



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. 88 OF 2010**

**MULTIPLE HAULIERS EAST AFRICA LIMITED.....PETITIONER**

**VERSUS**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**  
**KENYA URBAN ROADS AUTHORITY.....2<sup>ND</sup> RESPONDENT**  
**MINISTRY OF ROADS.....3<sup>RD</sup> RESPONDENT**  
**THE PERMANENT SECRETARY,**  
**MINISTRY OF ROADS.....4<sup>TH</sup> RESPONDENT**  
**THE MINISTRY OF LANDS.....5<sup>TH</sup> RESPONDENT**  
**THE PERMANENT SECRETARY,**  
**MINISTRY OF LANDS.....6<sup>TH</sup> RESPONDENT**  
**THE MINISTER, MINISTRY OF**  
**LOCAL GOVERNMENT.....7<sup>TH</sup> RESPONDENT**  
**MINISTRY OF LOCAL GOVERNMENT.....8<sup>TH</sup> RESPONDENT**  
**THE DIRECTOR OF CITY PLANNING,**  
**CITY COUNCIL OF NAIROBI.....9<sup>TH</sup> RESPONDENT**  
**THE CITY COUNCIL OF NAIROBI.....10<sup>TH</sup> RESPONDENT**

**AND**

**JUDGMENT**

**Introduction**

1. The subject matter of this petition are two parcels of land namely, L.R. No 9042/607 and L.R. No. 9042/608 situated at the junction of Airport North and South Roads at Embakasi, Nairobi (hereafter referred to as the “suit property”). The petitioner, a limited liability company incorporated as such under the Companies Act and engaged in long-haul transportation business in the East Africa region, states that it is the registered proprietor of the said parcels of land. It is aggrieved that on the 19<sup>th</sup> of November 2010, the respondents entered into its property and demolished a portion of the perimeter wall office blocks and other structures on the property. The petitioner terms the actions of the respondents unconstitutional and a violation of its right to property, and seeks various declarations and orders in respect of the said violation.

**The Facts**

2. The facts of the case as they emerge from the pleadings are on 22<sup>nd</sup> September, 2003, the petitioner agreed to purchase all those parcels of land known as LR No. 9042/607 & LR No. 9042/608 measuring 2.034 hectares and 1.012 hectares respectively from Realty Brokers Ltd, then the registered proprietors thereof.

3. The petitioner conducted official searches in the Ministry of Lands prior to purchasing the property which search confirmed that the suit property was available for purchase. The petitioner then proceeded to pay a consideration of Kshs 35,000,000 being the purchase price of the suit property. The petitioner also duly paid the stamp duty in respect of the properties and was subsequently issued with titles to the whole of the suit property.

4. Sometime in July 2004, the petitioner presented a development plan for the buildings it intended to put up on the properties to the government for approval, which development plan was duly approved by the City Council of Nairobi under the Physical Planning Act. The petitioner then proceeded to erect structures on the suit property including godowns, fuelling stations and vehicle inspection, greasing and washing bays. It also erected a perimeter wall around the properties.

5. All was well until the night of 19<sup>th</sup> November 2010 at about 1.00 am when the respondents proceeded to the suit property and with the help of bulldozers and heavy machinery, brought down a section of the perimeter wall, office blocks, and other structures erected on the northern boundary of the properties apparently to pave way for the construction of a road linking Mombasa road at the City Cabanas junction with Thika Road at Ruiru.

6. The petitioner estimated that the value of the portions of land excised and acquired from LR No. 9042/607, Deed Plan No. 203396 and L.R. No. 9042/608, Deed Plan No. 203397 Nairobi stands at Kshs. 28,000,000. In its further affidavit sworn on behalf of the petitioner through its General Manager, Shreyesh Dave, on 21<sup>st</sup> June 2013 pursuant to leave granted by this court on 10<sup>th</sup> June 2013, the petitioner states that the value of the property had increased from the earlier Kshs 28,000,000 stated in the Amended Petition of 17<sup>th</sup> April 2012 to Kshs 48,000,000. The petitioner has annexed to the said affidavit a report by Knight Frank Kenya Limited, a firm of property valuers, in support of its claim.

7. The petitioner states, that since the transfer to and registration of the suit property in its favour, the government has always demanded and the petitioner has always paid to the government land rates and rent based on the size and value of the suit property. The petitioner also charged the said property to its banker, NIC Bank, the Interested Party herein. The first security was granted under a charge dated 19<sup>th</sup> November 2003, and thereafter, the Interested Party granted the petitioner further loans. As at April 2012, the total advances to the petitioner on the security of the subject property stood at Kshs 1.524b.

