REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL PETITION NO. 8 OF 2012

IN THE MATTER OF: ARTICLE 22 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF THE BILL OF RIGHTS UNDER ARTICLES 10, 22, 23(3), 40(1) AND (3), 42 AND 47 OF THE CONSTITUTION OF KENYA, 2010 AND ARTICLES 13 AND 24 OF AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

BETWEEN

1. KILUWA LIMITED

2. SULEIMAN SAID SHAHBAL…..….....…….PETITIONERS

AND

1. THE COMMISSIONER OF LANDS

2. THE ATTORNEY GENERAL

3. BUSINESS LIASON COMPANY LIMITED

4. MUORGATE HOLDINGS LTD…….….....…….RESPONDENTS

RULING

THE PETITION

1. In their Petition dated 1st February, 2012 and filed on 17th February, 2012, the Petitioners sought the following orders:-

(a) A declaration that the First Respondent abused its office and acted illegally and unconstitutionally in alienating L.R. No. MN/I/5902, Mombasa which was curved out of a reserve

land to the Third Respondent;

(b) A declaration that the First Respondent abused its office and acted illegally and unconstitutionally in extending the boundary of L.R. No. MN/I/5901 to cover a portion of the reserve land;

(c) A declaration that the alienation by the First Respondent to the Third Respondent of L.R. No. MN/I/5902, Mombasa which is the Petitioners' access to the Indian Ocean beach has violated the Petitioners' right to own property and equal access to public property;

(d) A declaration that the extension by the First Respondent of the boundary of L.R. No. MN/I/5901 to cover a portion of the reserve land which is the Petitioners' access to the Indian Ocean beach is a violation of the Petitioners' right to own property and equal access to public property;

(e) A declaration that the alienation of a reserve land by the First Respondent to the Third and Fourth Respondents for private use was a violation of the Petitioners' right to clean and healthy environment and equal access to public property;

(f) A declaration that the alienation of L.R. No. MN/I/5902, Mombasa by the First Respondent to the Third Respondent and a portion of L.R. No. MN/I/5901 that encroaches on the reserve land to the Fourth Defendant was done in breach of the rules of natural justice, procedural and administrative fairness and national values and principles of governance;

(g) An order of injunction to restrain the Third Respondent, its officers, servants and/or agents from selling, transferring, mortgaging, charging, leasing, developing, putting up a wall or fence or blockage of any nature on and from having any other or further dealing with all that parcel of land known as L.R. No. MN/I/5902, Mombasa;

(h) A permanent injunction to restrain the Third and Fourth Respondents, their officers, servants and/or agents from blocking the Petitioners' access to and view of the Indian Ocean through L.R. No. MN/I/5902 and L.R. No. MN/I/5901 in any manner whatsoever;

(i) A mandatory injunction compelling the Third and Fourth Respondents to demolish a stone wall that they have constructed on L.R. No. MN/I/5902 and L.R. No. MN/I/5901, Mombasa;

(j) An order of Judicial Review in the nature of Certiorari to bring into this court and quash the decision of the First Respondent to alienate L.R. No. MN/I/5902, Mombasa to the Third Respondent;

(k) An order to Judicial Review in the nature of Certiorari to bring into this Honourable Court and quash the decision of the First Respondent to extend the boundary of L.R. No. MN/I/5901 to cover a portion of the reserve land;

(l) An order of Judicial Review in the nature of mandamus to compel the First Respondent and/or its successors in title to cancel Grant No. C.R. 22652 dated 4th April, 1992 for L.R. No. MN/I/5902, Mombasa;

(m) An order of Judicial Review in the nature of a Mandamus to compel the First Respondent and/or its successors in title to amend Grant No. C.R. 52344 dated 10th June, 2011 for L.R. No. MN/I/5901 and remove therefrom the portion thereof that extends to the reserve land;

(n) Costs of and incidental to this Petition;

(o) Any other or further relief this Honourable Court may deem fit or just to grant.

2. The Petition was supported by the Affidavit of Suleiman Said Shahbal, the Petitioner sworn on the 15th February, 2015 and the grounds on the face of the Petition, the written submissions filed on 11th May, 2012 dated 10th may, 2012, and the Further submissions dated and filed on 3rd February, 2015 in reply to the written submissions for the First and Second Respondents dated 30th January, 2015 and filed on 3rd January, 2015 by the Petitioners in support of the Petition.

3. The First and Second Respondents did not file any Replying Affidavit to rebut any of the averments of the Petitioners in support of the Petition. However the Attorney-General, on behalf of the First and Second Respondents filed on 3rd January, 2013 written submissions dated 30th January, 2013, in opposition to the Petition and sought dismissal of the Petition with costs.

4. The Third and Fourth Respondents opposed the Petition, through the Replying Affidavit of **OMAR BUNU FAMAU** who described himself as the Operations Manager of the Third Respondent, and swore the Replying Affidavit on its behalf in that capacity as well as the Fourth Respondent, on 6th March, 2012 and had it filed on 7th March, 2012, and avers that the Petitioners collectively lack the necessary **locus standi** to bring the Petition.

5. In addition, counsel for the Third and Fourth Respondents filed on 8th June, 2012 written submissions dated 6th June, 2012 and further written submissions dated 17th January, 2015. The Third and Fourth Respondents' list of authorities dated 6th March, 2012 was filed on 7th March, 2012.

THE CHAMBER SUMMONS OF 15TH JANUARY, 2012

6. This application for conservatory orders filed with the Petition on 17th January, 2012 was not urged because the court ordered on 12th March, 2012 that **"the main Petition herein be heard"** and the Chamber Summons for conservatory orders was therefore abandoned in favour of determination of the Petition herein. However, before indulging on the wider issues raised by the Petitioner, I will first deal with the question of **locus standi** and the judicial review prayers sought in the constitutional petition.

LOCUS STANDI OF THE SECOND PETITIONER AND THE PRAYER FOR JUDICIAL REVIEW ORDER IN A CONSTITUTIONAL PETITION

7. An issue of **locus standi** raised in a Constitutional Petition is akin to a Preliminary Objection on a point of law and raised in ordinary civil proceedings and must be determined on the outset before other issues raised are considered and determined. Connected with the question of **locus standi** was the place of orders of judicial review orders in Constitutional Petitions which may either be determined at the conclusion of the Petition, or, as in this case, as I have chosen, be dealt with as part of the issues for preliminary determination. I will however first deal with the question of **locus standi**, and then the place of judicial orders in Constitutional Petitions and this Petition in particular.

8. The question of **locus standi** was raised in two respects, **firstly**, whether the second Petitioner had capacity to be enjoined in the Petition; or to Petition, and **secondly,** whether the Petitioners have **locus standi** to Petition in the **public interest**. I will deal with these twin issues in turn.

(i) **Of whether the First Petitioner has locus standi to**

Petition

9. The question really is who may bring a Petition for enforcement of a constitutional right or fundamental freedom under Articles 22 and 258 of the Constitution of Kenya 2010 (the Constitution).

10. It was the claim and submission by counsel for Third and Fourth Respondents in paragraphs 1-6 of their main written submissions (of 6th June, 2012 filed on 8th June, 2012), that having sold and transferred his interest in the land known as MN/1/5902 (the suit land), to the First Petitioner, a limited liability

company, and of which he claimed to control 99% of the shareholding, the Second Petitioner had no further interest in the property and had no capacity to be enjoined in the Petition. Counsel cited section 16(2) of the Companies Act (Cap 486, Laws of Kenya) which says:-

> **"16(1) …..**
>
> **(2) From the date of incorporation mentioned in the certificate of incorporation, the subscribers to the memorandum, together with such other persons as may from time to time become members of the company, shall be a body corporate…capable of exercising all the functions of an incorporated company."**

11. It was counsel's submission that the First Petitioner being a body corporate needed no support from the Second Petitioner to institute the Petition, and that even if the Second Petitioner were to be enjoined in the Petition, or to Petition, he needed a special resolution of the First Petitioner's Board of Directors to enjoin the Second Petitioner to the Petition, and that in the absence of such special resolution, the Second Petitioner lacked the mandate to join the Petition with the First Petitioner.

12. Counsel for the Third and Fourth Respondents also argued that the claim by the Second Petitioner that it owned 99% of the shares in the First Petitioner was unsubstantiated in the absence of a certificate under the common seal of the company as required under section 183 of the Companies Act aforesaid which provides:-

> **"183. A certificate under the common seal of the company specifying any shares held by any member shall be prima facie evidence of the title of the member to the shares."**

13. It was this counsel's submission that in the absence of documentary proof of the shareholding from the Second Petitioner, the unsubstantiated claim by the Second Petitioner does not advance his position on **locus** to replace the requirements of section 16 of the Companies Act, and that such evidence is authenticated by a Certificate of Shareholding issued under the common seal of the company, and not by way of a letter from the Companies Registry and that such letter is not in law contemplated (by section 183 of the Companies Act) to provide evidence of ownership of shares in a company.

14. In light of the above, counsel submitted, the position of the Second Petitioner in the Petition is legally nebulous; that the Second Petitioner is legally incapable of litigating on behalf of the First Petitioner which can litigate alone without the aid of the Second Petitioner.

15. On their part, counsel for the Petitioners submitted that the Second Petitioner had the necessary **locus standi** to institute the Petition in conjunction with the First Petitioner as a shareholder of the First Petitioner. Counsel relied on the provisions of Articles 22 and 258 of the Constitution of Kenya 2010 ("*the Constitution*"). Counsel also relied upon the decision of the court in **JOHN MINING TEMOI & ANOTHER VS. GOVERNOR OF COUNTY OF BUNGOMA & 17 OTHERS [2014] eKLR** in which Mabeya J held - that Articles 22(1) and (2) and 258 of the Constitution had expanded the horizons of **locus standi** in matters of enforcement of fundamental rights and freedoms.

16. Counsel submitted that the provisions of Article 22 of the Constitution must be read in the context of the entire Chapter 4 of the Constitution and the intention of the draftsmen in phrasing Article 22 as they did must be taken into consideration when interpreting the said Article. It was this counsel's submission that Article 22 was phrased as it is to remove technical obstacles when it comes to enforcement of the Bill of Rights because the rights and fundamental freedoms encompassed in Chapter 4 of the Constitution are the backbone of a civil and democratic state; that Article 258 further emphasizes the intention to allow any person who feels that the constitution is being breached to access the court to protect and enforce its provisions.

17. Counsel emphasized that the interpretation of the provisions of Article 22 given by the Third and Fourth Respondents sought to dispose of the Petition on mere technicalities without addressing the issue

of whether there were any constitutional rights of the Petitioners being breached or threatened with breach by the Respondents.

DETERMINATION ON THE PRELIMINARY ISSUE OF LOCUS STANDI

18. I have considered the rival arguments as set out above. To answer the question – whether the Second Petitioner has **locus standi** to Petition herein, I set out below the provisions of both Articles 22 and 258 of the Constitution.

> **"22(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.**
>
> **(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by –**
>
> > **(a) a person acting on behalf of another person who cannot act on their own name;**
> >
> > **(b) a person acting as a member of, or in the interest of, a group or class of persons;**
> >
> > **(c) a person acting in the public interest; or**
> >
> > **(d) an association acting in the interest of one or more of its members.**
>
> **(3) The Chief Justice shall make rules providing for the court proceedings referred to in this Article which shall satisfy the criteria that –**
>
> > **(a) the right of standing provided for in clause (2) are fully facilitated;**
> >
> > **(b) formalities relating to proceedings, including commencement of the proceedings, are kept to a minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;**
> >
> > **(c) no fee may be charged for commencing the proceedings;**
> >
> > **(d) the court while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and**
> >
> > **(e) an organization or an individual with particular expertise may with leave of the court, appear as a friend of the court;**
>
> **(4) …..**
>
> **"258(1) Every person has the right to institute court proceedings claiming that this constitution has been breached, contravened, or is threatened with contravention;**
>
> **(2) In addition to any person acting in their own Interest, court proceedings under Clause (1) may be instituted by –**

a. **a person acting on behalf of another who cannot act in their own name;**
b. **a person acting as a member of, or in the interest of, a group or class of persons;**
c. **a person acting in the public interest or;**

d. **an association acting in the interests of one or more of its members;"**

19. In **MINING TEMOI & ANOTHER VS. GOVERNOR OF COUNTY OF BUNGOMA & 17 OTHERS**, (supra), the court, while construing Articles 22 and 258 aforesaid said –

"I am of the view that Article 22(1) and (2) of the Constitution has expanded the horizons of locus standi in matters of enforcement of fundamental rights and freedoms.

