



**Chernel & 3 others v Ministry of Lands and Physical Planning & 4 others (Environment & Land Petition 22 of 2022) [2023] KEELC 18220 (KLR) (23 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 18220 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**ENVIRONMENT & LAND PETITION 22 OF 2022**

**LL NAIKUNI, J**

**MAY 23, 2023**

**IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS  
AND FREEDOMS UNDER ARTICLES 1, 10, 19, 21, 22, 23, 24, 40, 47,  
94, 95, 114, 124 AND 125 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: THE LAND ACT, NO. 6 OF 2012**

**AND**

**IN THE MATTER OF: THE NATIONAL LAND COMMISSION**

**AND**

**IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT, NO. 4 OF 2015**

**BETWEEN**

**SHARA DIANA CHERNEL ..... 1<sup>ST</sup> PETITIONER**

**ANDRAS HAROLD CHERNEL ..... 2<sup>ND</sup> PETITIONER**

**JASON EUGENE CHERNEL ..... 3<sup>RD</sup> PETITIONER**

**DR.SOLTI GYOZO ..... 4<sup>TH</sup> PETITIONER**

**AND**

**MINISTRY OF LANDS AND PHYSICAL PLANNING ..... 1<sup>ST</sup> RESPONDENT**

**LAND REGISTRAR MOMBASA ..... 2<sup>ND</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 3<sup>RD</sup> RESPONDENT**

**DIRECTOR OF SURVEY ..... 4<sup>TH</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT**



## JUDGMENT

### I. Preliminaries

1. The Judgment of this Honorable Court pertains to the filed Constitution Petition dated 2<sup>nd</sup> June, 2022 instituted by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Petitioners herein on 3<sup>rd</sup> June, 2022. *The Constitution* Petition was brought against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents herein under the dint of the provisions of Articles 1, 10, 19, 21, 22, 23, 24, 40, 47, 94, 95, 114, 124 and 125 of *the Constitution* of Kenya 2010, the *Land Act* and the Fair Administrative Actions Act.
2. Upon service, the Respondents herein filed their responses accordingly.

### II. The Petitioners' Case

3. The Petitioners sought for the following orders:-
  - a. A declaration do issue that the Petitioners are the lawful registered owners of the parcel of land known as CR.26847 being LR No. 13433/115 AND CR. 26848 being LR No. 13433/ 116, and that their title to the same is valid.
  - b. A declaration that the dispossession of the Petitioners of the subject property by the 1<sup>st</sup> Respondent is in contravention and violation of the Petitioner's right to acquire and own property under Article 40 of *the Constitution* of Kenya and therefore wrongful, illegal, unconstitutional, null and void.
  - c. An interim order of injunction restraining the Respondents, their agents, servants and or anyone acting on their authority from alienating, transferring, dealing with, changing the allotment status of the suit property or otherwise interfering with the Petitioner's title thereof, until hearing and determination of this application;
  - d. An order of mandamus compelling the 2<sup>nd</sup> Respondent to pay to the Petitioner by way of a fair compensation the amount of Kshs. 251,000,000/= together with interest at 12% per annum from the date of Judgement;
  - e. General Damages for loss of Use of the Suit Property from 2011, to be assessed by this Honourable Court and, an Order of Mandamus compelling the 2<sup>nd</sup> Respondent to pay to the Petitioner the said assessed sum, together with interest at 12% per annum from the date of Judgement;
  - f. The Petitioners to surrender their title to the Government of Kenya upon receipt of Payments in Prayers (d) and (e) and for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent to ensure that the Register reflects the surrender.
  - g. Costs of this petition be borne by the Respondents.
  - h. Such other order(s) as this Honourable Court shall deem just to grant.

### III. The Legal foundation of the Petition

4. The Petition was founded on the following legal provisions:
  - a. Article 40 of *the Constitution* of Kenya 2010, which provides that every person has the right to acquire and own property of any description and that the state shall not deprive a person



of property of any description unless the deprivation is carried out in accordance with the Constitution, and provides for compensation to be made to property holders, in the event of acquisition of Land by the State.

- b. Article 47 of the Constitution, which states that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- c. Article 50(1) of the Constitution, which provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body.
- d. Article 165 (3) (d) of the Constitution, which provides that the High Court shall have jurisdiction to interpret the Constitution to determine the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of the Constitution.
- e. Article 259 of the Constitution of the Republic of Kenya, which provides that the Constitution must be interpreted in a manner that promotes its purposes, values and principles; advances the rule of law and human rights and fundamental freedoms in the Bill of Rights, permits the developments of the law and contributes to good governance.
- f. Part VIII of the Land Act 2012 Sections 107-133 which provide extensively for the process and procedures relating to Compulsory Acquisition of Land.

#### IV. The brief facts of the Case

5. The brief facts of this case are that the Petitioners are the legal and registered proprietors of two (3) parcel of land being:-
  - a). all that parcel of land known as LR No. 13433/115 being CR. 26847 situated in the Kwale District measuring 2.140 Hectares vide land Survey Plan No. 124495 being leasehold from the Government of Kenya for a term of 99 years with effect from 1<sup>st</sup> October 1982;
  - b). LR No. 13433/ 116 being CR. 28848 situated in the Kwale District measuring 1.921 Hectares vide Land Survey Plan No. 124496 being leasehold from the Government of Kenya for a term of 99 years with effect from 1<sup>st</sup> October 1982, both plots registered at the Land Titles Registry, Mombasa.
6. The land tenure of the Subject Property is leasehold from the Republic of Kenya, for a term of 99 years with effect from 1<sup>st</sup> October 1982 for an annual rent of a sum Kenya Shillings Two Thousand Nine Hundred and Twenty Five (Kshs. 2925/=) (CR. 26847) and a sum of Kenya Shillings Two Thousand Seven Hundred (Kshs. 2,700/=) (CR.26848) respectively. The Petitioner averred that upon the purchase of the subject property by the deceased father to the Petitioners EUGENE JOSPEH CHERNEL the same was lawfully and procedurally transferred to him on 26<sup>th</sup> September 2001 after meeting all the legal requirements, including but not limited to payment of stamp duty, and as such he acquired a good and indefeasible title, rights and interest to the suit property thereof.
7. Subsequent the transfer of the suit property to him, the deceased father of the Petitioners was diligently observing all the covenants and stipulations of the interest granted thereof including but not limited to payment of Land Rent. On 1<sup>st</sup> March 2019, Pursuant to Grant of Probate and Confirmed Grant of Probate issued in High Court Succession Cause No. 335 of 2014 and vide transfer by transmission, the said property was validly transferred into the Petitioners' personal names and as such, they have currently good and indefeasible title to the subject property. Subsequent to the transfer of the suit



property, the Petitioners have been diligently observing all the covenants and stipulations of the interest granted thereof, including but not limited to payment of Land rent.

