



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 66 OF 2013

IN THE MATTER OF: AN APPLICATION BY ALI HAMISI MWAZUMO also known as ALI
HAMISI KURIWA, UNDER ARTICLE 22 OF THE CONSTITUTION

AND

IN THE MATTER OF: ARTICLES 22, 23, 27, 40, 47, 48 AND 165 OF THE CONSTITUTION OF
KENYA

BETWEEN

ALI HAMISI MWAZUMO also known

as ALI HAMISI KURIWA.....PETITIONER

VERSUS

1. STEPHEN KATANA TSOFA

2. ADEN SAID MBARAK

3. HUSNIN SAID MBARAK

4. GANSHU KUMAR

5. JOEL NJUNGE MWANGI

6. ALBERT DALU

7. HAMISI MWAKUCHENGWA ATHUMANI

8. HAMISI OMARI MWAKUCHENGWA

9. HAMISI ATHUMAN MWAKUCHENGWA.....RESPONDENTS

AND

1. COMMISSIONER FOR LANDS

2. REGISTRAR OF TITLES, KWALE

JUDGMENT

INTRODUCTION

1. This Judgment relates to both the Petition herein and the Preliminary Objection thereon by the Respondents. The Petition is dated 7th November, 2013, and was filed on 11th December, 2013, and seeks the following orders -

(a) A declaration that the sub-division and registration of the suit land into the names of the 1st to 9th Respondents name was unconstitutional and amounted to an infringement of the Petitioner's right to property;

(b) A declaration that the Petitioner is the rightful owner of Kwale/Ukunda/2795, Kwale/Ukunda/2796, Kwale/Ukunda/2833, Kwale/Ukunda/3338, Kwale/Ukunda/3339, Kwale/Ukunda/3380, Kwale/Ukunda/3381, Kwale/Ukunda/3588, Kwale/Ukunda/3589, Kwale/Ukunda/3640 and Kwale/Ukunda 3641;

(c) An order nullifying and quashing the illegal title of the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th Respondent of the sub-divisions numbers Kwale/Ukunda/2795, Kwale/Ukunda/2796, Kwale/Ukunda/2833, Kwale/Ukunda/3338, Kwale/Ukunda/3339, Kwale/Ukunda/3380, Kwale/Ukunda/3381, Kwale/Ukunda/3588, Kwale/Ukunda/3589, Kwale/Ukunda/3640 and Kwale/Ukunda/3641;

(d) A mandatory injunction against the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th Respondents herein at their own costs to pull down and demolish all construction on the subject lands;

(e) A mandatory injunction against the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th Respondents, their agents and/or servants or any person whomsoever from trespassing, selling, disposing or in any other manner dealing with the subject lands;

(f) A mandatory injunction against the Registrar of Lands, Kwale County, to issue new Title for Plot Nos. Kwale/Ukunda/2795, Kwale/Ukunda/2796, Kwale/Ukunda/2833, Kwale/Ukunda/3338, Kwale/Ukunda/3339, Kwale/Ukunda/3380, Kwale/Ukunda/3381, Kwale/Ukunda/3588, Kwale/Ukunda/3589, Kwale/Ukunda/3640 and Kwale/Ukunda/3641 in the name of the Petitioner herein;

(g) Declaration that the Respondents are in breach and violation of the constitutional requirements of upholding the rule of law, equal protection and benefit of the law and protection of private property as enshrined in Articles 3, 10, 27 and 239 of the Constitution;

(h) A conservatory order, to preserve the subject land;

(i) An order that the Respondents do pay the costs of this Petition.

2. On their part the Fourth, Fifth and Sixth Respondents

took out a Notice of Preliminary Objection dated 16th April, 2015 and filed on 17th April, 2015 on the grounds that –

(1) the subject matter of the Petition, is **res judicata**, the same having been directly and substantially an issue between **inter alia**, the same parties herein, in Mombasa HCCC No. 802 of 1991 wherein the Petitioner's suit was dismissed and extinguished for all legal purposes by the judgment delivered on 11/07/1994 by Hon. Justice Isaac C. C. Wambiliyangah particularly because

(a) the matter directly and substantially in issue on the present Petition is the same matter which was directly and substantially in issue either actually or constructively in Mombasa HCCC No. 802 of 1991;

(b) Mombasa HCCC No. 802 of 1991 was a suit between the Petitioner and another person on the one hand, and the Fifth Respondent and three (3) parties under whom the Fourth and Sixth Respondents claim;

(c) the parties litigated under the same title in Mombasa HCCC No. 802 of 1991;

(d) The Hon. Mr. Justice Isaac C. C. Wambiliyangah who decided the former suit was competent to try the suit;

(e) The matter directly and substantially in issue in the present Petition was heard and finally decided by Justice Isaac C. C. Wambiliyangah in Mombasa HCCC No. 802 of 1991.

