



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CONSTITUTION PETITION NO. 32 OF 2020

(FORMERLY HCCC MBA) NO. 05 OF 2019)

IN THE MATTER OF: ARTICLE 10, 22, 23, 27, 28, 35, 40, 48 & 50 OF THE CONSTITUTION OF KENYA

- AND -

IN THE MATTER OF: SECTIONS 7, 75, 82 & 84 OF THE (REPEALED) CONSTITUTION OF KENYA

- AND -

IN THE MATTER OF: SECTION 3 OF THE GOVERNMENT LAND ACT.

- AND -

IN THE MATTER OF: ALLEGED CONTRAVENTION

OF SECTIONS 75 OF THE FORMER CONSTITUTION

OF KENYA AS READ WITH ARTICLE 40 OF THE CONSTITUTION

OF KENYA 2010 INTENDING ALLOCATION OF THE PARCEL OF LAND

KNOWN AS 17835 SITUATE IN KILIFI TOWNSHIP

AND

IN THE MATTER OF: CANCELLATION OF CERTIFICATE OF TITLE FOR:-

- PLOT NO. 17835/1 REGISTERED IN THE NAME OF FULSION COMPANY LIMITED

- PLOT NO. 17835/2, 17835/6 AND 17835/7 REGISTERED IN THE NAME OF EDWARD MZEE KAREZI

- PLOT NO. 17835/3 REGISTERED IN THE NAME OF KILIFI BEACH PROPERTIES LIMITED.

- PLOT NO. 17835/4 AND 17835/5 REGISTERED IN THE NAME OF CHIERA WAITHAKA

BETWEEN

MOHAMED SHALLY SESE

(Suing as the Administrator of the

Estate of the Late SHALI SESE.....PETITIONER

- VERSUS -

1. EDWARD MZEE KAREZI
2. FULSON COMPANY LIMITED
3. KILIFI BEACH PROPERTIES LIMITED
4. CHIERA WAITHAKA
5. STANBIC BANK(K) LIMITED
(SUCCESSOR IN TITLE OF CFC STANBIC BANK)
6. MINISTRY OF LANDS AND HOUSING
7. THE ATTORNEY GENERAL
8. EMMANUEL KAZUNGU
9. DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENTS

JUDGEMENT

I. PRELIMINARIES.

1. The Petitioner filed before the High Court Mombasa this Constitution Petition on 25th January 2019 through a Petition dated 22nd January, 2019. On 4th January, 2020 the 2nd and 3rd Respondents raised a Preliminary Objection on the jurisdiction of High Court to hear and determine the case. On dint of the Provisions under Section 13(1) of Environment and Land Court Act, No. 19 of 2012, on 6th October, 2020 the High Court delivered its decision whereby the suit was transferred from high Court to this court.

II. THE PETITIONER'S CASE

2. The Petitioner is seeking for the following orders:-

(a) A declaration that the Petitioner is the beneficial owner of the seven (7) acres of land severally registered as Plot No. 17835/1 in the name of Fulson Company Limited Plot No. 17835/2, 17835/6 and 17835/7 registered in the names of Edward Mzee Karezi, Plot No. 1735/3 registered in the name of Kilifi Beach Properties Limited, Plot No. 17835/4 and 17835/5 registered in the names of Chiera Waitthaka.

(b) An order directing the Chief Land Registrar to cancel the Certificate of titles for the said plots and in lieu thereof to issue a certificate of title in the name of the Petitioner.

(c) In the alternative to prayer (b) the 7th Respondent be directed to compensate the Petitioner in the sum of Kenya Shillings One Hundred and Seventy Five Thousand (Kshs. 175,000,000/=).

(d) General damages for mental stress and torture for the violation of the Petitioner's rights.

(e) Costs of the Petition.

3. The Petition is founded on the grounds, testimony and the averments of the 59 Paragraphed Supporting Affidavit of one MOHAMED SHALLY SESE, the Petitioner herein, sworn and dated on 22nd January, 2020 and the sixteen (16) annexures marked as "MSS – 1 to 16" annexed thereto.

He deponed that he is a male adult of sound mind and understanding and being the Petitioner herein hence competent and duly authorized to swear this affidavit on his own behalf hereof.

4. He deponed that he was one of the sons of the late Shali Sese (hereinafter referred to as "The Deceased"). He averred that he was the duly appointed Legal Administrator of the estate of the late Shali Sese, the deceased. To this effects, he annexed a copy of the Grant Letters of Administration to that effect marked as "MSS – 1".

He held that the deceased and his family from the time memorial occupied and settled on all that parcel of Land Known as Land Reference Number 17835 from the year 1954 (hereinafter referred to as "The Suit Land") and whereby the deceased had developed it by building a permanent family homestead with three (3) dwelling units. The Petitioner stated that on 1st April, 1989, the deceased decided to formally apply for the registration of the suit property directly to the then President of Republic of Kenya, His Excellency Daniel Toroitich Arap Moi

(retired) in his favour. He informed court that the said application was supported by a letter dated 11th February, 1992 from the Area Chief confirming that indeed they were the ones who were in physical occupation of the suit property. He deposed that the deceased, his father was guided and directed to apply instead directly apply for the registration of the suit land to the Minister of Lands. Pursuant to that, vide a letter dated 15th June, 1992, his father obliged. He annexed all these correspondences herein.

5. As fate would have it, unfortunately on 5th July, 1995 the Petitioner's father, the deceased, died intestate leaving and entrusting all these documents regarding the suit property to one Mr. Sadi Baru who is the brother to the deceased, to enable him finalize the registration process already initiated by the deceased. According to the Petitioner, Mr. Sadi Baru was illiterate and hence he further re - delegated and entrusted the onerous task of the registration process to one Mr. Edward Mzee Karezi, the 1st Respondent to pursue the allocation and/or registration of the suit property on his behalf and that of the estate of the deceased.

6. According to the Petitioner, the 1st Respondent had to date never gotten the suit property to be registered in the names of the deceased's favour. In the course of time, the Petitioner held that he later on learnt that the 1st Respondent had falsified, fraudulently and illegally the allocation/registration and obtained the title to the suit property in his names instead of that of the Late Shali Sese, the deceased. The Petitioner averred that he was informed by one Mr. James Kafwani Mzungu that the falsification (Forgery) exercise of the suit land registration was undertaken by the 1st Respondent under the supervision of Mr. Emmanuel Kazungu – the 8th Respondent who was then the Land Registrar in charge of Registration of the suit property in the 1st Respondent's favour.

7. He deposed that no ground report was undertaken and/or prepared by the 6th, 7th and 8th Respondents before the 1st Respondent was registered as the owner of the suit property. Further, he held that the 6th, 7th and 8th Respondents never prepared a Deed Plan in favour of the 1st Respondent either before or after he was issued with the title deed making it a nullity and not a good title deed as the same ought to have been issued in favour of the deceased's name.

8. The Petitioner contended that on 16th December, 2004, the 1st Respondent caused the suit property to be sub-divided into seven (7) parcels to wit Plot No. 17835/1, 17835/2, 17835/3, 17835/4, 17835/5, 17835/6 and 17835/7 respectively whereby he transferred the Plot No. 17835/1 to the 2nd Respondent, Plot 17835/3 to the 3rd Respondent, Plot No. 17835/4 and 17835/5 to the 4th Respondent. The 4th Respondent registered a charge over Plot No. 17834 and 17835 with the 5th Respondent.

9. The Petitioner opined that the said Sub-division was illegal and wrongful in that the 1st Respondent never undertook the necessary approval and/or consent from the County Council of Kilifi (Now County Government of Kilifi) and there was a letter dated 15th February, 2008 by the Town Council of Kilifi to that effect annexed and marked as MSS -5". According to the Petitioner, the 2nd, 3rd and 4th Respondents never undertook any due diligence prior to purchasing the suit property – to establish that the family of the deceased were indeed in occupation of the suit property. For these reasons, then the 2nd, 3rd and 4th Respondents were and therefore could not be bona fide purchasers for value without notice for their failure to conduct the due diligence, and that the 1st Respondent had no good title capable of being transferred to them as he was only holding the title deed in trust of the deceased. It was his contention that the 2nd, 3rd and 4th Respondents should simply recover their purchase price if at all they paid it from the 1st Respondent. The Petitioner stated that sometime in the year 2005 the 2nd, 3rd and 4th Respondents illegally and wrongfully evicted their family from the suit property using the assistance of the police from Kilifi Station. They were never issued with any eviction notice nor any court order for that matter and without being given an opportunity to pick their personal items and/or belongings.

