



Brookshil Limited & another v County Government of Kwale & 3 others; Mwadzugwe & 2 others (Interested Parties) (Petition 25 of 2021) [2023] KEELC 17188 (KLR) (3 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17188 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
PETITION 25 OF 2021**

**AE DENA, J
MAY 3, 2023**

BETWEEN

BROOKSHIL LIMITED 1ST PETITIONER

ASHBROOK LIMITED 2ND PETITIONER

AND

THE COUNTY GOVERNMENT OF KWALE 1ST RESPONDENT

THE NATIONAL LAND COMMISSION 2ND RESPONDENT

THE CHIEF LAND REGISTRAR 3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 4TH RESPONDENT

AND

SULEIMAN ALI MWADZUGWE INTERESTED PARTY

SALIM HUSSEIN OMAR INTERESTED PARTY

HATIBU MJAKA MTENGO INTERESTED PARTY

JUDGMENT

The Petition

1. The 1st Petitioner states it has at all times been the duly registered Proprietor of Land Reference Number Kwale/Diani Beach Block/1526 measuring approximately 2.535 hectares, situate within Kwale County, pursuant to a Certificate of Lease issued for a term of 99 years from 1st July, 2007.
2. The 2nd Petitioner states it's the duly registered Proprietor of Land Reference Number Kwale/Diani Beach Block/1527 measuring approximately 2.302 hectares, pursuant to a Certificate of Lease issued for a term of 99 years from 1st July, 2006 and Land Reference Number Kwale/Diani Beach Block/1352



measuring approximately 2.279 hectares, pursuant to a certificate of Lease issued for a term of 50 years from 1st June, 2002 which lies adjacent to Land Reference Number Kwale/Diani Beach Block/1527 with no distinctive boundary in between all situate in Kwale County.

- 3 The above three properties are herein collectively referred to as (“the suit properties”). The petition is supported by an affidavit sworn by one Bhavesh Halai the General Manager of both the 1st and 2nd Petitioners.
- 4 It is deponed that sometime in the year 2015 the Petitioners discovered forged titles to the suit properties registered in the names of the 1st and 2nd Interested Parties whose details did not correspond with the initial lease lawfully issued to Diccon Croft Wilcock who transferred his leasehold interest to the Petitioners. That later upon scrutiny the titles were found to be fraudulent having not originated from the Respondents. It is further averred that the official records of the suit properties were destroyed by unknown persons but the Land Registrar ordered reconstruction of the file.
- 5 It is stated that upon recurrence of the missing file, the Petitioners gave the requisite deeds of indemnity whereupon Kenya gazette Notices No 5670 and 5671 were published on 8/6/2018, and there being no objection, the Chief Lands Registrar declared the Petitioners were the registered owners of the suit properties and new green cards issued.
- 6 It is averred that in November 2018 the 1st Petitioner made a proposal to the 1st Respondent for construction of a perimeter wall which proposal was approved vide a notice dated 16/11/2018. However, on 23/11/2018 the 3rd Interested Party wrote to the 1st Respondent on behalf of the clans of Achina Kulo, Achina Saburi and Achina Ryaza claiming the suit properties constitute their ancestral land. That the 1st respondent while relying on this unjustified letter wrote to the 1st Petitioner on 28/11/2018 purporting to suspend the approval for construction of the perimeter wall in the interest of public safety.
- 7 The Petitioners state that the suit properties being held on leasehold tenure are registered private lands within the meaning of Article 64(a) & (b) of *the Constitution* of Kenya, 2010. That they were acquired bona fides for value without notice of any defect in the title and were protected under Section 26, of the *Land Registration Act*, 2012 from the ancestral claims including suspension of the approval to construct the perimeter wall herein. The Petitioners further aver their rights and interests over suit properties were absolute and indefeasible challengeable only in accordance with the law and guaranteed and protected under Article 40 and Article 60 (1) (b) of *the Constitution*.
- 8 It is asserted that the decision by the 1st Respondent was undertaken without allowing the 1st Petitioner an opportunity to address the claims by the Interested Parties. That the suspension of the approvals to construct the wall was unfair and meant to legitimize the attempted deprivation of the Petitioners lawfully acquired and constitutionally protected property. The Petitioners further state they have invested heavily by constructing private villas on two of the suit properties and which construction was never halted or objected and challenged by the Respondents or Interested Parties. The Petitioners state that their letter to the 1st Respondent explaining their unequivocal ownership of the land have been unanswered while threats of eviction and demolition of the Petitioners properties therein continued. The various articles of *the constitution* said to have been infringed upon and the manner thereof as against the Petitioners are also set out in paragraphs 22- 30 of the petition and reiterated in the reliefs sought by the Petitioners.
- 9 By this Petition dated 9th October 2019 and filed on 11th October 2019, the Petitioners seek the following remedies; -



- A. A declaration be issued that the 1st Respondents administrative decision and or order espoused in the letter dated 28/11/2018 ostensibly suspending the approvals of the construction of the perimeter wall in all those properties known as land reference LR No Kwale/Diani Beach Block/1526 situate in Kwale County within the Republic of Kenya violates the provisions of articles 10,19,20,21[1],24,27[1] & [2],40,47,50[1],60[1] [b],64,67 & 232[e] of *the Constitution*, Section 4 of the *Fair Administrative Action Act* No 4 of 2015 and section 14[3] [4] and [7] of the *National Land Commission Act* 2012.
- B. An order of judicial review in the nature of an order of certiorari be and is hereby issued to remove into this honourable court and quash the administrative decision and or order of the 1st Respondents espoused in the letter dated 28th November 2018 ostensibly suspending the further construction of the perimeter wall on all those properties known as LR No Kwale/Diani Beach Block/1526 situate in Kwale County within the republic of Kenya.
- C. An order of permanent injunction be and is hereby issued prohibiting the Respondents jointly and severally, their employees, officer agents and or servants, the interested parties or anyone whatsoever claiming under them from in anyway interfering with the Petitioners use, possession, ownership and interest over all those properties known as LR No Kwale/Diani Beach Block/1526,1527 and 1352 all situate in Kwale County within the republic of Kenya.
- D. An order that the office of the OCS Diani police station by themselves or through their servants, employees, agents, assigns, representatives provide security on the suit properties and restrain the interested parties, their servants, employees, contractors, agents, assigns, representatives and/or any other person claiming under them from entering upon, interfering with and/or having any dealings of adverse nature all over those properties known as LR No Kwale/Diani Beach Block/1527,1526 and 1352.
- E. A declaration be and is hereby issued that the Petitioners are the sole and legal owners of the suit properties known as LR No Kwale/Diani Beach Block/1527,1526 and 1352.
- F. A declaration be and is hereby issued that the properties known as land reference LR No Kwale/Diani Beach Block/1527 and 1526 are private properties and not ancestral land as purported by the 1st,2nd and 3rd Interested Parties.
- G. The honourable court do award the Petitioners jointly and severally general damages against the 1st Respondent for losses and inconveniences suffered by the Petitioners following the unlawfully arbitrary administrative decision of suspending the construction of the perimeter wall over LR No Kwale/Diani Beach Block/1526 situate in Kwale County without affording the Petitioners a fair hearing.
- H. The honourable court do award the Petitioners exemplary damages against the 1st Respondent for breach of the Petitioners fundamental rights.
- I. The costs consequent upon this petition be borne by the Respondents.
- J. The honourable court do award interest on [F] [G] and [H] at court rate from date of filing petition until settlement thereof in full.
- K. The honourable court do make any such other or further orders as it may deem just and expedient in the circumstances, to give effect to the orders above.



