



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

PETITION NO. 21 OF 2010

IN THE MATTER OF: ARTICLES 2, 19, 20, 21, 23, 25 ©, 31, 35, 40, 50(1), 165(3), 262 AND SECTION 7 OF PART 1 OF THE 6TH SCHEDULE OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER SECTION 75 OF THE CONSTITUTION OF KENYA, 1969 AND ARTICLES 10, 21, 29, 31, 40 AND 50(1) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: PLOT NOS. KWALE/DIANI BEACH/BLOCK 856, 551, 552, 553, 554, 556, 557, 558 AND 559

AND

IN THE MATTER OF: THE REGISTERED LAND ACT

AND

IN THE MATTER OF: THE GOVERNMENT LANDS ACT

AND

IN THE MATTER OF: MOMBASA HIGH COURT CIVIL SUIT NUMBERS: HCCC 140/2003 AND 108 OTHERS AND KWALE SRMCC 171/2010

AND

IN THE MATTER OF: TITLE NOS. KWALE/DIANI COMPLEX/056 AND 488 OTHERS

BETWEEN

LEISURE LODGES LIMITED.....PETITIONER

VERSUS

THE COMMISSIONER OF LANDS & 767 OTHERS....RESPONDENTS

JUDGMENT

The Petition

1. The petition herein was filed by Leisure Lodges Limited on 7th December, 2010. The same was amended on 11th August, 2011.
2. The petition is filed against 767 Respondents. The 1st – 8th Respondents are sued in their official capacities by virtue of their positions as officials of the Government of the Republic of Kenya or of the County Government of Kwale.
3. The 9th – 28th Respondents are sued in their personal capacities by reason of their alleged unlawful acts and omissions committed as

current and or former public officers in relation to the suit properties.

4. The 29th – 297th and 299th – 766th Respondents are sued as alleged beneficiaries and or registered owners of the 560 known plots constituting the suit property.

5. The 298th Respondent is a former advocate for the Petitioner and an alleged beneficiary of the matters complained of in the petition.

6. The 767th Respondent is the Government of the Republic of Kenya.

The Petitioner's Claim

7. The Petitioner presents this petition under Sections 22 and 165 (3) of the old constitution of Kenya. The Petitioner claims that it is the registered owner and is entitled to absolute possession of the ten (10) parcels of land known as

(i) KWALE/DIANI BEACH BLOCK/856 measuring 58.28 Hectares

(ii) KWALE/DIANI BEACHBLOCK/551 measuring 2.254 Hectares

(iii) KWALE/DIANI BEACH BLOCK/552 measuring 2.209 Hectares

(iv) KWALE/DIANI BEACH BLOCK/553 measuring 2.386 Hectares

(v) KWALE/DIANI BEACH BLOCK/554 measuring 2.022 Hectares

(vi) KWALE/DIANI BEACH BLOCK/555 measuring 2.023 Hectares

(vii) KWALE/DIANI BEACH BLOCK/556 measuring 2.023 Hectares

(viii) KWALE/DIANI BEACH BLOCK/557 measuring 2.022 Hectares

(ix) KWALE/DIANI BEACH BLOCK/558 measuring 2.100 Hectares

and

(x) KWALE/DIANI BEACH BLOCK/559 measuring 2.526 Hectares

8. All these properties are situate within Diani Beach Area South West of Mombasa in Msambweni District and are comprised in Leaseholds for 99 years from the Government of Kenya commencing in 1986 in respect of KWALE/DIANI BECH BLOCK/551 to 559 and 1987 in respect of KWALE/DIANI BEACH BLOCK/856, respectively (**hereinafter referred to as the suit properties**).

9. The Petitioner avers that the suit properties are registered under and governed by the provisions of the Registered Land Act, Chapter 300, (now repealed but which remains part of Kenya Law under the provisions of Article 62 as read with Section 7 of Part 1 of the 6th Schedule of the Constitution of Kenya, 2010). The Petitioner avers that the suit properties have always been registered as Leaseholds for 99 years from the Government of Kenya in the name of the Petitioner who was issued with Certificates of Lease under the Registered Land Act in 1987 in respect of KWALE/DIANI BECH BLOCK/551 to 559 and 1991 in respect of KWALE/DIANI BEACH BLOCK/856 respectively. The Petitioner claims that it has occupied the suit properties since 1986 when it purchased the same and sometime in 1993, it installed various water installations on the suit properties namely, boreholes, water tanks, water pumps, power houses, underground water pipes and underground electric cables on the parcel known as KWALE/DIANI BEACH BLOCK/856, and the underground water pipes run across (under the said land) to the other parcels of land known as KWALE/DIANI BEACH BLOCK/551, 552, 553, 554, 555, 556, 557, 558 and 559 and the said installations constitute the main source of water for the Petitioner's adjoining high class tourist establishments comprising a beach resort and golf course which share a boundary with one of the suit properties and the said water installations are the lifeline for the said high class tourist establishments, without which the said establishments would collapse because they lack reliable mains water supply.

10. The Petitioner states that according to the Survey Map for the Diani Beach area, (**Registry Index Map No. 201/3/2**), which is available from the 4th Respondent, the Director of Survey, the suit properties aforesaid, including the parcels of land on which the establishments referred to herein above are all situated in the registration area called **Kwale Diani Beach Registration Area** and the said **RIM No. 201/3/2** shows the Registration Boundary for the Kwale Diani Beach Registration Area is intact and has not been altered and it also shows that The Petitioner's 10 parcels of land aforesaid are intact. The Petitioner avers that over the years, successive holders of the office of Kwale District Commissioner together with local politicians have made claims that the Petitioner failed to re-settle some squatters who had been occupying the parcel of land known as **KWALE/DIANI BEACH BLOCK/856**, before the Petitioner purchased and took possession of the same on the basis of which they threatened to mobilize the alleged squatters to enter into and occupy the Petitioner's land and or to burn down its tourist establishments, instigated several riots in which the Petitioner alleges it lost property through arson. These events caused the Petitioner to agree to resolve the issue by purchasing a parcel of land known as **Land Reference No. 8517/10** measuring 93 acres situated within the Gombato area of Kwale District, which it did through the 298th Respondent (in whose possession the Petitioner avers the title documents should be) but the Government failed to settle the alleged squatters on the said land.

11. The Petitioner further avers that from 1996, successive Kwale District Commissioners have laid claims that the Petitioner owes the

Government 20 or 22 acres of land which it should surrender to the Government for settlement of squatters. To allegedly correct the anomaly, the government agents aforesaid have allegedly variously instructed the Kwale District Survey Office and the District Planning Office to re-survey the Petitioner's parcel of land known as **KWALE/DIANI BEACH BLOCK/856** which has been done, such that the Petitioner's said parcel of land has been sub-divided into small plots which have been allocated to alleged squatters who are actually officers of the Respondents, politically connected individuals, local politicians, friends and relatives of the various Kwale District Commissioners who have sub-divided the said plots, sold them and or commenced developments thereon. These are titles, being 560 in number, referred to and specifically identified in the heading to this petition.

12. The Petitioner avers that by making the false claims, the Kwale District Commissioners instigated and colluded with the Commissioners of Land to write several letters to the Petitioner, between 2006 and 2008, demanding that it surrenders the title deeds to the suit properties to the Government for allocation to alleged squatters, in default of which the 1st Respondent would issue letters of allotment to the squatters over the suit properties for the reason that the Petitioner allegedly failed to purchase extra land for squatters who were occupying one of the suit premises before the registration of the land in favour of the Petitioner.

13. The Petitioner states that sometime in 2006, the 1st Respondent instructed the 2nd Respondent to register restrictions on the registers of the suit properties to prevent the Petitioner from dealing with the same and to coerce the Petitioner to comply with the demands, upon which the 2nd Respondent instructed the 3rd Respondent to register the said restrictions. The Petitioner claims that it has come across letters written by the 3rd Respondent between October, 2009 and February, 2010 in which he claims that the suit properties do not exist for the reason that either the Petitioner surrendered the title deeds thereof to the Government or that the suit properties were acquired by the Government. The Petitioner states that this is a further attempt to deprive the Petitioner of the suit properties unlawfully and to cover up the Respondents illegal acts.

14. The Petitioner further states that on a date unknown to the Petitioner and in order to facilitate the unlawful sub-division of the properties and the issuance of letters of allocation and title deeds for plots over the suit properties, the 1st, 2nd, 3rd, 4th and 5th Respondents and their officers unlawfully created a new fictitious Survey Map called **Diani Complex Settlement Scheme (Sheet No. 4)** which covers the Petitioner's land (the suit properties). The Petitioner discovered this fact in December, 2009 in documents filed by some of the occupants of plots created over the suit properties, who sued the Petitioner seeking orders of injunction to restrain the Petitioner from evicting them from the suit properties whilst asserting that their titles issued over the suit properties are valid.

