



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO.120 OF 2011
(Formally Nairobi HCCC No.1012 OF 1998)

- 1. JOYCE NYOKABI (administrator of David Kamau Mwangi)**
- 2. TIMOTHY CHEGE.....PLAINTIFFS**
- =VERSUS=**
- 1. COMMISSIONER OF LANDS**
- 2. LAND REGISTRAR KILIFI**
- 3. ATTORNEY GENERAL**
- 4. WILSON GACHANJA**
- 5. ALFRED CHRWON**
- 6. JAMES RAYMOND NJENGA.....DEFENDANTS**

J U D G M E N T

Background:

1. The Plaintiffs commenced this suit by way of a Complaint dated 14th April 1998 in Nairobi.
2. In the Complaint, the Plaintiffs averred that at all material times, the deceased was the registered proprietor of land known as Kilifi Madeteni/615 and Chembe Kibabamshe/408 (the suit properties); that on 22nd December 1986, the 1st, 2nd and 6th Defendants, acting unconstitutionally and illegally purported to cancel the deceased's titles and purported to register the same in the name of the Government and that the Defendants have been unconstitutionally and unlawfully administering the said land as Government land.
3. The Attorney General entered appearance on behalf of all the Defendants on 23rd July 1999.
4. On 7th April 2003, a long consent between the Plaintiffs' advocate and "M/S D.O. Raballa, the litigation counsel for the Honourable Attorney General for all the Defendants" was filed in this court.
5. In the consent, the Attorney General, on his own behalf and on behalf of the other five Defendants

conceded to all the allegations raised by the Plaintiffs in the Plaint.

6. The opening paragraph of the consent, which I shall allude to later, shows that the same was entered into as a result of the orders of the High Court in Nairobi Judicial Review Application High Court Civil Miscellaneous Application No. 185 of 1987; Nairobi High Court Miscellaneous Application No 730 of 1989 and Nairobi HCCC No. 2387 of 1987.

7. The penultimate paragraphs of the consent between the Plaintiffs and the Attorney General provided as follows:

“IT IS THEREFORE HEREBY AGREED AND CONSENTED BY LITIGATION COUNSEL for all and on behalf of the Honourable Attorney General and on behalf of officers of the Government of Kenya who are Defendants in this suit and M/S S.K. Ritho and Company Advocates for and on behalf of the Plaintiffs as follows:-

(1) THAT all researches in land from 14th December 1895 to the day of signing this consent the area of the former Protectorate of Kenya was never Crown Land or Government Land and any claim by the Commissioner of Lands or any officer of the Ministry of Lands and Settlement who makes such claim the claim has no support of any Constitutional legal law in the form of Kenya Order in Council or any Provisions of Kenya Constitution and this has been confirmed by the Court in HCCC Miscellaneous Application No.185 of 1987, 730 of 1989 and HCCC No.2387 of 1987 and the research conducted by the Director of Survey has confirmed that between 1895 and present day there has never been Crown or Government Land within the former Protectorate of Kenya.

(2) THAT the suit lands in this suit were at all material times before 31st May 1963 private land under the sovereignty of the Sultan of Zanzibar in accordance with the Agreement between the Sultan of Zanzibar and Great Britain Crown dated 14th December 1895, Kenya (annexation) Order in Council 1920, Kenya Native Areas Order in Council 1939 and from 1st June 1963 to present day the same area did become Trust Land under Kenya Order in Council 1963 L.N.245 of 1963 Second Schedule Section 193,198 and 199 Kenya (Independence) Order in Council 1963 L.N.718 of 1963 Second Schedule Section 208 and since then has been at all material times Trust Land.

(3) THAT the claim by the Commissioner of Lands under the Commissioner of Land circular Letter No. 1139336/55 of 1986 and Gazette Notice No.2505 of 30th May 1986 were all unconstitutional and illegal claims and null and void ab initio and this legal status was confirmed by High Court in H.C.C.C Miscellaneous Application No. 185 of 1987 Nairobi, Miscellaneous Application No.730 of 1989 Nairobi and H.C.C.C No.2387 of 1987 Nairobi which have declared that the area of the former protectorate of Kenya has at all material times been Trust Land and the adjudication programmes were all carried out constitutionally and legally.

