Torino Enterprises Limited v Attorney General (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KESC 79 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION 5 (E006) OF 2022

MK IBRAHIM, SC WANJALA, N NDUNGU, I LENAOLA & W OUKO, SCJJ

SEPTEMBER 22, 2023

BETWEEN

TORINO ENTERPRISES LIMITED ..... APPELLANT

AND

HON ATTORNEY GENERAL ..... RESPONDENT

(Being an appeal from the Judgment and Orders of the Court of Appeal at Nairobi (Musinga (P), Murgor & Mohamed JJ.A) delivered in Civil Appeal No. 84 of 2012 on 4th February 2022)

A letter of allotment does not confer a transferable title on the allottee.

Reported by John Ribia

Jurisdiction *– jurisdiction of the High Court – jurisdiction of the High Court vis-à-vis the jurisdiction of the Environment and Land Court (ELC) – jurisdiction of the High Court to determine matters relating to the environment and the use and occupation of, and title to land that was filed before the Environment and Land Court (ELC) was operational - whether the High Court had the jurisdiction to determine a suit relating to the environment and the use and occupation of, and title to land that was filed before the Environment and Land Court (ELC) was operational, but was concluded after the ELC was operational - Constitution of Kenya, 2010 article 162 (1) and (2)(b); Practice Directions on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land, 2011 (Act No 19 of 2011 Sub Leg)*

Land Law *– public land – allotment of public land – allotment letter – legal effect of an allotment letter on conferring property rights - whether a letter of allotment that had not been perfected could confer property rights – whether a letter of allotment, in and by itself, conferred a transferable title to the allottee - whether an allottee that had fulfilled all the conditions of a letter of allotment but had not registered the land in their name could pass a valid title to a third party - whether the Commissioner of Lands had the authority to allocate un-alienated government land that had been converted to private free hold land - whether un-alienated government land that had been converted to private free hold land fell under the regulatory regime of the Government Lands Act (repealed) or subsequent laws regulating use of public land - Registration of Titles Act (cap 281 Repealed) section 23; Physical Planning Act (cap 286 Repealed), section 3; Land Registration Act, 2012 (Act No 3 of 2012),*

section 26; Land Acquisition Act (cap 295) (Repealed) part II; Government Lands Act (cap 280) (Repealed) section 2

Land Law *– innocent purchaser for value – expectations - whether to be considered as an innocent purchaser for value, one was expected to inspect the property they were purchasing.*

Brief facts

At the High Court, the appellant contended that it had acquired the suit property upon payment of a consideration of Kshs 12 million . It contended to have acquired the property from Renton Company Ltd (Renton), which company had acquired the property from an allotment letter from the defunct Nairobi City Council. The appellant urged that it had been issued with a title deed under the Registration of Titles Act, repealed, on April 26, 2021. The appellant contended that around 2005, the DoD encroached on its property and unlawfully fenced off 90 acres. DoD constructed a demining college and auxiliary buildings. The petitioner contended that the acts were illegal. The petition was allowed by the High Court and the occupation by DoD was deemed to be compulsory acquisition without compensation. The respondent was ordered to pay the appellant the sum of Kshs 1.5 billion being the market value of the suit land.

Aggrieved the respondent appealed to the Court of Appeal which held that the land in question was not un-alienated government land within the meaning of section 2 of the Government Lands Act (repealed). On the contrary, the court held that the suit property was private land, even long before defunct Nairobi City Council bought it in 1971. The Commissioner of Lands lacked the power to alienate or allocate it to a third party. Neither Renton nor the appellant had acquired a valid interest in or over the suit property. The Court of Appeal ultimately held that the Certificate of Title issued to the appellant was an illegal document and by virtue of article 40 (6) of the Constitution, the concept of indefeasibility of title under section 26 of the Land Registration Act was inapplicable.

Aggrieved the appellant filed the instant appeal before the Supreme Court.

Issues

i. Whether the High Court had the jurisdiction to determine a suit relating to the environment, the use and occupation of and title to land that was filed before the Environment and Land Court (ELC) was operational, but was concluded after the ELC was operational.
ii. Whether un-alienated government land that had been converted to private free hold land fell under the regulatory regime of the Government Lands Act (repealed) or subsequent laws regulating use of public land.
iii. Whether a letter of allotment that had not been perfected could confer property rights.
iv. Whether the Commissioner of Lands had the authority to allocate un-alienated government land that had been converted to private free hold land.
v. Whether the Commissioner of Lands had the authority to alienate land via allotment to a third party where the conditional thirty-day acceptance period to accept the allotment had lapsed.
vi. Whether a letter of allotment, in and by itself, conferred a transferable title on the allottee.
vii. Whether an allottee that had fulfilled all the conditions of a letter of allotment but had not registered the land in their name could pass a valid title to a third party.
viii. Whether to be considered as an innocent purchaser for value, one was expected to inspect the property they were purchasing.

Held

1. The Environment and Land Court was established under article 162 (1) and (2)(b) of the Constitution of 2010 . It was operationalized by the Environment and Land Court Act. After its commencement, vide Gazette Notice No 16268 dated November 9, 2012, the then Chief Justice issued the 'Practice Directions on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land (the Practice Directions). It was directed that all matters pending judgment and ruling before the High Court, arising from proceedings relating to the environment and the use and occupation of, and

title to land, would be concluded by the High Court. Similarly, all part-heard cases pending before the High Court, relating to the same proceedings would be heard and determined by the same court.