15. The Petitioner alleges that it has recently come across letters of allotment issued to various persons from 2003, by the 3rd Respondent through the Kwale District Commissioner, over portions of land or plots created over the suit properties to which the 3rd Respondent, between 2003 and 2010, issued free hold title deeds known as **Kwale/Diani Complex** to such persons allocated plots within the Petitioner's parcels of land comprising the suit properties and to sub-divisions of the same and he has continued registering various dealings in favour of the Interested Parties by unlawfully and fraudulently creating fictitious numbers and a non-existent registrations over the suit properties which has given the Interested Parties means to occupy the Petitioner's land thus taking away the Petitioner's land unlawfully. The Petitioner is aware that the letters of allotment and titles were not issued to squatters but to 1st to 31st Respondent's proxies, politically connected persons who are prominent individuals, senior civil servants, cronies, agents, friends and relatives of the Respondents, their officers, local politicians, local provincial administration officers and companies associated with them, in blatant abuse of office and in breach of the Anti-corruption and Economic Crimes Act, Act 3 of 2003 and the Public Officer Ethics Act, Act 4 of 2003. The Petitioner avers that there is a genuine **Diani Complex Scheme Registration Area** which is not within the genuine **RIM No. 201/3/2** wherein the suit properties are situated and therefore the map created by the 1st, 2nd, 3rd, 4th and 5th Respondents is fictitious and fraudulent and it is intended to assist the Interested Parties wrongly take The Petitioner's land and to occupy the same. The Petitioner states that it is aware that under Section 18 of the Registered Land Act, Chapter 300 of the Laws of Kenya, the Survey Map for the area in which the suit properties are situated is prescribed to be **RIM No. 201/3/2** within the **Kwale Diani Beach Registration Area** whose boundary is clearly shown (and whose registration regime is leasehold for 99 years) and the same has not been lawfully amended to incorporate the **Diani Complex Settlement Scheme Registration Area**. The creation of the false map over the Petitioner's land, sub-division of the same into small plots and the allocation and issuance of titles over the same to various persons by the 1st, 2nd, 3rd, 4th, 5th and 8th Respondents in collusion with their officers, the local District Commissioners, senior civil servants, regular police officers, administration police officers and local politicians is an unlawful process designed to deprive the Petitioner of its private property without due process. To the best of the Petitioner's knowledge and information neither the 1st, 2nd and 3rd Respondents nor the Kwale District Commissioner has power under the law to demand the surrender of the Petitioner's private property and or to sub-divide the same, issue letters of allotment over the same or to issue title deeds to any person over the same, to extend registration boundaries into privately owned property and or to change the registration regime of any parcel of land already registered under the Registered Land Act. As a result of the Respondents and their officers' acts and omissions, the Petitioner avers that numerous plots numbered haphazardly have been created over the suit properties and numerous persons have sought to occupy portions of The Petitioner's land and some of them, including officers of the Respondents and their immediate family members have commenced constructions upon the suit properties as a result of which the Petitioner has filed numerous suits in the High Court at Mombasa, (between 2003 and 2010) seeking orders of injunction to restrain 3rd parties from occupying its land, demolition of the structures and their eviction and therefore the Petitioner has incurred colossal sums of money in private investigations, legal fees and court fees. Sometime in April 2008 and May, 2008, officers of the 1st to 28th Respondents accompanied by private surveyors, District Commissioners from Kwale and Msambweni Districts heavily guarded by an armed contingent of Regular Policemen and Administration Policemen in riot gear under the command of the District Commissioner, Kwale descended upon the suit properties and commenced an illegal haphazard re-survey and sub-division of the suit properties by planting new beacons with a view to re-parceling the suit properties upon which the Petitioner filed **Nairobi Environment and Land Division Case Nos. 188 (Nbi. HC No. 188 of 2008)**, in April, 2008 in respect of Land Parcel **KWALE/DIANI BEACH BLOCK/856** and **217 of 2008** in May, 2008 (Nbi. HC ELC No. 188 of 2008) in respect of Land Parcels **KWALE/DIANI BECH BLOCK/551, 552, 553, 554, 555, 556, 557, 558** and **559** against the 1st, 2nd, 3rd and 7th Respondents in their official capacities.

16. The Petitioner avers that the foregoing is a blatant violation of the Petitioner's right to the full enjoyment and satisfaction of its property. The Petitioner is concerned that at the apex of the alleged illegal scheme to divest it of its lawfully acquired properties is the State through its lawful organs, which are very powerful and unless restrained, the Petitioner will suffer a serious violation of a fundamental right. This is the reason the Petitioner has come to this Court, praying for the following remedial orders: -

- a) A Declaration that the Creation of the Survey Plan Map titled Diani Complex Settlement Scheme Sheet No. 4 and an adjudication area over Your Petitioner's Parcels of Land known as KWALE/DIANI BEACH BLOCK/856, 551, 552, 553, 554, 555, 556, 557 558 and 559 is null and void and the said Survey Plan Map should be cancelled forthwith and the Survey Registry Index Map (RIM No. 201/3/2) for the area in which The Petitioner's Parcels of Land known as KWALE/DIANI BEACH BLOCK/856, 551, 552, 553, 554, 555, 556, 557 558 and 559 are situated be deemed to be the genuine map and the same be brought within Section 30 of the Survey Act and Section 18 of the Registered Land Act.
- b) An order be issued that the creation of a new registration area called Kwale/Diani Complex over Your Petitioner's Parcel of Land known as KWALE/DIANI BEACH BLOCK/856, 551, 552, 553, 554, 555, 556, 557 558 and 559 , the issuance of letters of allotment to plots thereon and title deeds to plots of land sub divided from your Petitioner's said parcels of land or derived there from and the registration of dealings involving the plots so created is contrary to law and in breach of your Petitioner's rights and amounts to acquisition of Your Petitioner's Land without compensation.
- c) An order be issued restraining further sub-divisions of your Petitioner's parcels of land known as KWALE/DIANI BEACH BLOCK/856, 551, 552, 553, 554, 555, 556, 557 558 and 559, allocations of plots thereon and issuance of titles to plots of land sub-divided there from and registration of any further dealings with the titles called Kwale/Diani Complex issued over Your Petitioner's Parcels of Land known as KWALE/DIANI BEACH BLOCK/856, 551, 552, 553, 554, 555, 556, 557 558 and 559
- d) An order be issued that the register of all the titles issued for all the plots called Kwale/Diani Complex issued over Your Petitioners Parcels of Land Known as KWALE/DIANI BEACH BLOCK/856, 551, 552, 553, 554, 555, 556, 557 558 and 559 should be cancelled forthwith and all the titles issued over the said properties should be revoked and cancelled forthwith and your Petitioner should be awarded mesne profits for loss of use of portions of the parcels of land known as KWALE/DIANI BEACH BLOCK/856, 551, 552, 553, 554, 555, 556, 557 558 and 559 from the dates the various unlawful titles were issued to the revocation of the same.
- e) A Declaration do issue that Your Petitioner is the lawful registered owner of the Parcels of land known as KWALE/DIANI BEACH BLOCK/856, 551, 552, 553, 554, 555, 556, 557 558 and 559 and that its titles are valid.
- f) A declaration that private property could not be acquired under the Kenyan Constitution 1969 or the Kenyan Constitution 2010 for private gain to private individuals
- g) A declaration that an Assistant Member of Parliament, Member of Parliament, Provincial Commissioner, a District Commissioner, a senior officer of the National Security Intelligence Service, the Clerk to the County Council, a District Commissioner's wife, nominated Councilors, former councilors, a chief, businessmen and such like cannot be described as squatters.
- h) A Declaration that the Petitioner's properties known as KWALE/DIANI BEACH BLOCK/856, 551, 552, 553, 554, 555, 556, 557 558 and 559 were not un-alienated Government land and could not therefore be allocated or allotted to any of the Respondents or the persons they purchased them from after these plots had been sold to and registered in favour of the Petitioners.
- i) A Declaration that land registered as a Lease hold under the Registered Land Act could only be dealt with under the provisions of that statute and that therefore none of the Respondents had the power to change the tenure of the land within the said leasehold or extend the registration area boundaries or authority to order the disposal of any interest in that land or the registration of any encumbrance over the land
- j) A Declaration that all persons in occupation of plots of land issued over Your Petitioners KWALE/DIANI BEACH BLOCK/856, 551, 552, 553, 554, 555, 556, 557 558 and 559 and any persons occupying any part of Your Petitioners parcel of land known as KWALE/DIANI BEACH BLOCK/856, 551, 552, 553, 554, 555, 556, 557 558 and 559 registered as KWALE/DIANI COMPLEX or howsoever registered are trespassers and they should be evicted and any structures constructed by them should be demolished and removed forthwith.
- k) A declaration that the actions of the Respondents and their officers including successive Kwale District Commissioners adversely affecting Your Petitioner's parcels of land known as KWALE/DIANI BEACH BLOCK 856,551,552,553,554,555,556,557,558 and 559 are acts of impunity and Your Petitioner is entitled to damages and interests thereon.
- l) An order compelling the 1st, 2nd and 3rd Respondents to forthwith remove all restrictions cautions and or prohibitions placed over Your Petitioner's Parcels of Land known as KWALE/DIANI BEACH BLOCK/856, 551, 552, 553, 554, 555, 556, 557 558 and 559.
- m) A permanent injunction restraining the 1st to 28th Respondent by themselves, their officers, employees, servants and or agents or otherwise howsoever from further entering into or further allowing any person to enter into or giving authority to any person to take possession of, to remain upon and or occupy such or any part and or portion of parcel of land of the whole or any portion derived from, excised from and or sub divided from the parcels of land known as KWALE/DIANI BEACH BLOCK/856, 551, 552, 553, 554, 555, 556, 557 558 and 559 howsoever registered or described and or from surveying, sub dividing the same or any part thereof, from allocating and or issuing any letters of allotment and or title deeds to any person to any part of the whole or any portion or plot of land derived there from and from further interfering with the Petitioner's right to occupation and ownership of the said parcels of land or any part thereof, howsoever registered or described and from further interfering with the existing registered particulars of proprietorship of the parcels of land known as

KWALE/DIANI BEACH BLOCK/856, 551, 552, 553, 554, 555, 556, 557 558 and 559 or over any part or portion of land allegedly excised or to be excised or set apart and or sub-divided from the same howsoever subsequently described and or registered.

n) A permanent injunction restraining all and registration of any contemplated dealings, to wit all surveys, adjudications, allocations, allotments, transfers charges cautions transmission under the Registered Land Act, Chapter 300 of the laws of Kenya or under any other law by the Respondent by themselves their officers, employees, servants and or agents in respect of the Petitioners Parcels of land known as KWALE /DIANI BEACH BLOCK 856, 551, 552, 553, 554, 555, 556, 557 558 and 559, or any part or portion thereof howsoever described and or registered.

