



Mbugua & another (suing as Administrator of the Estate of Simon James Mbugua) v Attorney General & 2 others (Environment and Land Constitutional Petition 2 of 2021) [2022] KEELC 3063 (KLR) (23 June 2022) (Judgment)

Neutral citation: [2022] KEELC 3063 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 2 OF 2021

LL NAIKUNI, J

JUNE 23, 2022

**IN THE MATTER OF: SECTION 84(1) OF THE OLD REPEALED CONSTITUTION,
ARTICLES 22(1) AND 23 OF THE CONSTITUTION AND SECTION
6 OF THE SIXTH SCHEDULE OF CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF RIGHTS AND
FREEDOM GUARANTEED UNDER SECTIONS 75 OF THE OLD CONSTITUTION,
ARTICLE 25(C), 40 (1) & (3) AND 47 OF THE CONSTITUTION OF KENYA, 2010**

- AND -

**IN THE MATTER OF: ILLEGAL AND IRREGULAR
CANCELLATION OF THE LAND TITLE NO.**

KILIFI/JIMBA/338

BETWEEN

THOMAS KAHENYA MBUGUA 1ST PETITIONER

SYMON WANGOMBE GITHUA 2ND PETITIONER

SUING AS ADMINISTRATOR OF THE ESTATE OF SIMON JAMES MBUGUA

AND

ATTORNEY GENERAL 1ST RESPONDENT

DISTRICT LANDS REGISTRAR KILIFI 2ND RESPONDENT

CHIEF LANDS REGISTRAR 3RD RESPONDENT



JUDGMENT

I. Preliminaries

1. The Judgment of this court pertains the filed Constitution Petition dated 10th January, 2021 by the Petitioners on 21st January, 2021. The Constitution Petition is brought under the dint of the provisions of Sections 75 and 84(1) of the old Constitution of Kenya (Repealed) Articles 22 (1), 23, 25 (c), 40 (1) & (3) and 47 of the Constitution of Kenya 2010, Section 6 of the Sixth Schedule of the Constitution of Kenya 2010. As a matter of background information, the parties in the case proceeded by both written affidavits and adducing of oral (“*Viva Voce*”) evidence.

II. The Petitioners’ Case

2. The Petitioners sought for the following orders:-
 - (a) A determination that the Purported Cancellation of the Petitioner title documents in respect of Land Reference No. Kilifi/jimba/338 are unconstitutional and unlawful.
 - (b) A declaration that the Kenya Gazette Notice No. 2505 of 1986 was unconstitutional and contrary to Article 40 of the Constitution of Kenya.
 - (c) A declaration that the subsequent transfer thereof to the third parties and issuance of new green cards by the Ministry of Lands/Government of Kenya and other subsequent actions emanating therefrom was illegal and contrary to the Constitution of Kenya.
 - (d) A declaration that the Petitioners are entitled to due compensation based on the present value of the land in the sum of Kenya Shillings Four Twenty Million (Kshs. 420,000,000/=).
 - (e) A declaration that the petitioners are entitled to a refund of Kenya Shillings One Million (Kshs. 1,000,000,000/=) incurred in erecting a fence and a farmhouse over all that parcel of land known as Land Reference No. Kilifi/jimba/338.
 - (f) General damages for loss and suffering on the unconstitutional and unlawful cancellation of the title documents, transfer to the Government and subsequent actions.
 - (g) Exemplary/Punitive damages for the unconstitutional and unlawful cancellation of the title documents transfer to the Government and subsequent actions.
 - (h) Costs of the suit plus interest on court rate.
Such other and/or further orders as the honorable court may deem fit and just.
3. The Petition is premised on the testimonial facts, grounds and the averments made out in the 15 Paragraphed Affidavit of Thomas Kaheya Mbugua And Symon Wangombe Guthua who are both the Petitioners in this Petition sworn and dated on 1st March, 2022. They also orally tendered their evidence in court through examination in chief, cross examination and re – examination accordingly.

Examination in Chief of the Petitioner Witness – 1 - Sworn and testified in the English Language by Mr. Gachuna Advocate.

4. The Petitioners’ witness number one was Mr. Thomas Mbogua Kahoya. He is a holder of the national identity card bearing numbers 3424275. He affirmed having signed the affidavit on 20th January, 2021 and Annexures marked as Petitioners Exhibits 1 to 10. He stated that the 2nd Petitioner and him the



surviving Legal Administrator/executors of the estate of the Late Simon James Mbugua (hereinafter referred to as “the Deceased”). Hence fully conversant with the matter herein. They had obtained a Grant of Letters of Administration issued by the High Court in Nairobi in Succession Cause No. 474 of 1990 – which they annexed thereto marked as “TS-1”) they held that the deceased was the registered owner of all that parcel of land known as Land Reference No. Kilifi/jimba/338 (hereinafter referred to as “The suit Land with a land Certificate over the same having been issued to him on 15th August 1979. Upon the payment of requisite adjudication and Land Control Board fees. They produced a receipt dated 15th August, 1979. Petitioner Exhibit - 2 issued by the Department of Land for adjudication and Land Control Fees and Land Certificate.

5. They indicated that they were aware that on or around the late years of 1980, the 3rd Respondents – the Chief Land Registrar with the instructions from the Commissioner of Lands wrote to all the occupants of the land within the following blocks in Kilifi Land Registration District, Chembe/Kibamshe, Kilifi/Jimba (where the land is situate) Kilifi/Madeteni, Kakuyuni/Madunguni/Kilifi/Matsangoni notifying them that their occupation of the said land/Plot was improper and not in accordance with the law as the land allegedly belonged to the Government and therefore the Land Adjudication Act Cap 284 applied before the titles they held were issued to them was erroneously applied as it was government land and that not trust lands. As such, their registration as absolute owners was a nullity *ab inito*, defective and for cancellation forthwith.
6. They were required to surrender the same to the 2nd Respondent for cancellation with a rider that the National Government was considering to allocate the title holders the same parcels under the provisions of Government Lands Act Cap 280 (Repealed), They produced a copy of the Kenya Gazette Notice No. 2505 of 30th May, 1986 as Petitioner Exhibit No. 4 and a letter issued after the fact Petitioner Exhibit No. 5. They stated that the deceased never voluntarily surrender the title documents but as the Legal Administrator/Executors of the Estate in the execution of the administration of their duties were intended to surrender the original title documents for reallocation in the month of May, 1995 whereof the 3rd Defendant wrote to the Commissioner of Lands informing him that the title document was among those erroneously adjudicated Government lands and that prior to the cancellation order issued *vide* Kenya Gazette Notice No. 2505 of 1986, the land belonged to the deceased and requested that the deceased be issued with a letter of allotment. He produced a letter dated 21st June, 1995 from the Commissioner of Lands marked as Petitioner Exhibit.
7. He stated that the case before court was his late father owned land Reference No. Kilifi/jimba/338 (2.4HA) registered on 13th September, 2006. He had the original Certificate of title deed in the year 1995 but was asked to surrender it for rectification and re-allocation. He complied with that. He surrendered it as they trusted the process. Today the title had not been re-allocated. He never got any communication.

He was referred to the letter dated 21st June, 1995. As he was concerned, he was aware about it. His father had indicated that there were cancellation of the neighbors titles. If he had known they would not return it to them he would not have surrendered the title deed.
8. They held that despite persistent follow-up, the commissioner of lands and his successor never issued them with the said Letter of Allotment in respect to the suit land. They informed court being aware that upon the cancellation of the title documents, the land was allocated to third parties and without any compensation being made to the deceased or his estate.

They held and based on the advise given by their Advocates that: -



- a. The cancellation of the title documents by the Government was illegal and irregular as it was never supported by the law then in place as the land did not belong to the Government but the natures and had been properly adjudicated and titles issued.
- b. There were no Kenya Order in Council, the instrument declaring laws published by the Colonial Government from time to time, from 14th December, 1895 when the Colonial Government declared a Protectorate over Kenya

Constituting it a Republic) and 31st May, 1963 (the last date of colonial administration/eve of attainment of internal self-government by the Country of Kenya) declaring the Land in the former protectorate of Kenya Crown/Government Land published by His/her majesty the King/Queen of Great Britain or legal/Gazette notice published by the Governor of Kenya between 1st June 1963 and 12th December, 1963. As such the land did not belong to the Government and it could not therefore adjudicate over the same produced as Petition Exhibit No. 7 and 8 the copies of the Judicial pronouncement and bundles of documents relating to the adjudication process undertaken prior to issuance of title documents over the lands. Comprised of Chembe/Kibabamshe, Kilifi/Jimba Kakuyuni/ Madunguni, Kilifi/Madeteni and Kilifi/Matsangoni adjudication sections of Kilifi District.

