



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**CONSTITUTIONAL PETITION NO. 8 OF 2019**

**(FORMERLY MOMBASA HIGH COURT CONSTITUTIONAL PETITION NO. 65 OF 2011)**

**IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS OF INDIVIDUALS UNDER ARTICLE 23 (3) AND 165 (3) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 21,22,23,27,28,39,40,62 (2) AND 63 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ARTICLES 1,2,3,6,7,8,9 AND 17 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR)**

**BETWEEN**

**SAID OMAR MWITU & 5 OTHERS (Suing on their own behalf and on behalf of 610 residents of Mabatani, Nyumba Sita, Vidziani, Gonjora, Fahamuni, and Kigwede area – Msambweni – Kwale County)**

**AND**

- KWALE INTERNATIONAL SUGAR CO. LIMITED.....1<sup>ST</sup> RESPONDENT**
- COUNTY COUNCIL OF KWALE .....2<sup>ND</sup> RESPONDENT**
- DISTRICT LAND REGISTRAR – KWALE.....3<sup>RD</sup> RESPONDENT**
- THE SENIOR REGISTRAR OF TITLES..... 4<sup>TH</sup> RESPONDENT**
- THE COMMISSIONER OF LANDS..... 5<sup>TH</sup> RESPONDENT**
- THE PERMANENT SECRETARY TO THE TREASURY OF KENYA.....6<sup>TH</sup> RESPONDENT**
- THE PERMANENT SECRETARY MINISTRY OF AGRICULTURE.....7<sup>TH</sup> RESPONDENT**
- THE PROVINCIAL ADMINISTRATION..... 8<sup>TH</sup> RESPONDENT**
- THE HON. ATTORNEY GENERAL .....9<sup>TH</sup> RESPONDENT**

**JUDGMENT**

*(Suit by petitioners alleging various breaches of their constitutional rights by the respondents; basis of the claim being a lease granted by the Government to the 1<sup>st</sup> respondent over land measuring about 15,000 acres in Ramisi area; lease granted for purposes of allowing the 1<sup>st</sup> respondent to farm sugarcane and revive the sugar industry in the area; petitioners claiming that this is their indigenous land held in trust by the County Council of Kwale under the Trust Land Act, and they ought to have been allotted the land or involved and*

*compensated before the land was leased to the 1<sup>st</sup> respondent ; petitioners claiming that the lease to the 1<sup>st</sup> respondent is thus illegal and should be nullified and the land offered to them; petitioners further alleging that the 1<sup>st</sup> respondent embarked on an eviction exercise where the petitioners were forcibly evicted from their homes and their six villages flattened; petition opposed with respondents asserting that this was not trust land held by the County Council of Kwale but was private land owned by private companies, the last holder having gone into receivership, and that the Government acquired the land and eventually issued a lease to the 1<sup>st</sup> respondent for part of the land so as to revive the sugar industry in the coast region; respondents denying any forceful eviction of the petitioners; evidence showing that the position of the respondents over the proprietorship of the land is correct and that the land was not trust land but private land; evidence further demonstrating that the lease was only for part of the land and that the Government reserved 27,000 acres for settlement of squatters; petitioners in their evidence retracting the claim for nullification of the lease to the 1<sup>st</sup> respondent and now wishing to be allocated the 27,000 acres and be shown the boundaries of the land of the 1<sup>st</sup> respondent; no basis therefore to nullify the title of the 1<sup>st</sup> respondent to the 15,000 acres leased to it; issue of allotment of 27,000 outside the pleadings presented in the case; no evidence of previous occupation of the land of the 1<sup>st</sup> respondent by the petitioners; no sufficient evidence proving that the houses of the petitioners were flattened and that they were forcefully evicted and that they suffered loss; petition dismissed)*

#### A. INTRODUCTION AND PLEADINGS

1. This suit was commenced through a petition which was filed on 26 October 2011 at the High Court in Mombasa and registered as Constitutional Petition No. 65 of 2011. The petition was subsequently transferred to this court thus the new number Mombasa ELC Petition No. 8 of 2019. The petition was originally filed by one person, Kassim Ali Kama, who stated that he was filing the petition on his own behalf and on behalf of 610 residents of Mabatani, Nyumba Sita, Vidziani, Gonjora, Fahamuni and Kingwende areas in Msambweni, Kwale County. Mr. Kassim died sometimes in the year 2016 or thereabout before the petition could be heard. The petition was then taken over by six persons which led to the petition being amended through an amended petition dated 10 July 2020 and filed on 13 July 2020. The now six petitioners appear to respectively represent the six villages of Mabatani, Nyumba Sita, Vidziani, Gonjora, Fahamuni and Kigwede, said to be affected in this petition. Apart from the substitution of the deceased original petitioner, and a few other amendments in the body of the petition, the original petition more or less remained the same.

2. When the petition was originally filed, the sole petitioner sued Kwale International Sugar Company Limited, the County Council of Kwale, the District Land Registrar-Kwale, the Senior Registrar of Titles, the Commissioner of Lands , the Permanent Secretary to the Treasury, the Permanent Secretary Ministry of Agriculture, the Provincial Commissioner, Msambweni District, and the Attorney General, as the 1<sup>st</sup> to 9<sup>th</sup> respondents respectively. I have seen from the record that there was an application dated 11 June 2018 seeking to join the National Land Commission and the Kwale District Land Adjudication Officer as the 10<sup>th</sup> and 11<sup>th</sup> respondents which application was allowed on 12 June 2018. The amended petition filed on 13 July 2020 however still retains the original 9 respondents though it does appear that the suit has been continued as if the National Land Commission succeeded the Commissioner of Lands and the County Government of Kwale succeeded the County Council of Kwale. The State Law Office has been appearing for all Government entities sued in the matter.

3. The subject matter of this suit is the land parcel LR No. 5004/30/R (though the amended petition also describes the land as LR No. 27742) (hereinafter referred to as ‘the suit land’).

