



REPUBLIC OF KENYA



**Gikono v Cypriano & 3 others (Petition E004 of 2021)
[2022] KEELC 14525 (KLR) (2 November 2022) (Judgment)**

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**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
PETITION E004 OF 2021
CK NZILI, J
NOVEMBER 2, 2022**

BETWEEN

EVANGELINE KARUGWATA GIKONO PETITIONER

AND

JOYCE NKUENE CYPRIANO 1ST RESPONDENT

DAVID MWITI CYPRIANO 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

LAND REGISTRAR – MERU COUNTY 4TH RESPONDENT

JUDGMENT

1. By an amended petition dated March 1, 2022, the petitioner, a female resident of Meru County has brought this case claiming that, as a daughter and beneficiary of the estate of her late father Gikono M’Ibere (deceased) initially the owner of LR No Nkuene/Taita/109. She averred that her deceased father showed her a portion of his land to occupy presently LR No 1631 and was left to take care of her two brothers then minors while in possession of all the ownership documents to the deceased’s land. She averred that her late brother Cypriano Gikono took out the ownership documents to follow up the title deed.
2. The petitioner averred that in total disregard of the deceased will and directives, her late brother only divided LR No 107 into two portions, with the late Francis Nyamu Gikono acquiring LR No 489. She also averred that the late Francis Gikono accommodated her on his portion which he subdivided into two portions namely LR No’s 1630 and 1631 in 1999 disposed of the former to one M’Aburi M’Mungania and gifted her the latter, since he had no wife or children.
3. The petitioner averred that in order to effect the gift, a land control board consent dated October 28, 1999 was obtained and later on duly executed the relevant form for registration in her favour.



4. The petitioner further averred that unfortunately her late brother fell ill and died on November 1999 before the registration was completed and following which her other brother Cyprian Gikono upon becoming aware of the process maliciously caused her to be arrested and charged for alleged forgery of the said documents. She was convicted in the lower court but the conviction and sentence were eventually overturned on November 13, 2007 by the High Court.
5. The petitioner averred that by the time the appeal was heard and determined, his late brother had already filed a succession cause for the estate of Francis Nyamu Gikono, obtained a confirmation of grant and was issued with a title deed in his name in total disregard of her rights to land ownership on account of inheritance, gift and occupation.
6. Additionally, petitioner averred that the entry No 11 of transfer and registration by the 3rd respondent in favour of the 2nd respondent was illegal and unprocedural since the appeal case never directed her late brother be registered as the owner of LR No Nkuene/Taita/1631 but had only directed that the land reverts to the name of the late Francis Nyamu Gikono pending the appointment of a legal representative, which decision was later on overturned by the appellate court.
7. The petitioner averred that prior to the determination of her appeal, she had sought for the revocation of the grant issued to her late brother but was declined by the court on November 16, 2006 on the ground that the land alleged had initially been registered in her name out of a criminal enterprise ostensibly as she remained a convict at the time.
8. Similarly, the petitioner averred that following the setting aside of her conviction and sentence the implication was that the registration of the suit land under her name on December 29, 1999 (entry No 5 of the land register) was legal and procedural.
9. The petitioner averred that following her successful appeal she filed Meru HCC No 26 of 2006 against her late brother for declaration that she was entitled to LR No Nkuene/Taita/1631 and for a permanent injunction in which the deceased raised a preliminary objection based on res judicata due to the succession cause. Therefore, her suit was struck out on October 12, 2007.
10. Further the petitioner averred that the ownership of the suit property was never determined in Meru HCCC No 26 of 2006 on merits. She later on filed Meru central LDT case No 68 of 2008 against her late brother and by a decision dated November 19, 2008 she was successful and an award was adopted in Nkubu Land Tribunal Case No 2 of 2008 whereof on February 20, 2015, she was registered as the owner of the land and issued with a title deed.
11. The petitioner also averred that the 1st and 2nd respondents purportedly filed a Succession Cause No 41 of 2010 against the estate of Cyprian Gikono and illegally included LR No Nkuene/Taita/1631 as forming part of the estate of his late brother which case was transferred to Meru High Court as Succession Cause No 752 of 2013. That on September 22, 2017 the 1st & 2nd respondents through the 3rd respondent proceeded to illegally and unprocedurally register her land under their names despite the fact that the petitioner was already the owner registered with a title deed.
12. The petitioner averred that vide an application dated 33.4.2019 in Meru Succession Cause No 752 of 2013, she sought for an injunction, annulment or rectification of the grant so as to remove the suit property from the list of properties belonging to her deceased brother and reversion of the land under her name, which application was dismissed for lack of a vesting order.
13. The petitioner further averred that the 3rd the respondent proceeded to cancel her name from the register and inserted that of the 1st and 2nd respondents who proceeded to file for eviction order against her in Nkubu ELC No 55 of 2019.



