



**Abdullahi & another v Chief Land Registrar & 3 others; Kenya Deposit Insurance Corporation [Receivers of Dubai Bank Kenya Limited] & another (Interested Parties) (Environment & Land Petition 3 of 2017) [2025] KEELC 2927 (KLR) (21 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 2927 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND PETITION 3 OF 2017  
LL NAIKUNI, J  
MARCH 21, 2025**

**BETWEEN**

**MOHAMED SHEIKH ABDULLAHI ..... 1<sup>ST</sup> PETITIONER**

**SHEIKH DAIB MOHAMED ..... 2<sup>ND</sup> PETITIONER**

**AND**

**CHIEF LAND REGISTRAR ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**BILL KIPSANG ROTICH ..... 3<sup>RD</sup> RESPONDENT**

**MASHA BIRYA DENA ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**THE KENYA DEPOSIT INSURANCE CORPORATION [RECEIVERS OF DUBAI BANK KENYA LIMITED] ..... INTERESTED PARTY**

**GARAM INVESTMENTS AUCTIONEERS ..... INTERESTED PARTY**

**JUDGMENT**

**I. Preliminaries**

1. The Judgment of this Court pertains to the filed a Petition/ Plaint dated 24<sup>th</sup> March, 2017. It was by, Mohamed Sheikh Abdullahi and Sheikh Daib Mohamed, the 1<sup>st</sup> & 2<sup>nd</sup> Petitioners/Plaintiffs herein and the National Land Commission, Chief Land Registrar, Bill Kipsang Rotich and Masha Biry Dena, the Respondents herein. The Petition was brought under the dint of the provisions of Articles 10, 27, 40 and 47 of *the Constitution* of Kenya 2010. The Petition was accompanied by an affidavit in support.



2. Upon service of the Petition, the Respondents entered appearance and filed their various responses as seen herein below. In the course of the proceedings, and through a Ruling delivered by this Court, the Petition and Cross - Petition were converted into a Plaint.

## II. Description of the Parties

3. The 1<sup>st</sup> & 2<sup>nd</sup> Petitioners were described in the Plaint as male adult persons residing on the County of Mombasa within the Republic of Kenya. The 1<sup>st</sup> Respondent is an Independent body established by Article 67 of *the Constitution*. The 2<sup>nd</sup> Respondent is a Government officer appointed by the Public Service Commission under the provision of Section 12 of the *Land Registration Act*, No. 3 of 2012 responsible for the effective discharge of functions of the said Act, service of summons shall be effected through the Senior Principal Litigation Counsel, the Honourable Attorney General's office, Mombasa. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents were described as the individuals in whose favour it now occurred the double allotment/registration of leasehold interest in the parcel of land known as Land Reference Numbers MN/I/6589 (Hereinafter referred to as "The Suit Land") was made and were therefore necessary parties in the present proceedings.
4. The 1<sup>st</sup> Interested Party is a body corporate with perpetual succession and a Common Seal established under Section 4 of the *Kenya Deposit Insurance Act*, 2012, No. 10 of 2012 appointed by the Central Bank of Kenya as Receivers of Dubai Bank Kenya Limited who were the affected party by the present proceedings by virtue of purported Charge created in the Bank's favour in respect of the suit property by the 3<sup>rd</sup> Respondent and the 2<sup>nd</sup> Interested Party was described as a necessary party to the present proceedings by reason of being the party that has advertised the suit property in the local dailies "The Daily Nation" newspaper edition of 20<sup>th</sup> March, 2017 for sale by public auction scheduled on 27<sup>th</sup> March, 2017 and hence shall be affected by the outcome of both interlocutory and final determination in the present matter.

## III. Court directions before the Hearing

5. Nonetheless, on 26<sup>th</sup> October, 2021, the Honourable Court fixed the hearing dated on 2<sup>nd</sup> and 3<sup>rd</sup> February 2022 with the parties having fully complied on the provisions of Order 11 of the Civil Procedure Rules 2010 and the matter proceed for hearing by way of adducing "Viva Voce" evidence with the Petitioners (PW - 1) testifying in Court after which they marked their case closed and the Respondents called their witnesses on a later date and they subsequently closed their case

## IV. The 1<sup>st</sup> & 2<sup>nd</sup> Petitioners' Case

### A. The brief facts of the Petition

6. The brief facts of the case were and still are that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were bound to discharge their duties in compliance with the National Values and Principles of Good Governance under the provisions of Article 10 of *the Constitution*, The *National Land Commission Act* No. 5 of 2012, The *Land Registration Act* No. 3 of 2012 and the *Land Act* No. 6 of 2012. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents were required by Law under the provision of Section 7 (1) of the *Land Registration Act* to maintain a Land registry in which there shall be kept records amongst others a Land register, parcel files, Plans, Presentation books, Index of Number of Properties and a register and file of Powers of Attorney.
7. In March 2014 the Property subject of Title number C.R 62008 measuring nought decimal two one four six (0.2146) of an hectare or thereabouts that was to say the suit property was offered for sale by one Masha Biya Dena, the 4<sup>th</sup> Respondent through a property agent at a consideration of a sum



of Kenya Shillings Twenty Million (Kshs.20,000,000/-). The Petitioners in exercise of due diligence through counsel carried out a Search at the Mombasa Land Registry and was issued with certificate of Postal Search on 13<sup>th</sup> May, 2014 indicating the proprietor – the suit property as Masha Birya Dena the 4<sup>th</sup> Respondent who had offered the same for sale.

8. The Petitioners agreed and indeed proceeded to transact over the subject – suit property as innocent purchasers for valuable consideration without notice. A written sale agreement dated 24<sup>th</sup> March, 2015 was entered into between the 1<sup>st</sup> Petitioner as purchaser and the 4<sup>th</sup> Respondent as vendor thereof. The Petitioners pursuant to the purchase of the suit property took possession consequent to which appropriate development approvals/permissions were sought and obtained from the relevant County Government of Mombasa and the National Environment Management Authority. [NEMA].
9. The Petitioners were in possession/occupation of the subject land on which they have carried out massive developments without any interruptions or objections till completion. On or about the 10<sup>th</sup> October 2016, while at the suit land, a valuer came to view the property purportedly on instructions of the Central Bank of Kenya's Department of the Kenya Deposit Insurance Corporation and thereby produced a copy of a letter and Title Number C.R.59150 for Parcel of the suit property which was in the third Respondent's name and indicated to have been authorized to value the property on the basis that the same title had been given/deposited as security for a loan that was now unpaid advanced by M/s. Dubai Bank Kenya Limited, now under receivership.
10. Pursuant to the Valuer's actions aforementioned, the Petitioners on 26<sup>th</sup> October, 2016 wrote to the National Land Commission/1<sup>st</sup> Respondent seeking to know the status of the subject land. The 1<sup>st</sup> Respondent vide a letter dated 23<sup>rd</sup> November, 2016 confirmed that the subject property was vested in the Petitioners.
11. From the foregoing it is clear that the Respondents had in breach of the National Values and Principles of Governance under the provision of Article 10 of *the Constitution* and Principle of Legality under the provision of Sections 7 (1) of the *Land Registration Act*, No. 3 of 2012 occasioned a double registration of the same Parcel of the suit property under Title Number C.R 59150 registered on 28<sup>th</sup> February, 2013 in favour of the 3<sup>rd</sup> Respondent and Title Number C.R. 62008 registered on 10<sup>th</sup> February, 2014 in favour of the 4<sup>th</sup> Respondent both for a term of ninety nine (99)years from the 1<sup>st</sup> day of October, nineteen ninety four (1994) contrary to *Land Registration Act*, No. 3 of 2012, Principles of Legality, Public Policy and hence infringes on the rights to fair administrative action enshrined under the provision of Articles 27 and 47 of *the Constitution*.
12. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents' maintenance of two (2) registers or titles/grants for the same parcel of the suit property was contrary to Constitutional Order, an affront to the Principle of Legality and sanctity of Title rendering naught and absurd private proprietary rights contrary to Article 40 of *the Constitution*, which, if left unchecked would occasion total collapse and a national crisis in the Kenyan Land Tenure System contrary to public interest, security and policy. The 3<sup>rd</sup> Respondent was estopped from asserting rights, if any, over the suit land having stood by as the Petitioners cleared bushes at the subject land and constructed a massive residential premises and wall to completion thereon without objections or challenge.
13. The Petitioners as innocent Purchasers for valuable consideration without notice of the subject land in reliance of the public land records held/maintained by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were legally entitled for protection in respect of their proprietary rights and the massive investments made thereon. The Petitioners averred that in balancing the parties rights, the Court should declare as extinguished the



- 3<sup>rd</sup> Respondent's rights over the subject land in favour of the Petitioners who were in possession and occupation having put up massive development thereon.
14. While the issue of double registration of the subject property remains unresolved, the 2<sup>nd</sup> Interested Party has advertised the same in the Daily Nation newspaper of 20<sup>th</sup> March, 2017 a sale by public auction scheduled for 27<sup>th</sup> March, 2017 which shall cause confusion, absurdity by introducing additional parties to the saga and cause irreparable loss/damage to the Petitioners. The Petitioners being registered owners of the subject property through an innocent purchase for valuable consideration without notice shall suffer irreparably if the scheduled Auction was not stopped by an order of the Honourable Court.
  15. The Petitioners stated that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents breached their Constitutional duty of ensuring proper efficient and transparent maintenance of Land records in respect of each Parcel of Land so as to ensure and uphold security of Land Rights as contemplated by the Principles of Land Policy under Chapter 5 of *the Constitution* of Kenya. The Petitioners' stated that to uphold the security and sanctity of title, rule of law, principle of legality and constitutional order, it was in the interest of justice that the Honourable Court does intervene by granting the reliefs sought in the Petition.

#### **B. The 1<sup>st</sup> & 2<sup>nd</sup> Petitioners' prayers**

16. The 1<sup>st</sup> & 2<sup>nd</sup> Petitioners sought for the following orders: -
  - a. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents breached the Principles of Land Policy, Principle of Legality, rule of law, *Land Act*, *Land Registration Act*, *National Land Commission Act* in causing the double allocation/registration and maintenance of two [2] Land Registry records for Plot MN/I/6589;
  - b. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' actions in respect of Plot No. MN/I/6589Is contrary to the Principle of Security Land Rights and an affront to the sanctity of title contrary to public policy contemplated by the *Land Act*, *Land Registration Act* and Chapter 5 of *the Constitution* hence unconstitutional;
  - c. A declaration that the Petitioners are innocent purchasers for valuable consideration without notice whose rights are absolute and cannot be impeached in favour of those of the 3<sup>rd</sup> Respondent;
  - d. An order that the 3<sup>rd</sup> Respondent is estopped from challenging the Petitioners' proprietary rights over Plot No. MN/I/6589;
  - e. An order directing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to cancel and revoke from the Land Records the 3<sup>rd</sup> Respondent's Title No. CR 59150 for Plot No. 6589/I/MN;
  - f. An order of injunction prohibiting and restraining the Respondents and the Interested Parties by themselves, their servants and/or agents from effecting any further dealings, disposing off, auctioning or in any manner interfering with the Petitioners' possession, occupation and ownership of all that piece of land known as Title No. CR 62008, Plot No. 6589/I/MN.
  - g. In the alternative to Prayer "D, E & F" hereinabove, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents be ordered to pay full compensation according to the market value of the property together with developments thereon as maybe established and assessed at the date of judgment;
  - h. Such other Orders or reliefs as this Honourable Court shall deem fit and just in the circumstances.



### C. The Petitioners' Affidavit in support

17. The Petition was supported by a 24 Paragraphed affidavit sworn by Mohamed Sheikh Abdullahi, the 1<sup>st</sup> Petitioner herein on the same date as the Petition with one (1) annexures marked as "MSA - 1" where he averred that: -
- a. He was aware that the property Title No. CR 62008 Plot No. 6589/I/MN was currently registered in the Petitioners' names having acquired the same through an innocent purchase for valuable consideration without notice from the 4<sup>th</sup> Respondent. He attached a copy of the sale agreement dated 24<sup>th</sup> March, 2015 between the 4<sup>th</sup> Respondent and together with copy of his identity card were produced at pages 1-5 of the Bundle of Exhibit.
  - b. The aforementioned property was sometime in March, 2014 was offered for sale by the 4<sup>th</sup> Respondent through agents to the Petitioners and having developed interest over the same counsel was instructed to carry out due diligence at the Land Registry, Mombasa whereto it was confirmed that the 4<sup>th</sup> Respondent was the registered proprietor of the subject land. A true copy of the Certificate of Official Search issued on 13<sup>th</sup> May, 2014 was produced at page 6 of the Bundle of Exhibit.
  - c. The Co – Petitioner and he started to make arrangements for the funds and pursuant to discussions the 4<sup>th</sup> Respondent agreed to some instalment's consequent to which the aforementioned agreement of 24<sup>th</sup> March, 2015 was thereafter executed duly diligence having been done earlier as stated above.
  - d. The sale/purchase consideration was duly effected by way of cheques drawn in the account of Messrs. Marende Birir & Company Advocates on instructions of Marende Birir Shimaka & Company Advocates who acted for the parties in the transaction. True copies of the cheques were produced at pages 7-15 of the Bundle of Exhibit.
  - e. He was aware that to facilitate transfer in terms of the agreement the relevant consent to transfer, valuation for stamp duty and Land rates Clearance Certificate were duly availed true copies of which were produced at pages 16-20 of the Bundle of Exhibit.
  - f. A transfer of the subject land dated 24<sup>th</sup> June 2015 duly executed was lodged for registration in favour of the Petitioners. A true copy of the transfer, official receipt and application for registration were produced at pages 21-27 of the Bundle of Exhibit.
  - g. Pursuant to the aforementioned application to transfer of the subject land the same was duly effected/registered in favour of the Petitioners on 26<sup>th</sup> June, 2015 as evidenced by Entry No. 2 to the title. A true copy of the title was produced at pages 28 - 31 of the Bundle of Exhibit.
  - h. They took possession and occupation of the subject property sometime in June, 2015 where after relevant Building Plans were drawn and forwarded for approval by NEMA and County Government of Mombasa. True copies of the Acknowledgements by NEMA and Notification of Approval by the County Government of Mombasa were produced at page 32-34 of the Bundle of Exhibit.
  - i. Pursuant to approvals to construct/develop the 2<sup>nd</sup> Petitioner has made massive residential house and wall developments on a half of the subject land without any objections or interruption from the 2<sup>nd</sup> Respondent, his agents, Bankers or servants to its' completion and occupation of the same. Photos showing the developments were produced at page 35 of the Bundle of Exhibit.



- j. On or about the 10<sup>th</sup> October 2016, while at the suit land, a valuer came to view the property purportedly on instructions of the Central Bank of Kenya's Department of the Kenya Deposit Insurance Corporation and produced a copy of a Title number C.R. 59150 for the same – suit property which was in the name of the 3<sup>rd</sup> Respondent with a view to value the property on the basis that the said Title had been given/deposited as security to M/s. Dubai Bank Kenya Limited, now under receivership for a loan that has remained unpaid. A true copy of the Title given to him then by the Valuer was produced at pages 36-38 of the Bundle of Exhibit.
- k. Pursuant to the Valuer's actions aforementioned, counsel was on 26<sup>th</sup> October, 2016 instructed to write to the National Land Commission [1<sup>st</sup> Respondent] seeking to know the status of the subject land. A true copy of the letter was produced at page 39 of the Bundle of Exhibit.
- l. The 1<sup>st</sup> Respondent -the National Land Commission vide a letter dated 23<sup>rd</sup> November, 2016 confirmed that the subject property was vested in the Petitioners. A true copy of the said letter was produced at page 40 of the Bundle of Exhibit.
- m. From the foregoing it was clear that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have in breach of law occasioned a double allocation and registration of the suit property under title number/Grant Numbers C.R 59150 registered on 28<sup>th</sup> February, 2013 in favour of the 3<sup>rd</sup> Respondent and C.R. 62008 registered on 10<sup>th</sup> February, 2014 in favour of the 4<sup>th</sup> Respondent both for a term of ninety nine (99) years from the 1<sup>st</sup> day of October, nineteen ninety four (1994) contrary to Land Statutes and Public Policy hence infringes on the rights to fair administrative action enshrined under Article 47 and rule of law, Article 10 & 27 of *the Constitution*.
- n. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents' maintenance of two (2) registers or titles/grants for the same parcel of land L.R No. MN/1/6589 was an affront to the sanctity of title and renders naught and absurd private proprietary rights contrary to the provision of Article 40 of *the Constitution*.
- o. The Petitioners as innocent Purchasers for valuable consideration without notice of the subject land in reliance of the public land records held/maintained were legally entitled for protection in respect of their proprietary rights and massive developments made to completion without any objections.
- p. The 3<sup>rd</sup> Respondent was estopped from asserting rights, if any, over the subject land having stood by as the Petitioners cleared bushes thereon and carried out construction massive residential premises and wall thereon to completion without objections or challenge.
- q. In balancing the party's rights, the Court should declare as extinguished the 3<sup>rd</sup> Respondent's rights over the suit land in favour of the Petitioners who are in possession and occupation having put up massive development thereon without any objections or challenge.
- r. While the issue of double allotment and registration of the subject property remains unresolved, the 2<sup>nd</sup> Interested Party had caused to be advertised in the Daily Nation newspaper of 20<sup>th</sup> March, 2017 a scheduled sale on 27<sup>th</sup> March, 2017 by public auction of the subject land. A true copy of parts of the Daily Nation of Monday, 20<sup>th</sup> March, 2017 was produced at page 41 of the Bundle of Exhibit.
- s. The Petitioners being registered owners of the said property through an innocent purchase for valuable consideration and in occupation and possession shall suffer irreparably if the scheduled Auction sale is not stopped by an Order of the Honourable Court



- t. So as to avoid an absurdity of creating more disputes that will arise by a sale to third parties in the Auction before the dispute between the Petitioners and Respondents is resolved the Honourable Court ought to intervene by issuing injunctive preservative orders herein as sought pending inter parties hearing of the Motion and determination of the Petition.
  - u. He had been shown the aforementioned documents paginated/serialized 1-41 which he produced in the affidavit bundle as an exhibit collectively marked as “MSA - 1”.
  - v. The affidavit was in support of the interlocutory reliefs sought in the motion as well as in support of the main Petition
18. The Petitioners called their first witness on 2<sup>nd</sup> February, 2022 at 2.30 pm who testified as follows:-

**A. Examination in Chief of PW - 1 by Mr. Mogaka Advocate.**

19. The witness testified under oath and in Swahili language. He identified himself as Mohamed Sheikh Abdullahi. He was a citizen of Kenya with all the particulars as indicated from the national identity card shown to court. PW – 1 told the court that he knew Sheikh Daib Mohamed the 2<sup>nd</sup> Petitioner. He recalled they signed the documents together. He signed the Affidavit at page 6 dated 24<sup>th</sup> March, 2017. He had read the Affidavit and understood it and adopted the statements and list of documents – 40 documents – Petitioner Exhibit Numbers “2 to 41”. He wished to rely on them as part of his evidence in chief in support of his case whatsoever.
20. He met the 4<sup>th</sup> Respondent when they wanted to sell his plot. They executed a sale agreement and paid for it.
21. PW - 1 told the court that he undertook all the due diligence. They got approvals from NEMA. They moved into the suit property and lived on it for several months. But someone came and claimed the land. He wanted them out of it. So they sought for legal action. The statement – supplementary paragraph 2 Affidavit dated 25<sup>th</sup> April, 2018 – he relied on the same as evidence in court. On being referred to the contents of Paragraphs 5, 6 and 7 of the Supplementary Affidavit the witness told the court that an official search was done by the advocate. The land belonged to the Petitioners and they had the documents. They relied on the documents “Petitioner/ Plaintiff’s Exhibit 6”.

**B. Cross Examination of PW - 1 by M/s. Kiti Advocate for 2<sup>nd</sup> Defendant.**

22. PW - 1 confirmed that they conducted due diligence – official search. The owner was Marsha Biryia Dena. They obtained all the pre-requisite documents. They physically visited the land. They were contented. It was vacant. There was a fence. They were given all the necessary documents by the Land Registrar.

**C. Cross Examination of PW - 1 by Mr. Shimaka for 4<sup>th</sup> Defendant.**

23. PW - 1 told the court that he knew the 4<sup>th</sup> Defendant. He had sued him. He had constructed on the suit land. After constructions, he never stopped him. PW - 1 was given Certificate Title Deed through the 4<sup>th</sup> Defendant. From all the Government Offices they got any problem or being told that it had problem.

**D. Cross Examination of PW - 1 by Mr. Bwire for 3<sup>rd</sup> Defendant.**

24. PW - 1 confirmed that he relied on the official search as seen from the contents of Paragraphs 5, 6 and 7 of the Supplementary Affidavit – Pages 28 to 31 the title that was issued to the 4<sup>th</sup> Defendant. It was signed on 8<sup>th</sup> January, 2014. He had seen that there was a title issued to Mr. Bill Kipsang Rotich



signed on 7<sup>th</sup> September, 2011 by the Commissioner of Land. He confirmed what he had seen earlier. They found a perimeter wall on the land. It was an old development. PW - 1 asked Mr. Marsha and he answered that he was the one who had constructed the said wall. All the transactions for the sale were undertaken by a common lawyer – M/s. Marende, Necheza and Birir Company Advocate.

E. Cross Examination of PW - 1 by Mr. Wafula Advocate for the Interested Party.

25. PW - 1 reiterated that he went to court as someone had acquired the land through purchase. He wanted to conduct valuation on it. By then they had been on the land for 5 months. He could not remember when they came onto the land. It might have been in the year 2016 or thereabout. He had seen the original title for the land at the Advocate's offices – Pages 28 to 31). There was an old perimeter wall. For someone to have constructed an old perimeter wall on the land, there must have been a title deed. It was for the year 2014. Within the vicinity, there were many plots with walls around them anyway. The title referred to Plot No. MN/1/6589. PW - 1 confirmed it was for – CR. No. 62008. He had also seen the title for the 3<sup>rd</sup> Defendant. He had seen the numbers. It was CR. No. 59150 which was different from the one on the PW – 1's title. The date of issue was 7<sup>th</sup> September, 2011. He had no knowledge whether the numbers were in sequential order. When it was put to him that the one for Kipsang was earlier; he as the Interested Party was Dubai Bank and that the IP had charged the title deed there. With reference to the Affidavit of Ombasa at page 50 he told the court that it was charged to Dubai Bank for a sum of Kenya Shillings Sixty Million (Kshs. 60, 000,000/=) – the PW – 1 vehemently denied these assertions.

#### **F. Re - Examination of PW - 1 by Mr. Mogaka Advocate.**

26. PW - 1 confirmed that he bought the suit land on 24<sup>th</sup> March, 2015. By the time the auctioneers came, he had been there for a year. He constructed a structure for one year, and he was there for approximately 5 to 6 months. They filed the case in March 2017. It took him less than a week. The Auctioneers came to them in March 2017. He had seen the CR. Numbers for the two titles. He confirmed they were different. As a land owner he did not play any role on the allocation of numbers of land. On page 6 of the Official Search is CR. No. 62008 dated 13<sup>th</sup> May, 2014. He never knew the existence of Mr. Kipsang's title before he filed the case. He had never seen the person. PW - 1 saw his title when the man came to his land. He did not know when the perimeter wall was built.
27. On 2<sup>nd</sup> February, 2022 the Petitioner/Plaintiff's case was marked closed by the counsel on record Mr. Mokaya.

