



REPUBLIC OF KENYA



KENYA LAW
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Town Council of Awendo v Onyango & 13 others; Mohamed & 178 others (Interested Parties) (Petition 37 of 2014) [2019] KESC 38 (KLR) (Civ) (30 April 2019) (Judgment)

Town Council of Awendo v Nelson O Onyango & 13 others; Abdul Malik Mohamed & 178 others (Interested Parties) [2019] eKLR

Neutral citation: [2019] KESC 38 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA**

CIVIL

PETITION 37 OF 2014

DK MARAGA, CJ & P, MK IBRAHIM, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ

APRIL 30, 2019

BETWEEN

TOWN COUNCIL OF AWENDO PETITIONER

AND

NELSON O ONYANGO 1ST RESPONDENT

ATTORNEY GENERAL & 12 OTHERS & 12 OTHERS & 12

OTHERS 2ND RESPONDENT

AND

ABDUL MALIK MOHAMED & 178 OTHERS & 178 OTHERS & 178

OTHERS INTERESTED PARTY

(Being an appeal from the entire Judgment and Order of the Court of Appeal sitting at Kisumu (Onyango Otieno, Azangalala & Kantai, JJ.A) delivered on the 18 day of October 2013 in Kisumu Civil Appeal No. 161 of 2010)

Land acquired through compulsory acquisition does not revert back to its original owners if unutilized

Reported by Ian Kiptoo

***Land law** - compulsory acquisition- rights of reversion- radicle title vis-à-vis fee simple title - where the Government utilized a certain portion of the land it compulsorily acquired-claim by the original owners that they had reversionary interests to the un-utilized portions – whether a proprietor whose land had been compulsorily acquired retained some reversionary interest in or, pre-emptive rights over the un-utilized portions - Constitution*



of Kenya, 2010, articles 40 and 68 (c) (ii); Constitution of Kenya, 1963 (Repealed), section 75; Land Acquisition Act (Repealed), sections, 6 and 19 (1).

Land law - compulsory acquisition – conditions to be met in compulsory acquisition of land - public purpose – where compulsorily acquired land remained unutilized – where the repealed Constitution and the repealed Land Acquisition Act were silent on use of un-utilized compulsorily acquired land – guiding principles applicable to compulsorily acquired land - what amounted to un-utilized land that had been compulsorily acquired - how could land that had been compulsorily acquired but remained unutilized be used - what were the guiding principles applicable to land compulsory acquired.

Land law - compulsory acquisition - pre-emptive rights vis-à-vis reversionary interests - where compulsorily acquired land remained unutilized - what was the distinction between pre-emptive rights and reversionary interest in regards to compulsorily acquired land – Land Act (cap 280), section 110 (2).

Brief facts

In the instant appeal the appellants urged that the Court of Appeal erred in fact in finding that the suit land was not acquired for purposes of the expansion of the appellant; that it erred by reasserting the 1st to 13th respondents' titles over the suit land, despite the titles having extinguished upon completion of the process of compulsory acquisition by the Government; and that the impugned judgment by the 1st appellate court had the effect of divesting the third party allottees (interested parties) of their property, including schools, hospitals, churches and financial institutions, in breach of articles 40, 48 and 50 (2) of the Constitution of Kenya, 2010 (Constitution).

Issues

- i. Whether a proprietor whose land had been compulsorily acquired retained some reversionary interest in or pre-emptive rights over the unutilized portions.
- ii. What amounted to unutilized land that had been compulsorily acquired?
- iii. How could land that had been compulsorily acquired but remained unutilized be used?
- iv. What was the distinction between pre-emptive rights and reversionary interest in regards to compulsorily acquired land?
- v. What were the guiding principles applicable to land compulsorily acquired?

Relevant provisions of the Law

Constitution of Kenya, 1963 (Repealed)

Section 75

(1) “No property of any description shall be compulsorily taken possession of, and no interest in or right over 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 interest of defence, public safety, public order, public morality, public health, town and county planning or the development or utilization of property so as to promote the public benefits; and

(b) the necessity thereof is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest 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...”

Constitution of Kenya, 2010

Article 40 - Protection of right to property

(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.

Land Act (cap 280)

Section 110 - Notice of acquisition and effect of acquisition on plant and machinery

(1) Land may be acquired compulsorily under this Part if the Commission certifies, in writing, that the land is required for public purposes or in the public interest as related to and necessary for the fulfillment of the stated public purpose.

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

Land Acquisition Act (repealed)

Section 19

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

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

Held

1. The suit land was compulsorily acquired by the Government of Kenya, pursuant to the provisions of section 75 of the repealed Constitution of Kenya, 1963 and section 6(2) of the repealed Land Acquisition Act 1968. Further, the proprietors of the land, including the 1st to the 13th respondents, were fully compensated in accordance with the applicable law. The compulsory acquisition was actualized *vide* the two Gazette Notices No. 2996 of October 8, 1976 and No. 3737 of December 24, 1976 (the gazette notices). However, while the parcels of land were acquired for a public purpose, what remained in contention was the specific nature of the purpose for which some of the parcels were acquired.
2. Both purposes for which the various land parcels were acquired fell within the rubric of public purpose, within the meaning of section 75 (1) of the repealed Constitution. Section 6 of the repealed Land Acquisition Act replicated the section 75(1). Therefore, on the face of the gazette notices, the suit lands in question were acquired, on the one hand for town and county planning and on the other hand, for the development of, or utilization of the said lands so as to promote the public benefit.
3. The proper basis for determining the specific nature of the purpose for which the suit lands were acquired, was the language used in the gazette notices. Towards that end, Gazette Notice No 2996 stated that the specified parcels of land were to be acquired for the South Nyanza Sugar Scheme while Gazette Notice No 3737 stated that the specified parcels were to be acquired for the South Nyanza Sugar Scheme (Awendo Township Expansion) in South Nyanza District.
4. The gazette notices were distinct and referred to different parcels of land. The land title in respect of the 7th respondent was not on the list of parcels of land acquired by the gazette notices. The tentative conclusion regarding that title therefore was that it was never compulsorily acquired. In addition, the land title in respect of the 1st respondent and the land title in respect of the 13th respondent were acquired *vide* Gazette Notice No. 2996. A perusal of the record revealed the fact that some of the respondents, to wit, the 3rd, 9th, 10th, 11th and 12th were not the original proprietors of the parcels in question. However, they referred to themselves in their supporting affidavits as beneficial owners.