2. The plaint was filed and determined at the High Court at a time before the Environment and Land Court was operational. The Practice Directions unequivocally directed the High Court to hear and determine pending proceedings on environment and land matters.
3. By a Consent dated March 25, 2021, the proceedings in ELC No 282 of 2012 were withdrawn, and the consent adopted as an order of the court. Consequently, when the appellate court delivered its Judgment, the said proceedings had long been concluded. There was no reason to fault the appellate court's exercise of jurisdiction to determine the appeal. There was nothing pending at the Environment and Land Court which could have necessitated the Court of Appeal to down its tools.
4. Once an individual or entity acquired any un- alienated government land, or other land for that matter, consequent upon registration of title, in accordance with the provisions of the applicable law, such land transmuted from "public" to "private" land. Article 64(a) of the Constitution defined private land as consisting of registered land held by any person under any freehold tenure.
5. Upon alienation to Kayole Estates Limited in 1964, the suit property was converted from un-alienated government land to private freehold land. The same was effectively divested from the purview of the regulatory regime of the Government Lands Act (repealed). The Commissioner of Lands could therefore not have had any authority, to allocate the suit property to any other person as he purported to have done.
6. The defunct Nairobi City Council acquired valid title to the suit property from Kayole Estates Ltd through purchase. Renton Company Ltd could only have acquired valid title from the Nairobi City Council, and not the Commissioner of Lands who had long been divested of authority to allocate the same.
7. An allotment letter was incapable of conferring interest in land, being nothing more than an offer, awaiting the fulfilment of conditions stipulated. An allottee, in whose name the allotment letter was issued, had to perfect the same by fulfilling the conditions therein. Those conditions included but were not limited to, the payment of a stand premium and ground rent within prescribed timelines. But even after the perfection of an allotment letter through the fulfillment of the conditions stipulated therein, an allottee could not pass valid title to a third party unless and until he acquired title to the land through registration under the applicable law. It was the act of registration that conferred a transferable title to the registered proprietor, and not the possession of an allotment letter.
8. An allotment letter in and by itself, was incapable of conferring a transferable title to an allottee. The holder of an allotment letter was incapable of transferring or passing valid title to a third party on the basis of the allotment letter unless and until he became the registered proprietor of the land consequent upon the perfection of the allotment letter. It mattered not therefore that the allotment letter had not lapsed.
9. Renton Ltd had not complied with the terms and conditions of the allotment letter. Therefore, the letter ought to have been deemed as lapsed at the time it purported to transfer the same to the appellant. An allotment letter, even if perfected, could not by and in itself confer transferable title to the allottee, unless the latter completed the process by registration. All transactions between Renton Company Limited and the appellant were a nullity in law.
10. The argument that the appellant was an innocent purchaser for value without notice could not hold. However, there was evidence on record in the form of correspondences and minutes, confirming that Department of Defence (DoD) had been granted access by the defunct municipal council and had taken possession of, and erected public infrastructure upon the suit property before the purported purchase. If the appellant was a diligent purchaser, it ought to have at least known of that fact. An innocent purchaser for value would also denote one was aware of what they were purchasing by inspecting the suit premises. The fact that the suit land was occupied must have sounded a warning

of "buyer be aware" to the appellant. It was not an innocent purchaser for value entitled to orders for restoration or compensation.

11. Although the DoD had been able to prove that it had been in exclusive occupation and use of the Suit Property from 1986, with the full knowledge and authority of defunct Nairobi City Council and the Commissioner of Lands, there was nothing on record to prove that DoD ever acquired valid title to the suit property. Just as the Commissioner of Lands could not allocate the said land to Renton for reasons already canvassed, so also was he equally hamstrung in relation to DoD. The title to the suit property, remained vested in Nairobi County which was the legal successor to the defunct Nairobi City Council.
12. The impugned documents were public documents within the meaning of section 79 of the Evidence Act requiring certification in accordance with sections 68 (1)(e)(f), (2) (c) and 80 of the Evidence Act. Information held by the State or state organs, unless for very exceptional circumstances, ought to be freely shared with the public. However, such information should flow from the custodian of such information to the recipients in a manner recognized under the law without undue restriction to access of any such information. A duty has also been imposed upon the citizen(s) to follow the prescribed procedure whenever they require access to any such information. That duty cannot be abrogated or derogated from, as any such derogation would lead to a breach and/or violation of the fundamental principles of freedom of access to information provided under the Constitution and the constituting provisions of the law. It was a two-way channel where the right had to be balanced with the obligation to follow due process.

Appeal dismissed.

Orders

Each party was to bear its own costs, security for costs to be refunded to the appellant.

Citations

Cases

Kenya

1. *Arthi Highway Developers Limited v West End Butchery Limited, Solomon Mwinzi Mwau, John Mucheni Musa , Attorney General, Kenya Medical Association Cooperative Society Ltd, Yamin Construction Co Ltd & Gachoni Enterprises* Civil Appeal 246 of 2013; [2015] KECA 816 (KLR) - (Explained)
2. *Benja Properties Limited v Syedna Mohammed Burhannudin Sahed & 4 others* Civil Appeal 79 of 2007; [2015] KECA 457 (KLR) - (Explained)
3. *Chemey Investment Limited v Attorney General & 2 others* Civil Appeal 349 of 2012; [2018] KECA 863 (KLR) - (Explained)
4. *Electrical Options Limited v Attorney General & another* Petition 23 of 2011; [2012] KEHC 5976 (KLR) - (Explained)
5. *Githinji, Elizabeth Wambui & 29 others v Kenya Urban Roads Authority & 4 others* Civil Appeal No 156 of 2013; [2019] eKLR - (Explained)
6. *Kanyiri, Peter Wariire v Chrispus Washumbe & 2 others* Environment & Land Case 603 of 2017; [2022] KEELC 1531 (KLR) - (Explained)
7. *Kiluwa Limited & another v Business Liaison Company Limited & 3 others* Petition 14 of 2017; [2021] KESC 37 (KLR) - (Explained)
8. *Kirimi, John Elias v Martin Maina Nderitu & 4 others* Environment and Land Case 320 of 2011; [2017] KEELC 3261 (KLR) - (Explained)
9. *Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others* Election Petition 4 of 2017; [2017] KESC 28 (KLR) - (Explained)
10. *Muriithi & 4 others v Law Society of Kenya & another* Civil Application 12 of 2015; [2016] eKLR; [2016] 1 KLR - (Explained)

11. *Mwero, Kadzoyo Chombo v Ahmed Muhammed Osman & 11 others* Environment & Land Case 42 of 2021; [2021] KEELC 30 (KLR) - (Explained)
12. *National Land Commission v Afrison Export Import Limited & 10 others* Environment and Land Reference 1 of 2018; [2019] eKLR - (Explained)
13. *Ng'ok , Joseph NK Arap v Moijo Ole Keiwua & 4 others* Civil Application 60 of 1997; [1997] KECA 1 (KLR) - (Explained)
14. *Ngacha v Chepsaat & 4 others* Civil Case 182 of 1992; [2008] KEHC 622 (KLR) - (Explained)
15. *Njatha, Lilian Wanjeri v Sabina Wanjiru Kuguru & another* Environment & Land Case 471 of 2010; [2022] KEELC 222 (KLR) - (Explained)
16. *Rai & 3 others v Rai & 4 others* Petition 4 of 2012; [2014] KESC 31 (KLR) - (Explained)
17. *Vekariya Investments Limited v Kenya Airports Authority & 2 others* Petition 263 of 2011; [2014] KEHC 5533 (KLR) - (Explained)
18. *Wanjohi , Isaac Gathungu & another v Attorney General & 6 others* Petition 154 of 2011; [2012] KEHC 5200 (KLR) - (Followed)