## **The Petition**

8. In the Petition dated 1<sup>st</sup> December 2010 (which was amended on 17<sup>th</sup> April, 2012) and supported by the affidavit of Shireyesh Dave, the petitioner seeks the following reliefs:

a. *An Order of declaration declaring that the Petitioner owns and is entitled to all those properties known as LR No. 9042/607, Deed Plan No. 203396 and L.R. No. 9042/608, Deed plan No. 223397 Nairobi.*

b. *An Order of declaration declaring that the action of the Respondents of demolishing the Petitioner's property in all those properties known as LR No. 9042/607, Deed Plan No. 203396 and L.R. No. 9042/608, Deed Plan No. 203397 Nairobi is unfair, unjust, unlawful and unconstitutional.*

c. *An Order declaration declaring that the Respondents' action in seeking to curtail, undermine and/or deprive the Petitioner of the Petitioner's right to all those properties known as LR No. 9042/607, Deed Plan No. 203396 and L.R. No. 9042/608, Deed Plan No. 203397 Nairobi without just cause and adequate compensation is unfair, unlawful and unconstitutional.*

d. *Judicial Review Order of Prohibition prohibiting the Respondents from further demolishing, bringing down or in any manner whatsoever interfering with the petitioner's perimeter wall, buildings, structures, properties and/or effects in/on all those properties known as LR No. 9042/607, Deed Plan No. 203396 and L.R. No. 9042/608, Deed Plan No. 203397 Nairobi*

e. *The Respondents be ordered to return all those portions of land unlawfully excised or acquired from LR No. 9042/607, Deed Plan No. 203396 and L.R. No. 9042/608, Deed Plan No. 203397 Nairobi.*

f. *In the alternative to prayer (e) above, the Respondents be ordered to compensate the Petitioner in the sum of Kshs 28,000,000.00 in value for all those portions of land unlawfully excised or acquired from LR No. 9042/607, Deed Plan No. 203396 and L.R. No. 9042/608, Deed Plan No. 203397 Nairobi*

g. *The Respondents be ordered to compensate the Petitioner in the sum of Kshs. 84,193,425.86 incurred by the Petitioner towards repair and/or reconstruction of the properties.*

h. *The Respondents be ordered to compensate the Petitioner for the loss occasioned to the Petitioner herein.*

i. *General damages*

j. *Costs*

k. *Any other/further order or relief that this Honourable Court may deem fit to grant.*

## **The Petitioner's Case**

9. The petitioner is aggrieved by the respondents' action of demolishing and excising part of what it alleges is its private property and complains that its right to property and secure protection of the law were violated and risked being further violated by the respondents. Further, it contends that its right to fair administrative action was violated in as far as it was not given notice or even a fair hearing prior to demolition of part of its property. The petitioner relied on several authorities in support of its case that the respondents failed to accord it natural justice including: **Kuria Greens Limited v Registrar of Titles & another Petition 107 of 2010, Onyango v Attorney General, Civil Appeal No 152 of 1986 [1987] KLR, Republic v the Staff Disciplinary Committee of Maseno University & 2 others, Misc. Civil Appl. No. 227 of 2003, Law Society of Kenya v Attorney General & 4 Others [2009] eKLR** . It contended that the respondents ought to have used due process in the acquisition of the portions of the suit property.

10. The petitioner is also concerned that as a result of the respondents' action, it continues to be portrayed as a land grabber in the public eye yet it followed due legal process in its purchase of the property including obtaining the necessary approvals.

11. In his oral submissions on behalf of the petitioner, Learned Counsel, Mr Kiragu Kimani, denied that the suit property was unlawfully acquired. He asserted that the burden of establishing that any part of the petitioner's property was acquired unlawfully lay on the respondents, and they had not discharged this burden.

12. To the respondents' allegations that the petitioner encroached on a road reserve, Counsel submitted that there was no evidence that the petitioner has gone beyond the boundaries set in the deed plan; and he also denied the existence of a valid notice prior to the demolition.

## **The Interested Party's Case**

13. NIC Bank, the Interested Party herein, supported the petitioner's case. It has filed an affidavit sworn by Kelvin Mbaabu, its Legal Officer, dated 27<sup>th</sup> April, 2012 and written submissions dated 6<sup>th</sup> June 2012. NIC contends that the respondents' actions in demolishing the structures erected on the suit property without any prior and/or proper notice to the petitioner are capricious and contrary to the rules of natural justice; and if the respondent was desirous of utilizing the land excised from the petitioner's property, their recourse was to compulsorily acquire the portions of the properties they have unlawfully excised from the suit property.