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

28. The 1<sup>st</sup> Defendant/Respondent through CHAVANGI TOM AZIZ, an Advocate of the High Court of Kenya and the Chief Executive Officer/Secretary of the 1<sup>st</sup> Defendant/Respondent opposed the Petition that had been converted into a Plaint through a 9<sup>th</sup> Paragraphed Replying Affidavit sworn on 29<sup>th</sup> September, 2017 where the deponent averred that:-
- i. The 1<sup>st</sup> Respondent is an independent Commission established under the provision of Article 67 (1) of *the Constitution* and is operationalized by the *National Land Commission Act* No. 5 of 2012 and has as one of its fundamental functions, the management of public land on behalf of the National and County Governments.
  - ii. Following promulgation of the current Constitution in 2010 and the overall responsibility of land management in the country. The 1<sup>st</sup> Respondent is partly the custodian of land records in the country and was enjoined to develop and maintain an effective land information system for the management of public land.



- iii. He had called for the relevant file in respect of all that parcel of land known as 6589/1/MN or MN/1/6589 as noted as follows;
    - a. MN/1/6589 was a Grant of public land. The same was allocated to one Masha Biry Dena by way of a Letter of Allotment for a term of 99 years with effect from 1<sup>st</sup> October 1994.
    - b. Upon payment of the requisite fees, and upon compliance of the terms contained in the letter of allotment, a lease in respect of the subject parcel was prepared and forwarded to the Chief Land Registrar for purpose of registration on the 16<sup>th</sup> January, 2014. Annexed in the affidavit and marked as “CTA - 1” was a copy of the said letter.
    - c. The Chief Land Registrar subsequently forwarded the lease for registration at the Coastal Registry vide correspondence dated 4<sup>th</sup> February 2014. Annexed in the affidavit and marked as “CTA - 2” was a copy of the said letter.
  - iv. He had confirmed from record, that there was no other record allocation of the subject parcel to any other party other than the allocation that was carried out in favour of one Masha Biry Dena. It was therefore untrue that there was an instance of double allocation of the subject parcel.
  - v. The Petition raised no Constitutional issues as against the 1<sup>st</sup> Respondent and hence should be dismissed as against the 1<sup>st</sup> Respondent.
  - vi. Affidavit was sworn in opposition to the Petition and he beseeched this Honourable Court to dismiss the same as against the 1<sup>st</sup> Respondent.
29. On 2<sup>nd</sup> February, 2022, the 1<sup>st</sup> Respondent called its first witness RW - 1 who told the court that:-

**B. Examination in Chief of RW – 1 by M/s. Kiti Advocate**

- 30. RW - 1 testify under the sworn in English language. He identified herself as Nkoili Siema Mwaguri. He told the Court that he worked as a Land Registrar bearing Personnel No. 2020 -020824 – Defence Exhibit – 1. He indicated that he would rely on an affidavit by Samuel Kariuki Mwangi 23<sup>rd</sup> November, 2017 and filed on 23<sup>rd</sup> November, 2017, further a witness Statement by John Gichuki Wanjohi filed on 15<sup>th</sup> July, 2020 and List of Documents dated 25<sup>th</sup> September, 2020 filed on 6<sup>th</sup> October, 2020. The documents by Samuel Kariuki Mwangi adopted as evidence in this case. 1 to 17 documents. The first document – (a) Letter 16<sup>th</sup> January, 2014 to National Land Commission forwarding document to LR. No. 6589/1/MN. (b) Letter dated 4<sup>th</sup> February, 2014 addressed to John Gichuki Wanjohi. Forwarding 4 Grant documents 6589/1/MN was included in the list of documents. (c) the forwarded Grant from the office of the Chief Land Registrar vide a letter dated 4<sup>th</sup> February, 2014 (d) A title deed for land LR. No. 6589/1/MN CR. 62008 – registered in the name of Masha 10<sup>th</sup> February, 2014. The same was transferred to the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners on 24<sup>th</sup> June, 2015. They registered on 26<sup>th</sup> June, 2015. RW – 1 stated that there were no record for the property by the 3<sup>rd</sup> Respondent/Defendant. Neither did they have any letter forwarding the rant for the 3<sup>rd</sup> Respondent/Defendant to them.
- 31. According to the witness, previously, the one would apply to be given a land by Government through the Commissioner of Lands. But nowadays the allocation was by the National Land Commission. One was issued with the Letter of Allotment. The leases on the Government land were forwarded to the Land Registrar, Mombasa for its registration. They tasked a team of surveyors to cause an investigation on the land. Once the Land Registrar registered the leases they informed the owner. The owner would



appear to sign papers and collect the registered Grant. The Land Registry played a very minimal role. He confirmed that they never received any documents from the Commissioner of Lands in relation to Mr. Bill Kipsang. He was aware of the existence of title bearing No. Title number C.R. 59150 for the same property. It was for Mr. Bill Kipsang.

32. From the as the Land Registrar a letter was written to National Land Commission (NLC) to inquire whether this parcel had been allocated to another person. There was no response. The only person/office who can verify whether this was a case of double allocation in NLC.

#### **A. Cross examination of RW - 1 by Mr. Mogaka Advocate.**

33. According to the witness, initially it was the Commissioner of Land who would allocate public land. However, this role has now been taken over by the NLC. The process for the allocation of public land that was available was clearly explained here. There was always a letter forwarding a Grant authored by the Commissioner of Lands (now NLC) to the Land Registrar for its registration. The Lessors were always copied in the letter. There was a letter dated 6<sup>th</sup> November, 2012 from the correspondence CR. 62008 – LR No. 6589/MN/I. The witness did not have any other records. Refers to the documents by the 3<sup>rd</sup> Defendant. There was no letter forwarding a Lease to the Land Registrar. The records were maintained at the strong room of the land's office. The records were the same. He was employed in year 2020 but what he had was on record. The current registered owners to the suit land were Mohamed Sheikh Abdulahi and Sheikh Daid Mohamed – the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners herein. Before it was registered in the names of Marsha Biryana Dena who was initial owner.
34. RW – 1 made reference to the Affidavit of Samuel Kariuki Mwangi and which he relied on strongly. He had annexed documents which were the same documents as the ones in the correspondence file.

#### **C. Cross Examination of RW - 1 by Mr. Wafula for the 1<sup>st</sup> Interested Party.**

35. RW – 1 confirmed to Court that there were two conflicting title deeds for the same parcel of land – the suit property. These were (a) CR. 59150 and (b) CR. No. 620088. CR. Number meant filing system “Certificate of Registration” for the Coast Region There was a register for these CR. Numbers. They were in sequential order. Before coming to court he never checked the register i.e. C.R. yet he knew the main contention was on the numbers of the title. It was not be possible to have a blank. A name was to be allocated in the register. From the CR register, CR. 59150 comes first. Ideally, it would appear the CR. No. 59150 would appear first though it was not necessary the case particularly whereby they were rejected or otherwise it was Government allocated land. The process started with the issuance of the Letter of Allotment then the processing through the Director of Survey and Director of Physical planning to the Commissioner of lands who would then forward the Leases to the Land Registrar for registration. Referred to the 3<sup>rd</sup> Defendant's bundle of documents – the Letter of Allotment which was issued to Mr. Bill Kipsang Rotich. RW – 1 noted that the said Letter of Allotment was never signed. However, he confirmed that there was a bankers cheque and a receipt issued dated 22.2 (the year was invisible).
36. According to the witness the receipt was faint. There was need for the production of the original or at least a certified copy as per the provision of Sections 65, 66 and 67 the *Evidence Act*, Cap. 80. There was a receipt dated 8<sup>th</sup> January, 2004 bearing No. 757166 for a sum of Kenya Shillings Seventy Thousand (Kshs. 70,000/-) made by Mr. Bill Kipsang. He was also referred to a letter dated 6<sup>th</sup> November, 2022 for the registration of the title No. CR. No. 59150 (MN/1/6589). It shows the registration had been paid for. According to RW – 1, if Mr. Bill Kipsang had made all the payments what was pending was registration and issuance of the title. Page 1 it was a title for CR. No. 59150 Land Reference No. 65.



37. The two titles were issued on 28<sup>th</sup> February, 2013 and 1<sup>st</sup> February, 2014 respectively. From the registration and issuance of the title deed it appears the one for Mr. Bill Kipsang was the first one to be registered. However, he did not know whether the said title for Mr. Kipsang was ever registered if at all as there were no records to that effect at the Land Registry. The witness adopted the witness statements of Mr. Samuel Kariuki Mwangi and John Gichuki Wanjohi. At Paragraph 5 they say the title were issued by the Commissioner of Land. He admitted that sometimes their offices would lose documents. In such a circumstance of loss of documents, an indemnity was prepared. It was their copy that was missing. The owner would be requested to produce an original title deed for verification. The indemnity was signed and registered by the Land Registrar. Subsequently, a new title was issued.
38. RW - 1 told the court that in the instant case, the indemnity was registered. Mr. Masha produced the original title. They relied on the title outside. There was no exception. For this indemnity, they used other documents for the verification of the title for Masha. They verified the signatures and the seal of the documents presented by the owner and the signatures. They opened an office title and the title was placed in file. The Affidavit of Samuel Kariuki Mwangi – Paragraph 3 – (Refer) – it says “I only accessed “both” and Paragraph 5 of the Affidavit.
39. RW - 1 told the court that he did not know what it meant. He referred to the Replying Affidavit of Bill Kipsang. It was an official search it referred to the property CR. 59150 and it was that the Land Registrar said he could not get. The Lease was for 99 years from 1<sup>st</sup> October, 1994. the Letter of Allotment was dated 1<sup>st</sup> October, 1994. The term tallies with the Lease. It was in the name of Bill Kipsang. It was signed by a Mr. Okubasu, a Land Registrar. For someone to have prepared the search he must have referred from the records at the land registry. It was a charge document. It had been signed by Mr. Wanjohi, who was in charge of the Land Registry. For it to be registered the documents were there. But today the documents were not there any more.
40. The witness was referred to page 50. It was the Affidavit of John Magesa Ombasa. It contained a postal search in respect of the same property which was charged for sum of Kenya Shillings Sixteen Million (Kshs. 16, 000, 000/=). The same was signed by Mr. Wanjohi. It was a case of double allocation of property. To him, the property of Bill Kipsang came first.

#### **B. Cross Examination of RW - 1 by Mr. Oduor Advocate.**

41. RW - 1 reiterated that he was relying on two affidavits by Mr. Samwuel Kariuki Mwangi. He believed in the contents of the said affidavit. From the Affidavit of Mr. John Gichuki Wanjohi, the NLC processes the title deed as the Commissioner of Land used to do. The function of NLC was the role of the former Commissioner of Land and Director of Administration. Hence the affidavit was incomplete. The Affidavit dealt on only one title of the parcel of the suit land from the information that was available to him. It seemed that this was the case of double allocation – Paragraph 5 of the Affidavit he said he wanted to see the original. The originals had not been brought to court. The title had been charged. At Paragraph 10. It was a ground Report. It verified that the Land Surveyor went on the ground and prepared a report and that was what was in the file. The Grant was prepared at Nairobi and then taken to Mombasa for registration. Once it had arrived from Nairobi, they filled in the details in a register (book). They then called the owner to pick the original Grant. He did not check the book and CR. Register before he came to court.
42. From the records, there were “authority” number and “reference Number” – there was not co - relationship of the 3<sup>rd</sup> Defendant Supplementary Affidavit F/No. 127258 R/No. D0671061. There seemed to have some sequence. The first payment was to Mr. Biryra Marsha on 12<sup>th</sup> November, 2023



and Letter of Allotment was issued on 1<sup>st</sup> October, 1994. Bill Kipsang paid on 21<sup>st</sup> February, 1995 his Letter of Allotment came on 7<sup>th</sup> September, 2011.

43. Further, RW - 1 stated while referring at page 5 of the 3<sup>rd</sup> Respondent Replying Affidavit that after the issuance of the Letter of Allotment it was sent to Mombasa on 8<sup>th</sup> November, 2012. The Bill's title was the 1<sup>st</sup> to be registered. The title for Birya Marsha was issued on 10<sup>th</sup> February, 2014 and registered on 8<sup>th</sup> January, 2014. However, upon conducting a search conducted the information showed that it belonged to another allottee. It showed the same number as that of Mr. Birya Masha. It was not possible to allocate two title deeds for one parcel of land. The charge was registered against the name of the person. This case was in the name of Mr. Bill Kipsang.

#### **A. Re - Examination of RW - 2 by M/s. Kiti Advocate**

44. RW - 1 confirmed that the letter had been signed by Mr. Osewe. It was not on an official letter head. As a matter of fact and policy, all Government Letters were and ought to be on Letter Head. This was on blank piece of paper. On being referred to the Affidavit of Samuel Kariuki Mwangi, it indicated that the parties concerned were asked to bring the original letter to prove the double allocation but they were never brought to them. Referred to the Letter of Allotment – in the Petitioners Supplementary document. It was not complete. The Letter of Allotment – clause 2 (Refer) – its dated 16<sup>th</sup> September, 1994 and the Cheque was made on 1<sup>st</sup> February, 1995 – it was to have paid a sum of Kenya Shillings Seventy Seven and Sixty Thousand (Kshs. 77,060/-).

#### **VI. The response by the 1<sup>st</sup> Respondent**

45. The 1<sup>st</sup> Respondent through STEPHEN KYANDIH, a Legal Counsel in the employment of the 1<sup>st</sup> Respondent opposed the Petition dated 27<sup>th</sup> November, 2023 through a 19<sup>th</sup> Paragraphed Replying Affidavit dated 17<sup>th</sup> April, 2024 who averred as follows:-
- a. The 1<sup>st</sup> Respondent was a stranger to the allegations at Paragraph 4 of the Petitioner's Supporting Affidavit and was put to strict proof of the said allegations. In particular, the 1<sup>st</sup> Respondent had not at any given time acted in any matter as intimated in Paragraph 4 as stated.
  - b. In response to Paragraphs 5 to 10 of the Petitioners' Supporting Affidavit, the process being referred to was carried out by the 2<sup>nd</sup> Respondent in the performance of its statutory mandate and the Petitioners were fully engaged and aware of the process.
  - c. Furthermore, any change by deletion by the 2<sup>nd</sup> Respondent as well as KeNHA was regularized by the publication of the gazette notice. The 1<sup>st</sup> Respondent was not involved in the said process.
  - d. In response to the contents of Paragraph 10 of the Petitioner's Supporting Affidavit, the Petitioners were aware that the properties were acquired vide a gazette notice and they participated in the process up to the point of deletion. Thereafter they approached the 1<sup>st</sup> Respondent vide the Notice under the provision of Section 66 (a) of the *Kenya Ports Authority Act*.
  - e. All processes of acquisition have a mandatory procedure to be subscribed to. The 1<sup>st</sup> Respondent could not directly acquire property by compulsorily acquiring one in light of the new land regime established under *the Constitution*. The 1<sup>st</sup> Respondent had to liaise with various national government institutions and departments which include the Treasury and especially the 2<sup>nd</sup> Respondent.



- f. The communication subject of the annexures marked as “MAO – 8”, and in particular from the 1<sup>st</sup> Respondent were strictly on a without prejudice basis. The letter one without prejudice basis were only for purposes of aiding parties to negotiate a settlement without fear of the said information not being used against them. The use of the letters in the Petition herein was therefore prejudicial to the 1<sup>st</sup> Respondent.
- g. The 1<sup>st</sup> Respondent proceeded to conduct itself in good faith all through after the Notice served by the Petitioners. They reiterated the contents of paragraph 7 above.
- h. In response to the contents of Paragraphs 12 and 13 of the Petitioner’s Supporting Affidavit, the existence of the valuation by the 2<sup>nd</sup> Respondent would not automatically call upon the 1<sup>st</sup> Respondent to compensate the Petitioners. The 2<sup>nd</sup> Respondent had an independent budgetary allocation and empirical process enabling it reach the figures.
- i. The involvement of the 2<sup>nd</sup> Respondent, KeNHA, and the 1<sup>st</sup> Respondent meant that it became exceedingly difficult to ascertain the party to compensate the Petitioners. The responsible party has therefore to be identified to avoid multiplication of claims, double compensation and loss of public funds.
- j. Similarly, whereas the law requires that in an event of compulsory acquisition the entity acquiring confirm availability of funds and that all surveys have been done; the uniqueness of the Mombasa Port Development Project was that the financing of the project was financed through many entities. This made the process of apportioning of compensation delicate and prolonged.
- k. Mid – project, there were changes that necessitated a redesign of the project and abandoning of some sections of the project. Being there no consultation within the entities, there is confusion on who was responsible for compensating the Petitioners. The 1<sup>st</sup> Respondent has not in any manner declined to proceed with compensation where its legally obligated, in any case, it had no authority to avoid legal liability once it arises.
- l. Despite the fact that the 1<sup>st</sup> Respondent had benefitted from the acquisition did not mean that she was responsible to make good of the Petitioner’s claims. The 1<sup>st</sup> Respondent, KeNHA and Kenya Railways all benefited from the project and therefore it would be unfair to burden the 1<sup>st</sup> Respondent with the sole responsibility of compensating the Petitioners without there not being any empirical assessment
- m. The 1<sup>st</sup> Respondent had to sought guidance and obtained authorization from the national government through the Treasury, 2<sup>nd</sup> Respondent and comply with its establishing statute before making payment for any compensation, including to the Petitioners’ herein.
- n. In response to response to paragraph 14 of the Petitioner’s Supporting Affidavit, they wished to reiterate that the contents of paragraphs 10 to 15 above and put the Petitioner’s to strict proof of contrary assertions.
- o. In response to paragraphs 15 to 20 of the Petitioner’s Supporting Affidavit, they wished to reiterate paragraphs 4 to 16 above.
- p. The Affidavit was in opposition to the Petition as filed herein and prayed that the same be dismissed with costs.



## VII. The Response of the 2<sup>nd</sup> Respondent

46. The 2<sup>nd</sup> Respondent through a 9<sup>th</sup> paragraphed Replying Affidavit sworn by Samuel Kariuki Mwangi, a Registrar of Titles under the Ministry of Land and Physical Planning currently stationed at District Land Office-Mombasa and filed on 23<sup>rd</sup> November, 2017 where the Deponent averred that:-
- a. Upon scrutiny of record in their custody he had only accessed both the deed file and correspondence file in respect to New Grant for LR. No. MN/I/6585 registered as CR. 62008 to Masha Biry Dena on first registration and which was subsequently transferred to Mohamed Sheikh Abdullahi and Sheikh Daib Mohamed, vide a transfer dated 24<sup>th</sup> June 2015 and registered in Lands Office on 26<sup>th</sup> June 2015. (Annexed in the affidavit and marked as “SKM - 1A & B” was a copy of the Grants and transfer document).
  - b. It was not possible to have the same parcel of land, bearing the same Land Reference Number, same acreage and same Deed Plan Numbers allocated or vested in two different people or entities.
  - c. He observed that both New Grant registered as CR. 59150 and CR. 62008 for L.R. No. MN/I/6589 were issued in respect to former Government Land and the allocation thereof was done through the former office of Commissioner of Lands. Consequently, the first registered owner should provide details of allocation and compliance thereof for authentication through the office of National Land Commission, the successor of the Commissioner of Land Office.
  - d. In particular the first owner should provide the National Land Commission with the Letter of Allotment for clarification on question of double allocation ascertaining the authentic Letter of Allocation as issued.
  - e. The office of Registrar of Titles -Mombasa is not involved in allocation of Government Land. In deed upon completion of allocation process the duly prepared New Grant is forwarded to Registrar of Title for registration purposes.
  - f. Upon receipt of the forwarded New Grant, the officer in charge of Records proceed to open a correspondences file and forward the same for registration. The Grant was subsequently booked, assigned a presentation/Day Book Number and documented in the Presentation Book.

## VIII. The Response and Cross Petition by the 3<sup>rd</sup> Defendant/ Respondent

47. The 3<sup>rd</sup> Defendant/Respondent responded to the Petition through a Cross Petition dated 3<sup>rd</sup> November, 2017 which was brought under Rules 3, 4(1), 8, 10 & 15(3) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

### A. The origination constitutional basis of the Petition

48. The Petition herein was brought pursuant to the provision of Article 22(1) of *the Constitution* of Kenya, 2010. Article 22(1) allowed persons to institute court proceedings claiming the violation, infringement or a threat to infringement of a right and/or fundamental freedom in the Bill of Rights.
49. Under Article 23 (1) of *the Constitution*, the High Court has jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to a right or fundamental freedom. Under Rule 2 of *the Constitution* of Kenya (Practice and Procedure Rules), 2013.



50. Article 19 (3) (b) of *the Constitution* legislates that the fundamental rights in the Bill of Rights are not exhaustive and that they do not exclude other fundamental freedoms and rights not in the Bill of Rights, but recognized or conferred by law, except to the extent that they are inconsistent with the Bill of Rights.
51. Article 40 of *the Constitution*, read with Article 260 guaranteed the right to protection of property.

### **B. Facts creative of the Cross Petition**

52. The Cross Petitioner was issued with Grant of title dated 7<sup>th</sup> of September 2011. He was notified by letter of 6<sup>th</sup> November 2012 to collect the Grant. The Title under which the Petitioners claim was purportedly issued to one Marsha Biry Dena on 8<sup>th</sup> January 2014, and was purportedly transferred to the Petitioners on 21<sup>st</sup> June 2015. The Cross-Petitioner's Grant is thus the first in time, having been issued about three (3) years before the Grant and title under which the 4<sup>th</sup> and 5<sup>th</sup> Respondents in the Cross - Petition claim.
53. Upon being registered as proprietor and after receiving the Title to the suit property, in accordance with the conditions of proprietorship the Cross - Petitioner developed a perimeter wall around the property. Prior to Charging the property, the Cross Petitioner conducted an Official Search on or about 10<sup>th</sup> October 2013, for presentation for negotiation discussions with Dubai Bank Kenya Limited who had been approached to lend to Premium Petroleum Company Limited, on security of the property. The Search of 10<sup>th</sup> October 2013 indicated clearly that the property was the Cross Petitioner's.
54. Pursuant to confirmation of proprietorship by dint of the Grant of Title to the Cross Petitioner herein, and even upon due diligence conducted by the advocates for Dubai Bank Kenya Limited, on 7<sup>th</sup> March 2014, the Cross Petitioner executed a Charge in favour of Dubai Bank Kenya Limited pledging the property herein as security in consideration of the bank lending to Premium Petroleum Company Limited the sum of Kenya Shillings Sixteen Million (Kshs. 16, 000, 000/=). The said Charge was registered at the Land Registry at Mombasa as No.59150/Z on the morning of 14<sup>th</sup> March 2014.
55. For the period that the Charge was registered over the property the Cross Petitioner reposed in the belief that with a Charge registered, his proprietorship had further been secured and was only imperiled by failure by Premium Petroleum Company Limited to service the loan. The Cross Petitioner never knew of the claim by the 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> Respondents herein the present Petition was filed and served upon him. Having so known the Cross Petitioner filed the present Cross Petition to protect his fundamental rights to the property as guaranteed by Article 40 read with Article 260 of *the Constitution*, and Section 23 of the Registration of Titles Act (Chapter 281 of the Laws of Kenya) as transitioned as under the provision of Sections 24 and 25 of the *Land Registration Act* (No. 2 of 2012).

