

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ELC CASE NO 36 OF 2021

SAID SULEIMAN MRAJA

ANISA HUSSEIN MWAKILALO

HASSAN ALI NGENYA

KASSIMU ABDALLAH SHEE

IDD MOHAMED MWATANDARA

ATHUMAN HAMISI ALI

ALI KASSIM MKUNGU

**KASSIM BAKARI MWAMZANDI (Suing on behalf of
residents of Mwaembe & Kisimachande
Village.....PLAINTIFFS**

VERSUS

COUNTY GOVERNMENT OF KWALE

KINANASI SWALEHE MWACHALIKA

SAIDI GUDE

MASHANGA

KASSIMU HAMISI KITAPWA.....DEFENDANTS

JUDGEMENT

1 This suit was commenced by the Plaintiffs in November 2014 through the firm of Khatib & Company Advocates

and later Olwande Oballa Advocates filed a Notice of Change of Advocates. The plaintiffs claim to be the registered owners of plot Numbers Kwale/Msambweni 'A' 3404, 3411 and 3412 (suit properties) all subdivisions of Kwale/Msambweni 'A' 2602 (mother title). According to the Plaintiffs the mother title was previously public land registered under the Kwale County Council a predecessor of the 1st Defendant. It is the County council that in the year 2009 passed a resolution to subdivide and issued titles to the Plaintiffs.

- 2 But what brought the Plaintiff to court then? They allege the 1st Defendant entered the suit properties cleared vegetation claiming the same belonged to Msambweni Hospital. The Plaintiff read this as a ploy to deprive them of their land without their consent and want the 1st Defendant permanently restrained from entering , trespassing, alienating, transferring, disposing or in any other way from interfering with the Plaintiffs ownership of the suit properties. They also seek an award of general damages, costs and interest.
- 3 The 1st Defendant denied the above allegations vide Amended Defence & Counterclaim dated 25/01/2018 through the firm of Muturi Gakuo & Kibara Advocates. The 1st Defendant avers the suit properties comprised the mother title were public properties. The same were illegally and fraudulently acquired by the Plaintiffs. The

particulars of the illegalities and fraud are set out in paragraph 11 of the further Amended defence.

- 4 The 1st Defendant prays inter alia that the titles be declared illegal null and void ab initio and rectification of the register by reinstatement to the 1st Defendant and registration of the Msambweni District Hospital as the sole legal and beneficial owner.
- 5 The 2nd and 3rd Defendants filed a Statement of Defence dated 27/01/2015 through the firm of Aminga & Company Advocates averring that the Plaintiffs were influential figures in the region who usurped their positions to irregularly acquire the suit properties without the rights of the local communities in situ. It is averred that plot 3404, 3411 and 3412 are registered in the names of public officers and which is termed abuse of office. The 2nd and 3rd Defendants aver that plot 3412 belongs to their family and they have always been ready and willing to offer the land to the hospital for expansion upon full disclosure of the dealings affecting the parcel.
- 6 The 4th Defendant never entered appearance
- 7 The 5th Defendant filed a memorandum of appearance in person but there was no defence on record.
- 8 The counterclaim was duly replied to by the Plaintiffs who denied all the allegations raised.

Evidence of the Parties

- 9 The hearing was conducted on 6/6/24, 29/7/2024, 30/7/2024 and 2/10/2024.
- 10 PW1 was **Said Suleiman Mraja** who adopted his witness statement dated 29/9/2024 as his evidence in chief. He narrated the history of the mother title from 1930 with the coming of a white doctor who was treating the locals with modern medicine and was given land to build a hospital. That upon adjudication in the year 1970 the hospital was designated a specific area which also comprised other government institutions being the DC's house, County Council houses, water and a youth group. All the boundaries were known. That the County Council was issued with one title (the mother title) for the entire land including Mwaembe and Kisimachande villages. That this was not fair as the villagers could not do anything without the consent of the County Council. The villagers were entitled to be issued with individual titles and deal with them as they pleased.
- 11 PW1 told the court upon engagement with the Council and affected institutions on the above concerns, and with approval of the Minister the hospital and government installations were hived off, fenced and titles issued as per the residents wishes. Thereafter there was peaceful co-existence until the advent of devolution when the 1st Defendant moved into the land used for cultivation. That through further engagement with the area MP, the Governor and the hospital administration and on

disclosure that the hospital held a title a truce was reached but the governor declined to execute the agreement.

- 12 According to PW1 the mother title was cancelled after following due procedure. That they were summoned by the EACC but were never charged and therefore assumed no wrong was found. That allowing the counterclaim would be against the Plaintiffs' rights. It was his evidence that they did not sue the National Land Commission because it did not exist then and they had no complaint against the Commission. The witness reiterated the land belonged to them. They were not given notice of compulsory acquisition and have never been compensated. That the hospital should only retain their portion. The court was urged to hold the plaintiffs' rightful owners and grant the prayers sought and dismiss the 1st Defendant's counterclaim.
- 13 The witness produced the documents in the list of documents dated 27/09/2013 as part of the Plaintiffs' evidence (PW1 Exh 1-8). Namely Minute 35/THTMC2009 of the Minutes from the Kwale County Council; Letter dated 26th August 2010 from the County Council of Kwale; Letter dated 26th August 2010 from the county Council of Kwale; Title Deed No. Kwale/Msamwebeni 'A'/3411; Title Deed No. Kwale/Msambweni 'A'/3412, A3403 and A3404 and Minutes of the MP meeting with the Deputy County Commissioner, doctors and elders from Mwaembe and

Kisima Chande villages at MPs Office , Gasi on 3rd January 2014.

- 14 Cross examined by Mr. Kibara the witness stated he was not present when the Europeans were given a portion of land by the elders. He conceded that upon adjudication the title was registered as No. 2602. Regarding the meeting held on 3/01/2014 he conceded the County Government was in place and that both the County and National governments attended including Dr. Omar Hussein Medical Superintendent. That Dr. Omar refused to sign the documents. He had no documents to confirm the meeting held with EACC. He testified the full council meeting gave the land to settle squatters. He confirmed Hassan Mwamzandi was the area MP for a long time and was not a squatter. PW1 confirmed he was aware of ongoing investigations. He testified that the Plaintiffs have not constructed anything on plot 2602 but had only trees and crops.
- 15 Upon further cross examination by Mr. Nyariki PW1 confirmed that Kisimachande and Mwaembe comprise of farms with no residents living therein. He indicated they sued the rest of the defendants because they supported the County. That while paragraph 3 & 4 of his witness statement referred to trustees the title, green card and minutes dated 4/6/09 made no refence to trustees. He did not know the reason why the names were listed as individuals yet they were representing other people. He

affirmed he had not presented a list of the villagers. He found nothing wrong with the MP Mwamzandi being given land since he was the peoples representatives. He conceded the 2nd Defendant's name was not in the minutes. That Hamisi Rasu one of those issued with titles once served as area councillor. He confirmed he had no proof of authority to file the suit on behalf of the members of the community.