1st Respondents Reply To The Petition

10 The 1st Respondent County Government of Kwale, filed a reply to the petition dated 7/5/2020, and replying affidavit sworn by its Physical Planner Ali Bedzuma on 12/6/2020. It is averred that the suit properties were initially part of parcel no Kwale/Diani Beach Block/198 (the head lease) measuring 12 Hectares leased to Diccon Croft Willcock for 99 years and which expired in 2013. That vide a letter dated 21/7/2006 the said Mr. Willcock applied for sub division of the head lease into two parcels (the suit properties herein) which was approved by the Commissioner of Lands in 2007. That however the Mr. Willcock did not proceed with the same, returned to his country of origin being a foreigner, was now deceased, which was in the public domain.

The Cross Petition.

11 The 1st Respondent further filed a cross petition wherein their averments of the reply to the petition and the replying affidavit are reiterated. For clarity the Cross Petition names The County Government of Kwale as the Petitioner, The National Land Commission, The Honourable Attorney General, Brookshil Limited, Ashbrook Limited, Suleiman Ali Mwadzugwe, Salim Hussein Omar and Hatibu Mjaka Mtengo as the 1st – 7th Respondents respectively.

12 It is stated in addition that Mr. Willcock was not in actual occupation of the suit property, that upon this knowledge the 3rd, 4th, 5th, 6th and 7th Respondents above who are land fraudsters and cartels with officials from the 1st and 2nd Respondents subdivided the head lease and processed certificate of leases, the suit properties herein. The cross-petitioner states the titles to suit properties in the names of the 3rd - 7th Respondents were forgeries. That the Cross Petitioner holds records indicating the head lease is still registered in the names of Diccon Croft Willcock. That through a letter dated 23/03/2018 the head lease has never been subdivided or transferred to the 3rd - 7th Respondent.

13 The Cross-petitioner states that any purported sale or process to transfer the suit properties to the 3rd - 7th Respondents is therefore illegal and fraudulent and has never been approved by the cross petitioner or its predecessor the County Council of Kwale. The Cross Petitioner further avers that there was no consent from the Land Control Board for the transfer of the head lease and subdivision which was also to be approved by the County Council. That consequently the suit properties are an illegal subdivision, forgeries hence null and void. It is stated that the head lease having expired in the year 2013 and in the absence of extension, the same automatically reverted to the Cross Petitioner as a trustee on behalf of the public being the Kwale County residents.

14 The Cross-Petitioner further states that it was not true as stated in the deed of indemnity herein that the parcel file for the suit properties was lost. This was but a scheme aimed at sanitizing the illegal and fraudulent acquisition of the suit properties by the petitioners.

15 That based on the fact that the Mr. Willcock did not procure a lease extension and never transferred the head lease to the 3rd - 7th Respondents, the land should be reverted to the cross petitioner. That the interests of the 3rd - 7th Respondents cannot outweigh those of the public. The Cross Petitioner prays;

- a. That a declaration be issued to declare that the purported transfer of the head lease from the head lease holder to the 3rd to 7th Respondents was illegal and is null and void in the absence of any approval from the defunct County Council of Kwale and subsequently the cross petitioner herein.
- b. That a declaration be made that the head lease herein duly expired in the year 2013 and thus the suit properties reverted back to the cross petitioner in the absence of any evidence of the



transfer to the 3rd to 7th respondents by the head lease holder and the extension of the head lease by either of them.

- c. That the interested party (sic – I think it should be honorable court) do declare that the head lease herein is public land in the absence of any transfer to the 3rd to 7th respondents and extension of the head lease thus consequently the suit properties herein and the process that led to the registration of the suit properties is illegal null and void ab initio.
 - d. That the cross petitioner be declared the legitimate proprietor of the head lease herein being plot no Kwale/Diani Beach Block/198 through reversion and the subsequent subdivisions which gave rise to the suit properties herein be cancelled.
 - e. Costs of the cross petition be provided for.
- 16 A replying affidavit sworn by the said Mr. Bezuma on 22/4/22 was also filed in response to the Petitioners response to the cross petition and the replying affidavit thereof. The same denies the allegations contained therein and reiterates the averments in the cross petition. It is stated that the responses confirm that the dispute herein is on ownership of the suit properties pitting the cross petitioners and 3rd – 7th Respondents. The Petitioners were also put in strict proof of the surrender and extension of the head lease.

The 2nd Respondents Response To The Petition

- 17 The 2nd Respondent, the National Land Commission did not file any pleadings despite service.

The 3rd And 4th Respondents Response To The Petition

- 18 The Chief Land Registrar and the Attorney General who are respectively the 3rd and 4th Respondents in the petition filed grounds of opposition dated 31/01/2022 in response thereto through State Counsel. It is stated that from the prayers sought by the Petitioners, there is no legal cause of action against the 3rd and 4th respondents and who were not necessary parties to the petition. That the misjoinder is wanton abuse of court process and the suit should be struck out.
- 19 The 3rd and 4th Respondents also replied to the cross petition through a reply dated 1/4/22.

