



REPUBLIC OF KENYA



Waterbeach Front Properties Limited & another v Kwale & another; Bendo (Interested Party) (Petition 7 of 2021) [2022] KEELC 4900 (KLR) (16 May 2022) (Judgment)

Neutral citation: [2022] KEELC 4900 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE**

PETITION 7 OF 2021

AE DENA, J

MAY 16, 2022

BETWEEN

WATERBEACH FRONT PROPERTIES LIMITED 1ST PETITIONER

SIMBA ORYX LTD 2ND PETITIONER

AND

LAND REGISTRAR KWALE 1ST RESPONDENT

NATIONAL LAND COMMISSION 2ND RESPONDENT

AND

OMAR SALIM BENDO INTERESTED PARTY

JUDGMENT

1. The background to this petition as lifted from the Petition is that the Petition revolves around parcel No. Kwale/Galu Kinondo/683 (suit property) registered in 1974 in the name of Luke Musomba Mutiso following land adjudication process. The suit property was transferred to Lavan Ngatia Mucemi in 1975 and subsequently to Titus Kilonzo Kitana in 1986.
2. Omar Salim Bendo the interested party herein filed Mombasa HCCC 97 of 1997 against Luke Musomba Mutiso and Titus Kilonzo Kitana claiming that he was the owner of parcel No. Kwale/Galu Kinondo/683. He was granted temporary injunctive orders prohibiting any dispositions in the suit property pending hearing and determination of the said suit, which order was registered against the land register. This order was subsequently lifted in November 2002. In the said year 2002 parcel No. Kwale/Galu Kinondo/683 was transferred to Latis Construction Company Ltd who subdivided the land into the Plots 1515 and 1516. Latis Construction Company Ltd subsequently in February 2003 transferred Plot No. 1515 to Waterfront Beach Properties Limited the 1st petitioner herein. In September 2005 HCCC 97 of 1997 was struck out for want of a reasonable cause of action. The court



of appeal dismissed the Interested Party application for stay for lack of merit. Thereafter in the year 2006 Plot No 1516 was transferred to Simba & Oryx (K) Ltd the 2nd petitioner herein at a valuable consideration. The register of parcel No Kwale/Galu Kinondo/683 was thus closed on February 11, 2003.

3. The interested party filed a complaint with the National Land Commission who on October 30, 2017 made a determination that the titles held by Luke Mutiso and Titus Kilonzo Katana be revoked and Kwale/Galu Kinondo/683 be reverted to the Interested Party. On December 20, 2017 the Interested Party then filed Mombasa HCCC 466 of 1997 as the plaintiff, against the National Land Commission and the Chief Land Registrar where he sought for a declaration that he was the legal beneficial owner of Land Parcel No Kwale/Galu Kinondo/683, and orders that the National Land Commission's determination be adopted by the court as well as the Chief Land Registrar to issue the title deed of Kwale/Galu Kinondo/683 to the interested party as reflected in the original adjudication records. The interested party also filed a Notice of Motion under certificate of urgency seeking for the National Land Commission determination of October 30, 2017 to be adopted as an order of the court and for the Land Registrar to comply with the orders of the said determination.
4. The Counsels for the parties appeared before court on April 10, 2018 and recorded a consent allowing the said Notice of Motion and the consent order was adopted as final orders of the court. On April 26, 2018 the consent was registered by the Land Registrar Kwale in the registers for land parcels No. Kwale/Galu Kinondo/683 and Kwale/Galu Kinondo/1515 and 1516 and the interested party registered as the proprietor of freehold interest in the said parcels. The subdivided land reverted to Kwale/Galu Kinondo/683 the mother parcel. The registration thus cancelled the petitioners titles in the said parcels.