10. The Petitioner stated that in or about the year 2005 he lodged a complaint with the Ministry of Lands complaints Commission and thereby investigations on the matter ensued. He stated that the 1st Respondent was summoned but failed to appear. At the same time, the Petitioner lodged a complaint at the Kilifi Police Station – where witness statements were recorded accordingly. Thereafter the 1st Respondent was arrested but for some peculiar unknown reason or justifiable cause he was never arraigned in court nor any charges preferred against him. Instead he was set free as the police indicated they were awaiting the outcome of the complaint lodged before the Ministry of Land Complaint Committee for them to take action of charging him.

11. The Petitioner averred that vide an internal Memo dated 25th September, 2013 the National Land Commission revoked the title for the suit property and directed the Chief Land Registrar to re-allocated the suit property in favour of the deceased – the internal memo is annexed and marked as "MSS -7" consequently the Petitioner was registered as the legal and absolute owner of the suit property – annexed and marked as MSS-8 is a copy of the Certificate of title deed in the names of the Petitioner.

12. Despite the above development, the Petitioner deposed that vide High Court (Mbsa) Judicial Review No. 74 and 75 of 2013 the 2nd and 3rd Respondents applied for the quashing of the decision made by the National Land Commission on the basis that the National Land Commission was only mandated to interfere with disposition in relation to public land and not private Land of which was the subject matter herein.

- On 5th June, 2015, high Court delivered its decision in favour of the 2nd and 3rd Respondents whereby found the National Land Commission acted ultra vires its powers and its the decision revoking the title issued in favour of the 1st Respondent was quashed. A Copy of Judgment annexed and marked as "MSS – 10" being aggrieved by the judgment of High Court, the Petitioner preferring an appeal against it at the Court of Appeal. On 30th September, 2016 the said appeal and an application for review was also dismissed on 6th December, 2018.

13. Eventually, the Petitioner instituted this Constitution Petition before this court. The Petitioner deposed that as a result of the 6th and 7th Respondents as current legal proprietors of the suit property they had violated the deceased's family's rights under the Provisions of Articles 47, 10, 20(3) (b) of the Constitution of Kenya. The Petitioner further held that sometime in the scheme of things Brawny Properties Limited

also obtained a title in respect to certificate of title land No. 35336. After acquiring it they sold the land to Kilifi Beach Properties Limited but for unclear reasons thereof the 6th Respondent refused to register it. Gearing to commit an illegality however, filed a suit being the Misc. Appl. No. 2 of 2008 **“Brawny Properties Limited –Versus- the Senior Registrar of Title – Coast Region and Another”**, the 6th Respondent alleged interest on the land and that the 6th and 7th Respondents were aware that the Petitioner was the genuine owner to suit property and the fact that there was a dispute between him and the 1st Respondent which was pending before the 6th Respondent. The 6th and 7th Respondents deliberately failed to bring out fact that to the attention of the court. Instead, they proceeded to register Brawny Properties Limited and Kilifi Beach Properties Limited as the owners and issued them with Certificate of title deed. The 1st Respondent filed an appeal and succeeded whereby the title deed issued to Brawny Properties and the transfer to Kilifi Beach Limited were revoked. The Petitioner held in summary that:-

- (a) The 6th Respondent erred by issuing two title deeds of the same property to Brawny Properties Limited and the 1st Respondent.
- (b) The fact the deceased had done correspondence dated 1st April, 1989 and 15th June, 1982 with the office of the then President of the Republic of Kenya and Minister of Lands seeking for the Registration of the suit land in his names it was negligent by the 6th and 7th Respondents to have issued title documents to other third parties without verifying the whereabouts of the deceased.
- (c) Failure by the 6th and 7th Respondents to undertake a ground check before allotting land to the 1st Respondent, 4th and 5th Respondents thereof.
- (d) The family of the deceased had always been in physical occupation of the suit property – therefore the actions by the 6th and 7th Respondents was illegal, wrongful and irregular.

The Petitioner averred that as the Petition relates to matters that occurred from the year 2009 and which are still on going, the Respondents had violated the Petitioner rights as enshrined in both the former Constitution and the current Constitution of Kenya promulgated on the year 2010. The Petitioner had held that he is entitled to be registered as the legal and absolute owner of the suit property and all the other titles which were registered over the suit property be revoked forthwith. In the alternative, the Petitioner prayed to be compensated for the full value of the suit property at the market value by the 7th Respondent at a sum of Kenya Shillings Twenty Five Million (Kshs. 25,000,000/=) per acre. He argued that the family had undergone through a lot of mental stress, anguish and torture as they were under the threat of losing their only home and be thrown out in the streets as destitute. He also prayed for general damages for the mental stress and torture they underwent so far as a result. The Petitioner urged this Honorable Court to grant a favorable Judgment to it by allowing all the prayers sought in it's filed Petition with costs.

III. THE 2ND RESPONDENT'S CASE

14. On 26th March, 2019, the 2nd Respondent filed a 23rd Paragraphed Replying Affidavit by one SANGEETA JIWAN sworn and dated 25th March, 2019 and Eight (8) annexures marked as “SJ-1 to 8”) annexed thereto.

He deponed that he was the Director of the 2nd Respondent and duly authorized to swear this affidavit on its behalf. He annexed letter of authority to that effect. He state that he was a stranger to the contents of the allegations on procedural impropriety or fraud committed in the acquisition of the title and/or interests in that parcel of land known as Plot No. Land Reference No. 17835 Kilifi and its sub-divisions thereof.

15. The Deponent held that on 4th October, 2010, the 1st Respondent offered to sell Plot No. 17835/1(Original No. 17835) Kilifi at an agreed purchase price in the sum of Kenya Shillings Eighteen Million (Kshs. 18,000,000/=) and upon carrying out official search and establishing it was registered in the names of the 1st Respondent they entered into a sale agreement terms and conditions stipulated thereof on 14th October, 2010 duly executed and made a 10% deposit of the purchase price. He inspected the physical beacons on the land on 28th October, 2010. There were exchange of the completion documents and the release of the balance of the purchase price being Kenya Shillings Sixteen Million Two Hundred Thousand (Kshs. 16,200,000/=) paid upon the duly execution of the transfer of lease in favour of the 2nd Respondent, payment of stamp duty and registration of the certificate of lease to the 2nd Respondent.

16. The Director herein held that they were fully in adherence to the due diligence. The land re was vacant and undeveloped with no traces whatsoever of any previous occupation thereof as at the time of the purchase of the land by the 2nd Respondent. The Director stated that the 2nd Respondent was completely a stranger to the Petitioner and the 2nd Respondent had since taking possession of the Plot No. 17835/1 (Original No. 17835_ Kilifi. He had never been approached by the Petitioner with regard to ownership or possession of the said plot. He held that the 2nd Respondent was an innocent bona fide purchaser for valuable consideration and absolutely no knowledge whatsoever at the time of due purchase of the suit land as to the previous and/or existing disputes relating to the ownership of the original plot and/or as related to the manner in which the sub-division were delineated from Plot No. 17835/Kilifi.

17. The Director stated based on advise given by his Advocates on record that the Petitioner had failed to demonstrate any clear case of abuse of any of the Constitutional right as to the acquisition, ownership use of possession of any parcel of land and that the Petition filed herein lacked merit. That it was manifestly calculated to re-litigate over a matter conclusively determined in court processes as against the Petitioner.

18. The 2nd Respondent contented that it had successfully and exhaustively vindicated its claim to the legal ownership of the Plot No. 17835/1 (Original No. 17835/Kilifi through the various judicial processes without the threat of the course of the justice being circumvented through a maliciously calculated scheme as purposed through the Petition filed.

The Director deposed that the alleged forgery and double issuance of Certificate of the Title for Plot No. 17835 Kilifi and its culpability would be better determined through the criminal justice system as opposed to a specific culpable party and not by challenging the Sacrosanct title held by the 2nd Respondent to Plot No. 17835/1 (Original No. 17835) Kilifi through the constitution Petition hereof. Further, the 2nd Respondent stressed they were total strangers to the alleged evictions of the Petitioner and at no time had the report been made to police to their knowledge.

