



REPUBLIC OF KENYA



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Ethics & Anti Corruption Commission v Kalsi & 8 others; National Museums of Kenya & another (Interested Parties) (Environment and Land Case Civil Suit 93 of 2021) [2023] KEELC 20315 (KLR) (2 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20315 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT AND LAND CASE CIVIL SUIT 93 OF 2021
AE DENA, J
OCTOBER 2, 2023
(FORMERLY MOMBASA ELC NO. 157 OF 2020)

BETWEEN

ETHICS & ANTI CORRUPTION COMMISSION PLAINTIFF

AND

MANHOMAN KAUR KALSI 1ST DEFENDANT

HASHIM GOT SAT 2ND DEFENDANT

KWALE DISTRICT LAND REGISTRAR 3RD DEFENDANT

SETTLEMENT FUND TRUSTEE 4TH DEFENDANT

DAVID NDIRANGU MWANGI 5TH DEFENDANT

MOHAMED OMARI MBOGAH 6TH DEFENDANT

MOHAMED HAMISI MWASENGEZA 7TH DEFENDANT

HALIMA MOHAMED 8TH DEFENDANT

SWAHILI BEACH RESORTS LIMITED 9TH DEFENDANT

AND

NATIONAL MUSEUMS OF KENYA INTERESTED PARTY

KENYA WILDLIFE SERVICES INTERESTED PARTY



JUDGMENT

Plaintiff's Case

- 1 By a Further Amended Plaint dated 4/6/2021 the Plaintiff, a body corporate established under Section 3 of the Ethics & Anti-Corruption Commission Act 2011 filed this suit seeking recovery of public land forming part of Chale Island allegedly belonging to the Government of Kenya.
- 2 The Plaintiff avers that vide Legal Notices No's 200 of 1992 and 196 of 1995 the Island was gazetted as Chale Island Sacred Grove under the Monuments and Antiquities Act Cap 215 Laws of the Kenya (repealed) and Diani Chale Marine National Reserve under the Wildlife [Conservation and Management] Act Cap 376 Laws of Kenya also repealed.
- 3 The Plaintiff states that having been preserved as above, the Island was not available for allocation from the dates of gazette. That this was disregarded and the Island subdivided and registered as Kwale/Kinondo Chale/99-146. The parcels were then transferred to the Settlement Fund Trustee the 4th defendant (herein SFT) as an extension of the Kinondo Chale Settlement Scheme. That on 10/3/2004 the 2nd defendant Hashim Got Sat registrar, transferred parcels No. Kwale/Kinondo Chale/103, 118, 119 and 146 to David Ndirangu Mwangi, Mohamed Omari Mbogah, Mohamed Hamisi Mwasengeza and Halima Mohamed the 5th 6th 7th and 8th defendants respectively. The titles were later on 18/1/2006 and 20/1/2006 transferred to Manhoman Kaur Kalsi the 1st defendant. It is averred that these defendants had actual or constructive knowledge of the alienation of the Island and participated in the unlawful acquisition and transfer of the defective titles and assumed legal consequences appurtenant thereto.
- 4 The Plaintiff further states following the 1995 gazette Kenya Wildlife Services the 2nd Interested Party (herein KWS) on 29/8/2002 obtained grant No. CR 35853 LR No. 24309 which encompasses the Island . That on 29/11/2006 KWS placed cautions forbidding the registration of dealings on Kwale/Kinondo Chale 103,119 and 146 which KWS lifted in suspect circumstances. That without the involvement of the 1st Interested Party (herein NMK), the 9th defendant (herein Swahili Beach) on 15/5/2008 obtained a 66 years lease (hereinafter referred to as the lease) from KWS for 1.71Ha comprising the said Kwale/Kinondo Chale 103,119 and 146 which were never cancelled, illegally creating parallel titles. According to the plaintiff all this was to pave way for the 1st defendant (a Director of Swahili Beach) to conceal her interests in the suit properties through issuance of the said lease in a bid to develop the suit properties.
- 5 The Plaintiff states that the registration and issuance of titles for the subject island was illegal and fraudulent on the part of the 1st, 5th,6th,7th and 8th defendants and the particulars are listed under paragraph 22 of the Further Amended Plaint. The 2nd defendant is accused of illegal registration and issuance of titles in blatant disregard of the provisions of the Monuments and Antiquities Act and the Wildlife [Conservation Management] Act, both now repealed as well as breach of public trust. The particulars are listed under Paragraph 24 of the further amended plaint.
- 6 The plaintiff further states that the lease was irregular and /or illegally issued by KWS and the same ought to be cancelled. The particulars of irregularity and illegality are listed under paragraph 24A of the further amended plaint.
- 7 The plaintiff thus prays for judgement against the defendants jointly and severally for;



- i. A declaration that the entry registering the 4th defendant as the initial proprietor of Title No's Kwale/Kinondo Chale/103, Kwale/Kinondo Chale/118, Kwale/Kinondo Chale/119 and Kwale/Kinondo Chale/146 on 7th March 2003 is null and void ab initio.
- ii. A declaration that Title No Kwale/Kinondo Chale 103 registered and issued to the 5th defendant on or about 10/3/2004 and subsequent transfer to the 1st defendant on or about 20/1/2006 is null and void for all intents and purposes.
- iii. A declaration that Title No Kwale/Kinondo/Chale/118 registered and issued to the 6th defendant on or about 12/3/2004 and subsequent transfer to the 1st defendant on or about 20/1/2006 is null and void for all intents and purposes.
- iv. A declaration that Title No Kwale/Kinondo Chale/119 registered and issued to the 7th defendant on or about 10/3/2004 and subsequent transfer to the 1st defendant on or about 18/1/2006 is null and void for all intents and purposes.
- v. A declaration that Title No Kwale/Kinondo Chale/146 registered and issued to the 8th defendant on or about 10/3/2004 and subsequent transfer to the 1st defendant on or about 18/1 2006 is null and void for all intents and purposes.
- vi. Further to [i]-[v] above, a declaration that the purported issuance of Title Nos Kwale/Kinondo Chale/103, Kwale/Kinondo Chale/118, Kwale/Kinondo Chale/119 and Kwale/Kinondo Chale/146 to the 5th, 6th, 7th and 8th defendants respectively and subsequent transfer to the 1st defendant was incapable of conferring any estate, interest or right in the suit property to the 1st defendant or any other person.
- vii. A declaration that all that parcel of land more particularly described as a portion of the park containing by measurement one decimal seven one Hectares[1.71ha] or thereabouts in the lease dated 15/5/2008 between the 2nd Interested Party to the 9th defendant was irregular and / or illegally issued and therefore null and void for all intents and purposes.
- viii. An order directing the 3rd defendant to rectify the register by cancellation of all entries relating to the issuance of the title in respect to Title Nos Kwale/Kinondo Chale/103, Kwale/Kinondo Chale/118, Kwale/Kinondo Chale/119 and Kwale/Kinondo Chale/146 made to the 1st Defendant.
- ix. An order for vacant possession of Title Nos Kwale/Kinondo Chale/103, Kwale/Kinondo Chale/118, Kwale/Kinondo Chale/119 and Kwale/Kinondo Chale/146.
- x. An order for a permanent injunction against the 1st defendant restraining her by herself, her agents or assigns from taking possession, trespassing upon, developing transferring leasing charging wasting or in any other manner dealing with the parcel of land registered as Title Nos Kwale/Kinondo Chale/103, Kwale/Kinondo Chale/118, Kwale/Kinondo Chale/119 and Kwale/Kinondo Chale/146 otherwise than by way of surrender and /or transfer to the government of Kenya.
- xi. Costs of and incidentals to this suit
- xii. Interest on [x] above at court rates
- xiii. Any other relief this court deems fit and just to grant.



1st Defendant's Defence

- 8 The 1st defendant filed Amended Statement of Defence and counterclaim is filed before court on 11/2/2021. The 1st defendant states that on or about 7/12/2006 the then Minister of State for National Heritage Hon Suleiman R Shakombo (herein the Minister) following a stakeholders forum with Kaya elders confirmed to the elders representatives of Chale Island that the Island was not of sacred significance to the Mijikenda. The Minister advised the gazettement as a National Monument be retained and that development on the subject island could be allowed subject to strict adherence of conservation regulations and prior approvals. That consequently the registration of the SFT as the original owner and subsequent allotment by SFT to the various beneficiaries was manifestly legal. The 1st defendant denies having had any knowledge of alienation of the Island and further denies involvement in the process that culminated into issuance of titles to the squatters on diverse dates in 2004.
- 9 The 1st defendant states no allegations of fraud have been proved against her. Outlining the vendors and purchase prices for parcel Nos Kwale/Kinondo Chale 103,118,119 and 146 as well as the legal costs and government taxes paid, it is averred the 1st defendant was an innocent purchaser for value and was not involved in any fraud.
- 10 It is averred that the plaintiff delay in filing the present proceedings 10 years after commencement of its investigations has deprived the 1st defendant of any legitimate expectation of filing suit for rescission of contract. That despite request by the 1st defendant, the plaintiff has refused to comply with the provisions of Article 35 of *the constitution* by failing to provide details of the investigations conducted in 2010.
- 11 The 1st defendant has filed a counterclaim against the Attorney General, The Settlement Fund Trustees, the Principal Secretary Ministry of Lands Housing and Urban Planning, the Ethics and Anti-Corruption Commission and the National Museums of Kenya as the 1st to 4th defendants respectively in the counterclaim. At paragraph 19 the 1st defendant states that the properties were acquired with the sole intention of protecting the forest on the land and has since its acquisition protected the flora and fauna thereon. At paragraph 20 the 1st defendant states that the plaintiff's action of seeking to revoke the titles is unconstitutional and will cause irreparable loss and damage. At paragraph 21 of the defence a schedule of payment for acquisition of the numerous plots forming part of the subject island is provided indicating the vendors and corresponding purchase prices. The contents of the defence on the paid legal costs and government taxes are reiterated at paragraph 22 and allegations that Chale Island ceased to be a kaya are particularized at paragraph 24 of the defence.
- 12 The 1st defendant who is the plaintiff in the counterclaim seeks judgement against the defendants as follows;
- a. A declaration that Chale Island is not a kaya or sacred grove and has lost its status as an area of national heritage which has been of religious significance use or veneration as per Section 2 of *National Museums and Heritage Act* No 6 of 2006.
 - b. A declaration that the Ministers at the time responsible for the National Museums when the Gazette Notice No 200 of 17th January 1992 and Gazette Notice No 1132 of 18th March 1994 declaring Chale Island sacred grove as a monument were published did not place Chale Island sacred grove under the control of the National Museums on any terms and with and subject to such powers and duties as he may direct.



- c. An order be issued revoking Gazette Notice No 200 of 17th January 1992 and Gazette Notice No 1132 of 18th March 1994 declaring Chale Island sacred grove as a monument.
- d. A declaration that the 2nd and 3rd Defendants lawfully processed and issued the titles to Kwale/Kinondo Chale/103 to 146.
- e. A declaration that the Plaintiff is the registered owner and bona fide purchaser for value of all that land that she acquired in good faith on Chale Island registered as Kwale/Kinondo Chale/103 to 146.
- f. A declaration that the Defendants jointly and severally deprive the Plaintiff of all her property known as Kwale/Kinondo Chale/103 to 146 that she acquired in good faith then she must be compensated by the Defendants jointly and severally pursuant to Article 40[4] of *the Constitution*.
- g. The Defendants jointly and severally in the counterclaim be ordered to compensate the Plaintiff in the counterclaim with damages as follows;
 - i. Special damages of Kshs 6,200,000 with interest at court rates from 1st February 2006 until payment in full
 - ii. Special damages of Kshs 16,060,000/- with interest at court rates from 1st December 2007 until payment in full
 - iii. Kshs 315,860 in respect of taxes and disbursements for Kwale/Kinondo Chale/103,118,119 and 149 with interest at court rates from 1st February 2006 till payment in full.
 - iv. Kshs 6,000,000 in respect of taxes and disbursements for Kwale/Kinondo Chale 104 to 146 payment of the Kwale/Kinondo Chale 103,118 & 119 with interest at court rates from 1st February 2006 until payment in full
 - v. Legal costs paid to Pandya & Talati Advocates of Kshs 1,400,000 with interest at court rates from 1st December 2007 till payment in full.
 - vi. Loss of bargain at market value of all the suit properties to be assessed being the difference between the purchase price and the current market value to be assessed by a joint valuer to be appointed by the court.
 - vii. Costs of the suit with interest thereon at court rates from the date of judgement.

13 The 1st defendant prays that the plaintiffs suit is dismissed with costs and judgement entered as prayed in the counterclaim against the Defendants therein jointly and severally.

2nd Defendants Defence

14 The 2nd defendant's defence is filed on 13/4/2021 and states that he duly exercised his mandate and powers as per the required laws and standards. That all the transfers effected by the 2nd defendant were executed by virtue of the existing green card which supported ownership of the suit properties by the transferors and as such conferred to him the power to execute his mandate as the Land Registrar.

15 It is also stated that at the time of preparation and issuance of the title, there was no communication that the exercise was in contravention of any laws . The 2nd defendant denies the allegations and particulars of fraud, illegality and breach of public trust and puts the plaintiff to strict proof of the



same. That his actions were undertaken in good faith and within powers conferred by virtue of being Land Registrar Kwale and relevant statutes. The 2nd defendant prays that the suit against him be dismissed with costs.

3Rd and 4Th Defendants Defence

- 16 The 3rd and 4th defendants filed their Statement of Defence to the suit and Counterclaim on 10/11/21 through the Attorney General. They reiterated most of the averments in the Further Amended Plaint and support the plaintiffs case to cancel the title to the Island . It is stated that the 1st Interested Party (NMK) as beneficial owners and Trustees on behalf of the Kenyan Public support the plaintiffs case as well. The allegations in the counterclaim are further denied on behalf of 1st 2nd 3rd and 5th defendant therein. It is stated that the plaintiffs' expectation is not legitimate since the parcels of land were obtained and /or purchased illegally.
- 17 It is stated that NMK is bestowed with a mandate to manage Kenya's heritage. Reiterating the purpose of the gazettelement it is averred the island enjoy protection the National Museum & Heritage Act 2006 (formerly the Antiquities and Monuments Act) and the NMK is mandated to ensure the heritage value of the property is maintained and preserved at all times for the benefit of the present and future generations. That prior to the gazettelement the subject island existed as trust land and by dint of section 11 of the repealed Act now section 33 of the National Museums & Heritage Act it could be set aside for government use as protected area. As such it is not an unalienated land that can be allocated to private individuals at will. That allocation to individuals was illegal and void ab initio.
- 18 The 3rd and 4th defendants state that unless the various persons including the plaintiff issued with titles are restrained from using the Island and titles revoked the NMK efforts to conserve the same will be greatly prejudiced and compromised and further render the existence of NMK meaningless and obsolete.
- 19 It is averred that the plaintiff(1st defendant) in the counterclaim misrepresented that the suit was available for allocation knowing the same had been gazetted as national monument; Misrepresented she was a purchaser for value knowing no value passed; fraudulently obtained the title documents without regard to the law; destroying a conservancy area and failure to protect an ecologically sensitive area; failure to observe principles outlined in article 69 of *the Constitution* instead of working to achieve tree cover of 10%. It is prayed the counterclaim be dismissed with costs.

5ThDefendants Defence

- 20 The 5th defendant filed his defence on 30/4/2021 and states that no cause of action has been established against the 1st defendant and the suit should be struck out. He avers that at all material times to the suit he was the legal registered owner of Kwale/Kinondo Chale/103 having obtained the first registration legally and procedurally and without defect in the title. That the Gazette Notices did not confer to the Interested Parties any proprietary interest. That the Island is not sacred mangrove forest for worshipping.
- 21 According to the 5th defendant the suit property does not fall within the land described in Legal Notice No 196 of 1995 but falls under the land described in Gazette Notice No 200 of 1992 which is forest land situated on map sheet no 201/3. It is averred that the plaintiff lacks locus to bring the suit as the land referred to is community land under the jurisdiction of the County Government of Kwale.
- 22 The 5th defendant states that he did not have any capacity to influence his being allocated the land . That despite carrying out investigations on the suit property the plaintiff has never preferred any criminal charges against any of the defendants. That in the absence of criminal culpability the title to the suit



property is indefeasible and cannot be nullified. The 5th defendant prayed that the plaintiff's suit be dismissed with costs.

6th, 7th and 8th Defendants Defence

23 As at the time of writing this judgement there was no defence filed by the 6th 7th and 8th defendants.

9th Defendants Defence

24 The 9th defendant filed its statement on 23rd July 2021. The 9th Defendant states that sometime in the year 2006 the Minister for state for National Heritage confirmed that Chale Island is not a sacred forest[kaya] and that the same is under the management of KWS. That the Minister advised that development would be allowed subject to strict adherence to conservation regulations and prior approvals by KWS. Subsequently the moratorium on development of infrastructure was lifted. It is averred that KWS was mandated under the law to lease properties under their management and administration. That the lease between the KWS and the 9th Defendant is legal and binding and the approval for developments issued by the 2nd Interested Party were in conformity with the provisions of the Wildlife [Conservation and Management] Act.

25 The 9th defendant, states that the 5th, 6th, 7th and 8th Defendants as well as the 1st defendant were innocent purchasers for value too, having been confirmed to them by the Land Registrar that the 4th Defendant was the registered owner of the suit property. The particulars of illegality and fraud are denied and the plaintiff is put to strict proof. The 9th Defendant prays that the suit against it is dismissed with costs.

Plaintiffs Reply To 1st Defendants Defence and Defence To Counterclaim.

