



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL PETITION NO. 47 OF 2012

**IN THE MATTER OF: ARTICLES 22, 23, 258, AND 259 OF THE CONSTITUTION OF KENYA
2010**

AND

**IN THE MATTER OF: THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLES 27, 28, 29, 35, 40, 47 AND 50 OF THE CONSTITUTION OF
KENYA 2010**

AND

**IN THE MATTER OF: REGISTERED LAND ACT, CAP 300 OF THE LAWS OF KENYA AND
LAND CONTROL ACT, CAP 302 OF THE LAWS OF KENYA**

AND

IN THE MATTER OF: L.R. MOMBASA/M.S/ DIANI BEACH BLOCK/ 10

- 1. RAHIMKHAN AFZALKHAN RAHIMKHAN**
- 2. SHAMSHAD BEGUM AFZALKHAN RAHIMKHAN**
- 3. DANIEL MWANGI**
- 4. PAULINE KAVINYA MWONGELA**
- 5. SAYED MUSHTAQ HUSSAIN.....PETITIONERS**

VERSUS

- 1. CHIEF LAND REGISTRAR**
- 2. ATTORNEY GENERAL**
- 3. COMMISSIONER OF LANDS..... RESPONDENTS**

JUDGMENT

The Petition

1. The Amended Petition herein (henceforth the “Petition”) was amended and filed in court on 5th July 2012. The 1st and 2nd Petitioners are the administrators of the Estate of Afzalkhan Rahimkhan (the “Deceased”) vide Letters of Probate of will issued on 17th September 1993. The 3rd, 4th and 5th Petitioners have petitioned this court on their own individual behalf. The 1st Respondent is the Chief Land Registrar of the Republic of Kenya while the 2nd Respondent is the Attorney General of the Republic of Kenya. The 3RD Respondent is the Commissioner of Land in the Republic of Kenya.

2. The Petition seeks remedies for alleged infringement of various constitutional rights under various Articles of the Constitution allegedly perpetrated by the Respondents jointly and severally.

Background to the Petition

3. The Deceased was prior to his death the registered co-owner together with the 3rd, 4th and 5th Petitioners of the property known as Mombasa/M.S/Diani Beach Block/ 10 measuring 328.5 Acres (the “property”) under a lease for a term of 99 years from 1st January 1914. Currently, the property is commonly known as “Diani Complex” or “South Coast”. The property which was agricultural land was subject to the Land Control Act, Cap 302, Laws of Kenya. The property was owned by the Petitioners by virtue of a Certificate of Lease that was issued on 8th April 1978 and pursuant to a Transfer of Lease dated 7th April 1978 for the consideration of Kshs. 140,000/= and the registration was marked as Entry No. B.5.

4. The property was bought from one Mrs. Reaby Eleanor Vere Wailes (“Mrs. Wailes”) who was the prior registered owner. Before the transfer of the property, Mrs. Wailes applied to the Kwale Land Control Board for the issuance of consent to transfer which was subsequently issued on 22nd March 1978 vide Minute 327/78. After registration of the Property in the names of the Petitioners, the Government of Kenya through the Director of Agriculture vide a letter dated 28th April 1978 sought to bar the Petitioners from having further dealings in the property allegedly because another “*member of the public was an interested party*” to the purchase of the property. The alleged member of the public was one Mr. Kahara who the Petitioners allege wanted to purchase the property together with his other unknown friends despite the fact that it had already been purchased by the Petitioners.

5. By a letter dated 16th May, 1978, the Registrar wrote to the 3rd Petitioner and the other Registered Owners reprimanding them as the documents in connection to the Property had not been delivered to his office. At this point the property had already been registered in the Petitioners’ names. Vide another letter dated 17th May 1978, the Director of Agriculture again wrote to Mr. Mwangi and the other Petitioners directing that the documents relating to the property and its registration be immediately released to Mr. Kahara for processing in the Land Control Board. The Petitioners did not deliver the said documents and the Registrar of Titles indicated that they could keep the title as another title would be issued in order to facilitate the takeover of the property from them.

6. While this was going on, Kasika Developers Limited (“Kasika”) which was registered by what the Petitioners allege to be powerful government employees presented its application for consent to transfer the property from Mrs. Wiles in their favor. Mr. Kahara was a director in the company and a “nominee of top government officials” as alleged by the Petitioners. The Petitioners further allege that the consent to transfer the property to Kasika was issued on 24th May, 1978 under Minute No. 584/78 and a Certificate of Lease issued to Kasika. The consent for the transfer was issued to Kasika after the initial consent issued to the Petitioners was cancelled after the proceedings of the Kwale Land Board on 22nd March, 1978 were nullified by the Chief Land Registrar vide a letter written by the Land Registrar, Mombasa on 19th March, 1979 on the ground that there was no quorum of the Board on that date as only three members and a secretary were present as opposed to six members which was in violation of Section 15 of the Land Control Act. The same letter also gave directions for the cancellation of the Registration of the title to the Petitioners based on Section 17 of the Land Control Act.

7. On 22nd May, 1979 the Registrar of Titles wrote a letter to the Petitioners giving effect to the cancellation of the registration of the Petitioners as the registered owners. The Petitioners argue that this was illegal as the Petitioners had already become the registered owners and their right upon the property had crystallized on registration and that only a legal process could cancel the registration. Despite the directive issued by the Registrar of Titles no cancellation of the title was ever done and the Petitioners allege that upon inspection of the land registry it shows that the Petitioners are still the registered owners of the property.

8. The Petitioners on diverse dates between 15th August, 1979 and 15th September, 1979, wrote to the Chief Land Registrar lodging a complaint over the manner in which the purported cancellation of their registration as owners was handled but they did not receive any response from the Chief Land Registrar or from any of the Respondent's agents. The Petitioners' claim that the decision to cancel their Title was pegged on the wrongful reading of Section 17 of the Registered Lands Act that empowers the Registrar to "*cancel any entry in the register which he is satisfied has ceased to have any effect*". The Petitioners contend that this Section only allowed the Registrar of Titles and the Chief Land Registrar to cancel entries that had ceased to have effect which was not the case in this instant. The Petitioners allege that their registration was under Section 27 and 28 of the Registered Land Act and their right to ownership of property crystallized under Section 75 of the Constitution of Kenya (now Repealed).

9. The Petitioners also claim that the Registrar of Titles and the Chief Land Registrar could not cancel the consent under the Land Control Act and their only available remedy would have been to lodge a written appeal at the Provincial Land Control Appeals Board within 30 days from the date the consent was granted pursuant to Section 11 and 19 of the Land Control Act. The Petitioners note that no appeal was ever lodged against their consent. They contend that cancellation of the Consent was therefore illegal and unlawful as it deprived the Petitioners of their right to the property without any compensation and hence unconstitutional.