Statutes

Kenya

1. Constitution of Kenya articles 6(2); 10(1)(2),19; 22; 24; 27(1)(2); 40; 50(1); 62(1)(b); 162(1)(2)(b); 163(3)(b)(4)(a); 189(3) - (Interpreted)
2. Environment and Land Court Act, 2011 (cap 8D) In general - (Cited)
3. Evidence Act (cap 80) sections 68, 79, 80 - (Interpreted)
4. Government Lands Act (Repealed) (cap 280) section 2 - (Interpreted)
5. Inter- governmental Relations Act, 2012 (cap 265F) In general - (Cited)
6. Land Acquisition Act (Repealed) (cap 295) part II - (Interpreted)
7. Land Registration Act, 2012 (cap 300) section 26 - (Interpreted)
8. Physical Planning Act (Repealed) (cap 286) section 3 - (Interpreted)
9. Practice Directions on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land, 2011 (Act No 19 of 2011 Sub Leg) In general - (Cited)
10. Registration of Titles Act (Repealed) (cap 281) section 23 - (Interpreted)
11. Supreme Court Act (cap 9B) section 15(2) - (Interpreted)

Advocates

Dr Kenneth Kiplagat and *Mr Ezekiel Wafula* for the appellant (E Wafula & Associates Advocates)

Mr Oscar Eredi for the respondent (State Counsel Office of the Attorney General)

JUDGMENT

A. Introduction

1. Before this court is the petition dated March 14, 2022 and filed on March 16, 2022. It is brought under articles 10(1) and (2), 19, 22, 27 (1) and (2), 50(1) and 163(3)(b) and (4)(a), of the *Constitution* and section 15(2) of the *Supreme Court Act, 2011*, challenging the judgment and orders of the Court of Appeal (Musinga (P), Murgor & Mohamed JJA) delivered in Civil Appeal No 84 of 2012 on February 4, 2022. The impugned decision overturned the High Court (Gacheche, J as she then was) in Constitutional Petition No 38 of 2011.

B. Background

i.At the High Court

2. On February 21, 1964, a freehold title known as Embakasi LR No 11xxx (Original No 41/x) measuring 5639 acres was alienated and granted to Kayole Estates Limited. Thereafter, this parcel of land was transferred to the then Nairobi City Council (hereinafter NCC) for valuable consideration and a transfer duly registered on November 22, 1971. In 1973, the parcel of land was subdivided into eight parcels. One such parcel is LR No 22xxx, Grant No IR 85966 situate within the City of Nairobi and measuring 83.910 hectares (hereinafter the Suit Property).

3. In a plaint dated March 10, 2011 and filed on even date, the appellant instituted High Court, Constitutional Petition No 38 of 2011 against the Attorney General, the respondent herein. It was the appellant's case that upon payment of a consideration of Kshs 12,000,000.00 it had acquired the suit property for a term of 99 years commencing from the year 2000, from Renton company limited, which company had acquired the said property for value from NCC, through an allotment letter dated December 19, 1999. The appellant urged that it was issued with a title deed under the *Registration of Titles Act* cap 281 on April 26, 2001.

4. The appellant further contended that on or about the year 2005, the Department of Defence (hereinafter DoD) encroached on its property and unlawfully fenced off ninety (90) acres thereof. It urged that despite demands and requests to desist from trespassing on its property, DoD proceeded to construct a demining college and auxiliary buildings. It was its case that these actions were illegal and contravened its constitutional rights to property guaranteed under article 40 of the *Constitution*. It further urged, that DoD had failed to communicate its intention to acquire part of the suit property or to comply with the compulsory acquisition procedures provided for under the *Land Acquisition Act* (cap 295). It consequently sought the following reliefs;

    i. A declaration that the Government's acquisition of 90 acres of the suit property was in contravention of article 40(3) of the *Constitution*;

    ii. A declaration that the said occupation, retention and detention of the said 90 acres amounted to compulsory acquisition;

    iii. A declaration that any continued occupation of the said portion of the suit property without compensation amounted to acquisition contrary to article 40(3) of the *Constitution*;

    iv. That it be restored possession of its land in the same condition it was when it was unlawfully acquired by the Government, or alternatively an order for the payment of Kshs 1, 530,000,000 being the [then] current value of the said 90 acres, with interest thereon at the [then] prevailing central bank rates from the date of the petition till payment in full;

    v. An order for mesne profits from the date of the respondent's occupation until its restoration; and

    vi. Costs of the petition.

5. In opposition, DoD argued that in 1984, it had requested the permanent secretary, Ministry of Defence to initiate consultative engagements with the NCC, the then registered proprietor and other stakeholders, with the intention to acquire a portion of the suit property for the expansion of its Embakasi Garrison. It was the respondent's argument that after expansive consultation in 1986, the Ministry of Defence surveyed, beaconed and fenced the identified portion. It was also contended that

the Commissioner of Lands had given assurance to DoD that the said parcel would be registered in its name.

6. DoD also challenged the legality of the appellant's title, arguing that the same had not been acquired in accordance with the applicable laws. It contended that the suit property was public land, and as such, was not available for allocation to a private entity. It further submitted that it had put up important military facilities thereon. In conclusion, DoD argued that the title issued to the appellant could not be protected under article 40(6) of the *Constitution* and that the said alleged proprietorship was against public interest.

7. In a judgment delivered on July 4, 2011, the trial court, (Gacheche, J) allowed the petition with costs to the appellant. The court determined that the suit property was a freehold private property and not public land, contrary to the contention by DoD. The court held that the appellant was the lawfully registered proprietor, pursuant to article 40 of the *Constitution* and section 23(1) of the *Registration of Titles Act*.

8. The trial court held that DoD was in contravention of article 40(3) of the *Constitution* and the requirements laid down in Part II of the *Land Acquisition Act* cap 295. It held that the occupation, retention, and continued occupation of the said portion of the suit property amounted to an illegal compulsory acquisition.

