

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC PET. CASE NO. 33 OF 2020**

**HEZEKIAH OMONDI ADALLA .....**

**PETITIONER**

**- VERSUS -**

**THE CHIEF LAND REGISTRAR.....1<sup>ST</sup>**

**RESPONDENT**

**NATIONAL WATER HARVESTING & STORAGE AUTHORITY  
(Formerly National Water Conservation Pipeline Corporation) .....2<sup>ND</sup>**

**RESPONDENT**

**JUDGMENT**

**I. Preliminaries**

1. The Judgement of this Honourable Court pertains to the Constitutional Petition lodged by *Hezekiah Omondi Adalla*, the Petitioner herein. It was instituted against the *Chief Land Registrar* and *NATIONAL WATER HARVESTING & STORAGE AUTHORITY (Formerly National Water Conservation Pipeline Corporation)*, the 1<sup>st</sup> & 2<sup>nd</sup> Respondents herein through a Petition dated 13<sup>th</sup> October, 2020.
2. Upon filing the Petition and service to the Respondent, the 1<sup>st</sup> Respondent filed their Memorandum of Appearance and response through a Replying Affidavit sworn on 15<sup>th</sup> December,

2020. Likewise, the 2<sup>nd</sup> Respondent filed their responses in opposition to the filed Petition.

3. It is instructive to note that during the pendency of this proceedings, on the request of the parties, the Honourable Court conducted a site visit ("***Locus in Quo***") pursuant to the provision of Order 18 Rule 11 of the Civil Procedure Rules, 2010. For ease of reference, the said report forms part of this Judgement herein.

## **II. Description of the Parties**

4. The Petitioner was described as an adult male of sound mind who resides and is engaged in gainful enterprise in Mombasa within the Republic of Kenya. The 1<sup>st</sup> Respondent on the other hand was described as the Land Registrar who is appointed under Section 12 of the Land Registration Act, 2012 as a public officer for purposes of the effective discharge of functions under the Act in relation to registration of Land in Kenya. The 2<sup>nd</sup> Respondent was described as

## **III. Court directions before hearing**

5. Upon confirming that the Plaintiffs had complied with Order 11 of the Civil Procedure Rules 2010, the Honourable Court set the hearing date on 6<sup>th</sup> April, 2024. The Petitioner called its witness and closed his case on 6<sup>th</sup> April, 2024 and the Defendants called their witnesses on 18<sup>th</sup> March, 2024.

## **IV. Opening Remarks**

6. The Learned Counsel for the Petitioner, Mr. Adalla averred that the Petitioner is the registered owner of the suit land. He is not

aware of any other person. He had protection under the fundamental rights well set out under the Constitution of Kenya, 2010. He pursued all the due diligence and procedure to acquire the suit property.

7. The 1<sup>st</sup> Respondent submitted that their case was basically with regards to the registration of a Restriction by the Land Registrar against the suit land. This happened for various cogent reasons but mainly on the strength of the letter by the 2<sup>nd</sup> respondent. The 1<sup>st</sup> Respondent had adequate documentary evidence to prove the reason for registering the restriction thereof. However, it was after that the Land Registrar was placed on the spot by the Petitioner to have it lifted. Indeed, the Honourable Court ordered for its removal.
8. The 2<sup>nd</sup> Respondents' counsel M/s. Mwangi submitted that the bone of contention was on the proprietorship of the property. She indicated that the 2<sup>nd</sup> Respondent would be demonstrating to Court the suit property was Government land. She would show the genesis of the land being for Government and hence not available for allocation to individuals or private purposes. On the contrary, the Petitioner acquired it illegally and unlawfully hived off. The Petitioner cannot purport to sale or to register any encumbrance whatsoever.

#### **V. The Petitioner's case**

9. From the Pleadings before Court, the facts were that the Petitioner was the registered proprietor and title holder of Land Reference Number 10121/I/MN having acquired and had the

same registered in his name on 2<sup>nd</sup> May, 2003 original Certificate of title being in his custody. The Petitioner put up a residential house on the said property sometime in the year 2005 and has stayed therein ever since until very recently.

10. In addition the Petitioner had severally put up the subject property as security for facilities from various banking institutions as follows:-

- a. A charge to Barclays Bank of Kenya on 15<sup>th</sup> September 2004 and subsequently discharged on 30<sup>th</sup> November 2006.
- b. A charge to KCB Bank Limited on 30<sup>th</sup> October, 2006.
- c. A further Charge to KCB Bank Limited on 20<sup>th</sup> November 2009 and subsequently discharged on 22<sup>nd</sup> April 2013.
- d. A charge to Chase Bank Limited on 23<sup>rd</sup> October, 2015.

11. The Petitioner averred that in all these instances the 1<sup>st</sup> Respondent has never raised any issue over the Petitioner's title or ownership and has always given a clean bill of health in terms of the Certificate of Search indicative of the Petitioner as the Registered owner subject only to the charges as noted above at every respective time. The Petitioner has always relied on the said assurance of the Respondent Registrar and relied on the same when he acquired the said title that the register as reflected by the Respondent is the true reference of the position regarding the subject property.

12. The Petitioner stated that in July 2020, out of an urgent need to secure capital for his business he decided to dispose of the subject property whereof he obtained the discharge of Charge

and the original Certificate of title for purposes of effecting the discharge from SBM Bank (the successor in title of Chase Bank Limited.) The Petitioner entered into an agreement with an intended buyer for the sale of the subject property and for purposes of acquiring capital to finance a tender project being undertaken.

13. The Petitioner lodged the above - mentioned Discharge of Charge and transfer for franking and registration together with the Original title deed after the purchaser had paid the necessary stamp duty. Despite the said transfer documents duly franked, the 1<sup>st</sup> Respondent failed to effect the transfer, at first stating orally that the Subject file was missing without giving any definite explanation for the same. Upon the Petitioner's Advocates insistence, the 1<sup>st</sup> Respondent claimed that the subject property had a restriction. The Petitioner's property had never had any restriction and the same had always been clean except the charges duly placed at instance of the Petitioner.
14. The Petitioner through his advocates wrote to the 1<sup>st</sup> Respondent on 24<sup>th</sup> July 2020 asking for the removal of the said restriction, which letter was not responded to nor was the restriction lifted as required by Law. The 1<sup>st</sup> Respondent had to date not lifted the said Restriction nor offered a plausible reason or basis upon which the said restriction was placed. The Petitioner stated that the 1<sup>st</sup> Respondent's action of placing a restriction on the Petitioner's Property was unlawful, capricious, whimsical and unreasonable and went against all known dictates of law and fair

hearing. The said restriction was placed on an unknown date without any notice to the petitioner or inviting the petitioner to be heard before making the said underhand and unlawful decision. The same goes against legitimate expectation and fair hearing as dictated by law.

15. Further the Petitioner was surprised that upon taking back the documents earlier lodged for registration, the 1<sup>st</sup> Respondent shamelessly and clandestinely endorsed the said entry into the Petitioner's Original title deed backdating the same to 29<sup>th</sup> June, 2016 without signing thereof. Notably, the said restriction could not have been there when all along the Original title was with the bank until the same was released to the Petitioner who was in custody of the same.
16. The Petitioner averred that in the circumstances, it was very evident that the Respondent had taken a route meant to frustrate the Petitioner and disinherit the Petitioner of his property illegally through the back door and not following the procedure laid down by law.

**a. The Legal Premise of the Petition**

17. The action by the 1<sup>st</sup> Respondent was out rightly illegal as the law provides thus at the provision of Sections 76 and 77 of the Land Registration Act, No. 3 of 2012: -

**Restrictions. 76. (I) For the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, and after directing such inquiries to be made and notices to be served and hearing such persons**

**as the Registrar considers fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge.**

**(2) A restriction may be expressed to endure-(a) for a particular period; (b) until the occurrence of a particular event; or (c) until the making a further order is made, and may prohibit or restrict all dealings or only or the dealings that do not comply with specified conditions, and the restriction shall be registered in the appropriate register.**

**(3) The Registrar shall make a restriction in any case where it appears that the power of the proprietor to deal with the land, lease or charge is restricted. Notice and effect of restriction.**

**77. (1) The Registrar shall give notice, in writing, of a restriction to the proprietor affected by the restriction.**

18. It was evident that the action of the 1<sup>st</sup> Respondent went against the dictates of the law as none of the above requirements were ever met. The Petitioners asserted that the provision of Article 47 of the Constitution makes provision that in every administrative decision every person affected was entitled to fairness. The said provision provides thus: -

**47. Fair administrative action (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**

**(2) 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.**

19. The said provisions are further elucidated in the Fair Administrative Action Act, 2015 which provides the following at the provision of Sections 3 and 4: -

**Section 3. Application.**

**(1) This Act applies to all state and non-state agencies, including any person-**

- (a) exercising administrative authority;**
- (b)**

**(c) whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.**

**Administrative action to be taken expeditiously, efficiently, lawfully etc.**

**(1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.**

**(2) Every person has the right to be given written reasons for any administrative action that is taken against him.**

**(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-**

**(a) prior and adequate notice of the nature and reasons for the proposed administrative action;**

**(b) an opportunity to be heard and to make representations in that regard;**

**(c).....**

**(d).....**

**(e).....**

**(f).....**

**(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.**

20. For this reason, the Petitioner stated that his rights as guaranteed by the Constitution had been contravened by the 1<sup>st</sup> Respondent through the action of placing the restriction on his subject property without hearing him or affording him an opportunity to make any presentation before the said restriction was placed.
21. The Petitioners reiterated the above and aver that being a public officer, the 1<sup>st</sup> Respondent was bound by the Constitutional delicts on the national values and principles of governance captured by Article 10 of the Constitution which demands the exercise of the Rule of law, human dignity, equity social justice, human rights, transparency and accountability. It was the Petitioner's case that the Respondent's actions fail the requirement of transparency and accountability and expressly outside the rule of law.
22. The Petitioner averred that the Constitution of Kenya guaranteed the protection of his right to property under the provision of Article 40 of the Constitution as below: -
- 40. Protection of right to property**
- (1) Subject to Article 65, every person has 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.**
- (2) Parliament shall not enact a law that permits the State or any person - (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or (b) to limit, or in any way restrict the enjoyment of any right under this Article on the**

**basis of any of the grounds specified or contemplated in Article 27 (4).**

**(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-(a)results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that- (i) requires prompt payment in full, of just compensation to the person; and (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.**

23. It was the Petitioner's case that the 1<sup>st</sup> Respondent's action of illegally placing a restriction on his land infringes on his right to property, curtailing his enjoyment thereof thereby necessitating the intervention of this Honourable Court.
24. The Petitioner opined that as a citizen and the proprietor of the subject property he was obligated to trust the 1<sup>st</sup> Respondent being the office mandated with the records keeping in matters relating land. That by issuing him with a title deed upon purchase of the same way back in the year 2003 and further transacting on the basis that the title was clean and proper as evidenced by the subsequent charges registered the petitioner relied entirely on the 1<sup>st</sup> Respondent. The Petitioner had that legitimate expectation that his title being indefeasible could not be questioned/challenged and that in case of any issue arising the 1<sup>st</sup> Respondent would follow procedure laid down in law, first

notify the Petitioner before any action could be taken affecting the Petitioner's rights/interest over the subject property. The Petitioner as the original title holder of the subject land equally has legitimate expectation that his title was supreme having been procedurally acquired thus should not be taken away and or his dealing therewith unprocedurally restricted without due process. As such the 1<sup>st</sup> Respondent's action of arbitrarily placing a restriction upon the Petitioner's land went against the legitimate expectation of the Petitioner.

25. Thus, the Petitioner averred that the 1<sup>st</sup> Respondent's action of placing a restriction upon the Petitioner's Land Reference Number 10121/I/MN without notice to the Petitioner and failing to supply a basis for the same is in breach of the Petitioner's guaranteed human rights and goes against the legitimate expectation of fair administrative action, indefeasibility of title and protection of right to property.

**b. Prayers**

26. The Petitioner prayed for the following orders:-

***a. DECLARATION THAT the action of the Respondent, Registrar of entering a Restriction upon the Petitioner's Land Reference Number 10121/I/MN without any notice to the petitioner and or according him a right to respond thereto is contrary to the provisions of Section 77 of the Land Registration Act, 2012, Section 4 (1) of the Fair Administrative Action Act, No. 4 of 2015 and invariably amounts to a violation of the Petitioners' fundamental rights protected by Articles 40 and 48 of the Constitution.***

- b. AN ORDER OF MANDAMUS BE AND IS HEREBY ISSUED Compelling the Respondent, the Registrar of Lands to remove/lift the Restriction placed against Land Reference Number 10121/I/MN.**
- c. A PROHIBITORY ORDER BE AND IS HEREBY ISSUED prohibiting the Respondent, the Registrar of Lands from taking any adverse action and/or interfering in any way whatsoever with the Applicant's ownership, occupation enjoyment and exercise of his legal rights over Land Reference Number 10121/I/MN.**
- d. General and exemplary damages for violation of the Petitioner's fundamental rights and freedoms.**
- e. Other/further orders this Honourable court shall deem fit to grant for the ends of justice.**
- f. Costs of this Petition.**

**c. Affidavit in Support of the Petition**

27. The Petition was supported by a 19 Paragraphed supporting affidavit sworn by HEZEKIAH OMONDI ADALA, the Petitioner who averred that: -
- a. The affiant averred that he was the registered proprietor and title holder of Land Reference Number 10121/I/MN having acquired and had the same registered in his name on 2<sup>nd</sup> May, 2003 original Certificate of title being in his custody. He put up a residential house on the said property sometime in the year 2005 and had stayed therein ever since until very recently. A copy of the Certificate of Title in the name of the Petitioner annexed in the affidavit and marked as "HOA - 1".

- b. In addition he had on several occasions put up the subject property as security for facility from various banking institutions as follows: -
- i. A charge to Barclays Bank of Kenya on 15<sup>th</sup> September 2004 and subsequently discharged on 30<sup>th</sup> November 2006.
  - ii. A charge to KCB Bank Limited on 30<sup>th</sup> October 2006.
  - iii. A further Charge to KCB Bank Limited on 20<sup>th</sup> November 2009 and subsequently discharged on 22<sup>nd</sup> April 2013.
  - iv. A charge to Chase Bank Limited on 23<sup>rd</sup> October 2015
- c. In all these instances the Respondent had never raised any issues over his said title or ownership and had always given a clean bill of health in terms of the Certificate of Search indicative that he was the registered owner subject only to the charges as noted above at every respective time. Annexed in the affidavit a copy of the Search Certificate dated 11<sup>th</sup> November, 2019 and marked as "HOA - 2".
- d. The Affiant had always relied on the said assurance of the 1<sup>st</sup> Respondent Registrar and even before he acquired the said title he did have the expectation legitimately so that the register as reflected by the 1<sup>st</sup> Respondent was the true reference of the position regarding the subject property.
- e. Sometime in July 2020, out of an urgent need to secure capital for a tender project he secured with the Kenya Ferry Services he decided to dispose of the subject property for purposes of effecting the discharge from SBM Bank (the successor in title of

Chase Bank Limited. Annexed in the affidavit a copy of the Letter from SBM Bank dated 26<sup>th</sup> June, 2020 releasing the original title and the Discharge of Charge duly franked awaiting registration and marked as a bundle respectively as "HOA - 3" and "HOA - 4".

- f. He entered into an agreement with an intended buyer for the sale of the subject property and for purposes of acquiring capital to finance the tender project being under taken. A copy of the sale agreement was annexed in the affidavit and marked as "HOA - 5".
- g. The Affiant's advocates duly lodged the above mentioned discharge of charge and transfer for franking and registration together with the original title deed after the purchaser had paid the necessary stamp duty. A copy of the Stamp duty receipt and transfer documents with duly franked transfer annexed in the affidavit as a bundle and marked as "HOA - 6" and "HOA - 7".
- h. Despite the said transfer documents duly franked, the Respondent failed to effect the transfer, at first stating orally to his Advocates that the Subject file was missing without giving any definite explanation for the same. Upon the Petitioner's Advocates insistence the 1<sup>st</sup> Respondent claimed that the subject property had a restriction.
- i. The said property had never had any restriction and the same had always been clean except for the charges duly placed at his own instance.

- j. The affiant wrote to the Respondents through his advocates on record on 24<sup>th</sup> July, 2020 asking for the removal of the said restriction, which letter was not responded to nor was the restriction lifted. A copy of the letter dated 24<sup>th</sup> July 2020 annexed in the affidavit and marked as "HOA - 8".
- k. To date the 1<sup>st</sup> Respondent had not lifted the said Restriction nor offered a plausible reason or basis upon which the said restriction was placed. Annexed in the affidavit a copy of the latest search that the Affiant conducted dated 1<sup>st</sup> September, 2025 and marked as "HOA - 9".
- l. It was his case that the 1<sup>st</sup> Respondent's action of arbitrarily and whimsically placing a restriction on his property was unlawful, capricious and unreasonable and went against all known dictate of law and fair hearing. The said restriction was placed on an unknown date without any notice to him or even inviting him to be heard before making the said underhand and unlawful decision. The same went against his legitimate expectation and fair hearing as dictated by law.
- m. What surprised him more was that upon taking back his documents previously lodged with the 1<sup>st</sup> Respondent, the 1<sup>st</sup> Respondent shamelessly and clandestinely endorsed the said entry of restriction into his original title deed and backdated the same to 29<sup>th</sup> June, 2016 without signing thereof. Annexed in the affidavit a copy of the title deed with the said entry of restriction and marked as "HOA - 10".