10. Subsequently, the Chief Land Registrar or his officers issued another Certificate of Title to Kasika meaning that two Certificates of Title had been issued in relation to the same property and this was confirmed by the then Attorney General Hon. Mr. Charles Njonjo in his letter dated 30th October, 1979.

11. Prior to the purported cancellation of the registration, the registered owners (the Petitioners) allege that they were harassed, victimized, arrested and beaten by the various government entities including the Kenya Police, Ministry of Lands officials, Ministry of Agriculture and other agents of the Respondents in an attempt to force them to deliver the Certificate of Title and other documents relating to the property. To illustrate this, the Petitioners indicate that the advocates who had represented them in the purchase of the property (M/s S P Master Advocate) had written to Mrs. Wailes in a letter dated 8th May 1978 that he had met Kasika's lawyer, a Mr. Wamba who advised that the Petitioners should accept a refund of their money paid to her as according to M/s S P Master there "*might be some questions from other quarters including the CID Section to answer which might very well affect them adversely*". The alleged harassment and victimization continued even after the purported cancellation of the registration. The Petitioners argue that this caused them mental anguish and degradation of their human dignity and irreparable loss more so since the "deceased" was beaten and arrested severally forcing him to flee to Tanzania where he subsequently succumbed to death. The Petitioners also argue that the 1st Petitioner and his brother Mr. Samir Khan have been charged with a criminal offence relating to them being alleged members of the Al-Shabaab militants of Somalia, which proceedings are ongoing as a result of the land dispute herein. Mr. Samir Khan, they allege, was murdered by the Anti-terrorism unit of the Kenya Police prior to the filing of this Petition. The Petitioners believe that his death was meant to silence the family and they are fearful for their lives.

12. The Petitioners claim that the Government of Kenya has sought to conceal its underhand dealings in the property through its agents such as the Kwale Land Registry that has covered all illegal actions relating to the transfer of the property. Any efforts to carry out a search at the Registry have been fruitless with the Registry indicating that the Property is a sensitive matter that could lead to tribal clashes in Ukunda and the surrounding areas.

13. The Petitioners allege that the Kwale District Survey Maps indicate the Property as Plot Number 5004/62 which was originally registered under the Crown Lands Act in 1914 but later transferred in 1915 to the Government Lands Act. Later, in the 1970s, the Government of Kenya started creating settlement schemes in the Coast where the property is located and this was the beginning of land grabbing and dispossession of local people of their land by the “*elite*”. The settlement schemes were also created in the 1990s and during this time the Diani Complex was established as a settlement scheme for the rich and mighty. The Diani Complex falls on the property in issue.

14. The Petitioners contend that the manner, strategy and method in which the second title was issued to Kasika while a valid title was already issued to the Petitioners are a violation of their constitutional rights and an infringement of their right to their land. The Petitioners liken their situation to that of numerous Kenyans whose land is forcefully grabbed by the Government and distributed to the other “*high and mighty*” Kenyans. They also claim that they could not have initiated any legal proceedings earlier against the cancellation of consent and Registration for fear of reprisals, torture and beatings by the police and the Provincial Administration and other powerful individuals in the Government. Their Petition was only possible after the promulgation of the new Constitution.

Matters Complained of

15. The Petitioners are aggrieved by the following violations of the Constitution and other laws governing the registration of titles.

i. Right to Property as provided for under Article 40 of the Constitution and Section 75 of the repealed Constitution.

The Petitioners’ case is that the cancellation and issuance of a subsequent Certificate of Lease to Kasika amounted to a compulsory deprivation of the Petitioner’s right to own property and amounted to an unlawful compulsory acquisition. The Petitioners’ case is pegged upon the Constitution of Kenya 2010 and the repealed Constitution as follows:

“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”

Article 40(3) provides,

“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...”

The Repealed Constitution provided at Section 75 that:

“No property of any description shall be compulsorily taken possession of, and no interest in or right over the property of any description shall be compulsorily acquired, except where the following conditions are satisfied;

(a) the taking of possession or acquisition is necessary in the interests of defense, public safety, public order, public morality, public health, town and country planning or the development or utilization of property so as to promote the public benefit; and

(b) the necessity therefor is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property; and

(c) provision is made by a law applicable to that taking of possession or acquisition for

the prompt payment of full compensation.”

16. The Petitioners claim that the Registrar had no power or authority to cancel the Consent or the Registration as his powers were limited under Section 8 of the Registered Land Act (RLA). The Petitioners were entitled to be recognized as registered owners having registered the property under Sections 27 and 28 of the RLA and that the Registrar did not have the power to issue a second Certificate of Lease while another existed in the names of the Petitioners. In addition, no compensation was paid to the Petitioners and the Government interfered with private matters of private citizens and using undue influence caused the property to be registered to another member of the public who was more powerful and well-connected at the expense of the Petitioners.

ii. Protection against discrimination under Article 27(4) of the Constitution

The Petitioners' cited Section 82(2) of the Repealed Constitution which provides:

“(2) Subject to subsections (6), (8) and (9), no person shall be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of the functions of a public office or a public authority.

(3) In this section the expression “discriminatory” means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.”

While Article 27(4) of the Constitution (2010) provides:

“(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.”

17. The Petitioners claim that by dispossessing them of the suit land and having it registered in favour of Kasika and Mr. Kahara, the state agents had discriminated on them in preference for the subsequent owners.

iii. Right to fair protection under the law under Article 27 of the Constitution

The Petitioners also referred to Article 27 of the Constitution which provides:

“27. (1) every person is equal before the law and has the right to equal protection and equal benefit of the law.”

This provision is almost similar to Section 77 of the Repealed Constitution that provided that each person had a right to life, liberty and security of the person and the protection of the law.

18. The Petitioners' case is that the right to protection of the law was infringed when the Petitioners' right guaranteed and secured by their registration was ignored, and the consent granted by the Kwale Land Board was cancelled though it had been validly acquired. No law or authority empowered the Registrar to cancel the registration and the consent and no law allowed the Registrar to issue a second Certificate of Lease while another valid one existed. Further, there were illegal and unlawful directives in the purported cancellation of the registration and the remedy available for cancelling a consent which is an appeal to the Provincial Land Board was never sought.

iv. Protection from inhuman treatment and Right to Human Dignity under Article 28 of the Constitution

19. The Petitioners' further cited Section 74 of the Repealed Constitution which provided that no person should be tortured or subjected to inhumane or degrading punishment. This is similar to Article 28 of the Constitution (2010) that provides;

“Every person has inherent dignity and the right to have that dignity respected and protected.”