26 By a response filed on 24/3/2021 the plaintiff reiterates the former Minister had no authority to allow development on Chale Island in total disregard of Legal Notices. The plaintiff denies that the 1st defendant was an innocent purchaser for value and avers that a legal notice contemplates that it is public knowledge that Chale Island was reserved as herein, information the 1st defendant ought to have had. Further that the title to the Sands Hotel was issued prior to the subject gazette notices. The plaintiff prays that the suit is allowed as prayed.

27 In its defence to the counterclaim the plaintiff maintains that the Island was not available for allocation. That the 1st defendants' acquisition of the suit properties was pegged on an illegality and the 1st defendant is not a bonafide owner of the said suit properties. That as a result no good titles could pass. The particulars of legitimate expectation and constitutional protection of right to property are denied.

28 It is stated that if the 1st defendant indeed validly purchased the suit property as alleged then neither the Commission nor the government is bound to indemnify or compensate the 1st defendant. The Plaintiff prays that the amended defence and counterclaim be dismissed with costs and judgement be entered against the 1st Defendant now Plaintiff as prayed for in the amended plaint.

Hearing and Evidence

29 On 24/1/2022, the court was informed that there were a total of 35 files and file No. 93 of 2021 being the present suit had been identified as the lead file and or test suit. Earlier orders in this regard were also agreed upon before Justice Sila Munyao. This matter therefore proceeded on this understanding. Counsels agreed to have a site visit to familiarize with the property and its environment, which took place on 4/4/2021 and whose report was shared with all the parties. The suit was heard on 21/6/2022, 22/6/22, 23/6/22, 26th – 29th September 2022 and 3/11/2022.



- 30 PW1 – Zuberi Hamadi Mwakirenje a farmer and vice chairman of the Kaya testified that he was born in Kinondo Chale in 1935. Adopting his statement made on 21/1/2022 he stated they used the Island since time immemorial for prayers. They had about 3 distinct places they would go for prayers and on other Kaya issues. That they no longer used the kaya for prayers as the same had been invaded by the hotel and two Englishmen Thomas and Joe which they did not support. That they should be given back the entire Chale Island .
- 31 In Cross-examination by Mr. Gichuhi the witness indicated the last ceremony held by Kaya elders was before the hotel was built which was over 20 to 30 years ago. That It is not possible to have a hotel in a Kaya. That the island was no longer a kaya but could be reverted to being one. On cross-examination by Mr. Mungai he confirmed he had no documents to prove the Island is a Kaya. On cross-examination by Mr. Wafula the witness confirmed that the former Kaya leader Abdalla Menyeze (deceased) was issued with a title in the Island . On Cross- examination by Ms. Andisi he confirmed that people had been arrested for clearing mangrove and other big trees. PW1 clarified in reexamination that he was not present during the meeting with Hon. Shakombo he was merely told about it and was not privy to how the titles were issued.
- 32 PW2 Herbart Mboya Ndolo Principal Land Surveyor with Ministry of Lands since 2011 and previously worked in Kwale and Mombasa as District Surveyor. He adopted his statement dated 14/3/2017 as his evidence in chief. That when being interrogated, the investigators showed him a map (see page 27 of the plaintiff bundle Kinondo Chale Settlement Scheme Map) he had not seen previously neither had he found correspondence forwarding the map to Nairobi or a copy of the map in the records at the office. That Kinondo Chale settlement was done on the mainland but the map was an extension of the scheme towards the island . The witness stated that the Kwale office they did not undertake any survey on Chale Island .
- 33 On Cross-examination by Mr. Gichuhi the witness indicated he was not involved in the subdivision that took place at Chale Island . That he was not aware about the title issued in the 1970s. That legally there cannot be two titles over the same area but when it happens the initial one would take precedence that is LR. 15205. That the subdivisions too were an overlap and the cure would have been to remove the Chale Island .
- 34 In cross-examination by Mr. Aziz the witness stated during the subdivision of Settlement Scheme the registrar had nothing to do with the survey documents. The land registrar role is at the end immediately after the publishing of the map. He confirmed the map at page 27 as being authentic, the registrar had no reason to question it. That SFT being 1st proprietor based on the green card it meant the process was duly followed.
- 35 On cross-examination by Mrs Njau PW2 stated the registrar cannot issue titles in the absence of RIM. On Cross-examination by Ms Opio he pointed new titles do not necessarily arise from existing titles. Cross-examined by Mr. Mungai he stated a map sheet does not indicate the total area only the D/Plan does. He could not confirm the actual size of the island though he noted from gazette notice it was 50HA translating into 125 acres.
- 36 Cross-examined by Mr. Wafula PW2 stated while he did not come across any documents for Kinondo Chale but the Director of survey who only deals with Settlement Schemes acknowledges it exists. That a purchaser obtains information from the land registrar’s office and if they see SFT as 1st allottee there is confidence of the root of the title. Cross-examined by Ms Andisi he indicated that based on his experience the title to KWS should come after the gazette ment since the gazette notice must first reserve the land .



- 37 PW2 clarified in Re-examination that after survey the records are submitted to Nairobi with copies retained at Kwale for mapping in area list and the RIM. That the overlapping titles should be cancelled. That the topographical map is for the Ukunda general area and a subset of map (33).
- 38 PW3 – Dennis Augo Mlewa a cartographer employed by the NMK since 1995. Adopting his statements dated 1/11/2011 and 1/7/ 2021 outlined his responsibilities as maintaining survey records for heritage sites and follow up on registration of land to be placed under custody of NMK and keeping records of all the gazetted sites in Kenya. He testified that before gazettement pre- research is conducted from which they learnt the Island had been allocated to a hotel and since a lease had been issued, they gazetted Chale Island Sacred Grove including the land on which Chale paradise hotel is built.
- 39 PW3 added that the island is still a monument as the gazettement hasn't been revoked and remained in the register of protected areas (see page 104 -106 of plaintiff supplementary bundle). Referring to the letter dated 5th July 2007 from curator NMK he noted that the letter allows development because gazettement does not stop development but recognizes consultation with Kaya elders on the development. That there existed rules for change use this being a protected area. That the letter from Hon Shakombo stating Chale was not a kaya was of no legal consequences because there was no attendant process of de-gazettement.
- 40 PW3 indicated during Cross-examination by Mr. Gichuhi he had been to Chale 4 times to make coordinates and the whole island is a shrine. On the letter dated 18/7/2007 by DG NMK he conceded it authorized the drawings and was final authority the DG being the highest office at NMK. He confirmed the Chale paradise hotel has never sought approvals for their ongoing developments and NMK has never stopped them. That even if the GoK had acquired the land there was still the need to carter for the protected areas however gazettement did not prevent subdivision.
- 41 In Cross-examination by Mr. Aziz PW3 stated where a hotel is in a Kaya NMK would encourage dialogue with the owner to resolve complaints. He had no proof of minutes of consultation between NMK and the elders. Cross-examined by Mr. Mungai he indicated that after gazettement the community manages the area but under the NMK's coordination. That during the site visit there was no Kaya elder. He agreed government can dispose of its land but within rules for protected area. He conceded NMK granted approval with conditions. He was not aware of anyone charged in court. He pointed that Marine life is connected to culture but it's not part of the Kaya culture. That though preferred Chale had not yet been registered as a community trust.
- 42 On Cross-examination by Mr. Wafula PW3 he testified that the remainder portion of the island remained public land but could not produce a search confirmation. The witness confirmed seeing the developments by the 9th defendant during the site visit and stated he was not aware of any complaints by the CFCU of noncompliance with the approvals given to the 9th defendants. On Cross-examination by Ms Andisi he stated the gazettement by KWS did not allow for alienation of Chale Island . He conceded gazettement did not confer ownership upon NMK.
- 43 On reexamination PW3 clarified that any development on the island will affect the biodiversity and also erode the cultural practices. That before a license is given touching on a protected area the NMK is consulted for input but was not aware of such request from NEMA.
- 44 PW4 – Isaiah Moguche Nyaega a legal officer at NMK adopted his statement dated 1/7/2021 as his evidence in chief. He confirmed gazettement of the island due to National Heritage biodiversity, the forest and cultural heritage (Kaya) where the locals used the place as a shrine. That there has been interference since the gazettement. He told the court that when a site is gazetted, it is no longer available for allocation to private entities. He emphasized the land should be preserved for the purpose for which



- it was gazetted. That where it is proposed to lease a gazetted area the NMK must be consulted to advise or object to the proposed user, which did not happen in the present case. He reiterated as long as there has been no legal process of de-gazettement the island remained a protected area notwithstanding the letter by the Minister.
- 45 On Cross-examination by Mr. Gichuhi referring to the definition of a shrine under section 4(1)(b) read together with the pre-gazettement report he stated the entire island is a shrine. He conceded he did not have a report from Ministry of Lands confirming ownership of the island before gazettement. That he was aware gazettement does not interfere with legal ownership including development which should be undertaken under defined terms & conditions/consultations incorporating NMK input. According to him the island has never ceased to be a monument or Kaya. That impediment on further development should be based on expert opinion. He noted during the site visit there was no entry restriction to the island. To him it did not make sense that PW1 stated Chale was not a Kaya yet there was no objection to its gazettement. He conceded he had no documentary proof to contradict the Minister and the elders' statement that Chale was not a Kaya, though he noted the Ministers sentiments that the gazettement as a monument should be retained and which he agreed with subject to expert opinion.
- 46 Cross-examined by Mr. Aziz PW4 he stated he was not privy to any complaint of fraud about the settlement scheme. Cross-examined by Mr. Mungai the witness stated if a titles history is good subsequent titles cannot be invalidated. That while the map sheet numbers on the gazette notice for the sacred grove and title 103 were prima facie different a lay person may not be able to confirm that the parcel referred to is the same. Upon cross examination by Mr. Abubakar he stated that the land was trust land and upon gazettement it became reserved and the owner thereof as well as the Commissioner of Lands would be restricted against allotment to private owners. That a gazette notice is a notice to everybody. He agreed that if a gazettement is found to be illegal it can be revoked under the law.
- 47 On Cross-examination by Mr. Wafula PW4 stated the effect of gazettement is to regulate developments but not vesting of title. He confirmed while the entire land was gazetted part of it was privately owned though he could not confirm the acreage. He had no evidence to show that the other portion was owned by Government of Kenya or any other entity. That according to the Green Card SFT was registered after the gazettement but before the defendants. The witness did not have records of any Kaya activities that took part on the island. He could not confirm if there were approvals granted to the Hotel for developments undertaken post the gazettement. On the DG letter to the 9th defendant approving development his view was gazettement as a Kaya did not bar approval of development. He was not privy to any information that the 9th defendant had destroyed special plants. The approval letter implied that NMK they were indeed consulted. That CFCU were not consulted. The witness was not aware if the NMK had registered any interest against the title. That the power by KWS to own and lease land did not exempt them from consulting. That he first saw the lease between KWS and 9th defendant at the EACC. He had no proof to show the Ministers letter was nullified at any forum but there was history justifying/informing the gazettement though he could not produce the report.
- 48 Cross-examination by Ms Andisi PW4 confirmed the lease did not negate the gazettement as monument. That the gazette Notice did not require that KWS obtains consent of NMK.
- 49 PW5 James Nyaga Githinji a forensic investigator with EACC since 2015 adopted his statements dated 25/9/2020 and 18/10/2021 and produced the list of documents dated 25/9/2020 and 18/10/2021 as exhibits. The witness testified that he was part of the team of investigators on the allocation of the Chale island. He stated Chale Island was a public land far from the mainland and there were no settlement then except 'Sands at Chale' hotel which occupied a portion and held a title predating the gazette notices. His evidence is that the gazette Notices covered the whole Island.



- 50 The witness went on to state that because the land problem in coastal region, SFT was tasked to identify land to settle the land less Digo/Mijikenda. Chale Kinondo squatter settlement scheme situate on the mainland was identified as one of such schemes and several people were settled. Thereafter a scheme was hatched to extend the scheme to the island (Kinondo Chale Settlement Scheme extension) when indeed the land was not available for such extension being a protected area. That the said extension resulted into subdivisions No. 99-146, letters of offer issued as well as freehold titles issued. Narrating the existence of the 999-leasehold interest to KWS and the lease endorsed thereon to Swahili Beach the 9th defendant for development and the cautions lodged by KWS on Kwale/Kinondo Chale 103, 118, 119, 125, 146, claiming legal ownership, the witness stated the freehold interest is superior. That a leasehold interest can only be derived from a freehold and the two cannot exist at the same time on one land. That the investigations had established the monument had not been de-gazetted to warrant the issue of the titles. That KWS and NMK ought to have consulted each other on the registration of the leases and specifically on the need for NMK to degazette. That upon completion of the investigations, the EACC sought to recover the land by instituting Civil Proceedings. He pointed that Kalsi Beach Cottages who were issued with EIA licence to develop plots 119, 118,146 and 103 were not registered.
- 51 On behalf of the Commission Mr. Githinji prayed that the gazette is maintained and there should be no clearing of forests to pave way for developments as this would interfere with the very purpose of the gazette.
- 52 On Cross Examination by Mr Gichuhi the witness confirmed he was the lead investigation officer and had interviewed most of the witnesses except the 2nd defendant. That the investigations started around 2010/11 upon receipt of anonymous reports on the alienation. He conceded that the 1st defendant had requested for a copy of the complaint but to him anonymous letters are never supplied. That the investigations revealed Chale was unalienated government land since the 1970's until the 1990s when a portion was allocated to Sands Hotel. He disagreed with PW2 evidence that there was possibility of existence of a title on the portion allocated to SFT before the said allocation. He conceded he had not produced before court a title for the Chale Island. He stated that the investigations on the allocation of the Sands hotel were separate and ongoing. On their claim of destruction by the 1st defendant he conceded he had no photographs of the same before court. That he was not privy to any complaint from NMK and KWS that the 1st defendant is not protecting the forest.
- 53 On further cross examination PW5 conceded that he was not an expert on Kaya matters. According to him the Ministers letter was inferior to the gazette notice but not a nullity, though he was for the proposal to retain the gazette. That even if there has been no Kaya activities the land remained gazzetted. Upon being shown the various government correspondence he conceded they confirmed a scheme was created however he pointed that scheme 778 was not on the island. The witness agreed the gazette notice is not registered against the title. He conceded there was no specific evidence to show collusion between 1st defendant and SFT. On illegality he testified that the defendants purchased land which was in a protected area and which wasn't available. He could not explain why SFT officers had not been sued. On being shown the various approvals and the lease he pointed that KWS was free to enter into any agreements as long as they follow the law, they would not be faulted. That he was not aware of any complaint by KWS on the lease between the 1st defendant and 9th defendant.
- 54 On Cross-examination by Mr. Aziz the witness could not produce any letter from the Chief Land Registrar disowning the titles for being fraudulent. He confirmed members of the District Plot Allocation Committee were interviewed by EACC including Jabu Salim a physical planner who denied preparing the PDP. He confirmed his team visited the District Land Adjudication where the documents in respect of the extension were obtained. He conceded that the 2nd defendant was



- appointed as Land Registrar Kwale in December 2002 – 2005, was therefore not in Kwale when the letters of allocation/offer dated the year 2000 and which identified the beneficiaries were issued. He conceded the Further amended plaint there is no claim of fraud against the SFT and the 3rd defendant and reiterated that like the 2nd defendant the 3rd defendant too was a public officer and he committed a wrong.
- 55 Cross-examined by Mr. Mungai PW5 clarified that the key issue was illegal extension of the scheme by the GoK and the allocations of its own land it had committed. That the complaint was on behalf of the public and not registered owners. He conceded based on plaint there is no fraud pleaded against the SFT as well as the 3rd and 5th defendants though he was not sure if this could be a basis for dismissing the suit. He confirmed there were no criminal charges proffered against any of the defendants on the Chale island . On cross-examination by Ms Andisi he conceded he had no proof that KWS required consent or consultation with NMK before entering into the lease arrangements herein.
- 56 On cross examination by Mr. Abubakar PW5 informed the court his statement suffices for the investigation report. He agreed no statements were recorded from the 7th and 8th defendants. Referring to the description of Kaya Kinondo, Chale Island sacred grove map sheep 201/3 he stated he had not established whether the grids were in the island since the investigations were not on Kaya Kinondo.
- 57 During Cross-examination by Mr. Wafula the witness confirmed he had not filed the statements from the Land Adjudication & Settlement Office which he denied was deliberate. That Ministry of Lands wrongly allocated this land to the defendant by dint of commissions and omissions on the part of the ministry officials who allocated in disregard of notice of a protected area. While the witness was aware of existing arrangements between KWS and private parties in the Amboseli and Masai Mara he conceded they had tendered no evidence that would stop KWS from doing the same in Chale Island . He stated that the pleadings do not contain any particulars of fraud against the 9th defendant and no staff at KWS has been charged. He stated receipt of ground rent for the lease by the government through KWS cannot legalise the illegal excision. He agreed there are approvals to Kalsi Cottages by NMK but which were subject to conditions.
- 58 On reexamination PW5 clarified that Mr. Mutiga could not prepare a report on the investigation because the investigations had not been completed by the time he took over. The same took long because of the complexity, collation of documents as well as site visits. That only NMK and KWS are mandated to initiate the process of degazettment. That he observed during site visit there were areas in the Chale Hotel that have been cleared. On the defence of innocent purchaser for value he stated that the defendant is deemed to have been aware of the gazette notice and ought to have undertaken due diligence. The 2nd defendant committed fraud in that he should not have opened the green card without the RIM, area map and discharge by SFT which he ought to have known as a public officer. That squatters were settled in the mainland and could not be settled in the island because it was not available for such.
- 59 PW6, Cyrus Wambugu Ngatia testified that he was previously employed by the Government of Kenya in Ministry of Lands from 1996 as Registrar of titles and deployed in Department of Lands Adjudication and Settlement up to 1999 when he was appointed Chief Land Registrar. He adopted his statement of 6/7/2010. That from the documents supplied to him by the EACC there were no documents to support the opening of the register in favor of SFT. He outlined the process of land allocation by the SFT as follows; -
- 60 That SFT are allocated land by the Commissioner of Lands or they buy from a private entity. After acquisition the SFT plan it for allocation, how its subdivided, identify the beneficiaries and allocates the land to them. Once its surveyed by Director of Survey he supplies the SFT with the Register Index



Map and area list. SFT forward to Chief Lands Registrar who then forwards the same in writing to the Land Registrars in the County's with written Instructions to open land register in favour of SFT. Once SFT is satisfied that a particular allottee has paid and all conditions of allocation satisfied they issue a transfer and discharge which are registered by the Land Registrar and title deed issued. In the event the process isn't followed the effect is that the register would not have any basis. Registers are based on these documents and in the absence the same is of no consequence.