(4) THAT the former Commissioner of Lands M/S James Raymond Njenga as he was then circular letter NO.113936/55 of 28th May 1986 and Kenya Official Gazette No.2505 of 30th May 1986 were declared in HCCC Miscellaneous Application No. 730 of 1989 unconstitutional, illegal and null and void ab initio and the Commissioner of Land is liable for damages caused by the unconstitutional, illegal and null and void ab-initio circular letter No.113936/55 of 28th May 1986 and Gazette Notice No.2505 of 1986. The compensation do be calculated based on accepted principles in Judgments, rulings and orders of the High Court and Civil Appeals and in accordance with Professional valuers principles of market values of the suit lands which as at the date for these consents is agreed and consented to be Kenya Shillings Five Million (Kshs.5,000,000) per acre the actual payable compensation for non-use of the land to be average overdraft Commercial Banks rates of interest between 1987 and 2004 which is about fifteen percent 15% per annum calculated on annual rates the way

commercial banks do calculate their interests and once they are calculated the calculation do be approved arithmetically only by the Deputy Registrar High court after which without any further reference to the Court the necessary decree do be drawn based on the said arithmetical calculations plus interest of Bank overdraft rates from the date of these consents do be issued and it do be executed as such, without any further reference to court against all the Defendants jointly and severally.

(5) THAT where there are development programmes the compensation payable do be based on the difference of cost of construction on 22nd December 1986 and 31st December 2004 plus loss of revenue from the development based on average interest at bank overdraft rates of 15% per annum of the market value of the land plus development value in 1986 calculated on annual rates from 22nd December 1986 the date the Plaintiffs titles were cancelled by the Commissioner of Lands until when the total sum shall be paid in full. The arithmetic details based on professional valuers, architects and quantity surveyors estimates once arithmetically confirmed by the Deputy Registrar High Court to be correct, they do become the Court Decree without any further reference to the court.

(6) THAT the Commissioner of Lands do be ordered to pay exemplary damages based on 5% of the total sum of damages agreed upon during the negotiations or quantified sum payable in accordance with the professional assessments as ordered by the Honourable Court do be paid to the Plaintiffs together with compensation referred to herein before within the shortest time possible and not latter than six months from the date of service of the final decree and if full payment would not be made to the Plaintiffs then the Plaintiffs do apply for the orders of Mandamus to compel the Accounting Officer of the Ministry of Lands and Settlement, Commissioner of Lands and the other Defendants to pay the Decretal sum jointly and severally without any further delay and within a set out time table failing which execution process do be commenced against the Defendants jointly and severally.

(7) THAT it is consented that the issues involved in this suit are very complicated and the relevant laws are also of not easy interpretation and for this reason it is agreed and consented that the costs awarded to the Plaintiff do be fifteen 15% percent of the total compensation payable to the Plaintiffs plus interest at the rate of fourteen 14% percent per annum calculated on annual rates the way commercial banks do calculate the overdraft interests bank loans from the date of filing this suit until when the total sum shall be paid in full.

(8) THAT Il proprietors purported to have been entered in the land registers of the suit land from 22nd December 1986 are all declared to be trespassers, the entries in the land registers do be declared to be unconstitutional and null and void ab initio, revoked from the time they were entered in the land registers and the Plaintiffs in this suit do be re-registered as the sole proprietors at all material times from 22nd December 1986 to the date of the execution of these consents and preliminary decree which may have been drawn before the final decree.

(9) THAT the Director of Surveys, Provincial Surveyor, District Surveyor, the Chief Land Registrar, District Land Registrar Kilifi and the Commissioner of Lands do revoke and cancell all land Registers, index, maps and plans and all land registers drawn and written on or there after the 22nd December 1986 and register in all official documents the names of the Plaintiffs or as directed by the Plaintiff's advocates.

(10) THAT these consents and arithmetical certified correct amount by the Deputy Registrar together with any specific orders sought in the prayers of this suit do become together with the other said orders sought and also the orders granted through the interlocutory judgments part of decree to be finally drawn and executed against all the Defendants jointly and severally.

(11) THAT the final decree do incorporate these consents and prayers in this suit as set out in the interlocutory Judgment and Preliminary decree.”

8. Without setting aside the consent of 7th April 2003, the Attorney General filed a defence on 28th February 2005.

9. In the Defence, the Attorney General averred that the suit properties did not fall within the specified areas under the Trust Land Act as alleged in the Plaint; that the only area in Kilifi District which is or was Trust Land as defined in Section 114(1)(a) of the repealed constitution was the area formally known as Coast Land Unit Section XVIII North Nyika and Gedi Special Settlement area.

10. The Defendants admitted that although an adjudication process was carried out in the suit land between 1974-1978 denied that the adjudication process was lawful.

11. The Defendants averred in their Defence that upon realization by the 1st Defendant in 1986 that the suit lands were erroneously adjudicated and titles issued under the Registered Land Act, the 1st Defendant did proceed to effect cancellation of all the titles which were done unlawfully after due notice was given to the respective title holders.

12. The Defendants prayed for the dismissal of the suit with costs.

The Plaintiffs' case:

13. This matter came up for hearing on 27th November 2014. On that day, the Plaintiff, PW1 informed the court she was the wife of the late David Mwangi Kamau. PW1 produced the letters of administration in evidence.