(2) The Petition is an affront to Article 159 of the Constitution of Kenya 2010;

(3) The Petition is as a whole frivolous and amounts to a gross abuse of the process of the court and must fail in its entirety.

3. For those reasons, these objectors seek orders that the Petition is **res judicata** as against them, and should be struck out with costs.

4. In answer to the Petition, the Second and Third Respondents filed on 9th October, 2015 Replying Affidavit sworn on 16th May, 2015, as well as written submissions dated 24th August, 2015, but filed on 9th October, 2015. These Respondents deny the Petitioner's claims, and aver that the dispute between the Petitioner and their deceased parent was adjudicated upon and determined in Mombasa CMCC No. 3089 of 2000, and the matter was therefore **res judicata**.

5. Similarly, the Fourth Respondent Ganshamkumar Ravjibhai Patel filed a Replying Affidavit on 19th November, 2015, but sworn on 10th November, 2015, and after giving details as to his acquisition of title, and therefore becoming the registered proprietor in absolute of the subject land, also avers that the subject matter raised in the Petition was directly and substantially in Mombasa HCCC No. 802 of 1991 between the Petitioner and parties herein, or claiming under such parties, and that the Petition was therefore **res judicata**.

6. The Replying Affidavit of Joel Njunge Mwangi, the Fifth Respondent sworn on 10th October, 2015, and filed on 11th October, 2015 was in like vein in relation to his Plot No. Kwale/Ukunda/2796, echoing the same argument that the matter was **res judicata** having been determined in Mombasa HCCC No. 802 of 1991.

7. Likewise Albert Dalu had an Affidavit filed on 11th November, 2015, and reiterated the same plea of **res judicata** in relation to his Plot No Kwale/Ukunda /2833, and urged the court to dismiss the Petition with costs.

8. In addition to these basic pleadings, the Petitioner's counsel filed on 18th May, 2015 written submissions dated 16th May, 2015, (on the Petition), as well as the Preliminary Objection dated 17th March, 2015.

ANALYSIS

9. I have perused very carefully the Petition herein, the Petitioner's counsel's submissions as well as the Petitioner's application (Notice of Motion) dated 17th March, 2015 and filed on 18th March, 2015 for temporary injunction against the First, Fifth, Seventh, Eighth and Ninth Respondents with regard to suit lands Kwale/Ukunda/3461, Kwale/Ukunda/2796, Kwale/Ukunda/3381 and Kwale/Ukunda/3589 from building on the said parcels notwithstanding knowledge of the existence of this Petition. I have also perused the answer to the Petition by the Seventh Respondent, Hamisi Mwakuchengwa Athumani dated 30th April, 2015, and filed on 5th May, 2015, in which this Respondent avers in paragraphs (4) and (9) that the suit lands stated above, belonged to the late HAMISI KURIWA, the late grandfather of the Petitioner and the Seventh Respondent in respect of whom no grant of letters of administration has been taken out, and that the Petitioner has therefore no locus or capacity to file the Petition, and which should therefore be dismissed with costs. The Replying Affidavit of the said Hamisi Mwakuchengwa Athumani sworn on 4th May, 2015 is to the same effect.

10. The Sixth Respondent, Albert Dalu likewise in his Replying Affidavit filed on 11th November, 2015 depones that he is the registered and beneficial proprietor of the parcel of land known as Kwale/Ukunda/2833, and gives a detailed history of his acquisition of the said property and which history has not been challenged by the Petitioner and urged the court to dismiss the Petition with costs.

11. Lastly, I have considered the submissions of counsel for the Fourth, Fifth and Sixth Respondents who seek the dismissal of the Petition on the grounds of **res Judicata**, and the first question is whether the doctrine of **res judicata** is applicable to a Constitutional Petition. To answer this question we need to understand the doctrine of **res judicata**.

