



Suleiman v Philan Holdings Ltd & 4 others (Environment & Land Case 456 of 2018) [2023] KEELC 17330 (KLR) (11 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17330 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 456 OF 2018**

**JO MBOYA, J
MAY 11, 2023**

BETWEEN

ABDUL MAJID SULEIMAN PLAINTIFF

AND

PHILAN HOLDINGS LTD 1ST DEFENDANT

KENTIMORE COMPANY LTD 2ND DEFENDANT

CHIEF LAND REGISTRAR 3RD DEFENDANT

NATIONAL LAND COMMISSION 4TH DEFENDANT

THE HON. ATTORNEY GENERAL 5TH DEFENDANT

JUDGMENT

Background and Introduction

1. The Plaintiff herein claims and contends that same is the Legal Representative; and heir of Suleman Mohamed Moti and Harsham Mohamed Moti , respectively, who are stated to have died in 1957 and 1969, respectively. In any event, the Plaintiff has further averred that prior to the death of the deceased persons, same held shares in respect of L.R No. 209/2566 (hereinafter referred to as the suit property).
2. Premised on the claim that same is the Legal Representative of the Deceased persons, the Plaintiff filed and/or commenced the instant suit *vide* Plaint dated the 11th October 2018, wherein same seeks a plethora of reliefs.
3. For coherence, the Reliefs sought at the foot of the Plaint are as hereunder;
 - a. A Declaration be issued to declared that the commissioner of lands un lawfully issued a provisional certificate of title to the 1st Defendant *vide* entry number 19 in the title No. I.R 4941 concerning the suit property.



- b. A Declaration be issued to declare that the extension of lease for L.R No. 209/2566 in favor of the 1st Defendant by the government *vide* the letter of the commissioner of lands dated the 31st July 1998 is fraudulent, illegal, null and void *ab initio*.
 - c. The Honourable court be pleased to issue an order to annul the approval of the extension of lease for L.R No. 209/2566 in favor of the 1st Defendant *vide* the letter of the commissioner of lands dated the 31st July 2008.
 - d. A Declaration be issued to declare that the 1st Defendant is not entitled to the possession and ownership of the suit property on account of the vesting order dated the 9th April 2008.
 - e. A Declaration be issued to declare that the 1st Defendant's claim to the suit property on account of the decree issued in Nairobi resident magistrate court civil case number 406 of 1992 was invalidated by the expiry of the lease for the suit property before it had acquired vesting orders for the same.
 - f. A Declaration be issued to declare that the 2nd Defendants' grant number I.R 112178 dated the 18th December 2007 is illegal, null and void *ab initio*.
 - g. The Honourable court be pleased to issue an order to annul Grant Number I.R 112178; dated the 18th December 2008, in favor of the 2nd Defendant.
 - h. A Declaration be issued to declare that the heirs to the Trustees of Memon Mohamed Moti (deceased), have a pre-emptive Rights and legitimate Expectations to the extension and renewal of the Lease for the suit property in their favor.
 - i. A Declaration be issued to declare that the 3rd and 4th Respondents are enjoined to consider the extension and renewal of the lease for the suit property in accordance with Section 13 of the [Land Act](#), 2012.
 - j. The Honourable court be pleased to issue an order of Mandatory Injunction to compel the 3rd and 4th Respondents to deal with the issue of extension and renewal of the lease for the suit property in accordance with Section 13 of the [Land Act](#), 2012 and the Regulations made thereunder.
 - k. Interest on (i) above at court rates.
 - l. Cost of the suit.
4. Upon being served with the Plaint and summons to enter appearance, the 1st Defendant duly entered appearance on the 9th November 2018; and thereafter filed a Statement of Defense on the 20th December 2018. On the other hand, the 3rd and 5th Defendants entered appearance on the 15th June 2022 and similarly filed a statement of Defense on even date.
 5. Furthermore, the 4th Defendant entered appearance and thereafter filed a Statement of Defense on the 27th February 2019. However, the Statement of Defense herein was thereafter amended on the 16th January 2023.
 6. Subsequently, the instant matter was listed for Case Conference, with a view to ascertaining and confirming the filing of the relevant bundle of documents; and witness Statements. Suffice it to point out, that the Parties indeed confirmed compliance with the Pre-trial directions and essentially, the filling of the requisite Documents and witness statements.
 7. Arising from the confirmations by the Parties, the suit was confirmed ready and ripe for Hearing.



Evidence by the Parties

a.Plaintiff's Case:

8. The Plaintiff's case revolves and gravitates around the Evidence of one witness; namely, Abdul Majid Suleiman. For clarity, the said Abdul Majid Suleiman, testified as PW1.
9. It was the testimony of the witness that same is the Legal Representative of the Estate of Abdul Aziz Suleiman, now deceased. In addition, the witness averred that by virtue of being the Legal Representative of Abdul Aziz Suleiman, now deceased, same is privy to and knowledgeable of the facts concerning L.R No. 209/2566, (the suit property herein).
10. Furthermore, the witness averred that the suit property is situated within the Central Business District of Nairobi and that same was registered in the name of Ali Mohamed and Kemeshwar Jathlal Pandia, as the Trustees of one, Memon Mohamed Moti, deceased.
11. On the other hand, the witness averred that same is aware that *vide* Civil Appeal Number 56 of 1962, the Court of Appeal ordered and directed that the suit property to be held by the three sons of Memon Mohamed Moti, Deceased, in shares, whose portfolios were duly contained in the Judgment. In particular, the witness testified that Suleiman Mohamed Moti was entitled to 42%; Hasham Mohamed Moti was entitled to 42%; and Hussein Mohamed Moti was entitled to 16%.
12. Additionally, the witness testified that upon the death of his Father, namely, Suleman Moti, same was duly appointed as the Legal Representative of the Estate. Further, the witness also testified that he is the Representative of Hashan Moti, Deceased.
13. It was the further evidence of the witness that on or about the year 1992 the City Council of Nairobi filed Civil Proceedings *vide* Case No. 406 of 1992 against one Abdula Hussein, who was the Legal representative of the late Hussein Mohamed Moti, wherein the City Council of Nairobi sought to recover arrears of rates that were due and/or owed from the suit property.
14. Other than the foregoing, it was the evidence of the witness that upon the filing of the said proceedings, the City Court proceeded to and indeed issued a decree, which eventually led to the sale of the suit property *vide* public auction. Further, the witness testified that the suit property was thereafter sold to and in favor of the 1st Defendant.
15. In addition, the witness testified that after the sale of the suit property to the 1st Defendant *vide* public auction, the 1st Defendant herein proceeded to and procured a vesting order from the Magistrates court, relating to ownership of the suit property. For clarity, the witness added that the vesting order was thereafter registered against the title of the suit property herein.
16. On the other hand, the witness added that after the registration of the vesting orders against the title of the suit property, the office of the Chief Land Registrar proceeded to and issued a Provisional Certificate of Title, namely, I.R No. 4941, which was issued on the 19th December 1991.
17. Nevertheless, it was the testimony of the witness that upon establishing the registration of the vesting orders and the issuance of the provision of certificate of title in favor of the 1st Defendant, one Abdul Aziz Suleiman, now deceased, filed Judicial Review proceedings *vide* Nairobi HCC No 583 of 1995, challenging the issuance of the vesting order in favor of the 1st Defendant herein.
18. Further, it was the testimony of the witness that the Judicial Review proceedings, namely Nairobi HCC Misc. Application No. 585 of 1995 was thereafter heard and disposed of, culminating into a



