



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**CONSTITUTIONAL PETITION NO. 17 OF 2018**

**IN THE MATTER OF: ARTICLES NOS. 10, 22, 23, 25, 27, 28, 40, 47, 67 AND 258 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF: SECTION 13 OF THE ENVIRONMENT AND LAND COURT ACT, 2011**

**AND**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF THE BILL OF RIGHTS UNDER ARTICLES 23(1) & (3), 40(3) AND 47 (1) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF: THE NATIONAL LAND COMMISSION ACT NO. 5 OF 2012**

**AND**

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

**BETWEEN**

**1. THERESIA RUNJI**

**2. MARIETA GITONGA CHEGE**

**3. NAOMI KIIO**

**4. SAMMY M. KARA.....PETITIONERS**

**VERSUS**

**NATIONAL LAND COMMISSION.....RESPONDENT**

**MIRITINI FREE PORT LIMITED.....INTERESTED PARTY**

**RULING**

1. The Notice of Motion application herein dated 12/02/2020 by the Interested Party has one main prayer; that this court be pleased to review its Judgment herein dated 12/11/2019 and thereafter set the same aside. The motion also prays that costs hereof be paid by the Petitioners herein.

2. The motion is premised on the grounds set out therein and is supported by affidavit of Joseph Mwella sworn on 12/2/2020.

3. The Applicant's case is that vide its Judgement issued on the 12/11/2019, the Court allowed the Petition herein and made consequential orders touching on the validity of the title subject matter of the suit herein, and which title is held by the named Interested Party herein; that though aggrieved by the Judgment and consequential decree, the Interested Party has not lodged an appeal from the decision aforesaid; that

in the meantime, the Interested Party has come upon new evidence which was not within its knowledge and could not be produced during the proceedings herein, to wit, the existence of an earlier Petition No. 44 of 2011 between the Petitioners herein, on the one hand, and Attorney General and the Commissioner of Lands on the other; that the said Petition No. 44 of 2011 effectively renders the instant Petition and consequential orders *res judicata*, by dint of the following:

- i) That the matter directly and substantially in issue in the determined suit herein is the same matter which was directly and substantially in issue in the former Suit/Petition.
- ii) That the matter involves the same Petitioners as parties or a party under whom the Petitioners claim as in the former Suit/Petition.
- iii) That the Petitioners, in both suits, are litigating under the same title, as “**the Petitioners,**” without their roles having been reversed and thus retaining their respective capacities in both cases.
- iv) That the former suit was lodged before a competent Court of concurrent jurisdiction as the instant Court, and which Court has the jurisdiction to similarly hear and determine the Petition herein, were the same to be lodged before it.
- v) That the former suit was heard on merits and finally decided in accordance with the applicable rules, and there is no indication that any appeal was preferred therefrom.

4. That in the circumstances, there exists sufficient reasons under the law for the court to exercise its review jurisdiction and to prevent an illegality being propagated in the guise of a lawful Court process, more so through the deliberate, non-disclosure of material facts by the Petitioners; that the instant application is timeously brought and without inordinate delay and before the Petitioner has formerly exchanged the relevant decree for the Interested Party’s approval before the envisaged execution hereof and that the Petitioners stand to suffer no discernable loss, not redressable by way of an order for costs, by the Court considering and determining the Review application herein.

5. The Applicant attached to the application a copy of Judgment in the Mombasa Petition No.44 of 2011 delivered on 29/03/2012. It is on the basis of this alleged new evidence of the aforesaid Judgment that the Applicant avers that the proceedings in petition herein were *res judicata*.

## **Response**

### **Petitioners’ Responses**

6. The Petitioners/Respondents opposed the motion through a Replying Affidavit sworn by Joseph Mbugua Gichanga on 27/02/2020 and a Supplementary Affidavit sworn on 12/3/2020. The deponent states that he is duly appointed, ordained and nominated by David Macharia, also known as Sammy Macharia Kara vide Power of Attorney No. PA/19103 dated 11/10/2017; Teresa Runji Gichoni vide Power of Attorney No. PA/19104 dated 11/10/2017; Naomi Kio vide Power of Attorney No. PA/19115 and Marieta Gitonga Chege vide Power of Attorney No. PA/19106 and as such he is competent to swear the Replying Affidavit.

7. The Petitioners’ case from the onset, is that it is misleading for the Interested Party/Applicant to state that it is still holding the title with respect to the suit property. The Petitioner states that the Interested Party was paid compensation with respect to the said land and the land has since been subdivided into 4805/1, 5267 and 5271 as at 13/9/2017. The Petitioner annexed a copy of the survey plan as annexure “**JMG-1**”. The Petitioners aver that they moved the court vide **Mombasa High Court Misc. Civil Application No. 318 of 1996; Elizabeth Munding & 7 others v. The Attorney General & Commissioner of Lands** to compel the Commissioner of Lands to issue certificate of title in their favour and also change the user of the land from industrial to commercial. However, the Commissioner of Lands decided to cancel the survey plan vide a letter dated 14/11/2007 without informing the Petitioners and on the same day decided to issue the same to Miqdad Enterprises. The Petitioners then filed an application seeking orders to restrain the Commissioner of Lands from proceeding with the said cancellation. The Petitioners annexed a copy of the order issued by the court as annexure “**JMG-2**”. In 2011 the Commissioner of Lands allotted the Petitioners other unsurveyed land marked as A, B, and C in the Part Development Plan No. 12.3 CT. 145.96 in the areas reserved for alternative settlements. This necessitated the Petitioners to file Mombasa **Petition No. 44 of 2011; Naomi Kiio & 3 others vs. The Attorney General & another**. The Petitioners state that the issues raised in Petition No. 44 of 2011 above do not render the instant Petition *res-judicata* because of the following reasons:

- a. Petition No. 44 of 2011 was in respect of the unsurveyed land marked as A, B, and C in the Part Development Plan No. 12.3 CT. 145.96 and not Plot No. 3912 and 3913/VI/MN which is the subject matter of the instant petition. The Petitioner annexed a copy of the said petition as annexure “**JMG-3**”.
- b. In Petition No. 44 of 2011 the Petitioners disclosed the existence of Mombasa High Court Misc. Civil Application No. 318 of 1996 which was with respect Plot No. 3912 and 3913/VI/MN wherein the Petitioners were challenging the cancellation of the allotments in their favour. (*See paragraphs 6 to 21 of the said annexure “JMG3”*).
- c. By the ruling delivered by the court on 29/3/2012 in Petition No. 44 of 2011 the court categorically held that the said petition was not with respect to Plot No. 3912 and 3913/VI/MN which is the subject matter of the instant petition.
- d. The parties in Petition No. 44 of 2011 and the instant petition are different as the National Land Commission and Miritini Free Port Limited were not parties in the said petition.
- e. Even though the judgment delivered on 29/3/2012 states that the petition is dismissed, the said petition was not heard on the merits. The court did not determine whether there were any violations done or not.

f. The cause of action in the instant petition is crystallized in the letters dated 8/8/2014; 22/9/2014 and 17/5/2017. Therefore, as the Judgment in Petition No. 44 of 2011 was delivered on 29/3/2012 the issue of res-judicata cannot be sustained at all.

8. The Petitioners' case is that vide a letter dated 3/4/2014 addressed to the Commissioner of Lands and the Respondent, the Attorney General required the Respondent to comply with the orders dated 11/9/1996 and 16/11/2005 issued in Mombasa High Court Misc. Civil Application No. 318 of 1996. The said orders directed the Commissioner of Lands to give the Petitioners certificates of title with respect to Plot No. 3912 and 3913/VI/MN. (See annexure "**JMG-5**"). The Petitioners further state that vide yet another letter dated 8/8/2014 the Attorney General registered disappointments with the Respondent and the Commissioner of Lands for the failure to comply with the orders dated 11/9/1996 and 16/11/2005 issued in Mombasa High Court Misc. Civil Application No. 318 of 1996 as advised in the Attorney General's letter dated 8/8/2014. (See annexure "**JMG-6**"). With a view to complying with the Attorney General's aforesaid letters, the Respondent sent a letter dated 22/9/2014 to the County Land Administration Officer, Mombasa to confirm the status of Plot No. 3912 and 3913/VI/MN and whether the allottees of the same were indeed compensated. (See annexure "**JMG-7**"). Vide a letter dated 26/5/2017 the National Land Commission County Coordinator Mombasa County confirmed to the Respondent that the Petitioners were allotted Plot No. 3912 and 3913/VI/MN which were amalgamated into MN/VI/4688 which was allocated by the Commissioner of Lands to Miqdad Enterprises and recommended that the Petitioners should be compensated forthwith for the said portions of land. (See annexure "**JMG-8**" being Respondent's letter dated 26/5/2017). Further, vide a letter dated 17/5/2017 the County Government of Mombasa directed the Respondent to compensate the Petitioners with respect to Plot No. 3912 and 3913/VI/MN or have the said plots revert back to them. (See annexure "**JMG-9**").

9. The Petitioners aver that the said parcels of land had been taken by the government for purposes of construction of the SGR, a fact that necessitated the filing of the instant petition, and that the order sought by the Interested Party would contradict the clear admission by the Government of Kenya as contained in the letters dated 22/9/2014, 26/9/2014 and 17/5/2018 that the Petitioners are entitled to compensation with respect to their right over the properties known as Plot No. 3912 and 3913/VI/MN.

10. The Petitioners aver that the order sought by the Interested Party is contrary to the public policy of Kenya and would uphold the immoral and/or illegal actions of the Respondent and the Interested Party due to the following reasons:

a. The Respondent has failed to comply with the orders dated 11/9/1996 and 16/11/2005 issued in Mombasa High Court Misc Civil Application No. 318 of 1996; Elizabeth Mundingi & 7 others vs. The Attorney General & Commissioner of Lands and the advice given by the Attorney General vide letters dated 8/8/2014 and 22/9/2014.

b. The Respondent has failed to comply with the instructions given by its principal, the County Government of Mombasa which recommended that the Petitioners be fully compensated. (see annexure **JMG-9**)).

11. The Petitioners state that the application for review seeks to ensure that the Petitioners are not compensated contrary to the directions of the County Government of Mombasa and the Attorney General, while at the same time the Interested Party is busy pursuing further compensation with respect to the same property in the ELC Court as witnessed in annexure "**JMG-13**".

12. Further, the Petitioners aver that the Respondent has failed to enforce Section 116 of the Land Act which gives it the power to recover any monies paid in error. As such, it is not enough for the Respondent to state that it has already paid compensation in respect of the suit property as the said payment can easily be recovered by application of the law.

13. The Petitioners further state that vide letters dated 25/10/2013; 11/2/2014; and 31/10/2014, the Respondent was advised by the Commission for Implementation of the Constitution; Office of the Attorney General; and the Ministry of Land, Housing and Urban Development respectively, that it was an agent of the National and the County Governments. As such, the Respondent ought to comply with the instructions given by the County Government and the Attorney General on behalf of the National Government. Therefore, there is no reason why the Respondent did not comply with the letters dated 8/8/2014; 22/9/2014 and 17/5/2017. (See annexure "**JMG-10**").