8. The Petitioners stated that sometimes in the year 2011, the Respondents, without following the requisite procedure provided for under Part VIII of the Land Act, No. 6 of 2012, and without notice to them or gazette, unlawfully issued three (3) new title deeds namely:- (1) LR. No. Kwale/ Ramisi Kinondo/110, (2) LR. No. Kwale Ramisi Kindondo/111 and (3) LR No. Kwale/ Ramisi Kinondo 112, all within the same geographical location as the Subject property under a purported Settlement Scheme. ( Ramisi Phase II'A Settlement Scheme F/R NO. 133/86) as a result of which the newly created parcels of land overlapped or were superimposed into the Subject Property, and thereafter, proceeded to settle squatters onto the new parcels of land.
9. The above fact, came to the Petitioner's knowledge in or about the year 2019, which was when the cause of action accrued. The Petitioner stated that processing and the issuance of the three (3) new title deeds and the settlement of the squatters was carried out without notice, consultation and/or reference to the Petitioner which was a blatant violation of their right to fair administrative action under the provision Article 47 of the Constitution of Kenya and in contravention of Part VIII of the Land Act No. 6 of 2012 dealing with Compulsory Acquisition of interests in land.
10. The Petitioners stated that they were not given reasons for the decision reached by the 1<sup>st</sup> Respondent which action was a violation of its right to fair administrative action under the provision of Article 47 of the Constitution of Kenya, 2010 entitling every Kenyan citizen to the right to administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair, and where a decision was likely to affect the rights of any person, such person had a right to be given written reasons for such actions.
11. The Petitioners held that the Respondents' actions infringed, contravened and violated the Petitioners property rights under Article 40 of the Constitution of Kenya and that the said actions having resulted in deprivation to Petitioners of the subject property were unconstitutional, illegal, null and void.
12. The Petitioners asserted that they were arbitrarily dispossessed of the suit property by the 1<sup>st</sup> Respondent sometimes in the year 2011. The dispossession was made absolute when the 1<sup>st</sup> Respondent and 4<sup>th</sup> Respondent re - surveyed the area, and purported to form a Settlement Scheme (RAMISI PHASE II'A SETTLEMENT SCHEME F/R No. 133/86) and proceeded to settle squatters on the parcels of land bearing new title numbers which overlapped into the suit property, hence the suit property was not available for restitution.
13. The Petitioner contended that as a result of the Respondents actions of issuing new title deeds which overlapped into Subject Property's title, the Petitioner had been arbitrarily deprived of their right to acquire and own property of any description in violation of the provision of Article 40 (3) of the Constitution of Kenya.
14. It was the Petitioners' case that the said deprivation of the Subject Property was not undertaken in accordance with the law since due process was not followed as required by the provisions of Article 40 (3) of the Constitution of Kenya and by Part VIII of the Land Act 2012. Upon dispossessing the Petitioners of the Subject Property the 1<sup>st</sup> Respondent through the 3<sup>rd</sup> Respondent ought to have paid the Petitioners prompt payment in full of just and full compensation of the value of the subject property, which they have failed to do so, to date. The Respondents did not have power under the law to demand the surrender of the Subject Property and or to subdivide the same, issue letters of allotment over the same or to issue title deeds to any person over the same, to extend registration boundaries into privately owned property and or to change the registration regime of any parcel of land already registered under the Registration of Titles Act, Cap. 281 without following the due process as provided



under the Constitution of Kenya, 2010 and Part VIII of the Land Act, No. 6 of 2012 on compulsory acquisition of land.

15. The Respondents proceeded in an ultra vires manner, acting outside of the scope of their authority to revoke the titles to the Petitioners' property, the illegal and unconstitutional adjudication, allocations, issuance of unconstitutional titles and subdivisions and invasion of the Subject Property. Thus, the Petitioners were reasonably apprehensive that the Register, Folders, Kalamazoos, Parcel files and all other documents relating to the Subject Property described above would be destroyed, altered, concealed, or otherwise dealt with before the determination of this Petition.
16. According to the Petitioners, the Subject Property continued to be sub - divided and re - surveyed to create new titles and various dealings involving the above named Plots and their sub - divisions continued being registered at the Kwale District Lands office to allow new occupants and owners take possession, the main aim being the total takeover and dispossession of the property from the Petitioner.
17. The Petitioners averred that vide its advocates, it retained a firm of licensed valuers known as M/s Elite Africa Valuers Limited on 18<sup>th</sup> May 2022 who conducted a valuation of the subject property exclusive of the developments and the said firm in its valuation report found the aggregate current market value of the suit property to be a sum of Kenya Shillings Two Fifty One Million (Kshs.251,000,000/-). The dispossession of the suit property was without notice, unlawful, irregular and unconstitutional, unfair and irrational. The Petitioners have suffered grave financial loss from the deprivation of the said Property, having been left unable to sell it, rent it or utilize it for any purpose at all from the year 2011. The Petitioners held that the 2<sup>nd</sup> Respondent failed to publish a gazette notice announcing an intention to acquire the subject property for any public purpose or in public interest in violation of Section 107 of the Land Act No. 6 of 2012. The Petitioners stated that it had written to the 3<sup>rd</sup> Respondent to pay compensation following the compulsory acquisition of the subject property. However the former had never reverted back or issued an award of compensation to date, clearly in violation of Section 111 of the Land Act 2012. The Petitioner averred that it is therefore in the interests of justice that the Petitioner be paid prompt, full and just compensation in tandem with the current market value of the subject property which a sum of Kenya Shillings Two Fifty One Million (Kshs. 251,000,000/= ) plus interest and Mesne profits. That is adequate on facts.
18. The Petition was premised on the grounds, testimonial facts and the averments made out in the 35 Paragraphed Affidavit of Jason Eugene Chernel who averred that:
  - a. The Petitioners were the current lawful owners of the Suit Property, having inherited it from Eugene Joseph Chernel (now deceased).
  - b. The Suit Property consisted of LR No. 13433/115 being CR. 26847 situated in the Kwale District measuring 2.140 Hectares vide land Survey Plan No. 124495 and leasehold from the Government of Kenya for a term of 99 years with effect from 1<sup>st</sup> October 1982 and LR No. 13433/ 116 and being CR. 28848 situated in the Kwale District measuring 1.921 Hectares vide Land Survey Plan No. 124496 and leasehold from the Government of Kenya for a term of 99 years with effect from 1<sup>st</sup> October 1982, both plots registered at the Land Titles Registry, Mombasa.
    - i. Annexed herewith and marked as "Exhibit JC - 2", was a copy of the title deed pertaining to CR. 26847;
    - ii. Annexed herewith and marked as "Exhibit JC - 3" was a copy of the title deed pertaining to CR. 26848



