Kenya African National Union v Cabinet Secretary Ministry of Lands & Physical Planning & 5 others (Environment and Land Petition E025 of 2020) [2024] KEELC 4563 (KLR) (3 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4563 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND PETITION E025 OF 2020

JA MOGENI, J

JUNE 3, 2024

BETWEEN

KENYA AFRICAN NATIONAL UNION ..... PETITIONER

AND

THE CABINET SECRETARY MINISTRY OF LANDS & PHYSICAL PLANNING ..... 1ST RESPONDENT

THE CABINET SECRETARY FOR TOURISM AND WILDLIFE .... 2ND RESPONDENT

THE HONORABLE ATTORNEY GENERAL ..... 3RD RESPONDENT

THE KENYATTA INTERNATIONAL CONVENTION CENTRE CORPORATION ..... 4TH RESPONDENT

NATIONAL LAND COMMISSION ..... 5TH RESPONDENT

THE KENYA POWER &LIGHTING COMPANY ..... 6TH RESPONDENT

Procedure to be followed in the disposition of Government land

The respondents contended that the petitioner did not comply with the requisite procedures for acquisition of property from the Government and thus the takeover of the suit property was null and void. The court highlighted the procedure to be followed in the process of the disposition of Government land. The court further held that the Commissioner of Lands had no power to allocate land that was designated appropriated or alienated for public purposes/use.

Reported by Kakai Toili

Land Law *– public land – alienation of public land – powers of the Commissioner of Lands to allocate public land - whether public land could be alienated and allotted to a political party in the absence of a part development plan - whether the Commissioner of Lands had power to allocate land that was designated appropriated or alienated for*

public purposes/use - what was the process of the disposition of Government land - what were the documents required to prove their interest in land on the foundation of an allotment letter – Government Land Act (repealed), sections 3 and 9.

***Constitutional Law** – fundamental rights and freedoms – enforcement of fundamental rights and freedoms – right to property - whether the taking over of land unlawfully acquired amounted to violation of the right to property – Constitution of Kenya, article 40; Land Registration Act, section 26(1)(b); Registration of Titles Act (repealed), section 23.*

Brief facts

The petitioner's (Kenya African National Union) case was that it was the registered trustee and or beneficial owner of the suit property which housed the Kenyatta International Convention Centre (KICC). The petitioner claimed that it was allocated the suit property by way of letter of allotment and that the letter conferred title and ownership of all the suit property. The petitioner stated that it was the lawful owner of the suit property. The petitioner thus claimed that it's right of ownership was unlawfully limited by the acts of the respondents illegally and un-procedurally taking over the suit property.

The petitioner prayed for among other orders: interim conservatory orders suspending the ongoing process of sale of the petitioner's Title Number Nakuru Municipality Block 9/31 (Nakuru property) pending the *inter partes* hearing and determination of the petition, a declaration that it was the registered owner of all the suit property and a declaration it was entitled to just and full compensation as alternative to repossession of the suit property.

The 1st to 4th respondents filed a cross-petition in which they averred that the development of KICC was funded by the exchequer and managed by different Government agencies until 1989 when the same was transferred to the petitioner under the chairmanship of the 2nd President of the Republic of Kenya Daniel Toroitich Arap Moi alongside Peter Oloo Aringo as trustees of the petitioner. The 1st to 4th respondent claimed that on June 10, 2010, the initial land reference number of the suit property ceased to exist and a new number was issued to the Permanent Secretary to the Treasury of Kenya as trustee for the Ministry of Tourism.

The 1st to 4th respondents contented that the petitioner did not comply with the requisite procedures for acquisition of property from the Government and thus the takeover of the suit property was null and void. The 1st to 4th respondents thus sought for among other prayers; a declaration that the suit property was obtained illegally hence a nullity *ab initio.*

Issues

i. What was the process of the disposition of Government land?
ii. Whether public land could be alienated and allotted to a political party in the absence of a part development plan.
iii. What were the documents required to prove their interest in land on the foundation of an allotment letter?
iv. Whether the Commissioner of Lands had power to allocate land that was designated appropriated or alienated for public purposes/use.
v. Whether the take-over of land unlawfully acquired amounted to violation of the right to property.

Held

1. The petitioner's claim was not supported by production of the allotment letter and the location of the suit property was already demarcated as public land which would house public offices. The letter of allotment was not produced in court by PW1 neither did he produce any part development plan (PDP) nor a deed plan to attest to the process of allotment. The title document produced in court showed that the names on the title on behalf of the petitioner were those of Daniel Arap Moi and Aloo Aringo. Daniel Arap Moi was the Vice President of the Republic Kenya, a State officer in 1969.
2. The law governing the alienation of Government Land in 1969 was the repealed Government Land Act even when the title was being issued to the petitioner in 1989 it was governed by the repealed Act

which was the law that would be applied for the process of alienation of public land. The petitioner did not in their evidence present before the court the procedure of how that public land was alienated and allocated to a political party which was a private entity. For the Government to construct on private land, the procedure was stipulated in the Compulsory Land Acquisition Act.

3. If there was no PDP then it meant the land could not have been alienated and allotted to the petitioner because it was not available. Further the petitioner could not explain why it took 20 years for the title to be issued on May 25, 1989.
4. The petitioner was allocated the suit premises by the Commissioner of Lands but the petitioner failed to call as a witness the Commissioner of Lands to produce any documents that would shed light and support the action allotment of public land to a private entity. The applicable law at that time was section 3 of the repealed Government Land Act which reserved the right to alienated Government land to the President who as at 1989 was Daniel Toroitich Arap Moi. From the evidence of PW1 he was also the trustee of the petitioner and the one who was registered in trust for the suit property for the petitioner alongside Oloo Aringo.
5. The power to dispose of public land was vested in two entities: the President and the Commissioner of Lands, under sections 3 and 9 respectively of the repealed Government Land Act. The process of the disposition of Government land followed the following procedure:
    1. The respective municipal council in which the land to be disposed was situate had the mandate of advising the Commissioner of Lands on which portions of land could be disposed. That step required the responsible council to visit the area or to carry out a fact-finding mission to satisfy itself that the land was first of all Government land and secondly that it was indeed available for disposition.
    2. The PDP was to be drawn up and approved by the Commissioner of Lands.
    3. The determination of certain matters by the Commissioner of Lands which matters were listed under section 11 of the repealed Government Land Act. The matters to be determined included;
        i. the upset price at which the lease of the plot would be sold,
        ii. the conditions to be inserted into the lease;
        iii. the determination of any attaching special covenants and the period into which the term was to be divided and the annual rent payable in respect of each period.
    4. The gazettement of the plots to be sold, at least four weeks prior to the sale of the plots by auction under section 13 of the repealed Government Land Act. The notice was required to indicate;
        i. the number of plots situate in an area;
        ii. the upset price in respect of every plot;
        iii. the term of the lease and rent payable, building conditions and any attaching special covenants.
    5. The sale of the plots by public auction to the highest bidder.
    6. The issuance of an allotment letter to the allotee. An allotment letter had been held not to be capable of conferring an interest in land, being nothing more than an offer, awaiting the fulfilment of the conditions stipulated therein by the offeree. In order for an allotment letter to become operative, the allotee was required to comply with the conditions set out therein including the payment of stand premium and ground rent within the prescribed period. The allotment letter also must have attached to it a PDP.
    7. The seventh step, which came after the allotee had complied with the conditions set out in the allotment letter was the cadastral survey, its authentication and approval by the Director of Surveys and the issuance of a beacon certificate. The survey process precipitated the issuance of land reference numbers and finally the issuance of a certificate of lease.

6. A litigant basing their interest in land on the foundation of an allotment letter must provide the following proof:
    1. The allotment letter from the Commissioner of Lands;
    2. attached to the allotment letter, a PDP; and
    3. proof that they complied with the conditions set out in the allotment letter, primarily that the stand premium and ground rent were paid, within the specified timeline.
7. The petitioner did not file a letter of allotment and therefore it was futile to scrutinize the other steps since the only document of proof of ownership that the petitioner produced was a copy of certificate of ownership which was contested. The respondents had contested the certificate since the suit property was public land.
8. For Government land to be alloted to a private entity it had to be alienated by the President who could choose to delegate those powers. If that was the case, it was only the President who could have alienated the suit property. The power of the President under section 3 of the repealed Government Land Act was delegated to the Commissioner of Lands in cases, only for religious, charitable, education or sports purposes. KANU was neither a religious, charitable, educational or sports institution. It was a political party of members with private aspirations not a charitable, not an educational, not a religious nor an institution related to sports.
9. The provisions of section 23 of the repealed Registration of Titles Act which was the operational law at the time of the alleged allocation of the suit property to the petitioner conferred an indefeasible title to the allottee. The same principle was also reiterated in section 28 of the repealed Registration of Titles Act. The Land Registration Act reflected the two provisions; thus, the Act reflected the three principles and further recognized the indefeasibility principle or put differently, the sanctity of title. That was to mean that the title was proof that the person named as proprietor of the land was the absolute and indefeasible owner of the land.
10. The indefeasibility principle was however not absolute. The law provided for grounds under which it could be impeached. The petitioner did not submit a letter of allotment nor any documents that would trace the root of the title being claimed to have been allotted to the petitioner. The 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.
11. The Commissioner of Lands had no power to allocate land that was designated appropriated or alienated for public purposes/use. Therefore, any alienation of land reserved for public purposes and issuance of a title for the same, whether under the repealed Registration of Titles Act (cap 281) or the repealed Registered Land Act (cap 300) was null and void *ab initio*. Such a title did not exist in the first place because the land belonged to the public and was not available for alienation.
12. The suit land was already reserved for purposes of construction of an international conference centre and was not available to delineate and allocate to the petitioner and therefore the purported title LR 209/11157 (the initial land reference number) did not exist because the land purportedly being allocated already belonged to the public.
13. In its claim the petitioner had sought to have the 1st to 5th respondents take over the accrued bills of utilities of KICC alleging that it was the Government that accrued the accumulated bills. There was already an order compelling the petitioner to pay the amount which accrued when KANU admittedly was occupying KICC. That being a commercial claim, the right forum at which it could be raised was the commercial court which already made a decision. The court would therefore desist from addressing that issue since from the pleadings it was raised in the wrong forum.
14. The Commissioner of Lands had no authority to alienate the suit premises to the petitioner. The allocation of the suit premises to the petitioner was therefore not only irregular but unlawful as well. Thus, the petitioner was not entitled to the orders that they had sought in the petition.