14. NIC contends that in granting the petitioner various loan facilities including a charge, further charge, as well as a second and third further charge on the security of the suit property, it placed full reliance on official records and government representations by the relevant government departments on the authenticity of the petitioner's title over the suit properties. NIC complains that as a result of the respondents' actions of hiving off portions of the property, the value of the property has been adversely affected as a result of which it harbours fears that the colossal sums of money advanced to the petitioner may not be recoverable from the property.

15. NIC contends that the respondents had no right to proceed as they did with regard to the suit property given the sanctity of title secured in the applicable Land Acts, in particular the **Registration of Titles Act (Chapter 282 of the Laws of Kenya)**. It states that under section 26 of the **Land Registration Act (No. 3 of 2012)**, the court was entitled to take the Certificate of Title to the suit property as evidence of absolute and indefeasible ownership of the property by the proprietor named in the said certificate of title.

16. Like the petitioner, the Interested Party maintains that even if the respondents had a right to acquire the land, it could only do so in accordance with due process. It relies on the decisions of the court in **Isaac Gathungu Wanjohi v The Attorney General & 6 Others [2012] eKLR; Ocean View Plaza Ltd. V Attorney General KLR (E&L) 1 475; Sound Equipment Limited v Registrar of Titles and Another [2011] eKLR; Torino Enterprises Limited v Attorney General [2011]eKLR** and **Kuria Greens Ltd v The Registrar of Titles & Another [2011]eKLR** for the proposition that acquisition of land could only be through a legally established mechanism. NIC, which stated that the petition was brought to

its attention in 2011 long after the demolition of the petitioner's property, urges the court to grant the reliefs that the petitioner was seeking.

### **The 1<sup>st</sup> -8<sup>th</sup> Respondents' Case**

17. The 1<sup>st</sup> - 8<sup>th</sup> respondents opposed the petition. They filed a replying affidavit and further affidavit sworn by **Eng. Michael Sistu M. Kamau**, then the Permanent Secretary, in the then Ministry of Roads, and written submissions dated 28<sup>th</sup> July 2012.

18. Their case as presented by Mr. Moimbo is in two limbs. First, they contend that the petitioner's purported right to the suit property cannot be protected under Article 40 of the Constitution as it was unlawfully acquired; and further, that L.R. No. 21919 from which the suit plots were excised was entirely 'reserved' for the Department of Aerodromes (now Kenya Airports Authority) way back in 1988 through a Part Development Plan and therefore, the suit property cannot have been available for alienation as private property as claimed by the petitioner.

19. The respondents maintain that on 16<sup>th</sup> August 1996, when the grants in respect of the suit property were issued, the said properties were not available for alienation as they were subsumed in L.R. 21919 which had already, a month prior to the issuance of the grants to the suit properties, been allocated to Kenya Airports Authority. They cited the case of **Commissioner of Lands & Another v the Municipal Council of Mombasa & another, Mombasa Misc. Civil Case No. 124 of 2001**, for the proposition that a grant having been made in favour of a government body, the land in respect of which such grant had been made could not be available for allocation.

20. The second limb of the 1<sup>st</sup>-8<sup>th</sup> respondent's case pertains to the boundary between the suit property and the road. They contend that even if the property was lawfully acquired, which they deny, the boundaries to the suit property illegally encroach onto a road reserve by a margin in excess of 10 meters, that such encroachment is a criminal offence under **section 91** of the **Traffic Act**, and that the decision to reserve part of the suit property for road



construction was done way back in the 1980s by the City Council of Nairobi. They contend that the special conditions on the grants to the suit property contemplate the expansion of the roads serving and or adjoining the plots and as such efforts to expand the roads enjoining the suit plots cannot be said to be an intrusion into private property.

21. The respondents aver that the suit property had encroached on the road reserve by approximately 12 metres and that a notice was served upon the persons whose structure had encroached on the road reserve way back in 2003; that the offending structures were marked with an 'X', the intention being that the owners would remove the offending structures voluntarily; that despite the fact that the petitioner had known since 2003 that its walls were situated on the road reserve, it failed to voluntarily remove the said walls.

22. The respondents aver further that the deed plans in the petitioner's possession are erroneous and inadvertently marked the property's boundaries out of the required area and furthermore, even if the suit property legitimately belonged to the petitioner and the petitioner relied on the deed plans, liability cannot attach to the respondents by dint of **Section 21(2)** of the **Survey Act Chapter 299 of the Laws of Kenya**.