5. A plain reading of Gazette Notice No 2996 indicated that the intention of acquiring the land parcels was for establishing the South Nyanza Sugar Scheme. That had to be taken to refer to all that it entailed to establish such a scheme, including the factory, sugar plantations, offices, plant and machinery and all necessary infrastructure. Towards that end, there was no dispute regarding the establishment of South Nyanza Sugar Scheme. As for Gazette Notice No 3737, it was stated that the listed parcels were to be acquired for the South Nyanza Sugar Scheme (Awendo Township Expansion) in South Nyanza District. The operative words were the bracketed ones.
6. The two gazette notices, although linked in material particulars, could not have been referring to the same purpose for the compulsory acquisition. The inclusion of the words Awendo Township Expansion had to be taken to mean that there was another purpose other than, but related to, the actual establishment of the South Nyanza Sugar Scheme. That other purpose was the expansion of the Awendo Township. The establishment of the South Nyanza Sugar Scheme within the vicinity of Awendo Township meant that the latter, had to be expanded to accommodate the functionality of the former. The need to expand the Township necessitated the further acquisition of extra land, for that purpose, as was clearly stated in the brackets. The words Awendo Township Expansion had to surely be taken to mean something; otherwise they would not have been included in Gazette Notice No 3737.
7. The purpose for which all that land, comprised in Gazette Notice No 2996, ie, the establishment of South Nyanza Sugar Scheme in South Nyanza, had been fully accomplished by the time of filing Civil Case No 133 of 2005 at the High Court. That being the case, there were no unutilized portions of land in the block to which the gazette notice applied.
8. A reversion was that interest in land that survived the expiry or extinction of an estate in the land. It was called a reversion because upon the extinction of the estate, that interest reverted to the person or entity from whose superior title the estate was originally created. An estate on the other hand, was a time bound bundle of rights over land or stated at common law, an estate was a time in the land or a land for a time. Thus a holder of a fee simple estate retained interest in that land for as long as there would be an heir to inherit the same. Where no heir remained to inherit the estate, then the land reverted to the State.
9. The State held a superior title to the land called the radical title. The fee simple estate also became extinguished upon a compulsory acquisition by the State in exercise of its powers of eminent domain. By the same token, in a landlord and tenant relationship, the tenant held the leasehold estate while the landlord retained the reversion which, upon the expiry of the leasehold, was surrendered back to the landlord, since the latter held a superior title from which the lease was created.
10. The respondents did not retain any interests in the land, capable of protection or resuscitation by the law as provided for in section 19(1) of the repealed Land Acquisition Act. The respondents did not have any reversion in the acquired lands since whatever reversion that had existed, could only have been a reversion in favour of the State, and not *vice versa*. The suit lands all became vested in the Government of Kenya.
11. For purposes of the appeal, unutilized land referred to any residual portion of land which had been compulsorily acquired, but which remained unused after the realization of the public purpose for which it had been acquired. Neither the repealed Constitution, nor the repealed Land Acquisition Act, provided any direction as to what should happen to land that remained unutilized after the public purpose for which it was compulsorily acquired became spent.
12. Land which had been compulsorily acquired had to be used for the purpose for which it was acquired. If for example, after compulsorily acquiring land, the Government or any of its agencies proceeded to allocate the land, to individuals or other entities, for their own private benefit, in total disregard of the public purpose, such allocation would not confer good title to the allottees.
13. Under the law as it then stood, the original owners of compulsorily acquired land had no reversionary rights in that land. *Niaz Mohammed v Commissioner for Lands & 4 others* [1996] eKLR appeared to



suggest that such land would legally revert to the original owners through equity. The fallback to equity was compelling, given that what was involved was land, a subject that unendingly continued to generate emotive disputes among all and sundry. Indeed, equity grew out of the interstices of common law rigidity. The doctrines that had catapulted it into the cosmos of law were themselves handmaidens of justice and fairness. But even equity, in all its splendor, followed the law, lest it be deformed, by judicial caprice or whim. Therefore, in the face of clear constitutional and legal provisions, that extinguished private title to compulsorily acquired land, not even equity could resuscitate such title to unutilized portions thereof.

14. The public purpose, for which the land was compulsorily acquired, could have been spent, but the unutilized portions thereof remained public land. Therefore, such land as remained unutilized could only be applied to a public purpose, or be utilized to promote the public interest, even if the interest was not such as had been originally envisaged. Unutilized portions of land, could in the instant case, be allocated to private entities, including those from whom the land was acquired, at a price, provided that, the land was to be put to such use as would promote the public interest.
15. The provisions relating to the doctrine of eminent domain as were enshrined in article 40 of the Constitution, and Part VIII, of the Land Act (sections 107 to 133), mirrored those of section 75 of the repealed Constitution, and section 6 of the repealed Land Acquisition Act with a few modifications. Article 68(c)(ii) of the Constitution provided that Parliament would enact legislation to regulate the manner in which any land could be converted from one category to the other.
16. Section 110(2) of the Land Act introduced the concept of pre-emptive rights over compulsorily acquired land. Where the purpose justifying the compulsory acquisition failed or ceased, then the original owners or their successors in title had the pre-emptive rights to re-acquire the land upon payment of the full amount received as compensation. However, a pre-emptive right was not the same as a reversionary interest. The former arose, consequent upon the failure or cessation of the purpose justifying the compulsory acquisition; while the latter reposed in the holder of a superior title and became exercisable upon the expiry of an estate.
17. It could not be said that the land over which the pre-emptive right of re-acquisition arose upon failure or cessation of the public purpose, was the same as unutilized land or portion of land that remained once the public purpose became spent. In the former case, there was a total failure of the public purpose, meaning that the acquired land could not be used as earlier envisaged. The wording of section 110(2) of the Land Act was permissive (the Commission may offer) in the sense that the acquiring authority, was not necessarily barred from applying the land to another public purpose. However, should it decide to abandon the land to private purchase, then the original owners had the pre-emptive rights to re-acquire the land upon restitution of the full sum that was paid in compensation.
18. The land to be re-acquired in the instant case was the whole as opposed to a portion thereof. That explained why the sum of money to be restituted by the original owners was the full amount paid in compensation. In the latter case, the public purpose had been realized, but the acquired land had not been utilized in full, leaving a portion thereof. In that instance, neither the original owners, nor their successors in title had pre-emptive rights to re-acquire the un-utilized portions. The following guiding principles were issued;
 - a. where the Government, pursuant to the relevant constitutional and legal provisions, compulsorily acquired land, such land, would only be used for the purpose for which it was compulsorily acquired;
 - b. the allocation of compulsorily acquired land, to private individuals or entities, for their private benefit, in total disregard of the public purpose or interest for which it was compulsorily acquired, would be incapable of conferring title to that land in favour of the allottees;
 - c. a person whose land had been compulsorily acquired in accordance with the relevant constitutional and legal provisions did not retain any reversionary interest in the said land; and



- d. unutilized portions of compulsorily acquired land could be used for a different public purpose, or in furtherance of a different public interest, including the allocation of such portions to private individuals or entities, at the market price, in furtherance of such public interest.
19. Through the instrumentality of Gazette Notices Nos. 2996 and 3737 of 1976, all parcels of land whose land titles were listed therein respectively, were compulsorily acquired and vested in the Government of Kenya. The appellant (or its successor in title) held that land in trust for the residents of the area, and as the implementing agency of the public purpose for which the land was compulsorily acquired. The letter written by the Land Registrar, directing the appellant to re-survey the land and allocate the same to the original owners or their successors in title had no legal basis.
20. The 1st and 13th respondents had no reversionary interest in the parcels of land listed in the gazette notices, since titles thereto were extinguished through the compulsory acquisition of the same. The purpose for the acquisition of all those lands listed in Gazette Notice No. 3737 of 1976 (the suit land) was for the expansion of Awendo Township in South Nyanza District. Such expansion, was necessitated by the establishment of South Nyanza Sugar Scheme, through Gazette Notice No. 2996.
21. The land comprised in Gazette Notice No. 3737 was not un-utilized land, given the fact that the expansion of Awendo Township was an on-going process. The allocation of various parcels of land comprised within Gazette Notice No.3737, at a price, to the interested parties, for the establishment of residential, commercial and other amenities such as churches, among others, was in furtherance of the expansion of Awendo Township. By purchasing the plots, and using them for residential, commercial and other purposes in consonance with the public interest, and in the absence of any proof of fraud on the part of the interested parties, the latter acquired valid title which could not be defeated by the claims of the respondents.

