



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT MALINDI**

**CONSTITUTIONAL PETITION NO 3 OF 2019**

**IN THE MATTER OF: ARTICLES 1 (1) (2) (3) (a), (b), 2 (4), 10, 19, 20,21,22,23,40,47,48, 165 (3) (d) (ii) (iii), 238, 244, 258 (1), (3)  
OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS AS ENshrined UNDER  
ARTICLES 10, 40,47,48 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF: FAIR ADMINISTRATIVE ACTIONS ACT, 2015**

**AND**

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

**AND**

**IN THE MATTER OF: THE NATIONAL POLICE SERVICE ACT NO. 11A OF 2011**

**AND**

**IN THE MATTER OF: ILLEGAL, FRAUDULENT AND UNJUSTIFIABLE DEALING IN PROPERTY L.R NO. 79568/111,  
LMU/1633/1/3/98 MTANGAWANDA**

**AND**

**IN THE MATTER OF: CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)  
PRACTICE AND PROCEDURES RULES 2013**

**BETWEEN**

**ABDULRAHMAN SALIM BAABAD.....PETITIONER**

**VERSUS**

**COUNTY COMMISSIONER OF LAMU.....1<sup>ST</sup> RESPONDENT**

**ADMINISTRATION POLICE SERVICE, LAMU.....2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL .....3<sup>RD</sup> RESPONDENT**

**NATIONAL LAND COMMISSION.....4<sup>TH</sup> RESPONDENT**

**AND**

**JUDGMENT**

By a Petition dated 4<sup>th</sup> March 2019, the Petitioners herein sued the Respondents seeking the following orders:

1. *A declaration that the Petitioner is the rightful and legal owner of parcel of land being Plot A, Plot B & Plot C LR No. 79568/111 LMU/1633/1/3/98 MTANGAWANDA*
2. *A declaration that the Petitioner's fundamental rights and freedoms as enshrined under Articles 40,47, 48 and 60 of the Constitution of Kenya 2010 have been contravened and infringed upon by the Respondents herein.*
3. *A declaration that the 2<sup>nd</sup> Respondent occupation of the Petitioner's parcel of land Plot A, Plot B and Plot C LR No. 79568/111, LMU/1633/1/3/98 MTANGAWANDA is illegal, unlawful, wrongful and infringement and violation of the Petitioner's Constitutional rights to property.*
4. *A conservatory order restraining, prohibiting and stopping the Respondents jointly and severally, their agents, officers and any other person acting under them from entering upon or trespassing, encroaching, constructing any structures, offering for sale, selling, disposing of, charging, sub-dividing, dealing, alienating, occupying, managing, letting or otherwise using, residing and remaining or representing themselves as the registered owners of the property in any way whatsoever from interfering with the petitioners proprietary rights including the right to quiet possession and enjoyment over the suit premise.*
5. *An order issued to the 2<sup>nd</sup> respondent to immediately vacate and render vacant possession of the suit of the suit parcel of land to the petitioner and to remove and demolish the structures erected therein.*
6. *An order of Mandamus directed to the 4<sup>th</sup> Respondent to register and issue title to property Plot A, Plot B and plot C LR No. 79568/111, LMU/1633/1/3/98 MTANGAWANDA in favour of the Petitioner.*
7. *An order for compensation to be directed towards the 2<sup>nd</sup> Respondent to compensate the Petitioner for infringement of the Petitioner's constitutional rights and freedoms and illegal occupation and construction on the Petitioner's parcel of land.*
8. *An order that the Interested Party to pay the Petitioner the licence fees for the use and occupation of the Petitioner's parcel of land from November 2017 to date and to continue paying the same to the Petitioner so long as they occupy and use the Petitioners parcel of land.*
9. *That this honourable court do grant any other appropriate relief and do make such further or orders and to give such further or other directions as this Honourable court may consider appropriate for the enforcing or securing the enforcement of the provisions of Articles 1(1) (2) (3) (a), (b), (4) (b), 2 (4), 6 (1) (2), 10, 165 (3) (d) (ii) (iii), 238,244, 258 (1) and 259 (1), (3) of the constitution and any other articles of the Constitution in relation to the Petitioner in this Petition.*

**10. Costs of this Petition**

Parties agreed to canvas the petition vide written submissions which were duly filed.