14. It was the evidence of PW1 that parcels of land known as Chembe/Kibabamshe 408 and Kilifi/Madeteni 615 were registered in her late husband's name. PW1 produced the original Land Certificate in respect of Kilifi/Madeteni/615 showing that David Kamau was registered as the proprietor of the said land on 24th July, 1982.

15. According to PW1, she lost the original Land Certificate for Chembe/Kibabamshe 408. PW1 Produced in evidence the police abstract dated 28th December 2007 showing that she reported the loss of the title deed for Chembe/Kibabamshe/408.

16. PW1 informed the court that when she made inquiries at the lands office, she was informed that the registers for the two parcels of land did not exist because the title deeds had been revoked by the 1st Defendant.

17. PW1 produced in evidence as PEXB 5 the consent that was entered into between her advocate and the Attorney General on 7th April 2003. PW1 relied on the contents of paragraphs 4, 5, 6 and 7 of the said consent.

18. PW1 informed the court that she engaged Mr. Gitonga, a valuer to value the suit properties. According to PW1, the current open market for Chembe/Kibabamshe is Kshs.120,000,000 while that of Kilifi/Madeteni is also Kshs.120,000,000.

19. The valuer, PW2, informed the court that he visited the two properties for the purposes of valuing them.

20. According to the valuer, he found land parcel number Chembe/Kibabamshe 408 fenced with a perimeter stone wall and had a double opening heavy steel gate. He ignored the developments thereon and valued the land alone.

21. According to PW2, he valued Chembe/Kibabamshe/408 (without developments) for Kshs.120,000,000. The valuation report was produced in evidence as PEXB6. PW2 produced the valuation report in respect to Kilifi/Madeteni 615 which he valued at Kshs.120,000,000.

The Defendants' case:

22. This matter was scheduled for Defence hearing on 9th February 2015. On that day, the Defendants' counsel informed the court that although Mr. Rabala, the advocate who signed the consent of 18th February 2003 April 2003 was in court, he had not recorded his statement.

23. When the court directed that Mr. Rabala should testify, the Defendants' counsel stated that the evidence of Mr. Rabala will not be favourable to the Defence case. Counsel applied for adjournment to call another witness. The matter was then adjourned to 11th March 2015.

24. The Defence hearing could not proceed on 11th March, 2015 because Mr. Ngari, counsel for the Defendants, was said to be indisposed. Consequently, the court directed the matter to proceed for defence hearing on 20th March 2015.

25. On 20th March 2015, the Defendants' counsel closed his case without calling any witness.

The Plaintiffs' submissions:

26. The Plaintiffs' counsel submitted that the claim before the court is against the State Officers represented by the Attorney General.

27. Counsel submitted that on 7th April 2003, the Plaintiffs' advocates on record and the Litigation counsel for the Attorney General executed a lawful and valid consent which was filed in court on the same day. Counsel referred the court to the consent that was produced in evidence.

28. The Plaintiffs' counsel submitted that the Defendants admitted in the said consent that the suit properties were at all material times before 1st May 1963 private land under the sovereignty of the Sultan of Zanzibar pursuant to the Agreement between the Sultan of Zanzibar and Great Britain dated 14th December 1895.

29. It was submitted that the suit properties became Trust land under Kenya Order in Council 1963, Legal Notice No.245 of 1963, Second Schedule Sections 193, 198 and 199 and Kenya (Independence) Order in Council in 1963 Legal Notice No. 718 of 1963, Second Schedule Section 208 and has remained as such since then.

30. Counsel submitted that the Commissioner of Lands circular letter number 113936/55 of 1986 and gazette notice number 2505 of 30th May 1986, which purported to cancel the Plaintiffs' title documents were all illegal, null and void, thus the current suit.

31. Having withdrawn the suit against the current registered owner(s) of the suit properties, counsel submitted that the court should award to the Plaintiffs compensation as captured in paragraphs 4, 5, 6, 7, 10 and 11 of the consent and that the Defendants did not object to the valuation reports that were produced in this court which give the current open market value of the suit properties.

32. Counsel submitted that pursuant to the consent produced in this court, the costs that are to be awarded to the Plaintiffs should be 15% of the total compensation payable to the Plaintiff plus interest at the rate of 14% per annum calculated on annual rates from the date of filing the suit.

33. The Plaintiffs' counsel submitted that according to the valuation reports, the open market value of Chembe/Kibabamshe/408 and Kilifi/Madeteni/615 is Kshs. 240,000,000.

34. In addition to an award of Kshs.240,000,000 as compensation, counsel submitted that the Plaintiffs are entitled to a whopping Kshs.2,526,232,552.86 being damages for non user of plot no.615 since 1988 to the year 2015 and Kshs.2,208,776,780.73 for plot no.408. The total payable damage for loss of user for the two plots, it was submitted, is Kshs.2,194,687,585.88 (sic).