- 16 He asserted in re-examination they were never informed of any irregularities in obtaining their titles. The residents don't live in their shambas they only farm. Not everyone could be registered thus the individual registrations and the understanding was that the individuals held the land in trust for others. He clarified that the Defendants were sued because they were claiming the entire land belonged to them including the hospital land. That the fact that the MP had land elsewhere did not stop him from being a resident of Mwaembe. There was no proof that the entire land was to be given to the hospital.

1st Defendant's Evidence

- 17 DW1 was **Francis Ndiege** the Ag. Director Msambweni Referral hospital. Adopting the witness statement dated 30/1/2024 he indicated the letter dated 30/3/93 from K.B. Mwamzandi was requesting the Minister to ensure the hospital land is used for its designated purpose. DW1 told the court the hospital is classified as level 5, for a capacity of 500 patients which requires a lot of land for expansion.

That it was currently at the capacity of 200 patients. That 15 acres left is not enough considering the requirement of 5 theatres against the existing two and the need to delink outpatient and emergency services which were currently combined. He also raised safety concerns owing to congestion.

- 18 He confirmed the land referred to in the extract of the minute of 4/6/09 is the same parcel in the green card opened on 2/7/1979 entry No. 2 and which is the title 2602 issued to Msambweni District Hospital on 1/9/2008. He pointed entry No. 2 preceded the Minute.
- 19 According to DW1 the hospital did not participate in the meeting and the minutes didn't form part of the hospitals record. That there was no record outside the said minutes that show the hospital was involved. Reading out Min 02/01/14 which related to the Reconciliation over hospital land he noted that only Dr. Hussein represented the board when such a resolution required the full board. That he had not come across a resolution of the hospital Board approving the content in the resolution.
- 20 Cross examined by Mr. Olwande he testified he had no board resolution/minute authorising the construction of the DC's residence, Water Station for Kwale Water and departmental houses. He confirmed the County council of Kwale was holding the land as trustee for the community. If the community wanted land they would have to petition the County Council. He noted entry No. 2/1/2008 does not

specify to whom title was issued while entry No.3 revoked the title. He agreed the letter dated 10/3/1993 did not cite the details of the land. He conceded he did not provide any report to back the inadequacy of the 15 acres or twice the requirement. He affirmed he had not sued the Ministries whose properties occupy some of the hospital land.

- 21 On further cross examination by Mr. Nyariki the witness could not confirm the size of land donated but testified that the 30 acres was as at adjudication in 1979. While he noted that by 2008 the plot number reserved was known he could not explain why the same is not disclosed in 2017. He admitted the letter dated 30/3/93 is silent on the size of the land. That the letter dated 14/4/93 in response thereto is also silent on the title number and the size. He agreed as at the date of the meeting the title was already revoked. He confirmed the subdivisions were undertaken pursuant to and as per the minutes. That as at the time of the meeting new plot numbers had been issued the hospitals being 3403 for 15.5 acres. That he had no gazette notice in proof of the revocation under entry No. 3.
- 22 The witness clarified in re-examination that the land was reserved for the Msambweni District Hospital and there was no other person recorded against the property as reserved. That the letter dated 30/3/93 makes reference to what part of the land was under developed that 'open

land where the old doctors house' That it is not the hospital that decided the other users who were on the land. The hospital was not challenging the use by other government agencies but having the open land for other users other than hospital/Gok utilization. That the approximate area is 12.2 Ha.

- 23 DW2 was **Muli Kilonzo** Kwale County Chief Health Administrative Officer who adopted the witness statement dated 4/6/2024 as his evidence in chief. He produced as evidence the documents 1, 3,16 and 17 in the list of documents dated 8/02/2017 and item 1 & 2 of the supplementary list dated 10/2/2021. He referred the court to the ongoing projects as seen in the Kwale County development plan and specifically rehabilitation of a waiting bay and referral maternity block.
- 24 Cross examined by Mr. Olwande on the letter dated 26/10/2010 and its contents he noted a full council adopted the resolution but reiterated the subdivision was unlawful. He agreed community land could be subdivided but added he was not a legal expert.
- 25 Cross examined by Mr. Nyariki DW2 confirmed he had worked with the county for approximately 11 years from 2013. He confirmed the individuals listed as attendees 3, 4, 5 and 6 in the minutes of the meeting held on 3/01/2014 worked under his department. That therefore the hospital was represented. That no reason is stated why Dr. Omar did not sign the minutes. That the Council

and the hospital has not raised any complaint against the resolution to subdivide. He stated there were no private individuals staying in plot 2602. He agreed as trustee before the year 2008 the County council had power to deal with the suit property. That the hospital objected through the PS letter dated 26/8/2010 which had a disclaimer since the hospital communicates through the PS.

- 26 He clarified in re-examination that it is possible to subdivide community land but not irregularly. That while the hospital staff were at the meeting it did not mean they had authority to make decisions on behalf of the Board. That the entry dated 2/7/79 on the green card was clear the land was being held in trust for purposes of the hospital. That the counterclaim is proof of objection as it challenges the subdivision.
- 27 DW3 was **Denise Mtana** land registrar Kwale. She gave the history of the property A/2602 as contained in the records at the lands registry specifically the green card opened on 2/7/1979. According to the witness entry No.3 effectively nullified all titles issued to private individuals. That subdivisions 3403- 3416 were not captured in the green card for the original mother title though procedurally they ought to. According to the witness if a subdivision is not entered in the register, it is questionable, null and void.