The Petitioner testified that inspite of multiplicity of unchallenged judicial pronouncements, findings and/or authorities that the entire process of takeover of the subject parcels of land in the said zone and the cancellation of the title documents thereof by the Government was illegal as the land never belonged to the Government in the first place and there being no appeal preferred against the said findings, the Respondent had continually failed and/or neglected to restore the title documents to the deceased's estate instead it had gone and issued the title to third parties and put the title documents under lock and key denying the Petitioners access and inspection of the same upon request. Produced as Petitioner Exhibit 8 copies of the official search and green card over the said parcel of land.

9. The Petitioner testified that by taking the suit property through an illegal administrative directives the action by the Government amounted to expropriation of personal property, without any due compensation made in breach of the provisions of the old Constitution of Kenya as well as the new Constitution of Kenya, further the actions by the Respondents amounted to blatant breach of the Petitioner's constitutional right to property, economic and social right, fair administrative action and fair hearing.

The Petitioner's informed court that they had recently carried out a valuation of the suit land which value valuation revealed that the value for the undeveloped parcel of land was a sum of Kenya Shillings Four Twenty Million (Kshs. 420,000,000/=). They produced the valuation Report dated 12th January, 2021 as Petitioner Exhibit No. 9 the valuation report prepared by a valuation firm trading in the names and style of "Ultimate Valuers Limited".

10. The Petitioners averred that they were aware that the deceased's dream in acquisition of the land had been directly communicated to them by him in their capacities as his son/heirs and active manager of his business empires during his life and as could be deciphered from the cycles of the real estate projects he was undertaking at the time. This had been for him to set up a tourist villas due to the Proximity of the land to the Watamu beach adjacent to the Indian Ocean which was and still is a hotspot for such developments by taking advantage of the Coastal strip as a local and international tourist destination.

However, they averred that the said dream was nipped in its buds by the action perpetrated by the Government and he was only able to continue with coconut and cashew nuts farming which he had commenced immediately upon the acquisition of the property as he prepared for the major project



and which economic activity he was compelled to terminate after the cancellation of his title take over and subsequent re-issue of the said title to third parties by the 2nd and 3rd Respondents.

They urged court to grant them the orders prayed for in the Petition.

Cross Examination of the Petitioner witness – 1 by M/s. Waswa Advocate:-

11. He stated that their title deed was for all that parcel of land known as Land Reference No. Kilifi/jimba/338. He had a copy of the title deed referred to Paragraph 4 of the Supporting Affidavit. He stated that the cancellation was done in the year 1986. The contents of the Kenya Gazette Notice Page 24 Annexures “TS-7”. The title deed was cancelled pursuant to the Kenya Gazette Notice. It was in the names of Simeon Mbugua.

Even after the Gazette Notice, they still retained the title deed. They surrendered it in year 1995. It was him who surrendered the title on the promise that they would be getting a re-allocation.

Court:- Why was the land being surrendered to the Government of Kenya?.

Mr. Mbugua:- It was miscommunication as all along they knew this parcel never for the Government land but was along the 10 miles strip area.

He testified that his father continued to use the land from the year 1980 to 1995. It was from the year 1995 that they stopped using the land. There had been some cultivations activities. He remembered the Land Registrar saying they would be getting the re-allocation. They left the land. He stated that later on they found out that there were new people on the land. He did not know whether there were people now or not. He did not know what happened to his neighbors. Currently, the land was not theirs. He stated that the value of the land was at that sum due to its proximity to the beach and being an area of high tourism attraction and hence suitable for hotel development. They had plans to develop it as we were doing the same in Nairobi. By 12th January, 2021 it was valued at a sum of Kenya Shillings Four Twenty Million (Kshs. 420,000,000/=). He reiterated that their land was irregularly and wrongfully taken away by them being asked to surrender the title deed. They were never compensated.

Re - Examination of the Petitioner witness no. 1 by Mr. Gachuna Advocate:-

12. He was not aware of any court proceedings before the cancellation of the title deed had been effected. The Kenya Gazette Notice, never made any reference to the said cancellation of the title deed. There were no proceedings undertaken before the cancellation.

However, on 18th November, 2021, the Learned Counsels, Mr. Gachuna for the Petitioner and Mr. Binyenya Advocate for the Respondents did enter and dully executed a mutual consent as follows:-

“By consent the Petitioner undertakes to assure Denman Properties Limited that the Petition dated 20th January, 2021 is purely for compensation and not for restitution to the suit property Land Reference No. Kilifi/jimba/338 and that the Prayer No. 26 (iii) thereof will not affect the ownership to the Applicant. Denman Properties Limited. Therefore, the Notice of Motion application dated 4th August, 2021 is hereby marked as compromised and/or spend/withdrawn and as no orders to costs”

The above orders were confirmed as being correct and hence adopted as the orders of this court. For this reason then, this Court will not consider the issue of restitution of the land but only concentrate on the compensation aspects only. That was the close of the Petitioner’s case.



III. The Respondents' case

The Replying Affidavit by the 1st, 2nd and 3rd Respondents

13. On 14th April, 2021, the 1st, 2nd and 3rd Respondents filed their 11 Paragraphed Replying Affidavit sworn by Stela Kinyua Gatuiru and dated March, 2021. She deposed to be the current County Land Registrar of Kilifi and therefore competent and duly authorized to swear the said affidavit on behalf of the 1st, 2nd and 3rd Respondents.

She informed court that as the Land Registrar she was responsible of processing land transactions, safeguarding and maintaining land records and documents in the County of Kilifi.

IV. The 2nd Replying Affidavit to the Petition

14. On 23rd December, 2021, there was the second 7 Paragraphed Replying Affidavit sworn by John Njogu on 16th December, 2021. He stated that he was the Chief State Counsel and head of the legal unit in the Ministry of Lands and Physical Planning and therefore duly authorized to swear the Affidavit.

He deposed that the certificate of title deed for Simeon James Mbugua the deceased herein for the parcel of land known as Land Reference Numbers Kilifi/jimba/38 was generated through the Land Adjudication process in 18th June, 1979. He posited that later on the Government of Kenya faulted the adjudication process which was communicated to all the land owners in the area. According to him the communication was made through individual letter and a Notice of Published on the Kenya Gazette being Gazette Notice No. 2505 dated 30th May, 1986 issued by the then Commissioner of Lands Mr. J.R. Njenga – The Respondent Exhibit 3 is a copy of the said Kenya Gazette Notice.

15. He averred that he was further advised by the Director of land Adjudication and Settlement that the Department had erroneously applied the *Land Adjudication Act* Cap 284 in the registration of the suit land and other parcels within the area on government land which was not proper. The Respondent Exhibit 4 is a Copy of the internal Memo dated 15th November, 2021 from the Director of Land and Settlement therefore, he held that in view of this error in the application of the law the title held by the Petitioner was thus held as defective and cancelled and all this was communicated to the Petitioner – the deceased.

On 17th February, 2022, the Respondents filed a further Affidavit sworn by Mr. John Njogu to the effect that on 23rd December, 2021 a valuation has since been done on the suit property being a sum of Kenya Shilling Seventy

Examination in Chief of the Respondent Witness – 1 – Stella K. Gatuiru – M/s. Waswa Advocate

16. M/s. Stella Kinyua Gatuiru was the Respondent Witness – 1. She said she was the Land Registrar based at County of Kilifi. She was an Advocate of High Court of Kenya and hence well versed with facts. Her personal No. was 2015 - 000645. She became the Land Registrar in the year 2015 and gazette in November, 2016 as Registrar No. 356. She swore the affidavit dated 29th March, 2021 and filed in Court on 14th April, 2021. The same was admitted as evidence for the Respondents. She was in Court responding to a summon whereby the Land Office was requested to give the status of the said land which they provided through the said filed affidavit.

She indicated that the matter in court was regarding the parcel of land known as Land Reference No. Kilifi/jimba/338. She indicated from her belief this case was for compensation for the illegal cancellation of the land. However, she confessed and admitted that the land office did not have any



records of the subject matter being issued to the Petitioners or Certificate of title being issued on 15th August 1979. She stated that according to the findings by the National Land Commission Kilifi Jimba 338 had been allocated to the Petitioner through the Land Adjudication process.

