



**Igwe Geeral Stores Ltd & 2 others v Board of Trustees, National Social Security Fund & 3 others (Environment & Land Petition E008 of 2020) [2022] KEELC 3191 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3191 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND PETITION E008 OF 2020**

**JO MBOYA, J**

**JULY 28, 2022**

**BETWEEN**

**IGWE GEERAL STORES LTD ..... 1<sup>ST</sup> PETITIONER  
JOHN MUTUNGA MWANGI ..... 2<sup>ND</sup> PETITIONER  
MARGARET WAIYEGO MUTUNGA ..... 3<sup>RD</sup> PETITIONER**

**AND**

**BOARD OF TRUSTEES, NATIONAL SOCIAL SECURITY  
FUND ..... 1<sup>ST</sup> RESPONDENT  
NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT  
CHIEF LAND REGISTRAR ..... 3<sup>RD</sup> RESPONDENT  
ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. Vide the petition dated the August 10, 2020, the petitioners herein have approached the court seeking for the following reliefs;
  - a. A Declaration to issue that the 1<sup>st</sup> petitioner was an Innocent Purchaser for Value without Notice of Plot No 209/21246 (original No. I.R No. 209/11314/3) from the 1<sup>st</sup> Respondent.
  - b. A Declaration do issue that the 2<sup>nd</sup> Respondent in failing to furnish the 1<sup>st</sup> petitioner with the Particulars of the Complaint raised concerning the petitioner's ownership of the suit property and in failing to set out any allegations of wrong doing by the petitioners that they were required to answer, the 2<sup>nd</sup> Respondent violated the petitioner's Fundamental Rights to Fair Administrative Justice under article 47 of *the Constitution*, 2010.



- c. A Declaration do issue that the petitioners' were entitled to payment in full of Just Compensation for the suitPlot L.R No. 209/21246 (OriginalNo. L.R No, 2019/21246).
  - d. A Declaration do issue that the petitioners' were entitled to Payment in Full of Just Compensation for the suit property known as L.R No. 209/21246 (OriginalNo. L.R No, 2019/21246) and the Developments thereon from the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents upon the Plot's Compulsory Acquisition by the 2<sup>nd</sup> respondent under articles 40(3)(b)(i) of *the Constitution*,2010.
  - e. A Declaration do issue that the Compulsory Acquisition of the 1<sup>st</sup> petitioner's Plot, same was entitled to payment in full of just compensation for the suit property known as L.R No. 209/21246 (Original No. L.R No, 2019/21246) and that by the Respondent acquiring same without compensation was a violation of the petitioners' Fundamental Rights to protection of Property under articles 40(3)(b)(i) of *the constitution*.
  - f. An Order for such Full and Just compensation for the 1<sup>st</sup> petitioner's leasehold Interests in the suit Plot L.R No. 209/21246 (Original No. L.R No, 2019/21246) pursuant to Compulsory acquisition by the 2<sup>nd</sup> Respondent as shall be assessed by this Honourable Court against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents jointly and/or severally.
  - g. In the alternative to prayer (vi) above, an Order do issue directing the 1<sup>st</sup> Respondent to pay to the petitioners' the value of the leasehold interest in plot L.R No. 209/21246 (Original No. L.R No, 2019/21246) as at the time of its Compulsory acquisition by the 2<sup>nd</sup> respondent as shall be assessed by this Honourable Court.
  - h. An order for Mesne Profits against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents jointly and/or severally in the sum of Kshs.480, 000/= Only, per Month from August 2017 the date of Compulsory acquisition of the petitioner's suit plot without Compensation until the date of Judgment.
  - i. An Order for General Damages as shall be assessed by the Honourable Court against the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Respondent for violation of the 1<sup>st</sup> petitioner's Fundamental Right to protection of Property under article 40(1) as read with article 23(3)(e) of *the Constitution*, 2010.
  - j. An order for General Damages as shall be assessed by the Honourable Court against the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Respondent for violation of the petitioners' Fundamental Right to Fair Administrative Action/Justice under article 47(1) as read with article 23(3)(e) of *the Constitution*, 2010.
  - k. An Order for General Damages as shall be assessed by the Honourable Court against the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Respondent for Mental and Psychological Distress, Pain and Suffering caused to the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners' in Violation of article 29(d) and (f) of the Constitutio, 2010..
  - l. Exemplary and/or aggravated Damages.
  - m. Interest on prayer (h) to (l) until payment in full.
  - n. Costs of this petition be borne by the Respondents
2. The subject Petition is premised on the various grounds which have been enumerated in the body of the Petition and same is further supported by the affidavit of John Mutunga Mwangi sworn on the August 10, 2020 and to which the deponent has attached various annextures running from annexture JMM 1 to JMM 23.



3. Upon service of the subject Petition herein, the 1<sup>st</sup> Respondent duly entered appearance and thereafter filed a Replying Affidavit sworn on the October 18, 2021.
4. On the other hand, the 2<sup>nd</sup> Respondent herein though served neither entered appearance nor filed any Answer to the Petition or response at all.
5. On behalf of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents same duly entered appearance and thereafter filed a Replying Affidavit sworn on the 7<sup>th</sup> June 2022 and in respect of which same have annexed a total of 15 documents.

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

#### **petitioners' Case:**

6. Vide Supporting Affidavit sworn on the August 10, 2020, one John Mutunga Mwangi, hereafter referred to as the deponent, has averred that same is one of the Directors of the 1<sup>st</sup> petitioner and hence same has been duly authorized and/or mandated to swear the affidavit on behalf of the 1<sup>st</sup> and 3<sup>rd</sup> petitioners.
7. On the other hand, the deponent has averred that sometime in the year 2003 the 3<sup>rd</sup> petitioner and himself negotiated for a lease with the 1<sup>st</sup> Respondent over a portion of L.R No 209/11314 belonging to and registered in the names of the 1<sup>st</sup> Respondent.
8. Besides, the deponent has further averred that in December 2003 the Board of Trustees of the 1<sup>st</sup> Respondent herein acceded to the request by and/or on behalf of the 3<sup>rd</sup> petitioner and the deponent and thereby agreed to demise unto the 3<sup>rd</sup> petitioner and the deponent a portion of L.R No 209/11314 measuring 5.5 acres for a period of six years.
9. Based on the foregoing, the petitioner has averred that thereafter a Lease Agreement was duly crafted and same was executed by the Managing Trustees of the 1<sup>st</sup> Respondent, on one part and the 3<sup>rd</sup> petitioner and the deponent, on the other hand.
10. Further, the deponent has averred that the 3<sup>rd</sup> petitioner and himself thereafter took possession of the demised portion of the land and commenced development thereon. For clarity, the deponent has averred that same proceeded to and constructed a Petrol Station, namely, Gulf Energy Petrol Station-Outering.
11. It has further been averred that whilst the 3<sup>rd</sup> petitioner and the Deponent were in occupation of the subject Property, the 1<sup>st</sup> Respondent herein proceeded to and subdivided the subject property into various Plots and the portion which was occupied by the 3<sup>rd</sup> petitioner and the deponent formed part of a resultant subdivision, namely, L.R 209/11314/3.
12. Be that as it may, the deponent has averred that in the year 2007, the 3<sup>rd</sup> petitioner and himself approached the 1<sup>st</sup> Respondent with a view to purchasing a portion of l.R No. 209/11314/3 measuring 1 acre and pursuant to the approach, the 1<sup>st</sup> Respondent agreed and/or covenanted to sell to and in favor of the 1<sup>st</sup> petitioner the designated portion measuring 1 acre at an agreed consideration of Kshs.11, 500, 000/= only.
13. Further, the deponent has averred that pursuant to the Mutual Agreement to sell, a Sale agreement was thereafter prepared between the 1<sup>st</sup> petitioner and the 1<sup>st</sup> Respondent and same was duly executed by the parties thereto.