o) A declaration that the sub-division and re-parcellation of The Petitioners Parcels of Land Known as KWALE/DIANI BEACH BLOCK/856, 551, 552, 553, 554, 555, 556, 557 558 and 559 to 3rd parties is contrary to the law and in breach of Your Petitioner's rights and amounts to acquisition of The Petitioner's land without compensation.

p) A declaration that the Titles set out hereinabove, that is to say: - KWALE/DIANI COMPLEX/056...1566 (The 560 plots as shown at paragraph 10 of the Supporting Affidavit to the Amended Petition) together with all the subdivisions thereto are null and void and the same should be cancelled and or revoked forthwith and the registers thereto should also be cancelled.

q) A declaration that any person occupying any of the plot numbers namely KWALE/DIANI COMPLEX/056...1566 (The 560 plots as shown at paragraph 10 of the Supporting Affidavit to the amended petition) together with all Sub-Divisions thereto, or howsoever registered, is a trespasser.

r) A declaration that the 1st to the 28th Respondent as state officers aided and abated the grabbing of the Petitioner's parcels of land the subject matter of this petition and therefore facilitated the trespass upon those plots and are equally liable for that trespass in their personal capacities.

s) A permanent order of injunction restraining the Attorney General or any of his State Counsels or any advocate drawing salary from any state organ or parastatal from representing the 9th to 28th Respondent.

t) A mandatory injunction to be issued before the hearing and determination of this petition compelling the present District Land Registrar, Kwale or any subsequent District Land Registrar, Kwale to gather all the Kalamazooos, Registers, folders, copies of Titles and all other documents and to deliver the Kalamazooos, the Registers, the folders, Copies of Title deeds and such other documents and all documents relating to plot number namely KWALE/DIANI COMPLEX/056...1566 (The 560 plots as shown at paragraph 10 of the Supporting Affidavit to the amended petition) together with all Sub-Divisions thereto and deliver them to the Deputy Registrar of the High Court of Kenya, Mombasa to be kept and maintained in secure custody as the Court may direct.

u) An order of permanent injunction restraining any of the Respondent herein from further entering upon, remaining upon, building, constructing, digging, leasing, subdividing, charging, transferring, pledging, or in any other manner dealing with or disposing of or assisting in building constructing, digging, leasing, sub-dividing, charging, transferring, pledging, or registering any document in relation to Plot Numbers namely KWALE/DIANI COMPLEX/056...1566 (The 560 plots as shown at paragraph 10 of the Supporting Affidavit to the Amended Petition) together with all subdivisions thereto.

v) A declaration that the arrest, detention and prosecution of the Petitioner's employees, servants and agents by the 22nd Respondent in any manner or on behalf of the 7th Respondent and its officers is unlawful and an order do issue restraining the 22nd Respondent and officers of the 7th Respondent from investigating, arresting, detaining, prosecuting The Petitioner's employee's servants and agents over matters relating to the suit property.

w) An order be issued restraining the 1st to the 28th Respondents by themselves, their officers, employees, servants and/or agents from interfering with Your Petitioner's title to the parcels of land known as KWALE/DIANI BEACH BLOCK/856, 551, 552, 553, 554, 555, 556, 557 558 and 559 and from interfering in any way whatsoever with Your Petitioner's quiet and peaceful occupation of the suit properties.

x) General punitive and aggravated damages against the 1st to the 28th Respondents

y) An order of eviction to evict the 14th to the 298th and the 299th to the 766th Respondent from the Petitioner's parcels of land known as KWALE/DIANI BEACH BLOCK/856, 551, 552, 553, 554, 555, 556, 557 558 and 559 and from any plots namely KWALE/DIANI COMPLEX/056...1566 (The 560 plots as shown at paragraph 10 of the supporting affidavit to the Amended Petition).

z) Mense profits and damages for trespass to all persons occupying the plots listed in (y) above and sub-divisions thereto.

aa) An order that the 298th Respondent be restrained from representing or appearing as an advocate for any of the Respondents herein or any matter relating to the Petitioner's land or the 560 plots registered as KWALE/DIANI Complex set out herein above or their sub-divisions or in any matter relating to the issues in this suit or in the suit named herein above or any future suit and that he be ordered to forthwith hand over to the Petitioner all documents relating to Land Reference 8517/10 in his possession.

bb) **An order that any orders issued in this Petition be enforced by the Commissioner of Police under the supervision of the Permanent Secretary Ministry of internal security and under the directions of the Court.**

cc) Costs of this Petition and interest herein be awarded to The Petitioner.

17. The petition is supported by affidavit sworn on 11th August, 2011 by **Mr. John K. Mutua** who describes himself as the Executive Director of the Petitioner. The Supporting Affidavit reiterates the averments in the petition. The petition is also supported by a Further Affidavit of **Mr. John K. Mutua** sworn on 31st July, 2018.

The Response

18. The petition is opposed. The 1st – 8th Respondents oppose the petition vide a Replying Affidavit sworn on the 27th July, 2018 by **Kennedy Githunguri Njoroge** who describes himself as the Principal Land Adjudication and Settlement Officer, Kwale.

19. The 1st – 8th Respondents also oppose the petition vide Amended Cross-Petition dated 5th November, 2018.

The Cross-Petition

20. The Amended Cross-Petition is founded on Articles 2(i), 19, 20, 22, 156, 23, 40, 50(1), 60(1), 62(1) and 165(3).

21. The Amended Cross-Petitioner's case is that the suit properties constitute part of the Leisure Lodge Hotels alleged parcel of land where the Petitioner carries on hotel business at Kwale County of South Coast Diani. The Respondents aver that the whole Diani Complex Scheme was Government land on which property the Government intended to develop a tourist centre. However, sometime in 1979 the Government, upon realizing that the project was proving to be expensive to implement, decided to allocate parts of that land to the landless members of the public.

22. By 1986, 962 parcels were realized and allotment letters were issued to beneficiaries. The Petitioner, Leisure Lodges Limited, was one of the beneficiaries as they had requested to be allocated a plot to be used for the golf course development leading to the amalgamation and sub-division of the suit parcels of land. The Respondents aver that **Land Reference No. KWALE/DIANI BEACH/BLOCK 856, 850, 852, 860, 859 and 812** were originally part of **Land Reference 131 and 560**. Diani Beach Land Reference No. 131 used to belong to the Ministry of Livestock while LR No. 560 belonged to Darad Farm, a company associated with Leisure Lodge Limited the Petitioner herein. The Respondents aver that the above parcels according to sub-division approval letter Ref.4609/93 of 19th January, 1990 were zoned to be shared/used as follows:

(a) Parcels 850 (c), 852(A), 853(B) and (F) surrendered to the Government in exchange of parcel 858 (J)

(b) Parcels 859(H) and 858 to be used for the purposes of Leisure Lodge Club and Golf apartment only.

(c) Parcel No. 856 (D) to be Darad Farm

(d) Parcel No. 860 to remain as Veterinary Farm

23. The Respondents aver that sometime in 1988, the officials of Kwale Agricultural Society cleared a piece of land adjacent to Leisure Lodge Hotels with a view of staging an agricultural show on a portion of land that was part of Ministry of Livestock Development land. However, when the management of Leisure Lodge noticed the clearing of the land, they, by a letter dated 23rd September, 1988 wrote to District Development Committee with a proposal to exchange the portion of land being cleared with an alternative portion near Ukunda road junction and near the Ukunda Police Station, saying the show activities would interfere with their hotel business. That proposal for exchange was discussed by Kwale District Development Committee on 25th September, 1989 and the committee agreed to exchange the 20 acres of parcel 858 with 48 acres parcel 853 offered by Darad Farm a subsidiary or sister company to the Petitioner. The Petitioner's request above was approved and parcel No. 853 (B) became the show ground. The Respondents aver that around 1991 the Petitioner applied and requested for the remaining parcel No. 860 belonging to Veterinary Farm of the Ministry of Livestock Development. Since the said land (parcel 860) had some squatters the Petitioner proposed to surrender Plot No. 8517/10 Kwale (Gombato Farm) to settle the squatters to give room for development of its golf course. The Respondents aver that the Petitioner instead of allowing plot 8517/10 to be settled by the squatters, they, in disregard of their commitment, disposed the land and/or never surrendered the title documents for resettlement of squatters leaving the squatters with nowhere to go. Because of this, the Petitioner was asked by the Commissioner of Lands to surrender (parcel No. Kwale/Diani Complex 856 which is the suit property herein and was undeveloped) to the government for purposes of settling the squatters. It was alleged that the government has prevailed upon the Petitioner vide letter Ref. 46029/189 of 21st July, 2006, 46029/207 of 15th February, 2008 and 4609/2008, as notices demanding the surrender of the suit parcel for settlement of displaced squatters without positive response.

24. The 1st – 8th Respondents aver that the action by the Petitioner to promise an alternative title, and then renege on the same was unlawful, irregular and misleading.

Particulars of alleged Illegality, Irregularity and Misleading

(a) That the Petitioner deliberately mislead the government to allocate them land, but they failed or refused to abide by the conditions of the contract;

(b) Disposing off government land illegally which was meant (and reserved) for the settlement of squatters;

(c) Failure to surrender the parcels number Kwale/Diani Complex/551, 552, 553, 554, 556, 557, 558 and 559.

25. The Respondents aver that the user of the land contained in the reserve being squatters, the land could not be registered for any other use without change of user which would require the consent of the Ministry of Lands and Ministry of Livestock Development. The Respondents aver that the Petitioner, Leisure Lodge knew and or ought to have known that the allotted land had conditions which they did not comply with and deliberately misled the government and the District Development Committee. The Respondents aver that the Petitioner did not acquire any title or property capable of protection under Article 40 of the constitution as there was nothing to purchase and sub-divide, the suit land having encroached and overlapped on a public utility road reserve.