### **C. Constitutional violations**

56. Violation of National Values-Article 10 of *the Constitution* – the value in issue was human rights. The Cross - Petitioner averred that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were enjoined in caring for the land record, in answer to any inquisition and or handling any issue that affects rights of others were crystalized on the Land register to have serious regard and uphold national values including human rights, in this instance of any person that would be prejudiced by their actions.



57. The national values under the provision of Article 10 of *the Constitution* are binding and not advisory. The significance of National Values of Article 10 of *the Constitution* was best captured judicially in the case of:- “George Bala v Attorney General [2017] eKLR”:

“.....70. By employing the use of the term ‘include’ the framers of *the Constitution* were alive to the fact that there are other values and principles which may advance the spirit of *the Constitution* and hence all State organs, State officers, public officers and all persons may be enjoined to apply them. This is where the limit of executive power by the High Court, in my view ought to be invoked. What this means is that the national values and principles of governance in Article 10 of *the Constitution* are not exclusive but merely inclusive. *The Constitution* set out to plant the seed of the national values and principles of national governance but left it open to all State organs, State officers, public officers and all persons when applying or interpreting *the Constitution*, enacting, applying or interpreting any law, or applying or implementing any public policy decision to water and nurture the seedling to ensure that the plant develops all its parts such as the stem, the leaves, the branches and the flowers etc. In other words the national values and principles of governance must grow as the society develops in order to reflect the true state of the society at any given point in time.

58. Violation of National Values had led to striking down of decisions made in disregard of the National Values, the best example was “George Bala v Attorney General (Supra)”.
59. Violation of the right to property-Article 40 read with Article 260 of *the Constitution* – the Cross Petitioner was said to be the registered proprietor of the property known as L. R No.MM/1/6589 situated in Mombasa County. The Petitioner's right to own the property was formally completed by issuance of a Certificate of Title on 7<sup>th</sup> September 2011. The Petitioner averred that the said title was issued under provisions of the Registration of Titles Act (Chapter 281 of the Laws of Kenya).

#### D. Statutory violations

60. The indefeasibility of the Petitioner's issued title was captured by the provision of Section 23 of the issuing Statute, the Registration of Titles Act (Chapter 281) (Now Repealed) of the Laws of Kenya as follows:

- “23. The certificate of title issued by the registrar to a purchaser of land upon a
- (1) transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.
  - (2) A certified copy of any registered instrument, signed by the registrar and sealed with his seal of office, shall be received in evidence in the same manner as the original.”

61. Upon repeal of the Registration of Titles Act, Cap. 281 the Petitioner's rights to proprietorship of L.R. No. NM/1/6589 was transitioned under the provision of Section 24 and 25 of the *Land Registration Act*, No. 3 of 2012 as follows:-

24. Interest conferred by registration



Subject to this Act-

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25. Rights of a proprietor

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-
  - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
  - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

62. Therefore, the Cross Petitioner averred that his proprietorship existed duly hallowed and protected at law and could not be defeated, even by issuing a competing Title to the property later to the Cross - Petitioner's title. The Cross - Petitioner averred that issuance of new Certificate of Title later in time after the Cross - Petitioner had become proprietor, threatens and dilutes the Cross - Petitioner's fundamental rights guaranteed under the provision of Article 40 read with Article 260 of *the Constitution*, and in terms of guarantee by the provision of Section 23 of the Registration of Titles Act, Cap. 281 and Sections 24 and 25 of the *Land Registration Act*, No. 3 of 2012.

63. The infraction of the Petitioner's right to protection of property was expressly violated in the events that the Petitioners in this Petition averred. That the said Petitioners had on basis of a violating, deficient instrument (Title Deed issued to Marsha Biry Dena) had gone ahead to trespass on the Cross -Petitioner's property and to construct unauthorized structures, which the Petitioner for avoidance of any doubt demands be removed at the Petitioners' cost. Existence of the Certificate of Title to the Petitioners herein egregiously violates the Cross - Petitioner's fundamental right to the property.

64. The Cross - Petitioner averred that it was now settled law in Kenya, that where two Titles exist over the same property, then the first Title in time supersedes the newer Title. This was the settled position of law in Kenya in the case of:- "Gitwany Investment Limited v Tajmal & 3 Others [2006] eKLR", "Vekariya Investments Limited v Kenya Airports Authority & 2 others [2014] eKLR" and confirmed by the Court of Appeal of Kenya in "Wreck Motor Enterprises v Commissioner of Lands & 3 others [1997] eKLR".

65. In the present case, the Cross Petitioner sought appropriate relief from the Honourable Court to protect its fundamental right to property duly guaranteed under *the Constitution*. Consequently, the Cross Petitioner prayed that this Honourable Court be pleased to issue the declarations, orders, directions and writs as may be necessary to safeguard and prevent the violation of its fundamental rights and freedoms under *the Constitution* of the Republic of Kenya



66. The Cross - Petition was further supported by the Replying Affidavit of Bill Kipsang Rotich filed herewith upon such other and/or further grounds as may be adduced at the hearing hereof.

#### **E. The Cross-Petitioner's prayers**

67. The Cross Petitioner therefore prayed for:-

- a. An Order that the title held by the 4<sup>th</sup> and 5<sup>th</sup> Respondents Mohamed Sheikh Abdulahi and Sheikh Daib Mohamed dated 8<sup>th</sup> January, 2014 over L.R. No. MN/1/6589 be and is hereby declared to be invalid and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are hereby ordered to cancel it within the next thirty (30) days;
- b. A Permanent injunction restraining the fourth and fifth Respondents, their any constructions in the suit land or in any other way interfering with L. R No.MN/1/6589;
- c. The structures constructed on L. R No. MN/1/6589 by the 4<sup>th</sup> and 5<sup>th</sup> Respondents be removed there from within 90 days of the judgment of the Court;
- d. All costs incidental to the removal of the structures in (c) above be borne by the Respondents;
- e. The Honourable Court do make any such other or further Orders as it may deem just and expedient in the circumstances to remedy the violation of the Petitioners' fundamental rights.

#### **F. The Replying Affidavit of the Cross Petitioner**

68. The Cross Petitioner through BILL KIPSANG ROTICH, the 3<sup>rd</sup> Respondent and the Cross Petitioner herein opposed the Petition which had since been converted into a Plaint through a 19<sup>th</sup> paragraphed Replying Affidavit dated 3<sup>rd</sup> November, 2017 who averred as follows:-

- a. The Grant of Title to him was issued on 7<sup>th</sup> September, 2011. He was notified by letter dated 6<sup>th</sup> November, 2012 to collect his Grant. Produced and marked as "BKR – 1" were copies of the Grant of Title and the letter of 6<sup>th</sup> November, 2012.
- b. The Title under which the Petitioners claim was purportedly issued to one Marsha Biry Dena on 8<sup>th</sup> January 2014, and was purportedly transferred to the Petitioners on 21<sup>st</sup> June 2015.
- c. His title was the first in time and being so, if per chance the issuance of the title to Marsha Biry Dena which was transferred to the Petitioners herein was by inadvertence, then at law the first title in time takes precedence to the claims by Marsha Biry Dena and the Petitioners who claim under him. This was the settled position of law in Kenya in "Gitwany Investment Limited – v - Tajmal (Supra), "Vekariya Investments Limited – v - Kenya Airports Authority & 2 others [2014] eKLR" and confirmed by the Court of Appeal of Kenya in "Wreck Motor Enterprises (Supra)".
- d. The Title to Marsha Biry Dena was inferior in right to his first in time proprietorship, any purchaser, even innocent purchaser for value could not get a better title, such purchaser was only bequeathed the deficiencies and inferiority that was Marsha Biry Dena's.
- e. Accordingly, the Petitioner's claim over the property was deficient and inferior to his proprietorship and their continued existence and or development on his property were gross acts of trespass, which are actionable.
- f. Having known of the trespass and unauthorized developments by the Petitioner's, he sought the Orders of the Honourable Court to declare the Title held by the Petitioners as invalid, to



remove the unauthorized structures on his property at the Petitioner's costs, vacant possession, and costs of this Petition on indemnity basis.

- g. Upon being registered as proprietor and after receiving the Title to the suit property, in accordance with the conditions of proprietorship he developed a perimeter wall around the property.
  - h. Prior to Charging the property, he conducted an official Search on or about 10<sup>th</sup> October 2013, for presentation for negotiation discussions with Dubai Bank Kenya Limited who had been approached to lend to Premium Petroleum Company Limited, on security of the property. The Search of 10<sup>th</sup> October 2013 indicated clearly that the property was under his proprietorship. Produced and marked as "BKR – 2" was a copy of the Search under the hand of the Registrar of Titles.
  - i. Pursuant to confirmation of proprietorship by dint of the Grant of Title to him issued herein annexure marked as "BKR – 1", and even upon due diligence conducted by the advocates for Dubai Bank Kenya Limited, on 7<sup>th</sup> March 2014, he executed a Charge in favour of Dubai Bank Kenya Limited pledging his property herein as security in consideration of the bank lending to Premium Petroleum Company Limited the sum of Kenya Shillings Sixteen Million (Kshs. 16, 000, 000/=). Produced and annexure marked as "BKR – 3" was a copy of the Charge duly executed and duly registered.
  - j. The said Charge, annexure marked as "BKR – 3" was registered at the Land Registry at Mombasa as No. 59150/Z on the morning of 14<sup>th</sup> March 2014.
  - k. For the period that the Charge was registered over the property he reposed in the belief that with a Charge registered his proprietorship had further been secured and was only imperiled by failure by Premium Petroleum Company Limited to service the loan.
  - l. He was aware of the attempted proceedings by the Liquidation Agent of Dubai Bank Kenya Limited for failure by Premium Petroleum Company Limited and when matters escalated as did he have to step in; to find alternative financing to settle the Bank, in order to secure his property.
  - m. He never knew of the claim by the Petitioners herein until the present Petition was filed and served upon him. Having so known he filed a Cross - Petition herein to protect his fundamental rights to the property as guaranteed by the provision of Article 40 as read with Article 260 of *the Constitution* and Section 23 of the Registration of Titles Act (Chapter 281) of the Laws of Kenya as transitioned as Sections 24 and 25 of the *Land Registration Act* (No. 3 of 2012).
  - n. Wherefore he prayed that the Petition herein 24<sup>th</sup> March, 2017 be dismissed with costs and the Cross - Petition filed herewith be allowed with costs.
  - o. The affidavit was in answer to the Petition and in support of the Cross Petition.
69. The 3<sup>rd</sup> Respondent called his witness on 27<sup>th</sup> September, 2023 at 1 pm where RW - 2 told the court that:-

**A. Examination in Chief of RW - 2 by Mr. Bwire Advocate.**

70. RW - 2 was sworn and testified in English language. He identified himself as Bill Kipsang Rotich, a citizen of Kenya with all the particulars indicated in the national identity card shown to Court. He told the court that he was the 3<sup>rd</sup> Respondent; He had filed a Cross Petition in these proceedings. He filed a



Replying affidavit on 3<sup>rd</sup> November, 2014 which he adopted as his testimony. It had annexures from pages 1 to 31 – 3<sup>rd</sup> Respondent Exhibit Number 1 filed – supplementary/documents Affidavit dated 1<sup>st</sup> February, 2022 1 to 4. He had applied for the suit property and he was given a Letter of Allotment dated 16<sup>th</sup> September, 1994. He paid a sum of Kenya Shillings Seventy Seven Thousand and Sixty (Kshs. 77,060/-) which was supported by an official receipts bearing numbers. 067106 and 757166.

71. According to the witness, the Registrar of Title gave him authority to be registered to the land. This was vide a Letter dated 20<sup>th</sup> September, 2011 which was copied to him. He was directed to collect the Grant. He confirmed that he received the Grant. RW 2 collected it from Mombasa. After that he constructed a Perimeter wall around the suit property as seen at page 6. The witness stated that he got the certificate of Postage – Pages 17 to 31 which confirmed the property was registered in his names. He charged the property. However, it was in the year 2017 that he came to know that there was another title. His counsel called him and told him that there was a parallel title appearing in the newspaper. He filed a Cross Petition seeking for specific prayers there (Refer). RW - 2 took an Architect to look at the suit property. The current status of the property was the property was still intact with his perimeter wall. The person claiming the property was Marsha Dena - the Petitioner.

#### **B. Cross Examination of 3<sup>rd</sup> Respondent by Mr. Wafula Advocate.**

72. The witness reiterated that he only saw the complete title in court. He had not looked at it. He was offered the property in the year 1994. RW - 2 confirmed that he complied with all the conditions on the Letter of Allotment by making the prerequisite payments.

#### **C. Cross Examination of 3<sup>rd</sup> Respondent by Mr. Mogaka Advocate.**

73. RW - 2 confirmed that he had not been on the land after he charged it. By then there was a perimeter wall. It was a while back. He charged this property with a financial institution – Dubai Bank - for a sum of Kenya Shillings Sixteen Million (Kshs. 16,000,000/-). He was given the money but he never developed the property. He was not the one who build the massive property which were on the property. The property was within the Mombasa Municipality and hence he would require approval.
74. Accordingly, he told the court that he had never applied for approval for the construction of the Perimeter wall. RW – 1 confirmed that there were some inconsistencies in the Letter of Allotment issued to him and the other documents. He was referred to the Letter of allotment dated 16<sup>th</sup> September, 1994. He stated that it bore the Reference No. 127258/6 for a Term of 99 years from 1<sup>st</sup> October, 1994. The Stand Premium was for Kshs. 65,000/- At page 4 showed that Stand premium to be for a sum of Kshs. 57,000/- and a receipt of 8<sup>th</sup> January, 2004 which were different from the ones indicated in the Letter of Allotment from the receipt – sale No. 127258. He could not clearly tell the number – there is no. 6.
75. RW - 2 testified that while the Letter of Allotment showed that the rent was Kshs. 33,250/-; at page 4 the receipt for rent was for Kshs. 4,190/- which was different from the rent in the Letter of Allotment. In the receipt, the total was Kshs. 70,000/-; yet from the Letter of allotment it was Kshs. 77,060/- by implication he paid less Kshs 7,060/-. The witness he did not have any other receipts to proof ownership of the suit property. For instance, he did not have evidence of Letter of Acceptance of the Letter of Allotment. He had not stated from his affidavit when he received the Letter of Allotment. It was a long period.
76. The witness stated with reference to condition No. 2 of the Letter of Allotment – within 30 days. He did not have the Letter of Acceptance. He paid a sum of Kshs. 8,000/- from a banker's Cheque No. 060367 – dated 21<sup>st</sup> February, 1995 – yet the Letter of Allotment was dated 16<sup>th</sup> September, 1994 –



it was over 5 months thereafter from the time of the issuance of the Letter of Allotment i.e. from the required 30 days. There was a receipt for a sum of Kshs. 8,000/- dated 22<sup>nd</sup> February, (the year was not provided) (very faint). This was the document he gave to his lawyer. He could not tell the year. On being referred to the supplementary list of document he stated that it showed/ written on 22<sup>nd</sup> February, 1995 but on the receipt there was no year. The receipt was for Kshs. 70,000/- which was for 8<sup>th</sup> January, 2004 (10 years after);

77. According to the witness he did not pay the sum of Kshs. 77,000/- within the 30 days as required by the Letters of Allotment; Instead, he paid a sum of Kshs. 8,000/- and Kshs. 70,000/- as per the two receipts totaling to a sum of Kshs. 78,000/- which was over and above. He never signed an indemnity at the Registrar indicating that his title was lost.
78. RW - 2 further told the court, on being referred to page 5 of the Replying affidavit. It was a letter dated 6<sup>th</sup> November, 2022 by the Commissioner of Lands addressed to the Senior Registrar of Titles, Mombasa. The letter was on a letter head. However, the one he was shown did not have a letter head although it had been copied to him. He did not have any other letter on a letter head. He took the loan for a sum of Kenya Shillings Sixteen Million (Kshs. 16,000,000/-) intended for the development of the property, through PRIME but he never developed it after that. He never went back to the plot. He did not remember whether he paid the loan or not. He did not agree that the receipts he had produced were a fabrication. He was aware that the bank attempted to auction the land.

#### **D. Re - Examination of 3<sup>rd</sup> Respondent by Mr. Bwire Advocate.**

79. On being referred to the Letter of Allotment, the witness confirmed that he paid Kshs. 8,000/- as shown on the receipt at page 3. He then added a sum of Kshs. 57,000/- as shown on receipt on page 4. It all amounted to a sum of Kshs. 65,000/- as Stand Premium. The rent on the Letter of Allotment was Kshs. 3,259/- for 1<sup>st</sup> October, 1994 to 31<sup>st</sup> December, 1994 which rent was Kshs. 4,190/- on 8<sup>th</sup> January, 2004 a period of 19 years. The title no. 127258 on page 3; the cheque no. 160367- he made the payment on 8<sup>th</sup> January, 2004 for the sum of Kshs. 70,000/-. They accepted it.
80. With reference to Exhibit at page 5, RW - 2 told the court that the letter was dated 6<sup>th</sup> November, 2012. He had been given the letter by the Ministry of Lands. He constructed a perimeter wall and took a loan for the construction. However, he defaulted and later on discovered there was a parallel title. The suit was instituted in the year 2017. He filed a Cross – Petition. The Petitioner obtained conservatory orders and hence the witness could not interfere with a court order. His title had never gone missing or him having any need to sign an indemnity. After he charged the property and he was told there was a court order he never went back to the suit land. Premier was to come in to repay the loan. He went to make payment in 2004 and they accepted the payment.
81. The 3<sup>rd</sup> Respondent's called Mr. Patroba, the Assistant Director of Land Administration on 16<sup>th</sup> July, 2024 who testified that:-

#### **A. Examination of Chief of by Mr. Mukuha Advocate.**

82. RW - 3 was sworn and testified in English language. He identified himself as Mr. Ojwang Omolo Patroba. He informed the court that he was an Assistant Director of Land Administration with the Ministry of Land, Physical Planning & Settlement. They were in charge of preparing leases and the custodian of all the records previously held by the National Land Commission. They also did development control including extension of leases. Further, they also in charge of handling of all legal issues in conjunction with other departments. He was an Advocate of High Court of Kenya and was employed in year 2006 in the same Directorate.



83. On being referred to the Letter of Allotment dated 16<sup>th</sup> September, 1994; the witness told the court that the same was issued for property LR. No. MN/I/6589 – Nyali Mombasa. It was issued by the Commissioner of Land. With reference to another Letter of Allotment issued to Marsh Birya Dena dated 16<sup>th</sup> September, 1994 for LR. No. MN/I/6589 – Nyali Mombasa issued by the Commissioner of Lands. The two (2) Letters of Allotment were not similar as they were issued to different parties though on even dates. RW – 3 stated that it was possible to issue two Letters of Allotment for the same property but it was absurd that they were issued on the same date. To him this as a case of double allocation. However, in such cases the Letters were dated the same date. What determined the property allottee, the Letters of Allotment had conditions overleaf and which had to be complied with. When they got complaint they checked out their records. They would go by what they had on record and disregarded other Letter of Allotment as not having been issued by themselves.
84. By conditions, these were printed overleaf. For instance, there was an offer which had to be receive an acceptance within 30 days and payments. Payments on rates and on development among others i.e. A Letter of Allotment was an offer. An acceptance was to be made in writing by the Allottee to the Commissioner of Lands. Ordinarily it was accompanied with fees to the relevant authority. With reference to the letter dated 22<sup>nd</sup> February, 1994 by Mr. B.K. Rotich addressed to the Commissioner of Lands. The substance refer to MN/I/6589 – Nyali Mombasa. It was thanking the Commissioner of lands for the offer and enclosing a Cheque of Kshs. 8,000/- as part payment. (The Letter of acceptance was expunged from the record of the court as it had not been filed before). With reference to a copy of the cheque No. 060367 dated 21<sup>st</sup> February, 1995; the witness told the court that the cheque was drawn to the Commissioner of Lands. It was for Kshs. 8,000/-. With reference to the receipt No. 067106 dated 22<sup>nd</sup> February, 1995; the witness told the court that he could only see the figures that were not clear and hence being a photograph he could not see the figures clearly. The rate was Kshs. 77,060/- as the assessment of Kshs. 8,000/- was made and the balance would be Kshs 69,000/-. On the Letter of Allotment, the reference number was 127258/6 the reference number on the receipt of 22<sup>nd</sup> February, 1995 was 127258.
85. Further, the witness confirmed that there were documents in their possession formally for – parcel No. MN/I/6589 from the correspondence file No. 127258 – for the subject for Mr. Masha Birya Dena. They contained:-
- a. Letter of Allotment to Mr. Masha Birya 16<sup>th</sup> September, 1994 – MN/I/6589 Nyali – Mombasa by the Commissioner of Lands.
  - b. A Letter of Acceptance from Mr. Masha Birya Dena dated 4<sup>th</sup> November, 2013 to the Commissioner of Lands.
  - c. It is forwarding a Banker Cheque of Kshs. 77,060/-.
  - d. A Memo (internal) from the Chairman of NLC to the cashier dated 7<sup>th</sup> November, 2013 it's an authority to pay for the cashier to accept payment from the allottee.
  - e. There was an official receipt of acknowledgement No. 127258 dated 12<sup>th</sup> November, 2013 for a sum of Kshs. 77,060/-.
  - f. Forwarding forms and forwarding forms of execution by the Commissioner of Lands.
  - g. A Certificate of Stamp Duty – File No. 127258 dated 27<sup>th</sup> June, 2014.
  - h. A Letter dated 16<sup>th</sup> January, 2014 forwarding the Grant for MN/I/6589 Mombasa in the name of Masha Birya Dena to the District Land Registry.