- c. The Subject property was transferred into the name of Eugene Joseph Chernel (now deceased) on the 26<sup>th</sup> September 2001, registered as Entry No. 4 on both titles of the Subject Property;
  - i. Annexed herewith and marked as “Exhibit JC - 4” was the transfer dated 14<sup>th</sup> October 1999 from Emfil Limited to Eugene Joseph Chernel for Plot No. CR. 26847;
  - ii. Annexed herewith and marked as “Exhibit JC - 5” was the transfer dated 14<sup>th</sup> October 1999, from Emfil Limited to Eugene Joseph Chernel for Plot no. CR.26848;
  - iii. Pursuant to the transfer, Annexed herewith and marked as “Exhibit JC - 6” was the certificate of postal search for CR. 26847 dated 1<sup>st</sup> October 2018, showing the registered proprietor as Eugene Joseph Chernel;
  - iv. Pursuant to the transfer, Annexed herewith and marked as “Exhibit JC - 7” was the Certificate of Post Search for CR.26848 dated 16<sup>th</sup> November 2017, showing the registered proprietor as Eugene Joseph Chernel.
- d. Eugene Joseph Chernel died on the 13<sup>th</sup> July, 2012. He attached and marked as “Exhibit JC – 8” a copy of the Certificate of death of Eugene Joseph Chernel;
- e. Vide Succession Cause No. HC 335 of 2014 (Mombasa) Grant of Probate of Written will of the Estate of the deceased Eugene Joseph Chernel was issued on 16<sup>th</sup> November 2015 and Confirmed on the 31<sup>st</sup> January 2017;
  - i. Attached and marked as “Exhibit – JC - 9” was a copy of the Grant of Probate.
  - ii. Attached and marked as “Exhibit JC - 10” was a copy of the Confirmation of Grant, confirming your Petitioners as Beneficiaries of the Deceased’s Estate.
- f. Pursuant to this was LR No.13433/115) being CR No.26847 was transferred to the Personal Representatives as executors on 1<sup>st</sup> March 2019 (Vide transfers dated 22<sup>nd</sup> October 2018); Attached and marked as “Exhibit JC - 11” was a copy of the said transfer, together with KRA stamp duty payment slip and Bank receipt;
- g. CR.No.26847(LR No.13433/115) was then transferred to the Petitioners herein who were the beneficiaries as per the Probate Will of the deceased on 1<sup>st</sup> March 2019; Attached and marked as “Exhibit – JC - 12” was a copy of the said transfer dated 22<sup>nd</sup> October 2018, together with KRA payment slip and receipt;
- h. The transfers by transmission were registered against LR No. 13433/115 CR.26847. Attached and marked as “Exhibit JC – 13” was a copy of the postal search issued on 19<sup>th</sup> October, 2019, after transfer by transmission, showing the Petitioners herein, as registered proprietors of the Subject Property;
- i. LR No.13433/116 being CR No.26848 was transferred to the Personal Representatives as executors on 1<sup>st</sup> March 2019 (vide transfers dated 29<sup>th</sup> November, 2018); Attached and marked as “Exhibit JC - 14” was a copy of the said transfer, together with KRA stamp duty payment slip and Bank receipt;
- j. LR No.13433/116 being CR.No.26848 was then transferred to the Petitioners herein who were the beneficiaries as per the Will of the deceased on 1<sup>st</sup> March 2019; Attached and marked as “Exhibit JC - 15” was a copy of the said transfer dated 29<sup>th</sup> November 2018, together with KRA payment slip and receipt;



- k. The transfers by transmission were registered against LR No. 13433/116 being CR. 26848. Attached and marked as “Exhibit JC - 16” was a copy of the postal search dated 9<sup>th</sup> October 2019, issued after transfer by transmission, showing the Petitioners herein ,as registered proprietors of the Subject Property;
- l. The Petitioners had ensured payment of all requisite County Rates and Land rent.
  - a. Attached and marked as “Exhibit, JC -17” were payment receipts for County Rates for the Subject Property for years 2018 and 2019;
  - b. Attached and marked as “Exhibit JC - 18” are the Land rent demand Notice together with KRA Payment Slip and Banking receipt for LR. No. 13433/115 being CR.26847 from year 2002 to 2017
  - c. Attached and marked as “Exhibit JC - 19” Land rent demand Notice together with KRA Payment Slip and Banking receipt for LR.No.13433/115 being CR.26847 from the years 2018 - 2020;
  - d. Attached and marked as “Exhibit JC - 20” was a copy of the Rent Clearance Certificate for LR. No.13433/115 being CR.26847;
  - e. Attached and marked as “Exhibit JC - 21” was the Land rent demand Notice together with KRA Payment Slip and Banking receipt for LR. No. 13433/116 being CR.26848 from 2018 to 2020;
  - f. Attached and marked as “Exhibit JC - 22” was the Land rent demand Notice together with KRA Payment Slip and Banking receipt for LR. No. 13433/116 being CR.26848 from year 2002 - 2017;
  - g. Attached and marked as “Exhibit JC - 23” was a copy of the Rent Clearance Certificate for LR. No.13433/116 being CR.26847;
- m. It came to the Petitioner’s knowledge in the year 2019, that sometime in the year 2011, the 1<sup>st</sup> Respondent issued a settlement scheme known as Ramisi Phase II ‘A’ Settlement Scheme F/R No.133/86,which superimposed upon the Subject Property and caused the creation of THREE new title deeds within the same geographical location as the subject property as a result of which the new parcels of land overlapped into the subject property.
  - a. Annexed herewith and marked as “Exhibit JC - 24” is the Original survey map of the area issued on 12<sup>th</sup> June 1985, showing the Subject Property clearly as LR 13433/115 & LR. 13433/116;
  - b. Annexed herewith and marked as “Exhibit JC - 25” was the Survey Plan of the Ramisi Kinondo Settlement Scheme published by Survey of Kenya in November 2011
- n. Upon request by the Petitioners, the District Surveyor investigated the matter and confirmed overlapping on the Subject property;
  - a. Annexed herewith and marked as “Exhibit JC - 26” was a covering letter dated 2<sup>nd</sup> May issued by the District Surveyor;
  - b. Annexed herewith and marked as “Exhibit JC - 27” was confirmation of Overlapping by the District Land Surveyor.