9. The trial court issued the following orders, as particularized in its decree issued on July 12, 2011;

    a. A declaration that the acquisition of the suit property by the respondent was in contravention of article 40(3) of the *Constitution of Kenya* & the *Land Acquisition Act* and thus the occupation, retention, detention and any continued occupation of the said portion of the suit land amounted to compulsory acquisition without compensation contrary to article 40(3) of the *Constitution of Kenya* .

    b. The respondent shall, within 30 days from the date of the Judgment, restore the possession of the said land to the respondent in the same condition as it was when it was unlawfully acquired;

    c. In the alternative, the respondent shall pay the appellant the sum of Kshs 1,530,000,000.00, being the market value of the said land as per the valuation report produced in court and undisputed by the respondent;

    d. Interest on the award at court rates till payment in full;

    e. The prayer for mesne profits is declined as it was not specifically pleaded; and

    f. Costs to the petitioner.

ii.At the Court of Appeal

10. Aggrieved by the entire Judgment, the respondent filed Civil Appeal No 84 of 2012 citing twenty-five (25) grounds summarized as follows, that the trial judge erred in law and fact, in:

    i. Failing to consider that the respondent had been in actual occupation of the suit property for decades before the purported registration in the appellant's name;

    ii. Failing to consider that DoD being a state organ within the meaning of article 62(1)(b) had an indefeasible constitutional right to use and occupy the suit property regardless of whether the appellant had subsequently been issued with title to the said property or not;

iii. Failing to consider that the uninterrupted occupation of the land by DoD and the erection of military installations thereon had created a public interest that overrides all private interests;

iv. Failing to find that the suit property was an original allocation from the Commissioner of Lands and thus was Government land within the meaning of the *Government Lands Act*;

v. Failing to find that the title documents were processed in favour of Torino Enterprises without the consent of the Attorney General's Accounting Officer;

vi. Finding that there was compulsory acquisition;

vii. Failing to consider that some of the documents relied on by Torino Enterprises before the trial court were obtained fraudulently;

viii. Granting Torino Enterprises an award of Kshs 1, 530,000,000.00 on the basis of an unproved valuation report;

ix. Failing to find that the title to the suit property purportedly acquired by Torino Enterprises contravened the provisions of article 40(6) of the *Constitution*; and

x. Failing to find that there was fraud in the process of registration of the suit land in the name of Torino Enterprises.

11. Before the matter was set down for hearing, the respondent by way of a motion dated October 5, 2017, sought leave to adduce additional evidence. The appellate court (Waki, Gatembu & Odek, JJA) on February 22, 2019, allowed the application and further granted leave to the appellant to adduce any additional evidence in reply. Both parties duly complied with the leave orders. However, during the hearing of the appeal, counsel for the respondent raised an objection urging the appellate court, to expunge part of the evidence adduced by the appellant. It was argued that the particularised evidence was inadmissible as it comprised uncertified public documents or confidential correspondence marked either 'restricted or secret', which ran contrary to the provisions of sections 68(2) and 80 of the *Evidence Act*.

12. After hearing the parties, the Court of Appeal delineated the following issues for determination; whether some of the documents that were relied upon by the respondent offended the provisions of sections 68(2)(c) and 80 of the *Evidence Act*; whether the suit land was available for alienation and/or allocation; whether the registration of the suit land in the respondent's name was legally done; and whether the respondent was illegally dispossessed of the suit land and therefore entitled to compensation.

13. In a judgment delivered on February 4, 2022, the Court of Appeal (Musinga (P), Murgor & Mohamed, JJA), allowed the appeal and overturned the High Court. On the issue of whether any evidence relied on was inadmissible, the appellate court faulted the trial court for failing to make a finding on a similar objection raised by the respondent before it. It then determined that the evidence appearing on pages 32 and 52 of the record of appeal and on pages 21, 22, 23-27, 28-29,30, 32 and 33 of the respondent's supplementary record of appeal was inadmissible. The court held that the same were public documents under section 79 of the *Evidence Act*. For the documents to be admissible as evidence, they had to be certified as required by section 80 of the *Evidence Act*. Since they had not been so certified, the same were expunged from the court's record.

14. On whether the suit land was available for alienation, the appellate court determined that the land in question was not "unalienated government land" within the meaning of section 2 of the *Government Lands Act* (repealed). on the contrary, the court held that the suit property was private land, even long

before NCC bought it in 1971. As a result, it opined that the Commissioner of Lands lacked the power to alienate or allocate it to a third party.

15. The court further found that at the time of allocation, purchase, and consequent transfer of the suit property, DoD was in occupation of a portion thereof. The latter had fenced it and put up various facilities thereon. As a result, it was the court's reasoning that even if the Commissioner of Lands had the power to alienate the suit property, all persons likely to be affected by such action ought to have been informed and heard before the alienation. Additionally, it determined that the appellant was not an innocent purchaser for value without notice, as any diligent purchaser ought to have been aware of DoD's occupation and military installations.

16. The appellate court also took issue with the fact that the suit property, was hastily registered just a day after Renton Company Limited's application to transfer the same to the appellant. It also noted that there was overwhelming evidence that sometime in 1997, NCC had entered into an arrangement with the Government of Kenya agreeing to allocate part of its land measuring 400 hectares to DoD at a consideration of Kshs.40,000,000.00. However, the appellate court did not definitively establish whether the purchase sum had been paid by DoD.

17. Consequently, the court concluded that neither Renton Company Limited, nor the appellant herein, had acquired a valid interest in or over the suit property. It held that the Certificate of Title issued to the appellant was an illegal document and by virtue of article 40(6) of the *Constitution*, the concept of indefeasibility of title under section 26 of the *Land Registration Act* was inapplicable.

iii.At the Supreme Court

18. Aggrieved by the entire judgment, the appellants filed the instant appeal, citing several grounds of appeal summarized as follows:

> The judges of appeal erred in law by:
>
> i. Failing to dismiss the appeal before it having entered a finding that the suit property was private land, but instead proceeded to invalidate the appellant's title in disregard of articles 10, 19, 22, 24, 27,40 and 50 of the *Constitution*, and particularly in disregard of laid down procedures for establishing the legality or otherwise of a title;
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> ii. Failing to consider that under article 40(6) of the *Constitution*, a finding that any land was unlawfully acquired, must be through a legally established process;
>
> iii. Failing to determine that there had never been such a process leading to a finding of any unlawfulness;
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> iv. Converting themselves into a court of first instance even when the respondent had brought to their attention the existence of a pending ELC Civil Case No 282 of 2012 *City Council of Nairobi v Attorney General, Minister for State for Defence & Kenya Defence Forces* (hereinafter ELC Civil Case No 282 of 2012) wherein the ownership and legality of the title to the Suit Property was squarely in issue;
>
> v. Failing to recognize that in a case where there were pending and substantive proceedings before a correct forum charged with the determination of the *bona*

fides of a certificate of title, to wit the Environment and Land Court, it lacked the jurisdiction to prejudge the pending suit;

vi. Defying and ignoring the respondent's clear submission to the effect that the High Court Constitutional Division was not the proper or appropriate forum to determine the parties' respective rights as there was no opportunity to call and test evidence on the nullification of a certificate of title;

vii. Failing to find that the respondent had not presented any cross petition to establish fraud, illegality or corruption by the appellant and therefore its finding prejudiced any other future or pending legal process under article 40(6) of the *Constitution*;

viii. Failing to follow the principle that the appellant's title could only be challenged on the ground of fraud or misrepresentation, which had not been proven; and

ix. Failing to appreciate that the *bona fide* owner of the suit property (NCC) was not claiming any rights against the appellant herein.

