



**Mbogho & 8 others v Director Lands Adjudication and Settlement & 4 others;  
County Government of Taita Taveta (Interested Party) (Environment & Land  
Petition 38 of 2021) [2023] KEELC 17814 (KLR) (15 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17814 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND PETITION 38 OF 2021**

**LL NAIKUNI, J  
MAY 15, 2023**

**BETWEEN**

**HERMAN MWAKITAU MBOGHO ..... 1<sup>ST</sup> PETITIONER  
ASHA MWAKE NDOLONGA ..... 2<sup>ND</sup> PETITIONER  
NEWTON CHUMA MWAKIO & 6 OTHERS ..... 3<sup>RD</sup> PETITIONER**

**AND**

**DIRECTOR LANDS ADJUDICATION AND SETTLEMENT . 1<sup>ST</sup> RESPONDENT  
CHIEF LAND REGISTRAR ..... 2<sup>ND</sup> RESPONDENT  
NATIONAL LAND COMMISSION ..... 3<sup>RD</sup> RESPONDENT  
MASDEN MALAGHO (SUED AS THE CHAIRMAN SOFIA BONNA ANNEX  
SETTLEMENT BLOCK 3) ..... 4<sup>TH</sup> RESPONDENT  
ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT**

**AND**

**COUNTY GOVERNMENT OF TAITA TAVETA ..... INTERESTED PARTY**

**JUDGMENT**

**i. Preliminaries.**

1. The Judgement of this Honourable Court pertains to a Petition dated 4<sup>th</sup> August, 2021 filed by the Petitioners herein. The Petitioners brought this suit on their own behalf and on behalf of other persons 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. The Petitioners claim to be the bonafide owners of the property Voi Municipal Block 3 which is situated within Voi Township and who have been



illegally and unlawfully be denied allocation of plots but which the plots have been wrongfully and illegally allocated to strangers and / or influential individuals in government of Taita Taveta County and National Government.

2. Upon service, on 21<sup>st</sup> March, 2022 the 4<sup>th</sup> Respondent filed their Responses accordingly.

## **ii. The Petitioners' Case**

3. The Petitioners sought for the following orders that:-

- a. A declaration that the Petitioners are entitled to be given the first priority for allocation and own plots within the Voi Municipal Block 3 arising from the sub - divisions thereof and such the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are and hereby ordered to allocate each Petitioner plots and to issue them with title deeds for the allocated plots.
- b. A permanent order of injunction do issue against the Respondents herein by themselves and / or officers working under them from trespassing, entering, encroaching, evicting and/ or in any way interfering with the parcels of land held and in possession, occupation and use by the Petitioners up and until the Petitioners have each been given plots from the subdivision carried out from the suit property.
- c. The 1<sup>st</sup> to 3<sup>rd</sup> and 5<sup>th</sup> Respondents are and hereby ordered to account for and provide the list of persons who benefitted from the sub - division of the Voi Municipal Block 3 for the Honourable Court to determine the fairness and equitable distribution on those deserving allocation as per the law.
- d. Honourable Court do issue such or further orders in the interests of justice.
- e. Costs of the Petition be granted to the Petitioners.

4. The instant Petition is a strange Petition from the usual conventional ones. The Petition is verified by a six ( 6 ) Paragraphed Verifying Affidavit sworn by HERMAN MWAKITAU MBOGHO (sic) and accompanied by his witness statement (sic) dated 4<sup>th</sup> August, 2021. The Petitioners have cited the provision of Articles 20 (1) (2) and (3), Article 23 (1) (3), 25 (c), 27, 35, 48, 60, 61, 22, 232 and 234 of *the Constitution* of Kenya, 2010 as the basis for the Petition.

## **iii. Factum matrix of the Petition.**

5. From the averments under Paragraphs numbers 9 to 32 of the Petition, the Petitioners state that the suit property is a vast parcel of land approximately over 1000 acres lying eastward of Voi township and running along Voi River to border the Voi old Railway station which has all over the years been treated as an agricultural land in spite lying within the town area due to its fertile soil. The Petitioners and members of the 4<sup>th</sup> Respondent herein have historically been in possession, occupation and user of the suit property until few years ago when it was decided the same should be sub divided into plots.
6. The Petitioners welcomed the idea of the suit property being subdivided subject to fair allocation of the plots. The pull forth and backwards between members of the petitioners and those of the 4<sup>th</sup> Respondent who were in the same community based organization led to split of the organization leading to registration of the Bona Annex Settlement scheme CBO while the 4<sup>th</sup> Respondent registering Sofia Bona Annex Voi Municipality Block 3. To the Petitioners it was apparent that there was an hand of influential individuals in the county an national government behind the conflict and in effect the 1<sup>st</sup> respondent ganged up against petitioners and secretly subdivided the suit property without informing the petitioners.