14. The Petitioners aver that Miritini Free Port and Miqdad Enterprises must have known that in amalgamating Plots Nos. 3912 and 3913 Section/VI/MN to make Plot No. 4805/VI/MN, that Plot Nos. 3912 and 3913/VI/MN measuring 3.997 Ha were unlawfully converted to their own use as the said plots did not belong to them; that even as the Interested Party presented claim for compensation it knew that 3.997 Ha which had been obtained by amalgamating Plots Nos. 3912 and 3913 Section/VI/MN into Plot No. 4805/VI/MN, did not belong to them.

15. Further, the Petitioners state that even assuming there is in fact *res judicata*, the minute the issues of fraud and illegality came into play, *res judicata* cannot apply.

16. The Petitioners state that the Respondent-National Land Commission - proceeded to pay compensation to the Interested Party in violation of national values, and this amounted to lack of accountability contrary to the provisions of Article 10 of the Constitution of Kenya, 2010, and this act was in furtherance of a fraudulent conduct by the Interested Party, and that the only reason why the Interested Party has filed the current application is to stall the ongoing criminal investigations against it. (See letters dated 23/8/2018 and 8/3/2018 in support of the above fact marked as annexure "**JMG-12**").

(All the annexures referred to above are those attached to the Replying Affidavit of Joseph Mbugua Gichanga sworn on 27/2/2020).

17. The Petitioners further aver that in any event the Interested Party no longer owns the suit title. That the Interested Party and Respondent completed the subdivision of plot 4805/VI/MN on 14/9/2017 pursuant to section 118 of the Land Act 2012 and in all, plots number MN/VI/4805/1, 5267 to 5271 were created. (See survey plan annexed as "**JMG-2**"). The Interested Party on 3/7/2019 made an application for surrender of plot No. MN/VI/4805 and issuance of new title deeds for Plot no. MN/VI/5267 to MN/VI/5271. (See copy of the application for surrender annexed as "**JMG-3**"). Further, the Interested Party by a deed dated 4/6/2019 surrendered the Certificate of Title CR NO. 50054 to the Registrar of Titles and which was registered as CR 50054/2 and which vested Plot MN/VI/4805/1 pursuant to section 120 sub section

(4) of the Land Act 2012 to the Government of Kenya (SGR). (See a copy of the surrender annexure “**JMG-4**). The Interested Party was issued with the new Titles for subdivision number Plot no. MN/VI/5267 to MN/VI/5271 CR NO. 50054/3 and the Title for Plot no. 4805/VI/MN was closed on surrender and the Title documents were cancelled pursuant to section 121(2a) (2b). (see a copy of the cancelled titles annexure “**JMG-5**).

(All the annexures referred to in paragraph 17 above are those attached to the Supplementary Affidavit of Joseph Mbugua Gichanga sworn on 12/3/2020).

18. The Petitioners aver that the orders sought by the Interested Party have the effect of reviewing the consent orders between the Petitioners; the Attorney General and the Commissioner of Lands in **Mombasa High Court Misc. Civil Application No. 318 of 1996; Elizabeth Mundingi & 7 others vs. The Attorney General & Commissioner of Lands** yet the Interested Party has no mandate or capacity in law to do that.

19. The Petitioner/Respondent also filed Preliminary Objection on 2/4/2020 stating that the Interested Party’s action is in furtherance of an illegality and is against the Principle of Public Policy; that the said application offends Article 40 of the Constitution of Kenya 2010, as the Interested Party has had no interest in Plot No. MN/VI/4805/1 since the 14<sup>th</sup> day of September 2017; that the Interested Party is a beneficiary of the non-compliance of court orders by the Respondent and its action herein is therefore illegal and devoid of Jurisdiction and that this court lacks jurisdiction to grant the orders sought.

### **Respondent’s Response**

20. The Respondent in the petition herein – National Land Commission, - did not respond to the motion, but their counsel Mr. Mbutia submitted that they supported the motion by the Interested Party.

21. The Applicant filed Grounds of Opposition to the Preliminary Objection on 5/6/2020 stating that the Preliminary Objection as conceived and formulated fails to meet the threshold of a competent objection to the Interested Party’s application herein for review; that the purported objection is not based on pure points of law but is replete with argumentative matters of fact that would require the court to go into the pleadings and interrogate whether there is indeed merit in the objection and that the Preliminary Objection is untenable and an abuse of the due process of court and the same ought to be dismissed with attendant costs.

22. Both the motion herein and the Preliminary Objection were consolidated and heard together.

### **Submissions**

23. Parties filed submissions to the motion and the Preliminary Objection. The Applicant’s submissions were filed on 2/4/2020 and their further submission filed on 5/6/2020.

24. The Respondent (NLC) filed its submissions on 09/6/2020.

25. The Respondent/Petitioner filed their submission on 02/04/2020 and supplementary submissions on 15/6/2020.

26. I have carefully considered the application, the Preliminary Objection and the rival submissions. In my view the following issues arise for my determination.

(i) Whether the petition herein was *res judicata*.

(ii) If the above is correct, whether *res judicata* can shield an intentional misdeed.

### **The Background**

27. The issues raised in the petition herein and in the current motion have been in court corridors for a while now, and the contention has revolved around the ownership of the suit property. On the 10/9/96 this Court by consent of parties in HC MISC. Civil Application No. 318 of 1996 having recognized the Petitioners as the lawful allottees of the PDP Nos. 32,110, 112 and 121 ordered and directed that the said allotments be changed from Industrial to Residential use. The Court further waived the stand premium accrued on the allotment. However, the said Court order was ignored by the Commissioner of Lands. Subsequently, however, allotment letters were then re-issued to the 1<sup>st</sup> to 4<sup>th</sup> petitioners on the 27/7/2000 vide letter of allotment ref. no. 90750/XIV in relation to plot 3912 and 3913 Section VI/MN. On the 16/11/05, this Court by consent of the parties ordered the Commissioner of Lands to comply with its orders issued on the 10/9/96 and directed that the Petitioners who were covered by the PDP’s Nos. 32,110, 112 and 121 (now plots 3912, 3913,3914,3915,3871 to 3881) Section VI/MN be granted leave to deposit the money payable to the Commissioner of Lands and the Registrar of Titles accrued on account of those allotments.