- c. Annexed and marked as “Exhibit JC - 28” was a topographic Image of the Subject property showing the Overlapping;
- o. The Three (3) title deeds issued by the 1<sup>st</sup> Respondent over the Subject property are:-
- i). LR No. Kwale/ Ramisi Kinondo SS/ 110;
  - ii). LR. No. Kwale/ Ramisi Kindondo SS/111;
  - iii). LR No. Kwale/ Ramisi Kindondo SS/112.
- p. The processing and issuance of the three (3) new title deeds by the 1<sup>st</sup> Respondent was carried out without notice, consultation and/or reference to the Petitioners which was a blatant violation of its right to Fair Administrative Action under the provision of Article 47 of the Constitution of Kenya, 2010.
- q. The Petitioners were not given reasons for the decision reached by the 1<sup>st</sup> Respondent which action was a violation of its right to fair administrative action under the provision of Article 47 of the Constitution of Kenya, 2010 which entitled every Kenyan citizen including a juristic person to the right to administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair and where a decision is likely to affect the rights of any person, such person has a right to be given written reasons for such actions.
- r. The Respondents' actions infringed, contravened and/or violated the Petitioners' property rights under Article 40 of the Constitution of Kenya and that the said actions in so far as they were designed to arbitrarily deprive the Petitioners of the subject property were unconstitutional, illegal, null and void.
- s. The Petitioners were arbitrarily dispossessed of the subject property by the 1<sup>st</sup> Respondent sometimes in the year 2011 and the dispossession was made absolute when the 1<sup>st</sup> Respondent settled squatters on the parcels of land, bearing new title numbers which overlapped into the suit property, which squatters had constructed permanent housing on the same. Hence the suit property was not available for restitution. As a result of the 1<sup>st</sup> Respondent's actions of issuing new title deeds which overlapped into subject property's title, the Petitioners had been arbitrarily deprived of their right to acquire and own property of any description in violation of its right under the provision of Article 40 (3) of the Constitution of Kenya.
- t. The said deprivation of the subject property was not undertaken in accordance with the law since due process was not followed as required by the provision of Article 40 (3) of the Constitution of Kenya, 2010 and by Part VIII of the Land Act No. 6 of 2012.
- u. Upon dispossessing the Petitioners of the subject property the 1<sup>st</sup> Respondent through the 2<sup>nd</sup> Respondent ought to have paid the Petitioners prompt payment in full, of just and full compensation of the value of the subject property and they had failed to do so to date.
- v. The Petitioners retained a firm of licensed valuers known as M/s Elite Africa Valuers Limited on 18<sup>th</sup> May 2022 who conducted a valuation of the subject property exclusive of all the developments and the said firm in its valuation report found the current market value of the suit property to be as follows:-
- a. Value of CR. 26847 was found to be a sum of Kenya Shillings One Thirty Two Million (Kshs. 132,000,000/=). Annexed herewith and marked as “Exhibit JC - 31” was a copy of the Valuation report dated 23<sup>rd</sup> May 2022;



- b. Value of CR.26848 was found to be a sum of Kenya Shillings One Nineteen Million (Kshs. 119,000,000/=). Annexed herewith and marked as “Exhibit JC - 32” was a copy of the Valuation report dated 23<sup>rd</sup> May 2022;
- w. The dispossession of the suit property was without notice, unlawful, irregular and unconstitutional, unfair and irrational. The 2<sup>nd</sup> Respondent failed to publish a gazette notice announcing an intention to acquire the subject property for any public purpose or in public interest in contravention of Part VIII of the provisions of the *Land Act* No.6 of 2012. The Petitioners had since written to the 2<sup>nd</sup> Respondent demanding payment of compensation and issuing a notice of intention to sue upon the office of the Attorney General following the compulsory acquisition of the subject property however the former had never reverted back or issued an award of compensation to date. Annexed herewith and marked as “Exhibit JC - 33” and “JC - 34” for each plot, was a copy of the notice of intention to sue, both dated 11<sup>th</sup> November 2020.
- x. A copy of current search clearly indicated that the suit land herein is still registered in favour of the Petitioners herein;
  - a. Annexed herewith and marked as “Exhibit JC - 35” was a copy of current search for CR. 26847;
  - b. Annexed herewith and marked as “Exhibit JC - 36” was a copy of current search for CR. 26848;
- y. It was therefore in the interests of justice that the Petitioner be paid prompt, full and just compensation in tandem with the current market value of the subject property which was a sum of Kenya Shillings Two Fifty-One Million (Kshs. 251,000,000/=).

#### **V. The 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondent’s case**

- 19. In response to the Petition the 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents filed Grounds of opposition to the Petition dated 21<sup>st</sup> day of October, 2022. They raised the following grounds in defence of the Petition;-
  - a. The land parcels CR 26847 being LR No. 13433/115 and CR 28848 being LR. No.13433/116 were amongst a series of matters under litigation in Civil Appeal No. 37 of 2020 where a stay was granted in the Civil case - ELC No. 113 of 2015.
  - b. The Appeal was heard in the month of July 2022 and had a Judgment date for 2<sup>nd</sup> December, 2022.
  - c. The instant suit being the latter suit should be stayed pending the outcome of the decision in Civil Appeal No. 37 of 2020.
  - d. The outcome of the earlier suit may affect the decisions on the instant suit in the event that the Appellant case in Civil Appeal No. 37 of 2020 was upheld or overturned.
  - e. Under the provision of Section 6 of the *Civil Procedure Act*, Cap. 21 expressly provided that no Court shall proceed with the trial of any suit or proceeding in which the matter in issue was also directly or substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.



- f. The Deponent cited the case of the Supreme Court of Kenya in the case of:- “Kenya National Commission on Human Rights – Versus - Attorney General; Independent Boundaries Commission & 16 others pronounced itself on the subject of sub judice. It stated that:-

“Those claiming under them over the same subject matter so as to avoid abuse of Court process and diminish the chances of Court, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before Courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub judice must therefore establish that there is more than one suit over the same subject matter; that one suit was instituted before Courts of competent jurisdiction and lastly; that suits are between the same parties or their representative.”

- g. The Principle of “sub judice” never talked about the prayers but rather the matter in issue. Further the Petitioners herein claimed that Emfill the Plaintiff in the Civil case of ELC Case No. 113 of 2015 being the earlier suit transferred the parcels of land being the subject matter in both suits to them. The existence of the two suits were substantially the same. Hence, it was against public policy and it will lead to multiplicity of suits on the same subject matter.
- h. A multiplicity of suits clogged the wheel of justice, holding up resources that would be available to fresh matters and adding to the backlog of cases Court had to deal with. The Respondents would suffer prejudice as they would be required to defend the same suit twice. The instant suit offended “the Sub Judice” rule and it was an abuse of the Court process by a party who was deemed to know the law.

## VI. The 3<sup>rd</sup> Respondent’s case

20. The 3<sup>rd</sup> Respondent responded to the Petition through a 21 Paragraphed Replying Affidavit dated 24<sup>th</sup> October, 2022 sworn by Chief Land Officer, Zacharia Ndege. He averred that:
- a. According to records in the correspondence file, the subject parcels of land LR.No.13433/115 and LR. 13433/116 were both situated South West of Mombasa Municipality in Kwale District measuring 2.140 Hectares and 1.921 Hectares respectively.
- b. LR.No.13433/115 was allocated to Emfil Limited by the defunct office of Commissioner of Lands pursuant to a sub - division of CR.18270/1 for a term of 99 years from 1st October 1982 with a payable annual rent of Kenya Shillings Two Thousand Nine Twenty Five (Kshs. 2,925/-).
- c. On 26<sup>th</sup> September 2001, the property was transferred to Eugene Joseph Chernel vide a transfer dated 14<sup>th</sup> October 2000.
- d. The Property was delineated in Deed Plan Number 124495 which was prepared and signed by the Director of Survey on 26<sup>th</sup> September 1985.
- e. The suit land was registered as CR26848 on 20<sup>th</sup> February 1995 at the Coast Inland Registry.
- f. LR.No.13433/116 was allocated to EMFIL Limited pursuant to a sub - division of CR 18270/1 for a term of 99 years commencing on 1<sup>st</sup> October 1982 with a payable Annual Rent of a sum of Kenya Shillings Two Thousand Seven Hundred (Kshs. 2, 700/=).