Reliefs Sought

5. The petition before court is therefore based on the above set of facts and was filed on 15/2/2019 seeking for the following orders; -
 - a. A declaration that the 1st respondent by making the determination they purported to make by the letter dated October 30, 2017 addressed to the Land Registrar, Kwale County through the Ag Chief Land Registrar, without first granting the Petitioners an opportunity to defend their rights in or over land parcels known as land reference numbers Kwale/Galu Kinondo/1515 and Kwale/Galu Kinondo/1516, violated and continues to violate the Petitioners rights to property and fair hearing as guaranteed under article 40,47 and 50[1] of the [Constitution of Kenya 2010](#).
 - b. A declaration that the 2nd respondent, by making the entries made in the proprietorship sections of the registers for the parcels of land known as land reference numbers Kwale/Galu Kinondo/683, Kwale/Galu Kinondo/1515 and Kwale/Galu Kinondo/1516 without granting the Petitioners an opportunity to defend their respective interests in the said land parcels, violated and continues to violate the Petitioners rights to property and fair hearing as guaranteed under article 40,47 and 50[1] of *the Constitution* of Kenya 2010
 - c. A declaration that the entries made by the 2nd respondent in the proprietorship section of the individual registers for the parcels of land known as land reference numbers Kwale/Galu Kinondo/683, Kwale/Galu Kinondo/1515 and Kwale/Galu Kinondo/1516 in a purported execution of the 1st respondents determination contained in the 1st respondent's letter to the 2nd Respondent dated October 30, 2017 through the Ag chief land registrar and comprising of entry numbers 12,13 and 14 made on 26/4/2018 in the register for LR No Kwale/Galu Kinondo/1516 without first granting the petitioners an opportunity to be heard in



respect of their rights in or over the said land parcels, violated and continues to violate the petitioners rights to property and fair hearing as guaranteed under article 40,47 and 50[1] of the Constitution of Kenya 2010.

- d. An order of *Certiorari* be and issued to quash, with effect from October 30, 2017, the 1st respondents determination contained in the 1st Respondents letter dated October 30, 2017 to the 2nd respondent, the Land Registrar Kwale County through the Ag Chief Land Registrar, together with any proceedings conducted by the 1st Respondent in respect thereof.
 - e. An order of *Certiorari* be and issued to quash with effect from 26/4/2018, the entries made by the 2nd respondent in the proprietorship section of the individual registers for the parcels of land known as land reference numbers Kwale/Galu Kinondo/683, Kwale/Galu Kinondo/1515 and Kwale/Galu Kinondo/1516 in execution of the 1st respondents determination contained in the 1st respondents letter to the 2nd respondent dated October 30, 2017 through the Ag chief land registrar and comprising of entry numbers 12,13 and 14 made on 26/4/2018 in the register for LR No Kwale/Galu Kinondo 683,entry numbers 12,13 and 14 made 26/4/2018 in the register for Kwale/Galu Kinondo/1515 and entry no 10 made on 26/4/2018 in the register for LR Kwale/Galu Kinondo/1516.
 - f. An order directing the 2nd respondent to forthwith cancel, entry numbers 12,13 and 14 made on 26/4/2018 in the register for land reference number Kwale/Galu Kinondo/683, entry no 9 made on 26/4/2018 in the register for land reference no Kwale/Galu Kinondo/1515 and Kwale/Galu Kinondo/1516 and entry number 10 made on 26/4/2018 in the register for land reference number Kwale/Galu Kinondo/1516
 - g. A permanent injunction to restrain the 1st respondent from interfering in any manner whatsoever with the Petitioners rights in the parcels of land known as land reference number Kwale/Galu Kinondo/1515 and 1516.
 - h. A mandatory injunction to compel the interested party to forthwith deposit in court original title deed issued to him by the 2nd Respondent vide entry no 14 made on 26/4/2018 by the 2nd respondent in the register for land reference no Kwale/Galu Kinondo/683 for transmission to the 2nd respondent for destruction
 - i. Thepetitioners costs in these proceedings be borne jointly and severally by the 1st respondent and the Interested Party.
6. The petitioners case is discussed latter in the petitioner’s submissions.

1st Respondents Response

7. In response to the Petition, the 1st respondent filed grounds of opposition dated February 15, 2021 through Mr. Mbuthia. It was contended that this court lacked jurisdiction since the 1st respondent’s decision being impugned had already been adopted as an order of the court on April 10, 2018. That if the Petitioners were dissatisfied with the said order, they had not appealed or applied to have it set aside, varied and or reviewed. That the 1st respondent merely exercised its lawful mandate under section 14 of the [*National Land Commission Act*](#) by giving the orders of October 30, 2017 which orders had already been implemented by the 2nd Respondent. Consequently, the courts determination would only be an academic exercise. In addition, it was stated that the Petition was an appeal against the 1st respondents decision disguised as a petition which appeal ought to have in any event been filed within 14 days of the determination and therefore the court lacked jurisdiction to entertain the appeal. Further that a full trial was the appropriate forum for determining issues of land ownership, not a petition. Moreover the



Petitioners had no proprietary interest capable of protection under the provisions of article 40 of *the Constitution* since the Petitioners titles over the suit property had been revoked and new titles issued to the interested party on April 26, 2018. That the petition failed the test set out in *Anarita Karimi v Republic* and was a gross abuse of the court process.