35. In addition to the said figure of Kshs.2,194,687,585.88 (sic), counsel submitted that the Plaintiffs are entitled to exemplary damages which should be 5% of Kshs.2,194,687,584.88 (sic) pursuant to paragraph 6 of the consent.

36. The Plaintiffs' counsel finally submitted that the counsels who executed the consent on 7th April 2003 did so with the full knowledge of their respective principals and that this court should enforce the consent as it is.

The Defendants' submissions

37. In his brief submissions, the Defendant's counsel submitted that the 1st Plaintiff has sued the Defendants in her capacity as the administrator of the Estate of the late David Mwangi.

38. However, it was submitted, the two beneficiaries named in the Certificate of Confirmation of grant never gave authority to the Plaintiff to institute the suit.

39. On the issue of the consent, the Defendants' counsel submitted that "a consent" is supposed to finalise a suit as per the agreed terms; that the court became functus officio from the date the "purported consent" was signed and that any proceedings thereafter are of no legal consequences.

40. The Defendants' counsel submitted that the record does not show that the consent was ever adopted as an order of the court and does not therefore have any legal effect and that because the said consent has no legal effect, it was submitted, the suit should be dismissed.

Analysis and findings:

41. The issues for determination in this matter are as follows:

(a) Whether the consent of 7th April 2003 between the Plaintiffs' advocate and the Defendants' Litigation counsel binds the Defendants.

(b) Whether the consent of 7th April 2003 amounted to admission of liability by the Defendants.

(c) Whether the Plaintiffs are entitled to damages and if so the quantum thereof.

(d) The payable costs.

42. In the Plaint dated 14th April 1998, the Plaintiffs averred that the deceased was at all material times the registered proprietors of land known as (Chembe/Kibabamshe/408 and Kilifi/Madeteni 615 and that he was the first registered owner of the suit properties within the meaning of Sections 14 and 143 of the Registered Land Act (repealed).

43. It is the Plaintiffs' case that on 22nd December 1986, the 2nd Defendant, acting unconstitutionally and illegally purported to cancel the deceased's registration as proprietor of the aforesaid parcels of land and purported to register the Government of the Republic of Kenya as the proprietor of the said parcels of land, which, according to the Plaintiffs, the Defendants have been administering as Government Land.

44. The Plaintiffs have averred in the Amended Plaint that the registration of the two parcels of land in the name of the deceased was a first registration having bought the same from the locals whose

undisputed customary law land rights had been established through the land adjudication process.

45. Consequently, it was averred, the Defendants could only acquire the suit properties by either setting it apart or compulsorily acquiring the land for the Government pursuant to the provisions of Sections 75 and 118 of the repealed Constitution.

46. The contention by the Plaintiffs in the Complaint is that the suit properties are situated within Gede Special Settlement area which was gazetted as a special settlement area in 1962 and that they are within the Boundary Plan No. 179 which appears in the 1st Schedule of the Trust Land Ordinance Cap 288 (1962 Ed); that the deceased purchased the suit land from the locals who were declared lawful title holders of the land during the adjudication process between 1974-1981 and that the deceased was subsequently registered as the first proprietor of the said land.

47. According to the Plaintiff's averment, the Commissioner of Lands and his officers took part in the investigations which took place between December, 1977 and April 1978 as a result of objections that were raised by the then District Commissioner, Kilifi.

48. According to the Plaintiff, the investigations that were undertaken in January and February, 1978 concluded that the area was Trust land and the adjudication process was allowed to proceed and was finalised. The Plaintiffs have averred that neither the Commissioner of Lands, the District Commissioner nor any other Government Officer appealed against the decision of the Land Adjudication Officer of February, 1978 which was made pursuant to the provisions of Section 26 of the Land Adjudication Act.

49. The Plaintiffs' prayers in the Amended Complaint are as follows:

(a) A declaration that the area where the suit land Kilifi/Chembe/Kibabamshe/408 and Kilifi/Madeteni 615 are situated has at all material times been Trust land before adjudication and registration under the Registered Land Act Cap.300 of Laws of Kenya took place on 30/5/1978.

(b) A declaration that the purported cancellation of the deceased titles and subsequent purported transfer of the Plaintiffs properties titles to the Government of Kenya on 22/12/1986 was illegal, unconstitutional, null and void ab initio.

(c) A declaration that all transactions in respect of the suit land are illegal and null and void ab initio.