Petition of appeal allowed.

Orders

- i. *The petition of appeal dated December 10, 2014 was allowed.*
- ii. *The Judgment of the Court of Appeal dated October 18, 2013 was overturned.*
- iii. *The 7th respondent would be fully compensated by the Government of Kenya for the loss of his Land Title No North Sakwa/Kamasonga/1193.*
- iv. *Each Party to bear its own costs of this ppeal.*

Citations

Cases

Kenya

1. *Kenya National Highway Authority v Salien Masood Mughal & 5 others* Civil Appeal 327 of 2014; [2017] KECA 465 (KLR) - (Explained)
2. *Kilonzo, Diana Kethi & another v Independent Electoral & Boundaries Commission (IEBC) & 2 Others* Civil Appeal 309 of 2013; [2014] KECA 353 (KLR) - (Followed)
3. *Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] KESC 8 (KLR); [2012] 3 KLR 199 - (Explained)
4. *Mohamed, Niaz Mohamed Jan v Commissioner for Lands, Municipal Council of Mombasa, Nandlal Jivraj Shah, Vimal Nandlal Shah t/a Jivaco Agencies & Mehul N Shah* Civil Suit 423 of 1996; [1996] KEHC 2 (KLR) - (Explained)
5. *Multiple Hauliers East Africa Limited v Attorney General & 10 others* Petition 88 of 2010; [2013] KEHC 6012 (KLR) - (Applied)
6. *Mutahi, Robert Wamithi & Republic v Francis Kirimi* Petition 13 of 2010; [2013] KEHC 4274 (KLR) - (Followed)
7. *Omolo, Peter Ouma & another v Awendo Town Council* Civil Case 144 of 2003; [2011] KEHC 2165 (KLR) - (Mentioned)



United Kingdom

1. *Blanchfield & others v Attorney General & another* [2002] 4 LRC 689; [2002] UKPC 1 - (Explained)
2. *Council of Civil Services Union & Others v Ministers for the Civil Services* [1984] UKHL 9; [1985] AC 374; [1984] 3 WLR 1174; [1985] ICR 14, [1984] 3 All ER 935, [1985] IRLR 28 - (Followed)

India

1. *Gulam Mustafa & others v State of Maharashtra & others* 1977 AIR 448; 1977 SCR (1) 875 - (Explained)
2. *M/S Royal Orchid Hotels Ltd & another v G Jayarama Reddy & others* 2011 AIR SCW 6081; 2012 (1) AIR KAR R 461 - (Explained)

Statutes

Kenya

1. Constitution of Kenya articles 40; 48; 50(2); 62(2); 68(c)(ii); 163(4)(b)(5) - (Interpreted)
2. Constitution of Kenya (Repealed) section 75(1) - (Interpreted)
3. Evidence Act (cap 80) section 79(1)(a)- (Interpreted)
4. Land Acquisition Act (Repealed) (cap 295) sections 6(2); 19(1)(4)- (Interpreted)
5. Land Act (cap 280) sections 107, 110(2); 133- (Interpreted)

Advocates

None mentioned

JUDGMENT

A. Introduction

1. This is a Petition of Appeal dated December 10, 2014 and filed on December 23, 2015 pursuant to its admittance by this court as one involving a matter of general public importance under articles 163(4) (b) and 163(5) of the [Constitution](#). The appellant is challenging the entire Judgment and Orders of the Court of Appeal (Onyango Otieno, Azangalala & Kantai JJ.A) at Kisumu in Civil Appeal No 161 of 2010 delivered on the 18th day of October 2013. In certifying the Appeal as one involving a matter of general public importance, in Miscellaneous Application No 49 of 2014; (Mutunga CJ &P, Tunoi, Ibrahim, Ojwang, Njoki, SCJJ); this court stated:

“.....The issues of the intended appeal cut across the former and the current Constitutions and law regimes. It is important to reconcile these two regimes, and the instant case provides the occasion. The question whether the respondents in this case are entitled to the revisionary interest in unutilized portions of land, invokes critical sub-themes of jurisprudential significance and which, in every respect touch on matters of public interest.” [Emphasis added]

B. Background

2. Sometime in 1976, in exercise of its powers of Eminent Domain, the Government of Kenya issued two Gazette Notices informing the public of its intention to acquire privately owned parcels of land in the then South Nyanza District. In doing so, the Government was acting pursuant to the provisions of section 75 of the [retired Constitution](#) and section 6(2) of the [Land Acquisition Act](#) of 1968 (Now



repealed). The first was Gazette Notice No 2996 of 1968 (Legal Notice No 47 of 1968) dated 8th October, 1976 (herein Gazette Notice 2996); which in its preamble read as follows:

“The Land Acquisition Act 1968 (No 47 of 1968) Notice of Intention to Acquire Land in Pursuance of section 6(2) of the Land Acquisition Act 1968, I hereby give notice that the Government intends to acquire the following land for the South Nyanza Sugar Scheme in South Nyanza” [emphasis added].

3. The second was Gazette Notice No 3737 (Legal Notice No 47 of 1968) dated 24th December, 1976, (herein after Gazette Notice 3737); which in its preamble read as follows:

“The Land Acquisition Act 1968 (No 47 of 1968) Notice of Intention to Acquire Land in Pursuance of Section 6(2) of the Land Acquisition Act 1968. I hereby give Notice that the Government intends to acquire the following land for the South Nyanza Sugar Scheme (Awendo Township Expansion) in South Nyanza District”. [Emphasis added]

4. The Government then proceeded to compulsorily acquire, various privately owned parcels of land. Some of the acquired parcels had been owned by the 1st to 13th respondents in this Appeal. Thus far, there was no legal dispute, until the year 2005, when the respondents herein filed suit in the High Court at Kisumu, in Civil Case No 133 of 2005; challenging the process of compulsory acquisition of the suit land and the allocation of unutilized portions to third parties by the Appellant.