- n. The said restriction could not have been there when all along the original title was the bank until the same was released to him and he had always been in full custody thereof.
- o. The actions of the 1<sup>st</sup> Respondent were reprehensible and did not reflect the integrity bestowed upon and required of the said public office and this court ought to have powers to issue remedy against such high handedness.
- p. His rights as guaranteed by the Constitution had been contravened by the 1<sup>st</sup> Respondent through the action of placing the restriction on his subject property without hearing and amounts to arbitrarily taking away his property.
- q. Being a public officer, the 1<sup>st</sup> Respondent was bound by the Constitutional edicts on the national values and principles of governance captured by Article 10 of the Constitution which demands the exercise of the Rule of law, human dignity, equity social justice, human rights, transparency and accountability. It was the Petitioner's case that the 1<sup>st</sup> Respondent's actions fail the requirement of transparency and accountability and expressly outside the rule of law.
- r. The Petitioner stood to suffer irreparable loss that could not be remained in anyway since he intended to channel the proceeds of the transaction towards a project tender construction he was engaged to do.
28. The Petitioner called their first witness on 6<sup>th</sup> April, 2024 who testified as follows:-

**A. Examination in Chief of the Petitioner by Mr. Adalla Advocate.**

29. The Petitioner witness was sworn and testified in English language. He was called HEZEKIAH OMONDI ADALA a citizen of Kenya and holder of the national identity card indicating all the particulars shown to Court. He was a Mechanical Engineer and the Petitioner herein. He filed a supporting affidavit sworn on 13<sup>th</sup> October, 2021 and had attached documents to the Affidavit - "H.O - 1 to 10" as the Petitioner's Exhibits No. 1 to 10. The witness told the court that he had brought the suit with regards to Land Reference No. 10121/I/MN to which he was the legal owner. He acquired the land in 2003.
30. According to the witness there was a 4 bedroom mainsonette i.e. residential - constructed from the year 2003 to 2006 - which he acquired the title from Swaleh Advocate for Mr. Saidi Omar Athman. He told the Court that he bought the land for the sum Kenya Shillings Seven Hundred and Fifty Thousand (Kshs. 750,000/-) in the year 2003 as per Entry No. 3 i.e. on 2<sup>nd</sup> May, 2003. He used to work for Bamburi Cement. There was a friend who had plots and the friend directed the witness to the suit property, gave him the contact of the owner and the witness bought the property after being shown the title belonged to SAID OMAR ATHMAN.
31. PW - 1 told the court that he was represented by Omondi Waweru Advocate - there was a sale agreement and the vendor. The witness told the court that an official search was conducted.

The official search showed it belonged to SAID OMAR ATHMAN. He paid the full amount for the purchase price and the transfer was completed. After acquiring the land he initiated the development - he got approvals from the Municipal Council of Mombasa after the background check was done and accomplished - development was the years 2005 to 2006 i.e. the residential house. After the completion of the development of the same he move in it in the year 2006. During that period, his occupation was never challenged. The title deed had never been revoked by a court of law. Being a contractor, he had been charging the title for collateral purposes for financial support from various institutions. It had been done 3 times. There had been on challenge by Barclays Bank, Kenya Commercial Bank Ltd and Chase Bank in the year 2015 - it was normally a very smooth elaborate process.

32. PW - 1 instituted the Petition seeking some declaration. He was given a contract by the Kenya Ports Authority (KPA) it required a hefty finance. He decided to sell the house, but in the process doing that they learnt that there was a restriction registered. It was a restriction under the provision of Section 76 of Land Registration Act, No. 3 of 2012. Before the registration of the Restriction, he was never notified by anybody. His views were never sought before placing of the restriction. He learnt about it through his advocate but before this he had never known of any restriction. To date, nobody had written to him about the restriction. As per the allegations by the 2<sup>nd</sup> Respondent, his case

was against the 1<sup>st</sup> Respondent. The 2<sup>nd</sup> Respondent was a stranger to him. He had not been shown any document indicating the land belonged to the 2<sup>nd</sup> Respondent. He considered the action by the Land Registrar on placing the restriction on his land to be a violation of his right.

**B. Cross Examination of Petitioner Witness PW - 1 by M/s. Mwangi Advocate.**

33. PW - 1 told the court that he had worked in many institutions as an Engineer. He had never been an employee for the Mombasa Land Registry. His friend was called Jackton Kiberenge who he helped him acquire the property. He died from Covid - 19. Before purchasing it he was living in Tudor Estate, Mombasa. He had an advocate who helped him acquire the property. He was aware that due diligence was done but not 100%. To him an official search was due diligence. Prior to the construction several approvals were obtained from the different places including Physical Planning - due diligence would require a certified Copy of the official search and if it had issued the experts would told him. The witness was not aware that there were Government houses around his house. He was not aware of any investigations going on by the EACC and that Notices had been published. He was aware that his title was never challenged.
34. According to the witness, there had been Certificates by the Government agencies directed to the bank. He was not aware that the land was being investigated by the EACC but he was

asked to present their documents for validation in the December 2022. It was for them to decide what they want to do with them.

**C. Cross Examination of PW - 1 by M/s. Waswa Advocate.**

35. PW - 1 confirmed to the court that he was the Petitioner in this matter. His claim against the Land Registrar, was for the refusal to allow the transaction from going through. He could not complete the land transaction. He did not go to the Land Registrar to ask him why he could not allow the transaction from taking place. He never went to undertake a search how land was acquired i.e. the history of the land, on how Said Omar got it. By that time it was common practice. With reference to the contents of his affidavit and that the annexure marked as "HOA - 1" the title deed - Entry No. 1. It was for Said Omar.

36. According to the witness, he sued the Land Registrar as he did not know why he disallowed his transaction. He never saw the replied but he had been living on the land from the years 2006 to 2013. His stage was called Sagah and not Kwa Maji.

**D. Re - Examination of PW - 1 by Mr. Adala Advocate.**

37. PW - 1 confirmed that he was not aware that the Land Registrar had discretion to place a restriction. This was done under the provision of Section 76 of the Land Registration Act, No. 3 of 2012. The official searches were coming from the Land Registry Offices. They filed the Petition when the Land Registrar declined to register his transactions due to the restriction. Further it was place on the land without consulting him. EACC had not

instituted any suit for the revocation of his title deed. This case was instituted first before he was called by the EACC.

38. PW - 1 reiterated that no one had ever informed him that he bought this land unprocedurally. He did not know the 2<sup>nd</sup> Respondent. They were strangers to him. When he purchased the land he was represented. He expected they did due diligence.

39. The Petitioner through his advocate Mr. Adala Advocate closed their case on 6<sup>th</sup> April, 2024.

#### **VI. The 1<sup>st</sup> & 2<sup>nd</sup> Respondents' case**

40. The Chief Land Registrar, responded through an 11 paragraphed Replying Affidavit sworn by Josephine Rama, the Land Registrar - Mombasa on 15<sup>th</sup> December, 2021 where she averred that: -

(i) As per the records held at the Land Office, the suit property; Land Reference Number 10121/I/MN; CR. 32130 is registered in the name of Hezekiah Omondi Adala.

(ii) The Land Registrar on 2<sup>nd</sup> December, 2019 received a letter dated same day from Coast Water Works Development Agency containing a List of various parcels of land situated within Mombasa County. The letter requested the Land registrar to place restrictions and or Caveats on the listed parcels of land which included the suit property herein. Annexed in the affidavit and marked as exhibit "JR - 1" the letter dated 2<sup>nd</sup> December, 2019 from Coast Water Development Agency and list of parcels therein.

- (iii) The letter clearly indicated that the Agency, Coast Water Works Development Agency which inherited land from the National Water and Pipeline Corporation conducted searches on the land on or about the years 2017. The revelation from the searches was that the abovementioned Land had been grabbed, sub-divided and transferred to 3<sup>rd</sup> Parties to create an impression of bona fide purchasers for value without notice; this include the Applicants herein.
- (iv) The Land Registrar under the provision of Section 76 of the Land Registration Act, No. 3 of 2012 had discretionary power to place a restriction once he receives a request and/or an Application to do so and he/she found it appropriate and necessary in the Circumstance. Having received the same application from the Government Agency, Coast Water Development Agency, the Land Registrar was mandated to do so to ensure the preservation of the suit property.
- (v) It was not clear whether the Applicant herein had officially made an Application to remove the restriction which would prompt the Registrar to call both parties alleging ownership for a hearing at the Lands office to enable him/her to either remove or not remove the restriction depending on the findings of the hearing by both parties.
- (vi) The Coast Water Works Development Authority was in a better position to explain further on the suit property hence their request for the Applicant to enjoin them to this suit.

(vii) The allegations in the Application was not true as the Registrar only acted to the Application brought to the office accordingly and as per his mandates. He has the discretion to place the restriction as set under the provision of Section 76 for purposes of preserving the property after having received a request accordingly.

(viii) It was their humble prayer that this suit be dismissed against the 1<sup>st</sup> Respondent as he did not do anything wrong or out of his set down mandates.

### **The 2<sup>nd</sup> Respondent's case**

41. The 2<sup>nd</sup> Respondent called its first witness on 18<sup>th</sup> March, 2024 at 12.00 noon where the witness testified as follows: -

#### **A. Examination in Chief of RW - 1 by M/s. Mwangi Advocate.**

42. RW - 1 was sworn and he testified in English language. He was called BENSON MBITHI MUINDI, a citizen of Kenya and holder of the national identity card bearing the particulars as shown to Court. He was a Land Surveyor. He worked with National Water Harvesting & Storage Nairobi. He had 32 years' experience in Land, survey of land and what pertains to land. Currently he was the Assistant Director Survey at the National Water Harvesting & Storage Authority. It was meant to be supplying water to Kenya. It was selling water. Selling of water was the domain of their organization but to his recollection the Ministry of Water would do this some of the assets were inherited from the Ministry of Water. The authority was operating in 22 Water Scheme - a

- water supply which include central and Eastern - this excluded Northern Eastern and Nairobi.
43. The coastal projects and property were Sabaki (Coastal Water Supply) Kilifi, Mombasa and Baricho was the largest i.e. 10 yielding Boreholes, supplying water at Sabaki in Lango Kubwa and to Malindi and Mombasa. It was inherited from the Ministry of Water in 1988 - it had large parcels of land and staff quarters in Mombasa and Kilifi. The land were fenced off. The Ministry prepared a PDP (Part Development Plan). In the year 25<sup>th</sup> January, 1976 a PDP No. 12 CT was prepared showing the land for Coastal area was land set aside for housing for staff. The land was at Shanzu - it borders the Shanzu Teachers College to the North, to the West was the Mombasa Malindi Road.
44. RW - 1 told the court that to the West was Kenya Power and Lighting Company land and the South was the road leading to a hotel known as Pride Inn. The suit property was "L" shape which measured around 45 acres for storage tanks and staff quarters. The Ministry of Water by the year 1978 it constructed timber houses - semi permanent structures. The staff houses were still in use by the employees of. On the PDP it was written National Water Conservation and Pipeline Corporation Staff Quarters - PDP was usually prepared for a purpose. It was not possible to have two PDPs for the same localities.
45. RW - 1 testified that ideally the PDP was to generate into a letter of allotment. However, in this case, the Ministry of Water took possession without the Letter of Allotment. It might have been

there but the office got burnt twice and it might have been destroyed then. He later on learnt that the “L” shaped land still had the buildings of Timber and the Water Act changed the mandate of the Authority from water supply to harvesting and 7 regional bodies were created which took over the role of selling of water. In particular, in the Coast region a body called Coast Water Service Board was established to no supply water in Coast Region. They also occupied the same region/ area “L” shaped. The National Water Harvesting Authority had indirect and remedial connection to the land. There were resultant sub - divisions. It was re - planned in the year 1995 into 8 portions and a PDP No. 12.4.L7.14.95 was signed on 3<sup>rd</sup> August, 1995.

46. The witness told the court that when they realized that their land was being issued a PDP which had been issued by the Director of Physical Planning for a church, dated 17<sup>th</sup> July, 1995. They found this was land near the Government - Voice of Kenya (V.O.K) transformation area. The correct way for an individual to have acquired the public land would have to require the original owner to be called and an inquiry made on whether they still had the use of the land or part of it. In this case it would require the Board of Directors of the National Water to confirm that they had any more use of the land.
47. RW - 1 testified that he had no such approvals from the National Water Harvesting Authority over the land so that it could be available for reallocation to other parties i.e. there were 3 PDPs (a) for the year 1976, (b) for the year 1995 and (c) 3<sup>rd</sup> August,

1995. Whenever, there existed more than one PDP it always raised a red flag/queries and suspicions on the land. His take was that the PDP at the V.O.K. transmission Station was super - imposed. Clearly, the number was copied. The PDP of 3<sup>rd</sup> August, 1995 led to the sub-division of the land to 8 parcels of 1/8 acres each. The PDP for the year 1976 had not been changed. It was still intact, for NWH and SH. The witness told the court that he had been questioned by officers from the EACC on the PDP and where the parcel No. MN/I/101 (formerly MN/I/101/8). The EACC were invited by the Coast Water Services and National Water Authority. It was on the land ownership at the Coast. They conducted the investigations and they had shared their findings with others.

48. The witness told the court that NWS & S and Coast Water Service Board; the regional bodies were created. The body created was Coastal Water Services Board and which changed to Coastal Water Works Development Agencies. The legal owners of the assets remained under the National Water Harvesting & Services Authority. RW - 1 was aware that the Coastal Water Services Board registered the restrictions. They took over the "L" shape and found out that the land had been grabbed. He was referred to the correspondences to the Land Registrar dated 4<sup>th</sup> April, 2016.

**B. Cross Examination by RW -1 by M/s. Waswa Advocate.**

49. RW - 1 confirmed that he wrote to the Land Registrar requesting for official searches. This was the letter dated 4<sup>th</sup> April, 2016. The

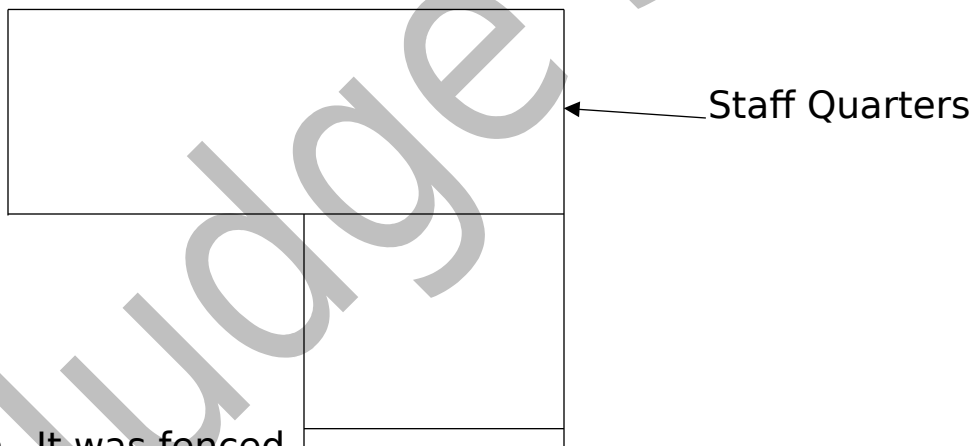
3 PDPs were marked for identification as “DFI - 1, 2 and 3” and Development Plan for 1988.

**C. Cross Examination of RW-1 by Mr. Adala Advocate.**

50. With reference to the letter dated 4<sup>th</sup> April, 2016, the witness told the court that the letter was not referring to any land title. It was referring to an attachment but there was nothing attached. The letter was making requisition for official search but not specifying the parcel of land. They meant the searches for the N.W.H.& S Land within Mombasa. The letter had an attachment but perhaps it fell off. What was in court had no attachment. Between the years 2006 to 2016, they noticed some development in conjunction with their sister the Coastal Water Services Board - reported to them there were sub-division and some areas were grabbed in Mombasa and not specific area/land.
51. RW - 1 told the court that all land in Kenya belonged to the Government until it allocated the land to individual or government project. In this case there had to be a Kenya Gazette Notice and many other instruments for setting aside land for Government use. In this case, they had a PDP as the instruments i.e. the Development Plan. The Letter of Allotment is accompanied by a PDP which confers ownership of the land. It was the Director of Physical Planning who generates the PDP. The Ministry of Water would indicate what land it requires and hence the Ministry of Land would cause the making of the PDP. From the year 1976 which was over 56 years ago there were no documents to that effect. Out offices got burnt. As of now they

did not have a letter of Allotment nor did he have any Kenya Gazzete Notice allocating land to N.W.H. & S.A. here.

52. RW - 1 testified that a PDP may be generated to other new PDPs save that there had to be references made from the previous PDP to the newly created PDP i.e. - superseding the previous one. There was a procedure for this i.e. for overriding the previous one, in that case, there were notes on the new PDP showing the one superseding it and the numbers will change. The procedure was that the land was set aside, PDP surveying, allocation of title. This procedure never took place for the subject land - they were on Survey Act and Physical Planning and Land Use Act.
53. With reference to annexure as "BM - 3" from the affidavit of Benson Muindi dated 10.10.2023 i.e. it was a SPARTIAL AERIAL diagram - goggle of the "L" of "7" shaped land.



- It was fenced
- It had a chief's offices

54. RW - 1 told the court that all of them apart from the Chief's quarter were not sanctioned by the N.W.H.& s. There was a road. He confirmed that the lower part of the "7" was developed for residential purposes - apart from 14 plots had not been built.

Referred to the signed PDP No. 12.4.LT.14.95 = dated 17<sup>th</sup> July, 1995 - he confirmed that it talked of the proposed residential use approved 3<sup>rd</sup> August, 1995. There were 3 PDPs.

- (a) 1976.
- (b) July, 1995.
- (c) August, 1995 (see above).

55. The witness told the court that from his knowledge the one that came earlier was the authentic one but this information was to be confirmed by the Director of Physical Planning - EACC was invited to confirm ownership, they were invited by Coast Water Services Board. Ownership was disputed to the best of his knowledge. With reference to LR No. MN/I/10121, the witness told the court that he was not aware whether there had been a title that had been cancelled of that title. He did not know whether the Petitioner was the registered owner to the subject land. The N.W.H. & S did not have a title to LR No. MN/I/10121. He had not seen approval for the reallocation of the land. He had also not seen a letter of allocation of land to N.W.H. & S. For the use of the land to change, the original allottee was consulted to state whether they still had use of the land.

56. I do recall there was a site visit. I attended and saw a report prepared by the Coast Regional Surveyor. Referred to the said report on Page 5 and Paragraph 2. It is a Surveying Plan on the land but not a surveying of the land. I know what unsurveying land is. It is one which is available for allocation by the Government. To covert public land to individual one is an

elaborate process. Public land can be allocated to state corporation or agency if it is required and requested for by the said entity. It would have to write to the Commissioner of lands (that time before the creation of the National Land Commission). The Ministry of Lands would consider the application and the availability of the land. It is through the Land Administration. From then the Government would issue a Letter of Allotment to the said agency seeking to be allocated the land. The Agency would be required to undertake a survey of the land and subsequently would be issued with a title deed. The Ministry of Land would then issue an instrument to show the land had been allocated to the Entity.