- g. On 26<sup>th</sup> September 2001, the property was transferred to Eugene Joseph Chernel.
- h. On 1<sup>st</sup> March 2019, the property was vested in the Petitioners herein as beneficiaries of the Estate of Eugene Joseph Chernel.
- i. The Petitioners had never been in occupation or use of the suit properties since it had historically been occupied by residents who were subsequently formally settled there by the government in the year 2011 when Ramisi Kinondo Settlement Scheme was established thereon by the Government.
- j. An analysis between the Registry Index Map for Ramisi Kinondo Settlement Scheme and Survey Plan FR.No.181/36 for the suit Properties clearly showed that the suit properties and the said Settlement Scheme fell on the same geographical area on the ground and they overlapped on each other.
- k. More specifically pursuant to the establishment of the settlement scheme new titles were created and registered for Kwale/ Ramisi Kinondo/110, Kwale/Ramisi Kinondo/ 111, Kwale/ Ramisi Kinondo/ 112. An access road was equally created. The area was now fully developed and in occupation of 3<sup>rd</sup> Parties who had since been issued with title documents pursuant to the establishment of the settlement scheme on the land.
- l. Granting the orders of eviction as sought would occasion a security nightmare since the area was fully occupied by 3<sup>rd</sup> Parties who were not before court.
- m. The case failed the test in the case of “Annarita Karimi – Versus - The Attorney General” since the Petitioners never set out with reasonable precision the rights that were violated and in what manner thus falling short of the threshold set out in this case. Annexed and Marked “NLC 1” a bundle of documents in support of the averments made.
- n. He swore the affidavit in opposition and reply to the Petition here.

## **VII. Submissions**

21. On 6<sup>th</sup> July, 2022 upon the close of the cases, parties were directed to file their written Submissions. On 1<sup>st</sup> August, 2022, the Petitioner complied by filing their written submissions. On 26<sup>th</sup> October, 2022 the parties were granted an opportunity to orally highlight the filed submissions. Indeed the Learned Counsels M/s. K. Moolraj, Mr. S. Mbuthia and Mr. E. Makuto effectively, decorum and diligently executed their duty. The Honorable Court wishes to sincerely thank them for their dedication and resilience as officers of this Court thereof. Subsequently, the Honorable Court reserved a date for the delivery of Judgment on notice accordingly.

### **A. The Written Submissions by the Petitioner**

22. On 1<sup>st</sup> August, 2022, the Learned Counsel for the Petitioner from the Law firm of Messrs. K.A. Kasmani & Company Advocates filed their written submissions dated the same day. M/s. Moolraj Advocate who submitted orally commenced her submission by providing the Court with the detailed background of the matter. The Learned Counsel submitted that further to the orders issued on 6<sup>th</sup> July, 2022, they had proceeded to draw their submissions below. They had to date, not been served with any Documents of opposition or affidavits in response to their submissions, from any Respondent save for the 3<sup>rd</sup> Respondent.
23. The Learned Counsel contended that on 26<sup>th</sup> September 2001, the Respondent’s Father Eugene Joseph Chernel (now deceased) Purchased CR. 26847 (LR No. 13433/115) and CR. 26848



(LR.13433/116 both situated in Kwale. The Affidavit in support of the Petition by Jason Eugene Chernel dated 30<sup>th</sup> May 2022, and attached to the Petition, exhibits the following documents in support:-

- a. "JC2"-pg.23-the title deed for LR No.13433/115;
  - b. "JC3"-Pg.24-the title deed for LR No. 13422/116;
  - c. "JC4" – Pg. 25 the transfer dated 14/10/1999 for LR No. 13433/115 and
  - d. "JC5" – Pg. 28 transfer dated 14/10/1999for LR No.13433/116.
24. The Learned Counsel averred that on 13<sup>th</sup> July 2012 Eugene Joseph Chernel passed away, and the petitioners herein were recognized as beneficiaries to his Estate Vide Succession Cause No. HC 335 of 2014. Attached were "Exhibits JC - 8" -Pg. 33 - being the Certificate of Death of Eugene Joseph Chernel;"JC - 9"-Pg.34,being the initial Grant of Probate and "JC - 10" - Pg.43, being the Confirmed grant of probate. On 1<sup>st</sup> March 2019, both titles were transferred into the Petitioners' names, as beneficiaries of the Estate of EUGENE JOSEPH CHERNEL. Transfers by Transmission, together with stamp duty payments slips and post registration searched had been attached as "Exhibits JC - 11"- "JC - 16" on pages 44 to 77.
25. In or about the year 2019, it came to the Petitioners knowledge that the Ministry of Lands had issued a settlement scheme in 2011 known as "Ramisi Phase II A Settlement Scheme FR No. 133/86", which superimposed three new title deeds on top of the Petitioners Property; This was done without the requisite notification to the Petitioners or gazettelement.The property was quite valuable being on a cliff top with views of the sea, and access to the Beach. The Petitioners were distressed and shocked to discover, that they had been divested of the property without any notification or compensation at all and felt robbed of their inheritance.
26. The Learned Counsel submitted that "Exhibit JC - 24"-Pg. 90 showed the original 1985 map of the area with the Petitioners property marked thereon as LR 13433/115 and LR 13433/116. Exhibit "JC25"-Pg.90B shows the survey plan of the settlement scheme published by Survey of Kenya - Plots 115 and 116 were clearly shown as being within that Settlement Scheme. On 2<sup>nd</sup> May 2019,the District Surveyor for Kwale confirmed that Plots 115 and 116 had been taken over by the newly created titles, Kwale/ Ramisi Kinondo/ 110, Kwale/ Ramisi Kinondo/ 111 and Kwale/ Ramisi Kinondo/ 112 vide his letter and analysis of the Petitioners plots with the newly created titles. This had been exhibited as "JC - 26"-Pg.91, "JC - 27"-Pg.92 and "JC - 28" - Pg. 93. The Petitioners also proceeded to run searches and green card requests on the newly created overlapping titles, "Exhibit JC - 29"- Pg.94 - 96, were copies of the Green cards of the newly created overlapping titles. These show clearly that the titles were freehold and were created on 2<sup>nd</sup> November 2011 under "Kwale/ Ramisi Kinondo Squatter S.S" and issued by the Kwale Lands Registry.
27. The Learned Counsel submitted that the Petitioners' titles at the Land's Registry, Mombasa subsisted as shown by Searches carried out on the 9<sup>th</sup> October 2019 and 23<sup>rd</sup> of May 2022, exhibited as "JC - 13"-Pg. 60 & "JC - 16" - Pg.77 and "JC - 35" - Pg. 140 & "JC36"-Pg. 141 for each plot respectively.
28. The Learned Counsel submitted that the Respondents in violation of the law, it was clear and obvious that the acts of the Respondents amounted to Compulsory Acquisition of the Land. Since creation of the new titles and the Ramisi Kinondo Settlement Scheme, civilians had settled on the property, developed it, sub - divided it and carryon transacting at the Land's registry, Kwale. The Petitioners' title deeds and records at the Lands Registry Mombasa, had been rendered useless and of no effect. In year 2011, when the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents proceeded to survey, demarcate and issue new titles