17. Subsequently, all the title deeds issued in that location of Kilifi Jimba and Chembe Kibabamshe section were cancelled on 22nd December, 1986 by the then Commissioner of Lands citing irregularities in the allocations of the said parcels of the subject land. The said cancellation of title deeds covered the whole wide area of Kilifi Jimba, Chembe & Kibara Mushe, Kilifi Madeteni And Kilifi Matsangoni. According to her, the Ministry of Lands become aware of the irregularities on the allocations of the land. The affected persons become aware of the cancellations through a notice published in the Gazette. Between the years 1986 to 2000 the land would be investigated for the irregularity, and if they were cleared the land would be returned to the first registration. There would be communication to this effect.

Thereafter, there was information from the Government of Kenya that there would be re-allocate of the land to the first registration. But some of the property title were cancelled and re-allocated to other persons.

18. She deposed that there had been reconstruction of the green card which was opened on 22nd December, 1986 with the Government being the registered proprietor of the land and holding absolute title.

According to her after the cancellation of the title deed, there was reconstruction of the green card was pursuant to a court order dated 8th May, 2015 issued in Malindi ELC No. 11 of 2012 Respondent Exhibit 1 is the Court Decree. From the said extract of the green card the current status of the land was it belonged to Denman Properties Limited having been issued to them on 13th September, 2006. The earlier communication is the cancellation of the title took place in the year 1986. The first owner to the said land was George Karisa Fondo of holder of the National Identity card numbers 1166610 as the proprietor who was allocated it being the second entry made on 9th August, 2000. The third entry was made on 21st August, 2006 being a transfer to “Vista Properties Limited” a Sum of Kenya Shillings Two Million (Kshs. 2,000,000/=) and a title deed issued. They then transferred it to “Denman Properties Limited” as the fourth entry made on 13th September, 2006 at a sum of Kenya Eleven Million Four Hundred (Kshs. 11,400,000.00/=) and a title deed issued. She produced a copy of the green card as Respondents Exhibit 2.

19. She stated that the parcel Land Reference No. Kilifi/jimba/338 was valued by the Principal Government Valuer John Wanyoike and Counter signed by the Director, Valuer, Jacinta Mutua – produced the Valuation Report dated 7th January, 2022 marked as Respondent Exhibit 6. The typographical error on the report by the Government of Kenya Report to the effect that the parcel No. read as Kilifi/jimba/427 Kilifi County and not Kilifi/jimba/338/Kilifi was corrected/amended by the consensus of the parties herein and adopted by Court.

Cross Examination of the Land Registrar by Mr. Gachuna Advocate:-

20. It took fourteen (14) years from 1986 to 2000 for re-allocation as it was the period of Embargo. In all the cases the Government would involve the owners. By irregularities she meant all the title deeds issued before the year 1986 during the adjudication process and Trust Land. She stated that the record she had were those after the year 1986.

From the ELC Petition No. 11 of 2012 the court directed for the reconstruction of records. It was filed by the 1st Petitioner seeking to stop the Report of the Task Force on Kilifi Jimba, Chembe & Kibabamshe dated June 2010. The task force gave recommendations for 17 parcels for 99 years leases. It was a political process. She testified that the cancellation of the title deeds within this region was done in accordance with the provisions of the law – Section 80(1) and (2) of Land Registration Act.



She admitted that the Report of the Task Force on Kilifi Jimba and Chembe Kibaba Mbeshe dated 10th June, 2010 and letter by the Honorable Gideon M. Mungaro dated the 10th August, 2010 were later on found to be illegal.

Re - Examination of the Respondent – Land Registrar by M/s. Waswa Advocate:-

21. She did not have any date on the irregularities. She was familiar with the contents of the publication of the Kenya Gazette Notice. On the issues pertaining to the cancellation of title deeds it's the court to guide. That is all.

Examination - in - Chief the Respondent Witness - 2 – by M/s. Waswa advocate:-

22. The Respondent's witness – 2 was John Wainaina Njogu who is a holder of the national identity card bearing No. 7550792. He was the Chief State Counsel attached at the Ministry of Land & Physical Planning since the year 2018. He swore the affidavit on 16th December, 2021 and a further one on 17th February, 2022. Both of them were admitted. He was in court as requested to confirm the ownership of the land in question. Pursuant to that, he requested the Ministry of Land and which provided him with the information to the effect that that Land Reference No. Kilifi/jimba/338 was allocated to Simeon Mbugua in 18th June, 1979. Thereafter by a Gazette Notice No. 2505 was irregularly issued and a letter dated 15th November, 2021 from the Director of Land Adjudication Office (DLAO). According to him, the Government faulted the Land Adjudication process meaning that the Petitioner had obtained his title deed after the Land Adjudication process had been initiated. He said that he was aware that this Petitioner was in this court. He affirmed that the title allocated to the Petitioner had been done erroneously. It had been meant to be government land. Thus, the said title deed was a nullity ab-initio and defective as such. That is all.

Cross Examination of Mr. Njogu by Mr. Gachuna Advocate-

23. The Government made an error in issuing these title deeds. There were no proceedings over the issuance of the title deed. He said that when they went to check for the records at Kilifi, there were none found any records there.

He insisted that the process of cancellation of the title deed involved the owners of the land and the interested party. The final say on the matter of compensation was court. He admitted that the publication in the Gazette Notice did not give any reasoning for the cancellation of the title deed.

Court:-

24. Upon the closure of both the Petitioner and Respondent case, the Honorable Court felt it needful to obtain more accurate information with regard to the value of the suit land. This was because there were two (2) valuer's report dated 12th January, 2021 by "Ultimate Valuers Limited" for a sum of Kenya Shillings Four Twenty million (Kshs. 420,000,000/=) and the Valuation report of the Government Valuer based at the Ministry of the Land & Physical Planning dated 7th January, 2022 for a sum of Kenya Shillings Seventy Two Million (Kshs. 72, 000, 000.00). Certainly, these two reports were too worlds apart with such a wide difference of a sum of Kenya Shillings Three Forty Eight Million (Kshs. 348,000,000/=). They were not helpful at all to Court in arriving at a just decision. Hence, on 15th March, 2022 the Honorable Court invoked the provision of Section 173 (1) of the *Evidence Act*, Cap 80 to wit:-

“The extended powers of Court of obtaining proper evidence – A Judge or Magistrate may, in order to discover or obtain proper evidence, ask any question he pleases, in any form,



at any time, of any witness, or of the parties about any fact whether or not it is otherwise admissible ; any may order the production of any document or thing and neither the parties nor their agents shall be entitled to object to any such question or order nor without leave of court to cross – examine the witness upon any answer given in Reply to any such question.

Provided that Judgement shall be based only upon facts which are otherwise admissible and which have been duly proved'

In order to arrive at a fair, reasonable and/or just valuation, it directed that there be an independent valuation Exercise conducted by a separate Land Valuer to be duly appointed by the Chairman of the Institute of the Surveyors of Kenya. As a result, this was undertaken and a report filed in Court. Pursuant to the order of this court dated 15th March 2022 the Institute of Surveyors of Kenya appointed and approved Mr. Geoffrey Koros as the Surveyor. He prepared a report and presented it in court. Led by Court, he testified as follows.

The testimony by the Independent Land Valuer - Mr. Geoffrey Koros

25. He was Mr. Geoffrey Kiprotich Koros. He was a registered Land Valuer attached to a Company trading in the names and style of “Legend Valuers Limited” for the last 14 years. He was now a director. He was a holder of Bachelor of Land Economics from University of Nairobi and a Post Graduate Diploma from the Survey of Kenya. He was aware of the order of this Court issued on 15th March, 2022. He stated he was the one who prepared the Land Valuation report dated 20th April, 2022.

He was directed to undertake the valuation of property No. Kilifi/jimba/338 within 45 days. He did that. He got all the necessary documents of Survey Map from Survey of Kenya attached on Pages 13 & 14. The plot was indicated and marked and verified using the google map that is the Registry Index Map –marked with red arrow measuring 2.4 HA (6 acres) its adjacent to Plot Nos. 340 and 337. Its within Kanani Watamu, County of Kilifi. They applied for official search but they were not able to get. They were informed it was under lock and key. For that reason they were compelled to rely only on the copy of Certificate of Title.