14. The deponent has also averred that following the execution of the Sale Agreement and upon the payment of the total consideration, the 1<sup>st</sup> Respondent herein proceeded to and indeed subdivided L.R No. 209/11314/3, culminating into the creation of inter-alia, L.R No. 209/ 21246, hereinafter referred to as the suit property.
15. The deponent has further averred that after the subdivision and/or creation of L.R No. 209/21246 same was thereafter to be transferred and registered in the name of the 1<sup>st</sup> petitioner.
16. Nevertheless, the deponent has continued to and stated that even though the suit property had not effectively been transferred and registered in the name of the 1<sup>st</sup> petitioner, but because the 1<sup>st</sup> petitioner had fully paid the purchase price, the 1<sup>st</sup> petitioner proceeded to and constructed two further buildings, namely, Business Block, other than the Petrol Station.
17. Further it has been averred that the 1<sup>st</sup> petitioner thereafter operated the Petrol Station and the Restaurant that was located in the suit property for a period of 4 years, before same demised the premises to various Tenants.
18. Be that as it may, the deponent has averred that on or about the 29<sup>th</sup> August 2014, before the 1<sup>st</sup> Respondent could transfer and cause the suit property to be registered in the name of the 1<sup>st</sup> petitioner, the 2<sup>nd</sup> Respondent herein gazzetted various plots along outering Road for Compulsory acquisition on behalf of Kenya Urban Roads Authority (KURA) for the expansion of the Outering Road.
19. However, the deponent had further averred that the title in respect of L.R No. 209/ 21246, in respect of which the 1<sup>st</sup> petitioner's Business Premises was standing, was not one of the Properties that was reflected in the gazette notice.
20. It has further been averred that as a result of the omission of L.R No. 209/ 21246, from the gazette notice for Compulsory acquisition, the deponent herein enquired from KURA whether the property, namely, L.R No. 209/21246, was likely to be affected by the intended project.
21. Besides, the deponent has averred that pursuant to the foregoing enquiry, same was duly informed by the officials of KURA that indeed the said property, that is, L.R No. 209/21246, would indeed be affected.
22. Pursuant to the foregoing, the deponent has further averred that same therefore gathered the ownership documents on behalf of the 1<sup>st</sup> petitioner and proceeded to present same to the National Land Commission with a view to staking a claim for compensation.
23. Notwithstanding the foregoing, the deponent has averred that or the 18<sup>th</sup> November 2014, before same could receive communication in respect of compensation, the 2<sup>nd</sup> Respondent herein published various notices in the Newspapers expressing her intention to Review Grants in respect of various/numerous titles including the title of the suit property.
24. Nevertheless, the deponent has averred that despite the fact that the Respondents had published Notices in the Newspapers showing the intention to Review the Grants including the title to the suit property, the 2<sup>nd</sup> Respondent however did not furnish the deponent with a copy of any Complaint raised as pertains to the suit property, over and in respect of which the 1<sup>st</sup> petitioner had accrued lawful and legitimate interest.
25. On the other hand, the deponent has further averred that on the January 19, 2015, the 2<sup>nd</sup> Respondent proceeded to and published notices in the Newspaper relating to the convened Public Hearings concerning Review of the Grants in respect of various Titles, including the Title of the suit property.



26. Based on the foregoing, the deponent has averred that same organized and indeed attended the Public Hearings before the 2<sup>nd</sup> Respondent and whereupon same narrated to the 2<sup>nd</sup> Respondent the background, history and circumstances leading to the 1<sup>st</sup> petitioner's claim to and in respect of the suit property.
27. Other than the foregoing, the deponent has also averred that same proceeded to and submitted to the 2<sup>nd</sup> Respondent assorted documents relating to the 1<sup>st</sup> petitioner's claim unto to the title of the suit property.
28. Be that as it may, the deponent has averred that in late 2015, the 2<sup>nd</sup> Respondent herein rendered her decision and same proceeded to and reviewed the Grant of title, which belonged to and was registered in favor of the 1<sup>st</sup> Respondent including the resultant subdivision, namely, L.R No. 209/11314/3.
29. Besides, the deponent has further stated that following the review of the Grant of title belonging to the 1<sup>st</sup> Respondent, the resultant subdivision, including inter alia, L.R No. 209/21246, which reflects the 1<sup>st</sup> petitioner's Interests was also nullified and/or revoked.
30. Notwithstanding the foregoing, the deponent has averred that the 2<sup>nd</sup> Respondent however declined to make any Compensation to and/or in favor of the 1<sup>st</sup> petitioner on account of compulsory acquisition.
31. However, the deponent has averred that the 2<sup>nd</sup> Respondent decreed Compensation and thereafter duly compensated the 1<sup>st</sup> petitioner for the Permanent Developments that had been erected on the Suit Property.
32. On the other hand, the deponent has averred that the 2<sup>nd</sup> Respondent advised and/or informed the deponent to pursue the issue of Compensation of the Land with the 1<sup>st</sup> Respondent, who (sic) sold same unto the 1<sup>st</sup> petitioner.
33. Premised on the decision of the 2<sup>nd</sup> Respondent, which declined to compensate the 1<sup>st</sup> petitioner for the loss of the land, the deponent averred that same thereafter approached the 1<sup>st</sup> Respondent with a view to procuring compensation for the loss of the land.
34. Nonetheless, the deponent has averred that the 1<sup>st</sup> Respondent intimated that same was not happy with the Decision of the 2<sup>nd</sup> Respondent and that same was keen to apply for a review in respect of the impugned decision.
35. For clarity, the deponent has further averred that indeed the 2<sup>nd</sup> Respondent proceeded to and filed a Review Application seeking to review and/or revise the decision of the 2<sup>nd</sup> Respondent, which had nullified the title of the suit property albeit without compensation for the loss of land.
36. Nevertheless, the deponent has proceeded to and stated that the 2<sup>nd</sup> Respondent indeed entertained the Review Application mounted by and/or on behalf of the 1<sup>st</sup> respondent, but the review application was latter dismissed and communication to that effect rendered to the 1<sup>st</sup> Respondent.
37. However, the deponent has stated that despite the dismissal of the Application for review by and/or on behalf of the 1<sup>st</sup> Respondent, the 2<sup>nd</sup> Respondent observed that indeed the 1<sup>st</sup> petitioner was an Innocent Purchaser of the suit plot for value from the 1<sup>st</sup> Respondent.
38. Further, the deponent has averred that the 2<sup>nd</sup> Respondent stated that the 1<sup>st</sup> petitioner's compensation can only be procured and/or obtained from the 1<sup>st</sup> Respondent and not otherwise.