Interested Parties Response To The Petition And Cross Petition

- 20 In response to the petition, the Interested Parties filed a replying affidavit to both the petition and cross petition. The affidavit is sworn by one Hatibu Mjaka Mtengo on his own behalf and that of the rest of the Interested Parties. It is deponed that this court lacks the jurisdiction to hear and determine the matter in so far as suspension of approvals for construction is concerned. It is denied that the 1st and 2nd Petitioners acquired an interest in the suit properties within the meaning of Article 64[a] and [b] of *the Constitution*.
- 21 It is averred that the suit properties form part of ancestral land formerly within the larger block 5004 Mombasa/Diani that dates as far back as 1909 where the British colonial government compulsorily acquired land and dispossessed their forefathers. That the forefathers had held various meetings with the then local chief one Hamad Kassim Mahendo who surrendered the land to a British army colonel Mr. Jannes Theoderous Orberhizzer. That the surrender of interest was reduced to a lease agreement for a period of 99 years from 1909 where ten (10) leaders from the clans represented appended their signatures. That the interest in land has over the years passed to various proprietors without due regard to the ancestral rights of ownership.



- 22 The Interested Parties state that in 2011 after promulgation of *the Constitution* they wrote to the then Minister of Lands to correct the historical injustice of land dispossession occasioned to the native communities. That unknown to them there had been change in ownership of the suit property together with the proprietorship to one Diccon Croft Willock as holder of a lease for a period of 99 years and that the land title had changed to Kwale/Diani Beach Block/198. It was also discovered that the lease term was to expire on 1/1/2013 but there had never been any application for extension/renewal of the lease term. The Interested Parties state that they noticed there was a request to subdivide Kwale/Diani Beach Block/198 into two parcels Kwale/Diani Beach Block/1526 and 1527. That the Petitioners purport to have acquired their interest in the suit properties with effect from 1/7/2007 and therefore in the absence of an extension of the leasehold interest held by Diccon Croft Willock the only transferable interest would be the remainder of the leasehold term which is 6 years.
- 23 According to the Interested Parties, vide a letter dated 23/3/2018 the Ministry of Lands pointed out the existence of forged green cards in respect of land parcels Kwale/Diani Beach Block/1526 and Kwale/Diani Beach Block/1527, the same confirmed that Diccon Croft Willock was still the registered proprietor. The Interested Parties state that no missing records or attempts to destroy the title documents have been occasioned at any time as the allegations are an attempt to hoodwink the court into legitimizing the illegal and corrupt means used by the Petitioners to acquire titles. It is stated that the Petitioners have failed to demonstrate a prima facie case and if they will suffer prejudice in the event that the orders sought are not granted.
- 24 In response to the cross petition, the Interested Parties denied that they have obtained forged titles over the suit property. It is stated that if the suit properties are reverted to the Cross Petitioners, then the same is held in trust on behalf of the residents of Kwale County.

Submissions By The Parties

- 25 The Petition was disposed by way of written submissions on agreement of the parties. All the parties complied except the Petitioners. I observed from the record that on 24/05/22 when the parties appeared before court to confirm compliance with filing of submissions Ms Kageni applied for a 3 days extension to file the petitioner's submissions. The court obliged and gave further directions on filing of submissions and slated the Petition for hearing on 21/07/22 but this was rescheduled for 17/11/22. On the said date Ms. Kageni was absent and none of the parties had been served with the petitioners' submissions. Ms Jadi for the Cross petitioner informed the court she had written several letters to Ms Kageni in this regard but there had been no response. I then directed the rest of the parties to file their submissions and gave a further 14 days extension to Ms. Kageni and set the matter for mention on 5/12/22. Ms. Kageni did not attend on 5/12/22 and I directed that the court would rely on what was on record. Mr. Kariuki for the Interested parties informed the court he would not file submissions but was going to rely on the replying affidavit. Be that as it may I will proceed with what is on record since it is now settled that submissions cannot take the place of evidence See the Court of Appeal dictum Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR.

1st Respondents Submissions

- 26 The firm of Madzayo Mrima & Jadi Advocates filed submissions on behalf of the 1st Respondent. It is submitted that the gist of the petition is the cancellation/suspension of the approval for construction of a perimeter wall in the suit properties by the county government of Kwale. That the county government being a constitutional body is mandated to undertake planning and development within its area of jurisdiction and to regulate the use of land and interest in land in the interest of the public and land use planning.



- 27 It is submitted that the development permission was granted subject to the strict adherence to interalia conditions listed under section 33[i] of the Physical Planning and Land Use Act key among them being if the land ownership was not disputed. The 1st Respondent submits it was not privy to the dispute on ownership pitting the Petitioners and the Interested Parties prior to the approval. That a decision to suspend the development was made in accordance with article 66 and the same has not in any way contravened the provisions of the constitution stated in the petition. That after such suspension, the 1st Respondent conducted due diligence and the suit properties were found to be public properties illegally acquired by the Petitioners and the Interested Parties. It is further submitted that the suspension of the development permission was made to pave way for investigations which found that the suit properties were public utility properties. Reference is made to the provisions of Articles 40(3)(b) of the Constitution on protection of proprietary rights and the limitation of rights thereof in the interest of the public.
- 28 It is submitted that the suit properties having been found to be public properties, then the Petition herein remains a non-starter and an abuse of the Court Process. Further, orders of injunction cannot be issued against the 1st Respondent who is exercising its mandate over the suit properties. The 1st Respondent states that the Petition herein as drafted is incompetent in that it is seeking judicial review orders and whereas Judicial Review Proceedings are special proceedings guided by the Fair Administrative Action Act No.4 of 2015. That the administrative decision espoused in the letter dated 28th November, 2018 suspending further construction of the perimeter wall remains valid and should not be quashed in view of the findings herein. Reliance is placed in the case of Aloise Matuya Mositi – Vs- National Environment Management Authority & Another (2020) eKLR.
- 29 The 1st Respondent advances that the Petitioners have not presented any evidence such as surrender, renewal of the head lease before the subdivisions to demonstrate that due process was followed in the acquisition of the suit properties. It is reiterated that any sale done before the sub-division ought to run to the year 2013 when the Head Lease was to expire and not otherwise. That the 1st Respondents letter dated 23rd March, 2018, confirms that the Head Lease was still registered in the name of the Head Leaseholder Mr. Diccon Croft Willcock which confirms that the head lease was never subdivided and/or transferred to the 3rd to 7th Respondents herein. That indeed the 3rd and 4th Respondents admit that the suit properties were first leased to one Diccon Croft Willcock pursuant to an extension.
- 30 That there being no extension the lease so expired in 2013 and the suit property reverted back to the County Government in trust of the public. The suit properties thus remain public utility properties which were fraudulently acquired and are for cancellation. Reference is made to the cases of William S. K Ruto –Vs- The Attorney General Hcc No. 1192 Of 2005 Nairobi, and Silas Make Otuke –Vs- The Attorney General 7 3 Others (2014) eKLR where the learned judges cited the case of Lazarus Estates Limited –Vs- Beasley (1961) 1 ALL ER 240 where titles were cancelled for having been obtained fraudulently.
- 31 On the Cross-Petition, reiterating the history of the Head lease as earlier stated, the application for subdivision by the Head lease holder, his subsequent death and the alleged scheme by the 3rd to 7th Respondents leading to the illegal sub divisions herein, averred this explained why the Respondents have title deeds for the same suit properties. That it is still in doubt which of the said Respondent did conduct due diligence towards the acquisition of the suit properties.
- 32 It is submitted that the Interested Parties have failed to inform the Cross Petitioner and also the Court how they acquired the titles herein when the history of the suit property was critical in settling the dispute herein. That the history as presented in the Cross-Petition remains unrebutted by the Respondents. Reference is made to the case of Nairobi Miscellaneous No. 663 Of 2006 Dennis Kuria