57. In the instant case the suit land was allocated to the NCWA. There maybe no Gazette Notice to that effect here but does not mean it never exists. From my written witness statement I have referred to the Kenya Gazette. The difference between PDP and DP are matters under the Physical Planning Act. I am not a Planner but a Surveyor to know that fact. However, I know for a fact that DP is for a bigger portion in size while the PDP is smaller in size. PDP comes after the DP. A PDP can amended. It is produced by the County Planner at the County (then District) level. They prepare them in conjunction with the Director of Survey. They are prepared regionally but with the consent of the national Government. In this case we are only dealing with the old regime - where the Commissioner of Lands was in control. A surveyor is never involved in planning but we have some training

on it. The surveying exercise was done by Edward Kiguru. I am a government Land Surveyor only to shade light on the ownership of the land and not the process of the acquisition of the title. There was a PDP which showed that the land was owned by NCWC but there is no title deed to that effect. There has never been any title. We are here for the placement of restriction

58. I may not know the owner of Land No. 10121/I/MN as at the moment until a search was conducted. However, as at the year 2022 it was registered in the name of Hezekiah Omondi Adala, the Petitioner.

**D. Re - Examination of RW - 1 by M/s. Mwangi Advocate.**

59. He was referred to the Surveying Report. Clearly, the land was not available as there was already a PDP for the year 1988 - No. CT/12/25/88/1 approved number 143. It meant the land was reserved for water department and hence it would not be available to any third party. However, if any party was interested, it would have to apply for allocation from the Commissioner of Lands. From then the application would be placed before the Permanent Secretary and the Board where the land was registered for them to indicate that they would not be having any use to the said land. This may be a policy. If such a letter was ever written I would have seen it. But as far as I am concerned no such correspondences exists. On the DP and PDP, there would be no distinction on the preservation would be the same. On one DP there would be several PDP produced.

60. There was no PDP on the “L” shaped land set aside for the NCWC. It was on the “L” shape that the buildings for the water department had always been since the year 1978 to date.

D. **Examination in Chief of RW - 2 by M/s. Mwangi Advocate**

55. RW - 2 was sworn and testified in English language. He was called Erick Otieno. He was a citizen of Kenya and holder of the national identity card bearing all the details shown to Court. He recorded his witness statement dated 25<sup>th</sup> March, 2024. He was a holder of the Bachelors of Business Administration in Economics & Finance. He also held Masters in Business & Chartered Public Accounts. He was trained as an Investigator with the Ethics and Anti - Corruption Commission (EACC). He conducted investigation and led the team. He had worked for six (6) years with EACC but had worked for 11 years in other organisations. The Land Registrar came to them and stated that he had placed a Caveat against the land and he indicated the Court had ordered for the caveat to be lifted. But the 2<sup>nd</sup> Respondent had lodged a complaint and wanted EACC to conduct their investigation. We undertook the investigation.

56. In his testimony he confirmed to the Court that the EACC had conducted investigations on the irregular alienation of public land property reference no. (MN/1/9622) belonging to the 2<sup>nd</sup> Respondent. Further that EACC had established that the property MN/1/9622 is the mother block from which sub-division of parcel number MN/1/10121, the suit property, was created. RW - 2 informed Court that in the year 1995, approximately

10.8 Ha of land reserved by the Government of Kenya for use by 2<sup>nd</sup> Respondents land in Shanzu was fraudulently, irregularly and illegally alienated and sub-divided into 8 blocks of parcels of land of measuring approximately 1.35 Ha each. The resultant blocks were MN/1/9616, MN/1/9617, MN/1/9618, MN/1/9619, MN/1/9620, MN/1/9621, MN/1/9622 and MN/1/9623. The illegal alienation was done using Part Development Plan number 12.4.CT.14.95 of 3<sup>rd</sup> August 1995.

57. RW - 2 adduced a letter dated 25<sup>th</sup> October 2022 written to the Director of Physical Planning which sought to verify the authenticity of Part Development Plan number 12.4.CT.14.95 of 3<sup>rd</sup> August 1995 and another letter referenced PPD/6/26/IX (130) dated 15<sup>th</sup> November, 2022 from the Director of Physical Planning responding and confirming that indeed Part Development Plan Number 12.4.CT.14.95 of 3<sup>rd</sup> August 1995 not authentic. Moreso, RW - 2 confirmed to the Court that Land parcel number MN/1/9622 from which parcel number MN/1/10121 was created was allocated to Shariff Nassir vide a letter of allotment Ref: 76474/VIII/...dated 11<sup>th</sup> August, 1995 as Unsurvey— Residential plot “B” - Shanzu - Mombasa for a period of 99 years from 1<sup>st</sup> August 1995 at a standing premium of a sum of Kenya Shillings Four Hundred Million (Kshs.400,000.00/-). The said allotment letter, indicated that parcel number MN/1/9622 was issued based on Part Development Plan number 76474/VIII/50A.

58. RW - 2 adduced a letter from EACC under letter referenced EACC/MSA/6/16/1 Vol x (13) dated 4<sup>th</sup> April, 2022 that sought verification on the authenticity of Part Development Plan number 76474/VIII/50A from the Director of Physical Planning and a response letter from the Director of Physical Planning under reference number PPD/6/26/VIII/ (40) dated 23<sup>rd</sup> May, 2022 indicating that drawings cited as Ref. 76474/VIII/50A do not exist in their records. The allotment letter for land parcel number MN/1/9622 was therefore issued based on an unapproved Part Development Plan.
59. Separately, it was also noteworthy that during re-examination, RW - 2 notified the Court that EACC had done and concluded its investigations on various other grabbed parcels of land (*still within the L Shaped land*) that were public land belonging to the 2<sup>nd</sup> Respondent. He further proceeded to list four Land recovery suits involving different parties that were currently proceeding before this Honorable Court. These were actions and measures taken squarely within the mandate of EACC following obtaining of full and conclusive evidence of corrupt schemes orchestrated to fleece government off public land illegally and unprocedurally.

### **Cross - Examination of RW - 2 by Mr. Adala Advocate**

60. RW - 2 stated that he thoroughly investigated the case. He was referred to paragraph 6 (ii). He was questioned as to why various land rate payments made by either the Petitioner or his predecessors was accepted by the County Government

Offices. It was clear that the County Government Offices were not mandated to verify and ascertain the authenticity or otherwise of certificates of title/lease while receiving land rates. The acceptance of any such land rates does not therefore sanctify an unauthentic certificate of title.

- 61.** He had documents that the Petitioner was an Employee of Land Office. He never stated it in his investigation report He did not have them in Court but he would avail it on request by Court.
- 62.** He had been an investigator for 21 years and hence experienced one. Several suits have been filed over this property. There has been 8 blocks derived from it. They had prepared a review report but not produced it as yet. On being referred to annexure 11, it showed that the rate payer was one Said Omar Athuman dated 23<sup>rd</sup> May, 2022. He was the one who preceded the Petitioner. He did not have the original PDP as they were never given. It remained with the Director of Physical Planning. Surveyor. However, he had the certified copy of the PDP. He had a lot of relevant documents in relation to the matter and its history.
- 63.** In reference to the other parcels, it was reserved in the year 1976 for the National Water Harvesting Authority. He did not have any Kenya Gazette Notice nor letter to that effect. He never came across any of the title to the suit land but the PDP was sufficient. One PDP could supercede another. I am not aware of the PDP for 1965. He relied on the documents

supplied to him by the relevant offices as per Paragraph 4 of his witness statement. He never subjected these documents to Document Examiner for forensic analysis. The inquiry made and documents were found from the relevant Government offices. He could not confirm whether the PDP was at the Land Registrar's offices or not. But he knew for a fact that the PDP was in the custody of the Director of Physical Planning.

- 64.** On being referred to the Title Deed and the Green Card for Land reference Numbers MN/I/10121. Entry No. 1 & 2 were in the names of Said Omar Athuman; Entry No. 3 was in the names of Hezekiah Omondi Adala having bought it at Kenya Shillings Four Hundred Thousand (Kshs. 400, 000.00/=) on 2<sup>nd</sup> May, 2003 which was about 21 years ago. He was not aware of any suits filed against the Petitioner. It was confirmed that the title was charged with various financial institutions. He never investigated the Charge. He only visited the land Registrar's offices Mombasa. He was not able to conduct official search. He confirmed that the Petitioner acquired the land as shown from all the Entry numbers 1 to 10 where there was restriction. This was public land where PDP, reservation letter and Gazette notices were needed.
- 65.** Referred to documents where it indicated that Land Reference Numbers MN/I/9622 was allocated to Shariff Nassir. He had the parcel file for the land but never brought it to Court. It confirmed there was a letter of Allotment. In the course of his investigation he made statements from various people

including the Land Registrar. He was never able to establish whether the Land Registrar had notified the Petitioner of the registration of the Restriction. He was only concerned about the ownership of the suit land. When the Land Registrar went to their offices he was only concerned on the lifting of the caveat.

- 66.** He had not produced any minutes on the amendment of the PDP. He confirmed that the annexure 1 was PDP for another land for technical school. It was larger measuring 18.0HA for the "L" shape. There was 10.3HA which was reserved for future development. It was at the tip of the "L" shaped land that there 7 acres where the staff quarters for the 2<sup>nd</sup> Respondent were found. He had not produced any evidence to effect.
- 67.** There were two ( 2 ) PDP which bore the same parcels of land. There was no need for forensic support to inform one that the PDP was forged or fraudulently acquired as he had already attained authority on it from the Director of Physical Planning.

#### **E. Re - Examination of RW - 2 by M/s. Mwangi Advocate**

- 68.** RW - 2 confirmed that this was the only investigation undertaken against the Petitioner's suit land. Indeed the suit land was one but it generated several blocks and thus suits in court. The other cases pending in Court were ELC No. 023 of 2023; ELC No. 039 of 2022 and ELC No. 040 of 2023.
- 69.** In the course of his investigation, he never came across any parcel file, Consents, transfer documents for the suit land duly

executed by the NCWC to the Petitioner. Further, he never came across any consents or approvals for the alienation of the Government or NCWC to the Petitioner. Additionally, he never saw any Gazette notices to transfer the land by the Ministry of land or NCWC from a public utility to a private individual. He never came across the name of Hezekiah Adala Omondi from the land registry. He was working as the District Land Registry though he did not know when that was. He established that the title deed was invalid. He came across the payment receipt for the land rates by Hezekiah Omondi Adala. Payment receipts never conferred the legality nor ownership of the suit property.

70. The PDP No. 12.4.CT.14 - 95 for the VOK was the genuine one.

**E. Examination in Chief of RW - 3 by M/s. Mwangi Advocate**

71. RW - 3 was sworn and testifies in English language. He was called Timothy Waiya Mwangi. He worked as a Deputy Director of Physical Planning working with the Ministry of Lands in the Department of Physical Planning, State Department for Lands and Physical Planning. He recorded the witness statement dated 5<sup>th</sup> July, 2024 which he wished to rely on his evidence. He had worked for 37 years.

72. In the years 1993 to 1995 the law in enforce was Physical Planning Act, Cap. 303. The procedure for the preparation of the PDP was provided for under Section 9 of the Government

Land Act, Cap. 280 for land where land was not required for public purpose the Commissioner of Lands would cause for the land to be set aside for industrial, residential or commercial purposes. However, public purposes was not defined under Government Land Act, Cap. 280. The Town Land Adviser (Now Director) was called to plan and given an authority. The Director of Physical Planning would visit the ground and prepare a PDP and circulate it to various authority for comments from the DC, Clerks to the Local authorities and the Land Registrar. Once the comments were received by the Director would then hand them to the Commissioner of Land's approval. Once that was done, the Commissioner of Lands would return a signed copy to the Director Physical Planning to enter to the register as the APPROVED PLAN in the register. Then the Director of Physical Planning would send the Approval Planning and number to the Commissioner of Land. A PDP has a legend and it states the purposes and the sizes of the land. There is always a note whether the approval supercedes it or not; the dates and the words PDP; the names of the person who prepared it; the dates of the preparation and the reference numbers; the person who drew it; and the name of the Director who approved the PDP and the PDP approval numbers. If the PDP does not have an APPROVED PLAN numbers then it cannot be used to alienate a public land.

73. He was referred to the PDP No. 12.4.CT.14.95 approved plan number 235 and dated 17<sup>th</sup> July, 1995. It related to the VOK

area. According to the record it was the genuine one. Under Paragraph 6 PDP No. 12.4.CT.14.95 was prepared on 10<sup>th</sup> July, 1995 and signed for the Director with number 235. The next PDP was dated 17<sup>th</sup> July, 1995 and certified by the Director on 3<sup>rd</sup> August, 1995 and approved by the Commissioner of Lands. There cannot be two PDPs for the same parcel of land. One must give way to the other. It requires for a process to supercede the other. It is assumed to be a new one and the Commissioner of Lands has to circulate it for comments from the various relevant authorities and hence the previous PDP stands superceded. Once a PDP has been allocated for public purposes it remains that way. The instant case the land was meant for water department and not individuals.

74. He confirmed to the Court that the adduced Development Plan Reference Number CT/ 12/25/88/1 approved Number 143 for the entire Shanzu area in Mombasa County was authentic and available in the Department of Physical Planning records.
75. In addition, in his testimony, he stated that the Development Plan was still captured land reserved for Coastal Water Supply Project Staff Houses coded as "05/" which when interpreted from the Legend "05" stood for "Coastal Water Supply Project Staff Houses". Further, he explained to Court that under section 11(3) of the Land Planning Act Cap. 303, the land was public purpose for Government purposes. Therefore, by dint of section 9 of Governments land Act as read with 11(3) of Land Planning Act Cap. 303, it was not available for

alienation to private persons, having been alienated for public purposes.

76. On the Part Development Plan Reference number 12,4. CT. 14.95 approval number 235 dated 17<sup>th</sup> July, 1995, RW - 3 informed Court that he had verified that the said PDP Number 12.4. CT. 14,95 approval number 235 was authentic and available in their records and was done for allocation of a church situated at VOK area and not Shanzu area. It had followed all the processes of preparing and approving Part Development Plans as The Plan was prepared for a Church and nothing else.
- 77.** In respect to Part Development Plan Reference number 12.4. CT. 14.95 dated 3<sup>rd</sup> August, 1995, RW - 3 confirmed to Court that he had verified that the said PDP Number 12.4. CT. 14.95 dated 3<sup>rd</sup> August, 1995 was not authentic and the same was not available in the Department of Physical Planning approved Part Development Plan Register. Notably this is the PDP that had been allegedly used to illegally, irregularly and fraudulently alienate 10.8 Ha off “the L” Shape public land into eight parcels of land measuring approximately 1,35 Ha each being MN/1/9616, MN/1/9617, MN/1/9618, MN/1/9619, MN/1/9620, MN/1/9621, MN/1/9622 and MN/1/9623.
78. RW - 3 unearthed that allotment letter for Land Reference Number MN/1/9622 bears a Part Development Plan Reference number 76474/VIII/50A which was the basis upon which the mother block MN/1/9622 was created, it was from MN/1/9622

that twelve (12) parcels of land were created including the disputed parcel MN/1/10121. The purported Part Development Plan number 76474/VIII/50A never conformed to the standard format of preparation of part development plans for Mombasa. The standard format is A/B/C/D, where A- 12, B- CT, C-No of plan prepared for the zone, D- Specific Zone for Shanzu this was 1 and E- Year of preparation. In addition, the purported Part Development Plan was not in Department of Physical Planning records.

79. In a nutshell, expert witness RW - 3 brought to light the massive fraud and illegalities which were cultivated in an attempt to confer private ownership rights anchored on fraudulent titles and emanating from illegal and unprocedural alienation of public land.

**Cross - Examination of RW - 3 by Mr. Adala Advocate**

80. RW - 3 was referred to the provision of Section 9 of the Government Land Act, Cap. 280. He did not have any evidence this procedure for the allocation of the public land to the 2<sup>nd</sup> Respondent was followed. There were no such documentary evidence such as consents or approvals or gazette notices were available. There was no evidence to the effect that the land was reserved for the 2<sup>nd</sup> Respondent. The only document he had relied on to prove ownership of the land was PDP. It was the only document to prove to court that the land was conferred to the 2<sup>nd</sup> Respondent. He confirmed that PDP was not a Letter of Allotment.

81. There was a difference between the development Plan and PDP. For there to be a successful alienation the PDP has to be approved and allotted numbers. The PDP he held had not been signed by a Commissioner of Lands. It had an initial for "JN Njenga". He would not be surprised that there was no such Commissioner of lands bearing such a name. The only Commissioner of Lands at that time was "James Reimond Njenga" as per the entries in the Kenya Gazette. PDPs are capable of being amended hence superceding the others. The PDP were under the custody of the Director of Physical Planning. He was aware that the Petitioner never produced any PDP. They were not the ones the PDPs. He saw some Letters of Allotment. He was referred to the Grid Scale of the PDP. The scale was 1 - 5, 000. It did not necessarily mean to cover the larger area of Shanzu. Referred to the PDP Numbers 12.CT.25.1.76 dated 14<sup>th</sup> July, 1977. It was for the proposed technical school. He did not know much about that as he was seeing it for the first time. He was not aware about the coordinates in other PDPs. Government departments are issued with title deeds and the same process is used.

**Re - Examination of RW - 3 by M/s. Mwangi Advocate**

82. The final process on the allocation of public land is upon attaining APPROVED PLAN and numbers to be executed by the Commissioner of lands and the Director of Physical Planning. This has to be there and then its registered. Anything less than that then the documentations are irregular, null and void.

83. The contents of the DP & PDP never changes. The only aspects that change are the development undertaken on the PDP for instance the roads, boundaries, etc. The PDP was for VOK. The Commissioner of Lands was James Njenga. The Approved Plan was Number 143. It had never been challenged. It was the one for technical school referred to by the Investigation Officer. It was still reserved for the original purpose - public use. He confirmed that Government Entities were issued with title deeds. But from the year 2000, it would only be done if a public entity made a request in writing. In the instant case there were structures on the ground. In that case the land would not be available for alienation for private individuals.