- 28 Cross examined by Mr. Olwande DW3 conceded while entry No.3 was for Kwale County Council it did not indicate the purpose for issue of the title. That the gazette notice is silent on the titles being revoked. That legally the registrar has no powers to cancel title. There was no court order allowing the registrar to cancel the title. She affirmed the subdivisions in entry dated 18/12/2009 being 3403-3410 were retained by Kwale County Council. She conceded the owners were not heard or given an opportunity to explain how they obtained their titles.
- 29 Cross examined by Mr. Nyariki the witness testified that she could not tell who was issued title under entry No. 2 dated 1/9/2008. That from the records she could not confirm who applied for revocation. She conceded the land registrar moved suo motto thus the Gazette Notice. She confirmed that Kwale County Council still holds plot 3403. She was not able to tell if after revocation title reissued for A/2602. There were no subsequent gazette notices for each subdivision.
- 30 The witness asserted in re-examination that the revocation was undertaken 14 years ago. That based on entry No. 2 the reservation is for Msambweni District Hospital thus indicative the purpose is for the hospital.
- 31 The 1st Defendant's case was closed.
- 32 DW4 was **Kinanasi Swalehe Mwachalika**. She told the court she was PW1 was her father's brother. She adopted her witness statement filed on 27/4/2017. She told the

court she was born and bred in plot 3412 where she has lived all her life and has never been chased away. In 2010 she declined an offer of Kshs. 500,000/= by Athman Hamisi, Iddi Tandara, Kassim Mwamzandi and Ali Mkungu to leave the plot as it had been allocated to them by the Council. That the three sold the land but she has remained in the suit property.

- 33 Upon cross examination by Olwande she indicated she had no map or picture to show she lived in the said plot. DW4 case was closed.

Submissions

- 34 The court issued directions on the filing of submissions. However, when the court retired to prepare the judgement which it had earlier deferred, only the 1st and 2nd Defendants' submissions were on record albeit filed out of time. I caused for the parties to appear before me to address me on the issue including the Plaintiff as the court did not want to lock out any party to render their final submissions in the interests of justice and fair adjudication of the matter. Parties appeared before me on 8/8/2025. Mr. Olwande Counsel for the Plaintiffs was absent. Counsels present had no objection to the Plaintiffs being granted leave to file submissions subject to corresponding leave. I issued directions appropriately but no submissions were filed by the Plaintiff.

35 The 1st Defendant's and 2nd Defendant's submissions dated 20th May 2025 and 22nd July 2025 respectively were admitted as duly filed.

1st Defendant's Submissions

36 Rehashing the evidence adduced before court it is submitted that all the entries in the green card confirm that a title was issued in favour of the County to hold the land in trust as public land for the Msambweni hospital. Therefore, suit property, having been marked as a public utility, and having been alienated and a title issued, was not available for allocation to private individuals for private use. That proper process and procedures were not followed in the conversion and subdivision of the public facility. Reliance is placed in the case of **Niaz Mohamed Jan Mohamed V Commissioner of Lands & 4 Others** where the legal principles surrounding the alienation of public land were enunciated.

37 That the Plaintiff's prayer for the equitable remedy of an injunction is unconstitutional. Reference is made to Article 40(6) of the Constitution which stipulates that the right to property does not extend to property that has been found to have been unlawfully acquired. That estoppel cannot be used to circumvent Constitutional provisions and there can be no estoppel against a statute. Reliance is placed on the case of **Henry Muthee Kathurima v Commissioner of Lands & Another (2014)**.

- 38 Counsel also submitted on the origins of the definition of public land and government land as explained in the case of **Kiluwa Limited & Another v Business Liaison Company Limited & 3 Others (Petition 14 of 2017)**, to buttress that the land was alienated public land.
- 39 It is contended that the titles of which the Plaintiffs have come to court seeking their validation by way of an injunction, have already been revoked/cancelled by dint of Gazette Notice No.7752 of 09/07/2010. The plaintiffs have not sought an order to reverse or nullify the Gazette notice. In the premises, the gazette notices therefore and its effect of cancellation of the titles remains valid and lawful, unchallenged. On this ground alone on this ground alone the plaintiffs' case must fail.
- 40 It is submitted therefore that the 1st Defendant deserves the orders sought in the Further Amended Statement of Defence & Counterclaim and the Plaintiffs' suit be dismissed.

2nd Defendant's Submissions

- 41 It is submitted that the 2nd Defendant claims adverse interest only in respect of Kwale/Msambweni 'A'/3412 whereof she is in physical possession.
- 42 Relying on the provisions of Section 26(1) (a) & (b) of the Land Registration Act it is submitted that the issuance of the title deeds in favour of the Plaintiffs was done fraudulently, unprocedurally, and illegally without the knowledge or consent of the 2nd Defendant.

- 43 It is urged that the Plaintiffs have not demonstrated how exactly they came into the alleged possession and ownership of the suit property bearing in mind that the same was neither allotted, sold nor transferred to them. That it was not enough to dangle the instrument of title. Reliance is placed in **Supreme Court of Kenya in the case of Dina Management Limited =Versus= County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [20231 KESC 30 (KLR).**
- 44 On possession by the 2nd Defendant the court was referred to the case of **Mohamud Ibrahim Alio & 6 others =Versus= Mandera County Government & 6 others [2021] eKLR,** where Cheronno J found in favor of those who were first in occupation and had been allotted numbers creating a legitimate expectation to be issued with title.
- 45 It is submitted that the Plaintiffs were seeking relief from court but were guilty of illegal and unlawful conduct with regards to the suit properties. The court of equity ought to take into consideration the personal conduct of the Plaintiffs in the dispute. The Plaintiffs were all influential figures and local leaders who usurped their powers and alienated to themselves the suit property at the detriment of the 2nd Defendant and her family. It is asserted “he who has committed an inequity, shall not have equity.”
- 46 The Court is invited to invoke the provisions of Section 80 (1) of the Land Registration Act, to rectify the register.

Further that having been in possession of plot "A"/3412 from time immemorial and the 2nd Defendant has adverse interest on the property and they will face great prejudice the Plaintiff's suit is allowed.

