



**Coastal Properties Limited v County Government of Kwale; Director of Survey  
Kwale County & 3 others (Interested Parties) (Environment & Land Petition  
13 of 2021) [2022] KEELC 15337 (KLR) (28 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15337 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND PETITION 13 OF 2021  
AE DENA, J  
NOVEMBER 28, 2022**

**BETWEEN**

**COASTAL PROPERTIES LIMITED ..... PETITIONER**

**AND**

**COUNTY GOVERNMENT OF KWALE ..... RESPONDENT**

**AND**

**DIRECTOR OF SURVEY KWALE COUNTY ..... INTERESTED PARTY**

**LANDS REGISTRAR KWALE COUNTY ..... INTERESTED PARTY**

**ATTORNEY GENERAL ..... INTERESTED PARTY**

**LEISURE LODGES LIMITED ..... INTERESTED PARTY**

**JUDGMENT**

**Background**

1. The facts of this petition are set out in the affidavit of Joab Andayi Ogutu Sworn on 13/7/20. The Petitioner avers to be the registered owner of plot No Kwale/Diani Beach Block/ 997 (the suit property) which borders the 4<sup>th</sup> Interested Party’s property (adjacent plot). That cutting through the suit property is a motorable footpath which runs parallel to the boundary wall of the adjacent plot. It is pleaded that sometime in June 2020 the Respondent, County Government of Kwale demarcated the footpath as a road reserve, ignored the Petitioners contention that the footpath was not a road reserve and proceeded to create a wide motorable access road through the suit property. According to the Petitioner the footpath was never meant to be an access road but despite a promise by the Respondent to investigate the matter his protests seem to have fell on deaf ears. The Respondent proceeded to create a wide motorable access road through the suit property and in the process took away part of the



petitioner's land and also destroyed the caretakers house therein. The Petitioner contents that this is a violation of his right to property under Article 40 and 47 on fair administrative action as he was never given an opportunity to be heard on his objections. The prayers sought in the petition are highlighted elsewhere in this judgement.

## **Response to the Petition**

### **1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Interested Party's Response**

2. On 9/06/22 Ms Langat State Counsel representing the 1<sup>st</sup> - 3<sup>rd</sup> Interested Party's informed this court that they would rely entirely on the grounds of opposition dated 8/10/21 filed in opposition to the petition. Citing the provisions of sections 19 (1)(2), 18 of the [Land Registration Act, 2012](#) and 30 of the [Survey Act](#) Chapter 299 of the Laws of Kenya it was their case that the dispute herein involved boundaries and such mandate lay with the Land Registrar and the court lacked jurisdiction. Invoking the doctrine of exhaustion, it was urged that since the law has given a legal obligation to a department of government, the department should be permitted to undertake its obligations.
3. Owing to the fact that jurisdiction is everything for without it the court would not move an extra step in the petition, the preliminary objection was heard first. I delivered a ruling on 19/05/22 where I made a finding that the petition was a hybrid case of ownership and boundary assuming that the interested Party position was correct on the latter. That to the extent that there is an ownership issue where land has been taken away by the expansion of the foot path into a road this court has jurisdiction to determine this petition.

### **Respondents Response**

4. The Respondent filed a response and cross petition on 14/10/21. It averred that there was a 20-meter public access road separating the suit property and the 4<sup>th</sup> Interested Party parcel Kwale/Diani Blk/980. That the Interested Party built a perimeter wall which encroached on the access road. It stated that following availability of funds the access road works were handed over to the respondent's public works department who commenced clearing the access road for grading based on the Registry Index Map .That upon receipt of the petitioner's letter dated 18/6/2020 the respondent immediately instructed the works be stopped to pursue an amicable solution and joint survey but the petitioner moved the court before the joint survey which was still undertaken on 7/8/2020 during the pendency of the proceedings. The respondent pleaded mistaken belief and good faith for their impugned actions.
5. Enumerating the key findings of the joint survey it was pleaded that the encroachment on the petitioner's land was caused by the 4<sup>th</sup> Interested Party illegal construction of the parameter (sic) wall herein. It is pointed that if the petitioners are liable for any damages as against the respondent then it should be minimal considering the suit property is not developed and the structure that was demolished was a small makuti structure. It stated that it is in the wider public interest that the orders sought are denied. The details of the cross petition are highlighted elsewhere in this judgement.

