



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**PETITION NO. 19 OF 2017**

**IN THE MATTER OF: ARTICLES 22 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)  
PRACTICE AND PROCEDURE RULES, 2013**

**AND**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER THE  
CONSTITUTION OF KENYA, 2010 TO WIT CONTRARY TO ARTICLES 19, 21, 22, 27(4), 35(2), 40, 47 AND 60**

**AND**

**IN THE MATTER OF: THE LAND REGISTRATION ACT, 2012**

**AND**

**IN THE MATTER OF: THE NATIONAL LAND COMMISSION ACT CAP 300(REPEALED)**

**AND**

**IN THE MATTER OF: GAZETTE NOTICE NUMBER 6866 CONTAINED IN THE SPECIAL ISSUE VOL. CXIX-NO. 97 AND  
PUBLISHED ON THE 17<sup>TH</sup> DAY OF JULY, 2017 BY THE CHAIRMAN, NATIONAL LAND COMMISSION**

**BETWEEN**

**LIKIZO LIMITED.....PETITIONER**

**VERSUS**

**NASIB KASHURU MUMBO.....1<sup>ST</sup> RESPONDENT**

**THE NATIONAL LAND COMMISSION.....2<sup>ND</sup> RESPONDENT**

**THE CHIEF REGISTRAR.....3<sup>RD</sup> RESPONDENT**

**THE COUNTY LAND REGISTRAR, KILIFI.....4<sup>TH</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**BACKGROUND**

1. By this Petition dated 20<sup>th</sup> September 2017 as amended on 16<sup>th</sup> May 2019, Likizo Ltd (the Petitioner) prays for:-

**a) A declaration that the Petitioner is the legal proprietor of Title No. Chembe/Kibabamshe/407;**

**b) Cancellation of the Certificate of lease in Title No. Chembe/Kibabamshe/407 issued to Nasib Kashuru Mumbo;**

**c) An order of permanent injunction to restrain the Respondents, their servants and/or agents from interfering with the Petitioner's use, ownership and utility of Title No. Chembe/Kibabamshe/407;**

**d) An order of Certiorari to bring to this Honourable Court for the purposes of being quashed Gazette Notice No. 6866 contained in the Special Issue Vol. CXIX-No 97 and published on the 17<sup>th</sup> day of July, 2017 by the Chairman, National Land Commission;**

**e) An order of permanent injunction to prohibit the Respondents by themselves, servants, agents or whatsoever authorized on their behalf from giving effect or implementing in any manner whatsoever Gazette Notice No. 6866 contained in the Special Issue Vol. CXIX-No. 97 and published on the 17<sup>th</sup> day of July, 2017 by the Chairman, National Land Commission.**

**f) An order of mandamus to issue compelling the 4<sup>th</sup> Respondent to restore the register in respect of Title No. Chembe/Kibabamshe/407 and issue to the Petitioner a Certificate of Search on payment of the requisite fees;**

**g) Costs of the Petition ; and**

**h) Any such other order(s) as this Honourable Court shall deem just.**

2. Those prayers arise from the Petitioner's contention that at all times material, it was the registered proprietor of a leasehold interest in the said Title No. Chembe/Kibabamshe/407 measuring approximately 3.4 Ha (the suit property). The Petitioner avers that it purchased the said property on 24<sup>th</sup> February 2004 from one Simeon Kipkoech Mining at a consideration of Kshs 4,500,000/-.

3. The Petitioner avers that when it purchased the suit property as aforesaid, there was no caveat or caution placed on the title and it was therefore a bona fide purchaser for value without notice. Save for carrying out a search at the Kilifi Land Registry to establish ownership prior to purchasing the suit property, the Petitioner asserts that it was under no obligation in law to inquire or ascertain the circumstances in, or the consideration for, which the previous registered owner of the property were registered.