23. It is the 1<sup>st</sup> - 8<sup>th</sup> respondents' further contention that the petitioner's claim raises no constitutional issue. They submit that the issues raised are civil in nature and pertain to the boundary between the petitioner's property and the road reserve. They invite the court to observe that the road in question measures 36 metres from City Cabanas junction to the Thika Road intersection at Ruiru, narrowing to 25 metres only at the petitioner's property.

24. The respondents claim further that the petition is simply a private law civil claim couched as a constitutional claim in order to avoid the rigours of the provisions of section 16 of the Government Proceedings Act, and that the petitioner ought to file a civil claim in which witnesses, including expert witnesses, will be called and the site in dispute visited by the Court.

25. The 1<sup>st</sup>-8<sup>th</sup> respondents urge the Court to find that the public interest supersedes the private claims of an individual and called in aid the words of Nyamu J (as he then was) in **Kenya Guards & Allied Workers Union-vs-Security Guards Services and 38 others and Another (IP) H.C. Misc. 1159 of 2003**.

26. Finally, with regard to the prayers sought by the petitioner, it is their contention that the orders sought are premised on the presumption that the land in question belongs to the petitioner; which is erroneous as the portions have been existing as a road reserve since 1980; that the valuation report is also unreliable as it is based on several untenable presumptions viz. that the suit property has good title; that it is free from burdens and restrictions,; and that all requisite consents and plans were obtained by the petitioner. They allege that the petitioner's valuers admit that they do not know the boundaries of the petitioner's property, and whether the demolished structures were constructed beyond the surveyed boundary. They therefore ask the court to dismiss the petition.

#### **The 9<sup>th</sup> -10<sup>th</sup> Respondents' Case**

27. The 9<sup>th</sup> respondent is the Director of City Planning of the then City Council of Nairobi, while the 10<sup>th</sup> respondent is the City Council of Nairobi. They have filed a replying affidavit sworn on 11<sup>th</sup> February 2011 by Patrick T. Odongo, the Director of City Planning, and written submissions dated 11<sup>th</sup> April 2011. They contend that the orders sought by the petitioner cannot issue; that the petitioner's property rights had not been violated as what belonged to it had not been demolished, and that the part of the property that was demolished was on a road reserve. The 9<sup>th</sup> and 10<sup>th</sup> respondent contend that acceptance of payment of stamp duty, land rent and rates does not validate a Title Deed that has been irregularly obtained; and further that the petition ought to be dismissed as it sought to make legal that which was illegal.

28. The 9<sup>th</sup> and 10<sup>th</sup> respondents submit that it was in the public interest that the parcel be repossessed. They relied on the decision of the court in **Daudi Murungi Mmboroki-vs-The Chief Conservator of Forests & Others HCCC Mic. Appln. No. 27 of 2006** for the Petition 88 of 2010 | Kenya Law Reports 2015 Page 10 of 24.

proposition that the government holds public resources for the public and that such public interest would defeat the defence of an indefeasible title; that the petitioner's concern was private in nature but that the act of construction on a road reserve was a public interest issue. They contend further that the respondents are empowered by the Constitution, the Physical Planning Act and the Local Government Act to enforce city planning rules and oversee city development according to the law., and relied on the authority of **Kenya Bus Service Ltd & 2 others v Attorney General & Another, Misc Civil Suit No 413 of 2005** in support of their submission that the enjoyment of fundamental rights and freedoms contemplates respect for the rule of law, including the protection of the rights of others, and for the public interest. They ask the court to dismiss the petition with costs.

### **Determination**

29. From the pleadings and submissions of the parties in this matter, this Court takes the view that the central issues for determination is whether there has been a violation of the petitioner's right to property and fair administrative action, and interlinked with that issue, whether the respondents had any justification for demolishing the perimeter wall and parts of the petitioner's building which had been constructed on the portion of the suit property in dispute.

30. It is, however, necessary before dealing with the main issue for the Court to address itself to the issues raised by the respondents with regard to the forum for litigating the issues in dispute. The respondents contend that the matter was in the nature of a civil suit that requires the hearing of oral evidence to test the issues in dispute, and not a constitutional petition. Through the Grounds of Opposition filed on 19<sup>th</sup> August 2011, the 1<sup>st</sup> to 8<sup>th</sup> respondents state that the orders sought are unavailable in the circumstances of the case and that to allow the application would amount to converting a constitutional petition to a civil suit for compensation. The 9<sup>th</sup> and 10<sup>th</sup> respondents through the deposition of Patrick Odongo also argue that the petition as drawn does not meet the requirements of a constitutional reference, offends the Civil Procedure Rules, and ought to be struck out.

