



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)

CIVIL APPEAL NO. 327 OF 2014

BETWEEN

**KENYA NATIONAL HIGHWAY AUTHORITY .....APPELLANT**

**AND**

**SHALIEN MASOOD MUGHAL ..... 1ST RESPONDENT**

**THE HON. ATTORNEY GENERAL .....2ND RESPONDENT**

**MINISTER OF ROADS .....3RD RESPONDENT**

**CHINA ROAD AND BRIDGE CORPORATION.....4TH RESPONDENT**

**THE CHIEF ENGINEER (MINISTRY OF ROADS) .....5TH RESPONDENT**

**THE COMMISSIONER OF LANDS.....6TH RESPONDENT**

*(An appeal from the Judgment and Decree of the High Court of Kenya*

*at Nairobi (D. S. Majanja, J) dated 17<sup>th</sup> March, 2014*

*in*

*Petition No. 186 of 2013)*

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**JUDGMENT OF WAKI, JA**

1. This is yet another land matter that brings two conflicting and fundamental principles into sharp focus; the right to private property and public interest. It also rekindles memories of the infamous phenomenon of yesteryears dubbed "**Land grabbing**" when it was in vogue for some well connected greedy individuals to illegally convert public land into private property.

2. The land in dispute in this matter is LR. No. 209/12258 measuring approximately 0.1176 Hectares (**the disputed plot**). It abuts the Nairobi/Mombasa road at the junction of Likoni road which is the take off point of the Nairobi southern by-pass road. As I write this judgment, one of the slip roads at the

interchange passes through the disputed plot and has been open to traffic use for several years.

3. The disputed plot was, by a Grant No. 90629 executed by the Commissioner of Lands and registered on 3<sup>rd</sup> December, 2002 under the **Registration of Titles Act (RTA)**, leased to one Peter Njuguna and Beatrice Wanjiru (as tenants in equal shares) for a period of 99 years from 1<sup>st</sup> March, 1999. They had paid KSh. 80,000 stand premium and committed to pay the annual rent of KSh. 16,000 and comply with the special conditions spelt thereunder. Two and a half years later on 5<sup>th</sup> May, 2005, they sold the disputed plot to the 1<sup>st</sup> respondent before us (**Mughal**) for KSh. 2.7 million, the transfer was registered in his favour, and a Certificate of Lease issued. He continued to pay the annual rent and rates but no developments were carried out on the plot.

4. In the year 2010, the construction of the Nairobi southern by-pass road commenced. It was a project of the appellant before us (**KENHA**) which has the mandate under the **Kenya Roads Act 2007** to, *inter alia*, 'construct, upgrade, rehabilitate and maintain' all national roads under its control. Kenha engaged the services of the 4<sup>th</sup> respondent before us (**China road**) on 5<sup>th</sup> November, 2010 and gave the order for commencement of works on 29<sup>th</sup> June, 2012 for completion within 3 years. The works on the interchange commenced in earnest in February 2013 and it was clear to Kenha, from the records it held, that there was a road reserve of 88 meters and a 30-meter buffer zone along the main Mombasa/ Nairobi road to accommodate the works. The acquisition of that space was made in the 1970s when the main road was being expanded.

5. In February 2013, Mughal saw China road constructing a slip road on the disputed plot before anyone gave him notice that the road works would affect his plot. All he had found out from the internet was that the plot was among the properties to be acquired by the government for by-passes and slip roads but he was not contacted before the works began. There was therefore an unlawful trespass on his property and that is why he rushed to the High Court and filed a Constitutional Petition on 4<sup>th</sup> April, 2013 to stop the construction of the slip road or any other works on the disputed plot, and for a declaration that his right to property, which is protected under **Article 40 (1) and (3) of the Constitution** and the **RTA** had been breached. He also sought general and exemplary damages for trespass. In the alternative to all those prayers, he sought an order for payment of full compensation at market rates for the acquisition of the property by the Government. According to him, the property was worth KSh.125 million in the open market at the time.

6. Enjoined in the petition was the Minister in charge of roads (**the Minister**) who is the 3<sup>rd</sup> respondent before us; the Ministry of Roads itself through the chief engineer (**the Ministry**) which is the 5<sup>th</sup> respondent; the Commissioner of Lands (**the Commissioner**), 6<sup>th</sup> respondent; and the Attorney General (**AG**) 2<sup>nd</sup> respondent who legally represents the 2<sup>nd</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents. Like Kenha, they maintained that the suit property was on a road reserve. According to them, the Government had acquired an 88-meter road, and had recommended that development of plots on the buffer zone and other critical areas of the interchange be disallowed. Referring to the **Ndung'u report**, they argued that Mughal had purchased the suit property when the said report had publicly exposed numerous instances of illegal land allocations of Government land to individuals and corporations and had recommended repossession and restoration of the lands for purposes for which they were intended. They contended that since the report was a public document and accessible to all, it was evident enough that Mughal did not exercise due diligence and was therefore not a *bona fide* purchaser for value without notice to defects in the title.