- i. A file cover – photocopy of it

### **B. Cross examination of RW - 3 by Mr. Mukuha Advocate.**

86. The witness told the court that the correspondence file number was 127258. The number was obtained from the records cards from the records offices and SPR – 0. He just walked there. The reference No. of Letter of Allotment bore a different number – the file no. It was the reference number for that region or if it was issued from that file and particularly if it was reversed. With reference to the Letter of allotment to the 3<sup>rd</sup> Respondent. The Reference No. was similar to the correspondence file. The Letter of Allotment was issued to the 3<sup>rd</sup> Respondent under the Commissioner of Land. Whenever, they were confronted by more Letters of Allotments they conducted an investigation and they would take a position by cancelling the one issued illegally.
87. According to the witness, from the Letter of Allotment to the 3<sup>rd</sup> Respondent which had the reference No. We have never taken any taken. Officially, they were no record for the 3<sup>rd</sup> Respondent from the file. What he had produced would be ordinary the complete record. From the forwarded documents to him by the Counsels, he compared what they had with what he had. He had been shown the receipts of the payment of a sum of Kenya Shillings Eight Thousand (Kshs. 8,000/-) and cheque. These records were not in their records, but on face value it was a confirmation that payments had been made.
88. With reference to the receipt dated 8<sup>th</sup> January, 2004 for a sum of Kenya Shillings Seventy Thousand (Kshs. 70,000/-). From the face value, it showed payment having been received from Mr. Bill Kipsang Rotich – It was for reference No. 127258, which appeared in the correspondence file. With reference to the letter dated 6<sup>th</sup> November, 2012 the witness told the court that Reference No. 127258/22 was addressed to the Senior Registrar of Titles, Mombasa. It had the same reference numbers. The subject of letter was MN/I/6589/Mombasa Municipality. It was forwarding the Grant for registration in the name of Mr. Bill Kipsang Rotich. It was copied to Bill Kipsang Rotich. He was called to appear before the Registrar of Title – the letter dated 16<sup>th</sup> January, 2014 forwarding the Grant MN/I/6589/Mombasa this was no inclusion of the name “Nyalii”.
89. According to the witness, from their office they did not have anything denouncing the letter dated 6<sup>th</sup> November, 2012. They held the records of the lease and forwarding them to the Registrar. The preparation of the Grant was done by the Commissioner of Lands and those were the records he had produced. With reference to the grant dated and bearing the day of execution - 7<sup>th</sup> September, 2011 in the names of Bill Kipsang Rotich. The witness told the court that from their offices they had nothing that disputed the validity of this Grant. The CR. No. on the grant was 59150.
90. On being referred the Grant issued to Masha Biry Dena. He confirmed that it was executed and dated 8<sup>th</sup> January, 2014. It was for CR. 62008. The witness told the court that from the records, the CR. Numbers were issued by the Registrar of Titles of Mombasa. If he was to give his opinion, he would go by what was on record. The one by Marsha Biry Dena was executed on 8<sup>th</sup> January, 2014 while the one for Bill Kipsang was 17<sup>th</sup> September, 2011. Hence, the one for Bill Kipsang was issued earlier. As a matter of practice, they never retained any Grant. The original Grant was given to the Lessee while the Registrar of Title only retained a copy of the said Grant.

### **C. Cross Examination of Mr. Patroba by Mr. Wafula Advocate.**

91. Mr. Patroba told the court that he was searching for the correspondence file of Reference No. 127258. It's the parcel number that took him to the file, if there was a stroke. Where there were Folios. Numbers – “Folio” meant a leaf of paper in the correspondence file. From the file, he got the Letter of Allotment



dated 16<sup>th</sup> September, 1994 for Bill Kipsang. He was told that by then, it was Mr. Wilson Gachanja followed by M/s. Judy Okongo who were the Commissioner of Lands. The reference No. 90750/VX – was for Masha Biryia Dena.

92. The witness told the court that he never carried this file - No. 90750/VX. Most of the time due to the movement the files were not available. These were not there. For the Letter of Allotment for Bill Kipsang was reference No. 127258/6. The file he had in possession was in relationship to the issues on Bill Kipsang. He carried the file, as it was the one available. He never carried the original file. What he brought to Court were the certified copies. They were always sufficient. Indeed, Courts had always accepted them.
93. With reference to the letter dated 4<sup>th</sup> November, 2013. It was a Letter of Acceptance for the Grant issued to Mr. Marsha Biryia Dena – By 16<sup>th</sup> September, 1994 there was no room for acceptance as the 30 days had lapsed. The Letter of 6<sup>th</sup> November, 1995 for acceptance by Bill Kipsang and the reference No. was 127258 it was addressed to the Senior Registrar of Titles Mombasa of 6<sup>th</sup> November, 1995 its signed by Mr. Aseri Irungu. He was still working for the Ministry though he was currently on suspension. These were some of the documents he received from the Law firm of Messrs. Bwire Advocate. He never got to a point of discussing the Letter with Mr. Aseri Irungu. To him this was unnecessary as it would mean calling so many other people who may have dealt with matter in one way or the other along the way. These files passed through the hands of many people within the Lands department. With reference to the Grant issued to Bill Kipsang. RW – 3 stated that it was executed on 17<sup>th</sup> September, 2011 by this time Mr. Masha Biryia Dena had not even accepted it his Letter of Acceptance, assuming it had been forwarded for registration. With reference to the Receipt dated 27<sup>th</sup> February, 1994) for Kshs. 8,000/- bearing numbers 1257258 on payment the Government always had its record, unless it loses it. He never tried to trace these documents from the archives. If its genuine the payment was consistent to the parcel file.
94. From the face value then by the time Marsha Biryia Dena was accepting the offer there was no land. They did not have the date of the Grant. It was executed by the Commissioner of Lands on 8<sup>th</sup> January, 2014. By this time the office of the Commissioner of Land had ceased by operating of law in the Republic of Kenya.

#### **D. Cross - Examination of Mr. Patroba by Mr. Mogaka Advocate.**

95. The witness told the court that formally, they did not have the records for Mr. Bill Kipsang. The first time he saw these documents was when they were brought to him by Mr. Bwire Advocate for Mr. Bill Kipsang. From his files, the following documents were missing:-
- a. The Letter of Allotment.
  - b. The Letter of Acceptance.
  - c. Cheques on payments.
  - d. Receipts.
  - e. Letters forwarding the Grant from the Commissioner of Lands to the Registrar of Titles, Mombasa.
96. The witness told the court that he heard cheques expired after 6 months – the cheque was dated 21<sup>st</sup> February, 1995 while the Letter of Allotment was dated 16<sup>th</sup> July, 1994. These two documents were not in his records. He stated that from 16<sup>th</sup> September, 1994 was given for 30 days which were to have ended on 16<sup>th</sup> October, 1994. Assuming he got the letter of allotment on 16<sup>th</sup> September, 1994 he



paid on 21<sup>st</sup> May, 1995 which was over 5 months and not 30 days as envisaged in law. The Letter of Allotment demanded for the payment of a sum of Kenya Shillings Seventy Thousand and Sixty (Kshs. 77,060/-) within 30 days. One would pay in instalments but it would not amount to full payment. There was no authority in form of a letter allowing the payment be made in installment.

97. According to the witness, the receipt was dated 22<sup>nd</sup> February, (invisible on the year). It confirmed the hand written for legal fees for a sum of Kenya Shillings Eight Thousand (Kshs. 8,000/-). This was not the one on the Letter of allotment i.e. it was not the full payment, on the letter of allotment there was no item for legal fees though these documents were not in his record. However, to Mr. Marsha Biryia paid a sum of Kenya Shillings Sixty Five Thousand (Kshs. 65,000/-) They had the legitimate records. They showed that Mr. Marsha Biryia Dena was allocated land and he paid for the land. The Land Registrar issued the Grant No. CR. 62008 – Plot No. MN/1/6589 to the person called Marsha Biryia Dena. He had transferred the Land to Mohamed Sheikh. These records tallied with ones in the records in possession of the Director of Land Administration. They were the official records. He stated that sometimes there would be double allocation but the genuine record was what they had on the record. The 30 days run from the date of the allotment but in practice would be on the payments date. He was shown the receipts for a sum of Kenya Shillings Eight Thousand (Kshs. 8,000/-). It neither had the year nor was it in his record.
98. He further stated that the second receipt was for a sum of Kenya Shillings Seventy Thousand (Kshs. 70,000/-) . It was not for Kenya Shillings Seventy Seven Thousand (Kshs. 77,000/-) as required. Finally, RW – 3 stated that there nothing on the land for Mr. Bill Kipsang in their official file at the Director of Land Administration. On the contrary, they only had the records for Marsha Biryia Dena.
99. The 3<sup>rd</sup> Respondent closed his case on 16<sup>th</sup> July, 2024.

#### **IX. The Response by the 4<sup>th</sup> Respondent**

100. The 4<sup>th</sup> Respondent Masha Biryia Dena opposed the Petition which had since been converted into a Plaint through a 12<sup>th</sup> Paragraphed Replying Affidavit sworn on 24<sup>th</sup> November, 2017 who averred as follows:-
- i. The deponent was the registered owner of property Title No. CR.62008 Plot No.6589/I/MN having been duly issued with title(Annexed and marked as “MBD - 1” was a copy of the Title).
  - ii. Prior to the issuance of the title he was issued with a Letter of Allotment dated 16<sup>th</sup> September, 1994. (Annexed in the replying affidavit and marked as “MBD – 2” was a copy of the said Letter of Allotment).
  - iii. He later paid for the requisite charges and premium and was issued with receipt. (Annexed in the affidavit and marked as “MBD – 3” was a copy of the fee receipt).
  - iv. The grant was later forwarded to the District Land Registrar vide a letter acted 16<sup>th</sup> January 2014. (Annexed in the affidavit and marked as “MBD - 4” was a copy of the said letter).
  - v. Having followed the due process he was then issued with a title No.CR 62008 Plot No.6589/ I/MN as stated above.
  - vi. In response to paragraph 2-8 of the Petitioner’s Affidavit the Deponent wished to state that it was indeed true that he sold the property to the 1<sup>st</sup> Petitioner herein for valuable consideration and duly transferred the property to him. (Annexed in the affidavit and marked as “MBD - 5” was a copy of the sale agreement).



- vii. Prior to the sale of the property to the 1<sup>st</sup> Petitioner he had been in peaceful occupation of the property without interruption and no one ever claimed ownership of the same.
- viii. The 3<sup>rd</sup> Respondent herein was a stranger to me and he had never met him neither had he ever claimed ownership of the property.
- ix. He sold the property to the 1<sup>st</sup> Petitioner herein for value and with good title having been duly issued with a title to the property and the search also revealed that he was the registered owner.

#### **X. The Response by the 1<sup>st</sup> Interested Party**

101. The 1<sup>st</sup> Interested Party through John Masega Ombasa, the Assistant Recovery Manager of the Kenya Deposit Insurance Corporation, the 1<sup>st</sup> Interested Party herein opposed the Petition which had since been converted into a plaint through a 19<sup>th</sup> Paragraphed Replying Affidavit dated 3<sup>rd</sup> May, 2017 who averred as follows:-

- a. KDIC was a Statutory Corporation established pursuant to the provisions of Section 4 of the *Kenya Deposit Insurance Act* as a body corporate with perpetual succession for purposes of providing a deposit insurance scheme for customers of member institutions and to receive, liquidate and wind up any institution in respect of which the Corporation is appointed receiver or liquidator in accordance with the *Kenya Deposit Insurance Act* No. 10 of 2012.
- b. On 14<sup>th</sup> August, 2015, the Central Bank of Kenya (CBK) appointed the KDIC as receivers of Dubai Bank Kenya Limited for a period of 12 months pursuant to the provisions of Section 43 (1), 43 (2) and 53 (1) of the *Kenya Deposit Insurance Act*, 2012.
- c. The appointment of KDIC as a Receiver of Dubai Bank Kenya Limited was done by CBK in the interest of the Bank's depositors, creditors and members of the public.
- d. Upon review of Dubai Bank Kenya Limited and considering the magnitude of weakness of the Bank, it was recommended that liquidation was the only feasible option with regard to dealing with the said Bank and pursuant to the said recommendation KDIC was appointed the liquidator of Dubai Bank Kenya Limited on 24<sup>th</sup> August 2015.
- e. Once KDIC was appointment KDIC as the liquidator of Dubai Bank Kenya Limited, it was under a duty to recover the debts owed to the Bank for the benefits of the Bank's depositors, creditors and members of the public generally.
- f. With regards to this case, Premium Petroleum Company Limited took a loan facility from Dubai Bank Kenya Limited amounting to Kenya Shillings Sixteen Million (Kshs. 16,000,000.00) only. Attached in the affidavit a letter of offer dated 23<sup>rd</sup> June 2013 marked as "KDIC-1".
- g. The suit property was registered in the names of Bill Kipsang Koech the 3<sup>rd</sup> Respondent herein as CR No. 59150 LR. No. Malindi North/I/ 6589. Attached in the affidavit a copy of the 3<sup>rd</sup> Respondent's title issued and or dated 7<sup>th</sup> September 2011 marked as "KDIC - 2".
- h. The 3<sup>rd</sup> Respondent charged to the Bank the aforesaid property known as LR. No. Malindi North/I/ 6589 as security for the re-payment of the said loan facility advanced to Premium Petroleum Company Limited.
- i. The bank conducted due diligence and confirmed that the property was registered in the names of Bill Kipsang Koech and proceeded to charge the same to the Bank as security for the



repayment of the loan facility. Attached in the affidavit a copy of the Charge dated 7<sup>th</sup> March 2014 marked as “KDIC - 3”.

- j. After the registration of the Charge, a search was done that confirmed the registration of the Charge in favor of the Bank. Attached in the affidavit a copy of the post registration search dated 26<sup>th</sup> May 2014 and marked as “KDIC - 4”.
- k. Registration of a person as an owner of a property vests ownership rights to the person in whose name the property is registered absolutely and therefore no other person has the right over the suit property.
- l. He had been shown the Petitioners’ title documents and upon examination of the same he had noted that the same referred to the same property registered in the names of Bil Kipsang Rotich save for the Grant Number.
- m. It was also clear that the Petitioners’ title was first issued to Masha Biryia Dena on 8<sup>th</sup> January 2014 whereas the title for Bill Kipsang Rotoch was issued on 7<sup>th</sup> November 2011 and therefore the one by Bill Kipsang Rotich was issued first.
- n. Therefore at the time the said Masha Biryia Dena was issued with the said title, there was no land capable of being allocation and therefore the same was illegal and null and void and the same was not capable of transferring a good title to the Petitioner herein.
- o. The Petitioners could not therefore purport to acquire title to property arising from an illegality or illegally acquired title.
- p. The Petitioners had no protected right to the suit property and their remedy was to claim damages from the person who sold to them and the Government of Kenya for misleading them.
- q. The affidavit was sworn in opposition to the Petition and prayed that the Petition be dismissed to enable KDIC to carry out its mandate as the liquidator of Dubai Bank Kenya Limited as obligated under the law and the appointment instrument.

102. The Interested Party called its witness on 5<sup>th</sup> March, 2024 who testified as follows:-

**A. Examination in Chief of IPW - 1 by Mr. Wafula Advocate.**

103. IPW - 1 was sworn and testified in English language. He identified himself as John Masega Ombasa). He testified as having been an employee for Kenya Debt Insurance Corporation (KDIC) which was a State Corporation with the mandate to Liquidate Dubai Bank Kenya Limited. In this case; Dubai Bank Kenya while in operation advanced loan to Bill Kipsang Rotich. Using the MN/I/6589 and the Grant No. CR. 59150 – the property belonging to Bill Kipsang Rotich. It had been taken from Dubai Bank for a sum of Kenya Shillings Sixteen Million (Kshs. 16,000,000/-). The charge had neither been discharged nor the loan repaid. KDIC as the Chargor tried to sell the property but it was not possible as this case arose. He filed an Affidavit on 3.5.2020 and a List of the 14 documents attached. He wished to rely on them as his evidence in chief.

**B. Cross Examination of Interested Party by M/s. Kiti Advocate.**

104. IPW - 1 told the court that from the charge document had a figure of sum of Kenya Shillings Ten Million (Kshs. 10,000,000/-) and not Kenya Shillings Sixteen Million (Kshs. 16,000,000/-). From the records, the Letter of Offer mentioned was for Kshs. 10,000,000/- while the charge was for Kshs. 16,000,000/- There was an overdraft of Kshs. 16,000,000/-. Before the bank granted the finances, it had conducted a search as due diligence it was dated 7<sup>th</sup> March, 2014.



### **C. Cross Examination of IPW – 1 by Mr. Mogaka Advocates.**

105. IPW - 1 told the Honourable Court that he only had the search of 26<sup>th</sup> May, 2014 – see KDIC 4. At page 14 – the Charge was dated 7<sup>th</sup> March, 2014. The search was for 26<sup>th</sup> May, 2014 after the Charge had been registered so that monies would be released. He did not have a search for the Letter of Offer – before the property was charged.
106. On being referred to page 24 of the affidavit the witness confirmed that it was the last Entry No. 3 of the original title. It was registered on 28<sup>th</sup> February, 2023. Entry No. 3 it was a Charge to Dubai Bank Kenya Limited dated 14<sup>th</sup> March, 2014. The witness testified that from the original title deed, it had no Entry No. 2. From the Observation there were no Entry No. 1 & 2. Entry No. 2 appeared to be a cancellation. He had a copy of the Deed of Indemnity dated 8<sup>th</sup> May, 2014 from Bill Kipsang Rotich to the Government of Kenya. It was prepared by M/s. Kibungi and Co. Advocates.
107. IPW - 1 stated he was indemnifying the Government of Kenya (paragraph 2) against any legal action, expenses in relation in opening another title to enable him to be granted the new Charge. Mr. Kipsang was the registered property - MN/I/5689. The charge had been lodged for registration on 14<sup>th</sup> March, 2014. The charger had been informed that the deed had been lost. From the original title Entry No. 3 the charge was registered on 14<sup>th</sup> March, 2014. He confirmed it was earlier than 8<sup>th</sup> March, 2014. There was a contradiction which he confirmed. Further the witness confirmed that all these documents were in their possession but they never filed them in court at the appropriate time. On being referred to the official search, IPW - 1 told the court that the same was for 26<sup>th</sup> May, 2014 and by that time the charge had already been registered.

### **D. Re- Examination of Interested Party by Mr. Wafula Advocate:-**

108. On being referred to the official search dated 26<sup>th</sup> May, 2014 at page 50, IPW – 1 confirmed that it was from the Registrar of Title It provided the registered owner and the encumbrance registered on it. It was the land's officer who were in control of all the documents on the land. With reference to the Deed of Indemnity of 8<sup>th</sup> May, 2014; it was not creating a new plot. He was not an expert on indemnity issues. Paragraph 3 did not indicate the time when the deed actually got lost. He knew the person who owned the property as being Bill Kipsang. He knew him. He was a party to the suit.
109. The 1<sup>st</sup> and 2<sup>nd</sup> Interested parties closed their case on 5<sup>th</sup> March, 2024 through their counsel Mr. Wafula Advocate.

### **XI. The Supplementary Affidavit of the Petitioners**

110. The Petitioners through MOHAMED SHEIKH ABDULLAHI, one of the Petitioners herein responded to:-
- i. the Replying Affidavit sworn and filed on 3<sup>rd</sup> May, 2017 by John Masega Ombasa on behalf of the 1<sup>st</sup> Interested Party;
  - ii. Replying Affidavit of Chavangi Tom Aziz sworn on 29<sup>th</sup> September, 2017 and filed on 9<sup>th</sup> October, 2017 on behalf of the 1<sup>st</sup> Respondent;
  - iii. Replying Affidavit of 3<sup>rd</sup> Respondent Bill Kipsang Rotich sworn on 3<sup>rd</sup> November, 2017 and filed on 7<sup>th</sup> November, 2017 as well as the Cross-Petition of the same date;
  - iv. Replying Affidavit of Samuel Kariuki Mwangi on behalf of the 2<sup>nd</sup> Respondent; and



- v. Replied Affidavit of the 4<sup>th</sup> Respondent Masha Biry Dena sworn and fled on 24<sup>th</sup> November, 2017; and
- vi. further in support of the Affidavit supporting the Petition through a 16<sup>th</sup> paragraphed Supplementary Affidavit dated 25<sup>th</sup> April, 2018. He averred as follows:-
  - a. The Cross - Petitioner's rights have been extinguished on developments to completion.
  - b. The Petitioners were registered as proprietors, took possession and occupation of the subject land upon conclusion of the purchase transaction.
  - c. Full reliance was placed on the public records/register in relation to the subject land which upon due diligence disclosed that Masha Biry Dena was the registered owner without any adverse claims or encumbrance being noted in the register/record.
  - d. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants were the entities constitutionally and statutorily obligated to maintain and ensure accuracy of the records as to the status in relation to title to land.
  - e. As innocent purchasers for value without notice the Petitioners in security full relied on the records of conveyances and instruments affecting the title as maintained by the 2<sup>nd</sup> Respondent whose stated was that the 4<sup>th</sup> Respondent was registered owner with no inconsistent claims noted in the register.
  - f. Because of the far-reaching public policy and interests involved, namely, the merchantability of titles passing from an allottee duly registered as owner to an innocent purchaser for valuable consideration without notice of any adverse/ inconsistent interest and the stability of public records which reflect the title to real property it tilts in favour of protecting the Petitioners' interest so as to uphold sanctity of title.
  - g. Irregularity or inconsistent claim/title the Petitioners' rights were protected and were not affected by matters which did not appear on the record.
  - h. After the coming in force of *the Constitution* of Kenya, 2010 and the enacted Land Statutes thereafter the role of allot leasehold land he duly vested in the 1<sup>st</sup> Respondent and that of registration in the 2<sup>nd</sup> Respondent.
  - i. Clearly from the Replied Affidavits of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents the interest of the 4<sup>th</sup> Respondent which was the one transferred and registered in favour of the Petitioners as per record is authentic and hence the Petitioners rights in the property could not be defeated.
  - j. From the foregoing taking into account the Replied Affidavits filed for and on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents it was abundantly clear that the proprietary claims by the 3<sup>rd</sup> Respondent and the 1<sup>st</sup> Interested Party had no legal backing.
  - k. The Petitioners' acquired rights as innocent purchasers for valuable consideration without notice of existence of any title, conveyance or claim inconsistent therewith and hence could not be defeated except with full compensation as to the current value of the land, developments thereon and inconvenience to be occasioned.



- l. The current value of the subject land and developments thereon as prepared by Fairlane Valuers in their Report of 23<sup>rd</sup> April, 2018 was Kenya Shillings One Hundred and Thirty-Five Million [Kshs. 135,000,000/-] only. A true copy of the Valuer's Report was produced hereto marked as "MSA - 2".
- m. The Affidavit was sworn in support of the Grant of the reliefs sought in the main Petition and pray that the Cross – Petition lodged by the 3<sup>rd</sup> Respondent be dismissed with costs.

**XII. The Petitioners' Defendant/Reply to the 3<sup>rd</sup> Respondent's Cross Petition dated 3<sup>rd</sup> November, 2017**

111. The Petitioners responded to the Cross Petition through a 17<sup>th</sup> Paragraphed response dated 24<sup>th</sup> April, 2018 where the Petitioners averred that:-
- a. The Petitioners were unaware of the contents of paragraphs 12 of the Cross-Petition and called for strict proof of the allegations contained therein.
  - b. In response to Paragraph 13 of the Cross-Petition the Petitioners admitted that their interest in the subject land was acquired from Marsha Biry Dena through an innocent purchase for valuable consideration without notice of existence of any title, conveyance or claim inconsistent therewith.
  - c. The Petitioners' aver that they transacted over the subject property upon carrying out due diligence as to its' status from the public records held by the relevant Land Registry at Mombasa.
  - d. In response to Paragraph 14 of the Cross-Petition the Petitioners' had no knowledge of existence and validity of the Cross - Petitioner's Grant/ Title to the subject land and adds that in any event the Cross-Petitioner's rights/title thereto had been extinguished by his inaction or lying/standing by while the Petitioners' carried out and concluded massive development of residential premises and perimeter wall over the subject land which they were and continued to be in possession and occupation.
  - e. The Petitioners' denied that the Perimeter wall around the subject property was put up by the Cross - Petitioner as alleged in paragraph 15 of the Cross - Petition.
  - f. The Petitioners' were not parties to the contents of Paragraphs 15, 16 and 18 of the Cross-Petition hence unable to plead to the same.
  - g. The Petitioners were unaware of any registered Charge against the subject property as due diligence conducted from the public records/register held at the Land Registry established that Marsha Biry Dena was the registered owner without any adverse claims or encumbrances noted in the register/record.
  - h. In response to Paragraphs 20, 24 and 25 of the Cross-Petition the Petitioners' averred that the Cross-Petitioner's rights if any, had been extinguished by their standing by or inaction and that their only remedy is a claim for damages as against the relevant Government bodies/Agencies in charge of land records.
  - i. The Petitioners' admitted the contents of Paragraphs 21, 22 and 23 of the Cross - Petition.