& Another –Vs- The Attorney General, High Court of Kenya, a case relating to the concept of public trust, where Court emphasized that the history of a land parcel is important to enable court establish legality of its ownership.

- 33 Additionally the 1st Respondent submitted on the provisions of Section 26 of the [Land Registration Act](#) on the grounds for cancellation of title. The court is referred to the holding in the case of Alice Chemutai Too –Vs- Nickson Kipkurui Korir & 2 Others (2015) eKLR, where Justice Munyao Sila espoused on the provisions of the said section in protecting real title owners from being deprived of their titles by subsequent transactions.

3rd and 4th Respondents Submissions

- 34 The submissions are filed before court on 25/7/2022 which reiterated the grounds opposition listed earlier. It is submitted that the 3rd and 4th Respondents are without any wrong doing and the reliefs sought against them were mere technicalities which can be cured through striking off the misjoinder parties. They submit that the Petitioners have not demonstrated the reliefs sought or any cause of action as against them to be enjoined in this suit and thus any reliefs issued by the court shall not directly affect them thus they should be struck off as parties to the suit.
- 35 On whether the 3rd and 4th Respondents are necessary parties to the suit, it is submitted that the Petitioners have not established whether the 3rd and 4th Respondents presence is necessary to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit. Reference is made to the holding in *Amon V Raphael Tuck & Sons Ltd* [1956]1 All ER 273 where the test for determining who a necessary party in a suit is was established.
- 36 It is also urged that civil suits involving the county government should be handled independently by the county government who is has capacity to sue and be sued without involving the national government Reliance was placed in the case of *Tom Luusa Munyasya & Another Versus Governor of Makueni County & 2 Others* [2014] eKLR. The 3rd and 4th respondents conclude by asking the court to strike off their misjoinder. That the same would not be fatal to the proceedings.

Jurisdiction

- 37 I'm aware from the proceedings that the jurisdiction of this court to entertain this petition was questioned by the 1st Respondent vide a preliminary objection dated 21st October 2020. The basis of the objection was that under the Physical Planning Act Cap 286 (repealed) the decision having arisen from the suspension of an approval by the 1st Respondent, the right forum was the Planning Liaison Committee and thereafter appeal lay to this court. That the mechanism provided should have been exhausted. This objection was subject to the ruling of my brother Yano J dated 29th July 2021. The court by invoking article 159(2)(d) of [the Constitution](#) 2010 found that the matter was properly before court as an ownership dispute over the suit property tilting the balance in favor all the parties in the dispute and in the public interest to have this mater heard substantively and attain closure. I agree with the above finding and proceed to render my judgement on the issues raised.
- 38 Let me also pronounce myself on the 1st Respondent's averment that judicial review proceedings and or reliefs should not have found their way into this petition. In my view there is nothing wrong with the reliefs being sought in this forum especially where in addition a determination of ownership of the suit properties is to be rendered by the same court. Firstly, I think it would not serve the objectives and purpose of the [Civil Procedure Act](#) which are also reiterated in the [Environment and Land Court Act](#) to have a litigant file separate proceedings delinked of this petition. It would not be efficient both in terms of time and the use of the scarce judicial resources. Secondly as long as the court does not depart



from the elements set out in law or precedent when reviewing the action/decision then I see no bar to the invitation for judicial review herein.

Issues For Determination

- 39 From the pleadings, the responses as well as the submissions of the parties, the Court frames the following as issues for determination.
- a. Whether the 1st Respondent act of suspending the approval of construction of the wall on the suit parcels contravened article 47 of *the Constitution* and the Petitioner's rights to fair administrative action.
 - b. Whether the registration of the Petitioners as proprietors of the suit properties was legal.
 - c. Whether the Petitioners are entitled to the reliefs sought in the petition.
 - d. Whether the Cross Petitioners are entitled to the reliefs sought in the Cross petition.
 - e. Whether the petition discloses a cause of action against the Chief Land Registrar and the Attorney General the 3rd and 4th Respondents
 - f. Who should bear the costs of this petition and cross petition.

Discussions And Determination Whether the 1st Respondent act of suspending the approval of construction of the wall on the suit parcels contravened article 47 of *the Constitution* and the Petitioner's rights to fair administrative action.

- 40 It is the Petitioners case that the suspension of the construction of the perimeter wall herein was done without according them a fair hearing and was without just cause and violated the petitioners right to fair hearing and fair administrative action entrenched and protected under articles 47 and 50 of *the Constitution* as read with section 4 of the *Fair Administrative Action Act* 2015. Looking at the first relief a myriad of articles and laws are alleged to have been violated but I will focus on the undernoted which I find more relevant for purposes of the judicial review orders.
- 41 Article 47 (1) of *the Constitution* speaks interalia to the fact that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- 42 The *Fair Administrative Action Act* 2015 was enacted to operationalize article 47 above. The Act defines administrative action to include the powers, functions and duties exercised by authorities or quasi-judicial tribunals or any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates. Section 3 of the Act stipulates interalia that the Act applies to all state and non-state agencies including any person exercising administrative authority. The 1st Respondent clearly is not exempted from the application of this Act as long as their actions or decisions affect the legal rights or interests of any persons to whom such action, or decision relates including the Petitioners herein.
- 43 Section 4 of the *Fair Administrative Action Act* is in the following terms;
- Section 4
- Administrative action to be taken expeditiously, efficiently, lawfully etc
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.
 4. The administrator shall accord the person against whom administrative action is taken an opportunity to–
 - a. attend proceedings, in person or in the company of an expert of his choice;
 - b. be heard;
 - c. cross-examine persons who give adverse evidence against him; and
 - d. request for an adjournment of the proceedings, where necessary to ensure a fair hearing.
 5. Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.
 6. Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of *the Constitution*, the administrator may act in accordance with that different procedure
- 44 Article 50 (1) is to the effect that every person has a right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or if appropriate another independent and impartial tribunal or body.
- 45 The impugned action of the 1st Respondent is contained in a letter dated 28th November 2018 emanating from the 1st Respondent Department of Environment & Natural Resources Management signed by the County Physical Planner which was produced by both the Petitioners and the 1st Respondent. The letter reads as follows; -