The Methodology:-

26. They applied the Sales comparable approach. This meant, establishing the actual current sales of plots within the area. This enable one to establish and know the exact market value at the moment. That was the case as the land was vacant land. This area is characterized by hotels, bar and restaurants, cottages that is hospitality, there is an ongoing tarmac road from Watamu towards Tawan Hotel approximately 2-3 Kilometers there is electricity in the neighborhoods, water is from sunk boreholes and wells, no constant supply of water. The closest trading Centre is Watamu town.

The population was high/low for residence being a commercial area and many tourist mainly from Italy and European Counties. There is a beach. They had analysis of the sales comparable by measuring plots that had already been previously sold. They analyzed the data the land proximity to the ocean attracts more values and middle gives average and that touching tarmac its like a curve. They got an average of a sum of Kenya Shillings Fourty One Million Six Hundred (Kshs. 41, 600, 000.00) per acre as an average. These were for this parcel which touches on the ocean. Hence, in total the total market value for the Plot was Kenya Shillings Two Fifty Million (Kshs. 250,000, 000.00/=) and an element 15% of disturbance amount of a sum of Kenya Shillings Thirty Seven Million Five Hundred (Kshs. 37,500,000/=). The disturbance allowances normally arises from the displacement and detachment from the sentiments value accrued from the use of the land when land is acquired by compulsory acquisition – [Land Assessment Rules](#) 2017 [Land Act](#). From there, they concluded the report signed and sealed it.



Cross Examination of Mr. Koros by Mr. Gachuna Advocate:-

27. He got data from their offices based at Mombasa. They had previously carried out the work. He went to the field physical. An amount of a sum of Kenya Shillings Fourteen Million (Kshs. 14, 000, 000.00) per acre offer is extremely on the lower side being a commercial area.

A figure of a sum of Kenya Shillings Seventy Million (Kshs. 70, 000, 000.00) an acre, would be on the higher side. That would be the value of Diani area.

Cross Examination of Mr. Koros by Mrs. Waswa Advocate-

28. He stated that he had never seen the valuation report prepared by the Government of Kenya, Principal Land Valuer, Mr. Wanyoike. He had never heard of him. He admitted that there was such a huge margin between the two reports that is a sum of Kenya Shillings Seventy Two Million (Kshs. 72, 000,000.00) and the one he prepared for a sum of Kenya Shillings Two Fifty Million (Kshs. 250, 000, 000.00). He held that it was an agricultural area/property. He gave it that value of a sum of Kenya Shillings Two Fifty Million (Kshs. 250, 000,000.00). There were no development on the ground. There were a few structure a residential houses, but at the far end on Plot No. 421 there was a well established “Tawan Hotel”.

The Plaintiff want to be compensated a sum of Kenya Shillings Four Twenty Million (Kshs. 420, 000, 000.00) amounting to a sum of Kenya Shillings Seventy Million (Kshs. 70, 000, 000.00) per acre.

29. He felt perhaps the figure was slightly on the higher side. According to him, his assessment would be a sum of Kenya Shillings Fourty One Six Million One Hundred Thousand (Kshs. 46,100, 000.00) per acre. The Disturbance Allowances of 15% is based on law. The report dated 20th April 2022 be marked as Exhibit by court pursuant to the provision of Section 173 (1) of the Evidence Act 80 and consensus by parties.

V. Submissions

30. On 2nd March, 2022 upon the close of the hearing by both the petitioner and the 1st, 2nd and 3rd Respondents, in the presence of all the parties Court directed that they all prepare and file their written submissions accordingly on 27th April, 2022 upon full compliance the Honorable Court reserved a date for the delivery of Judgment accordingly.

A. The Petitioners Written Submissions.

31. On 25th April, 2022, the Learned Counsel for the Petitioners, the Law firm of Messrs. Stanley Henry and Susan Kaoya Advocates filed their written Submissions dated 28th March, 2022. Mr. Gachuna Advocate submitted that the petitioner as the Legal Administrators of the Estate of Simon James Mbogua the deceased with powers bestowed upon them *vide* Grant of Probate of Written Will issued on 9th October, 1990 in Nairobi High Court Succession Cause No. 747 of 1990 filed this Petition. They sought for several reliefs *‘inter alia:-*

- a. A Declaration that the purported cancellation of the Petitioner’s title documents in respect of Kilifi/jimba/338 was unconstitutional and unlawful.
- b. A declaration that the Kenya Gazette Notice No. 2505 of 1986 was unconstitutional and contrary to Article 40 of the Constitution of Kenya.



- c. A declaration that the subsequent transfer to third parties and issuing of new green cards by the Ministry of Lands/Government of Kenya and other subsequent action emanating therefrom was illegal and contrary to constitution.

Pursuant to the afore stated declarations, the Petitioners sought the following various reliefs:-

- a. Due compensation based on the present value of the land in a sum of Kshs. 420,000,000/=.
 - b. Refund of Kshs. 1,000,000/= incurred in erecting a fence and farmhouse over Kilifi/jimba/338
 - c. General damages for loss and suffering on the unconstitutional and unlawful cancellation of the title documents transfer to the Government and subsequent actions.
 - d. Costs of suit plus interest on court rate.
 - e. Such other and/or further orders as the honorable Court may deem fit and just.
32. The Learned Counsel submitted that the ostensible cancellation of the title deed was through the executive fiat. The Government failed to obtain a Court order to have facilitated this cancellation and instead they proceeded to cancel a title document. The also proceeded to re-issue a title document of the same parcel of land without involving the court.

He emphasized on the evidence by the Land Registrar (Respondent Witness - 1) to the effect that there were no records or evidence of the cancellation of the title document in the file. Indeed, she held that the green card was reconstructed following a court order. He held that no official search could be possible over the suit land as for this to happen its normally a requirement the Applicant has to produce a copy of the title deed and which the Petitioners could not do.

33. He submitted that there existed various court pronouncements and/or findings that the entire process of takeover of the subject land in the said zone and cancellation of the title documents by the Government was illegal as the land did not belong to the Government in the first place. Despite of this decision they had been uncharacterized as no appeal against them had been preferred by the Respondents. Instead of them restoring the title documents to the Petitioner they had gone ahead and issued title documents to third parties Denman Properties Limited. They had put the title documents under lock and key denying the Petitioners access and inspection of the same upon request. He relied on the decision of “High Court Misc. App. No. 730 of 1989 to support its case on a matter involving a complaint over cancellation of title in Kilifi Madeteni area on the same government land has been wrongly adjudicated and court found as follows: -

“The Applicant has shown that she had the titled to the parcels of land and if the government intended to cancel those titles it had an obligation to follow due process”..... in all respects the actions of the Commissioner of Lands on cancelling the titles of the applicant without hearing the applicant is illegal, invalid and unconstitutional and has to be set aside by this court. The applicant has been wrongfully deprived of her proprietary rights in the two parcels of land by the Commissioner of Lands and I shall have no hesitation to declare so. 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 national justice.



I therefore declare that she is still the registered owner of title No. Kilifi/Madeteni/410 And Kilifi/ Madeteni/414”

He cited another High Court case HCCC No. 3106 of 1997 where court held:-

- a. The ten miles coast ship was originally a protectorate and owned by the Sultan of Zanzibar.
- b. The land was merged with the main land in terms at independence
- c. Sultan ceded rights over land was never owned by the Government of Kenya save for public Government buildings.

34. He cited the Provisions of Section 23(1) of Registered Title Act (RTA) and Section 26 (1) of Land Registration Act, and the cases of “Virenda Ranji Gudka and 3 others – Versus - Attorney General (2014) eKLR and Ocean view Plaza Ltd. –Versus- Attorney General (Mombasa) HCCC No. 527 of 2001 “B’ Khimfi Bhumfi Seyan & 2 Others –Versus- Attorney General (2015) eKLR on the issue of title and ownership of land and the effect of the title documents as conclusive evidence with regard to compensation based on the value of the land, the Learned Counsel submitted that the Petitioners had attached a valuation report prepared by Ultimate Valuers Ltd. For the purpose. He held that the salient consideration in coming up with the sum of Kenya Shillings Four Twenty Million (Kshs. 420,000, 000/=) are as follows:-

- a. The locality and especially the beach hotels construed in the neighborhood where it held Jacaranda Beach Resort, Jacaranda Villas, the one Watamu Bay Resort and Safina House are in the neighborhood which is referred to as “Jacaranda Beach”

He stated that the Jacaranda Beach Coast Line is one of the while sandy beaches on the North Coast and is developed with holiday houses, villas, cottages, hotels and other tourist oriented developments occupying the first and second row plots.