14. The petitioner averred that she had been occupying and cultivating the property all her entire lifetime of over 80 years and has extensively developed the suit land including farming activities as her only source of livelihood alongside her family members hence risked loss, damage, suffering and prejudice out of the respondents wrongful and or illegal, unlawful, discriminatory, oppressive actions which amount to breach of her constitutional right to own land under article 40 of the Constitution.
15. The petitioner prayed for the court to;
 - a. Declare the registration of the suit land from the name of his late brother and currently the 1st and 2nd respondents as illegal and violating her right to property and as unconstitutional.
 - b. Declare she was the lawful legal and sole owner of the suit land.
 - c. Direct the 3rd respondent to cancel and or remove the names of the 1st & 2nd respondents as registered owners and replace it with her names.
 - d. Permanent injunction against the 1st & 2nd respondents from trespassing or interfering with her use and possession of the suit land.
 - e. General damages for the violation of her rights.
 - f. Costs of the suit.
16. The petition was supported by a verifying affidavit, written statement dated January 25, 2021, list of documents namely; copies of the land register for LR No's Nkuene/Taita/109, 489, 1630, 1631, copy of an application for consent, letter of consent dated October 28, 1999, copy of death certificate dated November 9, 2009, copy of judgment in Meru Criminal Case No 315 of 2000 dated July 11, 2001 and judgment in Meru HC Appeal No 237 of 2001 dated November 13, 2007, copy of a ruling in Meru HC Succession Cause No 63 of 2000 dated November 16, 2006, copy of a ruling in Meru HCC No 26 of 2006 dated October 12, 2008, copy of proceedings and judgment in Meru Central LDT No 68 of 2008, copy of transfer forms signed by the Executive Officer Nkubu Law courts, copy of title deed for LR No Nkuene/Taita/1631, copy of application dated April 23, 2019, copy of ruling in Meru HC Succession cause No 752 of 2013 on November 23, 2020, copy of plaint dated July 10, 2019 filed in Nkubu ELC No 55 of 2019 and photographs attached as annexures marked EKG "1" – EKG "16".
17. The petition was opposed by the 1st & 2nd respondents through a replying affidavit sworn by Joyce Nkuene Cypriano on account of misrepresentation of material facts and *res judicata* since the cause of action was conclusively determined in Succession Cause No 752 of 2013.
18. The 1st and 2nd respondents stated that the petition did not demonstrate how the petitioner's rights had been denied, violated or threatened, especially given her cause of action appeared based on fraud, or on misrepresentation which are ideally civil wrongs not within the jurisdiction of a constitutional court.
19. The 1st and 2nd petitioners averred that they did not hold any public office with mandate, authority or power hence could not breach her constitutional rights hence the petition was misconceived and an abuse of the court process.
20. The 3rd and 4th respondents opted to oppose the petition through written submissions on the grounds that the petition did not meet the threshold of a constitutional petition, there was presumption of regularity, it was *res judicata* and disclosed no known cause of action against them.
21. Following leave of court and through the consent of party's, written submissions were filed dated May 9, 2022, May 23, 2022 and June 21, 2022 respectively.