### **Submissions**

6. Directions on the disposal of the petition by way of written submissions were issued by my learned brother Justice Sila Munyao on 11/11/20. This was before the response and cross petition was filed. The petitioner filed submissions dated 20/01/21 and further submissions dated 10/6/22. The 4<sup>th</sup> interested party filed submissions to the petition on 11/03/21. The 1<sup>st</sup> Respondent did not file final submissions while the 1<sup>st</sup> 2<sup>nd</sup> 3<sup>rd</sup> interested parties opted not to file any submissions but relied on its grounds of opposition herein.



## Petitioners Submissions

7. The petitioner identified four issues for identification.
  - i) Whether there exists a road reserve that cuts through the petitioner's property,
  - ii) Whether the respondent has breached the petitioners right to property,
  - iii) Whether the respondent has breached the petitioners right to fair administrative action and
  - iv) Whether the petitioner is entitled to the orders sought.

It was submitted that for parties that did not file replying affidavit to the petition, all the evidence adduced by the petitioner stood unchallenged and the facts uncontested. Based on the conclusion of the petitioner's survey report and the joint survey report it was submitted that that there was no road reserve or access road cutting through the suit property. That the true position was that the access road had been taken over by the 4<sup>th</sup> interested party who had blocked it with a perimeter wall.

8. On breach of right to property it was urged that since it was evident there was no road reserve and that the petitioner was the registered owner of the property, by paving a portion of the petitioner's property to create a road cutting through the property, the respondent had caused the petitioner to lose the said portion which it can no-longer use. That this amounted to forceful acquisition. Reliance was placed upon [\*Rutongot Farm Ltd v Kenya Forest Service & 3 others\* \[2018\] eKLR](#), [\*Jackson Kariuki Kabungura & another v John Karanja Kihagi & 5 others\* \[2018\] eKLR](#); [\*Vipingo Beach Resort Limited v Attorney General & 3 others\* \[2015\] eKLR](#). It was added that the respondent action amounted to trespass on the petitioner's property.
9. With regard to breach of right to fair administrative action counsel submitted that the respondent's action of ear-marking a portion of the petitioner's property constituted an administrative action since it affected proprietary right of the petitioner. They did not demonstrate that the act which would be otherwise unlawful was permitted by law considering the conclusion of the survey reports. That the respondents upon forming an opinion that the access path was a road reserve it ought to have notified the petitioner of its intention to demarcate its property as a road reserve. [\*Kenya Agricultural and Livestock Research Organization v Kisii County & Ano\* \[2019\] eKLR](#) was relied upon to buttress this argument.
10. It is contended that since the respondent's actions were unlawful and in breach of article 40 and violated article 47 of the [\*Constitution\*](#) the same were null and void and the court should issue an order of certiorari to quash the decision or action to demarcate the portion of the road reserve. [\*Kenya Human rights Commission & Anov Non- Governmental Organizations Coordination Board & Ano\* \[2018\] eKLR](#). The petitioner also submitted on the quantum for compensation to be payable for the violations of the rights aforesaid and for trespass which are discussed later in this judgement.

## 4<sup>th</sup>Interested party's Submissions/Response

11. The 4<sup>th</sup> Interested Party did not respond to the petition but filed submissions on 11/03/21. These are discussed elsewhere in this judgement in dealing with the issue of costs since the same were targeted at costs only.

## Analysis and Determination

12. Having considered the petition, the grounds in support thereof, the responses, the cross petition and the submissions the following issues commend for determination; -



1. Whether there exists a road reserve that cuts through the Petitioners property Kwale/Diani Beach Block 997.
2. Whether the respondent officers' actions contravened the constitution.
3. Whether the petitioner is entitled to the reliefs sought in the petition.
4. Whether the petitioner in the cross petition is entitled to the reliefs sought in the cross petition.
5. Who should bear the costs of the petition and cross petition?