(d) An order directed to the Land Registrar Kilifi the 2nd Defendant to rectify the Land Register by canceling all registration from 22/12/1986, and re-registering the Plaintiffs as the sole proprietors of the suit lands Kilifi/Chembe/Kibabamshe/408, and Kilifi/Madeteni 615 from the time they were registered under the Registered land Act cap.300

(e) The Plaintiffs to be paid general and punitive or exemplary damages quantum to be determined by the Court and be paid interest at the rate of bank commercial rate of interest of 35% of the said sum of damages from 22/12/1986 to the date when all money shall be paid in full to the Plaintiffs.

(f) Costs of this suit and interest of damages at Court rates.

(g) Any other relief which this Honourable Court may find justified in the circumstances.

50. On 7th April 2003, a long consent between the Plaintiffs' advocate and "M/S D.O. Raballa, the litigation counsel for the Honourable Attorney General for all the Defendants" was filed in this court.

51. In the consent, the Attorney General on his own behalf and on behalf of the other five Defendants conceded to all the allegations raised by the Plaintiffs in the Complaint.

52. The opening paragraphs of the consent shows that the same was entered into as a result of the orders of the court in Nairobi Judicial Review Miscellaneous Application No. 185 of 1987, Nairobi High Court Miscellaneous Application No 730 of 1989 and Nairobi HCCC No. 2387 of 1987.

53. The penultimate paragraph of the consent provided as follows:

“IT IS HEREBY AGREED AND CONSENTED BY LITIGATION COUNSEL for all and on behalf of the Honourable Attorney and on behalf of officers of the Government of Kenya (who are Defendants in this suit and M/S S.K. Ritho and Company Advocates for and on behalf of the Plaintiff as follows:-

(1) THAT all researches in land from 14th December 1895 to the day of signing this consent the area of the former Protectorate of Kenya was never Crown Land or Government Land and any claim by the Commissioner of Lands or any officer of the Ministry of Lands and Settlement who makes such claim the claim has no support of any Constitutional legal law in the form of Kenya Order in Council or any Provisions of Kenya Constitution and this has been confirmed by the Court in HCCC Miscellaneous Application No.185 of 1987, 730 of 1989 and HCCC No.2387 of 1987 and the research conducted by the Director of Survey has confirmed that between 1895 and present day there has never been Crown or Government Land within the former Protectorate of Kenya.

(2) THAT the suit lands in this suit were at all material times before 31st May 1963 private land under the sovereignty of the Sultan of Zanzibar in accordance with the Agreement between the Sultan of Zanzibar and Great Britain Crown dated 14th December 1895, Kenya (annexation) Order in Council 1920, Kenya Native Areas Order in Council 1939 and from 1st June 1963 to present day the same area did become Trust Land under Kenya Order in Council 1963 L.N.245 of 1963 Second Schedule Section 193,198 and 199 Kenya (Independence) Order in Council 1963 L.N.718 of 1963 Second Schedule Section 208 and since then has been at all material times Trust Land.

(3) THAT the claim by the Commissioner of Lands under the Commissioner of Land circular Letter No. 1139336/55 of 1986 and Gazette Notice No.2505 of 30th May 1986 were all unconstitutional and illegal claims and null and void ab initio and this legal status was confirmed by High Court in H.C.C.C Miscellaneous Application No. 185 of 1987 Nairobi, Miscellaneous Application No.730 of 1989 Nairobi and H.C.C.C No.2387 of 1987 Nairobi which have declared that the area of the former protectorate of Kenya has at all material times been Trust Land and the adjudication programmes were all carried out constitutionally and legally.

(4) THAT the former Commissioner of Lands M/S James Raymond Njenga as he was then circular letter NO.113936/55 of 28th May 1986 and Kenya Official Gazette No.2505 of 30th May 1986 were declared in HCCC Miscellaneous Application No. 730 of 1989 unconstitutional, illegal and null and void ab initio and the Commissioner of Land is liable for damages caused by the unconstitutional, illegal and null and void ab-initio circular letter No.113936/55 of 28th May 1986 and Gazette Notice No.2505 of 1986. The compensation do be calculated based on accepted principles in Judgments, rulings and orders of the High Court and Civil Appeals and in accordance with Professional valuers principles of market values of the suit lands which as at the date for these consents is agreed and consented to be Kenya Shillings Five Million (Kshs.5,000,000) per acre the actual payable compensation for non-use of the land to be average overdraft Commercial Banks rates of interest between 1987 and 2004 which is about fifteen percent 15% per annum calculated on annual rates the way commercial banks do calculate their interests and once they are calculated the calculation do be approved arithmetically only by the Deputy Registrar High court after which without any further reference to the Court the necessary decree do be drawn based on the said arithmetical calculations plus interest of Bank overdraft rates from the date of these consents

do be issued and it do be executed as such, without any further reference to court against all the Defendants jointly and severally.