20. This right, the Petitioners claim, was violated when they were discriminated and their land given to Meress. Kahara and Kasika. When unwarranted arrests, beatings, harassments and intimidations by state agents were leveled against them in a bid to have them deliver all documents relating to the property in their possession. The “*deceased*” was constructively chased from Kenya and denied the benefit of staying in his own country, and false allegations leading to criminal charges were brought against the 1st Petitioner and his brother.

v. Right to a fair administrative action under Article 47 of the Constitution.

21. The Petitioners further relied on Article 47 of the Constitution which provides:

“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair”.

22. The Petitioners' case is that the decision to cancel the Consent and Registration of the suit Property violated this right as it contravened the Land Control Act as the Registrar did not have authority and it was unreasonable and unlawful. The Petitioners' case is that the decision to cancel the consent and the registration of the Petitioners was *ultra vires* as the Registrar did not have power or jurisdiction to do this. The decision to purportedly cancel the consent and the registration of the Registered Owners was made in error of the law as no law empowered the Registrar to do this nor did the law empower the Registrar to issue a subsequent Certificate of Lease to Kasika parallel to that of the Registered Owners. Further, the decision by the Registrar to cancel the consent and registration failed to consider material facts among them that the Petitioners had purchased the property for value from Mrs. Wailes and had been registered as the owners, a valid consent had been issued by the Kwale Land Board to the Petitioners and the proper way to challenge this would have been through the appeal mechanism laid down under the Land Control Board Act and no such appeal was ever lodged and the Petitioners had legitimate expectations that the property would remain in their names and that they would enjoy all rights relating to it. The decision to purportedly cancel the consent and the registration was irrational and most unreasonable as it was not logical hence illegal and unconstitutional.

vi. Right to a fair hearing under Article 50 of the Constitution;

23. The Petitioners' also relied on Article 50 which provides:

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body”.

24. The Petitioners' allege that this right was infringed when the Registrar failed to file the appropriate proceedings to challenge the Consent but instead unlawfully cancelled the same without following the due process and later issued a parallel Certificate of Lease to Kasika.

Reliefs Sought in the Amended Petition

Pursuant to the foregoing, the Petitioners seek the following reliefs:

i. A Declaration that the following actions of the Respondents, their agents, servants and any and all other officers acting under their instructions were unconstitutional, unlawful, null and void;

- a. Purporting to cancel the Kwale Land Control Board Consent issued on 22nd March 1978 under Minute 327/78 for the transfer of the property from Mrs. Wailes to Daniel Mwangi, Pauline Mwongela, Afzalkhal Rahimkhan and Sayeed Mushtaq Hussain; and**
 - b. Purporting to cancel the registration of Daniel Mwangi, Pauline Mwongela, Afzalkhal Rahimkhan and Sayeed Mushtaq Hussain as the registered owners of the Property; and**
 - c. Purporting to issue a parallel Certificate of Lease to Kasika Developers Limited for the Property in the pendency of the Certificate of Lease in the names of Daniel Mwangi, Pauline Mwongela, Afzalkhal Rahimkhan and Sayeed Mushtaq Hussain.**
- ii. A Declaration that the constitutional rights of Daniel Mwangi, Pauline Mwongela, Afzalkhal Rahimkhan and Sayeed Mushtaq Hussain of Right to Property, Protection from Discrimination, Right to fair protection of the law, Protection from Inhuman Treatment and Right to Human Dignity, Right to Fair Administrative action and Right to Fair Trial were violated.**
- iii. A Declaration that Daniel Mwangi, Pauline Mwongela, Afzalkhal and Sayeed Mushtaq Hussain are entitled to the prompt payment in full of just compensation for;**
 - a. Deprivation of their property; and**
 - b. Infringement of their constitutional rights.**
- iv. Compensation as provided under the Constitution of Kenya 2010 for the 328.5 Acres valued as KHz. 30 million per Acre totaling to 9855 Billion.**
- v. Damages for loss of use of the Property.**
- vi. Interests on 4 and 5 above until date of payment.**
- vii. Costs to be provided.**

25. The Petition was supported by an affidavit sworn by the 1st Petitioner and filed on 4th May, 2012 in which the 1st Petitioner gives a detailed account of the facts material to the Petition. He also produced several documents to support the claims by the Petitioners including:

- a. Letters of Administration-marked as Exhibit RA 01
- b. A copy of the Certificate of Lease- marked as Exhibit RA 02
- c. A copy of the Transfer of Lease- marked as Exhibit RA 03
- d. A copy of the letter dated 5th April 1978- marked as Exhibit RA 04
- e. Letter dated 28th April 1978- marked as Exhibit RA 05
- f. A copy letter dated 16th May 1978- marked as Exhibit RA 06
- g. A copy of letter dated 17th May 1978- marked as Exhibit RA 07
- h. A bundle of documents showing attempts by Kasika to purchase the property- marked as Exhibit RA 08

- i. Letter dated 22nd May 1979- marked as Exhibit RA 09
 - j. Copies of letters dated 15th August 1979 and 15th September 1979- marked as Exhibits RA 10 and 11
 - k. Copy of letter dated 11th October 1979- marked as Exhibit RA 12
 - l. A copy of letter dated 30th October 1979- marked as Exhibit RA 13
 - m. A copy of letter written by Mr. Master dated 8th May 1978- marked as Exhibit RA
 - n. Copies of newspaper reports reporting death of the 1ST Petitioner's brother- marked as Exhibit RA 14
 - o. Copies of correspondences exchanged between lawyers of the Petitioners and the office of the Attorney General- marked as Exhibit RA 15
26. Through a Further Affidavit sworn by Dennis Muriithi on 5th July, 2012, a copy of the valuation report for the property was produced as Exhibit DM1.

The Response

27. The Respondents controverted the Petition by way of a replying affidavit that was sworn by **Evans Marwanga**, the District Land Registrar, Kwale District on 21st March, 2013 and filed on 21st March, 2013 in which he disputes the allegations put forth by the Petitioners in the Amended Petition. He alleges that the dispute is a failed private transaction between competing purchasers being one Mr. Kahara and his agents on one hand, and the deceased and the 3rd to 5th Petitioners on the other hand over the suit property which was under the management of the government through the provisions of the Agriculture Act. The Deponent alleges that the transfer of the property was subject to two conditions; possession dated 28th December, 1967 taken over by the government of Kenya and a caution dated 26th January, 1973 lodged by the government of Kenya hence the government was critical in any sought of disposition of the property and the Petitioners should have been aware of this.