- ruling rendered on the 21st November 1997. Instructively, the witness added that the vesting order which had hitherto been issued in favor of the 1st Defendant was quashed.
19. Additionally, the witness testified that after the quashing of the vesting order, the suit property effectively reverted to and remained the property of Ali Mohamed and Kameshwar Jathlal Pandya, as the Trustees of Memon Mohamed Moti, Deceased.
 20. Notwithstanding the foregoing, the witness further testified that the 1st Defendant herein again filed another suit, namely, Nairobi HCC Misc. Application No. 1125 of 1997, wherein same sought a further vesting order in respect of the suit property. In addition, the witness stated that the said suit was indeed heard culminating into an order issued on the 9th April 2008, which effectively granted a vesting order in favor of the 1st Defendant.
 21. However, the witness averred that the Lease over and in respect of the suit property, which was registered in the names of Ali Mohamed and Kameshwar Jathlal Pandya, as the Trustees of Memon Mohamed Moti, Deceased, was bound to lapse on the 1st June 2002. In any event, the witness added that by the time the Lease lapsed, the 1st Defendant had not acquired any vesting order over and in respect of the suit Property.
 22. Be that as it may, the witness further testified that the vesting order which was acquired and issued in favor of the 1st Defendant on the 9th April 2008, could not be registered against the title on various reasons, *inter-alia*, the fact that the Lease in respect of the suit property had Expired on the 1st June 2002.
 23. On the other hand, it was the testimony of the witness that upon the expiry of the Lease, the Commissioner of Land purported to approve the extension of the lease for a further term of 50 years, albeit at the instance of the 1st Defendant. However, the witness added that the Letter of the Commissioner of Lands dated the 31st July 1998, purporting to approve extension of the Lease in favor of the 1st Defendant was fraudulent and illegal, insofar as the Lease was still registered in the names of Ali Mohamed and Kameshwar Jathlal Pandya, as the Trustees of Memon Mohamed Moti, Deceased.
 24. Additionally, it was also the testimony of the witness that at the time when the Commissioner of Land purported to approve the extension of the Lease in favor of the 1st Defendant, the Commissioner of Land was enjoined to enquire from the heirs of the Estate of Memon Mohamed Moti, deceased, on whether same were desirous and intent on renewal of the term of the lease. However, the witness contended that the Commissioner of Land did not undertake any such enquiry.
 25. It was the further testimony of the witness that upon the expiry of the Lease, the heirs of Memon Mohamed Moti, Deceased, has a pre-emptive right to the Lease; and were thus entitled to First priority, as pertains to extension, or otherwise, renewal of the same.
 26. Furthermore, the witness testified that despite the fact that the heirs of Memon Mohamed Moti, Deceased, had pre-emptive rights in respect of renewal of the Lease, the Commissioner of Land fraudulently and illegally proceeded to and issued Grant Number I.R No. 112178; to and in favor of the 2nd Defendant. In this regard, the witness added that the said Grant was issued on the 18th December 2007.
 27. Premised on the foregoing testimony, the witness averred that the issuance of Grant/Certificate of title over and in respect of the suit property to the 2nd Defendant, was fraudulent and illegal; and thus ought to be revoked. In addition, the witness has also implored the Honourable court to compel the 3rd and 4th Defendants to consider and deal with extension of the Lease in favor of the heirs of Memon Mohamed Moti, now deceased.



28. Other than the foregoing, the witness essentially adopted and relied on the witness statement dated the 11th October 2018. For clarity, the contents of the witness statement, which have essentially been reproduced herein before were duly adopted and admitted as the Evidence- in- chief of the Witness.
29. In addition, the witness also referred to the List and Bundle of Documents dated the 11th October 2018, containing Five Documents; which the witness sought to adopt and rely on. In this regard, the documents at the foot of the List dated the 11th October 2018, were produced and marked as Exhibits P1 to P5, respectively.
30. Furthermore, the witness also alluded to the List dated the 18th February 2022, containing two Documents and also sought to adopt and rely on same. For coherence, the documents at the foot of the said List were admitted and produced as Exhibits P6 and P7, respectively.
31. Finally, the witness referred to the Further List and Bundle of documents dated the 17th June 2022; and similarly sought to adopt and rely on same. In this respect, the documents at the foot of the Further list dated 17th June 2022; was duly admitted and marked as Exhibit P8.
32. On cross examination by counsel for the 3rd and 5th Defendants, the witness confirmed that the suit property was issued to and registered in the names of Ali Mohamed and Kameshwar Jathlal Pandya, as the Trustees of Memon Mohamed Moti, Deceased.
33. Furthermore, the witness admitted and acknowledged that the Lease in question expired on the 1st of June 2002. Invariably, the witness also added that same applied for renewal and extension in the year 2014. Nevertheless, the witness conceded that by the time he applied for extension in the year 2014, a Grant had already been issued in favor of the 2nd Defendant.
34. In any event, the witness testified that even though a Grant had already been issued to the 2nd Defendant over and in respect of the suit property, the issuance of the said Grant was neither known to nor within the knowledge of the City County Government.
35. Nevertheless, the witness testified that same had pre-emptive rights to the renewal of the Lease.
36. On cross examination by counsel for the 4th Defendant, the witness stated that same had applied for renewal of the Lease to the Land office. For clarity, the witness stated that the application for renewal was addressed to the Ministry of Lands. Further, the witness stated, that the application for renewal was made in the year 2002.
37. Whilst under further cross examination, the witness stated that even though he applied for renewal in the year 2002, same did not receive any response from the Ministry of Lands. In any event, the witness added that he was informed to wait for a formal response.
38. Nevertheless, it was the testimony of the witness that same has never made any application for renewal to the National Land Commission. However, the witness added that the application for extension of the lease, which was made was addressed to the City County Government of Nairobi.
39. It was the further testimony of the witness during cross examination that he joined/ impleaded the National Land Commission in respect of the matter herein because he is aware that the Commission is chargeable with renewal/extension of leases, by dint of the provisions of the Constitution, 2010.
40. On the other hand, the witness also testified that same did not know who was the last registered owner of the suit property before the lapse/expiry of the Lease. However, the witness pointed out that he was aware that a vesting order had been issued by the High Court.