12. The Roman or Latin expression "**res judicata**" literally means the "thing" (the res), has been adjudicated and determined ("judicata"). This doctrine is codified in Section 7 of the Civil Procedure Act, (Cap 21, Laws of Kenya) whose title side note is "Res Judicate" and says –

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

13. Before considering the principles of **res judicata**, as stated above, I wish to answer the question whether the principle of **res judicata** apply to Constitutional Petitions. In my humble opinion, the principles of **res judicata** apply to Constitutional Petitions. If it were not so, there would be endless Petitions even after a matter has been heard and determined on its merits by a court of competent jurisdiction. It would defeat another principle enshrined in the doctrine of **res judicata**, there must be finality in litigation or put more positively, litigation must come to an end. The Romans used to say "**interest reipublicae ut sit finis litium**" It is in the interest of the public or republic that there be a limit to litigation. In this regard I am vindicated by recent decisions of this court.

14. **Firstly**, in the Petition by **Professor Christopher Mwangi Gakuo vs. Kenya National Highway Authority & 5 others [2013] eKLR** a decision of Isaac Lenaola J, the learned Judge said –

"32. For res judicata to be invoked in a matter, the issue in the present suit must have been decided by a competent court. Secondly, the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar. Thirdly, the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title – see the case of Karia and Another vs. the Attorney-General and others [2005] 1EA 83. It therefore follows that the essence of the doctrine of res judicata is to bring an end to litigation and a party should not be vexed twice over the same cause. This was also the holding in Omondi vs. National Bank of Kenya Limited and others [2001] EA 177.

33. In this regard I agree with Majanja J as he correctly stated in Elvin Thuo vs. Attorney-

General & Another (Petition No. 212 of 2012), that the court must be vigilant and guard against evading the doctrine of res judicata by introducing new causes of action. He stated as follows –

“The courts must always be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the Plaintiff is in the second suit, trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction.”

15. In **SAYIALEI OLE KOISEI VS. LAND REGISTRAR, KAJIADO & 4 OTHERS [2014] eKLR**, Lilian N. Mutende J, held –

“13. As stated in the case of Abok James Odera vs. John Patrick Machira (Civil application No. 49 of 2001), to rely on the doctrine of res judicata, it must be established that there was –

(i) a previous suit in which the matter was in issue;

(ii) the parties were the same litigating under the same title;

(iii) a competent court heard and determined the matter in issue, and

(iv) the issue had been raised once again in a fresh suit.

14. The issue herein though clothed as a constitutional rights issue, is ownership of a parcel of land known as Kajiado/Kipeto/3452 in the name of Daniel Nkirimpa Monieri the interested party. This was the subject matter before the Lands Dispute tribunal Kajiado. The court did, adopt the award and issued a decree thereto. Prior to the learned Judge coming up with the decision in HC Misc. application No. 142 of 2011, he considers the grounds upon which the application was based, the statement of facts and affidavit verifying the facts. The order was dated 31st January, 2012. The parties herein were the same ones litigating under the same title aforesaid. The issue was determined by a court of competent jurisdiction.

15. The same issue has now been raised in the instant suit. Although issues of constitutional rights have been brought in, the bone of contention is ownership of land which was determined by Makhandia J. The applicant having chosen not to appeal against the order, bringing up the same issue which is res judicata is tantamount to abuse of due process of court.

16. In the result the Preliminary Objection is allowed. The Petition herein filed is struck out with costs.”

16. Mary M. Gitumbi J, came to the same conclusion in another Petition of **SIMON MUSILIMUSYOKA & 2 OTHERS vs. COMMISSIONER OF LANDS & 8 OTHERS [2013] eKLR**, where the learned Judge *inter alia* said –

“The fact that this case involves enforcement of fundamental rights and freedoms does not negate the application of the doctrine of res judicata... See Samuel Njau Wainaina vs. Commissioner of Lands and others, Nairobi Petition No. 46 of 2012 (unreported).”

17. The foregoing being the principles of the doctrine of **res judicata** as well as decisions on similar Petitions, I now turn to and consider whether the principles of **res judicata** apply to each of the Fourth, Fifth and Sixth Respondents who have raised the doctrine as a bar to the Petition herein.