RE: Suspension Of Development Permission Granted On Land Parcel Number Kwale/
diani Beach Block /1376 For Development Of A Boundary Wall

We are in receipt of a complaint relating to the above referred development. The complainant forwarded to us, on behalf of claims by Mr. Hatibu Mjaka Mtengo disputes



the land ownership by Brookshild Limited and cites contrary rights to the land parcel in the interest of; -

1. Suleiman Ali Mwaduguzwe of ID No. 5415171
2. Salim Hussein Omar of ID No. 0765753

As per a copy of lease certificate attached with the complaining letter. (a copy pf the same has been attached)

In view of this and in the interest of public safety and security considering the sensitivity of land matters especially within the region, the development permission granted on the 16th day of November, 2018 for construction of a boundary wall is hereby suspended until such a time that the land disputes shall be resolved.

- 46 The above decision is an administrative action taken by the 1st Respondent Physical Planner suspending a development permission for construction of a boundary wall on parcel Kwale/Diani Beach Block/1526 which had been granted on 16/11/2018. It is now settled that judicial review is concerned with the decision-making process and not the merits of the decision. The Court of Appeal in the case of *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd (Interested Party)* Civil Appeal 185 of 2001 [2002] eKLR had this to say; -

‘The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at. Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker consider relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review’

- 47 Applying the provisions of the law cited and the above criteria, on jurisdiction the power of the 1st Respondent to undertake development control which goes with the mandate to consider and approve all development applications is donated under section 29 of Physical Planning Act Chapter 286 of the Laws of Kenya (now repealed). Power to approve comes with power to cancel and or suspend as is the case in the present suit. To the extent that the decision is in writing and states the reason for the suspension I would say there is compliance. But what does the Act prescribe as the procedure for complaints handling and or cancellation/suspension of development approval.

- 48 My perusal of the Physical Planning Act (repealed) revealed the Act is silent on the procedure to be followed by the approving authority before suspension or cancellation upon receipt of a complaint against such approval. However, from sections 35(2) and 41(4) the general spirit of the Act is that it is envisaged that parties shall be afforded an opportunity to make representations in writing if aggrieved. It is the 1st Respondents case that the approval is conditional upon the factors listed under section 33(1) of the Act one of which is that the land ownership is not disputed. Indeed, it lists 6 conditions attached to the approval No.1 being ‘that the ownership of the land is not disputed and No. 6 That a breach of one or more of the conditions may translate to a termination of the permission granted’. Indeed, Section 33 (1)(a) stipulates that the development permission may be granted with or without conditions. At the outset while this may be a justification it can only be used when arguing on the merits of the decision to suspend and not on procedural propriety of the same. To me it does not exempt the requirement for fair administrative action. Section 3 of the *Fair Administrative Action*



Act stipulates interalia that the Act applies to all state and non-state agencies including any person exercising administrative authority. In the case of *Shimoni Resort v Registrar of Titles & 5 others* [2016] eKLR the court stated thus; -

41.

Under Article 10 of the Constitution which embodies the national values and principles of governance all state organs, state officers, public officers and all persons are bound to apply the rule of law whenever they interpret any law and/or make or implement any public policy decisions. Applying the rule of law would have entailed the petitioner being given a chance to be heard before its title was cancelled. The cardinal rule of natural justice is that no person should be condemned unheard. There is no evidence the petitioner was accorded a chance of being heard before its title was cancelled.’

49 The letter states that the action was taken in the public interest and in order to avoid public disorder. Without going into the merits of the decision, for me while these could be considerations the letter would at least have contained an invitation at the earliest opportunity for the Petitioners to be heard on the same. As it is the letter to me looks final depicting no intention of hearing the Petitioners.

50 I think I have said enough to show that the decision to suspend the development approval was in breach of the Petitioners right to fair administrative action under Article 47 of the Constitution and I make that finding.

Whether the registration of the petitioners as proprietors of the suit properties is regular.

51 The Petitioners claim that they are the lawful registered owners of the suit properties and that by dint of section 26 of the Land Registration Act 2012 their titles are indefeasible and are protected from the ancestral claims and also enjoy the protection of article 40 of the Constitution. The Petitioners further claim protection under the doctrine of bonafide purchaser for value without notice. However, the 1st Respondent has challenged this title based on the content of the complaint received from the Interested Parties and also based on findings of their own investigations. To this end they have filed a cross petition. The Interested Parties have also challenged the Petitioners title based on fraud, illegality and ancestral ownership. The suit properties are also termed to be public property.

52 To determine whether the registration of the Petitioners is legal or regular it is important to visit the history of the suit properties and how the Petitioners acquired their registration. The Court of Appeal in *Munyu Maina v Hiram Gathiha Maina Civil Appeal No. 239 of 2009* [2013] eKLR, stated that where the registered proprietor’s title root is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register.

53 Justice Sila Munyao in the case of *Daudi Kiptugen Vs. Commissioner of Lands & 4 Others* (2015) eKLR persuasively stated; -

‘In order to determine the question whether the lease held by the plaintiff is valid, it must be demonstrated that it was properly acquired. It is not enough that one waves a Lease or a Certificate of Lease and assert that he has good title by the mere possession of the Lease or Certificate of Lease. Where there is contention that a Lease or Certificate of Lease held by an individual was improperly acquired, then the holder thereof, must demonstrate, through evidence, that the Lease or Certificate of Lease that he holds, was properly acquired. The



acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through the proper process, the title itself cannot be said to be a good title. If this were not the position, then all one would need to do is to manufacture a Lease or Certificate of Title, at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein. It is therefore necessary for this court to determine how the plaintiff ended up having a Lease and Certificate of Lease in his name, and further determine if the Government did intend to issue the plaintiff with a Lease over the suit land.'