**PETITIONER'S CASE**

The Petition is supported by the affidavit of Abdulrahman Salim Baabad who states that he is the beneficial owner of all that parcel of land known as **Plot A, Plot B and Plot C LR No. 79568/111, LMU/1633/1/3/98 MTANGAWANDA** having been allotted by the Government of Kenya vide letters of allotment reference No. 79586/III dated 5<sup>th</sup> January 1999 and had been residing, farming and carrying out camping business on the suit land prior to being issued with allotment letters.

It was the Petitioner's averment that he took out licences and permits and paid for camping business as was advised by the Lamu County Council vide a letter dated 29<sup>th</sup> January 1993. The Petitioner stated that he also leased out a portion of his land to BGP Kenya Limited measuring 100m x 100m fronting the beach and upon expiry of the lease, he entered into a licence agreement with the Interested Party who made payments to him through its subsidiary company Zarara Oil and Gas.

The Petitioner further stated that prior to executing the license agreement with the Interested Party, the County Government through its letter dated 1<sup>st</sup> February 2014 addressed to the 4<sup>th</sup> Respondent, intimated that it did not have any adverse report to make against the Petitioner's request to be issued with a title deed over the suit property.

The Petitioner avers that he had been in continuous occupation of the suit property before 2017 when the 2<sup>nd</sup> Respondent with the backing of the 1<sup>st</sup> Respondent, unlawfully and illegally invaded portion of the suit property where they occupied and constructed premises and erected tents therein. That following the illegal invasion and occupation by the 2<sup>nd</sup> Respondent, he wrote a letter dated 17<sup>th</sup> November 2017 addressed to the County Administrator informing him of the illegal action and invasion by the 2<sup>nd</sup> Respondent seeking assistance in the matter whereby the Sub County Administrator responded to his letter on 25<sup>th</sup> November 2017, confirming that he is the owner of the suit property.

The Petitioner further avers that through various correspondences to the County administration, the 2<sup>nd</sup> Respondent was advised to move from the suit property but has refused to vacate thus infringing on the Petitioner's legal rights to property.

It was the Petitioner averments that since signing the licence agreement with the Interested Party in 2017, it has failed to remit payments on the ground that the suit property is public land. The Petitioner stated that the suit property is not public land and that his ownership was affirmed in a Judgment delivered in **Lamu PMCC No. 30 of 2012** where the court decreed that the suit land belongs to the Petitioner and therefore urged the court to allow the Petition as prayed.

### **1<sup>ST</sup> 2<sup>ND</sup> AND 3<sup>RD</sup> RESPONDENT'S CASE**

The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents relied on the Replying Affidavit sworn by the County Commissioner Samson Irungu Macharia dated 25<sup>th</sup> July 2019 stating that the suit property was declared and gazetted as a forest Reserve under administration of the Kenya Forest Services department hence was legally protected land incapable of being allocated to private individual or ownership thereof as claimed by the Petitioner.

It was the Respondent's case that the suit land is situate in Mtagawanda and Mkowe Jetty area in Pate Island Lamu County which area falls within the area described by the Proclamation No. 44 of 1932 as Lamu mangrove swamp forests and therefore a reserve forest.

The Respondent further stated that vide a gazette **Notice No 174 of 20<sup>th</sup> May 1964** on the declaration of Central forests, identified areas touching on the suit land as central forest and therefore land under the protection of the Kenya Forest services.

The respondent deponed that the petitioner wrote a letter to the Ministry of Environment Natural Resources and Wildlife on 26<sup>th</sup> April 2006 requesting for permission to be allowed to use part of the land which request was considered and granted on condition that the use was on a temporary basis and was to surrender it back without resistance when is required for use by the Ministry.