15. Section 4(3) of the Fair Administrative Actions Act provided that where an administrative action was likely to affect the rights and fundamental freedoms of any person, the administrator shall give the person affected prior notice of the proposed action, an opportunity to be heard, right to internal review where applicable, statement of reasons, notice of right to legal representation, right to cross-examine where applicable, and information, materials and evidence forming the basis of the action.
16. Although the respondents did not demonstrate that the notice was served to the petitioners informing them of the takeover, the matter was canvassed before a competent court of law and the court determined the matter. There was no indication that the petitioner filed an appeal against the decision. The petitioner had not proved any violation of rights under article 40 of the Constitution. Whereas article 40 provided for the right to property, the protection did not extend to unlawfully acquired land. Section 26(1)(b) of Land Registration Act which the petitioner had sought to hinge their claim on did not protect the petitioner's title at all. Equally that was a title that did not enjoy the protection of the law under article 40(3) as it had been found to be unlawful under article 40(6).
17. The provisions of section 23 of the repealed Registration of Titles Act (cap 281) and article 40 of the Constitution only protected property acquired lawfully. Article 40(6) provided that protection given to a right to acquire and own property did not extend to property that had been acquired unlawfully. The petitioner had no valid proprietary rights in the suit property capable of protection by law. Therefore, there was no merit in the petitioner's contention that its rights to property under article 40 of the Constitution were violated by the respondents.
18. The petitioner had not proved that the takeover of the suit property which did not belong to them was unlawful and that it had in any way interfered with the petitioner's right to property. The petitioner was not the owner of the suit property having acquired it in the most unprocedural ways which was a nullity *ab initio*. Further the bills being claimed to have accrued to the respondents were accrued by the petitioner. Thus the 6th respondent's action of demanding the settlement of the accrued utility bills was legal and right but the instant court was not the court at which the claim should be made.
19. Although the petitioner alleged that they stood to suffer irreparable harm if the suit property Nakuru Municipality Block 9/31 was sold, that would be in compliance of the court order of February 12, 2015 following the judgment by the High Court in *Kenya Power & Lighting Company Limited v KANU & 5 Others*.
20. The petitioner was not entitled to any compensation as the building erected on the suit property was erected by the Government using public funds and it was a public building and the suit property belonged to the Government. There was no way the petitioner would be compensated by the doctrine of compulsory acquisition.
21. In situations like the instant one the Government should have clear procedures on the taking over of Government properties in the hands of private entities legally so as to avoid parties coming to court to seek for compensation and damages where clearly there was no violated right to property. The suit parcel being public land, the petitioner ought to have followed the procedure provided in law in order to have the suit parcel allocated to them. The suit parcel was illegally and unprocedurally acquired by the petitioner.
22. The title held by the petitioner was null and void given that it was appropriated in contravention of the law. Section 143 of the repealed Registered Land Act and section 80 of the Land Registration Act empowered the court to cancel an illegally acquired title. Equally, the title was impeachable under section 26(1)(b) of the Land Registration Act which provided that a title could be challenged where the certificate of title had been acquired illegally, unprocedurally or through a corrupt scheme.

Petition dismissed; cross -petition filed by the 1st to 4th respondents allowed.

Orders

i. *A declaration was issued that LR 209/11157 was obtained illegally, unlawfully and without following legal procedures hence a nullity ab initio.*

ii. *The title documents/leasehold interest created in LR No. 209/11157 was illegal and conferred no proprietary interest to the petitioner as per the provisions of article 40(6) of the Constitution.*

iii. *The allocation of the suit property to the 1st respondent without following the legal procedures, was unlawful, illegal and unconstitutional.*

iv. *The title for LR No. 209/11157 in the name of the 1st respondent in the cross-petition was revoked.*

v. *The suit property as registered being LR No. 209/19829 issued in the name of the Permanent Secretary to Treasury to hold in trust for the Ministry of Tourism was the lawful, legal and constitutionality appropriate title for the suit land.*

vi. *A declaration was issued that the Ministry of Tourism was the lawful owner of the suit land LR 209/19829 and the 1st respondent's registration of LR No. 209/11157 was unlawful, illegal and unconstitutional.*

vii. *Each party bear its own cost of the cross-petition and the petition.*

Citations

Cases

Kenya

1. *African Line Transport Co Ltd v Attorney General* Civil Suit 276 of 2003; [2007] KEHC 2621 (KLR) - (Explained)
2. *Attorney General v Kenya Commercial Bank Limited & 3 others* (2014) eKLR - (Explained)
3. *Chai & 9 others v Pwani University College* Civil Appeal 78 of 2016; [2017] KECA 135 (KLR) - (Explained)
4. *Chai, Nelson Kazungu & 9 others v Pwani University College* Environment & Land Case 70 of 2009; [2015] KEELC 460 (KLR) - (Explained)
5. *Chemey Investment Limited v Attorney General & 2 Others* Civil Appeal 349 of 2012; [2018] KECA 863 (KLR) - (Explained)
6. *Hassan, Adan Abdirahani & 2 others v Registrar of Titles, Ministry of Lands & 2 others* Petition 7 of 2012; [2013] KEHC 6319 (KLR) - (Explained)
7. *Kathurima, Henry Muthee v Commissioner of Lands & Director National Youth Service* Civil Appeal 8 of 2014; [2015] KECA 892 (KLR) - (Explained)
8. *Kenya Power & Lighting Company Limited v KANU & 5 others* Civil Suit No 14 of 2004 - (Mentioned)
9. *Mako, Abdi Dolal v Ali Duane & 2 others* Environment & Land Case 61 of 2017; [2019] KEELC 4929 (KLR) - (Explained)
10. *Mbau Saw Mills Ltd v Attorney General for and on behalf of the Commissioner of Lands) & 2 others* Civil Case 59 of 2008; [2014] KEHC 4946 (KLR) - (Followed)
11. *Ndungu, Paul Nderitu & 20 others v Pashito Holdings Limited & another* Civil Case No 3063 of 1996 - (Followed)
12. *Ng'ok, Joseph NK Arap v Moijo Ole Keiwua & 4 others* Civil Application 60 of 1997; [1997] KECA 1 (KLR) - (Explained)
13. *Ngacha, Gladys Wanjiru v Teresa Chepsaat & 4 others* Civil Appeal 94 of 2009; [2013] KECA 29 (KLR) - (Followed)
14. *Ngundo, Morris v Lucy Joan Nyaki & another* Civil Appeal 71 of 2015; [2016] KECA 390 (KLR) - (Explained)
15. *Norbixin Kenya Limited v Attorney General* Civil Case 1814 of 2002; [2014] KEHC 2554 (KLR) - (Explained)
16. *Nyaga, James Joram & another v Attorney General* Miscellaneous Civil Application 1732 of 2004; [2007] KEHC 3679 (KLR) - (Explained)
17. *Nyota, Harison Mwangi v Naivasha Municipal Council & 20 others* Civil Case 110 of 1998; [2019] KEHC 5238 (KLR) - (Explained)

18. *Rutongot Farm Ltd v Kenya Forest Service & 3 others* Petition 2 of 2016; [2018] KESC 27 (KLR) - (Explained)

South Africa

Fredricks & others vs MEC for Education and Training Eastern Cape & others [2002] 23 ILU 81 (CC) - (Followed)

United Kingdom

Gibbs v Messer [1891] AC 248 - (Explained)

Statutes

Kenya

1. Constitution of Kenya articles 3, 10, 19(1); 20(4); 40, 40(3); 40(6); 62(1)(2)(4); 259(1) - (Interpreted)
2. Fair Administrative Action Act (cap 7L) section 4(3) - (Interpreted)
3. Government Financial Regulations and Procedures (Chapter 412B) Chapter 19 paragraph 12 - (Interpreted)
4. Government Land Act (Repealed) (cap 280) sections 3, 4, 7, 9, 11, 15 - (Interpreted)
5. Land Planning Act (Repealed) (cap 303) section 11(3) - (Interpreted)
6. Land Registration Act (cap 300) sections 26(1)(b); 80 - (Interpreted)
7. Physical and Land Use Planning Act (cap 286) In general - (Cited)
8. Registered Land Act (cap 300) sections 28, 28(1); 143 - (Interpreted)
9. Registration of Titles Act (281) section 23 - (Interpreted)

Advocates

Mr Kibet for the petitioner.
Ms Kibet and *Mr Muteri* for the 1st – 4th respondents.

JUDGMENT

1. The petitioner's case is that the petitioner is the registered trustee and or beneficial owner of all that parcel of land known as Land Reference Number 209/11157, measuring 1.694 Ha in the Nairobi Central Business District and housing the Kenyatta International Convention Centre (hereinafter KICC). That the property was allocated to the petitioner by way of Letter of Allotment dated May 10, 1969 and the said letter conferred title and ownership of all that parcel of land known as Land Reference Number 209/11157, and its validity has never been contested in any court.