26. In the circumstances, it is the Respondents' case that the title held by the Petitioner, over land parcel KWALE/DIANI COMPLEX/856 is not protected by the law by dint of Article 40(6) of the 2010 constitution, and is therefore against public interest and polity and is null and void *ab initio*.

27. Accordingly the Amended Cross-Petitioner prays for:

(i) An order dismissing the petition with costs.

(ii) A declaration that title KWALE/DIANI BEACH/856 is not properly owned by the Petitioner Leisure Lodge and therefore not capable of constitutional protection.

(iii) A declaration that any past, present and any dealings by the Respondent, Leisure Lodge with the KWALE/DIANI BEACH/856 were unlawful and unconstitutional.

(iv) An order cancelling the title KWALE/DIANI BECH/856 and directing the Registrar of Lands, Kwale to rectify the land register of the suit property for being and/or consisting of a public utility.

(v) An order affirming the Gazette Notice No. 7752 published on 9th July,2010 and that the same was issued after the Petitioner, Leisure Lodge was given notice and sufficient hearing.

(vi) A permanent injunction restraining the Respondent, Leisure Lodge, its agents, servants, employees, assignees, successors or any person claiming under then from selling, transferring, entering or in any other way dealing with the portions of the land KWALE/DIANI BECH/856.

(vii) An order for delivery of vacant possession of the parcel title KWALE/DIANI BEACH/856 to the government.

(viii) Costs of the Cross-Petition.

(ix) Any other order or relief as the Court shall deem just to grant.

28. The Amended Cross-Petition is supported by affidavit of Kennedy Githunguri Njenga sworn on 27th July, 2018. The affidavit expounds upon the facts contained in the Amended Cross-Petition.

29. In response to the Amended Cross-Petition the Petitioner filed a Replying Affidavit sworn on 23rd November, 2018 by its Executive Director **John K. Mutua**, denying the Amended Cross-Petition and stating that the issues raised therein are *res judicata*. That contrary to the allegations made in the Cross-Petition, the suit properties comprising the 10 parcels of land known as KWALE/DIANI BEACH/BLOCK 551, 552, 553, 554, 555, 556, 557, 558, 559 and 856 which are registered in the Petitioner's name were legally acquired through a purchase for valuable consideration sometime in October, 1987 from **Hon. Boy Juma Boy**. The suit properties including the parcel of land known as MOMBASA/MAINLAND SOUTH/DIANI BEACH/560 referred to in the Cross-Petition were part of the sub-divisions of a larger parcel of land known as MOMBASA/MAINLAND SOUTH/DIANI BEACH/10, a leasehold for 99 years from 1914 measuring approximately 328.5 acres. They were previously known as MOMBASA/MAINLAND SOUTH/DIANI BEACH/XYZ. Further, the Petitioner's parcel of land known as KWALE/DIANI BEACH/BLOCK 856 was a sub-division of the parcel of land known as MOMBASA/MAINLAND SOUTH/DIANI BEACH/560. The Petitioner states therefore that it was always private land acquired for valuable consideration through a purchase and could not therefore have been public land or available for allocation to squatters or reserved for public use as alleged in the Cross-Petition and in the affidavit of **Kennedy Githunguri Njenga** dated 27th July, 2018.

30. The Petitioner reiterated the contents of Amended Petition stating that successive KWALE District Commissioners over the years from 1990's have claimed that the Petitioner owes the Government twenty (20) acres of land from an exchange of land which was allegedly to be used to settle squatters. On the basis of this claim, over the years, every District Commissioner who was posted to Kwale District (as it then was), would commence his own "squatter re-settlement program" by unlawfully forcefully hiving off portions of the Petitioner's parcel of land known as KWALE/DIANI BEACH/BLOCK 856, through the use of Administrative Police and District Surveyors which portions they would then 'allocate' to their proxies and cronies.

31. The Petitioner states that the successive Kwale District Land Registrars together with the Chief Land Registrar and the Commissioner of Lands were also part of this elaborate land grabbing scheme intended to illegally and forcefully acquire and deprive the Petitioner of its land. The said land officers' named in the petition created the fake Registry Index Map (RIM) marked as "JKM 19" at page 174 of the affidavit in support of the Amended Petition, which they superimposed upon the suit property and used the same to issue Free Hold titles

over the Petitioner's land, which was already registered as a Leasehold for 99 years. The Petitioner states that the process of illegal deprivation, forceful acquisition and allocation of portions of the Petitioner's land, the subject matter of this petition, through the creation of a false Registry Index Map (RIM) then sub-division of the same and issuance of Freehold titles over the already registered land owned by the Petitioner was illegal, unconstitutional and amounts to abuse of office by the public officers involved. That the said unconstitutional and unlawful process of depriving the Petitioner of its suit property came to a head in year 2006 when the then Commissioner of Lands by a letter dated 21st July, 2006 (marked DS 1 in the affidavit in support of the Amended Cross-Petition) demanded that the Petitioner should surrender one of the suit properties known as KWALE/DIANI BEACH/BLOCK 856 for settlement of squatters by forwarding the title deed in respect of the said parcel of land within 14 days. This was followed by a letter dated 1st February, 2008 in which the then Commissioner of Lands by a letter dated 1st February, 2008 (marked DS 2 in the affidavit in support of the Amended Cross-Petition) demanded that the Petitioner should surrender the title for its parcel of land known as KWALE/DIANI BEACH/BLOCK 856 within 14 days in default of which the government would proceed to issue letters of allotment to the beneficiaries of the squatter programme without further notice to the Petitioner. These demands were unlawful and made in total abuse of power.

32. In 2008, the then Commissioner of Lands by a letter dated 15th February, 2008 demanded that the Petitioner should surrender the other nine (9) parcels of land comprising some of the suit properties known as KWALE/DIANI BEACH/BLOCK 551, 552, 553, 554, 555, 556, 557, 558 and 559 for settlement of squatters on the grounds that in 1993 the Petitioner purchased the parcel of land known as L.R. 8517/10 comprising 93 acres for settlement of squatters then sold the same leaving the squatters with nowhere to go. By the said letter, he directed the District Land Registrar to enter restrictions on the cited parcels of land pending further directions. The letters dated 15th February, 2008, 1st February, 2008 and 21st July, 2006 were produced and shown as exhibits marked "JKM 17" and "JKM 18" in the affidavit in support of the Amended petition (at pages 167 to 173). The Petitioner avers that contrary to the allegations made in the various letters by the Commissioners of Lands, Chief Land Registrar and District Land Registrars referred to hereinabove and the letters by officers in the Ministry of Lands shown in the Cross-Petition, the suit property has never been set apart for settlement of squatters under any programme. Rather, the claims were made fraudulently with the objective of unlawfully acquiring the Petitioner's land by the various public officers and their cronies for their private gain. The Petitioner avers that the position on the ground is that there is no squatter on the suit property rather there are well connected and well to do people who have acquired portions of the Petitioner's land through the said unlawful process.

33. The Petitioner denies that the facts concerning the veterinary plot set out in the Amended Cross-Petition and states that they are erroneous and not true. The Petitioner states that it is aware that the Veterinary Farm of the Ministry of Livestock Development is intact and is registered as **Kwale/Diani Beach/Block 977** but it has also been unlawfully grabbed and sub-divided into small portions which were issued with freehold titles but the local leaders have stopped the process. The matter has been taken up by the National Land Commission which has commenced the process of hearing the dispute. The Petitioner produced an exhibit being a notice placed in the Standard Newspaper on the matter marked JKM 7.

34. The Petitioner states that it is also aware that the District Land Registrar issued a Gazette Notice No. 7752 dated 9th July, 2010 in which he revoked the title for the Petitioner's parcel of land known as KWALE/DIANI BECH/BLOCK 856 for reasons that the parcel of land was reserved for public purposes under the relevant provisions of the constitution. The Petitioner states that the alleged revocation was unlawful, and the Petitioner did not have any prior notice of the revocation as it was not accorded a hearing. In any event, the Petitioner avers that the District Land Registrar has no powers to revoke a title. The Petitioner challenged the Registrar's decision by filing Mombasa High Court Miscellaneous Civil Application No. 79 of 2010 (JR) in which leave to institute the proceedings was granted to operate as a stay. The matter has been stayed by the directions given in this petition to await the outcome of this petition. The Petitioner avers that the Cross-Petition and Kennedy Githunguri Njenga's affidavit dated 27th July, 2018 are further attempts to cover up the collusion by the public officers in their dealings with the Petitioner's land. The claims that the Petitioner's lawful title to the suit property known as KWALE/DIANI BEACH/BLOCK 856 was lawfully revoked are false because the said land or any portion thereof has never at any time been government land and or reserved for public purposes. In the circumstances, the Commissioner of Lands and or the Land Registrar did not have any statutory powers to interfere with the Petitioner's lawful title to the same. The Petitioner avers that the matters deponed to and set out in the Cross-Petition and Kennedy Githunguri Njenga's affidavit are intended to legitimize the unlawfully forcible deprivation of the Petitioner's private property by public officers without due process and through abuse of their offices. That the callous and allegedly corrupt manner in which they did so has been confirmed by the 1st, 2nd, 3rd and 7th Respondents in the said pleadings.

35. The Petitioner's claim against the 298th Respondent is also confirmed because it is alleged that the failure to complete the transaction of Gombato Plot No. 8517/10 by discharging the same and handing over the title to the Government led to the unlawful process the subject matter of this petition. However, the Petitioner avers that it has been actively pursuing Mr. Asige to produce the title documents and the Discharge of Charge he received from National Bank.