19. He deposed that the alleged sub-division of the parcel of the suit land was procedurally undertaken and in a process duly recognized by the relevant Government Department and the County Government of Kilifi to the extent that the 2nd Respondent had subsequently purchased the plot and able to make payments of the land rent and the land rates both to the National Government and to the County Government of Kilifi respectively.

20. The Director blamed the Petitioner for the laxity and manner in which he had attempted to vindicate the beneficial interest of the family of Shali Sese from its inconvenience and representation which had betrayed its true and bona fide intentions in filing the Petition. He field that there had been a lot of non-disclosure and obvious misrepresentation of material facts touching on the ownership and possession and the sub-division of the suit property. The 2nd Respondent held that the Petition was frivolous, incompetent, vexatious and otherwise an abuse of the due process of the law and court and should be dismissed costs.

IV. THE 3RD RESPONDENT'S CASE

21. On 5th April, 2019, the 3rd Respondent filed a 24 paragraphed Replying Affidavit sworn and dated 24th March 2019 by one MR. ISHAK MOHAMED KASSIM HAJI IBRAHIM and nine (9) annexures marked as "IMKHI – 1-9" annexed thereto. He deposed that he was the Director to the 3rd Respondent and duly authorized to swear this affidavit. He attacked a letter of authority to this effect to the affidavit marked as "IMKHI – 1.

22. He held being a stranger to the contents of the said Affidavit by the Petitioner in relation to any alleged procedural impropriety or fraud committed in the acquisition of the title and/or interest in the parcel of land and/or as related to the alleged forgery of the titled documents and of Plot Land Reference No. 17835 Kilifi and the sub-division on the part of the 1st Respondent.

He stated that sometimes in the month of September, 2010, the 1st Respondent offered the Directors of the 3rd Respondent to sale the suit property being sub-divided Plot No. 17835/3 (Original No. 17835) Kilifi at an agreed purchase price of Kshs. Kenya Shillings Eight Million Five Hundred Thousand (8,500,000/=). Upon conducting of an official search at the land Registry offices at Mombasa and establishing that the land was registered in the names of the 1st Respondent, they duly executed a sale agreement on 14th October, 2010 The Respondent was paid the 10% deposit of the purchase price being a sum of Kenya Shillings Eight Hundred and Fifty Thousand (Kshs. 850,000/=). Later, on 22nd September, 2010 he was paid the balance of Kenya Shillings Seven Million Six Hundred and Fifty Thousand (Kshs. 7,650,000/=) and the completion documents were exchanged. Eventually, the suit land was transferred to the 3rd Respondent upon making all the statutory dues such as the stamp duty. The 3rd Respondent was issued with a Certificate of Title in their names.

23. The Director, stated in summary that the 3rd Respondent bought the suit land upon exercising due diligence necessary in the ascertainment of the vendor's title to property and upon holding a physical inspection of the property and the beacons thereof. He held that the property was unoccupied vacant and undeveloped with no traces whatsoever of any proviso occupation as at the time of the purchase. The Deponent deposed that the 3rd Respondent was a stranger to the Petitioner and has since taken possession whereby they had never been approached by the Petitioner with regard to the issues on ownership of the suit land whatsoever.

He held that the 3rd Respondent had since undertaken extensive development onto the property. They had no knowledge of any previous land disputes or any existing disputes over Land ownership of the suit property.

He held the 3rd Respondent was an innocent bona fide purchaser for variable consideration and with absolutely no knowledge whatsoever at the time of due purchase as the previous or existing dispute.

24. He averred that the Petitioner had not demonstrated any clear case of abuse of any of the constitutional rights as to the acquisition of ownership, use or possession of any parcel of land and that the Petition was filed merely without any merit and was manifestly calculated to frustrate the 3rd Respondent's from the enjoyment of its proprietary rights over the suit plot.

He held that they were willing to exhaustively vindicate its claim to the legal ownership of the plot through the various judicial processes without the threat of course of justice being circumvented through a maliciously calculated scheme through the filed Petition.

25. The Director deposed that the 3rd Respondent believed the alleged forgery and double issuance of the Certificate of Title to the suit land and the culpable criminal liability of any party would best be handled through the established Criminal processes and not through challenging the sacrosanct of the title held by the 3rd Respondent through the filed Petition.

He held that the 3rd Respondent was a total stranger to the allegation of evictions nor complaint made at the police on their dispossession over the suit property. Meted upon the Petition and the family of the deceased.

26. He held that the sub-division process to the suit land belonging to the 3rd Respondent was undertaken procedurally with the full consent and approvals by the Government Departments and the County Government of Kilifi to the extent of the 3rd Respondent purchasing it. They were regularly paying all land rates and rents as required by law.

The Director blamed the Petitioner for its inconsistency of representation in relation to the manner of vindicating for the beneficial interest in the suit land by the 3rd Respondent for the family of Shali Sese. He reputed the fact that the 3rd Respondent having ever dealt with Brawny Properties Limited in regard to the Land transaction for the suit property. The 3rd party was never a party to the issuance of the order for the double title to the suit property and in addition to any court process as adduced by the Petition involving Brawny Properties Limited.

27. He contended that the Petitioner and its pleadings were manifestly replete with deliberate non-disclosure and misrepresentation of material facts touching on the ownership and possession of the suit property and the sub-division thereof all intended to circumvent the course of justice and to occasion prejudice to the 3rd Respondent.

The Deponent held that the Petition was frivolous Incompetent, vexatious and an abuse of the due process of his Honorable court and he same ought to be dismissed with costs.

V. THE 9TH RESPONDENT'S CASE

28. On 6th March, 2020 through the law firm of Messrs. Gulyenya Jonathan & Company Advocates for the 9th Respondent who filed an application under a Certificate of urgency under the provisions of Order 40 (1) Order 1 Rule 1 and 13, order 51 Rule 1 of the Civil Procedure Rules 2010 Article 50 (1) of the Constitution of Kenya 2010 and sought for leave of court to be joined in the case as the intended 9th Respondents – one Mr. Gertnido Henricus Antonius Van Dijck & Gerturda Josephina Mana Gornella OP Het Veld holding that they were the registered owners to the suit property No. land Reference No. 17835/6 which had been cited in the suit as belonging to one EDWARD MZEE KAREZI – the 1st Respondent. Eventually the said leave was granted accordingly. They were joined as the 9th Respondent in this matter.

On 6th March 2020, the intended 9th Respondent - one Gertrudo Henricus Antorious Maria Van Dijck filed a 14 paragraphed supporting affidavit sworn and dated on 6th March, 2020 and four (4) affidavits marked “ G1 to 4” annexed thereof. He averred that the names **Gertrudo Henritus Antoniou Maria Van Dijck and Prudy Gham Van Dijck** refer to one and the same person and that was him. He stated having learnt about the filed Petition through a neighbour and was apprehensive that the orders granted on it would affect him adversely since he was the legal owner to all that parcel of land known as Land Reference No 17835/7 together with one **Gertruda Josphina Maria Cornella Op Het Veld** also known as **Mariaon DJack Op Het Veld**.

29. He deposed that the property was bought through the law firm of M/s Musyimi & Co. Advocates and was registered in their favour. He attached copies of the transfer document was marked as “G-1”) to the affidavit. He held that the certificate of the title deed was issued to both of them - whose copy he attached and marked as “G-2”. Thus he held they were the bone fide purchasers and had a clean title deed and had been paying land rates and rents to the county of Kilifi and issued with clearance certificate. He held that through the official searches dated 9th May, 2005 and 10th September 2009 produced by the petitioner indicated the property – Land Reference No 17835/5 Kilifi was registered in the name of Edward Mzee Karezi is a misrepresentation of facts as property referred to as Land Reference No 17835 Kilifi title No CR 37185 measuring 2.88 Ha freehold allegedly belonging to Edward Mzee Karezi did exist as the said title was relinquished and seven (7) others titles were created through sub-division and where their title was hired off from the original title deed. They had never sold their property to any other person since they bought it.

