



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. 17 OF 2018

IN THE MATTER OF: ARTICLES NOS. 10, 22, 23, 25, 27, 28, 40, 47, 67 AND 258 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: SECTION 13 OF THE ENVIRONMENT AND LAND COURT ACT, 2011

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF THE BILL OF RIGHTS UNDER ARTICLES 23(1) & (3), 40(3) AND 47 (1) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: THE NATIONAL LAND COMMISSION ACT NO. 5 OF 2012

AND

IN THE MATTER OF: LAND ACT NO. 6 OF 2012

BETWEEN

1. THERESIA RUNJI

2. MARIETA GITONGA CHEGE

3. NAOMI KIIO

4. SAMMY M. KARA.....PETITIONERS

VERSUS

NATIONAL LAND COMMISSION.....RESPONDENT

MIRITINI FREE PORT LIMITED.....INTERESTED PARTY

JUDGMENT

The Petition

1. The petition herein dated 13/2/18 prays for the following orders: -

i) That the Respondent abused their statutory powers in refusing to compensate the Petitioners.

(ii) An order directing the Respondent, to forthwith tabulate, assesses and compensate the petitioners the value of their property **Plot No. 3912 and 3913/VI/MN** as at **July 2000**.

(iii) An order that the petitioner is entitled to interest, and any other damages applicable in law on the compensation to be awarded by the Respondent from the date provided in Law until payment in full at Commercial rates.

(iv) Costs of the petition be borne by the Respondent.

(v) That the Honourable Court do make any other orders that it may deem necessary in the interest of justice.

2. The Petitioners' case is that they were originally allocated the parcel of land known as Plot No. 3912 and Plot No. 3913 Section VI MN, FR/312/162 by the Kenya Government as compensation after eviction from Sheikh Sayed Children's Centre Bombolulu Mombasa. The said allocation was vide Part Development Plan No. 12.3.CT. 121.96. That the parcel of land known as Plot No. 3913/VI/MN measures 2.0 hectares whereas the parcel of land known as Plot No. 3912/VI/MN measures 1.997 hectares hence a total 3.997 Ha. The alleged allocation was as a result of the resettlement exercise following eviction of the Petitioners with others from parcels of land situated in Bombolulu, Mombasa and which was allocated to the President of the United Arab Emirates for the purpose of building an orphanage for Muslim children in Mombasa. The Petitioners state that in consideration of the Petitioners vacating the said land at Bombolulu, the Commissioner of Lands allocated the Petitioners the two parcels of land known as Plot No. 3912 and Plot No. 3913 Section/ VI/MN. The two parcels of land were allocated for industrial use in 1996. The 1st and 4th Petitioners were issued with allotment letters for Plot No. 3912 and 3913 Section/VI/MN vide letter of Allotment Ref No. 90750/XIV dated 27th July 2000. The Petitioners aver that they had the legitimate expectation that the then Commissioner of Lands would issue titles to them relating to the said two parcels. However, the Petitioners were shocked to learn that the Commissioner of Lands cancelled their survey plan without informing the Petitioners or obtaining their consent regarding the same and allocated the said plots to other parties, to wit, Miqdad Enterprises. Consequently, the said Plot No. 3912 and Plot No. 3913 Section/VI/MN, FR/312/162 were consolidated into Plot Number 4688/V/MN and thereafter consolidated to make Plot Number 4805/VI/MN. The Petitioners aver that the net effect of such consolidation was a total violation of the 1st and 4th Petitioners constitutional rights relating to the protection of their property rights. The same were unlawfully gifted by the Commissioner of Lands to Miritini Free Port Limited. Subsequently, the Petitioners moved the court vide an application dated 20th November, 2007 in **HC Misc Civil Application Number 318 of 1996, Elizabeth Mundingi & 7 others versus The Attorney General and The Commissioner for Lands** for orders that the Commissioner of Lands be restrained from registering Grant of Plot Number 4688/VI/MN in the name of Miqdad Enterprises. The said orders were granted on 28th November, 2008 and served upon the Commissioner of Lands. However, in blatant violation of the said Court order dated 28th November 2008, the Commissioner of Lands registered Plot number 4688/VI/MN in the name of Miqdad Enterprises, who later sold it to Miritini Free Port Limited.

3. The said Martini Free Port Limited who was also the registered owner of the Parcel of Land known as LR. NO. MN/VI/468 and situate at Miritini area of Mombasa County proceeded to consolidate the (2) Plots of land known as Plot No. 3912 and 3913/VI/MN with Plot No. L.R. No. MN/VI/4688 so as to create Plot No. MN/VI/4805.