36. The Petitioner urged the Court to dismiss the Amended Cross-Petition with costs.

Prior Suits before the Petition

37. The Petitioner in an attempt to secure its aforesaid property from alleged destruction by the Kwale County Government filed **Nai ELC Case No. 188 of 2008** in respect of Kwale/Diani Beach Block/856, and **Nai ELC No.217 of 2008** in respect of Kwale/Diani Beach Block/551, 552, 553, 554, 555, 556, 557, 558 and 559 against the 1st, 2nd, 3rd and 7th Respondents. The Petitioner sought and was granted orders of injunction in the two suits which have since been concluded in favour of the Petitioner. However, the Petitioner alleges that despite personal service of the orders and decrees upon the 1st, 2nd and 3rd Respondents, they have refused to comply with the orders of injunction issued in the said suits or to implement the decrees. The Petitioner avers that despite the 3rd Respondent being restrained from issuing further freehold titles upon the suit premises, he has continued doing so as well as registering further dealing upon the registers of the titles for plots created over the suit properties and sub-divisions thereof despite knowing that the said plots do not exist on the ground because the land thereof is already registered in the name of the Petitioner.

38. The alleged continuation of the aforesaid disobedience led to the Petitioner filing **Mombasa Miscellaneous Civil Application No. 545 of 2008** against the **Kwale and Msambweni District Commissioners**, and **Coast Provincial Surveyor, the Kwale District Surveyor**, and

others, who were found guilty of contempt of the court orders issued in **Nai HC ELC No. 188 and 217 of 2008**.

39. Between December, 2009 and October, 2010, several persons who were issued with plots within the suit premises and for which they claim to have title deed, filed 12 suits in the High Court at Mombasa against the Petitioner in which some of them have sought and been granted orders of injunction against the Petitioner, which would allow them to commence and complete construction activities in the suit property.

40. On 19th March, 2010 the 8th Respondent, though its former Clerk, the 23rd Respondent, who has acquired plots within the suit properties, issued enforcement notices under the Physical Planning Act in which it sought to demolish, remove and or relocate perimeter walls surrounding the Petitioner's Golf Course and around water tanks on the suit properties which had allegedly been erected without a grant of permission under the Physical Planning Act. However, the Petitioner has challenged the decision to demolish or remove its perimeter walls by filing a Judicial Review application (**Mombasa High Court Civil Miscellaneous Civil Application No. 46 of 2010**) in which it has sought, and been granted leave to operate as a stay.

41. On 9th July, 2010, and in breach of the court order restraining him from interfering with the Petitioner's proprietary title and interest over the suit properties, the District Land Registrar, Kwale sued herein as the 3rd Respondent issued a Gazette Notice No. 7752 in which he revoked the Petitioner's title to the parcel of land known as Kwale/Diani Beach Block/856 alleging that the same was illegally and unconstitutionally allocated to the Petitioner but the Petitioner has also challenged the decision to revoke its title by filing a Judicial Review application (**Mombasa High Court Civil Miscellaneous Civil Application No. 79 of 2010**) in which it has sought and been granted leave to apply for an order of certiorari which leave operates as a stay.

42. There are many suits now ongoing in various courts, including those specifically mentioned in the heading of this petition. Those cases are over 110. There are orders of injunction issued in those matters in favour of the Petitioner and those issued against the Petitioner. There are stay orders in the Mombasa High Court civil suits stated at the heading of the petition. Because the outcome of those suits are hinged on the outcome of this petition, the said suits, which are now in the Environment and Land Court in Mombasa, have been stayed pending the determination of this petition.

Jurisdiction

43. In the cause of these proceedings there were four Preliminary Objections mounted by various Respondents dated 5th August, 2015; 9th August, 2015; 17th August, 2015 and 10th August, 2015. All the Preliminary Objections were based on a broad single ground, hinging on the jurisdiction of this court to entertain this petition on account of Article 162 of the constitution that the matters raised herein are matters within the realm of the Environment and Land Court. Other minor grounds were that the issues raised herein are either *sub judice* or *res judicata*.

44. All those Preliminary Objections were dealt with by a three (3) Judge Bench of **M. J. Emukule, M. Kasango and E. Muriithi JJ** and a Ruling delivered on 29th February, 2016 in which the Court found that it has the jurisdiction to entertain this matter, and also dismissed the grounds raised of *sub judice* and *res judicata*. It is important for this Court to revisit the issue of jurisdiction, more so after Mr. Nguyo, learned counsel for the Attorney General submitted that upon the filing of Amended Cross-Petition, the Court should revisit the issue of jurisdiction.

45. It is, however, the view of this Bench that the issue as to whether or not this Court has the jurisdiction to entertain this matter, and whether the issues raised herein are *sub judice* or are *res judicata* are issues which the earlier Bench aforesaid had exhaustively considered and rendered themselves on, and none of the parties herein contested that decision in an appeal. It is the finding of this Court that those issues are now well behind us in this matter and therefore cannot be revisited.

Submissions

46. Parties to the petition were represented by counsel as follows:

- (i) Learned Counsel Mr. Ochieng Oduol, led the legal team for the Petitioner assisted by Mrs. Eunice Kibe.
- (ii) Mr. Wachira Nguyo, learned Counsel, represented the 1st – 7th Respondents assisted by Mr. Makuto learned Counsel.
- (iii) The 8th Respondent was represented by Mr. Njoroge Mwangi, learned Counsel.
- (iv) Ms. Umara, learned Counsel, represented the 145th Respondent.
- (v) Mr. Anangwe, learned Counsel, represented the 85th and 105th Respondents.
- (vi) Apollo Muinde, learned Counsel, represented the 95th and 185th Respondents.
- (vii) Mr. Ndinda, learned Counsel, represented the 72nd, 196th and 293rd Respondents.
- (viii) Mr. Asige, learned Counsel, represented himself as Respondent No.298 as well as other 116 Respondents.

Petitioner's Submissions

47. Basically, the written submission are a reiteration of the petition. However, in highlighting the same, **Mr. Ochieng Oduol**, lead Counsel for the Petitioner underscored the role of the Constitution in the Management of public affairs. Counsel submitted that the reason the Petitioner is before this court is to seek protection of its constitutional right to property, as the duly registered and legitimate owner of the ten (10) suit properties, (herein known as parcels of land Nos. Kwale/Diani Beach Block/551 – 559 (1989) and Kwale Diani Beach Block/836 (1991)). Counsel submitted that once the land has been registered and properly appropriated the same is not available for alienation and can only either be compulsorily acquired for public purpose or via transmission. Counsel submitted that under the Bill of rights, the Petitioner is entitled to the rights to property protected under Article 40 as read together with Articles 60 and 64 of the Constitution, the right to equal protection and equal benefit of the law under Article 27; the right to dignity and freedom under Article 28, and 29 (c) (f). **Mr. Ochieng Oduol** submitted that as a lawfully registered owner of the suit properties, the Petitioner has an absolute and indefeasible right to enjoy all the rights and privileges belonging thereto as provided for by Section 24 (a), 25 (1) and 26 of the Land Registration Act 2012 as read together with Section 27 & 28 of the Registered Land Act (repealed). Counsel cited **Vekaria Investment Limited –vs- Kenya Airport Authority & 2 others (2014) eKLR** and the Court of Appeal in **Joseph N. K. Arap Ng’ok –v- Moiwo Ole Keiwua & 4 others (1997) Eklr**, where it was held that a Petitioner has to demonstrate ownership of the land in petition under Article 40.

48. Counsel submitted that Article 40 of the Constitution accords the registered owner the protection from deprivation of their property by the state or any other person without due process and prompt and just compensation.

49. **Mr. Ochieng Oduol** made a cross reference to Article 25 of the South Africa Constitution which has similar provisions to Article 40 (3) of the Kenyan Constitution and cited South African decisions in **National Credit Regulator vs Opperman & Others (CCT 34/12) (2012) ZACC 29;2013** in which the Supreme Court stated:

“whether there has been a deprivation depends on the extent of interference with the use, enjoyment or exploitation of the Constitutionally protected property. Interference significant enough to have a legally relevant impact on the Rights of the affected party amounts to deprivation”.

50. **Mr. Ochieng Oduol** submitted that when all these titles are still subsisting, and the said land not having been surrendered, the staff at the Land Registry in Kwale created a false RIM for the purpose of depriving the Petitioner of its rightful property and proceeded to issue the respondents with letters of allotment. The result of this is that the 1st to 28th Respondents have deprived the Petitioner of the suit properties without due process and compensation, which is in violation of Article 40 (3) of the Constitution. Counsel brought to the attention of the Court an order of the Environment and Land Court in Cases No. 188 and 217, both of 2008, where, in the decrees made on 27th July, 2009, the government recognized that the Petitioner was the owner of the suit property. **Mr. Ochieng Oduol** submitted that the decrees were in rem, which means that as against the entire world, the proprietorship of the said parcels of land was not in question. Counsel demonstrated that the Respondents herein blatantly breached Court orders in various cases cited in the Petition, the consequence thereof being the subdivision and issuance of new plot numbers and titles on the suit properties which amount to an illegality. It was submitted that the Respondents’ actions against the existing Court orders were null, void and illegal. Consequently, a guilty party cannot therefore derive any benefit from the violation nor can it claim any right arising from violation of a Court order. See **Clarke and others vs Chadburn & other (1985) 1 ALL ER**.

51. **Mr. Ochieng Oduol** submitted that the act of creating a fictitious RM is an illegality, absolute impugny by parties who are supposed to safeguard integrity. Their action has no validity since it is founded on an illegal RIM. See the Privy Counsel in **Macfoy –v- United Africa Co. Ltd (1961) E. A.** Counsel cited Court of Appeal in **Mucuha –v- Ripples Ltd: -**

.... a Court should not come to the aid of the Respondent who have pertinently breached the Orders of the Court and now come for protection in the same Court.