4. The amended petition, the petitioners contend to be the beneficial owners of the suit land which they claim was trust land under the Kwale County Council. They aver that they are the original indigenous residents of the land as members of the Digo tribe and that they have been on the land since time immemorial. They claim that they have been asking to be allocated land but they have never been so allocated. They aver that the 1<sup>st</sup> respondent (Kwale International Sugar Company Limited, sometimes referred to herein as Kisco) was granted 15,000 acres which it has used to cultivate sugar. They contend that there is no valid ownership documentation in favour of the 1<sup>st</sup> respondent and further that the 1<sup>st</sup> respondent moved into the property around the year 2007 and started multifaceted violations of harassing, harming, maiming, and forcibly displacing the petitioners, and that she destroyed their crops, livestock and homesteads, estimated at over Kenya Shillings Nine Hundred Million (Kshs.900,000,000/=). They complain of attempted forced eviction by the respondents. They plead that the 1<sup>st</sup> respondent violated an order of injunction and was fined Kshs. 500,000/= for being in contempt of court. They also contend that the 1<sup>st</sup> respondent has caused some of the petitioners to be charged in various criminal cases which they have enumerated. They claim that a sublease in favour of the 1<sup>st</sup> respondent, dated 20 August 2007, was not properly executed and has not been registered, and thus there is no proof of ownership of the land by the 1<sup>st</sup> respondent. They further plead that it was wrong and illegal for the 3<sup>rd</sup> respondent (District Land Registrar-Kwale) to lease the land without taking into account the proprietary interests of the community and failing to appreciate that the land was not available for alienation. They contend that even if the land was to be acquired by the Government, they ought to have been involved in its setting apart, and be resettled and compensated, rather than being rendered homeless and destitute. They state that the resettlement of other persons other than the descendants of the original indigenous inhabitants in the property is wrongful and amounts to fraud, and is discriminatory against the native people. They aver that the failure by successive Governments to redress them for alienation of their land has denied them equal opportunity for economic and social development as other Kenyan communities.

5. In the amended petition, the petitioners seek the following orders :-

*i. Orders compelling the 5<sup>th</sup> Respondents to forthwith allot and issue letters of allotment for Plot L. No. 5004/30/R also identified from the Technical Committee Report (Headed by Nelson Marwa Regional Coordinator Coast Region then) LR NO.5004/30 which is identifiable as LR NO 5004/30 Folio No.343 RegisterNo.69 Plot Parcel NO.LR 27742 dated 16/07/07 File reference No. C176/XI1/40 Computations No. 55074 and also the Director of Surveys (Ministry of lands has issued a deed plan as Deed Plan No.277846 Folio No. 343/69, Plot Parcel No. L.R 27742 dated 13/08/07 Computations No. 55074 Net area 6082.60 Ha.) Msambweni District in favour of your petitioners and the entire community occupying areas such as Vidziani, Mabatani, Nyumba Sita, Kingwende and Gonjora.*

*ii. Order compelling the 3<sup>rd</sup> Respondent through the 4<sup>th</sup> Respondent to forthwith issue your Petitioners with a Certificate of Ownership or title documents for Plot LR. No. 5004/30/also identifiable from the Technical Committee Report (Headed by Nelson Marwa Regional Coordinator Coast Region then) as LR NO 5004/30 Folio No.343 RegisterNo.69 Plot Parcel NO.LR 27742 dated*

16/07/07 File reference No. C176/XII/40 Computations No. 55074 and also the Director of Surveys (Ministry of lands has issued a deed plan as Deed Plan No.277846 Folio No. 343/69, Plot Parcel No. L.R 27742 dated 13/08/07 Computations No. 55074 Net area 6082.60 Ha.)

iii. A permanent injunction restraining the 5<sup>th</sup> Respondent by himself, his agents and/or servants and/or any other persons acting in his authority from allotting and/or issuing letters of allotment in respect of Plot LR. No. 5004/30/R also identifiable from the Technical Committee Report (Headed by Nelson Marwa Regional Coordinator Coast Region then) as LR NO 5004/30 Folio No.343 Register No.69 Plot Parcel NO.L.R 27742 dated 16/07/07 File reference No. C176/XI1/40 Computations No. 55074 and also the Director of Surveys (Ministry of lands has issued a deed plan as Deed Plan No.277846 Folio No. 343/69, Plot Parcel No. L.R 27742 dated 13/08/07 Computations No. 55074 Net area 6082.60 Ha.) Msambweni District to any persons other than your Petitioners.

iv. A declaration that your Petitioners are entitled to compensation and/or restitution from the Kenyan Government for the endorsement for the wrongful dispossession of the suit property by the 1<sup>st</sup> Respondent.

v. A declaration that the Kenyan Government has breached their fiduciary duty owed to your Petitioners by failing to provide effective mechanisms and address from the wrongful alienation of the suit property.

vi. Order mandating the Kenyan Government to repossess the parcel of land that have been registered to other persons and including the 1<sup>st</sup> Respondent other than your Petitioners through any means at its discretion and in turn make the property available for use by the Petitioners and the certificate issued irregularly to other third parties be revoked and fresh Certificates of Title be issued in favour of your Petitioners.

vii. Order the 7<sup>th</sup> Respondent to produce the Livestock and Crop Valuation and Assessment Report carried out by Ministry of Agriculture Kwale County in respect of Petitioners destroyed properties by the 1<sup>st</sup> Respondent. And this honourable do order the 1<sup>st</sup> Respondent to fully compensate specifically for all the personal properties destroyed by the 1<sup>st</sup> Respondent belonging to the Petitioners.

viii. General damages

ix. Order for Subdivision and valuation of suit parcel by a registered government valuer to determine value of land before restitution and allocation to the Petitioners and residents of each area in Mabatani, Nyumba Sita, Vidziani, Gonjora, and Fahamuni.

x. Order for Petitioners to be given first priority to be out-growers of sugar cane in Kwale County by the Kenyan Government

xi. In the alternative. Order for cancellation of the Sub-lease dated 20th August 2007 issued to the 1st Respondent by the 6<sup>th</sup> and 7<sup>th</sup> Respondents.

xii. In any event the costs of and other incidental to this Petition herein be awarded to the Petitioners.

xiii. Interests on (IV) and (VII) above at Court rates.

xiv. Such others or further orders as this Honourable Court may deem fit and just.