4. It is alleged that on or about the 9th January 2015, the Respondent by a Gazette Notice No. 149 dated the 7th January 2015, which was published under the authority of the Government of Kenya on behalf of the Respondent, informed the Public that the Government of Kenya intended to acquire (22.11 Ha) from the suit property LR. NO. MN/VI/4805 for purposes of construction of the Mombasa-Nairobi Standard Gauge Railway. Subsequently Miritini Free Port was awarded a sum of Kshs. 1,475,486,485/= plus the further interruption award of Kshs. 360,000,000/=. The Petitioners aver this award was fundamentally flawed as the Respondent was and is aware that Miritini Free Port Limited was not and is not the absolute owner of all the said parcel of land being Plot No. MN/VI/4805

5. The Petitioners aver that the suit property herein was the subject of inquiry at Public Hearings in Mombasa conducted by the Respondent who vide its ruling dated the 1st December 2015, confirmed that the same was lawfully acquired by the Miritini Free Port Limited. The above awards were made after the said Public hearing. The Miritini Free Port Limited accepted the award made by the Respondent and supplied details of its bank account into which the money was to be deposited. The Petitioners allege that they became aware of such award only after the same was covered in a news report in one of the local dailies. The Petitioners state that they made several follow ups and have written several letters to the Respondent demanding payment, but the Respondent has ignored the Petitioners' demand. Later, the Respondent invited the Petitioners to Nairobi to discuss the issue of compensation and no formal agreement has ever been reached so far.

6. The Petitioner avers that it is on the strength of stolen property that the Miritini Free Port Limited, the Interested Party herein, received compensation for Kshs. 1,475,486,485/= for 91.09 Ha of land contained in plot No. 4805/VI/MN which is a consolidation of various plots including the Petitioners' property (plot Nos. 3912 and 3913/VI/MN).

7. The Petitioners aver that the failure by the Respondent to promptly compensate the Petitioners for the said acquisition of their land is a clear violation of the Petitioner's rights as set out in the Constitution. The Petitioners now claim their rightful share in the suit property and hence this Petition.

8. The petition is supported by affidavit of Marieta Gitonga Chege sworn on 13/2/18, a supplementary affidavit sworn on 20/5/19 and a further affidavit sworn by Joseph Mbugua Gichanga on 13/6/19.

The Respondent

9. The Respondent opposes the petition through grounds of opposition dated and filed herein on 15/11/18. The Respondent states that this Court is devoid of original jurisdiction to hear and determine the issues raised in the Petition dated 13th February 2018, stating that the matters raised in the suit herein fall within the exclusive jurisdiction of the Respondent herein in line with the Provisions of Section 112(1) and (5) of the Land Act. Section 112(5) of the Land Act vests the Respondent, at the first instance, original jurisdiction, to hear and determine claims for compensation arising out of compulsory acquisition of land. The Respondent states that this Court is only clothed with Appellate jurisdiction to hear and determine issues relating to compensation following a decision made by the Respondent.

10. Further the Respondent states that the Petitioners have not adduced evidence to show that the suit properties, being **Plot No. 3912** and **Plot No. 3913 Section/VI/MN** are subject of any compulsory acquisition by Government, or that L.R. 4805/VI/MN was formed as a result of amalgamation of **Plot No. 3912** and **Plot No. 3913 Section/VI/MN**, and that no survey plans have been adduced to this effect.

11. The Respondent avers that Section 14 of the National Land Commission Act vests the Respondent with jurisdiction to determine the legality of all grants and dispositions of public land either on its own motion or upon receipt of a complaint. That the legality of the grant over all that parcel of land known as **L.R 4805/VI/MN** has been determined by the Respondent to have been acquired in a lawful manner in line with its mandate under Section 14 of the National Land Commission Act. The Petitioners have not adduced any evidence to show that the above decision has been appealed against and stayed, varied or set aside by a court of appellate jurisdiction. The Respondent states that if the orders sought in the Petition are issued, it would amount to double compensation thus amounting to loss of public funds. This would run contrary to the provisions of Article 201(d) of the Constitution which provides that public funds shall be used in a prudent and responsible way.

12. The Respondent also filed a replying affidavit sworn by Brian Ikol on 27/5/19, stating that under Part Eight of the Land Act, the Respondent is the body duly vested with authority to compulsorily acquire land required for public purpose or public use on behalf of the National or County Government. Pursuant to these mandate the Respondent under Part Eight of the Land Act, undertook compulsory acquisition of 22,115ha out of all that parcel of land known as **MN/VI/4805** required for construction of Phase 1 of the Standard Gauge Railway from Mombasa to Nairobi. That **MN/VI/4805** is a grant of public land measuring approximately 91.09Ha and is registered in favour of Miritini Free Ports Limited, the interested Party herein, on a leasehold term of 99 years w.e.f. 1st December, 1994. The Respondent avers that the process of acquisition commenced through publication of notice of intention to acquire vide gazette notice number 6055 of 29th August 2014. As part of the acquisition process the Respondent physically inspected the area and held inquiries of compensation on 11th May, 2015 to hear and determine issues of propriety and claims for compensation by persons interested in the land. Inquiries of compensation were held following publication of notice of inquiry vide gazette notice No. 2740 of 25th April 2015 in accordance with Section 112 of the Land Act.