**Whether there exists a road reserve that cuts through the Petitioners property Kwale/Diani Beach Block 997**

13. The petition as I understand it is largely on the right to property and it is therefore imperative that the ownership of the property Kwale/Diani Beach Block 997 (suit property) is established. The petitioner's case is that he is the registered owner of the suit property. In proof he annexed a copy of the title to the suit property marked JAO 1. This is a Certificate of Lease for Kwale/Diani Beach Block/997 showing the registered proprietor to be Coastal Properties Limited, the petitioner herein issued on the 27/11/2007. This ownership is not disputed by any of the parties. In any case by dint of the provisions of sections 24(a) of Land Registration Act, 2012 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 appurtenant thereto.
14. Being the proprietor of the suit property, the petitioner is aggrieved by the respondent's action who it is alleged earmarked a private footpath cutting through the petitioner's property as a road reserve. It is the petitioners case that this was not a road reserve and there never existed a road reserve cutting through the suit property. That despite informing the respondents and supplying them with supporting documents, the respondents indeed went ahead to pave the said footpath. The petitioner produced a letter dated 18/6/20 addressed to the County Government of Kwale reference 30/Misc/2020 by Hamilton Harris & Mathews. The subject is 'illegal Demarcation of A Road Reserve On Kwale/Diani Beach Block/997'. The letter is emphatic that the footpath existing on the property was not a road reserve yet the officers of the county had put marks on the same demarcating it as a road reserve. It is stated the action violated the petitioners right to property. The letter encloses a survey plan which is attached to a survey report dated 17/06/20 (see page 5 - 11 of the petitioner's bundle). It also invited the respondent to confirm upon review of the material provided that there is no road reserve. My review of the documents supplied shows clearly that there is a 20 m wide road which is not within the suit property but the footpath cuts across the suit property (see page No. 9) this is also confirmed by the finding of the petitioners survey report whose objective was to 'check on the status/position of the existing path on the subject, which the county government wants to implement as an official road'. (see page 7-8). The findings are stated at paragraph 6 of the report as follows; -
  1. All the five beacons defining the subject plot were found intact on the ground and in their correct positions. There is an existing motorable path which passes through the subject plot
  2. There is a wall on the northern boundary of the subject plot which was erected by owner of Leisure golf grounds
  3. We also found that the surveyed road as per the survey plans is enclosed by the Leisure golf grounds wall
  4. The owner of parcel No 980 did not respect that 20 m served road when he was constructing the wall



5. At the time of survey the subject plot was vacant no structure inside except the temporally (sic) for the caretaker
  6. The subject plot is not encroached by any of the neighbors.
15. From the foregoing there is no doubt as stated in the conclusion that the existing motorable path passes through the petitioners plot illegally. This is further supported by the findings of the joint survey report undertaken on 7/08/2020 by consent pursuant to the orders of the court. The report is dated 11/08/2020 and submitted in these proceedings vide a letter dated 4/11/2020. The report is also attached as Exhibit 3 in the respondent's response to the petition. The main objective of the report is stated as identification of the correct position of the access road between the Kwale/Diani Beach Block/997' and 980 as well as any existing encroachments. The survey was conducted in the presence of all the parties who sent their private surveyors in addition to the surveyors from the respondent County Government of Kwale. The report concludes that a permanent wall encroachment does exist on the access road and that an encroachment does exist on parcel Kwale/Diani Beach Block/997' by the newly cleared road. The newly cleared road is the one referred to by the petitioner in his pleadings. The report fortifies the petitioners claim that there was no access road in the suit property ab initio. In any event it involved all the parties and its veracity assured. The findings are further entrenched by the respondent response to the petition which to me is largely an admission except that it attempts to shift the blame to the 4<sup>th</sup> Interested Party the respondent in the Cross petition.
16. It is my finding based on the foregoing that there existed no road reserve cutting through the Petitioners property Kwale/Diani Beach Block 997. This then takes me to the next issue.