ANALYSIS AND DETERMINATION

47 The court has considered the pleadings, the evidence, submissions and the law and identifies the following issues for determination; -

- 1) Whether the suit property is alienated public land**
- 2) If so whether the same was available for subdivision and alienation for private use or otherwise**
- 3) Whether the process leading to the subdivision to private use was lawful**
- 4) Whether the title to the suit land was obtained by means of fraud or a corrupt scheme**
- 5) Whether the plaintiffs are entitled to the reliefs sought**
- 6) Should the counterclaim be allowed**
- 7) Who should bear the costs of both the suit and the counterclaim**

Whether the suit property is alienated public land and if so whether the same was available for subdivision and alienation for private use or otherwise

- 48 The court will handle issues 1 & 2 concurrently as they overlap. For the court to determine the legal status and validity of the Plaintiffs titles, it must inquire into the root of the suit property. But it is important to first set out the categories of land under the Kenyan Law. The supreme law of the county is the Constitution.
- 49 Prior to independence (1963) land was categorised into three groups namely Government Land, Trust Land and Private land this is to say land registered in the names of private entities or individuals.
- 50 Government land was further categorized into alienated and unalienated government land. The Supreme Court of Kenya in the case of **Torino Enterprises Limited Vs Attorney General (Petition 5 (E006) of 2022 (2023) KESC 79 (KLR)** further explained this categorization thus;

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(iii) Alienated or un-alienated government land

[51] Article 62 of the Constitution defines ‘public land’ to include:

62 (1) (a) (a) land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date; [Emphasis Added].

[52] The Government Lands Act (repealed), which was the Act in force at the effective date defined ‘unalienated government land’ in Section 2 as

follows; “unalienated Government land” means Government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment. [Emphasis Added].’

- 51 So what was the legal status of the land before subdivision into the titles issued to the Plaintiffs?
- 52 The Plaintiffs claim that they are the proprietors of the suit properties having acquired the same from the then County Council of Kwale following a resolution of the said Council. The Council resolved to subdivide plot number Kwale/Msambweni A/2602 (mother title) into a number of plots where titles were issued to a number of individuals including the Plaintiffs and other public utilities. The 1st Defendant has raised a defence and counterclaim stating that the land was reserved for hospital use and expansion not available for such allocation.
- 53 PW1 testified the suit properties are a subdivision of the mother title which was held by the Kwale County Council in trust for the communities being the residents of Kisimachande and Mwaembe villages and Msambweni District Hospital and others.
- 54 DW3 was the Land Registrar Kwale. Making reference from the parcel file she testified that the adjudication record indicates the mother title was adjudicated to Kwale County Council and green card opened on 2/7/1979 for 12.2 Ha translating to approximately 30 acres. The

witness produced the Green Card for Kwale/Msambweni A/2602 and referred to entry No. 1.

- 55 My review of the above register reveals the mother title was registered in the name of Kwale County Council. It was then reserved for Msambweni District Hospital. Title deed then issued as reserved for the said Hospital. I also noted Kwale/Msambweni A/2602 register was the 1st edition opened on 2/7/79 pursuant to the process of Land adjudication.
- 56 In addition the plaintiffs plead at paragraph 6 of the plaint that 'The Parcel of Land KWALE/MSAMBWENI A/2602 was previously public land registered under the Kwale County Council a predecessor of the 1st Defendant.
- 57 What is the effect of the above registration including the reservation aforesaid. I have already noted that public land is divided into two categories namely alienated and unalienated.
- 58 With regard to unalienated government land the Court Appeal delved into subject in the case of **Frann Investment Limited Vs. Kenya Anti-Corruption Commission & 6 Others (Civil Appeal E038 of 2021) (2024) KECA 714 (KLR)** where the court had this to say;

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31. The Supreme Court of Kenya in Kiluwa Limited & Another vs. Business Liaison Company Limited & 3 Others, (Petition 14 of 2017) [2021] KESC 37 (KLR)

explained as follows as regards unalienated government land:

“[55] A number of conclusions can be derived from the foregoing provisions as quoted. Firstly, unalienated government land is public land within the context of article 62 of the Constitution and the Government Lands Act (repealed). This notwithstanding that, the expression “Public Land” only came to the fore with the promulgation of the 2010 Constitution. What Article 62 of the Constitution does is to clearly delimit the frontiers of public land by identifying and consolidating all areas of land that were regarded as falling under the province of “public tenure”. The retired constitution used the term “government” instead of “public” to define such lands”.

32. In this respect, section 2 of the repealed Government Lands Act defined “unalienated Government land” to mean Government land which was not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment. Government land in this context is land that was held by government ministries, departments, statutory bodies and agencies, and land which has not been registered. Section 3 of the then Physical Planning Act defines un-alienated Government land in similar terms. A

similar definition is now given to public land under Article 62 of the Constitution, which includes

- a. Land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date*
- b. Land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease...*

33. The Supreme Court of Kenya noted these definitions in Torino Enterprises Ltd vs. The Attorney General, SC Petition No. 5 (E006) of 2022; [2023] KESC 79 (KLR), and also cited with approval the decision of this Court in Benja Properties Limited vs. Syedna Mohammed Burhannudin Sahed & 4 Others, Civil Appeal No. 79 of 2007; [2015] eKLR that the legal effect of registration of land is to convert property from un-alienated government land to alienated land, with the consequence that the property became private property and moved out of the ambit and confines of the Government Land Act].'

59 Arising from the above therefore it is noteworthy that the suit property though public land, stood alienated and was reserved for a designated purpose. It was registered in the name of the County Council of Kwale but reserved for Msambweni District Hospital as highlighted in paragraph

54 - 55 of this judgement. The mother title therefore was alienated public land by dint of its said reservation.

60 Moreover the 1st Defendant produced letters showing that as early as the year 1993 it was on record through correspondence between the area MP and the Minister for local government that the land was required to be reserved for future expansion of the hospital. This is discussed later in the judgement.

61 Having made the foregoing finding the next question is whether alienated public land, reserved for public purpose, can be subject to subdivision and alienation for private use. How have the courts dealt with this subject? I will highlight a few decisions which I find serve good guidance.

62 In the case of **Niaz Mohamed Jan Mohamed v Commisioner for Lands & 4 others [1996] eKLR** Justice P.N.Waki stated;-

'I am not persuaded by the argument that upon compulsory acquisition of land and the consequent vesting of that land in the Government, then the land falls to be used by the Government in any manner it desires. There is plainly no such carte Blanche intended in the provisions of the law cited above. The land must be used, subsequent to the acquisition, for a lawful purpose, and as I see it, the only lawful purpose is the one for which it was intended.