19. The appellant seeks the following reliefs:

a. The appeal herein be allowed and the portion of the Court of Appeal judgment dated February 4, 2022 that purported to nullify or otherwise invalidate the appellant's title to land parcel No 22xx, Grant No IR 85xxx be set aside and the Judgment of the High Court dated July 4, 2011 be reinstated in full.

b. The court be pleased to grant any other or further relief it may deem fit.

C. The Parties Respective Submissions

i.The appellant's case

20. The appellant's submissions are dated September 12, 2022, and filed on November 7, 2022. The appellant challenges the Court of Appeal's jurisdiction, and urges that the latter assumed jurisdiction and prematurely determined the legality of its title in disregard of proceedings pending before the Environment and Land Court, in ELC Civil Case No 282 of 2012.

21. To support this assertion, the appellant cites this court's finding in *Deynes Muriithi & 4 others v Law Society of Kenya & another*, SC Civil Application No 12 of 2015, [2016] eKLR, wherein it was determined that the Court of Appeal's determination of an issue pending before the High Court had a pre- emptive effect and had consequently predetermined the petitions before the High Court without the applicants having been heard on the merits, contrary to article 50 of the *Constitution*.

22. Furthermore, the appellant urges that the respondent did not file any cross petition before the High Court seeking nullification or cancellation of its title. It submits that the issue before the Court of Appeal was whether a tort of trespass had been established at the trial court. Moreover, it is submitted that the legality of its title was only interrogated for the first time at the submission stage before the Court of Appeal, denying it the right to present its evidence or call witnesses.

23. On the second issue, whether the Court of Appeal determined the rights of a party not before it, the appellant submits that despite its several objections, the appellate court determined the legality and validity of property rights of Renton Company Limited which party was not before it. It is urged that

the Court of Appeal denied Renton Company LiMited the right to rebut allegations made against it, to the appellant's detriment.

24. On the requirement of interrogation of the legality of a title through a legally established process under article 40(6) of the*Constitution*, the appellant submits that where allegations of illegality or irregularity are made, the said article requires a formal process of proof to be undertaken by the party alleging fraud. Similarly, it urges that this requirement is mirrored by section 26 of the *Land Registration Act* No 3 of 2012, which provides that a title can only be challenged on the ground of fraud or misrepresentation. It must also be proved that the proprietor was a party to such fraud or had acquired the property illegally, or through a corrupt scheme.

25. To this end, it is submitted that the appellate court was wrong to investigate and make a finding on the legality of its title, in disregard of an established formal process before the Environment and Land Court. It faults the Court of Appeal for failing to abide by the constitutional requirement under article 40(6) of the *Constitution*. In support of its arguments, the appellant relies on the High Court Decisions in *Vekariya Investments Limited v Kenya Airports Authority & 2 others*; Constitutional Petition No 263 of 2011, [2014] eKLR; Chemei Investments Limited v the Attorney General & others Constitutional Petition No 94 of 2005 (unreported); *Electrical Options Limited v the Attorney General & another*; Constitutional Petition No 23 of 2011, [2012] eKLR; and *Isaac Gathungu Wanjohi & another v the Attorney General and others*; Constitutional Petition No 154 of 2011, [2012] eKLR.

26. Likewise, the appellant submits that in the absence of a finding of illegality by way of a hearing and determination by the Environment and Land Court, the respondent cannot rely on phantom fraud to forcefully deprive the former of its property. It cites the Court of Appeal Decision in *Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others*; Civil Appeal No 156 of 2013; [2019] eKLR to buttress this assertion.

27. On the issue as to whether a trespasser can assert a better title against a registered proprietor, it was urged in the negative. It is the appellant's submission that having determined that DoD did not have any rights over the suit property, the Court of Appeal only had one remedy to grant, to dismiss the appeal with *ex gratia* advice to the respondent to pursue the established legal process and challenge the legitimacy of the appellant's title.

28. On the issue of expunged evidence, it was the appellant's submission that when the respondent was granted leave to adduce additional evidence, the Attorney General adduced new evidence marked 'secret and confidential'. It further urges that to sanitize the misleading evidence, it retrieved and produced the same thread of communication and documentation omitted by the respondent.The appellant contests that the Attorney General ought not to have been allowed to present and rely on evidence marked 'secret and confidential' while denying an opposing party from controverting the same. In conclusion, it was urged that the Court of Appeal unfairly tilted the scales of justice in favour of the State and seriously prejudiced the appellant.

ii.The respondent's case

29. In opposing the appeal, the respondent has filed its response dated July 8, 2022 on July 13, 2022 and submissions dated November 4, 2022 and on November 7, 2022. It is the respondent's case that the Court of Appeal correctly considered the evidence adduced before it and conclusively applied the law.

30. The respondent challenges the appellant's title on ground that the latter did not acquire a good title from Renton Company Limited. To this end, it is urged that the appellant acquired a letter of allotment which had initially been issued to Renton Company Limited on December 19, 1999, to get itself registered as the proprietor of the suit property. Moreover, it is submitted that the suit property was

not un-alienated government land, and consequently the Commissioner of Lands lacked the authority to allocate it. Similarly, it is the respondent's case that at the time of allotment to Renton Company Limited, the Commissioner of Lands was aware that the suit property was occupied by DoD and was therefore, not available for allocation.

31. It is the respondent's further case that there were irregularities in the process leading to the acquisition of the appellant's title to the suit property. It urges that it was impractical to have the grant issued and registered on the same day. The respondent contends that the speedy registration was shrouded in fraud. To support this assertion, the respondent cites the Court of Appeal Decision in *Chemey Investment Limited v Attorney General & 2 others*; Civil Appeal No 349 of 2012, [2018] eKLR wherein the appellate court held that a speedy registration was not a reflection of efficient delivery of public services but rather a deliberate and fast-tracking of a flawed process to facilitate the theft of public property.

32. The respondent further submits that the said Letter of Allotment, had a condition that Renton company limited was to accept the allotment and pay the standard premium within 30 days or the offer would lapse. Since the condition had not been fulfilled at the time of the transfer of the letter of allotment to the appellant, the same was of no legal effect.

33. In conclusion, it is submitted that had the appellant exercised due diligence before purchasing the suit property, it could have discovered that DoD had been in actual occupation of the same since 1984. It is therefore the respondent's argument that the appellant cannot be treated as an innocent purchaser of the suit property for value without notice. It relies on the Court of Appeal Decision in *Arthi Highway Developers Limited v West End Butchery Limited & 6 others*; Civil Appeal No 246 of 2013, [2015] eKLR and *National Land Commission v Afrison Export Import Limited & 10 others*; ELC Reference 1 of 2008, [2019] eKLR to urge that the appellant had an obligation to carry out due diligence by looking at the history of the suit property before purchasing the same.