(i) At the High Court

- (5) At the High Court, the plaintiffs (respondents herein) sought determination of several issues, viz:
- (i) Whether the Government of Kenya had compulsorily acquired the suit land;
 - (ii) Whether that acquisition was for the “sole purpose” of establishing the South Nyanza Sugar Scheme;
 - (iii) Whether the Government thereafter utilized the entire acquired portion of the suit land;
 - (iv) Whether some of the acquired Suit land was left unutilized, after being marked as unfit for “the purpose for which it was acquired”;
 - (v) Whether the original owners had reversionary rights over the “unutilized portions” of the suit land;
 - (vi) Whether the appellant in this case had any proprietary rights over the “unutilized portions” of the suit land, and whether such proprietary rights had been acquired through gazettelement or if such interests (in any) were capable of being transferred to third parties; and
 - (vii) Whether there had been any improper dealings with the said “unutilized parcels of land” of the suit land, by officers of the Appellant.
6. In a judgment dated November 13, 2009 the High Court (Musinga J, as he then was) held that the sole purpose, of the compulsory acquisition of the suit land, was for the establishment of the Nuclear Estate for South Nyanza Sugar Scheme, as had been indicated on the Gazette Notices and admitted by the Appellant. That since the Government did not utilize the acquired suit land in its entirety, the appellant neither had proprietary interests over the suit land, nor the right to evict the 1st to 13th respondents. That the unutilized parcels of the suit land which were unfit for sugarcane farming, ought to have reverted to the respondents, as the original or beneficial owners thereof. The learned judge then



ordered the Lands Registrar, to re-survey the land, and issue title deeds to the respondents, pursuant to section 75 of the retired Constitution.

(ii) At the Court of Appeal

7. Aggrieved and dissatisfied with the entire Judgment of the High Court the appellant Appealed to the Court of Appeal, Civil Appeal No 161 of 2010 on the following grounds:
 - (a) That the learned trial judge erred in finding that the acquisition of the suit parcels of lands was not meant for the benefit of the appellant contrary to the Gazette notices.
 - (b) That the learned trial judge erred in finding in favor of the respondents without taking into account the fact that the Government which acquired the said parcels was never made a party to this suit.
 - (c) That the learned trial judge erred in finding in favor of respondents in a claim that was statutory time barred and therefore the court had no jurisdiction to entertain the claim.
 - (d) That the learned trial judge erred in entertaining the suit brought by way of originating summons when the issues involved are not suitable for determination by way of originating summons.
 - (e) That the learned trial judge's finding was against the weight of the evidence.
8. In response, the respondents opposed the Appeal on grounds that the appellant had admitted, that the suit land was acquired solely, for the establishment of the South Nyanza Sugar Scheme. Further, the respondents argued, that the Chief Land Registrar, in a letter dated February 29, 1996 and produced before the High Court, had directed that the residue land, be resurveyed and titles issued to the original owners.
9. The Attorney-General also opposed the appeal and argued that, the suit land was acquired for the sole purpose of, establishing the South Nyanza Sugar Scheme and that nothing on the material Gazette notices showed that the suit land had been acquired for the benefit of the appellant. It was further argued that there was nothing on record, to show that the residue suit land had been surrendered to the appellant by the President, as required by the Constitution.
10. In a Judgment dated October 18, 2013 the Court of Appeal (Onyango Otieno, Azangalala and Ole Kantai JJ.A) upheld the Judgment of the High Court and dismissed the appeal with costs. Consequently, the applicant sought certification to appeal to the Supreme Court against the Court of Appeal judgment. The application for certification, having been declined by the Appellate Court, was later granted by the Supreme Court, as detailed earlier in this Judgment.

(iii) At the Supreme Court

11. The appellant's grounds of appeal are that the learned judges of the Court of Appeal erred in fact, in finding that, the suit was not acquired for purposes of the expansion of the appellant; erred in law and fact, by reasserting the 1st to 13th respondents' titles over the suit land, despite the said titles having extinguished upon completion of the process of compulsory acquisition by the government; that the impugned Judgment by the 1st appellate court had the effect of divesting the third party allottees (Interested Parties herein) of their property, including schools, hospitals, churches and financial institutions, in breach of articles 40, 48 and 50(2) of the Constitution.



(a) The Appellant's Case

12. On the basis of its submissions and List of Authorities in support thereof, it is the appellant's case that the Gazette Notices leave no doubt that the compulsory acquisition of the suit land, was for purposes of establishment of the South Nyanza Sugar Company, as well as for expansion of Awendo Township, which purpose the appellant facilitated by allocating the unutilized suit land to the Interested Parties for development. That upon compulsory acquisition and by virtue of sections 19 (1) and (4) of the [Land Acquisition Act](#) (now repealed), the 1st to 13 respondents' titles were extinguished in favor of the Government of Kenya.
13. It is also the appellant's case that the judgment of the Court of Appeal violates third parties rights' to property under article 40 of the [Constitution](#), fair hearing under article 50 of the [Constitution](#), and access to justice under article 48 of the [Constitution](#) as the allottees were never enjoined in the suits both at the High Court and Court of Appeal.

(b) The 1st to 13th Respondents' Case

14. The 1st to 13th respondents in their submissions dated May 9, 2016, and further submissions of June 30, 2017, argued that the purpose of acquisition of the suit land, was never in dispute before the trial court, as both the appellant and the respondents were in agreement that the same was acquired for the development of the South Nyanza Sugar Company Scheme. That the said position was rightfully upheld by the High Court and the Court of Appeal in their respective judgments. They submitted that, the mere fact that the name of the appellant appeared in brackets on Gazette Notice No 3737 only meant that South Nyanza Sugar Company Scheme was in the appellant's proximity and did not mean that the appellant was a beneficiary of the acquisition.
15. They urged that section 19 of the [Land Acquisition Act](#) (now repealed) stipulates that upon the land so acquired being vested in the Government, a Notice to that effect, must issue upon all registered proprietors of the land. It was their contention that the said Notice, was not issued.
16. In conclusion the 1st to 13 respondents submitted that being the original owners of the land, they enjoy pre-emptive rights by law to acquire the residue of the acquired land under section 110 (2) of the [Land Act](#) and the [Constitution](#); that the government of Kenya through the Chief Land Registrar through the letter dated February 29, 1996 had directed that the residue land be resurveyed and the 1st and 13th respondents be issued with titles; that it would be unfair to displace them having lived on the suit land for decades. They also objected to the arguments by the appellants and the Interested Parties that the impugned Judgment violated the cited provisions of the [Constitution](#) as being baseless and without proof. That the same had not been argued before the High Court and the Court of Appeal and are an attempt to divert the attention of this court from the issue as it has been before the courts below.

(c) 14th Respondent's Submissions

17. The 14th respondent (the Attorney General) submitted that the suit land was acquired for the appellant's expansion and not otherwise. It was submitted that the Gazette Notices were clear and un-ambiguous, and that notwithstanding, since there were two opposing interpretations, the best approach would have been to invite the maker of the Notices, i.e., the Commissioner of Lands, to clarify the purpose for the compulsory acquisition. He thus faulted the Court of Appeal's interpretation of the Notices and the entire Judgment.
18. It was further submitted that the 1st to 13th respondents had failed to authoritatively adduce evidence, that there was residue land after acquisition. It was argued that for compulsorily acquired land to revert



to the original owners, the same must no longer be required for the purpose for which it was acquired, and this fact, must be communicated through a Gazette Notice by the Commissioner of Lands.