39. The deponent has averred that premised on the revocation and/or nullification of the title in respect of which the 1<sup>st</sup> petitioner had interest, the 1<sup>st</sup> petitioner thereafter vacated the suit property and surrendered their rights and or interest in respect of same to the 2<sup>nd</sup> Respondent.
40. Be that as it may, the deponent has further averred that after the refusal by the 2<sup>nd</sup> Respondent to compensate the 1<sup>st</sup> petitioner for the loss of land, same proceeded to and instructed a valuer to value the suit property with a view to ascertaining the monetary value thereof.
41. Besides, it has been averred that the nominated valuer thereafter proceeded to and carried out the valuation exercise, culminating into the preparation of a valuation report dated the September 16, 2015. For clarity, it was indicated that the value in respect of the suit property stood at Kshs.100, 000, 000/= only.
42. Other than the foregoing, it has also been averred that at the time when the suit property was (sic) compulsorily acquired the development thereon was generating the Monthly rent of Kshs.480, 000/= only and that the said monies, constituted the only source of income in favor of the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners.
43. Besides, the deponent has averred that the determination by the 2<sup>nd</sup> Respondent to compulsorily acquire the 1<sup>st</sup> petitioner's property, without due compensation has caused the 3<sup>rd</sup> petitioner and himself untold mental shock, psychological distress, pain and suffering for the los of the fixed assets in which same had invested their entire lifelong earnings.
44. In the premises, it has thus been averred that the compulsory acquisition of the suit property, without due Compensation to the 1<sup>st</sup> petitioner, was therefore illegal, unlawful and unconstitutional.
45. Further, the deponent has averred that having been adjudged to be Innocent purchasers over and in respect of the suit property, it behooved the 2<sup>nd</sup> Respondent to decree and pay prompt compensation to the 1<sup>st</sup> petitioner on account of the suit property.
46. Owing to the foregoing, the deponent has therefore contended that the manner in which the 2<sup>nd</sup> Respondent carried out and/or conducted the review of the Grant and title in respect of the suit property and by failing to compensate the 1<sup>st</sup> petitioner, same therefore breached, violated and/or infringed upon the 1<sup>st</sup> petitioners constitutional rights to own property.
47. In the circumstances, the deponent has averred that the 1<sup>st</sup> petitioners Constitutional rights as underlined vide articles 40(1), 47 and 232 of the Constitution 2010, have therefore been breached, violated and/or infringed upon.
48. In a nutshell, the deponent has therefore contended that the 1<sup>st</sup> petitioner is entitled to Due compensation on account of the suit property, which was compulsorily acquired by the 2<sup>nd</sup> Respondent, albeit on behalf of KURA.

**Response by the 3<sup>rd</sup> & 4<sup>th</sup> Respondents:**

49. The 3<sup>rd</sup> and 4<sup>th</sup> filed a replying affidavit sworn by one Abdul Kadir Ibrahim Jatani, sworn on the 7<sup>th</sup> June 2022 and in respect of which, same has averred that he is the Chief surveyor with KURA, for and on whose behalf the compulsory acquisition was being undertaken.
50. Further, the deponent has averred that KURA was keen to undertake a project to expand the Outering Road and that during the Design stage of the project, same identified various properties, which had been hived of the Transportation Corridor.



51. It was further averred that part of the Properties which had been hived off on the transportation corridors included L.R No. 209/21246 (Original No. L.R No, 209/11314/3) being one of those properties which lie at the junction within Jogoo Road, Outering and Kenya Railway Reserve.
52. Further, the deponent has averred that upon the discovery of the illegality in the alienation and/or annexation of part of what was hitherto the transport corridor, KURA referred the matter to the 2<sup>nd</sup> Respondent, by virtue of being the Constitutional body that is mandated and/or otherwise authorized to Review Grants/title for purposes of ascertaining the propriety or otherwise of such title.
53. Subsequently, the deponent has averred that the 2<sup>nd</sup> Respondent took up the Complaint on behalf of KURA and thereafter the 2<sup>nd</sup> Respondent conducted the requisite Public Hearings, culminating into the rendition of her decision on the 27<sup>th</sup> October 2015.
54. On the other hand, it has been averred that the 2<sup>nd</sup> Respondent indeed proceeded to and ascertained that the Grant and/or title in respect of the suit property had been illegally and/or unlawfully excised from the transport corridor, which ought not to be annexed and/or alienated.
55. In the premises, the deponent has averred that the suit property having been unlawfully hived off from the transport corridor, its origin was therefore illegal and unlawful. Consequently, the deponent has averred that the 2<sup>nd</sup> Respondent was therefore within the law in revoking and/or nullifying the title in respect of the suit property.
56. At any rate, the deponent has thereafter proceeded to and supplied a detailed history tracing back the origin of L.R No 209/11314, which is the title that gave rise to the suit property, the latter whose nullification has precipitated the filing of the subject Petition.
57. Finally, the deponent has averred that owing to the fact that L.R No 209/11314, hitherto registered in the name of the 1<sup>st</sup> Respondent was illegally acquired, the said title could therefore attract any protection pursuant to and under the provisions of article 40 of *the Constitution* 2010.
58. Based on the foregoing, the deponent has therefore contended that the claim by and/or on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> petitioners, is not only misconceived but is legally untenable.
59. For clarity, the deponent has stated that it would be contrary to Public policy and interests for Public Funds to utilized to compensate the 1<sup>st</sup> petitioner herein, as pertains to the title of the suit property, which was illegally and unlawfully acquired.