31. The argument by the respondent appears to be that since there is very contested and contradictory evidence before the Court, the Court is divested of jurisdiction to handle the matter. However, the fact that there are contested issues does not of itself divest the Court of

jurisdiction. Even where there are contested facts, it is the duty of the Court to weigh the evidence before it and test where the truth lies. As Majanja J observed in the case of **Sonia Kwamboka Rasugu -vs- Sandalwood Hotel and Resort Limited and Others Nairobi High Court Petition No. 156 of 2011 [2013] eKLR**;

*“[26] When the court is faced with such contradictory assertions and evidence, the court will seek to establish where the truth lies and this is by placing the evidence of the contesting parties and determine the likelihood of one version over the other. It does not matter whether the matter is an ordinary civil suit or a petition filed under Article 22 to enforce fundamental rights and freedoms. In each case, the duty of the court is to weigh the facts and evidence on either side, whether it is presented orally or by affidavit and make a finding. The respondents’ submission that the contested evidence can only be solved in a civil court is mistaken and lacks merit.”*

32. Accordingly, I decline to strike out the petition and proceed to deal with the substantive issues that it raises.

### **The Right to Property**

33. The right to property is protected under **Article 40** of the Constitution in the following terms:

*“40. (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) ....*

*(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.*

*(5) .....*

*(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”*

34. What is clear from these provisions is that private property is protected and may not be taken arbitrarily without due process. It is also clear that the protection afforded to property does not extend to property that has been unlawfully acquired because, as observed in **Isaac Gathungu Wanjohi & Another v Attorney General & 6 others Petition 154 of 2011 [2012]eKLR:**

*”[42] Article 40 must be read as a whole so that protections afforded by Article 40 which protects the right to property must be read to exclude property found to be unlawfully acquired under Article 40(6). This requirement is an extension of the fact that the Constitution protects higher values which are to be found in the preamble to the Constitution and Article 10. Values such as human rights and social justice cannot countenance a situation where the Constitution is used to rubberstamp what is in effect unlawful.”*

35. The petitioner states that it is the registered owner of the suit property. It has annexed to the affidavit in support of the property two grants in respect of the two properties, namely L.R. No. 9042/607 and L.R. No. 9042/608.

36. With respect to L. R. No. 9042/607, the basis of the ownership of the property by the petitioner is unclear. Grant No. I.R. 70209 dated 16<sup>th</sup> August 1996 (Annexure SD1) is made to Realty Brokers Limited. The entries in the grant do not indicate a transfer to the petitioner: entry no. 2 is a charge to Giro Bank and Credit and Commerce Finance Company Limited. Entry no. 3 is a discharge of that charge made on 31<sup>st</sup> October 2003; entry no. 4 is a further charge to the Interested Party, NIC Bank, dated 6<sup>th</sup> October 2006 while entry No. 5 is a charge to the Interested Party dated 18<sup>th</sup> June 2008. The final entry is entry no. 6, a fourth further charge to the Interested Party. I can therefore find nothing in the entries in respect of L.R. No. 9042/607 (Grant No. I.R. 70209 dated 16<sup>th</sup> August 1996) that identifies the petitioner as the registered owner of this property, and I must therefore agree with the 1<sup>st</sup> -8<sup>th</sup> respondent in their submission that the petitioner cannot make any claim with regard to this property.

37. With respect to L.R. No. 9042/608 (Grant No. I.R. 70208 also dated 16<sup>th</sup> August 1996), entry no. 2 dated 31<sup>st</sup> October 2003 is a transfer to Multiple Hauliers Limited, the petitioner herein. While it is indeed correct as submitted by the 1<sup>st</sup> -8<sup>th</sup> respondent that there are anomalies in the entries in this grant also, such as the fact that entry no. 4 and 5 appear to be repetitions of entry nos. 2 and 3, on the face of it, the entries do indicate that the petitioner is the registered owner of L.R. No. 9042/608 (Grant No. I.R. 70208), and that it did charge the property to the Interested Party.

38. A more complex question, one that has not been adequately addressed by the petitioner, is the extent of this property. As observed by the respondent, the road reserve from the City Cabanas junction is 36 metres, that it narrows down to 25 metres at the petitioner's property, then widens to 36 metres on the rest of the road to Thika Road at Ruiru. The respondent explains this by asserting that the petitioner has encroached on the road reserve, while the petitioner asserts that it placed reliance on government departments on the size and location of the property. From the material before me, it would appear that there was encroachment by the petitioner on the road reserve for about 11 metres, which the respondents were entitled to recover. The question is whether the respondents were entitled to recover the portion of the

road in the manner that they did, and if not, whether they violated the petitioner's right to fair administrative action by not granting it a hearing before proceeding to demolish the perimeter wall and recover the portions of the road reserve they alleged had been encroached upon by the petitioner.