- 61 On Cross-examination by Mr Gichuhi the witness stated as Chief Land Registrar he had access to land documents in Kenya but could not trace any records transferring documents to Kwale by the SFT. On being shown the map of the island and comparing LR No. 15205 and LR No. 24309 he stated that there having been a registration in 1991, with proper due diligence it was not possible to have another title (the KWS title) over the island . That where there two titles the 1st one prevails until it is set aside by the court. That he was not aware of any office at SFT which contested the title to the subject island . That where there is due diligence based on the green card one cannot be accused of fraud, they are an innocent purchaser. PW5 pointed that a gazette cannot nullify a title issued. That in the absence of an entry showing a Gazette Notice one should go as per the register. That he was not aware of any officer at SFT arrested because of this title.
- 62 On Cross-examination by Mr. Aziz the witness stated they have todate not traced the RIM and area list. He confirmed that as per the green card the first owner was the SFT a parastatal of the Government of Kenya, he never saw the transfer though it was reflected on the face of the record. That he was not aware of any complaint by the SFT against the 2nd defendant whom he had worked with for many years nor his being convicted. Referring to paragraph 3 and 4 of the Further Amended Complaint as to description of the 2nd defendant he pointed that the office he held being a public office meant the 2nd defendant is the Land Registrar.
- 63 On Cross-examination by Mr. Mungai the witness on being shown the letters of offer, departmental correspondence conceded the fact that he did not see the documents from the SFT and the transfer documents does not make the process unprocedural. On the reference to the mapsheets 201/3 and Map sheet 1 on the NMK gazette notice and green card respectively his opinion was that the gazette notice lacked clarity but which could not be discerned by an ordinary person. He stated that he would not attribute any fraud to the allottees as they were offered land .
- 64 On Cross-examination by Mr. Wafula PW6 testified that the Government of Kenya guarantees the content/ information in the register. That based on the letter dated 30/11/2007 by Director of Land adjudication to the District Land Adjudication and Settlement office, the scheme was properly established. That he was not aware of any charges preferred against the author B.O Akungu or any consequences for this confirmation. That an allottee is a purchaser for value from the SFT. The witness stated he is aware KWS owns vast Lands in Masai Mara, he had stayed in private hotels in National Parks and that the KWS title contained very clear conditions which included authority to lease. On further cross examination by Ms. Andisi the witness stated during his interaction with the present proceedings he did not come across any transfer document from KWS to another party.
- 65 PW6 clarified on reexamination that where there is a Gazette Notice for conservation area, there cannot be a legal allocation of absolute titles thereafter. As to due diligence he stated that an official search is no longer adequate because of the challenges at Ardhi House and one must look beyond the title.
- 66 PW7 Gordon Adeka Ochieng works with the Ministry of Lands and Physical Planning as Director Land Administration since September, 2021. He adopted his statement dated 19/9/2022. It was his evidence that the entire subject island is gazetted as a monument and he was not aware of any further Gazette Notice degazetting the island . Consequently, any letter of offer would be invalid. Noting that



- the 1st entry is to SFT he stated the process in this regard will start with letter of allotment, followed by survey, issue of RIM or Deed Plan as the case would be, title is then processed in the name of SFT and forwarded to respective registry and only then can they (SFT) cause the land to be subdivided. He stated that he was not aware of any letter allocating Chale Island to SFT.
- 67 On Cross-examination by Mr. Gichuhi the witness confirmed that their office didn't have records for subdivision of Chale and they don't deal with SFT issues. That from the contents of letters of allotment it appeared like the allotment procedure was followed. That reference to area list indicates there was an official survey. He stated that he didn't consult anyone at SFT regarding how they got this title. Referring to the letter dated 30/11/2007 he stated he knew its author B.O. Akungu, the senior most officer in Land Adjudication (Director of Land Adjudication) now retired. He was not aware of anyone charged at SFT over issuance of this title. He stated SS 778 refers to Chale on the mainland and not the Island though he had no proof before court. He conceded he had no capacity to testify on behalf of the department of Adjudication and Settlement.
- 68 On Cross-examination by Mr. Aziz outlining the departments in the ministry of Lands , PW7 stated he is in charge of Land Administration which is not responsible for SFT. That while there must be confirmation of availability of the land by the various departments he denied having ever written any confirmation for availability of land for setting up the scheme. On cross examination by Ms. Opio he reiterated his knowledge of how SFT acquires land and expected to see a letter of allotment from the former commissioner, title in the name of SFT and then process of subdivision for this to be a valid allocation, which he did not come across.
- 69 On Cross-examination Mr. Mungai PW7 stated due to the reference of the land by two different map sheet numbers one would say the properties were a different. On Cross-examination by Wafula he stated that KWS title is superior to any other title. He testified that the conditions in the KWS title did restrict leasing a portion though condition No. 5 requires consent of the Commissioner of Lands . He had not come across any charges against an officer of KWS for failing to obtain the consent. The witness acknowledged there is a proviso to condition No 5 that exempted requirement for consent for those in the hospitality industry. He confirmed the government had not refunded money to the 1st allottees. He acknowledged that the government was receiving payment and still claiming that the land was not properly allocated. Cross-examination by Ms Andisi PW7 reiterated he was not aware of any gazette notice de-gazetting KWS in respect of the property.
- 70 During reexamination the witness clarified if he doubted his view was if he doubted the description in the gazette notice he would purchase the map from survey. That the Commissioners have jurisdiction to cancel letter of allotment especially if discovered the land had prior commitments. It was not possible to have two titles over the same property. According to him the titles from SFT were irregular. He had not seen any evidence of the payments made to the Government by the allottees.
- 71 With the foregoing the plaintiffs case was closed.

Defence Case

- 72 DW1 Mrs. Manhonan Kaur Kalsi the 1st Defendant adopted her witness statement dated 4/2/2021 as her evidence in chief. The witness further adopted her amended list of documents amended on 4th February, 2021 and filed on 11/2/2022. The witness stated that she first visited Chale Island in 1982 and has been visiting the Island yearly since then and has never witnessed any Kaya activities. That over the years they witnessed a lot of destructions of the forest and they developed a passion to save the Island . That following due diligence and official searches through Pandya & Talati Advocates and relying on their professional advice they purchased the plots, paid government taxes to facilitate



- the transfer and acquired the land . Since then they have taken care of the colobus monkeys. The development were on parts that have been bare. Referring to the defence and counterclaim she prayed for judgement accordingly. She produced the 1st defendants bundle of documents as exhibit DEX 1.
- 73 On Cross Examination by Ms Wambugu the witness reiterated they did due diligence before the purchase and together with her husband met all the vendors and negotiated. That they relied on the letter dated 7/12/06 from Hon Shakombo except for plot Nos 103 and 118 which were registered before the said letter. That she purchased the various parcels from individuals who were allocated the land by the government. That her understanding of being settled is where the Government of Kenya gives one a plot to build a house and settle though she did not see anyone settled in the island including the vendors. She admitted she had only produced one title in the name of David Ndirangu.
- 74 DW1 agreed she had not demonstrated how she obtained the NEMA license and she had none in her name but insisted she was the owner of the land and director of Kalsi Cottages. That she did construct what was seen during the site visit. That though she understood a company is a separate entity, she gave no thought to her use of different letter heads but she had no underhand intention. Admitting clearing of forest was inevitable during construction of the cottages she pointed the bigger picture is to save the major forest.
- 75 The witness admitted she had not presented EIA report to the court. While the offer to own land was made in the year 2005 they never sought for de-gazettement of the Kaya because they spoke to Mr. Shakombo who said it was not a problem. That she subsequently sought approvals from NMK as stated in the counterclaim because she at that point believed the island was under NMK. In Cross-examination by Ms. Opio DW1 stated she was owner of the freehold titles and which were superior to the lease. That she entered into the lease agreement because KWS could better protect the property.
- 76 On Cross-examination by Mr. Wafula DW1 that she hired Pandya & Talati to undertake due diligence which she could not do as a layman. That none of the vendors have filed a claim against her for fraudulently acquiring their plot or nonpayment. That the various searches in her bundle and the letter dated 1/3/2006 from the District Land Adjudication and Settlement were a demonstration of due diligence.
- 77 Referring to the letter dated 7/12/06, license from NEMA, approval by NMK and KWS, development plan approved by NEMA her view was that all the relevant institutions were involved and she did not break any conditions. That NEMA has not been sued in this suit for issuing approvals. That had she not purchased the island then all the allottees would have cleared the forest which exists because of her effort. The name she chose for her business does not amount to corruption. On Cross-examination by Ms Andisi the witness testified that despite gazette notices being in the public domain, it was not within her knowledge that the land had been gazetted. The interest she held in Chale is purely leasehold.
- 78 DW2 Hashim Got Sat testified that he had worked with Ministry of Lands and Physical Planning for the last 38 years. In 2002 he was transferred to Kwale District Land Registry to understudy Mr. Mwachanya who was due for retirement in March 2003. He adopted his witness statement and stated that Kwale/Kinondo has two registration sections, Kwale/Kinondo Chale referring to the island and Kwale/Chale Kinondo the main land . That the process of settling squatters started in the 1990's when land issues were very emotive in Kwale. Mr. Mwachanya gave him the file containing correspondences supporting creation, survey and allocation of the Chale Kinondo scheme dating back to 1990's. Referring to the letter dated 21/9/94 DW2 pointed that he never participated in the exercise as he was at the Mombasa Lands registry. That in 2003 Mr Mwachanje causally hand ed over unsigned green cards to Kinondo Chale , a RIM, Area List and copies of letters of offers. That DW2 was then summoned to a meeting at the District Survey office attended by Mr. Walter Mwachoki the Provincial Land



- Adjudication Officer, Martin Shukuku the District Surveyor Kwale and an officer from the provincial land adjudication where Mr. Mwachoki informed the meeting that there were some green cards already opened awaiting the signatures of the registrar and assured that they had all the approvals pertaining to the establishment of the settlement scheme. The District Surveyor tabled a copy of the RIM and Area list and Mwachoki produced copies of the letter of offers. He stated that he acted in good faith signed the 1st certificate in the name of SFT on 7/3/2003 as he had no reason to doubt since the departments were interdependent. That there was no complaint from any quarter. That to his recollection there were transfers from SFT which emanated from Lands Office but the originals were not available since the EACC took all of them instead of getting certified copies.
- 79 DW2 added that apart from signing the green cards the land registrar only issues the title to the beneficiaries and is not involved in the processes. That the conditions for payment in the letter of allotment which were legally valid for 27 years and that he was not aware of any allottee who did not pay. He stated a gazette notice doesn't confer ownership it only confers interest in a title which can be registered against the title though he was not aware of any such registration by NMK. He added that had the gazette notice been brought to his attention he would still have signed the green cards but endorse the interest as per the gazette notice for future reference for everybody to know there was an interested party. Boasting of his experience as Land Registrar he pointed having worked in Lamu under UNESCO, Gede Watamu. Old Town where and the owners held their titles and nothing stopped them from using them except for consent from NMK. Referring to the particulars of fraud attributed to him under paragraph 24 of the Amended plaint he termed them as belittling him owing to his long dedicated service. As to 24 c he pointed that for period 1994-2003, the process started in the 1990's when he was not in Kwale. That he was not a member of the District committee. He stated that all the persons that were directly involved in the allotment process had not been sued which was unfair and an act of abuse of office by the EACC.
- 80 On Cross Examination by Ms. Maina. He conceded the Chief Land Registrar authorization must be in writing and was just an administrative requirement which he could bypass under Section 8 of RLA. He admitted that legally it is assumed that once published the public is deemed to be aware of the gazette notice. He could not remember seeing receipts for the payments made under the letters of allotment. Cross examined by Mr. Mungai DW2 stated it was in order for an allottee under informed/transfer, to transfer their land before issuance of title.
- 81 On Cross –Examination by Mr. Gichuhi SC the witness reiterated and explained his earlier position why his prosecution in the present suit is discriminatory. Asked to comment on the letters by Mr. Odari and Akungu he stated that they all pointed to the fact that due process was followed culminating into issuance of the titles. He stated the 1st defendant was never involved in the allotment of land to SFT. That the 1st Defendant was the 3rd owner and it's not possible that she could have committed any fraud not even with him.
- 82 DW2 stated that he was the one who informed EACC of the existence of a title for the Hotel (Sands at Chale). That he believed the other side was unalienated Government land and thus given to the squatters. He clarified under Sec 30 of the RLA the gazette notice is not an overriding interest. He noted that the NMK letter dated 18/7/2007 confirms that there is an interest that does not affect ownership.
- 83 On Cross examination by Mr. Wafula he stated that the SS was established by the Directorate of Land and Settlement is a substantive department in the Ministry. That the process started with them and he was the last in line. The directorate of land adjudication and settlement is still in existence and in his view the Directorate and SFT followed procedure. That he had not been shown any documents disputing the establishment of the scheme. In his opinion the titles KWS Chale Island and



- 1st Defendant all overlap. That under their title KWS can lease, sublease, charge subject to consent by the head lessor. That they were exempted from consent in respect of catering and accommodation services such as the 9th defendant. He considered the leasing as a contractual agreement which did not constitute corruption.
- 84 On Cross –Examination by Ms Andisi he clarified that it is possible for two people to hold title on the same land in the event one is free hold and the other leasehold because any lease above 25years must be registered since it was like a transfer. That it is not correct that the freehold by the 1st defendant came later after the leasehold by KWS. He stated one cannot register a caution in the absence of a registrable interest.
- 85 With the above the 2nd defendants’ case was closed.
- 86 DW5 David Ndirangu Mwangi adopted his statement dated 9/4/2021 and stated he bought Kinondo Chale 103 from Tabu Salim Mohamed based on his letter of offer dated 13/10/2000 which was normal as confirmed by the Land Registrar 2nd defendant during his evidence. That being a direct purchaser he was thereafter issued with a title. He stated the gazette notice did not properly describe the property as the mapsheet does not tally with the plot he purchased. The size in the gazette notice is 50 hectares which is wrong being familiar with the land it should be about 50 acres.
- 87 On Cross Examination by Ms Maina the witness testified that he was allocated only one plot 105 from the scheme but admitted he had no documents to show how he obtained the same from SFT. That he had not produced evidence to show how plot 103 passed from Jabu Salim to him. He confirmed plot No. 122 and 126 were in his wife’s name though he could not confirm if she was 1st allottee as she was independent. On Cross Examination by Ms Opio he testified that he was in the business of selling property, kept records but did not have records of the subject island as they got destroyed in a fire incident which he conceded he did not include in his witness statement. That he first came to Diani around 1983, was allocated the plots in 2004 and had qualified as a squatter by then. He denied Teresia was his wife stating she was just a mother to his children. Under cross examination by Mr. Gichuhi DW2 pointed he was not shown any evidence pointing to his fraud of SFT denying they were paid by him.
- 88 On Cross examination by Mr Aziz DW3 stated that he never purchased neither was he allocated any of the plots from or by the 2nd defendant.
- 89 On re-examination the witness emphasised he was issued with a title document meaning the registrar was satisfied with the documentation presented and he wouldn’t have issued title if the same were incomplete.
- 90 With the above the 5th defendants’ case was closed.
- 91 DW6 is Kalsi Barender he stated he owned Swahili Beach with his family which had invested Kshs 2 bilion in the 9th defendants five-star hotel accommodation and catering business. That he had known the subject island for a long time. Upon allocations by SFT his wife bought the land to protect the island . All the plots were bought in her name because she is a Kenyan citizen. That upon claim of ownership of the entire title by KWS they through M/s Pandya & Talati negotiated and were offered a lease on a portion which they accepted and are happy with. That he was aware of NMK interest in Chale and noted that relevant licences and approvals for the developments were granted to the 9th defendant by NEMA, NMK and the local authority, which had not progressed courtesy of EACC. None of the approvals/licences had been cancelled todote nor charges proffered on the same against him, his wife or even officers of NMK. The plaint raises no allegation of fraudulent issuance of the



- approval against NMK. As far as he was concerned there was no wrongdoing by the KWS in issuing the lease and he wanted to develop the lease as approved.
- 92 On Cross examination by Ms Wambugu he stated Kalsi Beach is a family entity but had not been asked to produce registration for Kalsi Beach Cottages. The names used did not matter much as the establishments are owned by the same people though distinct entities. The intention was to use Swahili Beach thus the surrender. He could not remember if Swahili Beach had an interest in the property before 2008. Noting that the property was registered in his wife's name he conceded it would only be proper for the same to be developed in her name including the licences/approvals.
- 93 When cross examined by Mr. Gichuhi his view was that both the 1st defendant and KWS held titles and there was nothing stating that the 9th defendant committed a fraud. There was also no prayer seeking for an order for cancellation of the lease. Relying on the statement of A/C from KWS upto 30th/11/2020 he noted they were compliant with rent. He further clarified that EIA licence refers to Swahili beach who also had a licence issued by NEMA.
- 94 On re-examination he reiterated that all the entities are owned by his family children and wife. KWS has been sued as the 2nd Interested party and had not complained about non-payment. That noncompliance with the lease is not an issue before this court. The lease at clause 1.5 (a) envisages a building to be constructed on the ground. Todate neither NEMA nor NMK had cancelled their approvals.
- 95 With the above the 9th defendant's case was closed.
- 96 DW7 Judy Adipo the Principal Land Manager at KWS testified that KWS responsibility was on protection and management of Kenya's bio-diversity through protected areas in form of National parks reserves, marine parks/reserve and sanctuaries. The witness adopted her statement dated 7/6/2022 and produced the list of documents dated 7/6/2022 as exhibits. Her evidence was that KWS is the registered owner of the subject island and whose registration was duly undertaken. According to her the gazettement as marine reserve was done for protection and upon gazettement the map was deposited with the Ministry of Lands and survey. Thereafter the folio and deed plan were produced and title issued to KWS office process. That the title by the 1st defendant is illegal since KWS did not give consent and the degazettment of the reserve was not done. The cautions lodged by KWS have never been lifted.
- 97 When cross-examined by Ms. Wambugu the witness confirmed before the lease KWS undertook an EIA which they did not produce in court. That KWS did not consult NMK since they don't consult when giving leases. It was the client to consult on its developments and Swahili had already obtained approvals from NMK. Referring to the Planning Framework (pg 30) she conceded KWS was under obligation to consult NMK.
- 98 On cross-examination by Mr. Gichuhi she pointed that gazette notice for KWS describes beyond Chale Island and does not specifically describe Chale Island . That the KWS title does not describe Chale Island as being under the said title though the deed plan showed it is. That in her experience as a land surveyor there cannot be two titles over the same land . She confirmed KWS has no lease with the Sands at Chale hotel. The 9th defendant had been paying KWS land rent and were up to date. She conceded Swahili had not destroyed the island , neither had KWS received a complaint from NMK in that regard or the lease or any third party. On Cross-Examination by Ms. Opiio she stated KWS title predated the 1st defendants alleged freehold title. The gazettement by the NMK does not interfere with KWS title since they were both managing the boundary within the island .