**F. Examination in Chief of the 1<sup>st</sup> Respondent by M/s. Waswa Advocate.**

84. The 1<sup>st</sup> Respondent's witness was sworn and testified in English language. She was called Mercy Chekemoi. She was a Land Registrar, at Mombasa holding P/No. 2015000412. She had 9 years experience. She had worked at the land Registry Mombasa for 5 years and 4 years at the Ministry of Land Headquarters, Nairobi. She appeared in Court to testify on the LR No. 10121/MN/1 CR No. 32130 which had been a subject of the Petition herein. They were served with a Decree dated 29<sup>th</sup> June, 2021 and they proceeded to register a Restriction on 1<sup>st</sup> July, 2021. The property was a subject of sub - division of the mother title - CR No. 28454. The mother title was registered on 17<sup>th</sup> June, 1996 in the names of Abdalla Saleh Duran. There

- were 11 sub - divisions. The suit property had undergone various transactions. The last entry was the Decree.
85. Before this Decree, the Entries were for the initial owners being Abdalla Salim Duran; Hale Hamisi & laban Swale Salm in 13<sup>th</sup> April, 1999; Title deeds were issued. Entry Number 2 was on 20<sup>th</sup> September, 1999 it was transferred to Said Omar. Entry Number 3 of 2<sup>nd</sup> May, 2003 it was transferred to Hezekiah Omondi Adala. Entry No. 4 it was charged to Barclays bank; Entry Number 5 it was a Discharge of Charge on 3<sup>rd</sup> November, 2006; Entry Number 6 it was Charged to Kenya Commercial Bank on 3<sup>rd</sup> November, 2006; a Charge and Discharged; Entry Number 7 was a further Charge to KCB on 20<sup>th</sup> November, 2007; Entry Number 8 it was a Discharge of Charge on 22<sup>nd</sup> March, 2013; Entry Number 9 it was Charged to Chase bank Limited on 23<sup>th</sup> October, 2015; Entry No, 10 it was the Restriction on 29<sup>th</sup> June, 2016; This was done pursuant to a letter by the 2<sup>nd</sup> Respondent dated 2<sup>nd</sup> December, 2019. Entry No. 11 was for the Decree by Court dated 29<sup>th</sup> June, 2021 in ELC No. 3 of 202 directing the removal of the restriction and registered on 1<sup>st</sup> July, 2024.
86. Upon receipt of the letter by the 2<sup>nd</sup> Respondent, the Land Registrar invoked the provisions of Section 76 of the Land Registration Act, No. 3 of 2012 and registered the restriction. She produced the said letter as her Exhibit.

**Cross examination of the 1<sup>st</sup> Respondent witness by M/s. Mwangi Advocate**

87. There was a valid reason to have registered the restriction. The following process & documents ought to be in the parcel file. An approved PDP; A Letter/Grant by the Director of Land Administration; Issuance of the Title deed.
88. It was only the Grant that was available. However, even if these documents are missing it does not mean the title deed is irregular. The Land Registrar heavily relied on the Grant for the registration.

**Cross examination of the 1<sup>st</sup> Respondent witness by M/s. Mwangi Advocate**

89. She only testified on the information that was available from the Land Registry. It was not about her. Referred to the title deed - it was registered in the names of Hezekiah Adala Omondi. He acquired it on 2<sup>nd</sup> May, 2003. That title deed had not been challenged by anyone. She confirmed that the Petitioner was the subsequent Grantor. The transfers from Entry Numbers 1 to 10 were regular and never challenged by anyone in any court of law.
90. From the time the Petitioner acquired the Grant, it had undergone through a lot transactions without any inhibitions. It was until they were requested by the 2<sup>nd</sup> Respondent to register the Restriction there were no other development. Unfortunately, it was never copied to the Petitioner. For her term as a Land Registrar there had never been any Land registrar by the name Hezekiah Adala Omondi. The mother

title was genuine one. Many other sub - divisions were derived from it.

91. Prior to the letter by the 2<sup>nd</sup> respondent, there was a letter by the EACC dated 15<sup>th</sup> September, 2021 requesting for documents and the whether it should remove the restriction. Apart from these two ( 2 ) letters there was nothing else complaining about this land.
92. These documents were not necessarily within the custody of Land Registrar. She had a copy of Deed Plan and the title deed. It was not within her knowledge of the missing documents.

**Re - Examination of the 1<sup>st</sup> Respondent Witness by M/s. Waswa Advocate.**

93. She was not able to ascertain how the Grant was obtained. However, the Grant to the Mother title was obtained by the main Grantor. As the Land Registrar, she would not know how the documents were allocated. Her role was only to register the documents availed.

**VII. Submissions**

94. On 27<sup>th</sup> May, 2024 after the Petitioner and the Respondents closed their cases, the Honourable Court by consensus of the parties directed that the Petition be canvassed by way of written submissions and the judgment was fixed on notice.

**A. The Written Submissions by the Petitioner**

95. The Petitioner through the Law firm of Messrs. Musa Boaz & Thomas Advocates filed their written submissions dated 10<sup>th</sup> March 2025. Mr. Adala Advocate submitted that what was before the Honourable Court was a Constitution Petition dated 13<sup>th</sup> October, 2020. The Petitioner was and still is the registered owner/ proprietor of land parcel number 10121/I/MN and with the original certificate of title acquired in the year 2003. The 1<sup>st</sup> Respondent is the Registrar of land, a public officer appointed under Section 12 of the Land Registration Act, 2012 for purposes of the effective discharge of functions under the Act in relation to registration of Land in Kenya. The Petitioner seeks declarations as a result of the Land Registrar's action of placing a restriction against his land plot Number 10121/I/MN without any notice and without hearing him before taking the said action which is against express provisions of the Law, to wit the Land Act, Fair Administrative Action Act and the Constitutional dictates and hence should be declared null and void. The 1<sup>st</sup> Respondent, Registrar of land filed a replying affidavit acknowledging taking the action complained of. Upon making an Application, the National Water Harvesting and Storage Authority was joined into these proceedings and thus became 2<sup>nd</sup> Respondent. The 2<sup>nd</sup> Respondent moved the court on the claim that the land the subject of this suit belongs to them. The Petitioner herein claimed that the 1<sup>st</sup> Respondent had breached his constitutional rights to property, fair administrative action as well as violated his legitimate expectation, by illegally and unprocedurally

entering a restriction and failing/refusing to remove the same upon the petitioner's said parcel of land despite having been officially asked to remove. The said restriction having been entered without any notice and or hearing of the petitioner as the registered owner. The breach and violation of the Petitioner's rights have further occasioned loss and the petitioner suffered losses/damages. Thus, the Petitioner had moved this Honourable Court seeking for the above cited orders.

96. The court granted conservatory orders after consent of the parties and thus we dived right into the main petition. The Petitioner was brought under provisions of Articles 2, 10, 19, 40, 47 and 48 of the Constitution of Kenya 2010, Sections 76 and 77 of the Registration of Lands Act, 2012, Section 3(1) a, 4(1), (2) and (3), 5(2) of the Fair Administrative Action Act nos. 4 of 2015, and the Constitution Practice and Procedure Rules, 2013). The said Petition was supported by an affidavit sworn by the Petitioner, Hezekiah Omondi Adalla. The Respondent filed a replying affidavit by Josephine Rama dated 15<sup>th</sup> December, 2020.
97. On the facts and grounds of the Petition according to the Learned Counsel was that the Petitioner is the bona fide and registered owner of land reference number 10121/I/MN having acquired the same procedurally and registered the same in his name on 2<sup>nd</sup> May 2003 with him having the original Certificate of Title. The Petitioner put up a residential house on the said property in the year 2005 and stayed therein ever since. Over the said period of time, the Petitioner severally put up the subject property as

security for facility from various banking institutions. Over those four charges, the Petitioner had not had any issue raised by the Respondent over the Petitioner's title or ownership and has always been given a clean bill of health by issuance of certificate of search indicative of a clean title.

98. Sometime in July 2020, out of an urgent need to secure capital for his business, the Petitioner decided to dispose of the subject property after obtaining the discharge of charge and the original certificate of title for purposes of effecting the discharge from SBM Bank. The petitioner entered into an agreement with the intended buyer and duly lodged with the Respondent the above mentioned discharge of charge and transfer for registration together with the original title after the purchaser had paid the necessary stamp duty. The Respondent failed to effect the transfer, by orally stating that the subject file was missing at the registry. Upon the insistence of the Petitioner's advocate, the respondent claimed that the subject property had a restriction.
99. The Petitioner through the advocate wrote to the respondent on 24<sup>th</sup> July 2020 asking for the basis and further the removal of the said restriction, which letter was neither responded to nor was the restriction lifted. The Petitioner was never notified before placing of the said restriction. He was never heard before the same was placed nor was he ever invited to make any presentation. The same was just placed by the Respondent purportedly acting under the provision of Section 76 of the Land Registration Act.

100. The Learned Counsel submitted that it was the Petitioner's case that by placing the restriction upon his property without according him an opportunity to be heard is an infringement of his fundamental human rights guaranteed by the constitution. The Petitioner relied on the following documents: -

- a. Certificate of title indicative of the Petitioner as the registered owner.
- b. Search Certificate dated 11<sup>th</sup> November, 2019 indicating the charge to bank.
- c. Letter from the bank of discharge of Charge.
- d. Discharge of charge awaiting registration.
- e. Sale agreement.
- f. Transfer in favour of Purchaser.
- g. A letter dated 24<sup>th</sup> July, 2020 asking the registrar to remove the restriction.
- h. A Search Certificate dated 1<sup>st</sup> September, 2020 with the restriction.
- i. Copy of Certificate of title with the said restriction irregularly placed and back dated

101. The Learned Counsel submitted on the Respondent's reply that their Replying Affidavit stated that on the 2<sup>nd</sup> December 2019, they received a letter from Coast water Works Development Agency requesting that the subject property be placed under restrictions. The Respondent acted pursuant to the said letter and section 76 of the Land Registration Act. The deponent further deponed that it is not clear whether the

Petitioner has officially made an application to remove the restriction. (They referred the Honourable Court to the letter dated 24<sup>th</sup> July, 2020 wherein the Petitioner asked the Respondent to remove the restriction.)

102. The Learned Counsel relied on Article 2 of the Constitution which recognized the supremacy of the constitution of Kenya such that any laws and or action, which are not in line with the provisions and spirit thereof, fall by the way side as unconstitutional. Article 10 states the core values are principles that govern and should guide state organs, public officers and all persons carrying out their duties in line with the constitution. Article 23 of the Constitution gave this court the jurisdiction to hear and determine matters involving violation of fundamental rights under the Bill of Rights. The jurisdiction of the High Court to determine issues of violation of fundamental rights is further cemented by Article 165(3) (b) which gives the High Court jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

103. Article 40 of the Constitution protects the right to property.

**Protection of right to property (1) Subject to Article 65, every person has 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.**

**(2) Parliament shall not enact a law that permits the State or any person-**

**(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or**

**(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).**

104. The Learned Counsel submitted that the thrust of Article 40 of the Constitution is to protect every person's proprietary rights under the law. Such rights were governed by statute. For instance in this case, the title was issued under Registered Land Act (Repealed). The same had not been challenged in any court of law. The Petitioner's case was that he had an absolute and indefeasible title that was capable of protection under Article 40 of the Constitution and that once a title is issued under the Act and other laws in Kenya; the holder thereof acquires an indefeasible title which could not be taken away except in accordance with the Constitution and the Law. The Respondent could not assert a right inconsistent with the title without following due process. The Constitution protects higher values found in its preamble including social justice and human rights, and the Respondent must be forced to respect the Constitution of the Republic of Kenya.

105. The Learned Counsel relied on the case of ***“Multiple Hauliers East Africa Limited - Versus - the Attorney General & 11 Others Nairobi HC Petition No. 88 of 2010”*** it was reiterated thus: -

***“Private property is protected and may not be taken arbitrarily without due process.”***

106. The Court's duty at this stage was to protect and uphold the accrued property rights of the Petitioner. Article 47 on the right to fair administrative action clearly states that:-

**47.(1) every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**

**(2) 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.**

**(3) Parliament shall enact legislation to give effect to the rights The Constitution of Kenya 33in clause (1) and that legislation shall-- (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and (b) promote efficient administration.**

107. Under the Fair Administrative Action Act, Section 3 provides that: -

**3.(1) This Act applies to all state and non-state Application agencies, including any person-**

**(a) Exercising administrative authority;**

**(b)**

**(c) whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.**

**4.(1) Every person has the right to administrative action, which is expeditious, efficient, lawful, reasonable, and procedurally fair.**

**(2) Every person has the right to be given written reasons for any administrative action that is taken against him.**

**(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-**

**(a) Prior and adequate notice of the nature and reasons for the proposed administrative action;**

**(b) An opportunity to be heard and to make representations in that regard;**

**(c).....**

**(g) Information, materials and evidence to be relied upon in making the decision or taking the administrative action.**

**(a) The administrator shall accord the person against whom administrative action is taken an opportunity to-**

**(a).....**

**(b)Be heard:**

**(c)...**

108. According to the Learned Counsel, reasonably, the 1<sup>st</sup> Respondent in her reply affidavit admitted to having not followed the due process and at no point did she either issue a notice or reason for the restriction even after the Petitioner's advocate wrote to them in the same inquiry.

109. The Learned Counsel relied on ***"Multiple Hauliers East Africa Limited - Versus - the Attorney General & 11 Others (Supra)"***, above the Court had this so say regarding the right to fair administrative action:-

***"This court has on several occasions emphasized the need for administrative actions to be carried out procedurally. Where a public authority's actions are likely to deprive individuals of their fundamental rights and freedoms, it is crucial that such actions be carried out through due process and in respect to***

***the rules of natural justice. H.W.R. Wade & C.F. Forsyth, in 'Administrative Law', 10<sup>th</sup> edition, Oxford University Press, page 404 cites Denning LJ in Abbott v Sullivan [1952] 1 KB 189 at 198 as stating;***

***"These bodies, however, which exercise a monopoly in an important sphere of human activity, with the power of depriving a man of his livelihood, must act in accordance with the elementary rules of justice. They must not condemn a man without giving him an opportunity to be heard in his own defence: and any agreement or practice to the contrary would be invalid."***

110. The Learned Counsel submitted that pursuant to Section 24 of the Land Registration Act No. 3 of 2012, interest in land is conferred by registration such that registration vests absolute ownership of the land together with all rights and privileges belonging to or appurtenant thereto, on the person registered as the owner of the property. Section 25 fortifies the rights of a registered owner of the land to the extent that the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, which shall not be liable to be defeated except as provided in the Act.

111. They humbly submitted that the Petitioner's title was acquired in a legal and proper manner and in accordance with the law, and the Certificate of Title has been confirmed to belong to the Petitioner even by the Respondent. Sections 76 and 77 of the Land Registration Act No. 3 of 2012 provide that:

**76.Restrictions**

**(1) For the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, and after directing such inquiries to be made and notices to be served and hearing such persons as the Registrar considers fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge.**

**77. Notice and effect of restriction**

**(1) The Registrar shall give notice, in writing, of a restriction to the proprietor affected by the restriction**

112. From the evidence presented before this honorable court, it was evident that the respondent's action goes against the provision of the law as neither of the above mentioned requirement was duly met and executed. In the case of ***"Bamburi Cement Limited - Versus - Chief Registrar & Attorney General [2018] eKLR"***, the Honourable Judge stated that:-

***"The basis for maintaining the caveats therefore is that the caveats against the Suit Properties were put in place pursuant to the decision taken at the Cabinet Meeting held on 29/6/2010. A caution does not confer ownership rights over land. If the Government believes the Suit Properties belonged to or were supposed to belong to it, then it ought to have taken steps to revoke or legally challenge the Applicant's titles over the Suit Properties and follow due process. The protection of the right over property afforded by Article 40 of the Constitution is to be enjoyed by the proprietor except where the property is found to have been unlawfully acquired. The court doubts that the Cabinet Meeting held on 29/6/2010 could***

**make a finding contemplated by Article 40(6) of the Constitution. Besides the court making such finding, the National Land Commission Act made provision for the process through which such a finding could also be made. This process as outlined by the law is the process, the respondent ought to have engaged in whether or not a government body had instructed or applied for a restriction, something that was not adhered to.**

113. On the doctrine of legitimate expectation, the Learned Counsel submitted that the Supreme Court in the case of **“Communication Commission of Kenya & 5 Others - Versus - Royal Media Services Ltd & 5 Others, (2014) eKLR”** had this to say of the doctrine of legitimate expectation: -

**“In proceedings for judicial review, legitimate expectation applies the principles of fairness and reasonableness, to the situation in which a person has an expectation, or interest in a public body retaining a long-standing practice, or keeping a promise.**

**An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. A party that seeks to rely on the doctrine of legitimate expectation, has to show that it has locus standi to make a claim on the basis of legitimate expectation.”**

114. The said Court further laid down the principles that govern a successful invocation of the doctrine of legitimate expectation to be:-

**“a. there must be an express, clear and unambiguous promise given by a public authority;**

**b. the expectation itself must be reasonable;**

***c. the representation must be one which it was competent and lawful for the decision-maker to make; and***  
***d. there cannot be a legitimate expectation against clear provisions of the law or the Constitution.”***

115. Applying these principles to the present case, it is the Petitioner's case that the 1<sup>st</sup> Respondent had always given a clearance and issued searches indicating that the land belonged to the petitioner subject to the charges created by himself in favour of the bank. From the time he acquired the title in the year 2003. There has never been a challenge to the Petitioner's title. This was adequate evidence of representations made and conduct by the Respondent as to the legitimacy of the title and ownership of the Petitioner. No entry contrary to that made by the petitioner, including a restriction at the instance of anyone could be made to the property against the petitioner's interest as that would go against the petitioner's legitimate expectation. It would be the Petitioner's legitimate expectation that should any ground arise that the Respondent would need to make any adverse entry on the Petitioner's title then the Petitioner would be duly notified first in writing as required by law and be heard before any action taken and or entry made.

### **The 2<sup>nd</sup> Respondents Case**

116. The 2<sup>nd</sup> Respondent, National Water Harvesting and Storage Authority made an application and were admitted into this petition and thus became Second Respondent. It is important to note that the 2<sup>nd</sup> Respondent do not seek any prayers against

the Petitioner. It is also important to note that the 2<sup>nd</sup> Respondent did not move the Registrar of lands to place the restriction. The restriction was placed at the behest of Coast Water Works Development Authority.

117. It was also of utmost importance to note that the 2<sup>nd</sup> Respondent have never challenged the Petitioner's title at any point in history. The title still remains in the Petitioner's name. The same has never been revoked. We shall submit that this Honourable Court cannot revoke the Petitioner's title through these proceedings. The 2<sup>nd</sup> Respondent has not placed on record any material to make this court make such a move.