## B. THE CASE OF THE PARTIES

### (i) The Petitioners' case

6. The amended petition is supported by the affidavit of the named petitioners. Said Omar Mwituu deposed that he is representing the residents of Vidziani Village; Bakari Juma Mambo the residents of Kigwede; Fatuma Mwamadi Dago, the residents of Mabatani; Suleiman Bakari Shauri the residents of Gonjora; Taufiz Hamad Mohamed the residents of Fahamuni; and Ramaali Mwazoa, the residents of Nyumba Sita. All the six adopted the contents of the supporting affidavit of Kassim Ali Kama, who swore the affidavit in support of the original petition. In his affidavit, Mr. Kassim deposed that LR No. 5004/30/R was trust land, registered under Kwale County Council, and that the petitioners are the original indigenous residents. He deposed that the 1<sup>st</sup> respondent was granted a lease for 15,000 acres of the land with the knowledge of the 2<sup>nd</sup> respondent (County Council of Kwale, now the County Government of Kwale). He deposed that this resulted in the acquisition of their ancestral land and that their houses were demolished and crops destroyed. He avers that this was unprocedural, as they were neither compensated nor resettled, or given alternative settlement. He further deposed that the 1<sup>st</sup> respondent has started moving to areas which do not fall within the designated area (I am assuming this to mean within the 15,000 acre area leased) and has encroached into Vidziani, Mabatani, Nyumba Sita, Gonjora, Fahamuni, and Kigwede areas. He also complained that the 1<sup>st</sup> respondent is re-leasing the land to other persons for grazing. He contended that the actions of the respondents violated their rights as a community to own property, and occupy and use it, without interference. He stated that even if the land was to be acquired by the Government, they ought to have been involved in the setting apart of it, be resettled and compensated. He stated that they are now on the verge of being evicted.

7. Apart from the affidavits, the six petitioners wrote witness statements in support of their case and oral evidence was also taken in court.

8. PW-1 was Suleiman Bakari Shauri of Gonjora Village. Inter alia he testified that the 1<sup>st</sup> respondent came to the land in the year 2006 with the police. He claimed that they uprooted their trees and their houses and took away their livestock. He was however not present when all this took place as he was away in Mecca, and when he came back, he saw an open field and that the whole of Gonjora village had been

destroyed. He had a list of what each villager lost. He stated that an agricultural officer also recorded what was lost though no report was available. He explained that what the 1<sup>st</sup> respondent got was 15000 acres in Ramisi but that Gonjora is about 10 kilometres away and that the 1<sup>st</sup> respondent has now planted cane in Gonjora.

9. Cross-examined on his list of the size of land claimed to have been occupied by the villagers, he affirmed that no survey was done; a person would come and say what his affected acreage was and he would record that. They would also bring some documents but he did not avail these. They would also say the number of trees destroyed. He himself did not verify the correctness of the information. He did state that they have no problem with the 15,000 acres given to the 1<sup>st</sup> respondent and their issue is with the additional land in the area which measures 27,000 acres. He however stated that they do not know where the 15,000 acres stands in relation to the 27,000 acres. He said that they are in court so that they can be shown the boundaries of the 15,000 acres of the 1<sup>st</sup> respondent so that they can be allowed to use the other 27,000 acres to plant sugarcane for sale. He was cross-examined on the photographs taken and said to be of the land but he said that he did not know who took the photographs and when. With regard to the County Government of Kwale, he stated that he did not know whether the suit land was one held in trust by the County Council of Kwale. He stated that they have no dispute with the County Government.

10. Cross-examined by counsel for the State, he testified that they have not sued because the respondents took land from them, but because they have gone beyond the boundaries of what was allocated to them. He had no documentary proof of when they started living on the land. He was aware that the land was previously owned by other companies before Kisco. He stated that they ought to have been consulted after the lease of Kisco's predecessor expired. He did not fault the Land Registrar or the other state offices sued, but he stated that he has sued them so that they can offer an explanation why the land did not revert to the people.

11. Re-examined, he affirmed that they have no issue with the 15,000 acres issued to the 1<sup>st</sup> respondent as it was given out for investment but claimed that they do not know the boundary. He stated that what was given to the 1<sup>st</sup> respondent can remain to the 1<sup>st</sup> respondent and what they want is the rest of the land. They have however not written to the Government to be allocated the land. They had a problem with a proposal on the allocation of this land as persons from three other villages were also to be allotted the land. He stated that after their eviction, the villagers went back to their ancestral homes.

12. PW-1 was recalled to produce documents relating to the claims in respect of the villages of Vidziani, Kigwede, Mabatani, and Fahamuni. It was him who signed these documents. He explained that the persons affected would inform him of the acreage and properties that they have lost and he would record the same. Cross-examined, he elaborated that the persons affected would fill the form and bring them to him to countersign. This time, in re-examination, he stated that they want to be given land where they were removed.

13. PW-2 was Rama Ali Mwazoa of Nyumba Sita village. In his written statement, he stated that they were asleep when their village was invaded and destroyed. They were arrested and charged in court but released on bond. It is then that they got an advocate (and they presented this case). He stated that people lost their valuables and two even died. He also had a list of people who lost land and their valuables. In his oral evidence, he testified that the 1<sup>st</sup> respondent invaded their land in the year 2008 and that everything was destroyed. The villagers then moved to the neighbouring land of one Sudi Suleiman Twabara and lived there as refugees. They then filed this suit for relief joining with other people from the other affected villages. They took to PW-1, who acted as their Chairman, the names of the persons affected and what they lost. He stated that there has been no demolition after they got orders of injunction in their favour and that they have rebuilt though not to the same level.

14. Cross-examined by counsel for the 1<sup>st</sup> respondent, he testified that they have sued over the eviction of 2008 and want to be compensated for their loss which he quantified at about Kshs. 500 million. He claimed that for his village, 131 people were affected, which would average to a loss of between Kshs. 3 and 4 million per person. He stated that he wants to be allocated a portion of 27,000 acres. On the alleged demolition of their houses, he had no proof of what they owned before the alleged act of eviction. He also had no proof of the alleged death of two people. He himself was not injured. He had no document from the police as they were allegedly denied P3 forms.

15. Cross-examined by counsel for the 2<sup>nd</sup> respondent, he stated that they sued the 2<sup>nd</sup> respondent for failing to press for issuance of land to them. He mentioned that a committee was formed (while this case was still going on) which resolved that they be given land but this has not been given effect.

16. Cross-examined by counsel for the State, he acknowledged that he has no documentation or valuation of what was lost and no building plan approvals. Neither were any treatment documents presented for those allegedly injured. He also acknowledged never to have written to the Government to be allocated land. He mentioned that the photographs presented were taken in the year 2008. He claimed that all houses were burnt.

17. Re-examined, he stated that they have no issue with the 1<sup>st</sup> respondent getting 15,000 acres so long as the boundary was defined.

18. PW-3 was Fatuma Mwamadi Dago. She used to live in Mabatani village. She adopted her witness statement as her evidence. In that statement, she has stated that her husband got traumatized by the eviction and got sick which led to his death. She stated that they used to farm on the land and lived here. She alleged that their houses were destroyed and their crops destroyed at night. They slept in the neighbouring village of Fahamuni. They subsequently filed this case. She said that where she used to live is now full of sugarcane grown by the 1<sup>st</sup> respondent. She wanted to be paid for all her crops, two goats lost, some money and value of the house destroyed. In her estimate, what the villagers lost was valued at Kshs. 150 million.