99 On Cross Examination by Mr. Mungai DW7 stated she could not attribute any illegality to the 5th defendant. That the gazette notice for NMK was according to her sufficient notice to the public and the description of 50 hectares corresponds to the size of the island though KWS had not surveyed the island . On Cross Examination by Mr. Wafula the witness KWS doesn't have any problem with the lease and has been receiving the rent which is for conservation purposes. The gazette by NMK does not vest title to them. That NMK approved the drawings and gave consent to the development. She stated the 9th defendant development a hotel is not functioning because of the cases that have been going on.

Submissions of the Parties

100 The parties agreed to file and exchange submissions which they did.

Plaintiff's Submissions

Whether the suit property was alienated for a public purpose and whether the same was capable of alienation to private entities.

101 The Plaintiff submitted the subject Island having been gazetted as a National Monument and a Marine Reserve, the same is public property and entrusted to the care of the 1st and 2nd Interested Parties who can only deal with the same in strict adherence to the law and not otherwise. That it was not available for subdivision, transfer to private persons or settlement of squatters. It could also not be alienated for any private use, without following the requisite procedure such as degazettment of the Gazette Notices. That the 1st defendant could not rely on the letter dated 7th December 2006 by Hon. Shakombo to validate registration of the subject titles in her name. Reliance was placed on the case of Timothy Ingosi & 87 others v Kenya Forestry Services & 2 others [2015] eKLR, Kenya Anti-Corruption Commission v Lima Limited & 2 Others (2019) eKLR, Kenya Anti-Corruption Commission v Frann Investment Limited & 6 Others (2020) eKLR and the decisions cited therein with approval.

Whether the 2nd Defendant had authority to issue Titles Nos. Kwale/Kinondo Chale/ 99-146.

102 It was submitted that having established that the subject Island remains a gazetted National Monument and a Marine Reserve to date, the 2nd Defendant did not have any authority to issue Titles Nos. Kwale/Kinondo Chale/ 99-146. That a review of the documents presented by the EACC to PW6 confirmed there was no document to support the opening of the registers in favour of the SFT. DW2 admitted to opening the registers without having seen the Registry Index Map and Area List and / or a letter authorizing him to open the green cards as is required. DW2 confirmed a title cannot be issued in the absence of a RIM and Area List. While the documents were very crucial DW2 relied on the word of his superior. That DW2 in abuse of his office as the then District Land Registrar at Kwale presided over the fraudulent process of the illegal and irregular conversion of the subject Island to an extension of Kinondo Chale Settlement Scheme when the island had already been alienated for public purpose. No interest could have been conferred to a private individual without following the requisite procedure under the law. That being aware of the letter dated letter dated 15th March 1999, by the then Commissioner of Lands Mr. Z. A. Mabea confirming the whole of the subject Island as reserved DW2 on 7th March 2003 registered the 4th defendant as the first proprietor to Title Nos. Kwale/Kinondo Chale/ 103, 118, 119 and 146. The court is referred to the holding in Nelson Kazungu Chai & 9 others v Pwani University [2014] eKLR that land reserved for a public purpose cannot be recognized as private property even after allocation to private individuals. That Public interest in land will always outweigh an individual's right to own the same property. Further Norbixin Kenya Limited



v The Attorney General HCCC No. 1814 of 2002 and Kenya Industrial Estates Limited vs Anne Chepsiror & 5 Others E & L No. 71 of 2013, where the court found that the Commissioner of Lands must bear the blame.

Whether the 1st Defendant acquired a good title and /or was a bonafide purchaser for value.

103. It was urged that in view of the conclusions in the two issues above the 1st defendant was incapable of acquiring a good title and the same were null and void. The court was referred to the holding in Daudi Kiptugen v Commissioner of Lands & 4 Others [2015] eKLR cited with approval in the case of Kenya Anti-Corruption Commission v Paulina Kemuma Anunda & another [2022] eKLR that acquisition of title cannot be construed only in the end result. Further that a court of law cannot on the basis of indefeasibility of title, sanction an illegality or give its seal of approval to an illegal or irregularly obtained title as held in Funzi Island Development Limited & 2 others –vs- County Council of Kwale & 2 others [2014] eKLR, Muthithi Investments Company Limited v Commissioner of Prisons & another [2020] eKLR and Munyu Maina v Hiram Gathiha, Nyeri C.A No. 239 of 2009 [2013] eKLR. that the titles issued to the 1st Defendant were null and void and could not confer good title.

Whether the subject Island is an area subject of the Land Adjudication Act, Cap 284 Laws of Kenya.

104 It was submitted that the argument that the 6th, 7th and 8th defendants acquired the suit properties by virtue of the Land Adjudication Act cannot hold. That the 6th, 7th and 8th defendants did not present before the Court any evidence to demonstrate that the subject Island was an adjudication area or a settlement scheme as alleged. That the Land Adjudication Act Cap 284 Laws of Kenya ascertains and records the rights and interests in community land which is held in trust by the local government (county government). Citing sections of the Act 3 and 5 it was submitted the Island does not fall under the definition of an adjudication area or an adjudication scheme nor was there an order by the Minister declaring Chale Island as such among other legal requirements with regard recording of claims, interests and ascertainment of rights, adjudication register.

Whether the 1st Defendant's counterclaim is merited

105 It was submitted that Section 64 of the National Museums and Heritage Act No. 6 of 2006 places the burden of proof on the 1st defendant to prove that the island is not a national monument. That The 1st defendant did not bring any expert witness to prove that Chale island has lost its status as an area of national heritage. That the letter dated 7th December 2006 from Hon. Shakombo indicating that Chale Island is not a Kaya could not be relied upon as the Minister lacked power to order for revocation of a gazette notice without following the requisite procedure under Section 25 (5) of the said Act as to publication of a notice for the proposal of a revocation. That the 1st defendant equally has not sought degazettement of the Chale island as a monument from the National Museums of Kenya, who have the mandate to gazette and /or degazette a site as a national heritage. That in the absence of any concrete evidence that the island has lost its status as an area of national heritage, it was submitted that prayer (a) is unmerited and the Court was urged to dismiss the same.

106 On prayer (b) it was contended that the declaration as national monument meant the users of the said Island ought to adhere to the conditions set by the 1st Interested Party to preserve the same as a heritage site and consequently any interest conferred or held by any person and /or entity ought to have been done with the consultation and the approval of the 1st Interested Party. It was submitted that the 1st Defendant cannot purport to state that the 1st Interested Party has no control over the subject Island yet the 9th defendant sought its approval to develop it. That the 1st defendant has not contested the said gazette notice by the 1st Interested Party prior to the institution of the plaintiffs suit herein.



107 With regard to Prayer (c), citing Section 25(5) of the *National Museums and Heritage Act* the plaintiff submitted the mandate to gazette and /or degazette the subject Island as a national monument lies with the 1st Interested Party. That to order revocation will amount to the Court cannot usurping the 2nd Interested Party's mandate.

108 The Plaintiff reiterated its submissions that the 1st defendant was not an innocent purchaser for value. Consequently, the 1st defendant is not entitled to Prayers (f) and (g) in the counterclaim. Reliance was placed on the case of Attorney General V Electrical Options Limited [2019] eKLR, wherein the Court refused to order compensation in a case where a title was irregularly obtained. That consequently the 1st Defendant was not entitled to costs of the suit. The Plaintiff prayed that the 1st defendant's counterclaim be dismissed with costs to them.

Whether the Lease between the 2nd Interested Party and the 9th Defendant was irregularly issued and therefore null and void for all intents and purposes.

109 The Plaintiff submitted that on 29th January 2007, the 2nd Interested Party placed cautions over the suit properties forbidding the registration of any dealings and the making of entries in the registers of the suit properties. The same were lifted without any justification paving way for the 1st defendant to irregularly obtain the long-term lease through the 9th defendant thus concealing her interest on the suit properties and casting a doubt on the same. That her aim was developing her own suit properties in contravention of the Gazette Notices.

110 The Plaintiff further submitted that in as much as the 2nd Interested Party has a right to lease any portion of land derived from Grant No. C.R. 35853 L.R. No. 24309 and created pursuant to Gazette Notice No. 196 of 1995, the 2nd Interested Party should have consulted the 1st Interested Party who is also mandated to protect the subject Island having gazetted it as a National Monument. It was the Plaintiff's submission that the Lease between the 2nd Interested Party and the 9th Defendant, for the reasons advanced hereinabove, was issued illegally and /or irregularly and therefore null and void for all intents and purposes.

Whether the Plaintiff's case has merit.

111 The Plaintiff submitted that it had proved its case on balance of probabilities that the suit property was already alienated for public purpose and was thus not capable for allocation as an extension of Kinondo Chale Settlement Scheme. That the subject island y was alienated Government land held in trust for the public and should be reverted to the public. The court was urged to grant the prayers sought the Further Amended Plaint dated 4th June 2021 with costs.

The 1st Defendants Submissions

112 The 1st defendant's submissions are made in opposition of the plaint and in support of the counterclaim as filed. Guided by the agreed issues dated dated 12th April 2022 the 1st defendant submitted as follows; -

Was the Chale Kinondo/Chale Settlement (Extension) lawfully established.

113 The 1st defendant submitted that the Chale Island settlement scheme was lawfully registered as supported by a final Registry Map Sheet No. 2, final area list for the Kinondo/Chale Settlement (Extension) submitted to Chief Land Registrar in Nairobi by the Director of Survey in Nairobi copied to various named relevant offices; A district plot allocation committee (DPAC) duly constituted which over time oversaw the process of recommending allottees; The tracing for the Kinondo Chale



Settlement Scheme (extension) plots Nos. 99-146 submitted to the Director of Survey by the District Surveyor K'wale and Letters of offer issued to the successful allottees between year 2000- 2002 by the Director of Land Adjudication and Settlement.

- 114 The 1st Defendant submits that the green card produced by the plaintiff showed the 1st defendant purchased 39 plots out of the 46 plots shown of the survey map above after due diligence and was duly registered as the 3rd Owner between 2006 and 2007. That the Plaintiff had failed in its evidence to rebut the letters dated 26th November 2007 by Okenyi S Odari confirming establishment of the scheme and that it was never cancelled; 30th November 2007 by the Director of Land Adjudication and Settlement in Nairobi confirming to Ms. Odari the establishment of the scheme being No. 778 and its due allotment to squatters.
- 115 Referring to the letter of offer dated 13th October 2000 to Halima Mohammed it is submitted the offers were simply direct purchases from SFT to the allottees. Evidence of preparation of discharges was thus not required. The court is referred to the case of Sarah Jelangat Siele v Attorney General & 2 others [2016] eKLR where the court explained the process of land allotment by SFT from creation of the map and charging or direct purchases.
- 116 That the plaintiff had failed to adduce any material and credible evidence to disprove the legality of the scheme contrary to the provisions of Section 108 of the *Evidence Act* and adverse inference should be made. Reference is made to the holding by the Court of Appeal in Chase Bank (Kenya) Limited v Cannon Assurance (K) Limited [2019] eKLR and on the issue of suppression of evidence and in Nesco Services Limited v CM Construction [EA] Limited [2021] eKLR where the court addressed Section 112 of the *Evidence Act* and drawing an adverse inference on the party failing to produce the evidence.
- 117 It is submitted that there was a legitimate expectation that the SFT followed due process buttressed by Joel Kazungu Yaa Mangi v Director of Land Adjudication and Settlement & another; David Rodney Green & another (Interested Parties) [2020] eKLR where the court held that SFT settles squatters from either unalienated government land or land purchased from private owners and once the land has been allotted then the public is assured that a legitimate process was followed.
- 118 It is urged it has not been proved why the registration to SFT should be cancelled. Further that a first registration cannot be impeached and referred the court to the case of Lawrence Sese & 6 others v Jeremiah Otieno Okenye & Another [2017] eKLR and Violet Omusula Sikenyi v Vincent Kamari [2006] eKLR. where the court dealt with a first registration from SFT which was later sold and reiterated that a first registration cannot be cancelled.

As to whether two titles can overlap on the same piece of land ?

- 119 Referring to paragraph 14 of the Further Amended Plaint stating that Chale Island fell within the 75 square kilometres of the gazetted national reserve, the 1st defendant submitted that it had emerged during cross-examination that there cannot be a title overlap on the same property. That there is no prayer in the said Plaint or Counterclaim by KWS to plead that Chale Island falls within the title of KWS-LR 24309. No counterclaim has been filed by KWS seeking to cancel prior issued titles on Chale Island . That from the oral and documentary evidence adduced in court it is clear that KWS has no legal right over Chale island and the Deed Plan does not include any beacons.

Has the Plaintiff proved any fraud or illegality against the 1st Defendant or the original allottees?

- 120 It is submitted no tangible evidence has been presented to support the allegations of fraud and proved against the 1st defendant. The Plaintiff's witnesses confirmed that the 1st Defendant carried out due diligence before purchasing the properties. The court is referred to the decision of Justice Sila Munyao



in the case of Christopher Kitur Kipwambok V Vipul Ratilal Dodhia & 3 Others [2013] eKLR where the court declined to grant any injunctive relief in the absence of any evidence to prove fraud against the defendants the plaintiff therein having demonstrated how they purchased the land and obtained the requisite consents to transfer the land. Also John Kirianyoni v Paul Ntomiaka M'mujuri [2021] eKLR that allegations of fraud must be proved on a standard higher than a balance of probabilities.

Is the 1st Defendant a Bonafide Purchaser for Value?

121 It is submitted that it is not in dispute that the suit properties were first registered in favour of the Settlement Funds Trustees, a body corporate under the repealed Agriculture Act. That the 1st Defendant in her documents all produced all the evidence that proved that she is an innocent purchaser for value and the third registered owner of the suit properties. No evidence has been adduced by the Plaintiff to prove that the 1st defendant was complicit in any fraud in acquiring the properties or guilty of any misrepresentation. None of her documents relating to the purchase of the suit properties have been impeached. The court is asked to consider the holding in the following authorities while making the finding that the 1st defender was a bonafide purchaser for value under the Torrens System of registration of land. Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others [2019] eKLR. Kenya Anti-Corruption Commission v Sindo Distributors Limited & 27 others [2020] eKLR. The Ugandan case of Katende v. Haridar & Company Limited (2008)2 E.A.173,

Should the gazette notices declaring Chale Island as a sacred grove be revoked?

122 It is submitted the plaintiff never rebutted or controverted the assurance in Hon. Shakombo's letter dated 7th December 2006 that Chale was not of sacred significance to the Miji Kenda and could be developed, the stakeholders forum held on 15th November 2006 to establish whether Chale Island was indeed a Kaya Sacred Forest, that 49 out of 51 elders stated that Chale Island was never a Kaya as tourists could access it without any restrictions which was also confirmed during the site visit. PW1 testimony that no Kaya activities has taken place since the 1970s.

Is the gazettelement of Chale Island as a national monument an overriding interest that can interfere with issuance of titles to property?

123 Citing Article 40(2) of *the Constitution* barring arbitrary deprivation of land it is contended that gazettelement of a national monument is not an overriding interest that impedes transfer of title to land. That gazettelement of a national monument is simply an interest that cannot override the protection of private land under Article 64 of *the Constitution* and does not elevate that land to public land under Article 62. That declaration of a monument under the repealed The Antiquities and Monuments Act is not classified as an overriding interest or an impediment in the registration of any interest over land and merely protects the designated monument from destruction. Moreover, the 1st defendant had produced incontrovertible evidence that the designation of Kaya does not exist.