22. The petitioner submitted that she has been in occupation of LR No Nkuene/Taita/1631 as registered owner prior to the illegal and unprocedural registration by the 3rd respondent to the names of the 1st & 2nd respondents without a court order to cancel or recall her title deed.
23. The petitioner also submitted that the 3rd respondent was at fault to do so more so following her successful appeal, registration in her favor on December 29, 1999. Given the appellate decision, the petitioner submitted the 3rd respondent should have canceled entries No 9, 10, 11, 12, & 13 and reinstated her as the owner but failed to do so.
24. Further, the petitioner submitted the 3rd respondent had failed to explain the manner in which LR No 1631, passed from her name to the 1st & 2nd respondents without an order for cancellation hence entries No's 16 & 17 of the register was unlawful and unprocedural.
25. In addition, the petitioner submitted the thrust of article 40 of the [Constitution](#) was to protect proprietary rights under the law as a title deed issued under a statute procedurally could not be taken away except in accordance with the law and under articles 10, thereof, higher values such as human rights and social justice must be upheld.
26. The petitioner submitted that whichever way the registration of the land in favour of the 1st & 2nd respondents by the 3rd respondent was looked at, without a court order it was definitely unprocedural and illegal.
27. Similarly the petitioner submitted her reliefs were anchored under articles 20, 22 and 40 of the [Constitution](#) in line with the finding in [Anarita Karimi Njeru vs AG](#) (1979) eKLR and [Mumo Matemu vs Trusted Society of Human Rights Alliance](#) (2013) eKLR.
28. The 1st and 2nd respondents submitted that though the petitioner had cited the constitutional provisions under which the cause of action was premised she had failed to demonstrate the nexus between the alleged infringement and the 1st and 2nd respondents more so given such issues as raised were conclusively determined in Meru Succession Case No 752 of 2013 where she was a party and that if she had any grievance she should have gone to the civil courts instead of invoking the [Constitution](#) for a tortious claim.
29. Additionally, the 1st & 2nd respondents submitted that they could not be able to infringe on the petitioner's rights as private citizens as held in [Chelimo a Marsiv & 7 others vs OCS Kirindo GSU Camp & 7 others](#) (2011) eKLR.
30. The 1st & 2nd respondents submitted the petitioner had failed to mention that prior to registration in their favour there were valid court orders lending to their registration.
31. Further, the 1st & 2nd respondent submitted the petition did not meet the constitutional threshold in [Anarita Karimi Njeru \(supra\)](#).
32. The 3rd & 4th respondents submitted the petition fell short of the holdings in [Anarita \(supra\)](#), [Grays Jepkemoi Kiplagat vs Zakayo C Cheruiyot](#) (2021) eKLR citing with approval Mumo Matemu (supra) [Benard Ouma Omondi & another vs AG & another](#) (2021) eKLR.
33. On presumption of regularity, the 3rd & 4th respondents submitted that a court presumes that official duties have been properly discharged and all procedures dully followed until the challenger presented clear evidence to the contrary.
34. Reliance was placed on Chief Land Registrar and 4 others vs Nathan Tirop Koech & 4 others (2018) eKLR and Teresia Kamene King'oo vs Harun Edward Mwangi (2019) eKLR on the proposition that