19. PW-4 was Bakari Juma Mambo who stated that he used to live in Kigwede village. He also had a statement which he adopted. In it he stated that he lived on the suit from the time he was born. He mentioned that he had crops and a residence. He stated that in 2008 the 1<sup>st</sup> respondent came to the land and evicted them by force. He lost things worth about Kshs. 300 million. It is then that they came to court. He stated that they got restraining orders in their favour which the 1<sup>st</sup> respondent violated. Cross-examined, he stated that he is aware that the 1<sup>st</sup> respondent has 15000 acres of land and that there are some other 27,000 acres. He did not fill any form setting out what he had lost and its

value. Neither did he have any report of what he had lost and its value. Re-examined, he claimed that the 1<sup>st</sup> respondent does not know the boundary of its 15,000 acre land and the boundary of the other 27,000 acres.

20. With the above evidence, the petitioners closed their case.

(ii) The 1<sup>st</sup> respondent's Response

21. The 1<sup>st</sup> respondent filed a replying affidavit sworn by Musili Benson Nzuka and a statement recorded by him. He also testified in court. He is the head of Legal and Board affairs of the 1<sup>st</sup> respondent. He gave the history of the disputed land as follows :- That sugarcane growing in Ramisi area (where the suit land is located) started in the early 1920s. The land, LR No. 5004/30/R, was private land originally allocated to Kenya Sugar Limited by the Government under a leasehold title of 999 years. In the late 1960s, Kenya Sugar Limited went into receivership, and through a sale by the receiver, the disputed land was acquired by Associated Sugar Company Limited. Transfer of the land was effected to Associated Sugar Company Limited (also known as Ramisi Sugar) in the year 1969. To help grow its business, Ramisi Sugar took a loan from Bank of India whereby the land LR No. 5004/30/R was given as security. There was default and Bank of India proceeded to exercise its statutory power of sale. It is then that the 1<sup>st</sup> respondent developed interest in purchasing the land. Due to the enormity of the land involved and the need to develop the sugar industry in Kenya, the Government compulsorily acquired the land. It then interrogated whether the 1<sup>st</sup> respondent had a business plan and whether they wished to produce sugar and what extent of land they needed for sugar production. Subsequently, the Government consolidated the land LR No. 5004/30/R with other parcels of land being LR No. 5009, LR No. 5048, LR No. 5055/R, LR No. 5056 to form LR No. 27742 measuring 15,000 acres. It is this 15,000 acres comprising the land parcel LR No. 27742 that the Government then leased to the 1<sup>st</sup> respondent in the year 2007 for a period of 99 years. The lease was executed on 20 August 2007 and a certificate of title issued to the 1<sup>st</sup> respondent under the Registration of Titles Act, Cap 281 (repealed).

22. Mr. Nzuka denied any fraudulent acquisition of the land by the 1<sup>st</sup> respondent. He denied that the land was previously trust land under the County Council of Kwale and denied that it was ever community land. He asserted that at no point was the land ever in the name of the County Council of Kwale and has never been held as trust land. He averred that the 1<sup>st</sup> respondent has been advanced credit facilities of USD 140,000,000 and is incurring losses as it is unable to have full access to its project area. He alluded to loss of over USD 100,000,000 in lost revenues from sugar sales and electricity. He asked the court to declare the 1<sup>st</sup> respondent as the legitimate owner of the suit property and for the petitioners to be evicted. He averred that the alleged loss of property by the petitioners is an attempt to hoodwink the court as no evidence whatsoever has been presented by the petitioners. He wondered how the petitioners can claim on one hand to be helpless squatters and yet claim to have lost millions. He averred that any prayer for compensation or resettlement should not be directed at the 1<sup>st</sup> respondent and that in fact it is the 1<sup>st</sup> respondent who should be compensated for the continuous encroachment of its property. To his affidavit, he annexed the various documents evidencing the history of the land, the title, and the business plan of the 1<sup>st</sup> respondent.

23. In court, he added that there were no residences or effective occupation of the land and that survey was done before consolidation into LR No. 27742. He stated that as at 2002, the 1<sup>st</sup> respondent were the largest sugar traders and wished to vertically align themselves to control the whole supply chain. It was as part of this strategy that they intended to take over the assets of Associated Sugar Limited. They had approached the Bank of India to purchase the land and had deposited USD 1.2 million and commenced formal negotiations. However, Associated Sugar had other obligations to the Government. It is then that the Government stepped in and compulsorily acquired the land and negotiations shifted from Bank of India to the Government. He explained that the whole land was 42,000 acres. The Government decided not to allocate the whole of it, but only allocate that, which was required for sugar production and its associated activities. Upon an assessment, the parcels LR No. 5009, 5004/30, 5055R and 5048, were identified as being suitable for the nucleus (70%) of the sugar growing activity. It is these that were consolidated into LR No. 27742 measuring 15,000 acres. It is on this land that the 1<sup>st</sup> respondent is supposed to install its infrastructure and cultivate. He lamented that at the moment they are only operating at 30% capacity owing to depressed raw material input.

24. He stated that 27,000 acres was set apart for squatters and was to be allocated to individuals who were to be integrated into the sugar production ecosystem as outgrowers. The plan was to allocate each person 5.5 acres, being 3 acres for sugar production, 2 acres for subsistence, and 0.5 acres for homestead. He stated that the 1<sup>st</sup> respondent is very much aware of its boundaries as their land has a survey plan with coordinates. These, he added, are clearly marked by beacons on the ground.

25. He testified that there were no people (previously settled) on the land. He stated that they have had a good relationship with the residents of the area. They inter alia provide 70% of the labour and they have various CSR activities including the building of schools.

26. Cross-examined by counsel for the petitioners, he asserted that there were no residences or any effective occupation of the suit land and that survey was done before consolidation. He acknowledged that the 1<sup>st</sup> respondent has lodged complaints that led to institution of criminal charges relating to destruction of property against some persons. He was not aware of any assessment made regarding damage to crops (of the petitioners) and denied that they moved people from the land. He was not aware of any forceful eviction. He was also not aware of a Government report made regarding the dispute.

(iii) The 2<sup>nd</sup> respondent's response

27. For the 2<sup>nd</sup> respondent, it was agreed by consent that the statement of Dr. Mohamed Pakia dated 7 June 2018 be admitted in evidence. Dr. Pakia is the Chief Officer, Lands and Natural Resources in the County Government of Kwale. In his statement, he has alluded to attempts to settle the matter which led to a taskforce which proposed some solutions. He attached the report and minutes of various meetings to his statement. I have gone through them.