13. The Respondent states that in addition to the functions denoted to it under the Constitution, the Respondent is also mandated under section 14 of the National Land Commission Act **to review all grants and dispositions of public land**, either on its own motion or upon receipt of a complaint with a view to establish their legality or propriety. In the exercise of this mandate the Respondent operates as a quasi-judicial body within the full meaning of Article 169(1) of the constitution and the procedure for carrying out this mandate is clearly set out under section 14 of the National Land Commission Act. The Respondent reviewed the suit property. The decision to review the legality of this grant was made following a complaint made by the County Government of Mombasa alleging that the grant was acquired in an unlawful manner. This complaint was lodged whilst the Respondent was on the process of compulsorily acquiring portion of the suit property for purpose of construction of the Standard Gauge Railway.

14. The Respondent states that before undertaking review under Section 14 of the National Land Commission Act, the Respondent is required under section 14(3) to give every person who appears to have an interest in the grant or disposition concerned, a notice of such review and an opportunity to appear before the Respondent and to inspect any relevant documents. The Respondent duly gave relevant notices pursuant to which all parties who appeared before the Respondent with claims over the said suit property, were accorded fair opportunity to put forward their case and present all the relevant documents in their possession for inspection by the Respondent. The Respondent avers that the Petitioners did not show up to state their claim or submit their relevant documents in support of their claim and participate in the Respondent's proceedings. The Respondent avers that having heard the submissions of all parties who appeared before the Respondent, reviewed all materials placed before it, undertaken investigations and reviewed the documents held by the Ministry of Lands at the lands record's registry, the Respondent in line with section 14(4) made a finding upholding the legality of the grant to the suit property in question. The Respondent states that the determination of the Commission, in respect of each of the suit properties, was ultimately made vide various rulings dated 1st December 2015 as appears in the Petitioner's exhibit appearing at page 69 in the Affidavit of Marieta Gitonga Chege sworn 13th February 2019. Following upholding of the legality of MN/VI/4805 the Respondent proceeded to issue the interested Party with an award of compensation dated 15th December 2015.

15. The Respondent's case is that in the exercise of its mandate under Section 14 of the National Land Commission Act, the Respondent has quasi-judicial powers which gives finality to its decisions. Therefore, any person not satisfied with the determination of the Respondent in this case the Petitioners, the only available recourse is the right of appeal in line with Section 30(1) of the National Land Commission (Review of Grants and Dispositions of Public Land) Regulations 2017. The Respondent avers that the current proceedings in the form of a Petition are attempt at substituting the findings of the Respondent with the opinion of the Court.

The Interested Party

16. On 12/3/19 upon application by the Respondent's counsel Mr. Wahome, the interested party was jointed to these proceedings in that capacity. They oppose the petition through a Replying Affidavit sworn by Joseph Mwella on 27/5/19.

17. The deponent is the Interested Party's legal officer. The interested party's case is that vide the Kenya Gazette Notice No. 951 of 19th February 2016, the Respondent herein set out the intent to compulsorily acquire the suit property herein, *inter-a-lia*, pursuant to the provisions of section 162 (2) of the Land Act 2012, for the purposes of the construction of Mombasa Southern Bypass road. Upon issuance of the Gazette Notice aforesaid, the Respondent received a complaint from the County Government of Mombasa to review the legality and/or propriety of the grants in in respect of the suit property herein among other parcels. Pursuant to the complaint, the Respondent issued a Public Notice in the dailies on the 27th July 2015, inviting all interested parties to attend Public hearing in respect of the subject properties at the Kenya School of Government in Mombasa between the 3rd and 6th August 2015 when the Commission heard representations from all interested parties including the Interested Party herein. After hearing the submissions of the parties, the Respondent undertook investigations and reviewed the documents at the Land Records at the Mistry of Land, Housing and Urban Development, and made the determinations in its award dated the 1st December 2015 (see annexure "JM-5") stating:

- i) That the interested Party purchased the suit properties from various owners after conducting due diligence of the Lands record.
- ii) That no information was submitted to confirm that the first allottees unlawfully acquired the land.
- iii) That the Interested Party is therefore the registered owner of all those referenced parcels **LR. No. MN/VI/3818, MN/VI/4412, MN/VI/4413, MN/VI/4688** that were subsequently consolidated to form one parcel, to wit, **MN/VI/4805**.
- iv) That the title of Miritini Free Port Ltd is hereby upheld and should be regularised.