- there was a presumption that all acts done by a public executive official have lawfully been done and that all have properly discharged their official duties.
35. On the issue of *res judicata* the 3rd & 4th respondents submitted that the matter was *res judicata* as defined in *Henderson vs Henderson* (1884 – 60) All ER 318.
 36. Regarding non-disclosure of a cause of action against the 3rd respondent, it was submitted that going by the definition of a cause of action in *Caxton Manufacturers Ltd vs Prudential Printers Ltd* (2013) eKLR, the petitioner did not give any particulars or adduce evidence demonstrating how the 3rd respondent's actions were malicious, unlawful, wrongful, illegal, harmful, discriminatory, oppressive or amounted to breach of her constitutional rights as it executed its statutory duties under section 12 of the *Land Registration Act* whose role was solely to confirm statutory compliance with the relevant procedures before recording the details pertaining to the status of the land in title to register.
 37. The 3rd & 4th respondents further submitted that the 3rd respondent undertook its actions in line with the statutory duties, lawfully and procedurally hence the allegations under paragraph 37 of the amended petition remained unsubstantiated.
 38. The issues for the court's determination are: -
 - i. If the petition has met the constitutional petition threshold and raised a constitutional question.
 - ii. If the issues raised in the petition are *res judicata*.
 - iii. If the actions of the 3rd respondent in registering the suit land in the name of the deceased then to the petitioner and later on in the names of the 1st & 2nd respondents met both the statutory and constitutional test in light of the circumstances of this petition.
 - iv. If the 3rd respondent in undertaking its statutory duties infringed on the rights of the petitioner as to ownership of the suitland.
 - v. If the petitioner is entitled to the reliefs sought.
 - vi. What is the order as to costs?
 39. The basic requirements for a constitutional petition are governed by articles 22, 23 & 165 3 (b) of the *Constitution*, section 13 (3) of the *Environment and Land Court Act* and the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Procedure & Rules 2013* (herein after the Rules).
 40. Under rule 10 thereof, a petitioner is required to describe the parties, set the facts relied upon, specify the particular rights infringed, threatened or violated and the manner of the violations, indicate if there are pending or determined proceedings over the matter between the parties and set out the reliefs sought.
 41. Rule 10 provides that a petitioner is at liberty to support his petition with an affidavit and if he wishes to rely on any document to annex the same to the petition or in the supporting affidavit whichever is applicable.
 42. Rule 15 provides that the Attorney General or a state organ shall within 15 days file a replying affidavit and if any document is to be relied upon to annex the same to the replying affidavit.
 43. Any other respondent apart from the Attorney General & a state organ is required to file a memorandum and either a replying affidavit or statement setting out the grounds to rely upon to oppose the petition.



44. Where the respondents fail to respond on time or at all to the petition, the court has the discretion to proceed with the hearing under rule 20 by way of affidavits, written submissions or by oral evidence.
45. While expounding on the above procedures and the threshold of a constitutional petition, the court in *Mumo Matemu vs Trusted Society (supra)* citing with approval *Anarita Karimi Njeru (supra)*, held that a constitutional petition should set out with a degree of precision the petitioner's complaint, the provisions infringed and the manner in which they are alleged to be infringed. The same position was echoed in *Bernard Ouma Omondi (supra)* that the particulars of the alleged infringement must be clearly stated to enable the respondents to be able to respond and or answer to the allegations as well as the compliant.
46. In this petition, the petitioner has set out the description and the capacity she has sued the respondents. The petition has set out facts in issue starting from the origin of her claim to the land from her late father Cypriano Kaiji Gikono as LR No 109 up to the subdivision by her late brother to LR 489, later on subdivided into LR No's 1630 and 1631 and her gift and current occupation.
47. The petitioner has also given out the litigation history of the dispute in various courts up to present where she is faced with eviction by the 1st & 2nd respondents in the Nkubu Magistrates case.
48. The petitioner has demonstrated how the 3rd respondent as the custodian of land records has been at the center of the dispute, leading to the authorization and registration of the subject land in the names of the 1st & 2nd respondents in total disregard to her constitutional right to land and protection of the law.
49. The petitioner in my considered view has therefore met the basic minimum of a constitutional petition which the respondents were able to understand and have been able to respond to the constitutional and statutory issues raised therein without raising any objection. None of the respondents have sought for any better particulars of the claim.
50. On the contrary the respondents were given sufficient time to reply to the petition.
51. The 3rd and 4th respondents failed to comply with rule 15 of the rules, which in my considered view is in mandatory terms as concerns the Hon Attorney General and any state organ to a constitutional petition. Instead, the 3rd & 4th respondents have opted to merely file written submissions which the courts have held, cannot replace pleadings or amount to evidence but are mere marketing tools as held in *Daniel Toroitich Arap Moi vs Mwangi Stephen Murithi* (2014) eKLR.
52. Therefore, the facts as set out by the petition as regards the acts of omission and omission by the 3rd respondent remains uncontroverted to the extent that the registration of the title in the name of the 1st and 2nd respondents ignored and or overlooked the law and the rights of the petitioner who to date continues to hold a title deed which has not recalled for cancellation, replacement, cancelled or a notice issued recalling it or seeking for the petitioner to show cause why it should not be cancelled and or recalled in favour of the 1st & 2nd respondents, in line with both the *Land Registration Act* .
53. In light of this I find the objection by the respondents that the petition lacks specificity and particulars of any constitutional infringement lacking merits.
54. Turning to whether a constitutional question has been raised and whether the cause of action is a tort which can be handled other than through a constitutional petition, in *Gabriel Mutava vs MD Kenya Ports Authority* (2016) eKLR, a constitutional controversy was defined as one which seeks answers and or solutions from the *Constitution* itself, such as its interpretation, the role of state organs and breach of constitutional rights and freedoms. courts have also held a constitutional court should not