7. The Petitioners blamed the Respondents for illegal allocations of the plots and a few members of the Petitioners being allocated plots and over 100 plots being allocated to unknown influential individuals of the County, national government, land officers and their relatives or cronies leaving the Petitioners empty handed.
8. The Petitioners state that it was the only source of their livelihood for them. They would grow food crops like maize and beans, vegetables like spinach, cabbages, kale and tomatoes and fruits on it. They would supply these products to Voi market and generate income for up keep and meet their daily needs. But due to frequent floods in the area many of the Petitioners had since moved out of the suit property and rented houses elsewhere.
9. The Petitioners felt aggrieved on what they termed illegal and discriminative acts of the Respondents resulting in loss and damage. The Petitioners maintained that the adjudication process undertaken by the Respondents was in secrecy, opaque and marred with fraudulent deals leaving out the bonafide beneficiaries and specifically the Petitioners. The Petitioners feel discriminated by dint of poverty, ethnicity and political consideration as well as their hard stand that the plots should be allocated to deserving not the mighty and the powerful.
10. The Petitioners state that they had been subjected to undue hardship, loss and damage, illegal discrimination and their rights to fundamental freedoms have been violated. The Petitioners feel that the right to provision of land and protection of their property by the government had been breached and prayed that the Court allowed the Petition.

#### **iv. The Responses by the 4<sup>th</sup> Respondent**

11. The 4<sup>th</sup> Respondent filed an 18 Paragraphed Replying Affidavit sworn by MASDEN MALAGHO and dated on 21<sup>st</sup> March 2022. He deponed that he was the 4<sup>th</sup> Respondent and hence competent to swear this Affidavit. He held that the Petitioners save for the 1<sup>st</sup> Petitioner and a few others were not members of Sofia Bona Squatter up grade scheme and were strangers. Thus, they were not entitled to any interests in the suit property. The deponent further stated that the land allocation exercise was not clandestine as claimed. On the contrary, there was public participation by way of election of a committee of 13 members, establishment of owners, pick and giving of numbers , development of a part development Plan (PDP) , meeting to scrutinize the plan and match it with owners.
12. Indeed, the Director of Physical Planning caused to be published on 2<sup>nd</sup> July 2012 in the local dailies a notice of completion of the development plan in both English and Swahili while calling for interested parties to raise objections within 60 days.
13. The 4<sup>th</sup> Respondent further averred that the 1<sup>st</sup> Petitioner had been issued with a title. He had collected it a fact he had not disclosed and could not now seek orders in vain. He could not deny that he was the registered owner of Plot No. Taita/Taveta/Voi Municipal Block 3 (Annex)/135.
14. The Petition challenged titles already issued to persons who had not been made parties to the suit and was not legally possible to challenge title already issued without making the registered owner a party to the suit. The 4<sup>th</sup> Respondent argued that the Petitioners had no probable cause of action.
15. The Petitioners ought to had raise objections which they never did. On record there was answer to Petition dated 10<sup>th</sup> March 2022 which the contents mirrors the Replying Affidavit.



### **Response by 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Respondents.**

16. The 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Respondents filed a 12 Paragraphed Replying Affidavit to Petition dated 12<sup>th</sup> February 2022 opposing the Petition and filed on 24<sup>th</sup> February, 2022. It was based on the grounds that the Petition was misconceived, vexatious and abuse of the process of the Court. That the Petitioners had no proprietary rights over the suit property to warrant the orders sought in the petition as being a member to Bona Annex settlement scheme CBO did not entitle the Petitioners to proprietary rights over the land. They stated that the Petition failed to meet the test of the case of “Anarita Karimi case and it ought to be dismissed. As such the Petition was fatally defective as it made allegations against persons who were not party to the Petition.
17. Further, the Petition sought for the cancellation of titles to suit property but failed to disclose details of those titles and the registered owners which was in contravention of the principles of natural Justice. The Respondents averred that the right to acquire property was not synonymous to right to provision of land as alleged by the Petitioners. They indicated that that the Petitioners were guilty of misrepresentation by alleging that there had been no public participation and material non disclosure in failing to disclose to this Honourable Court that the Certificate of Titles had been issued and some of the Petitioners were beneficiaries.
18. According to the Respondents, the Petitioners had failed to lodge an application as required by the provision of Section 8 of the [Access to information Act](#) with the 1<sup>st</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondents and/or lodge a complaint as provided for under the provision of Section 14 of the [Access to Information Act](#) to warrant grant of orders sought. The Respondents held that the Petition raised no claim against the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Respondents and that Petitioners had failed to discharged the burden to warrant the orders sought. Thus, they prayed for the Court to dismiss the case against the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Respondents with costs

### **Interested party’s - Grounds of Opposition.**

19. The Interested Party, the County Government of Taita Tavetta filed a notice of preliminary objection dated 20<sup>th</sup> September, 2021, a 9 grounds of opposition dated 13<sup>th</sup> May 2022. It termed the Petition as fatally defective, scandalous and a waste of the Court’s time as it never disclosed any cause of action against the Interested Party. The Interested Party contended that the process of allocation, adjudication and sub - division of the suit property was made public as required by law and members of public advised to inspect the register and raise any concerns, which opportunity the Petitioners never utilized. The Interested Party faulted the 1<sup>st</sup> Petitioner for failing to disclose that he was a beneficiary having been issued with a title and hence the Petition was wanting in specificity and particularity.
20. The process of adjudication having been finalized and titles issues, the substratum of the Petition had since fizzled and the Court was not clothed with jurisdiction. They averred that the Petitioners were guilty of laches and non disclosure of material facts to the Court and were misleading the Court and for this reason it should be dismissed. In conclusion the interested party terms the petition as incompetent and should be dismissed with costs.