VI. The grounds of opposition by the Office of the Director of Public Prosecution.

30. On 22nd May, 2019 the Office of the Director of Public prosecution (Hereinafter referred to as “The ODPP”) filed grounds of opposition dated 3rd June, 2019. They held that both the applicant and the Petitioner were pre mature, non - starter and lacked merit as they had not demonstrated how the 9th Respondent - ODPP had participated in in any violations and/or omission in relation to its mandate as outlined under the provision of Article 157 of the Constitution of Kenya 2010, it held that if anything the petitioner had avoided enjoining the police - Kilifi police station who evicted the family of Shali Sese from the suit property without notice and/or court order of eviction in the year 2005 as alleged from the filed Petition and not the ODPP. The Petitioner had to shown how the 9th Respondent was connected to such eviction within this legal mandate it further held that he Petitioner had not demonstrated that if the matter was reported at Kilifi police station in the year 2005 with his witness that it was the Honorable Attorney General then who had the knowledge or involved. They held that the ODPP had no such knowledge of the alleged matter which the Petitioner has even failed to provide the occurrence book (OB) number in his pleadings it further held that the Petition has failed to provide the particulars of the violation infringement and threshold of his fundamental rights caused by the ODPP hereof

V. SUBMISSIONS

31. On both diverse days the 17th December 2019, and 17th June 2021 while all the parties were in court it was agreed by consent and court adopted and directed that the Petition be disposed off by way of written submissions. On 17th June, 2012 by consent the suit against the ODPP was, marked as withdrawn. Subsequently, on 9th December 2021 all the parties had fully complied with the court’s direction and filed their written submissions and a judgment date for 17th January, 2022 reserved by the honorable court.

A. THE SUBMISSION BY THE PETITIONER.

32. On 8th October, 2021, the law firm of Messrs. Gikandi and Company Advocates for the Petitioner filed their written submission. The Learned Counsel submitted by raising several issues which they wished this Honorable court to take into consideration. These were:- Firstly, whether the suit property was unlawfully and/or illegally registered in the names of 1st Respondent. They held the Petitioner’s family had occupied the suit property from the year 1954 and on 17th April 1989 they applied for allocation of the suit property to the President of the Republic of Kenya the then Honorable Daniel Toroitich Arap Moi (Retired). They submitted that as a reply to their letter by a letter dated

12th July 1989 the Petitioner's father was advised to channel his request through the Ministry of Lands. Unfortunately as fate would have it, the Petitioner's father died on 5th July, 1995 leaving all the documents regarding the suit property to his brother Mr. Said Banu so that he could finalize the registration exercise. However, Mr. Banu being illiterate, he entrusted the 1st Respondent to pursue the matter of the registration of land on his behalf. Instead of the 1st Respondent handling the matter on behalf of the Shali Sese family, he cleverly and irregularly altered all the application documents and replaced the names Shali Sese with his name.

The Learned Counsel submitted upon investigations being conducted by the National Land Commission, it concluded that the 1st Respondents had falsified the application documents by replacing his name with that of Shale Sese. Indeed, the said investigation report noted that out of sheer hurry and confusion the fraudster forgot to change his age and maintained 65 years as his age while according to his details contained in national identity card he was born in 1949 which means by the year 1989 he ought to have been 40 years and not 65 years as alleged.

The Learned Counsel held that for these reasons the National Land Commission was convinced the fraud was evident and hence proceeded to revoke and cancel the Certificate of Title deed issued to the 1st Respondent and the subsequent sub-division and transfers effected to the 2nd, 3rd, 4th, 10th, 11th and 12th Respondents respectively. The Learned Counsel underscored the fact whatsoever that this decision by National Land Commission was quashed by **Mombasa High court Judicial Review No 74 and 75 of 2013**. Nonetheless, the Learned Counsel noted that the finding that the 1st Respondent illegally transferred the property was however not upset.

33. Further, they argued that the affidavit of Mr. James Kajwani Mzungu confirmed how the 1st Respondent undertook the said fraudulent action with the help of Mr. Emmanuel Kazungu who was the then Land Registrar. He stated that Kajwani, he 1st Respondent erased the names of Shali Sese using a white out and indicated his name with the assistance of the Land Registrar. Hence in conclusion the transfer of the registration of the suit property to the 1st Respondent was by and large illegal and/or unlawful. According to the Learned Counsel this evidence had not been rebutted and/or controverted by any of the parties herein.

In order to buttress this point, the Learned Counsel relied on the decision of **Munyu Maina - Versus - Hiram Gathui Maina (2013) eKLR** to the effect where the Court of Appeal stated -;

“Our consideration of the judgment reveals that the Learned Judge erred in failing to appreciate that the Respondent had evidential burden to prove how he acquired the suit property in order to dislodge the Appellants testimony that the suit property belonged to their deceased father and that it was their deceased father who put both parties in possession of this property to be shared equally. It is true that the legal burden to prove the existence of the trust rests with the Appellant. However, the moment the Appellant testified that the suit property belonged to their deceased father, the evidential burden shifted to the Respondent to dislodge this item”.

34. They further submitted that upon the Petitioner producing the evidence of the fraudulent action committed by the 1st Respondent with the assistance of the 6th Respondent, the burden of proof shifted to the Respondents to controvert the said evidence but which none of them did so and therefore this evidence by the Petitioner remained intact and admitted as the gospel truth.

They concluded by holding that the 1st Respondent caused the registration and sub-division of the suit property illegally, irregularly and hence was void for all purposes.

35. Secondly, the Learned Counsel submitted the 1st Respondent never passed a good title to the 2nd, 3rd, 4th, 10th, 11th and 12th Respondents as he acquired it fraudulently and corrupt means as stated above. They held that then Land Registrar - Emmanuel Kazungu was paid by the 1st respondent so as to ensure that the suit property was illegally and/or fraudulently transferred to him.

On this point they cited several court decision being - **Arthi Highway Development Ltd. –Versus- West End Butchery Ltd and Others (2015) eKLR**, **Benjamin Leonard Macfry –Versus- United Africa Company Ltd; Elijah Makeri Nyangwa'ra –Versus- Stephen Mungai Njuguna and Another 2013 eKLR**; to the effect that the argument of bona fide purchaser for the title does not hold water in light of the issues of illegality demonstrated by the Petitioner.

36. Thirdly the Learned Counsel submitted that the Certificate of Title registered in the 2nd, 3rd, 4th, 10th, 11th and 12th Respondents ought to be cancelled. They cited the Provisions of Sections 75 and 84 of the former Constitution of Kenya which fundamentally guaranteed the right to private property as these acts took place before the year 2010 and Section 74 of the former Constitution of Kenya which fundamentally guaranteed the right to humane treatment. The Petitioner right to private property was heavily destroyed by the actions of 1st and 6th Respondents offices in contravention of both Section 75 of the former Constitution and Articles 28, 29 and 40 of the Constitution of Kenya 2010 on how they treated the family of the Petitioner and their property without proper humane dignity respect and decorum through the evictions.

37. Finally, the Learned Counsel submitted that in the alternative, the Petitioner should be compensated the sum of One Seventy Five Million (Kshs. 175,000,000/=) to be footed and/or borne solely by the 6th and 7th Respondents for the loss of the suit property. They submitted ah the 6th Respondent was aware about the present of the Shali Sese family on the suit property the deceased having applied for the registration to the President of the Republic of Kenya but the 6th Respondent advised the family to re-direct their request to the Ministry of Lands. Despite all these the 6th Respondent still never objected the alteration of the names of Sese with that of the 1st Respondent and the subsequent sub-division and transfers to the other Respondents and issuance of the certificate of title deed to them. The evidence of James Kajwani Mzungu confirmed how the 1st Respondent under took fraudulent action with the help of Mr. Emmanuel Kazungu the Land Registrar then. The 6th Respondent had never rebutted the said evidence or at the very least call the said Mr. Kazungu as a witness to explain the basis upon which he issued the certificate of title deed to the 1st Respondent. On this point they relied on the decision of **“Linus Nganga Kiongo & 3 Others -**

Versus- Town Council of Kikuyu (2012) eKLR where Hon Justice G. V. Odunga clearly held that when a party fails to controvert evidence given by the opposite party, the same results in the uncontroverted evidence as the truth in respect of the particular fact. **And the case of Motex Knitwear Limited – Versus- Gopitax Knitwear Mills Limited (Nbi Milimani) HCCC No. 834 of 2002; and Trust Bank Ltd – Versus - Paramount Universal Bank Limited and 2 others Nbi (Milimani) HCCC No. 1243 of 2001.**

38. They held that the 6th Respondent had a legal obligation to explain the basis upon which the suit property was allocated to the 1st Respondent yet it was the Sese family who were on the ground and it was the late Shali Sese who had initially applied to the President of the Republic of Kenya to be allocated he said property. The 6th Respondent did not undertake any due diligence including undertaking a ground status report before the suit property was allocated to the 1st respondent was required of him under the law. Had due diligence been undertaken the 6th Respondent would have realized that the person on the suit property was Shali Sese and his family and not he 1st Respondent . The 6th Respondent having failed to undertake a ground status report as required under the law, the entire allocation exercise was rendered unlawful. They relied on the decision of the **Court of Appeal No 24 of 2019 - Abdulkhali Mohammed Abdulkhalik & 2 Others -Versus - Josiah Kaguta & Another** on undertaking a ground status report before allocating the property to the Appellants.