A literal interpretation of Articles 22 and 258 in my view confers upon any person the right to bring action in more than two instances firstly in the public interest, and secondly, where breach of the Constitution is threatened in relation to a right or fundamental freedom. Where one purports to enforce the rights of another, it is in my view that there must be a nexus between the parties. In this case, Mr. Khaoya has described himself as the "CEO/CO-ORDINATOR" of the organization and the Petition is about the alleged violation of the Constitution, Mr. Khaoya has in my view illustrated that there is a nexus between him and the organization."

20. The evolution of the doctrine of standing did not however commence with either Article 22 or 258 of the Constitution. Changes in judicial attitudes towards the enforcement of constitutionally protected rights **commenced much earlier. For instance in its decision in the case of KENYA BANKERS ASSOCIATION & OTHERS VS. MINISTER FOR FINANCE [2002] 1KLR 61** (also known as the Donde Bill case), the court considered the issue of standing and declared:-

> **"As regards a general principle relating to this type of public interest litigation, we wish to state, that what gives locus standi is a minimal personal interest and such an interest gives a person standing even though it is quite clear that he would not be more affected than any other member of the population."**

21. On the question of litigation protecting the constitutionality protected right of citizens, the court said:-

> **"In our very considered opinion … like in human rights cases, public interest litigation, including law suits challenging the constitutionality of an Act of Parliament, the procedural trappings and restrictions, the pre-conditions of being an aggrieved person and other similar technical objections cannot bar the jurisdiction of the court, or let justice bleed at the altar of technicality. This court has vast powers under section 60 of the Constitution of Kenya, to do justice without technical restrictions and restraints, and procedures and reliefs have to be moulded according to the facts and circumstances of each case and each situation."**

22. And at page 75 said:-

> **"Our legal system is intended to give effective remedies and reliefs whenever the Constitution of Kenya is threatened with violation. We state a firm conviction, that as a part of reasonable, fair and just procedure to uphold the constitutional guarantees, the right of access to justice entails a liberal approach to the question of locus standi. Accordingly, in constitutional questions, human rights cases, public interest litigation and class actions, the ordinary Anglo-Saxon jurisprudence, that an action can be brought only by a person to whom legal injury is caused, must be departed from."**

23. Section 60 of the repealed Constitution of Kenya, has effectively been replaced by Article 159(d) of the Constitution of the Second Republic, which expressly mandates the court to do justice to all without regard to either status or procedural technicalities. In addition Articles 22 and 258 and no less Articles 3 and 48 of the Constitution, grant every person not only access to courts, but also the right to protect, defend and uphold the Constitution.

24. In that regard therefore, I not only agree with the approach of the court in **Bankers Association of Kenya vs. Minister for Finance** on the question of **locus standi**, but entirely agree with and adopt as my

own, the interpretation of Articles 22(1) and 258 of the Constitution by the learned Judge in the above case of **Mining Temoi & Another vs. Governor of Bungoma**. The argument by counsel for the Third and Fourth Respondents that the Second Petitioner needed a Resolution under a Certificate of the First Petitioner's Board of Directors and not merely a letter from the Registrar of Companies cannot be correct. **Firstly**, the Registrar of Companies is the custodian by way of Annual Returns of records of shareholders of a company. **Secondly**, the issue in the Petition is not about ownership of shares in the First Petitioner, but rather an alleged breach of the constitutional rights of the First Petitioner of which the Second Petitioner is the primary beneficiary. **Thirdly,** in ordinary company litigation, the disclosure by the Second Petitioner is clear on lifting of the veil of incorporation. **Fourthly**, this is a Constitutional Petition, and Article 22(1) is clear that the court should not be unreasonably restricted by procedural technicalities.

25. I am therefore of the view that there is a fully disclosed nexus between the First Petitioner and the Second Petitioner, and the Second Petitioner is a necessary Petitioner in this Petition. For those reasons I reject contrary argument by counsel for the Third and Fourth Respondents.

(ii) **Of whether the Petitioners have locus to Petition in the public interest**

26. It was the submission of counsel for the Third and Fourth Respondents that as citizens the Petitioners or either of them can bring an action, in defence of a public right in cases where the interest of that particular affected litigant is greater in proportion than the rest of the members of the public. In that event, counsel argued, where no greater harm or damage is occasioned, a person cannot sue on behalf of the public without first seeking and obtaining the consent of the Attorney-General, and thereby bring a relator action (in the name of the Attorney-General).

27. Counsel therefore submitted that to the extent that no consent of the Attorney-General was sought and obtained, the Petitioners could only sue to the extent that the public right they claimed affects them and no more. The Petitioners cannot proceed to sue on behalf of the larger public.

28. Counsel submitted that there was a conflict between Article 22 (enforcement of the Bill of Rights) and Article 258 (enforcement of the Constitution) and consequently called in aid, academic texts, (Maxwell on Interpretation of Statues page 134), Odgers' Construction of Deeds and Statutes 5th Edition page 150) and case law, **WOOD VS. RILEY** at page 152, In **RE GARE, FILMER VS. V. CARTER** (page 154 – 157) all on interpretation of inconsistent statutes or sections thereof, and that the latter would be preferred to the former; and in appropriate cases –

> **"where two phrases, bequest or devices cannot be reconciled, the court will naturally follow the rule to give effect to the whole document."**

29. I do not propose to discuss the other arguments of counsel for the Third and Fourth Respondents on the contention on alleged inconsistency between Articles 22 (2) and Article 258 of the Constitution because there is no such inconsistency at all.

30. Even if there was such an inconsistency, and there is none, the injunction of the Constitution (Article 23) to the courts, is to construe the constitution in a manner that will give effect to the right or freedom granted by the Constitution. This is the rule of harmony and completeness. In **David Tinyefanza vs. The Attorney-General of Uganda (Constitutional Petition No. 17 of 1996)** the Ugandan Court of Appeal held –

> **"The second principle is that the entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution. I think it is now widely accepted that a court should not be swayed by considerations of policy and priority while interpreting the Constitution."**

31. Not only should Article 22 of the Constitution be read in the context of Chapter 4, Bill of Bills, but also along with Article 258. Article 22 emphasizes the portal and right of every person to enforce the Bill of Rights. Article 258 gives every person the right to approach court where the Constitution, not merely the Bill of Rights is being threatened with breach. In respect of these Articles the courts are enjoined to determine the conflicting claims by Petitioners on the basis of substantial justice (Article 22(b) and Article 159) of the Constitution without undue regard to unreasonable technicalities.

32. Both Articles 22(2) (a) and 258 grant every person the right to move the court in the **"public interest"**. Counsel sought umbrage in Article 156(6) of the Constitution which enjoins the Attorney-General to –

> **"…promote, protect and uphold the rule of law and defend the <u>public interest</u>" (underlining added)** to

support the proposition that where there is a claim of contravention, infringement or threat of such contravention of human rights or fundamental freedoms (Article 22(2)) or contravention or threatened contravention of the Constitution (Article 258), an individual cannot institute court proceedings in the public interest alone without the consent of the Attorney-General.

33. These provisions must not be confused with what used to be actions for nuisance (section 61 of the Civil Procedure Act, Cap 21, Laws of Kenya), or relator action at common law. Nuisance is a tort incapable of any exact definition, covering as it does every large and ill-defined number of wrongs into the three classes – **public nuisance, private nuisance and statutory nuisance.**

34. Public nuisance is a wrong which affects all the citizens of the country, the city, town or village, and all civil proceedings brought in respect of public nuisance are normally brought in the name of the Attorney-General. This does not however bar an individual from commencing an action in respect of public nuisance where he has suffered special damage over and above that suffered by the public at large, or where in addition to the interference with the public right, the act involves interference with a private right or special statutory protection vested in the individual.

35. Private nuisance may be defined as injuries to property or to rights over property. In **SPICER VS. SMEE [1946] 1 ALL E.R. 489, 493**, Atkinson J. summarized the position, as between adjoining owners thus:-

> **"a private nuisance arises out of a state of things on one's main property whereby his neighbours property is exposed to danger; And includes actions under the rule in <u>RLYANDS VS. FLETCHER [1868] E.R. 3, H.L. 330, 36 Digest 187, 311</u> – for the escape of things from a person's land and actions for damages caused by fire, whether framed in nuisance or negligence".**

36. Counsel for the Third and Fourth Respondents also sought umbrage in what used to be called **"relator actions"** at common law. Relator actions required Her Majesty's Attorney-General (called "our Attorney-General") on such actions, to be a party to proceedings at the relation of other persons when it was desired to enforce or restrain interference with some public interest. At common law the Attorney-General was actually a necessary party. The general rule in such actions was that the Attorney-General neither received nor paid any costs, and so that the action may not work hardship the relator was usually a person of substance, should costs be awarded against him. Accordingly applications to the Attorney-General for consent to his being a party to an action were to be accompanied by a certificate signed by the relator's Advocate to the effect that the relator was competent to answer the costs to the proposed action.

37. Counsel relied on many English decisions on the common law doctrine on relator actions. I will refer to these decisions for completeness of the discussion on the doctrine of **relator actions** on the common law.

38. The question of the role of the Attorney-General was considered in the case of **GOURIET &**

OTHERS [1978] AC 435, at page 477, where Lord Wilberforce said –

> **"a relator action – a type of action which has existed from the earlier times – is one in which the Attorney-General, on the relation of individuals (who may include local authorities or companies) brings an action to assert a public right. It can properly be said to be a fundamental principle of English law that private rights can be asserted by individuals, but that public rights can only be assessed by the Attorney-General as representing the public. In terms of constitutional law, the rights of the public are vested in the Crown, and the Attorney-General enforces them as officer of the Crown. and just as the Attorney-General has in general no power to interfere with the assertion of private rights, so in general no private person has the right of representing the public in assertion of public rights. If he tries to do so his action can be struck out."**
>
> **…..All the cases were cases asserting through writs of quo warranto or analogous writs or cases concerned with some proprietary right of the Crown, they were not cases of individuals asserting rights belonging to the public. No instance of this could be brought forward whether in ancient or modern times."**

39. And in answer to the contra argument that the role of the Attorney-General has been functional as the relator has to bear the costs of the relator action, the Judge said at page 78 –

> **"…But the Attorney-General's role has never been functional. His position in relator actions is the same as it is in actions brought without a relator (with the sole exception that the relator is liable for the costs) –**

(Attorney-General vs. Cockermouth Local Board [1874] LR 18 Eq 172, 176 All Jessel, MR)

> **"He is entitled to see and approve the statement of claim and any amendments in the pleadings, he is entitled to be consulted on discovery, the suit cannot be compromised without his approval; if the relator dies, the suit does not abate; for the proposition that his only concern is to "<u>filter out</u>" vexatious and frivolous proceedings, there is no authority – indeed, there is no need for the Attorney-General to do what is well within the power of the court. On the contrary he has the right, and the duty to consider the public interest generally and widely."**

40. In **STOCKPORT DISTRICT WATERWORKS COMPANY VS. MANCHESTER CORPORATION (1862) 9 Ju. N.S. 266,** rejecting arguments to the contrary, Westbury L.C. said at page 267 –

> **"…those are a few of the reasons which might be assigned showing how desirable it is not to allow any private individual to usurp the right of representing the public interest. The only arguments which I am disposed to accept from these which I have heard today are founded upon the public interest, and the general advantage of restraining an incorporated company within its proper sphere of action. But, in the present case, the transgressions of those limits inflicts no private wrong upon those plaintiffs; and although the plaintiffs, in common with the rest of the public, might be interested in the larger view of the question, yet the constitution of the country has wisely entrusted the privilege with a public officer, and has not allowed it to be usurped by a private individual.**
>
> **That is the exclusive right of the Attorney-General to represent the public interest – even where individuals might be interested in a larger view of the matter – is not technical nor procedural, nor fictional. It is constitutional. I agree with Lord Westbury L.C., that it is also wise."**

41. In conclusion Viscount Dilhorne said at page 493 -

"The conclusion to which I have come in light of the many authorities to which we were referred is that it is the law, and long established law, that save and in so far as the Local Government Act 1972, section 222, gives local authorities a limited power so to do, only the Attorney-General can sue on behalf of the public for the purpose of preventing public wrongs and that a private individual cannot do so on behalf of the public though he may be able to do so if he will sustain injury as a result of a public wrong. In my opinion the cases establish that courts have no jurisdiction to entertain such claims by a private individual who has not suffered and will not suffer damage.