I am persuaded that the land in issue was acquired for a specific purpose which is consonant with the Constitution and the Land Acquisition Act, namely for the construction of a public road. It matters (not sic) that the entire portion acquired was not used for that purpose. Unutilized portions in my view would remain as road reserves.

I am persuaded by the argument that since the acquisition was done for the purpose of making a public road, the road thus made remained a public road or street and vested in the Local Authority, The Municipal Council of Mombasa, to hold in trust for the public in accordance with the law. Needless to say this included the portion usually utilized for the tarmacked road and the remaining portions which form part of the road reserve.

63 In the case of **Kenya National Highway Authority v Shalien Masood Mughal & 5 others [2017] KECA 465 (KLR)** the Court of Appeal discussed the import of reservation thus;-

37...The fact of the matter is that there was in existence a road reserve before the disputed plot came into being in 2002 and it was not open for any authority to alienate it further for private development. The whole world ought to have been aware, as was ultimately established, that there was a road reserve of 80 meters and a buffer zone of 30 meters which did not in law have to be noted in any

land register. It is an overriding interest and not an equitable interest.'

64 In the case of **Dina Management Limited =Versus= County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023]1 KESC 30 (KLR)** the Supreme court was faced with the question whether land that had been reserved for a road could be allocated. The Supreme Court found the then applicable law and its effect to be as follows:

“(51) From the record and submissions, we note that the land was first allocated to HE Daniel T Arap Moi in 1989. The applicable law at the time was the Land Planning Act, cap 303, which was repealed by the Physical Planning Act cap 286 which has since been repealed by the Physical and Land Use Planning Act No 13 of 2019. The Land Planning Act made provision for open spaces. regulation 11(3) of the Development and Use of Land (Planning) regulations, 1961 made under the Land Planning Act defined “public purpose” as any nonprofit making purpose declared by the Minister to be a public purpose and includes educational, medical and religious purposes, public open spaces and car parks; and Government and local government purposes. Similarly, under the Physical Planning Act, section 29 gave the local authorities power to reserve and maintain land planned for open spaces.

(52) The suit property was at the time designated as an open space. Having been designated as such, it was rendered a public utility and could not be described as unalienated public land as urged by the appellant. It was therefore not available for alienation to HE Daniel T Arap Moi or for further alienation...

65 The import of the foregoing is that once a particular piece of land is alienated as reserved for a public purpose/utility in this case hospital (medical) the land in question ceases to be available for further alienation.

66 It is the finding of this court that the mother title and the unutilised portions therein were not available for alienation to private individuals.

67 The above takes me to the process that led to the subdivision.

Whether the process leading to the subdivision to private use was lawful

68 The Plaintiffs assert they followed due process in obtaining the titles they have produced. The Plaintiffs' case is that they followed procedure to have the land allocated to them. Their main footing is that a resolution was reached by the County Council in this regard. PW1 produced Minutes of the Kwale County Council Ordinary Full Council Meeting held on 4/6/09.

69 Based on the foregoing a resolution was reached as follows; -

(i) The request to subdivide plot no.2602/Kwale/Msambweni be Approved.

(ii) The subdivision be as follows: -

- Msambweni Hospital - 6.2 ha
- DC's residence - 1.14 ha
- Idd Mohamed Mwatandara - 0767138
 - Athumani Hamisi Ali - 11872752 - 0.8 Ha
 - Ali Kassim Mkungu - 0764916
 - Kassim Bakari Mwamzandi - 0765103
 - Hamisi Juma Raso - 9470470 - 0.8Ha
 - Mwanamkuu Bakari Mwariko - 13628974
- - Anisa Hussein Mwakilalo-0765582
 - Kassim Abdalla Shee-0764137 - 0.8 Ha
 - Hassan Ali Ngenya-0764743
 - Hamisi Masudi Mwazani-0763881
- Vinonovyehu Nur.schoo1 - 0.3 Ha
- Marine& turtle conservation Group - 0.12 Ha
- Council houses - 0.47 Ha
- Water Camp & Council houses - 1.2 Ha
- Ayub Badi Boi - 26033407
 - Nuru Mohamed Kilalo-24933381 - 0.4 Ha

70 Could the County Council lawfully resolve to subdivide the land and apportion some of it to private individuals the same being held in trust for use for a public purpose is a question I must pose. Firstly, unless the public purpose for which the land was reserved ceases to exist or the land is surrendered back to the government the Council would be able to convert the land subject to due process. I will

shortly show that the purpose for reservation never ceased.

- 71 In the present case DW2 Muli Kilonzo the Kwale County Health Administrative Officer produced the Development Plan of Kwale for FY 2020-2021 showing the land was planned for the future expansion meaning there had been no change of plan.
- 72 DW2 also produced a letter dated 30/03/1993 from Assistant Minister Ministry of Public Works addressed to the Minister for Local Government advising the open land be reserved for future development of the hospital as it was believed in the next 10 -20 years the hospital would need land. A response to this letter by the Minister for Local Government Hon W.R. Ole Ntimama was also adduced dated 14/04/1993 which strongly supported the said open land should be reserved. This response is copied to among other government administrators including Council Chairman Kwale County Council. Again, this corroborates there was no change of plan on the reserved user.
- 73 There was effort made during cross examination of DW1 towards indicating that the letters above did not refer or identify the subject land. This was clarified in re-examination by the witness that there was no entry in the green card indicating another reservation other than the hospital. But it was also clear to me that the land referred to was near the hospital and it was undeveloped and

infact the Msambweni District Hospital Management is directed to keep it clean so that it is seen as the hospitals land.

- 74 In any event the hospital still exists to date as evidenced by a Copy of a Certificate of Registration of Msambweni Hospital dated 2/08/2017 and License issued to Msambweni Hospital dated 2/08/2017 produced by DW2. The individuals could not further the purpose for which the land was reserved, but alleged squatters for their own use. The titles produced by PW1 from my review are registered to private individuals.
- 75 But let me come back to the discussion on process. I will now consider the legality of the alienation. In my view the question that must be posed at this point is what is the procedure set down in law for converting land already reserved for a public purpose to a private one? Would a resolution as presented by the Plaintiffs suffice? The 1st Defendant averment is that the procedure undertaken to allocate land by a local authority was never followed during the allocation of the Plaintiffs' titles.
- 76 For me from a reading of the minutes the meeting that resolved that the mother title be subdivided point to a conversion, change of user and replanning. This is elaborated later in this judgement. From the titles and minutes adducted in evidence the decision to subdivide was made in September 2009 and titles issued soon

thereafter which was a year to the promulgation of the Kenya Constitution 2010.