28. The Commissioner of Land still, in blatant disobedience of the Court order issued on the 10/9/1996, frustrated the process that would eventually lead to the issuance of title deed to the Petitioners. Unknown to the petitioners, the existing survey on the Petitioners’ plots was cancelled in favour of another survey that had been authenticated on the 9/11/2007 which consolidated the two plots 3912 and 3913 Section VI/MN into MN/VI/ 4688. This is where the apparent misdeeds in this matter began: a deliberate attempt by agents of the Interested Party/Applicant herein, aided and abetted by the Commissioner of Lands, and now, by the National Land Commission – the Respondent herein.

29. When the Petitioners got wind of the Commissioner of Land's intention to deprive them of their allotted plots, they moved this Court on the 20/11/2007, in HC MISC. Civil Application No. 318 of 1996 for orders to restrain the Commissioner of lands from registering any grant of Plot. No 4688/ Section VI/MN (consolidated). After hearing the Application, an interim conservatory order was issued restraining the Commissioner of Land, pending hearing of the Petitioners' application on the 19/12/07, and status quo prevailing on the 29/11/2007 was to be maintained. However, in blatant disregard of Court orders issued on the 28/11/07, two days before the hearing of the Petitioners' application dated 20/11/07, the Commissioner of Lands via letter dated 17/12/07 directed the registration of plot. No 4688/ Section VI/MN in favour of Miqdad Enterprises and the same was effected and a grant issued. It is therefore clear that the registration of Miqdad Enterprises as the lawful or registered owner of the said plots 3912 and 3913 was irregular, unlawful and the same was done in violation of a court order. This illegality notwithstanding, the said Miqdad went ahead to purport to sell to the Interested Party the same suit premises. The Interested Party then purported to acquire the suit premises, which it duly presented to the Respondent for use for the purposes of the Standard Gauge Railways (SGR) in exchange of money compensation.

30. In the meantime, during the process of the hearings for compensation, the County Government of Mombasa vide letter dated 17/5/17, informed the Respondent herein that LR. No. MN/VI/3912 & 3913 belonged to the Petitioners and recommended that the Petitioners be compensated, or the said parcels of land revert back to the Petitioners. Further, the Attorney General on many occasions has reminded the Commissioner of Lands of the aforementioned Court orders: on 17/10/05 and 3/4/14, the Attorney General urged the Commissioner of Lands to obey the Court order by **Justice Angawa** issued on the 10/9/96 and Court order dated 16/11/05. The Attorney General pointed out that the said orders had never been varied and or set aside and the argument that the Petitioners had squandered the opportunity to have the suit properties registered in their name was misleading as the letter of allotment dated 27/7/00 superseded the letter of allotment dated 26/4/96.

31. Further it is not that the Respondent did not know the truth about ownership of the suit lands. The Respondent through its letter dated 22/9/2014 addressed to the County Land Administration Officer and to the Secretary, Mombasa County Land Management Board sought certain confirmation regarding the Petitioner's claim herein. Again, the Respondent through the County Coordinator by is letter dated 23/5/2017 requested confirmation from Petitioners by way of a sworn affidavit, that they were the owners of the suit plots. Marieta Gitonga the 2<sup>nd</sup> Petitioner herein, swore an affidavit on 26/5/2017 on behalf of the other Petitioners. The same was delivered to the Respondent's offices and was acknowledged as received. Further, the Respondent's County Coordinator's letter dated 26/5/2017 and the County Executive Member, County Government of Mombasa letter dated 17/5/2017 are on record. These letters confirm that the Petitioners were allocated land vide PDP No. 12.3.CT 121.96 later surveyed to Plot No. 3912 and 3913 Section VI MN (FR 312/162). The Petitioners obtained allotment letters for the said parcels of land. However, as the same were of industrial use, the Petitioners vide Mombasa HCCC No. 318 of 1996 moved the court for orders of change of user and the waiver of the stand premiums. These orders were granted on 10/9/1996. Allotment letters were thereafter issued to the Petitioners for their respective plots on 27/7/2000. Despite such issuance, survey number FR 312/162 was later cancelled on 14/11/2007 by another Survey namely; FR No. 470/118. Aggrieved by such cancellation the Petitioners moved the court for restraining orders and obtained the same from **Hon. Justice Maraga** (as he then was) on 28/11/2007. The said order restrained the registration of Plot Number MN/VI/4688 to Migdad Enterprises Limited. Despite such orders, plot number MN/VI/4688 was thereafter curved out and the same was registered to Migdad Enterprises Limited. It is clear that the said property known as Plot Number MN/VI/4688 illegally encompassed Plot No. MN/VI/3912 and Plot No. MN/VI/3913. Record shows that the said Plot Number MN/VI/4688 was later consolidated into Plot No. MN/VI/4805 vide survey F/R 359/49. The said Plot No. MN/VI/4805 consolidated three (3) other plots including Plot Number MN/VI/4688 which contained Plot No. MN/VI/3912 and MN/VI/3913. The said Plot No. 4805/VI/MN is registered in the name of Miritini Free Port Ltd, the Interested Party and the Applicant herein.