39. The Learned Counsel relied on the Provision of Section 134 of the Registered Land Act (now repealed) Cap 300 on the damages to the family and the illegal allocation thereby disinheriting them and denial from using the land for over 20 years and Article 23 of the Constitution of Kenya

The Learned Counsel submitted that the Petitioner instructed a valuer who produced a report wherein the suit was valued at a sum of Kenya Shillings one Seventy Five Million (Kshs 175,000,000/=) and as such the Petitioner is seeking for compensation for he said sum.

They prayed for the petition to be allowed with costs.

B) THE 2ND AND 3RD RESPONDENTS SUBMISSIONS.

40. On 25th October, 2021 through the law firm of Messrs. Sherman Nyongesa & Mutubia Advocates filed written submissions dated 22nd October, 2021 for the 2nd and 3rd Respondents.

The Learned Counsel submitted that that on mainly on two (2) broad issues. These were;-

Firstly whether the Petitioner was entitled to the relief sought in the Petition. Which they reiterated the petition was incompetent frivolous, vexatious and otherwise and abuse of the due process of this Honorable court. They submitted the same ought to be dismissed with costs as the Petitioner had not demonstrated any clear case of abuse of any of his constitutional rights as the acquisition, ownership, use or possession of the suit property.

41. The Learned Counsel argued that the 2nd and 3rd Respondent submitted that the alleged forgery and issuance of the Certificates of Title for the suit property Land Reference No 17535/Kilifi and the culpable criminal liability of any party involved in the forgery were better determined through the criminal justice system as against a specific culpable party and not otherwise by the challenge the sacrosanct title held by the 2nd and 3rd Respondents to the plot sub-division on 17835/1 and No 17835/3 Kilifi respectively through the petition filed herein on this point they relied on the decision of **Grays Jepkemoi Kiplaget -Versus- Zakayo Chepkonga Cheruyoit (2010) eKLR and Bernard Murage -Versus- Fine Sewe Africa Limited and Others (2015) eKLR in which court held;-**

“Not each and every violation of the law must be raised before the High Court as a constitutional issues. Where there exist and alternative remedy through statutory law; then it is desirable that such a statutory remedy should be pursued first”

The Learned Counsel held that the Petitioner had deliberately failed to disclose that there exist other suits on the same suit property and on the same issue, being **Judicial Review Application No.74 of 2013** which suit have been already been conclusively determined. They held the Petitions was manifestly replete with deliberate non-disclosure and obvious misrepresentation of material facts touching on the ownership and possession of the suit land and sub-division all calculated to circumvent the course of justice and to prejudice the 2nd and 3rd Respondents.

42. Secondly, the Learned Counsel inquired whether the 2nd and 3rd Respondents acquired lawfully and legitimate title to the suit land and No 17835/1 and 17835/3 Kilifi.

They cited the provision of the Section 26 (1) of the Land Registration Act of 2012 and held that the 2nd and 3rd Respondents would only lose their title if it was proved to have been acquired fraudulently and/or with the knowledge of fraud at the time of acquiring the said property which the knowledge they argued the Petitioner failed to prove.

The Learned Counsel argued that the 2nd and 3rd Respondents had demonstrated having acquired he suit property following the due process and never participated and/or with any knowledge of fraud and therefore they held a valid and good certificate of title deed.

43. In the final analysis, the Learned Counsel, contended that if at all there had been any fraud which they denied by the 1st Respondent the 2nd and 3rd Respondents were innocent bona fide purchase for valuable consideration for the two plots. They carried out all the due diligence by conducting the requisite searches at the lands office inspection and physical bacons and there was no encumbrances but an indication the land was registered and owned by the 1st Respondent and there was no way they would have known that the projection was marred with any irregularities or forgery as alleged by the Petitioners.

44. Besides they argued the property was vacant and undeveloped with no traces whatsoever of any previous occupation as at the time of acquiring the said two properties. The 2nd and 3rd Respondents after acquiring took possession and had never been approached by the Petitioner in regard to its ownership or possession of the said properties prior to filing the Petition. They held the 2nd and 3rd Respondents were strangers to the Petitioner. To buttress their case they relied on the Uganda case of *Katende -Versus- Haridar Company Limited (2008) 2 E.A 173 Samuel D. Omwanga Angwenyi -Versus- National Land Commission & 2 Others (2019) eKLR , Shimoni Resort -Versus- Registrar Title & 5 Others (2016) eKLR*

The upshot of all these they argued they were innocent buyers and never participated in the fraudulent dealing of their title deed and the Petition should be dismissed with costs to the 2nd and 3rd Respondents.

VI. ANALYSIS AND DETERMINATION

45. I have keenly and critically assessed all the pleadings being the Petition by the Petitioner, the Replying Affidavits and the grounds of opposition by the 1st, 2nd, 3rd and 4th Respondents, the well-articulated written submissions by the parties herein, the cited authorities and the relevant provisions of the law.

In order to arrive at an informed, fair, and just decision I have framed the following salient issues as a guide. These are;

(a) Whether the Constitution Petition filed by the petitioner meets the well-established threshold for the well-known Constitutional Set up;

(b) Whether the 1st Respondent participated in fraudulent and/or corruptly means to have acquired the certificate of title to the suit property?

(c) Whether the 2nd, 3rd, 4th, 5th, 10th and 11th Respondents acquired their title deed as innocent bona fide purchasers for valuable consideration and notice?

(d) Whether the parties herein are entitled to the relief sought?

(e) Who will bear the costs of the Petition hereof?

ISSUE No. (a) Whether the Constitution Petition filed by the Petitioner

meets the well-established threshold for the well-known Constitutional

Set up:

Brief Facts.

46. Before embarking on a detailed analysis of the case culminate to a final judgment , may I extrapolate on the facts briefly. From the filed pleadings, it is stated that sometimes in the year, 1954, one Mr. Shali Sese, the deceased herein, with his family settled and occupied on the suit land being Land Reference No 17835 within the County of Kilifi measuring 2.88 HA (approximately 7.1136 acres).

The deceased was the biological father to the Petitioner herein. The deceased developed the property by building permanent structures on it. On 1st April 1989, vide a letter dated 11th February 1992 from the Area Chief confirming the deceased occupation of the land, the deceased applied for the registration of the suit property in his favour to the Hon President of the Republic of Kenya. However, vide a letter dated 15th June 1992 he was directed to make his request directly to the Ministry of Lands.

As fate would have it unfortunately on 5th June, 1995, the deceased passed on leaving all the relevant registration documents with his brother - called Sadi Banu so that he could finalize the registration process the deceased had initiated.

47. From the given facts, Mr. Banu was illiterate and could not do much with regard to the registration of the land on his own. Instead he entrusted Mr. Edward Mzee Karezi - the 1st Respondent herein with the responsibility to pursue the allocation and registration of the suit property on behalf of the deceased. Further from the facts availed, it is alleged on the contrary the 1st Respondent caused the suit land to be registered in his name, working in conspiracy and cahoots with the officers at the Ministry of Lands - 6th Respondent and particularly the 8th Respondent white washed the names of the deceased substituted it with his. This became a total game changer to the matter before hand. Subsequently, the 1st Respondent caused the sub-division of the suit land into seven (7) portions and which were sold off on diverse dates to the 2nd, 3rd and 4th Respondents.

48. The Petitioner applied for the grant letter of administration in order to preserve the deceased estate. In the course of time - year 2005, the deceased family and their properties was evicted from the suit land by the Kilifi Police Officers at the behest of the Respondents. The Petitioner lodged a complaint with the Complainant Committee at the Ministry of Lands and investigations ensured through the 1st Respondent was never co - operative as he willfully refused to participate in that process. He further lodged a complaint at the Kilifi Police Station together with his witnesses. He was advised to await the outcome of the Complaint Committee.