34. On the requirement of interrogation of the legality of a title through a legally established process under article 40(6) of the *Constitution*, it is contended that the appellant's pleadings before this court depart from its pleadings before the High Court. At the High Court, the appellant had claimed violations of its right to property under article 40 of the *Constitution*. Accordingly, it is urged that this right is subject to article 40(6) of the *Constitution*, and as such, the Court of Appeal was justified in ascertaining the validity of the title to the suit property, before determining whether the said right had been violated or not.

35. On the issue of expunged evidence, it is the respondent's case that in principle, the production of a public document by private individuals was not unlawful, but must be within the confines of section 80 of the *Evidence Act*. It submits that the Court of Appeal was well within the law in expunging the documents illegally obtained and adduced.

36. On the issue, of whether the respondent was in rightful occupation of the suit property, the respondent submits that DoD was in a long and uninterrupted physical possession, occupation, use and development of the suit property, before the purported allocation and subsequent transfer and registration to the appellant. It also emphasizes that NCC entered into an arrangement with the Government of Kenya to allocate part of its land measuring 400 hectares to DoD, and that the Commissioner of Lands had authorized the respondent to occupy and utilize the suit property.

37. In the alternative, it is urged that the respondent's occupation of the suit property was lawful and that the same had been converted to public land by virtue of article 62(1)(b) of the *Constitution*. More so, the Attorney General urges that the respondent is a state organ that has used and occupied the suit property, and therefore had an indefeasible constitutional right over it.

D. Issues for Determination

38. Based on the parties' pleadings and respective submissions, we consider that the following five issues, once determined will dispose of the appeal at hand

    i. Whether the superior courts below had jurisdiction to determine the legality of title to the suit property;

    ii. Whether the appellant has a valid title to the suit property;

    iii. Whether DoD acquired a good title to the suit property;

    iv. Whether the impugned documents were procedurally adduced; and

    v. Reliefs, if any, available to the parties.

E. Analysis

i.On jurisdiction

39. The appellant argued that the two superior courts acted in excess of jurisdiction by failing to confine themselves to the limited question of trespass and restitution as presented, and instead inquiring into the validity of the appellant's title to the suit property.

40. As regards the High Court, the appellant urged that the trial court was not the appropriate forum to determine the parties' respective rights to the suit property as there was no opportunity to call or test evidence. As for the Court of Appeal, it was contended that the appellate court converted itself into a court of first instance, in disregard of the proceedings then pending before the Environment and Land Court in ELC Civil Case No 282 of 2012, wherein the ownership and legality of the title to the suit property was in issue.

41. Similarly, it was urged that article 40(6) of the *Constitution* and section 26 of the *Land Registration Act* No 3 of 2012, create a positive legal prerequisite, entailing an inquiry to determine the validity of a title to land. The appellant submitted that the Environment and Land Court, is the constitutionally established forum for such inquiry, and faulted the two superior courts for usurping the constitutionally donated jurisdiction of the former.

42. On the other hand, the respondent argued that the two superior courts had properly invoked their jurisdiction. Towards this end, it was contended that to effectively determine the parties' respective claims, the courts had first to settle the question regarding the validity of title over the suit property. Moreover, the Attorney General urged that the appellant had departed from its pleadings before the superior courts and was seeking for the first time, the interpretation of what amounts to a legally established process under article 40(6) of the *Constitution*.

43. For us to dispose of the first issue in the face of the two contrasting views, it is important to briefly revisit the procedural environment, that preceded the operationalization of the Environment and Land Court. The court is established under article 162(1) and (2) (b) of the *Constitution of 2010* . It was operationalized by the *Environment and Land Court Act* No 9 of 2011. After its commencement, vide Gazette Notice No 16268 dated November 9, 2012, the then Chief Justice issued the '*Practice Directions on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land*'. It was directed that all matters pending judgment and ruling before the High Court, arising from proceedings relating to the environment and the use and occupation of, and title to land, would

be concluded by the High Court. Similarly, all part-heard cases pending before the High Court, relating to the same proceedings would be heard and determined by the same court.

44. Upon perusal of the record before us, we note that the appellant's suit before the High Court was instituted by way of a plaint dated March 10, 2011 and filed on even date. Consequently, the trial court heard and determined the dispute through its Judgment delivered on July 4, 2011. From the chronology of events, we entertain no doubt that, at the time the trial court heard and determined the suit, the Environment and Land Court was not operational.

45. In any event, the Practice Directions unequivocally directed the High Court to hear and determine pending proceedings on environment and land matters as specified in the foregoing paragraph 43 of this judgment. In the circumstances, we see no reason to fault the trial court on grounds of jurisdictional over-reach.

46. We now turn focus to the contention by the appellant to the effect that by determining the appeal before it, the Court of Appeal had in reality transformed itself into a court of first instance. It was the appellant's submission that at the time the appellate court handed down its judgement, the ELC Civil Case No 282 of 2012 was pending before the Environment and Land Court.

47. Upon perusal of the record before the Environment and Land Court, we note that by a consent dated March 25, 2021, the proceedings in ELC No 282 of 2012 were withdrawn, and the consent adopted as an order of the said court on June 30, 2021. Consequently, as of February 4, 2022 when the appellate court delivered its Judgment, the said proceedings had long been concluded. In similar vein therefore, we see no reason to fault the appellate court's exercise of jurisdiction to determine the appeal. There was nothing pending at the Environment and Land Court which could have necessitated the Court of Appeal to down its tools.

ii.Whether the appellant has a valid title to the suit property;

48. Two central sub-issues fall for our determination, namely, the legal status of the suit property, and whether the appellant acquired a valid title to the same. It was the appellant's case that upon payment of Kshs 12,000,000, it acquired the suit property from Renton Company Limited for a term of 99 years from 2000. It further argued that it was the duly registered proprietor, having been issued with a certificate of title on April 26, 2001.

49. The respondent disputed this assertion and contended that the appellant did not acquire a good title from Renton Company limited. The Attorney General maintained that the letter of allotment, upon which the appellant's title is premised, was silent on whose behalf the Commissioner of Lands was making the allotment; at the time of its transfer to the appellant, the conditional thirty days acceptance period had lapsed; the suit property was not un-alienated government land and therefore the Commissioner of Lands lacked the authority to alienate it. The Attorney General further submitted on "without prejudice" basis that, at the time of allotment, the suit property was occupied by DoD and was unavailable for allocation. In the alternative, the respondent urged that there were irregularities in the process leading to the registration of the property in the appellant's name;and had the appellant conducted due diligence, it would have ascertained DoD's possession and occupation at the time of purchase.