7. After the petition was filed and served and the parties made their responses, it was agreed before the trial court on 31<sup>st</sup> July, 2013 that professional surveyors from both sides should visit the disputed plot and ascertain its exact location; the exact location of the road reserve; the nature and extent of encroachment of the road reserve, if any, by the disputed plot; the extent of encroachment to the plot, if any, by Kenha; and any other relevant facts. The report was executed by both surveyors and filed in court confirming that the disputed plot was within the road reserve and buffer zone.

8. The parties thereafter filed written submissions, made oral highlights and cited several authorities

which the trial court considered in its judgment made on 17<sup>th</sup> March, 2014. The court framed four substantive issues for determination as follows:-

**“1. Whether the petitioner's right to property protected under Article 40 had been violated by the respondents?**

**2. Whether the suit property was the subject of land acquisition in the 1970s?**

**3. What relief is available to the petitioner?”**

The fourth issue was on costs.

9. On the first issue, the court found that Mughal's right to property as protected under **Article 40** of the **Constitution** had been violated. That right, the court held, was located in the title to the suit property issued under **section 23** of the **RTA (now repealed)** which gave him special protection by conferring indefeasibility.

10. As to whether the suit property was the subject of land acquisition in 1970s, the court found that the only evidence of the acquisition was a letter dated 5<sup>th</sup> December, 1972 by the Commissioner expressing an intention to acquire the property. As the custodian of all land documents, the Commissioner had not provided any gazette notice or any notice showing that the Government had taken possession of the land and that the property had vested in it in accordance with the **Land Acquisition Act (now repealed)**.

11. The trial court also found that Mughal was entitled to protection under **section 25 (1)** of the **Land Registration Act, 2012 (LRA)** and that pursuant to **section 26** of the said Act, his title could only be challenged on the ground of fraud or misrepresentation to which he had been proved to have been a party or if it is shown that he acquired the title illegally, unprocedurally or through a corrupt scheme.

12. Referring to the findings of the **Nairobi Liason Committee** and the **Ndung'u Report** which the AG relied on to show that Mughal had notice of illegality of the Title he held, the trial court rejected them on the ground that they were introduced in the submissions and had no value in the proceedings. A finding of "unlawful acquisition" could only be established through a process established by law for that purpose and not by a committee or a commission of inquiry, the court stated. It held, despite confirmation that the disputed plot was within a road reserve, that the respondents did not follow due process to dispossess Mughal and were therefore in violation of his fundamental rights and freedoms.

13. As for the reliefs available, the court found that an injunction would be ineffectual since the road construction had been completed and special damages were neither pleaded nor proved. The mere pleading by Mughal that he had submitted building plans to the local authority for approval, without more, did not entitle him to damages. In the end, the court issued the following orders:

**“1. It is hereby declared that the respondents violated the rights of the petitioners under Articles 40, 47 (1) and 50 (1) of the Constitution by taking possession of LR No. 209/12258 and constructing thereon the slip road from Mombasa Road to Likoni Road.**

**2. The petitioner shall be compensated for the acquisition of LR No. 209/12258 in accordance with the Land Act and the procedures set out therein shall be commenced within 21 days from the date hereof.**

**3. The 2<sup>nd</sup> respondent (Minister) shall bear the costs of the petition. ”**

14. Kenha was aggrieved by that decision and sought to challenge it on the following grounds which may be summarized:-

The learned Judge erred in law and fact by -

***(i) declaring that the petitioner's rights under Articles 40, 47 (1) and 50 (1) of the Constitution were violated.***

***(ii) holding that there was no proof of compulsory acquisition of the suit property whereas he had no jurisdiction to inquire into the issue.***

***(iii) holding and directing that the suit property be compulsorily acquired within 21 days.***

***(iv) an adverse order against the National Land Commission which had not been enjoined nor heard in the matter.***

***(v) ignoring and/or failing to sufficiently consider the findings in the joint survey report dated 27<sup>th</sup> November, 2013.***

***(vi) holding that a proprietor of an illegally acquired land should be compensated.***

***(vii) failing to consider the evidence of the respondents.***

***(viii) failing to appreciate the great public interest involved.***

15. The appeal was disposed of by way of written submissions and oral highlights. Learned counsel **Mr. Paul Wanga** instructed by M/s Waweru Gatonye & Company Advocates appeared for Kenha; State counsel **Miss. L. Odhiambo** for the AG, the Minister, the Ministry and the Commissioner; while **Mr. Kiragu Kimani** and **Gibran Dar** instructed by M/s Tariq Khan & Associates appeared for Mughal.

16. Mr. Wanga argued grounds (i), (ii), (v), (vi) and (vii) together submitting that Mughal's rights under **Articles 40, 47, and 50 (1)** of the Constitution were not violated. The argument was premised on the findings made by two professional surveyors representing all the parties which confirmed that the disputed plot was within the road and road reserve. That evidence, in counsel's view, supported the claim that the 88m wide road reserve was compulsorily acquired by the Government of Kenya in the 1970s, which is augmented by the letter produced in evidence dated 5<sup>th</sup> December, 1972. It was wrong, therefore, for the trial Court to make the finding that there was no evidence that the plot was within the road reserve. At any rate, asserted counsel, it is a matter of public knowledge that Mombasa road reserve exists and runs through the site of the disputed plot at the junction of Likoni Road and the Mombasa/Nairobi Highway. He submitted that the Constitution was clear in **Article 40 (6)** that the right to own property does not extend to property that is unlawfully acquired, and it cannot be lawful to acquire property for private use when it has already been acquired for a public purpose. The public purpose, in his view, would be an overriding interest under **section 28** of the **LRA**.