- j. The Petitioners maintained that by law the National Land Commission and the Chief Land Registrar's office keep and maintain records of all land and the registered owners.
  - k. The Petitioners' stated that the National Land Commission and the Chief Land Registrar were constitutionally and statutorily obligated/responsible to ensure accuracy of the records/register and authentication of titles and hence were liable to pay compensation for damages suffered/occasioned due to any double allocation or other errors committed through breach of legal duty during allotment or registration or transfer of land.
  - l. The Petitioners in response to Paragraph 26 of the Cross -Petition stated that they acquired title to the subject land as innocent purchasers for valuable consideration from a registered owner without notice of any defects in or infirmities, claims or equities against the seller's title hence their rights were absolute and not liable to be defeated.
  - m. In response to the contents of Paragraphs 28, 29, 30, 31, 33 and 34 of the Cross - Petition, the Petitioners' averred that the inaction or standing by on the part of the Cross-Petitioner as the Petitioners expended substantially in the massive residential and perimeter wall development on the subject property amounted to acquiescence which disentitles and precluded him from obtaining a declaration of title over the said land.
  - n. The Petitioners' maintained that they were the registered owners in possession and occupation of the subject property as innocent purchasers for valuable consideration without notice of prior adverse claims or title inconsistent therewith entitled to all rights under the Land Statutes and Article 40 of *the Constitution*.
  - o. The Petitioners' denied that the Cross - Petitioners were entitled to the reliefs sought in the Cross-Petition and added that the Government Agencies/Bodies' in charge of land should bear full responsibility as to damages occasioned for the double registration if established.
  - p. The Petitioners' in response to Paragraphs 30 and 32 of the Cross-Petition maintained that their rights to the subject land as innocent purchasers for valuable consideration without notice cannot be impeached.
  - q. Further the Petitioners' stated that interference with their proprietary rights over the land could only be subject to appropriate compensation as to the current value of the land, developments/improvements thereon as well as damages for inconvenience.
112. The Petitioners' prayed for the dismissal of Cross – Petition dated 3<sup>rd</sup> November, 2017 and entry for Judgment as prayed in the main (Original) Petition.

### **XIII. Submissions**

113. On 16<sup>th</sup> July, 2024, while all the parties were in court, they consented to canvassing the Petition dated 24<sup>th</sup> March, 2017 by way of written submissions. Pursuant to that, all parties obliged and the Honourable Court is sincerely grateful in the manner in which the Counsels Mr. Mogaka, M/s Kiti, Mr. Bwire and Mr. Wafula Advocates professionally executed their task to such a convoluted matter with exceptional resilience, humility, diligence, devotion, decorum and dedication.
114. Subsequently, on 12<sup>th</sup> November, 2024 the Honourable Court reserved the Judgment date for on 14<sup>th</sup> February, 2025. However, due to unavoidable circumstances, it was eventually delivered on 21<sup>st</sup> March, 2015 accordingly.



## A. The Written Submissions by the Petitioners

115. The Petitioners through the Law firm of Messrs. Mogaka Omwenga & Mabeya Advocates filed their written submissions dated 27<sup>th</sup> April, 2018 filed on the same day. Mr. Mogaka Advocate recapped that a Constitutional Petition dated 24<sup>th</sup> March, 2017, an affidavit in support sworn by the 1<sup>st</sup> Petitioner together with a Notice of Motion under Certificate of Urgency for interlocutory relief were filed in Court on the same date. A Supplementary Affidavit by the 1<sup>st</sup> Petitioner sworn on 25<sup>th</sup> April, 2018 was filed in Court on the same date alongside the Petitioners' Defence/Reply to the 3<sup>rd</sup> Respondent's Cross Petition dated 3<sup>rd</sup> November, 2017.
116. According to the Learned Counsel, the Petitioners' case was that they were bona fide innocent Purchasers of the subject land for valuable consideration without notice of any inconsistent claim or title. They averred to have acquired from a registered owner (4<sup>th</sup> Respondent) the property known as Title No. CR 62008, Plot No. 6589/I/MN measuring 0.2146Ha after exercising due diligence whereto the public land registry records did not disclose any noted defect or irregularity to the title or adverse encumbrances.
117. In support of the Petitioners were of bona fide innocent purchasers for valuable consideration without notice the relevant sale agreement, Certificate of Postal Search, Payment Cheques for purchase, Consent to Transfer, Receipt for the Consent, Valuation Requisition for Stamp Duty, Rates Clearance, Rates Invoice/Bill, Transfer document, Receipt for Transfer, Application for Registration, duly transferred Title, NEMA's acknowledgement of Environmental Impact Assessment Project Report, official receipt and County Government notification of approval of the application for development permission are exhibited to the 1<sup>st</sup> Petitioner's Supporting Affidavit at pages 1- 34 of the Bundle of Exhibit marked as "MSA - 1".
118. The Petitioners' maintained that upon purchase they took possession and occupation of the suit land and thereafter carried out massive residential house development and boundary wall without any objections or interruptions from the 3<sup>rd</sup> Respondent who apparently stood by as monies were being expended on the construction till completion. Petitioners acted with honest belief and trust that the property belonged to them as there was no adverse entry noted in the public register/record held at the Land Registry at the time of the purchase. Photos of part of the development are produced at page 35 of the exhibit marked as "MSA - 1 to the 1<sup>st</sup> Petitioner's Affidavit in Support to the Petition. The current value of the land and development on the suit land as per Valuation carried out by Messrs. Fairlane Valuers Limited was Kenya Shillings One Hundred and Thirty-Five Million [Kshs.135,000,000/-] only. The Valuation Report was produced and marked as exhibit "MSA - 2" to the Supplementary Affidavit of the 1<sup>st</sup> Petitioner sworn and filed on 25<sup>th</sup> April, 2018.
119. The Learned Counsel further posited that the Petitioners' pleadings in the Petition and Defence/Reply to Cross - Petition as well as evidence contained in the Affidavit in support lodged with the Petition and Supplementary Affidavit were to the effect that they only learnt of the 3<sup>rd</sup> Respondent's competing title interest over the suit property on 10<sup>th</sup> October, 2016 when a Valuer deputized by the 1<sup>st</sup> Interested Party called at the suit land with a view to carry out a valuation so as to pave way for an exercise of a statutory right of sale. The said Valuer provided a copy of the Title No. C.R 59150, LR No.MN/I/6589 together with instructions for valuation from Messrs. Dubai Bank's liquidation agent Adam Boru which were produced at pages 36-38a of the bundle of exhibits marked as "MSA - 1" to the 1<sup>st</sup> Petitioner's Affidavit in support of the Petition.



120. According to the Learned Counsel, the 4<sup>th</sup> Respondent's Affidavit was sworn and filed on 24<sup>th</sup> November, 2017. The 4<sup>th</sup> Respondent's said Affidavit explains how he acquired the suit property from the point of Letter of Allotment leading to issuance of Grant and registration of title. He stated that the 3<sup>rd</sup> Respondent was a stranger to him. The 4<sup>th</sup> Respondent confirmed that after being registered as owner he sold the suit land to the Petitioners for valuable consideration. To the 4<sup>th</sup> Respondent's Replying Affidavit were exhibited the duly registered and transferred copy of Grant/Title, marked as "MBA - 1", Letter of Allotment marked as "MBA - 2", Land Department's official receipt marked as "MBA - 3", National Land Commission's letter of 16<sup>th</sup> January, 2014 forwarding Grant to the Land Registry for registration copied to the 4<sup>th</sup> Respondent marked as "MBA - 4" and Transfer to the Petitioners marked as "MBA - 5".
121. The 3<sup>rd</sup> Respondent's Replying Affidavit is sworn on 3<sup>rd</sup> November, 2017 and filed in Court on 7<sup>th</sup> November, 2017 alongside the 3<sup>rd</sup> Respondent's Cross-Petition. It was the 3<sup>rd</sup> Respondent's Case that he was allotted the subject land as Grant/Title No. 59150 L.R No. MN/I/6589 in November, 2012 and subsequently Charged the same to Messrs. Dubai Bank Kenya Limited. True copies of exhibits produced to the 3<sup>rd</sup> Respondent's Replying Affidavit sworn on 3<sup>rd</sup> November, 2017 and filed on 7<sup>th</sup> November, 2017 were Grant/Title and copy of forwarding letter dated 6<sup>th</sup> November, 2012 were marked as "BKR - 1", the Certificate of Postal Search as at 10<sup>th</sup> October, 2013 was marked "BKR-2" and a Charge dated 7<sup>th</sup> March, 2014 was marked as "BKR - 3".
122. The 3<sup>rd</sup> Respondent's maintained that his said title was first in time and took precedent/priority against that issued to the 4<sup>th</sup> Respondent in respect of the suit property as it was not tenable conventionally/legally for another deed plan or title to be issued while his was in place. He stated that the Petitioners' claim was deficient and inferior and removed the structures from the said property and to be given vacant possession.
123. The 1<sup>st</sup> Interested Party's Replying Affidavit was sworn by John Masega Ombasa on 3<sup>rd</sup> May, 2017 and filed in Court on the same date. The 1<sup>st</sup> Interested Party's Case is to the effect that as appointed liquidators of Dubai Bank Kenya Limited they are obligated to recover debts owed to the Bank and that one such debt was a loan facility of Kenya Shillings Sixteen Million (Kshs.16,000,000/-) advanced to Premium Petroleum Company Limited and secured by the property CR No. 59150 LR No. MN/I/6589 in respect of which due diligence had been carried out and confirmed to belong to the said 3<sup>rd</sup> Respondent. It is stated further that the land having been allocated and registered in the 3<sup>rd</sup> Respondent's name the same was not available for allocation to the 4<sup>th</sup> Respondent and that the said allocation was illegal, null and void. True copies of exhibits produced and annexed to the said Affidavit include financial facility approval letter dated 26<sup>th</sup> June, 2013 marked as "KDIC -1", Grant/Title CR 59150 LR No. MN/I/6589 marked as "KDIC - 2", a Charge dated 7<sup>th</sup> March, 2014 marked as "KDIC -3" and Certificate of Postal Search as at 26<sup>th</sup> May, 2014 marked as "KDIC - 4".
124. The Learned Counsel averred that the 1<sup>st</sup> Respondent's Replying Affidavit was sworn by its Chief Executive Officer/Secretary Mr. Chavangi Tom Aziz on 29<sup>th</sup> September, 2017 and filed on the 9<sup>th</sup> October, 2017. It was the 1<sup>st</sup> Respondent's Case that it was the constitutional body established under Article 67 (1) of *the Constitution* and operationalized by the *National Land Commission Act* No. 5 of 2012 with one of the fundamental functions being management of public land on behalf of the National and County Governments. According to their relevant file the parcel of land known as 6589/I/MN (MN/I/6589) was allocated to one Masha Biryia Dena (the 4<sup>th</sup> Respondent) and that upon payment of requisite fees and compliance of terms of the allotment letter a lease was forwarded to the Chief Land Registrar for purposes of registration on 16<sup>th</sup> January, 2014. That there was no any



- other allocation in respect of the suit land other than that to the 4<sup>th</sup> Respondent. True copies of the 2<sup>nd</sup> Respondent's letter reference number 127258/12 dated 16<sup>th</sup> January, 2014 addressed to the District Land Registrar, Mombasa through the Chief Land Registrar produced as an exhibit marked as "CTA - 1" and a letter referenced CLR/FL/VOL.1 dated 4<sup>th</sup> February, 2014 from the Principal Registrar of Titles to the Senior Registrar of Titles, Mombasa was marked as "CTA - 2".
125. The 2<sup>nd</sup> Respondent's Replying Affidavit was sworn by Samuel Kariuki Mwangi on 23<sup>rd</sup> November, 2017 and filed in Court on the same date. It was the 2<sup>nd</sup> Respondent's Case that a scrutiny of their record established in their custody both the deed file and correspondence file in respect of a Grant to LR No. MN/I/6585 registered as CR 62008 to Masha Biryra Dena (the 4<sup>th</sup> Respondent) on 1<sup>st</sup> registration which was subsequently transferred to Mohamed Sheikh Abdullahi and Sheikh Daib Mohamed [the Petitioners] vide a Transfer dated 24<sup>th</sup> June, 2015 and registered in the Land office on 25<sup>th</sup> June, 2015. The Grant in favour of the 4<sup>th</sup> Respondent's was received alongside other Grants as captured in a letter dated 4<sup>th</sup> February, 2014 from the office of the Principal Registrar of Titles. It was confirmed that the Grant registered in the 4<sup>th</sup> Respondent's name bears the authentication stamp from the office of the Chairman of the National Land Commission. True copies of exhibits produced and annexed to the Affidavit are duly transferred Grant CR 62008 LR No.MN/I/6589 marked as "SKM - 1 (A)", Transfer by the 4<sup>th</sup> Respondent to the Petitioners dated 24<sup>th</sup> June, 2015, Indemnity, identity card of 4<sup>th</sup> Respondent, PIN Certificate, Stamp Assessment, Land Rent Demand Note, Department of Lands official receipt, Land Rent Payment-in-Slip and receipt, 2<sup>nd</sup> Petitioner's identity card, Valuation for Stamp Duty form, Rates Clearance Certificate, Consent to Transfer and Application for Registration marked as "SKM - 1 (B)", National Land Commission's letter referenced 127258/12 dated 16<sup>th</sup> January, 2014 forwarding Grant and copied to the 4<sup>th</sup> Respondent together with Principal Registrar's letter referenced CLR/FL/VOL.II dated 4<sup>th</sup> February, 2014 addressed to the Senior Registrar of Titles were marked as "SKM - 2".
126. In the Supplementary Affidavit by the 1<sup>st</sup> Petitioner sworn on 25<sup>th</sup> April, 2018 filed in Court on the same date alongside the Petitioners' Defence/Reply to the 3<sup>rd</sup> Respondent's Cross-Petition dated 3<sup>rd</sup> November, 2017, the Petitioners' Case as being bona fide innocent purchasers for valuable consideration without notice of any defect, irregularity or adverse encumbrance noted on the record/register is reiterated and the current value of the land and developments provided. A current Valuation Report in respect of the property which indicates a sum of Kenya Shillings One Hundred and Thirty-Five Million [Kshs.135,000,000/-] only was exhibited and marked as "MSA - 2".
127. Under the provision of Article 10 of *the Constitution* binds all State organs, State officers, public officers and all persons whenever any of them makes, or implements public policy decisions and/or applies the law. One of the national values and principles of governance include rule of law which is the foundation of constitutionalism. Article 60 of *the Constitution* on principles of land policy provides for security of land rights under (1)(b). Article 67 of *the Constitution* establishes the National Land Commission [1<sup>st</sup> Respondent] with the functions inter alia to manage public land on behalf of the National and County Governments. The said functions/role and powers are re-stated in Section 5 of the *National Land Commission Act* No. 5 of 2012. Article 68 of *the Constitution* empowers Parliament to legislate on land. In the discharge of its constitutional mandate Parliament enacted The *National Land Commission Act* No. 5 of 2012, the *Land Registration Act* No. 3 of 2012, and the *Land Act* No.6 of 2012 all of which came in force on 2<sup>nd</sup> May, 2012.
128. According to the Learned Counsel, the *Land Act* No. 6 of 2012 under the provision of Section 4 provides for the guiding values and principles of land management and administration which binds all State organs, public officers and all persons. In the discharge of the functions and powers of the said



Act the National Land Commission or State or public officers shall be guided in such a manner as to ensure security of land rights. Under Section 7 of the Land Act provides means upon which title to land may be acquired through (a) allocation; (g) transfers or any other manner prescribed in an Act of Parliament.

129. The Land Registration Act No. 3 of 2012-Section 6-provides for registration of units by the National Land Commission in consultation with National and County Government. Section 7 of the Land Registration Act provides for maintenance of a Land Registry in each registration unit in which shall be kept:- (a) a land register,(b) the cadastral map;(c)parcel files containing the instruments and documents that support subsisting entries in the land register; (d) plans (e) presentation book (f) an index of names of the proprietors and (g) a register and a file of powers of attorney.
130. Under the provision of Section 9 of the Land Registration Act, No, 3 of 2012 requires the Land Registrar to maintain the register and any document in a secure, accessible and reliable format. In both the Land Act, No. 6 of 2012 and the Land Registration Act, No. 3 of 2012 a proprietor is described to mean the person named in the register as the proprietor and/or the person in whose favour a Charge was registered in the register/record.
131. The Learned Counsel extensively submitted on the efficacy and effectiveness of registration base on the provisions of Sections 24, 25 and 26 of the Land Registration Act, 2012. He opined that the foregoing provisions assured a person who holds a Certificate of title that the document he/she holds provided it has been procedurally acquired is indefeasible. The Petitioners herein acquired the suit property from the 4<sup>th</sup> Respondent through a bona fide innocent purchase for value without notice after conducting a proper due diligence. Article 40 of the Constitution guarantees the right to property.
132. The Learned Counsel submitted that on public policy and interest from the foregoing clearly the public records of conveyances and instruments affecting the title to real estate are established by statute to furnish evidence of such title, and a purchaser may rely upon such records in security unless he has notice, or was chargeable in some way with notice of some title, conveyance or claim inconsistent therewith. The object of all land registries are to impart information to parties dealing with property respecting its transfers and encumbrances and thus to protect them from prior secret conveyances and liens. It is to the registry, therefore that purchaser, or others desirous of ascertaining the condition of the property, must look, and if not otherwise informed they can rely upon the knowledge there obtained.
133. It was indisputable that there was corroboration and consistency in the cases of the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents with that of the Petitioners in respect of the suit land having been allotted and a Grant/ Title duly issued and registered in favour of the 4<sup>th</sup> Respondent that was subsequently sold and transferred to the Petitioners as per the public records held by the 1<sup>st</sup> Respondent and at the relevant Land Registry falling under the mandate and control of the 2<sup>nd</sup> Respondent.
134. To buttress on this point, the Learned Counsel relied on the case of “Wreck Motor Enterprises v Commissioner of Lands (Supra)”, where the Court of Appeal held that:-

“.....Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafterof title document pursuant to provisions held. See Dr. Joseph N.K. Arap Ng'ok v Justice Moiyo ole Keiwua & 4 Others, Civil Application No. NAI.60 of 1997 (unreported).Sections 23(1) of the Registration of Titles Act reads as follows:- "Section 23 (1) The Certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof,



subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the [http://www.kenyalaw.org-Page 3/4Wreck Motor Enterprises v Commissioner of Lands & 3 others \[1997\]eKLR](http://www.kenyalaw.org-Page 3/4Wreck Motor Enterprises v Commissioner of Lands & 3 others [1997]eKLR) title of that proprietor shall not be subject to challenge, except on the ground of fraud or misinterpretation to which he is proved to be a party.”

135. Further in the case of “Samuel Kamere v Lands Registrar, Kajiado [2015] eKLR”, the Court of Appeal had this to say:-

“It is evident that there are two competing claims over the suit property, and we have said that the Plaintiff’s proprietary interest is already established. Since the appellant’s title is under challenge, in order to be considered a bona fide purchaser for value, he must prove that he had acquired a valid and legal title, secondly, that he carried out the necessary due diligence to determine the lawful owner from whom he acquired a legitimate title, and thirdly that he paid valuable consideration for the purchase of the suit property.”

136. According to the Learned Counsel, clearly from the Case and evidence of the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents as well as that of the Petitioners on record validity of the Grant/Title held by the 3<sup>rd</sup> Respondent and Charged to Dubai Bank Kenya Limited under liquidation by the 1<sup>st</sup> Interested Party was being challenged. The Learned Counsel further cited the case of: “Munyu Maina – v - Hiram Gathiha Maina [2013] eKLR”, the Court of Appeal had this to say:-

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”

137. Further in the case of “Daudi Kiptugen – v - Commissioner of Lands Nairobi Lands & 4 Others [2015] eKLR”, it was held:

“It is not enough that one waves a Lease or a Certificate of Lease and assert that he has good title by the mere possession of the Lease or Certificate of Lease. Where there is contention that a Lease or Certificate of Lease held by an individual was improperly acquired, then the holder thereof must demonstrate, through evidence, that the Lease or Certificate of Lease that he holds, was properly acquired. The acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through the proper process, the title itself cannot be said to be a good title. If this were not the position, then all one would need to do is to manufacture a Lease or Certificate of Title, at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.”

138. Indisputably the Petitioners pursuant to the purchase took possession, occupation and commenced massive construction of a residential premises as well as a perimeter wall without any interruptions or objections from the 3<sup>rd</sup> Respondent who stood by as funds were being expended on the constructions



to completion. The Learned Counsel relied on the case of “Benja Properties Limited – v - Syedna Mohammed Burhannudin Sahed & 4 Others [2015] eKLR”, the Court of Appeal stated as follows:-

“It is trite law that all titles to land are ultimately based upon possession in the sense that the title of the man seised prevails against all who can show no better right to seisin. Seisin is a root of title. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents being in possession of the suit land have a better right to the same as against the appellant. The maxim is that possession is nine-tenths ownership. As was stated by the Privy Council in Ghana of Wuta – Ofei v Danquah [1961] All ER 596 at 600, the slightest amount of possession would be sufficient.” This is a fact that cannot be denied by the 3<sup>rd</sup> Respondent.

139. Under the provision of Section 80 of the *Land Registration Act*, No. 3 of 2012 this Honourable Court has the power to order for rectification of the register. It provides:-

- “ 1) Subject to sub - section (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
- 2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”

140. The Learned Counsel submitted that the Petitioners prayed that the Honourable Court orders the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to rectify the register by cancelling and revoking from the Land Records if any, the 3<sup>rd</sup> Respondent’s Title No. CR 59150 for Plot No. 6589/I/MN. Undisputedly it was on the basis of the public record maintained in the relevant Land Registry at Mombasa that the Petitioners transacted and therefore their interest should not be defeated or interfered with in any manner unless on exceptional circumstances upon appropriate compensation by way of damages equivalent to the current market value of the land and developments thereon which was a sum of Kenya Shillings One Hundred and Thirty-Five Million [Kshs.135,000,000/-]. They relied on the Case of “Gitwany Investment Limited – v - Tajmal Limited (Supra)”.