18. The Interested Party avers that the Respondent's award in favour of the Interested Party has not been contested and/or appealed against by the Petitioners herein and/or by any other party claiming an interest therein and thus the same remains undisturbed.

19. Consequently to the foregoing, the Interested Party states that it moved to Court vide **Mombasa ELC Petition No. 170 of 2016** to compel the Respondents therein, including the National Land Commission, to pay up the compensation as awarded. Vide an application dated the **30th August 2016**, the Petitioners herein sought to be joined in the proceedings therein, only to later withdraw their application aforesaid. The Interested Party avers that the Petitioners lost opportunity to challenge the award and cannot now claim the suit property in the Constitutional Court. Further, the Petitioners lost a chance to vindicate their right in Petition 170 of 2016, aforesaid.

20. The Interested Party states that a party can only avail himself of a Constitutional Petition in the absence of an effective, alternative remedy, and which is not the case herein as the Petitioners squandered several opportunities to have their alleged claims redressed and determined before the proper, lawful authorities, to wit, the National Land Commission and the Environment and Land Court. Consequently, the current petition is but an abuse of the due process of Court, is a cropper and the prayers sought therein incapable of being granted by this Court in the circumstances.

21. The Interested Party avers that in any event they do not know why they have been joined to these proceedings since they are not in a position to grant the orders sought in the petition, and that they have not violated any of the Petitioners alleged rights. The Interested Party urged the Court to dismiss the petition with costs.

Submissions

22. The petition was canvassed by way of written submissions. The Petitioners were represented by Mr. Gikandi Ngibuini learned counsel; the Respondent by Mr. Wahome learned counsel; and the Interested Party by Michael Oloo, learned counsel.

The Determination

23. I have carefully considered the petition herein and submissions of counsel. In my view the following issues arise for determination:

- (i) Whether the suit property belongs to the Petitioners;
 - (ii) Whether the Petitioners are estopped from challenging the Respondent's determination made on 1.12.15;
 - (iii) Whether rights have been violated.
- (iv) Whether Petitioners are entitled to compensation;

(i) Whether the suit property belongs to the Petitioners

24. On the 10.9.96 this Court by consent of parties in HC MISC. Civil Application No. 318 of 1996 having recognized the Petitioners as the lawful allottees of the PDP Nos. 32,110, 112 and 121 ordered and directed that the said allotments be changed from Industrial to Residential use. The Court further waived the stand premium accrued on the allotment. However, the said Court order was ignored by the Commissioner of Lands. Subsequently, however allotment letters were then re-issued to the 1st to 4th petitioners on the 27th July 2000 vide letter of allotment ref. no. 90750/XIV in relation to plot 3912 and 3913 Section VI/MN.

25. Further, on the 16.11.05, this Court by consent of the parties ordered the Commissioner of Lands to comply with its orders issued on the 10.9.96 and directed that the Petitioners who were covered by the PDP's Nos. 32,110, 112 and 121 (now plots 3912, 3913,3914,3915,3871 to 3881) Section VI/MN be granted leave to deposit the money payable to the Commissioner of Lands and the Registrar of Titles accrued on account of those allotments.

26. The Commissioner of Land still was in blatant disobedience of the Court order issued on the 10th September 1996 and frustrated the process that would eventually lead to the issuance of title deed to the Petitioners. Unknown to the petitioners, the existing survey on the Petitioners' plots was cancelled in favour of another survey that had been authenticated on the 9th November 2007 which consolidated the two plots 3912 and 3913 Section VI/MN into MN/VI/ 4688.

27. When the Petitioners got wind of the Commissioner of Land's intention of depriving them of their allotted plots, they moved this Court on the 20th November 2007, in HC MISC. Civil Application no. 318 of 1996 for orders to restrain the Commissioner of lands from registering any grant of plot. No 4688/ Section VI/MN (consolidated). After hearing the Application, an interim conservatory order was issued restraining the Commissioner of Land, pending hearing of the Petitioners' application on the 19.12.07, and status quo prevailing on

the 20th November 2007 was to be maintained.

28. In blatant disregard of Court orders issued on the 28.11.07, two days before the hearing of the Petitioners' application dated 20.11.07, the Commissioner of Lands via letter dated 17.12.07 directed the registration of plot. No 4688/ Section VI/MN in favour of Miqdad Enterprises and the same was effected and a grant issued. It is therefore clear that the registration of Miqdad Enterprises as the lawful or registered owner of the said plots 3912 and 3913 was irregular, unlawful and the same was done in violation of a court order. This illegality notwithstanding the said Miqdad went ahead to purport to sell to the Interested Party the same suit premises. The Interested Party then purported to acquire the suit premises, which it duly presented to the Respondent for use for the purposes of the SGR in exchange of the money compensation.