It was the Respondents' further averment that in order to strengthen security in the County, the County Commissioner wrote a letter to Kenya Forest Service on 8<sup>th</sup> May 2014 requesting for use of the suit land as a Police Patrol Unit which request was accepted vide a letter dated 9<sup>th</sup> May 2014 on condition that the Kenya Forest Rangers would continue using part of the land that they occupy and that at the time the police took possession the Petitioner had long vacated the land.

The Respondent stated that the suit land is forest land which is held in trust by the Ministry of Environment Natural Resources and Wildlife and therefore not available for alienation by anyone including the Petitioner.

### **INTERESTED PARTY'S CASE**

The Interested Party filed a Relying Affidavit dated 6<sup>th</sup> July 2021 sworn by one Peter Gichagua Nduru a director of the Interested Party who states that the Interested Party and the Petitioner entered into a licence agreement for a period of thirty-six calendar months effective from 1<sup>st</sup> September 2017 for a monthly licence fee of Kshs. 100,000/ payable to the Petitioner.

Peter Nduru deponed that when the Interested Party attempted to make use of the property on or about October 2017, they were blocked and interrupted by the Border Control Unit of the National Police Service who were in possession of the said property. He further averred that they sought the intervention of the Petitioner vide a letter dated 25<sup>th</sup> July 2018, whereby they informed the Petitioner of its decision to terminate the licence and demanded a refund of Kshs. 200,000/ which had been paid to the Petitioner as the Interested Party has never used the suit land.

It was the Interested Party's contention that they are not a necessary party to the suit since the Interested Party is a wholly owned subsidiary of Zarara Oil and Gas Limited in Mauritius which is undergoing insolvency. The Interested Party urged the court to dismiss the Petition as they are wrongly joined to the Petition and that the Petitioner has not demonstrated how the IP has violated his rights.

### **PETITIONER'S SUBMISSIONS**

Counsel for the Petitioner reiterated the Petitioners case and listed the following issues for determination by the court:

- a) Whether the Petitioner is the owner of Plot A, Plot B and Plot C LR No. 79568/111, LMU/1633/1/3/98 MTANGAWANDA**
- b) Whether the Respondents have violated the Petitioner's constitutional rights over the suit property.**
- c) Whether the Petitioner is entitled to the reliefs sought.**

On the first issue as to whether the Petitioner is the owner of the suit property, counsel submitted that the Petitioner has been in occupation of the suit land since 1980's and that he was allotted the suit parcels by the government of which he annexed allotments letters to the supporting affidavit.

Counsel further submitted that the Petitioner produced a letter to the National Land Commission in a bid to regularize his ownership and no adverse report was made against the Petitioner 's occupation by the County Secretary.

Counsel submitted that the Respondents relied on the Kenya Forest Ordinance Rules and Regulations of 1932 but the same has no mention of Mtangawanda as mangrove swamp and it is inconceivable that the Commissioner of Lands would issue a letter of allotment to the Petitioner when the said area was gazetted forest reserve as alleged by the Respondents who have not provided any evidence that the suit property is held by the Kenya Forest Service.

Counsel relied on the case of *Re Funzi Island Dev. Ltd & 2 Others [2004] eKLR* where the court held that the Applicants had not made any effort to show that the land in dispute was covered by the proclamation and urged the court to find that the Petitioner has proved that he has rights to the property and that the Respondent have encroached on the same.

Counsel also cited the case of *Isaac Isiaho Faro & 3 others v Attorney General & 3 others [2020] eKLR* and submitted that the Petitioner having shown that he has ownership rights to the suit property and that the 2<sup>nd</sup> Respondent has violated such rights, the 4<sup>th</sup> Respondent should be compelled to carry out its administrative mandate and issue a title to the suit land to the Petitioner

It was counsel's further submission that in the event that the 2<sup>nd</sup> Respondent had intended to use the suit property for public use, due notice ought to have been given as was held in the case of *Evelyn College of Design Ltd v Director of Children's Department & Another [2013] eKLR*.

On the case against the Interested Party, counsel submitted that the Interested Party has violated the terms of the license agreement by declining to remit the licence fees due to him and that it had no reason to rescind the agreement. Counsel therefore urged the court to allow the petition as prayed.