- 54 Guided by the above I will proceed to interrogate the Petitioners claim that they are the lawful registered owners of the suit property and bonafide purchasers without notice of any defect in the title upon due diligence. I will tackle these together to avoid the risk of repetition.
- 55 I will deal with the issue of due diligence since it is the first investigation a proposed buyer must undertake before signing a sale agreement or a transfer. The key objective of due diligence with respect to property is to thoroughly inspect every relevant aspect of a property including ownership, encumbrances, previous entries or transactions as well as the history on the property. For properties held under a lease, the search discloses who the head lessor is and what the term of the lease is. Essentially, it is through due diligence and which must go beyond the register that the purchaser gets to know the history of the property.
- 56 It is the Petitioners case that they purchased the parcels LR. No. Kwale/Diani Beach/1526 and 1527 from Diccon Croft Wilcock upon conducting due diligence by way of official search at the Kwale Land Registry and confirmed the ownership and genuineness of the titles. The alleged certificate of official search was never produced before court by the Petitioners. Infact the searches presented all relate to the period way after the sale and not before the sale. It is known that a search at the at the lands registry alone is not sufficient. The Petitioner did not present any history of the property before the subdivisions not even in their response to the cross petition when it was critical to do so in view of the allegations raised. Infact the Petitioners clearly state they only did a search at the registry it is no wonder they could not give the history of the mother lease. I will then proceed to review the conveyancing transaction that resulted into the alleged registration of the Petitioners as leaseholders of the suit properties.
- 57 In respect of LR. No. Kwale/Diani Beach/1526 the Petitioners produced as part of their evidence in proof of the purchase transaction culminating into registration of M/s Brookshil Limited as proprietor the following documents; -
1. Lease dated 9/05/08 to Diccon Croft Wilcock of Nairobi for a period of 99 years with effect from 1/07/2007.
 2. Agreement for Sale dated 19/10/2010 between Diccon Croft Wilcock and Amarjit Singh Panesar, Jainmini Amit Naginbhi Patel, Harikrishana Shambhubhai Patel and Mukesh Kumar Naran Hirani in respect of Kwale/Diani Beach/ 1526.
 3. Transfer of Land for Kwale/Diani Beach/ 1526 to Brookshil Limited dated 17/11/2014.
 4. Certificate of Lease to Brookshil Limited in respect of LR. No. Kwale/Diani Beach/1526 dated 17/11/2014 for 99 yrs wef 1.7.07.
- 58 But what then would be the evidence necessary for a valid conveyancing and I will only go for the irreducible minimum depending with the nature of the interest being conveyed. In this regard I drew guidance from various legislation as well as some of the completion documents listed under clause 4.1.1 of the sale agreements produced herein. This shall become clearer shortly.



- 59 The disposition must comply with the requirements of section 3 of the Law of Contract Act. Essentially it must be in writing, executed by both parties and witnessed. I noted both sale agreements for LR. No. Kwale/Diani Beach/1526 and 1527 were compliant in this regard. Then there is the transfer which actually is the instrument that conveys the vendors interest to the purchaser. The transfer however was executed more than three years after signing of the sale agreement, was lodged on 17/11/2014 and registered on the same day. The transfer while it appears to have been assessed for stamp duty there was no corresponding stamp duty valuation form and proof of payment thereof. Stamp Duty is required in every land transaction under section 46 of the Land Registration Act which is to the effect that an instrument required by law to be stamped shall not be accepted for registration unless it is stamped in accordance with the Stamp Duty Act cap 480 of the Laws of Kenya.
- 60 Further it is evident from the sale agreement that a consideration of Kshs. 18,000,000/= was agreed upon and the proceeds were to be deposited into a designated account at Barclays Bank Limited Queensway Branch Nairobi held by the Vendors Advocates as stakeholder. No evidence was provided related to the Petitioners Bank Accounts showing monies used in connection with the sale agreement so deposited by the Petitioners to the account of their advocate and thereafter from his advocate to the vendors advocates. Even assuming there was financing which is stated as an option in the sale agreement there was no evidence of existence of a charge.
- 61 No evidence was presented showing rates clearance certificate was obtained (see clause 4.1.1(c)) which required this as part of the completion documents at that time. Rates clearance certificate is a mandatory statutory requirement under section 38(1) of the Land Registration Act (cap 3) which stipulates; -
- 38(1) The Registrar shall not register any instrument purporting to transfer or to vest any land, lease of land, situated within the area of rating authority unless, a written statement, by the relevant government agency, certifying that all outstanding rates and charges for the last twelve months and up to the date of request of transfer have been paid there is produced to the Registrar.
- 62 From the list of completion documents (see clause 4.1.1(d,e,f) three consents were required namely Commissioner of Land , District Land Officers consent to transfer and Presidential consent to transfer yet there was no presentation that these consents were obtained. This court was also never presented with a Certificate of Official search demonstrating the transfer of LR Kwale/Diani Beach/ 1526 to M/s Brookshil Limited was entered in the records of the parcel file at the Kwale Land Registry and neither was the corresponding green card produced. Infact this is supported by the letter dated 23/03/2018 (see KD-2) wherein the Chief Land Registrar directs the District Land Registrar Kwale to expunge any records that were not in the name of Mr. Diccon Croft Wilcock.
- 63 In relation to the acquisition of LR. No. Kwale/Diani Beach/1527 the Petitioners produced a Lease to Diccon Croft Wilcock for 99 years (though incomplete with the page containing the execution missing); Agreement for Sale dated 19/10/2010 between the same parties as Kwale/Diani Beach/ 1526. Transfer of Lease for Kwale/Diani Beach/ 1527 to Ashbrook Limited dated 7/2/2011 signed by two of the directors Amarjit Singh Panesar and Mukesh Kumar Naran Hirani; Certificate of Lease to Ashbrook Limited dated 8/02/2011 for 99 years wef 1.7.2006; Certificate of official search for 1527 dated 29th August 2018 showing Ashbrook Limited as the registered proprietor as at 8/2/2011 and corresponding Green Card opened pursuant to gazette notice No. 5671 dated 8/6/18.
- 64 Upon review of the above documents I noted the same issues as observed in respect of the documentation produced in Kwale/Diani Beach/ 1526 and I need not belabor the point. However,



two exceptions are noted. Firstly, while a certificate of official search is produced it is one undertaken in 2018 which to me cannot suffice. Going by what I have seen in cases before court ordinarily a search is undertaken immediately after the transfer is lodged and registered to confirm the registration. Secondly the date of the sale agreement and transfer correspond but this does not to me validate the transaction.