### **Evidence of Benson Muindi**

118. The Respondent's witness was one Benson Mbithi Muindi, the 2<sup>nd</sup> Respondent's Principal Land Surveyor. The witness alleged that National Water Harvesting and Storage Authority owns the subject land after allocation by the defunct Municipal Council of Mombasa in the year 1989. However he produced NO INSTRUMENT and no title conferring ownership to them. There is nothing showing any allocation to the 2<sup>nd</sup> Respondent by Municipal Council of Mombasa as alleged. The witness stated that according to survey Map Sheet No. D.4 the said portion was captured under survey plan F/R286/112. This again does not indicate any ownership.

119. The witness sought to state that there are developments, namely staff quarters on the subject land. However the site visit

conducted by court showed clearly that staff quarters of the 2<sup>nd</sup> Respondent was clearly in a different section and for which they have a title.

120. The witness claimed that the Petitioner irregularly and unlawfully acquired the subject property, however he did not bring any proof of the same. They had never challenged the title of the Petitioner.

121. The witness stated that the petitioner's land was created from parcel number MN/I/9622 which was originally government land allocated to the 2<sup>nd</sup> Respondent. All land originally belongs to the government. The Witness did not produce any document where they were allocated the said land as he purported.

122. The witness confirmed that allocation of land is not conducted by Part Development Plan (PDP). However there was an elaborate process that was followed before any land can be said to be allocated and transferred to an institution as the 2<sup>nd</sup> Respondent. The witness also confirmed that that process was not done in this case to have the land he alleges belong to the 2<sup>nd</sup> Respondent. The witness also confirmed and the court also saw that aside from the separate side which has staff quarters the land subject hereof and its surrounding is not occupied by the 2<sup>nd</sup> Respondent but the petitioner and other private citizens who have been there for close to 3 decades.

123. More disturbing, the witness alleged that in 1997 National water informed its sister company that some of its land had been

grabbed and sub - divided. The question that comes to mind is, if by the year 1997 as purported that they were aware that some of their land had been grabbed why would they take close to 30 years and do nothing about it??

124. A summary analysis of 2<sup>nd</sup> respondent's witness testimony was clear that there was no instrument allocating the land to them as purported. The land does not belong to them.

**Witnesses Called upon order of Court.**

125. The Honourable Court issued summons upon the Ethics and Anticorruption Commission Investigating officer and also Director of Physical Planning.

**Evidence of Ethics and Anticorruption Investigating Officer**

126. Mr. Erick Otieno, the investigating officer stated that he was instructed to investigate the land after the court issued judgment and a decree for removal of the restriction when one Registrar, Mr. Mwangi visited his office. He confirmed that no proceedings have ever been instituted to revoke the Petitioner's title. He claimed the land was reserved in 1976 for the 2<sup>nd</sup> Respondent but conceded and confirmed that there is no reservation letter reserving the subject land. He testified that the Key instrument used to reserve the land for the 2<sup>nd</sup> Respondent was the Part Development Plan Number 12.4.CT.25.1.7614 of 1976. However upon cross-examination he conceded that that was a PDP of a different area and also that reservation is not done by way of a PDP. There was never any

gazette notice setting aside the land for the 2<sup>nd</sup> Respondent.

127. He further confirmed that the petitioner Mr. Hezekiah Adala was not the original allottee but a third transferee. He was not party to the allotment/allocation process. Allocation was done in 1995. He bought the same in the year 2003 at a sum of Kenya Shillings Four Hundred Million (Kshs. 400,000/=) from Said Omar Athman who acquired the same from Abdullah Saleh Buran, Khalid Khamis Shapi and Nabhan Swaleh Salim. There was other entries in the title. He had no proof to his allegation that the Petitioner was an officer at lands. He confirmed that the Petitioner informed him that he is an engineer. There was nothing in the title to show any impropriety. There was nothing to show that the Registrar of land notified the petitioner before placing the restriction.
128. Mr. Erick Otieno further wished to show that the rates payment were in the name of Said Athman, however upon cross examination he conceded that this was the previous owner who sold it to the petitioner hence there was nothing to gather from his said sensationalism.
129. Again in his sensationalism Mr. Erick Otieno stated that though the current owner of the plot is Hezekiah Omondi Adala the commission could not obtain records of certificate of title as the same was missing at the land registry and that there is only a deed of indemnity. However this was of course refuted by the Land registrar who produced the original clean title bearing the

entire history of the subject land. That would only go to show that the investigations were not properly and thoroughly done.

130. Again Mr. Otieno confirmed that his report was not conclusive and that it had to await the review and conclusion of the Commission and the same has not yet been actioned upon. There is a committee within the Commission which reviews his report before the same can be said to be actionable report of the commission which has not yet been done.

**Evidence of Timothy Mwangi, Assistant Director Physical Planning**

131. The Assistant Director of Survey confirmed too that there was no instrument on record to show as to how land was allocated to the 2<sup>nd</sup> Respondent if any. There was an elaborate process in law and the same is missing. There is no reservation letter which was a requirement if any government land was to be reserved for any entity. There was no gazette notice. It is also not a PDP which is used for reservation of land. There is no title in the name of the 2<sup>nd</sup> Respondent. Apart from the Part Development Plan there was nothing. The said Part Development Plan is signed by one “**JN Njagi** while there never existed such a land commissioner as the land commissioner duly gazette was **JAMES RAYMOND NJENGA** and documents duly signed by him are indicated as **JR. Njenga**. That put a doubt as to the authenticity of the PDP produced. He confirmed that there is a difference between a Development Plan and a Part Development Plan and an Advisory Plan.

132. The Registrar of Lands testified in court. **One Mercy Chepkemoi.** She produced the original title, which was in their custody, and the court had an opportunity to see the same. She confirmed that the subject property being plot number 10121/I/MN was subdivided from the mother title CR28454 and had undergone various transactions. She confirmed that the initial owners were Abdulla Saleh Buran, Khalid Khamis Shapi and Nabhan Swaleh Salim, who acquired the same on 13<sup>th</sup> April 1999. It was subsequently transferred to Said Omar Athman on 20<sup>th</sup> September 1999. Then the next transaction was the transfer to Hezekiah Omondi Adala (Petitioner) on 2<sup>nd</sup> May 2003. Other entries are charge to Barclays Bank on 15<sup>th</sup> September 2004, discharge of Charge on 3<sup>rd</sup> November 2006, Charge to KCB 3<sup>rd</sup> November 2006 and further Charge to KCB on 20<sup>th</sup> November 2007, discharge of charge of 22<sup>nd</sup> March 2013 and Charge to Chase Bank 23<sup>rd</sup> October 2015. In all these charges, the Chargor was the Petitioner who is the registered owner.

133. The next was the restriction entry which was the crux of this case. She confirmed in cross examination that everything was done per the book in creating the transfers and discharges. She also confirmed that there was no communication with the Petitioner before the said restriction was placed. There was never any hearing conducted. It was just placed pursuant to a letter by Coast Water Works Development authority (not the 2<sup>nd</sup> Respondent herein). The letter was not copied to the Petitioner. She acted on the strength of the letter without hearing the

Petitioner. She confirmed that the original title is in the name of the Petitioner and the same has never been challenged in any court or any proceedings. Further even the mother title from where the subject subdivision arose was also never challenged.

134. In summary there was no tangible evidence to support the allegations that the 2<sup>nd</sup> Respondent owned the subject land. The 2<sup>nd</sup> Respondent has never challenged the Petitioner's title for reason that the land does not belong to them. Therefore hold that the procedure invoked by the 1<sup>st</sup> Respondent to unprocedurally place a restriction upon the Petitioner's land was improper and the said wrong ought to be made right by this Honourable court.

135. On the reliefs sought, the Learned Counsel submitted on the Petitioner seeking a declaration that the action of the 1<sup>st</sup> Respondent, Registrar of entering a Restriction upon the Petitioner's Land Reference Number 10121/I/MN without any notice to the petitioner and or according him a right to respond thereto is contrary to the provisions of Section 77 of the Land Registration Act, 2012, Section 4 (1) of the Fair Administrative Action Act, No.4 of 2015 and invariably amounts to a violation of the Petitioners' fundamental rights protected by Articles 40 and 48 of the Constitution, the Land Registration Act, 2012, provide for the procedure to be followed in and when registering a restriction. However, these due processes was ignored and therefore infringing on the fundamental right to own property as provided for by the constitution of Kenya.

136. The Learned Counsel sought to rely on the case of ***“R - Versus - Chief Immigration Officer (1976) 3 AER 843”*** as quoted in ***“Peter Andera Masakhalia - Versus - County Government of Kakamega [2019] eKLR”*** where Lord Denning stated thus regarding the Universal Declaration of Human Rights;

***“..... Among the important rights, which individuals traditionally have enjoyed, is the right to own property. This right is recognized in the Universal Declaration of Human Rights (1948). Article 17(1) which states that everyone has the right to own property and Article 17(2) guarantees that “noone shall be deprived of his property” The contention of the State counsel negates this right. An intention to provide for arbitrary infringement of human rights cannot be attributed to the legislature unless such intention is unequivocally manifest. When Parliament is enacting a statute, the court will assume that it had regard to the Universal Declaration of Human Rights and intended to make the enactment accord with the Declaration and will interpret it accordingly...”***

137. They further placed reliance on the case of ***“Susan Sambai Choge & 4 Others - Versus - Land Registrar & Another (2016) eKLR”***, where the court stated thus:-

***“This court finds that the right to be heard is so cardinal that it can not be wished away and that it is not proper in law to make a decision and to purport to hear the parties thereafter. Section 136 of the Registered Land Act (repealed) envisaged all parties interested in the outcome of the decision to place restriction on the parcel of land to be heard before the making of the said decision. This section provided that for the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the***

***application of any person interested in the land, lease or charge, after directing such inquiries to be made and notices to be served and hearing such persons as he thinks fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge. Sub - section (2) provides that a restriction may be expressed to endure for a particular period; or until the occurrence of a particular event; or until the making of a further order, and may prohibit or restrict all dealings or only such dealings as do not comply with specified conditions, and the restriction shall be registered in the appropriate register.***

***Section 76(1) of the Land Registration Act No. 3 of 2012 which is a replica of section 136 of the Registered Land Act provides that the foregoing provision envisage the hearing of the persons interested before making a decision but not making a decision to place a restriction on the title before hearing the parties. I do find that the decision by the 1st defendant is tainted with procedural impropriety as it was made without affording the Plaintiffs a hearing and therefore, illegal.***

138. The Learned Counsel thus submitted that the action of the 1<sup>st</sup> Respondent herein infringed on the Petitioner's right as provided for under Article 40 of the Constitution and went further against, natural justice and the provisions of Fair Administrative Actions Act.

139. On the Petitioner seeking an order of mandamus be issued compelling the respondent to remove or lift the restriction placed against the suit property - this was supported by the circumstances under which judicial review order of mandamus are issued as were set out by the Court of Appeal in "**Republic -**

**Versus - Kenya National Examinations Council ex - parte Gathenji & 8 Others Civil Appeal No. 234 of 1996**", the Court of Appeal cited, with approval, Halsbury's Law of England, 4<sup>th</sup> Edn. Vol. 7 p. 111 para 89 thus: -

***"The order of mandamus is of most extensive remedial nature and is in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right and it may issue in cases where although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. "...These principles mean that an order of mandamus compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed."***

140. The Learned Counsel submitted that in their response to Court the Registrar purported to have acted on the basis of a letter by another agency. It was not disputed by the Registrar that they did not accord the Petitioner any hearing before placing the said restriction. It was similarly not contested that the said alleged letter was ever brought to the attention of the Petitioner when the information was sought. More importantly, there was nothing that had been put forward to substantiate the placing of

the restriction. No document of any ownership contrary to that of the petitioner. Therefore can a letter be used to challenge a legal title?

141. The Petitioners were entitled to notice by virtue of Articles 47 and 50 (1) of the Constitution and section 76 of the Land Registration Act. The Registrar cannot interfere with the Petitioner's right to property guaranteed under Article 40 without following due process and nothing, not even a letter as purported can be a licence to violate property rights. In the decision in ***"Itrade Company Limited - Versus - Jane Mukami Mwangi & another (2015) eKLR"***, a caveat placed on a property without notice to the registered owner was removed by the court, the court noting that under section 78(2) of the Land Registration Act, it is empowered to intervene and either remove or vary the restriction or issue any other appropriate order. This is what the court had to say: -

**"I am inclined to rule in favour of the Applicant for the main reason that the restriction was entered against the suit property with the Applicant, the affected proprietor, not being given a chance to be heard. Only the 1st Respondent's side of the story was heard and acted upon. The Applicant made the necessary efforts to seek a hearing with the Registrar but was not accorded a hearing. This goes contrary to the provisions of section 76(1) of the Land Registration Act cited above and further goes contrary to the rules of Natural Justice that dictate that a party shall not be condemned unheard. Further, the Registrar failed to notify the Applicant that he has entered a restriction on the suit property as required under section**

**77(1) of the Land Registration Act resulting in the Applicant proceeding with its plans to develop the suit property only to come later to learn of the existence of the restriction. This resulted in the Applicant suffering major financial and other losses.**

142. In the case of ***“Republic - Versus - Chief Land Registrar & Another Ex Parte Patrick Mbau Malika & 6 Others (2017) eKLR”***, the court had this to say: -

***“The Registrar(s) in this case acted illegally and unlawfully by placing a restriction without giving the Registered Owners notice and compounded the unlawfulness by refusing to give them an opportunity to be heard. They have further aggravated the situation by refusing to engage the Ex Parte Applicants. The Court must intervene at this stage. It will do so now by issuing all the orders prayed in the Notice of Motion dated 01/02/2017.”***

143. Similarly in the instant case, and in the face of the blatant disregard of the law they urged the Honourable Court to grant the order sought for lifting of the said illegal and irregular restriction.

144. The Learned Counsel contended on the issue of the Petitioner seeking a prohibitory order prohibiting the 1<sup>st</sup> Respondent from taking any adverse action or interfering in any way with the petitioner’s ownership, occupation and enjoyment of his legal right over the subject property, and referred to the case of ***“Kenya National Examination Council - Versus - Republic ex parte Geoffrey Gathenji Njoroge & 9 other [1997]eKLR”***, the Court

stated the grounds upon which such an order may issue as follows;

***“What does an ORDER OF PROHIBITION do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings - See HALSBURY’S LAW OF ENGLAND, 4<sup>th</sup> Edition, and Vol.1 at pg. 37 paragraphs 128.”***

145. Both parties do agree that the Petitioner is the bona fide owner of the suit property and therefore reserves the right to enjoy the property as the legal and registered owner. While being conscious of the procedural provisions when instituting a restriction under the Land Registration Act, the Respondent thought it wise to ignore and go against the portrayed rules.
146. On the prayers for damages, the Learned Counsel submitted that the Petitioner averred that the need to dispose of the property was out of an urgent need to raise capital for a tender project. The action by the 1<sup>st</sup> Respondent and failure to remove the restriction has thus undoubtedly affected him which thus calls for this court to make an award for general damages. They sought to rely on the authority of ***“Geoffrey Kirimi Itania - Versus - Chief Land Registrar & 3 others (2018) eKLR”*** in which the court removed caveats registered without notice to the registered

owners and awarded damages. The court had this to say in summary:-

***Plaintiff avers that he has suffered loss as he was not able to develop his property. He is asking for general damages of Kshs.5,000,000.***

***Defendant on the other hand avers that the damages sought are special in nature and were not specifically pleaded. This suit was filed on 10<sup>th</sup> September, 2008. For the last ten years that the matter has been in court, defendants never attempted to mitigate the situation by either conducting investigations or removing restrictions.***

***In paragraph 10 of the Plaint, Plaintiff has clearly indicated the plans he had for the plot. These were future plans of which he had sought approval from the relevant authorities. Certainly Plaintiff could not have been in a position to compute the damages as the plot was not yet developed. I am therefore inclined to find that plaintiff is entitled to general damages for the wrongful, unlawful, unwarranted and unmitigated actions of the defendants. ....I proceed to award damages of Kshs.1,000,000”.***

147. In the case of ***“Multiple Hauliers East Africa Limited (Supra)”***, Court awarded the sum of Kenya Shillings Two Million (Kshs. 2,000,000/-) for breach of Article 47 which is similarly to the petitioner's case herein. They submitted that in the instant case the Petitioner having demonstrated that the restriction severely affected him, he was entitled to a high general damages. They submitted for the award of a sum of Kenya Shillings Two Million Five Hundred Thousand (Kshs. 2,500,000/-) as damages commensurate with the loss herein. They further prayed that

this Honourable Court do award the costs of this suit to the Petitioner.

148. In conclusion, the Learned Counsel prayed that the Court finds that the Petition had succeeded and that the actions of the 1<sup>st</sup> Respondent offended the law to wit Section 76 and 77 of the Land Registration Act, 2012, Section 4 (1) (2) and (3) of the Fair Administrative Action Act, 2015 and infringed on the Petitioner's guaranteed human rights as provided by Article 40 and 47 of the Constitution of Kenya, 2010. They further prayed that the Honourable Court makes a finding in terms of prayers sought and submitted herein.

### **The Written Submissions by the 1<sup>st</sup> & 2<sup>nd</sup> Respondents**

149. While opposing the Constitution Petition by the Petitioner, the 2<sup>nd</sup> Respondent through the Law firm of Messrs. Doris Mwangi Advocate filed their written submissions dated 18<sup>th</sup> March, 2025. M/s. Mwangi Advocate commenced her submissions by recounting and providing a detailed background of the matter. She stated that on the above stated filed Petition dated 13<sup>th</sup> October 2020 and the reliefs sought.

