



**Githii v Kenya Airports Authority & 4 others (Environment & Land Petition  
52 of 2019) [2022] KEELC 13835 (KLR) (23 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 13835 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND PETITION 52 OF 2019  
JO MBOYA, J  
SEPTEMBER 23, 2022**

**BETWEEN**

**CHRISTINE NYAMBURA GITHII ..... PETITIONER**

**AND**

**KENYA AIRPORTS AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**MINISTRY OF TRANSPORT, INFRASTRUCTURE, HOUSING AND URBAN  
DEVELOPMENT' ..... 2<sup>ND</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 3<sup>RD</sup> RESPONDENT**

**CHIEF LAND REGISTRAR ..... 4<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Background**

1. Vide the Petition dated the October 7, 2019, the Petitioner herein has approached the Honourable court seeking for the following Reliefs;
  - a. That a Declaration be issued to declare the Petitioner is the lawful owner of LR No 209/12457 within the meaning of Article 40 of the *Constitution*.
  - b. That a Declaration be issued to declare that the recommendation by the Respondent- National Land Commission – through Gazette Notice Number 1546 of February 15, 2019, that the title to LR No 209/12457 be revoked amounts to violation of her right to protection of property under Articles 40 of the *Constitution* and is null and void ab initio.



- c. That a Declaration be issued to declare that the impending revocation, re-possession and issue of a sub-lease to the Petitioner for LR No 209/12457 amounts to violation of her rights to protection from deprivation of property under Article 40 of the Constitution.
  - d. That a Declaration be issued to declare that the impending revocation, of the Petitioner's title to LR No 209/12457 violates the Petitioner's rights to human dignity and protection of law enshrined in Article 27, 28 and 50 of the Constitution.
  - e. That Permanent Injunction be issued to prohibit the Respondents severally and jointly from implementing the impending revocation, re-possession and issue of a sub-lease to the Petitioner for LR No 209/12457 pursuant to the Gazette Notice No 1549 of February 15, 2019, or any other Notice of communication.
  - f. That an Order of Prohibition be issued to prohibit the Respondents severally and jointly from implementing the impending revocation, re-possession and issue of a sub-lease to the Petitioner for LR No 209/12457 pursuant to the Gazette Notice No 1549 of February 15, 2019, unless and until the Government has compulsorily acquired it under Section 120 of the Land Act, No 6 of 2012 and complied with Article 40 of the Constitution.
  - g. That a Declaration be issued to declare that the Respondents jointly and/or severally are liable to acquire LR No 209/12457 in accordance with the Land Ac, No 6 of 2012 and Article 40 of the Constitution.
  - h. That a Declaration be issued to declare that the Petitioner's title to LR No 209/12457 is protected by Article 40 and 50 of the Constitution from arbitrary and unlawful action by the Respondents or through their officers, agents and servants.
  - i. That a Declaration be issued to declare that the Respondents jointly and/or severally are liable to compensate the Petitioner by way of damages for the threatened loss of user and other infringements of her rights and privileges as the registered owner of plot LR No 209/12457 on account of the declared intention to revoke her lawful and unencumbered title.
  - j. That a Declaration be issued to declare that the under Article 40 of the Constitution the Petitioner's land parcel LR No 209/12457 cannot be taken possession of by the Respondents either jointly or until this honourable court has found that the title to the said plot is a nullity and invalid.
  - k. That a Declaration be issued to declare that the 3<sup>rd</sup> Respondent's Gazette Notice No 1549 of February 15, 2019, is unlawful for contravention of the Petitioner's rights under Articles 27, 40, 47 and 50 of the Constitution to the extent that it relates to land parcel LR No 209/12457.
  - l. General damages for breach of the Petitioner's rights and freedom under Articles 27, 28, 40, 47 and 50 of the Constitution, 2010.
  - m. That the Respondents be ordered to bear the costs of this Petition in any event.
2. The subject Petition is premised and/or anchored on the various grounds, which have elaborately been enumerated in the body thereof and besides, same is supported by the affidavit of the Petitioner sworn on the October 7, 2019.
  3. For completeness, the supporting affidavit under reference has annexed a total of 11 documents, which the Petitioner seeks to rely on, in support of the grievances and or infringements alluded to.



4. Upon being served with the Petition herein, the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents duly entered appearance and thereafter filed two sets of documents. First and foremost, the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents filed Grounds of opposition dated the May 25, 2021.
5. Secondly, the 1<sup>st</sup> Respondent filed a Replying Affidavit sworn by one Rachid Abdullahi, on the November 11, 2021, wherein the deponent also alluded to and annexed a total of 26 documents, to leverage the response on behalf of the 1<sup>st</sup> Respondent.
6. Though served with the Petition herein, the 3<sup>rd</sup> Respondent, namely, National Land Commission, neither entered appearance nor filed any Response to the Petition.
7. Consequently, the Petition herein shall be determined on the basis of the Petition, the supporting affidavit thereto and the Response, details whereof have been alluded to in the preceding paragraphs.