124 The 1st defendant invites the court to order the removal of the NMK gazette notice as it has not been implemented as against the Sands at Chale hotel. That there having been no Kaya activities since the 1970s the court has the power to direct a land registrar to cancel or rectify a title including original jurisdiction to declare that the purpose of a national monument has ceased to exist. That monument was supposed to apply to the entire island but in reality, does not on account to the hotel which was also a discriminatory and selective application in contravention of Articles 27 and 40 of *the Constitution*. Moreover, the protection of the flora and fauna is under the auspices of KWS as the island is in the marine reserve as the NMK has no presence on the island or adduced evidence that it patrols the island.



Did the court site visit show any destruction of flora and fauna by the 1st Defendant or reveal any sacred shrine that restricted access to the entire island ?

125 It is submitted that the site visit established that the 1st defendant has been protecting the flora and fauna and the only part that bore evidence of destruction that occupied by the hotel- Sands at Chale. The site visit report confirms the pristine nature of the island and the absence of any purported Kaya shrines and that tourists had unrestricted dressing and access to the entire island .

Is the 1st Defendant entitled to a full refund of the purchase prices, legal costs, expenses, stamp duty and compensation for loss of bargain at market price if her titles are cancelled?

126 It is submitted that there is no legal basis to cancel the title. But should court find Kwale/Kinondo Chale/103,118,119 and 146 are affected, then full compensation must be ordered and damages assessed on the basis of an updated valuation report. The 1st defendant prayed that the counterclaim be allowed as prayed.

Can the Plaintiff interfere with a lease between the 9th Defendant and KWS?

127 Pleading estoppel it is submitted that all recent development permissions have been duly given to Swahili Beach Resorts Limited and the plaintiff is estopped from denying any acts that prove that various disclosed government bodies granted the same. In conclusion the court is urged to dismiss the Further Amended Plaintiff with costs and allow the 1st Defendant's Defence and Counter claim as prayed with costs to the 1st Defendant and issue the declarations, orders and compensation and costs as pleaded in paragraph 27 of the Counterclaim.

2nd Defendant's Submissions

Whether the establishment of Chale Settlement Scheme[extension] was lawful

128 It is submitted that during trial PW6 and DW2 explained that the creation of a settlement scheme is done by the District Land Adjudication and Settlement office. That the process was well documented as per the correspondences produced by the Plaintiff, the 1st and 9th Defendants. The 2nd defendant submits that he supplied the said documents to the plaintiff while stationed in Kwale during the investigations. That PW6 in his evidence in chief outlined the process of how allottees are allocated land and which included payment by allottees for the allocated land followed by titles which evidence was not rebutted. It is stated that as per the evidence of DW2 the process of issuance of titles was by a presidential directive which is corroborated by PW4. It is concluded that the settlement scheme was lawfully created.

Whether the 2nd Defendant actions of issuing titles amounts to fraud against public interest

129 On the 2nd issue for determination, it is submitted that the action of the 2nd Defendant in issuance of the title deeds was within his mandate and powers as provided for under the repealed RLA and as per the *Land Registration Act*. It is stated that the establishment of the settlement scheme was commenced way back in the early 90's by the land 's adjudication and settlement office. That the 2nd Defendant was not a party to that process and was only presented with already opened green cards for him to execute and issue titles to the allottees who had already been issued with allotment letters and cleared by the 4th defendant. That in the event the process was flawed then the Settlement Fund Trustees who were the first allottees should have brought evidence informing the court that they were never involved in the process. The court is asked to find the 2nd defendant not liable for any fraud or malicious intents



as insinuated by the plaintiff. The 2nd defendant submits that the suit is dismissed with costs to the 2nd defendant.

3Rd, 4Th Defendants and 1St Interested Party Submissions

- 130 The 3rd, 4th and 1st interested submitted in support of the plaintiffs claim and highlighting the history of the gazetments herein, the issuance of title to KWS in the year 2000 and opening of parcel files in March 2003 it is submitted the subject the Island was not available for allocation. That the lease to KWS already conferred an interest in the island in addition to the protection conferred by the gazette notices. That this was confirmed by PW6 whose evidence was very crucial having worked in the Department Land Adjudication & Settlement as Chief Land Registrar during the supposed allocation and who further stated in the absence of Chief Registrars written authority a new register under SFT cannot be opened. The letter did not exist. Further that PW7 Director Land Administration confirmed the lack of letter of allotment from the former commissioner, title in the name of SFT and subdivision documents meant the allocation was invalid. Consequently, the correct procedure for allocation of Chale Island to the private individuals was not followed.
- 131 It is urged that the protection of property under article 40 of *the Constitution* does not extend to property that has been illegally acquired and granting any remedy to the 1st defendant would amount to perpetuating an illegality. Further that there cannot be legitimation expectation without adherence to statutory or constitutional provisions. Reliance is placed in Farooq Imtiaz Mohamed Malik vs. Director of Police Investments & 3 others (2018) eKLR and Henry Muthee Kathurima vs Commissioner of Lands & The Director National Youth Service (2015)eKLR.
- 132 Referring to Mwangi & Another vs. Mwangi (1986) KLR cited in Henry Muthee Kathurima (supra) it is submitted that KWS and NMK having been in possession and occupation they had equitable rights which are binding on the land . That possessory rights are overriding. The court is urged to allow the plaintiffs claim as prayed.

5Th Defendants Submissions

- 133 The 5th defendant invoked article 40 of *the Constitution* on the right to property and bar to arbitrary deprivation of the same having demonstrated they were registered owners of the subject island properties and held title. Reliance was placed on Kitui Ole Yamboi & Another vs. Agricultural Finance Cooperation & 102 Others(2016)eKLR and section 24 of the *Land Registration Act*. Further that the plaintiff has acknowledged the defendant was the previous owner of the subject property and failed to establish and plead any particulars of fraud on the part of SFT and the Land Registrar which was also an admission that the history and root of the title deeds are not tainted. Thus the titles cannot be impeached under section 26 (1)(a) and (b). Stephen Murithi M'Ngaruthi vs. George Muthija (2018)eKLR was relied upon to buttress this position.
- 134 Is submitted that the plaintiff has failed to prove any loss it has and will suffer if the orders sought are not granted. The court is referred to the provisions of Section 107 of the *Evidence Act* on the burden of proof.
- 135 Citing the provisions of section 81 of the *Land Registration Act* 2012 and the holding in Antonie Kubondo Murungi vs. Attorney General & 3 Others (2017)eKLR it is submitted the 5th defendant should be deemed as a bonafide purchaser for value and entitled to be indemnified as per his counterclaim in the event of nullification of the title having demonstrated he acquired the title deed regularly and procedurally without fraud.



136 Additionally it is urged that the plaintiff has failed to prove that the notices to the public were unequivocal and properly described the property that was gazetted. That the current registered owners cannot be faulted for having had sufficient notice that the properties were not available for allocation. The court is urged to dismiss the suit with costs.

6th, 7th and 8th Defendants Submissions

137 It is submitted that the plaintiff lacks locus stand i for want of no legal interest vested upon the subject matter of the suit. Reference is made to the case of Khelef Khalifa El. Busaidy vs. Commissioner of Lands & 2 Others. That inter alia the orders seeking to dispossess the respondents can only be given by the special courts and are also premature. The case of Owners of Motor Vessel Lilian vs. Caltex Oil(k) Ltd and Samuel Kamau Macharia vs. The Official Receiver Madhupaper International Ltd was referred to buttress on jurisdiction. On the plaintiff's response to the preliminary objection it is submitted that the decision in John Katana Kalaveri vs EACC & Another is distinguishable to the extent that it was based on the provisions of Article 79 and 80 of *the Constitution*. These objections will become clearer in my analysis of the issues.

9th Defendants Submissions

138 The 9th defendant submits that the main issue is whether the 2nd Interested Party had capacity to lease the suit property to the 9th defendant for catering and accommodation. It is stated that the KWS had the capacity to dispose of movable and immovable properties and therefore the power to grant the 9th defendant the lease and did not require any permission from the government to do so. Reliance was placed in the evidence of PW7, PW5 and PW6.

139 The 9th defendant further submits that as per the evidence of PW3 and that of PW1 Kaya activities no longer take place in the subject island . That the same status was confirmed by the court during the site visit before commencement of the hearing. It is also notable that the Kaya chairman one Abdalla Menyeze was allocated land which could not have happened if the same was a Kaya. The court is asked to find that Chale Island is not a Kaya and that legal notice no 195 of 1995 repealed the gazette notice no 220 of 1992 by implication.

140 The 9th Defendant submits that Legal Notice No 200 of 1992 did not grant the NMK power to control development on the Chale Island . That as per the evidence of the witnesses and which include PW4, the gazette ment did not vest the property in the NMK but its effect was for the NMK to regulate development. It is submitted that sufficient evidence has been tendered to demonstrate that NMK participated in the approval of the 9th Defendants development, the court is urged to find so.

141 It is further stated that the Kenya Wildlife Service has been collecting payment of the use of the land from the 9th Defendant even though the 9th Defendant has never put the same into use. This is as per the lease agreement between the KWS and the 9th defendant. The 9th defendant submits that it has a legitimate right to enjoy the benefits of the lease agreement entered between it and KWS considering KWS has been invoicing and receiving the agreed rent. The 9th Defendant states that the legitimate expectation arises due to the fact that another entity is running a hotel on the same Chale Island . The court is referred to the holding in Republic V Kenya Revenue Authority Exparte Shake Distributors Limited HC Misc. Civil application No 359 of 2012 and several other authorities which the court has considered.

142 It is submitted that the lease agreement between the 9th Defendant and the 2nd Interested Party is a valid contract and that the KWS is deriving benefit from the same. That parties are bound by the terms



of their contract as was stated in National Bank of Kenya Limited Versus Pipe Plastic Samkolit[K] Ltd. That the 9th defendant is an investor and expects returns from its investment.

143 It is stated that the lease obtained by the 9th Defendant was in respect of KWS title and not the properties registered in the names of the 1st defendant namely Kwale/Kinondo Chale/103,119 and 146. It is submitted that the plaintiff has not made out a case against the 9th defendant and that the case against the 9th defendant should be dismissed.

2nd Interested Party's Submissions

144 The 2nd interested party supported the plaintiff submissions that in so far the 2nd Interested Party is the sole legal Proprietor of Grant No. C.R. 35853 (Land Reference Number 24309) as well as cancellation of Title Nos. Kwale/Kinondo Chale/103,118, 119 and 146. Rehashing the steps KWS took to obtain Grant No. C.R. 35853 followed by the lodging of cautions upon information of the alienation of the subject Island and which are intact to date as confirmed by the green cards produced by the plaintiff, it is submitted that KWS was never involved in alienation of the suit property in the name of the defendants. Further that the registration of the cautions by the land registrar confirmed KWS had an overriding registrable interest to register the Cautions.

145 Citing the provisions of section 34 of the Registration of titles Act requiring that for any transfer of land to be registered the transfer documents must be signed by the proprietor, it is submitted that Board of Trustees did not sanction any transfer of the subject Island . That the 1st -8th defendants failed to provide any evidence of transfer documents of the Subject Island duly executed by the Director General of the 2nd interested party to themselves or to the 4th defendant to whom they claim interest. Reliance is placed in the holding in *Kyalo Elly Joy v Samuel Gitahi Kanyeri* [2021] eKLR.

146 It is submitted that going by the provisions of Section 23 (1) of the Registration of Titles Act, no evidence was presented by the defendants challenging the Title in the name of the 2nd Interested Party. In Kenya, it is legally impracticable to have the same parcel of land having two independent titles, more so, freehold title being derived from a leasehold title. Further, the 2nd interested party obtained its title in the year 2002 and the defendants from sometime in 2003. It is urged that the thread of the registration and the freehold interests in the name of the defendants is tainted with misrepresentation and unprocedural conveyancing process and therefore deemed illegal. The court is referred to the case of *Ali Wanje Ziro v Abdulbasit Abeid Said & another* [2022] eKLR.

147 It is the 2nd interested party's submission that in the absence of a de- gazettement notice of the subject Island as a National Marine Reserve and legal cancellation of the Grant No. C.R. 35853 (Land Reference Number 24309), the 2nd Interested Party is the absolute and indefeasible owner of the Subject Island . That the titles No. Kwale/ Kinondo Chale/ 99-146 issued to private persons should be cancelled. It is submitted that the Lease Agreement entered into by the 2nd Interested Party and the 9th Defendant on 15th May 2008 did not confer proprietary interest over the subject Island . What is in dispute is that the 2nd Interested Party did not consult the 1st interested party before entering into the said lease agreement. That under Condition 5 of the Special Conditions of the Grant, the consent of the Commissioner of Lands is limited to alienation and is not a prerequisite when subletting for accommodation and catering facilities and which is confirmed by DW9 that the primary business of Swahili Beach Resort Limited is hotel and accommodation.

148 The 2nd interested party submits that under Section 6 of the *Wildlife Conservation and Management Act*, 2013, the 2nd interested party is a corporate body that has legal capacity to enter into the lease agreement herein in so far as Condition 5 was complied with. That so long as elements of a valid contract are present in the lease agreement then, in absence of evidence negating the validity of such



elements of a valid contract, then the lease agreement dated 15th May 2008 between the 2nd Interested Party and the 9th Defendant was procedural and therefore legal.

- 149 The plaintiff further responded and replied to the 1st 2nd and 9th defendant's submission by reiteration the plaintiffs submissions dated 24th February 2023. Further that a legal notice contemplates that the information contained therein is in public knowledge. Referring to the holding in *Henry Muthee Kathurima v Commissioner of Lands & Director National Youth Service* [2015] eKLR it is stated that the doctrine of legitimate expectation cannot be used to protect property that has been unlawfully acquired. It cannot override provisions of the law and only protects that which is legitimate. Other authorities cited in this regard were the Supreme court of Kenya in *Communication Commission of Kenya & 5 Others v. Royal Media Services & 5 Others*, on the meaning, tenets and import of the doctrine of legitimate expectation and *Fanikiwa Limited v Sirikwa Squatters Group & 17 others* (Civil Appeal 45 & 44 of 2017 (Consolidated)) [2022] KECA 1286 (KLR) (18 November 2022).
- 150 The plaintiff submitted that in conduct of its investigations and instituting the suit property, was not malicious and discriminatory as alleged. That it is not obligated to disclose the source of the complaints which are made to it either anonymously, officially in writing and /or physically at its offices nationally.
- 151 That the Torrens system cannot therefore be used to protect a person who fraudulently acquires land from the true owner. Unless and until the existing gazette notices are declared a nullity, or, for that matter, a degazettement is undertaken, a later application for registration of the same land , or any portion thereof, cannot legally stand as was held by the Court in *Wibeso Investments Limited & another v Tamarind Meadows Limited & 5 others* [2020] eKLR.

Jurisdiction

- 152 The standing of the Plaintiff to institute this suit has been questioned by the 6th 7th and 8th Defendants for lacking a legal interest in the subject island . This objection is anchored on Sections 54 and 56 of the Anti-Corruption & Economic Crimes Act (hereinafter ACECA). It is stated that while Section 56 allows the Plaintiff to obtain court orders prohibiting the transfer or other dealings with a property, the Plaintiffs must fulfil certain conditions precedent to obtain the orders. These are that an application is made to the High Court, there must be reasonable grounds to suspect the property was acquired through corrupt conduct, the order can only be made against a person who was involved in the said conduct or a person who subsequently acquired the property.
- 153 The Defendants further argue that for the Plaintiff to prove to the court such reasonable ground, it must conduct investigations as required under Article 252(1)(a) of *the Constitution*, Sections 11(1)(d) and 13(2)(c) of ACECA. It is stated that upon such investigations the Plaintiff is further required under the provisions of Section 11(1)(d) of the said Act to make recommendations to the DPP for the prosecution of any acts of corruption among other matters prescribed under the said Act or any other law enacted pursuant to Chapter Six of *the Constitution*.

It is further stated that the Plaintiff based on the provisions of Section 26 of the ACECA was also required as part of the investigations to cause for a written statement to be furnished by the suspect on how they acquired the impugned property. Thereafter it must present an Investigation Report to the DPP under Section 35 of the ACECA who must institute criminal proceedings against the suspects to the Special Courts appointed under Section 3 of the ACECA. That it is only at this stage that the plaintiff may move the High Court under the provisions of section 56 of the ACECA seeking an order preserving the property.



154 It is submitted that the Plaintiff has failed to prove that it complied with the above procedures. That the orders seeking to dispossess the defendants of the properties before a finding by the special courts as to their guilt or otherwise can only be made by the special courts appointed under section 3 of ACECA.

155 In rebuttal the Plaintiff submits that it is mandated under section 11(1)(j) of the ACECA to institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures. It is stated that the Plaintiff's conduct of investigations culminated into the filing of this suit. That the Plaintiff's mandate is not controverted and the allegation that the National Land Commission should have picked up the complaint is irrelevant.

156 My understanding of the above objection is that the Plaintiff did not have the right/ability to institute the suit herein. The objection further indicates that this court lacks jurisdiction to hear and determine this suit by virtue of the provisions of Section 56 of ACECA. Article 79 of *the Constitution* of Kenya 2010 enjoined Parliament to enact legislation to establish an independent Ethics and Anti-Corruption Commission with the status and powers of a commission under Chapter 15 of *the Constitution*. Pursuant to this Parliament enacted legislation namely the Ethics & Anti-Corruption Commission Act 2011 establishing the EACC (see section 3 thereof). Article 252 (1) of *the Constitution* provides each commission, and each holder of an independent office-

- (a)
- (b)
- (c)
- (d) may perform any functions and exercise any powers prescribed by legislation, in addition to the functions and powers conferred by this Constitution.