19. The Attorney General also submitted that the 1st to 13th respondents were not entitled to unutilized suit land, if any, because they had been compensated. Furthermore, it was argued, the suit land was strictly speaking, still being used for the purpose for which it had been compulsorily acquired, hence the revisionary interests, could not be said to have crystallized. The 14th respondent relied on the cases of *Peter Ouma Omolo & Another versus Awendo Town Council* [2011] eKLR to support his argument.
20. Citing the decision in *Robert Wamititabi and the Republic v. Francis Kirimi* [2013] eKLR, the 14th respondent submitted that the Court of Appeal, erred in law by finding that the unutilized land should be resurveyed and titles issued to the 1st to 13th respondents, without giving the Government, as the beneficial and registered owner, the Commissioner of Lands as the administrator and manager of public land and the third party allottees, an opportunity to be heard before the High Court and without a confirmation from South Nyanza Sugar company regarding the status of the land claimed as residue.
21. The 14th respondent contended that the Court of Appeal, should not have relied on oral evidence by the appellant's Town Clerk, regarding the purpose of the acquisition, in total disregard of the express provisions of Gazette Notice No 3737 of 24th December, 1976 which set out that the acquired land was for expansion of Awendo Township. Further, argued the said respondent, the Gazette Notice was a public document, within the meaning of section 79(1)(a) of the *Evidence Act* and having established that the two Gazette Notices were distinct, and clear as to the purpose of acquisition, the evidence by the appellant's Town Clerk to the contrary should not have been admitted.
22. In conclusion, the 14th respondent submitted that the Court of Appeal had failed to take into consideration the overarching public interest controlling the compulsory acquisition. Such public interest, the said respondent contended, should have taken precedence over the tenuous claims of the 1st to 13th respondents

(d) Interested Parties' Case

23. The Interested Parties submitted first, that the provisions of both the *retired* and the 2010 *Constitutions* are applicable to this Appeal. In support of their contention, they relied on this court's decision in *Samuel Kamau Macharia & 2 Others v. Kenya Commercial Bank & 2 Others* [2012] eKLR.
24. Secondly, the Interested Parties argued that the Gazette Notices had clearly stated, that the purpose of acquisition, was for the establishment of the South Nyanza Sugar Scheme, and expansion of Awendo Township. That since not all the land acquired was used for development of the Sugar Scheme, the residue was appropriated towards expansion of the appellant, as the successor in title to Awendo Township, through allocation of sections of the suit land to the Interested Parties. In furtherance of that purpose, the Interested Parties had built schools, hospitals, churches, and financial institutions.
25. Thirdly, it was submitted that the Court of Appeal Judgment, violated the Interested Parties' rights to the legitimate expectation, of free enjoyment of the suit land. They argued that since the state had exercised its powers to compulsorily acquire the suit land, and subsequently allocated the same to them, they should be protected in law. To this end, they relied on the decisions in *Diana Ketbi Kilonzo & another v The Independent Electoral & Boundaries Commission (IEBC) & 2 others* at paragraph 33 and *Council of Civil Services Union and Others v Ministers for the Civil Services* (1985 AC 374 (408-409) as cited in *Multiple Haulers East Africa Limited v the Attorney- General & 10 Others* [2013] eKLR.



26. In conclusion, they submitted that the Court of Appeal’s decision violated their rights as enshrined under the Constitution more specifically the right to fair trial under articles 50 and 48 as they were not enjoined to the suit before the High Court or the Court of Appeal.

C. Analysis

(i) Issue for Determination

27. Having carefully considered the grounds of appeal, the submissions of the parties, the authorities cited in support thereof, and the pronouncement of this court, admitting this appeal as one involving a matter of general public importance, it is clear to us that only one issue falls for determination. We hereby restate this single issue as being:

Whether a proprietor, whose land has been compulsorily acquired by the state, for a public purpose, in accordance with the Constitution and the Law, retains a reversionary interest in, or a pre-emptive right over any un-utilized portion of such land, should the public purpose for which it was acquired become spent?

(ii) What was the purpose for which the Suit Land was acquired?

28. From the Record of Appeal, it is not in doubt that the suit land, was compulsorily acquired by the Government of Kenya, pursuant to the provisions of section 75 of the retired *Constitution*, and section 6(2) of the *Land Acquisition Act 1968*, (now repealed). It is also not in doubt that the proprietors of the land, including the 1st to the 13th respondents herein, were fully compensated in accordance with the applicable law. The compulsory acquisition was actualized *vide* the two Gazette Notices No. 2996 of October 8, 1976 and No 3737 of December 24, 1976. However, while it is clear that the parcels of land were acquired for a public purpose, what remains in contention is the specific nature of the purpose for which some of the parcels were acquired. [Emphasis Added].
29. On the one hand, it is contended that the suit land was acquired for the sole purpose of establishing the South Nyanza Sugar Scheme In South Nyanza District. The proponents of this contention are the 1st to 13th respondents. They base their argument on the opinion of the then State Counsel, Mr Maroro, who on behalf of the Attorney General had submitted at the Court of Appeal (see Vol A Page 306, Para: 2), that the purpose of the acquisition was solely, for the establishment of the South Nyanza Sugar Scheme, and no other. This Opinion had also been expressed by the then Town Clerk of Awendo Town Council, Mr Barnaba Kosgei, in his replying Affidavit to the Originating Summons in the High Court.
30. On the other hand, the appellant, the Interested Parties, and the Attorney General (in a departure from his earlier position at the Court of Appeal) contend that the acquisition of the suit land was for the twin purposes of establishing the South Nyanza Sugar Scheme and the Awendo Township Expansion. They submit that Gazette Notice No 2996 was issued to effect the establishment of the Scheme while Gazette Notice No 3737 was for the Township Expansion.
31. Be that as it may, both purposes for which the various land parcels were acquired fall within the rubric of “public purpose”, within the meaning of section 75(1) of the retired *Constitution* of which the relevant provisions read as follows:

“No property of any description shall be compulsorily taken possession of, and no interest in or right over 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 interest of defence, public safety, public order, public morality, public health, town and county planning or the development or utilization of property so as to promote the public benefits; and
- (b) the necessity thereof is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest 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...”