2. That following the survey and delineation of the suit property the petitioner was granted Title Deed for a 99 year lease commencing on December 1, 1969 on May 25, 1969. That the petitioner is the lawful owner of the suit property since it is the first registration and thus conclusive evidence of ownership. Thus, the petitioner's right of ownership was unlawfully limited by the acts of the respondents illegally and un-procedurally leading to irreparable loss and damage to the petitioner despite being the legal person with the right to own and dispose of the property.

3. It is pleaded that the 1st to 5th respondents issued and applied an Executive Order communicated by way of a signed press statement to forcefully claim ownership of land parcel known as Land Reference Number 209/11157, thus forcefully evicting the managing agents of the petitioner's property and tenants in the KICC and altered the petitioner's office. This takeover of the petitioner's property was without compensation or consideration to the petitioner and neither was the said Executive Order produced nor served upon the Petitioner to enable it respond

4. To support their petition, the petitioners attached several annextures of news footage covered on the Nation Television and newspaper articles covering February 12, 2003, February 17, 2003 and February 24, 2003.

5. That the government is the majority shareholder at 50.1% of the 6th respondent. It is the petitioner's contention that section 26 of the Land Registration Act protects its right to the suit property and it was unlawful for the 1st respondent to purport to revoke the title without due process of the law, further that the government cannot purport to acquire the suit property and disclaim the accrued utility bills like electricity bills.

6. That the parcel of Land Reference Number 209/11157 was allotted to the petitioner on May 10, 1969 by the Commissioner of Lands and on May 25, 1969 the petitioner was granted Title Deed for 99 year lease term. The said parcel also houses Kenyatta International Convention Centre and its validity has never been contested in any court. The title is the first registration and conclusive evidence that the petitioner is a lawful owner of the suit property.

7. The petitioner contends that it has an indefeasible title to parcel Land Reference Number 209/11157 under section 26 of the *Land Registration Act*. That whereas the 1st -5th respondents orchestrated a forceful take over, this take over was occasioned by breach of the law without any order or decree of a Tribunal or Court of Law thus the occupation of the suit property by the Government of Kenya is unlawful.

8. That the suit property had leases and continue to have leases even at the time of the invasion on February 13, 2003 and despite serving the government with an Order obtained through the instituted Judicial Review Application No 128 of 2003 this was ignored.

9. Further that despite the 1st -5th respondent's takeover of the petitioner's Land Parcel Number 209/11157 the government has purported to waive its responsibility to pay the liabilities, bills and utility due to the property owing to the 6th respondent which has led the 6th respondent to initiate the process of selling the petitioner's assets by way of recovery.

10. It is the petitioner's contention that if its property Title Number Nakuru Municipality Block 9/31 is sold to repay the electricity bills owing to the 6th respondent the petitioner stands to suffer harm that will not be remedied by way of damages.

11. The petitioner further contends that since the government claims to have taken over the suit property it should also be responsible for the assets and liabilities including the electricity bills owing since the electricity was supplied to the building which building should be acquired with the accrued bills.

12. The petitioner holds the position that the acts and omissions of the respondent amounted to unlawful creation of public rights in private property and since this take over was instigated against the rules of natural justice it was thus void and the Petitioner prays for:

    a. Interim conservatory order be and is hereby issued suspending the ongoing process of sale of the petitioner's Title Number Nakuru Municipality Block 9/31 pending the *inter partes* hearing and determination of the application herewith

    b. Interim conservatory orders be and is hereby issued suspending the ongoing process of sale of the petitioner's Title Number Nakuru Municipality Block 9/31 pending the hearing and determination of this petition

    c. Declaration that the petitioner is the registered owner of all that parcel of land known as Land Reference Number 209/11157 measuring 1.694 Hectares

d. Declaration that the Government of Kenya unlawfully acquired possession of the petitioner's parcel of land known as Land Reference Number 209/11157

e. Declaration that the petitioner is entitled to just and full compensation as alternative to repossession of all that parcel of land known as Land Reference Number 209/11157

f. Declaration that the respondent is in breach of the Petitioner's Constitutional Right to property

g. Declaration that all the liabilities, utilities and electricity bills of KshS 355,200,295.80 claimed by the 6th respondent in High Court Civil Suit No 14 of 2004 – *Kenya Power & Lighting Company Limited versus KANU & 5 others* in relation to Land Title No Nakuru Municipality Block 9/31 shall be set off against the petitioner's claim herein.

h. A conservatory Order staying the intended sale by public auction of the petitioner's Land Title No Nakuru Municipality Block 9/31 directed by the Deputy Registrar of Court in High Court Civil Suit No 14 of 2004 - *Kenya Power & Lighting Company Limited versus KANU & 5 others* pending the determination of this petition.

i. An order directing the 1st to 5th respondent to indemnify the petitioner against the claim by the 6th respondent of Kesh 355,200,295.80 in owing electricity bills.

j. An order directing the Government to give vacant possession of all that parcel of land known as Land Reference Number 209/11157 measuring 1.694 hectares to the petitioner.

k. An order directing the 1st to 5th respondent to give just and full compensation to the petitioner following unlawful acquisition of all the parcel of land known as Land Reference Number 209/11157

l. Costs of this petition be awarded to the petitioner.

13. The 1st to 4th respondents describing themselves as various Government Ministries and State Corporations within the Republic of Kenya filed an amended cross-petition dated September 22, 2022 against the petitioner (KANU) as the 1st respondent, 2nd respondent (National Land Commission and the 3rd respondent (The Kenya Power & Lighting Company) alleging violations of the Constitution and fundamental rights and freedoms under art 2(1) and (2), article 3, 10, 19(1), 20(4), 40(6), article 62(1),(2)and (4) and article 259(1) of the *Constitution of Kenya*

14. In the cross-petition the cross-petitioners aver that the development of the suit property (KICC) was funded by the exchequer under project account number 530-801 (A)-001W at the cost of British Pound 3,987,350 and registered as a Government building number NRB/ADM/38/1 and managed by different government agencies until 1989 when the same was transferred to Kenya National African Union under the chairmanship of the 2nd President of the Republic of Kenya Daniel Toroitich Arap Moi alongside Peter Oloo Aringo as trustees of Kenya African National Union.

15. On June 1, 2010 the Land Reference Number 209/11157 ceased to exist and land registration number LR 209/19829 was issued to the Permanent Secretary to the Treasury of Kenya as trustee for the Ministry of Tourism.

16. Further that the suit Misc. Civil Application No 128 of 2003 which was determined in favour of the respondents challenging the executive order issued on February 11, 2003 enabled the government to take over the management of the suit property.

17. The 1st to 4th respondents content that the petitioner did not comply with the requisite procedures provided under chapter 19 paragraph 12 of the *Government Financial Regulations and Procedures* for acquisition of property from the Government either as a gift or purchase thus the takeover of the suit property was null and void.

18. They further stated that KICC is a body corporate established in 2011 and cannot be liable for acts committed or liabilities incurred before its incorporation. That the court entered judgment of KshS 212,816,986 with interest at court rates in HCC No 14 of 2004 which led to KPLC obtaining an order for attachment for Nakuru Municipality Block 9/31. That the issue of recovery and accrued electricity bills was not raised in the HCC No 14 of 2004 and therefore the issue of government being liable for the electricity bills is an afterthought.

19. On matters relating to supply of electricity the cross-petitioners have contested the jurisdiction of this honorable court stating the petitioner is at liberty to file its claim in the appropriate court and not the ELC court.

20. It is the cross-petitioners contention that the acquisition of the suit property by the petitioner was illegal and irregular and any rights/interest derived from the suit property is null and void without any legal consequences.

21. That land reference number 209/11157 was declared a national monument through Gazette Notice number 10686 dated July 24, 2013. The said suit property is known as 209/19829 and is registered in the name of Permanent Secretary to Treasury to hold in trust for Ministry of Tourism.

22. That any proprietary interest/right created in 209/11157 has been created contrary to the Constitution and in breach of articles 40(3) and there is no legal protection gained as provided under article 40(6). Further that the purported registration of the petitioner as the proprietor of parcel 209/11157 is in breach of articles 62 (4) and also the action breach article 62(2) which vests all land held by a county to be administered on their behalf by National Land Commission.

23. Although cross-petitioners named the 2nd respondent as the National Land Commission and the 3rd respondent as Kenya Power and Lighting Company, it is instructive to note that there are no claims made against the two respondents. It is not clear why they enjoined the two as respondents alongside the petitioner as the 1st respondent.

24. The 1st to 4th cross-petitioners thus made the following prayers in the cross-petition filed:

    a. A declaration that the LR 209/11157 was obtained illegally, unlawfully and without following legal procedure hence a nullity ab initio

    b. That the title documents/leasehold interest created in LR No 209/11157 is illegal and confers no proprietary interest to the 1st petitioner respondent per the provisions of article 40(6) of the *Constitution*

    c. That the allocation of the suit property to the 1st respondent without following the legal procedures is lawful, illegal and unconstitutional.

    d. That the title for LR No 209/11157 in the name of the 1st respondent in the cross petition be revoked

    e. That the suit property as registered being LR No 209/19829 issued I the name of the Permanent Secretary to treasury to hold in trust for the Ministry of Tourism is the lawful, legal and constitutionality appropriate title for the suit land.

f. A declaration that the Ministry of Tourism is the lawful owner of the suit land LR 209/19829 and the 1st respondent's registration of LR No 209/11157 is unlawful, illegal and unconstitutional.

g. That the respondents be condemned to bear the costs of this cross-petition and the cost of the petition

Petitioner's Case

25. During the hearing the petitioner had stated that he would call 2 witnesses but ended up calling one witness. Though the supporting affidavit has been sworn by Nicholas Kiptoo Arap Korir Salat, the petitioner made an oral application to substitute. The application was not opposed and therefore the petitioner substituted its witness.