141. The Petitioners reiterated their prayers in the Petition, their Affidavit evidence and documents annexed thereto and the submissions herein and prayed that Judgement be entered for them as prayed and that and the 3<sup>rd</sup> Respondent’s Cross - Petition be dismissed with costs to the Petitioners. The Authorities cited clearly highlighting the relevant portions to guide the Honourable Court were contained in the Petitioners’ List and Bundle of Authorities to be lodged with these Submissions.

#### B. The Written Submissions by 1<sup>st</sup> and 2<sup>nd</sup> Respondents

142. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents through the State Law office of the Honourable - Attorney General, Mombasa filed their submissions dated 4<sup>th</sup> July, 2018. M/s. Kiti Advocate argued that in March 2014 the property subject of Title No. CR 62008 measuring nought decimal two one four six (0.2146) of a hectare or thereabouts L.R. MN/1/6589 was offered for sale by one Masha Biry Dena, the 4<sup>th</sup> Respondent through a property agent at a consideration of a sum of Kenya Shillings Twenty Million (20,000,000/-).

143. The Petitioners agreed and indeed proceeded to transact over the subject parcel No.6589/1/MN as innocent purchasers for valuable consideration without notice. A written sale agreement dated 24<sup>th</sup> March, 2015 was duly executed between the 1<sup>st</sup> Petitioner as Purchaser on the one hand and the 4<sup>th</sup>



- Respondent as Vender thereof. The Petitioners claimed to be in possession/occupation of the subject land on which they had carried out massive development without any interruptions or objection till completion. All which was not denied.
144. While responding to the issues raised by the 2<sup>nd</sup> Respondent, the Learned Counsel submitted that it did not have two registers on the said subject matter as purported by the parties. As indicated by the affidavit of the 2<sup>nd</sup> Respondent dated 3<sup>rd</sup> November, 2017 and filed on 23<sup>rd</sup> November, 2017, it was clear that the records available on the suit parcel were specific. They conferred ownership on the suit land to the Petitioner. He clearly averred at Paragraph 4, to wit:-
- “That it is not possible to have the same parcel of land, bearing the same land reference number, same acreage and same deed plan number allocated or vested in two different people or entities.”
145. The said affidavit was issued after a scrutiny of records in the custody of the 2<sup>nd</sup> Respondent leading to the Deed file and correspondence file in respect to Grant for LR.No.MN/1/6589 registered as CR.62008 to Masha Biry Dena on first registration and which was subsequently transferred to Mohamed sheikh Abdullahi and Sheikh Daib Mohamed, vide a transfer dated 24<sup>th</sup> June, 2015 and registered in Lands Office on 26<sup>th</sup> June 2015. The copies of the Grants and transfers document were not opposed but were confirmed by the parties in the Cross - Petition. The Learned Counsel informed the Court that the Land Registrar explained that the Grant registered as CR.62008 - MN/1/6589 and registered on 10<sup>th</sup> February 2014 (in favour of the Petitioners) bore the authentication stamp from the office of the Chairman of the National Land Commission.
146. She asserted that the Land Registrar noted that the correspondence file for grant registered as CR.62008 (MN/I/6589) indicated the same was forwarded through the office of the Chief Land Registrar on 17<sup>th</sup> January, 2014. The forwarded Grant was received together with other grants as captured on letter dated 4<sup>th</sup> February 2014 from the office of Principal Registrar of Titles.
147. On the 3<sup>rd</sup> Respondent's response and Cross - Petition, the Learned Counsel submitted that the 3<sup>rd</sup> Respondent's claim was that he was issued with a Grant on 7<sup>th</sup> September 2011. He claimed having been notified to collect it through a letter dated 6<sup>th</sup> November 2012. The Learned Counsel held that it baffled to note that after he charged the suit parcel of land to Dubai Bank and received the money charged for he never visited the suit premises to stop the Petitioner from continue the construction of the massive development on the suit land if he was the genuine owner. He only took legal action after the Petitioner sued him. This left a lot to be explained by the 3<sup>rd</sup> Respondent.
148. The due diligence conducted by Dubai bank was doubtful. In saying so, according to the evidence by the 2<sup>nd</sup> Respondent there were no record to support the ownership of any other person except the Petitioner. It was thus not possible to generate the Grant in favour of any other person.
149. It was baffling to note that on or around the years 2015 and 2016 several events took place on the grounds of the suit parcel of land based on the records provided by the parties but the parties never met on the suit parcel of land. It was worth noting that in the year 2015 was when the Petitioner was making payments for the purchase of the suit parcel. Thus he made visits to the suit parcel of land. On 26<sup>th</sup> June, 2016 title to the Petitioners was issued. In October 2016 the liquidating agent of Dubai Bank issued instruction for the valuation of the suit parcel. On 25<sup>th</sup> October, 2016 an approval for construction by the Petitioners was done by the County Government. All hoping that the construction would later proceed.



150. Therefore, the Learned Counsel urged this court to declare only one title as per the records held by the 2<sup>nd</sup> Respondent as provided in court. Further the court should dismiss the Cross - Petition for lacking merit. This was supported by the fact that the Cross - Petitioner/4<sup>th</sup> Respondent had failed to demonstrate to this court how he merited the Grant of the suit parcel of land. If he was the first registered owner as pleaded he ought to have demonstrated his application to the Commissioner of Lands and the conditions present before the issuance of title.
151. On the National Land Commission, the Learned Counsel concluded that the position of the National Land Commission was very clear that only one Grant was issued by the commission and it was to Marsha Biryia. The Commission confirmed that the documents were later forwarded to the Chief Land Registrar for onward transmission to Mombasa for registration. It therefore confirmed that the Cross - Petition must fail. In a nutshell, the Learned Counsel urged the Court to uphold the Petition to the dismiss the cross - Petition.

### **C. The Written Submissions by the 3<sup>rd</sup> Respondent/Cross Petitioner.**

152. The 3<sup>rd</sup> Respondent/Cross Petitioner through the Law firm of Messrs. Echessa & Bwire Advocates, LLP filed his written submissions dated 7<sup>th</sup> May, 2018 and filed on 8<sup>th</sup> May, 2024. Mr. Bwire Advocate commenced their submission by relying on the Court of Appeal decision in “Dr. Joseph N.K. Ng’ok v Justice Moijo Ole Keiwua and 2 others C.A. No. 60/1997(unreported)”, where the Court held that:-

“Section 23 (1) of the Act gives an absolute and indefeasible title to the owner of the property. The title to such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

153. According to the Court of Appeal in the case of:- “Darelle Limited Plaintiff v ASL Limited & 2 others [2015] eKLR”, the Court held that:-

‘It is trite law that when there are two competing titles, the first in time will prevail. This was the findings in the case of Wreck Motors Enterprises v the Commissioner of Lands and others Civil Appeal No. 71 of 1997, where the court held that:

“...where there are two competing titles the one registered earlier is the one that takes priority.”

154. Additionally, the Learned Counsel relied on the case of “Gitwany Investment Limited (Supra)”, where the Court held that:-

“.....the first in time prevails, so that in the event such as this one whereby a mistake that is admitted, the Commissioner of lands issues two titles in respect of the same parcel of land then if both are apparently and on the face of them issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail.”

155. According to the Learned Counsel, the Petition was dated 24<sup>th</sup> March, 2017. Its reliefs embodied it. The 3<sup>rd</sup> Respondent filed a Replying Affidavit sworn by Bill Kipsang Rotich sworn at Nairobi on 3<sup>rd</sup> November 2017 and filed in Court on 7<sup>th</sup> November 2017. The 3<sup>rd</sup> Respondent also filed a Cross Petition dated 3<sup>rd</sup> November 2017 and filed in Court on 7<sup>th</sup> November 2017.



156. The Learned Counsel relied on the following issues of consensus on the Petition and Replying affidavit:-
- a. That the 3<sup>rd</sup> Respondent/Cross Petitioner is the holder of title to L.R No.MN/1/6589 issued and signed on 7<sup>th</sup> September 2011. This has been evidenced as annexure BKR-1 in the Supporting Affidavit of Bill Kipsang Rotich.
  - b. The 3<sup>rd</sup> Respondent has been such proprietor and has never transferred the property. The 3<sup>rd</sup> Respondent never transferred the property to the 4<sup>th</sup> Respondents and never to the Petitioners.
  - c. On 7<sup>th</sup> March 2014, the 3<sup>rd</sup> Respondent charged the property to the 1<sup>st</sup> Interested Party, who prior to the Charge conducted all due diligence and searches and established that the property belonged and was registered to the 3<sup>rd</sup> Respondent.
  - d. The title under which the Petitioners claim was issued initially to the 4<sup>th</sup> Respondent on 8<sup>th</sup> January 2014.
  - e. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents both confirm that the 3<sup>rd</sup> Respondent's title was legitimately issued procedurally, absent any fraud, error or mistake.
  - f. Accordingly 3<sup>rd</sup> Respondent's title is the first in time
157. On the legal issues and argument, the Learned Counsel submitted that the issues in the Petition and Cross - Petition essentially singular and a ramification:-
- i. The 3<sup>rd</sup> Respondent's title having been issued a first in time on 7<sup>th</sup> September 2011, what was status in law of the Petitioners' title?
  - ii. The Petitioners having constructed on the 3<sup>rd</sup> Respondent's property without the 3<sup>rd</sup> Respondent's consent, what was the 3<sup>rd</sup> Respondent's Remedy?
158. The Learned Counsel on the issue of the 3<sup>rd</sup> Respondent's title having been issued a first in time on 7<sup>th</sup> September, 2011, and what the status in law of the Petitioner's title is, submitted that the law in Kenya is settled on this issue:-
159. The Court of Appeal in "Wreck Motors Enterprises v the Commissioner of Lands (Supra)" restated the law as follows:-
- “...where there are two competing titles the one registered earlier is the one that takes priority.”
160. This position as per the Learned Counsel has been followed since in Kenya in the case of "Gitwany Investment Limited – v - Tajmal Limited & 3 Others (Supra)", where the High Court faced with a situation as the present one, rendered itself as follows:-
- “.....the first in time prevails, so that in the event such as this one whereby a mistake that is admitted, the Commissioner of lands issues two titles in respect of the same parcel of land then if both are apparently and on the face of them issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail.”



161. Further the Learned Counsel relied on the case of “Darelle Limited Plaintiff – v - ASL Limited & 2 others [Supra]”, the Environment and Land Court rendered itself as follows on similar issues:-

“It is trite law that when there are two competing titles, the first in time will prevail. This was the findings in the case of Wreck Motors Enterprises – v - the Commissioner of Lands and others Civil Appeal No. 71 of 1997, where the court held that:

“.....where there are two competing titles the one registered earlier is the one that takes priority.”

162. The Learned Counsel argued that it was a well settled law of Kenya and by stare decisis this Honourable Court should be bound by the decision of the Court in “Wreck Motors Enterprises v the Commissioner of Lands and Others (supra)”. The Learned Counsel urged the Honourable Court to uphold the 3<sup>rd</sup> Respondent/Cross Petitioner’s order issued on 7<sup>th</sup> September, 2011 and uphold the cross petition.

163. On the Petitioner having constructed on the 3<sup>rd</sup> Respondent/Cross - Petitioner’s property without the 3<sup>rd</sup> Respondent’s consent, what was the 3<sup>rd</sup> Respondent’s remedy. The Learned Counsel submitted that having issued the 3<sup>rd</sup> Respondent/Cross – Petitioner’s title in priority the Petitioners’ title could not stand, and had to be revoked. As at the time the title under which the Petitioners claim was issued, the land had already been alienated. It was immaterial at law that the 3<sup>rd</sup> Respondent had yet to occupy, for indefeasible title was not by occupation but by registration.

164. The Learned Counsel submitted that it was immaterial that the Petitioners had built on the property structures, and value of property was now at a sum of Kenya Shillings One Thirty Five Million (Kshs. 135, 000, 000.00/=), as per the Petitioners’ Valuation Report filed in court herein. The case herein was not without precedence, in “Gitwany Investment Limited v Tajmal Limited & 3 Others (supra)”, faced with similar situation, wherein the 1<sup>st</sup> Defendant a holder of a second title, issued second in time had entered the land as such holder of title and constructed flats at a cost of a sum of Kenya Shillings One Fifty One Million Five Hundred Thousand (Kshs. 151,500,000/-). When the Plaintiff, the first title holder sued, the Court rendered itself as follows:-

“51. I have held that the Plaintiff’s title is lawful and that the 1<sup>st</sup> Defendant’s title although apparently procedurally obtained is in fact a sham and cannot confer any indefeasible and absolute rights to it. The only question is whether the 1<sup>st</sup> Defendant is a trespasser through no fault of its own on the suit land.

52. It is admitted that the 1<sup>st</sup> Defendant is in occupation and has put up blocks of flats or apartments on the suit land. The Plaintiff never effectively occupied nor had it taken physical possession of the suit land since it obtained title. The 1<sup>st</sup> Defendant took possession on the basis of a mistaken title on the other hand. The 1<sup>st</sup> Defendant acted in good faith and believed that it had a good title and that its possession completely entitled it to the land and by such possession it was the other of the land.....

I am of the view that the old cause of action in trespass as known to English Law can apply to this case as against the 1<sup>st</sup> Defendant prior to nullification of its title and I so find. My view on the matter is supported by the old case of Wuta-Ofei v Danquah [1961] 3 All E.R. 596 and the decision in Moya Drift Farm Ltd v Theuri [1973] E.A. 114 where in the latter case the Court of Appeal in East Africa approving the decision in the former stated:-



(a) Per Spry V-P – “Mr. Hewitt conceded that it was formerly the law in England that a person had to have taken possession of land before he could take proceedings in trespass but he submitted that this cannot be the law of Kenya, as it would make nonsense of s.23 [of the Registration of Titles Act (Cap 281)]. I find this argument irresistible and I do not think it is necessary to examine the law of England. I cannot see how a person could possibly be described as ‘the absolute and indefeasible owner’ of land if he could not cause a trespasser on it to be evicted. The Act gives a registered proprietor his title on registration, and unless there is any other person lawfully in possession, such as a tenant, I think that title carries with it legal possession. There is nothing in the Act to say or even suggest that this title is imperfect until he has taken physical possession.”

(b) Per William Duffus P;

(c) “The following passage from the Judgment of the Privy Council delivered by Lord Guest in the case from Ghana of Wuta-Ofei – v - Danquah [1961] All E.R. 596 at pg.600 sets out in general terms the possession necessary to maintain the action” and this is that;

‘.....In these circumstances, the slightest amount of possession would be sufficient.’”

To my mind the legal possession established by Gitwany entitles it to possession against all other parties that have shown no better title than its own. The 1<sup>st</sup> Defendant falls in this category and once its title is found to be invalid it can only be termed a trespasser. In Winfield and Jolowic on Tort, 16<sup>th</sup> edition 2002, the point is graphically put at page 487 para 13.1.

“.....it is no defence that the only reason for.....entry was that he [the trespasser] had lost his way or even that he genuinely but erroneously believed that the land was his.”

The 1<sup>st</sup> Defendant is accordingly declared to be a trespasser on the suit land as argued by the Plaintiff and I so hold.

Is the Plaintiff entitled to its Reliefs?

I note from the Amended Plaintiff that one of the prayers sought by the Plaintiff is a declaration at prayer (e) thereof that it is the bona fide title holder of L.R. No. 209/12004 formerly known as L.R. No. 209/3088 and the Defendants have no rights whatsoever over the same. I have already effectively granted that prayer and I see no reason to return to it.

54. Prayer (a) relates to a permanent injunction restraining the Defendant from erecting any structures, fencing, constructing and in any other manner interfering with the suit land. Since I have already held that the Plaintiff holds a valid title and therefore is entitled to both ownership and possession of the suit land it follows that no party save itself with its authority should have any right to enter therein and attempt any construction thereon. This finding is consistent with the holding in Moya Drift Farm (Supra) that a perpetual injunction can issue to stop further trespass by the trespasser.



55. Prayer (b) seeks an order that the 1<sup>st</sup> Defendant should at its own cost remove any structures now on the suit land. I have held that the 1<sup>st</sup> Defendant entered the land because of a mistake perpetrated by the 3<sup>rd</sup> party. It commenced construction of flats or apartments on the basis of that mistake and in good faith. It has by this Judgment been told that it all along operated innocently, but on the basis of a mistaken belief that its title is indefeasible while in fact it is not. The blame has been passed on to the 3<sup>rd</sup> Party and I note that in the 3<sup>rd</sup> Party Notice, the 1<sup>st</sup> Defendant states inter-alia as follows;

“The relief sought from you (the 3<sup>rd</sup> party) is a reimbursement of all costs, expenses expected profits and generally full compensation to the said Taj Mall Limited....”

56. It is my considered view that while removing all structures now on the suit land, the costs thereof shall be met by the 3<sup>rd</sup> Party and not the 1<sup>st</sup> Defendant. I say so because clearly upon nullification of the title held by the 1<sup>st</sup> Defendant as I will shortly do, all structures on the suit land would amount to an act of continuing trespass if the 1<sup>st</sup> Defendant lays claim to them. It is my understanding that once a transferee such as the 1<sup>st</sup> Defendant makes improvements on land believing in good faith that it was absolutely entitled to do so, once its title is faulted, then it must be evicted (see Mullah (supra) pg.354). I have however held elsewhere that the peculiar circumstances of this case would necessitate that neither the Plaintiff nor the 1<sup>st</sup> Defendant should meet the costs of doing so but the party that caused them the inconvenience should do so hence my direction that the 3<sup>rd</sup> Party should bear the costs. That is my finding and order in this regard”.

165. The Learned Counsel contended that the law was summarized by the Court of Appeal of Kenya in “Dr. Joseph N.K. Ng’ok v Justice Moiyo Ole Keiwua and 2 Others (Supra)”, as follows:-

“Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title to such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

166. The interests protected under the provision of Section 23 (1) of the Registration of Titles Act (Chapter 281) of the Laws of Kenya), now repealed have been transitioned and now apply by the provision of Sections 24 and 25 of the [Land Registration Act](#), No. 3 of 2012 as follows:-

24. Interest conferred by registration Subject to this Act-

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights



and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25. Rights of a proprietor

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-
  - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
  - (b) to such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register.

167. The Learned Counsel opined that the holding in the “Gitwany case”, should be imported to apply herein, mutatis mutandis, and if the property, then the Petitioners and 1<sup>st</sup> and 2<sup>nd</sup> Respondents should bear the cost of restoration of the 3<sup>rd</sup> Respondent’s/Cross Petitioner’s property. On the Cross - Petition, the Learned Counsel submitted that the 3<sup>rd</sup> Respondent also filed a Cross - Petition dated 3<sup>rd</sup> November 2017 filed in court on 7<sup>th</sup> November 2017. The Cross - Petition was supported by the Replying Affidavit of Bill Kipsang Rotich sworn at Nairobi on 3<sup>rd</sup> November 2017 and filed in court on 7<sup>th</sup> November 2017. In submission, they reiterated the foregoing submissions, and urged the Honourable Court to grant the reliefs of the Cross - Petition.

168. By registration of the 3<sup>rd</sup> Respondent/Cross - Petitioner over the suit property, the 3<sup>rd</sup> Respondent/Cross Petitioner became conferred with interests in property protectable under the provision of Article 40 read with 260 of *the Constitution*. These right to protection of property subsisted from the 7<sup>th</sup> November 2011 and subsisted today, as the first registration in title over the suit property and thus by law taking precedence over any and all other subsequent rights of claim.

169. In conclusion, the Learned Counsel urged the Honourable Court to respect and protect the 3<sup>rd</sup> Respondent’s/Cross Petitioner’s said rights to property, by dismissing the Petition herein and by granting the Cross Petition. The 3<sup>rd</sup> Respondent/Cross Petitioner never objected to the alternative prayer (G) of the Petition.

**D. The Written Submissions by the 4<sup>th</sup> Respondent.**

170. The 4<sup>th</sup> Respondent through the Law firm of Messrs. Marende Necheza & Company Advocates filed their written submissions dated 28<sup>th</sup> June, 2018. From the face value they fully supported the Petition while they outrightly opposed the Cross – Petition. Mr. Shimaka Advocate told the court that by a Petition dated 24<sup>th</sup> March, 2017 the Petitioners had Petitioned this Honorable Court for the above cited orders. According to the Learned Counsel, all the respective parties have filed their responses including the 4<sup>th</sup> Respondent who filed his Replying Affidavit dated and filed on 24<sup>th</sup> November, 2017.

171. The Petitioner never sought any order against the 4<sup>th</sup> Respondent. The 4<sup>th</sup> Respondent filed his response in support of the fact that he was the registered owner of property Title No. CR.62008 Plot No.6589/1/MN before transferring the same to the Petitioners. During the time when the 4<sup>th</sup> Respondent was the registered owner of Title No. CR 62008 Plot NO. 6589/1/MN his title was not



challenged and had been in peaceful occupation and possession of the same until when he transferred the same to the Petitioners.

172. The Learned Counsel submitted that the 4<sup>th</sup> Respondent relied on his Replying Affidavit in support of the Petitioner's case and maintained that prior to the transfer of the suit property to the Petitioners he had a valid title hence the petitioners did indeed obtain a valid title Section 26 (1) of the [Land Registration Act](#), No. 3 of 2012 provides as follows:-

The certificate of title issued by the Registrar upon registration, or to a purchaser of the land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances easement restriction and conditions contained or endorsed in the certificate and the title of that proprietor shall not be subject to challenge expect

- a. On the ground of fraud or misrepresentation to which the person is proved to be the party; or
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme

1. It was the Learned Counsel's argument that the 4<sup>th</sup> Respondent's title could not be challenged as he had demonstrated to this Honourable Court how he acquired title to the suit property. The 4<sup>th</sup> Respondent was issued with a letter of Allotment dated 16<sup>th</sup> September, 1994 paid for the requisite charges and premium and was issued with a receipt for payment. The Title was later forwarded to the District Land Registrar vide a letter dated 16<sup>th</sup> January, 2014. Therefore, he followed the due process in acquiring the title. There was no fraud or misrepresentation on his part whatsoever and the title was indeed acquired procedurally. The 4<sup>th</sup> Respondents title also had no encumbrances, easement, restriction or conditions. The Learned Counsel relied on the authorities already cited by the Petitioners found at Paragraphs 28, 31 and 32 of their submissions in support of the submissions above.
2. According to the Learned Counsel, both the 1<sup>st</sup> and 2<sup>nd</sup> Respondents supported the averments made out by the 4<sup>th</sup> Respondent that indeed he held a valid title having acquired it legally before transferring it to the Petitioners for valuable consideration. The 1<sup>st</sup> Respondent through the Replying Affidavit dated 29<sup>th</sup> September, 2017 filed on 9<sup>th</sup> October 2017 had stated that the 4<sup>th</sup> Respondent was duly allocated the suit property and the 2<sup>nd</sup> Respondent through the affidavit dated 23<sup>rd</sup> November 2017 stated that the grant with respect to the suit property was registered as CR 62008 to the 4<sup>th</sup> Respondent on first registration and subsequently transferred to the Petitioners.
3. It was thus their humble submission that the 4<sup>th</sup> Respondent's title to the suit property was legally obtained and was valid and hence upon transfer of the same to the Petitioners the Petitioners obtained a valid and legal title. They urged Court to allow the Petition and dismiss the Cross – Petition with costs.