50. For us to determine the legal status and validity of the title, we must inquire into the root title of the suit property.

iii.Alienated or un-alienated government land

51. Article 62 of the *Constitution* defines 'public land' to include:

62 (1)

(a) land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date; [Emphasis Added].

52. The *Government Lands Act* (repealed), which was the Act in force at the effective date defined 'unalienated government land' in section 2 as follows;

> "unalienated Government land" means Government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment. [Emphasis Added].

section 3 of the *Physical Planning Act*, cap 286 defines unalienated land in similar terms.

53. This court in *Kiluwa Limited & another v Business Liaison Company Limited & 3 others*, (Petition 14 of 2017); [2021] KESC 37 (KLR) had this to say about un-alienated government land:

> "(55) A number of conclusions can be derived from the foregoing provisions as quoted. Firstly, un-alienated government land is public land within the context of article
>
> 62 of the *Constitution* and the *Government Lands Act* (repealed). This notwithstanding the fact that, the expression "Public Land" only came to the fore with the promulgation of the 2010 *Constitution*. What article 62 of the *Constitution* does is to clearly delimit the frontiers of public land by identifying and consolidating all areas of land that were regarded as falling under the province of"public tenure". The retired constitution used the term"government" instead of "public" to define such lands".

54. On the basis of the parties' submissions and the evidence on record, it is clear to us that on February 21, 1964, a parcel of land known as Embakasi LR No 113xx (Original No 41/3) measuring 5639 acres was alienated and a freehold title granted to Kayole Estates Limited. This parcel of land was later transferred to the defunct Nairobi City Council for valuable consideration by a transfer registered on November 22, 1971. In 1973, the parcel of land was subdivided yielding to, amongst others, the suit property.

55. In view of these dealings, could the suit property retain the status of "unalienated government land"? The answer to this question must be in the negative considering the fact that once an individual or entity acquires any un- alienated government land, or other land for that matter, consequent upon registration of title, in accordance with the provisions of the applicable law, such land transmutes from "public" to "private" land. Article 64(a) of the *Constitution* defines private land as consisting of 'registered land held by any person under any freehold tenure'. In *Benja Properties Limited v Syedna Mohammed Burhannudin Sahed & 4 others*, Civil Appeal No 79 of 2007; [2015] eKLR, the Court of Appeal held:

> "... the legal effect of registrations made in 1907 and 1911 was to convert the suit property at that time from un-alienated government land to alienated land with the consequence that

the suit property became private property and moved out of the ambit and confines of the Government *Land Act*. ..." [Emphasis Added].

We consider the foregoing statement to be an accurate illumination of the meaning of "private land".

56. Consequently, we find that upon alienation to Kayole Estates Limited in 1964, the suit property was converted from un-alienated government land to private freehold land. There being no question as to the regularity and legality of the process by which the said land was alienated in favour of Kayole Estates Ltd, we find and hold that the same was effectively divested from the purview of the regulatory regime of the *Government Lands Act* (now repealed). The Commissioner of Lands could therefore not have had any authority, to allocate the suit property to any other person as he purported to have done. By the same token, there being no evidence on record to the contrary, we find that the defunct Nairobi City Council acquired valid title to the suit property from Kayole Estates ltd through purchase. Where does our finding leave Renton company ltd? It is worthy restating that the said company could only have acquired valid title from the Nairobi City Council, and not the commissioner of lands who had long been divested of authority to allocate the same.

57. The respondent also challenged the letter of allotment on grounds that at the time of its transfer, the conditional thirty (30) days acceptance period had lapsed. As it turned out, the letter was also silent on whose behalf the commissioner of lands had made the allotment. Noting that the Commissioner of Lands by an allotment letter dated December 19, 1999 purported to allocate the suit property to Renton Company Limited. Thereafter, by a letter dated April 25, 2001, Renton Company Limited sought approval from the Commissioner of Lands to transfer the same to the appellant. The appellant's ownership is traced back to this allotment Letter even if subsequently registered under the *Registration of Titles Act* cap 281 (Repealed) on April 26, 2001.

58. So, can an allotment letter pass good title? It is settled law that an allotment letter is incapable of conferring interest in land, being nothing more than an offer, awaiting the fulfilment of conditions stipulated therein. In *Dr Joseph NK Arap Ng'ok v Justice Moijo Ole Keiyua & 4 others* CA 60/1997 [unreported]; and in *Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others* HC Civil Case No 182 of 1992; [2008] eKLR, the superior courts restated this principle as follows:

> " It has been held severally that a letter of allotment per se is nothing but an invitation to treat. It does not constitute a contract between the offerer and the offeree and does not confer an interest in land at all " [Emphasis added].

59. The pronouncement in Gladys Wanjiru and Dr Joseph NK Arap Ng'ok (*supra*) has been echoed in various Environment and Land Court decisions post the 2010 *Constitution*, including; *Lilian Wanjeri Njatha v Sabina Wanjiru Kuguru & another*, Environment and Land Case No 471 of 2010; [2022] eKLR; *John Elias Kirimi v Martin Maina Nderitu & 4 others*, Environment and Land Suit No 320 of 2011; [2021] eKLR; and *Kadzoyo Chombo Mwero v Ahmed Muhammed Osman & 11 others*, Environment and Land Case No 42 of 2021; [2021] eKLR, to mention but a few.

60. Suffice it to say that an Allottee, in whose name the allotment letter is issued, must perfect the same by fulfilling the conditions therein. These conditions include but are not limited to, the payment of a stand premium and ground rent within prescribed timelines. But even after the perfection of an allotment letter through the fulfillment of the conditions stipulated therein, an allottee cannot pass valid title to a third party unless and until he acquires title to the land through registration under the applicable law. It is the act of registration that confers a transferable title to the registered proprietor,

and not the possession of an allotment letter. In *Peter Wariire Kanyiri v Chrispus Washumbe & 2 others*, Environment and Land Court Case No 603 of 2017; [2022] eKLR, Kemei, J held as follows:

> "[15]. In the case at hand, in the absence of any title registered in the name of the plaintiff, the court is unable to hold that the plaintiff is the registered proprietor of the land. This is because the letter of allotment lapsed within 30 days and the same is of no legal consequences" [Emphasis added].

61. While we agree with the general tenor of the learned Judge's foregoing pronouncement, we remain uncomfortable with his inference that the allotment letter was of no legal consequence solely because it had lapsed after 30 days. We must reiterate the fact that an allotment letter in and by itself, is incapable of conferring a transferable title to an allottee. Put differently, the holder of an allotment letter is incapable of transferring or passing valid title to a third party on the basis of the allotment letter unless and until he becomes the registered proprietor of the land consequent upon the perfection of the Allotment Letter. It matters not therefore that the allotment letter has not lapsed.