26. PW1- George Wainaina stated that he was the National Executive Officer for KANU and the Secretary General of the petitioner which is a political party. He adopted his affidavit sworn on March 14, 2022 which he filed after he was substituted as the petitioner's witness following changes made to the office of secretary general of the party. He also adopted his witness statement. At the same time, he moved the court to adopt its annexures 19-139 as exhibits which are contained in the list of documents filed with the petition dated December 2, 2022. Since there was no objection to the exhibits they were all marked as produced.

27. Upon being cross-examination by state counsel Ms Kubai for the 1st to 4th respondents, he stated that the petitioner acquired the suit property through an allotment letter issued on May 10, 1969. He however testified that he was not aware about who issued the party with the allotment letter. At the same time he testified that although he referred to the allotment letter in his bundle of documents at pages he had not produced the said letter. He further testified that the petitioner was not issued with a part development plant.

28. It was his testimony that he did not know that an allotment letter had to be accompanied with a Part Development Plan which needed to have been in place before the Letter of Allotment was issued. When cross-examined further about the fulfilment of conditions in the allotment letter, he testified that he did not have documents that could attest to the petitioner having complied with conditions of the allotment of the suit property. That he did not have even a receipt of payment of the stand premium and other charges that are usually conditions to be fulfilled whenever one is allotted property.

29. PW-1 testified that the petitioner received the title deed on May 25, 1989, which was after 20 years since the alleged allotment letter of May 10, 1969. He testified that by the time the title was acquired the Kenyatta International Conference Centre had already been constructed. He further testified that that he assumed that KANU constructed KICC but he had no proof to support his claim that the petitioner did indeed construct KICC.

30. He testified that according to the bundle of documents for the 1st to 4th respondents at page 132 the description shows the building was constructed by government but the construction according to him was done on KANU land. That from his knowledge and information that he has, KANU was in charge of the building and was collecting rent and also paying electricity bills.

31. According to the testimony by PW1, Case No 13 of 2004 which was filed by Kenya Power and Lighting Company (hereinafter KPLC) was for the claim for unpaid bills and that in that particular case it was KANU which was sued and not the NARC government. He also stated that he was not aware that the judgment in that case had been set aside.

32. He testified that at paragraph 16 of the petition there was a refurbishment done by the petitioner to the suit property. That there is a letter at pages 36 to Nyanja Associates. He however averred that he was not aware whether Nyanja Associated had accepted the appointment. He further stated that the letter dated April 11, 1990 did not constitute a contract as the petitioner had stated and further that there was no list of consultants sent to KANU as alleged in the said letter. That the consultants never sent letters of acceptance going by what is stated at paragraph 11 and this means that the refurbishment of KICC never took place as alleged.

33. In giving further evidence he stated that there is JR Miscellaneous No 128 of 2003 which sought to crash the Executive Order referred to in this petition and that the court issued orders and suspended the Executive Order temporarily pending the filing of the Judicial Review (hereinafter JR). He however stated that he was not aware whether the JR was ever filed thereafter.

34. In further cross-examination by Mr Ochieng, counsel for the 6th respondent, PW1 stated that he was aware of the matter at hand and that he had authority to appear for the petitioner. He testified that KANU was in occupation of KICC from May 10, 1969 till February 12, 2003. That the petitioner collected rent and paid all the bills. It was his testimony that that the petitioner owned the property in Nakuru and the said property was being auctioned in 2014 and 2020. That when they filed this matter in 2020 the petitioner never served the 6th respondent with any letter. He testified that the petitioner served the 1st to 5th respondents only with a demand letter but he has not produced the said demand letter in court to support the claim that they served the respondents with it.

35. According to PW1 testimony he testified that in the instant petition, they sought to conserve the suit property which was being auctioned and that they filed an appeal but he was not aware of the progress of the appeal since 2020. Further that KANU accumulated the KPLC bill out of KICC which stood at Kesh 212,816,986 though he stated that he was not aware of the exact amounts of the outstanding accrued bill. He further stated that he aware of the KPLC case filed in 2004 and that judgment was delivered on August 7, 2009 and the petitioner herein KANU was ordered to pay the debt plus interest and costs. He further stated that as at the date of filing the instant case the Petitioner had not paid the decreed sums.

36. In his testimony he contended that he had stated in the petition that it is the government to pay the bills though he had no documents that could attest to his claim of inferring that the government was the one to pay the accrued bills. He also testified that he was aware that there are several cases that were ongoing and had not been finalized between the petitioner and 6th respondent but that he did not know how many they were in total.

37. PW1 further testified that in March 2013, the petitioner sought to stay execution of Suit No 14 of 2004 through an application dated May 25, 2013 and the court ruled that KANU (petitioner herein) should provide security to support their application for stay. He further contended that he was not aware of all the other pending cases filed against KANU or by KANU against other parties. In his testimony he further stated the government had 50.1% ownership of the 6th respondent but he had no documents to back this claim regarding the said ownership.

38. According to the testimony of PW1, the relationship the petitioner had with the 6th respondent was for supply of electricity and that the 6th respondent never evicted the petitioner from the suit property due to failure to pay electricity bills. That the petitioner being a national party had offices in all the 47 counties and that once the instant case is concluded they will pay the outstanding electricity bills

39. On re-examination by counsel Oruenjo, PW 1 stated that the allotment letter to the suit property was issued through the Commissioner of Land. He stated that for their property in Nakuru they obtained

a conservatory order against sale but he had not produced a copy of this order in court. With that the Petitioner closed its case.

Respondents (Cross-petitioner's') Defence Case

40. The cross-petitioners called seven witnesses.

6th Respondent's Case

41. DW1- Fredrick Njuguna Kariuki – testified that he is employed by the 6th respondent as a manager debt control. It was his testimony that he was in court to seek the court's intervention to direct the petitioner to pay the accrued electricity bills which now stood at Kshs 1,132,34,306.90. That this figure emanates from the Civil Case No 14 of 2004 in which the court's decision has placed the accrued figure at Kshs 212,816,696.80 inclusive of interest.

42. He testified that they filed a response to the petition which he wanted the court to adopt as their evidence and that their prayers are as per what they had stated in the replying affidavit.

43. When cross-examined by counsel Oruenjo for the petitioner he stated that having looked at the petition he has noted that KANU has not refused to pay the 6th respondent's bill but that KANU has averred that the bill should be paid by the government. It was his testimony that for the 6th respondent, the bill needs to be paid by whoever will pay. He further stated that it was for that reason that they chose to file a replying affidavit and not a cross-petition.

44. He stated that despite there being no conservatory orders issued in case no. 14 of 2004 they were not able to auction the petitioner's property in Nakuru because they never got a good buyer. That the bill the petitioner owes the 6th respondent is from the suit property LR 209/11157.

45. When he was re-examined he stated that KANU had not paid a debt amounting to KshS 1,132,34,306.90 and that although there was an auction in March 2021, KANU filed another case in Nakuru being Nakuru CMCC ELC 64 of 2021 where KANU was granted interim orders on 30/03/2021. Further that they have been unable to auction the land in Nakuru since KANU always seeks to stop the auction as is evidenced by the documents filed at pages 137 and 172 of the 6th respondent's bundle of documents.

46. DW2- Justus Ododa testified that he was the legal officer of the 6th respondent and he adopted his witness statement dated June 9, 2023. Upon cross-examination he stated that the petitioner is disrespectful since he failed to pay the amounts that the court decreed when it delivered the judgment for settlement of the accrued bills. Instead, the petitioner has filed a multiplicity of cases all over the courts in the country. He testified that they had not filed any case on contempt against the petitioner nor have they filed a cross-petition even in the current instant suit.

47. On re-examination, he testified that they had a record of 7 cases on the same subject matter and therefore it was not necessary for the 6th respondent to file contempt proceedings. With regard to the debt owed by the petitioner, he testified that there was no need to file a cross-petition in this matter since the debt is admitted by KANU (the petitioner). With this the 6th respondent closed their case.

1st -4th Cross-Petitioner's Case

48. DW3 – Timothy Waya Mwangi – Testified that he was a deputy director physical planning working in the Ministry of Lands, Public Works, Housing and Urban Development. He adopted his witness statement dated November 4, 2022 and also a list of documents at pages 212 as exhibit 1-16. Being a physical planner he testified that the concept behind planning of KICC is traced within the master

plan for Nairobi colonial capital. That a report prepared in 1948 provided for a Kenyan square that incorporated the public square open space to the Northwest of the railway station surrounded by administrative buildings.

49. That the concept of the public square was borrowed from the early example of what in his testimony he referred to as Greek's Agora which is an open space in the city centre where public, social and economic activities took place. This was incorporated in the 1948 plan and within the square were the High Court, Jogoo House A, Outside the square were Parliament Buildings, Holy Family Basilica and City Hall and the Police Headquarters, Harambee house, Attorney General's Chambers and the Kenya International Conference Centre, COMESA grounds among others.

50. He testified that on the said 1948 plan in the middle, there is a square which became today's City Square. This was a plan where the public could have access to civic buildings and open spaces and government offices as evidenced by the Master Plan.

51. With time, the buildings within the public square have remained predominantly public buildings because when a building is constructed within the public square it must be for public purpose. Section 11(3) of the *Land Planning Act* (LPA) defines public purpose. He stated that for purposes of planning the colour code for public purposes is colour yellow. That under the same section of the repealed *Land Planning Act, cap 303* (the planning law in force before the *Physical Planning Act*, cap 286) public purpose is defined as "any non-profit making purpose which may be declared by the Minister to be a public purpose and includes, educational, medical and religious purposes, public open space and car parks, government and local government purposes".