### **RESPONDENTS' SUBMISSIONS**

Counsel reiterated the evidence in the Replying Affidavit which gave an elaborate status of the suit land and stated that the land in question was declared and gazetted as a forest reserve under the administration of the Kenya Forest Services incapable of being allocated to an individual. Counsel relied on the Proclamation No 44 of 1932 and Gazette Notice No. 174 20<sup>th</sup> May 1964 which declared central forests identified as land falling under the protection of Kenya Forest Services.

Ms Lutta submitted that as 2018 the list of gazetted forests in counties entailed mangrove swamps in Tana River, Kilifi, Lamu and Mombasa Counties.

On the issue as to whether the Respondents have violated the Petitioner's rights, counsel submitted that a party who seeks redress for infringement of fundamental rights is duty bound to demonstrate clearly how the right has been violated and cited the case of *Matiba V The Attorney General, HCC Misc. Application 666 of 1990* of which the petitioner has not met the threshold.

Counsel also relied on the case of *Shamsher Kenya Limited v Director of Public Prosecutions & 2 others [2018] eKLR* where the court held that the duty of a litigant is to make full and fair disclosure of all material facts.

Similarly counsel relied on the cases of *Patrick Chege Kinuthia & 2 others v Attorney General [2015] eKLR*, *Adan Abdurahani Hassan & 2 others v Registrar of Titles, Ministry of Lands & 2 others [2013] eKLR* where the court held that the Commissioner of Lands cannot alienate government alienated land which has been set aside for public purpose and hence the suit land being gazetted forest land could only be alienated following laid down procedures for degazettement in the Forest Act Cap 385 (now repealed). That no valid title was issued to enable the Petitioner to lay claim of the suit land.

Ms Lutta therefore submitted that the Petitioner cannot enjoy the protection of Article 40 of the Constitution as he has no right over the suit land hence no violation. On the issue of public interest, counsel relied on the case of *Mohamed Tariq Khan vs. Land Registrar Lamu (Malindi High Court Misc. Application No. 27 of 2010 (unreported))* where the court held that public interest is both vivid and significant and must therefore take priority.

Counsel therefore urged the court to find that the suit land was not available for alienation and as such no violation been proved and that the Petition should be dismissed with costs.

### **INTERSTED PARTY'S SUBMISSIONS**

Counsel for the Interested Party listed two issues for determination as follows: -

- a) *Whether the Interested Party was properly joined to the proceedings?*
- b) *Even if the answer to a) above is in the affirmative, are the orders sought against the Interested Party under prayer 8 of the Petition capable of being justifiably issued?*

Counsel relied on Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (the "Mutunga Rules") that defines an Interested Party as a person or entity that has identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation.

Mr. Kinuthia submitted that paragraphs 16 and 17 of the Petition, demonstrates that the subject matter of the suit concerns a dispute over ownership of the suit property between the Petitioner and the National Police Service and that the only nexus between the Petitioner and the

Interested Party is that, the Interested Party entered into a Licence Agreement with the Petitioner with respect to then unsurveyed farming plot at Mtangawanda in Lamu County for a period of thirty six (36) calendar months which was later terminated due to frustration.

Counsel also relied on Rule 7 (1) and 7 (2) of the Mutunga Rules which lays down the procedure to be observed in joining an Interested Party to proceedings and cited the case of **Francis Kariuki Muruatetu & another v Republic & 5 others** [2016] eKLR (pages 1 to 14 of LoA), the Supreme Court laid down the elements that have to be present before an Interested Party is brought in a suit by stating:

One must move the court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the court; hence, sufficient grounds must be laid before the court, on the basis of the following elements: -

*i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.*

*ii. The prejudice to be suffered by the Intended Interested Party in case of non-joinder, must also be demonstrated to the satisfaction of the court. It must also be clearly outlined and not something remote.*

*iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the court.*

Counsel for the Interested Party submitted extensively on the question as to whether it was properly joined in the Petition as an Interested Party and stated that the procedure was flawed hence the Petition should be dismissed with costs.