52. The Petitioner submitted that it was curious that the government through the Attorney General, submitted that they were creating a settlement scheme for the squatters who had been occupying the parcel of land known as **Kwale/Diani Beach/856**. However, an official search and schedule from the Kwale Lands Registry gave particulars of the various allottees who turned out to be people holding government posts (such as Registrars, chief, D.Cs. P.C.’s, Politicians, Senior government officials etc). This is despite the government not having acquired the said land through the procedure provided for in the law, and for a noble purpose. The intention was always to benefit government officials their families and politicians. There was no intention to facilitate settlement of genuine squatters at all.

53. As far as the genuine squatters are concerned, **Mr. Ochieng Oduol** submitted that the Petitioner adequately addressed the issue when it purchased **Plot No, 8517/10/Kwale (Gombato)** which was availed for the settlement of the said squatters. This was an action ex-gratia on the Petitioner’s part. Counsel submitted that title to the said property is with Mr. Asige, Respondent No. 298 for handing over to the squatters at the pleasure of the Respondents.

54. **Mr. Ochieng Oduol** in his submissions lamented the apparent wanton abuse of the legal process by Respondents who have failed to obey Court Orders. Counsel submitted that appropriate actions should be taken against government officials who disobey Court Orders and their conspiracy to take away the Petitioners’ land by using state officers and illegal means.

55. On whether punitive damages should be awarded to the Petitioner, Counsel submitted that the 1st to the 28th Respondent by themselves and/or their agent, deliberately and brazenly breached and/ or infringed the Petitioner’s fundamental rights including the right to equal protection under the law, dignity and property by assisting in the grabbing of the Petitioners Parcels of land (the suit properties) and as result, facilitated the continued trespass upon the suit properties and are equally liable for trespass in their personal capacities.

56. Counsel submitted that the trespass on the suit properties has stopped the Petitioner from investing and acquiring potential growth and earnings from the land and it is for the aforesaid reasons that the Petitioner prays for an award of Ksh. 2,000,000,000/= for punitive and exemplary damages against the 1st to the 8th Respondents. In support for this claim the Petitioner relied on these cases.

- (i) **In Obongo vs. Kisumu Municipal Council (1971) EA 91**
- (ii) **Gathungu Wanjohi & Another -v- Attorney General & 6 others**
- (iii) **C. OM -vs- the Standard Group Limited and Another (2011) EKLR.**
- (iv) **In Bank of Baroda (K) Limited vs Timwood Products Ltd.**
- (v) **Mawenzi Investment Ltd -vs- Top Finance Co. Ltd & Anor HCCS No. 02 OF 2013.**
- (vi) **Simon Taveta -v- Mercy Mutitu Njeru (2014)**

57. As for General Damages Mr. Ochieng Oduol submitted that a sum of Kshs. 500,000,000/= would suffice to compensate the Petitioner for the trespass, infractions, damages and sufferings of the Petitioner in relation to the suit properties.

The Attorney Generals' Submissions on behalf of 1st to 7th Respondents.

58. **Mr. Wachira Nguyo**, learned counsel, appeared for 1st to 7th Respondents and made oral submissions. Counsel submitted that although the issue of jurisdiction had been settled, he would revisit it because prayer (o) of the petition refers to compensation whose procedure is within the jurisdiction of the Environment and land court as per the Land Act, and not the constitutional court. Counsel submitted that the amended petition refers to searches obtained in 2007, which are not recent and therefore ownership and extended ownership cannot be confirmed. He observed that the schedule attached to the said search is disputed because it does not form part of the search and cannot form a basis for determining who was allotted the subject parcels of land. He observed that the author of the schedule which is not signed, is also unknown so that its authenticity remains in doubt.

59. Mr. Wachira, further submitted that there was a change of ownership in 2010 and referred to exchange of letters, specifically one written of Z. A Mabeya, the then Commissioner of Lands and another by J. M. Okungu (Mrs.) where the Petitioner was ordered to surrender the title to the suit property within 14 days, failure to which the government would then issue allotment letters to the beneficiaries.

60. Mr. Wachira submitted that there had been negotiations regarding the ownership of the suit properties but the Petitioner chose to file a petition in the High court in Nairobi being ELC No. 188 of 2009, which was compromised by a consent. However, counsel submitted that this consent was endorsed by his colleague Alexander Mose, without authority and therefore was a forgery. However, earlier negotiations led to an agreement whereby the Petitioner was to give out Plot No. 8517/0/Gombato farm for settling squatters who were on land parcel number 856. That the Petitioner took over the veterinary land but never delivered the Gombato parcel of land. This then led to the cancellation of the title Number **Diani Beach/856** which Mr. Wachira submitted is justified.

61. With regard to the prayers sought by the Petitioner, Mr. Wachira submitted that the revocation of title extinguished the right to property for the Petitioner as provided for under article 40 of the Constitution. As for the prayers for damages, counsel submitted that there was no basis for assessment of damages as no valuation report or a breakdown of the damages suffered in monetary terms has been placed before the court.

Submissions by the 8th Respondent

62. The 8th Respondent is the county Government of Kwale a local Authority created under the then defunct local Government Act. Learned counsel, Mr. Njoroge Mwangi for the 8th Respondent adopted their submissions filed on 1st August, 2015. Counsel submitted that any suit alleging a violation of fundamental rights, should not be contentious. This is so because under the **Mutungua Rules**, a petition must disclose the facts relied on, (which must be simple and easily ascertainable), the constitutional provisions violated and the likely injury. Counsel submitted that the amended petition which involves about 757 Respondents as the owners of the land, fails that test. Mr. Mwangi further submitted that the suit property has never been trust land and as such the 8th Respondent cannot be drawn into proprietary issues over the suit property nor has it powers to subdivide, allocate, donate, or pass title to any land in a settlement scheme or land held privately like in this instance. Mr. Mwangi submitted the Petitioner has no cause of action or a reasonable cause of action against the 8th Respondent. Mr. Mwangi further submitted that the Petitioner has not shown that the 8th Respondent owns any land in the alleged suit premises or has violated any court order or been found guilty of contempt or violated any property rights that only accrue to the Petitioner.

63. Mr. Mwangi drew attention of the Court to about 115 Environment and Land Court cases which have been stayed because of this petition. Some have been disposed and others still pending. Counsel cautioned that if this Court by its orders, varies any of the decisions of the said ELC cases, this Court runs the risk of sitting as an appeal court and not constitutional, which is not proper.

Submissions by 145th Respondent

64. Mrs. Umara, Learned Counsel for the 145th Respondent submitted that she had filed a Replying Affidavit in response to the petition on 16th March, 2018 in which her client states that he does not own any parcel of land in Diani Complex and that there is no evidence that has been tendered to prove that he owns any land there. The 145th Respondent claims that he has wrongly been joined or sued in this petition.

Submissions by 85th and 105th Respondent

65. Mr. Anangwe learned counsel for the 85th and 105th Respondents submitted that he associated himself with the submissions by the Attorney General.

Submissions by 95th and 185th Respondents.

66. The 95th and 185th Respondents filed written submissions on 3rd May, 2018 through their learned counsel Mr. Apollo Muinde. On the hearing day Mr. Anangwe held the brief of Mr. Muinde and submitted that a conservatory order cannot issue as this would defeat the public interest. Counsel submitted that the Petitioner has not provided cogent evidence to show that it owns the suit properties.

67. Counsel submitted that Article 40(6) of the Constitution does not protect a property that has not been legally and lawfully acquired and that therefore the Petitioner has no constitutional protection. On the reverse, Counsel submitted that the Respondents lawfully revoked the suit properties and the said revocation properly divested the Petitioner of the suit properties.

68. On whether the Petitioner has satisfied the test for grant of a Mandatory Injunction, Counsel submitted that the Petitioner has not satisfied this Court for grant of mandatory injunction as per the test laid down in the case of *Giella vs. Cassman Brown Ltd [1973] EA 358*.

69. Mr. Anangwe submitted that the Petition is based on thin air and without backing of the law, and the orders sought are likely to prejudice the rights of others which rights have already accrued.

Submissions by 72nd, 196th and 293rd Respondents

70. Mr. Ndinda, learned Counsel holding brief for Mr. Kithi, counsel for the 72nd, 196th and 298th Respondents, that they will be relying on their submissions filed on 14th August, 2015. A perusal of the court record shows the said Respondents did not file any submissions on 14th August, 2015 but instead filed a list of authorities and a bundle of the said authorities to be relied on in support of their case.

Submissions by the 298th and 116 Other Respondents

71. Mr. Asige who is Respondent No. 298 also represents 116 other Respondents. The learned counsel submitted that he was associating himself with the submissions by Mr. Wachira Nguyo, Counsel for the Attorney General and Mr. Njoroge, Counsel for the 8th Respondent. He also indicated that he wished to rely on the affidavit sworn by Nassoro Abdalla filed on 1st March 2018, his own affidavit sworn on 9th March, 2018 and a further affidavit sworn on 22nd October, 2018 which have been outlined in the background of this case.

72. Mr. Asige further submitted that the petition has raised no constitutional issue or grievance or complain. Mr. Asige submitted that the petition is a civil suit couched in constitutional terms. Counsel submitted that the amended petition has not set out any particulars against the respondents in terms of what they are said to have breached because when a breach of right is pleaded, it must be clearly particularized. Consequently, counsel submitted that the petition must collapse.

Issues

73. Having considered the submissions by all the parties in the petition, we find the following issues arise from determination:

- (a) Whether the titles to the suit properties exist, and if so, who owns them, and how were they acquired?
- (b) Whether Government can compulsorily acquire a private property.
- (c) Whether there was superimposition, subdivision and issuance of new titles on the suit properties?
- (d) Were the title to the suit property revoked, and if so, by what process?
- (e) Did the Respondents or their officers violate or disobey lawful orders or the due process, and or did they abuse their offices as alleged in the petition or at all?
- (f) Should the Petitioner surrender the Gombato farm property Plot No. 8517/10 to the Government?
- (g) Who has the documents of title to the said Gombato property?
- (h) Are general and exemplary damages payable?
- (i) Is any party entitled to costs?