### **E. The Written Submissions by the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties.**

176. The 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties through the Law firm of Messrs. Cootow & Associates Advocates filed their written submissions dated 3<sup>rd</sup> May, 2018. Their case and submission totally opposed the Petition while it fully supported that of the Cross – Petition. Mr. Wafula Advocate recounted the back ground of the matter. According to the Learned Counsel he stated that before the Honourable Court was the Petition dated 24<sup>th</sup> March, 2017. The Petitioners had pleaded that they purchased the suit property



from one Marsha Biry Dena, the 4<sup>th</sup> Respondent vide a written Agreement dated 24<sup>th</sup> March 2015. The Petitioners purchased the suit property after having confirmed from a Certificate of Postal Search dated 13<sup>th</sup> May 2014 that the property was registered in the name of the 4<sup>th</sup> Respondent.

177. According to the Learned County Counsel, the Petitioners had subsequently established that the suit property had earlier been allocated to Bill Kipsang Rotich, the 3<sup>rd</sup> Respondent who then charged the same to the Bank therefore raising the issue of double allocation. The Petitioners therefore prayed for the above stated orders.
178. The Learned Counsel submitted that the Petitioners had indicated in paragraph 8 of the Petition that failure by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to keep proper records was in violation of the provision of Section 7(1) of the *Land Registration Act*. Therefore it follows that the breaches occasioned by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein arose from breach of statutory law. Additionally, filing a Constitutional Petition was in bad faith, bad in law and an abuse of the Court process. Article 22 of *the Constitution* granted each person a right to approach the Court alleging that a right or a fundamental freedom has been violated or is threatened with violation. But first the Petitioner must meet the established constitutional threshold for the Court to deal with the matter as a Constitutional Petition.
179. The principle of constitutional threshold was determined in the celebrated case of “Anarita Karimi Njeru v The Republic 1979 eKLR” where the court stated as follows:-

“We would, however again stress that if a person seeking redress from the High Court or a matter which involves a reference to *the Constitution*, it is important (only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

180. The principle was reaffirmed in the case of “Mumo Matemo v Trusted Society of Human Rights Alliance and 5 Others”, where the Court of Appeal stated as follows:

“We wish to reaffirm the principle on this question in Anarita Njeru (Supra). In view of this we hold that the Petition before the High Court did not meet the threshold established in that case.

It is our finding that the Petition before the High Court was not pleaded with precision as required in constitutional petitions. Having reviewed the Petition and Supporting Affidavit we have concluded that did not provide adequate particulars of the claims relating to the alleged violations of *the Constitution* of Kenya and the *Ethics and Anti-Corruption Commission Act*. Accordingly the Petition did not meet the standards enunciated in the Anarita Karimi Njeru case.”

181. The Learned Counsel submitted that the point they were making was that not all statutory breaches should be clothed as violation of constitutional rights so as to litigate them as constitutional Petitions. The mere allegation that provisions of a statute have been breached did not elevate an ordinary fraud dispute to constitutional level. The Court in the case of:- “Benard Murage v Fine Serve Africa Limited & 3 Others [2015] eKLR” cited with approval the court in the case of:- “Harrikissoon v Attorney General of Trinidad and Tobago (1980) AC 265” which stated as follows with regard to conversion of normal disputes to constitutional references:-

“The notion that wherever there is a failure by an organ of government or a public authority or public officer to comply with the Law this necessarily entails the contravention of



some human right or fundamental freedom guaranteed to individuals by Chapter 1 of *the Constitution* is fallacious. The Right to apply to the High Court under Section 6 (our Section 84) of *the Constitution* for redress when any human right or freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures of invoking judicial control of administrative action. The mere allegation that a human right has been or is likely to be contravened is not itself sufficient to entitle the Applicant to invoke the jurisdiction of the Court under the Section if it is apparent that the allegation is frivolous, vexatious or abuse of the process of Court, as being solely for the purpose of avoiding the necessity of applying the normal way for appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.”

182. The above decision was applied in the case of:- “Alphonse Mwangemi Munga v African Safari Club [2008] eKLR” and the court concluded as follows:-

“...In the instant case, we wish to emphasize the point that parties should make use of the normal procedures under the various laws to pursue their remedies instead of all of them moving to the Constitutional court and making constitutional issues of what is not. They have as a result lost valuable time to pursue contractual claims and / or to have... The upshot of this petition is that it is an abuse of the court process and it is hereby dismissed...”

183. According to the Learned Counsel, applying the above decisions in the present case, the Court would note the issue of double allocation is regulated by Section 7 of the *Land Registration Act*. Therefore any dispute of double allocation could be litigated through the normal process. However the same could not be elevated to constitutional reference. To that extent the Learned Counsel submitted that the Petition was an abuse of the Court process and ought to be dismissed with costs. Therefore for the purposes of demonstrating whether there was a prima facie case, the court was required to examine the Petitioners’ title documents (if any) to satisfy itself that the Petitioners had a right capable of protection.

184. On the merits of the Petition, the Learned Counsel submitted that as regards the merits of the Petition, the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties had demonstrated in the Replying Affidavit that title to the suit property was issued to Bill Kipsang Koech , the 3<sup>rd</sup> Respondent on 7<sup>th</sup> November 2011 whereas the Petitioners’ title was first issued to one Masha Biryia Dena, the 4<sup>th</sup> Respondent, on 8<sup>th</sup> January 2014. Therefore the title issued to the 3<sup>rd</sup> Respondent is first in time. The Court in “Darelle Limited v ASL Limited & 2 Others [Supra]”, stated as follows:-

“It is trite law that when there are two competing titles, the first in time will prevail. This was the finding in the case of Wreck Motors Enterprises vs. the Commissioner of Lands and Others Civil Appeal No. 71 of 1997 where the Court held “where there are two competing titles the one registered earlier is the one that takes priority.”

185. The Learned Counsel on the above position relied on the case of “Gitwany Investment Limited & 3 Others [Supra]”, where the Court similarly held as follows:-

“The first in time prevails, so that the event such as this one whereby a mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel of land then if both are apparently and on the face of them issued regularly and procedurally without fraud save for mistake, then the first in time must prevail.”



186. Taking the above dictum in consideration, the Learned Counsel submitted that it would appear that the title of the 3<sup>rd</sup> Respondent was first in time and must prevail. Therefore on the face of it the Petitioners had no prima facie case. Subsequently, to being registered, the 3<sup>rd</sup> Respondent charged the suit property to Dubai Bank Kenya Limited as security for the loan facility advanced to Premium Petroleum Company Limited vide offer letter dated 26<sup>th</sup> June 2013 marked as “KDIC - 1” and the Charge dated 7<sup>th</sup> March 2014 marked as “KDIC - 3”. The 3<sup>rd</sup> Respondent’s title was confirmed by the Certificate of Postal search dated 6<sup>th</sup> May, 2017 which was confirmed by the register.
187. The Learned Counsel posited that in view of the above provisions, it was clear that Dubai Bank Kenya Limited was dealing with a registered owner who had an indefeasible title. That title had not been revoked by this or any other Court. Therefore this case went to the root of the principle of sanctity of title. The principle of sanctity of title or indefeasibility of title was the foundation of the Torrens System of registration as compared to previous models of land registration practiced by common law systems. The Torrens System was not a system of registration of title but a system of title by registration. In other words, ownership of property was determined by what was indicated on the register and the register was conclusive prove with regard to ownership of the property.
188. According to the Learned Counsel the objective of the Torrens system was to save persons dealing with registered proprietors from the trouble and expense of going behind the register in order to investigate the history of the author’s title and to satisfy themselves of its validity. The court in “Gibbs v Messer [1891] AC (at page 254) PC” stated the classic statement of the purpose of Torrens Land title system as follows:-

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

189. The Learned Counsel submitted that under the Torrens system the philosophy of land titles system embodies three principles namely the mirror principle where the register is a perfect mirror of the state of the title; the curtain principle which holds that a purchaser needs not investigate the history of the past dealings with the land or search behind the title as depicted on the register and the insurance principle where the state guarantees the accuracy of the register. The Court of Appeal in “Charles Karathe Kiarie & 2 Others v Administrators of the Estate of John Wallace Mathare (Deceased) & 5 Others [2013] eKLR” applying the Classic Privy Council decision in “Gibbs – v - Messers [1891] AC 247 PC” stated as follows:-

“The word ‘Torrens’ is derived from Sir Robert Torrens, the third Premier of South Australia and pioneer and author of a simplified system of land transfer which he introduced in 1858. This is a system that emphasizes on the accuracy of the land register which must mirror all currently active registrable interests that affect a particular parcel of land. Government, as the keeper of the master record of all land and their owners, guarantees indefeasibility of all rights and interests shown in the land register against the entire world and in case of loss arising from an error in registration the person affected is guaranteed of Government compensation. This statutory presumption of indefeasibility and conclusiveness of title



under the Torrens system can be rebutted only by proof of fraud or misrepresentation in which the buyer is himself involved.”

190. It was their further submissions that the suit land having been allocated to the 3<sup>rd</sup> Respondent in 2011, the 2<sup>nd</sup> Respondent did not have power to allocate the same to the 4<sup>th</sup> Respondent in 2014 as shown by the Petitioners’ title. Lord Denning in “Macoy – v - United Africa Company Limited [1961] 3 ALL ER 1169” delivered the opinion of the Privy Council in the following words:-

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void and void without more ado though it is sometimes convenient to have the court to declare it to be so. Any every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

191. In conclusion, the Learned Counsel submitted that it followed that the Petitioners’ title stems from an illegality and the same was null and void. The said title did not confer any rights on the Petitioners capable of enforcement. The Petition must therefore fail.

#### **XIV. Analysis and Determination**

192. I have carefully considered all the filed pleadings pertaining to the Petition dated 12<sup>th</sup> March, 2017, the Affidavits by the Petitioners, the Respondents and Interested Parties, the Cross – Petition by the 3<sup>rd</sup> Respondent/Cross – Petitioner, the responses to the Cross - Petition, the articulate and comprehensive written submissions by both the Petitioners and the Respondents, the cited myriad of authorities, the appropriate provisions of *the Constitution* of Kenya, 2010 and the statutes.

193. For the Honorable Court to reach an informed, just, fair and reasonable decision, it has condensed the Subject matter into the following four (4) salient issues for its determination. These are:-

- a. Whether the Petition and the Cross - Petition by the Petitioners and 3<sup>rd</sup> Respondent/ Cross - Petitioner respectively meet the threshold for Constitution Petition.
- b. Whether *the Constitution* Petition has any merit and, if affirmative, if the Petitioners are entitled to the reliefs sought?
- c. Whether the Cross - Petition has any merit and, if affirmative, if the Cross - Petitioner is entitled to the reliefs sought
- d. Who will bear the Cost of the Petition and the Cross Petition?

#### **IssueNo. a). Whether the Petition and the Cross - Petition by the Petitioners and 3<sup>rd</sup> Respondent/ Cross - Petitioner respectively meet the threshold for Constitution Petition.**

194. Under this Sub - heading, for the Honourable Court to respond to this query, assessing certain aspects of the concept of Constitutional provision are inevitable. To begin with, under the provision of Article 2 (1) & (4) of Constitution of Kenya defines *the Constitution* as being the Supreme law of the Republic and it bids all persons and all States at all levels. Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency and any act or omission in in contravention of this Constitution is invalid.

195. Additionally, I dare say that a Constitution is a living tissue. Just like all other tissues, it has to be fed and watered. It breathes without oxygen and freshness it will die. I have learnt that these things are not



just metaphorical. They are real. As a matter of course, *the Constitution* of Kenya under Article 259 (1) provides a guide on how it should be interpreted as such: -

- a. Promotes its purposes, values and principles;
- b. Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
- c. Permits the development of the law; and
- d. Contributes to good governance.....”

196. This Court must give a liberal interpretation and consideration to any provision of *the Constitution* and have regard to the language and wording of *the Constitution* and where there is no ambiguity attempt to depart from the straight texts of *the Constitution* must be avoided. It must always be interpreted and considered as a whole with all the provisions sustaining and coordinating each other and not destroying the other.

197. Based on the principles set out in the edit of the Court of appeal case of the “Mumo Matemu v Trusted Society of Human Rights Alliance & Another (2013) eKLR” provided the standards of proof in the Constitutional Petitions as founded in the case of “Anarita Karimi Njeru v Republic [1980] eKLR 154” where the court is satisfied that the Petitioner’s claim was well pleaded and articulated with absolute particularity. It held: -

“Constitutional violations must be pleaded with a reasonable degree of precision.....”

Further, in the “Thorp v Holdsworth [1886] 3 Ch. D 637 at 639, Jesse, MR said in the year 1876 and which hold true today:

“The whole object of pleadings is to bring the parties to an issue and the meaning of the rule.....was to prevent the issue being enlarged which would prevent either party from knowing when the cause came on for trial what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues and thereby diminish expense and delay especially as regards the amount of testimony required on either side at the hearing.”

198. Article 23 (3) of *the Constitution* empowers a court to grant appropriate reliefs in any proceedings brought under Article 22 where there has been violation or threat of a violation of a fundamental right or freedom. The relief may include a conservatory order.

199. In this Petition, the Petitioners sought for declaratory orders that:-

- a. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents breached the Principles of Land Policy, Principle of Legality, rule of law, *Land Act*, *Land Registration Act*, *National Land Commission Act* in causing the double allocation/registration and maintenance of two [2] Land Registry records for Plot MN/I/6589;
- b. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents’ actions in respect of Plot No. MN/I/6589Is contrary to the Principle of Security Land Rights and an affront to the sanctity of title contrary to public policy contemplated by the *Land Act*, *Land Registration Act* and Chapter 5 of *the Constitution* hence unconstitutional;
- c. A declaration that the Petitioners are innocent purchasers for valuable consideration without notice whose rights are absolute and cannot be impeached in favour of those of the 3<sup>rd</sup> Respondent;



- d. An order that the 3<sup>rd</sup> Respondent is estopped from challenging the Petitioners' proprietary rights over Plot No. MN/I/6589;
  - e. An order directing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to cancel and revoke from the Land Records the 3<sup>rd</sup> Respondent's Title No. CR 59150 for Plot No. 6589/I/MN;
  - f. An order of injunction prohibiting and restraining the Respondents and the Interested Parties by themselves, their servants and/or agents from effecting any further dealings, disposing off, auctioning or in any manner interfering with the Petitioners' possession, occupation and ownership of all that piece of land known as Title No. CR 62008, Plot No. 6589/I/MN.
  - g. In the alternative to Prayer "D, E & F" hereinabove, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents be ordered to pay full compensation according to the market value of the property together with developments thereon as maybe established and assessed at the date of judgment;
  - h. Such other Orders or reliefs as this Honourable Court shall deem fit and just in the circumstances.
200. In this Cross - Petition, the Cross - Petitioner sought for the orders that:-
- a. An Order that the title held by the 4<sup>th</sup> and 5<sup>th</sup> Respondent Mohamed Sheikh Abdulahi and Sheikh Daib Mohamed dated 8<sup>th</sup> January, 2014 over L.R. No. MN/1/6589 be and is hereby declared to be invalid and the first and second Respondents are hereby ordered to cancel it within the next thirty (30) days;
  - b. A Permanent injunction restraining the fourth and fifth Respondents, their any constructions in the suit land or in any other way interfering with L. R No.MN/1/6589;
  - c. The structures constructed on L. R No. MN/1/6589 by the fourth and fifth Respondents be removed there from within 90 days of the judgment of the Court;
  - d. All costs incidental to the removal of the structures in (c) above be borne by the Respondents;
  - e. The Honourable Court do make any such other or further Orders as it may deem just and expedient in the circumstances to remedy the violation of the Petitioners' fundamental rights.
201. This Honorable Court must establish the constitutional basis of the Petition and the Cross - Petition which is founded on the facts of the Petition and the Cross - Petition. I have gone through the records and the pleadings both by the Petitioner and the Cross Petitioner and as far as I concerned they do raise intensive and indepth constitutional issues which not exhaustively dealt with in an ordinary suit. For that reason, I discern that the objection though belatedly raised by the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties at the submission stage to the effect that the Petition offends the doctrine of Constitutional avoidance is unfounded, baseless and misplaced altogether.
202. Thus, in application of the set out legal principles for filing a Constitutional Petition and the cross petition, the Honorable court is fully satisfied that the Petitioner and the Cross Petitioner herein has dutifully complied and fully met the threshold of reasonable precision in pleadings for instituting this Petition and Cross - Petition against the Respondents herein and pleading for the prayers sought. The next question would be whether the Petitioners and the Cross - Petitioner had proved the alleged breach of the rights particularized in the Petition and Cross Petition respectively as to fair administration in furtherance to the rights of the Petitioners and Cross Petitioner on the suit property.



**Issue No. b). Whether the Constitutional Petition has any merit and, if affirmative, if the Petitioners are entitled to the reliefs sought?**

203. Under this sub heading, the Honourable Court is critically informed that the main substratum in this matter is one on ownership and two competing titles over one suit property. In Kenya, land is a very sensitive commodity. The community depends on it for their livelihood. The instant case, it is a dispute that would require Solomonic wisdom as found in 1 Kings 3 Verses 16 to 28 on the story of the two Harlots who were competing for one child before King Solomon and his eventual wise Judgement. In so doing, it's imperative to extrapolate indepth on the concept and means of Land Allocation in Kenya and whether or not the Petitioners were innocent bona fide purchasers of land for value from the 4<sup>th</sup> Respondent.

204. Section 7 of the Land Act, No. 6 of 2012 provides as follows:-

Methods of acquisition of Land – Title to land may be acquired through:

- a. Allocation;
- b. Land adjudication process;
- c. Compulsory acquisition;
- d. Prescription;
- e. Settlement program;
- f. Transmissions;
- g. Transfers.
- h. Long term leases exceeding twenty one years created out of private land; or
- i. Any other manner prescribed in an Act of parliament.

The effectiveness and efficacy of the registration of land is founded under the provisions of Sections 24, 25 and 26 of the Land registration Act, No. 3 of 2012. They provide as follows:-

24. Interest conferred by registration

Subject to this Act-

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

Section 25 (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interest and claims whatsoever, but subject-



(a) To the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) To such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register.

Section 26 (1) of the *Land Registration Act* provides that:-

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme

205. Now turning to the issues at hand. I have considered the pleadings, evidence, submissions, authorities cited by both parties and the applicable law and in my view find the following issues commend for determination;

a. Who is the legal proprietor of the suit land.

b. Whether the Petitioners are entitled to the prayers sought in the Petition

206. Both the 3<sup>rd</sup> Respondent and the 4<sup>th</sup> Respondent claim that they were issued with Letters of Allotment on 16<sup>th</sup> September, 1994. Both parties held the Letters of Allotment said to have been issued by the County Government allocating them the suit plot.

207. The Honourable Court has critically examined the two claims by the 3<sup>rd</sup> and the 4<sup>th</sup> Respondents. It has noted that the 3<sup>rd</sup> Respondent produced a title and an alleged letter by the National Land Commission but which did not have a letter head. That was rather unusual from such a statutory institution. Accordingly the 3<sup>rd</sup> Respondent told the court that he had never applied for approval for the construction of the Perimeter wall.

208. From the basic registration documents, the Honorable Court is fully informed from the evidence by the RW – 3 being the Assistant Director of Land Administration to the effect that they had no records for the suit land for the 3<sup>rd</sup> Respondent. On the contrary, they only had those of the 4<sup>th</sup> Respondent. This position was backed up by the evidence by the RW – 2 – the Land Registrar, Mombasa, Mr. John Gichuki Wanjohi for the 2<sup>nd</sup> Respondent herein – the Land. From his witness statement filed in Court on 15<sup>th</sup> July, 2020 he stated as follows:-

a. It was evident that both new Grant registered as CR 59150 and CR 62008 for LR No. MN/1/6589 were issued in respect of the former Government land and the allocation done through the office of the Commissioner of lands.

b. Upon scrutiny of record in their custody he was only able to access both the Deed and Correspondence files in respect to New Grant for LR No. MN/1/6585 registered as CR. 62008.

c. The Grant LR No, MN/1/6589 CR. 62008 was registered to Masha Biryia Dena on first registration. The Grant was registered and was forwarded through the Office of the Chief Land Registrar on 17<sup>th</sup> January, 2014.



- d. The forwarded Grant was received together with other Grants as captured on letter dated 4<sup>th</sup> February, 2014. It was from the office of the Principal Registrar of Titles.
  - e. It was registered on 10<sup>th</sup> February, 2014 and bears the authentication stamp from the office of the Chairman, National Land Commission. The NLC should be able to explain whether the ground report was filed.
  - f. It was transferred to the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners vide a transfer dated 24<sup>th</sup> June, 2015 and registered in Lands Office on 26<sup>th</sup> June, 2015.
  - g. The correspondence file for Grant registered as CR. 59150 was absent. Thus, it was hard to explain how and when it was received in the Registry for registration.
  - h. It is not possible to have the same parcel of land, bearing the same land reference number, same acreage and same Deed Plan number allotted or in two different people.
209. However, based on leave of court he was supplied with copies of the registration documents by the Advocate for the 3<sup>rd</sup> Respondent. Be that as it may, the Court was able to note several inconsistencies from these copies. For instance, the Letter of allotment dated 16<sup>th</sup> September, 1994; Reference No. 127258/6 Term 99 years from 1<sup>st</sup> October, 1994. Stand Premium Kshs. 65,000/- from Letter of Allotment. With reference to page 4 of the stand premium – Kshs 57,000/- receipt of 8<sup>th</sup> January, 2004 which was different from the Letter of Allotment from the receipt – sale No. 127258 he could not clearly tell the number – there is no. 6. RW 2 argued that the letter of allotment showed that the rent was Kshs 33,250/-; at page 4 the receipt for rent was for Kshs 4,190/- which was different from the rent in the allotment letter. In the receipt, the total was Kshs 70,000/-; the Letter of allotment was Kshs 77,060/- by implication he paid less Kshs 7,060/-. The witness he did not have any other receipts i.e. he did not have evidence of accepting the letter of allotment. He had not stated from his affidavit when he received the Letter of Allotment. It was a long period.
210. I am sure one may belittle this issue here but to me its critically potent. I take note that being that the Letter dated 6<sup>th</sup> November, 2012 was not on an official letter head and the 3<sup>rd</sup> Respondent did not call the author of the said letter to determine its authenticity, the same did not come from him especially being that all letters from Government officers do bear and have letter heads. This is not an exception.
211. On the Grant by the 4<sup>th</sup> Respondent he produced documents showing that he paid the premium amount Kshs. 77,060/- which was evidenced by a receipt dated 12<sup>th</sup> November, 2013. This was further supported by a letter dated 16<sup>th</sup> January, 2014 which had a Letter head. Further during the trial, RW - 1 who was a witness for the 1<sup>st</sup> Respondent told the court that the first document – (a) Letter 16<sup>th</sup> January, 2014 to National Land Commission forwarding document to LR. No. 6589/1/MN. (b) Letter dated 4<sup>th</sup> February, 2014 addressed to John Gichuki Wanjohi. Forwarding 4 Grant documents 6589/1/MN is included in the list. (c) A title deed 6589/1/MN CR. 62008 – registered in the name of Masha 10<sup>th</sup> February, 2014. The same was transferred through a transfer dated 24<sup>th</sup> June, 2015 to 1<sup>st</sup> and 2<sup>nd</sup> Petitioners. They registered on 26<sup>th</sup> June, 2015. we do not have record for the property by the 3<sup>rd</sup> Respondent/Defendant. Neither do they had any letter forwarding to them.
212. According to the witness, initially it was the Commissioner of Land who would be allocating public land as provided for under the provision of Section 3 of the Government *Land Act*, Cap. 280 (Now Repealed) as indicated herein below:-
213. the provision of Section 3 of the Government *Land Act*, Cap. 280 (Now repealed) which provides as follows:-



3. The President, in addition to, but without limiting, any other right, power or authority vested in him under this Act, may— (a)\* subject to any other written law, make grants or dispositions of any estates, interests or rights in or over unalienated government land; (b) with the consent of the purchaser, lessee or licensee, vary or remit, either wholly or partially, all or any of the covenants, agreements or conditions contained in any agreement, lease or licence, as he may think fit, or, with the like consent, vary any rent reserved thereby; (c)†extend, except as otherwise provided, the time to the purchaser, lessee or licensee for performing the conditions contained in any agreement, lease or licence liable to revocation for such period, and upon such terms and conditions, as he may think fit, and the period so extended, and the terms and conditions so imposed, shall be deemed to be inserted in the agreement, lease or licence and shall be binding on the purchaser, lessee or licensee, and on all transferees, mortgagees, assignees and other persons claiming through him; (d)\* accept the surrender of any lease or licence under this Act; (e)† accept the surrender of any certificate granted under

- (e) accept the surrender of any certificate granted under the East Africa Land Regulations, 1897, or of any lease granted under the Crown Lands Ordinance, 1902, and grant to the lessee a lease under this Act of the area the subject of the surrendered certificate or lease, provided such surrender is made within such period as the President may by notice in the Gazette direct, such period to be not less than twelve months from the commencement of this Act:

Provided that this paragraph shall not apply to land granted under the East Africa Land Regulations, 1897, or leased under the Crown Lands Ordinance, 1902, upon terms which differ from the ordinary terms in force at the time at which such land was granted or leased; and

- f. accept the surrender of any freehold conveyance under the Crown Lands Ordinance, 1902, or freehold grant under this Act.