32. Interestingly, the Respondent in its letter of 1/12/2015 referenced NLC/Chairman/VOL/XIII/275 indicated that "Miritini Free Port Ltd purchased Plot No. MN/VI/4688 from Migdad Enterprises Limited who were in possession of an allotment letter." It is clear that Migdad Enterprises Ltd had no allotment letter in the first place for the plots of land known as Plot No. 3912 and 3913/VI/MN respectively. Whereas the Respondent had earlier acknowledged on 22<sup>nd</sup> September 2014 that compensation for Plot No. MN/VI/3912 and MN/VI/3913 was due, it defeats both logic and justice how it came to be that Plot No. MN/VI/4805 was due for determination for review without including the views of and or compensation to the Petitioners who rightfully own Plot No. MN/VI/3912 and MN/VI/3913 (which is now part of Plot No. MN/VI/4805).

33. This Court in its Judgment herein dated 12/11/2019 found that the purported registration of the grant to Miqdad Enterprises in stark disobedience of Court orders aforesaid rendered any action taken by the Commissioner of Lands in violation of the said Court orders a nullity and of no effect ab initio with the result that currently part of LR 4805/VI/MN still belong to the Petitioners. It is therefore clear that the Respondent paid part of the compensation money to a wrong party either knowingly or inadvertently. The amount allegedly already paid out to the Interested Party is said to be Kshs. 1,475,486,485/= plus a further interruption amount of Kshs. 360,000,000/=. It is therefore understandable the effort spent herein by the Interested Party to try to avoid the Judgment herein on account of alleged *res judicata*.

### **Determination of the Motion**

#### **(i) Whether the petition herein was *res judicata***

34. It is important at this juncture to look at prayers and orders in this Petition and in Petition No. 44 of 2011. In the present Petition, the 1<sup>st</sup> to 4<sup>th</sup> Petitioners vide the Petition dated 13/2/2018 sought declarations against the Respondent National Land Commission that: -

- i. A declaration that the Respondent contravened the constitution and their actions are unlawful, void *ab initio*.
- ii. That the Respondent abused their statutory powers in refusing to compensate the Petitioner's and have violated the provisions of the Constitution of Kenya 2010.
- iii. An order directing the Respondent to forthwith tabulate, assess and compensate the petitioners (the 1<sup>st</sup> to 4<sup>th</sup> Respondent) the value of their property Plot No. 3912 and 3913/VI/MN as at July 200, interest and damages.

iv. An order that the Petitioner is entitled to interest and any other damages applicable in law on the compensation to be awarded by the Respondent from the date provided in law until payment at commercial rates.

v. Costs of the Petition be borne by the Respondent.

vi. That the Honourable Court do make any other orders that it may deem necessary in the interest of justice.

35. This Court in a Judgement delivered on 12/11/2019 issued orders: -

i. That the Respondent abused their statutory powers in refusing to compensate the petitioners.

ii. That an order directing the Respondent to forthwith tabulate, assess and compensate the Petitioner the value of their property Plot Nos. 3912 and 3913/VI/MN (being the disputed part of the suit property Plot No. 4805) as at the date of lawful acquisition plus interest thereon at commercial rates.

iii. That the Petitioner is entitled to damages pursuant to paragraph 52 of the Judgement as part of the compensation to be awarded by the Respondent from the date of lawful acquisition until payment in full with interest thereon at commercial rates.

iv. That for the avoidance of doubt, this Judgment relates only to part of the suit property being plot Nos. 3912 and 3913/VI/MN (being 3.997 Ha.) claimed by the Petitioners. This means that the Respondents determination dated 1/12/15 to the extent that it relates to the unchallenged portion of the suit property belonging to the Interested Party remains as it is and undisturbed by this Judgment.

v. That the costs of the Petition be borne by the Respondent.

36. In Petition No. 44 of 2011, the four Petitioners herein had sought against the Attorney General and the Commissioner of Lands orders that: -

(a) A declaration that the Petitioners' constitutional rights to own property has been violated;

(b) A declaration that the Petitioners' constitutional rights to expeditious, efficient and procedurally fair administrative action has been violated;

(c) A declaration that the Petitioners' constitutional rights to freedom from discrimination and equal treatment had been denied;

(d) An order of mandamus compelling the 2<sup>nd</sup> Respondent to issue the Petitioners with Grant of Titles for the parcels of land marked A, B, C and D in Part Development Plan Reference No. 12.3.CT.145.96;

(e) A conservatory order restraining the 2<sup>nd</sup> Respondent or its successors in title from allocating or alienating the parcels of land marked A, B, C and D in Part Development Plan dated 15/4/1996, Departmental Reference No. 12.3.CT.145.96 to a third party;

(f) In the alternative to (d) and (e) above i.e (iv) and (v) above, an order for compensation in the sum equivalent to the value of Plot No. 3912/VI/MN and Plot No. 3913/VI/MN as at July, 2011 whose survey/allotments to the Petitioners was cancelled by the 2<sup>nd</sup> Respondent;

(g) That such other order be made as the Court deems just in the circumstances.

37. It is the Applicant's case that in the Judgment delivered by Kasango J on 29/3/2012, the Court found on the merits that the Petitioners' case was based on letters of allocation and that they ought to approach the Court by civil action, that the Court in dismissing the Petitioners' prayers for constitutional declarations and compensation held that the prayers sought in the Petition do not belong to a constitutional petition and it dismissed the petition with costs to the Respondents.

38. The Applicant submitted that from the prayers and orders in both the present Petition and in Petition No. 44 of 2011, the following undisputed facts emerge: -

(i) That the four (4) Petitioners in the present Petition were the Petitioners in Petition 44 of 2011;

(ii) That the Respondent in the present Petition is the National Land Commission while in Petition 44 of 2011 is the Attorney General and the Commissioner of Lands; and that it is an undisputed legal fact that the National Land Commission being a creation of the Constitution and the law became the successor of the Commissioner of Lands.

(iii) That the Petitioners seek declarations of their constitutional rights and seek compensation for land identified as parcels A, B, C and D in Part Development Plan dated 15<sup>th</sup> April 1996, Departmental Reference No. 12.3.CT.145.96 being Plot No. 3912/VI/MN and Plot No. 3913/VI/MN.