### **Deposition by the Parties:**

#### **a. Petitioner's Case**

8. Vide Supporting affidavit sworn on the October 7, 2019, the Petitioner who is herself an Advocate of the High Court of Kenya, averred that LR No 209/12457 (Grant IR No 126198, situate within the City of Nairobi, was hitherto registered in the name of one, Christopher Omutyole. In this regard, the deponent averred that the said Christopher Omutyole, was duly issued with the requisite certificate of title.
9. Further, the deponent has averred that on or about the March 26, 2013 same developed an interest in the purchase and acquisition of the suit property and pursuant to the interest, same carried out and undertook official search at the land registry, to ascertain and authenticate the ownership status thereof.
10. On the other hand, the deponent has further averred that upon being satisfied with the ownership status concerning the Suit property, same entered into a lawful land sale agreement with Christopher Omutyole (the vendor), who covenanted to sell and transfer the suit Property to and in favor of the deponent.
11. Subsequently, the deponent has averred that a Sale agreement was crafted and thereafter duly executed by both herself and the vendor.
12. Following the execution of the Sale Agreement, the deponent has stated that same proceeded to and paid the entire purchase price to the vendor and thereafter the suit property was duly and lawfully transferred and registered in her name. For clarity, the deponent has added that same was issued with the requisite certificate of title.
13. Other than the foregoing, the deponent has averred that upon the transfer, registration and ultimate issuance of the certificate of title in her favor, same entered upon and took possession of the suit Property.
14. In any event, the deponent has also averred that on the April 9, 2019, same entered into a lease transaction with a company known as M/s Aloma Holdings Ltd, which lease transaction was duly reduced into writing and executed by the respective parties.
15. Nevertheless, the deponent has added that on or about the November 27, 2018 same came across a notice advertised in One of the national daily Newspapers by and on behalf of the National Land Commission, whereby the said commission alluded to various titles, which same alleged to have encroached onto Jomo Kenyatta International Airport Land, namely, LR No 21919.



16. Further, the deponent has added that vide the impugned notice, the commission had invited persons whose titles were contained in the advertisement to file responses, to the claims that such titles were irregularly and illegally obtained.
17. At any rate, the deponent has also added that having come across the said notice/advertisement, same sought to authenticate the basis upon which the allegations were made and in due course, same came across a letter which had been written by the 2<sup>nd</sup> Respondent herein, which contended that various Properties, inter-alia, the suit property had been irregularly and illegally acquired.
18. Further, the deponent added that vide the impugned letter, the 2<sup>nd</sup> Respondent herein indicated that same was on the verge of commencing and or undertaking demolition of many structures, some of which were inside, whilst others were outside the airport and sought that before commencing the demolition, same wanted the commission to deal with the propriety of the impugned titles.
19. Be that as it may, the deponent has averred that same thereafter proceeded to and filed an elaborate Replying affidavit, sworn on the December 17, 2018 and in respect of which same explained the circumstances leading to the purchase, acquisition and registration of the suit property in her name.
20. Other than the foregoing, the deponent has also stated that she later on attended an open hearing before the 3<sup>rd</sup> Respondent and reiterated her position as concerns the mode and manner of acquisition of the suit property. For clarity, the deponent added that she pointed out that she was a Bona-fide purchaser of the suit property, without notice of any defect in the title of her predecessor.
21. Nevertheless, the deponent has further maintained that after the hearing which was conducted by the 3<sup>rd</sup> Respondent, same (3<sup>rd</sup> Respondent) indicated that the findings shall be communicated to each and every affected person as well as be published in an appropriate manner.
22. However, the deponent has added that same waited to be furnished with the findings and recommendations of the 3<sup>rd</sup> Respondent, albeit in vain.
23. Notwithstanding the foregoing, the deponent has stated that on or about the February 15, 2019, the 3<sup>rd</sup> Respondent published a Gazette Notice No 1549 and wherein same indicated that the Deponent's title was to be revoked and a sub-lease was to issue in favor of the 1<sup>st</sup> Respondent.
24. Despite the publication of the gazette Notice No 1549 of February 15, 2019, the Petitioner has averred that no reasons culminating into the impugned Recommendations for revocation, were ever issued or at all.
25. For completeness, the deponent has added that even despite her request to be availed and supplied with the reasons and or basis for the impugned recommendations, the 3<sup>rd</sup> Respondents has failed and/or neglected to avail such reasons.
26. Be that as it may, the deponent has also added that having lawfully bought and acquired the suit property, same was a Bona fide purchaser for value and in the premises, her title to the suit property ought not to have been revoked, without legitimate reasons being availed and/or tendered.
27. On the other hand, the deponent has further added that having been lawfully issued with a Certificate of title by the designated Government department and/or officers, the 3<sup>rd</sup> Respondent herein could not casually recommend the revocation of her title, without Due regard with the provision of Article 40(3) of the Constitution 2010.
28. Premised on the foregoing, the Petitioner has further averred that having lawfully acquired and been registered as the proprietor of the suit property, her rights and/or interests thereto were protected under



the law and hence the only way that her title could be impeached was vide Compulsory acquisition, subject to payment of Just compensation.

29. In view of the foregoing, the deponent has added that the manner in which the 3<sup>rd</sup> Respondent dealt with and proceeded to make recommendation of the title in respect of the suit property was illegal, unlawful and unconstitutional.
30. Owing to the foregoing, the deponent has therefore implored the Honourable court to find and hold that the impugned decision by and/or on behalf of the 3<sup>rd</sup> Respondent and the intended revocation of her title, constitutes violation and infringement of her rights and fundamental freedoms, as enshrined under the constitution, inter-alia Articles 10, 27, 28, 47 and 50(1) thereof.
31. Essentially, the deponent has therefore sought that the Honourable court be pleased to grant the Reliefs alluded to and contained at the foot of the Petition.