65 In addition to the foregoing observation there were doubts by the 1st Respondent as to whether there were any subdivisions herein undertaken by Mr. Diccon Croft Wilcock. As observed earlier by this court the Petitioner did not dwell much on this aspect of the history of the property. At paragraph 9 of the 3rd and 4th Respondents Reply to the Cross Petition which was filed on 4/4/22 they state; -

‘Prior to the registration of their properties in their names, the 3rd and 4th Respondents acquired copies of the lease to both properties which indicated that property LR. No. Kwale/Diani Beach/1526 had been leased, pursuant to a surrender, by the Government of Kenya to Diccon Croft Willock for a term of 99 years from 1st July 2007, whilst property LR. No. Kwale/Diani Beach/1527 had been leased, pursuant to an extension by the Government of Kenya to Diccon Croft Willock for a term of 99 years from 1st July 2006.’ (emphasis is mine)

No evidence of such surrender and extension above were presented.

66 But Let me state that there seems to be a common understanding by the Petitioners, the 1st Respondent and the Interested parties on the existence of a Head Lease which was held by Mr. Wilcock for a period of 99 years. Even the Interested parties depone that unknown to them there had been change in ownership of the suit property together with the proprietorship to one Diccon Croft Willock as holder of a lease for a period of 99 years and that the land title had changed to Kwale/Diani Beach Block/198. From the material placed before me there was no doubt in my mind of the existence of Mr. Wilcock as an owner at some point in relation to the suit properties. I will however still look at this from the point of view of the evidence produced to support a valid transaction. The history of the subdivisions became very pertinent after the subdivisions which are the substratum of the Petitioners sale agreements and transfers were impugned, yet the Petitioners made no efforts to produce evidence in rebuttal.

67 The Petitioners claim they were bonafide purchasers of the suit properties. The doctrine of bonafide purchaser has been a subject of numerous litigations extending to the Apex court in Kenya. Black’s Law Dictionary 9th Edition defines who a bonafide purchaser is as hereunder; -

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

68 In the case of *Katende v Haridas and Company Ltd.* [2008] 2 E.A 173 the Court of Appeal in Uganda states the definition of a bona fide purchaser and the instances when a purchaser can successfully rely on the bona fide doctrine enumerated thus;-

For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine he must prove that:

- (1) he holds a certificate of title;
- (2) he purchased the property in good faith;



- (3) he had no knowledge of the fraud;
- (4) he purchased for valuable consideration;
- (5) the vendors had apparent valid title;
- (6) he purchased without notice of any fraud; and
- (7) he was not party to the fraud.”

69 M.A Odeny J in the case of Kogo Flats Ltd v Sammy Cherunya & another [2019] eKLR where stated thus; -

‘.....The process of acquisition of a title is as good as the end result which is the title document. If certain steps are missing there has to be an explanation as to why there is an anomaly in the acquisition. There must be a checklist on the process which must be followed. You cannot be allowed to move from step one skip the other steps and jump to the last step where you get the title and expect eyebrows not to be raised on why certain steps are missing. In the current case it is glaring that something is not adding up on how the plaintiff got his title’.

70 The burden of proof lay on the Petitioners to prove all the above in support of their claim that they were innocent purchasers for value without notice. I’m not satisfied that the evidence tendered by the Petitioners supports a credible finding that they were bona fide purchasers of the disputed land. Section 107 of the *Evidence Act* (Cap 80) on the issue of "Burden of proof" states: (1,) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

71 The omission of necessary statutory steps and documents in a land transaction constitute unprocedural registration of the Petitioners as proprietors. Who would spend Kshs 36 million without going beyond the title investigation at the title registry assuming it was undertaken. A purchaser making a purchase of a magnitude such as the one in this case would not fail to produce the properties history unless they did not look out for it. Who would spend a hefty Kshs. 36 million and fail to keep records of such expenditure? It was no small change then, neither is it today. This court wonders what was so difficult with presenting this information or procuring the same from their lawyers or procuring a testimony from the law firm that it undertook any due diligence and/or acted as a trust account holder to facilitate the transaction. Where is the bonafides amidst all this?

72 Having identified and or observed all the foregoing would this court or any other court for that matter faced with such glaring gaps deem it safe to draw a conclusion or making a finding that the acquisition and transfer of LR. No. Kwale/Diani Beach/1526 and 1527 culminating into the issuance of the Certificate of Lease to the Petitioners was legal and lawful. The Petitioners failed to provide evidence that would support a valid purchase and sale transactions occurred to confer them with good title. To me the registrations of the Petitioners as leaseholders does not create the confidence it was above board.

73 It is therefore my finding that the petitioners were not bonafide purchasers for value without notice and neither was their title legal.



74 What about the title in respect of LR. No. Kwale/Diani Beach/ 1352 dated 22/05/2018. I have keenly looked at the petition as well as the cross petition and there is nothing much that is pleaded about LR. No. Kwale/Diani Beach/ 1352. Infact the contest is on LR. No. Kwale/Diani Beach/ 1526 and 1527. It just appears to me to have been brought in since it is adjacent to the former two parcels. I observed from the Certificate of official search dated 22nd May 2018 produced by the petitioners this parcel was initially registered to Colubus Development Company Ltd and not Diccon Croft Willock. No sale agreement was presented. With the material placed before me this court declines to issue any orders on this parcel that would give it legitimacy.

Whether the Petitioners are entitled to the reliefs sought in the petition.

75 I think for good flow, this would be the appropriate juncture to consider whether the Petitioners are entitled to the reliefs sought in the Petition. The reliefs sought by the Petitioners have already been listed elsewhere in this judgement. I will not belabor this point for I take the position that nothing comes out of an illegality. The alleged titles in the name of the Petitioners too cannot enjoy protection of Article 40 of *the constitution*. I find support in SC Petition 8 (E010) of 2021 Dina Management Limited Vs County Government of Mombasa & 5 Others where the Supreme Court of Kenya recently pronounced thus; -

(111) 111] Article 40 of *the Constitution* entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired. Having found that the 1st registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under Article 40 of *the Constitution*. The root of the title having been challenged, as we already noted above the appellant could not benefit from the doctrine of bona fide purchaser.

76 Having made a finding that the registration of the Petitioners as proprietors of the suit properties LR. No. Kwale/Diani Beach/ 1526 and 1527 was illegal then it goes without say that the reliefs sought cannot be granted.