If these conclusions are right, then when the Attorney-General gives his consent to a relator action, he is enabling an action to be brought which an individual alone could not bring. When he refuses his consent, he is not denying the right of any individual and barring his access to the courts for they have no jurisdiction to entertain a claim by an individual whose only interest is as a mentor of the public right. Consequently, any suggestions that his refusal constitute a challenge to the rule of law appears to be entirely misconceived, and though views may differ as to where the balance of the public interest lies, it should not be lightly assumed that his refusal of consent in a particular case was unjustified and not grounded on considerations of public interest."

42. And Lord Diplock at page 502 said –

> **"Apart from obiter dicta in the McWHIRTER case [1973] Q.B. 629 to which Lord Wilberforce has already referred, there is no authority that the court has jurisdiction at the suit of a private individual as plaintiff to make declarations of public rights as distinct from rights in private law to which the plaintiff claims to be entitled. The court has jurisdiction to declare public rights but only at the suit of the Attorney-General ex officio or <u>ex relatione</u> since as my noble and learned friends Lord Wilberforce and Viscount Dilhorne have demonstrated he is the only person who is recognized by public law as entitled to represent the public in a court of justice."**

43. With profound respect to counsel for the Third and Fourth Respondents, the provisions of Articles 22(2) and 258 of the Constitution must not be confused with common law relator actions in respect of public nuisance or public charity which are today preserved in sections 61 and 62 of the Civil Procedure Act (Cap 21, Laws of Kenya) which provides –

"61(1) In the case of public nuisance, the Attorney-General or two or more persons having the consent in writing of the Attorney-General, may institute a suit though no special damage has been caused, for a declaration and injunction, or for such other relief as may be appropriate to the circumstances of the case.

(2) Nothing in this section shall limit or otherwise affect any right of suit which may exist independently of its (this) provision.

62. In the case of an alleged breach any express or constructive trust created for public purposes of a charitable or religious nature, or whether the direction of the court is deemed necessary for the administration of the trust, the Attorney-General, or two or more persons having an interest and having obtained the consent in writing of the Attorney-General, may institute a suit, whether contentious or not in the High Court to obtain a decree –

(a) removing any trustee;

(b) appointing a new trustee;

(c) vesting any property in trustees;

(d) directing accounts and inquiries;

(e) declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust;

(f) authorizing the whole or any part of the trust to be let, sold, mortgaged or exchanged;

(g) settling a scheme, or

(h) granting such further or other relief as the nature of the case may require"

44. The provisions of Articles 22(2) and 258(2) of the Constitution changed all these common law principles. The expression or phrase **"in addition"** used in Articles 22(2) and 258(2) of the Constitution do not constitute a condition precedent to a person's right to bring court proceedings in the public interest. The phrase merely emphasizes and expands the right of every person to initiate court proceedings in **"the public interest"** in addition to a personal interest (where there is a claim or alleged contravention or infringement of a right or fundamental freedom, or threat thereto, or a contravention or threat to violate the Constitution).

45. Even if the above interpretation was wrong, the Third and Fourth Respondents interpretation that the consent of the Attorney-General is required, under Article 155(6) of the Constitution, such interpretation would however be in conflict with Article 20(3) (b) which enjoins the court while applying a provision of the Bill of Rights to –

(a) develop the law to the extent that it does not give effect to a right, and

(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

46. **Firstly,** the provisions of Article 156(6) is merely a function or power granted to the Attorney-General to act in the public interest when called upon to do so. **Secondly,** the provision neither affects nor limits the right of an individual to commence proceedings alleging infringement, contravention, threat to a right or fundamental freedom, or a contravention of the Constitution. It must be further emphasized that Articles 22 and 258 are enforcement provisions of the obligation of every person under Article 3, to protect and defend the Constitution.

47. **Thirdly**, on this issue, the Petition herein is brought under Articles 10, 22, 23(3), 40(1) and (3), 42 and 47 of the Constitution. The argument that the Petitioners have no **locus standi** or that the consent of the Attorney-General to file the Petition ought to have been sought has no basis under the Constitution. Any contrary interpretation would unnecessarily restrict the **locus standi** granted to every person under Articles 22(2), and 258 of the Constitution to bring court proceedings for enforcement of the Bill of Rights (Article 22), or the Constitution (Article 258).

48. The other question which needs to be determined at this stage, is the remedy of the orders in judicial review as prescribed under Article 23 (3) (4) of the Constitution. Counsel for the Third and Fourth Respondents argued that under sections 8 and 9 of the Law Reform Act, (Cap 26, Laws of Kenya), and Order 53 of the Civil Procedure Rules, an application for the judicial review orders of certiorari, prohibition and mandamus must be brought within six months of the act or decision being challenged. The Petitioners' claim having happened in the year 1992, and the Petition having been filed in the year 2012, the Petition is way out of the statutory period of six months, is statute-barred, and no orders of judicial review may therefore be granted.

49. With respect I do not agree with this view of the interpretation of the Constitution. What Article 23(3) of the Constitution does is to prescribe the various reliefs or remedies which the court may grant upon determination of a Petition. These reliefs include, a declaration of rights, an injunction, a conservatory order, a declaration of invalidity of any law that denies, violates, infringes or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24, an order for compensation, and an order for judicial review. There is no statutory period prescribed for commencement of the Petitions under either Article 22 or 258 of the Constitution. The grant of those

reliefs or remedies are consequently not subject to any statute or period of limitation either under the Limitation of Actions Act (Cap 22, Laws of Kenya), or the Law Reform Act aforesaid. I therefore reject argument by counsel for the Third and Fourth Respondents subjecting the reliefs in judicial review granted in a Constitutional Petition to any period of limitation.

50. The other third preliminary issue raised by the Third and Fourth Respondents in objection to the Petition is the claim that any issue of alleged historical injustice to allocation of land is a matter for investigation by the National Land Commission established under Article 67 of the constitution, and whose functions under Article 67(e) is to –

"(e) initiate investigations, on its own initiative or on a complaint, into present or historical land injustices and recommend appropriate redress."

51. On this ground, the Third and Fourth Respondents argued **inter alia** that the Petitioners overlooked and sidestepped this constitutional gateway and body to which their complaint should have been made. The Respondents argument is that since L.R. No. MN/1/5902 was allocated and transferred to the Third Respondent in 1992, this constituted historical strands in the existence of the property that can only be dealt with by one constitutional body, that is the National Land Commission before any matters arising therefrom find their way to the High court in its supervisory jurisdiction over subordinate courts, person, or authority exercising quasi-judicial function.

52. Counsel for these Respondents therefore contended that the Petitioners by by-assing the National Land Commission **deprived the affected Respondents the opportunity to fully put up their respective defences**, pursuant to the provisions of the National Land Commission Act 2012, enacted pursuant to Article 68(n) of the Constitution, and section 14(1) of which mandates the National Land Commission upon a complaint by the national or county government, or a community or an individual, to review all grants or dispositions of public land to establish their propriety or legality. Counsel submitted that the Petitioners failed to take advantage of this opportunity pursuant to the provisions of section 14(2) and (3) of the National Land Commission Act.

53. Counsel therefore submitted that the determination by the court of this Petition would deprive the Respondents the opportunity afforded them in sections 19(3) and (4), being a directive of Articles 67 and 68 of the Constitution. In this regard counsel relied on the decision of the court in **SILAS OTUKO VS. HASSAN ALI JOHO & 3 OTHERS (Mombasa Petition No. 44 of 2013).**

54. For all those reasons, the Third and Fourth Respondents contend that the Petition herein is premature, the Petitioners having **"missed the correct and initial procedural step that should have been followed, before finding its way to this court."**

55. In response to objections by the Third and Fourth Respondents, the Petitioners counsel submitted that –

> (a) the power conferred upon the National Land Commission cannot and does not exclude the jurisdiction of the court, to determine whether the matter complained of has the effect of violating the constitutional rights of the Petitioners; and
>
> (b) as at February, 2012, when the Petition was filed, the legislation contemplated under Article 68(2) (1) of the Constitution, the National Land Commission Act was not in place, that neither its lack of existence as at February, 2012, nor its coming into effect thereafter can act as a bar or a stay of the exercise of the court's jurisdiction under Article 165 as read together with Articles 22 and 23 of the Constitution.

56. The Third and Fourth Respondents had a fourth preliminary objection, and that was that the matter was proceeding by way of affidavit evidence only as procedurally required under judicial review matter. This, counsel for the Petitioner submitted was misleading, because it was not a judicial review application, but a constitutional petition and directions had been given by the court that it would proceed

by way of written submissions based on the affidavit evidence by the Petitioners and Respondents, and grounds of opposition raised by the Second Respondent. There was no preferred mode of disposal of the Petition provided by the Third and Fourth Respondent during the three years existence of the Petition. In any event an earlier suggestion to visit the disputed parcels of land were not raised at the hearing of the Petition.

57. In determining this aspect of the preliminary objection, I entirely agree with the Petitioner's counsel's submissions. **Firstly,** the National Land Commission Act 2012 was enacted after this Petition had been filed in February, 2012. **Secondly,** the Third and Fourth Respondents have for three years of the existence of the Petition, failed to raise with the court or the Petitioners on the role of the Commission. **Thirdly,** there is no provision in either the Constitution or the National Land Commission which purports to oust the jurisdiction of the court to determine land disputes either before or after the enactment of the Constitution of Kenya 2010, or the enactment of the National Land Commission Act. **Fourthly,** there is as yet no definition of **"present or historical land injustice"**. However, if it means or includes settlement of Kenyans from other parts of Kenya to lands which were not prior to Independence in 1963, their community's or nations, ancestral area or areas, Article 40(1) of the Constitution has **debunked** that definition as it expressly declares that every person irrespective of his origin in Kenya or elsewhere, has a right, either individually or in association with others to acquire and own property –

(a) of any description, and

(b) in any part of Kenya

58. If the expression refers to the procedure under which the land is presently allocated (by Government at the national or county levels), that is a question for legitimate inquiry either by the court or the National Land Commission within its mandate under the National Land Commission Act.

59. The Petitioners' claim is not about **"historical land injustice"**. The dispute in the Petition is in respect of a parcel of land which the Petitioners contend gave them access to the sea shore. I therefore reject the argument by the Third and Fourth Respondents' counsel that was a dispute subject to the jurisdiction of the National Land Commission.

60. Having disposed of those preliminary issues, I now turn to the main issues raised by this Petition –

(1) whether the Petitioners had pre-emptive right of access to the sea-shore of the Indian Ocean from the site of their premises;

(2) whether the Petitioners' rights to such access were violated by the alienation of those rights by the First Respondent

THE PETITIONERS' CASE

61. The Petitioner is the proprietor of all that parcel of land known as MN/I/18888 which is registered at the Mombasa District Lands Registry as Title No. CR 538889 (the Petitioners property).

62. The First Petitioner's property was originally owned by the Second Petitioner and was known as Sub-Division No. 857, Section 1, Mainland North, Mombasa (registered at the Mombasa District Lands Registry as Title Number CR 8911). The First Petitioner's property was transferred to the First Petitioner by the Second Petitioner on 19th December, 2011 in consideration of the shares that the Second Petitioner holds in the First Petitioner.

63. The parcel and title number for the First Petitioner's property was changed in the year 2011 from Sub-Division No. 857, Section 1, Mainland North Mombasa (CR 8911) aforesaid to the present L.R. MN/1/18888 (CR. 53889) pursuant to a successful application for change of user of the said property from a single dwelling house, to a multi-dwelling facility.