RES JUDICATA IN RESPECT OF GANSHAMKUMAR R. PATEL, THE FOURTH RESPONDENT

18. The doctrine of **res judicata** applies to the Fourth Respondent for the following reasons –

(a) The Fourth Respondent bought the parcel of land known as KWALE/UKUNDA/2795 from one **Salim Mohamed Mwajora** for a consideration of Ksh. 800,000/= in 1995.

(b) Prior to that transaction, Ali Hamisi the Petitioner herein together with one Shaban Hamisi Kuriwa filed Mombasa HCCC No. 802 of 1991 against Joel Njunge Mwangi (now the Fifth Respondent), Salim Mohamed Mwajora (that is the person who sold to the Fourth Respondent the subject property) and Johnson Nyarogo and Ali Mwamamba.

(c) In that case, (HCCC 802 of 1991), the Petitioner herein together with his co-plaintiff Shaban Hamisi Kuriwa claimed that their deceased father, Hamisi Kuriwa was the original owner of Plot No. 4, which they argued included, **inter alia**, Kwale/Ukunda/2795.

(d) Upon hearing and analyzing the evidence presented before him by all the parties, the presiding Judge **Isaac C. C. Wambiliyangah** delivered his Judgment on 11/07/1994 and found in favour of the Defendants and dismissed the Plaintiffs' case with costs.

19. It is thus clear that all the elements stated in Section 7 of the Civil Procedure Act and reiterated above are present to bar this Petition from further proceeding on the ground of **res judicata**. The ownership of **inter alia** land parcel known as Kwale/Ukunda/2795 is a matter directly and substantially in issue in the present Petition and was the same matter which was directly and substantially in issue in HCCC No. 802 of 1991.

20. What the Petitioner is trying to do is to have another bite at the cherry by bringing to this court clothed in the garb of a constitutional issue another issue of ownership, of **inter alia**, the parcel of land known as Kwale/Ukunda/2795 which issue was considered and finally and conclusively determined by a court of competent jurisdiction.

WHETHER RES JUDICATA APPLIES IN RESPECT OF JOEL NJUNGE, THE FIFTH RESPONDENT

21. The case of Joel Njunge Mwangi, the Fifth Respondent is not dissimilar with that of Fourth Respondent, Ganshamkumar R. Patel. Joel Njunge Mwangi lawfully bought a parcel of land comprised in Title Number Kwale/Ukunda/2796 from one James Keari Moturi for the sum of Kshs. 34,000/= in the year 1991.

22. The Petitioner, Ali Hamisi Kuriwa, with one Shaban Hamisi Kuriwa and this Respondent along with Salim Mohamed Mwajora, Johnson Njoroge and Ali Mwamamba made similar claims in said Mombasa HCCC No. 802 of 1991 claiming that their deceased father Hamisi Kuriwa was the original owner of Plot No. 4, which they argued included **inter alia**, Kwale/Ukunda/2796.

23. Once again, upon the hearing all the parties, and analyzing the evidence presented before him the learned Judge delivered his Judgment on 11th July, 1994 and dismissed the case against this Respondent with costs.

24. Inevitably therefore, the ownership of **inter alia**, land parcel known as Kwale/Ukunda/2796 is a matter directly and substantially in issue in this Petition, and was, the same matter which was directly and substantially in issue in Mombasa HCCC No. 802 of 1991. Again, the Petitioner cannot evade the doctrine of **res judicata** by bringing before this court as a Constitutional Petition a cause of action which has been conclusively and finally determined by a court of competent jurisdiction. Once again this Respondent succeeds on the Preliminary Objection, and has also the costs against the Petitioner.

OF WHETHER RES JUDICATA APPLIES IN RESPECT OF ALBERT DALU – THE SIXTH RESPONDENT

25. From the pleadings and submissions, this Respondent's parcel of land known as Title Number Kwale/Ukunda/4167 comprising approximately 0.035 Hectares, was curved or was a sub-division out of the parcel of land known as Kwale/Ukunda/2833, and he bought from one Eunice Wangui Gitau for Kshs. 500,000/= in 1996, and was issued with the Title Deed in that year.