#### **b. Response by the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents**

32. In response to the Petition herein, one Rashid Abdullahi has sworn a replying affidavit and wherein same has averred that he is the acting Manager, In charge of Planning with the 1<sup>st</sup> Respondent herein. In this regard, the deponent has added that same is therefore mandated and authorized to make the affidavit herein.
33. On the other hand, the deponent has averred that having checked the records held by the 1<sup>st</sup> Respondent, same has established that grant number IR No 70118, LR No 21919, was registered on the August 13, 1996, for a term of 99 years. For clarity, the deponent has averred that the acreage of LR No 21919 was stated to be 46.74.0 Ha.
34. On the other hand, the deponent has also averred that on the June 7, 1996, the Managing Director of the 1<sup>st</sup> Respondent herein wrote to the Commissioner of Land and sought for the preparation and issuance of the requisite titles over the property, namely LR No 21919.
35. Other than the foregoing, the deponent has also added that upon receipt of the Letter dated June 7, 1996, the Commissioner of land proceeded to and issued the 1<sup>st</sup> Respondent with a Letter of allotment relating to and in respect of LR 29191.
36. Nevertheless, the deponent has added that despite having been issued with a Letter of allotment and thereafter paying the sum of Kshs 3, 530/= Only, the 1<sup>st</sup> Respondent was never issued with the requisite lease and certificate of title in respect of LR No 21919
37. Be that as it may, the deponent has averred that from the records held by the 1<sup>st</sup> Respondent, the suit property belonging to and registered in the name of the Petitioner falls within the survey plans overlapping with LR No 21919, which belongs to the 1<sup>st</sup> Respondent.
38. Other than the foregoing, the deponent have also averred that on the August 10, 2001 and January 8, 2003, the 1<sup>st</sup> Respondent wrote to the Commissioner of Lands and pointed out to the Commissioner of Lands of the existence of encroachment onto the land belonging to the 1<sup>st</sup> Respondent.
39. At any rate, the deponent has further added that having examined the FR No 255/38, which led to the creation of LR No 209/12457 (IR No 126198), being the property registered in the name of the Petitioner, same discovered that there was an overlap onto LR No 21919, belonging to the 1<sup>st</sup> Respondent.



40. Notwithstanding the foregoing, the deponent proceeded and stated that on the September 4, 2003, the Managing Director of the 1<sup>st</sup> Respondent wrote to the Ministry of Transport and Communication and forwarded a list of Properties which the 1<sup>st</sup> Respondent required to be interrogated by the Commission of Inquiry into allocation of Public land.
41. Besides, the deponent herein has gone ahead to state that on or about September/October the 1<sup>st</sup> Respondent herein approached a Multi- sectoral Agency Committee on unsafe structures to demolish the many structures which were within and adjoining the airport and which posed security threat to aircraft and other aviation facility.
42. Pursuant to the foregoing, the deponent has added that the Secretary of the Multi sectoral Agency Committee on unsafe structures thereafter wrote to and or lodged a complaint with the National Land Commission, seeking the intervention of the Commission to review various titles/lands, including the title of the suit property.
43. The deponent has also stated that after the lodgment of the complaint with the National land commission, the commission undertook inquiries and investigations and thereafter published a Report containing her findings/recommendations vide gazette notice No 1549 of February 15, 2019.
44. It has been pointed out by the deponent that pursuant to the findings of the Commission, it was established that the suit property falls within the boundaries of LR No 21919 belonging to the 1<sup>st</sup> Respondent.
45. Premised on the foregoing, the deponent has therefore stated that the suit property was irregularly and illegally acquired by the Petitioner. Consequently, it has been added that having been unlawfully acquired, the 3<sup>rd</sup> Respondent was therefore within her mandate to recommend revocation of the impugned title.
46. It was pointed out that the onset of this Judgment that though the 3<sup>rd</sup> Respondent was duly served with the Petition and the supportive documents, same neither entered appearance nor failed any Response to the Petition.
47. In a nutshell, the Petition remains unopposed as against the 3<sup>rd</sup> Respondent.

### **Submissions by the Parties:**

#### **a. Petitioner's Submissions:**

48. On the January 27, 2022, the Petition herein came up for direction, whereupon the advocate for the respective parties (with the exception of the 3<sup>rd</sup> Respondent), agreed to have the Petition canvassed and disposed of on the basis of affidavit evidence and written submissions.
49. On the other hand, the Parties herein also proposed to file and exchanged written submissions within stipulated/circumscribed timelines.
50. Pursuant to the foregoing, the Petitioner proceeded to and filed written submissions dated the June 16, 2022. Nevertheless, the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Respondents filed their written submissions dated the May 15, 2022.
51. The Counsel for the Petitioner herein raised three pertinent issues which were canvassed and/or addressed vide the submissions.



52. First and foremost, counsel for the Petitioner submitted that the suit property herein had hitherto been registered in the name of one Christopher Omonyole, who by virtue of such registration became the lawful owner and/or proprietor thereof.
53. Further, counsel added that sometime in the year 2013, the Petitioner entered into and executed a lawful land sale agreement with the vendor, who thereafter sold and ultimately transferred the suit property in favor of the Petitioner.
54. In the premises, it was submitted on behalf of the Petitioner that by virtue of being a Bona fide Purchaser for value, the Petitioner herein was lawfully protected and her title could therefore not be defeated by and/or at the instance of the 3<sup>rd</sup> Respondent.
55. Secondly, counsel for the Petitioner also submitted that having lawfully and legitimately procured the title over and in respect of the suit property, the Petitioner's right to the said title could only be defeated in accordance with the law, subject to prompt and just payments in line with the Constitution, 2010.
56. Thirdly, counsel for the Petitioner also submitted that having invited responses from the proprietors and or owners of the properties, whose titles were sought to be reviewed, inter-alia the title of the suit property, it was therefore incumbent upon the 3<sup>rd</sup> Respondent to supply and/or avail to the affected Parties and in this case the Petitioner, the reasons/findings that were arrived at by the commission.
57. Be that as it may, counsel for the Petitioner added that despite the constitutional requirement that an affected Party be supplied and/or availed with the reasons for any determination made, no such reasons were ever disseminated to the Petitioner or at all.
58. Premised on the failure to supply and/or avail the reasons for the impugned decision, Counsel for the Petitioner added that such a failure has therefore negated the legality and Constitutionality of the impugned decision.
59. Finally, counsel for the Petitioner submitted that the decision by the 3<sup>rd</sup> Respondent was arrived at and/or informed by bad faith and in any event, the 3<sup>rd</sup> Respondent did not evaluate the title Documents and relevant evidence that was submitted by the Petitioner.
60. In the circumstances, the Learned counsel for the Petitioner has contended that the impugned decision by the 3<sup>rd</sup> Respondent was therefore an illegality and to this extent, same is null and void.
61. In support of the forgoing submissions, counsel for the Petitioner has relied on and cited various decisions inter-alia *Virendra Ramji Gudka & 3 Others versus The Attorney General (2014)eKLR*, *Ocean View Plaza Ltd versus Attorney General (2002)eKLR*, *Kuria Greens Ltd versus Registrar of Titles & Another (2011)eKLR*, *Isaac Gathungu Wanjohi v The Attorney General & 6 Others (2012)eKLR* and *Japheth Azegele versus Chief Land Registrar & 3 Others*.