64. The Second Petitioner had purchased the Petitioners' property from a company known as African Safari Club Limited on 30th June, 2009 at a consideration of KShs. 42,500,000/=. the Petitioners property is situate at Shanzu Beach, Mombasa Mainland North and was at all material times a first row beach plot.

65. The Petitioners claim that between their property and the Indian Ocean high water mark, there was a strip of land that was reserved for public use, that by virtue of its location, the property enjoyed unrestricted access, use and view of the Indian Ocean waters over the years through the said reserve land. This is clear from a copy of the title attached to Supporting Affidavit of the Second Petitioner and marked "SSS2", where the said land is clearly marked "Reserve". It is also clear from the Deed Plan for the said title that there was no other parcel of land between the Petitioners' property and the Indian Ocean save for the said reserve.

THE THIRD RESPONDENT

66. The Third Respondent is the registered property of the parcel of land known as LR No. MN/1/5902 which was allocated to the Third Respondent by the First Respondent on 14th April, 1992 for a term of ninety-nine (99) years from First June, 1989 (as per a copy of the Grant No. CR. 22 652 annexed to the Affidavit of the Second Petitioner in support of the Petition as annexture "SSS 6". The Petitioners' claim as shown in the Deed Plan No. 141057 (annexed to the Grant for the plot), is that the plot was created from the land reserved for public use, between the Petitioners' property and the Indian Ocean and that the plot has completely blocked access to the Indian Ocean from the Petitioners' property. For the purposes of this Judgment this plot shall be referred to as the **"First Reserved Plot"**.

THE FOURTH RESPONDENT

67. The Fourth Respondent is the registered proprietor of the parcel of land known as LR No. MN/5901 which was allocated to the Fourth Respondent on 2ndJune, 2011 by the First Respondent, and a Grant CR. 52344, issued on 10th June, 2011 annexed to the Second Petitioner's Affidavit in support of the Petition. This plot came about as a result of the consolidation of several plots during which a portion of the land that was reserved for public use in front of the Petitioners' property was excised and curved out to form part of the plot which shall hereafter be referred to as the **"second reserve plot"**. The Petitioners claim that the curving out of a portion of the First Reserve lot to form part of the second reserve plot had also the effect of blocking the Petitioners' access to the Indian Ocean from the Petitioners'' property.

THE FIRST AND SECOND RESPONDENTS

68. These Respondents have been joined in the Petition for the role they played in allocating the First and Second Reserve Plots to the Third and Fourth Respondents.

THE BASIS AND CIRCUMSTANCES GIVING RISE TO THE PETITION

69. The Petitioners claim is that they had purchased the Petitioners' property for the purpose of erecting a multi-million modern development comprising of seventy three (73) holiday apartments under the project name **"KILUWA"**. According to the project concept, the intended development was to give the residents of the apartments a view of the beautiful scenery of the Indian Ocean waters, beach and the Kenyan coastline from their rooms, and the construction was intended to commence in September, 2011.

70. The Petitioners however say that before they could commence the development of their project, the Third and Fourth Respondents commenced erecting a stone wall along the boundary of the **First and Second Reserve** plots and the Petitioners' property, and that the said wall had completely blocked the Petitioners' access to the Indian Ocean from the Petitioners property, as shown in the photographs annexed and marked as "SSS9" to the Second Petitioner's Affidavit in support of the Petition.

71. The Third and Fourth Respondents insisted that as the lawful owners of the First and Second Reserve plots, along which the said wall is being built, they have a right to erect the said wall. On their part the Petitioners say that in the absence of access to the Indian Ocean, their development cannot

proceed in accord with the concept of an ocean view scenery on which it was grounded. The Petitioners' are consequently aggrieved by the actions of the Third and Fourth Respondents, and allege that the said Respondents have violated their constitutional rights. The Petitioners therefore challenge the constitutionality and legality of the said Third and Fourth Respondents' ownership of the First and Second Reserve Plots, and the construction thereon of the boundary wall.

THE GROUNDS UPON WHICH THE PETITION IS BROUGHT

72. **Firstly**, the Petitioners challenge the taking away of their **lithoral** rights, to access, use and view, the Indian Ocean Water by the alienation, by the First Respondent, to the Third Respondent of L.R. No. MN/1/5902 (the first reserve plot), curved out of the land that was reserved for public use and which was used by the Petitioners to access the Indian Ocean. **Secondly**, the Petitioners also challenge the extension of the boundary of the parcel of land known as LR No. MN/1/5901 (the second reserve plot) to cover a portion of the land which formed part of the land that was reserved for public use and formed part of the Petitioners' access to the Indian Ocean. **Thirdly**, the Petitioners also challenge the Third and Fourth Respondents' decision to put up a wall along the boundary of the two plots and the Petitioners' property, and thus blocking the Petitioners' access, use and enjoyment of the Indian Ocean waters.

73. In support of their prayers first set out at the beginning of this Judgment, the Petitioners also set out nine grounds upon which they say their Petition should be allowed.

74. **Firstly**, the Petitioners say, the First Respondent had no power in law, to alienate land that was reserved for public use to the Third Respondent. The first reserve plot [LR No. MN/1/5902] was curved out of land which was reserved for public use in accessing the Indian Ocean at Shanzu Beach, a fact the Petitioners' say, is not disputed by the Respondents. It is also a fact not in dispute, that the wall has denied the Petitioners access to the Indian Ocean. Counsel for the Petitioners relied upon the provisions of section 9 of the Government Lands Act, (Cap 280, Laws of Kenya(repealed), but the First Respondent could only allocate land in township if the same was not required for public purposes, and that the First Respondent had no power to alienate land that was reserved for public purpose. Counsel submitted that the parcel of land from which the First Respondent curved out L.R. No. MN/1/5902 was reserved for public purposes and was not available for alienation for private use by the First Respondent; the alienation of the said land to the Third Respondent was therefore unlawful, null and void.

75. Relying on the said section 9 of the Government Lands Act, counsel for the Petitioners concluded that the First Respondent can only dispose of land in township if it is not required for public purposes, that the land, the subject of the Petition which had already been reserved for public purpose was not available for disposal to the Third and Fourth Respondents, as the land was held in trust by the Government for the public.

76. Citing Regulation 110 (1) of the Survey Regulations made pursuant to section 45 of the Survey of Kenya Act (Cap 299, Laws of Kenya), counsel for the Petitioners submitted that even if it is assumed that the reserve land was available for alienation, the parcel of land, (LR No. MN/1/5902) curved therefrom was created in contravention of the said regulation 110(1) which says –

> **"110(1) Where unalienated Government land fronting on the area coast is being surveyed for alienation, a strip of land not less than sixty meters in width shall normally be reserved above the high water mark for Government purposes.**
>
> **PROVIDED that, if the interest of development require, the minister may direct that the width of this reservation shall be less than sixty meters in special cases."**

77. Counsel submitted that the creation of LR No. MN/1(5902) and the extension of the boundary LR No. MN/1/5901 to the reserve land did not leave the sixty meters reserve land provided for in the Regulation, and section 9 of the Government Lands Act.

78. **Secondly**, counsel argued, the extension of the boundary of LR No. MN/5901 to cover a portion of

the land that was reserved for public use was unlawful, null and void. The said extension counsel contended, offends the provisions of section 9 of the Government Lands Act aforesaid, as well as the provisions of Regulation 110(1) of the Survey Regulations made under section 45 of the Survey Act aforesaid.

79. **Thirdly**, counsel submitted, the creation of the First and Second Reserve Plots had the effect of completely blocking access to the Indian Ocean waters from the Petitioners' property. Counsel for the Petitioners further argued that in light of the prejudice that was bound to be suffered by the proprietors of the Petitioners property, by the First Respondents' act of alienating the said reserve plots to the Third and Fourth Respondents, the rules of natural justice and equity required that the proprietors of the Petitioners' property be consulted, and be given a hearing before the said alienation. Such alienation by the First Respondent to the Third and Fourth Respondents without giving the Petitioners any hearing was a breach of the rules of natural justice, equity, the rule of law, and that the alienation is null and void. In this regard the Petitioners' counsel relied upon the decision of the Court of Appeal in the case of **THE COMMISSIONER OF LANDS VS. KUNSTE HOTEL LIMITED [KLR] E&L 1**, where the court held that –

> **"where allocating land under the Government Lands Act, the Commissioner of Lands is exercising a statutory power and when the exercise of that power is likely to affect the rights of third parties, such parties as are likely to be affected ought to be heard. Failure to hear such parties before the allotment is made renders the allotment null and void."**

80. Counsel concluded that the Petitioners herein as well as other members of the public were entitled to be heard by the First and Second Respondents before a decision was made to allocate a portion of the land reserved for public use to the Third and Fourth Respondents for private use.

81. **Fourthly**, the Petitioners' counsel also contended that the decision of the First Respondent to create the first and second reserve plots from the land which was reserved for public use and to allocate the same to the third and Fourth Respondents and which allocation had the result of depriving the Petitioners of their right to access, use and enjoyment of the Indian Ocean waters from their property was a violation of the Petitioners' right to equal access to public property which is guaranteed under Article 13(3) of the African Charter on Human and Peoples Rights which article provides –

> **"13(3) Every individual shall have the right of access to public property and services in strict equality of all persons before the law."**

Counsel contended that by virtue Article 2(6) of the Constitution of Kenya 2010, the said Charter is part of Kenya Law, as the Treaty has been ratified by Kenya.

82. **Fifthly**, the Petitioners also claim that by virtue of being owners of a parcel of land that abuts the Indian Ocean, the Petitioners possess rights incidental to this ownership. The Petitioners' claim that the Common Law rights known as **littoral rights** guarantee the Petitioners access from the front of their property to the Indian Ocean waters, that these littoral rights, as private rights enjoy protection under Article 40 of the Constitution of Kenya, 2010. Under Black's Law Dictionary – **Littoral Rights** are defined as:-

> **"rights concerning properties abutting an ocean, sea or lake rather than a river or stream (riparian), littoral rights are usually concerned with the use and enjoyment of the shore."**

83. In the U.S.A. the Supreme Court of Florida held in the case of **WALTON COUNTY VS. STOP THE BEACH RENOURISHMENT**, that –

> **"…the owners of land fronting the ocean or beaches (upland owners) held several special or exclusive common law lithoral rights, namely:-**

i. **the right to reasonably use the water;**

ii. **the right to accretion and reliction; and**
iii. **the right to unobstructed view of the water."**

84. Counsel submitted that blockage of the Petitioners' access to the Indian Ocean waters is violation of the rights the Petitioners claim which are protected under Article 40 of the Constitution of Kenya, 2010.

85. Counsel for the Petitioners claimed that by virtue of their right to ownership of property guaranteed under the said Article 40, the Petitioners have property rights which are incidental to such ownership and include the right to access, use, and enjoy unobstructed view of the Indian Ocean waters, and that any act which interferes with such rights is a violation of the right to own property that the unlawful restriction on the Petitioners' access to the Indian Ocean beach, from their property by the allocation of public land which the Petitioners' used to access the beach to a third party thereby curtailing the Petitioners use and development on the Petitioners' property which was conceptualized on unrestricted access to the Indian Ocean waters amounts to a violation of the Petitioners' right to property.

86. In this regard, counsel for the Petitioners' cited the case of **KAMAU VS. GATHURU KLR & ANOTHER (E&L 1, page 655)** where the Respondent, the Municipal Council of Nakuru purported to provide an access to the frontage of the Plaintiff's residence, and thereby blocking that access. The court held –

> **"…that the Defendant had no right to block the frontage of the plaintiff's property which opened up to a cul de sac."**

87. Likewise counsel concluded, the Third and Fourth Respondents herein have no right to block the frontage of the Petitioners' property that opens up to a public beach.