157 Section 11 of the Ethics and Anti-Corruption Act sets out a number of additional functions of the Commission. 11(j) provides as follows;-

In addition to the functions of the Commission under Article 252 and Chapter Six of *the Constitution*, the Commission shall—

.....

Institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures including proceedings for the recovery of property or proceeds of corruption located outside Kenya.

158 Section 56 of the ACECA speaks to how suspect property is dealt with by the Plaintiff, it provides as follows;

- 56. Order preserving suspect property, etc.
 - (1) On an ex parte application by the Commission, the High Court may make an order prohibiting the transfer or disposal of or other dealing with property if it is satisfied that there are reasonable grounds to suspect that the property was acquired as a result of corrupt conduct.



- (2) An order under this section may be made against a person who was involved in the corrupt conduct or against a person who subsequently acquired the property.
- (3) An order under this section shall have effect for six months and may be extended by the court on the application of the Commission.
- (4) A person served with an order under this section may, within fifteen days after being served, apply to the court to discharge or vary the order and the court may, after hearing the parties, discharge or vary the order or dismiss the application.
- (5) The court may discharge or vary an order under subsection (4) only if the court is satisfied, on the balance of probabilities, that the property in respect of which the order is discharged or varied was not acquired as a result of corrupt conduct.
- (6) A person who is served with an order under this section and who contravenes it is guilty of an offence and is liable on conviction to a fine not exceeding two million shillings or to imprisonment for a term not exceeding ten years, or to both.
- (7) In this section, “corrupt conduct” means—
 - (a) conduct that constitutes corruption or economic crime; or
 - (b) conduct that took place before this Act came into operation and which—
 - (i) at the time, constituted an offence; and
 - (ii) if it had taken place after this Act came into operation, would have constituted corruption or economic crime.

159 Locus stand i signifies the right of an individual to be heard in court proceedings. To have locus to sue in a court of law, a party must have a sufficient interest in the matter in issue See Law Society of Kenya v Commissioner of Lands & Others [2001] eKLR (Nakuru High Court. I’m aware that in the case of Charles M. Waihanya & 2 others v Mary Wanjiku Njoroge & 3 others [2017] eKLR it was held that where the court finds the plaintiff lacks locus stand i and that the whole suit cannot stand , it may strike out the suit for being an abuse of the court process.

160 The Plaintiff has stated under the Further Amended Plaintiff that the present proceedings are instituted for the recovery of public land forming part of the Chale Island allegedly belonging to the government. Further that it is filed pursuant to the provisions of Section 11[j] of the Ethics & Anti-Corruption Act and the Anti-Corruption & Economic Crimes Act 2003. Sections 11(1)(d) and (k) of the EACC Act sets out one of the functions of the Plaintiff is to investigate corruption and economic crimes to facilitate criminal prosecution and or civil recovery as prescribed by legislation. This provision is clearly two pronged. It recognizes that upon investigation the EACC may other than facilitate criminal prosecution, institute civil recovery. Institution of civil proceedings to recover is therefore one of the functions conferred by legislation as envisaged under article 252 (d) above. The proceedings before this court are of a civil nature to recover the suit properties.

161 It is clear from the constitutional provisions cited as well as the statutory provisions above the EACC is legally entitled to bring these proceedings and derives its locus stand i and or interest by virtue of *the Constitution* and the Ethics & Anti-Corruption Commission Act. As long as the suit is filed to recover public land and which is reflected in the prayers sought then this is where the Plaintiffs interest in the property lies based on its mandate. The plaintiff therefore has the locus to institute and litigate this suit. I respectfully dissent with the 6th to 8th Respondents submission at paragraph 15 of their written



submissions that the Plaintiff failed to conduct investigations and make recommendations to the DPP for prosecution of the respondents for corruption, bribery and economic crimes. I am of the same mind with the court in the case of Joash Oindo & Another v Ethics and Anti-Corruption Commission & another; National Land Commission & another (Interested Parties) [2020] eKLR where Justice J. Onyiego persuasively stated as follows; -

Further, Section 11 of the EACC Act empowers the 1st respondent to investigate, to establish the extent of liability for the loss of, or damage to public property and to institute civil proceedings against any person for recovery or restitution and where appropriate freeze or confiscate proceeds arising out of corruption or the payment of compensation or take any other punitive action. This authority is realized under Section 55 of the ACECA where the 1st respondent can seek forfeiture of such property. It therefore follows that; institution of civil proceedings is not dependent upon the existence of any other criminal proceedings or investigations with a view to instituting criminal proceedings.’

162 The 6th to 8th Respondents at paragraph 16 of their submissions aver that this court does not have the jurisdiction to dispossess them of the properties subject of this suit as it is not a specialised court. The said assertion is based on the provisions of Section 54 of the Anti-Corruption & Economic Crimes Act. I have combed through section 54 of the mentioned Act, the provisions do not specify where the proceedings are to be instituted or conducted. It only states that the proceedings are to be instituted and conducted in court. There is no mention of special courts.

163 It is trite that a court’s jurisdiction flows from either *the Constitution* or legislation or both. See the Supreme Court dictum in the case of Samuel K. Macharia & Another vs. Kenya Commercial Bank Lt and Another (2012) eKLR. The jurisdiction of the Environment and Land Court is derived from Article 162 (1)(2)(b) of *the Constitution* to hear and determine disputes relating to environment, and the use and occupation of, and title to land as read together with the Section 13 of the Environment & *Land Act*. The proceedings are on a dispute relating to land . It has already been established by this court that the plaintiff has locus stand i to litigate this suit, the same is on the basis that the titles herein were allegedly illegally acquired and hence the need for recovery of the land for the benefit of the public as per its mandate. This court therefore has the requisite jurisdiction to determine this dispute, the objection by the 6th to 8th Respondents is not merited.

Issues For Determination

164 Following directions of this court, Proposed Agreed Issues were filed on 18th February 2022 but I note that parties did not fully adopt them in their submissions. From my careful consideration of the respective pleadings, evidence, written submissions the following issues emerge for determination:

1. Was the Chale Kinondo/Chale Settlement (Extension) lawfully established.
2. Whether the Chale Island was available for allocation.
3. Is the gazettelement of Chale Island as a national monument an overriding interest that can interfere with issuance of titles to property
4. Whether the 4th, 5th, 6th, 7th and 8th Defendants passed a good title to the suit property.
5. Whether the 1st Defendant is a bonafide purchaser for value without notice of any defect in title.
6. Whether the 1st defendants Counterclaim is merited.



7. Whether the Lease between the 2nd Interested Party and the 9th Defendant was irregularly issued and therefore null and void for all intents and purposes
8. Whether the Plaintiff has proved its case to the required standard and therefore entitled to the prayers sought
9. Who should bear the costs of the suit and Counterclaim.

Analysis and Determination

- 165 The history of this dispute starts with the gazette of the Island as Chale Island Sacred Grove under the Monuments and Antiquities Act Chapter 215 Laws of Kenya (now repealed by the National Museums Act 2006). The process commenced in January 1992 and the gazette as monument confirmed by the Minister on 8/4/93. In May 1995 the Island was also gazetted as a Marine National Reserve under the Wildlife (Conservation and Management) Act Chapter 376 Laws of Kenya (repealed). Thereafter the subject island was subdivided into plots Kwale/Kinondo Chale/99-146 which were then transferred to the 4th defendant ostensibly to form extension of Kinondo Chale Settlement Scheme. These plots were then transferred to private individuals through the office of the 2nd defendant to private individuals who also transferred to third parties where the 1st defendant acquired inter alia plots Kwale/Kinondo Chale/103, 118, 119 and 146. Was there a problem with these transfers starting with the 4th defendant to the other defendants? This brings me to a discussion as to why the plaintiff filed the present proceedings.
- 166 According to the plaintiff the subject Island having been gazetted and reserved as aforesaid was not available for allocation from the dates of the gazette notices. It is alleged that in total disregard of the gazette notices, the Island was allocated to the SFT which then led to the subsequent transfers. That this ought not to have happened as long as the gazette notices were still in place rendering registration and issuance of titles fraudulent, illegal, null and void ab initio. This leads me to the discussion on whether the Chale Kinondo/Chale Settlement (Extension) was lawfully established;

Was The Chale Kinondo/chale Settlement (extension) Lawfully Established;

- 167 PW5 Mr. Githinji a forensic investigator with the Plaintiff stated that their investigation revealed, there were gazette notices reserving Chale area as monument and marine reserve. He produced copies of the Legal Notices Nos. 200 of 1992 dated 17th January 1992 and 196 of 1995 dated 17th May 1995 respectively. His evidence was that the gazette Notices covered the entire Island and the existence of the gazette notices rendered the Island unavailable for allocation and there cannot be a legal allocation of absolute titles before the legal notice is cancelled. This position is supported by PW4 Isaiah Moguche Nyaega legal officer at NMK who told the court that when a site is gazetted, it is no longer available for allocation to private entities until such notice is vacated through a process of de-gazette. PW3 also supported the argument when cross-examined by Mr. Gichuhi.
- 168 From the proceedings it is not in dispute that gazette notices were indeed published. The primary issue is whether the suit island had been degazetted as a national monument before its allocation to the SFT. Green cards produced show the 4th defendant SFT as the first registered owner of the titles as at March 2003 as an extension of the Kinondo Settlement Scheme. PW3 confirmed that the island is still a monument as the gazette has not been revoked and which is supported by the register of protected areas that was tendered as evidence (see page 104 -106 of plaintiff supplementary bundle).
- 169 Part II of the Antiquities and Monuments Act Cap 215 (repealed) sets out provisions on Protective Declarations. Section 4 thereof is on Declaration of monuments that the Minister may by notice in



gazette declare a specified place or immovable structure which he considers to be of historic interest and a specified area of land under or adjoining which is his opinion required for maintenance thereof to be a monument within the meaning of the Act. It is further provided at Section 4[4] that any notice published under section 4 [a] to [c] shall be effectual for all purposes of the Act and until it is withdrawn.

- 170 So how is such withdrawal to be undertaken? My detailed perusal of the repealed statute did not avail me an answer on how a place gazetted as a monument may be degazetted or withdrawn as stated under section 4[4]. In the absence of such procedure it would reasonably mean that the withdrawal would be in the same manner that the notice was published. That there would be a notice inviting objections followed by confirmation notice in the gazette declaring ceasing of the Island or a designated portion from being a Kaya or monument. That is to say the same procedure deployed to gazette the monument should be the same procedure for its withdrawal. A withdrawal cannot be effected by verbal evidence such as that of PW1 who stated that there had been no Kaya activities or prayers since the setup of the Sands at Chale Hotel or by DW1 that she had known Chale for over 40 years and had seen no such activities. I'm aware there is reference to the letter dated 7/12/2006 by the then Minister but this does not apply at this stage as it came later in time.
- 171 The repealed Act however is clear that any notice published under section 4 is effectual until withdrawn. No evidence of such withdrawal has been tendered in these proceedings touching on the portion forming part of the scheme extension that it was no longer a national monument, before the same was allocated to the SFT.
- 172 The 5th Defendant's argument is that the land was forest land . Indeed, this is confirmed in the Ministers letter dated 7/12/2006 where it is referred to as sacred forest grove and reference to the Forest Department having been part of the conservation of the same. To me the island being a forest can still not sanitize the absence of the de-gazettement before allocation to the SFT. Section 4 of the Forest Act, Cap 385 (repealed) states as follows;

“ 4.

- (1) The minister may, from time to time, by notice in the Gazzete-
 - (a) declare any unalienated Government land to be a forest area;
 - (b) declare the boundaries of a forest and from time to time alter those boundaries;
 - (c) declare that a forest area shall cease to be a forest area.
- (2) Before a declaration is made under paragraph (b) or paragraph (c) of subsection (1), twenty -eight days' notice of the intention to make the declaration shall be published by the minister.”

- 173 From the above provisions of the Forest Act, a procedure on de-gazettement has been outlined, the Respondents have not tendered any tangible evidence leading to the conclusion that the island ceased being a forest before the land was allocated to the SFT. The 5th defendant's argument therefore fails.
- 174 The court finds that without the degazettement, the notices earlier issued declaring the suit island a monument and a marine reserve were still valid. The suit island was therefore not available for allocation and the allocation of the land to SFT was illegal. The court is guided by the holding in Samuel



M'amaroo M' Kaura & 9 others v Meru County Government & 3 others [2018] eKLR where the court declared null and void a roadside declaration by the then president at a public rally withdrawing a legal notice that had led to the creation of the Nyambene National Reserve. It was held that due process had not been followed in revoking/withdrawing the said legal notice. Also see the persuasive decision of Judge A. Ombwayo in Timothy Ingosi & 87 Others vs. Kenya Forestry Services & 2 Others (2015) eKLR .

175 The above consideration alone render the establishment of the scheme unlawful.

176 This court also finds support in the letter dated 15th March 1999 by the former Commissioner of Lands Mr. Z. Mabea addressed to M/s Mariko Kirwa Singoei and Samuel Kioko Muumbi referring to Plot 'B' Chale Island stating thus;-

.....

This is with reference to our letter of allotment re.34860/103 dated 26th June, 1992 offering you the above-mentioned plot.

I however wish to bring to your attention the fact that the whole of Chale Island is Gazetted as a National preservation area under the Antiquities and Monuments Act and in view of that offer of the above plot is hereby cancelled accordingly.

177 The above letter is self-explanatory and I need no belabour that it points to the fact that indeed the Ministry realised that the suit property was not available for allocation to the SFT for the settlement to private persons having been preserved for a public purpose aforementioned.

178 This court notes that it came out so clearly during the oral testimonies and specifically cross examination of Hebert Ndolo (PW2) Dennis Augo Mlewa (PW3) Isaiah Moguche Nyaega, PW5 Mr. James Nyaga Githinji that the Legal Notices No. 200 of 1992 did not confer ownership of the property to National Museum. The Court respectfully agrees with this position. But having said that it is my view that the point that has been missed in this argument is the preservation of the Island for a public purpose and benefit. It is this preservation that conferred ownership to the public and therefore made the island not available for allocation to private individuals. It is not the conferment of ownership as understood in relation to an entity being the registered proprietor. It is not about ownership of the Island by NMK and whether the gazettment was an overriding interest. It is the preservation for a public purpose that is the focus and which is the ownership to the public. It is this court's finding that the Chale Island was not available for allocation.

179 In respect of the above this court associates itself with the decision in the case of Kenya Anti-Corruption Commission vs Frann Investment Limited & 6 Others (2020) eKLR the court cited with approval the case of Kenya Anti-Corruption Commission vs. Paulina Kemuma Anunda & Another (2022) eKLR where the court was of the view that where land had been specifically assigned for a public purpose, then so long as the purpose remained, that land ought to be considered to be part of government land that cannot be alienated to private individuals for private use regardless of whether or not an allotment letter or lease had been issued. The suit property was already being enjoyed by the government. Also see Dina Management Limited vs County Government of Mombasa & 5 Others Petition No.8(E10) of 2021

180 Assuming I'm wrong on the above finding I will proceed to consider the basis upon which the 1st 2nd 5th 7 and 8th defendants urge that the establishment of the scheme was lawful. This is bearing in mind that this was the root of their titles and which is being challenged. The Court of Appeal held in the case of Munyu Maina v Hiram Gathiha Maina Civil Appeal No. 239 of 2009 [2013] eKLR, that where the



registered proprietor's root title 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. This was subsequently echoed by Justice Sila Munyao in *Daudi Kiptugen v Commissioner of Lands & 4 Others* [2015] eKLR where he 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.’

- 181 The 1st defendant pleads at paragraph 6 of the Amended Defence and Counterclaim that any transfer of land was manifestly legal as the various parcels of land were originally registered in the name of SFT. This is reflected by PW2 who during cross examination by Mr. Wafula stated that a purchaser obtains information from the land registrar's office and if they see SFT as 1st allottee there is confidence of the root of the title. The 1st defendant testified that she was informed by an elder who owned a plot at the Island that it was possible for her to own part of the island. It was her evidence in cross examination by Ms. Wambugu learned counsel for the plaintiff that she purchased the various parcels from individuals who were allocated the land by the government. Indeed, this court noted the 1st defendants Counsels analysis of the steps that culminated into the registration of the SFT as the 1st owner of the various titles and subsequent registration of the second owners from whom the 1st defendant purchased 39 plots and her alleged due registration as the 3rd owner in the year 2006. It is further urged that the scheme was validated by Ministry of Lands Department of Land Adjudication and Settlement through letters dated 26/11/2007, 30/11/2007 which the plaintiff had failed to rebut. Reference was also made to PW6 admission that on the face of the said correspondence the Scheme was properly established, as well as DW2 testimony confirming that from the letter dated 30/11/2007 it was clear that the process of establishing the scheme was followed, payments made and titles issued.
- 182 Mr. Gordon Adeka Ochieng (PW7) who works with the Ministry of Lands and Physical Planning as Director Land Administration noting that the 1st entry is to SFT told this court that the process should have started with letter of allotment, followed by survey, issue of RIM or Deed Plan as the case would be, title is then processed in the name of SFT and forwarded to respective registry and only then can they (SFT) cause the land to be subdivided. He stated that he was not aware of any letter allocating Chale Island to SFT. The witness reiterated on cross examination by Ms. Opio his knowledge of how SFT acquires land and the documents in support for a valid allocation which he did not come across. Applying the above case law clearly it is not enough for a title holder to state that on the face of it the process appears to have been followed and that there were letters validating the scheme extension.