4. The Petitioner avers and affirms that prior to being registered as the proprietor of the suit property, the original title as held by the previous proprietor, Simeon Kipkoech Mining, and the transfer documents as required by law were produced to the County Land Registrar, Kilifi (the 4<sup>th</sup> Respondent herein). The Petitioner further affirms that the parcel file for the suit property was opened on 3<sup>rd</sup> March 1993 and that like other properties registered within the Kilifi Chembe Kibabamshe Settlement Scheme, it was registered under the repealed Registered Land Act, Cap 300 of the Laws of Kenya which legal regime still applies in Kenya.

5. The Petitioner asserts that like any holder of a title document to any parcel of land in the Republic of Kenya, it was entitled to rely on the indefeasibility of title conferred by statute to protect its right to property. The Petitioner avers that ever since it purchased the suit property, it has been in quiet occupation and possession of the same without interference from the Respondents herein or any other person and has been remitting all the request rent and rates as they fall due.

6. The Petitioner contends that based on a Report dated June 2010 by the Special Task Force on Kilifi Jimba and Chembe Kibabamshe Land Adjudication Section, the Government of Kenya through the then Commissioner of Lands vide a letter of allotment dated 26<sup>th</sup> August 2010 did allocate the suit property to the 1<sup>st</sup> Respondent for a term of 99 years from the 1<sup>st</sup> day of September 2010.

7. The Petitioner avers and affirms that it is illegal and contrary to the provisions of Section 32(1) of the repealed Registered Land Act for there to be two different title documents in respect of the same parcel of land issued to different people. The action of the Commissioner of Lands, the Chief Land Registrar (the 3<sup>rd</sup> Respondent) and the County Land Registrar, Kilifi (the 4<sup>th</sup> Respondent) to issue the second certificate of title was therefore not only illegal but amounted to compulsory acquisition of the Petitioner's land contrary to the provisions of Article 40 of the Constitution.

8. In addition, the Petitioner avers and affirms that the Environment and Land Court at Malindi has since issued declarations in a Judgment dated 8<sup>th</sup> May 2015 in **Malindi ELC Petition No. 11 of 2012** to the effect that the issuance of Certificate of Leases based on the Report of the Task Force on Kilifi Jimba and Chembe Kibabamshe dated June 2010 was in violation of the Constitution and quashed the same.

9. The Petitioner further asserts that the 3<sup>rd</sup> to 5<sup>th</sup> Respondents herein were the Respondents in the said **Malindi ELC Petition No. 11 of 2012** while the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein were the Interested Parties therein. The Respondents herein were thus aware of the decision and their actions herein are in violation of the decision and the law, ultra vires and illegal for all intents and purposes.

10. But in his Replying Affidavit sworn and filed herein on 17<sup>th</sup> October 2017, Nasibu Kashuru Mumbo (the 1<sup>st</sup> Respondent) asserts that he is the bona fide proprietor of the suit property having acquired the same through the required process of land allocation. The 1<sup>st</sup> Respondent avers that he was issued with a letter of allotment dated 26<sup>th</sup> August 2010 and that he had fulfilled all his obligations to the Settlement Fund Trustees (SFT) pursuant to which he was issued with a certificate of lease for the suit property.

11. The 1<sup>st</sup> Respondent further avers that the Petitioner lacks the locus standi to institute this Petition as it has no proprietary interest in the same having not been in possession for years. The 1<sup>st</sup> Respondent asserts that the Petition is a non-starter as the Petitioner had already filed the suits being *Malindi HCC No. 41 of 2011; Likizo Ltd –vs- Yerry Kombe & 3 Others* as well as *Malindi ELC No. 123 of 2012; Likizo Ltd – vs- Yeri Kombe & 3 Others* relating to the same premises. The said Malindi *ELC No. 123 of 2012* was dismissed for want of prosecution on 13<sup>th</sup> May 2016 and the Petitioner neither appealed the decision nor sought to reinstate the same for determination.

12. The 1<sup>st</sup> Respondent avers that the Petitioner cannot now purport to assert his rights regarding ownership of the land yet he abandoned a legitimate process to determine the same. The 1<sup>st</sup> Respondent accuses the Petitioner of playing lottery with the Court and using it as a game of chance and asserts that there are no Constitutional issues arising from his claim of ownership.