**Whether the respondent officers' actions contravened the Constitution**

17. In considering this issue the court will address if the respondent officers' actions of entering the petitioner's property, paving and creating a wide motorable access road cutting through the petitioner's property violated articles 40 and 47 of the Constitution and in what manner. It is trite that under article 40 of the Constitution, the petitioner has the right to property, which right includes the use of the suit property. Article 40 of the Constitution provides as follows:

- “ 40. Subject to Article 65, every person has the right, either individually or in
- (1) association with others, to acquire and own property—
    - (a) of any description; and
    - (b) in any part of Kenya.
  - (2) Parliament shall not enact a law that permits the State or any person—
    - (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
    - (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4). (3) 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.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

18. The guarantee to protection of the right to property under article 40 of the *Constitution* is expressed in the terms that no person shall be arbitrarily deprived of property; See Supreme Court in *Rutongot Farm Ltd v Kenya Forest Service & 3 others* [2018] eKLR. The ownership of the property is clear since there is no dispute on the same. As stated in my earlier analysis the finding of the joint survey which is not disputed is that there is no access road that cuts through the suit property. From the evidence adduced herein and the respondent's admission it is very clear that there was already a planned road which does not cut through the petitioner's land which was earmarked by the physical planning for this public purpose. However, this was taken up by the 4<sup>th</sup> Interested party's perimeter wall.

19. The Respondent denies that its officers' actions having been based on mistaken belief that the footpath is the access road and its long term user by the public amount to violation of the petitioners right to property as guaranteed in the *Constitution*. Let me state that the circumstances under which an owner of land can be deprived of their property are well stated under article 40 (3) of the *Constitution*. The exceptions given are that 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 the *Constitution* and an 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

Chapter five deals with relationships between governments with respect to cooperation between national and county governments and support for county governments and therefore going by the facts of this case sub article 3(a) above is excluded.

20. The other ground is for public use and which I note the motorable road which has been paved is for use by the members of the public which is for a public purpose. The criteria for compulsory acquisition is well articulated under section 107 – 133 of the *Land Act, 2012* and it is not evident in the respondents pleadings neither is there seen to be any effort to seek an easement. The respondent admits that it was under mistaken belief that they went in to pave the road. While this is not acceptable coming from the repository of physical planning, mistaken belief is not listed as one of the exceptions herein. To me the result of the actions is that the petitioners land which is private has been taken away without compensation, for a public purpose. I therefore make a finding that the respondent officers' actions of entering the petitioner's property, paving and creating a wide motorable access road cutting through the petitioner's property violated the petitioners right to article 40 of the *Constitution*.



## Whether Article 47 of the Constitution was contravened

21. The Petitioner states that its right to fair administrative action under article 47 have been infringed since for procedural fairness the Petitioner ought to have been heard on his objections. Article 47 of the Constitution provides that;

Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

Parliament shall enact legislation to give effect to the right in clause (1) and that legislation shall—

- a. Provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
- b. Promote efficient administration.

22. Indeed, the legislation enacted for the above purpose is the Fair Administrative Action Act, 2015 and is expounded by my brother Justice Mutungi in Kenya Agricultural and Livestock Research Organization v Kisii County & Ano (*supra*) and which I'm persuaded and guided by his dictum where faced with almost the same circumstances and reliefs sought expressed himself thus; -

26 The Fair Administrative Action Act, 2015 under Section 4 underscores what a party carrying out an administrative action likely to be prejudicial to an interested party is required to do to ensure that the action taken is arrived at through a process that is procedurally fair. Section 4(1), (2) and (3) of the Fair Administrative Action Act provides as follows: -

- (1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) Every person has the right to be given written reasons for any administrative action that is taken against him.
- (3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-
  - (a) prior and adequate notice of the nature and reasons for the proposed administrative action;
  - (b) an opportunity to be heard and to make representations in that regard;
  - (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;
  - (d) a statement of reasons pursuant to section 6;
  - (e) notice of the right to legal representation, where applicable;
  - (f) notice of the right to cross-examine or where applicable; or
  - (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.