(5) THAT where there are development programmes the compensation payable do be based on the difference of cost of construction on 22nd December 1986 and 31st December 2004 plus loss of revenue from the development based on average interest at bank overdraft rates of 15% per annum of the market value of the land plus development value in 1986 calculated on annual rates from 22nd December 1986 the date the Plaintiffs titles were cancelled by the Commissioner of Lands until when the total sum shall be paid in full. The arithmetic details based on professional valuers, architects and quantity surveyors estimates once arithmetically confirmed by the Deputy Registrar High Court to be correct, they do become the Court Decree without any further reference to the court.

(6) THAT the Commissioner of Lands do be ordered to pay exemplary damages based on 5% of the total sum of damages agreed upon during the negotiations or quantified sum payable in accordance with the professional assessments as ordered by the Honourable Court do be paid to the Plaintiffs together with compensation referred to herein before within the shortest time possible and not latter than six months from the date of service of the final decree and if full payment would not be made to the Plaintiffs then the Plaintiffs do apply for the orders of Mandamus to compel the Accounting Officer of the Ministry of Lands and Settlement, Commissioner of Lands and the other Defendants to pay the Decretal sum jointly and severally without any further delay and within a set out time table failing which execution process do be commenced against the Defendants jointly and severally.

(7) THAT it is consented that the issues involved in this suit are very complicated and the relevant laws are also of not easy interpretation and for this reason it is agreed and consented that the costs awarded to the Plaintiff do be fifteen 15% percent of the total compensation payable to the Plaintiffs plus interest at the rate of fourteen 14% percent per annum calculated on annual rates the way commercial banks do calculate the overdraft interests bank loans from the date of filing this suit until when the total sum shall be paid in full.

(8) THAT Il proprietors purported to have been entered in the land registers of the suit land from 22nd December 1986 are all declared to be trespassers, the entries in the land registers do be declared to be unconstitutional and null and void ab initio, revoked from the time they were entered in the land registers and the Plaintiffs in this suit do be re-registered as the sole proprietors at all material times from 22nd December 1986 to the date of the execution of these consents and preliminary decree which may have been drawn before the final decree.

(9) THAT the Director of Surveys, Provincial Surveyor, District Surveyor, the Chief Land Registrar, District Land Registrar Kilifi and the Commissioner of Lands do revoke and cancell all land Registers, index, maps and plans and all land registers drawn and written on or there after the 22nd December 1986 and register in all official documents the names of the Plaintiffs or as directed by the Plaintiff's advocates.

(10) THAT these consents and arithmetical certified correct amount by the Deputy Registrar together with any specific orders sought in the prayers of this suit do become together with the other said orders sought and also the orders granted through the interlocutory judgments part of decree to be finally drawn and executed against all the Defendants jointly and severally.

(11) THAT the final decree do incorporate these consents and prayers in this suit as set out in the interlocutory Judgment and Preliminary decree.”

54. That consent was produced by PW1 as PEXB5. The record shows that the consent between the Plaintiffs and the Defendants was filed in this court on 7th April 2003, the same day it was signed by the

advocates who were then on record.

55. The consent dated 7th April 2003 has never been set aside, varied or appealed against.

56. Although the Litigation counsel who signed the consent on behalf of the Attorney General was in court when the matter came up for Defence hearing, counsel fro the Defendants informed this court that his evidence was not favourable to the Defendants. He therefore did not call him as a witness in this matter.

57. The Defendants' counsel has submitted that the said consent was never adopted as an order of the court, and that consequently the same is invalid.

58. The Plaintiffs' case, as I understand it, is not that the consent that was signed on 7th April 2003 and filed in court on the same day is an order of the court. What I understand the Plaintiffs to be saying is that the Defendants, by authorizing their counsel to sign the consent, were bound by the contents of the consent.

59. What the Plaintiffs want is for the court to enforce the terms of the consent, which is as good as a contract, between themselves and the Defendants.

60. Having not denied that indeed a consent between the Plaintiffs and the Defendants was executed by the parties' advocates, the Defendants cannot run away from the consent just because it was not adopted by the court as an order.

61. The Defendants had an opportunity to challenge the authority of the Litigation Counsel who signed the consent, when he presented himself to court to testify on 9th February 2015. The Defendants' advocate however declined to put Mr. Rabala in the witness box to enable him testify on the circumstances under which he signed the consent on behalf of the Attorney General and the other Defendants.

62. The only inference that this court can draw for the refusal by the Defendants to call Mr. Rabala to testify is because Mr. Rabala signed the consent of 7th April 2003 with the authority of his Principals, that is, the Attorney General and the other Defendants.

63. The Black Law Dictionary, 9th edition has defined “a consent” as follows:

“Agreement, approval or permission as to some act or purpose, given voluntarily by a competent person; legally effective assent.”