52. That all the purposes mentioned, KANU is not a public purpose institution and neither was it ever declared to be one by the minister nor is it non-profit organization and could thus not have been assigned any use in the public square by the director of physical planning.

53. He thus testified that KICC was erected within the public square because it was constructed for public purpose and that the petitioner could have owned a building within the public square if they were declared to be an organization for public purpose and declared so under section 11(3) of the *LPA*.

54. It was his testimony that the *Government Land Act* (GLA) section 9 has provided the procedure of alienating public land for private use and this had to be applicable for the City Square and an allotment letter had to be issued by the Commissioner of Land after consultative processes that involved the director of physical planning.

55. He contended that for the alienation of public land to happen, the procedure dictated that the director of physical planning would be required to visit the exact size of the piece of land to be alienated and map the existing infrastructure, consult extensively and circulate the proposed part development plan for comments. That once the comments were received then he was required to sent it back to the Commissioner of Lands who if satisfied that the proposed land to be alienated fulfilled the purposes as provided under section 11(3) of the *Land Planning Act* (LPA) would then approve the proposal. He would then have to insert an approved physical development plan number which the Director would use to register the plan. That it was only when the plan is registered, that the Commissioner then after receiving a copy of the said plan issue an allotment letter.

56. It was DW3's testimony that the alienation of public land involved a detailed elaborate plan that brought on board many actors and was therefore not a process that could be circumvented easily.

57. It was his testimony that there is no approved letter of allotment that was issued to the petitioner. That in 1991 the department approved a PDP for other public use developments such as the extension of the law courts, a car park for the law courts and a multistoried car park for then then City Council.

However, according to him, he stated that he had not seen in their records any PDP for the petitioner to the suit property.

58. He further testified that where the government has constructed on public land the PDP is prepared after the construction but that this changed when land grabbing became rampant and also development partners supporting projects insisted that there had to be PDPs before they (development partners) could release funds to support projects. Therefore, the issue of regularization and issuance of titles to public land is an ongoing process to safeguard and secure all public land.

59. In further cross-examination he testified that whereas there was government square there are also private buildings in between. That it is the Master Plan for the suit property which was developed in 1948 and that to him a political party and in this case KANU does not fit the definition of a public institution as defined under section 11(3). It was his testimony that he could not confirm any of the titles produced in court since that is the responsibility lay with the office of the Chief Land Registrar and not the physical planner.

60. On re-examination, he categorically stated that a letter of allotment must have a part development plan (PDP). That the suit property fell within the government square. Further that the government square and city square are functionally interconnected but they are not spatially the same as per the 1948 plan. He pointed out that there are no privately owned buildings in the government square. It was his testimony that the letter of allotment must be accompanied with a PDP number and if need be the Director of Planning needs to have all PDPs in the register.

61. DW4 – Peter Maina a building surveyor employed by the Ministry of Lands adopted his witness statement dated September 8, 2022 as his evidence in chief and a list of documents of even date which was produced as Exhibit 17 – The building register. He testified that after the government constructs a building there is a register for it since it becomes an asset of the government. That the suit property was registered as KICC – NAIR/Admin/38/1 and the record shows the date of construction as September 13, 1971 and the cost of construction is shown as British Pounds 3,937,350 and the exchange rate was Kesh 20 as at 1971.

62. He testified that the money for construction came from a vote of the exchequer from account number 530-801 (A-001) and the building was completed on March 3, 1975 and the description of the building includes the plinth areas and all developments which consist of the main tower with a podium, an amphitheater, lower ground area and a basement with 32 floors in total.

63. He testified further that all properties build on public land were not assigned LR numbers since they were deemed to be safe until recently due to the threat of land grabbing the department started registering them.

64. On cross-examination, he stated that he never had to check the validity of title as a building surveyor since he builds on government land. He stated that KICC falls under his mandate but before 1971 it was under the Ministry of Public Works. He testified that Ministry of Finance, Ministry of Tourism and Office of the President have managed the building. That between 2002- 2003 the Ministry of Tourism started managing the building alone. He stated that KANU has never managed the building they were just tenants but when asked to prove the claim he had made he stated that he could not produce any records to prove the claim that KANU never managed the building. Being tenants the liability for utility like electricity fell on KANU.

65. At this point since there was no objection raised by counsels for the petitioner and the 6th respondent, the court allowed the application from counsel for the 1st to 4th respondents (cross-petitioners) to adjourn the matter. This would enable the Counsel to ensure the witnesses that had been summoned

by the cross-petitioners were able to attend court. At the same time the adjournment was also granted so as to enable the Director of Survey to be able to produce the deed plans that they had listed in their list of authorities

66. When the hearing resumed on February 13, 2024 the 1st to 4th respondents called DW-5 Elias Muthomi Kaburu who testified that he worked with the Ministry of Land as a Land Administration Officer. It was his testimony that they did not have any records for allocation of the suit property to the petitioner. That there was no letter of allotment and other than the letter the petitioner also needed to have been issued with a PDP from director of planning which comes before the letter of allotment. He testified that the process of allotment for public land is preceded by an advertisement by the government in a newspaper with wide circulation.

67. In his testimony he stated that this advertisement in the newspaper ensures all who want to be allotted the identified land are given a chance to apply and prove financial capability to pay and develop the land and if there are many applicants, balloting is done and the successful candidate is sent to the Director of Physical Planning to have the PDP developed before issuance of a Letter of Allotment which will show location, size, user and the payments to be made which must be made with acceptance within 30 days.

68. It was his testimony that where the allotment is done by Commissioner of Land, still there has to be a PDP and the Commissioner has to confirm in writing the availability of the land before issuance of Letter of Allotment. The other process for the successful allotee is that they will make payments and engage a surveyor who upon completing the process will issue a deed plan or Registry Index Map and the alottee will forward the same to the Commissioner of Lands for preparation of a lease document. This process was not undertaken for the petitioner for the suit property.

69. On cross-examination he testified that their department was the custodian of the Letters of Allotment and there is no indication that it was filed nor any register done with respect to the petitioner's alleged land. Further that the file of the petitioner does not also show that there are any records in the scanned data office.

70. On further cross-examination he testified that the fact that they had no records of the petitioner's records it means that the said information does not exist. When re-examined he testified that the PDP and Letter of Allotment are most essential documents and that there are no records in favour of the petitioner in relation to the suit property.

71. The next witness was DW6 – Simeon Ngumi Munyu who is the Principal Land Surveyor working with Survey of Kenya and he testified that he field a survey plan and two deed plans (see page 212). He also filed a supplementary list of documents dated December 19, 2022 and which he adopted as exhibit 18 and 19 and a further list dated October 30, 2023 which he produced as exhibits 20 and 21. He testified about the process of issuance of a deed plan and that the suit property has two deed plans and the second one was issued after the first one was cancelled being the one that supported the LR 209/11157. A new one was issued supporting title number LR 209/19829.

72. On cross-examination he testified that he did not know why the earlier plan and title were cancelled since the deed plan file at the Survey of Kenya was missing and he testified that the Survey of Kenya they sometimes have missing files.

73. On re-examination he stated that the survey plan that gave rise to the Petitioner's suit property was not cancelled but that the Registration number issued was the one cancelled and it no longer exists.

74. DW -7 George Gichere Gitonga a Land Registrar produced the list of documents dated September 8, 222 and produced the exhibits as number 22 which was a copy of title deed and another exhibit number 23 which is the Memorandum of Registration of Transfer where the Transferor is the President of

Kenya and the Transferee is the PS Ministry of Tourism in relation to suit property LR 209/119829. The transfer is dated June 14, 2010 and that the only record available with regard to the title pertains to LR 209/119289 grant number IR 123524 and no other records.

75. When he was cross-examined he testified that he has never seen the records of title LR 209/11157. Further that ideally the Commissioner of Lands is the one who signs the Memorandum of Registration of Transfer but in this case it is the President who signed. Upon re-examination he stated that they had no records pertaining to petitioner's title nor of any other owner of the suit Property before the President's transfer to the PS.

76. This matter was first filed on May 2, 2017. An amended petition dated October 8, 2018 was later filed, which is supported by an affidavit jointly sworn by Charles Opondo, Nick Musungu and Boniface Makokha Telewa the 1st -3rd petitioners) dated October 8, 2018. The three deponents have expressed to have brought the petition on their own behalf and on behalf of 100 other persons who, incidentally, are also expressly listed as petitioners. The petitioners filed their further affidavits on April 3, 2019 and July 22, 2019.

77. DW 8 – Justus Kivindyo was the last witness who testified that he works at KICC as a Legal Officer and adopted his witness and a further witness statement. It was his testimony that they had filed a cross-petition. On cross-examination he testified the Ministry of Tourism acquired the suit property in 2003 by possession since it was then under KANU who had occupied the whole building and rent was then payable to KANU. It was his testimony that he was not aware that there were other offices in the building. In his further witness statement he testified that KANU was a tenant because they had possession and they were also renting offices and collection proceeds from the tenants.

78. He further stated that at paragraph 3 of his witness statement he cognized that there was a title Number LR 209/11157 in the names of Daniel Arap Moi and Oloo Aringo but that the new title shows that the suit property was handed over to the PS Tourism. With this the defendant closed its case.

79. The parties were directed to file their submissions. The petitioner filed their submissions dated March 11, 2024, the 1st to 4th respondents theirs dated March 14, 2024 and the 6th respondent filed their submission dated March 15, 2024. Each party submitted on the critical issue of ownership of the suit property. Save for the 6th respondent who submitted on the accrued bill of Kshs 822,830,416.64 contending that the since the petitioner was I occupation of the suit property between 1995 to March 20034 the privity of contract rules dictated that he had an obligation to pay the accrued electricity bill that they incurred.