2nd Respondents Response

8. The State Counsel Nguyo Wachira also filed grounds of opposition. They supported the Petition to the extent that the petitioners were the registered owners of the suit property following the subdivisions. It was stated that the decision of the 1st respondent may have been made without the benefit of the earlier decided court cases on the suit property and without hearing the parties. That the issues raised in the petition relate to ownership, where the registered owner has the absolute right of ownership and use and the same should only be taken away after full hearing unlike the decision of the 1st respondent of October 30, 2017. This court was urged to consider setting down of ELC Case No. 466 of 2017 for full hearing and determination in the presence of all the parties.
9. Together with the grounds of opposition a Notice of Claim and Indemnity was also filed against the interested party on the grounds that the latter presented misleading documents to the 1st respondent claiming ownership of the suit property knowing the same to be incorrect. It was urged that the 2nd respondent executed the court order and documents in good faith and in accordance with its statutory mandate.

Interested Party's Response

10. The interested party was represented by the firm of Marende Necheza & Company advocates and never filed any response to the petition. He died in the course of the proceedings and Counsel by a Notice of Motion dated 28th of May 2021 sought orders that the petition be dismissed since the suit against the interested party had abated. This court on December 17, 2021 made orders that the suit against the interested party had abated and the Petition was to proceed as against the rest of the parties.

Submissions

11. The petition was canvassed by way of written submissions.

Petitioners Submissions

12. The petitioner filed submissions dated June 2, 2021 where they identified three issues for determination 1) Whether the 1st respondent had jurisdiction to hear and determine the purported complaint filed by the interested party in respect of the subject land parcel 2) Whether the petitioners constitutional rights and right to fair administrative actions were violated and 3) Whether the prayers sought by the petitioners in the petition should be granted.
13. It was submitted that the functions of the 1st respondent are stipulated under article 67[2][e] of *the Constitution* and which include to initiate investigations on its own initiative or complaint into present or historical land injustices and recommend appropriate redress. Counsel referred this court to articles 68[c][v] and 61[2] of *the Constitution* on the definition of public land. Further article 64 of *the Constitution* and section 14[1] of the *National Land Commission Act* on the jurisdiction to review grants and disposition on public land or land that was previously public land but later converted to private land as being a preserve of the National Land Commission. Counsel urged that from the evidence placed before court and which included green cards of the land parcels herein, the land parcels were all freehold titles and consequently private land. That the land in dispute has never been converted



to public land. That for those reasons the 1st respondent commission had no jurisdiction to hear and determine the purported complaint by the interested party in respect of land parcel Nos Kwale/Galu Kinondo/683 and Kwale/Galu Kinondo/1515 and 1516 and relied on the holding of Emukule J in *R v National Land Commission & 4 others Ex parte Fulson Company Limited & another* [2015] eKLR.

14. It was contended that even if the Commission had jurisdiction to investigate and determine claims over private land, then it nevertheless still had no jurisdiction to re-open and hear afresh a claim for ownership of private land which had already been heard and determined by the High Court which is a superior court clothed with the jurisdiction to hear and determine such disputes. The court was referred to the holding in *Republic v national Land Commission Ex parte Holborn Properties Limited* [2016] eKLR.
15. On whether the petitioners constitutional rights and right to fair administrative actions were violated, it was submitted that despite knowing the petitioners were the proprietors of Land Parcel Nos Kwale/Galu Kinondo/1515 and 1516, the interested party presented a claim over the said parcels without joining the petitioners as respondents therein. Further that the Petitioners were not served with copies of the complaint by the interested party and hence did not have an opportunity to participate in the said proceedings. That the complaint proceeded on October 30, 2017 before the 1st respondent and by a determination made on the same day the title deeds held by Luke Mutio and Titus Kilonzo Kitana were revoked and the land reverted to the interested party. according to counsel, the said determination was made despite the fact that the two parties mentioned above were at that time not the legal proprietors of the suit parcels as the same had already been subdivided and transferred to the petitioners herein.
16. Submissions were also made that the 1st respondent purported to determine that the suit land be reverted to the interested party despite the land record for the said parcels being clear on the fact that the interested party had never at any particular time been the registered proprietor of the said land parcels. Moreover, the manner in which the proceedings were undertaken by the 1st respondent, the petitioners were condemned unheard and that their constitutional rights and rights to fair administrative action were violated. The violations were listed as;
 - i. Failure to be given prior adequate notice to prepare and defend themselves against the complaints lodged against them by the interested party contrary to section 4[3][a] of the *Fair Administrative Actions Act*.
 - ii. Failure to be given notice of their right to legal representation
 - iii. Failure to be given notice to cross examine any witnesses availed by the opposing side
 - iv. Failure to be given copies of information materials and evidence adduced against them
 - v. Failure to be given an opportunity to attend the proceedings and making a finding against them hence depriving them their interests over the suit land and thus a violation to their right to fair trial as envisaged under article 40,47 and 50[1] of the *Constitution of Kenya 2010*.