### **Response by the 1<sup>st</sup> Respondent**

60. The 1<sup>st</sup> Respondent herein responded to the Petition vide replying affidavit sworn on the October 18, 2021 and in respect of which it was contended that the 1<sup>st</sup> Respondent is a Statutorily Corporation created and established under an Act of Parliament.
61. Further, it was averred that the 1<sup>st</sup> Respondent herein identified a property situate along Outering Road, within the City of Nairobi and thereafter carried out and/or undertook due diligence to ascertain and/or authenticate the validity of the title of the property, whose details were ascertained as L.R No. 209/11314
62. Further, it has been averred that after due diligence was carried out, it was established that the said property belonged to and was registered in the name of Endesha Multipurpose Cooperative Society Limited, who were duly issued with the requisite title documents.



63. On the other hand, it has been averred that after the due diligence, the 1<sup>st</sup> Respondent engaged Endesha Multi-Purpose Cooperative Society Limited, with a view to purchase the said property, culminating into a Sale agreement being prepared and/or executed by the respective Parties.
64. On the other hand, it has further been averred that towards and in a bid to purchase and/or acquire L.R No. 209/11314, the 1<sup>st</sup> Respondent thereafter engaged the various Government Agencies, including the Treasury, to procure and obtain the requisite approval, towards purchase and acquisition of the suit property.
65. At any rate, it has been averred that the 1<sup>st</sup> Respondent proceeded to and thereafter purchased the property in question, culminating into the transfer and registration of same in her name.
66. Be that as it may, it has been stated that thereafter the 1<sup>st</sup> Respondent carried out and/or undertook subdivisions over and in respect of the said property culminating into the creation of inter-alia, L.R No. 209/21246, which same entered into a sale agreement to dispose off, to and in favor of the 1<sup>st</sup> petitioner herein.
67. Further, it has been averred that by virtue of having been a Purchaser of the Property, namely, L.R 209/11314, her title thereto ought not to have been impeached, impugned and/or revoked, in the manner same was dealt with by the 2<sup>nd</sup> Respondent.
68. Besides, it has also been stated that following the delivery of the ruling and/or decision of the 2<sup>nd</sup> Respondent, the 1<sup>st</sup> Respondent herein was aggrieved and/or dissatisfied with the determination by the 2<sup>nd</sup> Respondent and same thereafter filed an Appeal, seeking Review of the decision of the 2<sup>nd</sup> Respondent.
69. Nevertheless, it has been averred that the Appeal, filed and/or mounted by the 1<sup>st</sup> Respondent was ultimately dismissed by the 2<sup>nd</sup> Respondent vide decision communicated on the July 18, 2017.
70. Be that as it may, it has been underscored on behalf of the 1<sup>st</sup> Respondent that the decision of the 2<sup>nd</sup> Respondent which nullified the title of L.R No. 209/11314/3, which included the suit property, was unlawful.
71. Finally, the 1<sup>st</sup> Respondent has contended that the petitioners' claim does not lie against herself, but instead same lies against the 2<sup>nd</sup> Respondent, who indeed confirmed that the 1<sup>st</sup> petitioner was an Innocent Purchaser for Value.

**Response by the 2<sup>nd</sup> Respondent:**

72. Despite having been duly served with the Petition herein, the 2<sup>nd</sup> Respondent neither entered appearance nor filed any Response, in opposition to the Petition.
73. On the other hand, the 2<sup>nd</sup> Respondent also did not participate in the proceedings in respect of the subject matter.

**Submissions by the Parties:**

74. The Parties herein agreed to canvass and/or dispose of the Petition on the basis of affidavit Evidence and Written submissions.
75. Pursuant to the foregoing, the petitioners' filed their written submissions dated the April 25, 2022 and in respect of which; same identified assorted issues for determination;





76. First and foremost, the petitioners' contended that after carrying out due diligence, the 1<sup>st</sup> petitioner herein entered into a valid sale agreement with the 1<sup>st</sup> Respondent, who was at all material times the registered proprietor and/or owner of L.R No. 209/11314/3.
77. Further, it has been submitted that to the extent that the 1<sup>st</sup> petitioner paid to and in favor of the 1<sup>st</sup> Respondent the requisite consideration, same therefore became a bona fide purchaser for value and hence her interest over and in respect L.R No. 209/21246 (Original No. I.R 209/11314/3) ought not to have been invalidated and/or revoked.
78. Secondly, it has been submitted that the 1<sup>ST</sup> petitioner herein were never accorded a Fair Hearing, prior to and or before the title in respect of the suit property was revoked and/or nullified by the 2<sup>nd</sup> Respondent.
79. In this regard, it has been submitted that the petitioners' Right to Fair Administrative Action were also breached, violated and/or infringed upon.
80. Thirdly, it has been submitted that the 2<sup>nd</sup> Respondent herein was not seized and/or possessed of the requisite power and/or mandate to revoke the title in respect of L.R No 209/21246 (Original No. I.R No. 209/11314/3), insofar as same was acquired vide lawful purchase. In this regard, counsel for the petitioner submitted that the said title were insulated vide section 14(7) of the National Land Commission Act, 2012.
81. Fourthly, counsel for the petitioners has submitted that to the extent that the 1<sup>st</sup> petitioner was an Innocent purchaser in respect of L.R No 209/21246 (original number I.R 209/11314/3), same ought to have been compensated for the value of the land, pursuant to the provisions of article 40 of the Constitution 2010.
82. Other than the foregoing, the petitioners have also submitted that at the time when the suit property was compulsorily acquired, same were deriving rental income therefrom in the sum of Kshs.480, 000/= Only, per month.
83. In this regard, the petitioners therefore contend that same are entitled to compensation on account of Mesne Profit. For clarity, the petitioners have sought for Mesne Profit at the rate of Kshs.480, 000/= Only, per month w.e.f August 2017 till payment in full.
84. Fifthly, the petitioners have also submitted that other than Mesne Profits same are also entitled to General Damages for breach of the petitioners' Fundamental rights of the protection of the suit property, which has been quantified and/ or ascertained in the sum of Kshs.30, 000, 000/=Only.
85. Sixthly, the petitioners have also submitted that same are also entitled to Compensation for breach and/or violation of their Right to Fair Administrative Justice under the provisions of article 47 of the Constitution 2010.
86. Further, the petitioners have also submitted that same are also entitled to General Damages for Mental anguish, psychological Distress, Pain and Suffering in the sum of Kshs.50, 000, 000/= Only.
87. Finally the petitioners have also contended that given the circumstances under which the title was revoked, same are entitled to Exemplary and Aggravated Damages in the sum of Kshs.20, 000, 000/= only.
88. In support of the foregoing submissions, Learned Counsel for the petitioners has cited and relied on various decisions including; Mwangi Stephen Muriithi versus National Land commission & 3 others (2018)eKLR, Zinj Ltd versus Attorney General & 3 others (2019)eKLR, Kenatco Transport



*Company Ltd versus Samuel Gikaru Njoroge & another* (2021)eKLR, *Susan Kaikai versus Ministry of Cooperative Development & 2 others* (2020)eKLR, *Attorney General versus Zinj Ltd* (2021) KESC 23(KLR), *Shimoni Resort versus Registrar of Titles & 5 Others* (2017)eKLR, *Joseph Kipkemboi Tanui versus Chief of Kenya Defense Forces & 2 Others* (2019)eKLR, *Paulin Kabiga Waititu versus County Government of Nairobi & Another* (2021)eKLR, *Mike Maina Kamau versus Attorney General* (2017)eKLR, *Dvaid Gitau Thairu versus County Government of Machakos & 2 Others* (2020)eKLR and *Belgo Holding Limited versus Kenya Urban Roads Authority* (2020)eKLR.

89. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents filed their written submissions dated the June 7, 2022 and in respect of which same ventilated and or addressed two issues only. For clarity, the 1<sup>st</sup> issue that was addressed by Learned Counsel on behalf of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents related to the propriety in the revocation of the title over and in respect L.R No. 209/21246 (Original Number I.R 209/11314/3).
90. According to Counsel, the original parcel of land, namely, L.R No. 209/11314, which gave rise to L.R No 209/11314/3, was part and parcel of the Transport corridor, which was reserved for the expansion of the Outering Road.
91. In the premises, Learned Counsel submitted that the original property having been hived out of the transport corridor, albeit illegally and/or unlawfully, same was rightfully and lawfully revoked by the 2<sup>nd</sup> Respondent.
92. In any event, Learned Counsel further submitted that the suit property having been unlawfully acquired, the petitioners herein cannot seek to attract and/or accrue any protection vide the provision of Article 40 of *the Constitution* 2010.
93. Secondly, counsel for the 3<sup>rd</sup> and 4<sup>th</sup> Respondents submitted that the petitioners herein have not established and/or proved that any of their Constitutional and Fundamental rights have been violated either as alleged or at all.
94. Consequently, it has been submitted that in the absence of proof, the petitioners herein are not entitled to compensation for breach and/or violation of (sic) their constitutional rights or at all.
95. At any rate, Learned Counsel for the 3<sup>rd</sup> and 4<sup>th</sup> Respondents has further submitted that if any rights of the petitioners were breached and/or violated, such rights touched on and/or concerned a property that had been unlawfully acquired and hence no compensation can be granted and/or awarded. In this regard, counsel invoked and relied on the provisions of Article 40(6) of *the Constitution*, 2010.
96. In support of the foregoing submissions, Learned Counsel for the 3<sup>rd</sup> and 4<sup>th</sup> Respondents have cited and relied on various decisions, inter alia, *Regnal Oil Kenya Ltd versus National Land Commission & Another* Nairobi ELC Petition no. 175 of 2016, *Milan Kumar Shah & Others versus City Council of Nairobi and Others* Nairobi HCC No. 1024 of 2005 and *James Joram Nyaga & Another versus The Attorney General & Another* Nairobi HCC Misc. Application 1732 of 2004.
97. Other than the foregoing, it is appropriate to state that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein did not file their written submissions, either within the circumscribed timeline or at all. Consequently, the only Written Submissions on board are the ones that have been referred to.

#### **Issues for Determination:**

98. Having reviewed the Petition filed by and/or on behalf of the petitioners, the Supporting Affidavit thereto and the Documents attached to the Supporting affidavit and having taking into account the Responses on behalf of the Respondents and finally, having taken into account the Written submissions that were duly filed, the following issues do arise and are thus germane for Determination;



- a. Whether the Petition by and/or on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners' Disclose any reasonable cause of action and/or claim, whatsoever and howsoever.
- b. Whether the 1<sup>st</sup> petitioner's Fundamental and Constitutional Rights to Property, were violated, infringed upon and/or breached by the 2<sup>nd</sup> Respondent.
- c. Whether the 1<sup>st</sup> petitioner is entitled to Compensation following the Review of the Grant of title over and in respect of L.R No. 209/21246 (Original No. I.R 209/11314/3) and the consequential Revocation of the title by the 2<sup>nd</sup> Respondent and if so, against whom.
- d. Whether the 1<sup>st</sup> petitioner is entitled to Mesne Profits, Exemplary and Aggravated Damages and if so, the Quantum thereof.
- e. What Reliefs ought to be granted.

### **Analysis and Determination:**

#### **Issue number 1**

Whether the Petition by and/or on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners' disclose any reasonable cause of action and/or claim, whatsoever and howsoever.

99. Prior to and or before endeavoring to answer the 1<sup>st</sup> issue herein, it is appropriate to state that at the onset, the 2<sup>nd</sup> petitioner herein, engaged the Managing Trustee of the 1<sup>st</sup> Respondent herein, with a view to procuring and/or obtaining a Lease over and in respect of the property known as L.R No 209/11314, situate along Jogoo Road within the city of Nairobi.
100. Suffice it to point out, that at that point in time the 2<sup>nd</sup> petitioner was trading under the name and style of Igwe General stores, which appears to be a Business name, hitherto registered and operated by the 2<sup>nd</sup> petitioner.
101. In the premises, I wish to underscore that the 1<sup>st</sup> transaction which was entered into with the 1<sup>st</sup> Respondent herein, namely, the Lease Agreement, was indeed between the 2<sup>nd</sup> petitioner in his individual capacity and the 1<sup>st</sup> Respondent.
102. Nevertheless, on or about the 15<sup>th</sup> April 2005, it appears that the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners proceeded to and incorporated a Limited liability Company, namely, Igwe General Stores Limited, which is now the 1<sup>st</sup> petitioner herein.
103. Subsequently, the 1<sup>st</sup> petitioner herein entered into an agreement for sale of land, namely, L.R No 209/11314 ( with the 1<sup>st</sup> Respondent and the sale agreement was reduced into writing and thereafter executed by the respective Parties). For clarity, the purchaser in respect of designated portion of L.R No 209/11314, was the 1<sup>st</sup> petitioner herein and not the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners.
104. It is also imperative to underscore that though the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners are Directors and shareholders of the 1<sup>st</sup> petitioner, however, the 1<sup>st</sup> petitioner has a distinct legal entity separate and independent from her shareholders and or Directors.
105. Besides, where a wrong, whether legal and/or constitutional is committed against the 1<sup>st</sup> petitioner, which is a separate and independent legal entity, it is the 1<sup>st</sup> petitioner, which is seized of the requisite locus standi to commence and or mount any proceedings aimed at redressing the wrong and/or injury occasioned unto her.