The report further held that the Southern portion of the Plot is enclosed by a perimeter wall and fronts the Indian Ocean to the South with a frontage of approximately 85 Meters. The area has perfect accessibility.

35. The Petitioner Witness -1 testified that the deceased’s dream was to develop the property by putting up villas. The Respondent in carrying out a valuation of the Property, made similar observations as the Petitioners to wit:-

“Property is located in an area popular with High end hotels and apartments like the one Watamu Bay and Jacaranda Hotels and Apartments. This property is favoured by fronting the Indian Ocean as well as the main roadHowever, the property can be developed into cottages or other tourisms service facility.

The final valuation was Kenya Shillings Seventy Two Million (Kshs. 72,000,000/=) which the counsel described as being an auto climax and urged court to consider the one and Ultimate Valuers Limited.

He further submitted that all lands compulsory acquired by Government, it involves the provisions of the repealed Land Acquisition Act Cap 295 and add 15% to the value of the land as compensation for disturbance as provided in the schedule to the Act to wit

“To the amount of compensation so determined there shall be added a sum equal to fifteen percent of the marked value as determined in accordance with paragraph 1 by way of compensation for disturbance”



36. He held that the same provisions of law have even been incorporated under “*The Land (Assessment of Just Compensation) Rules* 2017 made under the operative “*Land Act* No. 6 of 2012, Rule 6 made thereunder provides:- Additional compensation”. The commission shall add a sum equal to fifteen percent of the market value to the amount of compensation as compensation for disturbance”.

Further the Petitioner have prayed for exemplary damages which is made Kenya Shillings One Million (1,000,000/=) in exemplary damages.

On 5th May, 2022 the Petitioner filed a further supplementary submission. It follows that on 1st March, 2022 and 15th March, 2022 this Honorable Court invoking the Provision of Section 173 of the *evidence Act* demanded to be furnished with an independent land valuation report to be appointed by the Institute of the Surveyors of Kenya.

Pursuant to this Mr. Koros of Legend Valuers Limited was appointed and after conducting the exercise he prepared a report and presented it in Court.

From his assessment he concluded that the value of the suit land was sum of:-

- a. Marked value Kenya Shillings Two Fifty Million (Kshs. 250,000,000/=)
- b. Disturbance Allowance 15% a sum of Kenya Shillings Thirty Seven Million Five Hundred (Kshs. 37,500,000/=)

Thus, a total of a sum of Kenya Shillings Two Eighty Seven Million Five Hundred (Kshs. 287,500,000/=). On the other hand, the Petitioner made a compensation claim of a sum of Kenya Shillings Four Twenty Million (Kshs. 420,000,000/=)

VI. The Respondents Written Submissions

37. On 11th May, 2022 the Learned Counsel, Mrs. Winne Namahya Waswa, Litigation Counsel for the Attorney General filed their written submissions dated even date M/s. Waswa Advocate submitted that the main contention by the Petitioners was that the deceased was the registered and absolute owner of the suit property having been issued with the title deed on 15th August, 1979.

Further, according to the Petitioners the suit property had been adjudicated in the names of Indigenous People who has lived on it from time immemorial before selling it to the deceased. The counsel averred that it was the Petitioner Contention that in December 1986, the 3rd Respondent under the instruction of the then commissioner of lands wrote to various occupants of many land owners including the Petitioners informing them that their occupants was improper and that Land belonged to the Government and not Trust Land a sit had been believed to be. The Learned Counsel stated that the Petitioners were informed that their titles were a nullity ab-initio and hence would be cancelled forthwith. They were ordered to surrender the titled to the 2nd Respondent for cancellation with a rider that the Government would consider allocating the holders of the same parcels under the Provisions of the *Government Land Act* Cap 280 (now repealed).

The Learned Counsel submitted that despite all this the Petitioners never surrendered the title until in May, 1995 when the 3rd Respondent wrote to the Commissioner of Lands informing him that the Petitioner’s title was among those that were erroneously adjudicated Government Land and prior to the cancellation order issued *vide* Kenya Gazette Notice No. 2505 of 1986, the land belonged to the deceased and requested that the deceased be issued with a Letter of Allotment.

38. According to the Petitioners despite the follow-ups the Commissioner of Lands and his succession never issued an Allotment Letter in respect of the suit land to the deceased and instead after the cancellation, the suit property was allocated to other third persons without compensating the deceased



and hence it was in contravention of numerous constitutional provisions including Article 40(1) and (3) of the [Constitution of Kenya](#) which provided an individual or association with rights to acquire and own property of any property and of any description in any part of Kenya and that the state would not deprive them of the same unless. It was for compulsory acquisition and even then there would be just, fair, prompt and adequate compensation. Thus it's for that reason that the Petitioner were claiming compensation for a sum of Kenya Shillings Four Twenty Million (Kshs. 420,000,000/=) as stipulated in the Land Valuation Report at the current market value.

39. The Learned Counsel submitted that the Government sudden cancellation of the title belonged to the Petitioner was regular and legal. In saying so the Learned Counsel held that after the Government realized some errors in the crucial titles it published the Gazette Notice to inform the respective owners of the suit properties as indicated from the said notice. She argued that the Provisions of Section 79 of the [Land Registration Act](#) allowed for the rectification of the registry by the Government Officer with the capacity and mandate to do so. In the instant case, notification was done and actually the Government admitted there had been some error on its part by stating that the initial titles were erroneously issued to parties including the Petitioners.

Further, the Learned Counsel submitted the Petitioners eventually did agree to surrender title and on promise they would be re-allocated the same land but she confessed that it was not clear how between the 22nd December, 1986 and 9th August, 2000 when the same suit property was then allocated to a third party George Karisa Fondo. Its her contention all in all that this did not amount to compulsory acquisition of the land as the Government never took over the land for its own use. Hence, the Petitioners were not entitled to the relief under Article 40 (3) and 22 of [Constitution of Kenya](#).

Additionally, it was the contention of the Learned Counsel that the Petitioner had enough time to have sought for redress against the Gazette Notice but opted not to use the chance.

40. The Learned Counsel held that although courts had provided its opinion on other similar subject matters as this one, the Government had power to ensure any error once realized was procedurally corrected. In the instant case, this was done by issuance of property notices to the affected persons before the cancellation of the title documents was effected according to the Counsel.

With regard to whether the Petitioners were entitled to any remedy from the Government for the cancellation and issuance of title to third parties and not themselves. She argued that they fully relied on the valuation report conducted on 5th January, 2012 and held that the amount of Kenya Shillings Seventy Two Million (Kshs. 72,000,000/=) would be fair, just and adequate compensation considering that the suit property had never been developed save for the wall constructed by the Petitioner.

On to the Land Valuation Report by the independent valuer, submitted pursuant to the court's intervention and involving of the Provisions of Section 173 of the [Evidence Act](#) Cap 80, his justification that he had experience of valuation of land within this area, and that the area was rich agricultural land, recreational like hotels, villas and cottages which attracted tourists both locally and internationally and his proposal of Kenya Shillings Two Fifty Million (Kshs. 250,000,000) she felt it was on the high side.

41. In conclusion, the Learned Counsel held that the Petition had failed to establish their case against the Respondents and hence prayed for the Petition to be dismissed with costs as there was no violation, denial and any threat to their fundamental rights and freedom.

VII. Analysis and Determination: -

42. I have carefully considered all the filed pleadings pertaining to the Petition dated 20th January, 2021, the Supporting and Replying Affidavits by both the Petitioners and the Respondents, the oral evidence



testified by all the witnesses in court during the hearing of the full trial, the articulate written submissions, the cited authorities provisions of Constitution of Kenya and the Provisions of the law.

In order to arrive at an informed, just, fair and equitable decision the Honorable Court has framed the following seven (7) salient issues for its determination. These are:-

- a. Whether the Petition dated 20th January, 2021 by the Petitioner meets the fundamental threshold of a constitutional set up.
- b. Whether the deceased properly acquired the suit land and hence was the registered and absolute owner to the suit land with all the indefeasible rights, interest and title vested in him by law.
- c. Whether the acquisition of the suit land by the Government lawfully undertaken for compulsory acquisition or any other purpose whatsoever as provided for by law? IF YES, was the lawful procedure the said compulsory acquisition or the said purpose adhered with or not?
- d. Whether the Government has legal statutory powers to cause any cancellation of a title deed belonging to an individual and if so, what is the laid - down procedure for doing so?
- e. Whether there are any available remedies to the an individual where the acquisition and cancellation of the title is found to have been undertaken unlawfully.
- f. Whether the Petitioner is entitled to reliefs sought from the Petition
- g. Who will bear the costs of the Petition?