41. In answer to a question pertaining to whether or not the order quashing the vesting order was duly registered at the Land offices, the witness pointed out that the registration of the quashing order, was to be pursued by his advocate. However, the witness added that he is not aware whether the advocate duly lodged the quashing order at the Land registry.
42. In addition, the witness testified that same does not know whether the Land in question reverted to the Government of Kenya; and whether the Government could chose to deal with the land as it pleases.
43. On re-examination, the witness stated that the Land in question belongs to his Grandfather, now deceased. Furthermore, the witness added that the Lease was to expire and indeed, same expired on the 1st June 2002.
44. Additionally, the witness stated that same made an Application for Extension of the Lease in the year 2014. Essentially, the witness clarified that the application for extension was made to the City County of Nairobi. On the other hand, the witness confirmed that the suit property is currently under the occupation of the 1st Defendant.
45. In response to a question as to whether same has ever applied for extension to the National Land Commission, the witness responded and stated that he was advised to make the application for extension to the City County Government of Nairobi; and it was the City County Government of Nairobi who was to escalate the application to the National Land Commission.
46. With the foregoing testimony, the Plaintiff's case was duly closed.

b.The 1st Defendant's Case:

47. The 1st Defendant herein duly entered appearance and filed a Statement of Defense. Similarly, the 1st Defendant also filed witness statements and bundle of documents, which same intended to rely on during the trial.
48. Nevertheless, even though the 1st Defendant was privy to and knowledgeable of the scheduled hearing date, same neither attended court nor participated in the said proceedings. Consequently, the 1st Defendant's case was closed without any evidence being tendered.

C. The 2nd Defendant's Case:

49. Though duly served with the Plaint and summons to enter appearance, the 2nd Defendant herein neither entered appearance nor filed any Statement of Defense. In any event, the 2nd Defendant also did not participate in the proceedings.
50. For good measure, the 2nd Defendant's case was similarly closed without any evidence being tendered on her behalf.

d.The 3rd and 5th Defendants' Case:

51. The 3rd and 5th Defendants duly entered appearance and filed a Statement of Defense dated the 15th June 2022. Nevertheless, the 3rd and 5th Defendants' neither filed any List and Bundle of documents, nor witness statements.
52. Be that as it may, Learned counsel for the 3rd and 5th Defendants duly attended court and actively participated in the proceedings. For coherence, counsel for the 3rd and 5th Defendants extensively cross examined the Plaintiff's witness.



53. Nevertheless, learned counsel for the 3rd and 5th Defendants thereafter intimated to court that same would not be calling any witness in the matter. Consequently, the 3rd and 5th Defendants' case was closed without any Evidence being tendered on their behalf.

e. The 4th Defendant's Case:

54. Similarly, the 4th Defendant duly entered appearance and filed a Statement of Defense/counter-claim. However, the 4th Defendant neither filed any List and Bundle of documents nor witness statement.

55. On the other hand, though learned counsel for the 4th Defendant participated in the proceedings and indeed cross examined the Plaintiff, however, same ultimately intimated to the court that the 4th Defendant shall not be calling any witness.

56. In the premises, the 4th Defendant's case was similarly closed, albeit with no evidence having been tendered on behalf of the 4th Defendant.

Submissions by the Parties

a. Plaintiff's Submissions:

57. Learned counsel for the Plaintiff filed written submissions dated the 8th February 2023 and in respect of which learned counsel has isolated, highlighted and amplified three issues for consideration and determination by the Honourable court.

58. First and foremost, Learned counsel for the Plaintiff has submitted that the suit property herein was hitherto registered in the names of Ali Mohamed and Kameshwar Jathlal Pandya, as the Trustees of Memon Mohamed Moti, Deceased; and that the Lease was to subsists up to and including the 1st of June 2002.

59. In addition, learned counsel has submitted that even though the City Council of Nairobi had purported to dispose of the suit property by way of public auction, the 1st Defendant who purchased the suit property from the public auction, did not effectively became the registered owner of the suit property. For clarity, counsel has pointed out that no vesting order was issued and registered against the suit property by the time the Lease lapsed on the 1st June 2002.

60. Furthermore, Learned counsel has contended that upon the lapse of the Lease on the 1st June 2002, the suit property reverted to the City Council of Nairobi; and in this regard, Learned counsel submitted that the Estate of Memon Mohamed Moti, deceased, therefore had a right in priority to be offered a fresh Lease.

61. Secondly, learned counsel for the Plaintiff submits that the Lease that was issued to and in favor of the 2nd Defendant herein was fraudulent and illegal. In particular, learned counsel has submitted that by the time the Commissioner of Lands purported to issue a certificate of lease in favor of the 2nd Defendant; the suit property had reverted to the City Council of Nairobi as the Lessor.

62. According to Learned counsel for the Plaintiff, the Commissioner of Lands could not alienate or allocate the suit property to and/or in favor of the 2nd Defendant, because the property had reverted to and thus belonged to the City Council of Nairobi.

63. Thirdly, it is the submissions of learned counsel for the Plaintiff that the Trustees of Memon Mohamed Moti, now deceased, who were the owners of the suit property, were entitled to priority and thus had preemptive rights in respect of renewal/extension of the Lease upon expiry.



64. Furthermore, learned counsel has submitted that based on the preemptive rights in favor of the Trustees of Memon Mohamed Moti, Deceased, it behooved the Commissioner of Lands to first enquire from the heirs of Memon Mohamed Moti, whether same were keen and desirous to renew the Lease, before offering the Lease to any Third Party.
65. In any event, learned counsel has submitted that it was incumbent upon the Commissioner of Land to have invited the heirs of Memon Mohamed Moti, Deceased, to apply for renewal, before same could purport to issue a Grant in favor of the 2nd Defendant. In this regard, counsel has submitted that the Trustees of Memon Mohamed Moti, Deceased, therefore had a Legitimate Expectation pertaining to and concerning the issuance of a fresh Lease.
66. In support of the submissions pertaining to and concerning the Doctrine of Legitimate Expectation, Learned counsel for the Plaintiff has invited the attention of the Honourable court to, inter-alia, the case of *Diana Kethi Kilonzo & Another versus Independent Electoral & Boundaries Commission & 10 others* (2013)eKLR and *Kenya Industrial Estate Ltd versus Ann Chepsiror & 5 others* (2015)eKLR, respectively.
67. Premised on the foregoing submissions, learned counsel for the Plaintiff has therefore contended that the Plaintiff has been able to prove his case on a balance of probabilities; and thus same is entitled to the reliefs sought at the foot of the Plaintiff.
68. As a result, learned counsel has invited the Honourable court to grant the reliefs as prayed for.