29. In the meantime, during the process of the hearings for compensation, the County Government of Mombasa vide letter dated 17.5.17, informed the Respondent herein that LR. No. MN/VI/3912 & 3913 belonged to the Petitioners and recommended that the Petitioners be compensated, or the said parcels of land revert back to the Petitioners.

30. The Attorney General on many occasions has reminded the Commissioner of Lands of the aforementioned Court orders. Just to mention a few reminders; on 17.10.05 and 3.4.14, the Attorney General urged the Commissioner of Lands to obey the Court order by **Justice Angawa** issued on the 10.9.96 and Court order dated 16.11.05. the Attorney General pointed out that the said orders had never been varied and or set aside and the argument that the Petitioners had squandered the opportunity to have the suit properties registered in their name was misleading as the letter of allotment dated 27.7.00 superseded the letter of allotment dated 26.4.96.

31. Further it is not that the Respondent did not know the truth about ownership of the suit lands. The Respondent through its letter dated 22nd September 2014 addressed to the County Land Administration Officer and to the Secretary, Mombasa County Land Management Board sought certain confirmation regarding the Petitioner's claim herein. Further, the Respondent through the County Coordinator by is letter dated 23rd May 2017 requested confirmation from Petitioners by way of a sworn affidavit, that they were the owners of the suit plots. Marieta Gitonga the 2nd Petitioner herein, swore an affidavit on 26th May 2017 on behalf of the other Petitioners. The same was delivered to the Respondent's offices and was acknowledged as received. Further, the Respondents County Coordinator's letter dated 26th May 2017 and the County Executive Member, County Government of Mombasa letter dated 17th May 2017 are on record. These letters confirm that the Petitioners were allocated land vide PDP No. 12.3.CT 121.96 later surveyed to Plot No. 3912 and 3913 Section VI MN (FR 312/162). The Petitioners obtained allotment letters for the said parcels of land. However, as the same were of industrial use, the Petitioners vide Mombasa HCCC No. 318 of 1996 moved the court for orders of change of user and the waiver of the stand premiums. These orders were granted on 10th September, 1996. Allotment letters were thereafter issued to the Petitioners for their respective plots on 27th July, 2000. Despite such issuance, survey number FR 312/162 was later cancelled on 14th November, 2007 by another Survey namely; FR No. 470/118. Aggrieved by such cancellation the Petitioners moved the court for restraining orders and obtained the same from **Hon. Justice Maraga** (as he then was) on 28th November, 2007. The said order restrained the registration of Plot Number MN/VI/4688 to Migdad Enterprises Limited. Despite such orders, plot number MN/VI/4688 was thereafter issued and the same was on 9th November 2007 registered to Migdad Enterprises Limited. It is clear that the said property known as Plot Number MN/VI/4688 illegally encompassed Plot No. MN/VI/3912 and Plot No. MN/VI/3913. Record shows that the said Plot Number MN/VI/4688 was later consolidated into Plot No. MN/VI/4805 vide survey F/R 359/49. The said Plot No. MN/VI/4805 consolidated three (3) other plots including Plot Number MN/VI/4688 which contained Plot No. MN/VI/3912 and MN/VI/3913. The said Plot No. 4805/VI/MN is registered in the name of Miritini Free Port Ltd. Interestingly, the Respondent in its letter of 1st December, 2015 referenced NLC/Chairman/VOL/XIII/275 indicated that "Miritini Free Port Ltd purchased Plot No. MN/VI/4688 from Migdad Enterprises Limited who were in possession of an allotment letter." It is clear that Migdad Enterprises Ltd had no allotment letter in the first place for the plots of land known as Plot No. 3912 and 3913/VI/MN respectively. Whereas the Respondent had earlier acknowledged on 22nd September 2014 that compensation for Plot No. MN/VI/3912 and MN/VI/3913 was due, it defeats both logic and justice how it came to be that Plot No. MN/VI/4805 was due for determination for review without including the views of and or compensation to the Petitioners who rightfully own Plot No. MN/VI/3912 and MN/VI/3913 (which is now part of Plot No. MN/VI/4805).

32. It is the finding of this Court that the purported registration of the grant to Miqdad Enterprises in stark disobedience of Court orders aforesaid rendered any action taken by the Commissioner of Lands in violation of the said Court orders a nullity and of no effect ab initio with the result that currently part of LR 4805/VI/MN still belong to the Petitioners.

33. In **Central Bank of Kenya & Another vs. Ratilal Automobiles Limited & Others Civil Application No. Nai. 247 of 2006**, the Court of Appeal held as follows:

"Judicial power in Kenya vests in the Courts and other tribunals established under the Constitution and that it is a fundamental tenet of the rule of law that court orders must be obeyed and it is not open to any person or persons to choose whether or not to comply with or to ignore such orders as directed to him or them by a Court of law. The consequences of failure to obey Court orders are that any action taken in breach of the court order is a nullity and of no effect."