13. The 1<sup>st</sup> Respondent further contends that the Court Judgment cited by the Petitioner had no bearing on the suit property and are not binding thereon as both the Petitioner and the 1<sup>st</sup> Respondent were not parties in the suits and the orders granted were specific to certain parcels of land cited therein. The 1<sup>st</sup> Respondent further denies that the National Land Commission (the 2<sup>nd</sup> Respondent) made its findings herein based on the Report of the Task Force. On the contrary, the 2<sup>nd</sup> Respondent carried out its own investigations, heard witnesses and after a thorough scrutiny of the documents presented to it made its determination pursuant to its Constitutional and Statutory mandate.

14. The National Land Commission (the 2<sup>nd</sup> Respondent) is equally opposed to the Petition. In a Replying Affidavit sworn on 14<sup>th</sup> November 2015 by its Acting Director Legal Affairs and Enforcement Brian Ikol, the Commission asserts that the outstanding historical land issues affecting the Coast Region and land complaints emanating from Kilifi County in particular, informed its concern on the need for a plot verification exercise in three land registration sections namely Kilifi Chembe/Kibabamshe, Kilifi /Jimba and Kilifi/Madeteni where land adjudication and registration had taken place.

15. The 2<sup>nd</sup> Respondent avers that the adjudication process within Chembe/Kibabamshe commenced on 2<sup>nd</sup> October 1974 and that a total of 440 title deeds were issued for the various parcels therein under the provisions of the Registered Land Act (now repealed). The suit property is one of the parcels that were created under the process.

16. Following the conclusion of the adjudication and issuance of the titles, the Commissioner of Lands by a circular dated 28<sup>th</sup> May 1986 and Gazette Notice No. 2505 of 30<sup>th</sup> May 1986 declared the concluded areas as Government Land and therefore not subject to the application of the Land Adjudication Act, Cap 284 of the Laws of Kenya, notwithstanding the fact that the areas had since become private land following the conclusion of the adjudication process.

17. The 2<sup>nd</sup> Respondent further avers that thereafter, the Commissioner of Lands instructed the District Land Registrar, Kilifi to cancel titles already registered and a Government embargo was subsequently placed thereon restricting any dealings. Following this action, the parcels of land falling within Chembe/Kibabamshe were consequently allocated by the Commissioner of Lands under the provisions of the Government Lands Act (also now repealed) thus creating multiple titles. The title in favour of the Petitioner herein was issued following allocation of the parcel under the said provisions.

18. The 2<sup>nd</sup> Respondent further avers that following numerous complaints by the local communities within the area, the Government again sought in 1998 to establish Settlement programmes over the area and a total of 443 parcels were allocated under the programme thereby leading to multiple disputes.

19. Having conducted field observations and interviews with those claiming interests over the parcels of land in the area, the 2<sup>nd</sup> Respondent avers that in line with its mandate under Section 14 of the National Land Commission Act, it sought to review all grants and dispositions of interests in land over the area with the aim of ascertaining the true ownership of the parcels of land within the area.

20. Before commencing the exercise, the 2<sup>nd</sup> Respondent asserts that it caused to be published notices in various dailies on 1<sup>st</sup> and 2<sup>nd</sup> September 2015 giving its intention to review the legality of grants. Those notices also required all the interested parties to tender their written representations and documentation. The suit property was among those listed and scheduled for hearing on 16<sup>th</sup> September 2015 at the Red Cross Hall Malindi.

21. The 2<sup>nd</sup> Respondent accuses the Petitioner of choosing to disregard the notices and thereby failing to appear at the hearing and to submit any claim or documentation in relation to the suit property. The 2<sup>nd</sup> Respondent accordingly proceeded with the hearing and made the findings that:-

***i) All parcels of land falling within Chembe/Kibabamshe area are trust lands and not government lands.***

***ii) That consequently, the Commissioner of Lands had no authority to allocate and proceed to issue title either under the Registration of Titles Act or the Registered Land Act.***

22. The 2<sup>nd</sup> Respondent avers that in accordance with the findings, it made a determination directing the 3<sup>rd</sup> Respondent to revoke the Petitioner's title to the suit property and instead recommended issuance of a title in the name of the 1<sup>st</sup> Respondent who was the bona fide owner arising out of the adjudication process. It is those findings that were ultimately communicated vide the notice as published and appearing in Gazette Notice No. 6866 on the 17<sup>th</sup> July 2017.