### **v. Submissions**

21. On diverse dates of 28<sup>th</sup> march, 2022, 7<sup>th</sup> June, 2022 and 15<sup>th</sup> November, 2022 while all the parties would be present before the Honourable Court, they were directed to have the Petition be disposed off by way of written submissions. Pursuant to that all the parties fully obliged. Hence, the Honourable Court reserved a date to deliver the Judgement on 27<sup>th</sup> march, 2023 accordingly. However, since on this



date the Judgement had not been ready notices were further issued for the delivery of the Judgement on 15<sup>th</sup> May, 2023.

#### **a. The Written Submissions by the Petitioners**

22. On 29<sup>th</sup> August, 2022 the Learned Counsel for the Petitioners the Law firm of Messrs. Mwinzi & Advocates filed their written submissions in the submissions dated 26<sup>th</sup> August 2022. Mr. Mwinzi Advocate commenced the submission by providing a brief background of the Petition to the effect that the Petitioners had been historically the owners in possession of the suit land. Due to being in the lower areas of Voi town, it began to be flooded every rainy season causing many of the Petitioners to relocate to safer places. In the year 2019, the Respondents and the Interested party caused the surveying of the land into small sub – divided portions. They made promises that the Petitioners would be considered upon the completion of the sub - division. However, after the exercise its other influential and well connected people and strangers who benefited while the Petitioners were outrightly side lined. The protest by the Petitioners never bred any fruits. They were kept in darkness until the year 2021 when the title deeds commenced being issued to the illegal allottees which necessitated them to institute this suit.

23. The Learned Counsel framed four (4) issues for determination. These were:-

Firstly, whether the constitutional rights of the Petitioners had been violated by the actions of the Respondents. The Petitioners submitted that they had brought the Petition pursuant to Article 20 (1) (2) and (3) of *the Constitution* of Kenya, 2010. They had a right to approach Court on alleged infringement of the Constitutional rights. They relied on the case of “Anarita Karimi Njeru - Versus - Republic which held that:- “Constitutional violation must be pleaded with reasonable degree of precision” . The Petitioners argued that the actions of the Respondents in disregarding the plight of the genuine members who had missed on the allocation of land in the Adjudication section were discriminatory and violated their rights under the provision of Article 27 of *the Constitution*. The Petitioners further averred that the Respondents violated their constitutional right to access to information under Article 35 of *the Constitution*. The Petitioners contended that the negative effect of adjudication register as presently constituted following the flawed allocation of plots was an affront and infringement on the Petitioners right to own property and acquire property under Article 40 of *the Constitution* of Kenya, 2010 having lived on the suit land as squatters and homeless since time immemorial but were now being evicted. They stressed that there was no public participation before this decision to allocate the land to individuals whose names never appeared in the CBO was arrived at. They were denied their rights to be heard and access to information despite all efforts made by them. To buttress on these points they relied on the cases of “Kenya Human Rights Commission & Ano - Versus – Non – Governmental Organisation Co – ordination Board, Nbi High Court Petition No. 404 of 2017 (2018) eKLR; and Kimwele Kithoka & 26 Others – Versus – Deputy County Commissioner Kyuso, Sub County & 7 Others (2022) eKLR.

Secondly, whether the Petitioners were entitled to the allocations of plots. They argued that their rights were violated as they were denied rights to access information. They claimed that they were never informed that after demarcation was done some plots would be sold to other individuals who were not listed in the Sofia Bona Annex Settlement Scheme CBO. This action taken by the Respondents violated their rights. They cited the case of “Wifred Juma Wasike & 11 Others – Versus – Ministry of Interior & Co – ordination & Ano. (2022) eKLR.



Specifically, they argued that they were entitled to allocation of the plots from sub - division of their land.

Thirdly, whether an order to produce and account for the individuals allocated plots should issue. The Learned Counsel averred that the Petitioners land was sub – divided and the Plots created but they were never given. Instead, the plots were allocated to unknown individuals. The said individuals were undeserving making the allocation irregular and illegal. They were denied their right to own property. As such the Petitioners were entitled to being given the list of the individuals who benefited from the allocation of the sub – divided plots. They relied on the case of “Judicial Service Commission – Versus – Mbalu Mutava & Ano (2015) eKLR” where Court held that natural justice comprised the duty to act fairly.