17. On the issue of jurisdiction raised in ground (ii), it was submitted by Mr. Wanga that it was not the duty of the learned Judge to inquire into whether or not the Land acquisition process undertaken in the 1970s was done in accordance with the law. The validity or otherwise of that process could only have been questioned and determined within the time frame specified in the **Land Acquisition Act** (now repealed) and by the parties from whom the land was being acquired. The Government cannot re-acquire and re-compensate the same land twice over. Buttressing this line of argument, he relied on the case of ***Cycad Properties Limited & Another vs The Honourable Attorney General & 4 Others [2013] eKLR***.

18. Turning to grounds (iii) and (iv), Mr. Wanga submitted that, it is a well-established principle of law, that before an adverse order is issued against an entity not a party to the suit, it is imperative that the entity be given an opportunity to present its case. In this case, he observed, an order was made against the National Land Commission, the entity mandated by law to compulsorily acquire and compensate land by virtue of **section 113** of the **Land Act, 2012**. No one else can implement the order issued by the trial Court, he submitted. In aid of those submissions, he cited several authorities, including: ***David Oloo Onyango vs Attorney General [1987] eKLR***; ***James Kanyiita Nderitu and Another vs Marios Philotas Ghikas & Another [2016]*** and the case of ***Pashito Holdings & Another vs Ndung'u & 2 Others KLR (E&L) 1 295***. He also relied on the persuasive text of the **Halsbury Laws of England, 5<sup>th</sup> Edition 2010**

Vol. 61 para 639 which states:

***"the rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the Audi alteram partem rule) is a fundamental principle of justice."***

19. Finally, Mr. Wanga urged ground (viii) relating to public interest. He submitted that the construction of the slip road on the road reserve was done in the interest of the wider public, which overrides private claims as held by the Court of Appeal in the case of *Kenya Hotel Properties Ltd vs Willisden Investments Ltd & 6 Others [2013] eKLR* and *Veronica Njeri Waweru & 4 Others vs City Council of Nairobi & 2 Others [2012] eKLR* where the High Court held that public interest demands that land meant for use as a public road reserve should be used for the purpose intended and should not be appropriated for private use.

20. Miss. Odhiambo in support of the appeal, associated herself fully with the submissions made by Mr. Wanga. She reiterated that Mughal's ownership of the suit property was questionable and the joint survey report confirming that the disputed plot was on the road reserve and buffer zone attests to that. The learned Judge, she submitted, totally ignored and failed to consider the joint survey report. She cited the case of *Isaac Gathungu Wanjohi & Another vs Attorney General & 6 Others [2012] eKLR* for the proposition that protections afforded by **Article 40** of the Constitution must be read to exclude property found to be unlawfully acquired. Values such as human rights and social justice cannot countenance a situation where the Constitution is used to rubber stamp what is in effect illegal, she added.

21. State counsel further submitted that **section 26** of the **LRA** provides for indefeasibility of a property's title if it is lawfully acquired. She contended that the learned Judge failed to consider that the petitioner had come to justice with unclean hands and ought to have been tasked to prove the manner of acquisition of the disputed plot considering that it was confirmed to be on a road reserve. The road reserve had been set aside in the 1970s and there was no evidence that the Government offered it for further alienation or allocation. It follows, in counsel's view, that Mughal did not carry out due diligence before exposing himself to the unfortunate circumstance he finds himself in. She cited the case of *Niaz Mohamed Jan Mohamed vs Commissioner for Lands & 4 Others [1996] eKLR* where **Waki, J.** (as he then was) stated that land acquired for a public purpose cannot be alienated, transferred or used in any other way than for the public purpose. She also relied on the *Cycad Properties case (supra)* where similar claims were made in relation to the Nairobi northern road by-pass.

22. In response to those submissions, Mr. Kimani conceded that pursuant to **Article 40 (6)** of the **Constitution**, the right to property does not extend to property acquired unlawfully. But he submitted that for there to be said to be an unlawful acquisition within the meaning of **Article 40 (6)**, there must be a finding made through a legally established process and not by forceful taking of property by state institutions. For that proposition he relied on the High Court's decisions in *Evelyn College of Design Ltd vs Director of Children's Department & Another [2013] eKLR* and *Kuria Greens Ltd v. Registrar of Titles & Another [2011] eKLR*.

23. Counsel observed that there was no dispute that Mughal was the registered owner of the disputed plot as he provided a copy of the Certificate of Lease and Transfer as well as receipts issued for rates and rent payment as proof of that. He also produced a letter from the Ministry of Lands sent to him in 2008 confirming that he was the registered owner. On such undisputed evidence, submitted counsel, the entry into the property by Kenha with the sanction of the other state organs without Mughal's authority, amounted to a forceful taking of the property without due process in violation of the right to property. Further, it was a blatant violation of Mughal's right to fair administrative action as enshrined by **Article 47** of the Constitution. In any event, he submitted, if Kenha was of the view that Mughal's title was defective, then the proper thing to do was to challenge the said title.