150. According to the Learned Counsel, the said Petition had earlier on proceeded without the knowledge of the 2<sup>nd</sup> Respondent and a Judgement had been delivered by Justice Yano on 24<sup>th</sup> May 2021 in favor of the Petitioner giving the following orders: -

- (a) ***A declaration is hereby issued that the restriction imposed on Land Reference Number 10121/I/MN is oppressive, unjustified and unlawful and the same is hereby removed.***
- (b) ***A prohibitory order is issued prohibiting the Respondent from taking any adverse action and/ or interfering in any way***

**whatsoever with the Petitioner's ownership, occupation, enjoyment and exercise of his legal rights over the said parcel of land without due process of law.**

**(c) Kshs. 1,000,000.00 general damages.**

**(d) The Petitioner shall also have the costs of this Petitioner against the Respondent.**

151. Subsequently the 2<sup>nd</sup> Respondent filed an application dated 29<sup>th</sup> September 2021, together with the Supporting Affidavit of Sharon Obonyo, inter alia, seeking the following orders:-

- a. This Honorable Court be pleased to issue a temporary order of injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents; being Hezekiah Omondi Adala and The Chief Land Registrar respectively, by themselves and' or any other person acting on their behalf from any further dealings in the subject suit property: Land Reference Number 10121/I/MN, pending the hearing and determination of the application inter- parties;**
- b. This honorable Court be pleased to join the Applicant as a Respondent in this Petition.**
- c. This Honorable Court be pleased to review its decree issued on 29<sup>th</sup> June 2021 and the orders issued therein and set it aside together with other consequential orders;**
- d. Leave be granted to the Applicant to file pleadings as well as any such documents that it deems necessary to support its claim over the suit premises.**
- e. The Petition be heard de novo;**
- f. The costs of the application be awarded to the Applicant.**

152. The 2<sup>nd</sup> Respondents application dated 29<sup>th</sup> September 2021 was allowed by this Honorable Court. In opposing the Petition the 2<sup>nd</sup> Respondent filed a Replying Affidavit of Benson Muindi

who is working at the 2<sup>nd</sup> Respondent as a Deputy Director Surveyor ( *and was working as a Principal Land Surveyor at the time of swearing his Affidavit*) sworn on 10<sup>th</sup> October, 2023 together with annexes in support of the fact that the property in dispute was at all material times public land reserved by the Government of Kenya for construction of their Government Staff quarters and other institutional infrastructure facilities to enhance water sector services within the Coastal Region. In the 2<sup>nd</sup> Respondents response/ reply to the Petition, it *inter alia* prayed:-

- g. That the Honorable Court unequivocally pronounce itself on the issue of illegal and unlawful acquisition of public land.***
- h. That the Honorable Court declare that the Certificate of Title as presented by the Petitioner was irregularly acquired and subsequently revoke the same in the interest of the public.***
- i. That the Petition is thus incompetent, frivolous, fatally defective and, upon determination that the 2<sup>nd</sup> Respondent is the rightful owner of the disputed parcel, the title be revoked and the Petition be dismissed with costs.***

153. The 2<sup>nd</sup> Respondent averred that the genesis of the Petition filed by the Petitioner arose following registration of a restriction in respect to public Land Reference Number MN/1/10121 located in Shanzu, within Mombasa County Land by the Office of the Land Registrar Mombasa sometimes on 29<sup>th</sup> June 2016. As soon as the 2<sup>nd</sup> Respondent caught wind the Court decree in this matter from the 1<sup>st</sup> Respondent, the 2<sup>nd</sup> Respondent moved the Court for an opportunity to canvass its ownership claim to the

suit property and lay bare massive schemes of fraud and illegalities that culminated in the irregular and unprocedural alienation of its land to private individuals. It was the 2<sup>nd</sup> Respondent case that the title being flashed by the Petitioner was an end product of a process. Important is, that the process that was followed prior to the issuance of the title **did not comply** with the law, therefore **the said title held cannot be indefeasible**. It is thus the 2<sup>nd</sup> Respondents firm position that these illegal alienations of public land, the subsequent acquisitions together with all ensuing certificates of title from inception are null and void *ab initio*.

154. To further buttress its ownership claim to the suit property, the 2<sup>nd</sup> Respondent called three witnesses (RW - 1), Benson Muindi, (RW - 2) Erick Otieno from the investigating agency Ethics & Anti-Corruption Commission (EACC) and (RW - 3) Timothy Mwangi the Deputy Director of Physical Planning working with Ministry of Lands in the Department of Physical Planning, State Department for Lands and Physical Planning as follows:-

155. RW - 1 was a Principal Land Surveyor working with the 2<sup>nd</sup> Respondent. He stated that at all material times, the suit property was illegally hived off from a larger "L" Shaped Parcel of Land measuring approximately 18.3 Ha reserved for the Mombasa Coastal water supply project as was contained in Part Development Plan number 12. CT.25.1.76, approved number 48 dated 14.7.1974 and certified copy of the Development Plan

Reference Number CT/12/25/88/1 approved Number 143 for the entire Shanzu area in Mombasa County both adduced in Court.

156. RW- 1 further explained to the Court that the 2<sup>nd</sup> Respondent has to date, *never, at any time, surrendered the suit property, or any portion of the L Shaped land, to the Government and/ or relinquished it to the Government or any other party. The L Shaped land including the suit property was and is still not available for alienation to the Petitioner for private use.* Any purported allocation of the suit property to private individuals including the Petitioner herein was illegal, irregular and fraudulent. As for placing of the restriction on the suit property, RW1 explained to the Court that the 1<sup>st</sup> Respondent acted diligently and in good faith in stopping further fraudulent dealings on land which falls within the classification of public land by effecting the subject restriction at the instance of Coast Water Works Development Agency, a sister company of the 2<sup>nd</sup> Respondent.

157. RW - 1, while giving his oral testimony in Court, indeed categorically corrected and clarified that the allocation of the land to the 2<sup>nd</sup> Respondent was done by the then Commissioner of Lands as opposed by the defunct Municipal Council of Mombasa, as had been mentioned in his witness statement. RW - 2 was an Investigator with the Ethics and Anti - Corruption Commission (EACC). In his testimony he confirmed to the Court that the EACC had conducted investigations on the irregular alienation of public land

property reference no. (MN/1/9622) belonging to the 2<sup>nd</sup> Respondent. Further that EACC had established that the property MN/1/9622 is the mother block from which sub-division of parcel number MN/1/10121, the suit property, was created.

RW - 2 informed Court that in the year 1995, approximately 10.8 Ha of land reserved by the Government of Kenya for use by 2<sup>nd</sup> Respondents land in Shanzu was fraudulently, irregularly and illegally alienated and sub-divided into 8 blocks of parcels of land of measuring approximately 1.35 Ha each. The resultant blocks were MN/1/9616, MN/1/9617, MN/1/9618, MN/1/9619, MN/1/9620, MN/1/9621, MN/1/9622 and MN/1/9623. The illegal alienation was done using Part Development Plan number 12.4.CT.14.95 of 3<sup>rd</sup> August 1995.

158. RW - 2 adduced a letter dated 25<sup>th</sup> October 2022 written to the Director of Physical Planning which sought to verify the authenticity of Part Development Plan number 12.4.CT.14.95 of 3<sup>rd</sup> August 1995 and another letter referenced PPD/6/26/IX (130) dated 15<sup>th</sup> November, 2022 from the Director of Physical Planning responding and confirming that indeed Part Development Plan Number 12.4.CT.14.95 of 3<sup>rd</sup> August 1995 not authentic. Moreso, RW - 2 confirmed to the Court that Land parcel number MN/1/9622 from which parcel number MN/1/10121 was created was allocated to Shariff Nassir vide a

letter of allotment Ref: 76474/VIII/...dated 11<sup>th</sup> August, 1995 as Unsurvey— Residential plot “B” - Shanzu - Mombasa for a period of 99 years from 1<sup>st</sup> August 1995 at a standing premium of a sum of Kenya Shillings Four Hundred Million (Kshs.400,000.00/-). The said allotment letter, indicated that parcel number MN/1/9622 was issued based on Part Development Plan number 76474/VIII/50A.

159. RW - 2 adduced a letter from EACC under letter referenced EACC/MSA/6/16/1 Vol x (13) dated 4<sup>th</sup> April, 2022 that sought verification on the authenticity of Part Development Plan number 76474/VIII/50A from the Director of Physical Planning and a response letter from the Director of Physical Planning under reference number PPD/6/26/VIII/ (40) dated 23<sup>rd</sup> May, 2022 indicating that drawings cited as Ref. 76474/VIII/50A do not exist in their records. The allotment letter for land parcel number MN/1/9622 was therefore issued based on an unapproved Part Development Plan.

160. Separately, it was also noteworthy that during re- examination, RW - 2 notified the Court that EACC had done and concluded its investigations on various other grabbed parcels of land (*still within the L Shaped land*) that were public land belonging to the 2<sup>nd</sup> Respondent. He further proceeded to list four Land recovery suits involving different parties that were currently proceeding before this Honorable Court. These were actions and measures taken squarely within the mandate of EACC following obtaining of full and conclusive evidence of corrupt schemes orchestrated

to fleece government off public land illegally and unprocedurally.

161. While being cross examined, RW - 2, was questioned as to why various land rate payments made by either the Petitioner or his predecessors was accepted by the County Government Offices. It was clear that the County Government Offices were not mandated to verify and ascertain the authenticity or otherwise of certificates of title/lease while receiving land rates. The acceptance of any such land rates does not therefore sanctify an unauthentic certificate of title. In a nutshell RW - 2 unearthed the massive fraud and illegalities that lead to first irregular and illegal allotment of public land belonging to the 2<sup>nd</sup> Respondent to the first illegal allocatee Shariff Nassir and further exhumed the subsequent chain of illegalities and fraud that followed to date.
162. RW - 3 was a Deputy Director of Physical Planning working with the Ministry of Lands in the Department of Physical Planning, State Department for Lands and Physical Planning. In his testimony RW - 3 an expert on physical planning enumerated to the Court the process of issuance of approved and authentic part development plans (PDP). He confirmed to the Court that the adduced Development Plan Reference Number CT/12/25/88/1 approved Number 143 for the entire Shanzu area in Mombasa County was authentic and available in the Department of Physical Planning records.

163. In addition, in his testimony, he stated that the Development Plan was still captured land reserved for Coastal Water Supply Project Staff Houses coded as "05/" which when interpreted from the Legend "05" stood for "Coastal Water Supply Project Staff Houses". Further, he explained to Court that under section 11(3) of the Land Planning Act Cap. 303, the land was public purpose for Government purposes. Therefore, by dint of section 9 of Governments land Act as read with 11(3) of Land Planning Act Cap. 303, it was not available for alienation to private persons, having been alienated for public purposes.
164. On the Part Development Plan Reference number 12,4. CT. 14.95 approval number 235 dated 17<sup>th</sup> July, 1995, RW - 3 informed Court that he had verified that the said PDP Number 12.4. CT. 14,95 approval number 235 was authentic and available in their records and was done for allocation of a church situated at VOK area and not Shanzu area. It had followed all the processes of preparing and approving Part Development Plans as The Plan was prepared for a Church and nothing else.
165. In respect to Part Development Plan Reference number 12.4. CT. 14.95 dated 3<sup>rd</sup> August, 1995, RW - 3 confirmed to Court that he had verified that the said PDP Number 12.4. CT. 14.95 dated 3<sup>rd</sup> August, 1995 was not authentic and the same was not available in the Department of Physical Planning approved Part Development Plan Register. Notably this is the PDP that had been allegedly used to illegally, irregularly and fraudulently

alienate 10.8 Ha off “the L” Shape public land into eight parcels of land measuring approximately 1,35 Ha each being MN/1/9616, MN/1/9617, MN/1/9618, MN/1/9619, MN/1/9620, MN/1/9621, MN/1/9622 and MN/1/9623.

166. RW - 3 unearthed that allotment letter for Land Reference Number MN/1/9622 bears a Part Development Plan Reference number 76474/VIII/50A which was the basis upon which the mother block MN/1/9622 was created, it was from MN/1/9622 that twelve (12) parcels of land were created including the disputed parcel MN/1/10121. The purported Part Development Plan number 76474/VIII/50A never conformed to the standard format of preparation of part development plans for Mombasa. The standard format is A/B/C/D, where A- 12, B- CT, C-No of plan prepared for the zone, D- Specific Zone for Shanzu this was 1 and E- Year of preparation. In addition, the purported Part Development Plan was not in Department of Physical Planning records.
167. In a nutshell, expert witness RW - 3 brought to light the massive fraud and illegalities which were cultivated in an attempt to confer private ownership rights anchored on fraudulent titles and emanating from illegal and unprocedural alienation of public land. The Learned Counsel identified the following issues for determination by this Honourable Court. These were:-
168. Firstly, whether the suit property was public land reserved for the 2<sup>nd</sup> Respondent. The 2<sup>nd</sup> Respondent, tendered substantive evidence to proof that the suit property was at all material

times reserved for public use to enhance facilitation of Water Service Sector and its Staff within the Coastal Province. The evidence of Benson Muindi, RW - 1 substantiated the fact that the 2<sup>nd</sup> Respondent laid its ownership claim to the suit property dating back to the year 1970's when the then Ministry of Water, water Department was in charge of matters water infrastructure in the Republic of Kenya.

169. At the hearing RW - 1 stated that the suit property was part of government land that had been illegally and unlawfully hived off from the larger public parcel of land which appears "L shaped" in certified copy of Part Development Plan number 12. CT.25.1.76, approved number 48 dated 14.7.1974 which was and was still reserved for Mombasa Coastal Water Supply Project. The entire "**L** shaped" parcel of land which comprised of the suit property within itself, sat in between the land reserved for Transmission Station and Shanzu Teachers College. The "**L** shaped" parcel of land belonged to the Ministry of Water then and was inherited by the National Water Harvesting & Storage Authority following the established of the latter as the first implementation arm/agency of the then Ministry of Water. On a portion of the "**L** - **Shaped**" parcel of land there still exists Staff houses that were constructed way back in the year 1978 for the Mombasa Coastal Water Supply Project. RW - 1 further adduced a certified copy of Part Development Plan number 12. CT.25.1.76, approved number 48 dated 14.7.1974 from the Director Physical of Physical Planning which captured

the “L shaped” parcel of land reserved for Mombasa Coastal Water Supply Project.

170. RW - 1, further adduced a certified copy of the Development Plan Reference Number CT/12/25/88/1 approved Number 143 for the entire Shanzu area in Mombasa County. The Development Plan still captured land reserved for Coastal Water Supply Project Staff Houses coded as “O5” which when interpreted from the Legend “O5” stood for Coastal Water Supply Project Staff Houses. The land indicated as reserved and coded “O5” in the development plan of Shanzu is the same piece of land that was inherited by the National Water Harvesting & Storage Authority for Staff houses from the Ministry of water.

171. The above facts were corroborated by the evidence of RW - 2 and RW - 3 who testified before this court that in as early as 1976, the Government of Kenya had reserved an “L” - Shaped land for the Mombasa Coastal Water Supply Project. The said reservation is also captured in the Development Plan Reference Number CT/12/25/88/1 approved Number 143 for the entire Shanzu area in Mombasa County. The Development Plan still captured land reserved for Coastal Water Supply Project Staff Houses coded as “O5” which when interpreted from the Legend “O5” stood for Coastal Water Supply Project Staff Houses.

Key to note was that the law in force during the alleged alienation was the Land Planning Act Cap 303 as read with section 9 of

Government Lands Act Cap. 280. Under section 9, land was only allocated if not required for public purposes. The phrase "may cause a portion of township not required for public purpose to be subdivided into plots " means that the commissioner was not undertaking the planning process. This was the mandate of the Town Planning Advisor (the Director of Physical Planning) under Land Planning Act Cap 303. Section 11 (3) (c) of the Act, provides that Government and local government purposes are public purposes and could not be alienated because they were already alienated for Government purposes.

Paragraph 3.5.1 of the year 1991 Handbook on Land Use Planning Administration and Development Procedures provides that land reserved for government ministries, departments or parastatals was not available for use by another without surrender of that land by the original allottee. The Director of Physical Planning could not therefore prepare a PDP to alienate already reserved for the 2<sup>nd</sup> Respondent.

The Learned Counsel averred that the suit property was hived off from the land reserved by Government for public use by the 2<sup>nd</sup> Respondent since 1976 and the 2<sup>nd</sup> Respondent had never at any time surrendered the said land to the Government and/ or relinquished it to the Government or any Private individual and the same was therefore not available for alienation to the Petitioner for private use. To buttress on their submissions, the Learned Counsel relied on the Case of: "***Dina Management Limited*** -

**Versus - County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR)”** where the Court held that:-

**“.....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.....”**

**172. Similarly, in the case of:- “Kenya Industrial Estates - Versus - Anne Chepsiror & 5 Others ELC Case No. 71 of 2013”** the Court held:-

**“there is a reason why the Government holds certain land and does not give it away to private individuals. There is also a reason why the Government assigns certain land to its own institutions. These institutions could be State Corporations, Schools and other educational institutions, or hospitals. Such land is meant for use by the public. It could be land for recreational purposes, or land reserved for a school or hospital, or a road, or for research purposes, or to maintain a forest. In so far as town plots are concerned, it is my view that unless such land ceased to serve a public function, then such land, could not be issued to private individuals. That to me, is the import of the provisions of Section 9 of the GLA which was drawn as follows:-**

**GLA S. 9. The Commissioner may cause any portion of a township which is not required for public purposes to be divided into plots suitable for the erection of buildings for business or residential purposes, and such plots may from time to time be disposed of in the prescribed manner (emphasis mine).**

**53. There would be no legitimate reason, to hand over to private hands, land which is still required for a public purpose or which is held and occupied by a public institution for a public purpose. If public land had to revert to private**

**hands, then the procedure of offering the said land by way of public auction had to be followed. But even then, the Commissioner of Lands ought not to have offered such land to private individuals if the public purpose for which the land was reserved still existed. That position has has been affirmed by various decisions. In the recent case of Republic - Versus - Commissioner of Lands & 4 others ex parte Associated Steel Limited, High Court at Nairobi, Misc. Civil Suit No. 273 of 2007, (2014) eKLR, there was a dispute on whether certain land that had been allocated to a private individual was a public road. The court held that the land was a public road and was therefore not available for allocation or alienation".**

The Court further held that:- ***"in order to convert the public utility to private hands, the Commissioner of Lands needed to follow the provisions of Sections 12 and 13 of the GLA and further hold consultations from all stakeholders.*** It held that the Commissioner of Lands held the land as trustee on behalf of the public and affirmed as follows: -

**"It is thus our holding that the disputed plot having already been set aside as a public utility plot the same was held in trust by the 1st respondent (Commissioner of Lands) for the public and public purposes and was not available for further alienation and could not at any rate be allocated to a private developer as a commercial plot".**

173. Secondly, whether the suit property was available for alienation/allocation to private persons. The Learned Counsel held that the Respondent's 2<sup>nd</sup> witness, Mr. Erick Otieno, RW - 2, informed this Court and indeed produced evidence to prove that the suit property was part of the land that was reserved way back in the year 1976 by a Part Development Plan (PDP)

Number 12.CT.25.1.76 with approved development plan No. 48 for public purpose and for use by the 2<sup>nd</sup> Respondent. It was the 2<sup>nd</sup> Respondent submissions it had never surrendered the said property back to the Government or relinquished its interest over the suit property for private use or any other use. The 2<sup>nd</sup> Respondent had never disposed off the said property and or issued notice of disposal, consented or approved the allocation of the suit property to any other person including the Petitioner. The process of allocation and sub-division of their land without their consent and or authority from the mother Ministry and/or adherence to the procedure of disposal of public land was therefore tainted with fraudulence, illegality, null and void to confer any right, interest and or estate to the Petitioner for private interest as the land was already reserved for the 2<sup>nd</sup> Respondent and was never available for alienation to private parties or for private interest. The 2<sup>nd</sup> Respondent therefore humbly requested that the restriction registered at the land registry in respect of the suit property be maintained to safeguard public interest until the title deed was revoked and issued in the names of the 2<sup>nd</sup> Respondent. The 2<sup>nd</sup> Respondent further submitted that reservation of the public land by the Government of Kenya rendered the suit property unavailable for alienation or allocation. The procedure of reservation was well elucidated by Mr. Timothy Mwangi, RW - 3, who clearly enumerated the process and informed this Court that once reservation was done for a particular purpose, the land became

alienated and non-available for further allocation or alienation. We submit that this is the true position of the law.