80. Further that the petition does not raise nor itemize constitutional matters deserving of a constitutional interpretation since the petitioner has not mentioned specific rights that are violated. Among the cases referred to in underscoring the issue of constitutionality of the petitioner's claim is *Fredricks & others vs MEC for Education and Training Eastern Cape & Others* [2002] 23 ILU 81 (CC). They further submitted that the question in the petition relates to a private agreement which does not meet the criteria of a constitutional issue.

Analysis and Determination

81. This court has looked at the pleadings filed, the evidence on record, the submissions and the cited authorities by the parties and isolated the following as issues deserving to be determined:

    a. Whether the petitioner is entitled to the orders sought in the petition.

    b. Whether the petitioner's rights and fundamental freedoms were violated.

c. Whether the cross petition is merited

Whether the petitioner is entitled to the orders sought in the petition;

82. It is the petitioner's case that it is the registered trustee and or beneficial owner of all that parcel of land known as Land Reference Number 209/11157, measuring 1.694 Ha in the Nairobi Central Business District and housing the Kenyatta International Convention Centre (hereinafter KICC). That the property was allocated to the Petitioner by way of Letter of Allotment dated May 10, 1969 and the said letter conferred title and ownership of all that parcel of land known as Land Reference Number 209/11157, and its validity has never been contested in any court. This claim is however not supported by production of the said allotment letter knowing that the location of the suit property was already demarcated as public land which will house public offices.

83. The letter of allotment was not produced in court by PW1 neither did he produce any Part Development Plan (PDP) nor a deed plan to attest to the process of allotment. The title document produced in court show that the names on the title on behalf of the Petitioner are those of Daniel Arap Moi and Aloo Aringo. Daniel Arap Moi was the Vice President of the Republic Kenya a state officer in 1969. The question that then begs to be answered is how did a land reserved for public use get alienated for private use without the president's permission.?

84. The Law Governing the alienation of Government Land in 1969 was the *Government Land Act* (now repealed) even when the title was being issued to the petitioner in 1989 it was still governed by the *Government Land Act* (GLA, now repealed) which was the law that would be applied for the process of alienation of public land. The petitioner did not in their evidence present before the court the procedure of how this public land was alienated and allocated to a political party which is a private entity.

85. As I had stated earlier, the petitioner's case is that the suit premises was reserved and allotted to the petitioner but there was no PDP and also he testified that according to the documents produced by the 1st to 4th respondents, KICC which is the building on the land was constructed by government but according to him it was constructed on the petitioner's land.

86. Now for the government to construct on private land, the procedure is clearly stipulated in the Compulsory Land Acquisition Act. There is no need of elaborating on this process because the petitioner's claim is that the land belonged to them not that it was acquired compulsorily.

87. PW1- for the petitioner testified that he was not aware that there was a PDP. Clearly therefore if there was no PDP then it means the land could not have been alienated and allotted to the petitioner because it was not available. Further the petitioner could not explain why it took 20 years for the title to be issued on May 25, 1989. Between 1969 to 1989 what was the petitioner waiting for to acquire the title?

88. In 1989 Daniel Arap Moi was the President of the Republic of Kenya the question that begs to be answered is how did the president allocate public land to himself without having it alienated, and subjected to the procedure laid down in the Government Land Act (Repealed) so as to have the land alienated and allocated to himself as trustee of a political party which is a private entity?

89. In assessing whether the allocation to the petitioner was lawful, this court will go further and ask the question, who actually allocated the petitioner the Suit Premises was it the President or the Commissioner of Lands and were they aware of the provisions of the Government Land Act? If so was the act of allocating the petitioner public land an act of furthering the now established but disturbing Kenyan attitude of "mtado" or was it a failure to understand the law?

90. I have carefully read through all the documents filed by the petitioner and the cross-petition including the voluminous bundles filed with documents including newspaper and television news clips and maps. What has emerged is that apparently, the petitioner was allocated the suit premises by the Commissioner of Lands but the petitioner failed to call as a witness the Commissioner of Lands to produce any documents that would shade light and support the action allotment of public land to a private entity.

91. Now, the applicable law at that time and I say this for the umpteenth time was section 3 of the *GLA* (now repealed) which reserved the right to alienated Government land to the President who as at 1989 was HE Daniel Toroitich Arap Moi the then President of the Republic of Kenya. From the evidence of PW1 he was also the trustee of the Petitioner and apparently the one who was registered in trust for the suit property for the Petitioner alongside Oloo Aringo.

92. Given these facts, I am constrained to wonder aloud whether the President of the Republic of Kenya who under section 3 and 7 of the *Government Lands Act*(Repealed) is the only one who had the sole discretion to alienate government land but could delegate that role to the Commissioner of Lands and again for limited and specific purposes could have ignored the law and chosen to alienate public land and authorized the Commissioner to allocate it to the petitioner.

93. Is it possible that the President could have allocated to a political party he was a member to and a trustee of; government land knowing too well that this was public land? I find this disturbing because from the testimony of DW4 the building on the said land KICC, was constructed using public funds as at a cost GBP 3,937,350 and registered as public asset number NAIR/Admin/ADM/38/1. This averment was supported by the production of the building register This was supported by the building register produced by DW-4.

94. The said building as stated by the cross-petitioners in the supporting affidavit of Jane Frances Mutisya on September 22, 2022 is of immense significance to Kenya being national monument but also hosts many International Conferences and is used to promote tourism in the country

95. I also noted that the evidence of DW4 was not rebutted by the petitioner. Earlier when PW1 testified he only claimed that the government built KICC on the land allotted to KANU though as stated there was no supporting documents produced to support this claim of the land belonging to the Petitioner.

96. Allow me at this point to briefly state how public land is alienated as was testified by DW5 who apparently educated the court and the members of the public on the well-established procedure of alienating public land.

97. Now Justice Cherono in the case of *Mako Abdi Dolal v Ali Duane & 2 others* [2019] eKLR noted that prior to the promulgation of the 2010 *Constitution* and the 2012 amendments to the body of Land Laws in Kenya, disposition of government land was governed by the *Government Lands Act* (Repealed). Section 4 of the *Act* provided as follows:

> " All conveyances, leases and licenses of or for the occupation of Government Lands, and all proceedings, notices and documents neither this Act, made, taken, issued or drawn, shall serve as otherwise provided, be deemed to be made, taken, issued or drawn under and subject to the provisions of this Act."

98. Thus the power to dispose of public land was vested in two entities: The President and the Commissioner of Lands, under sections 3 and 9 respectively of the *GLA*. The process of the disposition of government land followed the following procedure: First, the respective municipal council in which the land to be disposed was situate had the mandate of advising the Commissioner of Lands on which

portions of land could be disposed. This step would have required the responsible council to visit the area or to carry out a fact-finding mission to satisfy itself that the land was first of all government land and second that it was indeed available for disposition. See *Harison Mwangi Nyota v Naivasha Municipal Council & 20 others* [2019] eKLR

> "...The question that the plaintiff seemed to raise is what role the Municipal Council of Naivasha had in the issuance of allotment letters to the defendants in 1992. According to DW1, an employee of the 1st defendant, the local authority (1st defendant) has to recommend that the land is available for allocation before an allotment letter can issue. DW13 also told the court that the Council oversees all developments in its jurisdiction and allocates land on advisory basis for the Commissioner. It seems that even if the 1st defendant issued the letters dated December 1, 1992, it was mere advisory to the Commissioner of Lands. The allotment of the land had to be ratified by the Commissioner for Lands. It is obvious even from the communication between the Municipal Council and the Office of the Commissioner of Lands that the Council played an important role in identifying what land was available for purposes of alienation."

99. The second step would be for the part development plan to be drawn up and approved by the Commissioner of Lands. See *Nelson Kazungu Chai & 9 others v Pwani University College* (2014) eKLR

> "It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister of Lands before any unalienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved Part Development Plan is then issued to the allottee."

100. The third step involved the determination of certain matters by the Commissioner of lands which matters are listed under Section 11 of the *Government Lands Act* (repealed). The matters to be determined include the upset price at which the lease of the plot would be sold, the conditions to be inserted into the lease; the determination of any attaching special covenants and the period into which the term is to be divided and the annual rent payable in respect of each period.

101. The fourth step would be for the gazettement of the plots to be sold, at least four weeks prior to the sale of the plots by auction under section 13 of the Government Lands Act (repealed). The notice was required to indicate the number of plots situate in an area; the upset price in respect of every plot; the term of the lease and rent payable, building conditions and any attaching special covenants.

102. The fifth step would be for the sale of the plots by public auction to the highest bidder. Section 15 of the *Government Lands Act* (repealed).

103. The sixth step would be for the issuance of an allotment letter to the allotee. An allotment letter has been held not to be capable of conferring an interest in land, being nothing more than an offer, awaiting the fulfilment of the conditions stipulated therein by the offeree. See the decisions in: *Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others* 182/1992 (Nyeri); and in *Dr Joseph NK Arap Ng'ok v Justice Moijo Ole Keiyua & 4 others* CA 60/1997 where the Court of Appeal held as follows:

> "It has been held severally that a letter of allotment per se is nothing but invitation to treat. It does not constitute a contract between the offerer and the offeree and does not confer interest in land at all. It cannot thus be used to defeat a title of a person who is the registered proprietor of the said parcel of land."

104. In order for an allotment letter to become operative, the allotee was required to comply with the conditions set out therein including the payment of stand premium and ground rent within the prescribed period. See the decision in: *Mbau Saw Mills Ltd v Attorney General for and on behalf of the Commissioner of Lands) & 2 others* [2014] eKLR

105. The allotment letter also must have attached to it a part development plan (PDP). See the decision in *African Line Transport Co Ltd v Hon AG*, Mombasa HCCC No 276 of 2013 where Njagi J held as follows:

> " ...Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number."