106. To the contrary, the Shareholders and/or Directors of the 1<sup>st</sup> petitioner (read the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners), cannot originate and/or mount any claim, which is geared towards attracting Compensation for a wrong (sic) committed against the 1<sup>st</sup> petitioner.
107. In the premises, it is evident and/or apparent that the proceedings herein, which have been commenced by and/or on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners, who held no lawful and/or equitable rights in respect of the suit property, is therefore premature, misconceived and otherwise legally untenable.
108. To buttress the observation that it is only the Company and not the Individual Directors, who can commence such proceedings in her own name, it is appropriate to take cognizance of the dictum in the case of *Moir v. Wallersteiner*[1975] 1 ALL ER 849atp. 857, where Lord Denning M R, held as hereunder;

“It is a fundamental principle of our law that a company is a legal person with its own corporate identity, separate from the directors or shareholders and with its own property rights and interests to which alone it is entitled. If it is defrauded by a wrong doer, the company itself is the one person to sue for the damage. Such is the rule in *Foss V. Harbottle*[1843] 2 Hane 461.

The rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only one who can sue. Likewise, when it is defrauded by insiders of the minor kind, once again the company is the only person who can sue”.

109. Other than the foregoing decision, it also imperative to take note of the holding in the case of *Salmond vs= Salmond & Co. Ltd* (1897) A.C in which it was stated inter alia as follows:

“The company is at law a different person and altogether from the subscribers to the memorandum and though it may be that after incorporation the business is precisely the same as it was before and the same persons are managers and the same hands receive the profits, the company is not in law the agent of the shareholders of the subscribers or trustees for them nor are the subscribers as members liable in any shape or form, except to the extent and in the manner provided by the Act.”

110. Based on the legal principles that have been underlined in the foregoing decisions, I am unable to discern the legal basis and/or foundation, upon which the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners herein, can mount and/or maintain a claim for inter-alia, breach of their Fundamental Rights and Compensation for such breach, for whatever purpose.
111. In my considered view, the Fundamental rights, if any, were violated in respect of the manner in which the title of L.R No. 209/21246 (Original No. I.R 209/11314/3) was dealt with by the 2<sup>nd</sup> Respondent, belonged to the 1<sup>st</sup> petitioner and not the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners.
112. Consequently, I am afraid that the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners herein have no disclosed stake and or claim to the suit property and thus the subject proceedings. In this regard, it is safe to find and hold that the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners are devoid of the requisite locus-standi to commence and/or mount the subject Petition whatsoever.
113. Suffice it to state that locus-standi is a prerequisite to the mounting and/or commencing of any Civil proceedings, including, inter alia, Constitutional Petitions, like the one beforehand. Absent locus-standi, the proceedings commenced becomes legally untenable and thus void for all intent and purposes.



114. To underscore the foregoing observation, it is appropriate to adopt and restate the holding of the court vide the case in *Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & another* [2016] eKLR, where the Court at paragraph 61 held as hereunder;

61. It is therefore clear that over time the issue of standing, particularly in public law litigation has been greatly relaxed and in our case *the Constitution* has opened the doors of the Courts very wide to welcome any person who has bona fide grounds that *the Constitution* has been or is threatened with contravention to approach the Court for an appropriate relief. In fact, since article 3(1) of *the Constitution* places an obligation on every person to respect, uphold and defend *the Constitution*, the invitation to approach the court for redress as long as the person hold bona fide grounds for believing that *the Constitution* is under threat ought to be welcome. I must however hasten to add that the liberal interpretation does not mean that the rule on locus standi is no longer relevant in constitutional petitions. Where it is clear that the petitioner has completely no business in bringing the matter to Court to permit such proceedings to be litigated would amount to the Court itself abetting abuse of its process.

115. In view of the foregoing articulation, it is therefore my finding and holding that the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners herein have locus-standi to commence the subject suit; and secondly that the Petition on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners does not therefore disclose any reasonable cause of action.

#### **Issue Number 2:**

Whether the 1<sup>st</sup> petitioners Fundamental and Constitutional Rights to property, were violated, infringed upon and/or breached by the 2<sup>nd</sup> Respondent.

116. It is common ground that the 1<sup>st</sup> petitioner herein indeed entered into a land sale agreement with the 1<sup>st</sup> Respondent, who covenanted to sell to and transfer in favor of the 1<sup>st</sup> petitioner a designated portion of L.R No. 209/11314, along Outering/Jogoo Road within the City of Nairobi.
117. It is also important to note that following the entry into and execution of the sale agreement, the 1<sup>st</sup> Respondent herein proceeded to and undertook subdivision of L.R No. 209/11314, culminating into the creation of inter-alia, L.R No. 209/11314/3, which was thereafter subdivided and thereby gave rise to L.R No. 209/21246, hereinafter referred to as the suit property.
118. Other than the foregoing, it is common ground that though the 1<sup>st</sup> Respondent was in the process of facilitating the transfer and registration of the suit property to and in respect of the 1<sup>st</sup> petitioner, however the transfer and registration of the suit property had not materialized and/or crystalized.
119. To underscore the preceding observation, it is worthy to reproduce paragraph 13 of the supporting affidavit, which sated as hereunder;

“That on the 29<sup>th</sup> August 2014, before the 1<sup>st</sup> Respondent could effect transfer of title of L.R No. 209/21246 to the 1<sup>st</sup> petitioner, the 2<sup>nd</sup> Respondent NLC Gazatted Plot along Outering Road for compulsory acquisition on behalf of KURA for expansion of outering road but the petitioners plot was among the gazette plots.”

120. My understanding of the foregoing deposition for and/or behalf of the 1<sup>st</sup> petitioner is that same had not become the registered proprietor and or owner of the suit Property, namely, L.R No. 209/21246, whose title was nullified and/or revoked by the 2<sup>nd</sup> Respondent.



121. Indeed, the 1<sup>st</sup> petitioner's complaint is that the 2<sup>nd</sup> Respondent herein neither served upon her any allegations concerning and/or touching of any defects that were apparent in respect of the suit property.
122. Nevertheless, having not been duly registered as the owner of the suit property and given that her rights were still inchoate, the 2<sup>nd</sup> Respondent herein could only serve the requisite notices, if any, on the 1<sup>st</sup> Respondent herein who was still shown as the registered owner of the suit property. For ease of reference, it is appropriate to take cognizance of annexure JMM 7 attached to the supporting affidavit sworn in support of the Petition.
123. Given the foregoing, the question then that arises is whether the 1<sup>st</sup> petitioner had acquired property rights, over and in respect of the suit property, in line with the provisions of sections 24 and 25 of the [Land Registration Act, 2012](#).
124. To ascertain the nature and extent of rights, if any, that inheres in a Proprietor of land, it is imperative to reproduce the foregoing provisions and same 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.
125. In view of the foregoing, I am afraid that the 1<sup>st</sup> petitioner's rights over and in respect of the suit property had not crystalized and therefore it cannot be said that the 1<sup>st</sup> petitioner's Property Rights pursuant to Article 40 of [the Constitution, 2010](#), were breached and/or violated, when the title in respect of the suit property was revoked and/or nullified.
126. Perhaps, it is appropriate to assert that property rights in favor of a title holder can only accrue and/or arise upon the issuance of a certificate of title and/or title Document.