#### **b. Submissions by the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents**

62. On their part, the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents filed their written submissions dated the May 16, 2022 and in respect of which same have raised three pertinent issues for consideration.
63. First and foremost, counsel for the said Respondents has submitted that the recommendations by the National Land Commission to revoke the grant/title in respect of LR No 209/12457, belonging to and registered in the name of the Petitioner did not constitute or amount to breach, violation or infringement of the Petitioner's rights and fundamental freedom.



64. In any event, counsel for the designated Respondents further added that the National Land commission is a constitutional commission and that same was conferred with the requisite mandate to undertake and carryout review of grants and titles. Consequently, it has been contended that the carrying out of the constitutional mandate of the National Land Commission cannot now be said to constitute a breach of the Petitioner's fundamental freedom.
65. On the other hand, counsel for the designated Respondents has submitted that the title of the suit Property, arose from or is a direct alienation of Government land and thus same falls within the purview of Section 14 of the *National Land Commission Act* 2012.
66. Secondly, it has been submitted that who ever desires a court of law to review and quash the decision of a Constitutional commission, National Land Commission not excepted, is obligated to prove and establish any of the Grounds set out vide Section 7 of the Fair Administrative Actions Act, 2015.
67. Nevertheless, counsel for the designated Respondents has submitted that in respect of the subject matter, the Petitioner herein failed to establish and prove the Grounds that are set out under the law. For clarity, counsel added that the burden of proof lay on the shoulders of the Petitioner, in accordance with the provisions of Section 107, 108 and 109 of the *Evidence Act* Cap 80 Laws of Kenya.
68. Thirdly, counsel for the designated Respondents has further submitted that the Petitioner herein did not tender and adduce credible evidence to show that same lawfully acquired the suit property.
69. For coherence, counsel added that what comprises of the suit property was part of the airport land, which was illegally and unlawfully alienated and acquired by the Petitioner as well as her predecessor in title.
70. To the extent that the title of the suit property was illegally and unlawfully acquired, counsel for the designated Respondents has therefore submitted that no lawful rights and interests therefore accrued to the Petitioner, either as claimed or at all.
71. In the premises, counsel has contended that to the extent that the suit property was unlawfully and illegally acquired, National Land commission was therefore within the law, to recommend the revocation of the Petitioners title.
72. Simply put, the counsel for the designated Respondents has added that based on the illegality attendant to the acquisition and issuance of the title in respect of the suit property, the orders sought by and at the instance of the Petitioner herein cannot therefore issue.
73. At any rate, counsel has added that where there is a conflict between Private and Public interests, the former must give way for the latter.
74. In a nutshell, counsel for the designated Respondents therefore submitted that the decision by the National Land Commission was therefore lawful, legitimate and valid. In this regard, counsel has implored the court to find and hold that it would be contrary to Public interests to decree the orders sought.
75. In support of his submissions, counsel for the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondent has invited the court to take cognizance of, inter-alia *Mbutbia Macharia versus Anna Mutua Ndwiga & Another (2017)eKLR*, *Eastern produce K Ltd versus Christopher Atiado Osiro (2006)eKLR* and *Redcliff Holdings Ltd versus Registrar of Titles & 2 Others, Court of Appeal Civil Appeal No 77 of 2016*.





## Issues for Determination

76. Having reviewed the Petition dated the October 7, 2019, the affidavit in support thereto and the Response vide Replying affidavit in opposition thereof; and having considered the written submissions filed, the following issues do arise and are thus pertinent for determination;
- i. Whether the Petitioner lawfully acquired the title over and in respect of the suit property or otherwise.
  - ii. Whether the Petitioner was a Bona fide purchaser for value without notice and if so, whether the Petitioner's title was amenable to revocation in the manner proposed by the 3<sup>rd</sup> Respondent.
  - iii. Whether the Decision to revoke the Petitioner's title to and in respect of the suit property was Legitimate and Constitutional.
  - iv. Whether the Petitioner is entitled to the Reliefs sought.