88. The Petitioners also contended that the manner in which the First Respondent alienated the reserved plots to the Third and Fourth Respondents amounted to unfair administrative action and a breach of the national values and principles of governance set out in Article 10 of the Constitution. The values and principles bind all state organs, state officers and public officers whenever they make or implement public policy decisions or apply or interpret any law. The First Respondent is a public officer and the decision to allocate public land is a public policy decision, and that when making such a decision, the First Respondent is bound to observe the national values and principles of governance which include the rule of law, participation of the people, equity, social justice, non-discrimination, good governance and sustainable development.

89. Counsel submitted that the First and Second Respondents acted contrary to these values and principles when they failed to observe the law which barred them from allocating land reserved for public use to third parties for private use, without consulting the public and all those who were likely to be affected by that allocation, and likewise failed to apply social justice and equity in breach of the national values and principles of governance.

90. The Petitioners' counsel also contended that the construction by the Third and Fourth Respondents of the wall, blocking the Petitioners' access to the Indian Ocean waters and any other development put up by the Third and Fourth Respondents on the reserved land would violate the Petitioners' right to clean and healthy environment as guaranteed under Article 42 of the Constitution.

91. The Petitioners' counsel submitted that the reserve land out of which the two reserved plots were curved from is situate on the shore-line of the Indian Ocean with a very delicate ecosystem, and that any development on the said two plots and more particularly the portion bordering the High Water Mark would disturb the ecological balance in the area and would adversely affect marine life, as well as endanger the surrounding environment, and that this would violate the Petitioners' rights to clean and healthy environment. In support of this submission counsel cited the case of **MWANIKI & 2 OTHERS VS. GICHEHA & 3 OTHERS, KLR (E&L) 1**, at page 739 where the Plaintiff had sought an order to restrain the Defendants from constructing a slaughter house near their homes which was bound to affect their lives negatively due to smell and affluent being discharged therefrom.

92. Contrary to the Defendants contention that the Plaintiffs were strangers to the land on which the slaughter house was to be built, and to be affected by the smell and affluent, the court held **inter alia** that –

"any person who alleges that his entitlement to clean and healthy environment has been or is likely to be contravened has the right to apply to the High Court for redress notwithstanding the fact that he may not have land in the area where the environment degradation is threatened."

93. Similarly, in the case, **INSURANCE COMPANY OF EAST AFRICA LIMITED VS. THE ATTORNEY GENRAL & 4 OTHERS KLR, (E&L)1 AT PAGE 406,** the Plaintiffs had at page 406 sued among others, the Commissioner of Lands and the Attorney-General challenging the curving of a plot from land fronting the Indian Ocean that had been left as an open space as a public utility and thereby blocking the road reserve leading to the Indian Ocean. On an application for an injunction, it was held **inter alia** –

"(i) that where an allotment of land is challenged, it is incumbent upon the Respondents to show what legal procedures under the Government Lands Act was followed in allocating the land to them.

(ii) where issues of public rights and environmental implications are raised, a positive and liberal interpretation of locus standi should be adopted more particularly where the Applicants' private rights have been advanced."

94. The Petitioners' counsel also cited Article 47 which guarantees fair administrative action, and submitted that the acts of the First and Second Respondents complained of, were not lawful, reasonable and fair, and that the Petitioners' rights to fair administrative action were violated, and that the titles held by the Third and Fourth Respondents to the two reserved plots were not acquired through due process and are likewise null and void.

95. For all these reasons the Petitioners' counsel urged the court to allow the Petition with costs against the Respondents, jointly and severally.

THE RESPONSE OF THE FIRST AND SECOND RESPONDENTS

96. The First and the Second Respondents' case in opposition to the Petition is set out in their counsel's submissions dated 30th January, 2013, and was argued under five issues, namely –

(1) whether the land between the Petitioners' property and the high water mark is and/or was public land;

(2) whether the First Respondent abused its office and acted illegally and unconstitutionally in alienating L.R. Number 5902 and extending the boundary thereof to block of L.R. Number MN/1/5901 access to the sea shore;

(3) whether the alienation by the First Respondent to the Third Respondent of L.R. No. MN/I/5902, Mombasa violated the Petitioners' access to the Indian Ocean beach and the Petitioners' right to own property and equal access to public property;

(4) whether the extension by the First Respondent of the boundary of L.R. No. MN/I/5902, Mombasa violated the Petitioners' right to own property and equal access to public property;

(5) whether the alienation of L.R. No. MN/I/5902, Mombasa by the First Respondent to the Third and Fourth Respondents was in breach of the rules of natural justice, procedural and administrative fairness, and national values and principles of governance.

97. On the first issue, counsel for the First and Second Respondents argued that the land between the

Petitioners' land and the high water mark is, or was not public land, and that neither had it been reserved for public purposes, under Regulation 110(1) of the Survey Regulations 1994, which provides:-

> **"110(1) Where unalienated Government land fronting on the area coast is being surveyed for alienation, a strip of land not less than 60 metres in width shall normally be reserved above the high water mark for Government purposes."** *[emphasis added]*

98. Counsel concluded that on the basis of the said survey, the First Respondent had the said land alienated to the Third and Fourth Respondents, and that the said land so alienated as L.R. No. MN/I/5902 does not fall within the scope of public land as defined under Article 62 of the Constitution of Kenya 2010. I do not propose to include in this Judgment the definition of public land under Article 62of the Constitution of Kenya 2010 as those provisions are not relevant for the purposes of determination of this Petition. Counsel however argued that the alienation of L.R. No. MN/I/5902 was within the President's discretion under section 3 of the Government Lands Act (Cap 280, Laws of Kenya, now repealed) –

"S.3 The President in addition to, but without limiting, any other right, power or authority, vested on him under this Act, may –

> **(a) subject to any written law, make grants or dispositions of any estates, interests or rights in or over unalienated Government land."**

99. Counsel submitted that the area marked as **"Reserve"** in the Deed Plan No. 38154 of 15th April, 1941, attached to Title No. CR. 8911 was merely an area of land reserved for future alienation by the First Respondent, and which the Government had power to alienate, and was not therefore public land or land reserved for public use, and urged the court to so find and hold. In any event counsel argued, relying on the decision in **RE FUNZI ISLAND DEVELOPMENT LTD. & 2 OTHERS [2004] eKLR** that it was the duty of the Petitioners to adduce evidence that the disputed land was reserved for public use, and urged the court to decline to issue the orders sought.

100. It was further argued for the First and Second Respondents that the Petitioners were aware at the time they purchased L.R. No. Section 857, Mainland North (now L.R. No. MN.I/18888) adjoining No. L.R. No. MN/I/5902) that the said adjoining land was registered in the name of the Third Respondent, and that they (Petitioners) are consequently estopped from claiming that the land parcel number MN/I/5902 is public land or was land reserved for public use. Counsel therefore concluded that prayers (a) to (f) of the Petition must fail.

101. On the question whether the First Respondent had abused its office and acted illegally and unconstitutionally in alienating L.R. No. MN/I/5902 and extending the boundary thereof counsel submitted that the First and Second Respondents acted in terms of section 3 of the Government Lands Act (now repealed), and relied on the case of **OCEAN VIEW PLAZA LIMITED VS. ATTORNEY-GENERAL [2000] 1KLR (E&L)** where the court said:-

> **"the allotment of land to a citizen or others protected under the Constitution which action is symbolized by Title Deeds, invests in the allottee inviolable and indefeasible rights that can only be defeated by a lawful procedure under the Land Acquisition Act."**

102. Counsel consequently concluded that the allotment of L.R. No. MN/I/5902 to the Third and Fourth Respondents respectively and the issue of Titles therefore under the Registration Act (Cap 281, Laws of Kenya) (now repealed) and in absence of fraud, the same is indefeasible by virtue of section 23 of the said Act.

103. Regarding the question whether the alienation by the First Respondent to the Third Respondent of L.R. No. MN/I/5902, Mombasa violated the Petitioner's access to the Indian Ocean shore and the Petitioners' right to own property and equal access to public property, counsel submitted that the Petitioners' right to own property and equal access to public property had not in any way been violated,

that the Petitioners have no easement over any portion of privately owned L.R. No. MN/I/5901, and therefore their access to the Indian Ocean has not been breached.

104. Counsel for the First and Second Respondents equally denied that the extension by the First Respondent of the boundary of L.R. No. MN/1/5901, Mombasa violated the Petitioners' right to own property and equal access to public property. The extension, counsel submitted, was pursuant to the provisions of section 3 of the Government Lands Act (now repealed).

105. Likewise the First and Second Respondents' counsel submitted that the alienation of L.R. No. MN/1/5902 to the Third and Fourth Respondents was not in breach of the rules of natural justice, procedural and administrative fairness and national values and principles of governance, as the alienation was in accord with the provisions of section 3 of the Government Lands Act which vests in the President the right, power or authority under the Act to make grants or dispositions of any estates, interests or rights vested in or over unalienated Government land.

106. Counsel concluded that L.R. No. MN/I/5902 was unalienated government land, which was subsequently alienated, and had never been public land or land reserved for public use, and that the alienation was done in exercise and within the scope of the said section 3 of the Government Land Act (now repealed).

107. Counsel relied on the decision of the court in **RE: FUNZI ISLAND DEVELOPMENT LIMITED & 2 others [2004] e KLR** where the court declined to issue orders because there was no evidence to show that the land had been reserved for public use.

108. Counsel further argued that the Petitioners knew before they purchased L.R. No. MN/I/18888 (formerly L.R. 857, section 1) that the parcel of land known as L.R. No. MN/I/5902 was registered in the name of the Third Respondent, and are therefore estopped from claiming that MN/I/5902 was public land or was reserved for public use. Counsel therefore submitted that prayers (a) to (f) of the Petition should fail.

109. Regarding prayers (g) to (i) for injunctive orders this counsel submitted that the Petitioners had not satisfied the three legs for grant of injunctions as stated in the case of **GIELLA VS. CASSMAN BROWN [1973] E.A. 358**.

(a) the Petitioners had established no prima facie case for grant of an injunction;

(b) the Petitioners had not shown that they would suffer irreparable loss and injury if an injunction was not granted, and

(c) that where doubt exists, the court would decide the application on a balance of convenience.

110. In counsel's view, the balance of convenience would tilt in favour of the Respondents because no fraud or irregularity had been proved by the Petitioners' in the process of alienating and allotting the Third and Fourth Respondents the parcels of land in question, pursuant to a survey by the Director of Survey – **OCEAN VIEW PLAZA LIMITED VS. ATTORNEY-GENERAL [2000] 1KLR (E&L)**.

111. For said reasons, counsel submitted that prayers (g) to (i) of the Petition should fail.

112. On the question whether the First Respondent abused its office and acted illegally and unconstitutionally in alienating L.R. No. MN/I/5902, and extending the boundary of L.R. No. MN/I/5901, counsel reiterated his earlier submission that L.R. No. MN/I/5902 was unalienated Government land which was subsequently alienated and had never been public land or land reserved for public use. Counsel relied on the decision of the court in **OCEAN VIEW PLAZA LIMITED VS. ATTORNEY-GENERAL** (supra).

113. Therefore counsel concluded, the allotment by the First Respondent to the Third and Fourth

Respondents was lawful and in the absence of fraud, is indefeasible under section 23 of the Registration of Titles Act, (repealed).

114. This counsel submitted that the alienation by the First Respondent to the Third Respondent of L.R. No. MN/I/5901 did not violate the Petitioners' right of access to the Indian Ocean. Counsel submitted that the Petitioners had no easement over any portion of privately owned L.R. No. MN/I/5901 and L.R. No. MN/I/5902 and that therefore their alleged right of access to the Indian Ocean has not been breached.

115. Likewise counsel submitted, the extension by the First Respondent of the boundary of L.R. No. MN/I/5901 did not violate the Petitioners' rights to own property and equal access to public property.

116. Lastly, on the question whether the alienation of L.R. No. MN/I/5902 by the First Respondent was in breach of the rules of natural justice, procedural and administrative fairness and national values and principles of governance, counsel reiterated his earlier submissions that the First Respondent was acting in exercise of the power, and within the scope of his authority under section 3 of the Government Lands Act.