The 3rd And 5th Defendants' Submissions:

69. The 3rd and 5th Defendants' filed written submissions dated the 7th March 2023; and same have highlighted three issues for consideration determination.
70. Firstly, learned counsel for the 3rd and 5th Defendants' has submitted that the Plaintiff herein is not seized of the requisite Legal Capacity to commence, originate and maintain the instant suit insofar as same has not been issued with the requisite Grant of Letters of administration of the Estate of Memon Mohamed Moti, deceased; or of the trustees of the said Memon Mohamed Moti, whatsoever.
71. In addition, learned counsel for the 3rd and 5th Defendants has submitted that it is common ground that the Plaintiff's suit touches on and concerns the Estate of Memon Mohamed Moti, now deceased; and hence no suit can be commenced and/or maintained without the requisite Grant of Letters of Administration having been sought for and obtained as provided for under the *Law of Succession Act*, Chapter 160 Laws of Kenya.
72. Furthermore, learned counsel has submitted that in the absence of the requisite Grant, the Plaintiff herein is thus devoid of the requisite locus standi to maintain the instant suit. In this regard, it has been contended that the suit is therefore a nullity *ab initio*.
73. In support of the submissions concerning the lack of the requisite Locus standi, learned counsel has cited and relied on, *inter-alia*, the case of *Julian Adoyo Onguma & another v Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi)* (2016)eKLR, *Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama* (2014)eKLR and *Daykio Plantations Ltd v National Bank of Kenya Ltd & 2 others* (2019)eKLR, respectively.
74. Secondly, learned counsel for the 3rd and 5th Defendants has submitted that it was incumbent upon the Trustees of Memon Mohamed Moti, now deceased, to apply for extension of the Lease, over and in



- respect of the suit property prior to and before the expiry date. In this regard, learned counsel pointed out that the extension could only be done before the 1st June 2002, which however, was not the case.
75. On the other hand, learned counsel has further submitted that the trustees of Memon Mohamed Moti, Deceased, could also apply for renewal, albeit, after the expiry of the lease. Nevertheless, counsel has pointed out that such application for renewal ought to have been made timeously to the Commissioner of land, who at the point in time, was responsible for renewals.
76. Notwithstanding the foregoing, learned counsel has further submitted that even to date, the heirs of Memon Mohamed Moti, Deceased, have not made the requisite application for renewal of the lease or issuance of a fresh Lease, in accordance with the provisions of Section 13 of The Land Act, 2012 (2016). In any event, counsel has also cited and relied on the provisions of Land (Extension and Renewal of Lease) Rules, 2017.
77. In addition, learned counsel has submitted that upon the expiry of the Lease, the suit property reverted to the Government; and same was therefore Public land. Consequently, it has been submitted that the Commissioner of Lands was therefore at liberty to allocate/alienate the suit property subject to the provisions of the Government Lands Act, Chapter 280 Laws of Kenya.
78. In support of the submissions that the suit property reverted to the Government of Kenya and thus became Public Land, learned counsel has cited and relied on the case of Suleiman Murunga v Nilestar Holding Ltd & Another (2014)eKLR.
79. Finally, learned counsel for the 3rd and 5th Defendants has submitted that the suit property was ultimately allocated to and in favor of the 2nd Defendant and a Grant was duly issued. In this regard, learned counsel has submitted that the suit property is no longer available for alienation in favor of the Plaintiff, either by extension of lease or otherwise.
80. Furthermore, learned counsel has also added that the question of administration and management of Public land belongs to the National Land Commission by dint of the provision of Articles 62(2) and 67(2) of the Constitution 2010. Consequently, counsel has submitted that it is not the responsibility of this Honourable court to direct the National Land Commission on how to undertake and discharge her constitutional mandate.
81. In view of the foregoing, learned counsel for the 3rd and 5th Defendants has therefore implored the Honourable court to find and hold, *inter-alia*, that the suit beforehand is incompetent and thus ought to be struck out.

The 4th Defendant's Submissions:

82. The 4th Defendant filed written submission dated the 28th March 2023; and same has highlighted two issues for consideration and determination by the Honourable court.
83. Firstly, learned counsel for the 4th Defendant has submitted that the Plaintiff herein was not vested with any pre-emptive rights to and in respect of the suit property. In any event, learned counsel has submitted that the provisions of Section 13 of the Land Act, 2012 (2016), did not apply to the circumstance relating to the suit property, whose Lease expired on the 1st June 2002, long before the enactment of the Land Act, 2012.
84. Furthermore, learned counsel has also submitted that even if the Plaintiff was entitled to pre-emptive rights, (which is not the case), Learned counsel has contended that it behooved the Plaintiff to make the requisite application for extension. However, it has been submitted that no such application was ever made by the Plaintiff, until the year 2014.



85. In addition, learned counsel has further submitted that by the time the Plaintiff herein purported to make an application for extension of the lease, to the County Government of Nairobi and not to the National Land Commission, the application for extension was barred by Section 7 of the *Limitation of Actions Act* Chapter 2022 Laws of Kenya.
86. Secondly, learned counsel for the 4th Defendant has submitted that the suit property herein lawfully reverted to the Government of the Republic of Kenya; and thus same forms part and parcel of Public land, which can only be administered by the National Land Commission and not otherwise.
87. Additionally, learned counsel has submitted that even though the Commissioner of Land purported to allocate and alienate the suit property to and in favor of the 2nd Defendant, the purported alienation was illegal and thus void. In this regard, learned counsel has invoked and relied on the provisions of Article 40(6) of the *Constitution* 2010.
88. In a nutshell, it is the submissions for the 4th Defendant that the suit property is indeed Public land and thus falls within the purview, administration and management of the National Land Commission, by dint of and pursuant to the Provisions of Section 5 of the *National Land Commission Act*, 2012.

Issues For Determination

89. Having evaluated and considered the Pleadings filed by the respective Parties, the oral evidence tendered and the written submissions filed by and on behalf of the parties, respectively; the issues that do arise and are thus worthy of determination are as hereunder;
 - i. Whether the Plaintiff herein is seized of the requisite Locus standi to commence, originate and maintain the instance suit?
 - ii. Whether the claims at the foot of the instant suit are barred by the provisions of Sections 3(1) of the *Public Authorities Limitations Act*, Chapter 39; and Section 4(2) of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.
 - iii. Whether the Honourable court is seized of the requisite Jurisdiction to direct the 4th Defendant to consider, deal and process renewal of the Lease over and in respect of the suit property in favor of the Plaintiff.
 - iv. Whether the heirs of Memon Mohamed Moti, Deceased, had (sic) pre-emptive rights to and in respect of suit property.

Analysis and Determination

Issue Number 1 Whether the Plaintiff herein is seized of the requisite Locus standi to commence, originate and maintain the instance suit?

90. It is the Plaintiff's case that the suit property belonged to and was registered in the names of Ali Mohamed and Kameshwar Jathlal Pandya, as the Trustees of Memon Mohamed Moti, now deceased.
91. Further, the Plaintiff herein adduced and tendered before the court a copy of the Certificate of Title/Grant which was issued to the named trustees.
92. Nevertheless, it is imperative to underscore that the Grant which was issued clearly stipulate that the suit property was registered in the names of Ali Mohamed and Kameshwar Jathlal Pandya, albeit, as the Personal Representatives of the Deceased.