28. The deponent further claims that the deceased and the 3rd to 5th Petitioners were aware that the suit property was to be sold to Mr. Kahara at the time they purported to purchase it from Mrs. Wailes. He avers that at the time of the purchase, the 3rd Petitioner was the District Agricultural Officer and he abused his office to acquire information that would help to advance their transaction in order to thwart attempts by Mr. Kahara to purchase the property. The deponent purports that when the transaction failed, the Petitioners or their successors in title should have sought a refund of the purchase price and once they were paid the refund their interest in the property would have been extinguished and they cannot therefore claim compensation from the government and this is reason why the deceased never listed this property as part of his estate in his last Will and Testament. The deponent claims that there is no proof that the Petitioners did not receive a refund of their purchase price.

29. As to the allegations of intimidation, harassment, unlawful arrest and victimization, Mr. Marwanga avers that the allegations are all false and baseless and if the Petitioners were indeed unlawfully arrested, intimidated, harassed or victimized such actions had nothing to do with the property in issue.

30. On the issue of discrimination of the Petitioners on the basis of their color, the Respondent states that the 1st, 2nd and 5th petitioners appear to be Kenyans of Asian Origin while the 3rd and 4th Petitioners are Kenyans from central and eastern provinces respectively. He also disputes the allegation put forth by the Petitioners that coastal people are being disenfranchised from their ancestral land. The deponent claims that the Petitioners have not named any prominent people on whose behalf the property is being acquired by the government. The Respondents' case is that the acquisition of the property by the Petitioners was

through fraud, collusion and abuse of office as a close look of Exhibits marked RA5 and RA6 of the 1st Petitioner's affidavit show that no valid title was acquired by the Petitioners and thus they cannot receive protection under Article 40 of the Constitution. He avers that through the Exhibit marked RA 8 in the verifying affidavit of the Petitioners, the petitioners were notified of the error in registration of the transfer due to the consent not being properly acquired. He alleges that the Petitioners should thus have made a fresh application and returned the titles for cancellation but instead they opted to wait for 33 year to commence these proceedings. The Respondents' case is that the lease title is no longer in existence as it was cancelled and if it was existing it has been extinguished by the lapse of time as it was due to expire in the year 2012. The Respondents' case is that the orders sought in the Petition cannot be granted because the Petition is based on the current Constitution that cannot apply retrospectively to causes of actions that arose before it was promulgated.

Interlocutory Proceedings

31. On 14th February, 2014, the Respondents through the State Counsel, Mr. Ngari, applied to the court submitting that the petition raised substantial questions in law which should be referred to the Chief Justice under Article 165 (4) as read with Article 165 (3) (b) as to whether the Constitution could apply retrospectively as the allegations made occurred in the 1970s yet the Petition is brought under the Constitution of Kenya, 2010. The Petitioners through their lawyer Mr. Mureithi opposed the application and a Ruling was delivered on 28th February, 2014. In the Ruling Mr. Justice Muriithi found that this matter did not require a determination by a three judge bench and he dismissed the application.

The Hearing

32. The Petition came up for hearing on 11 November, 2014. The 1st Petitioner (PW 1) testified and gave a detailed account of the issues surrounding the Petition as was given in the Background and in the verifying affidavit to the Petition. The witness made reference to various documents that were marked in his affidavit filed on 4th May, 2012. In his cross examination he testified that his father (the deceased) did not include the suit property in his Will and that the said Will was never challenged in court. The witness testified that RA 02- Certificate of Lease of 8th April, 1978 did not show the approximate area of the property; that the transfer of lease marked RA 03 was drawn by Daniel Mwangi, the 3rd Petitioner. That a letter dated 11th October 1979 marked RA 12 indicated that the property had been sold to two purchasers and that he did not have any evidence that his father had fled to Tanzania nor that he had bought the property. Upon further cross-examination, the 1st Petitioner stated that he had never seen the certificate of lease in the name of Kasika. He also admitted that he did not know whether his father had taken any steps to challenge the cancellation of the consent and that a search of the property at the land registry in Mombasa revealed that it was registered in the name of the deceased and the other 3 petitioners. PW1 admitted that they had not attempted to evict the persons in possession of the land and that they have not been in possession of the land since 1978 and that he does not have the names of the government officials who are forcefully keeping possession of the land. On re-examination he indicated that the letter dated 28th April, 1978 showed that the land is 329 Acres.

33. The Second Petitioner (PW 2) (wife to the deceased) testified on 16 January, 2015, and confirmed that she is an administrator to the deceased estate by virtue of letters of administration dated 17 September, 1993. PW2 testified that she is in possession of the original transfer of lease and certificate **(the court attempted a comparison between exhibits RA 2 and RA 3 named in the affidavit of the 1st Petitioner and was told that the originals were released to the 1st Petitioner for safe keeping)**. Pw 2 in her testimony reiterated the information offered in the background to the Petition and added that her husband did not add the suit property to his Will because he was afraid and due to past history of intimidation and harassment. Upon cross-examination by Mr. Ngari counsel for the respondents, the witness testified that she was present when a Mrs. Wailes sold the land to the Petitioners and that she had heard of Mr. Kahara who had claimed to have bought the land after the Petitioners had already purchased it. PW2 admitted that they did not return the title deed, and that the letter demanding return of the titles marked RA 05 and RA 07 was addressed to Daniel Mwangi, the 3rd Petitioner, who the witness admitted

was a public officer that worked for the government. Upon further cross-examination PW2 admitted that they have no documents to show that they were beaten by the police although she contended that one of their children witnessed the beatings.

34. PW 3, Edwin Muturi Mbugua also testified. He testified that he was a registration officer and was requested by the firm of Ahmednasir Abdikadir & Company Advocates to conduct a valuation of the suit property on plot Diani Beach Plot /10 measuring 328.5 acres. The witness testified that the certificate of lease did not show the acreage. PW3 testified that on 24th June, 2012 he went to the property and obtained maps from the lands office which showed the ground area. The map is attached to the valuation report. He also stated that the maps did not show whether there are any developments on the property but they only indicated the acreage. The witness identified the valuation statement attached to the affidavit dated 5/12/2014 and marked as MD1. On cross-examination, PW3 admitted that his findings on the valuation were based on the documents supplied to him by the Petitioners and that the value of the land will remain even after the lease expires. The witness testified the suit land could be worth no more than Kshs. 8.5 Billion in 2012. The Petitioners' subsequently closed their case after the testimony of PW 3.