117. Counsel sought to distinguish this case from the case of **COMMISSIONER OF LANDS VS. KUNSTE HOTEL KLR (E&L) 1** because in that case ,the Respondent had applied for the land between the highway and the hotel (KUNSTE HOTEL), be left as a road reserve, and not for any future alienation or that the plots be amalgamated, and the applicant thereafter accepted and issued a revised allotment.

118. In the present case, counsel submitted that the Petitioners relied upon the false promise by their predecessors in title and the Third Respondent that the said L.R. No. MN/I/5902 was solely for recreation and no building of any nature was to be put up. Counsel asked the court to note that the First Respondent caused the subject portion of the **"reserved land"** to be surveyed for alienation in the year 1989 way before the Petitioners became the registered proprietor of the adjacent land (LR No. MN/I/18888 (formerly L.R. No. 857, section 1, MN) and that it follows therefore that the Petitioners cannot claim that the alienation was done in breach of the rules of natural justice, procedural and administrative fairness, national values and principles of governance, and that therefore prayers (j) to (m) of the Petition should fail.

119. For all those reasons counsel urged the court after considering their submissions to dismiss the Petition with costs against the Petitioners.

THE SUBMISSIONS OF THE THIRD AND FOURTH RESPONDENTS

112. I have already dealt with the preliminary issues of **locus standi** and the **status of judicial review** orders in Constitutional Petitions, that the Second Petitioner has **locus standi** as a shareholder in the First Petitioner, and that the Petitioners have **locus standi** in their own interest and in the public interest to commence court proceedings under both Articles 22 and 258 of the Constitution of Kenya 2010. I also dealt with the objection that the dispute should have been reported to the National Land commission, and determined that reference to the Commission does not bar the Petitioners from commencing court proceedings in the High Court.

113. I now turn to the substantive prayers in the Petition and whether any one of the said prayers, (set out at the beginning of this judgment) should be granted. Though counsel for the Petitioners argued at length on the various prayers, the only issue in dispute is really one, whether the extension of L.R. No. MN/I/5902 Mombasa to cover the area of access to the Indian Ocean sea shore was –

(i) illegal and unconstitutional and abuse of office by the First Respondent;

(ii) a violation of the Petitioners' right to own property, and equal access to public property;

(iii) a violation of the Petitioners' right to clean and healthy environment and equal access to public property;

(iv) whether such alienation was a breach by the First Respondent of the rules of natural justice, procedural and administrative fairness and national values and principles of governance;

114. To answer these issues, it is important to understand the nature of the property the Petitioners claim they had in the parcel of land known as MN/I/5902, Mombasa. In addition thereto, it is also necessary to understand the thrust of the Petitioners' claim that as reserve lands the two "reserve plots" ought not to have been curved out of the reserve land. Article 260 of the Constitution defines **"property"** as including any vested or contingent right to, or whether in or arising from –

(a) land, or permanent fixtures on, or improvements to, land;

(b) goods or personal property;

(c) intellectual property, or

(d) money choses in action or negotiable instalments.

115. **Firstly** the Petitioners claim arises from the Sale Agreement between the Second Petitioner, and the African Safari Club Limited, dated 30th June, 2009 which was executed between the African Safari Club Limited as Vendor Business Liaison Company Limited (the owner of LR No. MN/1/5902), and the Second Petitioner. Under clause 9.1 of the Sale Agreement, the Vendor covenanted as follows –

9.1 The property is sold subject to:-

> *(a) all subsisting easements, quasi-easements and rights of way (if any) equities, quasi-equities and overriding interests;*
>
> *(b) the Acts, reservations, stipulations, conditions and other matters contained or implied in the documents of title in respect of the property;*
>
> *(c) the vendor shall always provide to the Purchaser access or easements without any hindrance whatsoever through Vasco Da Gama Hotel outlet No. MN/859;*
>
> *(d) the Vendor shall also provide another access or easement to the recreation park and the Shanzu Beach through Plot Number MN/I/5902 owned by its sister company Business Liaison Company Limited, which shall execute the Agreement consenting and binding itself as a party to this agreement and the owner Business Liaison Company Limited will not sell its aforesaid plot without the consent and the first option being given to the Purchaser herein and if the same is sold it shall at all times remain as a recreational park but otherwise free from rent charges or mortgages.*

116. From the said clause, it is clear that the interest which the Petitioners derived from the Agreement was an **easement** over Plot No. MN/I/5902. The question is what is an **"easement"**? An easement is an **"incorporeal hereditamant involving a right capable of forming the subject matter of a grant which is appurtenant to the land of one person and is exercisable over the land of another."** An easement is said to be **"either a right to do something or a right to prevent something",** and in order to explain what rights can and cannot exist as easements, we must examine –

(a) the essentials of an easement, and

(b) the distinction between easements and certain analogous rights.

117. The four essential elements which must be satisfied before there can be an easement are:

(1) there must be a dominant and servient tenement,

(2) the easement must confer a benefit on (or accommodate) the easement,

(3) the dominant and servient tenement must not be owned by the same person,

(4) the easement must be capable of forming the subject-matter of a grant.

118. If the examples given by the Respondents of Black Acre being the dominant tenement, and White Acre as servient tenement, are substituted to the case in point, the Petitioners land (L.R. No. 18888) would be the dominant tenement, and the Third Respondent's Plot MN/I/5902 would be the servient tenement. This is because an easement cannot exist in gross but only as appurtenant to a dominant tenement. The reason for this is said to be in the policy of the law against encumbering land with burdens of uncertain extent.

119. The law is that on any transfer of the dominant tenement, the easement will pass with the land, so that the occupier for the time being will enjoy even if he is merely a lessee and where the dominant tenement is severed the benefit of the easement will pass with each and every part of it, subject only to two restrictions. **Firstly**, the severed/sub-divided part of the dominant tenement must itself be accommodated by the easement. **Secondly**, the severance must not increase the burden on the servient tenement.

120. Where an easement is created by an express grant there is no legal necessity for it to specify or refer to the dominant tenement. The court is invited to consider all the relevant facts known to the grantor and grantee at the time of the grant to see whether there was in fact a dominant tenement for the benefit for which the easement was granted, and what its extent and identity were.

121. The facts revealed in this case clearly establish that at the time when the 6.0 Ha Plot were surveyed and sub-divided into sub-plots No. 3622/A and consolidated with Plot No. MN/I/856 they appeared to encroach upon the Government's foreshore reserve and allocated to the Third Respondent M/S Business Liaison Company Limited as MN/I/5902 which then constituted the servient tenement to the Petitioners' plot No. 857 (the dominant tenement).

122. The Affidavit of Renato Bachmann sworn on 15th February, 2012, clearly shows in Exhibit RB"1", how L.R. No. MN/I/5901 and MN/I/5902 were created, and I set out herein in full, for ease of reference, the chronology of events -

(1) Survey Plan marked Folio Number 128: Register Number 39 ("F/R 128/39 the ("Plan B") of 1973, shows the consolidation of the plots MN/I/853-855 forming new number MN/I/2159 and respects the 60 meters foreshore reserve;

(2) Survey Plan marked Folio Number 128: Register Number 86 ("F/R 128/86 the ("Plan C") of 1974, that shows the creation of road of an 18.29 meters access adjacent to MN/I/856 and new plot number MN/I/2207;

(3) Survey Plan marked Folio Number 155: Register Number 79 ("F/R 155/79 the ("Plan D") of 1981 showing the subdivision of MN/I/2159 found in Plan B into two new subplots number MN/I/3621 and MN/I/3622 with the 60 meters foreshore reserve respected;

(4) Survey Plan marked Folio Number 205: Register Number 26 ("F/R 205/26 the ("Plan E") of May 1989, where the foreshore fronting the plot MN/I/857 is not respected and is shown as a new plot MN/I/5902 and MN/I/5904. There are highlighted portions boundary lines d-R1 of length 38.50 meters and R1-12 of length 89.89 meters;

(5) Survey Plan marked Folio Number 198" Register Number 4 ("F/R 198/4 the ("Plan F") of November 1989, where a new plot number MN/I/6926 is created on consolidating MN/I/5900, 5901

and excepting MN/I/3622/I with the 60 meter foreshore reserve not respected and affecting the property MN/I/857;

(6) Survey Plan marked Folio Number 317: Register Number 35 ("F/R 317/35 the ("Plan G") of 2002, is compilation survey plan and of interest is new plot number MN/I/12623/3 which is consolidation of MN/I/6926, Government Land (G.L) and excision of new road known as MN/I/1263/1. Note a road has closed and a new one provided;

(7) Survey Plan marked Folio Number 371: Register Number 61 ("F/R 128/39 the ("Plan H") of 19 May, 2011, where the plot that affects the foreshore reserve of 60 meters for plot number MN/I/857 is reverted to MN/I/5901, by way of cancelling plot number MN/I/12623, and a new deed plan number 325739 issued for registration as a Grant Number C.R. 52344. Take note that the survey Plan H indicates the deed plan number for MN/I/5901 as 325740.

123. Once the gymnastics of sub-division and amalgamation were complete, the original Grant of L.R. No. 5902, to the Third Respondent disappeared, and so were the conditions in it, and in its place a new Grant L.R. 52344, a new Deed Plan No. 325740 for MN/I/5902. Plot Number 5901 by its terms of the original allocation was not to be developed, it was for recreational purposes only. The Third Respondent or its representatives appeared to have ignored the covenants with the Second Petitioner upon sale of L.R. No. 857, that the Petitioner would always have access to the seashore or the 60 metre High Water Mark, through Plot No. 5902.

124. The Petitioners' claim **firstly** that the First Respondent abused his office by approving new deed plans, and consolidation of plots and not respecting the 60 meter High Water Mark, and **secondly** acted unlawfully in issuing new titles to the Forth Respondent without reference to the covenants that run with the land and respecting the Petitioners easements have legitimacy.

DETERMINATION

125. The petition herein is premised upon the provisions of Articles 10, 22, 23(3), 40(1) and (3), 42 and 47 of the Constitution of Kenya, 2010, and Articles 13 and 14 of the African Charter on Human and Peoples Rights.

126. The national values set out in Article 10(2) of the constitution bind every state organ, state officer, public officer and all persons whenever any of them –

(a) applies or interprets the Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

127. The national values and principles of governance include –

(a) patriotism, national unity, sharing and devolution of

power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social, justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development.

128. I have already discussed at length and concluded that Article 22 of the Constitution grants standing

to every person and right to commence proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or threatened. Likewise, I have discussed at length that Article 23(3) sets out the remedies which the court may grant pursuant to court proceedings brought under Article 22, and in so far as judicial review remedy orders are concerned, it is not subject to limitation under section 8 and 9 of the Law Reform Act (Cap 26, Laws of Kenya).

129. Save only for the limitation under Article 65, (regarding landholding by non-citizens to ninety-nine years leases), and to compulsory acquisition under Article 40(3), Article 40(1) of the Constitution guarantees to every person the right, either individually, or in association with others, to acquire and own property –

(a) of any description, and

(b) in any part of Kenya.

130. The only question is whether an easement is property capable of protection under Article 40(1). I discussed at some length in paragraphs 117 – 121 (supra), the nature and essential characteristics of an easement and in particular the existence of a dominant and servient tenement, and that the said dominant and servient tenement must not be owned or controlled by the same person, natural or juridical.

131. I discussed in paragraphs 122, 123 and 124 the evolution and subsequent control of the parcel of land known as LR No. MN/1/5902, through various surveys and issuance of a new grant known as Number LR 52344 and alienation of the Petitioners right of access to the oceanic view of the sea-shore whether a creek or a sand beach, from its parcel of land known as LR No. MN/1/857 (now LR No. MN/1/18888). All this happened without reference to the Petitioners and in particular the Second Petitioner, the mouth piece of the juridical person, the First Petitioner. That in my humble view, was a grave violation by the First Respondent of the national values and principles of governance, integrity, transparency and accountability as set out in Article 10 of the Constitution, and the rules of natural justice under Article 47 which guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

132. Procedurally fair means that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action, and an opportunity to respond to the proposed action.