The court was referred to the case of *Onyango Oloo v Attorney General* [1989] eKLR.

17. The petitioners counsel also submitted that by purporting to enter into a consent order before the Environment and Land Court, the parties therein failed to take into consideration the fact that the petitioners had still not been afforded the opportunity to be heard by the court in respect of the interests that they had in the suit parcels and which interest was adversely affected by the contents of the said consent order. Reference was made to the case of *Mwangi Stephen Muriithi v National Land Commission & 3 others* [2018] eKLR.



18. On whether the prayers by the petitioners should be granted, it was submitted that the petitioners had incurred costs in purchase of the land, further costs in development of the same and had sustained severe damage from loss of the said properties. That given the circumstances under which the respondents herein cancelled the petitioners' titles to the suit property and had them reverted to the interested party, it would only be proper for the court to allow the petition in its entirety as presented before it against the respondents.

1st Respondents Submissions

19. On December 17, 2021 the 1st respondent was granted 30 days to file its submissions. They however failed to comply, on January 21, 2022 this court granted them a further 7 days to comply failure to which it would be concluded that they were not interested in filing the same and the court would proceed to make its judgement without the same. There was no compliance.

2nd Respondents Submissions

20. The 2nd respondent submissions were dated September 6, 2021 and presented two issues for determination one touching on abatement of the suit against the interested party and which had already been conclusively dealt with by this court vide its ruling dated December 17, 2021. Counsel supported the petitioners claim while emphasising on articles 40 of the Constitution on protection of a citizen's right to property, 25 on the right to a fair trial, 23 on jurisdiction of the court to handle applications for violations of rights and 24 on limitation of fundamental rights.

Analysis And Determination

21. I have considered all the material placed before this court in support and against the application. I have also looked at the pleadings, documents exhibited, submissions and authorities filed herein. I will proceed to analyse the orders sought and if they warrant issuance by this court.

Jurisdiction

22. However before I consider the above, it is imperative that I determine whether this court has jurisdiction to grant the orders sought since it has been contented that the 1st respondents determination of October 30, 2017 and which the petitioners seeks to quash had already been adopted as an order of this court on April 10, 2018 in HCC 466 of 2018. In my view this court has jurisdiction to deal with the Petition before it by dint of jurisdiction conferred to it under articles 162 of the Constitution as read together with section 13 of the Environment & Land Court Act. The only issue is the limitation raised by virtue of the fact that the orders adopted by the court have since been implemented. What this court has been asked to do is to impugn the determination of the 1st respondent for failure to accord the petitioners a fair hearing among others and this is what this court will proceed to analyse and consider.
23. In coming up with the above finding I also considered the fact that the orders dated April 10, 2018 were duly adopted as the orders of the court (see hand written proceedings FM 4 page 123-125). The orders still stand which the petitioners have not denied. Indeed, the question that arose in my mind is why the petitioners did not seek to be enjoined as parties upon discovery of the existence of this order with a view to moving the court to set aside the consent order and or review the matter. Instead, the petitioners through their counsel herein wrote to the Attorney General vide a letter dated October 31, 2018 demanding that the consent order be set aside. My concerns were partly addressed in the petitioners arguments in response to this objection, that the 1st respondents determination forms the



basis of the consent order and once quashed under this petition, it would be open to the petitioners to subsequently also move the court which was allegedly misled into recording the consent to set it aside.