be trivialized by bringing all manner of dispute which can as well be brought through the ordinary process's. Further courts have held not every statutory breach amount to a constitutional questions or controversy to be brought before a constitutional court. See [Patrick Mbaabu Karanja vs Kenyatta University](#) (2013) eKLR.

55. Additionally, where an alternative route or dispute mechanism exists under a statute, courts have held the constitutional court is not the first but the last port of call after exhaustion of the internal dispute mechanism under the statute as article 159 of the [Constitution](#) encourages alternative dispute resolution mechanism. See [CCK vs Royal Media Services Ltd](#) (2014) eKLR.
56. In this petition the petitioner has given a chronology of the events leading to the acquisition of the land through both her late father and brother through a perfected gift, occupation thereof till present; her arraignment in court and a successful appeal; later on, the illegal title to it to the 1st & 2nd respondents by the 3rd respondent in an irregular manner.
57. As a consequence, the petitioner averred the title deed held by the 1st & 2nd respondent was invalid, illegal and unconstitutional to the extent that the process and basis leading to its registration and issuance impeded her right to ownership of land under article 40 of the [Constitution](#), more so in view of her long and tedious litigation history.
58. The right to land as provided under the [Constitution](#) includes the right not to be deprived of ownership without the due process of the law.
59. The question whether the deprivation of the land contrary to the rights of the petitioner in the manner it was done by the 3rd respondent in tandem with the 1st & 2nd respondents in total disregard of the petitioner's right to possession and occupation is beyond the statute on land registration and the law of succession hence properly before this court.
60. The Probate Court was therefore right in declining to revoke the confirmed grant since such court lacks jurisdiction to determine land ownership rights.
61. The mandate and jurisdiction of a Probate Court is governed by the [Law of Succession Act](#) and the probate Rules made thereunder. The court's sole mandate is to administer testate and interstate estates. Any question arising therein an ownership of property is to be referred to a court of competent jurisdiction which is the ELC. In the event a Probate Court is faced with an issue relating to ownership of property under dispute, rule 43 of the [Probate Rules](#) requires such a property be isolated and its distribution deferred until issues of who owns such a property is determined. Musyoka J in [Re-estate of Alice Mumba Mutha \(deceased\)](#) (2017) eKLR said a probate court's role is to determine the assets of the deceased, his survivors and person with beneficial interest, finally distribute them amongst the survivors/ beneficiaries, handle disputes surrounding those parties. The court went on to hold that claims by and or against third parties who are neither survivors nor beneficiaries and are not within the province of a Probate Court to handle and determine ownership disputes since its sole mandate is to distribute properties among beneficiaries and legalities. This position has been echoed in a plethora of cases including [Isaac Kinyua & 3 others vs Hellen Kaigongi](#) (2018) eKLR, [Jospeh Kaberia Kumari vs Tony Mwenda Muthaura](#) (2021) eKLR.
62. The respondents have taken the view that the cause of action if any, is *res judicata* having been conclusively dwelt with by a Probate Court in Meru Succession Case No 752 of 2013. Given my finding above, the issues herein are beyond the Probate Court. They were not also determined to finality and conclusively