93. On the other hand, the Plaintiff herein averred and contended that the Court of Appeal *vide* Civil Appeal No. 56 of 1962 issued a decree, which effectively stipulated that the shares in respect of the suit property were to be held by three sons of Memon Mohamed Moti, Deceased; and thereafter the court proceeded to and itemized the share portfolio of each son. In this respect, the Plaintiff averred that the shareholding was to be as follows;
- i. Suleman Mohamed Moti 42%
 - ii. Hashan Mohamed Moti 42%
 - iii. Hussein Mohamed Moti 16%
94. Other than the foregoing, it was the Plaintiff's testimony that he is the Legal Representative of Suleman Mohamed Moti and Hashan Mohamed Moti, respectively. For clarity, the Plaintiff's position is that same has commenced the instant suit as the Legal Representative of the named Estate. See paragraph 12 of the Plaintiff.
95. It is imperative to state from the onset that the claim being propagated by the Plaintiff herein, is obscure and confusing. Firstly, the Plaintiff himself admits and concedes that the suit property belonged to and was registered in the names of Ali Mohamed and Kameshwar Jathlal Pandya, as the trustees of Memon Mohamed Moti, Deceased. In this respect, it is therefore instructive to note that the only people who can sue and propagate a claim pertaining to and in respect of the suit property are the named trustees and not otherwise.
96. Secondly, if by any chance the named trustees are deceased, (which is conceded) then the suit property reverts to the name of the person on whose behalf the trust was created. Consequently, it thus means that the suit property would be deemed to belong to Memon Mohamed Moti, Deceased, insofar as the same does not appear to have been effectively, distributed, (subject to expiration of the lease).
97. Premised on the foregoing, the critical legal question that needs to be highlighted and addressed is whether the Plaintiff herein has ever taken out, or better still, been issued with the requisite Grant of Letters of administration, or otherwise in respect of the Estate of Memon Mohamed Moti, Deceased, so as to be able to propagate any claim in that regard.
98. Furthermore, it is not lost on the Honourable court that the Plaintiff herein duly acknowledged during re-examination that the suit property belongs to his Great grand-Father. Clearly, the Plaintiff appreciates that the suit property does not belong to himself and hence same has no personal rights/ Interests thereon.
99. As a result, if the Plaintiff herein was keen to commence the instant suit, subject the suit property being available, then same was obligated to first procure and obtain the requisite Grant of Letters of Administration.
100. Be that as it may, during the entire testimony by the Plaintiff, same did not advert to or produce any Grant of Letters of administration. In this regard, what becomes evident and apparent is that no such Grant of Letters of administration has ever been issued to the Plaintiff. Certainly, if the Plaintiff had obtained same, nothing would have been easier, than by availing same to Court.
101. Premised on the foregoing, the consequential question that the Honourable court must now deal with; is whether anyone, the Plaintiff not excepted, who has not taken out Grant of Letters of Administration can mount, commence and maintain a suit allegedly on behalf of the Estate of a deceased person.



102. First and foremost, the provision of Section 82 of the *Law of Succession Act*, Chapter 160 Laws of Kenya, are instructive and apt. For coherence, Section 82(1) provides as hereunder;

82. Powers of personal representatives

Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers-

- (a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;
- (b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

103. Notably, the importance of procuring and obtaining Grant of Letters of administration, (whether full or limited), prior to and before commencement of a suit on behalf of the Estate of a deceased was underscored and emphasized by the Court of Appeal in the case of *Virginia Edith Wamboi Otiemo versus Joash Ochieng Ohugo & another* (1987)eKLR.

104. For coherence, the Honourable Court held and stated as hereunder;

“But an administrator is not entitled to bring an action as administrator before he has taken out letters of administration. If he does the action is incompetent at the date of its inception. The doctrine of the relation back of an administrator’s title, on obtaining a grant of letters of administration, to the date of the intestate’s death, cannot be invoked so as to render the action competent”.

105. Recently, the significance of procuring and obtaining Grant of Letters of administration before commencing a suit on behalf of the Estate of a deceased was also discussed/ canvassed by the Court of Appeal in the case of *Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama* [2014] eKLR, where the court stated as hereunder;

“It is common ground that at the time of institution of the said summons, the respondent was not in possession of a grant of letters of administration. The respondent acknowledges that he may have known of the existence of a Will, but according to him he doubted the validity of the Will. In his view therefore the deceased died intestate. As far as he was concerned, he moved to court by virtue of being a beneficiary for purposes of preserving the deceased’s estate. That may well be the case, but in our view the position in law as regards locus standi in succession matters is well settled. A litigant is clothed with locus standi upon obtaining a limited or a full grant of letters of administration in cases of intestate succession.

106. Arising from the foregoing, it is therefore common ground that the Plaintiff herein could not commence and or originate the instant suit, pertaining to and or concerning an interest over and in respect of the suit property, prior to and or before obtaining the requisite Grant of Letters of Administration over and in respect of the Estate of the Deceased.

107. Consequently and to the extent that the suit was filed prior to and/or before obtaining Grant, the Plaintiff herein is thus devoid and bereft of the requisite *Locus standi*, to maintain the suit before the Honourable court, irrespective of the nature of the claim and/or complaint.



108. For clarity and for good measure, Locus standi is so central and integral, insofar as it determines the right of a concerned party to appear before the Honourable court. Clearly and simply put, Locus Standi, is a threshold issue and must therefore be satisfied at the onset.

109. Without belaboring the importance of *Locus standi*, it is imperative to borrow from the holding in the case *Julian Adoyo Ongunga & another versus Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased)* [2016] eKLR, where the court stated and held as hereunder;

Further the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party.

The impact of a party in a suit without locus standi can be equated to that of a court acting without jurisdiction since it all amounts to null and void proceedings.

It is also worth-noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties.

110. Furthermore the court added as follows;

In this matter therefore the Respondent lacked the requisite locus standi to institute and/or maintain the suit. The result is that all the proceedings before the trial court were instituted and maintained by a person who lacked the legal capacity to do so. They are indeed a nullity and as such lack the legal leg to stand on.

111. On the other hand, the question of *Locus standi* and its significance in civil proceedings was also addressed in the case of *Alfred Njau & 5 others versus City Council of Nairobi* [1983] eKLR, where the court stated and observed as hereunder;

“Lack of locus standi and a cause of action are two different things. Cause of action is the fact or combination of facts which give rise to a right to sue whereas locus standi is the right to appear or be heard, in court or other proceedings; ...”

The court proceeded to state:

“To say that a person has no cause of action is not necessarily tantamount to shutting the person out of the court but to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to.”

112. Having anxiously reviewed and evaluated the Evidence beforehand and juxtaposed same against the obtaining position in Law, the court comes to the conclusion that lack of the requisite locus standi negates and invalidates the Plaintiff’s suit herein. Consequently, the entire suit by and on behalf of the Plaintiff would fail on the threshold question of lack of locus standi.