ISSUE No. a). Whether the Petition dated 20th January, 2021 by the Petitioner meets the fundamental threshold of a constitutional set up.

43. The Constitutional basis of the Petition are well founded under Paragraphs 5 to 11 of the Petition they include:-

- a. Section 75 of the *old Constitution* which provided for protection from deprivations of property by the Government and for due compensation incase of compulsory acquisition.
- b. Article 25(c) of the *Constitution* which provides that the right to a fair trial shall not be limited despite any other provisions of the Constitution of Kenya.
- c. Article 40 (1) and (3) of the *Constitution of Kenya* declares the right to acquire and own property of any descriptions in any part of Kenya and protection from state deprivation unless procedurally done and due compensation was made.
- d. Sixth schedule under Article 262 on Transitional and consequential provisions on Existing obligations laws and Rights which preserves all rights and obligations of the Government of Kenya or the Republic and subsisting immediately before the promulgation of the year 2010.
- e. Article 47 of *Constitution of Kenya* on fair administrative action which provides for written reasons to be served upon a person whose right has been or is likely to be adversely affected by acts of the government.
- f. Article 22 of *Constitution of Kenya* declaring the right upon any person or authorized representative to commence proceedings for declaration and compensation for violation of rights and fundamental freedom.
- g. Article 23 of the *Constitution of Kenya* giving High Court jurisdiction to deal with such matters and out timing the nature of relief that can be granted.



- h. Article 165(3) (d) and 5 as read with Article 162 (2) (b) of the *Constitution of Kenya* giving this court jurisdiction to determine the questions whether a right of fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened inland matters
44. 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.

45. 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] eKLR 154 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 application of these set out principles for filing a Constitutional Petition to this case, the honourable court is fully satisfied that the Petitioners herein have dutifully complied and fully met the threshold of reasonable precision in pleadings for instituting this Amended Petition against the Respondents, the Affected parties and the Interested Parties herein and pleading for the prayers sought.



ISSUE No. b). Whether the deceased properly acquired the suit land and hence was the registered and absolute owner to the suit land with all the indefeasible rights, interest and title vested in him by law.

The Brief Facts

46. Before embarking on to the indepth analysis of the framed issues hereof this Honorable Court finds it imperative to expound onto the facts of this case thought briefly. From the filed pleadings the deceased was the registered as absolute owner of land title No. Kilifi/jimba/338 measuring 2.4 HA (approximately 6.0 acres or thereabout) the suit land with a Certificate of title over. It was issued on 15th August 1979 upon payment of requisite adjudication and Land Control Board fees. The said parcel had been adjudicated under the [Land Adjudication Act](#) Cap 284 in the names of indigenous people who had lived there from time immemorial before selling it to the deceased. The title deed was issued under [Registration of Land Act](#) Cap 300 (Repealed). In or around the December, 1986 the 3rd Respondent under the instruction of the commissioner of lands (then) wrote to all the occupants of the land within these blocks in Kilifi – Land Registration District Chembe/Kibamshe, Kilifi/Jimba (where the suit land is situate), Kilifi/Madeteni, Kakuyuni/Madunguni/Kilifi/ Matsangoni notifying them that their occupation of their parcels of land was improper and not in accordance with the law as the land allegedly belonged to the Government. Therefore, the [Land Adjudication Act](#), 284 which was applied before the titles were issued to them had been erroneously applied to the land as it was government land and not trust lands. As such their registration as absolute owners was a nullity *ab - initio*, defective and was be cancelled forthwith. They were required to surrender the same to the 2nd Respondent for cancellation with a rider that the Government was condensing allocating the title holders the same parcels under the Provisions of [Government Lands Act](#) Cap 280 (Repealed). The Gazette No. 2505 of 30th May, 1986 was issued by the Land Registrar Kilifi.
47. The deceased did not heed to this directive. He refused to surrender the title to the suit land until his unfortunate demise. It was until May, 1995 when the 2nd Respondent misrepresented to the Legal Administration, that it was going to issue them with another title documents for the same under the proper regime that the Petitioners obliged to surrender the title. [Government Land Act](#) Cap 280 (Repealed) only then did they agreed to return the title for issuance with another one. This was pegged on the well-grounded understanding that the title documents had been issued by the Government itself.

However, despite all this, it later on that the Petitioners realized that they had been deceived by the Government as he instead of being issued with another title deed indeed, the suit land and title deed bearing the same number was issued to third parties. It's from there that they instituted this case.

The Learned Counsel submitted that from the pleadings and the evidence adduced in court, there was no doubt that the deceased was the absolute and legal owner to the suit property having acquired it though a purchase from a person who was an indigenous and who had acquired it from a [Land Adjudication Act](#) Cap 284. The deceased had fulfilled all the requirements pertinent to issuance of the title documents to him including paying adjudication fees and applicable fees the adjudication process had legally, regularly and procedurally been carried out by the relevant Government departments prior to the issuance of the title documents seen from the Government Gazetted Legal Notice No. 155 of 7th August, 1970. The said Notice declared that the [Land Adjudication Act](#) would apply to all the truest land situated within the Northern and Southern Division of the Kilifi Administrative District. The process was conducted and title deed issued. However, vide a letter dated 16th December, 1996 by the then Commissioner of Lands Wilson Gachanja, holding that the issuance of two sets of title over the



same land by the Government was a mistaken act by the Government in other words, the Learned Counsel held that the cancellation of the title documents issued by the Government was done through a letter communicated in the Gazette Notice No. 2505 of 30th May, 1986. He held that the Petitioner fulfilled all the requirements for him to have been issued with the title deed and he had not to be blamed. He submitted that the Land registrar as her evidence (PW - 2) confessed that there were no documents on the Land Registry file with regard to the cancellation of the title documents. The Learned Counsel submitted that the green card in respect to the suit land was a re – constructed pursuant to a court order of 8th May, 2015. In essence the reconstruction was done backward to include the takeover of the land by the government.

48. The Learned Counsel argued that the Petitioners position was that the alleged cancellation of the title document was in contravention of the law as it was un-procedural for failure to obtain a court order prior thereto and hence no legal basis. He avers that the process for the Land Adjudication was legal and procedural as the land was not government as the land was not government land but trust land for the following reasons:-

- (a) There was no Kenya order in council from 14th December, 1895 and 31st May, 1963 declaring the Land in the former protectorate of Kenya Crown/Government Land published by the His/her majesty the King/Queen of Great Britain or legal gazette notice published by the Governor of Kenya between 1st June 1963 and 12th December, 1963.
- (b) As such the land did not belong to the Government and it could not therefore, adjudicate over it. The land is within the 10 miles Coastal strip that had been under the control of Sultan of Zanzibar.

Section 75 of the *old Constitution* was on the protection of private property and Article 40 (1) and (3) of *COK* gives every person the right to acquire property anywhere in the Republic of Kenya. The State should not deprive such a person of his property without prompt and just adequate payment.

Section 144 of the *Registered Land Act*, cap. 300 (Repealed) and Section 81 of *Land Registration Act* compliments Article 40 of *Constitution of Kenya*. According to these sections, any person suffering damages as the Petitioners herein 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. The Respondent apart from stating so vaguely that they conducted investigation and found out the land which was Government land was allocated by mistake wrongfully under the Land Adjudication process under the *Land Adjudication Act*, Cap. 284 and the need to rectify it under the *Government Land Act*, Cap. 280 from the adduced evidence they never rebutted the Petitioners' evidence that they were the absolute registered owners to the suit land in the year.....before the titles were surrendered and hence cancelled or revoked by the 1st Respondent. The Respondent never adduce any evidence that the Petitioner acquired the title deed through fraudulent, unlawful or corrupt means. Instead of rectifying the alleged mistake, the Government proceeded to re – allocate the same land to other third parties as clearly seen from the re – constructed green card which ironically was reconstructed following a Court order otherwise this was information to remain concealed for ever.

49. All said and done, under this sub heading, 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.

50. In Kenya, by dint of Section 107 of “The Land Registration Act” of 2012, the law applicable to this matter here for the title deed was issued in the yearsto the indigenous community under the Land Adjudication process of the Land Adjudication Act, Cap. 284. The title deed was under the Registration of Land Act, Cap. 300 (Now Repealed) and the relevant Sections 27, 28 and 143 (1) of the said Act is applicable here. It provides:-

“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...”