(iv) That the Petitioners constitutional rights and claim for compensation over land identified as parcels A, B, C and D in Part

Development Plan dated 15<sup>th</sup> April 1996, Departmental Reference No. 12.3.CT.145.96 being Plot No. 3912/VI/MN and Plot No. 3913/VI/MN is in competition with the rights of the Interested Party (applicant herein) over the same land.

(v) That despite the joinder of the Interested party in the present Petition and for purposes of analysis of the judgment in the Petition herein being *res judicata* the Petition and orders in Petition 44 of 2011, the Respondent invites the court to be guided by the holding of the **Supreme Court in the Case of Kariuki Muruatetu vs. Republic & 5 Others** as quoted in **Supreme Court Petition 16 of 2016 Methodist Church In Kenya vs. Mohamed Fugicha & 3 Others [2019] eKLR** to the effect **“Therefore in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own issues or introduce new issues for determination by the Court.”**

39. The Petitioner/Respondent herein, however, submitted the alleged undisputed facts are indeed all disputed, and fall short of the requirement to be satisfied in order to hold and apply the principle of *res judicata*.

### **The Res Judicata Principle**

40. The principle of *Res judicata* is found in Section 7 of Civil Procedure Act as follows:

**“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.**

**Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.**

**Explanation. (2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.**

**Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.**

**Explanation. (4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and in substantially in issue in such suit.**

**Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.**

**Explanation. (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”**

41. There is a plethora of authority on this issue. In **William Koross vs. Hezekiah Kiptoo Komen & 4 others [2015] eKLR**, it was stated:

**“The philosophy behind the principle of *res judicata* is that there has to be finality; litigation must come to an end. It is a rule to counter the all-too human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go.**

Speaking for the bench on the principles that underlie *res judicata*, Y. V. Chandrachud J in the Indian Supreme Court case of **Lai Chand v Radha Kishan, AIR 1977 SC 789** stated, and we agree;

**‘the principle of *res judicata* is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue.’**

42. In the above case, the court observed that the practical effect of the *res judicata* doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it –because it is the court itself that is debarred by a jurisdictional injunction, from entertaining such suit.

43. For a suit to satisfy the principle of *res judicata*, Section 7 of the Civil Procedure Act must be strictly complied with. This is so because *res judicata* principle when applicable, has the effect of bringing a matter to finality, thereby shutting out any further argument thereon. To begin with, it is necessary to examine the parties before the court. In this matter it is noteworthy from the outset that the Applicant herein – the Interested Party - was not a party in the Petition No. 44 of 2011. And even in this petition, the Applicant’s interest is not substantive. The parties to this petition are the Petitioners who were indeed the Petitioners in Petition No. 44 of 2011. The Respondent in this petition is the National Lands Commission. However, in Petition No. 44 of 2011 the Respondents were **The Attorney General and The Commissioner of Lands**. The Attorney General is not a party to this petition, while the Commissioner of Lands is the predecessor of **The**

**National Land Commission** – the only Respondent herein. Clearly, this falls short of Section 7 of the CPA which requires an issue to have been between the same parties or between parties under whom they claim. The only party who can claim to be a party in both petitions is the Respondent herein, because the Respondent herein is the predecessor of the Commissioner of Lands. However, it must be noteworthy that there is a wide difference between **The Commissioner of Lands** in Petition No. 44 of 2011 and **The National Land Commission**, the Respondent herein. In Petition No. 44 of 2011 the Attorney General was an important party in matters concerning lands and national policy on land issues and so the pronouncements of the Attorney General and his presence as a party in a suit in land matters and issues concerning alleged violations of constitutional rights was critical. However, in the current petition, the National Land Commission is a constitutionally created organ under Article 67 as follows:

**“67.(1)There is established the National Land Commission.**

**(2) The functions of the National Land Commission are—**

**(a) to manage public land on behalf of the national and county governments;**

**(b) to recommend a national land policy to the national government;**

**(c) to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya;**

**(d) to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities;**

**(e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;**

**(f) to encourage the application of traditional dispute resolution mechanisms in land conflicts;**

**(g) to assess tax on land and premiums on immovable property in any area designated by law; and**

**(h) to monitor and have oversight responsibilities over land use planning throughout the country.**

**(3) The National Land Commission may perform any other functions prescribed by national legislation.”**

44. It means therefore that the National Land Commission who is the Respondent in this matter has much wider powers and functions than the Commissioner of Lands. Its powers include determination and assurances touching on individual and private land rights under the constitution. Therefore, the Commissioner of Lands in Petition No. 44 of 2011 cannot in anyway compare or measure to the National Land Commission in this petition. In Petition No. 44 of 2011 the Attorney General was a necessary party to provide legal comfort to the Commissioner of Lands. The absence of the Attorney General, and the absence of the Commissioner of Lands in the current petition makes inapplicable the doctrine of *res judicata* in this petition. To this, add the fact that the Interested Party – the Applicant herein, was not a party to Petition No. 44 of 2011. Clearly the requirement that parties to both suits be the same has not been met in the current application.

45. However, more importantly as far as the issues of parties is concerned, is that the constitutionally established National Land Commission has such wide powers under the constitution which even allow a claimant, who may have reached a dead end in litigation, to appeal or complain to the National Land Commission to open up proceedings, or in the alternative to commence new proceedings where there are allegations of historical land injustices. Article 67 (2) (e) states:

**“(e) to initiate investigations, on its own initiative or on a complaint, into present and historical land injustices, and recommend appropriate redress.”**

46. This provision allows any citizen to bring new complaints or proceedings to or against the National Land Commission to address historical land injustices. It is clear therefore, that the capacity of the Respondent herein – the National Land Commission - in the petition herein is by far different from that of the Commissioner of Lands. It is also true that the Petitioners, having been cheated out of their property since the early 1990s qualify to have suffered historical land injustices which can only be addressed by a more constitutionally empowered National Land Commission under the constitution. Therefore, this petition and Petition No. 44 of 2011 have different parties within Section 7 of CPA thereby rendering the *res judicata* principle inapplicable.