- over the Land, the Land Acquisition Act Cap. 295 was in force. Preliminaries to Acquisition under the provisions Sections 3, 4 and 5 of that Act, made it mandatory for initial publication of a notice in the Gazette with details of the land to be acquired, by the Commissioner of Lands, and a delivery of a notice to interested parties of the land. Furthermore, Section 5, provided for compensation as soon as practicable after entry. The provision of Sections 8 and 9 of the Land Acquisition Act Cap. 295, lay out the specific processes, time frames, publications and notices to be issued to the proprietors for the purposes of affording them compensation for their loss.
29. The Learned Counsel submitted that in the matter before the Honorable Court, the Proprietors were kept in the dark completely, and only discovered the acquisition, when squatters began appearing on the land, claiming that they had “bought” it. The requisite publication in the Gazette was not carried out, no notice was issued to the Proprietors and they were never called to submit an inquiry for grant of compensation.
30. The provision of Section 19 of the Land Acquisition Act, Cap. was very clear and stated that:
- “After the award has been made, the Commissioner shall take possession of the land by serving on every person interested in the land a notice that on a specific day, which shall be not later than sixty days after the award has been made, possession of the land will vest in the Government.”
31. The Learned Counsel submitted that it was therefore clear and obvious that title may only vest in the Government after the award for compensation had been made. The above Land Acquisition Act was repealed and taken over by the provision of Land Act, No. 6 of 2012, which in PART VIII, bears similar conditions for acquisition of land by the Government. S.111 of the Land Act No. 6 of 2012 provides that:
- “if land is acquired compulsory under this Act, just compensation shall be promptly in full to all persons whose interests in the land, have been determined.”
32. Under Section 120 of the Land Act No. 6 of 2012 provides:-
- “Only after the award has been made, and the amount of the first offer has been paid, the Commission shall take possession of the land by serving on every person interested in the land, a notice on that specified day possession of the land and the title to the land will vest in the national or county governments as the case may be.”
33. The Learned Counsel submitted that both legislatures, made it a pre-requisite condition, that compensation be paid before the title vested in the Government. It was therefore clear, that the titles for Plots 115 and 116, had not vested in the Government, and all actions to survey, demarcate and allot titles were carried out illegally, ultra vires and without following the protocols and steps which are mandatory in both the Land Acquisition Act and the Land Act 2012. Furthermore, and sadly, the Petitioners had been stripped of their right to their Land without any notification or compensation in contravention of provision of Article 40 of the Constitution.
34. The Learned Counsel submitted that the Petitioners realized that civilians had been settled on the Land, had sold onwards and had built houses and structures thereon. It would be unfeasible to seek for the land to be restituted back to the Petitioners, this would involve, hostility, animosity and eviction, and would not bode well for the collective reputation of the Respondents either, none of which followed due process.



35. On 11<sup>th</sup> November 2020, the Petitioner addressed an official letter seeking compensation from the Respondents herein. Copies of the said letter were exhibited as “JC - 33” - Pg. 134 and “JC - 34” - Pg.137 respectively. Sadly, there was no response to their claim for compensation. In light of the circumstances, the Petitioners sought for award of compensation for the market value of the two plots. The Petitioners had filed valuation reports by Elite Valuers Africa Limited for the two plots, the Valuation report for CR.26847-LR.13433/115 (having been valued at a sum of Kenya Shillings One Thirty Two Million (Kshs. 132,000,000/=) Exhibited as “JC - 31”-Pg.100, and the Valuation Report for CR.26848-.LR.13433/116 (having been valued at a sum of Kenya Shillings One Ninety Nine Million (Kshs. 119,000,000/=) exhibited as “JC - 32”-Pg.117.
36. The Learned Counsel submitted the Petitioners therefore seek for an order of Mandamus compelling the 3<sup>rd</sup> Respondent to pay to the Petitioners the aggregate sum of Kenya Shillings Two Fifty One Million (Kshs. 251,000,000/=) together with interest at 12% from the date of Judgement. The Petitioners also sought for General Damages for Loss of use of the property from November 2011, to be assessed by this Honourable Court. The Court was respectfully asked to bear in mind, The Land Act 2012 Section 117, which provides for compensation that has not been paid “out to be placed in a special Bank account into which the Commission shall pay this matter, compensation was neither paid out, nor has it been placed in any special account that they knew of. The Petitioners humbly requested that General damages be assessed as interest would have been 251,000,000 x 12% x 11 years = Ksh.331,320,000/=.
37. The Learned Counsel argued that they referred the Honourable Court to the only one authority issued by the Supreme Court of Kenya, which was at par and alike in circumstances to the matter before the Court. This was the case of “Attorney General – Versus - Zinj Limited (Petition No. 1 of 2020) [2021] KESC 23 (KLR)(Civ)(3 December 2021), where the presiding Supreme Court Justices MK Koome, CJ & P.P.M Mwilu. DCJ & VP. MK Ibrahim, SC Wanjala & W Ouko, SCJJ unanimously held as follows:-

“Pg. 9 para 27: The only way the government could lawfully deprive the Respondent of part or all of its property, was through a compulsory acquisition, in conformity with the provisions of Article 40 (3) of the Constitution, and the procedure stipulated in the Land Acquisition Act (repealed) which was the applicable law at the time.

Most critically, the resultant acquisition ought to have been attended with prompt payment in full of a just compensation to the Respondent. There was nothing on the record to show, that any of those mandatory processes, was followed before a portion of the suit property was acquired. The issuance of titles over a portion of the suit property, in favour of third parties was unlawful, un-procedural, and an egregious violation of the Respondent’s right to property. The issuance of titles to third parties over a portion of the suit property, amounted to a violation of Article 40(3)(a) and (b) of the Constitution.”

38. On damages, the Learned Counsel referred to pg. 10 para 29:

“It is a trite principle of law, that any injury or loss suffered by a person either through a tortious act, omission or breach of contract, attracts redress in a court of law. The redress includes an award of damages to the extent possible as may be determined by the court. The question regarding the type, extent, and quantum of damages to be awarded, has long been settled through a long line of decisions from the courts. Under article 22(1) of the Constitution, every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed, or is threatened. Among the reliefs that a court may grant upon proof of violation of



a fundamental right, is an order for compensation (article 23 (3)(e)). The quantum of damages to be awarded, depends on the nature of the right that is proven to have been violated, the extent of the violation, and the gravity of the injury caused.