77 I will be guided by the case of **Dina Management Limited Supra** where the court stated thus;-

[100] From the record and submissions, we note that the land was first allocated to H.E. Daniel T. Arap Moi in 1989. The applicable law at the time was the Land Planning Act, Cap 303, which was repealed by the Physical Planning Act Cap 286 which has since been repealed by the Physical and Land Use Planning Act No.13 of 2019. The Land Planning Act made provision for open spaces. Regulation 11(3) of the Development and Use of Land (Planning) Regulations, 1961 made under the Land Planning Act defined “public purpose” as any non-profit making purpose declared by the Minister to be a public purpose and includes educational, medical and religious purposes, public open spaces and car parks; and Government and local government purposes. Similarly, under the Physical Planning Act, Section 29 gave the local authorities power to reserve and maintain land planned for open spaces.

78 In the case of **Jimmy Gichuki Kiago & another v Transitional Authority & 7 others [2019] eKLR** whose facts I find bore some resemblance to the present case and which decision I’m persuaded with the following dictum;-

Section 29 of the **Physical Planning Act** states as follows:

“Subject to the provisions of this Act, each local authority shall have the power-

(a) to prohibit or control the use and development of land and buildings in the interests of proper and orderly development of its area;

(b) to control or prohibit the subdivision of land or existing plots into smaller areas;

(c) to consider and approve all development applications and grant all development permissions;

(d) to ensure the proper execution and implementation of approved physical development plans;

(e) to formulate by-laws to regulate zoning in respect of use and density of development; and

(f) to reserve and maintain all the land planned for open spaces, parks, urban forests and green belts in accordance with the approved physical development plan.

79 The court further observed and held as follows;-

46. *In my view, under **Section 29** of the **Act**, the 1st defendant is empowered only in the following respects: development control, prevention of subdivision of land into smaller areas, consideration and approval of development applications, ensuring execution or proper implementation of approved development plans, formulation of bylaws to regulate zoning in respect of use and density of development and to protect or preserve and maintain all the land*

planned for open spaces, parks, urban forests and green belts in accordance with the approved physical development plan.

*47.The defendants have failed to demonstrate that the matters being agitated by the plaintiffs here fall within the category of the matters set out in **Section 29** of the **Act**. I therefore find no succour for the defendants in the provisions of **Section 29** of the **Act**.'*

80 In the present case PW1 evidence in chief is that it was unfair for the residents to be always seeking permission to do anything on the land. The minutes show that the main consideration was to reduce the incidents of people who were squatters in their own land. Was squatter settlement one of the aspects envisaged under Section 29. The answer is in the negative and therefore making the process flawed.

81 Looking at the subdivision as a replanning of the mother title the court in **Jimmy Gichuki Kiago & another supra** referring to the provisions of section 5 of the Physical planning Act on mandate to cause a re-planning of any area. The court held that the function of planning is the mandate of the Director of Physical Planning who may delegate such duties as he may find appropriate and the decision made by the Town Planning and Markets Committee of the County Council of Trans-Nzoia to re-plan

the suit land was therefore wholly without jurisdiction and therefore illegal.

- 82 It therefore follows that the resolution of Minutes of the Kwale County Council Ordinary Full Council Meeting held on 4/6/09 were not legally effective or capable of re-planning the mother title without recourse to the Ministry of Lands so as to convert some of the public utility land into private use for the resettlement of squatters if that could have been deemed necessary by the latter office. I agree with the 1st Defendants' submission that the mother title being a public utility under the Government of the Republic of Kenya could not therefore be alienated without the consent or the consultation of the relevant Government institutions.
- 83 But assuming that the court could be wrong on the above finding, the titles issued to the plaintiffs would still not hold.
- 84 In the case of **Rosemary Wanjiru Njiraini v Officer In Charge of Station, Molo Police Station & another [2017] eKLR** the court stated as follows with regard to titles;-

17. 'It has been the law, and it still is the law, that the Certificate of Title issued to a person is prima facie evidence, that the said person holds title to the land noted therein. In the pre-2012 land regime, this was provided for in Section 28 of the Registered Land

Act and Section 23 of the Registration of Titles Act which were drawn as follows :-

RLA S.27. *Subject to this Act -*

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;*
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.*

RTA S.23 *(1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.*

18. *The current law is in Section 26 of the Land Registration Act, 2012, which provides as follows :-*

26. (1) *The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—*

(a) *on the ground of fraud or misrepresentation to which the person is proved to be a party; or*

(b) *where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.*

(2) *A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.'*

85 In the present case the titles herein produced by the plaintiffs have been challenged by the 1st Defendant. It is now established that where a registered proprietors title is challenged, they must defend its root including a demonstration of how they acquired it and if the acquisition was lawful. - - see the case of **Daudi**

Kiptugen Vs. Commissioner of Lands & 4 Others
(2015) eKLR

86 The court has made a finding that the land was not available for allocation meaning the subdivision was unprocedural and illegal which also speaks to the above legal provisions.

87 The 1st Defendant's case is that decision to subdivide and the resulting titles were marred with illegalities and fraud. That the Plaintiffs in concert with others are guilty of falsifying and perverting the entire process upon which such conveyance or alienation is premised upon.

88 Black's Law Dictionary 9th Edition also defines '**fraud**' as: -

“A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”

89 My reading of the minutes produced by the Plaintiffs in evidence reveal that MIN.35/THTMC2009-SUBDIVISION ON PLOT NO.2602/KWALE MSAMBWENI bore the relevant deliberations and resolution. The deliberations are that a member informed the meeting that part of the parcel land was occupied by the residents and the other part by Msambweni District hospital. He said that the residents were squatters in the plot and yet the land was big enough. He suggested that the land to be subdivided and a portion be set aside for the community and the hospital be given a portion which will allow for future development and expansion. Another member said that the land was

vast to be left for the hospital only instead it should be sub-divided and apportion for the community be set aside to reduce the issue of having residents as squatters in their own land.