(iv) The response of the 3<sup>rd</sup> – 9<sup>th</sup> respondents

28. For the State, it was agreed by consent that the affidavit of Prof. Hamadi I. Boga sworn on 1 July 2020 be admitted in evidence. Prof

Boga is the Principal Secretary Ministry of Agriculture, Livestock, Fisheries and Cooperatives, State Department for Crops and Agricultural Research. In his affidavit, he deposed that the suit land was never trust land under the County Council of Kwale. He deposed that the suit land is registered in the name of the Permanent Secretary, Treasury of Kenya, and that it is leased to the 1<sup>st</sup> respondent. He has averred that pursuant to the lease agreement, the land is to be used solely for purposes of undertaking sugarcane farming and other auxiliary activities. He has deposed that the petitioners are squatters who have encroached on the land hence jeopardizing the project. He is of opinion that the petition should be dismissed.

29. With the above, the respondents closed their cases.

### C. SUBMISSIONS OF COUNSEL

30. I invited counsel to file written submissions, which they did. I have gone through the same in their entirety and I will only highlight a few issues.

31. In her submissions, Mrs. Kipsang, learned counsel for the petitioners submitted that the petitioners were forcefully evicted. She submitted that their rights were violated without compensation. She referred me to the case of *Mitu-Bell Welfare Society vs Kenya Airports Authority & 2 Others (2021) eKLR* and *Ibrahim Sangor Osman vs Minister for State for Provincial Administration and Internal Security & 3 Others*. She also referred to the Indian Case of *Olga Tellis & Others vs Bombay Municipal Corporation*. She further submitted that the state has an obligation to protect the petitioners' homes however rudimentary. She was of the view that the petitioners are entitled to the award of general, exemplary and aggravated damages. She also submitted that the sublease in favour of the 1<sup>st</sup> respondent was not properly executed. She submitted that this court has jurisdiction to revoke title and referred me to various authorities that confirm the court's power to do so. She asked the court to order for subdivision and valuation of the land to determine its value before restitution and allocation to the petitioners. She submitted that the locals should be given priority in employment by the 1<sup>st</sup> respondent. She asked that the petition be allowed with costs.

32. For the 1<sup>st</sup> respondent, Prof. Ojienda, Senior Counsel, inter alia submitted that this suit is *res judicata* the case *Rama Ali Mazoa & 4 Others vs Kwale International & 2 Others (2011) eKLR*. He submitted that in that case the issue of the lease to the 1<sup>st</sup> respondent was settled. He submitted that the petitioners cannot lay claim to the land on alleged long occupation as the history of the land shows that it was in private hands for a long time. He referred me to the case of *Mombasa Technical Institute vs Agnes Nyevu Charo & 108 Others (2014) eKLR*, *Mtana Lewa vs Kahindi Ngala Mwangandi (2015) eKLR* and *Michale Githinji Kimotho vs Nicholas Murathe Mugo, Civil Appeal No. 53 of 1995*, to demonstrate that a squatter has no entitlement to the land he occupies. On the case of *Mitu-Bell Welfare Society vs Kenya Airports Authority*, he submitted that it was not held that one should be issued with title merely for being in occupation of public land but only a protectable right to housing over the same. He nevertheless submitted that the petitioners have failed to prove that they are squatters and thus do not have a legitimate claim to Government land. He referred me to the evidence of the petitioners who stated that they have no interest in the 15,000 acres of the 1<sup>st</sup> respondent but are only interested in the 27,000 acres owned by the Government. He submitted that an advocate (clearly referring to the submissions of counsel for the petitioners) cannot insist on making an opposite stand to that taken by her clients. He submitted that the 1<sup>st</sup> respondent holds a legitimate lease and that no iota of evidence has been presented that the same was acquired fraudulently. He referred me to the law and various authorities giving sanctity to title. He further submitted that protection of socio-economic rights is a reserve of the Government and not the 1<sup>st</sup> respondent. He submitted that the 1<sup>st</sup> respondent cannot be responsible for the obligation of providing housing and referred me to the case of *William Musembi & 13 Others vs Moi Education Centre Co. Ltd & 3 Others, SC Petition No. 2 of 2018*. He submitted that his client cannot be held liable for actions of the police. He nevertheless submitted that there was never any proof of loss by the petitioners.

33. For the 2<sup>nd</sup> respondent, Ms. Jadi, learned counsel, inter alia submitted that the suit land was never trust land. She continued to submit that the exact acreage leased to the 1<sup>st</sup> respondent is yet to be ascertained and added that in absence of a survey report it is not possible to make out what was leased to the 1<sup>st</sup> respondent and what was left for the petitioners. She submitted that the petitioners have been on the land for many years after the collapse of the sugar factories and that it was thus incumbent on the Government to establish the situation on the ground before leasing it, and that the petitioners, being on the ground, should have been given first priority for the land to be leased to them. She submitted that it was not clear how the allocation of the land was done to the 1<sup>st</sup> respondent. She submitted that failure to call the petitioners and hear them before leasing out the land was a violation of their constitutional right which has led to historical injustice being visited upon the petitioners. She submitted that since they were in occupation, the petitioners had a legitimate expectation that they would be considered for allocation of the land in priority to the 1<sup>st</sup> respondent. She referred me to the case of *Commissioner of Lands vs Kunste Hotel Limited (1997) eKLR*. She submitted that the 1<sup>st</sup> respondent did not care about the interests of the persons in occupation and thus dispossessed the petitioners. She submitted that there was lack of a ground report from the Commissioner of Lands prior to signing the lease which confirms that the petitioners were in occupation. She submitted that there was overwhelming evidence that the land was leased to the 1<sup>st</sup> respondent without vacant possession. She submitted that the 2<sup>nd</sup> respondent has an interest as stakeholder and was never involved in the exercise leading to the lease of the land to the 1<sup>st</sup> respondent. She submitted that it was incumbent upon the Government to balance the rights of the community and that of the 1<sup>st</sup> respondent as investor, and could have allocated the 1<sup>st</sup> respondent land elsewhere instead of uprooting the petitioners.