The meaning of “alienated or un – alienated government land” was exhaustively defined in the Supreme Court Case of “Petition No. 5 (E006) of 2022 – Torino Enterprises Limited v Hon. Attorney General” as thus:-

Para 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).....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”

Further, under the contents of Para 55 of the same case stated that:- ”.....once an individual or entity acquires any unalienated 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”.

However, the procedure of acquiring unalienated land to private land had now changed whereby allocation of all public land was undertaken by the National Land Commission. Basically, the procedure of allocation of public land was and still is extremely stringent. The public land has to be available for allocation or alienation. Further, it would entail one making an application for allocation of the land. Upon assessment on its availability, it would entail the issuance of a Letter of Allotment and the Part Development Plan (PDP) generated by the District Land Surveyor or Physical Planner and whereby these documents were forwarded



to the Director of Surveyor for the Registration of Index Map (RIM) and the Director of Physical Planning for approval and registration. It's the said Approved Plan that was sent to the Commissioner of Lands who would prepare the Grant to be forwarded to the Land registrar or Registrar of Title for its registration. There was always a letter forwarding a Grant authored by the Commissioner of Land or the NLC to date to the Land Registrar, the Lessors were always copied in the letter. Refers to the documents by the 3<sup>rd</sup> Defendant. Evidently, in the instant case, there was no letter from either the Commissioner of land or the NLC forwarding a Lease to the Land Registrar. At this juncture, the testimony by the Assistant Director of Land Administration – RW – 3 is extremely significant here. He testified that there was a letter dated 6<sup>th</sup> November, 2012 from the correspondence file CR. 62008 – LR No. 6585/MN/I. The witness did not have any other records apart from those of the 4<sup>th</sup> Respondent. The records were maintained at the strong room of the Ministry of Land – Ardhi house's office at Nairobi. The records were the same. He was employed in the year 2020 but what he had was on record. All the documents he got were copies supplied to him by the Advocates for the 3<sup>rd</sup> Respondent. The current owners were Mohamed Sheikh Abdulahi and Sheikh Daid Mohamed. Before it was for Marsha Biryana Dena who was initial owner.

214. According to RW - 1 there were two conflicting title deeds (a) CR. 59150 and (b) CR. No. 620088. CR meant filing system "Certificate of Registration". There is a register for these CR. Number. They are sequential. Before coming to court he never checked the register i.e. C.R. yet he knew they were number. It was not possible to have a blank. A name was to be allocated in the register. From the CR. 59150 comes first, ideally it would appear the CR. No. 59150 would appear first though it was not necessary so particularly when they were rejected or otherwise Government Allocating land. It starts with the Letter of Allotment. Referred to – 3<sup>rd</sup> Defendant – the Letter allotment is issued to Mr. Bill Kipsang Rotich but it was not signed.
215. According to RW - 3 who was the witness to the 3<sup>rd</sup> Respondent to the court that with reference to the Letter of allotment dated 16<sup>th</sup> September, 1994; the witness told the court that the same was issued for property LR. No. MN/I/6589 – Nyali Mombasa. It was issued by the Commissioner of Land. With reference to another letter of allotment issued to Marsh Biryana Dena dated 16<sup>th</sup> September, 1994 for LR. No. MN/I/6589 – Nyali Mombasa issued by the Commissioner of Lands. The two (2) Letters of Allotment are not similar as they were issued to different parties though on even dates. It was possible to issue two Letters of Allotment for the same property but absurd that they were issued on the same date as it was in the case of double allocation. However, in such cases the Letters were dated the same date. What determined the property allottee, the Letters of Allotment had conditions printed overleaf them which were to be fulfilled within the prescribed period of 30 days. They included but not limited to the payment of a Stand Premium and Ground Rent, undertaking some development for the purposes upon which the Letter of Allotment was applied for. Furthermore, it was trite law that Letter of Allotment were incapable of conferring interest (passing good title) in land as they were nothing than mere offer awaiting the acceptance and fulfilment of the said conditions stipulated hereof. In a nutshell, a Letter of Allotment was an offer awaiting an acceptance made in writing by the Allottee to the Commissioner of Lands, ordinarily it's accompanied with fees to the relevant authority.
216. A perusal of the process of disposition of Government land even at that time reveals that certain procedures and processes had to be followed. Those included the identification of land by the Local Government Council within which the land was situated to inter alia find out if the parcels of land set for alienation was indeed Government Land and second, if it was available for disposition. It is trite law, that under the repealed Government Lands Act, Cap. 280 a Part Development Plan (PDP) had



to be drawn and approved by the Commissioner of Lands before any unalienated Government Land could be allocated. A letter of allotment, is then based on the Part Development Plan.

217. As the Court of Appeal stated in the case of:- “D. Joseph N. K. Arap Ng’ok v Justice Moiyo Ole Keiwa & (Supra)”:-

“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 offeror and the offeree and does not confer interest in land at all. It cannot thus be used to defeat a title of a person who is the registered proprietor of the said parcel of land.”

218. In the instant case, making reference to the letter dated 22<sup>nd</sup> February, 1994 by Mr. B.K. Rotich addressed to the Commissioner of Lands. The substance refer to MN/I/6589 – Nyali Mombasa. It was thanking for the offer and enclosing a Cheque of Kshs. 8,000/- as part payment. (The Letter of acceptance was expunged from the record of the court). With reference to a copy of the cheque No. 060367 dated 21<sup>st</sup> February, 1995; the witness told the court that the cheque was drawn to the Commissioner of Lands. It was for Kshs. 8,000/-. With reference to the receipt No. 067106 dated 22<sup>nd</sup> February, 1995; the witness told the court that he could only see the figures that were not clear and hence being a photograph he could not see the figures clearly. The rate was Kshs 77,060/- as the assessment of Kshs 8,000/- was made and the balance would be Kshs 69,000/-. On the letter of allotment, the reference number was 127258/6 the reference number on the receipt of 22<sup>nd</sup> February, 1995 was 127258.

219. Further the witness confirmed that there were documents in their possession formally for – parcel No. MN/I/6589 from the correspondence file No. 127258 – for the subject for Mr. Masha Biry Dena they contain:-

- a. Letter of Allotment to Masha Biry 16<sup>th</sup> September, 1994 – MN/I/6589 Nyali – Mombasa by Commissioner.
- b. A Letter of Acceptance from Masha Biry Dena dated 4<sup>th</sup> November, 2013 to the Commissioner of Land.
- c. It is forwarding a Banker Cheque of Kshs. 77,060/-.
- d. A Memo (internal) from the Chairman of NLC to the cashier dated 7<sup>th</sup> November, 2013 it’s an authority to pay for the cashier to accept payment from the allottee.
- e. There was an official receipt of acknowledgement No. 127258 dated 12<sup>th</sup> November, 2013 for Kshs. 77,060/-.
- f. Forwarding forms and forwarding forms of execution by the Commissioner of Land.
- g. A Certificate of Stamp Duty – File No. 127258 dated 27<sup>th</sup> June, 2014.
- h. There is a Letter dated 16<sup>th</sup> January, 2014 forwarding the Grant for MN/I/6589 Mombasa in the name of Masha Biry Dena to the District Land Registry.
- i. A file cover – photocopy of it.

220. RW - 3 told the court that the Letter of Allotment by the 3<sup>rd</sup> Respondent which had the reference No. they had not taken any action. From where he sat he did not have the record for the 3<sup>rd</sup> Respondent. What he had produced would be ordinary the complete record. From the forwarded documents to him by the Counsels, he compared what they had with what he had. He had been shown the receipts of the



payment of Kshs. 8,000/- and cheque. These records were not in their records, but on face value it was a confirmation that they are value of payments. With reference to the receipt dated 8<sup>th</sup> January, 2004 for Kshs. 70,000/- and on the face value its being received from Mr. Bill Kipsang Rotich – It was for 127258, which appeared on the correspondence file. With reference to the letter dated 6<sup>th</sup> November, 2012 the witness told the court that Reference No. 127258/22 was addressed to the Senior Registrar of Titles, Mombasa. It had the same reference numbers. The subject of letter is MN/I/6589/Mombasa Municipality. It was forwarding the Grant for registration in the name of Mr. Bill Kipsang Rotich. It was copied to Bill Kipsang Rotich. He was called to appear before the Registrar of Title – the letter dated 16<sup>th</sup> January, 2014 forwarding the Grant MN/I/6589/Mombasa this was no inclusion of the name “Nyalii”.

221. According to the witness, from their office they did not have anything denouncing the letter dated 6<sup>th</sup> November, 2012. They held the records of the lease and forwarding them to the registrar. The preparation of the Grant was done by the Commissioner of Lands and those were the records he had produced. With reference to the grant dated on the day of execution 7<sup>th</sup> September, 2011 in the names of Bill Kipsang Rotich, the witness told the court that from their offices they had nothing that disputes the validity of this Grant. The CR. No. on the grant in 59150. The witness told the court that they did not have the records for Mr. Bill Kipsang. The first time he saw these documents was when they were brought to him by Mr. Bwire Advocate. Officially, on his file, he never had any of the following documents:-
- a. Letter of Allotment.
  - b. Cheques.
  - c. Receipts.
  - d. Letters forwarding the Grant.

222. In the case of “Mbau Saw Mills Limited v Attorney General for and on behalf of the Commissioner of Lands & 2 others [2014] eKLR” it was stated as follows:-

“I have considered the evidence on record and the submission of the parties and do find that a Letter of Allotment was issued to Mr. Joseph K. Mugambi on 21/10/1971 with a condition to accept the offer within 30 days. He did not do so and thereafter the offer lapsed 30 days after it was made in accordance with the allotment letter. Having failed to accept the offer as stipulated in the letter of allotment Mr. J.K. Mugambi did not acquire interest in the unsurveyed lorry depot and therefore had no interest to transfer to the Plaintiff. This court holds that a letter of allotment does not confer any property rights to a person unless there is acceptance and payment of the stand premium and ground rent. In the letter dated 17/6/1988 which was written about 17 years after the allotment letter was issued, the Commissioner of Lands confirmed that the plot was allocated to Joseph M. Mugambi in 1971 for lorry depot. However, the plot had neither been paid for nor an acceptance of the offer in the allotment letter made. The implication of this letter was that the allottee had not complied with the terms of the allotment letter and therefore the offer had lapsed. The offer having lapsed, the allottee Mr. Joseph M. Mugambi did not have any interest to transfer to the Plaintiff and therefore all transactions between the allottee and the Plaintiff were a nullity in law.”

223. In the absence of signatures and a letter head which would have been proof that the said letter of grant to the 3<sup>rd</sup> Respondent was authored by a government official in occupation at the National Land



Commission or County Government of Mombasa. I wonder why the 3<sup>rd</sup> Respondent would ignore such an integral detail especial knowing that it would call to the authenticity and legitimacy of his title.

224. Having failed to pay the entire requisite amount and showing prove that the documents were legitimate, the 3<sup>rd</sup> Respondent did not acquire legitimate interest on the suit property further the two officials from the Lands Office both admitted to only having the records for the 4<sup>th</sup> Respondent. Additionally, what is rather intriguing in this matter were the lethargic, laid - back and cavalier attitude graphically depicted by Mr. Bill Kipsang Rotich upon the ostensible registration of the Grant. Firstly, he casually claims to have constructed a perimeter wall but never produced any empirical documentary evidence or corroborated evidence from the Contractors, or neighbours from the filed pleadings and oral evidence such as approvals, Bills of Quantities, Constructors costs and so forth for it adduced from the filed pleadings or the evidence. Secondly, he proceeded to Charge the Grant with Dubai Bank Limited for a sum of Kenya Shillings Sixteen Million (Kshs. 16, 000, 000/=). Thirdly, the Chargor though claim to have undertaken due diligence prior to offering the high financial sum, one wonders at which registry this was done as from the evidence by the Land Registrar, Mombasa and the Assistant Director of Lands these records were never available for inspection or registration of any instrument against the said Grant. Finally, and the most disturbing and crucial one. Upon registration and transferring of the Grant from the 4<sup>th</sup> Respondent to the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners, they immediately undertook to cause massive development on the suit land. From the evidence adduced by a Valuer trading in the names and style of “Fairlane Valuers Limited” the development by the Petitioners was of residential premises amounting to a sum of Kenya Shillings One Thirty Five Million (Kshs. 135, 000, 000/=). This was a colossal sum and major development. The facts were never disputed. Now, it is rather self defeating that all these activities would be taking place on land supposedly belonging to Mr. Bill Kipsang Rotich without his attention nor him taking any appropriate legal action whatsoever against the Petitioners. He only had to waiting until the Petitioners instituted this Petition for him to lean on it in form of a Cross – Petition. A clear after thought. But even then, I dare say, he was bereft of authentic documentations to support the registration of the Grant.

225. On whether the Petitioners are entitled to the prayers sought; the Court notes for a purchaser to successfully rely on the bona fide doctrine as was held in the case of “Hannington Njuki v William Nyanzi High Court civil suit number 434 of 1996”, must prove that: -

- “ 1. he holds a certificate of title;
2. he purchased the property in good faith;
3. he had no knowledge of the fraud;
4. he purchased for valuable consideration;
5. the vendors had apparent valid title;
6. he purchased without notice of any fraud; and
7. he was not party to the fraud.”

226. The Petitioners through PW 1 he met the 4<sup>th</sup> Respondent when they wanted to sell his plot. They executed an agreement and paid for it. PW - 1 told the court that he did all the due diligence, they got approvals from NEMA, they moved in and lived for several months. But someone came and claimed the land and wanted them out, so they sought for legal action. The statement – supplementary paragraph 2 Affidavit dated 25<sup>th</sup> April, 2018 – he relied on the same as evidence in court. With reference to Paragraphs 5, 6 and 7 of the Supplementary Affidavit the witness told the court that an official search



was done by the advocate. The land belonged to the Petitioners and they had the documents. They relied on the documents “Petitioner/ Plaintiff’s Exhibit 6”.

227. PW - 1 confirmed that they conducted due diligence – official search. The owner was Marsha Biryra Dena. They obtained all the pre-requisite documents. They physically visited the land. They were contented – it was vacant. There was a fence. They were given all the necessary documents by the Land Registrar.
228. The Petitioners have produced an agreement to show that they bought the property from the 4<sup>th</sup> Respondent who the court has already determined is the bona fide owner of the suit land. I therefore proceed to allow all the prayers sought in the Petition.

**Issue No. c). Whether the Cross Petition has any merit and, if affirmative, if the Cross Petitioner is entitled to the reliefs sought**

229. From the filed records, the 3<sup>rd</sup> Respondent/Cross - Petitioner filed a response and a Counter - Claim claiming ownership of the suit property which the Court has since determined previously in this Petition that the same was suspicious as some alleged letters from the Lands office do not have a letter head and some letters are not signed which are crucial to determining his ownership of the land.
230. By and large, and from all the issues raised herein, the 3<sup>rd</sup> Respondent/Cross – Petitioner has failed to prove he legitimately acquired the suit land. Consequently, the Cross – Petition and the Counter - claim stands outrightly dismissed.

**Issue No. d). Who will bear the Costs of the Petition and the Counter claim**

231. It is now well established that the issue of Costs is the discretion of Courts. Cost is the award that a party is granted at the conclusion of a legal proceeding or action. According to the Black Law Dictionary, “Cost” is defined to mean, “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”. The provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow events. By the events, it means the results or outcome of any legal action or proceedings thereafter. The case before Court being a Constitutional Petition, Rule 26 (1) and (2) of *the Constitution* of Kenya (Protection of Rights and fundamental Freedoms practice and Procedure Rules 2013) provides: -

- “(1) The award of costs is at the discretion of the Court.
- (2) In exercising its discretion to award costs, the Court shall take appropriate measures to ensure that every person has access to the Court to determine their rights and fundamental freedoms.”

232. In the case of “Reids Hewett & Company v Joseph AIR 1918 cal. 717” and “Myres v Defries [1880] 5 Ex. D. 180”, the House of the Lords noted: -

“The expression “Costs shall follow the events” means that the party who, on the whole succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word ‘event’ should be read distributive and the costs of any particular issue should go to the party who succeeds upon it.....”



233. Further, these legal principles were upheld in the Supreme Court case of “Jasbir Rai Singh v Tarchalans Singh, [2014] eKLR” and the Court of Appeal cases of “Cecilia Karuru Ngayu v Barclays Bank of Kenya & Ano. [2016] eKLR” the Courts held: -

“.....the basic rule on attribution of costs is that costs follow the event.....it is well recognized that the principles costs follow the event is not to be used to penalize the losing party rather it is for compensating the successful party for the trouble taken in presenting or defending the case”.

234. Therefore, the events in the instant case is that the 1<sup>st</sup> and the 2<sup>nd</sup> Petitioners herein have succeeded in establishing its case on preponderance of probabilities. For that very fundamental reason, therefore, the costs of this Petition and Counter - Claim shall be made to the Petitioners.

## **XV. Conclusion and Disposition**

235. Ultimately, having intensively and thoroughly deliberated on all the framed issues herein, this Honorable Court arrives at the finding that the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners herein have succeeded in all the prayers sought from its filed Petition. For avoidance of doubt, I allow the Petition dated 24<sup>th</sup> March, 2017 specifically under the following terms: -

- a. That judgement be and is hereby entered in favour of the Petitioners as per the Petition dated 24<sup>th</sup> March, 2017 in its entirety.
- b. That the Counter Claim dated 3<sup>rd</sup> November, 2017 by the 3<sup>rd</sup> Respondent be and is hereby dismissed for lack of merit.
- c. That a declaration do and is hereby made that 1<sup>st</sup> and 2<sup>nd</sup> Respondents breached the Principles of Land Policy, Principle of Legality, Rule of Law, [Land Act](#), [Land Registration Act](#), [National Land Commission Act](#) in causing the double allocation/registration and maintenance of two [2] Land Registry records for Plot MN/I/6589.
- d. That a declaration do and is hereby made that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' actions in respect of Plot No. MN/I/6589 is contrary to the Principle of Security Land Rights and an affront to the sanctity of title contrary to public policy contemplated by the [Land Act](#), [Land Registration Act](#) and Chapter 5 of [the Constitution](#) hence unconstitutional.
- e. That a declaration do and is hereby made that the Petitioners are innocent purchasers for valuable consideration without notice whose rights are absolute and cannot be impeached in favour of those of the 3<sup>rd</sup> Respondent.
- f. That an order do and is hereby issued estopping the 3<sup>rd</sup> Respondent from challenging the Petitioners' proprietary rights over Plot No. MN/I/6589.
- g. That an order do and is hereby issued directing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to cancel and revoke from the Land Records the 3<sup>rd</sup> Respondent's Title No. CR 59150 for Plot No. 6589/I/MN.
- h. That an order do and is hereby issued directing the Respondents to forthwith undertake valuation and pay the compensation in respect of the further utilization by the 1<sup>st</sup> Respondent of 0.01 hectares of Land Sub - division Number 2445 Section VI Malindi North and 0.0585 hectares of Subdivision Number 2446 Section VI Malindi North within 30 days or such period as the Honourable Court may order with interest.



- i. That an order of injunction do and is hereby issued prohibiting and restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents and the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties by themselves, their servants and/or agents from effecting any further dealings, disposing off, auctioning or in any manner interfering with the Petitioners' possession, occupation and ownership of all that piece of land known as Title No. CR 62008, Plot No. 6589/I/MN
- j. That the costs and interest of the Petition are awarded to the Petitioners to be borne by the 3<sup>rd</sup> Respondent and the 1<sup>st</sup> & 2<sup>nd</sup> Interested Parties herein and the Petitioners, 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondent shall have the costs of the Cross - Petition.

It Is So Ordered Accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED AT MOMBASA THROUGH MISCROFT TEAMS VIRTUALLY THIS 21ST DAY OF MARCH, 2025.**

.....

**HON. MR. JUSTICE L. L. NAIKUNI**  
**ENVIRONMENT AND LAND COURT AT**  
**MOMBASA**

Judgement delivered in the presence of: -

- a. M/s. Firdaus Mbula – the Court Assistant.
- b. M/s. Monari Advocate holding brief for Mr. Mogaka Advocate for the 1<sup>st</sup> & 2<sup>nd</sup> Petitioners.
- c. No appearance for the 1<sup>st</sup> Respondent.
- d. M/s. Kiti Advocates for the 2<sup>nd</sup> Respondent.
- e. Mr. Mukuha Advocate holding brief for Mr. Bwire Advocate for the 3<sup>rd</sup> Respondent/Co – Petitioner.
- f. No appearance for the 4<sup>th</sup> Respondent.
- g. Mr. Weloba Advocate holding brief for Mr. Wafula for the 1<sup>st</sup> & 2<sup>nd</sup> Interested Parties.