Neither is it sufficient for PW2 to state that while he did not come across any documents for Kinondo Chale the Director of survey who only deals with Settlement Schemes acknowledges it exists.

- 183 To me there are gaps in the process that were not explained by the defendants to the satisfaction of the court or at all. There was no evidence at all of the documents enumerated by PW7 above. For instance, DW2 is a Land Registrar who had an experience spanning 38 years at the Ministry of Lands and Physical Planning stated in his evidence in chief that to his recollection there were transfers from SFT which emanated from Lands Office but the originals were not available since the EACC took all of them instead of getting certified copies. What is surprising is that if the documents existed, rationally it is not possible that copies would be missing in the relevant departments. It is strange that DW2 did not make inquiries from the departments which he stated during his evidence were interdependent for example the directorate of Land Adjudication & Settlement which he confirmed in cross examination by Mr. Wafula was still in existence. Infact upon cross examination by Ms. Opio DW2 testified that while he knew he required an authorization letter he did not inquire about it from the Chief Land Registrar as he had no reason to doubt it was available. Upon cross examination by Ms. Maina DW2 conceded that he did not see the actual authority authorising the opening of the green cards and confirmed he was expecting some documents to be brought and that he did not have them at the time he endorsed the entry. Could these have been the documents outlined by PW7?
- 184 For the RIM which was said to be missing PW2 on cross examination by Ms Opio stated the registrar cannot issue titles in the absence of RIM. PW6 Cyrus Wambugu Ngatia who had been in the ministry since 1996 as Registrar of titles and deployed in Department of Lands Adjudication and Settlement up to 1999 confirmed they could not trace the RIM and area list to date and on cross examination by Mr. Gichuhi reiterated he could not trace any records transferring documents to Kwale by the SFT.
- 185 DW2 defence is that he was finalising a process that had already begun and which he reiterated many times during his oral testimony, which in my view did not preclude him from ensuring that all the requisite documents were available on record. Infact this is supported by his testimony when he clarified during cross examination by Ms. Maina that reference to endorsement in his statement meant formalizing, validating and finalising. What then was he validating in the absence of documents?
- 186 The foregoing goes further to demonstrate why the setting up of the Chale Island Settlement Scheme extension was not lawfully registered.
- 187 What then does the above finding signify for the validity of the subsequent transfers and or titles emanating from the Settlement Fund Trustees? Was good title passed?

Whether The 4th, 5th, 6th, 7th and 8th Defendants Passed A Good Title To The Suit Property.

- 188 It was the 5th defendant evidence in chief that he was allocated plot 103 by SFT without influence. That he also purchased plots 107, 121, 140 and 136 from the initial allottees after the titles were issued to them. That he recorded a statement with the EACC and has never been charged for any criminal offence in relation to these proceedings. This court reiterates the civil proceedings herein are not dependent upon any criminal proceedings or a conviction. To me these are two independent and separate processes and the absence of one should not impede the presence of the other and vice versa.
- 189 The 5th defendant only stated he came to Diani in 1984 and he qualified as a squatter. On Cross Examination by Ms Maina he conceded he had no documentations to show how he ended up being allocated the land by SFT. His attempt during cross examination by Ms. Opio to attribute the absence of the same to a fire that destroyed his documents was to me just but an afterthought. He conceded this information was not part of his witness statement. In any case nothing would have been easy but for Mr. Ndirangu to obtain an OB showing the incident was reported. He had none before court.



- Mr. Ndirangu also claims to be an innocent purchaser which the court was not convinced. This will become clearer in the courts analysis on who a bonafide purchaser is.
- 190 The 6th-8th defendants did not give any evidence before Court. Ms Judy Adipo, KWS Principal Land Manager who testified on behalf of KWS stated that the KWS Board of Trustees never gave any authorisations for the transfers. It is noteworthy that KWS held the title CR Grant No. C.R. 35853 which was tendered in evidence. The witness enumerated to the satisfaction of this court how KWS obtained the said title as a follow up to the gazettment. Clearly it is was therefore not legally possible to have other titles when there was already an existing title registered under the KWS.
- 191 Mohamed Omar Mboga, Mohamed Hamisi Mwasengeza and Halima Mohamed the 6th 7th and 8th defendants respectively did not testify before court nor did they call any witnesses to testify on their behalf. They did not produce any evidence to show how they ended up being allocated the land by SFT.
- 190 The 5th 6th 7th and 8th defendants represent the second tier of registered proprietors through allocation by SFT. The court has already determined that the establishment of the scheme and allocation of the land to SFT was illegal for the reasons outlined. The registration of the SFT as proprietor was the root and origin of their titles. As long as the said registration was bad there cannot have been a valid transfer of the properties to the said 2nd tier beneficiaries. A nullity is a nullity and nothing comes out of an illegality. It cannot be salvaged not even on the basis of indefeasibility. Such was the position taken by Lord Denning in *Macfoy vs. United Africa Limited* (1961) ALL FR 1169 and which has been adopted in many instances in our courts. The 4th defendant did not pass good title to 2nd tier beneficiaries and or allottees. It is my finding that the 4th 5th 6th 7th and 8th defendants could not pass valid title. What does this portend for the 1st defendant a third registered buyer?
- 191 The 1st defendant contends that she is a third registered owner and bonafide purchaser from people who were allocated land by the government and which is the SFT. It is her evidence that she had known the Island for over 40 years and having developed a passion for it and upon being informed by a land owner in Chale that she could own land therein, she engaged the services of Pandya & Talati Advocates who following proper due diligence oversaw the process of purchase and transfer of the parcels for her. It is further confirmed in the 1st defendants' submissions herein that she indeed purchased 39 plots. Throughout the proceedings and upon extensive cross examination on this point by Ms. Maina, there was no doubt in my mind that the Plaintiff purchased the suit properties. She stood the test of cross examination in my view.
- 192 Indeed there cannot have been title to the 1st defendant in the absence of the creation of the extension to the scheme herein. I have already made a finding that the creation of the extension of the scheme and registration of SFT as proprietors was illegal and unlawful. Additionally, the vendors she purchased from could not pass good title for the reasons I have already enumerated. I will reiterate that nothing comes out of an illegality since there was no substratum upon which any of the titles emanating from SFT could stand. Can the 1st defendant defence of innocent purchaser for value without notice survive this finding?

Whether The 1st Defendant Is A Bonafide Purchaser For Value Without Notice Of Any Defect In Title.

- 193 The 1st defendants case is that she is a bonafide purchaser for value without notice. I think an understanding of the doctrine of a bonafide purchaser for value without notice is necessary. The Supreme Court of Kenya in the case of *Dina Management Limited vs County Government of Mombasa & 5 Others* Petition No.8(E10) of 2021 quotes various authorities on the definition of a bonafide purchaser thus:-



[90] The Black's Law Dictionary 9th Edition defines a bona fide purchaser as: "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."

[91] The Court of Appeal in Uganda in *Katende v Haridar & Company Ltd* [2008] 2 E A 173, defined a bona fide purchaser for value as follows: "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."

[92] On the same issue, the Court of Appeal in *Samuel Kamere v Lands Registrar, Kajiado Civil Appeal No. 28 of 2005* [2015] eKLR stated as follows:

"...in order to be considered a bona fide purchaser for value, they must prove; that they acquired a VALID and LEGAL title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property..."

194 Applying the above principles, I will start with notice and whether the 1st defendant was aware of the existence of the gazette notices herein. Firstly, during cross examination by Ms. Wambugu DW1 conceded she was fully aware of the gazette notice at the time of purchase but that she was an innocent purchaser. She also stated that while the offer to own land was made in the year 2005 they never sought for de-gazettement of the Kaya because she and her husband spoke to Hon. Shakombo who indicated it was not a problem. That they also relied on his letter except for plot Nos 103 and 118 which were registered before the said letter. Clearly DW1 was aware of the Notice. Though aware of the same she also proceeded with arrangements for plot 103 and 118 which predated Hon Shakombos letter and the question I pose is what did the 1st defendant rely on before the said letter. I shall shortly revisit this letter.

195 The 1st defendant also testified in cross examination that her understanding of being settled is where the Government of Kenya gives an individual a plot to build a house and settle though she did not see anyone settled in the island including the vendors. I found this rather interesting that citizens would be allocated land for settlement and choose not to settle but to dispose yet they were presumably land less. DW5 David Ndirangu Mwangi and who confirmed he sold one of the titles to the 1st defendant stated in cross examination by Ms. Maina that he came to Diani around 1983, was allocated the plots in 2004 and had qualified as a squatter by then and yet it is his evidence that though he had structures therein he never lived in them and used the land for farming. Mr. Ndirangu also confirmed plot No. 122 and 126 were in his wife's name Teresia though he tried to distance himself from her but conceded was the mother of his children. DW2 on cross examination by Ms. Maina agreed to alluding to a claim that the local residents were claiming to be squatters in their own land but he could not confirm if they lived on the same though he noted during the site visit there was no sign of habitation. The whole setting up of the scheme extension appear to me to have been orchestrated to dish out land and which the 1st defendant was ironically strategically available to purchase 39 of the plots. Where is the bonafides in all this. Where is the 1st defendants bonafides and or innocence in proceeding to buy land that she



admitted she understood was for settlement of squatters and land less. I'm not persuaded that the 1st defendant is an innocent purchaser for value without notice. This applies to the 5th defendant.

196 Noting further from the case law cited that a bonafide purchaser must show that they acquired a valid and legal title, I have already made a finding that the titles had no substratum upon which they can be upheld owing to illegal formation of the settlement scheme extension.

197 The court is further guided in this regard by the Supreme Court of Kenya in the case of Dina Management Limited vs County Government of Mombasa & 5 Others (supra) which has now settled the long time controversy of innocent purchaser for value where it stated thus:-

(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.

198 It has been contended by the 1st defendant that the Plaintiff had failed to prove fraud against the 1st defendant and that the 1st defendants titles cannot be impeached. It is my view that the court having not been persuaded that the title of the defendant is a good title as outlined earlier, Section 26 (1)(d) does not require that the 1st defendant participated in the fraud. In any event the Supreme Court in Dina Management Limited vs County Government of Mombasa & 5 Others (supra) further stated thus on indefeasibility of title:-

In the case of Funzi Development Ltd & Others v County Council of Kwale, Mombasa Civil Appeal No.252 of 2005 [2014] eKLR thus; -

the Court of Appeal, which decision this Court affirmed, stated that:

“...a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot on the basis of indefeasibility of title sanction an illegality or gives its seal of approval to an illegal or irregularly obtained title.”

199 I will at this juncture render myself on the Ministers letter and its implications as it relates to the gazette notice No. 200 of 1992. The letter dated 7th December 2006 is addressed to Mohamed H. Mwasengeneza the elders representative of Chale Island and is copied to B. Kalsi, Kalsi Cottages. The letter highlights the background of the Island and the confirmation of its gazettement as Sacred Forest Grove. It alludes to a stakeholders forum with Kaya elders whose conclusion was that the subject island was never a Kaya. That based on the unrestricted access devoid of the usual Kaya entry protocols as to the manner of dressing, the Island cannot be Kaya. Consequently the letter advises verbatim as follows:-

1. Despite Chale not being a Kaya, the Gazettement as a National Monument be retained.
2. The moratorium on development of infrastructure be lifted as the stringent requirements of no development in Kaya hold.
3. Chale Island is still, however, important as unique biodiversity hotspot as evident by the giant mangroves and other fauna and flora, and hence deserving of active continued conservation measures being instituted



4. While developments may be allowed, strict adherence of conservation regulations be instituted and prior approval with full environmental impact assessment be sought before embarking on construction.

The letter concludes both development and conservation can go on at Chale Island .

200 My understanding of the content of the entire letter is that it seeks to declare that the Chale Island ceases to be a Kaya while at the same time retaining the gazette as a monument. I have already shown that the repealed statute recognizes any notice published under section 4 is effectual until withdrawn. The said Act was repealed by the *National Museums and Heritage Act* No. 6 of 2006. PW4 Isaiah Moguche Nyaega legal officer at NMK was of the view that the Minister lacked power to order for revocation of a gazette notice without following the requisite procedure under Section 25 (5) of *National Museums and Heritage Act* No. 6 of 2006 as to publication of a notice for the proposal of a revocation. The *National Museums and Heritage Act* No. 6 of 2006 commenced on 8th September 2006 and clearly the letter dated 6/12/2006 was issued within the pendency of the new statute. I will produce the relevant section verbatim; -

25. Declaration of monuments, etc.

- (1) After consultation with the National Museums the Minister may by notice in the Gazette declare—
 - a. An open space to be a protected area within the meaning of this Act;
 - b. A specified place or immovable structure which the Minister considers to be of historical interest, and a specified area of land under or adjoining it which is in the Minister's opinion required for maintenance thereof, to be a monument within the meaning of this Act;
 - c. A specified site on which a buried monument or object of archaeological or palaeontological interest exists or is believed to exist, and a specified area of land adjoining it which is in the Minister's opinion required for maintenance thereof, to be a protected area within the meaning of this Act;
 - d. a specified object or type of object, whether or not part of an immovable structure, which the Minister considers to be of historical, cultural, or scientific interest, to be a protected object within the meaning of this Act;
 - e. a building and a specified area of land adjoining it which in the Minister's opinion is required for the maintenance thereof to be a protected building within the meaning of this Act; or
 - f. a geopark to be a protected area within the meaning of this Act, and the notice shall state that objections to a declaration made under this section shall be lodged with the Minister within two months from the date of publication of the notice.
- (2) A copy of every notice published under subsection (1) shall, if referring to an immovable object or site, be posted by the National Museums in a conspicuous place, on or near that object or site or on the area to which it relates, and if referring to a specified movable object, be delivered or sent to the person in whose possession that object is or is believed to be.



- (3) On the expiration of the period of two months, the Minister, after considering the objections, if any, shall confirm or withdraw the notice.
- (4) An object or area of land declared by or under the Preservation of Objects of Archaeological and Palaeontological Interest Act, or under the Antiquities and Monuments Act (both now repealed) to be a protected object, monument or protected area shall be deemed to be a protected object, monument or protected area, as the case may be, within the meaning of this Act.
- (5) No declaration made and gazetted by the Minister under this section may be revoked without the consent of the National Museums.
- (6) Notice of the proposal for revocation shall be published in the Gazette and the Minister shall consider all objections or recommendations made to the Minister within two months after the publication of the notice.

.....

201 From the foregoing it is clear the above procedure was not followed. At least nothing was placed before this court to support the contents of the letter herein. A letter alone cannot suffice for purposes of de-gazettement. I have elsewhere in this judgement spoken to the process of de-gazettement. In any case the Minister still retains the gazettement as a monument in the said letter. In my view the letter dated 6/12/2006 was of no legal consequence and neither can it be used as a justification by the 1st defendant.

202 I think I have said enough to justify the making of a finding that the 1st defendant was not a bonafide purchaser for value without notice.

203 The foregoing discussion seals the fate of the titles held by the 1st defendant, they are void for the reasons earlier stated herein. I do not find it necessary to delve into the submission by Senior Counsel Allen Gichuhi on legitimate expectation that the SFT followed due process, it cannot sail through. Further that as long as the 1st defendant was not a bonafide purchaser for value without notice it therefore follows that the counterclaim must also fail.

204 As regards the 2nd defendant, Hashim Got Sat, it is averred in paragraph 9 of his defence that his actions as Land Registrar Kwale were done within powers conferred by virtue of his position and relevant statutes and in good faith. During his evidence in chief the 2nd defendant testified that from all the departments involved in the process he was the only one sued in his personal capacity. These coupled with allegations of discrimination played out during cross examination. Faced with a similar issue in the case of Kenya Anti-Corruption Commission vs Bernsoft Limited & 2 Others (Environment & Land Case 168 of 2009) (2003) KEECL 16159 (KLR) (16 February 2023) Justice L. Naikuni adopted among others the Court of Appeal decision in the case of: - "Kenya Anti - Corruption Commission – Versus - Judith Marylyn Okungu Appl. No. 187 of 2007 eKLR (2007)" Court held:-

"It was right for the Plaintiff to have sued the Defendant in his personal capacity for wrongs committed while in office"-.