34. For the 3<sup>rd</sup> to 9<sup>th</sup> respondents, Mr. Nguyo, learned State Counsel, inter alia submitted that in their evidence, the petitioners stated categorically that they are not opposed to the ownership of the 15,000 acres occupied by the 1<sup>st</sup> respondent. He submitted that the boundaries are however unclear and this leads to friction and confusion. He submitted that pursuant to Section 18 (2) of the Land Registration Act, 2012, this court has jurisdiction to hear the boundary dispute. He submitted that it is paramount that a resurvey be done to ascertain the boundaries. He referred to case of *Fredrick Otieno Obonyo vs Gilbert Otieno Nyanjom (2018)eKLR*. On the claim for compensation, counsel submitted that the Government set apart 27000 acres for relocation of squatters under the Ramisi/Kinondo/Settlement Scheme I, II, and III. He submitted that the land has never belonged to the petitioners and that they are not genuine squatters but illegal occupants of another person's land. He submitted that they are therefore not entitled to compensation. He added that the presence of the 1<sup>st</sup> respondent is of more benefit to the locals, compared to it being shut down, as the locals would suffer loss of income and daily subsistence. His parting shot was that the land

be resurveyed.

#### D. ANALYSIS AND FINAL ORDERS.

35. I have considered all the above and take the following view.

36. I will start with the prayers in the petition. They are 14 in total. The first prayer seeks to compel the 5<sup>th</sup> respondent to allot the suit land to the petitioners. Prayer 2, seeks an order to compel the 3<sup>rd</sup> respondent to issue to the petitioners a certificate of ownership to the suit land. Prayer 3 seeks an order to stop the 5<sup>th</sup> respondent from allotting the suit land to any other person other than the petitioners. Prayer 4, seeks a declaration that the petitioners are entitled to compensation and/or restitution from the Kenyan Government for wrongful dispossession of the suit land. Prayer 5 seeks a declaration that the Kenyan Government has breached its fiduciary duty by failing to provide effective mechanisms and address the wrongful alienation of the suit property. Prayer 6 seeks an order for the suit land to be repossessed and make it available to the petitioners. Prayer 7 seeks an order to compel the 7<sup>th</sup> respondent to produce a livestock and crop valuation and assessment report carried out by the Ministry of Agriculture over the destroyed properties of the petitioners and order full compensation. Prayer 8 is for general damages but not specified for what loss. Prayer 9 is for subdivision of the land and allocation to the petitioners. Prayer 10 is that priority be given to petitioners to be out-growers of sugar and in the alternative (prayer 11) that the sublease to the 1<sup>st</sup> respondent be cancelled. Prayer 12 is for costs. Prayer 13 is for interest. Prayer 14 is for any other relief.

37. I will fix the issues pursuant to the said prayers. In my view, prayers 1, 2, 3, 6, 9, 10, and 11 are all related. They more or less seek orders of cancellation of the title of the 1<sup>st</sup> respondent and for the land to be given to the petitioners. Prayer 4 is seeking compensation for wrongful dispossession and can be an issue on its own. Prayer 7 is also stand alone. The others are general prayers for damages, costs, interests and other reliefs. But before I go to the main issues, I think it is necessary first to settle some pertinent facts.

38. Although this petition is premised on the claim that the suit land was trust land under the County Council of Kwale, and was leased to the 1<sup>st</sup> respondent without the involvement of the County Council of Kwale or the community as required of land held under trust, the fact of the matter is that the suit land was never trust land under the County Council of Kwale. There is sufficient documentation that provides the history of the land and it is clear that it was never set aside as trust land. From the documents provided by the 1<sup>st</sup> respondent, which are not disputed by any party, there were various parcels of land in the area that were owned by Kenya Sugar Limited. The land that was under Kenya Sugar Limited was acquired by Associated Sugar Company Limited. These parcels of land are contained in a Gazette Notice dated 24 October 1969 exempting the transactions from requiring the consent of the Land Control Board. The parcels of land noted therein are LR No. 5048 (584 acres), 5056 (4,735 acres), LR No. 5055/R (396 acres), LR No. 11372 (original No. 7335) (142 acres), LR No. 5062 (2.06 acres); LR No. 5041 (909.5 acres); LR No. 5031 (319.5 acres); LR No. 5020 (7,352 acres); LR No. 5004/36 (3,356 acres); LR No. 5004/30 (13,441 acres); LR No. 5009 (1,199 acres); LR No. 1080 (640 acres); LR No. 9864 (10,774 acres). That consent also has two plots of land but these can be ignored for our purposes. The total acreage of what I have set out is 43,850 acres. This lends credence to the evidence of the 1<sup>st</sup> respondent's witness that the Government held 42,000 acres in the area. Associated Sugar Company Limited charged the properties to Bank of India. There was default and Bank of India needed to realise the securities and this is when the Government came in. There is a newspaper article dated 14 June 2005, which infers that the Government stepped in because it was owed about Kshs. 141,252,690/= by the collapsed company in land rents and other taxes.

39. I have no reason to doubt that the Government acquired either all or some of the parcels of land of Associated Sugar Company Limited. I have seen a Gazette Notice No. 10327 of 15 December 2006 in an affidavit sworn by Zacharia Ndege for the 5<sup>th</sup> respondent, which publishes an intention by the Government to acquire the land parcels No. 5048, 5056, 12335, 5031, 5009, and 12336 (which is same as LR No. 5004/30/R). The purpose of acquisition is for the Ramisi Sugar Factory Project. There was an amalgamation of some of the parcels of land which led to the creation of LR No. 27742 which was subsequently leased on 20 August 2007 to the 1<sup>st</sup> respondent for a period of 99 years at the annual rent of Kshs. 3,0006,000/= per annum. The petitioners allege that the lease is not properly drawn, but I see no issue. I have seen a copy of the lease and I am unable to decipher what is wrong with it. It is clear to me that the 1<sup>st</sup> respondent holds a sublease to the land parcel LR No. 27742 measuring 6082.6 Ha for a duration of 99 years from 1 June 2007. Anybody disputing that has his facts all wrong.

40. The petitioners are certainly completely off the mark in trying to claim that this is land that was trust land and was illegally allocated to the 1<sup>st</sup> respondent. This was private land that had been handed down to various private companies over the years, resting with the acquisition and subsequent lease by the Government to the 1<sup>st</sup> respondent.