On 25th September, 2013 the National Land Commission having heard the matter made a decision to have all the title deeds issued to the

Respondents revoked and cancelled on the basis they had been issued fraudulently and the same be registered in the names of the Petitioner.

Being aggrieved by that decision on 25th September, 2013 the Respondents instituted a Judicial Review – Misc. Appl. No 74 and 75 of 2013 at Mombasa, to have the aforesaid decision by the National Land Commission quashed. On 5th June, 2015 they were successful. Although the Petitioner who came to learn of his judgment late tried preferring an appeal at the court of appeal without success. It is for this reason that he decided to institute the instant Constitution Petition seeking the orders as stated out hereof.

49. As a matter of course, the Constitution of Kenya under Article 259 (1) provides a guide on how it should be interpreted as such:-

This Constitution shall be interpreted in a manner that:-

a) Promotes its purposes, values and principles;

b) Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

c) Permits the development of the law; and

d) Contributes to good governance.....”

This Court must give a liberal interpretation and consideration to any provision of the Constitution and have regard to the language and wording of the Constitution and where there is no ambiguity attempt to depart from the straight texts of the Constitution must be avoided.

Further, it is important to fathom that the Constitution is “a living instrument having a soul and consciousness of its own”. It must always be interpreted and considered as a whole with all the provisions sustaining and coordinating each other and not destroying the other.

50. A Petition ought to follow the principles laid down of drafting Constitutional Petitions. Based on the principles set out in the edit of The Court of appeal case of *the Mumo Matemu – Versus – Trusted Society of Human Rights Alliance & Another (2013)eKLR* provided the standards of proof in the Constitutional Petitions as founded in the case of *Anarita Karimi Njeru –Versus - Republic [1980]KLR 154 [1979] eKLR. Trevalyan J (as he then was) and Hancox J (as he then was)* stated as follows:

“We would however again stress that if a person is seeking redress from High Court on a matter which involves a reference to the Constitution it is important (if only to ensure that justice is done to his/her case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.” where the court is satisfied that the Petitioner’s claim were well pleaded and articulated with absolute particularity. It held:-

“Constitutional violations must be pleaded with a reasonable degree of precision.....”

Further, in the *“Thorp – Versus – Holdsworth (1886) 3 Ch. D 637 at 639, Jesse, MR* said in the year 1876 and which hold true today:

“The whole object of pleadings is to bring the parties to an issue and the meaning of the rule.....was to prevent the issue being enlarged which would prevent either party from knowing when the cause came on for trial what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues and thereby diminish expense and delay especially as regards the amount of testimony required on either side at the hearing”.

In other words, cases cannot be dealt with justly unless the parties and the Court know the issues in controversy. Pleadings assists in that regard and are a tenet of substantive justice, as they give fair notice to the other party.....”

51. In direct application of these set out principles for filing a Constitutional Petition to this case, the Honorable Court wishes to address itself on two broad issues. Firstly, has the Petition filed by the Petitioner herein pleaded with reasonable precision as founded in the *Anarita Karimi (Supra)*. To respond to this query, the honorable court indeed totally concurs and satisfied that the Petitioner have dutifully complied and fully met the threshold of reasonable precision in pleadings for instituting this Petition against the Respondents herein and pleading for the prayers sought.

52. Now embarking on the issues raised under this sub-heading. All said and done, this court underscores the fact that land in Kenya is a very emotive and sensitive matter. It is the source of livelihood to many and hence was relied on immensely thus any land dispute has to be handled with vast circumspect to avert creating any chaos or disarray situation arising. Under the provision of Article 61 of the Constitution of Kenya, land has been classified into three (3) categories. These are Public, Community or Private land. First and foremost there is need to appreciate the legal framework on land in Kenya. From the time of attaining independence of the Country, there has been very clear methods and procedures of the acquisition of land to public, individual and community categories. The Provisions of Section 7 of the Land Act No. 6 of 2012 provides the said methods as follows:

S. 7 Title to land may be acquired through:-

i. Allocations;

ii. *Land Adjudication process;*

iii. *Compulsory acquisition;*

iv. *Prescription;*

v. *Settlement programs;*

vi. *Transmissions;*

vii. *Transfers;*

viii. *Long term leases exceeding Twenty one years created out private land; or*

ix. *Any other manner prescribed in the Act of Parliament.*

55. In the instant case, the 2nd, 3rd and 9th Respondents have held they acquired their land through purchase and transfer as private property from an innocent bona fide purchasers for valuable consideration on notice from the 1st Respondent. Being a major issue in the matter, I shall be assessing in more depth hereinbelow. In Kenya, by dint of Section 107 of “**The Land Registration Act**” of 2012, the law applicable to this matter here for title deed that was issued in the years 1954 would be Registered Land Act, Cap. 300 (Now Repealed) and the relevant provisions being Sections 27, 28 and 143 of the Registered Land Act, Cap. 300.

Section 27(a) “Subject to this Act (a) the registration of a person as the proprietor of land shall be vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”

Section 28 of the Act provides that:-

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

Under Section 143 (1) of the Act provides thus:-

“Subject to Sub Section (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake

(2) The register shall not be rectified so as to affect the title of a particular who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default”

56. Nonetheless, the root of the title is critical in any land legal dispensation. The effect of the Registration of Lands is founded in the provisions of Section 24 of “**The Land Registration Act**’ which provides as follows:-

“Subject to this Act – The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenances thereto and;

To advance on this legal proposition, the efficacy, legitimacy and legality of the rights of the legal land proprietor is created through registration. The Certificate of Title and in this case Lease is deemed to be the “*prima facie*” evidence of the stated registration. The Certificate of Lease held by the land owner is protected under the Provisions of Law- Sections 25 (1) and 26 (1) of “**The Land Registration Act**” No. 3 of 2012 provides as follows:-

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

57. This fact is strengthened by the following decisions - “*ELC (Nku) No. 272 of 2015 (OS) – Masek Ole Timukoi & 3 others –Versus- Kenya Grain Growers Ltd & 2 others and “ELC (Chuka) No. 110 of 2017 – M’Mbaoni M’Thaara – Versus- James Mbaka. And in Civil Appeal 60 of 1992 – ‘Dr. Joseph M. K. Arap Ngok –Versus- Justice Moijo Ole Keiwua’* where courts has held that:-

‘It is trite law that land property can only come into existence after issuance of a letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to Provisions in the Act under the property is held.’

58. Be that as it may, the main bone of contestation in this instant suit is the allegations meted by the Petitioner against the 1st, 2nd, 3rd, 4th,

5th, 6th, 7th, 8th, 9th, 10th and 11th Respondents herein that they acting in close collusion to illegally, wrongfully and through fraudulent means acquired the Certificate of the title deed to the original title deed which legally and absolutely belonged to the deceased and blatantly caused the resultant sub divisions to the suit land. Eventually, the said title deeds were purportedly transferred by the 1st Respondent to the 2nd, 3rd, 4th and 9th Respondents who ostensibly claim to have legally and rightfully acquired the title deeds as bona fide innocent purchasers for value on notice upon conducting due diligence and never detected any encumbrances registered against these legal documents at the Land Registry whatsoever.

59. In order for this Honorable Court to effectively deal with the afore stated legal issue of contention, I wish to cite the provisions of Section 26 (1) of the Land Registration Act Verbatim:-

“(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.”

In the case of “**Joseph Komen Somek - Versus - Patrick Kennedy Suter ELC Eldoret Appeal No. 2 of 2016 (2018) eKLR** - clearly spells out the purpose of above provisions of Section 26 (1) (b) is to protect the real title holders from being deprived of their title by subsequent transactions. However, where the Certificate of Title or in this case Lease is doubtful suspect or obtained by fraud or forgery unprocedurally, illegally or corrupt means or by mistake or omission as envisaged under the above Provision of Section 26 (1) of Land Registration Act, the Provisions of Section 80 (1) & (2) of Land Registration Act for the cancellation and rectification of the title comes to play – “**Peter Njoroge Nganga – Versus - Kenya Reinsurance Corporal Limited & Others” ELC (Kjd) No. 204 of 2017.**”

60. The concept of bona fide innocent purchaser for value has been well captured in the now famous case of “**Katende Haridar & Company Limited (2008) 2 EA 173**, where the Court of Appeal of Uganda held that:-

a) “For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the properly offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine as was held in the case of Hannington Njuki Vs. William Nyanzi, High Court Civil suit number 434 of 1996, must prove that:-

b) He holds a Certificate of title;

c) He purchased the property in good faith;

d) He had no knowledge of the fraud;

e) He purchased for valuable considerations;

f) The vendors had apparent valid title;

g) He purchased without notice of any fraud; and

h) He was not party to the fraud.

