P.D.P is therefore proof that the allotment letter and title that were issued therefrom were not issued in a vacuum as alleged by the Respondents.

90. Having found that there is no evidence to show that the suit property was reserved for a public purpose, it follows that the P.D.P was issued lawfully and the allotment letter and title flowing from it were also issued lawfully. Indeed, as was held by this court in the case of Nelson Kazungu Chai & 9 Others vs Pwani University [2014] eKLR, a Part Development Plan (PDP) can only be prepared and issued in respect of Government land that has not been alienated or surveyed.

91. The import of the foregoing is that no evidence has been adduced to show that the title held by the Petitioner was unlawfully acquired, or that the said land was compulsorily acquired. To the contrary, if at all the land has been utilised for the road, then the 1st Respondent should compensate the Petitioner for the same.

92. The last ground set out by the Respondents was that the absence of a sale agreement was in contravention of the provisions of the Law of Contract Act thus rendering the suit void. Section 3(3) of the Law of Contract Act provides as follows:

> "(3) No suit shall be brought upon a contract for the disposition of an interest in land unless-
>
> (a) the contract upon which the suit is founded-
>
> (i) is in writing;
>
> (ii) is signed by all the parties thereto; and
>
> (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:
>
> Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust."

93. The above section applies to suits which are based on contract. The current suit is a constitutional Petition based on Article 40. While that provision might have been of great consequence in a civil suit, and where the previous owner is laying claim on it, the same is not available to the Respondents and the Interested Parties as a defence.

94. Based on the foregoing, I find that all the grounds put forth by the Respondents impugning the Petitioner's ownership of the suit property have failed. It therefore follows that on account of the title on record, and the failure by the Respondents to prove that it was unlawfully acquired, the Petitioner is the lawful owner of the suit property.

95. Considering that a portion of the suit property has been utilised by the 1st Respondent as a road, and the land having not been acquired lawfully by the Respondents, it follows that the Petitioner should be compensated for the same. That being so, and in view of the valuation report on record, the court makes the following final orders:

a. An award of damages in the sum of Kshs. 164, 749,000 being the last valuation of the suit property together with interest accruing thereon at court rates from the date of filing this Petition until payment in full to be paid by the 1st Respondent.

b. The 1st Respondent to pay the costs of the suit.

DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY THIS 20TH DAY OF NOVEMBER, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

No appearance for Appellant

Mr. Allan Kamau for Respondents

Court Assistant: Tracy

DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY ON 20TH NOVEMBER, 2024.

AMENDED UNDER SECTION 99 AND 100 OF THE CIVIL PROCEDURE ACT ON 21ST JANUARY, 2025.

O. A. ANGOTE

JUDGE