24. I will however approach the above objection and corresponding response from the need to attain substantive justice vis a vis technicality in the spirit of article 159 (2) (d) of the *Constitution*. This is a unique case where as I have already alluded to earlier that the suit against the interested party herein has abated and it would still be the same position under HCC 466 of 2018 where the interested party is named as the plaintiff. I'm therefore inclined to proceed with the Petition before me based on the facts and evidence placed before this court to ensure that justice is dispensed with once and for all, the consent order having been adopted by the court notwithstanding. There is need to administer justice without undue regard to technicalities and this courts concern is to do justice to the parties. I'm also guided by the holding in *Principal Mariakani Secondary School & another v Maglena Amina Kamau* [2020] eKLR. In any event it is clear that there has been previous proceedings filed since the year 1997 on the suit property, this I will address latter in this judgement and which will support the position I have taken since litigation must come to an end.

Were the Petitioners rights infringed upon?

25. It is the petitioners case that the 1st respondent by making the determination without according them an opportunity to be heard and defend their rights in or over land parcels known as land reference numbers Kwale/Galu Kinondo/1515 and 1516, violated and continues to violate the petitioners rights to property and fair hearing as guaranteed under article 40,47 and 50[1] of the *Constitution of Kenya 2010*. The reliefs/orders sought in a, b and c of the Petition all revolve around these (see paragraph 5 of this judgement). The petitioners must therefore prove that these rights were infringed upon and I will start with the 1st respondent whose determination is the substratum or catalyst of the actions by the rest of the respondents.
26. In determining whether the rights of the petitioners herein were infringed upon by the respondents as indicated by the petitioners pleadings, it is imperative that this court considers the threshold required for proof of violation of rights. In *Anarita Karimi Njeru v Attorney General*, (1979) KLR 154 the court of appeal stated as follows:

“We would however again stress that if a person is seeking redress from the 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 case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.”

The courts position in the above case was further asserted in *Mumo Matemu v Trusted Society of Human Rights Alliance and others*, Nairobi Civil Appeal No 290 of 2012 where the court stated as follows:

“We cannot but emphasize the importance of precise claims in due process, substantive justice and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not conterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point...Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and



are a tenet of substantive justice as they give fair notice to the other party. The Principle in *Anarita Karimi Njeru (supra)* that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle."

27. It is the petitioners case that their rights to fair hearing and ownership of property have been abused by the respondents, a closer look at the pleadings herein confirms that the interested party [now deceased] presented a claim for ownership of land parcel No. Kwale/Galu Kinondo/683 to the 1st Respondent. This is also confirmed by the letter dated October 30, 2017 from the 1st respondent, the National Land Commission titled 'Determination of dispute in Respect of LR. No. Kwale/Galu Kinondo/683-Kwale County'. According to the letter the 1st Respondent set down the claim for hearing on October 30, 2017 and proceeded to revoke the Petitioners titles and had the land reverted to the Interested Party. It is clear that the Petitioners were not aware of the proceedings before the 1st respondent and the complaint by the interested party, they were never served. It is clear from this letter which capture the proceedings that the respondents were only Luke M. Mutiso and Monica Ndunge Kitana (as the legal representative of Titus Kilonzo Kitana. The Petitioners were never made a party to the proceedings despite the 1st respondent being aware of the existence of the subdivisions registered in the names of the Petitioners (see the subtitle 'Findings'). The 1st respondent proceeded to hear and determine the complaint in the absence of the Petitioners and who were the then registered proprietors of the suit parcels. Infact I will confidently state that Luke M. Mutiso and Monica Ndunge Kitana had no interest in attending the session having transferred the property. The effect of the determination was to deprive the Petitioners of their properties which I have noted a concise history and how they obtained the same has been made out. Article 40(3) provides that the state shall not deprive a person of his property of any description unless certain criteria are met, article 50(1) of *the Constitution* provides that every person has the right to have any dispute that can be resolved by the application of law resolved in a fair and public hearing before a court or other independent and impartial tribunal or body.
28. It is the 1st respondents case that it made the decision to revoke the Petitioners titles based on the powers vested on it by section 14 of the *National Land Commission Act*. My understanding is that the powers conferred upon the Commission were to be exercised in accordance with the rules of natural justice. This is buttressed by Section 8 of the *National Land Commission Act* which provides that in the exercise of its power, the Commission shall be guided by the principles set out under article 47 of *the Constitution*. Article 47 of *the Constitution* is to the effect that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. I place further emphasis on this issue with reference to an excerpt from the holding in *Sceneries Limited v National Land Commission* [2017] eKLR where the court stated thus;-
- "Generally, however, it is imperative that individuals who are affected by administrative decisions be given the opportunity to present their case in some fashion. They are entitled to have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process which is appropriate to the statutory, institutional, and social context of the decision being made".
- The above position is affirmed in *Republic...vs...National Land Commission; Pacifica Mwangi & another (Interested Parties); ex parte Anil Ratilal Tailor* [2019] eKLR where the court held that;
- "Section 14 (2) of the *National Land Commission Act* envisions the creation of a set of rules intended to guide the Commission in reviewing of grants or dispositions of public land subject to articles 40, 47 and 60 of *the Constitution*. In the absence of those rules, the procedure under Section 4 of the Fair Administrative Action Act which was enacted to give