Having determined that the respondent's right to property had been violated by the Government, the trial court, and later the Appellate court, made orders for compensation in favour of the Respondent. Both courts granted special and general damages. As we have arrived at a similar conclusion, we see no reason to interfere with the findings of the two superior courts in this regard..... The main basis upon which special damages can be granted for the deprivation of property, is the market value of the said property. In case of general damages, a court of law exercises discretion guided by the circumstances of each case.”

39. The Learned Counsel submitted that in a nutshell, the Petitioners basically pray for the following:-
- a. A declaration that the Petitioners were the lawful true registered owners of the Land being CR 26847 being LR 13433/115 and CR.26848 being LR No. 13433/116
  - b. An order of Mandamus compelling the 3<sup>rd</sup> Respondent to pay to the Petitioners as compensation, the total sum of the market value of the two parcels of land in the sum of Kenya Shillings Two Fifty One Million (Kshs.251,000,000/=) together with interest at 12% from the date of judgement;
  - c. General Damages for loss of the use of the property from the year 2011,to be assessed by this Honourable Court, preferably, in the same manner that interest on delayed compensation would have been calculated, in the sum of Kenya Shillings Three Thirty One Million Three Twenty Thousand (Kshs. 331,320,000/=), and order of Mandamus compelling the 3<sup>rd</sup> Respondent to pay to the Petitioners the said sum together with interest at 12% per annum from the date of Judgement;
  - d. Upon receipt of the payments in (b) and (c) above, for the Petitioners to surrender their titles to the Government for cancellation.
40. The Learned Counsel concluded that the overlapping of plots on the ground and the conflicting titles could not remain as is. The entire affair was an embarrassment. The Petitioners titles and records at the Mombasa Land registry ( LR 13433/115 and LR No. 13433/116) produce searches that showed their names as proprietors. The overlapped newly created titles created at the Kwale Land Registry, produce searches in the Squatters/Civilian's name, yet the land on the ground was the same land.

### **VIII. Issues for Determination.**

41. I have carefully considered all the filed pleadings pertaining to the Petition dated 2<sup>nd</sup> June, 2022, the Supporting and Replying Affidavits by both the Petitioners and the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents herein, the grounds of opposition, the articulate written submissions, the myriad cited authorities and the provisions of *Constitution of Kenya, 2010* and the law.
42. For the Honorable Court to reach an informed, fair, just, reasonable and equitable decision, it has condensed the subject matter into the following three (3) salient issues for its determination. These are:-
- a. Whether *the Constitution* Petition dated 2<sup>nd</sup> June, 2022 by the Petitioners herein meets *the Constitution* thresholds of such Petitions.



- b. Whether the fundamental rights of the Petitioners were violated, threatened, infringed and denied and If Yes, whether the parties herein are entitled to the reliefs sought.
- c. Who will bear the costs of the Petition.

## IX. Analysis and Determination

43. Based on the framed issues herein, the following is the analysis of the said issues.

### Issue No. a). Whether *the Constitution* Petition dated 2<sup>nd</sup> June, 2022 by the Petitioners herein meets *the Constitution* thresholds of such Petitions.

44. Under this Sub – heading, its clear that the Constitutional Petition revolves around the safeguards of *the Constitution*, there will be need to spend some slight time on the Constitutional concept. As a matter of course, *the Constitution* of Kenya under Article 259 (1) provides a guide on how it should be interpreted as such:-

This Constitution shall be interpreted in a manner that:-

- 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.....”

45. 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. Further, it is important to fathom that *the Constitution* is “a living instrument having a soul and consciousness of its own” . It must always be interpreted and considered as a whole with all the provisions sustaining and coordinating each other and not destroying the other.

46. Based on the principles set out in the edit of The Court of appeal case of the “Mumo Matemu – Versus - 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 – Versus - Republic [1980] eKLR 154 where the court is satisfied that the Petitioner’s claim were well pleaded and articulated with absolute particularity. It held:-

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

Further, in the “Thorp – Versus – 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”.



47. But first the Court must establish the Constitutional basis of the Petition which was founded under Paragraphs 7 to 11 which include:-
- a. Article 40 of *the Constitution* of Kenya 2012, which provides that every person has the right to acquire and own property of any description and that the state shall not deprive a person of property of any description unless the deprivation is carried out in accordance with *the Constitution*, and provides for compensation to be made to property holders, in the event of acquisition of Land by the State.
  - b. Article 47 of *the Constitution*, which states that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
  - c. Article 50 (1) of *the Constitution*, which provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
  - d. Article 165 (3) (d) of *the Constitution*, which provides that the High Court shall have jurisdiction to interpret *the Constitution* to determine the question whether anything said to be done under the authority of *the Constitution* or of any law is inconsistent with, or in contravention of *the Constitution*.
  - e. Article 259 of *the Constitution* of the Republic of Kenya, which provides that *the Constitution* must be interpreted in a manner that promotes its purposes, values and principles; advances the rule of law and human rights and fundamental freedoms in the Bill of Rights, permits the developments of the law and contributes to good governance.

**Issue No. b). Whether the fundamental rights of the Petitioners were violated, threatened, infringed and denied and If Yes, whether the parties herein are entitled to the reliefs sought.**

48. Under this sub title, the Honorable Court will endeavor to apply these principles to the instant case to justify whether the parties are entitled to the reliefs sought. In application of these set out principles for filing a Constitutional Petition to this case, the Honourable court is fully satisfied that the Petitioner herein has dutifully complied and fully met the threshold of reasonable precision in pleadings for instituting this Petition against the Respondents herein and pleading for the prayers sought.
49. In this Petition, the Petitioners stated that they were the registered proprietors of that parcel of land known as CR. 26847 being LR No. 13433/115 situated in the Kwale District measuring 2.140 Hectares vide land Survey Plan No. 124495 being leasehold from the Government of Kenya for a term of 99 years with effect from 1<sup>st</sup> October 1982 and CR. 28848 being LR No. 13433/ 116 situated in the Kwale District measuring 1.921 Hectares vide Land Survey Plan No. 124496 being leasehold from the Government of Kenya for a term of 99 years with effect from 1<sup>st</sup> October 1982, both plots registered at the Land Titles Registry, Mombasa (both plots hereinafter jointly referred to as “the Subject Property”) having purchased the same from EMFIL LIMITED sometime in 2001.
50. The land tenure of the Subject Property is leasehold from the Republic of Kenya, for a term of 99 years with effect from 1<sup>st</sup> October 1982 for an annual rent of a sum of Kenya Shillings Two Thousand Nine Twenty Five (Kshs. 2925/=) (CR. 26847) and a sum of Kenya Shillings Two Thousand Seven Hundred (Kshs. 2,700/=) (CR.26848) respectively. The Learned Counsel for the Petitioner asserted that upon purchase of the subject property, by their deceased father Eugene Josphe Chernel the same was lawfully and procedurally transferred to him on 26<sup>th</sup> September 2001 after meeting all the legal



requirements, including but not limited to payment of stamp duty, and as such he acquired a good and indefeasible title to the suit property thereof.