Finally, the Learned Counsel contention was that the Petitioners had discharged their burden of proof and as it was trite law that they were entitled to costs to be borne by the Respondents.

### **B. The Written Submission by the 1<sup>st</sup> , 2<sup>nd</sup> and 5<sup>th</sup> Respondents**

24. Through the Learned State Counsel Mr. Emmanuel M. Makuto, the 1<sup>st</sup> , 2<sup>nd</sup> and 5<sup>th</sup> Respondents filed their written submissions dated 21<sup>st</sup> November 2022 rehashing to detail the contents of their Reply to Petition. The 1<sup>st</sup> , 2<sup>nd</sup> and 5<sup>th</sup> Respondents analyzes that the Petitioners lay claim to the suit property of the land is not clear enough to enable the Respondents put in a substantive reply to the Petition. The registration details of the suit property had not been provided to enable the Respondents know which parcel of land the Petitioners were laying claim to.
25. They submitted in failing to properly to describe the suit property the Petitioner failed to adhere the need to set out the cause of action precisely in adherence to the principles set out in the case of “Anarita Karimi Njeru – Versus - Republic and echoed in Mumo Matemu - Versus -Trusted Society of Human Rights Alliance Civil Appeal 290/ 2012 (2013) eKLR. The Counsel further submitted that the Petitioners failure to adequately describe the suit property denied them an opportunity to respond to the Petition adequately and unable to know the precise suit land that was the subject of the proceedings. Similarly the Petitioners had not cared to explain why or how membership to Sofia Bona annex settlement scheme CBO entitled them to any proprietary interests in the suit parcel to warrant grant of the orders sought .
26. The Learned Counsel argued that the Petitioners had erroneously construed the right to acquire and own property enshrined in the provision of Article 40 of *the Constitution* to be synonymous to a right to provision of land. The Petitioners had not produced any document proving of the suit property. His contention was that Petitioners had not presented proof the suit property had been sub - divided and if so how many parcels. The Petitioners failed to disclose who the owners of the new sub - divisions were.
27. He averred that apart from the 1<sup>st</sup> Petitioner the other members were not members of the Sofia Bona Squatter upgrade scheme a statement which had not been contested. The committee members were elected and land owners identified by the elected committee and publications were made in both Kiswahili an English Languages. The Counsel further contended that the beneficiaries including the 1<sup>st</sup> Petitioner had already been issued with a title which was strange that the Petitioner never disclosed that fact to Court that he had already been issued with a title.
28. Further that in the absence of the registered owners of the individual parcels of land this court could not make any orders touching on the land without infringing on the registered owners right to be heard before any adverse orders were made against them and the Court should declined the invitation



to grant the orders sought in the Petition without hearing the registered owners. He further argued that the Petitioners had failed to lodge an application as required by the provision of Section 8 of the [Access to Information Act](#) with the 1<sup>st</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondents or lodge a complaint as provided in the provision of Section 24.

29. In conclusion, the Counsel submitted that the Chairman Sofia Bonna Annex Settlement Block had provided a list of beneficiaries in Sofia Bona Squatter Up grading scheme. The Petitioner had knowledge of the list before making his submissions yet the Petitioners stated in their submissions that they had knowledge of the list which is contrary that the land was given to unknown individuals. According to them the Petitioners beneficiaries were undeserving but no reasons had been disclosed why they were undeserving. They pray the Court to dismiss the Petition with costs.