106. And again, in *Nelson Kazungu Chai & 9 others v Pwani University College* (2014) eKLR

> " Worth noting as well is that no Part Development Plan was produced to back the appellants' claim that due process had been followed as alleged."

107. The seventh step, which comes after the allotee has complied with the conditions set out in the allotment letter is the cadastral survey, its authentication and approval by the Director of Surveys and the issuance of a beacon certificate. The survey process precipitates the issuance of land reference numbers and finally the issuance of a certificate of lease. *Nelson Kazungu Chai & 9 others v Pwani University College* (2014) eKLR the court held as follows:

> 'It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a Certificate of Lease. This procedural survey was confirmed by the Surveyor, PW3. The process was also reinstated in the case of *African Line Transport Co Ltd vs The AG*, Mombasa HCCC No 276 of 2013 where Njagi J held as follows
>
> "Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the department of survey, who undertake the surveying. Once the surveying is complete, it is then referred to the Director of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot."

108. Having evaluated in detail the necessary steps to be followed, it is emergent that a litigant basing their interest in land on the foundation of an allotment letter must provide the following proof: First, the allotment letter from the Commissioner of Lands; Secondly, and attached to the allotment letter, a part development plan; Thirdly, proof that they complied with the conditions set out in the allotment letter, primarily that the stand premium and ground rent were paid, within the specified timeline.

109. Now, in the present case, the court confirms that the petitioner did not file a letter of allotment and therefore it is futile to scrutinize the other steps since the only document of proof of ownership that the petitioner produced is a copy of certificate of ownership which is contested. The respondents have contested the said certificate since the suit property is public land.

110. Therefore, for government land to be allot to a private entity it must be alienated by the president who may choose to delegate these powers. If this be the case then, it is only the President who could have alienated the suit property. The power of the President under section 3 of the *GLA* was delegated

to the Commissioner of Lands in cases, only for religious, charitable, education or sports purposes. KANU was neither a religious, charitable, educational or sports institution. It was and is a political party of members with private aspirations not a charitable, not an educational, not a religious nor an institution related to sports.

111. The provisions of section 23 of the *Registration of Titles Act*, chapter 281 Laws of Kenya (now repealed) which was the operational law at the time of the alleged allocation of the suit property to the petitioner conferred an indefeasible title to the allottee.

> " Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party; such is the sanctity of title bestowed upon the title holder under the Act.

112. The same principle is also reiterated in section 28 of the *RLA* as thus:

> " The rights of a proprietor, whether acquired on first registration or whether acquired 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 claim whatsoever, but subject....."

113. Today, the *Land Registration Act* reflects the two provisions, it states that:

> 26. Certificate of title to be held as conclusive evidence of proprietorship
>
> (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
>
> (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
>
> (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

114. Thus the *Land Registration Act* reflects the three principles and further recognises the indefeasibility principle or put differently, the sanctity of title. This is to mean that the title is a proof that the person named as proprietor of the land is the absolute and indefeasible owner of the land. This principle was eloquently noted in the case of *Attorney General v Kenya Commercial Bank Limited & 3 others* (2014) eKLR where the court stated that:

> " [...]it would be a bad precedent where parties to a transaction in land would not only have to satisfy themselves that the land in question is registered but also trace the history of the land to establish whether or not the title to the said parcel of land was legitimately acquired[...] It would also make nonsense of the title deeds issued and guaranteed by the Government in respect of parcels of land owned by individuals".

115. The Kenyan endorsement of the principle seems to have been borrowed from the Privy Council decision in the case of *Gibbs v Messer* [1891] AC where it was stated as follows: -

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

116. Notably though, the indefeasibility principle is however not absolute. The law provides for grounds under which it can be impeached. In the Court of Appeal decision of *Dr Joseph NK Arap Ngok v Justice Moijo Ole Keiwua* No 60 of 1997 the court interpreted section 23 of the *RTA* as thus; -

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

117. The petitioner has claimed that being a first registration the title conferred on the petitioner cannot be challenged. At the same time the petitioner has submitted that its rights under article 40 of the *Constitution* have been violated.

118. As already stated above the petitioner did not submit a letter of allotment nor any documents that would trace the root of the title being claimed to have been allotted to the petitioner. In its bundle of documents, the petitioner stated that it had produced a copy of the letter of allotment at pages 22-31. I perused the entire bundle but did not cite the documents to support delineation of public land under sections 3 and 7 of the *Government Land Act* (repealed) that would have conferred an indefeasible title under section 23 of the *Registration of Titles Act* (RTA repealed) whose registration is replicated under section 26 of *Land Registration Act* 2012.

119. PW1 on his part testified that there was no letter of allotment that he had seen. Further, annexture E produced is allegedly an affidavit sworn on March 9, 1993 by one Wilson Gachanja, Commissioner of Lands who was not called as a witness to produce the said affidavit.

120. I still perused the document not for any probative value since the maker was not in court but to understand the claim of the petitioner better and noted that the maker referred to a letter of allotment which was made on December 1, 1967 but the same was not produced in court neither was the maker of the document called as a witness – again this has no probative value.

121. In the case of *Chemey Investment Limited v Attorney General & 2 others* [2018] eKLR, the Court of Appeal stated as follows:

> " 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.

122. 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."

123. There are countless legal decisions and authorities in Kenya where courts have held that the Commissioner of Lands had no power to allocate land that was designated appropriated or alienated for public purposes/use. In the case of the *Adan Abdirahani Hassan & 2 others v Registrar of Titles, Ministry of Lands & 2 others* [2013] eKLR court held as follows;

> "My take is that the Commissioner of Lands or his subordinates, while alienating Government land, can only do so over unalienated Government land as defined in the Constitution and under the repealed Government of Lands Act. The Commissioner of Lands or his subordinates cannot purport to alienate land which has already been set aside for public purpose.

124. Similarly, in the case of *Norbixin Kenya Ltd v Attorney General* Nairobi HCCC No.1814 of *Norbixin Kenya Limited v AG* in HCCC Case No 1814 of 2002 wherein the court dismissed a claim of public land on the ground that: -

> "Once a suit property was designated as a Police Station, it ceased to be un-alienated Government land as it was set aside for use as a public utility for the general public. The Commissioner of Lands henceforth became a trustee with regard to this public utility plot.....the suit property having been set aside and planned as a police station for public use...was not therefore available for further alienation or allocation."

125. In the case of *Paul Nderitu Ndungu & 20 others v Pashito Holdings Limited & another* (Nairobi HCCC No 3063 of 1996), Mbhogoli Msagha J held-

> "that the Commissioner of Lands had no legal authority to allocate two pieces of land which had been reserved as a Police Post and a Water Reservoir as they had already been allotted."

126. Therefore, any alienation of land reserved for public purpose and issuance of a title for the same, whether under the *Registration of Titles Act*, cap 281 or the *Registered Land Act*, cap 300 is null and void ab initio. Such a title does not exist in the first place because the land belonged to the Public and was not available for alienation. See *R v Registrar of Lands, Kilifi ex parte Daniel Ricci* (2013).

127. In the instant petition the land was already reserved for purposes of construction of an international conference centre and was not available to delineate and allocate to KANU, the petitioner and therefore the purported title LR 209/11157 does not exist because the land purportedly being allocated already belonged to the public.

128. In the case of *James Joram Nyaga & another v AG* (2007) eKLR, the court held that:

> "The above section (section 3 of the GLA) clearly limits the power of the commissioner to executing leases or, conveyances on behalf of the President and the proviso to the section specifically limits the power to alienate un-alienated land to the president."

129. In its claim I have also noted that the petitioner has sought to have the 1st to 5th respondents take over the accrued bills of utilities of KICC alleging that it is the government that accrued the accumulated bills. The decision of Justice Lessit J (as she then was) in *Kenya Power & Lighting Company Limited versus KANU & 5 others* (2004) eKLR where KPLC obtained an order for attachment of Nakuru Municipality Block 9/31 since a judgment against KANU for the sum of Kesh 212,816,986 with interest at court rates from the date of filing the suit until payment in full and costs has not been set aside. Meaning that there is already an order compelling the Petitioner to pay the said amount which accrued when KANU admittedly was occupying KICC. Further this being a commercial claim the right forum at which the issue can be raised is the commercial court which as I have noted already made a decision. I will therefore desist from addressing this issue since in my reading of the pleadings it is pleaded in the wrong forum.

130. This position is also applicable to the 6th respondent's claim.

131. Thus on the first issue the court finds that the Commissioner of Lands had no authority to alienate the suit premises in this case to the petitioner. The allocation of the suit premises to the petitioner was therefore not only irregular but unlawful as well. Thus the petitioner is not entitled to the orders that they have sought in the petition.

Whether the petitioner's rights and fundamental freedoms were violated.

132. Article 40 of the *Constitution of Kenya* provides:

> "(1) Subject to article 65, every person has the right, either individually or in association with others, to acquire and own property
>
> (a) of any description; and
>
> (b) in any part of Kenya.
>
> (2) Parliament shall not enact a law that permits the State or any person.
>
> a. to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
>
> b. to limit, or in any way restrict the enjoyment of any right under this article on the basis of any of the grounds specified or contemplated in article 27(4).
>
> (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—
>
> a. results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
>
> b. is for a public purpose or in the public interest and is carried out in accordance with this *Constitution* and any Act of Parliament that—
>
> i. requires prompt payment in full, of just compensation to the person; and

ii. allows any person who has an interest in, or right over, that property a right of access to a court of law.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.

(6) The rights under this article do not extend to any property that has been found to have been unlawfully acquired."Article 47 of the Constitution provides:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action."