Issue Number 2 Whether the claims at the foot of the instant suit are barred by the provisions of Section 3 (1) of the Public Authorities Limitations Act, Chapter 39; and Section 4(2) of the Limitation of Actions Act, Chapter 22 Laws of Kenya.

113. The Plaintiff herein averred and stated that upon the expiry of the Lease, which was hitherto registered in the names of Ali Mohamed and Kameshwar Jathlal Pandya, as the trustees of Memon Mohamed Moti, now deceased, the heirs of Memon Mohamed Moti, deceased had priority and pre-emptive rights over and in respect of the suit property.
114. In this regard, the Plaintiff contended that the Commissioner of Land therefore ought to have enquired from the heirs of the named deceased, whether same were keen to seek for extension or renewal of the Lease.
115. Furthermore, the Plaintiff has contended that despite the fact that the heirs of Memon Mohamed Moti, Deceased, were entitled to pre-emptive rights, the Commissioner of Land illegally and fraudulently proceeded to and indeed processed and issued a Grant in favor of the 2nd Defendant. For clarity, it was pointed out that the Grant in favor of the 2nd Defendant was issued on the 18th December 2007.
116. On the other hand, the Plaintiff has also complained that the Commissioner of Land also generated a Draft Certificate of Lease in favor of the 1st Defendant, on or about the year 1998. However, it has been conceded that the said Draft certificate of lease, was neither signed nor executed.
117. My understanding of the Plaintiff's complaint and essentially as pertains to the Grant which was issued in favor of the 2nd Defendant is that the Plaintiff contends that same is illegal and fraudulent. Clearly, the Plaintiff's claim is founded on tort of fraud and illegality, which is stated to have been committed by the office of the Commissioner of land in conjunction with the 2nd Defendant.
118. Given the foregoing, what comes to mind is whether the Plaintiff's suit beforehand was filed timeously and in accordance with the provisions of Section 3(1) of the Public Authorities Limitation Act, Chapter 39 Laws of Kenya; and Section 4(1) of The Limitation of Actions Act, Chapter 22 Laws of Kenya.
119. To start with, the provisions of Section 3(1) of the Public Authority Limitations Act, provides that a suit against the Government, Government department or Public authority, arising out of a tort, ought to be commenced and/or instituted within 12 months from the occurrence of the action.
120. For good measure, it is appropriate to reproduce the provisions of Section 3 of The Public Authority Limitations Act (*supra*).
121. Consequently same are reproduced as hereunder;

3. Limitation of proceedings

- (1) No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.
- (2) No proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date on which the cause of action accrued.
- (3) Where the defence to any proceedings is that the defendant was at the material time acting in the course of his employment by the Government or a local authority and the proceedings were brought after the end of—



- (a) twelve months, in the case of proceedings founded on tort; or
 - (b) three years, in the case of proceedings founded on contract, from the date on which the cause of action accrued, the court, at any stage of the proceedings, if satisfied that such defendant was at the material time so acting, shall enter judgment for that defendant.
122. As pertains to the cause of action against the 1st and 2nd Defendants, against whom fraud has also been impleaded, it is imperative to take cognizance of the provisions of Section 4(2) of the [Limitation of Actions Act](#), Chapter 22 Laws of Kenya.
123. For ease of reference, Section 4(2) of The [Limitation of Actions Act](#), (*supra*) are reproduced as hereunder;
- (2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:

Provided that an action for libel or slander may not be brought after the end of twelve months from such date.
124. From the contents of the Plaintiff and essentially paragraphs 26 and 30 thereof; it is evident and apparent that the Complaints being ventilated by the Plaintiff arose and/or accrued at the very latest on the 18th of December 2008. In any event, the Grant in favor of the 2nd Defendant, which the Plaintiff seeks to impugn and invalidate is stated to have issued on the 18th December 2008.
125. On the other hand, it is not lost on the Honourable court that the instant suit was only filed on the 11th October 2018. In this regard, the question that does arise and which is worthy of discussion is whether the suit premised and predicated on fraud, could be filed in the year 2018, whereas (sic) the fraud complained against arose and accrued in December 2008.
126. In my humble view, the cause of action that colors/ undergirds the suit mounted and propagated by the Plaintiff herein, could only be filed in line with the provisions of Section 3 of [Public Authorities Limitation Act](#) and Section 4(2) of the [Limitation of Actions Act](#), respectively.
127. Based on the foregoing discussion, it must have become explicit and crystal clear that the Plaintiff's suit beforehand was indeed filed outside the prescribed duration/limitation. Consequently, the Plaintiff's suit is statute barred.
128. In respect of a claim that is statute barred, it is imperative to state and underscore that the moment a cause of action is statute barred, such cause of action is rendered redundant, sterile and extinct. In short, such a cause of action can neither be mounted nor prosecuted before the Honourable court or such other adjudicative forum.
129. Concerning the importance of the statute of limitation, the Court of Appeal in the case of [Gathoni versus Kenya Cooperative Creameries](#) (1982)eKLR, stated as hereunder;
- “The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest. Special provision is made for infants and for the mentally unsound. But, rightly or wrongly, the Act does not help persons like the applicant who, whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done”.



130. Additionally, the law of limitation and its implications, was also deliberated upon in the case of *Deposit Protection Fund Board in Liquidation of Euro Bank Limited (In Liquidation) vs Rosaline Njeri Macharia & Another* [2016] eKLR. This Court stated:

“As to whether the suit was statute barred under the *Limitation of Actions Act*, the suit was filed on 19th July 2007. By dint of paragraphs 24, 25, 26, 28, 29 and 30 of the plaint, the cause of action was pleaded to have accrued on 27th July 1999 when the alleged breach of contract occurred. As the breach was of a contract relating to lending of money whose security instrument is contested, section 4(1)(a) of the *Limitations of Actions Act*, Cap 22 requires that an action founded on contract may not be brought after the end of six years from the date on which the cause of action accrued. In this appeal, the “suit” having been instituted in 2007 when the accrual of the cause of action was in July 1999, it was clearly filed outside the six-year period and consequently was time barred, if indeed it was a suit.”

131. Whereas it is notable that the Court of Appeal, was dealing with a claim arising out of contract and thus discussed the provisions of Section 4(1) of The *Limitation of Actions Act*; however, the point worth noting is the effect and implications of Limitation on a cause of action.
132. Having come to the conclusion that the Plaintiff's suit is statute barred, the consequence thereon is that the Plaintiff suit is thus not legally tenable or otherwise. Inevitably, the Plaintiff's claim herein is thus rendered redundant, that is assuming that the Plaintiff was indeed seized of the requisite locus standi, which was addressed at the foot of issue number one.
133. Before departing from the question of limitation of actions, the Honourable Court deems it imperative to cite the decision in the case of *Bosire Ogero versus Royal Media Services* [2015] eKLR, where the court stated as hereunder;

The law of limitation of actions is intended to bar the plaintiffs from instituting claims that are stale and aimed at protecting defendants against unreasonable delay in the bringing of suits against them. The issue of limitation goes to the jurisdiction of court to entertain claims and therefore if a Matter is statute barred, the court has no jurisdiction to entertain the same. And even if the issue of limitation is not raised by a party to the proceedings, since it is a jurisdictional issue, the court cannot entertain a suit which it has no jurisdiction over

134. Instructively, I am aware that neither of the Parties to the suit addressed the question of limitation, either in their pleadings or submissions. However, it is important to recall that limitation is a jurisdictional question and thus same can be implied from the totality of the pleadings filed by the Parties; and if such an issue does arise, then it behooves the court to address and adjudicate upon same.