35. On 18th May, 2016, Mr. Ngari, counsel for the Respondents, submitted that he would not be calling any witnesses and would instead rely on the replying affidavit sworn by Evans Marwanga, the District Land Registrar, Kwale District on 21st March, 2013 and filed in court on 22nd March, 2013 as a defense to the Amended Petition and Counsel closed the Respondents' case.

Submissions

36. The Petitioners filed their submissions dated 14 June 2016 on 16 June, 2016. The Respondents filed their submissions on 1st April 2016. The submissions were orally highlighted in court by Ms. Asli for the Petitioners and Mr. Ngari for the Respondents. I have carefully considered the parties' submissions. Although parties identified separate issues for determination, I have reconciled those issues and in the opinion of this Court the following are the issues for determination:

- (i) Whether the Petitioners have locus to present this Petition and seek the remedies sought in the Amended Petition under the new Constitution.
- (ii) Whether the 1st Petitioners has authority to file the Petition on behalf of the other Petitioners.
- (iii) Whether the Petitioners are the legal proprietors of the suit property.
- (iv) Whether the Petitioners' constitutional rights were infringed by the actions of the Respondents?
- (v) Whether the Petitioners ought to be compensated for the infringement of their rights, and if so, how much?

Analysis and Determination Whether the Petitioners have locus to present this Petition and seek the remedies sought in the Amended Petition under the new Constitution

37. M/s. Asli counsel for the Petitioners submitted that this Petition raises questions of infringement and breach of rights enshrined in the Constitution primarily under Article 40 thereof. Counsel submitted that this Court has the jurisdiction to determine these issues which stem from Article 165(3) of the Constitution that provides that the High Court shall have:

“(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened:...”

38. M/s Asli submitted that the Petition has also been filed pursuant to Article 22 and 23 of the Constitution that grant every person the right to institute court proceedings claiming violation or threat of infringement of a fundamental right.

39. On his part Mr. Ngari for the Respondents submitted that the alleged violations took place under the old Constitution and that a cause of action for same cannot be maintained under the new Constitution. The issue then is whether or not the present Constitution can be used to ventilate the Petitioners' grievances. To do this we have to look at the new Constitution and also the old Constitution. Under Article 22 of the Constitution it provides;

“(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.”

While Section 84 (1) of the old Constitution provides:

“...if any person alleges that the provisions of Sections 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if another person alleges a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available may apply to the High Court for redress”.

40. Pursuant to above texts, this court accepts submissions by Ms. Asli that this court has the jurisdiction to entertain the Petitioners' grievances under the current Constitution because their rights were already secured under the old Constitution and were carried along into the new Constitution. However, if there is still any doubt, case law now shows that citizens whose rights were violated in the old constitutional dispensation have successfully filed claims for vindication under the new Constitution. See **Koigi Wamwere v. The Attorney General, Civil Application No. 86 of 2013 eKLR** and **Otieno Mark Onyango vs. Attorney General & Another [2012] eKLR**. In both these cases, the Petitioners' rights were violated under the old Constitution. However, they filed their Petitions under the new constitutional dispensations for vindication. The court found that it had the jurisdiction to entertain the claims, and indeed vindicated the Petitioners under the provision of the new Constitution.

Whether the 1st Petitioner had the authority to file the Petition on behalf of other Petitioners

41. Petitioners submitted that the 3rd, 4th and 5th Petitioners have the capacity to institute these proceedings as the Registered Owners of the property in issue whereas the 1st and 2nd Petitioners have capacity as the administrators of the estate of Afzalkhna Rahimkhan who was also a registered owner of the suit property. Their right to sue is enshrined under Article 258 of the Constitution which provides that:

“(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

- (a) a person acting on behalf of another person who cannot act in their own name;**
- (b) a person acting as a member of, or in the interest of, a group or class of persons;**
- (c) a person acting in the public interest; or**
- (d) an association acting in the interest of one or more of its members”.**

On this issue, Mr. Ngari submitted that the 1st and 2nd Petitioners lack the authority to file the Petition as

the 1st Petitioner hasn't filed any authority from his co-petitioners authorizing him to file the petition on their behalf. He contends that the 2nd to 4th Petitioner's claim should be dismissed as set out in the Amended Petition as the 1st Petitioner is the only one who has signed the affidavit.

42. In reply M/s Asli rightly in my view, submitted that this court can grant the remedies sought by virtue of Article 23 which provides that the court can grant relief including a declaration of rights, an injunction, a conservatory order, a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24, an order for compensation and an order of judicial review. Article 23 of the Constitution provides:

“23 (1) The High Court has jurisdiction, in accordance With Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights...

(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review”

Whether the Petitioners are the legal proprietors of the suit property and whether their constitutional rights were infringed by the actions of the Respondent

43. M/s Asli submitted that Petitioners constitutional rights were infringed on by the actions of the Respondents. Counsel submitted that the Petitioners had an indefeasible title registered under the RLA and thus protected under Article 40 and also under Section 23 of the Registered Titles Act. Article 40 - Protection of Right to Property - had been violated. Their title is proper and was issued to them by the Registrar of Titles on 8th April, 1978. This was proved during the examination of the 2nd Petitioner who produced the Original Title as evidence of ownership. The Petitioners had acquired protection under Article 40 of the Constitution. M/S Asli cited the case of **Vekariya Investments Limited vs. Kenya Airports Authority & 2 Others [2014] eKLR** where Judge Majanja had this to say:

“At the heart of the Petitioner's claim is the right to the protection of property afforded by Article 40 of the Constitution. 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.”

In response to this issue Mr. Ngari for the Respondent submitted that the Petitioners' title ceased to be valid when the consent to transfer the same was revoked, and that the only remedy the Petitioners had was to get refund from the person who sold to them the property.

44. It is the position of this court that the provisions of Article 40 (1) and 40(3) of the Constitution and Section 75 of the of the Repealed Constitution of Kenya protect the right to property in absolute terms and that protection can only be interfered with as stipulated by the law. Justice Ombwayo in **Re the**

Estate of William Kimngeny Arap Leting (Deceased) [2016] eKLR observed that:

“In light of the above provisions it is very clear that the two sections that is Section 75 of the Old Constitution and Article 40 of the current Constitution are too general and quite broad with sub-sections. But it is essentially important to note that the two sections of the law, both provide for the protection of the Right to Property. The foot note to Article 40 of the current Constitution reads; ‘protection of right to property’ and similarly the foot note to section 75 of the old Constitution reads; “protection from deprivation of property”.