force to article 47 suffices to assess whether the respondent adhered to the rules of natural justice. The provision provides that in all cases where a person's rights or fundamental freedoms are likely to be affected by an administrative decision, the administrator must give the person to be affected by the decision prior and adequate notice of the nature and reasons for the proposed administrative action; an opportunity to be heard and to make representations; notice of a right to a review or internal appeal against the decision where applicable; a statement of reasons; notice of the right to legal representation and right to cross-examine; as well as information, materials and evidence to be relied upon in making the decision or taking the administrative action.

29. It has been contended by the Petitioners that the 1st Respondent had no jurisdiction to make inquiry on private land. Reliance was placed upon the case of *Mwangi Stephen Murithi vs National Land Commission & 3 others* (2018) eKLR where the court guided by articles 67, 68(c) (v) of *the Constitution* and section 14 of the *National Land Commission Act* confirmed that the 1st Respondents jurisdiction was limited to public land. The suit property according to the evidence produced was private land as at the time of the determination by the 1st respondent and there is no evidence placed before this court by the 1st respondent to show that the suit property was once public land before this alienation. I have also read the decision cited and I'm persuaded that the 1st respondent clearly did not have jurisdiction to adjudicate on the complaint filed by the interested party before it.
30. I also find it necessary to make some observations on the proceedings by the 1st respondent including other court cases filed by the interested party touching on the suit property. A summary of the determination is contained in the 1st respondents letter dated October 30, 2017 which I have keenly looked at. It appears that there is information that was clearly not made available to the Commission in respect of the subsequent orders made in HCCC 97 of 1997 after the orders made by the late Justice Khaminwa on March 3, 2005 unless they were provided and the 1st respondent deliberately chose to ignore. Unfortunately, the 1st Respondent chose not to file any replying affidavit to account for its actions. The orders of March 3, 2005 favored the Complainant Interested Party since their effect was to revert the suit property to its pre-subdivision form. The 1st respondent stopped in its analysis at this order, yet there were subsequent orders by Justice Mwera made on September 22, 2005 that struck out the suit for failing to disclose a reasonable cause of action against the estate of Titus Kilonzo Kitana who was indeed the one who subdivided and sold the properties. The failure to disclose these orders in my view was in bad faith, meant to ensure that the 1st Respondent made a finding in the interested party's favor. My misgivings are confirmed by the court of appeal in its ruling in Civil Application No. Nai. 341 of 2005 where the Interested Party herein sought to stay Justice Mwera's decision of September 22, 2005 (see page 148 -155). The judges in refusing to grant an order of stay observed as follows; -
- ‘the disclosures made by the respondent which have not been denied are rather disturbing as they portray the applicant as lacking in candor. He would appear to have surreptitiously obtained money from unsuspecting purchasers of a property whose title he is aware is not in his name. He also persists in denial, submitting that the property still exists in the Land Registry when from all indications it is non-existent after new titles were issued to persons who are not parties to this dispute. Courts do not act in vain and it seems to us that any orders for stay that we may issue would be unenforceable against the respondent.....the matter has been overtaken by events and we decline to be sacked into patently nefarious schemes by the parties which both the law and equity would frown upon’
31. Had the 1st respondent seen the above ruling maybe it would never have made the determination. Infact the 1st respondent I must say was caught up in the Interested Party's nefarious schemes by clearly sitting on a matter which the High court had clearly decided upon. They had no jurisdiction in my view. The



above excerpt also goes a long way in supporting my earlier decision to stand for substantive justice in this matter.