32. Section 6 of the *Land Acquisition Act* (now repealed) replicates the above provisions of the retired *Constitution*. On the face of the two Gazette Notices therefore, we find little difficulty in concluding that the Suit lands in question were acquired, on the one hand for town and county planning and on the other hand, for the development of, or utilization of the said lands so as to promote the public benefit. This then immediately leads us to determine the lingering controversy, as to whether the parcels of land in question were acquired solely for the establishment of the South Nyanza Sugar Scheme, or in addition thereto, for the expansion of the Awendo Township.
33. Having taken note of the divergent opinions advanced by the parties regarding this issue, we hold that the proper basis for determining the specific nature of the purpose for which the suit lands were acquired, is the language used in the two Gazette Notices. Towards this end, Gazette Notice No 2996 states that the specified parcels of land are to be acquired for “ the South Nyanza Sugar Scheme” while Gazette Notice No 3737 states that the specified parcels are to be acquired for the South Nyanza Sugar Scheme (Awendo Township Expansion) in South Nyanza District.
34. We also note from the Record, that the two Gazette Notices do not refer to the same parcels of land. On the contrary, the Notices are distinct and refer to different parcels of land. Thus Gazette Notice No 3737 refers to land title nos. North Sakwa/Kamasonga/204 (plot no. 204), North Sakwa/Kamasonga/34 (plot No 34), North Sakwa/Kamasonga/1081 (plot No 1081), North Sakwa/Kamasonga/1093 (plot No 1093), North Sakwa/Kamasonga/1111 (plot No 1111), North Sakwa/Kamasonga/1067 (plot No 1067), North Sakwa/Kamasonga/207 (plot No 207), North Sakwa/Kamasonga/45 (plot No 45), North Sakwa/Kamasonga/111 (plot No 111), and North Sakwa/Kamasonga/202 (plot No 202) in respect of the 2nd, 3rd, 4th, 5th, 8th, 9th, 10th, 11th and 12th respondents respectively (hereinafter the Suit Land).
35. It is also noted from the Record (VolA pages 137 and 158) that land title No North Sakwa/Kamasonga/1193 (Plot No 1193) in respect of the 7th Respondent was not on the list of parcels of land acquired by the two Gazette Notices. The tentative conclusion regarding the said title therefore, is that it was never compulsorily acquired. Besides, it is noted from the Record that land title No. North Sakwa/ Kamasonga/ 46 (Plot No 46) in respect of the 1st respondent and Land Title No North Sakwa/ Kamasonga /168 (Plot No 168) in respect of the 13th respondent were acquired *vide* Gazette Notice No 2996.
36. Finally, a perusal of the Record reveals the fact that some of the respondents herein, to wit, the 3rd, 9th, 10th, 11th and 12th were not the original proprietors of the parcels in question. However, they refer to themselves in their supporting affidavits as beneficial owners.
37. Against this background, what meaning as to purpose ought to be attributed to the language in the two Gazette Notices? A plain reading of Gazette Notice No 2996 clearly indicates that the intention



of acquiring the land parcels listed therein was for establishing the South Nyanza Sugar Scheme. This must be taken to refer to all that it entails to establish such a scheme, including the factory, sugar plantations, offices, plant and machinery and all necessary infrastructure. Towards this end, there is no dispute regarding the establishment of South Nyanza Sugar Scheme.

38. As for Gazette Notice No 3737, it is stated that the listed parcels therein are to be acquired for the South Nyanza Sugar Scheme (Awendo township Expansion) in South Nyanza District. The operative words are the bracketed ones ie, “Awendo Township Expansion”. It was the Attorney General’s argument that the two Gazette Notices referred to one and the same purpose; the establishment of the South Nyanza Sugar Scheme. This was the same argument advanced by the 1st to 13th respondents. Much later in the appeal before the Supreme Court, the Attorney General would abandon this argument. It was now his submission that a plain reading of the two Gazette Notices reveals that under Gazette Notice No 2996 the parcels listed therein were acquired for the South Nyanza Sugar Company while Gazette Notice No 3737 was for Awendo Township Expansion. He faulted the Court of Appeal for treating the two acquisitions as if they were one and the same, when they were in fact, different.
39. We are of the firm view that the two Gazette Notices, although linked in material particulars, could not have been referring to the same purpose for the compulsory acquisition. The inclusion of the words “Awendo Township Expansion” must be taken to mean that there was another purpose other than, but related to, the actual establishment of the South Nyanza Sugar Scheme. This other purpose was the expansion of the Awendo Township. Is it any wonder then that the two Gazette Notices did not refer to the same parcels of land? The establishment of the South Nyanza Sugar Scheme within the vicinity of Awendo Township meant that the latter, had to be expanded to accommodate the functionality of the former. The need to expand the Township, necessitated the further acquisition of extra land, for that purpose, as was clearly stated in the brackets. The words “Awendo Township Expansion” must surely be taken to mean something, otherwise why were they included in Gazette Notice No 3737? Why didn’t the latter Notice simply echo or replicate the words in Gazette Notice No 2996? Is it not logical, if not compulsive, to assume that the establishment of the Sugar Company would trigger demands, upon the Township of a socio-economic, demographic and financial nature, hence the need for its expansion? For example, where were the experts, labourers, company executives, their spouses and children to be accommodated for them to serve the Sugar Company? Where were they to seek health, financial, recreational, educational, and other social services? One could go on and on.
40. We also find and hold that, the purpose for which all that land, comprised in Gazette Notice No 2996, ie, the establishment of South Nyanza Sugar Scheme in South Nyanza, had been fully accomplished by the time of filing Civil Case No 133 of 2005 at the High Court. That being the case, there were no “un-utilized portions” of land in the block to which the said Gazette Notice applied.

(iii) Reversionary Interest in or Pre-Emptive Rights over Compulsorily Acquired Land

41. We now turn to the crux at the heart of this Appeal, and that is, whether a proprietor whose land has been compulsorily acquired, nonetheless retains some reversionary interest in, or pre-emptive rights over, the un-utilized portions thereof. At the outset, it is important to set out the legal elements of a reversion in order to discharge the burden before us. Simply stated, a “reversion” is that interest in land that survives the expiry or extinction of an estate in the said land. It is called a “reversion” because upon the extinction of the estate, that interest reverts to the person or entity from whose superior title the estate was originally created. An estate on the other hand, is a time bound bundle of rights over land, or as they say at Common Law, “an estate is a time in the land or a land for a time”. Thus a holder of a fee simple estate retains interest in that land for as long as there will be an heir to inherit the same. Where no heir remains to inherit the estate, then the land reverts to the state. The state holds a superior title to



the land called “the radical title”. The fee simple estate also becomes extinguished upon a compulsory acquisition by the State in exercise of its powers of Eminent Domain. By the same token, in a landlord and tenant relationship, the tenant holds the leasehold estate while the landlord retains the reversion which, upon the expiry of the leasehold, is surrendered back to the landlord, since the latter holds a superior title from which the lease was created.

42. For purposes of argument in this Appeal, we shall treat the 1st to 13th Respondents as the original owners of the suit land. (We say for purposes of argument, because some of the respondents were not the original owners). They had acquired title to their various parcels of land most likely, through registration pursuant to the necessary land adjudication processes. However, their titles to those parcels of land became extinguished upon compulsory acquisition. Upon the compulsory acquisition, their estates in the land (whether fee simple or absolute proprietorship) ceased to exist and became fused with the States’ superior title. Their parcels of land now became public land, having been compulsorily acquired for a public purpose in accordance with the Constitution and the law. The respondents were compensated for the loss of their land to the public interest.
43. Given this scenario, what rights or interests if any, could the Respondents be said to have retained following the compulsory acquisition of their parcels of land? As the law stood then, it is clear that the Respondents did not retain any interests in the land, capable of protection or resuscitation by the law. Section 19(1) of the *Land Acquisition Act* (now repealed) provides that:

“After the award has been made, the Commissioner shall take possession of the land by serving on every person in the land notice that on a specified day which shall not be later than sixty days after the award has been made, possession of the land and title the land will vest in the Government.”