#### **ANALYSIS AND DETERMINATION**

I have considered the Petition, the affidavits, and the submissions by counsel and find that the issues for determination are as follows: -

- a) Whether the Petitioner has ownership rights over the suit property.
- b) Whether the Respondents have violated the Petitioner's constitutional rights over the suit property.
- c) Whether the Interested Party was properly joined to the proceedings
- d) Whether the Petitioner is entitled to the reliefs sought.

From the elaborate pleadings and submissions by counsel, it is not disputed that the first contact of the Petitioner and the Respondent with the suit land was vide a letter dated 26<sup>th</sup> April 2006 to the Ministry of Natural Resources requesting for permission to be allowed to use a building on the suit land of which permission was granted vide a letter dated 30<sup>th</sup> May 2006. It is noted that the letter does not specifically mention the citation of the suit land.

The Petitioner produced letters of allotment dated 5<sup>th</sup> January 1999 to the suit land which he stated that he had been allocated by the government. Part C of the Petitioner's case against the Respondents, the Petitioner states at paragraph 13 that he is the beneficial owner of the suit plots having been allocated the same by the then Area Chief as a government representative in charge of public land in the area. I find this as an anomaly as the Area Chief does not have authority or power to allocate/alienate public land. It was only the Commissioner of Lands who had such authority on unalienated public land while following the laid down procedures in the Government Lands Act.

The court does not dispute that the Petitioner has allotment letters which he displayed as evidence of having been allocated the suit parcels of land but the question is whether the land was available for alienation or allocation.

This case is similar to the case that the Petitioner cited of **Re Funzi Island Dev. Ltd & 2 Others (supra)** which went to the Court of Appeal and the Supreme Court. In the High Court, it was held that the Applicant had not proved that the suit land formed part of proclamation No. 44 of 1932 and dismissed the Application.

The matter went on appeal to the Court of Appeal where the High Court decision was overturned and found that the land was gazetted forest land which formed part of the proclamation in the case of **Funzi Island Development Limited & 2 others v County Council of Kwale & 2 others** [2014] eKLR. The Court of Appeal held that the land in question was forest land as per the legal **Notice No 174 of 1964** and **proclamation No 44 of 1932** and that the land having been declared a forest area was not available for alienation.

The same case was heard on appeal in the Supreme Court of Kenya in **Pati Limited v Funzi Island Development Limited & 4 others** [2021] eKLR where the Court observed that:

*“The three learned Justices wrote their Judgments separately. Maraga, JA (as he then was) found that the suit land was forest land, while on the second issue, the Judge held that the suit land was neither trust land, nor had it been properly allocated. His reasoning was that by dint of Proclamation No. 44 of 1932, as restated by Legal Notice No. 174 of 1964, the suit land was forestland. He observed that such land could only have ceased to be forestland pursuant to Section 4(1)(a) of the Forests Act Cap 385, of the Laws of Kenya, which requires the Minister in charge of forests to make a declaration to that effect. He clarified that*

by Legal Notice No. 174, the Minister for Natural Resources, after consultation with the National Forest Authority, declared as forest area, inter alia, "Those pieces of land approximately 111, 366 acres, situated between the high and low water-mark on the coast of Kenya, which were declared to be forest areas by Proclamation No. 44 of 1932." The Judge added that it was conceded by the Appellant's managing director in paragraph 13 of his Affidavit sworn on 13th January 1995, that the suit land always became completely submerged at high tides two times a year. The learned Judge concluded that from this concession, and as stated in Legal Notice No. 174 of 1964, the suit land was situated between the high and low water mark on the coast of Kenya".