### **Right to Fair Administrative Action**

39. The petitioner and Interested Party allege a violation of **Article 47** which guarantees to everyone the right to fair administrative action in the following words:

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

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

*(3)...*

40. This court has on several occasions emphasized the need for administrative actions to be carried out procedurally. Where a public authority's actions are likely to deprive individuals of their fundamental rights and freedoms, it is crucial that such actions be carried out through due process and in respect to the rules of natural justice. **H.W.R. Wade & C.F. Forsyth, in 'Administrative Law', 10<sup>th</sup> edition, Oxford University Press, page 404** cites Denning LJ in **Abbott v Sullivan [19\52] 1 KB 189 at 198** as stating;

*“These bodies, however, which exercise a monopoly in an important sphere of human activity, with the power of depriving a man of his livelihood, must act in accordance with the elementary rules of justice. They must not condemn a man without giving him an opportunity to be heard in his own defence: and any agreement or practice to the contrary would be invalid.”*

41. Similarly, in the Australian case of **Kioa v. West [1985] HCA 81; (1985) 159 CLR 550**, Mason J. remarked that the law in relation to administrative decisions

*"... has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention...."*

42. In this jurisdiction, the Court observed in the case of **Dry Associates Ltd v Capital Markets Authority and another, Petition No. 328 of 2011**, as follows with regard to **Article 47**:

*"Article 47 is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law ... but is to be measured against the standards established by the Constitution."*

43. If, as asserted by the respondents and found by this Court, the petitioner had encroached on the road reserve, it was incumbent upon the respondents in the present case to accord the petitioner a fair hearing and employ due process in the course of taking back the portion of the road reserve that had been encroached upon.

44. The petitioner claims that no notice was issued to it by the respondents prior to the demolition of its property on 19<sup>th</sup> November 2010. This claim is discounted by the 1<sup>st</sup> - 8<sup>th</sup> respondents. They assert in the affidavit of Eng. Michael Sistu M. Kamau sworn on 13<sup>th</sup> May 2011 that the petitioner's properties had been marked with an 'X' as far back as 2003, indicating an intention to demolish those properties that had encroached on a road reserve. There is also a notice dated April 2006 carried in a newspaper annexed to the further affidavit of Shreyesh Dave. It is not clear why the notice is annexed to the said affidavit, but at any rate, an examination of the notice indicates that it is a 'Public Notice' signed by the Kenya Airports Authority (KAA) through its Managing Director in which KAA advises the public that parcel numbers LR. 21919 (Jomo Kenyatta International Airport) and L.R. 209/13080 (Wilson Airport) belong to KAA. The notice contains a sketch of the area belonging to the KAA.



45. The petitioner has also attached to the said further affidavit the “REMINDER NOTICE” issued on 15<sup>th</sup> September, 2011 by the Managing Director of KAA to ‘vacate illegally developed land and encroached portions of Kenya Airports Authority L.R. NO. 21919 at Kyangombe and Syokimau, Jomo Kenyatta International Airport and L.R. NO. 209/13080 Mitumba Village at Wilson Airport.’ It is these notices that Mr. Moimbo, Learned Counsel for the 1<sup>st</sup> -8<sup>th</sup> respondents, in his submissions before this Court, relied on as constituting notice to the petitioner with regard to the intention by the respondents to repossess the portions of the road reserve it had encroached upon.

46. I have examined the said notices and in my view, they do not satisfy the clear requirements of Article 47. They are not addressed to the petitioner, and the land reference number to which they pertain would not, on a cursory glance thereat, give any indication that it was intended for or would affect the petitioner’s property. Consequently, it is my finding that the respondents failed to give notice to the petitioner of their intention to reclaim the portion of the road reserve that it had encroached upon, and in failing to give such notice, violated the petitioner’s right to fair administrative action. When the respondents demolished portions of the perimeter wall and some of the structures erected on the portions of the land alleged to be encroachments on the road reserve. The action taken by the respondents was to that extent unlawful and unfair.