### **c. The Written Submission by the 4<sup>th</sup> Respondent**

30. On 4<sup>th</sup> November 2022, the Learned Counsel for the 4<sup>th</sup> Respondent filed their written Submissions dated even date. Mr. Nyange Advocate commenced by providing a brief introduction and background of this case. For its consideration, the Learned Counsel framed three issues for determination. These were, firstly whether non joinder of the registered owners was fatal. His submission was that the Petition challenged the process of allocation of the suit land. There was evidence that the titles had since been issued and collected and the 1<sup>st</sup> Petitioner had collected his title, a fact he deliberately failed to disclose. The principles of natural justice never allowed a party to be condemned unheard. The 4<sup>th</sup> Respondent submits that the provision of Articles 25 and 50 of [the Constitution](#) were not subject to limitation. To buttress its case, the Counsel cited several cases being “Mbaki & Others – Versus – Macharia & Another (2005) 2 EA 206; Pashito Holdings & Ano. – Versus – Ndungu & 2 Others KLR (E&L 1 295; Nyongesa & 4 Others Egerton University College (1990)) eKLR 692; Cozens -Versus – North Devon Hospital Management Committee & Ano. (1966) 2 ALL EA 799; JMK – Versus – MWM & Another (2015); and Msagha – Chief Justice & 7 Others Nairobi HCMCA No. 1062 of 2004 (2006) 2 KLR 553.
31. Secondly, whether there were constitutional violations. The Learned Counsel submitted that none of the violations complained of were substantiated. He argued that none of them had produced a copy of title that the 1<sup>st</sup> Petitioner was the registered owner of the property Taita / Taveta Municipality Block 3 (Annex) 135. To the Counsel, the Petitioners had not demonstrated how their property rights had been infringed. The evidence on record showed that the settlement process was commenced and was completed which exercise the Petitioners or some of them benefitted from the settlement exercise. The land adjudication and settlement process had not infringed on the Petitioners right to property and on the contrary the process was aimed at giving the Petitioners proprietary rights over the suit property.
32. The Learned Counsel faulted the Petitioner for failing to stick to the elaborate procedure on how complaints arising from the planning, demarcation, and surveying of land provided under the [Land Adjudication Act](#), Cap 284 under the provisions of Sections 6, 9 and 31. He submitted that the Petitioner had not shown that the adjudication register in respect of the suit property was ever published and they raised objections. The Counsel submitted that as per the provision of Section 29 (3) of the Act the director had signed certificate of finality and forward the adjudication register to the Chief Land Registrar for registration. The Petitioners could only move this court for declaratory orders and judicial review orders by way of an ordinary suit once they had exhausted the mechanisms that the law has put in place.
33. Thirdly, whether the final orders sought could issue. The Learned Counsel argued that the parties were bound by their own pleadings. A court could not frame an issue stated in the pleadings. To buttress



on this point, he relied on the decision of Supreme Court “Raila Amolo Odinga & Ano. – Versus – Independent Electoral and Boundaries Commission & 2 Others (2017) eKLR.

34. The Counsel contention was that the final prayers sought which had not been amended could not issue. The title deeds having been issued the first prayers for the Petitioners to be given priority in the allocation arising of the sub - divisions had been overtaken by events. The order for a permanent injunction against the Respondents had also been rendered moot, the suit land had already been allocated and titles issued the work of the Respondents was concluded under statute. The third prayer for an order to account and give list of beneficiaries was of no longer necessary. Title having been issued that list of beneficiaries was of no value and was easily available. The Petitioners were fishing for evidence. They wanted to turn the Court into an investigative entity. The orders were aimed at assisting the Petitioners secure evidence which they wanted the Court to examine and determine its fairness on the face of it. The Learned Counsel argued that this prayer could not issue and sought the Petition be dismissed with costs.

#### vi. Issues for determination.

35. Upon keen perusal of the Petition, the responses on record, the documents and the written submissions and plethora of authorities by the parties, the relevant provisions of *the Constitution* and statutes, there are three (3) issues that crystallizes for determination by this Court:-
- a. Whether a declaration that the Petitioners are entitled to be given the first priority for allocation and own plots within the Voi Municipal Block 3 arising from the subdivisions thereof and such the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are and hereby ordered to allocate each petitioner plots and to issue them with title deeds for the allocated plots can issue?
  - b. Whether a permanent order of injunction sought by the Petitioners herein against the Respondents herein by themselves and / or officers working under them from trespassing, entering, encroaching, evicting and/ or in any way interfering with the parcels of land held and in possession, occupation and use by the Petitioners up and until the petitioners have each been given plots from the sub - division carried out from the suit property can issue?
  - c. Who is to bear the costs.

#### vii. Analysis & Determination.

36. To arrive at a decision whether the orders sought can issue I will analyze the prayers sought in the Petition as hereunder:-

**Issue No. a). Whether a declaration that the petitioners are entitled to be given the first priority for allocation and own plots within the Voi Municipal Block 3 arising from the subdivisions thereof and such the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are and hereby ordered to allocate each petitioner plots and to issue them with title deeds for the allocated plots can issue?**

37. The *Land Registration Act*, No. 3 of 2012 is very clear on issues of ownership of land. The provision of Section 24(a) of the *Land Registration Act* provides as follows:

“Subject to this Act, 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.”



38. The provision of Section 26 (1) of the [Land Registration Act](#) states as follows:

“The Certificate of Title issued by the Registrar upon registration ... 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... 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.”

39. It is well established that, the Certificate of Title issued by the Registrar upon registration 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 and the title of that proprietor shall not be subject to challenge except – On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

40. The Court in case of:- “Elijah Makeri Nyangw’ra – Versus - Stephen Mungai Njuguna & Another (2013) eKLR The Judge in the case while considering the application of section 26(1) (a) and (b) of the [Land Registration Act](#) rendered himself as follows:-

“-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”

41. From their filed pleadings, the Petitioners state they have been historically the owners in possession and occupation of the suit property for as long as they could remember and in the year 2019, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in consultation with the interested party moved the Petitioners into the parcels of land and caused the surveying giving rise to subdivisions of plots of various measurements. To the Petitioners they were kept in darkness until the year 2021 when title deeds were issued. The Petitioners state that the instant Petition was not about stopping the adjudication of the suit property which process entirely ended long time ago and titles issued . They are challenging the unfair distribution of the plots which they alleged were done to unknown and well connected individuals who were not registered members of the Sofia Bona Annexed settlement scheme CBO and thus termed the adjudication process as illegal on the basis that undeserving parties were allocated portions of the suit property leaving the Petitioners empty handed.