133. Section 4(3) of the *Fair Administrative Actions Act* also provides that where an administrative action is likely to affect the rights and fundamental freedoms of any person, the administrator shall give the person affected prior notice of the proposed action, an opportunity to be heard, right to internal review where applicable, statement of reasons, notice of right to legal representation, right to cross-examine where applicable, and information, materials and evidence forming the basis of the action.

134. The petitioner has alleged to be the lawful and registered owner of the suit property and that the 1st -4 respondents have filed a cross-petition alleging that the suit property is government property. In their cross-petition they have relied on articles, 2(1), 3, 10, 19, 20, 40, 62 and 259 as being the legal foundations for the cross-petition and alleged that the petitioner violated the constitution and fundamental rights and freedoms of Kenyans. The petitioner stated that the 1st to 5th respondents issued and applied an Executive Order communicated by way of a signed press statement to forcefully claim ownership of land parcel known as Land Reference Number 209/11157, thus forcefully evicting the managing agents of the petitioner's property and tenants in the KICC and altered the petitioner's office.

135. That this takeover of the petitioner's property was without compensation or consideration to the petitioner and neither was the said Executive Order produced nor served upon the petitioner to enable it respond

136. The respondents on the other hand had filed a response to the suit that had been filed by the petitioner challenging the executive order issued on February 11, 2003 that enabled the government to take over the management of the suit property. Misc Civil Application Number 128 of 2003 which eventually was as heard and determined in favour of the respondents. They also contended that the petitioner's acquisition of the suit property by the did not comply with the requisite procedures provided under Chapter 19 paragraph 12 of the *Government Financial Regulations and Procedures* for acquisition of property from the Government either as a gift or purchase and therefore the action was null and void. Although the respondents did not demonstrate that the Notice was served to the petitioners informing them of the takeover, it is suffice that the matter was canvassed before a competent court of law and the court determined the matter. There is no indication that the petitioner filed an appeal against the decision.

137. I am also of the view that the petitioner has not proved any violation of rights under art 40 of the *Constitution*. Whereas article 40 provides for the right to property, the protection does not extend to unlawfully acquired land. In the case of *Morris Ngundo v Lucy Joan Nyaki & Another* [2016] eKLR the court held that:

> " Article 40 of the Constitution provides the right to property. Article 40(6) provides that the rights under the said Article do not extend to any property that is found to have been unlawfully acquired. Article 40 must be read as a whole so that protection afforded therein which protect the right to property must be held to exclude property found to be unlawfully acquired under article 40(6)".

138. Further the Supreme Court in the case of *Rutongot Farm Ltd v Kenya Forest Service & 3 others* [2018] eKLR, expressed this position thus:

> Once proprietary interest has been lawfully acquired, the guarantee to protection of the right to property under article 40 of the Constitution is then expressed in the terms that no person shall be arbitrarily deprived of property. The same guarantee existed in section 75 of the repealed Constitution.

139. Section 26(1)(b) of *Land Registration Act* which the petitioner has sought to hinge their claim on does not protect the petitioner's title at all. Equally this is a title that does not enjoy the protection of the law under art 40(3) of the *Constitution* as it has been found to be unlawful under art 40(6) of the *Constitution*.

140. The provisions of section 23 of the *Registration of Titles Act*, chapter 281 Laws of Kenya (now repealed) and article 40 of the *Constitution* which were cited by the petitioner in its petition and submissions only protect property acquired lawfully. article 40(6) of the *Constitution* provides that protection given to a right to acquire and own property does not extend to property that has been acquired unlawfully. It is my finding that the petitioner has no valid proprietary rights in the suit property capable of protection by law. I therefore find no merit in the petitioner's contention that its rights to property under article 40 of the *Constitution* were violated by the respondents.

141. This court is of the view that although the petitioner has alleged that their rights under *Constitution* were violated, they have not proved that the takeover of the suit property which does not belong to them was unlawful and that it has in any way interfered with the petitioner's right to property. This court has established that the petitioner is not the owner of the suit property having acquired it in the most unprocedural ways which was a nullity ab initio. Further the bills being claimed to have accrued to the respondents were accrued by the petitioner and the court made this finding already. Thus the 6th respondent's action for demanding the settlement of the accrued utility bills is legal and right but this is not the court at which the claim should be made.

142. Although the petitioner has alleged that they stand to suffer irreparable harm if the suit property Nakuru Municipality Block 9/31 is sold, this will be in compliance of the court order of February 12, 2015 following the judgment by Justice Lesit J (as she then was) in *Kenya Power & Lighting Company Limited versus KANU & 5 others* (*supra*).

143. This court has established from the evidence on record that the suit property belongs to the government as the cross-petition states. The petitioner in their submissions stated that the property belongs to the petitioner and in the event the government has acquired the property forcefully by evicting the petitioner then in line with the doctrine of compulsory acquisition, the petitioner should be compensated as required by the law.

144. I am of the view that the petitioner is not entitled to any compensation as the building erected on the suit property was erected by the government using public funds and it is a public building and I have also established that the suit property belongs to the government as claimed by the 1st to 4th cross-petitioners and there is no way the petitioner will be compensated by the doctrine of compulsory acquisition.

145. On this second issue this court holds that the petitioner has not proved any violation of rights under art 40(3) of the *Constitution*. I therefore find no merit in the petitioner's contention that its rights to property under article 40 of the *Constitution* were violated by the respondents

146. This court is of the view that in situations like this the government should have clear procedures on taking over government properties in the hands of private entities legally so as to avoid parties coming to court to seek for compensation and damages where clearly there is no right to property violated.

Whether the cross petition is merited

147. The 1st -4th respondents in their cross petition alleged that the suit property is public land and that the development of the suit property was (KICC) was funded by the exchequer project account number 530-801 (A)-001W at a total cost of Kpound 3,987,350 registered as a Government Building number NRB/ADM/38/1.

148. The cross-petitioners allege that the suit property being claimed by the petitioner was obtained and acquired in breach of article 62(4) which provide for the manner in which public land shall be disposed of. Further that the suit property houses KICC which they testified was constructed using public funds.

149. In the case of *Paul Nderitu Ndung'u & 20 others v Pashito Holdings Limited & Another* (*supra*) it was held that the Commissioner of Lands had no legal authority to allocate the two pieces of land which had been reserved for a Police Post and a Water Reservoir as they had already been alienated. In the *Paul Nderitu Ndung'u case* Justice Mbogholi Msagha said:

> "Under the *Government Lands Act* (cap 280, Laws of Kenya) the Commissioner of Lands can only make grants or dispositions of any estates, interests or rights in over unalienated government land. (Section 3). In the instant case, the two parcels of land among others had been alienated and designated for particular purposes. It was not open for the Commissioner of Lands to re-alienate the same. So the alienated was void *ab initio*."

150. In the case of *Henry Muthee Kathurima v Commissioner of Lands & another* [2015] eKLR the court stated as follows:

> "The Commissioner of Lands had no power to alienate public land and any action taken without due authorization is a nullity. We cite the case of *Said Bin Seif v Shariff Mohammed Shatry*, (1940) 19(1) KLR 9, and reiterate that an action taken by the Commissioner of Lands without legal authority is a nullity; such an action, however, technically correct, is a mere nullity."

151. The cross-petitioners have been able to specifically prove the particulars of breaches of clearly laid down procedures in law that were not followed by the petitioner in seeking to acquire the suit property. The suit parcel being public land, the petitioner ought to have followed the procedure provided in law in order to have the suit parcel allocated to them. This court has looked into the evidence on record and it is clear that the suit parcel was illegally and unprocedurally acquired by the petitioner.

152. As I am persuaded as above, I find that the title held by the petitioner is null and void given that it was appropriated in contravention of the law. It is the finding of the court that section 143 of the *Registered Land Act* (now repealed) and Section 80 of the *Land Registration Act* empowers it to cancel an illegally acquired title. Equally the said title is impeachable under section 26(1)(b) of the *Land Registration Act* which provides that a title can be challenged where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

Disposal Orders

153. In conclusion this court finds that the petitioner's petition is unmerited and is hereby dismissed with costs. The cross -petition filed by the 1st to 4th respondents is merited and this court therefore orders as follows:

1. A declaration is hereby issued that LR 209/11157 was obtained illegally, unlawfully and without following legal procedure hence a nullity ab initio.
2. That the title documents/leasehold interest created in LR No 209/11157 is illegal and confers no proprietary interest to the 1st petitioner/respondent per the provisions of article 40(6) of the Constitution
3. That the allocation of the suit property to the 1st respondent without following the legal procedures is lawful, unlawful, illegal and unconstitutional.
4. That the title for LR No 209/11157 in the name of the 1st respondent in the cross petition is hereby revoked
5. That the suit property as registered being LR No 209/19829 issued in the name of the Permanent Secretary to treasury to hold in trust for the Ministry of Tourism is the lawful, legal and constitutionality appropriate title for the suit land.
6. A declaration is hereby issued that the Ministry of Tourism is the lawful owner of the suit land LR 209/19829 and the 1st respondent's registration of LR No 209/11157 is unlawful, illegal and unconstitutional.
7. This being a public interest case I will direct that each party bear their own cost of the cross-petition and the petition.

It is so ordered

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 3RD DAY JUNE 2024.

AMENDED DATED AND SIGNED AT NAIROBI ON THIS 13TH DAY OF JUNE 2024 AS PER SECTION 99 OF THE CIVIL PROCEDURE ACT.

.....

MOGENI J

JUDGE

In the presence of: -

Mr. Kibet for Petitioner

Ms Kibet for 1st – 4th Respondent with Mr. Muteri for 1st – 4th Respondent

No appearance for 5th -6th Respondent

Ms. Caroline Sagina - Court Assistant

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MOGENI J

JUDGE

JUDGEMENT FOR ELC PETITION NO.E025 OF 2020	0