45. In addition to the above, this court makes reference to International law specifically Article 17 of the Universal Declaration of Human Rights 1948 which provides:

- “(1) everyone has the right to own property alone as well as in association with others;**
- (2) No one shall be arbitrarily deprived of his property”.**

The importance of this right under international law was acknowledged by Justice Lenaola in **Archery Limited vs. Attorney General [2014] eKLR** where he stated that **“the importance of the said right has been acknowledged by courts generally and by dint of Article 2(5) and (6) of the Constitution 2010, the Universal Declaration of Human Rights has force of law in Kenya.”**

46. The magnitude of Article 17 of the Universal Declaration of Human Rights was also emphasized in by **Lord Denning in Republic vs. Chief Immigration Officer [1976] 3All ER 843** where the Judge postulated that **“it guaranteed enjoyment of property rights”.**

47. It is the finding of this court that the 1st Respondent infringed on this right when he purported to cancel the consent and registration in favour of the Petitioners and issue a parallel Certificate of Lease to Kasika, as he did not have the power or authority to cancel the consent. The Certificate of Lease issued to the Petitioners was recognized under Sections 27 and 28 of the RLA which provide that **“the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”** and the Registrar could not cancel the Registration as his powers were limited under Section 8 of the RLA. Also, no compensation was paid to the Petitioners for the dispossession of the property, hence, this amounted to an unlawful compulsory acquisition. In **Virenda Ramji Gudka & 3 others vs. Attorney General [21014] eKLR** Justice Mutungi stated:

“the allotment of land to a citizen or others protected under the Constitution which action is symbolized by the title deed, vests in the allottee inviolable and indefeasible rights that can only be defeated by a lawful procedure under the Land Acquisition Act”.

Clearly, it is now trite that unlawful acquisition of a citizen’s land amounts to breach of their right to property, and this court has the paramount duty to confirm the same.

48. It is the finding of this court that a Certificate of Title issued by the Registrar to any purchaser is to be taken by the courts as conclusive evidence that the persons named therein are the absolute and indefeasible owners. In **Kongowea Markets Limited vs. Registrar of Titles [2011] eKLR** Justice Okwengu stated that **“the certificate of title by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof, shall be taken by all the courts as conclusive evidence that the person named therein as proprietor is the absolute and indefeasible owner thereof, subject to encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be party.”**

49. It is also the finding of this court that the 1st Respondent acted *ultra vires* in cancelling the Petitioners’ Certificate of Title as this was outside his scope of powers under Section 17 of the RLA which provides that:

“The Registrar may cancel any entry in the register which he is satisfied has ceased to have any effect”.

50. In this regard, the court finds that the Petitioners’ registration had not ceased to have effect as it was still registered under Sections 27 and 28 of the RLA and was still recognized under Section 75 of the Repealed Constitution. On the allegation that the Kwale Land Board had no quorum on the day they issued the consent to transfer, the court finds that neither the Registrar of Titles nor the Chief Land Registrar can cancel the consent under the Land Control Act and all they can do is challenge it by way of an appeal to the Provincial Land Board within 30 days from the refusal or grant of the consent according to Sections 11 and 19 of the Land Control Act. In the instant case no appeal was lodged. To support this view, I will further refer to Okwengu J in **Kongowea case supra**, where the learned Judge stated as follows with regards to the registrar acting outside his mandate:

“I come to the conclusion that in revoking the ex-parte applicant’s title to the suit property the respondents acted outside their jurisdiction, as it was not within their powers to revoke the title, secondly, the revocation of the ex-parte applicant’s title was unlawful as it was contrary to Article 40 of the Constitution of Kenya, and thirdly the respondents breached the rules of natural justice by failing to give the ex-parte applicant a hearing before revoking the title”.

51. Pursuant to the foregoing, it is the finding of this court that only the court can amend or cancel a title where it finds that the title was obtained, made or secured through fraud or mistake, and only where it is not a first registration. In **Kuria Greens Limited vs. Registrar of Titles & Another [2011] eKLR**, Musinga J, stated that he could not find any provision that granted power to the Registrar of Titles or the Commissioner of Lands to arbitrarily revoke a valid land title even after careful analysis of the Land Titles Act, the Registration of Titles Act, the Indian Transfer of Property Act, the Government Lands Act, the RLA and the Land Control Act.

52. It is the finding of this court that the 1st Respondent deliberately issued a second Certificate of Lease to Kasika parallel to that of the Petitioners which was confirmed by the Attorney General vide a letter dated 30 the October, 1979 which was produced as Exhibit RA-13 in the verifying Affidavit. It is the finding of this court that where two certificates of title are issued for the same property, the first in time prevails. In **Gitwany Investment Limited vs. Tajmal Limited & Others [2006] eKLR**, it was held that the title given to Gitwany in the first instance would prevail, the Judge noted, **“...Like equity keeps reminding us, the first in time prevails so that in the event such as this one where, by mistake that is admitted, two titles are issued in respect of the same parcel of land, then if both are issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail...”**

53. In **Govas Holdings Limited vs. Tom Mayani Omami & 2 others [2004] eKLR** Khaminwa J held that **“the government cannot allot or in any way alienate land which has already been allocated to another person and that the Commissioner of Lands carrying a survey of the land and allocating it to the first and second defendants is unlawful and illegal”.**

54. Mr. Ngari had no answers to these submissions, only arguing that the revocation of the said title was not illegal since the Petitioners were notified of the error in registration of the transfer due to the faulty consent, and Petitioners were thus required to make a fresh application and return the titles. Instead, the Petitioners choose to wait for 33 years to commence these proceedings, a delay which Mr. Ngari submitted is not justifiable. To support this, Counsel cited case of **Samuel Kamau Macharia vs. Kenya Commercial Bank and Others [2012] eKLR** where it was held that the retrospective application of the Constitution is not absolute. Further in **Duncan Otieno Waga vs. The Attorney General Petition No. 94 of 201**, the court held:

“The Constitution of Kenya is only retrospective and acts occurring prior to the Constitution are, unless, otherwise stated by the Constitution itself, be judged by the existing legal regime that is the former Constitution”.

55. Mr. Ngari submitted that the present Constitutional Regime allows for a broader interpretation and application of administrative jurisprudence and this differs significantly with the former Constitutional regime hence Sections relied on in the repealed Constitution differ significantly from those of the Constitution of Kenya, 2010. However, I have already found that the Petitioners' rights under Section 75 of the old Constitution were carried along into the new Constitution, and that in any event, courts have vindicated violations of rights which occurred under the old constitution within the new constitutional dispensation.