41. Let me now address the issues as I had outlined them earlier.

*Issue 1 : Are the petitioners entitled to the prayers for cancellation of the title of the 1<sup>st</sup> respondent and for an order for the land to be allocated to them ?*

42. The petitioners, in the body of the amended petition, have sought for cancellation of the title of the 1<sup>st</sup> respondent and pray that they be allocated the 1<sup>st</sup> respondent's land. In as much as these prayers are in the amended petition, I am not convinced that the petitioners are still keen to pursue the same. When they testified in court, the petitioners actually stated that they have no issue with the lease over the 15000 acres of land leased to the 1<sup>st</sup> respondent, and that what they want is to be allocated land in the remaining 27000 acres of the land in the area which they alluded belonged to the Government. What the petitioners appeared to suggest is that they are not aware of the boundaries of the land allocated to the 1<sup>st</sup> respondent, which they wished to have determined, so that the other land can then be subdivided amongst them. They said that they are in court so that they can be shown the extent of the boundaries of the 15000 acres leased to the 1<sup>st</sup> respondent. I think this is what informed the submissions by Mr. Nguyo, that what the court should order is a re-survey of the land so that the boundaries are established. In his submissions, Mr. Nguyo thought that the 1<sup>st</sup> respondent does not know its boundaries, a position that appears to have support in Ms. Jadi's submissions. But is this really the position?

43. Mr. Nzuka in his evidence stated that the boundaries of the land leased to the 1<sup>st</sup> respondent are known. I agree. There is no ambiguity over the land leased to the 1<sup>st</sup> respondent. It is LR No. 27742 and it measures 6082.6 Ha. The extent of this land is contained in the deed plan. There is therefore absolutely no doubt over the extent of the land that is leased. If anyone wants a survey of the land so as to establish its position vis-à-vis any occupation, such person is free to do so. All he needs is to apply to the District Land Surveyor, pay the requisite fees, and this will be done. There is indeed no prayer before me for the ascertainment of the boundaries of the land for reason that the same are not clearly defined. What the petitioners pleaded in their petition is that they want to be allocated this land, a position that they appear to have retracted when they gave evidence, and instead wished to have the extra land left after allocation to the petitioners, allotted to them.

44. I regret my inability to make any pronouncement regarding allocation of the other 27000 acres as I do not have the appropriate pleadings before me. What I am not in doubt of is that the petitioners in the course of time abandoned their quest to have the suit land allotted to them as evidenced by their testimony in court. I do not see how, given their own evidence which went against their pleadings, I can now award them land that they do not wish to have. Given their own evidence in court, their prayers seeking title to the land must collapse.

45. Even assuming that I am wrong on the above, and that their prayers are still subsisting, I would still not grant the said prayers. The 1<sup>st</sup> respondent holds a sublease over the land. That sublease must be protected unless the petitioners demonstrate that it is liable to be cancelled under the law. This emerges from a reading of Section 26 of the Land Registration Act, 2012, which provides as follows :-

*26. Certificate of title to be held as conclusive evidence of proprietorship.*

*(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—*

*(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or*

*(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.*

*(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.*

46. It will be seen that title can be impeached on grounds of fraud, or misrepresentation, to which the title holder is a party, or where such title was obtained illegally, unprocedurally or through a corrupt scheme. I have no evidence of such before me. Nothing has been presented to demonstrate any fraud or misrepresentation, and I have no evidence of any illegality, procedural impropriety or any corrupt scheme that led to the issuance of the sublease to the 1<sup>st</sup> respondent.

47. In fact, what the petitioners seem to argue is that instead of the 1<sup>st</sup> respondent being given the land, it is them who should have been offered the land. It is tied to the argument of legitimate expectation of land presented by counsel for the 2<sup>nd</sup> respondent. I must at this juncture state that I found the position of the 2<sup>nd</sup> respondent rather curious, if not outrightly contradictory. This vacillation by the 2<sup>nd</sup> respondent makes one doubt whether the 2<sup>nd</sup> respondent is resisting the petition or supporting it. On one hand they oppose the petition saying that it should be dismissed. On the other hand, they say that the petitioners have a legitimate expectation for the land. That is my observation and I think that this ambivalence is a product of political play. But I digress.

48. Putting aside the fact that the petitioners in their evidence abandoned the claim for the land, is there really any ground to hold that the petitioners have a legitimate expectation for the land? I don't think so. First, as I have taken the trouble to elaborate, this land has a long history of being in private hands. It was not land used for settlement but for farming sugarcane. I have already pointed out that it was never trust land. Before the land came into the possession of the 1<sup>st</sup> respondent, the same had been the subject of a charge and the chargee could as well have exercised its statutory power of sale and sold the land to any person with cash to pay. In other words, the land could have been acquired by any other private person and such person would have had the freedom to do anything on the land. However, the Government needed to ensure that the sugar industry is revived and instead of risking the land being sold to anyone to do anything on it, it stepped in and acquired it. The purpose of the Government acquiring the land was not to settle people but to ensure that the sugar industry was revived and farming of sugarcane continued on the land for the benefit of the economy. If the land was instead sold through a sale by chargee to a private individual, would there have been any basis for the petitioners to complain and contend that they must be given first priority to purchase? Certainly not, and with that finding, I see no basis for them to complain because the Government acquired the land and leased it to an investor whom it felt has the capacity to revive the sugar industry in the region. I cannot fault the Government for finding it necessary to have an investor have the land for purposes of reviving the sugar industry. There was heavy investment needed. Indeed, the 1<sup>st</sup> respondent pointed out that it has invested over 140 million USD. This was not land for settlement and it was not land that the Government was carving out for landless people to be settled. This was land upon which the entire sugar industry in the coastal region depended on. The only way to ensure that the sugar industry was revived was by allotting the land to an investor who had capacity. There is no evidence before me that the petitioners had the capital and proficiency to continue the industry that was previously on the land and no evidence that they made a pitch that they be allotted the land for purposes of reviving the sugar industry. I do not therefore see how they can claim a legitimate expectation to be allotted the land.

49. The facts of this case are completely different from those in the case of *Commissioner of Lands vs Kunste* referred to me by Ms. Jadi. In that case, the respondent had a hotel which was adjacent to vacant land. It had asked that this land either be left as a road reserve, for it abutted the Nakuru-Nairobi highway, or it be allotted to it and be used as part of the hotel. The Government instead allotted it to a third party which was the subject of the challenge. It is on those facts that the Court held that the respondent had a legitimate expectation, pursuant to its earlier application, that if the land was to be allotted, then it would be allotted to it. This is not the situation we have in this case. No previous application for the land had ever been made by the petitioners. I have already pointed out the importance of this land to the revival of the sugar industry in the coast region. Not having demonstrated the capacity to continue the sugar industry, the petitioners have no basis for

complaining that they were overlooked and that instead, the land was leased to the 1<sup>st</sup> respondent.

50. The other reason why the petitioners appear to suggest that they deserve the land is because historically the land was of their forefathers. That may be so, but the mere fact that land was previously settled by one's forefathers, does not by itself give a right to a descendant to have title to that land. I have addressed such issue in my decision in the case of *Henry Wambega & 733 Others vs The Hon. Attorney General & Others, Mombasa ELC Constitutional Petition No. 2 of 2018 (2020) eKLR*. This land ceased to be ancestral land for decades before it was leased out to the 1<sup>st</sup> respondent. Any ancestral claim to it must have been extinguished by the chain of ownership in private hands. In other words this land was no longer ancestral land but private land that could be disposed of.