127. In this regard, I beg to adopt and restate the dictum in the case of *Joseph N.K. Arap Ng'ok v Moiyo Ole Keiwua & 4 others* [1997] eKLR where the court of Appeal held as hereunder;

“It is trite that such title to landed property can only come into existence after issuance of letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to provisions in the Act under which the property is held.”

128. Other than the foregoing, the centrality of the Certificate of Title in authenticating the rights of the owner, was also underscored in the decision in the case of *Ocean View Plaza Ltd v Attorney General* [2002] eKLR, where the Court observed as hereunder;

Allotment of land to a citizen or others protected under *the Constitution*, which action is symbolized by Title Deeds, invests in the allottee inviolable and indefeasible rights that can only be defeated by a lawful procedure under Land Acquisition Act. It is not in evidence that such procedure was followed.

129. At any rate, it would be recalled that after the review of the Grant and Certificate of title over and in respect of the suit property, it is the 1<sup>st</sup> Respondent that filed the review application, seeking to challenge the decision of the 2<sup>nd</sup> Respondent and not otherwise.

130. To my mind, the reason why it is the 1<sup>st</sup> Respondent who made the Application and not the converse, was because the Property rights in respect to the suit property, still vested in the 1<sup>st</sup> Respondent, who had not transferred same to and in favor of the 1<sup>st</sup> petitioner.

131. Based on the foregoing, if any Property rights, touching on and/or concerning ownership of the suit property were breached, violated and/or infringed upon, then such rights were the rights of the 1<sup>st</sup> Respondent and not otherwise.

132. Premised on the foregoing, I am constrained to answer issue number two in the negative. Simply put, up to and including the point of revocation of the title in respect of the suit property, the only known Owner of the suit property was the 1<sup>st</sup> Respondent and not otherwise.

### **Issue Number 3**

Whether the 1<sup>st</sup> petitioner is entitled to Compensation following the Review of the Grant of title over and in respect of L.R No. 209/21246 (Original No. I.R 209/11314/3) and the consequential revocation of the title by the 2<sup>nd</sup> Respondent and if so, against whom.

133. It is common ground that the 1<sup>st</sup> petitioner had entered into a lawful and legitimate sale agreement with the 1<sup>st</sup> Respondent herein, who at the material point in time was the registered owner of L.R No. 209/11314.

134. Subsequent to the entry into and execution of the Sale Agreement, the 1<sup>st</sup> Respondent proceeded to and caused the original parcel of land to be subdivided and the subdivision ultimately resulted into the creation of, inter alia, L.R No 209/21246.

135. Besides, it is settled that L.R No. 209/21246, formed and/or constituted the portion of land which the 1<sup>st</sup> Respondent had intended to transfer to and in favor of the 1<sup>st</sup> petitioner.

136. Suffice it to note, that at the point in time when the 1<sup>st</sup> Respondent entered into and executed the Agreement for sale with the 1<sup>st</sup> petitioner, same covenanted that she held lawful and legitimate rights



- over and in respect of the suit property and that same would be in a position to convey a valid title to the 1<sup>st</sup> petitioner.
137. Nevertheless, it latter on turned out that the original parcel of land, a portion of which was being sold to the 1<sup>st</sup> petitioner, was illegally and unlawfully hived out of the transport corridor and same was therefore unlawfully acquired.
  138. Premised on the allegation that the original title belonging to and registered in the name of the 1<sup>st</sup> Respondent was illegally acquired, a complaint was placed before the 2<sup>nd</sup> Respondent, who in exercise of her Constitutional mandate proceeded to review the title over and in respect of the original property.
  139. The title belonging to and registered in the name of the 1<sup>st</sup> Respondent having been reviewed and thereafter nullified, it then meant that the 1<sup>st</sup> Respondent did not have any valid land capable of being transferred to and or registered in favor of the 1<sup>st</sup> petitioner.
  140. To my mind, the revocation and/or nullification of the title in the name of the 1<sup>st</sup> Respondent defeated and/or otherwise invalidated the intended transaction between the 1<sup>st</sup> Respondent and the 1<sup>st</sup> petitioner. Simply put, the intended sale and alienation of the Suit Property in favour of the 1<sup>st</sup> petitioner was frustrated.
  141. In the circumstance, the 1<sup>st</sup> Respondent herein, therefore had no land to sell to and in favor of the 1<sup>st</sup> petitioner. In short, the 1<sup>st</sup> Respondent was in breach of the clear terms of the agreement for sale wherein same had covenanted to transfer to and convey in favor of the 1<sup>st</sup> petitioner a valid title, upon receipt of the consideration.
  142. In my considered view, the compensation that ought to avail to and in favor of the 1<sup>st</sup> petitioner is premised and/or founded on breach of contract and not for compulsory acquisition. For clarity, I am afraid that the suit property, which the 1<sup>st</sup> petitioner stakes a claim to was not compulsorily acquired.
  143. In any event, it is appropriate to distinguish between Compulsory acquisition, which is undertaken by National Land Commission in line with the provisions of sections 109 to 111 of the [Land Act 2012](#) and Review of Grants and disposition carried out under the provisions of articles 67 of [the Constitution 2010](#) as read together with the provisions of section 14 of the [National Land Commission Act, 2012](#).
  144. Having been deprived of the right to own the suit property for which the 1<sup>st</sup> petitioner had lawfully paid the agreed consideration and thereafter extensively developed, I come to the conclusion that the 1<sup>st</sup> petitioner is entitled to compensation equivalent to the current value of the suit property, which the 1<sup>st</sup> Respondent held on trust for the 1<sup>st</sup> petitioner.
  145. As concerns the Quantum of compensation for loss of the land, it is appropriate to state that the 1<sup>st</sup> petitioner commissioned a valuation over and in respect of the suit property and a valuation report was duly prepared and same was attached to the supporting affidavit.
  146. Suffice it to state that the valuation report which was annexed as annexure JMM 15 to the supporting affidavit, has not been challenged and/or impeached by the 1<sup>st</sup> Respondent. Consequently, the value of the suit property which the 1<sup>st</sup> petitioner had lost stood at the sum of Kshs.100, 000, 000/= only, which sum is payable and/or chargeable against the 1<sup>st</sup> Respondent and not otherwise.
  147. In the premises, my answer to issue number three is that the 1<sup>st</sup> petitioner is entitled to recompense on the basis of the lost parcel of land, which was in the process of being transferred unto her and which title was revoked on the basis of unlawful acquisition vide Article 40(6) of [the Constitution 2010](#).