And Sub-Section 4 of the said section provides:

“Upon taking possession, the land shall vest in the Government absolutely free from encumbrances.”

44. As we have stated, the respondents did not have any reversion in the acquired lands, since whatever reversion that had existed, could only have been a reversion in favour of the State, and not Vice Versa. The suit lands all became vested in the Government of Kenya. But this legal position notwithstanding, can it be said that the respondents retained some kind of reversionary interest over the un-utilized portions of the land, once the public purpose for which the land had been acquired became spent? What was the un-utilized portion of the land in question?
45. For purposes of this Appeal, we shall deem “un-utilized land” to refer to any residual portion of land which has been compulsorily acquired, but which remains unused, after the realization of the public purpose for which it had been acquired. Now coming to the case before us, it is the respondents’ case that the land parcels appearing in Gazette Notice No 3737, be deemed as un-utilized land. It is their argument that the said parcels are to be so deemed, because the purpose of establishing the South Nyanza Sugar Scheme, for which they had been acquired, was realized long ago. The Attorney General and the Interested Parties however, contend that the said parcels were acquired for the South Nyanza Sugar Scheme but specifically for the expansion of Awendo Township, a purpose, that is still ongoing. The Interested Parties submit that they have utilized their allocated plots for residential, commercial and other purposes in furtherance of the expansion of Awendo Township.
46. Having already pronounced ourselves regarding the meaning to be attributed to the Gazette Notices, we now proceed to determine the legal standing of the Respondents vis-a-vis what they consider as



un-utilized portions of land. In this regard, neither the retired Constitution, nor the [Land Acquisition Act](#), provide any direction as to what should happen to land that remains un-utilized after the public purpose for which it was compulsorily acquired becomes spent.

47. We begin by reasserting the long held legal principle that, land which has been compulsorily acquired, must be used for the purpose for which it was acquired. If for example, after compulsorily acquiring land, the Government or any of its agencies, proceeds to allocate the said land, to individuals or other entities, for their own private benefit, in total disregard of the public purpose, such allocation would not confer good title to the allottees. Such was the holding in [Niaz Mohammed v Commissioner for Lands & 4 others](#) (1996) eKLR in which Waki J, (as he then was) rendered himself thus:

“I am not persuaded by the argument that upon compulsory acquisition of land and the consequent vesting of that land in the Government, then the land falls to be used by the Government in any matter it desires. There is plainly no such Carte Blanche intended in the provisions of the law...The land must be used, subsequent to the acquisition, for a lawful purpose, as I see it, the only lawful purpose is the one for which it was intended.”

48. This position was re-affirmed by the Court of Appeal in [Kenya National Highway Authority v Salien Masood Mughal & 5 others](#) (2017) eKLR. Also of persuasive value, is the decision of the Supreme Court of India in [M/S Royal Orchid Hotels Ltd & anor v G Jayarama Reddy & ors](#) Civil Appeal No 7588 of 2005; in which the question for determination was whether, land acquired for a specific public purpose, could be used for another purpose not being a public purpose. In that case, instead of utilizing the acquired land for the purpose specified in the notifications or for any other public purpose, the Corporation transferred the same to private parties. The Supreme Court of India held:

“The Courts have repeatedly held that in exercise of its power of eminent domain, the State can compulsorily acquire land of the private persons but this proposition cannot be over-stretched to legitimize a patently illegal and fraudulent exercise undertaken for depriving the landowners of their constitutional right to property with a view to favour private persons.... The diversification of the purpose for which land was acquired under section 4(1) read with section 6 clearly amounted to a fraud on the power of eminent domain.”

49. Thus far, these judicial pronouncements in our view represent the correct legal position regarding compulsorily acquired land, under both the retired [Constitution](#) and the 2010 [Constitution](#).

50. However, the question as to what should happen to un-utilized land remains unanswered. It is worth reiterating that under the law as it then stood, the original owners of compulsorily acquired land have no reversionary rights in that land. In [Niaz Mohamed v. Commissioner of Lands](#), [*supra*]; Justice Waki appeared to suggest that such land would legally revert to the original owners through Equity. The learned judge opined thus:

“...Un-utilized portions in my view would remain as road reserves. And if it was the case that it was found unnecessary after all to have acquired the portion for the expressed purpose, does equity not require that the portions be surrendered back to the person from whom the land was compulsorily acquired?” [Emphasis added].

51. The fall back to Equity is compelling, given that what is involved here, is land, a subject that unendingly continues to generate, emotive disputes among all and sundry. Indeed, Equity grew out of the interstices of Common Law rigidity. The doctrines that have catapulted it into the cosmos of law are themselves handmaidens of justice and fairness. But even Equity, in all its splendor, follows the law, lest it be deformed, by judicial caprice or whim. Therefore, in the face of clear constitutional and legal



provisions, that extinguish private title to compulsorily acquired land, not even Equity can resuscitate such title to un-utilized portions thereof.

52. The public purpose, for which the land was compulsorily acquired, may have been spent, but the un-utilized portions thereof, remain public land. It is therefore our view, that such land as remains un-utilized can only be applied to a public purpose, or be utilized to promote the public interest, even if the said interest is not such as had been originally envisaged. Un-utilized portions of land, may in this instance, be allocated to private entities, including those from whom the land was acquired, at a price, provided that, the land is to be put to such use as will promote the public interest. The Privy Council decision in *Blanchfield and others v Attorney General and another* (2002) 4 LRC 689; is persuasively instructive in this regard. This was an appeal against the judgment of the Court of Appeal of Trinidad and Tobago. The plaintiffs were descendants of landowners, whose land had been compulsorily acquired by the government. They had sought a declaration that the land in question should automatically revert to them by operation of law, since the said land was no longer required for the purpose for which it had been acquired. The Privy Council held:

“In the absence of an express reverter clause in the enabling legislation or in the conveyance or order by which the land was conveyed to or vested in the acquiring authority, none can be implied. Consequently, where land compulsorily acquired becomes surplus to the requirements of the acquiring authority, there is no automatic reversion in favour of the original owners or their descendants.” (Emphasis added).

53. In the Indian case of *Gulam Mustafa & ors v The State of Maharashtra & Ors* 1977 AIR 448, 1977 SCR (1) 875, certain land was compulsorily acquired for running a country fair or market. After the acquisition, the municipality parcelled out the excess land and sold it for a housing colony. On appeal to the Supreme Court of India, it was contended that the acquisition by the housing colony was not for a public purpose and that it was mala fide. With regard to the status of the excess land, the Supreme Court held:

“Once the original acquisition is valid and title has vested in the Municipality, how it uses the excess land is no concern of the original owner and cannot be the basis for invalidating the acquisition. There is no principle of law by which a valid compulsory acquisition stands voided because long later the requiring authority diverts it to a public purpose other than the one stated in the s. 5(3) declaration.”