- 90 The court picked some disturbing facts which did not build confidence that the Plaintiffs were genuine squatters. PW1 confirmed during cross examination that Kisimachande and Mwaembe villages comprise of farms with no residents living therein. The witness confirmed he had not presented a list of the villagers. It emerged from his testimony that the MP Mwamzandi was given land since he was the peoples representative. PW1 found nothing wrong with this. The witness also conceded that Hamisi Rasu one of those issued with titles once served as area councillor.
- 91 Moreover PW1 further affirmed that while paragraph 3 & 4 of his witness statement referred to trustees the title, green card and minutes dated 4/6/09 made no refence to the fact that the individuals proposed were being given the land to hold as trustees on behalf of the villagers. The court agrees with this observation and which points to individuals who were out to acquire land for their own selfish motives when they were not squatters. The witness could not give any cogent answer as to why the minutes did not reflect that they were to hold the land on behalf of the residents. And to crown it all PW1 presented no list

from the residents authorising him to plead on their behalf if that were so.

92 All the foregoing goes to affirm to this court the corrupt scheme deployed through misrepresentations to have the subdivision for the benefit of private individuals who were not squatters. There was no bonafides in the justification to issue part of the land to squatters. In any as long as the root of the Plaintiffs' titles were anchored on the Council resolution they cannot be upheld by this court.

93 I must echo the Court of Appeal dictum in the case of **Emfil Limited v Registrar of Titles Mombasa & 2 others [2014] KECA 348 (KLR)** where the court observed thus; -

[27] On the issue of public interest, while we appreciate that the settlement of squatters in this country is a matter of public interest requiring urgent attention, the same must be done in accordance with the law.It is in the public interest that the rule of law prevails, and it is for this purpose that the people of Kenya through the Constitution entrusted the court with judicial power. The remedy of judicial review of administrative action is intended to check the excesses of power to ensure that the rule of law prevails.'

Whether the plaintiffs are entitled to the reliefs sought

94 I will not belabour the point as clearly from the foregoing discussions the plaintiffs cannot be granted the reliefs they crave. A title acquired illegally cannot be protected by the law.

95 In view of the foregoing I must now address the counterclaim

Should the Counterclaim by the 1st Defendant be allowed

96 **The 1st Defendant raised a counterclaim and** avers at paragraph 11 of the Further Amended Statement of Defence & Counterclaim that the suit properties originally comprised one block or parcel of public land known as Kwale Msambweni 'A' 2602 but were irregularly, illegally and/or fraudulently acquired by the Plaintiffs and must of necessity be declared by this court as inalienable public property and further that the purported titles issued and fraudulently acquired by the Plaintiffs be declared as null and void.

97 The particulars of illegalities were listed and enumerated with clarity at paragraph 11 of the the Further Amended Statement of Defence & Counterclaim as follows;-

a. That the titles that the Plaintiffs hold in respect of the subject suit properties were hived off from the original property known as Kwale Msambweni 'A' 2602 measuring approximately 30 acres.

- b. That the suit properties which were originally alienated and reserved in favour of Msambweni District Hospital were not available for allocation to the plaintiffs or any other entity for that matter**
- c. That it therefore follows that all the titles that emanated from the said parcel of land and were put in the hands of private persons and in particular the Plaintiffs were null and void and of no consequence.**
- d. That the title issued to it having been revoked on the 10th August 2010 vide a Gazette Notice No. 7752, the Kwale County Council could not thereafter through minutes of its committee purport and resolve to dish out the suit properties by way of subdivision to the plaintiffs. To that extent all the titles emanating therefrom must of necessity be held to have been issued fraudulently, irregularly and or illegally.**
- e. The procedure legally undertaken to allocate land by a local authority was never followed during the allocation of the plaintiffs' titles by virtue whereof what ensued was an irreversibly flawed fraudulent and irregular process. In the premises the resultant plaintiff's titles are null and void ab initio as the same was reserved for Msambweni**

District Hospital at the Kwale District Lands Registry.

- f. The Plaintiffs in concert with others alienated the suit properties with knowledge that the said suit properties belonged to and was so held in trust on behalf of the Public.**
- g. In alienating the suit properties, the plaintiffs acted mischievously and in breach of the express provisions of the law.**
- h. The plaintiffs in concert with others are guilty of falsifying and perverting the entire process upon which such conveyance or alienation is premised upon,**
- i. The Plaintiffs unlawfully caused the transfer of the suit properties with full knowledge the same was held in trust for the use of and the benefit of the Public; and**
- j. The Plaintiffs fraudulently and illegally dispossessed the public of Kwale County and future generations of Kwale County the use and enjoyment of the suit properties,**

98 Most of the above particulars not only overlap but have been discussed in the courts analysis and findings a foregoing.

99 The 1st Defendant called three (3) witnesses namely Francis Odhiambo Ndiege, Muli Kilonzo and Denise Mtana, the Kwale Land Registrar. Indeed DW 1 confirmed that

indeed all the titles in respect of the suit property were all hived off from the original property known as Kwale Msambweni 'A' 2602 measuring approximately 30 acres. This was corroborated by the evidence of the land registrar who also added that the land was reserved for Msambweni District Hospital.

100 DW2 in support of the 1st defendants case also produced in evidence documents in the 1st Defendant's List of Documents dated 08/02/2017 and the documents in the 1st Defendant's Supplementary List of Documents dated 10/2/2021. These documents are discussed elsewhere showing that as early as the year 1993 it was on record through correspondence between the area MP and the Minister for local government that the land was required to be reserved for future expansion of the hospital - see DW2 Exh 5 and 6.

101 A letter dated 20/08/2010 was also produced by the 1st Defendant shows that in trying to sanitize the subdivision the resolution was being sent to the ministries after the land had already been subdivided and title issued. This could not in my view suffice for purpose of process.

102 In the case of **Kenya Anti-Corruption Commission v Lima Limited & 2 Others (2019) eKLR**, the Court stated as follows:

"The land in dispute was already alienated for public utilities and was fully developed with a High Court Station, district hospital, fire station and

Administration Police Camp and therefore it could not be deemed unalienated. The 2nd Defendant therefore had no authority in law to make the alienation and therefore no interest could be conferred upon the 1st Defendant.

I have found that the suit property was meant for public use reserved for housing of civil servants, it was thus not available for allocation to the Defendants or for any private use. Hence the purported allocation to the 1st, 2nd and 3rd Defendants amounted to a second allocation, which was illegal and fraudulent.'