26. In the Mombasa HCCC No. 802 of 1991 (which I have already set out above with the names of the Petitioner's co-plaintiffs in reference to the Fourth and Fifth Respondents), the Petitioner made similar claims that the parcel of land known as Kwale/Ukunda/2833 was part of Plot No. 4. In other words, the ownership of, **inter alia**, Kwale/Ukunda/2833 is a matter directly and substantially in issue in the present Petition, **and was** the same matter which was directly and substantially in issue in Mombasa HCCC No. 802 of 1991, a case which was determined conclusively, that is, finally, by a court of competent jurisdiction in favour of all the Defendants, including Eunice Wangui Gitau from whom the Sixth Respondent derived title by purchase subsequent to sub-division of Kwale/Ukunda/2833.

27. The Petitioner's claim against this Respondent is therefore barred by the doctrine of **res judicata**, and must therefore be dismissed on the preliminary point taken out by this, like other Respondents, in the objection.

WOULD THE PETITION AS AGAINST THESE RESPONDENTS AND FIRST, SECOND, THIRD, SEVENTH, EIGHTH AND NINTH OTHERWISE STAND?

28. Having considered the doctrine of **res judicata** in relation to the Petition against the Fourth, Fifth and Sixth Respondents, and having found and held that the Petition against these Respondents is barred under the said doctrine, the question still remains, whether in the absence of the plea of **res judicata**, the Petition would stand or be liable to dismissal not just against these Respondents, but as against Respondents 1st -3rd and 7th - 9th inclusive.

29. The Petition herein is primarily grounded upon two letters dated 21st June, and 23rd June, 2010 purportedly written by the same person with a scrawled signature, no initials, but purportedly under title CLAO (Coast/N Eastern) for Commissioner of Lands, and both letters, emanating from the Commissioner of Lands Offices, Nairobi. It is thus unclear who investigated the claims that acquisition and subsequent registration by one **Ali Mwamwamba** was not **"only illegal but also fraudulent."** To authenticate such information, the maker of such statement needed to confirm by a separate affidavit or oral evidence. That is the requirement of Section 35 of the Evidence Act, (Cap 80, Laws of Kenya). Otherwise it will have no probative value. Besides these letters the Petitioner has no other grounds in support of his claims against any of the Respondents.

30. In relation in particular to Plot No. 4 from which he subsequent plots emanate, the record of proceedings in Mombasa HCCC No. 802 of 1991 is instructive. In his evidence Ali Mwamwamba, the 4th Defendant testified –

"...we had settled on the plot as long ago in 1940, by which time the plaintiffs were not yet born... he said he is the one who invited the plaintiffs' father to join him. He also said that during the land adjudication he became not only co-proprietor of plot 4, but sold part, then adjudicated Plot 4 to the Second Defendant, James Muturi and James Nyaboga (3rd Defendant). In examination in chief he said –

"I transacted all these sales in the presence of the chief of our location. I sold what belonged to me, not in any one else's land."

and

When he was cross-examined by the plaintiffs' Advocate, Mr. Magolo, he said –

"The plots which I sold to my co-defendants were my personal property."

31. The court observed that **“the evidence of the Fourth Defendant was by and large unchallenged. Thus, in the absence of any other clear and incredible evidence to the contrary, the 4th Defendant’s evidence is cogent and there is no valid ground to treating it as unreliable.”**

32. The court concluded that unless the adjudication [records] **“are annulled the challenge to the titles of the Defendants is everything but a futile exercise. It is a wild goose chase”** and proceeded to dismiss with costs the Petitioner’s Mombasa HCCC No. 802 of 1991.

33. Has anything changed since the dismissal of that case? Nothing seems to have changed in respect of the Petitioner. He has been constantly in court. He was in court in Mombasa CMCC No. 267 of 1997 as a Defendant for resisting execution of a court decree in respect of Kwale/Ukunda/4, now Plot No. Kwale/Ukunda/3338. He was in court as Plaintiff in the name of **Ali Hamisi Mwazuma** in Mombasa Misc. Application No. 119 of 2012, in relation to orders in Mombasa CMCCC No. 303 of 2000, against a vesting order issued by this court in Misc. Civil Case No. 657 of 2003 in favour of one Stephen Kutawa Tsofa. He was in court in Kwale SRMCC No. 72 of 2001, in the name of Ali Hamisi Mwavumo vs. (1) Said Mbarak Saidi, (2) Ali Ashur Buyashoot, (3) Joel Njunge Mwangi, (4) Ganshamkumar Ravjibhai Patel and (5) Albert Dalu, which case was dismissed by the Senior Resident Magistrate on the grounds of **res judicata** in a Ruling delivered on 25th October, 2001.