161. The Petitioner did not produce any approved PDP as evidence of the basis of alienating land in his favour or his predecessors. They were guided by the case of: "***Cancer Investment Limited - Versus - Nairobi City County Government & Others ELC No. 81 of 2019***" where it was held that:-

**".....suffice it to point out that in the absence of a PDP, the alienation of the suit property would be invalidated and vitiated. Simply put, it is the part development plan, if any, that would signify that the land intended to be alienated is available. Consequently, and in the absence of the requisite PDP, it cannot be verified whether the commissioner of lands acted within the scope of his statutory mandate or otherwise."**

174. The Court also had an opportunity to visit the suit property on two occasions. During the first site visit, the Court was informed, and it indeed appreciated the L-shaped property from which the suit property was created. The mother block borders Government institutions like the Shanzu Teachers College, Shanzu Chief's Office and on the other side was the Shanzu Police Station. Most importantly, there were Government staff quarters that were occupied by the employees of the 2<sup>nd</sup> Respondent's as well as employees of its' sister institution, Coast Water Works Development Agency. These were further indicators that in deed the suit property was a reserved government land for public purpose.

175. That during the same Court sanctioned site visit which was presided over by the Deputy Registrar and which had in attendance the Land Surveyors of all the Parties, the Petitioner during the physical measurement and verification of the perimeter of the 2<sup>nd</sup> Respondents L Shaped land including the suit property, the Petitioner admitted that indeed that suit property lay inside the perimeter of the L Shaped parcel of land belonging to the 2<sup>nd</sup> Respondent.

176. It was needless to belabour this point. They urged the Court to lend credence to the testimonies of the 2<sup>nd</sup> Respondent's Witnesses, their statements on record on the background of the suit property together with the PDPs evidence tendered in support. They relied on the case of:- "**Mombasa ELC Case No. 43 of 2015; Ethics & Anti- Corruption - Versus - Edward Mwangi Irungu Minalove Hotel**", where the Court held that:-

***"Nevertheless, the Plaintiff has demonstrated that vide a letter dated 28<sup>th</sup> October 1955 the suit property was allocated for government staff housing and on 8<sup>th</sup> March 1991 it was occupied as government staff house-quarter. In my view, there is clear evidence that the suit property was allocated for public use as government staff quarters long before it was allotted to the 1<sup>st</sup> Defendant. The suit property cannot be said to be unalienated government land available for allocation, and the fact that it is allocated next to state house is clear indication that it was not available for allocation to private individuals".***

177. The Court of Appeal in the case of:- ***“Munyu Maina - Versus - Hiram Gathiha Maina [2013] eKLR”*** emphasized the duty of the holder of an impugned title in a claim such as the present one in the following words:

***“We state that when a registered proprietors’ root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances, including any and all interests which need not be noted on the register”***

It behooved an intending purchaser of land to take all measures to ascertain the authenticity of the search for the land and the ownership of the said parcel of land. A purchaser must ascertain that based on the history of the land, the said land was available for allocation. *And what would this entail?* Fundamentally, it should include going into a discovery of whether the land had ever been reserved in an approved development plan for a public purpose or not. Further, whether the land was being occupied by a state organ or other party.

The Courts have pronounced themselves on this matter as is elucidated in ***“AL-Kheyar Properties Limited - Versus - AG & Others ELC No.427 of 2010”*** the where Court held that:-

***“Once a search is issued by the Lands Office, it should be conclusive evidence of proprietorship in light of the fact that our title registration system is based on the Torrens System of registration. However, based on the inherent danger of the search system which is based on the Torrens System of***

**registration, it is necessary for one to take further steps to ascertain the authenticity of the search and ownership of the land. If the Plaintiff had bothered to delve into the history of the title, it would have discovered that the property was part of the Moi Air base and hence was not available for sale. The Plaintiff should have gone a step further to ascertain the true status of the title to the land in question”.**

178. It would also be pertinent to ascertain whether the allotment letter was issued based on an approved part development plan. The Learned Counsel submitted that should the Petitioner have conducted due diligence on the suit property he would have not purchased the property as it would have been as clear as day to him that the property is public land having been so reserved way back in the year 1976. Therefore, the Learned Counsel opined that the suit property was public land which was not available to alienation/ allocation to any private person including the Petitioner.
179. Thirdly, whether the alienation/allocation of the suit property followed the due process. The 2<sup>nd</sup> Respondent, through Mr. Erick Otieno (the investigator) from EACC, RW - 2, took the liberty to inform this Honorable Court the result of the EACC investigations into the allegation of irregular alienation of public land property reference MN/1/9622, which was the mother title from which the suit property was created. He informed this Court that the 2<sup>nd</sup> Respondent's land was reserved way back in the year 1976 by a Part Development Plan (PDP) Number 12.CT.25.1.76 with approved development plan No. 48. That

even though this PDP was for a proposed site for a Technical High School, it still captured the land for water department in the year 1976. To this end, RW - 2 produced the subject PDP. He also produced a topo cadastral map for Mombasa Mainland North prepared in the year 1982 which clearly indicated the land reserved for water department in an "L" shaped manner. The Court was equally informed that in the year 1988, a Development Plan Number CT/12/25/88/1 approved number 143 for the entire Shanzu area was prepared by the Coast Provincial Head of Physical Planning and the Respondent's land was reserved under code "05" which reads "Coastal Water Supply Project Staff Houses". This plan was produced before this Court.

180. RW - 2 continued with his testimony and informed this Court that in the year 1995, approximately 10.8 Ha of land reserved by the Government for use by the 2<sup>nd</sup> Respondent was fraudulently, irregularly and illegally alienated and sub-divided into 8 blocks of parcels of land measuring approximately 1.35 Ha. That among the resultant blocks was MN/1/9622 which was later subdivided into 12 smaller plots vide survey plan number F/R 322/78 giving rise to the suit property MN/1/10121 as one of the 12 plots. He further informed Court that investigations revealed that the illegal alienation referred to above was done using PDP No. 12.4. CT.14.95 of 3<sup>rd</sup> August 1995. RW - 2 informed Court that his investigations into the alleged alienation of the suit property did not stop there. He informed

Court that the investigation team wrote to the Director of Physical Planning where they sought to verify the Authenticity of the PDP No. 12.4. CT.14.95 of 3<sup>rd</sup> August 1995 that was used to alienate the suit property and that in response, the Director of Physical Planning responded indicating that the subject PDP was not authentic and the same was not available in their records.

181. Further, the RW - 2 informed this Court that the resultant block MN/1/9622 from which the suit property was created was allocated to one Shariff Nassir vide a letter of allotment Ref: 76474/VIII/ dated 11<sup>th</sup> August, 1995 as Unsurvey-Residential Plot "B"-Shanzu based on PDP number 76474/VIII/50A. He informed this Court that investigation team again wrote to the Director of Physical Planning to confirm the availability of this PDP and in their response, the Director indicated that said PDP did not exist in their record. The 2<sup>nd</sup> Respondent called its 3<sup>rd</sup> and final witness, one Mr. Timothy Mwangi, the Deputy Director of Physical Planning from the State Department for Lands and Physical Planning who adopted his statement dated 5<sup>th</sup> July, 2024 as filed before this Court. In his testimony, the Deputy Director (RW - 3) took the liberty to assist the Court on the process of preparation of a PDP under the various regimes. Of utmost importance was his uncontroverted testimony that once the Commissioner of Lands approved a PDP, the plan was presented to the Director of Physical Planning who assigned it an Approved Development Plan Number. Once the number was

assigned, the said PDP was submitted to the Commissioner of Lands for issuance of an allotment letter.

182. Equally, he informed this Court that the Directorate of Physical Planning was the custodian of PDPs and that any PDP that was not in their records was either not authentic or did not get approved as required by the law and that any alienation or allocation of any public land based on an unauthentic or unapproved PDP was unlawful and irregular in all circumstances. He informed this Court that he had verified that PDP reference Number 12.CT.14.95 dated 3<sup>rd</sup> August, 1995 that was used to subdivide the 2<sup>nd</sup> Respondent's land giving rise to 8 blocks including the mother block MN/1/9622 from which the suit property was created was not authentic and the same was not available in their records of approved PDP register. He further informed Court that the said PDP also lacked an Approved Development Number.

183. He equally informed this Court that he had been shown another PDP number 12.4.CT.14.95 with approval number 235 dated 17<sup>th</sup> July, 1995 and that he had verified that the said PDP was authentic and available in their records and was done for allocation of a church situated at VOK area and not Shanzu area. He informed Court that the said PDP followed all the processes of preparing and approving a PDP. He was equally shown an allotment letter for the mother block MN/1/9622 that bore PDP number 76474/VIII/50A which was the basis upon which the mother block was created and from which 12 smaller

plots were later created including the suit property. He informed Court the purported PDP was not only unavailable in their records, but also did not conform to the standard format of preparation of a PDP for Mombasa. In conclusion, the Deputy Director, RW - 3, informed this Court that the allotment letter for the mother title MN/1/9622 that gave rise to the suit property were issued based on an unapproved PDP and as such, the title that was issued was not lawfully.

In the case of:- ***“Ethics & Anti-Corruption Commission v Ann Wanjiku, Mtamwini Enterprises Limited, Ocean View Plaza Limited & Chief Land Registrar (Environment & Land Case 145 of 2018) [2021] KEELC 4074 (KLR) (10<sup>th</sup> March 2021)”***, the Court had this to say as regards allotment letters and PDPs:-

***“I have seen the allotment letter issued to the 1<sup>st</sup> defendant on 15<sup>th</sup> November 1995. It is not one issued by the President but by one F.O Otieno on behalf of the Commissioner of Lands for residential purposes. There is therefore doubt whether the allocation was regular, and without an explanation from the Defendants, I can only hold that it was indeed irregular. Apart from that, there is a letter dated 19<sup>th</sup> September 2017 from the Director of Physical Planning who states that the PDP that accompanied the allotment letter was never approved. It follows that the allotment letter was on the basis of a non-existent PDP”.***

184. It was not in dispute that the purported alienation of the suit property was done in favor of those who sold the suit property to the Petitioner under the provisions of the

Government Lands Act (Cap. 300) and the titles issued under the Registration of Titles Act (Cap. 281). Section 3 of GLA provides thus:-

***“The President, in addition to, but without limiting, any other right, power or authority vested in him under this Act, may—***

***(a)\* subject to any other written law, make grants or dispositions of any estates, interests or rights in or over unalienated government land;***

***(b)\* with the consent of the purchaser, lessee or licensee, vary or remit, either wholly or partially, all or any of the covenants, agreements or conditions contained in any agreement, lease or licence, as he may think fit, or, with the like consent, vary any rent reserved thereby;***

The same section provides for circumstances under which the Presidential powers of grant may be delegated to the Commissioner of Lands as follows:-

***“The powers of the President under this paragraph are delegated to the Commissioner in the following cases only (Cap. 155 (1948), Sub. Leg.)— (a) for religious, charitable, educational or sports purposes on terms and conditions in accordance with the general policy of the Government and the terms prescribed for such purpose by the President;***

185. Section 7 donates the powers of the President to the Commissioner of Lands in alienation of unalienated government land. It provides:-

***“The Commissioner or an officer of the Lands Department may, subject to any general or special directions from the***

***President, execute or and on behalf of the President any conveyance, lease or licence of or for the occupation of Government lands, and do any act or thing, exercise any power and give any order or direction and sign or give any document, which may be done, exercised, given or signed by the President under this Act.***

***Provided that nothing in this section shall be deemed to authorize the Commissioner or such officer to exercise any of the powers conferred upon the President by sections 3, 12, 20 and 128".***

**186.** The Learned Counsel averred that the said section 7 above limits the power of alienation of unalienated Government land to the President only. The Commissioner of Lands had no power to alienate unalienated Government Land. That was an exclusive preserve of the President. There were numerous legal decisions and authorities in Kenya where Courts had held that the Commissioner of Lands had no power to allocate land that was designated appropriated or alienated for public purposes/use. In the case of "***Adan Abdirahani Hassan & 2 others - Versus - Registrar of Titles, Ministry of Lands & 2 others [2013] Eklr***" Court held as follows: -

***"My take is that the Commissioner of lands or his subordinates, while alienating Government land, can only do so over unalienated Government land as defined in the Constitution and the repealed Government Lands Act. The Commissioner of Lands or his subordinates cannot purport to alienate land which has already been set aside for public purpose"***

The above position was upheld by the Court in the case of”-  
**“Kenya African National Union versus The Cabinet Secretary  
Ministry of Lands and Physical Planning & Others [2020] eKLR”**  
and held that:-

***“The cross Petitioners have been able to prove the particulars of breaches of clearly laid down procedures in law that were not followed by the Petitioner in seeking to acquire the suit property. The suit parcel being public land, the Petitioner ought to have followed the procedure provided for in law to have the suit property allocated to them...it is clear that the suit parcel was illegally and unprocedurally acquired by the Petitioner”***

***In NBI, HC. Misc. Appl. 1732 of 2004, James Joram Nyaga & Another -Versus - Attorney General & Another [2007] eKLR”*** the court referring to Sections 3 and 7 of the GLA observed thus:-

***“The above section clearly limits the power of the Commissioner to executing leases or, conveyances on behalf of the President and the proviso to the section specifically limits the power to alienate unalienated land to the President. We find and hold that the Commissioner of Lands had no authority to alienate the disputed plot to the Applicants as he purported to do vide the letter of 18<sup>th</sup> December, 1997. That was the preserve of the president. It follows that the Commissioner of Lands could not have made any grant under the Government Lands Act Cap. 280 Laws of Kenya nor could he pass any registerable title under the Registration of Titles Act Cap. 281 of the Laws of Kenya.”***

187. In conclusion, they submitted that no evidence was led to the contrary. The Petitioner did not lead any evidence to dispute the testimonies of Mr. Erick Otieno and Director Timothy

Mwangi. It remains therefore that the process was not followed as the title was issued based on an unapproved PDP. Equally, the said land was not available for alienation as the same was already reserved for a public purpose as informed by Mr. Erick Otieno and this can only lead the Court to one conclusion- That the allocation/alienation of the suit property did not follow the lawful process and the title must be declared as invalid.

188. Equally, under the GLA and RTA, it is clear that the Commissioner of lands, or anyone acting on his behalf, had no capacity to alienate unalienated Government land as that was a preserve of the President. Thus, it was their submissions that the process of alienation and allocation of the suit property was fundamentally flawed.

189. Fourthly, whether the title CR NO. 32130 issued to the Petitioner stood the test of legality to be protected. It was trite law that a title to a property must be as good as the process leading to its issuance. The Petitioner filed in this Court a Certificate of title and official search in his favor that showed that the suit property belonged to him. The question that has already been answered in the negative is whether the process leading to its issuance was as good as the title itself. The 2<sup>nd</sup> respondent had led evidence to show that allotment letter for Land Reference Number MN/1/9622,( Land Reference Number MN/1/9622 is the mother block from the twelve (12) parcels of land were created including the disputed parcel MN/1/10121), bore a Part Development Plan Reference number

76474/VIII/50A which number does not conform to the standard format of preparation of part development plans for Mombasa.