23. The Chief Land Registrar, the County Land Registrar, Kilifi, the Attorney General (the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents respectively) are similarly opposed to the Petition. In a Replying Affidavit sworn on their behalf by Felix Nyakundi, the Land Registrar Kilifi and filed herein

on 10<sup>th</sup> January 2018, the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents support the position taken by the 2<sup>nd</sup> Respondent and assert that the 2<sup>nd</sup> Respondent acted as per its mandate in law in reaching the impugned decision.

24. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents aver that upon reaching its decision, the 2<sup>nd</sup> Respondent issued a directive to the 3<sup>rd</sup> Respondent as contained in the Gazette Notice No. 6866 of 17<sup>th</sup> July 2017 for compliance. Upon receipt of the directive, the 3<sup>rd</sup> Respondent proceeded as directed and placed a restriction on the suit property awaiting further directions.

25. By a Notice of Motion application dated 13<sup>th</sup> December 2018 Messrs Gidjoy Investment Ltd claiming to have purchased the suit property herein from the 1<sup>st</sup> Respondent, applied to be enjoined as an Interested Party in these proceedings. By the consent of the parties, that application was allowed on 28<sup>th</sup> January 2019 and the Interested Party was thereby granted 21 days within which to respond to the Petition.

26. Responding to the Petition, the Interested Party in an Affidavit sworn by its Operations Manager Mark Munge and filed herein on 11<sup>th</sup> March 2019 avers that it is the registered proprietor of the suit property having purchased the same on 23<sup>rd</sup> December 2010 at a consideration of Kshs 30,000,000/-. The Interested Party avers that prior to the purchase, they carried out an official search which revealed that the property was registered in the name of the 1<sup>st</sup> Respondent. The said search did not reveal any restriction or encumbrances on the suit property and the same was sold to them with vacant possession although the Interested Party allowed the 1<sup>st</sup> Respondent and his family to continue occupying the houses therein to safeguard the property against encroachment.

### **Analysis and Determination**

27. By a consent order recorded herein on 9<sup>th</sup> May 2019, the parties agreed to have the Petition disposed of by way of affidavit evidence and submissions. I have perused and considered the pleadings and the evidence placed before me. I have equally perused and considered the detailed submissions and authorities that were placed before me by the Learned Advocates for the respective parties.

28. The Petitioner herein Likizo Ltd is a limited liability company incorporated under the Companies Act. Through the Supporting Affidavit of its Shareholder and Director Timothy Mathew Darlington, the company asserts that it is the registered proprietor of a leasehold interest in Title No. Chembe/Kibabamshe/407 measuring approximately 3.4 Ha situated within Kilifi Country (the suit property).

29. The Petitioner avers that on or about 24<sup>th</sup> February 2004 acting as a bona fide purchaser for value without notice and after complying with all conveyancing protocols, it did purchase the suit property from one Simeon Kipkoech Mining at a consideration of Kshs 4,500,000/-. Subsequently the property was transferred and registered in the Petitioner's name vide a Certificate of Lease dated 3<sup>rd</sup> August 2004.

30. The Petitioner told the Court that when it bought the property, there were no caveats or cautions registered on the said Simeon Kipkoech Mining's title and it bought the same in good faith after conducting due diligence and establishing the ownership thereof as per the records held at the Land Registry at Kilifi.

31. The Petitioner asserts that he thereby acquired a good and indefeasible title and that it has since then been in quiet occupation and possession of the suit property meeting all the requisite outgoings such as the land rent and rates to the relevant authorities.

32. The Petitioner has however since come to learn that by a letter of Allotment dated 26<sup>th</sup> August 2010, the Government has purportedly allotted the same suit property to the 1<sup>st</sup> Respondent herein based on the Report by a Task Force appointed by the Ministry of Lands dated June 2010. The Petitioner has further learnt that on the 29<sup>th</sup> September 2010, the Land Registrar Kilifi (the 4<sup>th</sup> Respondent) without due regard to the law and due process issued another Certificate of Lease to the 1<sup>st</sup> Respondent in respect of the same property.