## Analysis and Determination

### **Issue Number 1 Whether the Petitioner lawfully acquired the title over and in respect of the suit Property or otherwise.**

77. The Petitioner herein filed an elaborate affidavit and attached thereto assorted documents, including a copy of the certificate of title which was hitherto issued in favor of one Christopher Omunyole.
78. On the other hand, the Petitioner also availed and/or tendered in evidence copy of the sale agreement and the transfer instrument, which were executed by her predecessor in title.
79. Further, evidence was also adduced that after the completion and or conclusion of the sale transaction between the vendor and the Petitioner herein, the suit property was duly transferred to and registered in the names of the Petition. For completeness, it was pointed out that a certificate of title was ultimately issued.
80. Though the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents filed a replying affidavit, the testimony by the Petitioner which explained the circumstances preceding the sale, transfer and ultimate registration of the suit property in her name were not controverted and/or contested.
81. On the other hand, no evidence, was adduced to show that the certificate of title, which was issued in favor of the Petitioner did not originate from the Chief Land Registrar or such other officer, duly authorized under the law.
82. At any rate, though the deponent of the Replying affidavit had indicated that LR No 21919 belonging to the 1<sup>st</sup> Respondent measured approximately 46.60 Ha, no report and/or evidence was placed before the court to show that the acreage alluded to has been reduced or otherwise affected in any way.
83. To my mind, if the title over and in respect of the suit property and the other titles sought to be challenged, were to emanate from portions of LR No 21919, belonging to the 1<sup>st</sup> Respondent, then no doubt, the acreage hitherto alluded to would have been affected or better still reduced in size.
84. Notwithstanding the foregoing, it is also appropriate to mention that though the deponent of the replying affidavit had averred that FR No 255/38, which led to the creation and ultimate registration of the suit property, overlaps survey plans No 265/27, (the latter denoting the extent of the 1<sup>st</sup>



- Respondents land), it is imperative to observe that the deponent did not state in the body of the replying affidavit that same is a professional surveyor, to warrant making the deposition herein.
85. Be that as it may, the survey plan, FR No 255/38, which culminated into the creation of the suit property, evidently shows that same was duly prepared, checked, approved and certified by the authorized officers. For clarity, no evidence has been availed from the Director of Survey to impugn the legality of the survey plan leading to the creation of the suit property.
86. Other than the foregoing, it is imperative to state that the title document which was issued to and registered in the name of the Petitioner came from and was issued by the designated department of the Government. In this regard, no evidence was tendered of any fraud and or illegality, in the process of the issuance of the said certificate of title.
87. To my mind, the issuance of the certificate of title to and in favor of the Petitioner confers upon the Petitioner lawful rights and interests over the suit property and hence such rights are entitled to protection under the law.
88. To ascertain the extent and scope of the rights and interests of a registered proprietor, it is appropriate to take cognizance of Section 24 and 25 of the Land Registration Act, 20112.
89. For convenience, the provisions of Section 24 and 25 (supra) are reproduced as hereunder;
24. Interest conferred by registration Subject to this Act—
- (a) The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.
25. Rights of a proprietor
- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
- (a) To the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- (b) To such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.
90. Other than the foregoing provisions, the extent and scope of registration and issuance of title, has also been the subject of various decisions of the court.



91. In the premises, it is also appropriate to discern what courts have hitherto said about the import and implication of registration. To this end, I beg to cite and refer to two decisions, whose holdings are pertinent.

92. First is the decision in the case of *Samuel Murimi Karanja & 2 others vs Republic [2003] eKLR*, where the court observed as hereunder;

' The issue of land ownership is volatile, it is for this reason that holders of valid titles to land must be protected by the law, the government and this court. The Court of appeal of Kenya has occasionally dealt with this point and therefore once the court is faced with the claim of a valid title issued by the government, it has no obligation to inquire into the reasons or manner in which the title was obtained, unless of course there is clear evidence of fraud against the holder of the title. Courts must shy away from usurping the authority of the grantor or right to question title deeds issued by the President, except in clear cases of fraud or where the title was not issued in accordance with the Governing Act. This strict observance of the property rights of a title holder is necessary to ensure certainty in transactions regarding land.'

93. Secondly, the decision in the case of *David Peterson Kiengo & 2 Others V Kariuki Thuo [2012] eKLR*, where the court observed as hereunder;

13. Where, then, does this leave us? There is no elegant way to resolve this issue. There is only a pragmatic way of doing so. It is in keeping with the objectives of the Registered Lands Act, and, indeed, the entire system of registration of land in Kenya. The Registered Lands Act is based on the Torrens' System. Under this system, indefeasibility of title is the basis for land registration. The State maintains a central register of land title holdings which is deemed to accurately reflect the current facts about title. The whole idea is to make it unnecessary for a party seeking to acquire interests in land to go beyond the register to establish ownership. The person whose name is recorded on the register holds guaranteed title to the property. Since the State guarantees the accuracy of the register, it makes it unnecessary for a person to investigate the history of past dealing with the land in question before acquiring an interest. That this is the essence of the Torrens System was stated as early back as 1891 in the case of *Gibbs v Messer* (1891) AC 254: .

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

14. Practically, the principle of indefeasibility has two implications for the instant case. It means that if the parties who acquired interests to the properties from Njendu can demonstrate that they did so in good faith, without notice and did not participate in Njendu's fraud, their titles will be secure and guaranteed by the State. They were not obligated to do anything more than search the official register to establish ownership. If, as it turned out, the register was inaccurate by reason of malfeasance by land officials, the second implication is that the parties deprived of their property by such inaccuracy



or malfeasance may bring an action against the State for recovery of damages but not for possession or ownership of the property.

94. Premised on the dicta, which rans across the foresighted decision, I come to the considered conclusion that the Petitioner herein lawfully acquired the title to and in respect of the suit property.
95. On the other hand, I also come to the conclusion that no fraud and or illegality has been proven and/or established against the title that was issued to and in favor of the Petitioner.
96. In any event, the 3<sup>rd</sup> Respondent before whom the complaint seeking to review the title/grant of the suit property was placed, has not availed any evidence, if at all, same procured, to vindicate that the Petitioner's title was vitiated by any scintilla of fraud.
97. Consequently, my answer to issue number one is that the Petitioner's title was lawfully and legally acquired and that not fraud or otherwise, has been established to vitiate same.