47. The second issue is whether or not the parties are litigating under the same title. The Petitioners’ case is that it is misleading for the Interested Party/Applicant to state that it is still holding the title with respect to the suit property. The Petitioner states that the Interested Party was paid compensation with respect to the said land and the land has since been subdivided into 4805/1, 5267 and 5271 as at 13/9/2017. Petition No. 44 of 2011 was in respect of the unsurveyed land marked as A, B, and C in the Part Development Plan No. 12.3 CT. 145.96 and not Plot No. 3912 and 3913/VI/MN which is the subject matter of the instant petition. Further, in Petition No. 44 of 2011 the Petitioners disclosed the existence of Mombasa High Court Misc. Civil Application No. 318 of 1996 which was with respect Plot No. 3912 and 3913/VI/MN wherein the Petitioners were challenging the cancellation of the allotments in their favour.

48. It is clear to this Court that the cause of action in the instant petition crystallized in the letters dated 8/8/2014; 22/9/2014 and 17/5/2017. Therefore, as the Judgment in Petition No. 44 of 2011 was delivered on 29/3/2012 the issue of *res judicata* cannot be sustained at all.

49. Further, it is clear that once the Interested Party was paid money compensation for the suit lands, the Interested Party no longer

owns the suit title. The Interested Party and Respondent completed the subdivision of plot 4805/VI/MN on 14/9/2017 pursuant to section 118 of the Land Act 2012 and in all, plots number MN/VI/4805/1, 5267 to 5271 were created. (See survey plan annexed as “JMG-2”). The Interested Party on 3/7/2019 made an application for surrender of plot No. MN/VI/4805 and issuance of new title deeds for Plot no. MN/VI/5267 to MN/VI/5271. (See copy of the application for surrender annexed as “JMG-3). Further, the Interested Party by a deed dated 4/6/2019 surrendered the Certificate of Title CR NO. 50054 to the Registrar of Titles and which was registered as CR 50054/2 and which vested Plot MN/VI/4805/1 pursuant to section 120 sub section (4) of the Land Act 2012 to the Government of Kenya (SGR). (See a copy of the surrender annexure “JMG-4). The Interested Party was issued with the new Titles for subdivision number Plot no. MN/VI/5267 to MN/VI/5271 CR NO. 50054/3 and the Title for Plot No. 4805/VI/MN was closed on surrender and the Title documents were cancelled pursuant to section 121(2a) (2b). (See a copy of the cancelled titles annexure “JMG-5).

(The annexures referred to in above paragraph are those attached to the Supplementary Affidavit of Joseph Mbugua Gichanga sworn on 12/3/2020).

50. It is therefore true, that even as the Interested Party/Applicant herein purports that the petition herein is *res judicata*, it no longer enjoys ownership to the suit property, and its interest herein appears only to avoid the need to refund wrongful compensation should the Respondent herein exercise its powers under Section 116 of the Land act to demand back moneys paid in error.

51. Further, as observed by the court in Petition 44 of 2011, the Petitioners herein based their claims on letters of allotments and not on titles which is the basis of this petition. The court in Petition 44 of 2011 observed thus:

**“...the petitioners at least three of them are in possession of letters of allocation. It is on the basis of these letters that they would approach the court by civil action to get orders against the respondent requiring him to issue them with title documents.”**

52. It is the finding hereof that the parties are not litigating under the same title for *res judicata* principle to apply.

53. The third issue is whether or not the decision was heard on merit on the issue and a final decision made by such court. In this regard I refer to the Judgment dated 29/3/2012.

**“The respondent in opposition to this petition submitted that the petitioners should have filed an ordinary civil case for orders of the court to compel the respondents to issue title documents. As stated before, the relevant constitution in respect of the dispute in this petition is now repealed. It follows therefore that prayer (d) and (f) cannot be granted under the now repealed constitution. They fail. Prayer (a) seeks the protection of rights to own property. That right was covered by Section 75 of the now repealed constitution. Prayers (b) and (c) fall under Section 82 of the repealed constitution. Prayer (e) was granted in the interim pending the final determination of this petition. It shall therefore not be entertained at this stage.**

**The respondent in my view was correct to argue that the orders sought by the petition can only be issued in a civil action. The prayers before court are misplaced in a constitutional petition. The reason for so holding is because the petitioners at least three of them are in possession of letters of allocation. It is on the basis of these letter that they would approach the court by civil action to get orders against the respondent requiring him to issue them with title documents. The prayers which are sought in this petition do not belong to a constitutional petition. It is for that reason that the petition is dismissed with costs to the respondent”**

54. It is clear that the court did not grant the orders sought, not because they were not deserved, but because the court was of the view that the orders could be sought in a civil suit. It is instructive that even as it dismissed the suit the court observed that:

**“The reason for so holding is because the petitioners at least three of them are in possession of letters of allocation. It is on the basis of these letter that they would approach the court by civil action to get orders against the respondent requiring him to issue them with title documents.”**

55. The court then dismissed the petition summarily without considering it on merit. In dismissing the petition, the court observed as follows:

**“As stated before the relevant constitution in respect of the dispute in this petition is now repealed. It follows therefore that prayers (d) and (f) cannot be granted under the now repealed constitution. Prayers (d) and (f) are as follows:**

**(d) An order of mandamus compelling the 2nd Respondent to issue the Petitioners with Grant of Titles for the parcels of land marked A, B, C and D in Part Development Plan Reference No. 12.3.CT.145.96;**