24. He further submitted that **section 23** of the **RTA** (now repealed and replaced by **section 25 and 26** of the **LRA**) upheld the indefeasibility of title. It has not been alleged or proved that Mughal was guilty of any fraud or misrepresentation or that he obtained the certificate of title illegally, unprocedurally or

through a corrupt scheme. For the principle of indefeasibility, counsel relied on the cases of *Dr. Joseph Arap Ngok vs Justice Moijo ole Keiwua & 5 Others, Civil Appeal No. Nai. 60 of 1997*; *Wreck Motor Enterprises vs Commissioner of Lands & 3 Others [1997] eKLR*; and *Eunice Grace Njambi Kamau & Another vs Attorney General & 5 Others [2013] eKLR*.

25. Counsel contended that the burden was on Kenha to prove when the road reserve was created by way of compulsory acquisition of the land, which was not done. According to counsel, the letter dated 5<sup>th</sup> December, 1972 which was produced by Kenha and the 2<sup>nd</sup> to 6<sup>th</sup> respondents did not contain any confirmation from the Commissioner of Lands that the suit land had been acquired by the Government or that the right procedure for compulsory acquisition was followed. It only expressed an intention of compulsory acquisition of the land. It was also immaterial, in his view, that the surveyors who visited the plot confirmed that it was on the road reserve since theirs was a mere opinion which was not binding on the court. For burden of proof, and the procedure in compulsory acquisition, counsel relied on the cases of *Jennifer Nyambura Kamau vs Humphrey Mbaka Nandi [2013]eKLR*; *Commissioner of Lands vs Coastal Acquaculture Ltd C. A. No. 252 of 1996*; *Ramji Gudka & Others vs Attorney General [2014] eKLR*. He distinguished the *Cycad Properties case (supra)* on the basis that there was proof of compulsory acquisition in that case.

26. As for the reliefs available, Mr. Kimani submitted that **Article 23 (3)** of the Constitution provides that in any proceedings brought to enforce the bill of rights, the court had power to give any appropriate relief so long as the order given was capable of redressing the situation. By the time the learned Judge was making his decision, the road had already been constructed on the property and therefore the order granted by the trial Court was proper and logical. In his view, it did not matter that the National Land Commission was not a party to the petition since no adverse order was made against it. The order merely asked the Commission to do what it is obligated to do and it would have challenged the order if it was aggrieved by it, but did not. According to counsel, there are many instances when state organs or holders of certain offices are called upon to give effect to court orders. He relied on the case of *Arnacherry Limited vs Attorney General [2014] eKLR*, among others.

27. Finally, as regards public interest versus private rights, Mr. Kimani submitted that there is no rule of law that places the former over the latter or states that private rights are subservient to the public interest. On the contrary, submitted counsel, the case of *Capital Markets Authority vs Jeremiah Gitau Kiereini & Another [2014] eKLR* held that the rights of the individual outweigh the public interest. In passing, I may, as one of the Judges who decided that case, correct the impression that there was a general categorical statement on the primacy of individual rights over public interest. In line with previously decided cases, the Court held that

***"the Constitutional requirements of fair administrative action and fair hearing cannot be limited even by public interest"***. [Emphasis added]

28. This being a first appeal, the Court is enjoined to reconsider the evidence, evaluate it and draw its own conclusions. The usual caveat that the appellate court has neither seen nor heard the witnesses and must therefore give allowance for it, does not apply here as the matter was not orally heard. The findings of the trial court must, nevertheless, be given due deference unless they fall foul of proper evaluation in line with the evidence on record or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see *Ephantus Mwangi vs Duncan Mwangi Wambugu (1982-88) 1 KAR*.

29. I have considered the grounds of appeal, the submissions of learned counsel as well as the judgment of the trial court and the applicable law. Having done so, in my view, the critical issues that commend themselves as determinative of this appeal are these:

***(i) Whether the road reserve for the Nairobi/Mombasa Highway at the interchange with the Southern bypass encroaches the disputed plot or the disputed plot encroaches the road reserve.***

***(ii) In either case, whether Mughal's rights under Article 40 of the Constitution and section 23 of RTA were violated.***

**(iii) What are the remedies available to the parties?**

30. In considering the first issue, it is necessary I think, to explore whether the trial court was right in finding that there was no persuasive evidence to show that the road reserve was lawfully acquired by the Government in the 1970s or at all. In its view, the onus was on Kenha and the other government agencies sued with it, to provide such evidence but they had miserably failed to do so. I think for myself, with respect, that the trial court was unduly harsh on the Government agencies as the main issue before the court was not whether the road reserve was compulsorily acquired. The trial court was also dismissive of, and indeed ignored, available evidence which could have been positively evaluated on a balance of probability, in favour of Kenha and the respondents 2, 3, 5 & 6. The strongest evidence that there was an existing road reserve for the Nairobi/Mombasa highway was the report filed pursuant to the trial court's own order to establish the physical location of the two properties. It was a non-partisan report from professional surveyors appointed by both sides and there was no reason to second guess it. They confirmed that they applied scientific methodology in arriving at their conclusions. And what did the report say? Take the background information which I may reproduce:

**“Parcel No. 209/12258 was surveyed by Mr. Gordon Peter Okumu Wayumba of Geometer Surveys Ltd. The survey is contained in F/r No. 262/89 and Comps. No. 31958.**

**The Survey left a 60.00m road reserve (Mombasa road) on the southern direction. The road was widened to 80.00m from beacon „L27? as per the approved survey plan (F/R 204/133. A 30.00m buffer strip runs from „MW6? to „C9? on F/R 195/95.**

**The road reserve then widens from „C9? (F/R 195/95) to „M3? on Likoni road according to the Nairobi Development Plan No. 305 and F/R 178/104. This is the section that L.R No. 209/12258 was excised from.”**

31. The fact of the existence of an 80-meter road reserve was established to have existed long before the disputed plot was carved out. Then the surveyors gave their verdict as follows:

**(a) "The suit property L.R. No. 209/12258 abuts the Mombasa-Nairobi Highway and it is undeveloped.**

**(b) The tarmac road runs alongside the suit parcel for a distance of 46m.**

**(c) The area of the suit land taken up by the road is 470.14m<sup>2</sup> (0.047 Ha Approx.). This leaves a balance of 0.0696Ha. on the parcel.**

**(d) However, the said balance still falls on the road reserve as pointed out on the background information.**

**(e) In conclusion, a portion of L.R No. 209/12258 measuring 0.047 Ha. falls on the road reserve."**

32. It was Kenha's case that the road was reserved and expanded in the 1970s when the former **Villa Franca Dairy Farm** was compulsorily acquired for that purpose and there was a letter from the Commissioner of Lands to confirm those intentions. Villa Franca Dairy farm does not exist anymore and it does not complain about the acquisition. The verification on the ground that there was a road reserve of 80 meters and a 30 meter buffer zone shows on a balance of probability, in my view, that there was an acquisition made by the Government for a public purpose-construction of a highway/road. Should the trial court have insisted on proof of the acquisition in any event? I do not think so and I find the reasoning in the ***Cycad Properties case (supra)*** fairly persuasive.

33. In that case, the petitioners, who were third generation owners of various plots of land, claimed that the government was intending to arbitrarily and illegally expropriate 20 meters of their land for construction of the northern by-pass corridor. The government on the other hand claimed that the disputed

land was within the road reserve of 80 meters compulsorily acquired in the 1970s for construction of the by-pass in order to ease traffic jams in the city. According to the petitioners, the compulsory acquisition covered only 60 meters and not 80 meters. There were 19 properties on which Certificates of Lease had been issued in December 2003 and an investment of over KSh.600 million was made in development. There were also several purchasers of various other plots costing more than KSh. 35 million each. They all went to court to assert their proprietary rights as stipulated in **section 27** of the **Registered Land Act** (repealed), the **Registration of Titles Act** (repealed) and **Article 40** of the **Constitution**, as they claimed to have been innocent purchasers of the properties without notice of any irregularities.

34. It was contended in that case, as it is in this one, that there was no record of the alleged acquisition either in the Lands Office or in the Survey Office; that the process of acquiring the 80 meter road reserve was never started or completed and that there was no evidence of payment of prompt compensation under **section 13** of the **Land Acquisition Act**. As in this case, professional surveyors were involved in verifying the position on the ground and they found an 80 meter road reserve. In answering the crucial issue as to whether the petitioners can challenge the compulsory acquisition of land for the Northern bypass that took place in 1970, which was a major plank of the petitioners' claims, the trial court (**Mumbi Ngugi, J.**) held:

*"It is not the duty of the court to inquire into whether or not the acquisition process undertaken in the 1970s was done in accordance with the law. The validity or otherwise of that process could only have been questioned and determined within the time frame specified in the Land Acquisition Act, and by the parties from whom the land was being acquired. In this regard, I agree with the respondents that the petitioners cannot at this stage question the process of acquisition undertaken more than three decades before they acquired their interests in the subject properties."*

With respect, I agree with that view.

35. I would find that the trial court was in error in finding that there was no proof of compulsory acquisition of the road reserve or that one was necessary. With that finding, the answer to the first issue becomes clear that there was an 80 meter road reserve and a 30 meter buffer zone on the Nairobi/Mombasa Highway at the interchange with the Southern bypass and the disputed plot was within it. It was scientifically proved by the survey report filed with the court. Needless to say, it was the disputed plot that encroached on the road reserve.

36. Having so found, were Mughal's rights violated? The onus was, of course, on him to establish the manner in which those rights were violated. See **Anarita Karimi Njeru (1976-80) 1 KLR 1272**. All he says is that he has an **RTA** Title issued to him after purchasing the disputed plot and therefore his title is indefeasible. That would indeed be so since **section 23** of that Act provided that a certificate of title issued by the registrar to any purchaser of land is to be taken by all courts as conclusive evidence that the person named therein as the proprietor of the land is the absolute and indefeasible owner thereof and his title is not subject to challenge except on the ground of fraud or misrepresentation to which he is proved to be a party. The entire Act was repealed in 2012 and re-enacted in similar tenor under **section 26** of the **LRA** with an additional reason for defeasibility "*where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme*". There are numerous authorities, some of them cited before us by Mr. Kimani Kiragu, that speak to the application of those sections of the law.