63. The issue of whether the doctrine of *res judicata* applies in constitutional petition was dealt with by the Supreme Court in [*John Florence Maritime Services Ltd & another vs Cabinet Secretary for Transport and Infrastructure & 3 others*](#) (2021) eKLR. The court reaffirmed the key elements to be demonstrated for the doctrine to apply namely that; a former judgment which was final was made on merits, rendered by a court of competent jurisdiction and was between identical parties on the same subject matter and or cause of action. The court held that in a constitutional petition the court is empowered to look beyond the process and not only examine but delve into the merits of a matter or a decision.
64. Citing with approval [*Mitu Bell Welfare Society vs KAA & 2 others*](#) (2021) eKLR the court said the constitutional court can move ahead to reaffirm the use of structural interdicts and supervisory orders to redress the violation of a fundamental right in order to allow the development of court sanction in the enforcement of human rights. The court held that a determination of a judicial review could not be termed as a final determination of issues under a constitutional petition since the considerations were different, the orders a court could grant are more expounded under a constitutional petition and therefore the outcomes are different.
65. The court went on to state that *res judicata* could only apply in the rarest and the clearest of cases in a constitutional petition which may include where there was potential for substantial injustice if a court did not hear a constitutional matter or issue on its merits and where a litigant had demonstrated special circumstances warranting the court to make an exception.
66. In [*CCK vs Royal Media Services Ltd & 5 others*](#) (2014) eKLR, the Supreme Court of Kenya held the concepts of *res judicata* operates to prevent causes of action or issues from being relitigated once they have been determined on the merits and prevent or limits a party by estoppel who has previously litigated a claim and lost it from taking a second bite of the cherry, with a view of bringing finality to litigation by avoiding multiplicities of proceedings and for protecting the integrity of the administration of justice all in the cause of fairness in the settlement of disputes.
67. Applying the above binding case law, have the respondents demonstrated that this is a rare and clear case and exceptional circumstances exist for this court to invoke the doctrine of *res judicata*? Put another way, can the petitioner be said to be in an institutional detour to attach the validity of previous decrees by seeking a different result from a different forum through a designated constitutional petition so as to evade the doctrine of *res judicata*? See [*Omondi vs NBK & others*](#) (2001) EA 177 and [*Okiya Omtatah Okoiti & another vs AG & 6 others*](#) (2014) eKLR.
68. As indicated elsewhere in this judgment, there exists a clear delineation of the role of Probate Courts vis a vis an Environment and Land Court as per the operating statutes.
69. Section 3 of the [*Law of Succession Act*](#) defines an estate to mean the free property of a deceased person which is that property he could legally, competently or freely dispose during his lifetime and in respect of which his interest has not terminated by his death. [*In Re Estate of Job Ndunda Muthike \(deceased\)*](#) (2018) eKLR, Odunga J held any property a deceased could not completely freely dispose while alive could not form part of his estate and could not form part of his confirmation of a grant. [*In Re-Estate of Reuben Mugesani \(deceased\)*](#) 2020 eKLR, Musyoka J held after confirmation of grant, property moves from the name of the deceased to that of beneficiaries named in the grant through transmissions which process is not defined anywhere under the [*Law of Succession Act*](#) but falls under the province of land laws.
70. The 1st & 2nd respondents took the view that the issues raised herein were before the Probate Court where the petitioner was a party and the court determined it conclusively by finding her allegations without merits. The 1st & 2nd respondents in their reply and submissions say the cause of action was