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

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”



Nonetheless, 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;

51. To advance on this legal preposition, 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.....”

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 Moiyo 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.’

Nonetheless, the main bone of contestation in this suit are four (4) fold, namely:- a). was the Petitioners lawfully allocated suit land as required by law b). the allegations meted by the Government exact that the land was allocating to the affected person wrongfully to be surrendered for re – allocation c). was the suit land re – allocated to the Petitioners or was it to other third party d). What reliefs is entitled to the parties herein – through restitution or compensation?.

52. In order for this Honorable Court to effectively deal with the afore stated four (4) issues, 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, un - procedurally 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 un procedurally, 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.”

Having stated all these preposition of law, it is quite clear that the deceased was were the absolute and legal owner to all that suit land with indefeasible title, right and interest vested on it. Therefore, for the Government to have taken it away on the pretext that it was their land which was allocated by mistake under the Land Adjudication Act and that they would be re – allocating it to him was erroneous, illegal, wrongful and irregular.

ISSUE No. c). Whether the acquisition of the suit land by the Government lawfully undertaken for compulsory acquisition or any other purpose whatsoever as provided for by law? if yes, was the lawful procedure the said compulsory acquisition or the said purpose adhered with or not?

53. Under this sub - heading, the Honorable Court holds that from the pleadings filed and the evidence adduced, certainly this land was not acquired by the Government through compulsory acquisition for public use as founded under Article 40 (3) of the Constitution of Kenya and Part VIII of the land Act – Sections 107 to 118. The concept of Land Compulsory acquisition and in Kenya is founded under the current law or statutory framework governing compulsory acquisition of interest in land is founded under Part VIII, Sections 107 to 133 of the Land Act No. 6 of 2012 and Article 40 (1), (2) and (3) of the Constitution of Kenya (See Viranda Ramji Gudka & 3 Others – Vs – The AG (2014)eKLR as read together with Part V of The Land Regulations of 2017. The process of the compulsory acquisition is in summary provided as follows:-

The Article 40 (3) provides as follows:-

The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

- a. results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
- b. is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that –
 - (i) Requires prompt payment in full, of just compensation to the person; and
 - (ii) Allows any person who has an interest in, or right over, that property a right of access to a court of law.

54. Under the provisions of the Land Act, 2012, Section 107 of the Act holds that, the National Land Commission ordinarily prompted by the request of the National or County Government through the Cabinet Secretary or County Executive member respectively for authentication of the compulsory acquisition of land are required to submit the request to NLC providing a reason for the land acquisition which must not be remote or fanciful. Strictly, the Land must be acquired for public purpose or in public interest and not any other purpose as dictated by Article 40 (3) of the Constitution of Kenya. In this case the threshold must be met. If the Land is so acquired the compensation which is



just, adequate, full and prompt is to be to persons affected by the project or have interest on the land under the provision of Section 111 of the Act. In this case, this did not happen.

Upon the conclusion of the inquiry, the NLC makes compensatory awards to every person whom it has determined to be interested in the land after serving such person with a notice of award and offer of compensation. (See. Sections 113 & 114). Adequate and conclusive compensation can also be in form of land if available, whose value is not exceed that amount of money the NLC considers should have been awarded (See. See Section 142 (2). Once the award is accepted, it must be promptly paid by the NLC, after which the process of compulsory acquisition of land is completed by the taking possession of the Land in question being taken by the NLC. The property is deemed to have vested in the National or County Government as the case may be with both the proprietor and the Land Registrar being duly notified. In the case Patrick Musimba (*Supra*) the word compensation was viewed as carrying a corollary that the loss to the seller must be completely made up to him on the ground that unless he receives a price that fully equaled his pecuniary detriment the compensation would not see equivalent to the compulsory sacrifice. Just compensation is therefore mandatory. It should be prompt and in full, and should use principles of equivalence but must also protect coffers from improvidence.

55. Therefore, from the above detailed statutory analogy, its clear that the compulsory acquisition of Land by the state for public use is ordinarily a creature of statute. While this is the case, the citizens should not be deprived, disowned and/or dispossessed of their land by the state or any public authority whatsoever against their wish unless expressly authorized by law and public interest also decisively demands so. The citizen has to be protected from wanton and unnecessary deprivation of their private property. There is no doubt to the fact that deprivation of a person's private property against their will is an invasion of their proprietary rights. There is no contention that while the state is indeed entitled to compulsory acquisition rights of land for public use this fundamental rights must be keen and exercised with circumspect to be checked lest it is being done merely as an abuse and sheer whimsical gimmick to deprive the citizen their private rights. It's a extremely delicate balance to be weighed with utmost case.

Patrick Musimbi v National Land Commission & 4 Others” Petition No. 613 of 2014” held *inter alia*:-

“As the taking of a person's property is a serious invasion of his proprietary rights, the application of constitutional or statutory authority for the deprivation of those rights require to be most carefully scrutinized. In short, in our view, there must always exist a presumption against an intention to interfere with vested property rights as the legislative and constitutional intentions is always the protection rather than interference with the proprietary rights.....the power to expropriate private property as donated in the State by both the *Constitution* and statute law (the *Land Act*) leaves the private land owner with no alternative. The power involves the taking of a person's land against his will. It is a serious invasion of his proprietary rights through the use of statutory authority. The private land owner has no alternative but wait for compensation. It is consequently necessary that the court must remain vigilant to see to it that the State or any organ of the State does not abuse the constitutional and statutory authority to expropriate private property. It is on this basis that courts have consistently held that the use of statutory authority to destroy proprietary rights requires to be most carefully scrutinized. Just compensation is mandatory”

56. In application of these principles to this case, the filed pleadings and the evidence adduced by the two Respondent Witnesses – M/s Stella Gatuiri the Land Registrar Kilifi and Mr. John Njogu, the Chief State Counsel attached at the Ministry of lands and Physical Planning held that the land belonged to the Government. From a report by the National land Commission showed that an investigation was



conducted and found out that the Government claimed that the land was taken after it conducted its investigations and found out that the land had been acquired wrongfully. The land had been acquired under the Land Adjudication process under the Land Adjudication Act, Cap. 284 and instead of it being under the Government Land Act, Cap. 280 (Repealed).

They stated that as a result, the Government through a letter from the then Commissioner for lands, Mr Wilson Gachanja caused the publication of the notice in the Kenya Gazette No. 2505 of 1986 which led to the cancellation of title deeds in a whole area.

Based on all these facts therefore, this Honorable Court finds this evidence and procedure intriguing in that the Land Registrar herself during the cross examination confessed that there were no records at all at the Land Registry and hence wonder where she obtained all these information from. Mr. Njogu only relied on the scanty information contained in the Notice published in the Kenya Gazette. Certainly, the land was never acquired under the compulsory acquisition purposes as stated out herein in law.

ISSUE No. d). Whether the Government has legal any statutory powers to cause any cancellation of a title deed belonging to an individual and if so, what is the laid - down procedure for doing so?

57. Under this sub – heading it is alleged that after the investigation by the Government it was found the procedure used in allocating the land was improper. The Government asked for the surrender of the title deed deeds so that it would re – issue them properly. This did not happened as instead, they proceeded to re – allocate the land to other third party.

She indicated that the green card had to be reconstructed following a court order of 8th May, 2015. From the re – constructed green card it is rather evident that the title deed to the suit land was allocated to third party and not the Petitioner. The procedure for the cancellation of title deed – Sections 79 of Land Registration Act is for rectification of the Register with the consent of the proprietor and not cancellation. Cancellation cannot be through a publication of a notice in the Kenya Gazette. That was illegal, improper and wrongful. Cancellation can only be through a Court order under Section 80 of LRA. That did not happen at all.

58. In support of this legal position, the Honorable Court has relied on several cases which are all founded against matters with such similar facts. These are :-

Supreme Court Petition No. 1 of 2020 – Attorney General - Versus - Zinj Limited; Court of Appeal, Civil Appeal no. 30 of 2018 – The Attorney General & Chief Land Registrar – Versus – Rabimkhan Afzalkhan Rabimkhan & Others; Nairobi Civil Miscellaneous Application No. 730 of 1889 – Helena Kitbinji – Versus – The Attorney General and ELC (Civil Case No. 119 of 2011 (Formally Nairobi HCCC No. 2577 of 1997) – James C Boit – Versus – Commissioner of Lands, land Registrar, Kilifi & The Attorney General.