The Supreme Court in affirming the decision of the Court of Appeal held that: -

*".....the suit land was set apart for use as a boat landing base, (a purpose that would have benefitted the local communities ordinarily resident in the area) yet the appellant has constructed a five-star hotel on it. There is no further Notice on record for change of purpose of setting aside. This is in contravention of the provisions of Section 117 of the former Constitution and Section 7(3) of the Trust Land Act (repealed), which required the Notice of an intended alienation to specify the purpose for which the land is required to be set apart.*

*[64] The entire process and Notice for setting apart, fell far short of the requirements of the Constitution and the law. In view of these shortcomings and our conclusion regarding the legal status of the suit land, we find no reason to upset the judgment of the Court of Appeal."*

The Proclamation No. 44 of 1932, mangrove swamp forest reserves were declared as follows;

*'All land between high water and low water marks (ordinary spring tides) in the localities as described below, viz on the mainland and islands adjacent to the coast from Chale Point in the North, to the boundary of the Trust Territory of Tanganyika in the South.*

*Provided that any areas that lie within the foregoing boundaries which may have been, or may be, declared private property under Crown, are excluded from the forest reserves.'*

There is no evidence that the suit properties were declared private property and excluded from the forest reserves. The Forest Act, Cap 385 (now repealed) provided for procedures on declaration of any unalienated government land to be a forest and degazettement of forests. This was provided for under section 4 of the said Cap 385 (now repealed) which states as follows;

*"4. (1) The Minister may, from time to time, by notice in the Gazette-*

*(a) declare any unalienated Government land to be a forest area;*

*(b) declare the boundaries of a forest and from time to time alter those boundaries;*

*(c) declare that a forest area shall cease to be a forest area.*

*(2) Before a declaration is made under paragraph (b) or paragraph (c) of subsection (1), twenty -eight days' notice of the intention to make the declaration shall be published by the minister."*

**There is further no evidence that the procedures above were undertaken to degazette the forest for alienation to private individual. Any allocation by the Commissioner of Lands without altering the boundaries of the forest by degazettement was null and void and the Commissioner had no authority to allocate already alienated government land which was reserved for a forest.**

In the case of Norbixin Kenya Ltd v Attorney General Nairobi HCCC No. 1814 of 2002 the court dismissed a claim over land that was reserved for public use and was acquired irregularly. Similarly, in the case of Adan Abdirahani Hassan & 2 others v Registrar of titles, Ministry of Lands & 2 others [2013] eKLR the court held that the Commissioner of Lands could only alienate unalienated government land and not land already set aside for public purpose.

In the case of James Joram Nyaga & Another v A.G & Another (2007 eKLR where the court referred to Section 3 of the Government Lands Act and observed as follows: -

*"The above section clearly limits the power of the Commissioner to executing conveyances on behalf of the President and the provision to the section specifically limits the power to alienate unalienated land to the President. We find and hold that the Commissioner of Lands had no authority to alienate the disputed plot to the Applicants as he purported to do vide the letter dated 18th December 1997. That was the preserve of the President. It follows that the Commissioner of Lands could not have made any grant under the Government Lands Act Cap 280 Laws of Kenya nor could he pass any registrable title under the Registration of Titles Act Cap 281 of the Laws of Kenya."*

I have considered the evidence, submission by counsel and relevant authorities and find that the suit land was not available for alienation as the same was reserved as a forest therefore the allocation by the Commissioner of Lands was null and void.

On the issue of whether the interested party was properly joined in the suit, this had been raised in a preliminary objection and a ruling delivered by Justice Olola. The court is cognizant of the "Mutunga Rules" on the definition of an interested party and how they can be joined

in a Petition. Such a party must have an identifiable stake in the subject matter. The court further has the discretion to join any party at any time if it is of the opinion that it will enable the court to effectually and completely adjudicate upon and settle the questions involved in the suit.

And in this particular petition, I do not see the stake that would have necessitated the joining of the Interested Party in this suit for a mere licence agreement which the Interested Party paid for but never used the suit land due to what it termed as frustration by the Border Police unit.

There is no evidence that the rights of the Petitioner have been violated by the Interested Party, conversely it is the Interested Party who should be agitating for a refund of the unused amount if any. Such would be a normal suit or use of alternative dispute resolution mechanisms and not through a Petition. The Petition therefore fails against the Interested Party. I order that each party to bear their own costs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 24<sup>TH</sup> DAY OF FEBRUARY, 2022.**

**M.A. ODENY**

**JUDGE**

***NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.***