64. Until it is set aside or varied, the consent that was entered into between the Plaintiffs advocate and the Defendants advocate, on instructions from their principals, is binding on both parties, notwithstanding that the same was not adopted as an order of the court.

65. There is no evidence before me to show that the Defendants did not instruct Mr. Rabala to sign the consent of 7th April 2003. In the case of **Kenya Commercial Bank Limited Vs Benjoh Amdgamated Limited (1998) e KLR**, the Court of Appeal quoted with approval the **Supreme Court Practice (1976) (Vol.2) paragraph 2013 page 620** the extent of authority of a solicitor to compromise a suit which states as follows:

“Authority of solicitor – a solicitor has a general authority to compromise on behalf of his client, if he acts bona fide and not contrary to express negative directions; and it would seem that a solicitor acting as agent for the principal solicitor has the same power (Re-Newman, [1903] 1ch pp 817,818; Little Vs Spreadbrury, [1901]2 KB658). No limitation of the implied authority avails the client as against the other side unless such limitation has been brought to their notice-see Welsh Vs Roe (1918-9)ALLER 620.”

66. In the absence of evidence to show that the litigation counsel who was acting for the Defendants did not act bona fide or that he was not acting on the express instructions of the Defendants, and considering that the Defendants have never attempted to set aside or vary the consent of 7th April 2003, I find and hold that the said consent is binding on the Defendants, and by extension the Government of Kenya.

67. As I have already stated, the consent of 7th April 2003 was signed by the parties principally because the High Court had stated in numerous other cases that the cancellation by the Commissioner of Lands of the title deeds falling within the 10 mile coastal strip in 1986 was unconstitutional, null and void.

68. The decisions which were quoted in the said consent are Nairobi Civil Miscellaneous Application No. 185 of 1987, 730 of 1989 and Nairobi HCCC No. 2387 of 1987.

69. In **Nairobi Civil Miscellaneous Application No. 730 of 1989, Helena Kithinji Vs The Attorney General, Rawal J**, as she was then, held as follows:

“In all respect the actions of the Commissioner of Lands of cancelling the titles of the applicant without hearing the applicant is illegal, invalid and unconstitutional and has to be set aside....i also declare that she has been deprived of the proprietorship of the land registered in her name in pursuance of the circular which is unconstitutional and in flagrant violation of the rules of natural justice. I therefore decree that she is still the registered owner of titles No. Kilifi/Madeteni/410 and Kilifi Madeteni 414.”

70. Indeed, after the filing of the consent in this matter on 7th April 2003, Ang'awa J in **Nairobi HCCC No. 3106 of 1997, Regina Ngaku & Others Vs Commissioner of Lands & 4 Others** held as follows:

“36. The Commissioner of Lands cancelled titles within Kilifi/Chembe/Kibabamshe despite parties having held title for the same area.”

37. This cancellation of title by the Commissioner of Lands in 1986 has already been determined by Rawal J and the position therefore lies that the cancellation was null and void.

38. The consent (entered into by the state and S. K. Ritho) has admitted the material facts herein and the government is accordingly bound by it.”

71. I will not, in this Judgment, state whether I agree with the decisions of Angawa J or Rawal J (as she was then) in the above matters or the decisions of the other judges of the High Court on the constitutionality or otherwise of the cancellation of the title documents by the Commissioner of Lands vide his circular letter no.113936/55 of 1986 and gazette notice number 2505 of 30th May, 1986.

72. All I can state in this particular matter is that at paragraph 3 of the consent of 7th April 2003, the State agreed with the decisions of the High Court that the cancellation of the Plaintiffs title deeds in respect to the suit properties in 1986 was unconstitutional, null and void ab initio.

73. The State also agreed at paragraph 4 of the consent of 7th April 2003 to compensate the people whose titles were revoked in 1986 by the Commissioner of Lands “in accordance with professional valuers principles of market values”. The State was also supposed to compensate the Plaintiffs for non use of the land.

74. The consent further provided that the Commissioner of Lands was to pay “exemplary damages based on 5% of the total sum of damages agreed upon during the negotiation or quantified sum payable in accordance with the professional assessment as ordered by the court.”

75. Paragraph 7 of the consent further provided that the costs awarded to the Plaintiffs was to be 15% of the total compensation payable to the Plaintiffs plus interest at the rate of 14% from the date of filing the suit until when the total sum shall be paid in full.

76. The Defendants having admitted liability and considering that the Defendants did not call witnesses to rebut the Plaintiffs' claim, this court can only assess the payable damages in accordance with the consent of 7th April 2003 and the rules of evidence.

77. The 1st Plaintiff, PW1, informed the court that his late husband was registered as the proprietor of Chembe/Kibabamshe/408 and Kilifi/Madeteni/615

78. According to PW1, the said titles were recalled by the Government and revoked in 1986 on the basis that the land in question was Government Land and not Trust land. The Government, according to PW1, proceeded to revoke titles for plot numbers 408 and 615

79. PW1 informed the court that he was only pursuing compensation for the two parcels of land in accordance with the consent of 7th April 2003.