133. These principles and rules require that before the First Respondent tinkered with the Special Conditions under which the title to LR. No. MN/1/5902, was granted to the Third Respondent (that the land would be used for recreational purposes only and no buildings would be erected thereon (save for the short decorative wall), inquiry would be made as to the adverse consequences if any, to the holders of adjacent lands, if any change of user was effected. It is immaterial that at the time when the changes were purportedly made Articles 10 and 47 of the Constitution did not exist. The principles of good governance, integrity, transparency, accountability and rules of natural justice are of universal application, and are not limited by time or space. Their application was incorporated in special condition 2 in Grant to LR No. MN/1/5902. The encroachment by the First Respondent, to alienate a right of easement enjoyed by the Petitioners was a grave violation of these principles and rule.

134. Likewise, the Third Respondent violated its own covenants with the Second Petitioner by acting in consort with the Fourth Respondent while all the time knowing that the Grant was made to it to secure the interest of Africa Safari Club Limited, the original registered owners of LR No. 857, who sold the said parcel to the Second Petitioner and bound itself with the same covenants in relation to LR No. MN/1/5902. It is consequently not open, and it is foul in the mouth to say, that the Third Respondent gave false representations or that the Second Petitioner relied on false representations given to the by the Third Respondent with regard to the servient easement over LR No. MN/1/5902.

135. As the Petitioners were directly affected, it behoved in particular the First Respondent, and no less the Third Respondent (the registered owner of LR No. MN/1/5902 – the servient tenement) to disclose to

the Fourth Respondent, who in turn would be affected by the restrictive covenant under which the said parcel was held, to make inquiries as to application or otherwise of the restrictive covenant, particularly with the Petitioners who would be adversely affected by the clandestine activities of the First, Third and Fourth Respondent.

136. As discussed in paragraphs 122-124 above, the easement granted by the third Respondent to the Second Petitioner was not only a covenant which run with the land but as a servient tenement, affected and bound every subsequent transfer of the whole parcel or sub-division thereof. For the First, Third and Fourth Respondents to purport to defeat that covenant without reference to the Petitioners, and incorporate portions thereof into the grant issued as Number LR 52344 and subsequently erect a wall over what was LR No. MN/1/5902, blocking the Petitioners view to the sea-shore and expanse of the Indian Ocean, was a grave violation of the Petitioners right to property represented by the easement.

137. The right to a clean and healthy environment, guaranteed under 42 of the Constitution includes the right to have the environment protected for the benefit of the present and future generations not only through legislative and other measures, and particularly those measures contemplated in Article 69 to ensure inter alia sustainable exploitation, utilization, management and conservation of the environment and natural resources and ensure the equitable sharing of the accruing benefits.

138. It is on that basis that it was recognized by the First Respondent's predecessors way back in 1989 when title LR No. MN/1/5901 and 5902 were curved out of the original Government (Crown) Land, and first granted to George Cruikshank Griffiths of Nakuru in 1941. It was thus a breach of those principles, and not open to the First Respondent in collusion with the Third and Fourth Respondents to change the user and character of LR No. MN/1/5902 by extending the boundaries of other lands (LR No. MN/1/5901) and creating Grant No. 52344 with altered conditions of development. It was procedurally unlawful for the First Respondent to act in the manner it did.

139. On the question of littoral rights, section 45 of the Survey Act, read together with Regulation 110(2) of the Survey Regulations clearly require the First Respondent to maintain a reserve land of at least sixty (60) meters between the High Water Mark and the littoral lands. This is what is clearly marked in the Survey Declaration No. 38154 of 15th April, 1941. That principle was maintained in the Grant No. CR. 22652 made to the Third Respondent on 1st June, 1989 and indicated in Survey Deed Plan No. 141057 of 18th October, 1989, conditional upon the said Reserve land being used for recreational purposes only (Special Edition No. 2), and the Third Respondent was not to sell, transfer or charge the said land without the written consent of the First Respondent. It was breached by Survey Plan marked Folio Number 371, Register Number 611 (LR 317/35 (the plan "G" of 19th May, 2011 where the plot that affects the foreshore reserve of sixty (60) meters for plot No. MN/1/857 (now MN/1/18888) is reverted MN/1/5901, by way of cancelling Plot Number MN/1/12623/3 and a new Deed Plan Number 325739 issued for registration as a Grant Number LR 52344.

140. Lastly, the African Charter on Human and Peoples Rights is part of the law of Kenya by virtue of Article 2(5) of the Constitution, the general rules of international law form part of the law of Kenya. Kenya is a signatory to, and has also ratified the African Charter on Human and Peoples Rights. Articles 13 and 14 thereof guarantee every person the right of access to public property, whether designated Government buildings or open public spaces such parks in city centres, or littoral areas under the sixty metre reserve area before the High Water Mark, of the oceans and seas.

141. The question to be answered is this, what was the nature of the sixty (60) meter land between the **high water mark** and the alterations of LR MN/1/857, in 1941, and the subsequent allocations of the reserve land that constituted LR. No. MN/1/5901 and 5902. It is clear from Regulation 110(1) that the 60 meters above the high water mark is for government purposes. It can only be taken away under a direction of the Minister of the time being responsible for Survey of Kenya. In the absence of such direction (and none was exhibited by the Respondents), the grant of that reserve land was patently unlawful, and is null and void.

142. On the question of the right to clean and healthy environment, though Article 43 of the Constitution

guarantees that right, it would not be remiss for this court to refer to the much earlier law, the Environment Management and Control Act No. 8 of 1999) (EMCA) which came into force on 14th January, 2000 (as amended by Acts of that name Nos. 6 of 2006, No. 17 of 2006, and No. 5 of 2007), had in section 3(1) thereof, declared that every person in Kenya is entitled to a clean and healthy environment, and has the duty to safeguard and enhance the environment. That right is granted constitutional sanctity in Article 42 of the constitution, that every person has the right to a clean and healthy environment and this includes –

(a) the right to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly, those contemplated in Article 69, and

(b) to have the obligations relating to the environment fulfilled under Article 70.

143. Under section 3(2) of EMCA, the entitlement to a clean and healthy environment under section 3(1) includes the access by any person in Kenya to the various public elements or segments of the environment for recreational, educational, health, spiritual and cultural purposes. Section 3(4) gives capacity or standing to any person to bring an action notwithstanding that such a person cannot show that the Defendant's act or omission has caused or is likely to cause him any personal injury provided that such action–

(a) is not frivolous or vexatious, or

(b) is not an abuse of the court process.

144. An action seeking any orders on protection of the environment, may include orders to -

(1) prevent, discontinue any act or omission deleterious to the environment;

(2) to compel any public officer to take measures to prevent or discontinue any act or omission deleterious to the environment.

145. In granting any of the above orders, the court will be guided by the following principles –

(1) the principle of public participation in the development of policies, plans and processes for the management of the environment;

(2) the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and are not repugnant to justice and morality or inconsistent with any written law;

(3) the principles of international co-operation on the management of environmental resources shared by two or more states;

(4) the polluter pays principle; and

(5) the precautionary principle.

146. These principles were summarized and discussed (by Nyamu, Ibrahim and Emukule JJ) in the case of **WAWERU VS. REPUBLIC KLR E&L I, 677**, at 688-696 in the paragraphs reproduced in the following passages of this Judgment.

"147. The four principles which we consider directly relevant to the question at hand are -

(1) sustainable development,

(b) precautionary principle,

(3) polluter-pays,

(4) public trust (which is not spelt out in the EMCA), but is clearly included in the principle of public participation".

148. Before discussing these principles in any detail, it is necessary to remind ourselves of what ancient philosophers bequeathed to us. In the **"POLITICS"** Book 7(1), translated by Carnes Lone (1984) the University of Chicago Press at 35, Aristotle said –

> **"Since we see that every city is some sort of partnership, and every partnership is constituted for the sake of some good (for everyone does everything for the sake of what is held to be good), it is clear that all partnerships aim at some good, and that the partnership that is most authoritative of all and embraces all the others does so particularly, and aims at the most authoritative good of all. This is what is called the city or the political partnership."**

149. And St. Thomas Aquinas in **Questiones Dispute de Veritate**, 17 and 1, as quoted by Joseph Reper in **The Human Wisdom of St. Thomas**, Sheed and Ward, Limited, London, 1948, No. 225, said –

> **"Conscience is said to be the law of our minds because it is the verdict of the reason, deduced from the law of nature."**

150. And what is **"nature"**? Neither the Constitution, nor the EMCA define **"nature"**, and there could therefore be as many definitions as the number of the cases, and different usages of the word. I adopt in the context of this judgment, the definition given in **Wordsworth Concise English Dictionary** 2007 Edition at page 604 –

> **"Nature – the power that creates and regulates the world; the power of growth, the established order of things, the external world, especially untouched by man; the qualities of anything which makes it what it is; essence; being; constitution; or kind or order naturalness; normal feeling, conformity with truth, or reality, inborn mind, character, motive or disposition; nakedness, a primitive undomesticated condition; the strength or substance of anything…"**

151. The meaning of "nature" I favour is that which refers to **"untouched, especially by man."** The waters oceans and seas of the world have been used by man as uncharted highways for the discovery of unknown worlds, the sources of food and employment for its rich sources of foods, the different types of fish, the linkages between continents seaways, in ancient as well as present times. Despite advances in technology and exploitation of its hidden riches, especially oil, under its seabed, vast trenches of the oceans are still **"natural"**, **"untouched by man"**, hence the disappearance of aircraft even in the twenty-first century into its belly, without trace, or until it vomits it out by the power of its sub-terranean rivers, the deep ocean currents. That is why when modern science that is to say, better knowledge or understanding of nature observes the formation of a hurricane**, man** can only warn of its occurrence, but is otherwise doomed to watch its progress, and only acts after its passage or aftermath. This is partly why, the nations of the world under its umbrella, the United Nations, came together in 1972, and established the **United Nations Environment Programme**, (UNEP), which has its Headquarters in Africa, specifically in Kenya, East Africa. The location of UNEP in Kenya is one reason that informed the enactment of the legislation governing environment, EMCA in 1999, and subsequent amendments, and the adoption of the four principles first stated above.

152. Emphasizing the critical role of Judiciaries of the world in articulating and giving effect to the laws relating to environment, Klauss Topper [the then Executive Director of UNEP], in his message to the **UNEP GLOBAL JUDGES PROGRAMME 2005**, in South Africa said inter alia –

> **"…..the Judiciary is also a crucial partner in promoting environmental governance, upholding the rule of law and ensuring a fair balance between environmental, social and**

developmental consideration through its judgment and declarations."

SUSTAINABLE DEVELOPMENT

153. The Rio Declaration on Environment and Development 1992 adopted the following:

> **"In order to achieve sustainable development environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."**

PRECAUTIONARY PRINCIPLES

154. The Rio Declaration adopted the precautionary principles in these words –

> **"in order to protect environment, the precautionary approach shall be widely applied by states according to their capabilities, where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."**

155. Under **Principle 16** the internalization of environmental costs and polluter pays principle, was adopted in these words –

> **"National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the application that the polluter should in principle bear the cost of pollution with due regard to the public interest and without distorting international trade and investments."**

156. But nothing summarizes the concept of sustainable development better than the United Nations World Convention on Environmental Development (WCED) 1987, published report. **"OUR COMMON FUTURE"** at page 44 –

> **"Development that meets the needs of the present without comprising the ability of future generations to meet their needs."**

PUBLIC TRUST

157. **"The principle of public participation in the development of policies plans and processes for the management of the environment**" reinforces the principle of public trust. The essence of public trust is that the state as trustee is under a fiduciary duty to deal with the trust property, in a manner that is in the interest of the general public. It is the principle of public trust, that led to the agreements on the Convention of the Sea that the high seas are a common heritage of mankind the use and exploitation of its resources could not be left to the owners of technology to exploit alone without reference to the less technologically resourced people of the world.

158. The UN Conference on the Human Environment 1972, in the several declarations on the establishment of UNEP noted that the environment was –

> **"essential to the enjoyment of basic human rights – even the right to life itself."**

and in Principle No. I the Conference stated –

> **"man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of equality, that permits a life of dignity and well-being."**

159. In the UN Conference on Environment and Development in 1992 on the Rio Declaration, Principle No. I said -

"…human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature."