Issue Number 3 Whether the Honourable court is seized of the requisite jurisdiction to direct the 4th Defendant to consider, deal and process renewal of the Lease over and in respect of the suit property in favor of the Plaintiff.

135. It is instructive to recall that the Plaintiff herein has sought for a plethora of reliefs before the Honourable court. Some of the reliefs which have been sought for relate to the issuance of a mandatory injunction to compel the 3rd and 4th Defendants to deal with the issue of extension and renewal of the Lease for the suit property in accordance with Section 13 of the *Land Act* 2012.
136. My understanding of the said prayer drives me to the conclusion that the Plaintiff is before the Honourable court and is seeking the Honourable court to compel the 4th Defendant, namely, National



- Land Commission to consider and process an extension of the lease over and in respect of the suit property, albeit, in favor of the Plaintiff.
137. Nevertheless, despite the prayer of issuance of mandatory injunction against National Land Commission, (whose import shall be addressed shortly), it is worthy to recall that the Plaintiff herein admitted and acknowledged that same has never made any application either for extension or renewal of the lease to National Land Commission.
138. For coherence, the Plaintiff stated as follows during re-examination;
- “The application that I made for extension of the lease was done in the year 2014. The same was directed to the City County Government of Nairobi. We were told that the application must be made to the City County Government and thereafter the same would be the ones to forward the application to National Land commission. However, we did not make any application to the National Land Commission”.
139. Given the clear import and meaning of the testimony tendered by the Plaintiff, the question that does arise is whether the 4th Defendant can be compelled to engage with, consider and process an application that has never been mounted before itself. Clearly, the relief being sought by the Plaintiff beforehand is tantamount to putting the wagon before the horse.
140. Back to the jurisdictional question. It is important to note that the 4th Defendant is an Independent and constitutional commission created and established by dint of the provision of Article 67(1) of the Constitution, 2010. Furthermore, the mandate and jurisdiction of the 4th Defendant are provided for by dint of Article 62(2) and 67(2) of the Constitution 2010 and same are further amplified by Section 5(2) of The National Land Commission Act, 2012.
141. In addition, the extent and scope of the mandate of the 4th Defendant was also underscored by the Supreme Court of Kenya in the case of; In The Matter of National Land Commission (2015)eKLR. For clarity, the Supreme Court underscored that it is the mandate of the said commission to administer and manage public land on behalf of both the National and County Government.
142. In addition, the Supreme Court ventured further and held as hereunder;
- (222) The Land Act defines “alienation” as the sale or other disposal of rights to land, while the NLC Act confers the power of alienation of public land upon the NLC. Thus, the disposal of such land can only be done by the Commission, with the consent of the National or County Government. The NLC, in effect, has been granted the power to sell or dispose of public land, on behalf of the National and County Governments. The National or County Government has to give consent, for such disposal.
- (223) It may be inferred that, the power of alienation of public land is one of the ways through which the NLC administers such land. The requirement of consent to such a transaction, from the National or County Government, is certainly a check-and-balance relationship between the two State organs. The NLC’s function of monitoring the registration of all rights and interests in land, is another mechanism of checking the powers of the body responsible for registration. Section 5(2)(e) of the NLC Act-versus-the Constitution’s terms
143. On the other hand, the mandate and role of the National Land Commission whilst dealing with allocation or alienation of public land, including extension and renewal of leases, was also considered by the Court of Appeal in the case of Cordison International (K) Limited versus Chairman National Land Commission & 44 others [2019] eKLR, where the court held as hereunder;



31. Section 12 of the Land Act grants the Commission authority to allocate public land on behalf of the national or county governments and section 14 of the Act specifies the steps that the Commission ought to take before it undertakes any such allocation. The Commission has to issue, publish or send a notice of action to the public and interested parties, at least thirty days before offering for allocation a tract or tracts of land.
 32. At least thirty days prior to the allocation the Commission should send a notice to the governor in whose county the public land proposed for allocation is located and to the head of the governing body of any administrative subdivision having development control, among others. The notice should then be published in the Kenya Gazette and at least once a week for a period of three weeks and thereafter published in a newspaper of general circulation in the general vicinity of the land being proposed to be offered for allocation.
 33. It is therefore clear beyond any peradventure that it is the role of the Commission, and not a county government, to allocate public land. The allocation must however comply with the laid down constitutional and statutory procedure as stated above.
144. Additionally, it is appropriate to state that in the discharge of her mandate and role, the National Land Commission is not subject to the direction of any authority or person. In this respect, it is appropriate to take cognizance of the provisions of Article 249(2) of the Constitution 2010, which provides as hereunder;
249. Objects, authority and funding of commissions and independent offices
- (1) The objects of the commissions and the independent offices are to—
 - (a) protect the sovereignty of the people;
 - (b) secure the observance by all State organs of democratic values and principles; and
 - (c) promote constitutionalism.
 - (2) The commissions and the holders of independent offices—
 - (a) are subject only to this Constitution and the law; and
 - (b) are independent and not subject to direction or control by any person or authority.
145. Arising from the foregoing discourse, I form the opinion that the reliefs wherein the Plaintiff is seeking that the Honourable court does issue a mandatory injunction to compel National Land Commission to engage with, consider and process extension/renewal of the Lease, is certainly unconstitutional.
146. Clearly, this Honourable court is not seized of the requisite Jurisdiction to compel and direct the 4th Defendant to issue an extension in favor of anyone, let alone the Plaintiff herein. In any event, it must be remembered that no application for (sic) extension, or renewal, was ever dispatched to the said Commission on behalf of the Plaintiff or at all.
147. Worse still, the Plaintiff is seeking for an order of Mandatory injunction to compel, inter-alia, the 4th Defendant to deal with issues of extension and renewal of the Lease (which had long lapsed), even though no such application has ever been made to the commission.



148. In a nutshell, I come to the conclusion that the Honourable court is not seized of the requisite jurisdiction to compel the 4th Defendant to undertake the issuance of extension and (sic) renewal of the lease in favor of the Plaintiff, either as sought or at all.

149. On the question of Jurisdiction, it is essential to recall the observations and statement of the Supreme Court in the case of *Samuel Kamau Macharia versus Kenya Commercial Bank & Another* (2012)eKLR, paragraph 68 where the Court held as hereunder;

(68) A Court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the *Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits.