61. Suffice it to say, the above legal position seem to be changing. In the case of “**Mwangi James Njehia & Another – Versus – Simon Kamanu**’, *Civil appeal no. 177 of 2019*, the Court of appeal on this matter held:-

“We nonetheless wish to state that the law, including case law, is not static and the above requirement which were entered over twenty (2) years ago cannot be said to have cast in stone. We hold the vie that (e) above will need to be revisited and the word “apparent” be done away with altogether. We say so because in the recent past and even presently, fraudsters have upped their game and we have come across several cases where Title deeds manufactured in the backstreets have, in collusion of officers in the land registries, been transplanted at the Lands Office and intending buyers have duped to believe that such documents are genuine and on the basis they have ‘Purchased’ properties which later turn out to belong to other people when the correct documents mysteriously reappear on the register or the genuine owner show up after seeing strangers on their properties waving other instruments of title. It is prevalence of these incidents that have necessitated the current overhaul and computerization of the registration systems at the Land registries at Nairobi.....”

62. This Honorable Court while in seizure and full control of the root of the title is fully satisfied that the original title deed was in the names of the deceased. Undoubtedly, the title for the deceased having acquired it and in physical possession by the deceased and his beloved family lived on the suit land from the year 1954 was never challenged nor controverted by any of the Respondents herein. Therefore, this Honorable court is fully satisfied and concludes that the suit land belongs to the deceased and ought to be restored to them henceforth. In saying so, the Court sums up the reasons as follows.

63. Firstly, sometimes in the year 1989, he opted on having it formally registered in his the names by applying directly to the President of the Republic of Kenya but to be directed to the Ministry of Lands. Its upon his demise that the 1st Respondent herein took advantage of the

illiteracy and humility of the deceased's family and with the assistance of the 8th Respondent he got the land irregularly and wrongfully registered in his names. The Contents of the affidavit by one James Kajwani Mzungu is extremely detailed and graphic with facts on how the falsification of the title took place.

64. Secondly, ideally, for the registration of the suit land to the 1st Respondent to have been legal and regular, one would have expected an exercise of the ground report to have been undertaken and prepared by the 6th, 7th and 8th Respondents herein. This report was not produced as clearly it never exists. Secondly, in addition there was no Deed Plan prepared for the support of the Grant/Title to be issued in favour of the 1st Respondent and the subsequent sub – divisions into seven (7) parcels. Thirdly, this Court was not shown any copies of the Consents or approvals for any of these transactions on the land having been obtained from the County Government of Kilifi or other relevant authorities. Fourthly, the Petitioner testified elaborately having been evicted from the land and through the use of the police. Once again this Court was never shown any eviction notices displayed or served upon the Petitioner but instead destroying his property and making them destitute. Fifthly, the lethargy by the police from the Kilifi police station in taking any action against the 1st Respondent and other persons involved in these acts of omission and commission even after a formal complaint being lodged and statements made leaves this court with great suspicion and condemnation. Sixthly, this Court has taken judicial notice to the fact that the High Court in its decision in quashing the decision of the National Land Commission for having surpassed its legal mandate, it carefully stayed away or never touched on the legality and irregularity of how the 1st Respondent acquired the title deed to the suit land. Indeed from the documents presented to the National Land Commission, the 1st Respondent forgot to change his age as it continued to read 65 years. From the contents of his national identity card, it indicates the 1st Respondent was born in 1949 hence by the year 1989 he ought to have been 40 years old. Talk of day broad light forgery. In the given circumstances and on preponderance of probability, the Petitioner has been able to prove his case.

ISSUE No. 3 - Whether the parties are entitled to the relief sought

65. Based on the issues and the analysis undertaken herein, this Honorable Court finds that the Petitioner herein is entitled to the relief sought from this Petition. On the contrary, this Honorable Court finds that none of the Respondents have demonstrated any entitlement to their defence. The Honorable Court makes this legal proposition based on several reasons. These are, firstly, from the adduced evidence and the authorities relied on, the Petitioner as the duly appointed Legal Administrator to the estate of the deceased is the “*Prima facie*” registered owner of the suit land with all the indefeasible title, right and title vested in him by law. The Court is satisfied that he acquired the suit land as a 1st Registration in consonance to the provisions of Sections 27, 28 and 143 of the Registered Land Act, Cap. 300 (Now repealed). There was no omission, mistake or fraud alluded to by any of the Respondents herein.

Secondly, It is trite law and as founded under Sections 107 and 108 of “**The Evidence Act**” **Cap 80** that he who alleges fraud or any such a claim has to prove it. None of the parties herein have been able to prove the allegation of fraud by filing a report by a Land Surveyor or an investigation agency or forensic document examiner, or a report from the Division of Criminal Investigation Office being the established expert on demonstrating the allegation fraud were produced nor summoned.

Thirdly, indeed, while the root of the title is significant, the Respondents have spend all their energies on the claiming to have acquired the suit property as bona fide innocent purchasers for value without bothering to appreciate the detailed historical background of the title from the year 1954 and the family of the deceased. The Honorable Court finds these defence to be rather peripheral and one of merely scratching the bare surface and avoiding to get in depth of the root of the title.

66. Fourthly, on the argument that they conducted due diligence and conducted official searches which established that the property belonged to the 1st Respondent and later on simultaneously transferred to the 2nd, 3rd and 9th Respondents respectively is defeatist and not convincing at all. The registration and as part of the due diligence conducting of official searches to ascertain the genuine position of land in Kenya was elaborately deliberated on In *the ELC (Nbi) – ELC Reference No. 1 of 2018 – In the Matter of Drive In – Primary School & Ruaraka School – Versus – the National Land Commission & 11 others*” court held:-

“An official search on any title at the land registry is very important before one can act on it. The search indicates the owner (s) of a particular property and the encumbrances or other relevant entries registered against that land. Once a search is issued by the Lands Office, it should be conclusive evidence of proprietorship in light of the fact that our title registration system is based on the Torrens System of registration. However, a search may not always be a true reflection of the position.On Torrens System of registration. It is necessary for one to take further steps to ascertain the authenticity of the search and ownership of land. If the Applicant had bothered to delve into history of the title. It would have discovered that the title had two mortgage besides the entries in the register.....or any other overriding interest affecting the land they wish to transact on. In light of the foregoing our finding is that a search is not conclusive evidence of ownership. One needs to go further than a mere search”

67. Fifthly, as per the Petitioner's pleadings, it will be prudent that the all the Respondents who are in physical occupation of the suit should legally vacate from it under the laid down Provision of Section 152 E of the Land (Amended) Act, 2016.

Finally, I am reminded of Madan, JA (as he then was) in the case of “*Chase International Investment Corporation and Ano. – Versus – Laxman Keshra & Others (1978) eKLR 143; 143 (1976 – 80) 1 KLR 891*” to the effect that:-

“If the circumstances are such as to raise equity in favour of the Plaintiff and the extent of the equity is known, and in what way it should be satisfied, the Plaintiff is entitled to succeed. When the ghosts of the past stand in the path of justice clanking their medieval chains the proper course of the Judge is to pass through them undeterred”

68. Therefore, in the given circumstances, the most appropriate and available legal relief entitled to the Petitioner is to invoke the provisions of Section 80 (1) and (2) of the Land Registration Act which holds:-

“Subject to sub -section (2), the court may order the rectification of the register by directing that the registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake...”

Based on the above legal proposition, and tracing the root cause of the title deed for the deceased family this court finds it rather difficult to connect the ownership and registration of the suit land to the 1st Respondent. It is left to conclude that the 1st Respondent acquired it unlawfully and/or illegally and through corrupt means.