160. Article 24 of the African Charter of Human and Peoples Rights 1981 provides –

"All people shall have the right to a general satisfactory environment favourable to their development."

161. Article 26 of the Constitution of Kenya 2010 guarantees the right to life. It does not however define "life". Again, I resort to the "Concise Oxford Dictionary 11th Edition which defines life as –

"the condition which distinguishes animals and plants from inorganic matter, including the capacity for growth, functional activity and continual change preceding death – living things and their activity."

162. The Pakistan case of **GENERAL SECRETARY WEST PAKISTAN SALT MINERS LABOUR UNION VS. THE DIRECTOR OF INDUSTRIES AND MINERAL DEVELOPMENT 1994 SCMR 2061**, was filed by residents who were concerned that salt mining in their area would result in the contamination of the local water courses, reservoir and pipeline, and petitioned the Supreme Court of Pakistan to enforce their right to have a clean and unpolluted water and filed their claim, as a human right under Article 184(1) of the Constitution of Pakistan. The Supreme Court held that as Article 9 of the Constitution provided that **no** person shall be deprived of life or liberty save in accordance with the law the word **"life"** should be given an expansive definition, the right to have unpolluted water was a right to life itself.

163. And in **ZIA VS. WAPDA PLD 1994 SC 693**, Justice Saleem Akhtar held as follows –

"The constitution guarantees the dignity of man and also the right "life" under Article 9 and if both are read together, questions will arise whether a person can be said to have dignity of man if his right to life is below bare necessity line without proper food, clothing, shelter, education, healthcare, clean atmosphere and unpolluted environment."

164. Whereas the literal meaning of life under Article 26 means absence of physical elimination, the dictionary covers the activity of living. The activity takes place in some environment and therefore the denial of a wholesome environment is a deprivation of life as defined in Zia vs. Wapda (supra).

165. The point for determination in this case relates to the alienation by the First Respondent to the Third and Fourth Respondents of the area originally marked in Survey Deed No. 38154 of 15th April, 1941, as **"Reserve Land"** and part of the 60 meters **"High Water Mark"**. That area is what Regulation 110(1) reserved for Government purposes, and shall not be alienated except with a special dispensation or licence issued by the Cabinet Secretary responsible for matters relating to environment, and land.

166. For the alienation of LR Nos. MN/1/5902, for purposes of a special licence ought to have been given by the Cabinet Secretary. It is clear from the Conditions attached to the Grant for the said land, that such licence or certificate was not granted by the Cabinet Secretary. That is why Special Condition No. 2 provided that the parcel of land would be used for recreational purposes only, and that no buildings would be erected thereon except for the then existing low level decorative wall. It was therefore unlawful for the First Respondent through skewed surveys to grant title to land in respect of the 60 meters High Water Mark. Like the **Baselines**, from which the outer limits of the territorial sea and other coastal state zones (the 12 mile territorial sea, the 12 mile contiguous zone, and with the extra 176 miles all comprising the Economic Zone), the High Water Mark defines the area of the main land which is left for government purposes, and unless procedurally reduced, not alienated, the purported alienation was not in accord with the Survey Act nor the Survey Regulations, the EMCA, and certainly violated the Petitioners' right to a clean and healthy environment which is enhanced by open sea breezes, and access thereto.

167. As observed by the court in **WAWERU VS. REPUBLIC** (supra),

"it is quite evident from perusing the most important international instruments on the environment that the word life and the environment are inseparable and the word "life" means much more than keeping body and soul together."

168. The orders I make under Articles 69 and 70 of the Constitution are clearly intended to secure the place of a clean and healthy environment as a prerequisite to a life worth living. The reserve of the 60 meter High Water Mark is from the country's **coast baseline**, but it carries significance to the maintenance of the country's environment, whether at the sea/ocean coast, lake shore, river shores, or forest edges.

(1) **Statutory Remedy And Public Trust**

169. The 60 meters High Water Mark is held by the state as a Public Trust as a buffer zone to the country's territorial sea. It was unlawful for the First Respondent whether under advice of the Second Respondent or others not party to the Petition.

As it is clear from Article 69(1) be it land resources, forests, wetlands and waterways or the ocean, and lakes the Government and its agencies are under a public trust to manage them in a way that maintains a proper balance between the economic benefits of development with the needs of a clean environment.

The 60 meters High Water Mark is held by the State as a public trust as a buffer zone before the baseline from which the country's territorial sea is measured. It was therefore unlawful for the First Defendant under the advice of the Second Respondent, or under orders to allot them to the Third and Fourth Respondents. There shall therefore issue an order of certiorari and quash the allotment letter dated 2nd June, 2011 (Exh.SSS"8") issued to the Fourth Respondent, as well as the grant CR 52344 dated 10th June, 2011 issued pursuant thereto and registered as No. CR 52344/1.

170. Likewise there shall issue orders of **mandamus** to restore the 60 meters High Water Mark in respect of the coast for purposes of access by all citizens of Kenya to run along and recreate in the open shores of the Indian Ocean.

(2) **SUSTAINABLE DEVELOPMENT**

170. In **WAWERU VS. REPUBLIC** (supra) the three Judge Bench Court said inter alia –

"The Government (under which the First and Second Respondents serve) through the relevant ministries (and agencies) is under obligation under the law to approve sustainable development and nothing more, which is development that meets the needs of the present generation without compromising the ability of future generations to meet their needs."

171. In this regard therefore, no more development on the 60 meter High Water Mark in respect of MN/1/5902 and LR No. 5901 without prior approval from National Environment Management Authority and the relevant Cabinet Secretary's certificate reducing the 60 meters High Water Mark.

(3) **INTERGENERATIONAL EQUITY**

172. In the book, E. Brown Weiss, ON **FAIRNESS TO FUTURE GENERATIONS** UN University Press, 1989, at paragraphs 36-37, the author defines the intergenerational principle in these telling words –

"The proposed theory of intergenerational equity postulates that all countries have in intergeneration obligation to future generations, as a class, regardless of nationality… There is increasing recognition that while we may be able to maximize the welfare a few immediate successors, we will be able to do so only at the expense of our more remote descendants, who will inherit a despoiled nature and environment. Our planet is finite, and we are becoming increasingly interdependent in using it. Our rapid technological growth

ensures that this dependence will increase. Thus our concern for own country must, as we extend our concerns into longer time horizons and broader geographical scales, focus on protecting the planetary quality of our natural and cultural environment. This means that, even to protect our own future nationals, we must cooperate in the conservation of natural and cultural resources for all future generations."

173. I entire endorse the above definition.

(4) **THE CHALLENGE**

174. Though Professor E. Brown Weiswrote in 1989, over twenty six years ago, it is not apt for this generation to ask for a sign before realizing how serious and imminent the issue of environment protection is important to our and future generations the floods which occur in Bombolulu, Mikindani, Mshomoroni, Buxton and other residential areas of Mombasa every rainy season, the destruction of mangrove swamps and forests, the spawning crabs and aquatic species of fishes and other animals, the disappearing soda ash in Lake Magadi is enough reason to rare inspire this rabid generation in joining the fight for environmental justice. In their judgment in **WAWERU VS. REPUBLIC** (supra), the Judges said –

"It will be recalled that it is our generation that wholly depended on river water for home consumption and for livestock, water pipes and taps were invented in our life time but had not reached us. Our rivers had quality water that sustained all generations. Then came the tapped water with the cleansing power of chlorine – finally the water pipes and taps reached some of us – they still have not reached many and the majority of our brothers and sisters. It is our generation again which now says that you take tap water at your own risk – to be on the safe side take "bottled water" yet it is a fact that only a chosen few have access to this new invention. What went wrong before our own eyes? In the name of environmental justice water was given to us by the Creator and in whatever form it should never ever be privilege of a few – the same applies to a right to a clean environment."

175. I have deliberately dealt expansively on the Petitioners' claim to a right to a clean and healthy environment. This springs from the fact that it is our generation, the generation which took control of this country in various capacities in Government and other agencies in the late 1960s and the decades immediately thereafter which has perhaps witnessed the greatest degradation of the environment more than any other past generation as clearly depicted in the bottled water phenomenon described in the **Waweru vs. Republic** (case), we have not so much fallen from grace of the Garden of Eden where the first man survived on the abundance of nature. Between entrance and exit from mother earth, man is by both the laws of nature and man's law like EMCA, required to live in a clean and healthy environment. When that equilibrium and balance exists, then life becomes more than the maintenance of body and soul together before returning to mother earth.

176. In conclusion therefore, I reiterate the orders of certiorari and mandamus herein above issued.

THE FINAL ORDERS

177. For reasons already given the Petition herein succeeds, and there shall issue orders in terms of prayers (a).

Having come to the above captioned conclusions, I make the following declarations and orders.

1. (a) A declaration that the First Respondent abused its

office and acted illegally and unconstitutionally in alienating L.R. No. MN/I/5902, Mombasa which was curved out of a reserve land to the Third Respondent;

(b) A declaration that the First Respondent abused its office and acted illegally and unconstitutionally in

extending the boundary of L.R. No. MN/I/5901 to cover a portion of the reserve land;

(c) A declaration that the alienation by the First Respondent to the Third Respondent of L.R. No. MN/I/5902, Mombasa which is the Petitioners' access to the Indian Ocean beach has violated the Petitioners' right to own property and equal access to public property;

(d) A declaration that the extension by the First Respondent of the boundary of L.R. No. MN/I/5901 to cover a portion of the reserve land which is the Petitioners' access to the Indian Ocean beach is a violation of the Petitioners' right to own property and equal access to public property;

(e) A declaration that the alienation of a reserve land by the First Respondent to the Third and Fourth Respondents for private use was a violation of the Petitioners' right to clean and healthy environment and equal access to public property;

(f) A declaration that the alienation of L.R. No. MN/I/5902, Mombasa by the First Respondent to the Third Respondent and a portion of L.R. No. MN/I/5901 that encroaches on the reserve land to the Fourth Defendant was done in breach of the rules of natural justice, procedural and administrative fairness and national values and principles of governance;

(g) An order of injunction to restrain the Third Respondent, its officers, servants and/or agents from selling, transferring, mortgaging, charging, leasing, developing, putting up a wall or fence or blockage of any nature on and from having any other or further dealing with all that parcel of land known as L.R. No. MN/I/5902, Mombasa;

(h) A permanent injunction to restrain the Third and Fourth Respondents, their officers, servants and/or agents from blocking the Petitioners' access to and view of the Indian Ocean through L.R. No. MN/I/5902 and L.R. No. MN/I/5901 in any manner whatsoever;

(i) A mandatory injunction compelling the Third and Fourth Respondents to demolish a stone wall that they have constructed on L.R. No. MN/I/5902 and L.R. No. MN/I/5901, Mombasa;

(j) An order of Judicial Review in the nature of Certiorari to bring into this court and quash the decision of the First Respondent to alienate L.R. No. MN/I/5902, Mombasa to the Third Respondent;

(k) An order to Judicial Review in the nature of Certiorari to bring into this Honourable Court and quash the decision of the First Respondent to extend the boundary of L.R. No. MN/I/5901 to cover a portion of the reserve land;

(l) An order of Judicial Review in the nature of mandamus to compel the First Respondent and/or its successors in title to cancel Grant No. C.R. 22652 dated 4th April, 1992 for L.R. No. MN/I/5902, Mombasa;

(m) An order of Judicial Review in the nature of a Mandamus to compel the First Respondent and/or its successors in title to amend Grant No. C.R. 52344 dated 10th June, 2011 for L.R. No. MN/I/5901 and remove therefrom the portion thereof that extends to the reserve land;

2. The Petitioner shall have the costs of the Petition herein.

3. In so far these orders affect the management of the Environment, this Judgment and orders shall be served upon the National Environment Management and Control Agency on enforcement of the 60 meter High Water Mark.

Dated, Signed and Delivered in Mombasa this 13th day of October, 2015.

M. J. ANYARA EMUKULE

JUDGE

In the presence of:

Miss Onesmus holding brief Mr. Khanna for Petitioners

Mr. Kibara holding brief Mr. Butti for 3rd and 4th Respondents

Mr. Ngari for 1st and 2nd Respondents

Mr. Kaunda Court Assistant