42. Proceeding from the Petitioners statements, first off it is trite law that upon adjudication and issuance of titles Voi Municipal Block 3 ceased to exist. What we have right now was the resultant titles emanating from the mentioned suit property. The Petitioners state that they are entitled to be given the first priority for allocation and own plots within the Voi Municipal Block 3 arising from the subdivisions thereof. On this aspect the Petitioners have not demonstrated why they should be allocated land on a priority basis .

43. The Petitioner are asking the Court to order the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to allocate each Petitioner plots and to issue them with title deeds for allocated plots this question cannot issue. I say so because the substratum of the Petition is that the Petitioners are challenging the adjudication process giving rise to titles already issued to individual owners. The process is complete and the only remedy is to



challenge the issue of titles in the names of individuals who are not before this Court. Guided by the principles of natural justice, of the right to be heard and not condemned unheard, it will be an injustice and contrary to the right to a fair hearing for this Court to proceed and make orders which in effect can cancel a title without according such a person an opportunity to present his/her/its case.

44. Additionally, I fully concur with the learned Counsel for the 4<sup>th</sup> Respondent to the extent that under the provision of Article 50 of *the Constitution* of Kenya entitles every person right to a fair hearing. That right according to Article 25(c) of *the Constitution* cannot be limited. The right to a fair trial is a fundamental right, the non-observance of which undermines all other human rights. Therefore the right to a fair trial is a non-derogable right.

45. In the case of “Pinnacle Projects Limited - Versus - Presbyterian Church of East Africa, Ngong Parish & another [2018] eKLR, had the following to say on Article 50 with respect to fair trial principles in civil cases:

“While the wording of Article 50 of *the Constitution* on the right to a fair hearing prima facie seems to focus on criminal trials it’s not lost that fair trial in civil cases includes: the right of access to a court, the right to be heard by a competent independent and impartial tribunal, the right to equality of arms, the right to adduce and challenge evidence, the right to legal representation, the right to be informed of the claim in advance before the suit is filed, the right to a public hearing, and the right to be heard within a reasonable time.”

46. The Honorable Court went on to say:

“.....it is important that in any judicial process adjudication parties involved be given opportunity to present their case and have a fair hearing before the decision against them is made by the respective judge or magistrate. It is not lost that procedural fairness is deeply ingrained in our administration of justice system.

47. It is not contested that the adjudication process is now complete and titles issued to respective person (s). I decline to make an that the petitioners are entitled to be given the first priority for allocation and own plots within the Voi Municipal Block 3 arising from the sub - divisions thereof and order the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to allocate each petitioner plots and to issue them with title deeds for the allocated plots. I say so because the order sought is incapable of taking effect. The process of adjudication is complete and titles issued, which part of the suit will the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents allocate to the Petitioners. Making such an order at this point is a recipe for chaos a typical replica of what the famous English Philosopher Thomas Hobbes once stated as “Short, Nasty and Brutish”.

48. Whereas the Petitioners state that they are entitle to be given portions of the suit priority they have not advanced the reasons as to why they should be given priority. The herculean questions arise here, is it because they have been residing on the suit property or there is a criteria which was being used to allocate the plots which the Respondents failed to adhere to. The Respondents on the other hand have also not tendered any evidence of the criteria used in the allocation process. For these reasons, the Honourable Court declines the invitation by the Petitioner to grant this prayer on the reason that such order may interfere with the validity of the titles issued without affording respective proprietors the opportunity to be heard. I advise that, perhaps the Petitioners may consider moving this Court through an ordinary suit seeking the appropriate orders for the cancellation and/or revocation of the already issued title deeds. I rest this matter.

**Issue No. b). Whether a permanent order of injunction sought by the Petitioners herein against the Respondents herein by themselves and / or officers working under them from trespassing,**



**entering, encroaching, evicting and/ or in any way interfering with the parcels of land held and in possession, occupation and use by the petitioners up and until the petitioners have each been given plots from the subdivision carried out from the suit property can issue?**