51. But even then, the Government did not lease the whole of the land. Out of 42,000 acres, only 15,000 of it was leased to the 1<sup>st</sup> respondent, leaving 27,000 acres which the evidence demonstrates was supposed to be converted into a settlement scheme to settle any squatters. It is this 27,000 acres that the petitioners ought to have pursued to get a share. If at all they were on the suit land, what they can probably argue, is for a legitimate expectation for a share of the 27,000 acres for it is this that was meant for resettlement. The other part, leased to the 1<sup>st</sup> respondent, was for investment purposes, not resettlement.

52. From the above discourse, it will be seen that I am not persuaded to impeach the lease to the 1<sup>st</sup> respondent. Neither have the petitioners made out a case that they are entitled to the suit land. Their prayers in this regard are hereby dismissed.

#### *Issue 2 : Whether the petitioners deserve any compensation*

53. It is a heavy call to ask someone to pay compensation thus the need for proof. If that was not the case then all one would need to do is lodge any sort of claim for compensation, claim that the defendant is liable, and get paid. In our case, if at all the petitioners were entitled to compensation, then they needed to demonstrate three things. First, that they were resident on the land; secondly, that they were illegally evicted, and thirdly, that they suffered loss. It is of course debatable, whether a trespasser who has been ejected has any right of compensation but I will put that debate aside for the moment.

54. So, have the petitioners proved that they were resident on the suit land ?

55. Save for their oral evidence, I actually have no corroboration of the allegation that the petitioners and the 610 persons that they represent were in occupation of the suit land. There is certainly some evidence of occupation of some parts of the land by some persons, but who these people are, and whether they wish to have any part to play in this petition has not been established to the required standard. For example, there is no ascertainable objective list of who was in occupation of the land at the time that the same was acquired by the Government and at the time that the same was leased to the 1<sup>st</sup> respondent. In the affidavit of Zacharia Ndege, I have seen Gazette Notice No. 10328 of 15 December 2006, which is a notice for inquiries into compensation by people interested in the parcels of land to be acquired. That notice provides that the inquiry for compensation will be held at Msambweni D.Os office on Tuesday, 30 January 2007 at 9.30am. Every person who was interested in the affected parcels of land was required to deliver to the Commissioner of Lands a written claim for compensation no later than the said date of inquiry. It would probably have helped the case of the petitioners if they had provided evidence that they presented their claims for compensation as required in the Gazette Notice. It would also probably have helped the petitioners if they had taken the trouble to present the minutes of the meeting of 30 January 2007 for it is in this meeting that the claims made would be documented. The petitioners have not demonstrated that they lodged any claim for compensation and neither have they demonstrated that no such meeting was ever held. In other words, I really have nothing before me that is credible enough to allow me to say that a particular person was in actual occupation of the suit land, what sort of residence such person had, and what he/she used to do on the land. There is absolutely nothing. It will be dangerous, given the very thin oral evidence presented, for this court to hold that the 610 persons that this petition is said to be brought for their benefit, had actual residences in the suit land and that they were evicted as alleged.

56. Apart from the oral evidence, what the petitioners presented were forms filled by the petitioners themselves, where they themselves said what they occupied and what they lost. These forms have not been verified by any independent person. In fact, even the person who countersigned the forms did not himself verify the correctness of the information provided there. There is no valuation report nor any other report to support what is filled in those forms. Those forms, I am afraid, are not credible enough to say that they demonstrate the correct position that was there on the ground before the alleged eviction. I have in fact no evidence of eviction at all. It is only claimed by the petitioners that there was an eviction in the year 2008. There is no report from a chief, police officer, or anything that would support the claim of eviction. I would suppose that evicting and flattening six whole villages in a country such as ours would have invited the press or even the involvement of the area Member of Parliament or the Councillor of the area at that time. I have no press report, no evidence of any complaint of eviction, and no Parliamentary complaint. It was said that people were injured and two even died. I have no treatment records of any person and no certificate of death. In other words, I have absolutely nothing to demonstrate any eviction of the petitioners from the six villages that they claim existed.

57. The 1<sup>st</sup> respondent has denied any eviction took place in the year 2008. It was incumbent of the petitioners to demonstrate and prove that there was an eviction as alleged. One would expect that the date of such momentous event would be etched in the memory of the petitioners or at least some of them. Even the petition itself does not have a date of when the alleged eviction took place. All that is said is that the events took place "around the year 2007." The supporting affidavit of Kassim Ali Kama provided no date of any eviction. The statements of the petitioners witness also have no dates of the alleged event. The witnesses merely stated that the eviction took place in the year 2008. I am afraid that I have absolutely nothing to support the allegation of eviction. I regret to tell the petitioners that I am unable to hold that they were evicted as alleged or at all. With that holding, it is not even necessary for me to enter into a debate on whether or not the petitioners deserve compensation pursuant to the holding in the case of *Mitu-Bell vs Kenya Airports Authority* for the petitioners have failed to present facts to show that they were indeed on the suit land and that they were evicted or that they suffered any loss pursuant to an eviction.

58. Given the above, I have no basis to order any compensation to the petitioners.

#### *Issue 3 : Whether the petitioners are entitled to the other prayers*

59. The other prayer is for a livestock and crop valuation and assessment report carried out by the Ministry of Agriculture Kwale in respect of the properties of the petitioners to be provided. I have no evidence that there was ever any valuation done so that there may be a report to be presented. There is no evidence provided of when such valuation was done, and who did it, so that we can presume that there is a report for which an order can be made for its production. This court cannot issue an order in vain. I need not go any further than this. This prayer is disallowed.

60. I know that there were other smaller issues raised such that the petition is *res judicata*. It is not necessary to delve into these given that I am not persuaded as to the merits of the petition.

Conclusion

61. It will be seen from the above that I am not persuaded that this petition has any merit. It is hereby dismissed. The only issue left that I need to address is costs. I award costs to the 1<sup>st</sup> and 3<sup>rd</sup> – 9<sup>th</sup> respondents. I do not see how the 2<sup>nd</sup> respondent can justify any entitlement to costs given the ambivalent position that it took in these proceedings.

62. Judgment accordingly.

**DATED AND DELIVERED THIS 13<sup>TH</sup> DAY OF JANUARY 2022.**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT MOMBASA**