80. PW1 produced in evidence the original Land Certificate for parcel of land number Kilifi/Madeteni/615 issued on 24th July 1982 in the name of David Kamau. PW1 also produce a copy of the title for Chembe/Kibabamshe/408.

81. According to Interconsult Valuers Limited, the current value of parcel of land numbers 615 and 408 is Kshs.120,000,000 and Kshs.120,000,000 respectively.

82. Mr. Gitonga Akotha of Interconsult Valuers Limited, PW2, produced the valuation report dated 25th March, 2014 in respect of parcel of land known as Chembe/Kibabamshe 408.

83. In the report, PW2 stated that when he inspected the suit property on 26th February, 2014, he found that the property is fronting the ocean.

84. He noted in his report that similar properties are in high demand in the neighbourhood and due to very low supply to the market, the value is very high.

85. PW2 gave the open market value for Chembe/Kibabamshe/408 as Kshs.120,000,000.

86. As for Kilifi/Madeteni/615, PW2 stated in his report that the property is a beach property fronting the Indian ocean. PW2 observed that the proximity of the property to the Coastal beach resorts in the neighbourhood makes it a high value property.

87. PW2 valued the suit property for Kshs.120,000,000.

88. The two valuation reports were produced as PEXB 6 and 7.

89. The Defendants did not produce any valuation reports to rebut the evidence of PW2. In fact, the Defendants did not adduce any evidence in this matter.

90. The only damages which have been proved pursuant to the consent of 7th April 2003 is the current open market value of the two suit properties.

91. Although the Plaintiffs' advocate submitted that the Plaintiffs are also entitled to Kshs.2,194,687,585.88 for loss of business (non-user of land), no evidence was produced to show how the Plaintiffs intended to use the property after the same was allocated to the deceased. Consequently, this court declines to award the Plaintiffs the said amount.

92. Before I make my final orders, I would like to state that where an individual is issued with a title document by the government and the government revokes that title without following due process, the individual whose title has been unlawfully revoked or cancelled is entitled to either get his land back or to be compensated monetarily, with or without the consent of the Government.

93. I say so because Article 40 (1) and (3) of the Constitution gives every person the right to acquire and own property and the State cannot deprive such a person of his property without prompt payment for it.

94. Section 144 of the Registered Land Act (repealed) and Section 81 of the Land Registration Act compliments Article 40 of the Constitution. According to those Sections, any person suffering damages by reason of any rectification of the register or an error in the register is entitled to indemnity unless it is shown that the person has caused or substantially contributed to the damage by fraud or negligence.

95. In this matter, the Defendants did not adduce evidence to rebut the Plaintiffs evidence that they were registered as proprietors of the suit property in 1978 before the said titles were revoked or cancelled by the 1st Defendant in 1986.

96. The Defendants did not also adduce any evidence to show that the Plaintiffs acquired the suit properties unlawfully or fraudulently.

97. Consequently, even without the consent of 7th April 2003, the Plaintiffs would still be entitled to indemnity, being the value of the suit properties considering that the said properties have since been allocated to other people after the revocation of the their titles.

98. Having proved that they are entitled to compensation in respect to the two suit properties, being the current market value of the suit properties, to the tune of Kshs.240,000,000, I find and hold that the Plaintiffs are also entitled to exemplary damages of Kshs.12,000,000 being the 5% of the total sum of the quantified damages (Kshs.240,000,000) pursuant to paragraph 6 of the consent dated 7th April 2003. The Plaintiffs are also entitled to costs of the suit of Kshs.36,000,000 being 15% of the total compensation as provided for under clause 7 of the consent, the total compensation being Kshs.240,000,000.

99. For the foregoing reasons, I allow the Plaintiffs' Complaint dated 14th June, 1998 in the following terms;

(a) The Defendants, or their successors in office, to pay to the Plaintiffs compensation in respect of parcels of land number ChembeKibabamshe/408 and Kilifi/Madeteni/615 Kshs.240,000,000 being the market value of the said parcels of land.

(b) The Defendants, or their successors in office, to pay to the Plaintiffs exemplary damages of Kshs.12,000,000, being 5% of Kshs.240,000,000.

(c) The Defendants, or their successors in office, to pay to the Plaintiffs costs of the suit amounting to Kshs.36,000,000 being 15% of the quantified damages.

(d) The Defendants to pay to the Plaintiffs interest on (a), (b) and (c) above at the rate of 14% per annum from the date of this Judgment until payment in full.

Dated and delivered in Malindi this 25th day of September 2015.

O. A. Angote

Judge