56. It is also the finding of this court that although Articles 47 and 50 - Right to Fair Administrative Action and Fair Hearing - were not anchored in the old Constitution, the essential components of fairness in any administrative hearing are reasonable advance notice, reasonable opportunity to be heard and an impartial, competent and independent decision maker. This is to ensure that a party is able to present their case and is not disadvantaged. The 1st Respondent did not follow these provisions when he revoked the Petitioners' title. If it is to be assumed that the Respondents had the power to revoke the Petitioners' title then the Petitioners should have been given a hearing and this was not done hence there was a breach of rules of natural justice. The Petitioners should have been afforded an opportunity to state their case before the Respondents made any decision. Further, this right is now embedded in the constitution. But it is a principle of natural justice which has always been there even in 1978 when the Petitioners' were being deprived of their land. See the Constitutional Court of South Africa in its decision in **President of the Republic of South Africa and others vs. South African Rugby Union and Others [CCT16/98] 2000 (1) SA 1**, at paragraph 135-136 where it was held that:

“Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see Section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33 but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...”

57. In regard to Article 28 - Inhuman Treatment and Breach of Right to Human Dignity, - the Petitioners contend that they were harassed, victimized and beaten up by the Kenya Police, the Provincial Administration, Ministry of Lands Officials, Ministry of Agriculture officials and other agents of the Respondents in an attempt to have them deliver documents relating to the property in their possession. This they argue amounts to inhuman and degrading treatments contrary to Article 28 of the Constitution. M/s Asli submitted that they expected the Respondents as public officials to adhere to the provisions of the law while carrying out their duties. Counsel submitted that this legitimate expectation is a principle of fairness that is at the root of the rule of law and cited the case of **Republic vs. Devon County Council Ex Parte P. Baker [1995] 1 All ER** where Lord Simon Brown stated:

“the expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest in it is one that the law holds protected by the requirements of procedural fairness; the law recognizes that the interest cannot properly be withdrawn (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision”.

58. In response Mr. Ngari submitted that the 1st Petitioner had in his testimony in court claimed that during the occurrence of the violations he was only 4 years old. Mr. Ngari submitted that a 4 year old child cannot comprehend issues to do with land transactions. Mr. Ngari submitted that the allegations that the Petitioners were assaulted, harassed, arrested and intimidated are false and baseless. Counsel submitted that the Petitioners have failed to produce any evidence of any discrimination or alleged victimization and it can be concluded that the claimed violations never occurred. To support this, Mr.

Ngari submitted that during cross-examination of the 2nd Petitioner she admitted that they had no medical documents to prove they were beaten.

59. I have looked at the evidence. Apart from stating that they were harassed, beaten and persecuted, no evidence of intentional inhuman treatment was provided in court. But given that the Petitioners were literally kicked out of their property, it is not unreasonable to imagine that the kicking out involved extreme extra judicial measures which may have included inhuman treatment but whose evidence cannot be available more than 34 years after the event. However, every allegation must be proved, and this court finds that the allegations of inhuman treatment, (which are likely to have indeed taken place during and around the time of the property takeover by the agents of the Respondent), were not proved and are accordingly dismissed. However, the act of deprivation of the suit property necessarily caused the Petitioners to suffer loss of enjoyment of their property rights, and they also thereby suffered physical, mental and psychological torture for which they deserve compensation from the Respondents.

Whether the Petitioners ought to be compensated for the infringement of their rights, and if so, by how much

60. As to whether the petitioners should be compensated for the infringement of their rights, the Petitioners argue that the reliefs they seek are reasonable and proportional to the damage suffered. They contend that an award of damages would be appropriate for the violations they have suffered and Article 23 of the Constitution empowers the Court to grant damages. In relation to determination of the appropriate award of damages, the Petitioners argue that this Court should take into account the circumstances of the Petitioners including the fact that they lost their right to peaceful enjoyment of their property and they also suffered physical, mental and psychological torture.

61. In relation to the exact amount, the Petitioners submitted that they undertook a valuation of the suit property which was done by Messrs. Ultimate Valuers and the Valuation Report produced in the Further Affidavit of Dennis Muriithi dated 5th July, 2012 as Annexature DM-01. The property was valued at Kshs. 8,500,000,000 (open market value) on 26th June, 2012, giving a sum of over Kshs. 25,000,000/= per acre. However, in their submissions the Petitioners submitted for a sum of Kshs. 30,000,000 per acre, being the current market value.

M/s Asli relied on the case of **Arnacherry Limited vs. Attorney General (supra)** where Lenaola J awarded Kshs. 850,000,000 million which was the amount at which the suit land was valued. In **Re Estate of William Kingeny Arap Leting (supra)** the learned Judge awarded damages totaling to Kshs 3, 736,070,381.23 billion for loss of 546 Acres of land and Kshs. 4,132, 942, 32.49 billion for the loss of a total of 604 acres of land.

62. On the issue of compensation, Mr. Ngari submitted that Section 5(1) of the Succession Act embodies the principle of testamentary freedom that allows any person to dispose of his property by Will provided he or she is of sound mind. The test on testamentary capacity, Mr. Ngari holds, was set down in the case of **Banks vs. Goodfellow** where Cockburn CJ stated:

“he must have a sound and disposing mind and memory. In other words, he ought to be capable of making his will with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, and of the persons who are the objects of his bounty and the manner it is to be distributed between them”.

63. Mr. Ngari submitted that the deceased did not list the suit property as one of his property therefore at the time of his death he had no proprietary interest in the property. Counsel submitted that during cross-examination the 1st Petitioner admitted that his late father’s (the deceased) Will was never challenged in court. Therefore it is the Respondents’ case that the property never belonged to the deceased and so there is no valid ground to compensate his estate.

64. In my view however, the fact that the deceased did not include the suit property in his Will would not deny his estate the asset which belonged to it. To begin with, the deceased appears to have been

intimidated by the government forces who were intent in taking over his land. He had to run out of the country, and died in Tanzania in 1991 after suffering mental anguish and psychological torture. He had no luxury of time to include all his property in the Will. In any event, beneficiaries of an estate can at any time bring into the estate unknown assets which belonged to the estate at any time upon such discovery. The inclusion or lack thereof of the property in the Will of the deceased is not proof of ownership. Only a certificate of title is evidence of ownership. Further, the Constitution removes all technical obstacles that may hinder enforcement of the Bill of Rights and fundamental freedoms.