77 It is also noteworthy that this court noted the submissions of the state counsel and in view of the findings I have made, I do not find it necessary to address the issue of their joinder. The answer lies in the final orders of this court herein in respect of this petition.

78 I must say something about the Interested Parties pleadings herein while bearing in mind that the contest herein pitted the Petitioners and the 1st Respondent the County Government of Kwale. I have seen two Certificates of title produced attributed to the 1st and 2nd Interested Parties in the Replying affidavit of the 3rd Interested Party Hatibu Mjaka Mtengo sworn on 1/4/22 in respect to the petition and cross petition. Let me state that the same are of no consequence. Firstly, even though I have found that the Petitioners titles were illegal, it is trite a property cannot have two valid title deeds or certificate of leases at the same time. Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v Attorney General & 4 others [2017] eKLR. In any case the titles were unleashed before this court without any explanation on how the suit properties were acquired.

79 Further the certificate of official search dated 12/7/2016 attached thereto gives returns that do not correspond with the title. While it shows that the two were registered on 10/12/2008 there is no entry showing that a title was issued which departs from the normal way search results are given. Moreover, the certificate of title shows the lease was issued on 3/9/2013. The Interested parties support the 1st Respondent position that the initial lease expired in the year 2013 how can their alleged titles be valid



if they were issued in the year 2013? They cannot have their cake and it. These titles are clearly not authentic. Be that as it may the Interested Parties clearly state that their claim is based on ancestral rights the suit property having belonged to their forefathers. They produced a copy of submissions dated 3/03/2011 addressed to the then Minister of Lands James Aggrey Orenge by representatives of China Saburi Gowa, China Kulo-Mwachidziru and China Ryaza clans. The Interested Parties depone at paragraph 12 of the affidavit that they wrote to the Minister to duly correct the historical injustice of land dispossession occasioned to the native communities. The Petition before me is not about historical injustices claim and which issue is not before me for determination.

80 The upshot of the foregoing discussions is that the Petition should be dismissed. Section 80 (1) of the [Land Registration Act](#) provides that: -

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

It is imperative that the register in respect of the suit property be rectified accordingly as the Petitioners titles did not meet the legal compliance of a good title and is impeached.

Whether the Cross Petitioners are entitled to the reliefs sought in the petition.

80 Having dispensed with the Petition the court must render itself on the cross petition herein. The gist of the Petition is the suit property having been initially held by Mr. Diccon Croft Willock on a 99-year lease from the government of Kenya expired in the year 2013 and having never been renewed, the lease should be reverted to the Cross Petitioner in trust for the people of Kwale County. It is also stated that the registration of the Petitioners as proprietors as lessee of the suit properties herein was fraudulent and illegal. I will not spend much time on this issue many of the issues raised have been answered in the earlier discussions.

81 In my view having made a finding that the Petitioners titles were illegal, that there was no evidence of renewal or extension of the initial lease held by Diccon Croft Willock then the lease expired. What then is the effect of this? The initial ownership of the suit property by the said Diccon Croft Willock is not in dispute and I have already alluded to this elsewhere in this judgement. It was not in dispute that he was a non-citizen, had left jurisdiction and is deceased. Legally being a foreigner, no pre-emptive rights apply. According to the documents presented before me the Lessor was the Government of Kenya. The land by operation of the law (reversion) should revert to the Lessor. There is no doubt that the land is public land.

82 Article 62(1) defines public land thus; -

62. Public land

(1) Public land is—

- (a) land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date;
- (b) land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease;
- (c) land transferred to the State by way of sale, reversion or surrender;
- (d) land in respect of which no individual or community ownership can be established by any legal process;



- (e) land in respect of which no heir can be identified by any legal process;
 - (f) all minerals and mineral oils as defined by law;
 - (g) government forests other than forests to which Article 63(2)(d)(i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas;
 - (h) all roads and thoroughfares provided for by an Act of Parliament;
 - (i) all rivers, lakes and other water bodies as defined by an Act of Parliament;
 - (j) the territorial sea, the exclusive economic zone and the sea bed;
 - (k) the continental shelf;
 - (l) all land between the high and low water marks;
 - (m) any land not classified as private or community land under this Constitution; and
 - (n) any other land declared to be public land by an Act of Parliament—
 - (i) in force at the effective date; or
 - (ii) enacted after the effective date.
- (2) Public land shall vest in and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission, if it is classified under—
- (a) clause (1)(a), (c), (d) or (e); and
 - (b) clause (1)(b), other than land held, used or occupied by a national State organ.
- (3) Public land classified under clause (1)(f) to (m) shall vest in and be held by the national government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission.
- (4) Public land shall not be disposed of or otherwise used except in terms of an Act of Parliament

83 Applying the above provisions then the suit property having reverted to the State in my view shall in accordance to article 62(2)(a) above vest and be held by the County Government where it is situate and shall be administered on behalf of that county government by the National Land Commission. In the present case the suit property is in Kwale county and therefore the County Government of Kwale.

84 The reliefs sought by the Cross Petitioner have already been enumerated elsewhere in this judgement and which I have considered. However, it is my view that the following orders should issue to dispose of the petition and cross petition.

- i. The petition is dismissed with costs to the Respondents except the 2nd Respondent the National Land Commission who did not participate in these proceedings.



- ii. The Cross Petition succeeds.
- iii. The registration of the Petitioners as proprietors as Lessees of LR. No. Kwale/Diani Beach/1526 and LR. No. Kwale/Diani Beach/1527 was illegal, null and void.
- iv. The suit properties Land Reference Number Kwale/Diani Beach Block/1526 and Land Reference Number Kwale/Diani Beach Block 1527 shall revert and be held by the County Government of Kwale in trust for the people resident in the county to be administered on their behalf by the National Land Commission.
- v. The Chief Land Registrar shall cause the register for LR. No. Kwale/Diani Beach/1526 and LR. No. Kwale/Diani Beach/1527 to be rectified by expunging the entries in respect of the Petitioners and the 1st and 2nd Interested Parties.
- vi. The Petitioners shall also bear the Costs of the cross petition in terms of 1 above.

Orders accordingly.

DELIVERED AND DATED AT KWALE THIS 3RD DAY OF MAY 2023

A.E. DENA

JUDGE

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

Ms. Jadi for the 1st Respondent

Ms. Kagoi Holding brief for Ms. Langat

Mr. Kariuki for Interested Parties

No appearance for the Petitioners

Mr. Daniel Disii – Court Assistant