34. This Court is dismayed that Kshs. 1,475,486,485/= plus a further sum of Kshs. 360,000,000/= was awarded to the Interested Party herein as compensation for compulsory acquisition for part of the suit property without factoring in the Petitioners' interests. My understanding is that this money has already been disbursed. The Petitioners are left without land. Justice demands that the Petitioners be justly and promptly compensated for the loss of their land. This Court finds and holds that the determination given by the Respondent on 1.12.15, to the extent that it did not include or consider the interests of the Petitioners is unconstitutional as it was reached without hearing the Petitioners. It also amounted to abuse of office as it was reached in complete disregard of the Respondent's own previous findings. The Petitioners have in my view established their right to approach this Constitutional Court for redress, for the loss of their property being plot Nos. MN/VI/3912 and MN/VI/3913 total area (3.997) Ha.

(ii) Whether the Petitioners are estopped from challenging the Respondent decision.

35. Counsel for The Respondent submitted that it gave everyone an opportunity to appear before it and present their claims over the suit property as required under Section 14(3) of the National Land Commission Act after receiving a complaint from the County Government of Mombasa. The Petitioners herein did not appear before it and in exercise of its quasi-judicial function it delivered its finding vide a ruling dated 1st December 2015 upholding the legality of MN/VI/4805 and the Interested Party was issued with an award of compensation dated 15th December 2015.

36. This Court as a Court of justice and equity is under Article 23(1) and Article 165(3) (a) & (b) mandated to entertain, determine and grant the reliefs being sought by the Petitioners.

Article 23.

(1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

Article 165 (3) (a) & (b) of the Constitution

(3) Subject to clause (5), the High Court shall have—

(a) Unlimited original jurisdiction in criminal and civil matters;

37. The Court of Appeal in **LTI Kisii Safari Inns Ltd & 2 others vs. Deutsche Investitions-Und Entwicklungsgellschaft ('Deg') & others [2011] eKLR** held as follows...

“It is regrettable that despite these lamentations, the learned Judge did not render justice between the parties according to law. It is not enough for a court of law to tell a victim of injustice that a wrong had been perpetrated against him without offering a remedy. It is a maxim of equity that Equity will not suffer a wrong to be without a remedy. The idea expressed in this maxim is that no wrong should be allowed to go unredressed if it is capable of being remedied by courts of justice. See Snell’s Equity 23rd Edn page 28.”

38. Similarly, in **Kanyi vs. Muthiora [1984] KLR 712** it was observed thus:

“This Court is a court of law and a court of equity; Equity shall suffer no wrong without a remedy; no man shall benefit from his own wrong doing; and equity detests unjust enrichment. This Court is bound to deliver substantive rather than technical and procedural justice. The relief, orders and directions given in this judgment are aimed at delivery of substantive justice to all parties having legal and equitable interest in the suit property.”

39. It is a fact that vide letter dated 22.9.14 the Respondent was aware that the Petitioners had a claim of ownership on the suit property and it raises eyebrows why the Respondent opted to issue a notice of their intention to acquire exclusively in the Kenya gazette yet the Respondent was aware that the petitioners existed and it would have been best to undertake personal service upon them as a gazette notice alone in my view was not adequate notice.

Section 107 of the Land Act provides as follows.

(1) Whenever the national or county government is satisfied that it may be necessary to acquire some particular land under section 110, the respective Cabinet Secretary or the County Executive Committee Member shall submit a request for acquisition of public land to the Commission to acquire the land on its behalf.

...

(5) Upon approval of a request under subsection(1), the Commission shall publish a notice to that effect in the Gazette and the county Gazette, and shall deliver a copy of the notice to the Registrar and every person who appears to the Commission to be interested in the land.

40. Under Section 107(5) of the Land Act, the National Land Commission must publish in the gazette a notice of the intention to acquire the land. The notice is also to be delivered to the Registrar as well as every person who appears to have an interest in the land.

41. In this matter the Respondent has always been aware that the petitioners had claimed to have an interest in the suit property but no notice was served upon the petitioners informing them of the intention by the government to compulsorily acquire their land.

42. In **Sceneries Limited vs. National Land Commission [2017] eKLR**, the court held that

“... Failure to give proper notice is in itself a denial of natural justice and fairness...’ In the present case the respondent contends that the gazette notice is adequate notice to the appellant. I disagree with the respondent in respect of the mode of service. It neither qualifies as adequate notice under the Land Act and does not comply with the principles of natural justice.”