Article 258 of the Constitution also allows any person who deems the Constitution to have been breached to access the court to protect and enforce its provisions. To this end, the property; Diani Beach Block/10 is jointly owned by the Petitioners in equal shares hence it cannot be separated and the court cannot view the infringement as separated and distinguished claims. Further, by virtue of Article 159 of the Constitution the courts are enjoined to determine claims without undue regard to technicalities. In the case of **John Mining Temoi vs. Governor of County of Bungoma & 17others [2014] eKLR** Judge Mabeya stated that Articles 22(1) and (2) and 258 of the Constitution had expanded the horizons of *locus standii* in matters of enforcement of fundamental rights and freedoms. The learned Judge explained that a literal interpretation of Article 22 and 258 confers upon a person the right to bring an action in more than two instances; first in the public interest, second, where the breach of the Constitution is threatened in relation to a right or fundamental freedom, and third, where a person purports to enforce the rights of another there must be a nexus between the parties.

65. It is the finding of this court that a written authority is not necessary to sustain this Petition.

66. Now, back to the issue of damages, I have seen the valuation report herein attached to the Further Affidavit of Dennis Muriithi dated 5th July, 2012. I have no reason to question that valuation. The Respondents did not question that valuation. PW3 Edwin Muturi Mbugua gave evidence and was cross-examined on that valuation, and on the actual acreage of the suit property, which he ascertained from area maps which he obtained from the Kwale Lands Office. The certificate of lease did not show the acreage, but the witness ascertained the same at 328.5 acres. He also confirmed that the valuation as at 2012. That evidence was not challenged. Indeed, the Petitioners' case was not controverted by any witness evidence. I am satisfied that the Petitioners have proved their Petition on a balance of probability. Since the claim is based on valuation per acre this court is satisfied that the Petitioners' are entitled to be compensated at the market rate being Kshs. 30,000,000/= per acre for 328.5 acres.

Final Orders

1. This is a matter which raises serious constitutional issues, and the extent to which this court can address alleged or confirmed constitutional violations committed under the old Constitution. The case at hand is where relevant governmental agencies decided to openly violate the law by cancelling consent and registration of title given to the Petitioners, and registering the same to third parties. These third parties subsequently sub-divided the property and sold them to other people. The suit property is situated within Diani Beach Block area of Mombasa South Coast. The property traverses Ukunda-Ramisi road, Beach road and Diani Beach road. The titles are held on a Leasehold interest for 99 years with effect from 1st January, 1914. At the time this Petition was filed the lease was about to expire. To date the title is still registered in the names of the Petitioners. The area is 328.4 acres and is now commercial cum residential. The parcel is developed with commercial, hotel institutions, churches and other residential developments. By virtue of its strategic location the suit property has extensive commercial use by the fact that it touches extensively the main access roads in Diani and Ukunda whose use is basically commercial. The property enjoys proximity to the host of infrastructure facilities and social amenities. The suit property is now popularly known as "*Diani Complex*". It is a beautiful place, and is the "*jewel*" in the South Coast.

2. This is the property which was illegally taken away from the Petitioners. The takeover was carefully designed, and was effected with utmost impunity. Even after that take over, the Chief Lands Registrar did not bother to rectify the title to reflect the takeover. Those were mighty forces,

and the Petitioners could not do anything about this. They must have suffered serious mental, physical and psychological torture, but which found no way of expression. The deceased had to run to Tanzania where he died in 1991.

3. It is only after the promulgation of the new Constitution, that the Petitioners' frustrations found expression when they filed this Petition. The question to ask is this: how do the Petitioners feel when they traverse Diani Complex and see all the developments, and good things that has taken place there, yet this was their land and they have no say over it? The feeling must indeed be bad, and the anger palpable, and that is why they filed this Petition for the redress of their grievances.

4. As I have found in this Judgment, the Petitioners' rights were violated. And a wrong done does not rot. Neither can it be wished away. It can only be redressed. Under this new constitutional dispensation the Petitioners shall be vindicated. Although the said property is no longer available because it has been sub-divided and sold to third parties, the Petitioners are entitled to full compensation at the current market rates. The Petitioners are also entitled to damages for the loss suffered over the years and damages for physical, mental and psychological torture. I know no other way of vindicating such violations of constitutional rights except as provided in the Constitution.

5. It is the finding of this court that the Petitioners have proved their Petition on a balance of probability and are entitled to Judgment in their favour against the Respondents as follows:

(i) It is hereby Declared that the following actions of the Respondents, their agents, servants and any and all other officers acting under their instructions were unconstitutional, unlawful, null and void;

(a) Purporting to cancel the Kwale Land Control Board Consent issued on 22nd March 1978 under Minute 327/78 for the transfer of the property from Mrs. Wailes to Daniel Mwangi, Pauline Mwongela, Afzalkhan Rahimkhan and Sayeed Mushtaq Hussain; and

(b) Purporting to cancel the registration of Daniel Mwangi, Pauline Mwongela, Afzalkhan Rahimkhan and Sayeed Mushtaq Hussain as the registered owners of the Property; and

(c) Purporting to issue a parallel Certificate of Lease to Kasika Developers Limited for the Property in the pendency of the Certificate of Lease in the names of Daniel Mwangi, Pauline Mwongela, Afzalkhan Rahimkhan and Sayeed Mushtaq Hussain.

(ii) It is hereby Declared that the constitutional rights of Daniel Mwangi, Pauline Mwongela, Afzalkhan Rahimkhan and Sayeed Mushtaq Hussain of Right to Property, Protection from Discrimination, Right to fair protection of the law, Protection from Inhuman Treatment and Right to Human Dignity, Right to Fair Administrative action and Right to Fair Trial were violated.

(iii) It is hereby Declared that Daniel Mwangi, Pauline Mwongela, Afzalkhan and Sayeed Mushtaq Hussain are entitled to the prompt payment in full of just compensation for;

(a) Deprivation of their property; and

(b) Infringement of their constitutional rights.

(iv) Compensation as provided under the Constitution of Kenya 2010 for the 328.5 Acres valued as Kshs. 30 million per Acre totaling to 9.855 Billion.

(v) Damages for loss of use of the Property, physical, mental and psychological torture assessed at Kshs. 60,000,000.

(vi) Interests on (iv) and (v) above until date of payment.

(vii) Costs of the Petition to be paid by the Respondents.

That is the Judgment of the court.

Dated, Signed and Delivered in Mombasa this 20th day of June,

2017.

E. K. O. OGOLA

JUDGE

In the presence of:

M/s. Asli for Petitioners

M/s Kiti for Respondents

Mr. Kaunda Court Assistant