49. Taking cue from the Petitioners sentiments that the process is complete and titles have been issued, importantly it must be noted the Court cannot make an order in vain. The prayer sought by the Petitioners is ambiguous and incapable of taking effect. The Petitioners are asking the Court to issue injunctive orders against the Respondents until the Petitioners have each been given plots from the sub - division carried out from the suit property which will amount to directing other parties on how to execute their duties. Unlike Temporary Injunction which are granted only to be in force for a specified time or until the issuance of further orders from Court, Permanent Injunction are rather different, in that they are perpetual and issued after a Suit has been heard and finally determined. Permanent Injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the Respondent in order for the rights of the Petitioner to be protected. This Court has the powers to grant the Permanent Injunction under Sections 1A, 1B, 3, 3 A and 63 ( e ) of the Civil Procedure Act, Cap 21 and Order 40 Riles, 1,2 & 3 of the Civil Procedure Rules, 2010 or Conservatory Orders under the Constitution (Protection of fundamental rights and freedoms) Rules, 2013 if it feels the right of a Party has been fringed, violated and/or threatened as the Court cannot just seat, wait and watch under these given circumstances. It's the effect of the order that matter as opposed to it mere positive working which makes it mandatory. The circumstances under which the Court would grant a Mandatory Injunction was well stated out by the Court of Appeal in the Case of "Malier Unissa Karim –Versus -- Edward Oluoch Odumbe (2015) eKLR as follows:-

“The test for granting a Mandatory Injunction is different from that enunciated in the “Giella –Vs- Cassman Brown case which is the locus classicus case of Prohibitory Injunctions. The threshold in Mandatory is higher than the case of Prohibitory Injunction and the Court of Appeal in the case of “Kenya Breweries Ltd-Vs- Washington Okeyo (2002) EA 109” had the occasion to discuss and consider the principles that govern the grant of a Mandatory Injunction was correctly stated in Vol. 24 Halsbury Laws of England 4<sup>th</sup> Edition Paragraph 948 which states as follows:-

“A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, it the case is clear and one which the Court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the Defendant attempts to steal a match on the Plaintiff, a Mandatory Injunction will be granted on an Interlocutory application”.

50. Further the same Court of appeal in the case of “Jay Super Power Cash and Carry Ltd –Versus - Nairobi City Council and 20 others CA 111/2002” held that:-

“This Court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken balance he can pay for it”.

51. Clearly, I concur with the Learned Counsel for the 4<sup>th</sup> Respondent that while making this prayer the Petitioners would want to turn the Court into an investigation entity. The orders of permanent



injunction is now moot and overtaken by events. It is a mere academic discourse. For these reasons, I decline to grant this prayer as sought.

**Issue No. c). Whether an order directing the 1<sup>st</sup> to 3<sup>rd</sup> and 5<sup>th</sup> Respondents to account for and provide the list of persons who benefitted from the sub division of the Voi Municipal Block 3 for the Honourable Court to determine the fairness and equitable distribution on those deserving allocation as per the law.**

52. Under this sub heading, the Honourable Court recognises the averments by the Petitioners to the effect that the Respondents violated their constitutional right to access to information under the provision of Article 35 of *the Constitution* of Kenya, 2010 can issue. The provision of Article 35 of *the Constitution* decree the right to access to information that:-

- (1) Every citizen has the right of access to—
  - (a) information held by the State; and
  - (b) information held by another person and required for the exercise or protection of any right or fundamental freedom.
- (2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.
- (3) The State shall publish and publicise any important information affecting the nation.

53. To give effect to this Article, Parliament enacted “The *Access to Information Act*, 2016, No. 31 of 2016. The provision of Section 3 lists the Object and purpose of the Act is to—

- (a) give effect to the right of access to information by citizens as provided under Article 35 of *the Constitution*;
- (b) provide a framework for public entities and private bodies to proactively disclose information that they hold and to provide information on request in line with the constitutional principles;
- (c) provide a framework to facilitate access to information held by private bodies in compliance with any right protected by *the Constitution* and any other law;
- (d) promote routine and systematic information disclosure by public entities and private bodies on constitutional principles relating to accountability, transparency and public participation and access to information;
- (e) provide for the protection of persons who disclose information of public interest in good faith; and (f) provide a framework to facilitate public education on the right to access information under this Act.

54. The provision of Section 8 (1) of the Act stipulates that an application to access information shall be made in writing in English or Kiswahili and the applicant shall provide details and sufficient particulars for the public officer or any other official to understand what information is being requested.

55. It is evident that when the Petition was filed the 1<sup>st</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondents took a passive role. Ideally, it was expected that their responses they would have explained the criteria used to allocate portions of the suit property and provide the list of the beneficiaries as ordinarily it is a public document in their custody. Surprisingly, the 1<sup>st</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondents states that the Petitioners have not presented proof the suit property has been subdivided and if so how many parcels.



56. I now submerge my mind to *the Constitution*. that Article 232 (f) of *the Constitution* provides the principles and values of public service, one of which is transparency and provision to the public of timely, accurate information. Article 10 provides for National values and principles of governance:-

- (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—
  - (a) applies or interprets this Constitution;
  - (b) enacts, applies or interprets any law; or
  - (c) makes or implements public policy decisions.
- (2) The national values and principles of governance include—
  - (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
  - (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
  - (c) good governance, integrity, transparency and accountability; and
  - (d) sustainable development. (emphasis added)

57. In the case of “President of Republic of South Africa – Versus - M & G Media the Constitutional Court of South African emphasized the importance of the right to access information as a founding value of constitutional democracy and stated

“ [10]. The constitutional guarantee of the right of access to information held by the state gives effect to “accountability, responsiveness and openness” as founding values of our constitutional democracy. It is impossible to hold accountable a government that operates in secrecy. The right of access to information is also crucial to the realisation of other rights in the Bill of Rights. The right to receive or impart information or ideas, for example, is dependent on it. In a democratic society such as our own, the effective exercise of the right to vote also depends on the right of access to information. For without access to information, the ability of citizens to make responsible political decisions and participate meaningfully in public life is undermined.”