37. However, in the case before us, Kenha and the other respondents do not challenge the validity of Mughal's title to the disputed plot. Their assertion is that, to the extent that he has, as confirmed in the report by the surveyors, encroached on the road reserve and buffer zone, his title is defeasible and is not entitled to the protection afforded by **Article 40** of the **Constitution**. The Article protects proprietary rights but under the current Constitutional regime those rights are not absolute. They can be limited and one of the limitations appears in **Article 40 (6)** under which the protection does not extend to any property that has been found to have been unlawfully acquired. One may ask whether the disputed plot in this matter was lawfully acquired but it is unnecessary to go there. One may even wonder whether, with the exercise of due diligence it was possible to establish the extent of the road reserve for the Nairobi/Mombasa Highway before the disputed plot was created. The fact of the matter is that there was

in existence a road reserve before the disputed plot came into being in 2002 and it was not open for any authority to alienate it further for private development. The whole world ought to have been aware, as was ultimately established, that there was a road reserve of 80 meters and a buffer zone of 30 meters which did not in law have to be noted in any land register. It is an overriding interest and not an equitable interest. Indeed it is difficult in the circumstances of this case to accept that Mughal was not aware of these facts noting his evidence that he was literate enough to obtain information about the plot from the internet and further noting the information in the public domain from the *Ndung'u report* which rang alarm bells about irregular/unlawful plot allocations in the country.

38. Be that as it may, when I was confronted by a similar situation in the case of *Niaz Mohamed Jan Mohamed vs Commissioner of Lands & 4 Others [supra]*, in which the remainder of land compulsorily acquired for a road had been converted to private use and a title for it issued, I expressed myself as follows:-

***"I am persuaded that the land in issue was acquired for a specific purpose which is consonant with the Constitution and the Land Acquisition Act, namely for the construction of a public road. It matters not that the entire portion acquired was not used for that purpose. Unutilized portions in my view would remain as road reserves..... I am persuaded by the argument that since the acquisition was done for the purpose of making a public road, the road thus made remained a public road or street and vested in the local authority, the Municipal Council of Mombasa, to hold in trust for the public in accordance with the law. Needless to say this included the portion usually utilized for the tarmac road and the remaining portions which form part of the road reserve. Finally I am persuaded by the argument that as such trust land, neither the local authority nor the government could alienate the land under the Government Lands Act."*** [Emphasis added].

I am still of the same persuasion 20 years hence!

39. In answer to the 2<sup>nd</sup> issue, I do not find that Mughal's rights were violated by the entry into the road reserve by Kenha since Kenha had the right to so enter and carry out the road works. Mughal was entitled to his property to the extent that such property did not encroach upon land that was acquired and set aside for a public purpose. It would otherwise be unlawful to superimpose a grant/certificate of title on land which is already lawfully alienated for public purpose.

40. It seems to me, as I move to answer the last issue, that this case is not far removed from the notorious cases where unsuspecting Kenyans fell victims to the land grabbers I alluded to at the opening paragraph of this judgment. As this Court opined in the case of *Arthi Highway Developers Limited vs West End Butchery Limited & 6 Others [2015] eKLR*:

***"It was common knowledge, and well documented at the time, that the land market in Kenya was a minefield and only a foolhardy investor would purchase land with the alacrity of a potato dealer in Wakulima market. Perhaps the provisions of the new Constitution 2010 and the Land Registration Act, 2012 will have a positive impact for land investors in future."***

41. At the peak of land grabbing, the courts stamped their authority in order to protect the public interest and I may sample some of the decisions:

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

***"Courts should nullify titles by land grabbers who stare at your face and wave to you a title of the land grabbed and loudly plead the principle of the indefeasibility of title deed...It is quite evident that should a constitutional challenge succeed either under the trust land provisions of the Constitution or under section 1 and 1A of the Constitution or under the doctrine of public trust a title would have to be nullified because the Constitution is supreme law and a party***

*cannot plead the principle of indefeasibility which is a statutory concept. A democratic society holds public land and resources in trust for the needs of that society. Alienation of land that defeats the public interest goes against the letter and spirit of section 1 and 1A of the Constitution.”*