The facts of how land was for the deceased is not controverted nor in disputed and I need not belabour on them. It is for this reason and this court fully concurs with the decision of the National Land Commission by revoking and cancelling the title deed issued to the 1st Respondent. Additionally, the court is fully persuaded by the contents of the affidavit of James Kajwani Mzungu who confirms how the 1st Respondent undertook the said fraudulent action with the help of Emmanuel Kazungu the then Land Registrar by erasing out the name of the deceased using a white out and indicating the name of the 1st Respondent. What this court finds baffling and intrigued is from where the 1st Respondent obtained the ownership and possession of the suit land as stated by law as first Registration under Section 7 (1) of the Land Act . He is not in any way related to the deceased. The overwhelming evidence produced by the Petitioner on the fraud and forgery by the 1st Respondent proves without doubt that the acquisition registration, sub-division and the subsequent transfer of the suit property by the 1st Respondent is illegal, unlawful and/or wrongful. Interestingly the evidence has not been controverted nor rebutted by any of the Respondents. For these reasons, I conclude and reiterate that the 1st Respondent had no good title to have passed to any other party as alleged. I have relied on the decision of ***“Court of Appeal Munyu Maina – Versus - Hiram Gathiha Maina (2013) eKLR where court held:-***

“When a registered property root of title is under challenge it is not sufficient to damage the instrument of title as a proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how the acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register” and Huber L. Martin & 2 others –Versus- Margaret J. Kamau & 5 Others (2016) eKLR.

Taking that the title by the Petitioner could have not been challenged being a first registration and issued a first time, I have relied on the Court of Appeal decision of ***Munyu Maina –Versus - Hiram Gathiha Maina (2013) eKLR*** where the court termed argument fallacious thus:-

“The Respondent contends that his title to the suit property which is a first registration is absolute and indefeasible we agree that the Respondents title is a first registration however his argument is fallacious. Section 27, 28 and 30 of the repealed Registered Land Act (RLA) Cap 300 provide exceptions to indefeasibility of title”

Certainly, the 1st Respondent could not pass a good title to any of the Respondents, in particular the 2nd, 3rd and 9th Respondents as he had none whatsoever. By this issue alone the Petitioner’s Petition must succeed.

ISSUE No. (c) Whether the 2nd, 3rd 4th 5th 10th and 11th Respondents acquired their titles deed as innocent bona fide purchasers for valuable consideration and notice?

69. Under this sub-heading the 2nd, 3rd 5th 10th and 11th Respondents acquired title deed as innocent bona fide purchasers for valuable consideration and notice from the 1st Respondent.

According to the Black Law Dictionary 8th Edition defines;-

“Bona fide purchaser” as

“One who buys something for value without notice of another claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller’s title one who has in good faith paid valuable consideration for property without notice prior adverse claims”

The 2nd and 3rd Respondents have elaborately submitted that before purchasing the suit land they carried out due diligence by conducting the requisite official searches at the land offices as demonstrated by their annexures and from these searches they found there were no encumbrances and the same had been registered in the names of the 1st Respondents and hence there was nothing that could have put the 2nd and 3rd Respondents on inquiry with regard to the title deed of the suit land. They have held severally being strangers to the petitioner and any existing dispute over the land nor the evictions of the family as they found land vacant and unoccupied and caused development on the land. The Petitioner had never confronted them on the ownership or possession of the two parcels. They denied having participated in any forgery of the title deed.

I am not persuaded by this argument by the 2nd and 3rd .

70. I am compelled to strongly rely on the Ugandan decision of ***Katende -Versus- Haridar Company Limited (2008) 2 E.A 173 Samuel D. Omwanga Angwenyi -Versus- National Land Commission & 2 Others (2019) eKLR , Shimoni Resort -Versus- Registrar Title & 5 Others (2016) eKLR***

The 2nd and 3rd Respondents ought to have known that the deceased had been in occupation of the suit land from the year 1954; and all the

correspondences he made requesting the acquisition of the land from the President of the republic of Kenya and the subsequent events the advice by the 6th Respondent and the death of the deceased. It would have been important for the 2nd and 3rd Respondents to have made inquiry as to the genesis and the root historical investigative inquiry from where the 1st Respondent acquired the land from. Besides this is land that has had numerous activities taking place including the eviction by the family of the deceased, the complaints at the complainant's land and the complaint at Police Kilifi, the numerous court case whereby the Respondents cannot ignore and plead to be ignorant or lack of knowledge.

ISSUE NO. (c) Whether the parties herein are entitled to relief sought?

71. Nonetheless they have a remedy of being refunded their money as purchase price paid to the 1st Respondent for a bad title deed. The family of the deceased need to be restored back to their land which they have suffered and made destitute for over 20 years. In the alternative they can be compensated by the 1st and 6th Respondents for the loss of use and as per the contents of the land valuation report a sum of Kenya Shillings One Seventy Five Million (Kshs. 175,000,000/=) a fact which was never rebutted.

ISSUE NO. (d) Who will bear the costs of the Petition.

72. The Black Law Dictionary defines cost to mean, *“the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”*

73. The provisions of Section 27 (1) of the Civil Procedure Act, Cap. 21 holds that Costs follow events. The events in this case are the result of the case whereby the Petitioner has succeeded in his case. For that very fundamental reason, therefore, the costs of this suit will be made to the Petitioner to be borne by the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th and 11th Respondents herein to the estate of the deceased – the Late Shali Sese.

VI. DETERMINATION.

74. Ultimately and in view of the foregoing, I proceed to hold that the Constitution Petition dated 22nd January, 2019 by the Petitioner has merit and it succeeds for against the 1st, 2nd, 3rd and 4th Respondents the prayers sought jointly and severally are hereby granted. For avoidance of doubt I direct as follows:-

(a) **THAT** a declaration that the Petitioner being the duly appointed legal Administrator of the Estate of the late Shali Sese be and is hereby legally and absolutely registered the beneficial owner of all the seven (7) acres of land severally registered as Plots No. Originally as numbers 17835 which are currently in the names of Fulson Company Limited, Plot No 17835/2, 17835/6 and 17835/7 or Gertrudo Henritus Antonio Maria Van Dijck aka Prudy Ghram Van Dijck and Geruda Josphina Maria Cornella Op Het Veld aka Mariaon Djck Op Het Veld or in the names of Edward Mzee Karezi, Plot No 17835/3 registered in the names of Kilifi Beach Properties Ltd., Plot No 17835/4 and 17835/5 registered in the names of Chiera Waihaka .

(b) **THAT** pursuant to the Provision of Section 80 (1) and (2) of the Land Registration Act of 2012, an order be and is hereby made directing the Chief Land Registrar to:-

(i) Forthwith cancel and revoke all the certificate of title deeds for the above stated parcels of lands; and

(ii) In lieu thereof to issue fresh Certificate of title deed for all these said parcels of land in the names of the Petitioner – MR. MOHAMMED SHALI SESE - being the duly appointed Legal Administrator to the estate of the Late Shali Sese (The deceased).

(c) **THAT** the Petitioner is directed to issue all the Respondents who are unlawfully in physical occupation of the suit land with a **THREE (3) MONTHS EVICTION NOTICE** in both English and Kiswahili languages before the intended day of the forceful eviction to be served and/or printed in block letters on a board to be planted on the land pursuant to the provision of Section 152E of the Land Act, No. 6 of 2012 to enable them able to legally and free vacate the suit land without any difficulties at all.

(d) **THAT** the County Commander of police, the County of Mombasa and the Officer in Charge of Kilifi Police station to ensure that this orders are strictly adhered and complied with.

(e) **THAT** in the alternative to prayer (b) above the 1st, 6th and 7th Respondents are directed to fully compensate the Petitioner as the duly appointed Legal Administrator to the estate of the deceased as sum of Kenya Shilling One Seventy Five Million (Kshs 175,000,000) as adequate and fair compensation for the loss of land.

(f) **THAT** the estate of the deceased is awarded general damages for the mental stress and torture and suffering from the violation, denial and threat of their fundamental rights.

IT IS SO ORDERED ACCORDINGLY.

JUDGMENT DATED, SIGNED AND DELIVERED AT MOMBASA THIS 16TH DAY OF FEBRUARY, 2022.

HON. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIROMNENT AND LAND COURT

MOMBASA

In the Presence of:

M/s. Yumna Court Assistant.

No Appearance by the Advocate for the Petitioner

No Appearance by the Advocate for the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th 9th, 10th and 11th Respondents.