- determined and valid orders issued with necessitated the registration of the land in their name by the 3rd respondents.
71. The appeal by the petitioner in the High Court was determined on November 13, 2007 and the conviction and sentence set aside. Consequently, the recommendations by the trial court to the land registrar to delete her name as the registered owner pending the appointment of a legal representative to the estate stood invalidated.
 72. The ruling by Sitati J, now retired and Ouko J as he then was were made on March 16, 2006 and October 12, 2007 respectively. It therefore goes without saying that after the November 13, 2007, the respondents knew as a matter of fact and law that the interests and rights of the petitioner on the suit land were valid, legal and protectable in law hence the reason the 3rd respondent issued her with a title deed dated February 20, 2015 for LR No Nkuene/Taita/1631 and which has never been recalled, cancelled and or invalidated to date by the 3rd respondent.
 73. The 3rd and 4th respondents have submitted on the doctrine of regularity and urged the court guided by *Chief Land Registrar vs Tirop (supra)* to find that the 3rd respondent acted regularly by issuing the title deed to the 1st and 2nd respondents as per entries number 16, 17 and 18 in the copy of record for LR No 1631 in exercise of its legal or statutory powers and duties.
 74. By the time the 1st & 2nd respondents filed Chuka Succession Cause No. 41 of 2010 which later became Meru Succession Cause No 752 of 2013 and included LR No 1631 as forming part of the deceased property, the said property in law was not free property which the deceased could dispose of during his lifetime.
 75. The 1st and 2nd respondents knew it but irregularly proceeded to include it an mislead the court to distribute it. Eventually, the two proceeded to cause the 3rd respondent to register and transfer it to them in total disregard of the rights of the petitioner.
 76. Sections 60 & 87 of the *Land Registration Act* requires that the Land Registrar to exercise and safeguard the rights of the registered owner including a right to be heard before the title deed is replaced. Section 80 of the *Land Registration Act* requires that an order of court for the cancellation of title where a title is issued by mistake or fraud. Subsection (2) states that a register shall not be rectified to affect the title unless the proprietor has been notified or has knowledge of the omission.
 77. The doctrine of the presumption of regularity is rebuttable in law. The petitioner has laid out the illegalities, irregularities and deprivation of her rights by the 3rd respondent in favour of the 1st and 2nd respondents without following due process leading to deprivation of right to land.
 78. The 3rd respondent has opted not to controvert or challenge those facts and lay before the court the order which cancelled the title in the first instance and secondly, whether to justify its actions in view of an article 40 of the *Constitution* and the Land laws.
 79. The 3rd respondent has not produced before this court anything to show that there was a valid court order for the cancellation and recall of the petitioner's title and or a duly filed and executed transfer forms so that the court can presume the regularity of the its actions.
 80. The court cannot assume that there was due process without evidence. The 3rd respondent is the custodian of the said evidence. In my considered view, the 3rd respondent failed to follow the law and hence denied and infringed on the rights of the petition on land and due protection of that law.
 81. The 3rd respondents failed to undertake his powers under section 14 of the *Land Registration Act* and instead deprived the petitioner's right under article 40 (3) of the *Constitution*.



82. When a title is under investigation, it is not enough for a party to waive it. The root of the title must be traced and every party has to show that their title has a good foundation and was passed properly to the current title holder. See *Hubert L Martin & 2 others vs Margaret Kamare & 5 others* (2016) eKLR, *Munyu Maina vs Hiram Gathiba Maina* (2013) eKLR. In *Zachariah Wambugu Gathimu & another vs John Ndungu Maina* (2019) eKLR, the court held that a title deed issued in contravention of sections 45 and 55 of the *Law of Succession Act* was obtained illegally, unprocedurally and or through a corrupt scheme hence was liable to be cancelled under Section 26 of the *Land Registration Act*. See also *Evanson Wambugu Gachugi vs Simon Wainaina Gatwiki & 2 others* (2014) eKLR.
83. The 3rd respondent has failed to demonstrate how there was due performance of their duties and responsibilities. Evidence produced by the petitioner shows that there was dereliction of duty on the part of the 3rd respondent. Section 112 of the *Evidence Act* provides that in Civil Proceedings when any fact is within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.
84. In this petition, the facts of compliance with the law in effecting and transferring the land in favour of the 1st & 2nd respondents without first cancelling and or summoning and or notifying the petitioner who had a valid title deed issued by the same office was within the knowledge of the 3rd respondent who despite leave to explain out his actions so that the court can presume its statutory and constitutional compliance, failed to seize the opportunity and explain it out before court.
85. It is either the 3rd respondent knew about the illegality or irregularities or failed to exercise due diligence before embarking on the transaction and hence acted outside the law to the detriment of the constitutional right to protection of right to property of the petitioner.
86. In *Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & another* (2013) eKLR, the court held that the rights of a real title holder needed to be protected.
87. In *Chemei Investments Ltd vs the AG and others* Nairobi Petition No 94 of 2008, the court said the Constitution protects a higher value that of integrity and the right to land which cannot be side stepped by imposing legal blinders based on indefeasibility.
88. In *Alice Chemutai Too, vs Nickson K Kori & 2 others* (2015) eKLR, the court said a title deed procured through misrepresentation could be impeached where vitiating factors point at obtainment, unprocedurally, illegally or through corrupt scheme under section 46 (1) (b) of the *Land Registration Act*.
89. In *County Government of Migori vs Registered Trustees of Catholic Diocese of Homabay & 2 others* (2015) eKLR Okongo J stated; “..... the land registrar had no power under Sections 79 of the *Land Registration Act 2012* to transfer land from one proprietor to another through rectification of the register.... The land registrar has powers to correct errors and omissions in the register only in formal matters and in cases where such correction does not necessarily materially affect the interest of any proprietor of land and where all the affected party’s consent to the correction.... what the land registrar was engaged in here was an act of impunity and abuse of public office in its raw form. The land registrar had no power to cancel a title that was in the name of the council and purport to transfer or to register the suit property in the name of the first respondent in the guise of correcting an error in the register. The transaction was an absolute nullity”.
90. In *PCEA (Uthiru Church) & another vs Kiholo & 3 others* Civil Appeal 303 of 2018 (2022) KECA 49 (KLR) February 4, 2022 (judgment) the court of appeal held; “.... the land registrar did no have power