42. Similarly, Nyamu, J (as he then was) in Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443 held:

*“Should the Land Acquisition Act give shelter to the land grabbers of public land or are the courts going to invent equally strong public interest vehicle to counter this. Should individual land rights supersede the communal land, catchments and forests? How for instance are the Courts going to deal with the land grabbers who stare at your face and wave to you a title of the grabbed land and loudly plead the principle of the indefeasibility of title? Are the Courts going to stay away and refuse to rise to the greater call of unravelling the indefeasibility by holding that such a title perhaps issued in order to grab a public utility plot such as hospital by an individual violates the public or national interest and therefore a violation of the Constitution. I venture to suggest that such titles ought to be nullified on this ground and, thrown into the dustbins.”.....In my view there could be other constitutional challenges to reckless and unaccountable alienation of public land and other public resources based on the principle or concept of what is necessary in a democratic society. Sections 1 and 1A of the Constitution captures the vision of a democratic society. Take for example the human rights jurisprudence, one of the permissible limitations to the fundamental rights is what is necessary in “a democratic society.” This phrase also appears in most of the fundamental rights and freedoms provisions in chapter 5. These words have received almost internationally accepted meaning in so far as the human rights area is concerned. To my mind, section 1 and 1A are wider and cover the concepts of good governance accountability and transparency...A democratic society holds public land and resources in trust for the needs of that society. Alienation of land that defeats the public interest goes against the letter and the spirit of s 1 and s 1A of the Constitution in my view...The doctrine of public trust as defined above is certainly a ready enemy of alienation of natural resources and land grabbing now and in the future and should serve as a perpetual protection to public land, forests, wetlands, riparian rights, riverbeds and “kayas” just to name a few. The doctrine shall constitute the cutting edge of any actual or threatened allocation of public resources including public land.”*

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

*“The Constitution protects a higher value, that of integrity and the rule of law. These values cannot be side stepped by imposing legal blinders based on indefeasibility. I therefore adopt the sentiments of the court in the case of Milan Kumar Shah & 2 Others vs. City Council of Nairobi & Another (supra) where the Court stated as follows, “We hold that the registration of title to land is absolute and indefeasible to the extent, firstly, that the creation of such title was in accordance with the applicable law and secondly, where it is demonstrated to a degree higher than the balance of probability that such registration was procured through persons or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law and the public interest.”*

44. Mughal is not without a remedy. I have found that the road reserve existed before the disputed plot. It was an overriding legal interest unaffected by the rights of any subsequent purchaser whether such purchaser had notice of it or not. *Black’s law Dictionary 8<sup>th</sup> Edition* defines 'bona fide purchaser' as:

*“One who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller’s title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.” [Emphasis added].*

45. I have expressed my doubts that Mughal was such a purchaser. Nevertheless, he is entitled to press his case on the sanctity of his Title under **section 23** of RTA (supra) which this Court has emphasized in numerous decisions including **Dr. Joseph Arap Ngok vs Justice Moijo ole Keiwua & 5 Others, Civil Appeal No. Nai. 60 of 1997**, thus:

***“Section 23 (1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”***

46. If violation of such sanctity which is guaranteed by the State is proved, then **section 24** of the same Act kicks in. It states as follows:

***“Any person deprived of land or of any interest in land in consequence of fraud or through the bringing of that land under the operation of this Act, or by the registration of any other person as proprietor of the land or interest, or in consequence of any error or misdescription in any grant or certificate of title or any entry or memorial in the register, or any certificate of search, may bring and prosecute an action at law for the recovery of damages against the person upon whose application the land was brought under the operation of this Act, or the erroneous registration was made, or who acquired title to the interest through the fraud, error or misdescription.”***

It is my finding that the pursuit of damages is one of the remedies open to an offended party and I would leave it at that.

47. The upshot of my analysis is that this appeal is meritorious and is for allowing. I would allow it with the consequence that the petition filed before the constitutional division of the High Court is dismissed. As the dispute appears to have been provoked by the office of the Commissioner of Lands who appears to have issued the original grant and the subsequent Certificate of Title to Mughal, despite existing records in his offices showing that the plot was not available for alienation, I would order that the costs of the litigation, both here and before the High Court, shall be borne by the Commissioner of Lands, the 6<sup>th</sup> respondent.

48. As Nambuye and Kiage JJ.A agree those shall be the orders of the Court.

**Dated and delivered at Nairobi this 30<sup>th</sup> day of June, 2017.**

**P. N. WAKI**

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**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**

**JUDGMENT OF KIAGE, J.A**

I have had the benefit of reading in draft the judgment of my learned brother, Waki, J.A. with which I am in agreement.

What is wrong with the public offices charged with land registration and administration? That question gnaws at my mind and I am certain disturbs countless Kenyans who find themselves holding the short end of the stick in matters to do with land allocation registration and administration. The old troubling, phenomena of double allocation; rival certificates of title; land-grabbing and the like ought not to happen, at any rate not at endemic levels, if only offices charged with the registration of land transactions were not asleep on the job or simply complicit in the fraudulent and unlawful machinations of fraudsters and land thieves.

It is nothing short of scandalous that in a case such as the one before us, (and it is by no means unique, or unprecedented) a title holder, in this case the 1st respondent finds himself deprived of the land itself and his title rendered worthless paper because, lo and behold, the land in question sits squarely within public land, being a road reserve. It did not become a road reserve by some recent action of Government. Rather, it turns out it was compulsorily acquired from an entity, of only historical significance now, called **Villa Franca Dairies**, back in the 1970s. The purpose for which it was acquired was the expansion of Mombasa Road, then one of the main thoroughfares into and out of the City of Nairobi. It has maintained its crucial and strategic importance and grown into a modern highway. Its latest expansion and improvement involved the creation of an interchange with the Southern bypass. It turns out that part of that complex of roads cuts right through and consumes the land for which Mughal holds title while what remains of the land falls within the road's buffer zone. That much was confirmed by a bipartisan team of surveyors who visited the site, conducted their scientific measurements and returned a unanimous opinion that the disputed land was on land reserved for the road and its buffer zone.