27. It is imperative having regard to the above provisions that before an authority charged with taking administrative action against a party who stands to be adversely affected by any action that may be taken must subject such a party to a fair process by ensuring due process is followed before the action is taken. The party must be given notice and must be afforded an opportunity to be heard in adherence to the rules of natural justice. No party should be condemned without being heard.
23. The petitioner's case is that the road was first marked 'X' on either side meaning that the respondent had formed the opinion that there existed a road reserve on the petitioner's property. They did not inform the petitioner of the same. That even after the petitioner's letter complaining and putting the record straight and attaching documents to help the respondents it was not given an opportunity to be heard on its complaints. The respondent admits receipt of the letter dated 18/6/20 and in fact responded to it by its letter dated 1/7/2020 stating that they were consulting relevant departments after which they would revert. Come 7/7/20 the respondent had not reverted and a reminder was sent and four days later on 11/7/20 the respondents officers entered the property, graded the foot path to create a wide motorable access road. The letters and the documents were attached in the affidavit of Joab Andayi Ogutu as exhibits 5- 12. No letter informing the petitioner of the outcome of the consultations and or giving reasons for the respondents' decision to proceed with the grading is given in evidence by the Respondent. Clearly all these actions would affect the petitioner's rights adversely and it was entitled to a hearing with or without its complaint and an explanation in writing why the actions were being taken. There was no fairness at all in my view. Even the joint survey which was undertaken latter by consent of the parties is not an escape. In any event it is the petitioner's surveyor who suggested it in the survey report dated 17/6/20 produced herein.
24. In the case of *Judicial Service Commission v Mbalu Mutava & another*, the Court of Appeal held that: -
- “ Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”
25. Based on the foregoing it is this courts finding that the petitioners right to fair administrative action were infringed by the actions of the respondents. Is the petitioner then entitled to the reliefs sought in the petition.
26. The petitioner craves the following reliefs; -
1. A declaration that there is no road reserve that cuts through the Petitioners property of Kwale/ Diani Beach Block 997.
  2. A permanent injunction restraining the respondent whether by itself, employees, servants, associates, agents or anyone from trespassing, encroaching on the Petitioners property known as Kwale/Diani Beach Block /997 and or entering, demarcating, creating a road reserve or carrying out any works thereon and committing any acts of wastage or damage or in any way purporting to alienate the property of the Petitioner in any manner whatsoever.



3. A declaration that the action by the respondent in demarcating a portion of the Petitioners property as a road reserve and proceeding to pave and open up a portion of the Petitioners property to create an access road is unlawful and unconstitutional as it violates the Petitioners right to property as enshrined under article 40 of the Constitution and violation of the Petitioners right to fair administrative action as enshrined under article 47 of the Constitution.
  4. An order of *certiorari* to remove into this court and quash the decision by the respondent in demarcating a portion of the petitioners property as a road reserve
  5. Damages for trespass and for wastage of the petitioner's property
  6. Aggravated/exemplary damages for wantonly invading and damaging the petitioner's property.
  7. Costs of this petition
  8. Such other order(s) as this honorable court shall deem fit.
27. From this courts earlier analysis and the findings made on merit it follows that the petitioner is entitled to the 1<sup>st</sup>, 2, 3<sup>rd</sup> and 7 of the orders above. I however find it necessary to briefly interrogate the reliefs sought in, 4, 5 and 6 above.
28. An order of *certiorari* to remove into this court and quash the decision by the respondent in demarcating a portion of the petitioners' property as a road reserve is sought. For the orders of certiorari to issue the applicant must demonstrate that a decision has been made which is grossly unreasonable, careless, procedurally improper and demonstrated utter disregard for the principles of natural justice see Pastoli v Kabale District Local Government Canal & others (2008) 2 EA 300. I reiterate, how does an institution which is a repository of the function of physical planning enter into a private property, demarcate and proceed to gravel a motorable path without ascertaining from their plans the provisions for a road access under the guise of mistaken belief? It also deprived the petitioner of his right to a portion of the property for the acquisition was contrary to the relevant law as relates to compulsory acquisition. The petitioner case is that despite submitting the relevant documents to the respondents which have already been referred to earlier the respondent still went ahead to implement its intention to pave the road when they had initially just marked the access with X. The respondent at paragraph 18 admits their actions but their case is that the encroachment was not intentional neither was it meant to deprive the petitioner of its property. In any event who best should be aware of this other than the County Government of Kwale physical planner.
29. I think from the analysis given the decision taken was grossly unreasonable, irrational, illegal and must be condemned in the strongest terms. But the question is can the decision be recalled. Lord Denning in Macfoy v United Africa Co Ltd [1961] 3 All ER 1169 at page 1172 stated as follows: -