54. Even as the law as we have pronounced it, appears to be clear, it is imperative that we consider the provisions of the *2010 Constitution* to determine whether any insights can be drawn therefrom for a just and fair resolution of the dispute at hand. In this regard, we derive inspiration from this Court’s dictum in *Samuel Kamau Macharia & 2 Others v Kenya Commercial Bank & 2 others* [2012] eKLR; on when a court of law may fall back to the provisions of the *Constitution of 2010* in determining a dispute that may have crystallized before the promulgation of the Constitution. At paragraph 62, the court stated:

“At the onset, it is important to note that a Constitution is not necessarily subject to the same principles against retrospectivity as ordinary legislation. A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods. In this way, a Constitution may and does embody retrospective provisions, or provisions with retrospective ingredients. However, in interpreting the Constitution to determine whether it permits retrospective application of any of its provisions, a Court of law must pay due regard to the language of



the Constitution. If the words used in a particular provision are forward-looking, and do not contain even a whiff of retrospectivity, the Court ought not to import it into the language of the Constitution. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately acquired before the commencement of the Constitution.”

55. When certifying this appeal as one involving a matter of general public importance, the determination of which, goes beyond the interests of the parties, we were cognizant of the fact that similar disputes were likely to occur in other parts of the Country. In resolving such disputes as may occur post the [2010 Constitution](#), our decision in this appeal will no doubt be instructive, hence the need to consider the relevant provisions of the Constitution, to the extent that the same are backward and forward looking.
56. The relevant provisions for purposes of this appeal are as follows:

Article 40(3) and (4) of the [Constitution](#) provide thus:

“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.”

57. The provisions relating to the doctrine of “Eminent Domain” as are enshrined in article 40 of the [2010 Constitution](#), and Part VIII, of the Land Act (sections 107 to 133), mirror those of section 75 of the retired [Constitution](#), and section 6 of the [Land Acquisition Act](#) (now repealed) with a few modifications. Towards this end, section 110(1) of the [Land Act](#) provides that:

“Land may be acquired compulsorily under this Part if the Commission certifies, in writing, that the land is required for public purposes or in the public interest as related to and necessary for the fulfillment of the stated public purpose.”

Subsection 2 of the said section provides that:

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



Article 62(2) of the Constitution provides that:

“Public land shall vest in and held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission...”

58. Article 68(c)(ii) of the Constitution provides that Parliament shall enact legislation to regulate the manner in which any land may be converted from one category to the other.
59. Section 110(2) of the Land Act introduces the concept of “Pre-Emptive Rights” over compulsorily acquired land. Where the purpose justifying the compulsory acquisition fails or ceases, then the original owners or their successors in title have the pre-emptive rights to re-acquire the land upon payment of the full amount received as compensation. In view of our analysis however, a pre-emptive right is not the same as “a reversionary interest.” The former arises, consequent upon the failure or cessation of the purpose justifying the compulsory acquisition; while the latter reposes in the holder of a superior title and becomes exercisable upon the expiry of an estate.
60. By the same token, it cannot be said that the land over which the pre-emptive right of re-acquisition arises upon failure or cessation of the public purpose, is the same as un-utilized land or portion of land that remains once the public purpose becomes spent. In the former case, there is a total failure of the public purpose, meaning that the acquired land cannot be used as earlier envisaged. The wording of section 110(2) of the Land Act is permissive (“the Commission may offer”) in the sense that the acquiring authority, is not necessarily barred from applying the land to another public purpose. However, should it decide to abandon the land to private purchase, then the original owners have the pre-emptive rights to re-acquire the land upon restitution of the full sum that was paid in compensation. The land to be re-acquired in this case is the “whole” as opposed to “a portion thereof”. This explains why the sum of money to be restituted by the original owners is “the full amount paid in compensation.” In the latter case, the public purpose has been realized, but the acquired land has not been utilized in full, leaving a portion thereof. In this instance, neither the original owners, nor their successors in title have pre-emptive rights to re-acquire the un-utilized portions.
61. On the basis of the foregoing analysis, we hereby issue the following guiding principles:

General Principles

1. Where the Government, pursuant to the relevant constitutional and legal provisions, compulsorily acquires land, such land, shall only be used for the purpose for which it was compulsorily acquired.
2. The allocation of compulsorily acquired land, to private individuals or entities, for their private benefit, in total disregard of the public purpose or interest for which it was compulsorily acquired, shall be incapable of conferring title to that land in favour of the allottees.
3. A person whose land has been compulsorily acquired in accordance with the relevant constitutional and legal provisions does not retain any reversionary interest in the said land.
4. Un-utilized portions of compulsorily acquired land may be used for a different public purpose, or in furtherance of a different public interest, including the allocation of such portions to private individuals or entities, at the market price, in furtherance of such public interest.



62. Consequently, flowing from the above analysis and guiding principles, we find and hold as follows:

Gazette Notices Nos 2996 and 3737 of 1976

1. Through the instrumentality of Gazette Notices Nos 2996 and 3737 of 1976, all parcels of land whose land titles are listed therein respectively, were compulsorily acquired and vested in the Government of Kenya.
2. The appellant herein (or its successor in title) holds that land in trust for the residents of the area, and as the Implementing Agency of the public purpose for which the land was compulsorily acquired.
3. The letter written by the Land Registrar, directing the appellant to re-survey the land and allocate the same to the original owners or their successors in title had no legal basis.
4. The 1st and 13th respondents have no reversionary interest in the parcels of land listed in the two Gazette Notices, since titles thereto were extinguished through the compulsory acquisition of the same.
5. The purpose for the acquisition of all those lands listed in Gazette Notice No 3737 of 1976 (The Suit Land) was for the expansion of Awendo Township in South Nyanza District. Such expansion, was necessitated by the establishment of South Nyanza Sugar Scheme, through Gazette Notice No 2996.
6. The land comprised in Gazette Notice No 3737 was not “un-utilized land”, given the fact that the expansion of Awendo Township is an on-going process.
7. The allocation of various parcels of land comprised within Gazette Notice No 3737, at a price, to the Interested Parties, for the establishment of residential, commercial and other amenities such as churches, etc, was in furtherance of the expansion of Awendo Township.
8. By purchasing the said plots, and using them for residential, commercial and other purposes in consonance with the public interest, and in the absence of any proof of fraud on the part of the Interested Parties, the latter acquired valid title which cannot be defeated by the claims of the Respondents herein.

63. These conclusions lead us to make the following Orders:

D. orders

64.

- (i) The Petition of Appeal dated December 10, 2014 is hereby allowed.
- (ii) The Judgment of the Court of Appeal dated October 18, 2013 is hereby overturned.
- (iii) The 7th respondent herein shall be fully compensated by the Government of Kenya for the loss of his Land Title No North Sakwa/Kamasonga/1193.
- (iv) Each party shall bear its own costs of this appeal.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF APRIL, 2019.



D. K. MARAGA

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

S. C. WANJALA

JUSTICE OF THE SUPREME COURT

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

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