33. The Petitioner asserts that the Task Force Report did not have the force of law and that it is illegal and contrary to the provisions of Section 32(1) of the Registered Land Act (now repealed) for there to be two different title documents in respect of the same parcel of land issued to different people. It further avers that the issuance of the second certificate of title was not only contrary to the law but it also amounted to compulsory and arbitrary acquisition of its land contrary to the provisions of Article 40 of the Constitution.

34. It is further the Petitioner's case that the suit property having been owned privately was not government land and was not therefore available for allocation. The allotment and subsequent registration of the Certificate of Lease in favour of the 1<sup>st</sup> Respondent was therefore according to the Petitioner, irregular, null and void.

35. In addition, the Petitioner asserts that in **Malindi ELC Petition No. 11 of 2012**, this Court had declared that the issuance of Certificates of Leases based on the Report of the Task Force dated June 2010 was in violation of the Constitution and the Land Act. The same Court had issued an order of certiorari quashing such titles and an order of injunction prohibiting the Respondents in that case from giving effect to or implementing the Report of the Task Force.

36. The Petitioner further told the Court that the 2<sup>nd</sup> Respondent herein was a party in the said **Malindi ELC Petition No. 11 of 2012** and was hence aware of the orders which had neither been appealed nor set aside when it went ahead to publish the Gazette Notice No. 6866 of 17<sup>th</sup> July 2017 wherein it determined that the property belongs to the 1<sup>st</sup> Respondent.

37. The Petitioner avers that as a result of the publication of the said Gazette Notice by the 2<sup>nd</sup> Respondent, the 1<sup>st</sup> Respondent and his agents have now encroached upon the suit property claiming ownership thereof and that they are now in the process of erecting structures thereon.