103 I think in my view the 1st Defendant have proved to the required standard of proof that the suit property was meant for public use reserved for Msambweni District Hospital and its future development and was thus not available for allocation to the Plaintiffs or for any private use. That the purported allocation was illegal and fraudulent. That the purpose for which it was reserved has never ceased at any point.

104 Having made the above finding should the prayers in the Counterclaim issue? The 1st Defendant prays as follows; -

a)A declaration that the title issued to the Plaintiffs over the suit premises known as Kwale/Msambweni 'A'/3409, 3411 and 3412 is illegal, null and void ab initio.

- b) A declaration that any entry in the Lands Registry transferring the property known as Kwale/Msambweni 'A'/ 3409,3411 and 3412 was irregular by reason of fraud and illegality.**
- c) An order directing the National Land Commission and the Registrar of Lands and or their servants, agents and or employees to ensure that he rectifies the register by cancellation of all the entries relating to the issuance of the title complained of in respect of Kwale/Msambweni 'A'/3409, 3411 and 3412.**
- d) An order be issued directing the National Land Commission and the Registrar of Lands its servants, agent and or employee to rectify the register by cancellation of all the entries relating to the suit properties and rectify the same in all manners required so as to ensure the intended objective and result of the 1st Defendant's reinstatement and registration of the Msambweni District Hospital as the sole legal and beneficial owner.**
- e) An order directing the Plaintiffs to demolish all buildings developments and any construction of any nature that is present and/or of continuing on the suit premises.**
- f) Eviction of the Plaintiffs, their servants, agents, employees or proxies and any other parties from the suit premises.**

g) An order directing the Plaintiffs or any one of them and all of them to deliver up vacant possession of the suit premises to the Plaintiffs.

h) General damages.

i) Costs of and incidental of this Counter Claim.

j) Further and or other relief as this Honourable Court may deem fit to grant

105 The court does not find any reason why prayers (a) - (d) cannot be granted in view of the findings hereinabove. I'm emboldened by the Court of Appeal in **Robert Mutiso Lelli v Kenya Medical Training College & 2 others [2021] eKLR**, where the court pronounced itself thus:

"We have found that the allocation and issuance of titles to the subject plots to the appellant was irregular and unlawful. And though Article 40 guarantees the right of every person to acquire property, Article 40 (6) qualifies this right to exclude "...any property that has been found to be unlawfully acquired."

106 The court is also empowered under Section 80 (1) of the Land Registration Act, 2012 to order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake. I find that the Plaintiffs facilitated the irregular, fraudulent and unprocedural subdivision and registration of the portions

of the mother title in their names and the same should not be allowed to stand. The public interest is in favour of the cancellation of titles held by the Plaintiffs since the same was part of land reserved for a public purpose.

107 I'm further emboldened by the case of **Republic vs Minister For Transport & Communication & 5 Others Ex Parte Waa Ship Garbage Collector & 15 Others Mombasa HCMCA No. 617 of 2003 [2006] 1 KLR (E&L) 563** Maraga, J (as he then was) expressed himself as follows:

“Courts should nullify titles by land grabbers who stare at your face and wave to you a title of the land grabbed and loudly plead the principle of the indefeasibility of title deed...It is quite evident that should a constitutional challenge succeed either under the trust land provisions of the Constitution or under section 1 and 1A of the Constitution or under the doctrine of public trust a title would have to be nullified because the Constitution is supreme law and a party cannot plead the principle of indefeasibility which is a statutory concept. A democratic society holds public land and resources in trust for the needs of that society. Alienation of land that defeats the public interest goes against the letter and spirit of section 1 and 1A of the Constitution.”

108 On prayers e, f, and g above PW1 testified and reiterated during cross examination by both counsels for the defendants that the Plaintiffs have not constructed anything on plot 2602. DW2 testified that there were no private individuals living in plot 2602. The orders for eviction in my view are misplaced and are not based on any evidence. I decline to issue a blanket order for eviction.

109 With regard to the prayer for General damages while this is at the discretion of the court, Counsel for the 1st Defendant did not submit on the same and I find no basis upon which I would peg a figure for general damages.

110 I must now address the 2nd & 3rd Defendant's case in light of the Counterclaim raised by the 1st defendant. According to the witness statement filed on 27/04/2017 the 2nd defendants interest is on parcel No. 3412. I have already noted that the titles issued herein were illegal abnatio. I have noted the 2nd defendants counsel submissions suggesting adverse possession. However, the 2nd defendant categorically stated at paragraph 8 of her witness statement they have always been ready and willing to offer the land to Government expansion of the hospital. This is also echoed at paragraph 5 of the defence dated 27th January 2015 but upon full disclosure of the dealings affecting the parcel. This supports the 1st Defendant's case and was infact affirmed by PW1 who testified they were sued for the only reason that they

supported the hospital. A party is bound by its pleadings – see the case of **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR.**

111 The upshot of the foregoing is that the Plaintiffs have failed to prove their case on a balance of probabilities and their suit against the defendants is hereby dismissed.

112 The court enters judgement for the 1st defendant on the counterclaim as follows; -

- (i) A declaration that the titles issued to the Plaintiffs over the suit premises known as Kwale/Msambweni 'A'/3409, 3411 and 3412 are illegal, null and void ab initio.**
- (ii) A declaration that any entry in the Lands Registry transferring the property known as Kwale/Msambweni 'A'/ 3409,3411 and 3412 was irregular by reason of fraud and illegality.**
- (iii) An order directing the National Land Commission and the Registrar of Lands and or their servants, agents and or employees to ensure that the register is rectified by cancellation of all the entries relating to the issuance of the title complained of in respect of Kwale/Msambweni 'A'/3409, 3411 and 3412 so as to restore the suit property to its intended objective and registration of the Msambweni District Hospital as the sole legal and beneficial owner.**

(iv) While costs by dint of section 27 of the Civil Procedure Act abide to the successful party in a suit, based on the circumstances of the case which point to public interest, I shall order that each party bears its own cost.

Orders accordingly.

Judgement dated signed and delivered this **3rd** Day of **October** 2025.

HON. LADY JUSTICE A.E DENA

JUDGE

03.10.2025

Judgement delivered virtually through Microsoft teams Video Conferencing Platform;-

In the presence of:

Ms. Kinuva Holding Brief for Mr. Kibara for the 1st Defendant

Mr. Nyariki for the 2nd Defendant

No appearance for the Plaintiff

Mr. Daniel Disii - the Court Assistant.