#### Issue Number 4

Whether the 1<sup>st</sup> petitioner is entitled to Mesne Profits, Exemplary and Aggravated damages and if so, the Quantum thereof.

148. The 1<sup>st</sup> petitioner herein has raised several claims, including Mesne Profits, Exemplary and Aggravated Damages, which same seek to accrue as against the Respondents, jointly and/or severally.
149. Given the nature of claims made and/or mounted on behalf of the 1<sup>st</sup> petitioner, it is therefore appropriate to ascertain whether the said claims are payable and if so by whom.
150. First and foremost, it is important to understand the meaning and import of Mesne Profits and when same is payable. In this regard, the starting point is by taking cognizance of section 2 of the [Civil Procedure Act](#), chapter 21 Laws of Kenya which defines Mesne Profits as hereunder;

“Profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession;
151. Other than the foregoing, it is also appropriate to refer to the holding in the case of [Attorney General v Halal Meat Products Limited](#) [2016] eKLR, where the Court of Appeal observed as hereunder;

‘It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another. See McGregor on Damages, 18<sup>th</sup> Ed. para 34-42.’
152. The cornerstone to granting and/or making an award for Mesne Profits is firstly; proof of ownership of the suit property vide lawful title documents.
153. In respect of the subject matter, I have found elsewhere that up to and including the revocation of the title of the suit property, same was registered in the name of the 1<sup>st</sup> Respondent, who had not transferred the suit property to the 1<sup>st</sup> petitioner.
154. In the premises, the 1<sup>st</sup> petitioner herein had not become the registered owner of the suit property, to warrant wrongful deprivation thereof, in the 1<sup>st</sup> place.
155. Based on the foregoing, I am afraid that the claim for Mesne Profits, is not well grounded. Consequently same is not awardable.
156. In respect of the claim, for Exemplary and Aggravated Damages, it is appropriate to state that same would have been due and awardable but subject to proof that the 1<sup>st</sup> petitioner was the lawful owner of the suit property; and secondly that the suit property belonging the said 1<sup>st</sup> petitioner has been taken away by the aggressor, in a manner that violates the 1<sup>st</sup> petitioner’s Constitutional and Fundamental rights.
157. To the contrary, the process leading to the revocation of the title of the suit property, which at the time of revocation was registered in the name of the 1<sup>st</sup> Respondent, was underpinned by [the constitution](#).
158. To my mind, the process leading to the revocation of the title in respect of the suit property was lawful and legitimate and same was calculated to recover public property that had unlawfully and illegally been acquired, in contravention of [the Constitution](#) of Kenya.



159. To my mind, the actions of the 2<sup>nd</sup> Respondents, leading to the revocation of the title in respect of the suit property, cannot create a basis to warrant the grant of Exemplary and/or Aggravated Damages
160. In any event, it is apt to take cognizance of the rendition of the Court of Appeal vide the decision in the case of *Chemey Investment Limited vs Attorney General & 2 Others* [2018] eKLR this Court rendered itself on this subject thus;

“Decisions abound where courts in this land have consistently declined to recognise and protect title to land, which has been obtained illegally or fraudulently, merely because a person is entered in the register as proprietor. See for example *Niaz Mohamed Jan Mohamed v. Commissioner for Lands & 4 Others* [1996] eKLR; *Funzi Island Development Ltd & 2 Others v. County Council of Kwale* (supra); *Republic v. Minister for Transport & Communications & 5 Others ex parte Waa Ship Garbage Collectors & 15 Others* KLR (E&L) 1, 563; *John Peter Mureithi & 2 Others v. Attorney General & 4 Others* [2006] eKLR; *Kenya National Highway Authority v. Shalien Masood Mughal & 5 Others* (2017) eKLR; *Arthi Highway Developers Limited v. West End Butchery Limited & 6 Others* [2015] eKLR; *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR and *Milan Kumar Shah & Others v. City Council of Nairobi & Others*, HCCC No. 1024 of 2005. The effect of all those decisions is that sanctity of title was never intended or understood to be a vehicle for fraud and illegalities or an avenue for unjust enrichment at public expense.”

161. Based on the foregoing, it is my finding and holding that the 1<sup>st</sup> petitioner herein is similarly not entitled to Exemplary and Aggravated Damages, either in the manner sought or at all.
162. Finally, the petitioners’ have laid a claim for mental anguish, psychological distress pain and suffering. To this end, all I can say is that the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners cannot attract compensation for mental anguish, psychological distress, pain and sufferings, for the obvious reasons that were articulated while disposing the first issue elsewhere herein before.
163. As concerns the 1<sup>st</sup> petitioner, there is no gainsaying that same is inanimate and therefore same has no body, soul and mind to warrant any Mental and psychological distress. For coherence, the Company cannot suffer such Distress in the manner alluded to.
164. Consequently, it follows that no award can be made in favor of the 1<sup>st</sup> petitioner under the foregoing headings.

### **Final Disposition:**

165. Having evaluated and analyzed the issues for determination that were highlighted in the body of the Judgment herein, it is now appropriate to render a dispositive order.
166. Nevertheless, before making the final orders, I beg to state that the 1<sup>st</sup> petitioner’s claim is partially successful. Consequently, the orders that commend themselves to me are as follows;
- i. The 1<sup>st</sup> petitioner be and is hereby awarded the sum of Kshs.100, 000, 000/= only as against the 1<sup>st</sup> Respondent, on account of compensation for the loss of L.R No 209/21246 (Original No. 209/11314/3) which the 1<sup>st</sup> Respondent was in the process of transferring unto her.
  - ii. The Petition on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> petitioners be and is hereby struck out.
  - iii. The petitioners’ claim against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondent be and is hereby Dismissed.



- iv. The 1<sup>st</sup> petitioner shall be entitled to Interest at court rates in respect of the award in clause (i) hereof.
- v. The 1<sup>st</sup> petitioner be and is hereby awarded costs as against the 1<sup>st</sup> Respondent only and same to be taxed and certified by the Taxing officer of the Court.

167. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF JULY 2022.**

**HON. JUSTICE OGUTTU MBOYA**

**JUDGE**

In the Presence of;

Kevin Court Assistant

Ms. Gikonyo h/b for Mr Mbugua Mureithi for the petitioners

No appearance for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent\*\*

Mr. Menge for the 3<sup>rd</sup> and 4<sup>th</sup> Respondent 27|\*\* Page