What creates a mental dissonance and assaults all logic is that even though the disputed land was clearly part of public land, acquired by taxpayers' money and set aside for a laudable and critical public purpose, the Commissioner of Lands by a Grant No. 90629 dated 3rd December 2002 leased the same to some two people, **Peter Njuguna** and **Beatrice Wanjiru** as tenants in common for a period of 99 years from 1st March 1999. The duo paid **Kshs. 80,000** as stand premium and were required to comply with other special conditions including payment of annual rent of **Kshs. 16,000**.

By an agreement dated 5th May 2005, those two sold the disputed land at the price of **Kshs. 2.7 million** to Mughal in whose name the transfer was registered. A certificate of Lease then issued to him and he asserts its sanctity and inviolability.

He did not put up any developments on the disputed land though he claimed that he had serious intentions to do so and had building plans prepared. He continued to pay the requisite annual rent and rates for the land.

The importance of certainty of title to any economy worth the name cannot be gainsaid. Certificates of title lend credence and confidence to investors and it is the business of the relevant government agencies to ensure that the dream of land ownership does not become an expensive and heart breaking nightmare to those who dare to invest. It is therefore quite atrocious, to my way of thinking, that the Commissioner of Lands who was the custodian of records regarding the disputed land, should have issued a grant thereof to the two people above mentioned while it was unavailable for alienation, then proceeded to register a transfer and issue a certificate of lease over the same to Mughal upon his purchase.

Such conduct smacks of either intolerable indifference or outright neglect of duty and a failure to appreciate that a system of land registration and certification is either certain and accurate or else it is a civil curse. This is what this Court had in mind when in the oft-cited case of **DR. JOSEPH ARAP NGOK vs. JUSTICE MOIJO OLE KEIUWA & 5 OTHERS** Civil Appeal No. Nai 6 of 1997 it was categorical on sanctity title;

***“Section 23 (1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title,***

***otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”***

I therefore agree, as has been suggested by Waki, J.A., that a party offended by the misdeeds be -they fraudulent or negligent-that have the effect of making his otherwise good title of no effect is at liberty to seek appropriate compensation. In this case I would think the person or persons responsible for the misrepresentations and/or misdeeds that led to a hollow title ought squarely to bear that blame. The remedy could not lie in the High Court proceedings leading to this appeal for it would be inequitable, iniquitous even, to require the Government to pay for compulsory acquisition having made acquisition of that same land in the 1970s. I do not find myself possessed of enough material upon which to view Mughal as anything but a *bona fide* purchaser for value without notice, as no allegations of fraud or other mischief however been leveled against him. I will, however, say no more on the point lest I should embarrass the Judge who will hear any suit as may be filed to deal with that and related issues.

That will be another day but in this case we must decide in favour of the public interest. What it entails as regards public land was succinctly expressed and eloquently upheld by Nyamu, J (as he then was) in **MUREITHI & 2 OTHERS (FOR MBARI YA MURATHIMI CLAN) vs. ATTORNEY-GENERAL & 5 OTHERS** [2006] 1 KLR 443. It is a well-written judgment and I need not quote any excerpts from it, content to say that the courts of this country cannot countenance a situation where the public good is subjugated to and sacrificed at the multifarious altars of private interests. Nor will they sit idly by and see land cartels, brief-case investors and speculators with high connections use public land as tickets to individual largesse in the wake of public pain or inconvenience. Government cannot compulsorily acquire land only for it to be gifted or otherwise conveyed to private individuals who have access to the shakers and movers for purposes of selling them off to line their pockets. I would say that by serious forensic application of such legal methods and means as tracing, and restitution, the courts when appropriately moved should ensure that those who have fattened themselves on public utility land are made to disgorge the proceeds.

In the **MUREITHI** case (supra) Nyamu, J made extensive reference to the ***Ndung'u Report*** and to the various laudable, if radical, recommendations therein. It is a serious indictment to this country's commitment to social equity and justice especially as it relates to the land question that much of what was recommended is yet to be implemented leading to the perception that the report is a mission impossible. (See, Africa Centre for Open Government; ***Mission Impossible? Implementing the Ndung'u Report*** [http://www.africog.org/reports/mission\\_impossible\\_ndungu\\_report.pdf](http://www.africog.org/reports/mission_impossible_ndungu_report.pdf).)

I, for one am not that cynical and remain persuaded that the Constitution and the laws do require probity, transparency and accountability in these matters and they cannot be swept under the carpet. Enough said.

The upshot is that this appeal succeeds but the culpable office must bear the costs as proposed by Waki, J.A. whose dispositive orders I am fully in agreement with.

**Dated and delivered at Nairobi this 30th day of June, 2017.**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

**JUDGMENT OF NAMBUYE, JA**

I have had the benefit of reading in draft the Judgment of Waki, J.A. I concur with the Orders proposed. I

have nothing useful to add.

**Dated and delivered at Nairobi this 30<sup>th</sup> day of June, 2017.**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**