It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the *Constitution*. Where the *Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

Issue Number 4 Whether the heirs of Memon Mohamed Moti, Deceased, had Pre-emptive rights to and in respect of suit property?

150. In the course of his testimony as well as in the submissions that were filed on behalf of the Plaintiff, it was contended that the heirs/trustees of Memon Mohamed Moti, now deceased, have pre-emptive rights and Legitimate expectation to the extension and renewal of the Lease pertaining to the suit property.

151. Premised on the foregoing contention, the Plaintiff has therefore implored the Honourable court to make a declaration that indeed the heirs of the deceased have pre-emptive rights; and thus same were entitled to the first right of refusal, before the suit property could be allocated or better still alienated in favor of a Third Party.

152. Before venturing to address whether or not the heirs of the deceased had pre-emptive rights or otherwise, as pertains to extension or renewal of the lease over the suit property, it is imperative to note that the Lease in question lapsed/expired on the 1st June 2002. In addition, it is also worthy to note that by the time the lease in question lapsed, the law that governed extension, renewal and or allocation of Government Land was contained in *Government Land Act* Chapter 280 Laws of Kenya (now repealed).

153. Furthermore, the authority to allocate and alienate government land, subject to statutory exceptions, was conferred upon the office of the Commissioner of Land. See Section 3 of the *Government Land Act*, Chapter 280 Laws of Kenya (now repealed).

154. Subsequently, the law governing extension and renewal of leases; allocation and alienation of public land, whether on behalf of the National or County Government was re-enacted and same is now contained in the *Land Act*, 2012.



155. Pursuant to the provisions of Section 13 of the [Land Act](#), 2012, the mandate to undertake the extension and renewal of leases on one hand and allocation and alienation of public land on the other hand; now inheres in the National Land Commission. For clarity, the provisions of Section 13 of the [Land Act](#), 2012 stipulate as hereunder;
- 13.
- (1) Where any land reverts back to the national or county government after expiry of the leasehold tenure the Commission shall offer to the immediate past holder of the leasehold interest pre-emptive rights to allocation of the land provided that such lessee is a Kenya citizen and that the land is not required by the national or the county government for public purposes.
 - (2) The Commission may make rules for the better carrying out the provisions of this section, and without prejudice to the generality of the foregoing, the rules may provide for the following.
 - (a) prescribing the procedures for applying for extension of leases before their expiry.
 - (b) prescribing the factors to be considered by the Commission in determining whether to extend the tenure of the lease or re-allocate the land to the lessee.
 - (c) the stand premium and or the annual rent to be paid by the lessee in consideration of extension of the lease or reallocation of the land.
 - (d) other covenants and conditions to be observed by the lessee.
156. Clearly, the principle of pre-emptive rights in favor of the immediate preceding holder of the Leasehold came with the enactment of the [Land Act](#) 2012 and not otherwise. In this regard, the question that does arise is whether the Plaintiff herein can invoke the doctrine of pre-emptive rights to agitate a claim concerning a Lease that expired on the 1st June 2002, long before the enactment of the [Land Act](#).
157. In my humble view, the provisions of the [Land Act](#), 2012, which came into operation on the 2nd May 2012 can not be invoked and/or relied upon by the Plaintiff herein to propagate a claim for (sic) renewal of the lease in favor of the heirs of Memon Mohamed Moti, deceased. Simply put, the said provisions of the [Land Act](#), 2012, do not apply retrospectively, or at all.
158. In short, I come to the conclusion that insofar as the provisions of the [Land Act](#), 2012 do not apply retrospectively, the claim by the Plaintiff premised on the existence of pre-emptive right and legitimate expectation; respectively, are built on quick-sand and hence same falls flat on the face.
159. Additionally, it is also appropriate to underscore that upon the expiry of the lease term, the suit property reverted back and automatically became public land. Consequently, the state through the office of the commissioner of lands (now defunct) was obligated to alienate and/or allocate same, in accordance with the applicable legal regime.
160. As pertains to the Legal position hitherto obtaining, I share the sentiments of Justice Mutungi J in the case of [Suleiman Murunga versus Nilestar Holding Ltd & Another](#) (2014)eKLR, where the Judge stated and held as hereunder;

“While there may be issues and questions to be raised on the manner the plaintiff got the letter of allotment in respect of the suit premises from the Commissioner of Lands



on 3rd November 2011 the fact remains that at the time the allotment letter was made to the plaintiff no approval of lease extension or renewal of lease had been made to the 1st Defendant and thus there was nothing to prevent the Commissioner of Lands from making the allotment. The property had reverted to the Government by operation of the law following the expiry of the 1st Defendant's lease term. Prior to the enactment of the new *Land Act* NO. 6 of 2012 there was no clear provision in the law as to the process and procedure to be adopted in the renewal and/or extension of leases that had expired and/or were about to expire and thus section 13(1) of the *Land Act* would have no application to leases that had expired before it came into force.”

161. Premised on the foregoing explication, it is my humble albeit considered view that neither the Plaintiff herein nor the heirs/trustees of Memon Mohamed Moti, deceased, had any pre-emptive rights, pertaining to and concerning extension of the Lease, which lapsed on the 1st June 2002. For the avoidance of doubt, such a claim could only exist if same was explicitly espoused by and provided for in law and not otherwise.

Final Disposition

162. Having duly considered the various itemized Issues for consideration, it is now appropriate to render the determination as pertains to the entirety of the subject matter. Nevertheless, it is evident and apparent that in the course of the discourse, various conclusions were arrived at which are determinative of salient aspects of the dispute beforehand.

163. Be that as it may, this court found and held that the Plaintiff herein was devoid and bereft of the requisite Locus standi to commence and maintain the instant suit. In addition, the court also came to the conclusion that the suit was statute barred.

164. Premised on the foregoing, it is the court's finding that the entire suit was not only misconceived and bad in law, but was also Legally untenable. Consequently, the suit herein constitutes and amounts to an abuse of the court process.

165. In a nutshell, the suit be and is hereby struck out with costs to the 3rd, 4th and 5th Defendants only. Such costs to be agreed upon; and in default same to be taxed and certified by the Deputy Registrar of the Honourable court.

166. Finally, it is also imperative to speak to (sic) the counter-claim which was filed on behalf of the 4th Defendant; and in respect of which no evidence was tendered. For completeness, the counterclaim by and on behalf of the 4th Defendant is devoid of merits and same be and is hereby dismissed, albeit with no orders as to costs.

167. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF MAY 2023.

OGUTTU MBOYA

JUDGE.

In the Presence of;

Benson Court Assistant

Mr. Arthur Ingutia for the Plaintiff

Ms Mumbi h/b for Ms Freedom Kubai for the 3rd and 5th Defendants



N/A for the 4th Defendant

N/A for the 1st and 2nd Defendants