## **Issue Number 2**

### **Whether the Petitioner was a Bona fide Purchaser for value without Notice and if so, whether the Petitioner's title was amenable to revocation in the manner proposed by the 3<sup>rd</sup> Respondent.**

98. According to the Petitioner, same bought, purchased and/or acquired the suit property from the previous registered owners thereof. In this regard, the Petitioner has produced and tendered in evidence the requisite sale agreement and the transfer instrument, which were duly executed by the vendor-Petitioner's predecessor in title.
99. Having bought and/or purchased the suit property from a previous owners, the Petitioner is therefore constituted as a Purchaser.
100. Nevertheless, what is material is not whether the Petitioner was a purchaser, but whether same purchased the suit property for valuable consideration, without notice of any defect in the title of her predecessor.
101. Besides, the other critical ingredient is to ascertain whether the purchaser (read the Petitioner herein), was privy or party to any fraud or misrepresentation, which may have been caused or occasioned by her predecessor in title.
102. Suffice it to point out that in respect of the subject matter, the Petitioner tendered evidence to show that same was a Bona fide Purchaser for value and that prior to the purchase, same undertook and exercised due diligence.
103. Premised on the foregoing, the Petitioner's position before the 3<sup>rd</sup> Respondent and which position has been reiterated herein is that same was a bona fide purchaser for value without notice.
104. To warrant a finding that one is a Bona fide Purchaser for value without Notice, certain critical ingredients must be established and/or proven.
105. Without belaboring the point, the critical ingredients that bely proof who a Bona fide purchaser for value is, were considered and elaborated in the case of *Lawrence P Mukiri Mungai, Attorney of Francis Muroki Mwaura v Attorney General & 4 Others, Nairobi Civil Appeal No 146 of 2014*, where the Court



of Appeal cited with approval the case of *Katende v Haridar & Company Ltd* (2008) 2 EA 173, where the Court of Appeal in Uganda held that:-

' For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly.

For a purchaser to successfully rely on the bona fide doctrine as was held in the case of *Hannington Njuki v William Nyanzi* High Court civil suit number 434 of 1996, must prove that:

1. He holds a certificate of title;
2. He purchased the property in good faith;
3. He had no knowledge of the fraud;
4. He purchased for valuable consideration;
5. The vendors had apparent valid title;
6. He purchased without notice of any fraud; and
7. He was not party to the fraud."

106. Recently, the Court of Appeal re-visited the circumstances that underline the application of Bona fide Purchaser for value without any notice of defect. In this regard, it is apt to refer to the holding in the case of *Tarabana Company Limited versus Sebmi & 7 others (Civil Appeal 463 of 2019) [2021] KECA 76 (KLR) (8 October 2021)* (Judgment), where the court stated and observed as hereunder;

What was required was to determine whether the Appellant was in any way involved in the process through which the 4<sup>th</sup> Respondent obtained title, which the learned Judge found was irregular and with which we agree. There was no evidence adduced before the trial court to show that the Appellant played any role, or was involved in any way in the said process. If title was acquired by fraud, or misrepresentation, illegal, unprocedural or corrupt scheme, the same was before the Appellant came into the picture. We therefore find that the appellant was a bona fide innocent purchaser for value for these reasons, and its title could not and cannot be challenged.

107. To my mind, no evidence was placed before the court to contradict and/or controvert the evidence by the Petitioner, to the effect that same bought the suit property, without knowledge of any fraud or at all.

108. At any rate, even the 4<sup>th</sup> Respondent herein, whose office was responsible for the issuance of the Petitioner's title, chose not to swear any affidavit. In this regard, the inference to be discerned by the failure on behalf of the 4<sup>th</sup> Respondent, is that the Petitioner's title was legitimate and valid.

109. In the premises, I come to the considered finding that the Petitioner was a bona fide purchaser for value without notice of any defect or an illegality in the title pertaining the suit property.



### Issue Number 3

#### **Whether the Decision to revoke the Petitioner's title to and in respect of the suit property was Legitimate and Constitutional.**

110. Following the lodgment of a Complaint by the Secretary, Multi-sectoral agency committee, with the 3<sup>rd</sup> Respondent on unsafe structure, the 3<sup>rd</sup> Respondent published a notice in the local daily's containing details of various properties, which same sought to interrogate and/or review.
111. It is common ground that following the publication of the impugned notice, the Petitioner herein, whose property was one of those that was affected filed an elaborate Replying affidavit opposing the intended review and/or revocation of the certificate of title in respect of the suit property.
112. At any rate, the Petitioner also added that after the lodgment/ filing the Replying affidavit, same was invited to and indeed attended a Formal hearing which was conducted by the 3<sup>rd</sup> Respondent.
113. Be that as it may, upon the conclusion of the hearing, which was undertaken by the 3<sup>rd</sup> Respondent, same undertook to disseminate the findings of her investigations to the affected Parties, inter-alia, the Petitioner herein.
114. Nevertheless, evidence was tendered that despite the assurance by the 3<sup>rd</sup> Respondent that same would disseminate and furnish the affected Parties with the decisions and findings, same failed and/or neglected to do so.
115. In fact, the Petitioner tendered evidence to show that after a duration of delay, same wrote to the 3<sup>rd</sup> Respondent vide letter dated the July 9, 2019, seeking to be notified of the date of the intended ruling.
116. On the other hand, the Petitioner also tendered evidence that pursuant to the letter under reference, the 3<sup>rd</sup> Respondent responded vide letter dated the August 28, 2019 and attached a copy of the recommendation reached and/or arrived at.
117. Nevertheless, the copy of the recommendations, which was attached is indeed the gazette notice No 1549 published on the February 15, 2019, but which was devoid of the findings by the commission and the reasons belying the decisions/Recommendations arrived at.
118. Clearly, the 3<sup>rd</sup> Respondent was obligated to avail to and supply the Petitioner with reasons belying her decision and/or Recommendations, to revoke the title in respect of the suit property. Absent of such reasons, the decision to revoke the Petitioner's title to the suit property would be illegal, illegitimate and unconstitutional.
119. To this end, it is appropriate to underscore the import and tenor of the provisions of Article 47 of the [Constitution](#) 2010.
120. For clarity, the said Article provides as hereunder;
  47. Fair administrative action
    - (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
    - (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.