62. Back to the facts of this case, the allotment letter issued to Renton Company Limited was subject to payment of stand premium of Kshs 2,400,000.00, annual rent of Kshs 480,000.00 amongst others. Moreover, the letter was granted on condition that Renton Company Limited would accept it within thirty (30) days from the date of the offer, failure to which it would be considered to have lapsed.

63. While the allotment letter is dated December 19, 1999, Renton Company limited made the specified payments on April 24, 2001, one hundred and twenty- seven (127) days from the date of the offer. It is not in question that Renton had not complied with the terms and conditions of the allotment letter. Therefore, the letter ought to have been deemed as lapsed at the time it purported to transfer the same to the appellant. The respondent submitted that a letter of allotment does not confer any property rights unless it is perfected, failure to which it is rendered inoperative and of no legal import. We have already declared that an allotment letter, even if perfected, cannot by and in itself confer transferable title to the Allottee, unless the latter completes the process by registration. Therefore, the grim reality is that all transactions between Renton Company limited and the appellant were a nullity in law.

64. What about the argument to the effect that the appellant was an innocent purchaser for value without notice? It is obvious by now that such argument cannot hold in view of our pronouncements regarding the transactions between Renton and the appellant. However, be that as it may, there is evidence on record in the form of correspondences and minutes, confirming that DoD had been granted access by the defunct municipal council and had taken possession of, and erected public infrastructure upon the suit property before the purported purchase. Of importance is the letter from the Commissioner of Lands to DoD, confirming that the latter was in occupation of the Property. Further, it is on record that the Ministry of Lands and Settlement was monitoring excision activities by NCC to ensure that the portion occupied by DoD was not affected. This letter is dated August 11, 1999, approximately one (1) year and eight (8) months before the impugned transfer. Therefore, if the appellant was a diligent purchaser, it ought to have at least known of this fact. An innocent purchaser for value would also denote one was aware of what they are purchasing by inspecting the suit premises. This takes us to the question of whether the appellant had visited the suit premises and if so, what was its impression of the military installations on the suit premises? The fact that the suit land was occupied must have sounded a warning of "buyer be aware" to the appellant. We therefore find that it was not an innocent purchaser for value entitled to orders for restoration or compensation.

iv.Whether DOD acquired a valid title to the property

65. In as much as the appellant does not have a valid title to the suit property, DoD is similarly tainted. Although it has been able to prove that it has been in exclusive occupation and use of the Suit Property from 1986 to date, with the full knowledge and authority of NCC and the Commissioner of Lands, (see the various communication and correspondence between it, NCC and other stakeholders including an Internal Memo dated April 24, 1984, minutes of a meeting held on May 24, 1984, letter dated February 22, 1996 and letter dated August 11, 1999), there is nothing on record to prove that DoD ever acquired valid title to the suit property. Just as the Commissioner of Lands could not allocate the said land to Renton for reasons already canvassed, so also was he equally hamstrung in relation to DoD.

66. The court takes cognizance of ELC Civil Case No 282 of 2012, filed by the defunct Nairobi City County seeking; rescission of the letter of allocation dated October 7, 1997; delivery of vacant possession of LR. No 41/33 Embakasi; in the alternative to compensation in the sum of Kshs 61,500,000,000; interest; any other reliefs the court deemed fit to grant. Moreover, we note that during the main hearing of this case, the learned state counsel, representing the Attorney General, submitted that Parliament had taken over the dispute between NCC and DoD with a view to settling the matter outside the court process.

67. Although, ELC Civil Case No 282 of 2012 was duly withdrawn in line with the provisions of articles 6(2) and 189(3) of the *Constitution* as well as the *Inter- governmental Relations Act* No 2 of 2015, the withdrawal neither determined ownership nor passed good title to the Suit Property or a portion thereof to DoD. As matters currently stand therefore, title to the suit property, remains vested in Nairobi County which is the legal successor to the defunct Nairobi City Council.

v.Admissibility of evidence

68. The appellant faults the Court of Appeal for expunging documents on pages 32, 52 and 21, 22 23-27, 28-29, 30, and 33 of its record and supplementary record respectively. It urged that the appellate court crafted and imposed an asymmetrical application of section 80 of the *Evidence Act*. It also contended that once the Attorney General had been granted leave to introduce confidential documents, it too had an automatic corresponding right to adduce similar evidence obtained from the same chains of communication. The appellant urged that the asymmetrical application contravened article 50(1) of the *Constitution* and amounted to suppression of evidence. In response, the Attorney General submitted that public documents within the meaning of section 79 of the *Evidence Act* must be produced in accordance with sections 68(1)(e)(f), (2)(c) and 80 of the *Evidence Act*, and the non-compliance rendered the evidence inadmissible.

69. We agree with the Court of Appeal's reasoning that the impugned documents were public documents within the meaning of section 79 of the *Evidence Act* requiring certification in accordance with sections 68(1)(e)(f), (2)(c) and 80 of the *Evidence Act*. Moreover, we are guided by this court's decision regarding evidence unlawfully procured, in *Njonjo Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others*; Presidential Election Petition No 4 of 2017, [2017] eKLR, wherein we held as follows:

> "(22) ..... We also recognize that information held by the State or state organs, unless for very exceptional circumstances, ought to be freely shared with the public. However, such information should flow from the custodian of such

information to the recipients in a manner recognized under the law without undue restriction to access of any such information.

(23) Further, a duty has also been imposed upon the citizen(s) to follow the prescribed procedure whenever they require access to any such information. This duty cannot be abrogated or derogated from, as any such derogation would lead to a breach and/or violation of the fundamental principles of freedom of access to information provided under the *Constitution* and the constituting provisions of the law. It is a two-way channel where the right has to be balanced with the obligation to follow due process." [Emphasis Added].

vi.Reliefs

70. Having disposed of the issues framed, and having reached the conclusions we have, we are left with no option but to dismiss the Appeal. As regards costs, in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*, SC Pet No 4 of 2014; [2014] eKLR, this court held that it has the discretion to award costs to ensure that the ends of justice are met and that costs ordinarily follow the event.

71. Having considered the history and nature of the case before us, it is our view that each party shall bear its own costs in the High Court, Court of Appeal, and this court.

F. Orders

72.

i. The appeal dated March 14, 2022 and filed on March 16, 2022 is hereby dismissed;

ii. Each party shall bear its own costs; and

iii. The sum of Kshs 6,000/-, deposited as security for costs upon lodging of this appeal, shall be refunded to the appellant.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2023.

.....

M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT OF KENYA

.....

S. C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

.....

W. OUKO

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

Registrar,

Supreme Court Of Kenya