43. The lack of adequate notice notwithstanding the Respondent together with the Interested Party aver that since the 1st Respondent has already made a determination on the ownership of the disputed suit property, this Court has no jurisdiction to interfere with that determination. That position may be right. However, there are three militating factors about that determination. The first is that the said determination was made in a process where the Petitioners were not parties and therefore the Petitioners had no opportunity to challenge the same. The Petitioners only found out about the fact that their property had unlawfully been given to the Interested Party almost two years after the award was made. In those circumstances the Petitioners could not go back to the Respondent's Tribunal to open up the determination proceedings. Given that the Petitioners' constitutionally guaranteed property rights were taken away unprocedurally by the Respondent, the only avenue now open for the Petitioners were these constitutional petition proceedings where they are able to demonstrate that their rights were violated in the said process, and hope to be constitutionally vindicated.

44. The second reason is that the proceedings leading to the said determination by the Respondent were so biased, and so lopsided with the only clear objective of denying the Petitioners their rights. On the face of the record, there was no justification at all why a responsible Tribunal could arrive at an unjust determination when every record before it shows otherwise.

45. The third reason is that following the aforesaid determination by the Respondent dated 1.12.15, the County Government of Mombasa raised a red flag about the occasioned injustice in response to the Respondent's letter dated 22.9.14 which had sought for the confirmation that the Petitioners were indeed the owners of the disputed part of the suit property. The Respondent's determination proceedings were deemed re-opened by:

- the letter from the County Government of Mombasa dated 17.5.17 which recommended to the Respondent that the Petitioners should be fully compensated.
- Ministry of Lands and Physical Planning letter dated 22.5.17 which also confirmed that the Petitioners were the original allottees of the suit property.
- A letter from the Presidency, Ministry of Interior and Coordination of National Government dated 17.5.17 enquiring about the position on the matter.
- Lastly, and this is very instructive in determining the place of the said determination of the Respondent, a letter by the Respondent dated 26.5.17. This detailed letter written by Mr. Edward Bosire, the National Land Commission County Coordinator, Mombasa, states as follows in its conclusion:

“From the foregoing the following facts are derived:

- 1. That the said persons were in the original list of the squatters that were evicted from Sheikh Zayed Children's Center.**
- 2. That the size of land occupied by Sheikh Zeyed Children Center is 8.2 Ha.**
- 3. The number of squatters who were evicted from Sheikh Zayed Children Center is eighteen families according to the copy of the letter addressed to the District Commissioner Mombasa Ref SF/KIS/LND/1/106 of 19th September 1994 by the then Area District Officer Kisauni Division. However, according to the sworn affidavit the squatters comprised around 45 families.**
- 4. That His Highness Sheikh Zayed offered the squatters Kshs. 60,000 as compensation for demolition of their homes and that the Government of Kenya offered to resettle them at Miritini area of Mombasa and that neither of the above was implemented (according to the affidavit).**
- 5. That the four squatters: Theresa Runji, Sammy Macharia Kara, Naomi Kio and Marieta Gitonga were never given any kind of compensation. But Christopher Kuria and J. M. Gichanga were given alternative land and they are not demanding any compensation.**
- 6. That the said squatters have not benefitted from any squatters settlement scheme.**

“owing to the above and subject to the accuracy of the above reports and facts I do recommend, therefore, that the squatters be considered for a just and fair compensation.”

This letter alone, in my view, settles once for all not only the issue of ownership of the suit property but more importantly the issue of the respondent's determination and whether it can be re-opened.

46. By stating that:

“owing to the above and subject to the accuracy of the above reports and facts I do recommend, therefore, that the squatters be considered for a just and fair compensation”,

the Respondent is tacitly acknowledging that its determination of 1.12.15 is opened to allow a “*just and fair*” compensation.

47. This being the case it is the finding hereof, and I so hold, that the aforesaid determination process has been re-opened to facilitate a fair

and just compensation, which must necessarily involve the Petitioners. To avoid any doubt, that process is hereby re-opened by this Court, and shall include the Petitioners, to facilitate a just and fair compensation.

(iii) Whether the Petitioner's rights were violated

48. From the foregoing, it is clear that the disputed part of the suit property belonged to the Petitioners. The purported registration of the same to Miqdad Enterprises was illegal since the registration was done in violation of court order. Further, proceedings by the Respondent which led to its determination of 1.12.15 as regards the disputed part of the suit plots were illegal because the lawful owners of the said disputed plots were not involved, and no notice was issued to them to join the proceedings as required by law. The said proceedings as related to the disputed parts of the suit property were therefore a nullity *ab-initio* and this fact has now been confirmed by the Respondent itself who in its letter dated 26.5.17 has called for a "*fair and just compensation*" to the Petitioners. This by necessary implication impugns the said determination, to the extent of the disputed part of the suit property.

(iv) Whether the Petitioners are entitled to compensation.