58. The right to access information as a basis for accountability, responsiveness and openness is also emphasized in the case of:- “Brummer - Versus - Minister for Social Development & Others (supra) where the Court stated-

“(62) The importance of this right too, in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the state. Indeed one of the basic values and principles governing public administration is transparency. And *the Constitution* demands that transparency “must be fostered by providing the public with timely, accessible and accurate information.”

(63) Apart from this, access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights. For example, access to information is



crucial to the right to freedom of expression which includes freedom of the press and other media and freedom to receive or impart information or ideas.”

59. In the case of “Trusted Society of Human Rights Alliance & 3 Others - Versus - Judicial Service Commission the Court stated that the exercise of this right should not require individuals to demonstrate a specific interest in the information and where therefore a public authority seeks to deny access to information, it should bear the onus of justifying the refusal at each stage of the proceedings.
60. As is in the instant Petition the 1<sup>st</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondents responds by submitting that the Petitioners have failed to lodge an application as required by section 8 of the [Access to Information Act](#) with the 1<sup>st</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondents or lodge a complaint as provided in section 24. In the case of:- “Katiba Institute – Versus - Presidents Delivery Unit & 3 others [2017] eKLR the learned E C Mwita J rendered himself thus:-
52. The Respondents further contended that the petition is premature basing their argument on section 21 of the Act. Their take was that the petitioner should have first complained to the Commission on Administrative Justice (CAJ) before filing the petition. I have read the Act but could not trace a provision making a report to CAJ a condition precedent to triggering the jurisdiction of this Court to deal with petitions filed seeking to challenge violations of the right to access information under Article 35 of [the constitution](#). This Court has unlimited jurisdiction under Article 165(3)(b) to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. The respondents’ contention that the petition is premature is therefore unsustainable.
61. In the present Petition, I note that vide a letter dated 11<sup>th</sup> November 2020, the Petitioners wrote to the Cabinet Secretary, Ministry of Lands and Physical Planning requesting for the beneficiary list submitted by the Director of land adjudication. On record is a letter dated 21<sup>st</sup> September 2020 the County of Taita Taveta survey office sought from the Director of Surveys requested for Registry Index Maps of the schemes within Voi township issued with titles but with Maps still in Nairobi. I find no reason as to why the 1<sup>st</sup> 3<sup>rd</sup> and 5<sup>th</sup> Respondents should decline to disclose the beneficiary list sought to the Petitioner in the spirit of transparency and accountability. For these reasons, I am inclined to grant that prayers as sought by the Petitioners from the filed Petition.

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

52. 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 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 vs 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.....”

67. 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 Petitioners have partly succeeded in their



case. Nonetheless, this being a case of great public interest, it is just fair, reasonable and equitable that each party bears their own costs.

**viii. Conclusion and disposition**

67. From my evaluation and analysis of the facts and evidence in this Petition and written submissions by the Learned Counsel for the parties, I come to the inescapable conclusion that Petitioners have only partially proved their case to warrant grant of prayer (c) of the Petition not for this Court to determine fairness and equitable distribution on those deserving allocation as per the law but for information of the Petitioners to satisfy themselves on who benefited from the portions of the suit property.

68. For avoidance of any doubt, I specifically proceed to enter Judgement in the following terms:-

- a. That Judgement be and is hereby entered in favour of the Petitioners herein but only as far as Prayers ( c ) of the Petition is concerned. The Honourable Court do hereby decline to grant the prayers being ( a ) and ( b ) prayed in the Petition herein.
- b. That an order is and hereby issued directing the 1<sup>st</sup> 3<sup>rd</sup> and 5<sup>th</sup> Respondents to provide the list of persons who benefitted from the sub division of the Voi Municipal Block to the Petitioners within 21 days of this judgement thereof.
- c. That each party to bear its own costs.

It is so ordered accordingly.

**JUDGEMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 15<sup>TH</sup> OF MAY 2023.**

.....

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

**ENVIRONMENT & LAND COURT**

**AT MOMBASA.**

**Judgement delivered in the presence of:**

- a. M/s. Yumnah, the Court Assistant.
- b. No appearance for the Petitioner.
- c. No appearance for 1<sup>st</sup> , 2<sup>nd</sup> , 3<sup>rd</sup> & 5<sup>th</sup> Respondents.
- d. Mr. Nyange Advocate for the 4<sup>th</sup> Respondent.