Hence, the right person to sue was the person who acted illegally and outside his statutory powers while effecting alienation of public land. He was the person who would know why he acted unlawfully or in the manner in which he acted. Such a person did not deserve to be covered by suing the incumbent/ office or even tax payers' funds to defend his action. If found liable he should also personally bear the costs of the suit. (Emphasis is Mine)



- 205 It is not in contestation that the 2nd defendant has been sued in his personal capacity. It should not escape this courts attention that Particulars laid out in Paragraph 24 of the Further Amended Plaintiff are not just about fraud perse. It is also about public trust bestowed upon government officials. Guided and agreeing with the above dictum it is my finding that the 2nd defendant was properly sued in his personal capacity.
- 206 The Further amended Plaintiff at paragraph 17 – 21 links the 2nd defendant as the officer who issued the titles. At paragraph 21 it is stated that together with the others he had actual or constructive knowledge of the alienation of the subject island and participated in the unlawful acquisition. I think I have already said enough to show how the 2nd defendant effected the registrations herein un- procedurally. It did not matter that he came at the at tail end of the process. I will add that while Mr. Got alluded to instructions trickling down from a presidential directive to fast truck the processes and which Mr. Githinji confirmed during cross examination. To me this was not a licence or authority to ignore procedure and due process. Additionally, he could not feign lack of knowledge of the Gazette Notice. Infact on cross examination by Ms. Maina admits gazette notice is public notice. In any event the inference is that one cannot state they were not aware of the gazette of any information when the same is public knowledge made available to the public See Simon Kiprono Sang vs. Zakayo K. Cheruiyot & 2)thers (2013)eKLR. This court respectfully disagrees with Mr. Aziz Counsel for the 2nd defendants’ submissions narrowing the allegations against the 2nd defendant to fraud and that no fraud has been proved against the 2nd defendant. To me he is culpable on the illegalities attributed to him. Had he been diligent at the tail end of the process which was also critical probably we would not have been here.
- 207 I will now proceed to discuss the 9th defendants’ case. From the Further amended plaintiff, the plaintiffs case against the 9th defendant is that following the issuance of title No. CR 35853 LR No. 24309, KWS placed cautions forbidding the registration of dealings against Kwale/Kinondo Chale/103,119 and 146 registered under the 1st defendant as the absolute owner. That the same were lifted by KWS without justification and in suspect circumstances and thereafter KWS issued a long-term lease for a portion measuring 1.71Ha to the 9th defendant. The 9th defendant subsequently assigned all its leasehold rights to the 1st defendant. So, what was the problem with all this? According to the plaintiff there was lack of involvement of NMK, the lease was meant to conceal the 1st defendants interest in a bid to develop the suit properties, the lease was issued without cancelling the said titles 118, 119 and 146 thus illegally creating parallel titles. Against the 9th defendant it is stated that with constructive knowledge of the subsisting public user obtained the lease and which lease covers the same area as the 1st defendant’s titles Kwale/Kinondo Chale/103,118,119 and 146. These are expounded further at paragraph 24A of the Further Amended Plaintiff and are attributed to the KWS. That the lease having been irregularly issued it is craved that the same be declared null and void.
- 208 The 9th defendant defence to the above is that the relevant Minister confirmed the Island is not a sacred forest(Kaya) and allowed KWS approved conditional developments effectively lifting the moratorium on developments of infrastructure. This speaks to the alleged knowledge constructive or otherwise of the public user as sacred grove. It is not in dispute that the 9th defendant was a family business involving the 1st defendant and Mr. Kalsi who testified for the 9th defendant. The 1st defendant evidence in this regard is that she together with her husband had spoken to Hon. Shakombo who said it was okay and further relied on the letter dated 7/12/2006 where the said Minister advised on the Conservation status of Chale Island . I have already outlined why the letter dated 7/12/2006 is of no consequence and I will not belabor the point.



- 209 It is also the 9th defendant's case that KWS is mandated by law to contract with third parties including leasing properties under their Management. This indeed is not disputed and is supported by the provisions of Section 3 of Wildlife (Conservation & Management Act) Cap 376 of the Laws of Kenya. The KWS is a body corporate capable of owning and disposing of property. The title CR 35853 Land Reference no. 24309 to KWS was produced in evidence by both the Plaintiff and the 2nd Interested Party. It is not in dispute that indeed a lease was issued to the 9th defendant and which was produced by Mr. Kalsi as the evidence of the 9th defendant. The lease is dated 15th May 2008 between Kenya Wildlife Service and Swahili Beach Resorts Limited for a portion of the said title measuring 1.71 ha or thereabouts. The lease is for a period of 66 years, is duly executed and was registered on 8th August 2008. I also had occasion to look at clause 5 of Special Condition Terms and which exempts KWS from obtaining the consent of the Commissioner of Lands where the sublease is for sites for accommodation and catering facilities. It has not been disputed that Swahili Beach Limited is in such business.
- 210 This court has been invited to make a determination on whether the lease to the 9th defendant was issued irregularly? I will firstly address the issuance of this lease as against the two Legal Notices No. 200 of 1992 and 196 of 1995. It is urged by the 9th defendant that the Legal Notice No. 195 of 1995 repealed the Gazette Notice No. 200 of 1992 published under the Monuments & Antiquities Act by implication. That the said gazette designated Chale Island as a Kaya. That subsequently the Island was gazetted as a National Marine Reserve under the Wildlife (Conservation and Management Act. That the designation of the island under the later Act placed the entire Island under the Management of the KWS which entails restricting access to the Island. Referring to PW1 evidence on the restrictions and protocols of accessing a Kaya including dressing and gender vis a vis the KWS designation as a tourist site, it was submitted this was inconsistent with the designation of the Island as a praying site.
- 211 I have noted the definition of a Kaya as drawn from the Wikipedia given by the 9th defendant in its final submissions thus:-
- ‘as a sacred forest of the Mijikenda people in the former Coast Province of Kenya considered to be an intrinsic source of ritual power and the original cultural identity. It is also a place of prayer for members of the particular ethnic group.’
- 212 From the foregoing definition clearly it is not only a place of prayer but also encompasses cultural identity and which is the heritage. PW1 stated in his evidence in Chief they used the Island since time immemorial for prayers. That they had about 3 distinct places they would go for prayers and on other Kaya issues. The cultural identity is another aspect of the Kaya and which is confirmed by law. The Gazette Notice was published pursuant to the Monuments and Antiquities Act Cap 215 (repealed). Indeed, it was not gazetted as an antique but a monument. The Act is an Act of Parliament to provide for the preservation of antiquities and monuments. Section 2 (d) thereof defines a “monument” as; -
- (d) a place or immovable structure of any age which, being of historical, cultural, scientific, architectural, technological or other human interest, has been and remains declared by the Minister under section 4(1)(a) to be a monument. and includes the site thereof and such adjoining land as may be required for maintenance thereof;
- 213 The definition also includes other human interest. To therefore posit that it is a place for prayer and peg this to the inconsistency alluded to, is to me a very narrow view of the Kaya as a Monument. It should be looked at from the heritage and culture perspectives. and there being no conflict demonstrated and which is the main pillar of the doctrine, the doctrine cannot apply. This court was referred to the case of *Martin Wand eri & 19 Others vs. Engineers Registration Board of Kenya & 5 Others* (2014) eKLR and which I have considered. The KWS and NMK each have distinct mandates as prescribed by statute



and preservation of Monuments is not one of KWS functions. It is my finding that the subsequent gazette of 1995 did not repeal the legal notice No. 200 of 1992 by implication.

- 214 Against the 9th defendant it is pleaded by the Plaintiff that with constructive knowledge of the subsisting public user they obtained the lease and which lease covers the same area as the 1st defendants titles Kwale/Kinondo Chale/103,118,119 and 146. The public user is derived from the Legal Notice No. 200 of 1992. Let me state further that the issue here is not whether the KWS were mandated by law to enter into contract with third parties such as in the lease with the 9th defendant. Or whether it is about the lease and not the 1st defendant's titles. To me it's the fidelity to the process and this is where the irregularity comes in. The challenge lies in the fact that for purposes of Legal Notice No. 200 of 1992 the land was not available for alienation for private purpose. This was information that was well within the knowledge of the KWS. It would also follow that for purposes of this gazette notice the area that is the subject of the leased portion measuring 1.71Ha ought to have been carved out so as to be degazetted for purposes of the lease to remove it from the ambit of the Legal Notice No. 200 of 1992. This is where consultation ought to have come in before the lease. Infact during cross examination by Ms. Wambugu Ms. Adipo confirmed KWS did not consult NMK since they do not consult when giving leases. Referring to the Planning Framework (pg 30) she conceded KWS was under obligation to consult NMK. Thirdly the lifting of the development moratorium through the Ministers letter dated 6/12/2006 was of no consequence for the reasons I have already stated.
- 215 The totality of the above in my view is that renders the lease between the 2nd Interested Party and the 9th defendant irregular. The 9th defendant contends that indeed the NMK was involved in the planned developments and gave its approvals which was not denied. The 9th defendant produced as part of his evidence the letter dated 18th July 2007 from Dr. Idle Farah, OGW then Director General of NMK. The court noted that in this letter the Director General approves the request for development with conditions to ensure conservation of the area. I agree with the 9th defendants counsel contention that this letter was never rebutted during the proceedings. It is important to note however that the basis of all these approvals is the Ministers letter dated 6/12/2006 which I stated was of no consequence in terms of making the land available for alienation for private use and lifting of the development moratorium.
- 216 I have noted the 9th defendants contention of legitimate expectation based on the existence of another hotel in the suit premises. Mr. Githinji PW5 informed the court that the Sands at Chale Hotel was established before the Gazette. This is corroborated by PW1 who according to his testimony was born in Chale in 1935 when he stated in cross examination by Mr. Gichuhi that the hotel was built over 20 to 30 years ago. Neither the 1st nor the 9th defendant tendered evidence to rebut this assertion. Moreover, the lease to the 9th defendant was obtained after the gazette of the Island . The claim for legitimate expectation cannot stand in my view.
- 217 Based on the foregoing I find no basis for sustaining the Lease entered between the 2nd Interested party and the 9th defendant. This court makes a finding that the same was issued irregularly.
- 218 The upshot of the foregoing is that the Plaintiff has on a balance of probability proved its case against the defendants and is entitled to the prayers sought. Consequently, the counterclaim filed by the 1st defendant fails.
- 219 I therefore enter judgement for the Plaintiff against the defendants jointly and severally and issue the following orders:-
- i. A declaration that the entry registering the 4th defendant as the initial proprietor of Title Nos. Kwale/Kinondo Chale/103, Kwale/Kinondo Chale/118, Kwale/Kinondo Chale/119 and Kwale/Kinondo Chale/146 on 7th March 2003 is null and void ab initio.



- ii. A declaration that Title No Kwale/Kinondo Chale 103 registered and issued to the 5th defendant on or about 10/3/2004 and subsequent transfer to the 1st defendant on or about 20/1/2006 is null and void for all intents and purposes.
- iii. A declaration that Title No Kwale/Kinondo/Chale/118 registered and issued to the 6th defendant on or about 12/3/2004 and subsequent transfer to the 1st defendant on or about 20/1/2006 is null and void for all intents and purposes.
- iv. A declaration that Title No Kwale/Kinondo Chale/119 registered and issued to the 7th defendant on or about 10/3/2004 and subsequent transfer to the 1st defendant on or about 18/1/2006 is null and void for all intents and purposes.
- v. A declaration that Title No Kwale/Kinondo Chale/146 registered and issued to the 8th defendant on or about 10/3/2004 and subsequent transfer to the 1st defendant on or about 18/1 2006 is null and void for all intents and purposes.
- vi. Further to [i]-[v] above, a declaration that the purported issuance of Title Nos Kwale/Kinondo Chale/103, Kwale/Kinondo Chale/118, Kwale/Kinondo Chale/119 and Kwale/Kinondo Chale/146 to the 5th, 6th, 7th and 8th defendants respectively and subsequent transfer to the 1st defendant was incapable of conferring any estate, interest or right in the suit property to the 1st defendant or any other person.
- vii. A declaration that all that parcel of land more particularly described as a portion of the park containing by measurement one decimal seven one Hectares[1.71ha] or thereabouts in the lease dated 15/5/2008 between the 2nd Interested Party and the 9th defendant was irregular and / or illegally issued and therefore null and void for all intents and purposes.
- viii. An order directing the 3rd defendant to rectify the register by cancellation of all entries relating to the issuance of the title in respect to Title Nos Kwale/Kinondo Chale/103, Kwale/Kinondo Chale/118, Kwale/Kinondo Chale/119 and Kwale/Kinondo Chale/146 made to the 1st Defendant.
- ix. An order for vacant possession of Title Nos Kwale/Kinondo Chale/103, Kwale/Kinondo Chale/118, Kwale/Kinondo Chale/119 and Kwale/Kinondo Chale/146.
- x. An order for a permanent injunction against the 1st defendant restraining her by herself, her agents or assigns from taking possession, trespassing upon, developing transferring leasing charging, wasting or in any other manner dealing with the parcel of land registered as Title Nos Kwale/Kinondo Chale/103, Kwale/Kinondo Chale/118, Kwale/Kinondo Chale/119 and Kwale/Kinondo Chale/146, otherwise than by way of surrender and /or transfer to the Government of Kenya.
- xi. Ordinarily costs follow the event but due to the public nature of the suit I will not make any orders as to costs.
- xii. This being a test suit the findings in this suit and the final orders shall apply mutatis mutand is in the following cases; -



	CASE NUMBER	CITATION
1	ELCC/92/2021	ETHICS and Anti-Corruption Commission vs David Ndirangu Mwangi and Hashim Got Sat and 6 Others
2	ELCC/93/2021	ETHICS and Anti-Corruption Commission vs Manmohan Kaur Kalsi and Hashim Got Sat and 8 Others
3	ELCC/148/2021	Ethics and Anti-Corruption Commission vs Mwalimu Alfani Mwaranduni and Hamad Hamisi Mwakapera and 5 Others
4	ELCC/149/2021	Ethics and Anti-Corruption Commission vs Mohamed Ali Chigoti and Stephen Ndungu Mairu and 4 Others
5	ELCC/150/2021	Ethics and Anti-Corruption Commission vs Hamisi Mohamed Godi and Abdalla Mohamed Mwatunu and 4 Others
6	ELCC/151/2021	Ethics and Anti-Corruption Commission vs Irmgard Helga Bickel and Masudi Said Shambi and 5 Others
7	ELCC/152/2021	Ethics and Anti-Corruption Commission vs Yusuf Mohamed Mwaranduni and Hashim Got Sat and 2 Others
8	ELCC/153/2021	Ethics and Anti-Corruption Commission vs Fatuma Hamisi Nduni and



		Jamila Masha Kalama and 3 Others
9	ELCC/154/2021	ETHICS and Anti-Corruption Commission vs Suleiman Said Mwakunepho and Khadimu Zuberi Kirenje and 5 Others
10	ELCC/155/2021	ETHICS and Anti-Corruption Commission vs Salim Lali Mohamed and Hashim Got Sat and 4 Others
11	ELCC/156A/2021	Ethics and Anti Corruption Commission vs Salimu Lali Mohamed and Hashim Got Sat and 2 others
12	ELCC/173/2021	Ethics and Anti-Corruption Commission vs Bernad O. Maira and Hashim Got Sat and 2 Others
13	ELCC/174/2021	Ethics and Anti-Corruption Commission vs Zahra Athman ALI and Hashim Got Sat and 2 Others
14	ELCC/181/2021	Ethics and Anti-Corruption Commission vs Juma Salimu Mwachei and Mohamed Salimu Mbongi and 3 Others
15	ELCC/183/2021	Ethics and Anti-Corruption Commission vs Mwanamkuu Salim and Hashim Got Sat and 2 Others
16	ELCC/184/2021	Ethics and Anti-Corruption Commission vs Mwanakombo Said Ndaro



		and Hashim Got Sat and 2 Others
17	ELCC/185/2021	Ethics and Anti-Corruption Commission vs Yolanda Joseren Firth and Hashim Got Sat and 2 Others
18	ELCC/187/2021	Ethics and Anti-Corruption Commission vs Inamwisho Bongo and Jonah Karubi Muraguri and 3 Others
19	ELCC/256/2021	Ethics and Anti-Corruption Commission vs Mohamed Mwalimu Mwarandani and Salimu Hamad Salimu and 3 Others
20	ELCC/258/2021	Ethics and Anti-Corruption Commission vs George Muriithi Kamongo and Mary Kai and 2 Others
21	ELCC/259/2021	Ethics and Anti-Corruption Commission vs Hamisi Salimu Mwamasumbi and Hashim Got Sat and 2 Others
22	ELCC/301/2021	Ethics and Anti-Corruption Commission vs Ali Mwatete Mwarandani and Asman Omari Yema and 3 Others
23	ELCC/302/2021	Ethics and Anti-Corruption Commission vs Yusuf Mahmoud Aboubakar and Hashim Got Sat and 2 Others
24	ELCC/303/2021	Ethics and Anti-Corruption Commission vs Stephen Njoroge Kungu



		and Hashim Got Sat and 3 Others
25	ELCC/304/2021	Ethics and Anti-Corruption Commission vs Hamad Zuberi Dzopheka and Hashim Got Sat and 3 Others
26	ELCC/308/2021	Ethics and Anti-Corruption Commission vs Teresia Muthoni Ndirangu and Hashim Got Sat and 2 Others
27	ELCC/309/2021	Ethics and Anti-Corruption Commission vs Donnacha Fahey and Hashim Got Sat and 3 Others
28	ELCC/312/2021	Ethics and Anti-Corruption Commission vs Said M. Mwinyi and Mohamed M. Hamisi and 3 Others
29	ELCC/313/2021	Ethics and Anti-Corruption Commission vs Hamad Ali Mwapishi and Hashim Got Sat and 2 Others
30	ELCC/314/2021	Ethics and Anti-Corruption Commission vs David Ndirangu Mwangi and Hashim Got Sat and 2 Others
31	ELCC/315/2021	Ethics and Anti-Corruption Commission vs David Ndirangu Mwangi and Hashim Got Sat and 4 Others
32	ELCC/316/2021	Ethics and Anti-Corruption Commission vs David Ndirangu Mwangi



		and Hashim Got Sat and 2 Others
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It is so ordered

Delivered and Dated at Kwale this 2nd Day of October 2023

A.E. DENA

JUDGE

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

Ms. Maina for the Plaintiff

Mr. Allen Gichuhi Senior Counsel for the for the 1st Defendant

Mr. Aziz for 2nd Defendant/Respondent

Mr. Penda H/B for Ms. Opio for 3rd, 4th Defendants/Respondents and 1st Interested Parties

Mr. Mungai for the 5th Defendant

Abubakar the 6th, 7th and 8th Defendant

Mr. Wafula for the 9th Defendant

N/A for the 2nd Interested Party

Mr. Daniel Disii - Court Assistant.

Page | 25 ELC SUIT NO 93 OF 2021 LADY JUSTICE A.E. DENA