to transfer ownership of the suit property from the native land trust board to Ndibo Nthenge. A new title to land cannot be conferred by way of a rectification”.

91. The 1st & 2nd respondents knew as a matter of fact that the criminal charges against the petitioner were vacated as at November 13, 2007 by Hon Justice William Ouko as he then was but still went ahead to deliberately include the LR 1631 as forming part of the estate of the deceased yet the said property did not form part of the estate.
92. The 1st and 2nd respondents still presented documents which they have not produced before this court to the 3rd respondent who proceeded to issue a new title on the same property while a title deed was in existence not so long ago issued by the same office to the petitioner.
93. The innocence of the 1st & 2nd respondents in the whole exercise is suspect and so is that of the 3rd respondent. The intention was clear that they were out to steal a match and deprive the petitioner of her land rights.
94. The petitioner has asked for general damages against the respondents for breach of her constitutional rights.
95. In *Park Towers Ltd vs John Mithamo Njika & 7 others* (2014) eKLR, Mutungi J held a party need not prove that he suffered specific damage or loss to be awarded damages and the court is under a duty to assess damages awardable depending on the unique facts and circumstances of each case.
96. In *Gitobu Imanyara & 2 others vs AG* (2016) eKLR, the court held damages arising out of a constitutional violation also known as constitutional tort actions are within public law remedies and different from the common law damages for tort under private law of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements and a court should exercise rationality and proportionality in determining them.
97. Angote J granted Kshs 5,000,000/= for breach of constitutional right to property. In this petition the petitioner still occupies the suit land and is yet to be evicted. She did not plead or offer evidence of the nature of the loss and damages. The 3rd respondent however failed to protect the petitioner’s right to property.
98. In *Peter Ndegwa Kiai t/a Pema Wines & Spirits vs AG & 2 others* Civil Appeal 243 of 2017 (2021) KECA 328 (KLR) December 17, 2021 (Judgment) the Court of Appeal held the damages are awarded for purposes of declaring and vindicating legal and constitutional rights and do not require proof of harm. Even though the petitioner had not specially pleaded the loss incurred, the court granted Kshs 5,000,000/= as compensation.
99. In the premises I find the petition proved to the required standards and proceed to grant prayer numbers. (1), (2) (3) and Kshs 2 million general damages for prayer number (5), payable by the 3rd and 4th respondents. Costs of the petition shall also be paid by the respondents jointly and severally.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 2ND DAY OF NOVEMBER, 2022

In presence of:

C/A: Kananu

Mwenda for Kieti for 3rd & 4th respondents

HON. C.K. NZILI



ELC JUDGE