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse...”<sup>6</sup>

Therefore, having made a finding that the pathway was not the designated access road, the same having already been factored as earlier stated but taken up by the 4<sup>th</sup> interested party I cannot begin to fathom how it can be salvaged. It was void ab initio and must be recalled by this court.



30. With regard to Aggravated/exemplary damages as well as damages for trespass and for wastage of the petitioner's property the petitioner states that the petitioner is entitled to compensation from the respondent. Counsel on behalf of the petitioner placed the quantum at Kshs. 2 million each under the claim for violation of rights under article 40 and 47 of the Constitution making a total of Kshs 4 million of the claim guided by various precedents he cited. The petitioner also wants exemplary damages of Kshs 5 million based on the case of David Gitau Thairu v County Government of Machakos & 2 others [2020] eKLR. It is submitted that the petitioner having demonstrated that the respondent's rights were violated the petitioner is entitled to redress regardless of whether it was pleaded. I have read the Court of Appeal decision in Commission on Administrative Justice v Kenya Vision 2030 Delivery Board & 2 others [2019] eKLR but I have also noted that the decision was overturned by the Supreme Court on March 24, 2021. For me I will take the position that the petitioner is bound by his pleadings. I will proceed to therefore to address the exemplary damages and trespass.
31. The authority of this court to uphold and enforce the bill of rights is derived from article 165 and 23 of the Constitution. The court is mandated to among other reliefs issue conservatory and orders of injunction, including orders for compensation. In have read the decision of Justice AO Angote in David Gitau Thairu v County Government of Machakos & 2 others (*supra*) and I'm largely persuaded. The learned judge while referring to the case of Mikidadi v Khaigan & another [2004] eKLR, enumerating the circumstances under which exemplary damages can be awarded namely
- (a) Oppressive arbitrary or unconstitutional action by servants of government. Subject
  - (b) Conduct calculated by the defendant to make him a profit which may well exceed the compensation payable to the plaintiff, or
  - (c) Cases in which the payment of exemplary damages is authorized by statute, held that; -
- “The 1st Respondent is a government recognized and established by the Constitution. The 1st Respondent knew, and its officers have admitted as much, that the suit property is owned by the Petitioner. While constructing a road, and the sewerage system, it dug trenches on the suit property, and deposited soil on the land to the extent that the Petitioner was unable to utilize the land.....The actions of the 1st Respondent's agents in trespassing on the Petitioner's land, and digging trenches, and creating a public road thereon without following the law pertaining to acquisition of private land was oppressive, arbitrary and unconstitutional. Indeed, even after promising to remove the debris deposited on the Petitioner's land, they have never done so to date. In the circumstances, this is a fit case for the award of exemplary damages, in addition to the declaratory orders. 52. Although the Petitioner has sought for an award of Kshs 10,000,000 as exemplary damages, I am of the view that a sum of Kshs 5,000,000 will suffice. I say so because the suit property is valued at Kshs 20,000,000, which the Petitioner will still retain. Therefore, an award equivalent of Kshs 5,000,000 as exemplary damages is just.’
32. It is also trite that every case must be decided based on its own circumstances. Indeed, monetary compensation must be reasonable and fair considering all the circumstances of each case. In this case I note that the violations while they occurred, I will agree with the respondent that the suit property was not developed and the public had been allowed to use it over time coupled with the fact the respondent must still comply with the physical plan for the area and implement the designated access road. In fact, they pray for the wall to be demolished in the cross petition. The petitioner will have his portion of the land back. Having found that the respondent's actions/decision taken were grossly unreasonable,