47. The respondents have urged the court to consider that its action was in line with public interest and have relied on the decision of the Court in the case of **Kenya Guards Allied Workers Union v Security Guards Services & 38 others, Misc. 1159 of 2003** where Justice Nyamu (as he then was) expressed himself as follows:

*“Where national or public interest is denied the gates of hell open wide to give way to deforestation, pollution, environmental degradation, poverty, insecurity and instability. At the end of the day, we must remember those famous words of a famous jurist-Justice is not a cloistered virtue. I must add that where justice is done and public interest upheld, it is acknowledged by the public at large, the sons and daughters of the land dance and sing, and the angels of heaven sing and dance and Heaven and Earth embrace. By upholding the public interest and treating it as twinned to the human rights we shall be able to do away with poverty eradication programmes and instead we shall have empowered our people to create real wealth for themselves. Public Interest must be the engine of the millennium and it must where relevant occupy centre stage in the courts...”*

48. I agree that public interest considerations are critical factors for a Court to take into account, and in the circumstances of this case, construction of a road is for the public good. However, the public interest will be better served if the state and all organs of state and public authorities scrupulously act in accordance with the dictates of the Constitution.

### **Legitimate Expectation**

49. The petitioner and the Interested Party have alleged violation of the right to legitimate expectation. They urge the Court to find that they had a legitimate expectation on the free enjoyment of the suit property in question, having relied on various government representations on the availability of the land.

50. In the case of **Diana Kethi Kilonzo & another v The Independent Electoral & Boundaries Commission (IEBC) & 2 Others**, at Para 133, the Court addressed the issue of legitimate expectations in the following terms:

*“At its core, and in its broad sense, the doctrine of legitimate expectation is said to arise out of a promise made by a public body or official which the person relying on anticipates will be fulfilled. It is also said to arise out of the existence of a repeated or regular practice of the public body or official which could reasonably be expected to continue. Essentially, once made, the promise or practice creates an estoppel against the public body or official, so that the person benefitting from the promise or practice would continue to so benefit, and that the promise or practice would not be withdrawn without due process or consultation.”*

51. In **Council of Civil Service Unions and Others v Minister for the Civil Service(1985 AC 374 (408-409))**, it was observed that for a legitimate expectation to arise, the decisions of the administrative authority must affect the person by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision maker that

they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.

52. In the present matter, the petitioner and the Interested Party contend that they relied on government records from official searches in taking their respective actions of purchasing the suit property on the part of the petitioner; and making advances to the petitioner on the security of the said properties on the part of the Interested Party.

53. It should be stated at the outset that this Court is not making any findings one way or the other with regard to whether or not the petitioner's property was regularly acquired or not. However, as I observed earlier in this judgment, the contents of the primary documents, particularly the grants in respect of the two properties relied on by the petitioner and the Interested Party, raise some doubts with regard to the legitimacy of the petitioner's and the Interested Party's expectations. While it is true that a party ought to rely on documents sourced from the government, and the failures and omissions of the respondents with regard to the issuance of documents of title and approval of development plans are to be decried, the entries in the title documents, particularly the absence of an entry evidencing the petitioner's title, ought to have put, at the very least, the Interested Party on notice.

54. With regard to the boundaries and dimensions of the suit property, the petitioner contends that it relied on documents and plans prepared by the respondents. On their part, the 1<sup>st</sup> to 8<sup>th</sup> respondents assert that there may have been an error in the boundaries indicated in the survey plans. They contend that deed plan numbers 203396 and 203397 marked the boundaries of the suit property outside the required area, and that liability for such errors cannot, as provided under section 21 of the Survey Act and section 85 of the Land Registration Act 2012, attach to the government.

55. I agree with the respondents in this regard. As often happened in that regrettable epoch in our history when public property was being parceled out in complete disregard of the interests of the public, the petitioner may have been a victim of surveyors who may have prepared

subdivision plans in ignorance or disregard of the existing road corridor-see **Cycad Properties & Others –vs- Ministry of Roads & Others High Court Petition No. 70 of 2010**. In the circumstances, I cannot find a basis for alleging a violation of the petitioner’s legitimate expectations on the part of the respondents.

## **Findings**

56. My findings in this matter therefore, and which I shall take into account in considering what reliefs to grant the petitioner, are as follows:

i. That this matter is properly before the court and cannot be struck out solely on the basis that some of the reliefs sought are available in civil proceedings or that the facts giving rise to the petition are contentious. It is the duty of any court to evaluate the evidence before it, whether presented by way of affidavit or *viva voce* or both, and determine on a balance of probability where the truth lies.

ii. That there was no unlawful or arbitrary acquisition of the petitioner’s property as the evidence on record indicates that the boundary of the suit property had encroached on a road reserve.

iii. That the respondents violated the petitioner’s right to fair administrative action by failing to accord it a hearing and an opportunity to make representations with regard to the encroachment on the road reserve prior to proceeding with the demolition of the perimeter wall and other structures erected on the portions of the suit property in dispute.