32. In view of the foregoing it goes without say that all the subsequent actions and decisions anchored on the said determination by the National Land Commission cannot stand. They should also collapse since their substratum has collapsed. This would also be applicable to the consent that was adopted by the Court since the consent which was adopted was based on a determination which was illegal. In any event the Petitioners were not party to those proceedings yet the parties therein were very much aware of the fact that the Petitioners were the registered proprietors of the subdivisions. I will not belabor this point neither will I seat on appeal against the court that adopted the consent. I will be guided by the holding of the Late Nyarangi JA in *David Onyango Oloo vs The Attorney General* Civil appeal No. 152 of 1986 also cited by Counsel for the Petitioners where the late Nyarangi JA pointed that; -

‘A decision taken in breach of the rules of natural justice ‘is not cured by holding that the decision would otherwise had been right. If the principal of natural justice is violated it matters not that the same decision would have been entered at all.’ (Emphasis is mine)

33. This court must also address itself to the issue of ownership of the suit property to enable a full determination of this matter. I’m also guided by the court of appeal decision in *Munyua Maina vs Hiram Gathiba Maina* (2013) eKLR where the court held that; -

‘it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is being challenged and the registered proprietor must go beyond the instrument to prove legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.’

Thepetitioners have set clearly in their pleadings and facts the chronology of events on how they acquired the suit property. This entire history is buttressed by the entries made at the lands registry which have also been presented and are also confirmed in the 1st respondents determination. They are also further supported in the proceedings in HCCC 97 of 1997 and the observations made by the Court of Appeal which I quoted verbatim earlier. I find that from the material placed before me the Petitioners have proved on a balance of probabilities that they are the bonafide proprietors of the suit land and that the registration of the Interested Party as owner was marred with misrepresentation.

34. The upshot is that the petitioners have been able to prove on a balance of probabilities they were the registered bonafide owners of the suit properties. That indeed their rights were violated through the 1st respondents actions of not according them a fair hearing before making its decision of October 30, 2017. That the 1st respondent had no jurisdiction to make a determination over private property and in any event the matter had already been determined in HCCC 97 of 1997.

35. The following orders be and hereby issue to dispose of this Petition; -

1. The decision by the 1st respondent by the letter dated October 30, 2017 addressed to the Land Registrar, Kwale County through the Ag Chief Land Registrar be and is hereby set aside
2. An order of Certiorari be and is hereby issued to quash the 1st respondent’s determination of October 30, 2017 and the proceedings thereof.
3. An order of Certiorari be and hereby issue to quash with effect from April 26, 2018, the entries made by the 2nd respondent in the proprietorship section of the individual registers for the parcels of land known as land reference numbers Kwale/Galu Kinondo/683, Kwale/Galu Kinondo/1515 and Kwale/Galu Kinondo/1516 in execution of the 1st respondents determination contained in the 1st respondents letter to the 2nd Respondent dated October 30,



2017 through the Ag chief land registrar and comprising of entry numbers 12,13 and 14 made on 26/4/2018 in the register for LR No Kwale/Galu Kinondo 683,entry numbers 12,13 and 14 made 26/4/2018 in the register for Kwale/Galu Kinondo/1515 and entry no 10 made on 26/4/2018 in the register for LR Kwale/Galu Kinondo/1516.

4. An order directing the 2nd respondent to forthwith cancel, entry numbers 12,13 and 14 made on 2April 6, 2018 in the register for land reference number Kwale/Galu Kinondo/683, entry no 9 made on 26/4/2018 in the register for land reference no Kwale/Galu Kinondo/1515 and Kwale/Galu Kinondo/1516 and entry number 10 made on 26/4/2018 in the register for land reference number Kwale/Galu Kinondo/1516
5. Each party to bear its own costs.

DELIVERED AND DATED AT KWALE THIS 16TH DAY OF MAY, 2022

A.E. DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Muthama for the Petitioners

Ms Njau holding Brief for Ms Langat for 2nd Respondent

Mr. Denis Mwakina- Court Assistant.