irrational, illegal I'm inclined to award Kshs 5,500,000 as exemplary damages to the petitioner. In my view this award should suffice for all the damage suffered by the petitioner.

### Cross Petition

33. A cross petition has been raised by the respondent against the 4<sup>th</sup> interested party who is now named as the respondent as mentioned earlier in this ruling. The cross petitioner squarely lays the blame at the doorstep of the Leisure Lodges Limited who built a perimeter wall surrounding plot number 980 which is adjacent to the suit property which wall completely encroached and occupied the access road. It is noteworthy that Coastal Properties Limited is named in the cross petition as the interested party. It is pleaded that as a result of the illegal actions of the respondent's members of the public created an access road across the perimeter wall and the suit property. Further believing the access road created by the said usage was the Access Road indicated on the Registry Index Map the County Government hereinto started its clearing and then grading. It is this road created by the public that to their surprise turned out not to be the Access Road but a portion of the suit property. They rely on the joint survey report herein and its findings. These findings are discussed elsewhere in the judgement. Citing article 62(1) defining public to include all roads and thoroughfares and 62(4) barring disposition of or usage otherwise than in accordance to terms provided by an Act of parliament, it is stated the acts of Leisure Lodges Limited herein, were unconstitutional, unlawful and is liable for damages or loss suffered by the interested party. The County Government of Kwale craves the following reliefs;-
- a. a declaration that the actions of the respondent in the cross petition to build a perimeter wall on the access road is unconstitutional violates article 62 of the Constitution,
  - b. the respondent in the cross petition to pay any damages if at all that are entitled to the interested party as a result of the encroachment by the petitioner
  - c. the respondent to forthwith demolish all that portion of the perimeter wall encroaching the access road
  - d. the respondent to pay the petitioner damages and
  - e. The petitioner in the cross petition be awarded the costs of the petition and the cross petition
34. In response to the cross petition Coastal Properties Limited the petitioner in the main petition opted to rely on the main petition as their answer. The respondent Leisure Lodges Limited did not respond to the cross petition and while this can be termed that the facts as pleaded were not controverted, in my view considering the findings that the respondents actions in the petition were unconstitutional, to allow the respondents to benefit from them would be not only contradictory but entertaining a party who has come to court with unclean hands. The only orders I find appropriate to issue in the cross petition is the orders for the demolition of that portion of the perimeter wall encroaching the access road. Noting that there is already a joint survey undertaken with the involvement of the Respondent Leisure Lodges Limited the same should guide the exercise. I see no prejudice that will be occasioned to any of the parties if the joint survey report dated 11/8/20 is applied.
35. At this juncture I will deal with the issue of costs to the 4<sup>th</sup> Interested party in the petition. As earlier stated the import of the 4<sup>th</sup> respondent submissions was that there was no cause of action raised against them in the pleadings since all violations were against the respondent. That there was also no remedy sought against the 4<sup>th</sup> Interested Party and they were unlikely to be affected by the orders sought in the petition. The 4<sup>th</sup> interested party invited this court to invoke its discretion and award it costs for its joinder which they deemed was unnecessary.