- (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
    - (a) Provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
    - (b) Promote efficient administration.
121. Other than the foregoing provisions, it is also worthy to recall that Parliament enacted the *Fair Administrative Action Act*, 2015, whose purpose and tenor was to facilitate the realization and enjoyment of the right to Fair Administrative Actions.
  122. Pursuant to the provision of the said Act, it was underscored that whenever an administrative body or quasi-judicial tribunal was bound to make any decision that would affect the rights of a citizen such administrative body/quasi tribunal would be obliged to comply with certain minimum conditions, which were statutorily circumscribed.
  123. In this regard, it is imperative to take cognizance of the provisions of Section 6 of the Fair Administrative Actions Act, 2015, which provides as hereunder;
    6. Request for reasons for administrative action
      - (1) Every person materially or adversely affected by any administrative action has a right to be supplied with such information as may be necessary to facilitate his or her application for an appeal or review in accordance with section 5.
      - (2) The information referred to in subsection (1), may include—
        - (a) The reasons for which the action was taken; and
        - (b) Any relevant documents relating to the matter.
      - (3) The administrator to whom a request is made under subsection (1) shall, within thirty after receiving the request, furnish the applicant, in writing, the reasons for the administrative action.
      - (4) Subject to subsection (5), if an administrator fails to furnish the applicant with the reasons for the administrative decision or action, the administrative action or decision shall, in any proceedings for review of such action or decision and in the absence of proof to the contrary, be presumed to have been taken without good reason.
      - (5) An administrator may depart from the requirement to furnish adequate reasons if it is reasonable and justifiable in the circumstances, and shall inform the person making the request of such departure.
  124. In respect of this particular matter, there is no gainsaying that the Petitioner sought to be availed and/or supplied with reasons pertaining to the impugned decision, but despite the request no such reasons were availed or at all.
  125. At any rate, even after the filing and service of the subject Petition, the 3<sup>rd</sup> Respondent who made the impugned decision, has never bothered to avail and/or furnish the Petitioner with the reasons underlining the impugned decisions.
  126. In the circumstances, it is evident and/or apparent that the impugned decision was arrived at on adhoc basis, without due consideration of the Issues and thus no reasons are available.



127. On the basis of the failure to avail and or furnish the reasons belying the impugned decisions and there being no explanation for such failure, I come to the conclusion that the impugned decision/recommendations was ex-facie illegal, unconstitutional and thus Void.
128. Notwithstanding the foregoing, there is yet another aspect, which would render the impugned decision illegal and unlawful. This is, premised on the fact that the Petitioner's title arose from a purchase as opposed to alienation or allocation.
129. Given that the Petitioner was a purchaser for value without notice of any defect in the title of her predecessor, was the 3<sup>rd</sup> Respondent seized of the requisite mandate to revoke or recommend for such title for revocation.
130. The answer to the foregoing question is provided for vide Section 14(7) of the [National Land Commission Act](#), which provides as hereunder;
14. Review of grants and dispositions
- (1) Subject to Article 68(c)(v) of the [Constitution](#), the Commission shall, within five years of the commencement of this Act, on its own motion or upon a complaint by the national or a county government, a community or an individual, review all grants or dispositions of public land to establish their propriety or legality.
  - (2) Subject to Articles 40, 47 and 60 of the [Constitution](#), the Commission shall make rules for the better carrying out of its functions under subsection (1).
  - (3) In the exercise of the powers under subsection (1), the Commission shall give every person who appears to the Commission to have an interest in the grant or disposition concerned, a notice of such review and an opportunity to appear before it and to inspect any relevant documents.
  - (4) After hearing the parties in accordance with subsection (3), the Commission shall make a determination.
  - (5) Where the Commission finds that the title was acquired in an unlawful manner, the Commission shall, direct the Registrar to revoke the title.
  - (6) Where the Commission finds that the title was irregularly acquired, the Commission shall take appropriate steps to correct the irregularity and may also make consequential orders.
  - (7) No revocation of title shall be effected against a bona fide purchaser for value without notice of a defect in the title.
  - (8) In the exercise of its power under this section, the Commission shall be guided by the principles set out under Article 47 of the [Constitution](#).
  - (9) The Commission may, where it considers it necessary, petition Parliament to extend the period for undertaking the review specified in subsection (1).
131. My humble reading of the foregoing provision, is to the effect that where the title holder is able to show and prove that the title was acquired on the basis of Bona fide Purchase for value without notice, then such a title is statutorily insulated.
132. In view of the foregoing, I come to the conclusion that the impugned decision by the 3<sup>rd</sup> Respondent, was not only illegal but null and void.





133. In the premises, the impugned decision cannot be allowed to hold sway and/or stand.
134. Respectfully, the legal implication of a decision that is null and void was underscored vide the dictum vide the case of *Macfoy vs United Africa Co Ltd* [1961] 3 All ER 1169, where Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

' If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.'