## **Reliefs**

57. The petitioner has prayed for judicial review orders and an order of compensation for the repairs of the damaged property on the suit property in addition to the cost of the property

unlawfully excised. The respondents contend that compensatory reliefs could only issue in civil matters and urged the court not to grant the petitioner's order for compensation.

58. As observed above, the evidence before me indicates a violation of the petitioner's right to fair administrative action. Under the provisions of **Article 23**, this Court has the jurisdiction, in a petition alleging violation of constitutional rights, to grant appropriate relief, including declaration of rights, a conservatory order, an order of compensation and an order of judicial review.

59. In the present case, the petitioner has sought various orders and declarations, including an order for monetary compensation for the portion of land it alleges was unlawfully excised from the suit property, for rebuilding the demolished wall and buildings, and orders of judicial review.

60. The petitioner had sought compensation in the sum of Kshs 28,000,000.00 (later revised to Kshs 48,000,000) in value for all those portions of land unlawfully excised or acquired. However, as this Court has found that there was no such excision or arbitrary acquisition of the petitioner's property, such an order is not merited.

61. Similarly, with regard to the prayers for judicial review orders of prohibition, I believe that they have now been overtaken by events as the road in question is now almost complete, and the respondents have given an indication that they do not intend to continue with the demolitions of the rest of the properties as their interest was in the portion that encroached on the road reserve.

62. The petitioner also seeks compensation for the demolition of its perimeter wall and other structures without notice. In his further affidavit dated 27<sup>th</sup> January 2012, the Petitioner's General Manager pleads the amount of Kshs 84,193,425.86 as the amount incurred to repair/rebuild the subject property after the demolitions. This amount is based on the valuation report prepared by Knight Frank and exhibited as part of the bundle annexed to the further affidavit and marked "SD".

63. The petitioner's valuation was vehemently challenged by the respondents. In a further affidavit dated 27<sup>th</sup> January 2012 sworn by Eng. Michael Sistu M. Kamau (which appears to be responding to the initial valuation dated 23<sup>rd</sup> may 2011) it is averred that the valuation was conducted long after the structures were demolished from the road reserve. Mr. Kamau deposes, on the basis of advice by the Chief Government valuer, that it is impossible to conduct a valuation of properties which have been confirmed to have been demolished unless one is assessing the worth of the debris; and that the value that should have been assessed was the cost of reinstating the demolished structures, which value should have been assessed by a Quantity Surveyor.

64. A more troubling question, however, in the view of this Court, is whether, and if so, what relief to grant in respect of property whose construction had encroached on a road reserve upon the demolition of such property without notice. Would it be in the public interest to grant monetary compensation on the basis of the cost of reconstruction of the demolished property where such property, though demolished in violation of the right to fair administrative action, was constructed and was therefore demolished as a consequence of its having encroached on a road reserve?

65. In the case of **Isaac Gathungu Wanjohi –vs- The Attorney General & Others High Court Petition No. 154 of 2011**, the Court (Majanja J) made an award of **Kshs. 2,000,000.00** as general damages for breach of **Article 47** of the Constitution upon his finding that the issuance of a Gazette Notice purporting to revoke the petitioners' title in that case was in violation of the petitioners' rights under Article 47 of the Constitution. While I am persuaded that the grant of compensation for violation of the petitioner's right under Article 47 is, in this case, also merited, I am not persuaded that compensation is merited for demolition of a

perimeter wall and other structures constructed on a road reserve. It would, in my view, be to make a compensation order in respect of an illegality.

66. In the circumstances, I make an award of Kshs 2,000,000 for violation of the petitioner's right to fair administrative action.

67. The petitioner shall also have the costs of this petition against the respondents.

68. In closing, I must express my gratitude to Counsel for all the parties in this matter for their well-researched arguments and submissions.

**Dated, Delivered and Signed at Nairobi this 19<sup>th</sup> day of December 2013**

**MUMBI NGUGI**

**JUDGE**

**Mr. Kiragu Kimani instructed by the firm of Hamilton, Harrison & Mathews for the Petitioner**

**Mr. Muindi instructed by the firm of Kimondo Gachoka & Co. Advocates for the Interested Party**

**Mr. Moimbo Momanyi instructed by the State Law Office for the 1<sup>st</sup> to 8<sup>th</sup> Respondents**

**Ms Mogusu instructed by the firm of Momanyi & Associates & Co. Advocates for the 9<sup>th</sup> to 10<sup>th</sup> Respondents**



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