The Determination

Who owns the suit properties?

74. It is the Petitioner's case that it owns the 10 suit properties being Title Nos. Mombasa/Mainland South/Diani Beach/856, 551, 552, 553,

554, 555, 556, 557, 558 and 559, having purchased the same. The Petitioner denies that the suit properties were ever government properties. In a replying affidavit sworn on 23rd November, 2018 by the Executive director of the Petitioner, John K. Mutua, the Petitioner exhibited various documents relating the suit properties. There is an agreement for sale dated 19th October, 1987 between the Petitioner and Hon. Boy Juma Boy as administrator of the estate of Juma Boy in respect of Title Nos. Mombasa/Mainland South/Diani Beach /549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559 and 560. Title for Plot 560 was issued to the Petitioner on 10.11.87. The green card for the plot indicates that the lease was initially issued to Boy Juma Boy and Fodi Juma Boy as administrators of the estate of Juma Boy. Entries No. 2 and 3 show the Petitioner as the owner. The Petitioner further exhibited correspondence from the Commissioner of Lands relating to the subdivision of Plot No. 560. A letter dated 2nd January, 1991 shows that the resultant Plots and their respective user were Plot 856 - agricultural user, Plot 855 - golf and Plot 858 – apartments. The letter dated 21st March, 1991, informed the Petitioner that upon valuation land rent for Plot 856 had been set at KShs. 4,200/= . The Petitioner was then directed to surrender the original title for Plot 560 in exchange for tiles for the resultant plots 856 and 855. Certificate of Lease for Plot 856 was issued to the Petitioner on 3rd September, 1991. As regards Plots 551-559, the exhibited copies of Certificates of Lease indicate that they were all issued to the Petitioner on 10th November, 1987 whereas the official searches of 27th June, 2007 show that the Petitioner is the registered owner of the said plots.

75. The 2nd and 3rd Respondents claim in their amended Cross-Petition that in 1988, Plot No. 131 which belonged to the Ministry of Livestock was to be used as show ground. They claim that the Petitioner being anxious that the proposed show ground would affect their business, offered plot near Ukunda Road junction in exchange for the show plot which would have affected their hotel business. In a replying affidavit sworn on 27th July, 2018, Kennedy Githunguri Njenga, the Principal Land Adjudication and Settlement Officer in Kwale County averred that Diani Complex Scheme was government land earmarked for development of a tourist center. In 1979 however, the Government realizing it was too costly decided to allocate the land to the public. In 1986 the land was subdivided into 962 plots measuring 0.4 ha which were allocated to persons identified as deserving. It was further averred that Plot 131 belonging to Ministry of Livestock and Plot 560 belonging to Darad farm a sister company of the Petitioner were in 1990 amalgamated and subdivided into 7 portions namely Kwale/Diani Beach/Block 856, 850,852, 860, 859 & 812.

76. Kennedy Githunguri Njenga further averred that according to a subdivision approval letter, dated 19th January, 1990, Plots 850(C), 852(B), & (F) were to be surrendered to the Government in exchange of Parcel 858(J). Plots 859(H), and 858 were for the Petitioner’s club and apartments. Plot 856(D) was to remain as Darad Farm while Plot 860 was to remain as veterinary farm. Although Kennedy Githunguri Njenga indicated that the letter was annexed to the affidavit, it was not. Also not annexed are the letters referred to in Kennedy Githunguri Njenga’s affidavit by the Petitioner to the District Development Committee with a proposal to exchange the showground plot with an alternative portion near Ukunda road junction. The letter by the Petitioner to surrender the Gombato land to settle squatters was also not annexed. The letters from the Msambweni District Officer on the identity of the squatters to be settled were also not annexed. Without the benefit of seeing these letters buttressing the averments of Kennedy Githunguri Njenga, the Court draws the conclusion that the case of the Petitioner which is supported by documentary evidence is more convincing.

77. The Certificates of Lease in respect of the suit properties were issued to the Petitioner under the provisions of the repealed Registered Land Act Cap 300. The certificates of lease conferred upon the Petitioner rights that cannot be made avoided, defeated or cancelled arbitrarily. Section 28 of the Act provides:

“The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever...”

78. The indefeasibility of a title was well captured by the Court of Appeal in Joseph N. K. arap Ngo’k v Moiyo Ole Keiwua & 4 Others [1997] eKLR as follows:

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

79. The 1st -8th Respondents do not dispute the ownership by the Petitioner of the suit properties. What they do state is that the Petitioner reneged to surrender Gombato land for resettlement of the squatters thus inviting the revocation of the title to Plot 856.

80. Having considered the foregoing therefore, there is no doubt in our minds that the suit properties belong to the Petitioner.

Can Government compulsorily acquire private property?

81. It is not in doubt that the Government has the power to extinguish private rights by forcing involuntary transfers of property to the state or a designated agency. This is the eminent domain of the state. Black’s Law Dictionary Tenth Edition defines eminent domain as:

The inherent power of a government entity to take privately owned property, esp. land, and convert it to public use, subject to reasonable compensation for the taking.

82. The Constitution of Kenya, 2010 has set out the conditions to be met when there is a need for the State to deprive a person of their property. Article 40(3) provides:

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

83. In order for the state to lawfully exercise its eminent domain, it must be demonstrated that the acquisition of land or an interest in land has been done in accordance with Chapter Five of the Constitution. It must also be demonstrated that the land to be acquired is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament. There must be that prompt payment in full, or just compensation to the person to be deprived of the land and such person must have a right of access to a court of law.

84. In the present case, the issue of compulsory acquisition has not arisen. What we have is what appears to be a revocation of title. So the issue of just compensation does not arise. The issue here is whether or not the alleged revocation is lawful or procedural.

Was the current RIM superimposed upon the suit properties?

85. It is the Petitioner's case that the Registry Index Map (RIM) No. 201/3/2 for Kwale Diani Beach area where the suit properties are situated, is still intact and so are all the all 10 suit properties. The tenure for this area is leasehold. However, in order to facilitate the alleged subdivision of the suit properties, and allocate and issue title deeds to the same, the 1st -4th Respondents purported to create an adjudication area and survey map over the suit properties and named it **Diani Complex Settlement Scheme Sheet No. 4**. The Petitioner contends that there is a genuine Diani Complex Settlement Scheme which is not within RIM No. 201/3/2.

86. The Respondents did not provide any evidence to rebut these claims. Their focus has been on the alleged renegeing by the Petitioner on the condition upon which it was given Plot 856. One would have expected the 1st - 7th Respondent to produce documentary evidence showing just when and how the Diani Complex Settlement Scheme came about. On the other hand, the Petitioner has clearly shown through documents that it acquired all 10 suit properties through purchase. Without documentary evidence, it is not possible for us to find that the suit properties belonged to any party other than the Petitioner.

Were titles to suit properties revoked and by what process.

87. On 9th July, and in breach of the order of the Court restraining him from interfering with the Petitioner's proprietary title and interest over the suit properties, the District Lands Registrar, Kwale, sued herein as the 3rd Respondent issued a Gazette Notice No. 7752 in which he purported to revoke the Petitioner's title to KWALE/DIANI BEACH/ BLOCK/856 alleging that the same was illegally and unconstitutionally allocated to the Petitioner. It appears that this is the only basis upon which the Respondents purport to deny the Petitioner's title. The Petitioner challenged the said decision and the matter is pending in Court. However, from the proceedings herein the Petitioner's ownership of the said title has been traced to 1986 when the Petitioner validly purchased the property. The property was not given to the Petitioner by the process of allocation. It was purchased. So the said Gazette No. 7752 was irregular. Further, and more importantly, the District Lands Registrar has no powers to revoke a title. A title can only be revoked arising from a Court order. So a Gazette revoking a title derives its authority from a Court Order. Therefore, what the said District Lands Registrar Kwale purported to have done was a mere performance of an illegality the consequence of which has no force in law. In fact, according to the Survey Map for the Diani Beach area (Registry Index Map No. 201/3/2) which is available from the 4th Respondent, the Director of Survey, the Petitioner's parcels of land forming the suit properties are all situated in the registration area called Kwale Dani Beach Registration Area and the said RIM No. 201/3/2 shows the Registration Boundary for the Kwale Diani Beach Registration Area is intact and has not been altered and shows clearly the Petitioner's 10 parcels of land forming the suit properties. It is therefore unlawful for the Respondents to allege that the suit title aforesaid was revoked.

88. This Court finds that the said titles are intact and that the alleged revocation was misconceived and illegal and is hereby set aside. Also superfluous and illegal are the submissions by the Respondent that the Registry Index Map (RIM) No. 201/3/2 aforesaid was superimposed and a new registration regime created upon which the new titles being issued are based. That is a submission not supported by law. It is a submission immersed in legal impunity where a custodian of titles can whimsically discard a registration of title regime, open a new one and revoke titles at will. This cannot happen in a civilized, and democratic society. A society must have order. The land registration regime or system must never be interfered with for private gain. But it could be understood if people trying to do that are rouge human beings. However, when the very people involved are senior state officers then the impunity could go beyond remedy unless it is stopped on its track by an order of Court.

Was the Petitioner's right to property contravened/violated?

89. For a party to succeed in a claim of violation of a constitutional rights, such party must set out clearly the violation in respect of which he seeks redress. This was the holding in **Anarita Karimi Njeru Versus Republic (1976 – 80) 1 KLR 1272** Trevelyan and Hancox, JJ stated that:

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a

reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

90. In order to determine whether the Petitioner’s right to property was violated, it is necessary to consider the foregoing history of the properties. The Court is satisfied that from the documentary evidence on record, the suit properties belong to the Petitioner.

91. The Constitution of Kenya, 2010 guarantees to every person the right to property. It further prohibits the arbitrary deprivation of any person of property or further restrict the enjoyment Article 40 provides:

“(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person—

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

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

92. In *Vekariya Investments Limited v Kenya Airports Authority & 2 others* [2014] eKLR, Majanja stated:

“In order to succeed in a petition under Article 40, the Petitioner must demonstrate that it holds property which is recognized in law as capable of being protected.”