38. Nasibu Kashuru Mumbo (the 1<sup>st</sup> Respondent) does not deny being in occupation of the property. He however denies that the Petitioner was in possession thereof and/or that he only took possession of the suit property when the 2<sup>nd</sup> Respondent published its recommendations in the Gazette Notice. On the contrary, the 1<sup>st</sup> Respondent asserts that he has always lived on the land and that he is the bona fide proprietor thereof having acquired the same through the required process of land allocation.
39. The 1<sup>st</sup> Respondent avers that in recognition of that fact he was on 26<sup>th</sup> August 2010 issued with a Letter of Allotment by the Government through the Settlement Fund Trustees (SFT) and that having fulfilled all the requirements spelt out under the Letter of Allotment, he was subsequently issued with a Certificate of Lease for the suit property.
40. The 1<sup>st</sup> Respondent told the Court that the Petitioner was not being candid in his claim that his Constitutional rights had been violated as he had filed a similar suit against himself in the year 2011 which suit he abandoned and was dismissed by the Court for want of prosecution. He further told the Court that the cases cited by the Petitioner had no bearing on the suit property as neither the Petitioner nor himself were parties thereto and the orders granted were specific to certain parcels of land whose ownership were in contention in the cases.
41. On its part, the National Land Commission (the 2<sup>nd</sup> Respondent) denied that it made its findings based on the Report of the Task Force. On the contrary, the Commission told the Court through its Acting Director Legal Services Brian Ikol, that it had carried out its own Plot verification exercise arising from numerous complaints received from residents of the Chembe/Kibabamshe area, heard witnesses, and after thorough scrutiny of the documents presented by the parties, made its determination pursuant to its Constitutional and statutory mandate.
42. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents supported the position taken by the 2<sup>nd</sup> Respondent and asserted through the Land Registrar Kilifi, Felix Nyakundi, that the 2<sup>nd</sup> Respondent had acted in accordance with its mandate in law in reaching its decision.
43. That was the same position taken by M/s Gidjoy Investments Ltd (the Interested Party) who told the Court that it is now the registered proprietor of the suit property having purchased the same from the 1<sup>st</sup> Respondent vide a Sale Agreement dated 23<sup>rd</sup> December 2010 at a consideration of Kshs 30,000,000/-. The Interested Party told the Court that they had prior to the purchase carried out an official search which had revealed that the property was registered in the name of the 1<sup>st</sup> Respondent.
44. The Interested Party told the Court that their Search did not reveal any restrictions or encumbrances on the suit property and that the same was sold to them with vacant possession although they had allowed the 1<sup>st</sup> Respondent and his family to continue occupying the same in order to safeguard it from encroachment.
45. From the material placed before me, there was nothing much to support the Petitioner's contention that the 1<sup>st</sup> Respondent and his agents or assigns had invaded the suit property following the publication of the Gazette Notice No. 6866 of 17<sup>th</sup> July 2017. Instead, it was clear to me that as early as 2012, the Petitioner had filed *Malindi ELC No. 123 of 2012; Likizo Ltd –vs- Yeri Kombe & 3 Others* seeking orders of injunction barring the Defendants from dealing with the suit property. While the 1<sup>st</sup> Respondent was not initially among those that were sued, he did apply and was enjoined in the said suit on the basis that he was the proprietor thereof as per the Certificate of Lease issued to him on 29<sup>th</sup> September 2010.
46. It was also apparent that as early as 2013, the Petitioner herein was aware of the 1<sup>st</sup> Respondent's parallel claim and the fact that the 1<sup>st</sup> Respondent had been issued with the Certificate of Lease whose issuance he challenges herein. In the Grounds of Opposition that he filed to oppose an application dated 18<sup>th</sup> September 2013 by the 1<sup>st</sup> Respondent to be enjoined in the said *ELC No. 123 of 2012*, the Petitioner told the Court that the 1<sup>st</sup> Respondent's title was suspect and that the criminal investigations department had confirmed that it was the Petitioner's title that was genuine.
47. In a Ruling delivered on 6<sup>th</sup> March 2014, the Honourable Justice Angote determined that the 1<sup>st</sup> Respondent herein was indeed a proper party in those proceedings and that indeed it was him and the Petitioner herein who were the main protagonists and accordingly, the Learned Judge not only enjoined the 1<sup>st</sup> Respondent in those proceedings but he also set aside the orders of injunction he had granted against the four defendants sued by the Petitioner and ordered the maintenance of the status quo.
48. In its application for injunction dated 30<sup>th</sup> July 2012, the Petitioner had accused the Defendants of invading the suit property on 28<sup>th</sup> March 2011, bringing down part of its fence, removing the Petitioner's property and proceeding to erect their own stone structures thereon. The Petitioner further accused those it sued of erecting an illegal fence on the suit premises, connecting electricity to the premises, installing a guard thereon and refusing entry to the Petitioner.
49. The orders of status quo by the Honourable Angote J. thus left the 1<sup>st</sup> Respondent and his said agents and assigns in occupation of the suit property, a situation which remained unchanged until the institution of this suit as the said *Malindi ELC No. 123 of 2012* was on 13<sup>th</sup> May 2016 dismissed for want of prosecution.
50. The circumstances under which the suit property got itself with two separate certificates of titles can be discerned from the lengthy affidavit filed herein by the 2<sup>nd</sup> Respondent Commission. By a Notice published in the Kenya Gazette Supplement No. 58 of 7<sup>th</sup> August 1970 (Annexure B11 to the affidavit), the then Minister for Lands and Settlement J.H. Angaine applied the Land Adjudication Act to the area comprising the then Kilifi Administrative District of Kilifi Chembe/Kibabamshe, Kilifi/Madeteni, Kilifi/Jimba and Kilifi/Mtondia Roka Adjudication Sections.
51. Subsequently the adjudication process within Chembe/Kibabamshe commenced on 2<sup>nd</sup> October 1974 and a total of 440 title deeds were issued for the concerned parcels of land under the provisions of the now repealed Registered Land Act. The suit property was among the

parcels created in that process.