51. The Petitioners were also seeking an order of Mandamus compelling the 2<sup>nd</sup> Respondent to pay to the Petitioners by way of a fair compensation the amount of Kenya Shillings Two Fifty One Million (Kshs. 251,000,000/=) together with interest at 12% per annum from the date of Judgement and general damages for loss of Use of the Suit Property from year 2011, to be assessed by this Honorable Court and, an Order of Mandamus compelling the 2<sup>nd</sup> Respondent to pay to the Petitioner the said assessed sum, together with interest at 12% per annum from the date of Judgement.
52. It was not disputed that the Petitioners were the registered owner of the suit property. The Petitioners produced a copy of the title deed and marked it as “Exhibit JC – 2” and “JC – 3”. The land tenure of the subject property is a leasehold of 99 years from the Republic of Kenya with effect from 1<sup>st</sup> October, 1982. The 3<sup>rd</sup> Respondents Affidavit sworn by Zacharia Ndege and filed in court on the 24<sup>th</sup> October 2022, Paragraphs 3-7 confirm that the Petitioners are the legitimate proprietors of the suit land and that the same was validly transferred to them. This aspect of proprietorship, is therefore not disputed.
53. It is trite that under Article 40 of *the Constitution*, the Petitioners have the right to property, which right includes the use of the suit property. Article 40 of *the Constitution* provides as follows:

“ 40.

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



- (i) requires prompt payment in full, of just compensation to the person; and
  - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.
- (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.
  - (5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.
  - (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

54. The Respondents have argued that the Petitioners had neither demonstrated how the cited Articles of *the Constitution* have been breached by the Respondents nor explained how the Respondents have breached its constitutional right to property under Article 40 of *the Constitution*.

55. Under the provision of Article 61 of *the Constitution* of Kenya, land has been classified into three (3) categories. These are Public, Community or Private land. First and foremost there is need to appreciate the legal framework on land in Kenya. From the time of attaining independence of the Country, there has been very clear methods and procedures of the acquisition of land to public, individual and community categories. The Provisions of Section 7 of the *Land Act* No. 6 of 2012 provides the said methods as follows:

S.

7 Title to land may be acquired through:-

- i. Allocations;
- ii. Land Adjudication process;
- iii. Compulsory acquisition;
- iv. Prescription;
- v. Settlement programs;
- vi. Transmissions;
- vii. Transfers;
- viii. Long term leases exceeding Twenty one years created out private land; or
- ix. Any other manner prescribed in the Act of Parliament.

56. Having cited the provisions of Article 40 of *the Constitution*, and having shown how he has been deprived the use of the suit property by the Respondents, which allegation had been admitted by the Respondents, the Petitioners had particularized the provisions of *the Constitution* which have been allegedly contravened by the Respondents.



57. In the case of “Trusted Society of Human Rights Alliance – Versus - Attorney General & 2 Others Civil Appeal No. 290 of (2012) eKLR, the Court of Appeal held as follows:

“However, we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are so insubstantial and so attenuated that a Court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged. The test does not demand mathematical precision in drawing constitutional petitions. Neither does it demand talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case.”

58. The Petition clearly brings out the complaint that the Petitioner had as against the Respondents, that is the breach of the Petitioners’ right to not only own the suit property, but also to use the property. Consequently, the Petition is validly before this court.
59. The Respondents have admitted to the property right being transferred to Eugene Joseph Chernel. The 3<sup>rd</sup> Respondent contended that the Petitioners have never been in actual occupation of the land after it was transferred to them when Eugene Joseph Chernel was deceased. It is clear that the Petitioners have the legal proprietary rights to the suit property. For these reasons, the Honorable Court is fully satisfied that the Petition by the Petitioners must succeed as prayed.

#### **Issue No. c). Who will bear the Costs of the Petition**

60. Having dealt with the constitutional part of the Petition I will deal with the Cost. Regarding the issue of the costs of the Petition, the Black Law Dictionary defines “Cost” 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 26 ( 1 ) and ( 2 ) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013; Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow events. The issue of Costs is the discretion of Courts. In the case of “Reids Hewett & Company vs Joseph AIR 1918 cal. 717 and Myres – Versus - 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.....”

61. From these provisions of the law, it means the whole circumstances and the results of the case where a party has won the case. The events in the instant case is the Petitioner has succeeded in his case. For that very fundamental reason, therefore, the costs of this suit will be made to the Petitioner by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents jointly herein.

#### **X. Conclusion and Disposition**

62. In the long run, having intensively and thoroughly deliberated on all the framed issues herein, this Honorable Court arrives at the finding that the Petitioner has succeeded in all the prayers sought from



their filed Petition. For avoidance of doubt, I allow the Petition dated 9<sup>th</sup> May, 2022 these are the orders of the Court:-

- a. That a declaration do issue that the Petitioners are the lawful registered owners of the parcel of land known as CR.26847 being LR No. 13433/115 AND CR. 26848 being LR No. 13433/116, and that their title to the same is valid.
- b. That A declaration that the dispossession of the Petitioners of the subject property by the 1<sup>st</sup> Respondent is in contravention and violation of the Petitioner's right to acquire and own property under Article 40 of the Constitution of Kenya and therefore wrongful, illegal, unconstitutional, null and void.
- c. That an order of mandamus do issue compelling the 3<sup>rd</sup> Respondent to pay to the Petitioner by way of a fair compensation the amount of Kshs. 251,000,000/= together with interest at 12% per annum from the date of Judgement.
- d. That the Petitioner herein is awarded a sum of Kshs. 138, 050.00 (Kshs. 251, 000, 000.00 X 5% X 11 years = Kshs. 138, 050.00/=) as General Damages being 5% of the quantified damages of (Kshs 251,000,000/=) for loss of user on the unconstitutional and unlawful acquisition of land to the Government and subsequent orders
- e. That the Petitioners to surrender their title to the Government of Kenya upon receipt Payments in Prayers ( c ) and ( d ) and for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to ensure that the Register of Titles reflects the surrender.
- f. That the Respondents shall bear the costs of the Petition jointly and severally.

It Is So Ordered Accordingly.

**JUDGMENT IS DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED at MOMBASA THIS 23<sup>RD</sup> DAY OF MAY 2023.**

.....

**HON. JUSTICE MR. L.L NAIKUNI (JUDGE)**

**ENVIRONMENT AND LAND COURT AT**

**MOMBASA**

**Judgement delivered in the presence of:-**

- a. M/s. Yumna – the Court Assistant
- b. M/s. Moolraj Advocates for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Petitioners.
- c. M/s. Kiti Advocates for the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents
- d. No appearance for the 3<sup>rd</sup> Respondent