34. Thus restless, the Petitioner rested for another twelve (12) years and came to this court in 2013, by way of a Constitutional Petition, seeking the declarations first set out above, on the same claims. I do not with respect, to the Petitioner and the Petitioner’s counsel, think that christening the claim *“Constitutional Petition”* changes the substance or the subject of the claim, namely, the *“ownership”* or title to the parcels of land referred to in the Petition. That subject matter was fully canvassed, and finally determined by a court of competent jurisdiction in Mombasa HCCC No. 802 of 1991 and cannot, on the grounds of **res judicata** be re-opened. But, as I have asked, would be conclusion be different if there was no **plea of res judicata**? I do not think so. And these are the reasons for that conclusion.

35. I have already referred to the letter from the Commissioner of Lands alleging irregularities on the adjudication, and issue of letters to the Respondents. There is no proof, without calling the author of those letters, and production of original thereof, of the authenticity of those letters. But even if they were, none of the Respondents was given a hearing at the alleged investigations. This is contrary to the cardinal constitutional principles enshrined on Articles 47 and 50 of the Constitution. A person to be adversely affected by a decision must be informed and be heard (Article 47) in respect of Fair Administrative Action – must be expeditious, fair and just, and Article 50, (every person is entitled to fair hearing which includes, full disclosure of the claim against him/her, and adequate time to prepare an answer/reply in defence against contrary claims. To ignore giving an opportunity to the Respondents on the said complaints is contrary to the rules of **natural justice** – “hear the other party (*“audi alteram partem”*), and no man may be Judge in his own cause (*“nemo debet esse judex in propria causa”*). The purported letters from the Ministry of Lands are liable to be quashed, and cannot therefore be relied upon.

36. In any event, the Petition itself does not say in any specific manner the wrong-doing on the Respondents’ part in the process of acquisition of titles to their respective properties.

37. No officer of the Ministry of Lands and Settlement or other body outside the superior courts of law has jurisdiction to invalidate title to the subject properties or indeed any parcel of land. Any purported finding by the same undisclosed functionary of the Ministry of Lands and Settlement regarding alleged fraud in the acquisition of titles by the Respondents or any of them, would be null and void **ab initio**.

38. In this regard it pays to state that Section 159 of the Registered Land Act (RLA), (Chapter 300, Laws of Kenya), (under which statute the Respondents’ titles to the subject property were issued, offered absolute and indefeasible protection to any person dealing with valuable consideration with a proprietor of registered land. The said Section provides expressly, that no person dealing for valuable consideration with a proprietor of a registered land shall be required to inquire or ascertain the circumstances in or the consideration for which that registered proprietor or any previous proprietor was registered. This is even more so, where, as in this case, the Respondents say, they have and each one of them has, been in actual

and constructive possession or occupation of the said lands.

39. Further, Section 143 of the Registered Land Act empowers this court to cancel or amend the register on condition that such cancellation or amendment does not affect the title of a proprietor who is in possession and acquired the land for valuable consideration, unless such proprietor had knowledge of the omission, fraud, or mistake in consequence of which the rectification is sought. If there was any omission, fraud or mistake in the manner in which the previous owner(s) of the subject properties obtained title to them, there is no material to show that these Respondents had knowledge of any such omission, fraud or mistake.

40. Accordingly, the Respondents are innocent purchasers for value without notice (of any alleged impropriety) and are therefore the duly registered proprietors of the subject properties.

41. I therefore find and hold that the Petitioner's Petition and the Notice of Motion filed herein are both frivolous, and otherwise amount to an abuse of the court process.

CONCLUSION

43. Based upon the well-settled principles of **res judicata**, I find and hold that the Petition herein has no sound, factual and legal basis. I accordingly allow with costs, the Preliminary Objection dated 16th April, 2015 and filed on 17th April, 2015.

44. In the same vein, and for the same reasons, the Petitioner's Petition dated 7th November, 2013 (and filed on 8th November, 2013), and the Petitioner's Notice of Motion application dated 17th March, 2015 (and filed on 18th March, 2015) are hereby dismissed with costs.

45. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 25th day of August, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE

In the presence of:

Mr. Obara for Petitioner

Mrs. Mwema for Interested Party

No Appearance for Respondents

Mr. S. Kaunda Court Assistant