93. All public and state officers and organs including the 1st to the 8th Respondents herein are bound by the national values and principles of governance in the exercise of their mandate and authority and in making or implementing public policy decisions. Article 10 of the Constitution of Kenya, 2010 sets out the national values and principles of governance which include *inter alia* the rule of law, equity, equality inclusiveness, social justice, integrity, transparency, accountability, human rights, etc. State organs are now accountable to the people for their actions. This was well articulated by the Supreme Court of Kenya in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR. The Court observed:

“The Constitution itself has reconstituted or reconfigured the Kenyan state from its former vertical, imperial, authoritative, non-accountable content under the former Constitution to a state that is accountable, horizontal, decentralized, democratized, and responsive to the principles and values enshrined in Article 10 and the transformative vision of the Constitution. The new Kenyan state is commanded by the Constitution to promote and protect values and principles under Article 10 and media independence and freedom.”

94. In the present case, the suit properties belong to the Petitioner. The Petitioner has been deprived of adequate use and enjoyment of the same. There is no evidence of prompt and just compensation should this Court accept that the same was compulsorily acquired by the State. Further, no evidence of due process has been placed before the Court. Other than the letters from the Commissioner of Lands demanding surrender of Plot 856 to settle squatters, no due process has been demonstrated. Following the demands, the Petitioner’s title to Plot 856 was revoked by the Kwale District Land Registrar’s Gazette Notice No. 7752 of 9th July, 2010. In short a valid indefeasible title issued to the Petitioner on 3rd September, 1991 was by a stroke of the pen purportedly revoked. The only conclusion we can arrive at is that the Petitioner’s right to land as guaranteed by Article 40 of the Constitution of Kenya, 2010 has been violated by the acts of the 1st – 7th Respondents.

Violation of Court orders

95. The Petitioner states that the 1st – 28th Respondents together with surveyors guarded by administrative and regular police descended on the suit properties and commenced illegal and haphazard subdivision with a view to re-parcelling the same. This prompted the Petitioner to file Nairobi Environment and Land Case Nos. 188 of 2008 in respect of Plot 856 and 217 of 2008 in respect of Plots 551, 552, 553, 554, 555, 556, 557, 558 and 559 (the ELC matters). The suits were concluded in favour of the Petitioner by consent and injunctive orders were issued against the 1st-3rd and 7th Respondents who have been accused of violating the said Court orders. The 3rd Respondent has proceeded to issue freehold titles upon the suit properties and to register further dealings upon the registers of the titles created. The Attorney General has stated that the consent orders issued in the ELC matters in Nairobi were a forgery and fraudulently obtained.

96. We have looked at the decrees issued on 27th July, 2009 and note that the suit was compromised by a consent order of all the parties. These orders have not been reviewed nor appealed against. They therefore remain orders of the Court and the Respondents were obligated to obey the same.

Abuse of office by Respondents

97. The history of this petition is replete with constant abuse of office by the 1st – 7th Respondents. Abuse of office and refusal to obey Court orders indicate a failure of due process. The state officers Respondents in this petition have displayed wanton abuse of office and impunity with regard to Court orders and it is upon the Attorney General to meet out appropriate sanctions upon them.

The Gombato property

98. It is the Attorney General's case that the Petitioner in 1991 applied for Plot 860 for development of their golf course. Since the same had squatters, the Petitioner offered to surrender Plot No. 8517/10 measuring 93 acres (Gombato land) for resettlement of genuine squatters who had been identified. The Attorney General however accuses the Petitioner of renegeing on the agreement and disposed of the Gombato land. The Attorney General further accuses the Petitioner of taking possession of Plot No. 856 which was the only other available land where the squatters would be settled. The Petitioner was by a letter dated 21st July, 2006 asked by the Commissioner of Lands to surrender Plot 856 which was undeveloped for resettlement of the squatters. A reminder was sent on 1st February, 2008 giving the Petitioner 14 days to surrender Plot 856 and in default the Government would issue letters of allotment to the squatters. The Petitioner states that it did intend to settle squatters on the Gombato land but not because there was an agreement as alleged by the Attorney General.

99. We have carefully looked at the record. There is correspondence on record to show that the Petitioner did indeed purchase the Gombato land from Gombato (1975) Ltd. By a letter dated 15th July, 1993, the Petitioner forwarded to its then advocates, Asige Keverenge & Anyanzwa Advocates, the 298th Respondent, a cheque for Kshs. 1,860,000/= payable to National Bank of Kenya Limited in exchange for the title documents including the discharge of charge. The 298th Respondent by a letter dated 4th August, 1993 and addressed to the Bank, acknowledged receipt of the documents. There is also a letter dated 9th August, 1993 from the Kwale District Commissioner informing the District Surveyor that the Petitioner had purchased the Gombato land for resettlement of squatters. He further directed the District Surveyor to assign a surveyor to survey the Gombato land to enable the squatters move in by 15th August, 1993. There was a follow up letter dated 19th October, 1993 seeking an update.

100. The foregoing is indicative of a party who was willing to resettle squatters on land purchased for that purpose. Further, a certificate of Postal Search indicated that as at 4th September, 2008, the Gombato land was still registered to Gombato (1975) Limited. The record shows that the original title documents are in the custody of the 298th Respondent who has not denied the allegation. It is therefore not clear why the Attorney General would assert in the Cross Petition that the Petitioner illegally reneged on its promise and disposed of the Gombato land. Even if it were the case that the Petitioner had deliberately declined to have the squatters settled in the Gombato land, our view is that the Government ought to have exercised its powers compulsorily to acquire the same instead of proceeding to take over Plot 856 which measures 58.28 hectares approximately 144 acres compared to Gombato land's 93 acres. The purported revocation of title to Plot 856 is in our view is unjust.

101. In his submissions, Mr. Ochieng Oduol, learned counsel for the Petitioner, submitted that the Petitioner is still willing to give the said Gombato land to the government to settle the alleged squatters. In our view while there is no legal compulsion to do that, the Petitioner has acted in total honour and this Court accepts the Petitioner's willingness to still offer the said land to the government. In this regard the 298th Respondent, Mr. Asige, is hereby directed to avail to the Petitioner all the documents of title related to the said land with 14 days from today to enable the perfection of title to the new owner to go on without further delay.

Whether Damages are payable

102. In a constitutional petition, where a Court has established that a Petitioner's rights have been violated the Court is at liberty to grant various remedies including declarations and damages. This is what we shall do soon hereafter. However, an invitation to grant damages to the Petitioner has not been well anchored. Damages, the law is, should be specifically pleaded and proved. We are satisfied that the Petitioner has shown that the deprivations stated herein have caused it to suffer serious damages relating to the enjoyment of its right as a land owner and user thereof. However, in line with remedies which this Court can grant we only declare that the Petitioner has suffered damages, but leave the assessment of the same to other forums. We are careful not to make a finding on the quantum of damages payable, suffice to state that in our view the Petitioner has suffered damages which should be compensated. Our position on this matter is informed by the fact that the Petitioner has sought for very many prayers in the petition, including a prayer for various declarations. It may be possible that upon the grant of those Prayers the Petitioner may be intent on taking further action in this matter. We therefore leave the issue of damages payable to be assessed in other forums, should that be necessary.

Disposition

103. In conclusion, it is the finding of this Court, pursuant to the foregoing paragraphs of this Judgment, that the Petitioner has proved its petition on a balance of probability. It is also the finding of the Court that the Amended Cross-Petition lacks merit, was not proved, and is hereby dismissed. Other orders are granted as follows:

(i) The following prayers are hereby granted:

(a) (b) (c) (d) (except the part for mesne profits is not granted) (e) (h) (i) (j) (k) (l) (m) (n) (p) (bb)

(ii) The following prayer are not granted either because they are repetitive and are already covered in the prayers granted, or because we have in the body of the Judgment dealt with and pronounced ourselves on the issues raised in those prayers:

(f) (g) (q) ® (s) (t) (u) (v) (w) (x) (y) (z) (aa)

(iii) Mr. Japhet Asige the 298th Respondent herein is directed to avail to the Petitioner all the title documents relating the Gombato title No. 8517/10 within 14 days from today.

(iv) It is hereby declared that the Petitioner has suffered general and exemplary damages and is entitled to appropriate compensation for the same.

(v) Costs of the petition are given to the Petitioner on the basis of two counsel.

(vi) The orders herein are issued against the Respondents jointly and severally. However, it is the finding of this Court that the 8th Respondent Kwale County government had little role to play in the dispossession of title herein but its officer acted with impunity in breaking the wall and in other aspects of the matter. However, we are of the view that the 8th Respondent should not be faulted in this petition. We also find that the 145th respondent does not possess a title in the impuned registry and that he was wrongfully joined to these proceedings. We accordingly strike out the 145th Respondent from these proceedings.

(vii) On the whole the finding of this Court is mainly against the executive impunity displayed by the 1st – 7th Respondents, and any costs payable herein are hereby limited to the 1st – 7th Respondents.

That is the Judgment of the Court.

Dated, Signed and Delivered in Mombasa this 23rd day of May, 2019.

HON. E. OGOLA HON. M. THANDE HON. D. CHEPKWONY

JUDGE

JUDGE

JUDGE

In the presence of:

Mr. Ochieng Oduol & Ms. Kibe for Petitioner

Ms. Kiti holding brief Mr. Nguyo for 1st to 7th Respondents

Mr. Mwangi Njoroge for 8th Respondent

Mr. Okanga holding brief Mr. Asige for 116 Respondents

Mr. Mwangi Njenga holding brief Kithi for 72nd, 95th and 223rd Respondents

Mr. Kaunda Court Assistant