**(f) In the alternative to (d) and (e) above an order for compensation in the sum equivalent to the value of Plot No. 3912/VI/MN and Plot No. 3913/VI/MN as at July, 2011 whose survey/allotments to the Petitioners was cancelled by the 2nd Respondent.”**

56. It is clear that the court did not consider these prayers on merit because they were made under the repealed constitution. It is also clear that these prayers could still be made under the new constitution. Indeed, these are the prayers the Petitioners made herein under the new constitution, and which this court has upheld. Therefore, the finding hereof is that the issues raised in Petition No. 44 of 2011 were not determined on merit, and the Judgment was not made in a way to foreclose any future litigation on the issues. The court was clear that another forum was necessary for the ventilation of those grievances. That forum accrued when the National Land Commission was constitutionally empowered to address the grievances of the people of Kenya, including the Petitioners herein, on all land issues including

historical land injustices. The issue of *res judicata* is therefore misplaced.

57. Indeed, there is no evidence that the Attorney General or the Commissioner of Lands were against the orders sought by the Petitioners. Their view is clear that the Petitioners were entitled to the orders but in a civil cause. This is, in my view, the reason why, the Attorney General and the National Land Commission as well as the County Government of Mombasa, by their correspondences referred to herein, acknowledged that the Petitioners were entitled to be given titles to their portion of land and to be compensated by the National Land Commission upon the Petitioners' property being acquired for SGR purposes.

58. The promulgation of the new constitution, with the creation of National Land Commission with expansive constitutional powers over land matters must clearly have motivated the Petitioners to file the current petition for the redress of their grievances, and for the determination of their prayers on merit. That is what this court heard, and then delivered the Judgment herein.

59. From the correspondences listed under the Background section of this Ruling it is clear that the Attorney General, National Land Commission, and the County Government of Mombasa all came to unanimous conclusion that the suit property belongs to the Petitioners. They all directed the National Land Commission to issue titles to the Petitioners. They recognized the existing court orders in MSA H.C. Misc. Civil Application No. 318 of 1996 and demanded compliance by the National Land Commission. Indeed, as correctly submitted by the Petitioners, the cause of action in the instant petition crystallized in the letters dated 8/8/2014; 22/9/2014 and 17/5/2017 by the Attorney General, National Land Commission and County Government of Mombasa. Therefore, as the Judgment in Petition No. 44 of 2011 was delivered on 29/3/2012, the issue of *res judicata* cannot be sustained at all. In failure to comply, the National Land Commission is also going against its own recommendation contained in its letters of 22/9/2014 and 26/5/2017.

60. Further it is the finding hereof that the orders sought by the Interested Party have the effect of reviewing the consent orders between the Petitioners; the Attorney General and the Commissioner of Lands in **Mombasa High Court Misc. Civil Application No. 318 of 1996; Elizabeth Mundingi & 7 others vs. The Attorney General & Commissioner of Lands** yet the Interested Party was not a party in that suit.

61. While it is easy to understand the interest of the Interested Party to avoid the Judgment herein, this court is at a loss at the conduct of the Respondent – National Land Commission. Having unlawfully, and whether by mistake or otherwise, paid the Interested Party compensation money which is rightfully due to the Petitioners, the Respondent has not taken any steps to recover the said compensation money unlawfully paid. Section 116 of The Land Act empowers the Respondent to do that.

**“Section 116:**

**If a person has received any money by way of compensation awarded for an interest in the land being acquired, either in error or before it has been established that some other person is rightfully entitled to the interest, the Commission may, by notice in writing served on that person, require that person to refund to the Commission the amount received, and the amount shall be a debt due from that person to the Commission.”**

#### **Whether *res judicata* can shield an intentional misdeed**

62. As I have stated in the foregoing paragraphs of this Ruling, the Interested Party herein knowingly or inadvertently allowed itself to be paid compensation money on a property which the Interested Party knew or had reason to believe belonged to the Petitioners. It is therefore in its best interest to have the Judgment herein overturned so as to avoid refund consequences under Section 116 of The Land Act No. 6 of 2012. I have already found that the principle of *res judicata* is not available to the Applicant in this matter. However, in my view, even if that principle was available, it would not be used to shield what may appear to be illegal or unprocedural transactions. As a willing participant in what this court has now established as deprivation of Petitioners' property rights, the Applicant cannot claim *res judicata* as a sword to acquire what does not belong to it. Indeed, the Applicant is using this review application as a sword to lay claim on someone else property. A court of equity cannot allow that. In **Matter of Montalvo, 157 B.R. 510 (D.P.R. 1993)** it was held that:

**“... limited exception to the application of *res judicata* exists where a claim is created in a prior case tainted with fraud.”**

63. As the party who stands to benefit should this review application succeed, the Interested Party/Applicant must show that its application for review premised on *res judicata* is not meant to award or benefit it, but is for the general public good and the rule of law, which, in my view, is not the case here.

64. Further, it is the view of this Court that if the application for review before the court were to succeed, it would create unprecedented legal absurdity where a Court process is used to deprive a citizen of accrued property rights in the guise of *res judicata* principle involving a case where the Applicant herein was not a party.

65. In the upshot it is the finding hereof, and I so hold, that the motion herein dated 12/2/2020 has not been proved, lacks merit and the same is herewith dismissed with costs to the Petitioners.

**Dated, Signed and Delivered at Mombasa this 30<sup>th</sup> day of July, 2020.**

**E. K. OGOLA**

**JUDGE**

Ruling delivered via MS Teams in the presence of:

Mr. Gikandi for Petitioners

Mr. Oloo for Interested Party

Mr. Mbuthia for Respondent

Mr. Kaunda Court Assistant