Where the courts held as follows in summary:-

“In all respects the actions of the Commissioner of lands of Cancelling the titles of the Applicant without hearing the Appellant 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”

Therefore, in conclusion, the Government in causing the cancellation of the title deed belonging to the Petitioner without obtaining a court order it acted *ultra vires*, illegal and wrongfully.



ISSUE No. e). Whether there are any available remedies to the an individual where the acquisition and cancellation of the title is found to have been undertaken unlawfully.

59. As already graphically established the procedure meted in the acquisition of the land from the Petitioners of the 1st, 2nd and 3rd Respondents herein was the illegal, wrongful, irregular and un procedural acts. Arising from the Petitioners herein are entitled to several legal remedies. These include the restitution of the same land or just, fair and prompt compensation as provided for in law.

Nonetheless, the issue of the restitution of the land has been settled by the Consent by the parties on the 18th November, 2022 the same is now rested. For this reason the court is now left with only one aspect of the relief. This is in form of compensation. The Compensation will be adjudicated along the Valuation reports prepared by the three (3) Land Valuers and the provisions of “The Land Act of 2012” and “The Land (Assessment of Just Compensation) Rules, 2017” and accordingly.

60. What then is ‘market value’. In the decision of “Kanini Farm Limited - Versus - Commissioner of Lands (1986) KLR 310” the court stated as follows:

“The market value as the basis for assessing compensation is the price which a willing seller might be expected to obtain from a willing purchaser, the purchaser may be a speculator, but a reasonable one...In determining the amount of compensation which ought to be paid the court should take into account comparable sales and awards on other acquisition of land of similar character”

In the case of “John Kariuki Macharia – Versus - Commissioner of Lands [2014] eKLR the court defined the market value for purposes of compulsory acquisition as follows:-

“My view therefore on what the market value of the suit property entails in this appeal, is that it is the unimproved site value of the suit property and the value of the developments thereon in the open market at the time of gazettment of the notice of intention to acquire the suit property on 28th May 2010. I have arrived at this definition because both the Appellant and Respondent gave no comparable property that was sold at that time that had developments similar to those on the suit property, and the majority of the comparable were of properties with vacant possession.

From the law and the jurisprudence above, the market value of a property is how much a property is worth in the open market according to different market participants. The arrived value should be seen to be based on different factors including comparable, but it should not only be based on a personal opinion.

ISSUE No. d). Whether the Petitioner is entitled to reliefs sought from the Petition.

67. The Petitioner was the absolute owner of the suit property. The acquisition of the title and further re allocation of the same to a third party by Government was improper as it violated, threatened and infringed the Petitioner’s rights to private property as entitled to under the provision of Article 40 of the Constitution of Kenya.

The acquisition of the land by Government was not for compulsory acquisition for public use. The remedy available would have been to cancel the title and restitute the Petitioner to the said suit land.

However, based on the Consent entered by the parties that they only pursue compensation and not restitution of the land.



The Compensation is based on three valuation reports – the Petitioners through Ultimate Valuers of Kshs. 420, 000,000.00; the Government Valuations by the Principal valuer of Kshs. 72,000, 000.00 and the one by the Valuer from the Institute of the Surveyors of Kenya, Mr. Koros, of Legend Valuers of Kshs. 287, 500, 000.00. Out of these various valuation estimates based on the Market value and disturbance allowances of 15%, based on the provisions of “The *Land (Assessment of Just Compensation) Rules* 16, 2017 under the *Land Act*, No. 6 Rules 6 and having proved that the Petitioners were entitled to compensation in respect of the suit property, the Court arrives at a tune total sum of Kshs. 421, 000, 000.00 taking into consideration the high rate of land appreciation of the land location being a beach area one that has high potential of tourism attraction at this period. I have taken cognisance that the last valuation was conducted at a time almost immediately after the global COVID – 19 pandemic and exigencies which adversely and drastically affected the hospitality industry. Now the situation has changed as it getting back to normalcy.

68. I also find that they were entitled to exemplary damages of Kenya Shillings Seventeen Million Five Hundred (Kshs. 17, 500, 000.00) being 5% of the total sum of the quantified damages from the market value Kenya Three Fifty Million (Kshs. 350, 000, 000.00). They are entitled to Costs of the suit of Kenya Shillings Fifteen Two Million Five Hundred Thousand (Kshs. 52, 500, 000.00) being 15% of the total compensation

ISSUE No. e). Who will bear the Costs of the Petition.

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

The provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow events. The issue of Costs is the discretion of Courts. In the case of “*Reids Hewett & Company – Versus – Joseph* AIR 1918 cal. 717 & *Myres – Versus – Defries* (1880) 5 Ex. D. 180, the House of the Lords noted:-

“The expression “Costs shall follow the events” means that the party who, on the whole succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word ‘event’ should be read distributive and the costs of any particular issue should go to the party who succeeds upon it.....”

70. From this provisions of the law, it means the whole circumstances and the results of the case where a party has won the case. The events in the instant case is the Plaintiff in the Counter Claim has succeeded in his case. For that very fundamental reason, therefore, the costs of this suit will be made to the Plaintiff in the Counter Claim by the 1st and 2nd Defendants in the Counter Claim herein.

VI. CONCLUSION & DISPOSITION.

71. Before the conclusion, I sincerely must applaud the Learned Counsels in this matter Mr Gachuna, Mrs. Kahoya, Mr. Wachira and Mrs. Waswa for both the Petitioners and the 1st, 2nd and 3rd Respondents for their resilience, devotion and dedication in adjudicating this case.

Ultimately, having intensively and thoroughly deliberated on all the framed issues herein, this Honorable Court arrives at the finding that the Petitioners have been successfully awarded the prayers sought from their filed Petition. For avoidance of doubt, these are the orders of the Court.

- a. That a declaration that the purported cancellation of the Petitioner’s title documents in respect of the Land Reference Numbers Kilifi/jimba/338 was unconstitutional and unlawful.



- b. That a declaration that the Kenya Gazette Notice No. 2505 of 1986 was unconstitutional and contrary to the provision of Article 40 of the *Constitution of Kenya*.
- c. That a declaration that the subsequent transfer thereof to the third parties and issuance of new green cards by the Ministry of Lands/Government of Kenya and other subsequent actions emanating therefrom was illegal and contrary to the *Constitution of Kenya*.
- d. That 1st, 2nd & 3rd Respondents herein or their successors in office, to pay to the Petitioners a total compensation for a sum of Kenya Shillings Four Twenty One Million (Kshs. 421, 000, 000.00) based on the present market value of the Land Reference Numbers Kilifi/jimba/338 broken down as follows:-
 - i. A sum of Kenya Shillings Three Fifty Million (Kshs. 350,000,000/=) being the current market value of the suit land.
 - ii. A sum of Kenya Shillings Fifty Two Million Five Hundred Thousand (Kshs. 52, 500, 000.00) as the disbursement allowance of 15% of the total market value amount.
 - iii. A sum of Kenya Shillings Seventeen Million Five Hundred (Kshs. 17,500,000.00) as general (exemplary/punitive) damages being 5% of the quantified damages of (Kshs. 350, 000, 000.00) for loss and suffering on the unconstitutional and unlawful cancellation of the title documents transfer to the Government and subsequent actions.
 - iv. A sum of Kenya Shillings One Million (Kshs. 1,000,000/=) being a refund of incurred in erecting a fence and farmhouse over the suit land known as Land Reference Numbers Kilifi/jimba/338.
- e. That a declaration that the Kenya Gazette Notice No. 2505 of 1986 was unconstitutional and contrary to Article 40 of the *Constitution of Kenya*.
- f. That the 1st, 2nd and 3rd Respondents herein to pay the Petitioners the costs of suit plus interest on (d) above at the court rate of 14% per annum from the date of this Judgement until payment in full.

DELIVERED, SIGNED AND DATED ON THIS 23RD JUNE OF 2022

HON. MR. JUSTICE L.L NAIKUNI (JUDGE),

ENVIRONMENT & LAND COURT AT

MOMBASA

In the presence of:-

- a. M/s. Yumna Hassan, Court Assistant
- b. Mr. Gichuna & Mrs. Kahoya Advocates for the 1st & 2nd Petitioners.
- c. Mrs. Winnie Waswa for the 1st, 2nd & 3rd Respondents.