49. It is a fact that the Petitioners were allotted the suit properties in exchange of their land that had been acquired by the government for the setting up of Sheikh Sayed Children's Centre and the allotted suit properties were illegally allotted to Miqdad Enterprises by the Commissioner of Lands in blatant violation of Court orders leaving the Petitioners landless which was in violation of their right to under Article 40(3) of the Constitution. As a result, it is the finding of this Court that the Respondent ought to be held liable for that violation. It is also the finding of this Court that had the Respondent conducted due diligence as required of it under Section 107(8) which provides that all land to be compulsorily acquired shall be geo-referenced and authenticated by the office or authority responsible for survey at both the national and county government, then it would have established that indeed the suit properties belonged to the Petitioners.

50. In Gami Properties Limited vs. National Land Commission [2017] eKLR

"Under Section 107 of the Land Act, the National Land Commission (the 1st Respondent herein) is ordinarily prompted by the national or county government through the Cabinet Secretary or County Executive member respectively. The land must be acquired for a public purpose or in public interest as dictated by Article 40(3) of the Constitution. In our view, the threshold must be met: the reason for the acquisition must not be remote or fanciful. The National Land Commission needs to be satisfied in these respects and this it can do by undertaking the necessary diligent inquiries including interviewing the body intending to acquire the property..."

As part of the National Land Commission's due diligence strategy, the National Land Commission must also ensure that the land to be acquired is authenticated by the survey department for the rather obvious reason that the owner be identified. In the course of such inquiries, the National Land Commission is also to inspect the land and do all things as may be necessary to ascertain whether the land is suitable for the intended purpose: see Section 108 of the Land Act."

51. Similarly in National Land Commission vs. Afrison Export Import Limited & 10 others [2019] eKLR it was held as follows:

"it is necessary for one to take further steps to ascertain the authenticity of the search and ownership of the land. If the Applicant had bothered to delve into the history of the title, it would have discovered that the title had two mortgages besides other entries in the register and the other transactions in respect of L. R. No. 7879/4 which were not noted on the register. We appreciate the fact that searches are generated by the Registrar of Titles but the Applicant being the National Land Commission which works closely with the Ministry of Lands under which the Registrar falls, the Applicant should have, in the spirit of the Advisory Opinion of the Supreme Court In the matter of National Land Commission [2015] eKLR gone a step further to ascertain the true status of the title to the land in question."

52. The upshot is that the Petitioners have suffered serious constitutional violation of guaranteed rights for which they are entitled to compensation. However, this compensation shall be factored into the compensation process for the disputed part of the suit property.

53. I cannot conclude this Judgment without making a comment on the undisputed part of the suit property, and the interest of the Interested Party herein. There is clear and unchallenged evidence that the Interested Party herein remains the registered owner of the undisputed part of the suit property. There has been no dispute on that part of the suit property. This therefore means that the determination of the Respondent dated 1.12.15 to the extent that it relates to the undisputed part of the suit property is unchallenged. The Interested Party joined these proceedings to protect its interests. Since there is no evidence of any claimant in respect of the undisputed part of the suit property except the Interested Party the Respondent is at liberty to sever its determination dated 1.12.15 to safeguard the interest of the Interested Party in as far as the undisputed part of the suit property is concerned.

54. In conclusion this Court finds and holds that the petition herein has been proved on a balance of probability, and that the Petitioners are entitled to orders, which I grant as follows:

i) That the Respondent abused their statutory powers in refusing to compensate the Petitioners.

(ii) An order directing the Respondent, to forthwith tabulate, assesses and compensate the Petitioners the value of their property **Plot Nos. 3912 and 3913/VI/MN** (being the disputed part of the suit property Plot No. MN/VI/4805) as at the date of lawful acquisition plus interests thereon at commercial rates.

(iii) An order that the Petitioner is entitled to damages pursuant to **paragraph 52** herein as part of the compensation to be awarded by the Respondent from the date of lawful acquisition until payment in full with interests thereon at commercial rates.

(iv) For avoidance of doubt, this Judgment relates only to part of the suit property being **plot Nos. 3912 and 3913/VI/MN** (being 3.997 Ha.) claimed by the Petitioners. This means that the Respondent's Determination dated 1.12.15 to the extent that it relates to the unchallenged portion of the suit property belonging to the Interested Party herein remains as it is and undisturbed by this Judgment.

(v) Costs of the petition shall be borne by the Respondent.

Dated, Signed and Delivered at Mombasa this 12th day of

November, 2019.

E. K. OGOLA

JUDGE

In the presence of:

Mr. Oloo & Mr. Busieka for Interested Party

Ms. Tum holding brief Gikandi for 4th Petitioner

No Appearance for Respondent

Mr. Kaunda Court Assistant