36. In response to the above the petitioner in his supplementary submissions filed on 25/03/21 contended that the award of costs is at the discretion of the court and the same ordinarily follow the event. That costs are for compensating a party for the trouble taken in prosecuting or defending the case. Relying on the test enunciated by Mativo, J in Nairobi High Court Commercial & Admiralty Division) Case No E551 of 2020 *SMS Kopuz Gida v Erycom Desire (Alias) & 8 others* it was submitted that this is not a proper case to award costs for the petition to the 4<sup>th</sup> interested party because it did not file any pleadings, did not incur costs by way of disbursements, its advocate only attended court twice on two occasions for mention, that the court attendance was virtual hence no costs were incurred for travelling. Highlighting the role and import of interested parties as stated in the *Mutunga Rules* as well as the case of *Kenya Medical Laboratory Technicians and Techologists Board & 6 others v Attorney General & 4 others* [2017] eKLR it was submitted that the interested party had an identifiable stake being the owner of the adjacent property which was confirmed by the joint survey report to have taken up the designated access road reserve. Their actions were the root cause of the respondent's action. That however the 4<sup>th</sup> interested party could not be sued as a defendant because the petitioner had no direct claim against them.
37. This court respectfully disagrees with the 4<sup>th</sup> interested party's contention that they were unnecessarily joined by the petitioners in these proceedings. At the outset in paragraph 9 and 10 of the petition it is stated that the footpath herein ran parallel to their property. In my view to enable the court to effectually determine the contest between the parties they were a necessary party to these proceedings. The 4<sup>th</sup> interested party participated through its private surveyor in the joint survey that was undertaken herein. The conclusion of the survey report was that the perimeter wall constructed by the 4<sup>th</sup> interested party had encroached the access road. It is trite that section 27 of the *Civil Procedure Act* stipulates that costs follow the event however the court is given the discretion for good reason to order otherwise. In my view the 4<sup>th</sup> interested party's behavior does not warrant them costs. They cannot in my view benefit from their actions herein. I thus deny them costs of the petition.
38. Ultimately therefore and having considered all the evidence herein, I am satisfied that the petitioner has proved its case against the respondent. There shall be Judgment for the petitioner as against the respondent in the following terms: -
1. A declaration be and is hereby issued that there is no road reserve that cuts through the petitioners property of Kwale/Diani Beach Block 997.
  2. A permanent injunction be and is hereby issued restraining the respondent whether by itself, employees, servants, associates, agents or anyone from trespassing, encroaching on the petitioners property known as Kwale/Diani Beach Block /997 and or entering, demarcating, creating a road reserve or carrying out any works thereon and committing any acts of wastage or damage or in any way purporting to alienate the property of the petitioner in any manner whatsoever.
  3. A declaration is hereby issued that the action by the respondent in demarcating a portion of the Petitioners property as a road reserve and proceeding to pave and open up a portion of the petitioners property to create an access road is unlawful and unconstitutional as it violates the petitioners right to property as enshrined under article 40 of the *Constitution* and violation of the petitioners right to fair administrative action as enshrined under article 47 of the *Constitution*.
  4. An order of *certiorari* is issued to remove into this court and quash the decision by the respondent in demarcating a portion of the petitioners property as a road reserve.



5. The petitioner is awarded Kshs 5,500,000 as aggravated exemplary damages.
6. The petitioner is also entitled to cost of the petition to be borne by the respondent.
7. The 4<sup>th</sup> Interest party shall have no costs on the petition
8. The respondent in the cross petition shall demolish that portion of the perimeter wall encroaching the access road in accordance to the joint survey dated survey report dated 11/8/20 within 90 days of the date hereof failure to which the County Government of Kwale shall undertake the demolition.
9. The parties shall bear their own costs on the cross petition.

**DELIVERED AND DATED AT KWALE THIS 28<sup>TH</sup> DAY OF NOVEMBER, 2022.**

**AE DENA**

**JUDGE**

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

Mr Ochieng for the Petitioner.

Mr Muliro for Respondent

Ms Langat for 1<sup>st</sup> 2<sup>nd</sup> 3<sup>rd</sup> Interested Party.

N/A for 4<sup>th</sup> Interested Party.

Mr Mazera - Court Assistant.