52. As it turned out however, after the adjudication process and issuance of title was concluded, the Commissioner of Lands through a Circular issued on 28<sup>th</sup> May 1986 and the subsequent Gazette Notice No. 2505 of 30<sup>th</sup> May 1986 declared the concluded areas as Government Land and hence not subject to the Land Adjudication Act. The Commissioner then instructed the District Land Registrar, Kilifi to cancel the titles already registered and issued an embargo restricting any dealings therewith.

53. Following the action taken by the Commissioner of Lands, parcels of land falling within the area were consequently allocated again by the Commissioner of Lands under the provisions of the Government Lands Act (also now repealed).

54. Later on in 1998, following complaints by the local communities around the area, the Government again sought to establish Settlement Programmes over the Chembe/Kibabamshe area in which a total of 443 parcels of land were allocated under the Settlement programmes.

55. Whichever way one looks at it, the inescapable conclusion to me was that the suit property was once considered as public land prior to its alienation. The problems associated with irregular and illegal allocation of public land in part formed the establishment of the 2<sup>nd</sup> Respondent Commission. In that respect, Article 67(2) (e) of the Constitution grants the 2<sup>nd</sup> Respondent power *to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices and recommend appropriate redress.*

56. Article 61(2) of the Constitution classifies land in Kenya as public, community or private. Public land is then defined under Article 62 as follows:-

**“62. (1) Public Land is-**

***a) Land which at the effective date was un-alienated government land as defined by an Act of Parliament in force at the effective date;***

***b) Land lawfully held, or occupied by any state organ, except any such land that is occupied by the state organ as lessee under a private lease;***

***c) Land transferred to the state by way of sale, reversion or surrender;***

***d) Land in respect of which no individuals or community ownership can be established by any legal process;***

***e) Land in respect of which no heir can be identified by any legal process;***

***f) All minerals and mineral oils as defined by law;***

***g) Government forests other than forests to which Article 63(2) (d)(i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas;***

***h) All roads and thoroughfares provided for by an Act of Parliament;***

***i) All rivers, lakes and other water bodies as defined by an Act of Parliament;***

***j) The territorial sea, the exclusive economic zone and the sea bed;***

***k) The continental shelf;***

***l) All land between the high and low water marks;***

***m) Any land not classified as private or community land under this Constitution; and***

***n) Any other land declared to be public land by an Act of Parliament-***

***i) In force at the effective date; or***

***ii) Enacted after the effective date.”***

57. What constitutes private land is on the other hand defined under Article 64 of the Constitution as follows:-

**“64. Private land consists of-**

***a) Registered land held by any person under any freehold tenure;***

***b) Land held by any person under leasehold tenure; and***

**c) Any other land declared private land under an Act of Parliament.**

58. In cognizance of the existence of disputes arising from irregular and/or illegal allocation of public land, Article 68(c) (v) of the Constitution provides that Parliament shall enact legislation to enable the review of all grants or dispositions of public land to establish their propriety or legality. In light of this provision, Parliament enacted the National Land Commission Act, No. 5 of 2012. Section 14(1) of the said Act provides:-

***(1) Subject to Article 68(c) (v) of the Constitution, the Commission shall, within five years of the commencement of this Act, on its own motion or upon a complaint by the national or a County Government, a community or an individual, review all grants or dispositions of public land to establish their propriety or legality.***

59. While the above cited provisions would appear to clothe the 2<sup>nd</sup> Respondent with jurisdiction to review all such grants and dispositions, the Petitioner faults the Commission for proceeding to make the determination without jurisdiction on account that the suit property was private land and that the Commission acted on the basis of the Special Task Force Report dated June 2010 which Report had been quashed by the Court. The Petitioner further accuses the 2<sup>nd</sup> Respondent of acting contrary to the orders of the Court and failing to afford the Petitioner a reasonable opportunity to be heard.