#### **Issue Number 4**

##### **Whether the Petitioner is entitled to the Reliefs sought.**

135. The Petitioner herein has essentially established and proved that same lawfully purchased and hence acquired title to the suit property in accordance with the law.
136. Secondly, the Petitioner has also proved and established that in the course of the purchase and acquisition of the suit property, same was not privy nor party to any fraud or illegality, if at all, that may have occurred at the onset of the acquisition of the title by her predecessor.
137. In short, the Petitioner has established and proven that same was/is a bona fide purchaser for value without notice of any defect in the title.
138. Thirdly, this Honourable court has since found and returned a verdict that the impugned decisions, which was rendered by the 3<sup>rd</sup> Respondent was ex-facie, illegal and void.
139. Having come to the foregoing conclusion, it is evident that the Petitioner's claim is therefore meritorious. In this regard, the Petitioner would be entitled to the various reliefs sought save for prayer number (g), insofar as this Honourable court is devoid of jurisdiction to compel the Respondents or any of them to compulsorily acquire the suit property.
140. Suffice to point out that where there is and or shall be need for compulsory acquisition, there exists an elaborate statutory process to be followed, as articulated vide the provisions that governs such a process. In this regard, the Provision of Sections 107 to 113 of the *Land Act* 2012 are paramount and succinct.
141. Before departing from the issue of reliefs to be granted, it is also appropriate to point out that the manner in which the Respondents and in particular, the 3<sup>rd</sup> Respondent dealt with the proceedings against the Petitioner amounted to and/or constituted breach and/or infringement of the Petitioner's Rights and Fundamental freedoms.
142. Consequently, the Petitioner herein is entitled to be compensated in monetary Damages for such breach, violation and/or infringements of her rights under the *Constitution*.
143. In the premises and given the oppressive manner in which the impugned proceedings were conducted and/or carried out, I award to and in favor of the Petitioner the sum of Kshs 10, 000, 000/= only as against the Respondents jointly and/or severally. See the case of *Attorney General v Zinj Limited (Petition 1 of 2020) [2021] KESC 23 (KLR) (Civ) (3 December 2021)* (Judgment), pertaining to the applicable principles in the assessment and award of General damages in cases of infringement and or violation of Fundamental Rights.



## Final Disposition:

144. Having considered and/or addressed the various issues that were highlighted and amplified herein before, it is now appropriate to make the final and Dispositive orders.
145. Consequently and in the premises, I enter Judgment in favor of the Petitioner as hereunder;
- a. That a Declaration be and is hereby issued declaring that the Petitioner is the lawful owner of LR No 209/12457 within the meaning of Article 40 of the Constitution.
  - b. That a Declaration be and is hereby issued declaring that the Recommendation by the 3<sup>rd</sup> Respondent- National Land Commission – through Gazette Notice Number 1546 of February 15, 2019, that the title to LR No 209/12457 be revoked amounts to violation of her right to protection of property under Articles 40 of the Constitution and is null and void ab initio.
  - c. That a Declaration be and is hereby issued declaring that the impending revocation, re-possession and issue of a sub-lease to the Petitioner for LR No 209/12457 amounts to violation of her rights to protection from deprivation of property under Article 40 of the Constitution.
  - d. That a Declaration be and is hereby issued declaring that the impending revocation, of the Petitioner’s title to LR No 209/12457 violates the Petitioner’s rights to human dignity and protection of law enshrined in Article 27, 28 and 50 of the Constitution.
  - e. That Permanent Injunction be and is hereby issued prohibiting the Respondents severally and jointly from implementing the impending revocation, re-possession and issue of a sub-lease to the Petitioner for LR No 209/12457 pursuant to the Gazette Notice No 1549 of February 15, 2019, or any other Notice of communication.
  - f. That an order of Prohibition be and is hereby issued prohibiting the Respondents severally and jointly from implementing the impending revocation, re-possession and issue of a sub-lease to the Petitioner for LR No 209/12457 pursuant to the Gazette Notice No 1549 of February 15, 2019, unless and until the Government has compulsorily acquired it under Section 120 of the Land Act, No 6 of 2012 and complied with Article 40 of the Constitution.
  - g. That a Declaration be and is hereby issued declaring that the Petitioner’s title to LR No 209/12457 is protected by Article 40 and 50 of the Constitution from arbitrary and unlawful action by the Respondents or through their officers, agents and servants.
  - h. That a Declaration be and is hereby issued declaring that the Respondents jointly and/or severally are liable to compensate the Petitioner by way of damages for the threatened loss of user and other infringements of her rights and privileges as the registered owner of plot LR No 209/12457 on account of the declared intention to revoke her lawful and unencumbered title.
  - i. That a Declaration be and is hereby issued declaring that the under Article 40 of the Constitution the Petitioner’s land parcel LR No 209/12457 cannot be taken possession of by the Respondents either jointly or until this Honourable court has found that the title to the said plot is a nullity and invalid.
  - j. That a Declaration be and is hereby issued declaring that the 3<sup>rd</sup> Respondent’s Gazette Notice No 1549 of February 15, 2019, is unlawful for contravention of the Petitioner’s rights under Articles 27, 40, 47 and 50 of the Constitution to the extent that it relates to land parcel LR No 209/12457.



- k. The sum of Kes 10, 000, 000/= only be and is hereby awarded in favor of the Petitioner as against the Respondents jointly and/or severally on account of General damages for breach of the Petitioner's rights and freedom under Articles 27, 28, 40, 47 and 50 of the Constitution.
- l. Cost of this Petition be and is hereby awarded to the Petitioner and same shall be assessed and taxed and certified by the taxing officer of the court.

146. It is so ordered

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF SEPTEMBER 2022.**

**OGUTTU MBOYA**

**JUDGE**

**In the Presence of;**

Kevin Court Assistant

Mr. Motari for the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondent.

Mr. Mbuthia for the 3<sup>rd</sup> Respondent.

N/A for the Petitioner.