60. The jurisdiction of the 2<sup>nd</sup> Respondent under Section 14(1) of the National Land Commission Act has been the subject of a number of Judicial pronouncements. In **Republic –vs- National Land Commission & Another Exparte Krystalline Salt (2015) eKLR**, the Honourable Justice Weldon Korir observed as follows:-

***“Under Section 14 of the National Land Commission Act, the Respondent is given jurisdiction to enforce Article 68(c)(v) of the Constitution and review all grants and dispositions of public land to establish their propriety or legality. In my view, the Respondent can only fulfill this responsibility by querying the process under which public land was converted to private land. I do not see how an unlawfully and irregularly acquired parcel of land becomes out of reach of the Respondent for the mere reason that it is registered as private property.”***

61. Similarly, in **Republic –vs- National Land Commission Ex-parte Holborn Properties Ltd (2016) eKLR**, the Honourable Justice Angote delivered himself as follows:-

***“Although the Constitution has defined private land to consist land registered under any freehold or leasehold tenure, and whereas Section 14(1) of the National Land Commission Act gives the Respondent the power to review all grants or disposition of public land, it follows that such review can only entail land that has been converted from public land to private land.***

***I say so because the Respondent cannot review what is still, according to the records, public land. One must have acquired land that was initially public land and (was) issued with a title document, either as a freehold or leasehold, for a review to be done.***

***It is therefore not true that once land falls under the purview of the definition of “private land”, the same cannot be reviewed. Indeed, it is only such parcels of land that can be reviewed by the Respondent with a view of recommending to the Registrar to revoke the title.”***

62. Arising from the foregoing, it was clear to me that under Section 14 of the National Land Commission Act, Act No. 5 of 2012, the Respondent herein has jurisdiction to enforce Article 68 (c) (v) of the Constitution and to review all grants and dispositions of public land to establish their propriety or legality. It was further clear to me that the fact that the property was already registered in the name of either the Petitioner or the 1<sup>st</sup> Respondent was not a bar to the 2<sup>nd</sup> Respondent’s jurisdiction. The 2<sup>nd</sup> Respondent can only fulfill its Constitutional and statutory mandate by querying the process under which the land hitherto considered public was converted into private land where there was evidence such as in this case that the land was once treated as public land.

63. While it was true from the material placed before me that the Report of the Task Force on Kilifi Jimba and Chembe/Kibabamshe adjudication Sections dated June 2010 was the subject of **Malindi ELC Petition No. 11 of 2012**, there was no evidence tabled before this Court that the 2<sup>nd</sup> Respondent had relied on the said Report to arrive at its impugned determination.

64. Indeed from a perusal of the record of those proceedings, it was evident that neither the Petitioner herein nor the 1<sup>st</sup> Respondent were parties in the said dispute. The suit property herein therefore was not the subject of those proceedings and I decline the invitation to extend the application of the Judgment delivered therein on 8<sup>th</sup> May 2015 to all other properties that were not the subject of litigation before the Court.

65. As it were, it was not in dispute that before commencing its review of grants for the area in dispute, the 2<sup>nd</sup> Respondent caused to be published notices appearing in various newspapers on 1<sup>st</sup> and 2<sup>nd</sup> September 2015 informing the public of its intention to review the legality of the grants. Those notices required all interested parties to tender their written representations and documentation. Having considered the same including the oral testimonies, the 2<sup>nd</sup> Respondent made a determination to direct the 3<sup>rd</sup> Respondent herein to revoke the Petitioner’s title to the suit property.

66. As a result there was nothing placed before me to suggest that in going about its mandate, the 2<sup>nd</sup> Respondent had acted in a manner that was unlawful, unreasonable or procedurally unfair. Instead it was clear to me that the Petitioner herein was only bent on reviving by other means, the dispute that first led to its filing of **Malindi ELC No. 123 of 2012** which suit was dismissed for want of prosecution on 13<sup>th</sup> May 2016.

67. In that respect, I am in agreement with the 1<sup>st</sup> Respondent that this Petition was not precipitated by any violation of the Petitioner's alleged Constitutional rights but was instead an attempt by the Petitioner to play lottery with the Court and to try to obtain with the second chance the ownership of the parcel of land whose claim it had lost when it failed to prosecute the earlier suit leading to its dismissal some one year before it filed this Petition.

68. In the premises, I did not find any merit in the Petition. The same is hereby dismissed with costs.

**Dated, signed and delivered at Malindi this 25<sup>th</sup> day of June, 2020.**

**J.O. OLOLA**

**JUDGE**