190. Furthermore, evidence was led to the effect that the alienation/allocation of the suit property was contrary to the law. RW - 3, informed this Court that the PDP that was used to allocate the suit property was unapproved and therefore any title issued as a consequence must be declared as invalid. In the case of: ***“Funzi Development Ltd & others - Versus - County Council of Kwale, Mombasa Civil Appeal No 252 of 2005 [2014] eKLR”*** the Court of Appeal stated that:-

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

Similarly, in the case of:- ***“Ethics & Anti-Corruption Commission case in para 70 above”***, the Court had this to say on Titles acquired fraudulently or through misrepresentation:-

***“It is clear to me from the foregoing, that the title issued under the Registration of Titles Act (RTA), could not have been issued without elements of fraud and/or misrepresentation. Section 23 of the RTA provided as follows: -***

***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.**

The Court went ahead thus:-

***“It will be seen from the above that although the RTA recognized sanctity of title, title could be challenged on the ground of fraud or misrepresentation to which the title holder is proved to be a party”***

191. Maraga, J. as he then was (and now retired Chief Justice of the Republic of Kenya) in 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 eKLR E&L 563”*** held that:

***“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 sections 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 sections 1 and 1A of the Constitution.”***

192. In the case of:- ***“Kenya Anti-Corruption Commission - Versus - Online Enterprises Limited, Ejai Nobala Amoyi, Shiraz Mohamed Nanji, Zeenat Shiraz & Wilson Gachanja (Environment & Land Case 708 of 2019) [2019] KEELC 4680 (KLR) (25 January 2019) (Judgment),*** the Court had this to say regarding the sanctity of title:-

***“In order to determine the question whether the lease held by the 1<sup>st</sup> defendant is valid, it must be demonstrated that it was properly acquired. It is not enough that one waves a Lease or a Certificate of Lease and assert that he has good title by the mere possession of the Lease or Certificate of Lease. Where there is contention that a Lease or Certificate of Lease held by an individual was improperly acquired, then the holder thereof, must demonstrate, through evidence, that the Lease or Certificate of Lease that he holds, was properly acquired. The acquisition of title cannot be construed only in the end result, the process of acquisition is material and important especially when there are doubts to the regarding the process”.***

193. The Court went ahead thus:-

***“It is therefore necessary for the court to determine how the Defendant ended up having a Lease and Certificate of Lease in its name, and further determine if the Government did intend to issue the Defendant with a Lease over the suit land. The law is clear that, the Certificate of Title issued by the Registrar upon registration 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 and the title of that proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme***

194. In the same case, and while quoting with approval Hon. Justice Munyao Sila in the case:- “***Elijah Makeri Nyangw’ra - Versus - Stephen Mungai Njuguna & Another (2013) eKLR***” where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. Hon Justice Munyao Sila in the case while considering the application of section 26(1) (a) and (b) of the Land Registration Act had rendered himself as follows:-

***“The law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”***

195. It had been held further that it does not matter whether or not the Petitioner was personally involved in the unprocedural process. In the **Kenya-Anti Corruption case** above, Lady Justice Odeny while quoting Justice Munyao Sila in the case of:-

**“Alice Chemutai Too - Versus - Nickson Kipkurui Korir & 2 Others [2015] eKLR”** stated and I quote;

***“it needs to be appreciated that for Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions”.***

196. In the case of:- **“Mombasa ELC No. 97 of 2014; Ethics & Anti-Corruption Commission - Versus - Lekyo Tours Limited and Another”** where RW - 3 had equally testified, Justice Munyao Sila while cancelling the title issued in favor of the Defendants had this to say:-

***“PW - 2 was Timothy Waiya Mwangi, the Deputy Director Physical Planning Department, Ministry of Lands and Physical Planning. He testified that his office issues a Part Development Plan (PDP) before a letter of allotment of land is issued. This PDP would have a specific number. He pointed out that in respect of the suit land, there was a PDP but with no number”.***

He went ahead thus:-

***“I therefore declare that the suit land is still land held by the Government and further declare that the registration of the 1<sup>st</sup> Defendant as proprietor was unlawfully and/or irregularly procured. I proceed to order the Land Registrar Mombasa, to cancel the title of the 1<sup>st</sup> Defendant and have the title revert back to the Government. So that no member of the public is duped to deal with the suit land, I do order that the cancellation of the title of the 1<sup>st</sup> Defendant be advertised in the Kenya Gazette. I further issue an order of permanent injunction to both Defendants and/or their servants/agents restraining them from visiting, entering, being upon, or dealing with the suit land”.***

197. Thus, the Petitioner were expected to lead an unbroken chain of evidence to establish his ownership now that the Respondents spoke to the illegality and unprocedural alienation of the suit property. It was not enough that the Petitioner had a Certificate of title in his name. The initial allottees of the mother block MN/1/9622, one Mr. Shariff Nassir, did not acquire a good title as the allocation was done using an unauthentic and unapproved PDP. The same applies to the subsequent allottees from whom the Petitioner acquired his title being Abdulla Saleh Buran, Khalid Khamis Shapi and Nabhan Swaleh Salim whom also could not acquire a good title as the process alienation of the mother title was unprocedural. In the case of: **“Mombasa ELC Case No. 43 of 2015; Ethics & Anti-Corruption -**

**Versus - Edward Mwangi Irungu Minalove Hotel & 2 Others** the Court held as follows:

***“The 1<sup>st</sup> Defendant never held a good title, he had no leasehold interest in the suit property and hence had nothing to transfer to the 2<sup>nd</sup> Defendant. The common law principle of nemo dat quod non habet (no one can give what they do not have), becomes applicable”.***

**198.** While quoting with approval the Court of Appeal in the case of:- ***“Arthi Highway Developers Limited - Versus - West End Butchery Limited & 6 Others (2015) Eklr”***, the Court went ahead thus:-

***“It is our finding that as between West End and Arthi, no valid Title passed and the one exhibited by Arthi before the trial court was an irredeemable fake. It follows that Arthi had no Title to pass to subsequent purchasers, and therefore KMAH, Yamin and Gachoni cannot purport to have purchased the disputed land or portions thereof.”***

***Having declared that the 1st defendant did not acquire a good title, then needless to say he had no good title to pass downstream. His title was not sanctioned by the fact that he transferred it to someone else, if anything he transferred a title tainted with illegality and fraud and remained null and void ab initio”.***

**199.** For foregoing analysis and case laws point to a conclusion that a title to any property must be as good as the process. The end never justified the means. The issuance of the title in dispute was a result of a flawed process. It was the submission that

the title issued could not stand the test of legality. The Petitioner acquired an illegal title.

200. Fifthly, whether the Petitioner had met the threshold to be granted the orders sought. According to the Learned Counsel, the Petitioner acquired no better title to the suit property. Having not obtained a good title to the suit land, Abdulla Saleh Buran, Khalid Khamis Shapi and Nabhan Swaleh Salim had no good title to pass to the Petitioner, and therefore the Petitioner never held a good title to the suit land. Even the doctrine of an innocent purchaser for value without notice cannot help in such an instance. The doctrine of an innocent purchaser for value without notice, in this jurisprudence, could not apply to one who had purchased a fraudulent title, or a title that was for one reason or another declared to be null and void.

201. The provision of Article 40 of the Constitution entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that had been found to have been unlawfully acquired. Having led evidence to show that the title to the suit property was irregularly acquired, she submitted that the ownership of the suit property by the Petitioner could not be protected under Article 40 of the Constitution. As such, they urged the Court to find that no relief lied to the Petitioner. Instead, they asked the Court to nullify the title as per Section 80 of the Land Registration Act.

202. In conclusion, the 2<sup>nd</sup> Respondent had taken the Court through the process that was used to acquire the title to the suit property. They had established that the process was not followed as the allocation of the mother block that gave rise to the suit property was done on the basis of an unapproved PDP. No evidence was led by the Petitioner to rebut the overwhelming evidence by the 2<sup>nd</sup> Respondent in so far as the acquisition of the suit property was concerned. Thus, they urged the Court to consider the foregoing analysis, provisions of various laws cited and various Court decisions quoted and, in the end, find favor with the 2<sup>nd</sup> Respondent's Defense. In so doing, this Honorable Court should dismiss the Petition and nullify the title, retain the restriction and order the Land Registrar to rectify the Register and register the suit property in favour of the 2<sup>nd</sup> Respondent and equally pray for the costs of the suit.

### **VIII. Analysis and Determination**

203. I have carefully considered all the filed pleadings pertaining to the Petition dated 13<sup>th</sup> October, 2020, the Affidavit by the Petitioner, the articulate written submissions by both the Petitioner and the Respondents, the cited authorities, the appropriate provisions of the Constitution of Kenya, 2010 and the statutes.

204. For the Honorable Court to reach an informed, just, fair and reasonable decision, it has condensed the Subject matter into

the following four (4) salient issues for its determination. These are:-

- a) Whether the Petition meet the threshold for Constitution Petitions.**
- b) Whether the Constitution Petition has any merit?**
- c) If (b) is in the affirmative, whether the Petitioner and the 1<sup>st</sup> & 2<sup>nd</sup> Respondents are entitled to the reliefs sought?**
- d) Who will bear the Cost of the Petition?**

**ISSUE No. a). Whether the Petition meet the threshold for Constitution Petitions.**

205. Under this Sub heading, for the Court to respond to this query, assessing certain aspects of the concept of Constitutional provision are inevitable. To begin with, under the provision of Article 2 (1) & (4) of Constitution of Kenya defines the Constitution as being the Supreme law of the Republic and it bids all persons and all States at all levels. Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency and any act or omission in in contravention of this Constitution is invalid.

206. Additionally, I dare say that a Constitution is a living tissue. Just like all other tissues, it has to be fed and watered. It breathes without oxygen and freshness it will die. I have learnt that these things are not just metaphorical. They are real. As a matter of course, the Constitution of Kenya under Article 259 (1) provides a guide on how it should be interpreted as such:-

- a. Promotes its purposes, values and principles;**

- b. Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;**
- c. Permits the development of the law; and**
- d. Contributes to good governance.....”**

207. This Court must give a liberal interpretation and consideration to any provision of the Constitution and have regard to the language and wording of the Constitution and where there is no ambiguity attempt to depart from the straight texts of the Constitution must be avoided. It must always be interpreted and considered as a whole with all the provisions sustaining and coordinating each other and not destroying the other.

208. Based on the principles set out in the edit of the Court of appeal case of the **“Mumo Matemu - Versus - Trusted Society of Human Rights Alliance & Another (2013) eKLR”** provided the standards of proof in the Constitutional Petitions as founded in the case of **“Anarita Karimi Njeru - Versus - Republic [1980] eKLR 154”** where the court is satisfied that the Petitioner’s claim were well pleaded and articulated with absolute particularity. It held:-

**“Constitutional violations must be pleaded with a reasonable degree of precision.....”**

**Further, in the “Thorp - Versus - Holdsworth (1886) 3 Ch. D 637 at 639, Jesse, MR said in the year 1876 and which hold true today:**

**“The whole object of pleadings is to bring the parties to an issue and the meaning of the rule.....was to prevent the issue being enlarged which would prevent either party from knowing when the cause came on for trial what the real point to be discussed and decided was. In fact, the whole meaning of the**

***system is to narrow the parties to define issues and thereby diminish expense and delay especially as regards the amount of testimony required on either side at the hearing.”***

209. Article 23(3) of the Constitution empowers a court to grant appropriate reliefs in any proceedings brought under Article 22 where there has been violation or threat of a violation of a fundamental right or freedom. The relief may include a conservatory order.

210. In this Petition, this Court is called upon to determine whether the entry of a restriction against Land Reference Number 10121/I/MN in the name of the Petitioner, without notice or hearing, was lawful and constitutional. The Petitioner contends that the restriction violated his rights under Articles 40 and 47 of the Constitution, while the Respondents maintain that the restriction was properly entered pursuant to Section 76 of the Land Registration Act, 2012 following a request from a government agency.

211. Thus, in application of these set out legal principles for filing a Constitutional Petition, the Honorable court is fully satisfied that the Petitioners herein have dutifully complied and fully met the threshold of reasonable precision in pleadings for instituting this Petition against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein and pleading for the prayers sought.

**ISSUE No. b). Whether the Constitution Petition has any merit**

**THE SITE VISIT REPORT BY THE DEPUTY REGISTRAR ON 20th MAY,2022**

212. As already indicated, below is the site visit report reproduced herein below for ease of reference.

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LANDS COURT AT MOMBASA**  
**ELC PETITION NO 33 OF 2020**  
NATIONAL WATER HARVESTING AND STORAGE AUTHORITY  
(FORMERLY NATIONAL WATER CONSERVATION AND PIPELINE CORPORATION (NWCPC) .....APPLICANT  
-VERSUS-  
1. HEZEKIAH OMONDI ADALA  
2. CHIEF LAND REGISTRAR .....RESPONDENTS  
**SITE VISIT REPORT**

**Coram**

**20<sup>th</sup> May, 2022**

Before Hon J. Nyariki-Deputy Registrar  
Court Assistant- Ms Yumna  
Mr. Adalla-Counsel for the Petitioner  
Mrs. Mwangi-Counsel for the Respondent  
Mrs. Waswa-Counsel for the Hon. Attorney General  
Sam Juma-Coast Regional Surveyor  
Muindi Mbithi-Surveyor NWHSA  
Wilfred Mutiga-Surveyor NWHSA  
Ndune James-Chief State  
Odioma Mary-Deputy Director County Regional Water  
Job Kiprotich-Chief Economist NWHSA  
Elvis Karanja-Surveyor for the Petitioner  
Dede-Surveyor for the Petitioner  
Abbas Walid-Coast Regional Surveyor  
Irad Noah-Coast Regional Surveyor

**A. Introduction**

1. This is a site visit report for Environment and Land Court Petition Case No 33 of 2020 which emanates from a court order by Hon. Justice L.L. Naikuni from the two rulings dated 8<sup>th</sup> February and 19<sup>th</sup> May 2022.

## **B. Objectives**

The objectives for this site visit were as follows:

1. To undertake a detailed historical background;
2. To undertake a critical and detailed surveying exercise physically on the two parcels of land;
3. To prepare a comprehensive survey report bearing an exercise conducted, sources of information, the methodology applied, observations on the people on it, development challenges and recommendations pertaining the parcels of land.

## **C. Site Proceedings.**

APPLICANT/RESPONDENT: We received an order yesterday to amend our application and order of Parcel FR NO 290/112 to FR NO 286/12. The often aspects of the order remain.

PETITIONER: No objection

RESPONDENT: No objection

APPLICANT/RESPONDENT: 10121/I/MN is a development property that falls inside the large map 286 that contains many blocks. All parties consent that 10121/I/MNN is a developed property that falls inside the larger FP No 286/12 that contains many other parcels of land.

Mrs. Waswa left the Court and Mr Ndune was left to hold brief for her.

The Court proceeded with all the to survey the parcels of land which are mapped in the following beacons. The parcel of land contains beacons GR 2X, GR 3, GR 14 and GR15X. The beacons on the disputed area are M21, M20, M24 and M23 clearly marked and intact. The survey plan is marked as 322/78.

There are four plots with old occupied houses at one end of the larger FP NO 286/12 belonging to NWPC employees. Each of the houses sits on approximately half an acre. The owners were not at home but their domestic workers were present. However, the workers had no clue when the properties were built.

## **D. Methodology used**

The surveyors used maps, R.T.K GPS (Real Time Kinematic) and Survey Plans sourced from Director of surveys. We also participated in the physical survey conducted by the Regional Surveyor.

## **E. Observations**

- CR:10121/I/MN is a developed parcel of land with a residential house inside and a boundary wall. There are roads running through the parcel of land FR No 286/12. Part of the parcel of land FP No 286/12 contains NWPC staff quarters and is developed with residential buildings, a hotel and

serviced apartments and trees with people residing in the area. FP No 286/12 falls within beacons identified as GR22, GR21, GR15, GR 1 and GR 2 as per the survey plan FR No 286/12.

- The NWPC has staff housing in an area zoned as GR 21, GR 22, GR 8 and GR 17. The parcel of land FR No 286/12 contains 8 blocks of land in it. The block containing the suit property has beacons.
- Two of the residents of the estate in FP No 286/12 whom we engaged indicated that they are living in fear as they believe that demolition is imminent especially when they see government officials and NWPC officials are sited in the area.

#### **F. Historical background by the Regional Surveyor**

- According to the records of the Regional Surveyor, the entire suit block surveyed in 1979 including Parcel MN/I/1780 which forms part of the block and has a permanent wall. When Parcel of Land MN/I/1780 was surveyed all the neighboring pieces of land were marked as GL meaning Government Land.
- Another survey was done in 1995, the FR No 286/12 created the 8 blocks from the land marked as GL. Another survey done in 1997 created parcels No 10114 and 10125. These plots are a sub-division of MN/I/9622/I being the last survey.
- The directors of physical planning are the one who approves all the Part Development Plan and the National Land Commission gives allocation. It is important that these two offices identify the documents produced for the any land acquisition. There were the two offices that confirm the authenticity of land documents.

#### **G. Resident interview-Sammy Esitaba**

- He stated that he had lived in the area since 2004. He averred that the suit property had an owner called Ezekiel Adalla who moved there in 2004. The parcel was undeveloped and the construction on the parcel started around 2005. He sold the house to someone by the name of Otieno around 2018 which was before Covid-19. He stated that he used to work for Adalla. The houses in the neighborhood started construction around 2005 when the entire area was bushy.
- He stated that he has heard information from the neighbors that there is a mother title and a map showing that the whole parcel belongs to the National Water Harvest and Storage Authority (Formerly Water Conservation and Pipeline Corporation). He further averred that the rising tensions among residents over ownership of the land began around 2019. The members of the estate then formed a Whatsapp group and contributed sums to appoint an advocate to represent them. He stated that he is the caretaker of the owner of the property he resides in. He stated that all the residents of that piece of land have allotment letters which contain the plot numbers. The issue at hand affects the entire estate

#### **H. Directions**

- By Consent all parties to submit their documents to the Regional Surveyor for purposes of preparing his report within 7 days. Mention remains on 24th May, 2022 before the trial court to confirm occurrence of the site visit.

Report prepared by:  
Hon. Nyariki J,  
Deputy Registrar-Environment & Land Court, Mombasa  
Date:20th May,2022

#### **I. CERTIFICATE**

- This report is prepared based on the author's own observation and interaction with the parties. It bears no interference or input by any party to the dispute herein or any other external factors.

213. Under this sub - title the Petitioner states that he is the registered proprietor and title holder of Land Reference Number 10121/1/MN having acquired and had the same registered in his name on 3<sup>rd</sup> May 2003 Original Certificate of Title being in his custody. A copy of the certificate of title has been annexed. The Petitioner states that he put up a residential house on the said property sometime in the year 2005 and have stayed therein until very recently. That he has also on several occasions offered the subject property as security for facilities from various banking institutions and the endorsement of the charges, further charge and discharges are on the certificate of title. That in all these instances the 1<sup>st</sup> Respondent has never raised any issues over the Petitioner's said title or ownership and has always given a clean bill of health in terms of the certificate of search indicating that the Petitioner is the registered owner of the property subject only to the charges referred to above. According to the evidence by the 1<sup>st</sup> Respondent's witness, the Land Registrar, Mombasa the title

deed being the Grant had been a sub - division of the mother title. The Sub - Divisions comprised of 11 parcels. The suit property had 11 entries whereby several financial transactions had taken place. During all these period, the title deed had never been challenged until they received a letter from the 2<sup>nd</sup> Respondent to register a restriction under the provision of Section 76 of the Land Registration Act, No. 3 of 2012. Besides this, on her own testimony, they never informed the Petitioner about the Restriction as was required by Law. A copy of the search certificate dated 11<sup>th</sup> May, 2019 has been annexed. The Petitioner avers that he has always relied on the said assurance of the 1<sup>st</sup> Respondent and even before acquiring the said title, he had the expectation legitimately that the register as reflected by the 1<sup>st</sup> Respondent is the true reference of the position regarding the subject property.

214. The Petitioner's case is that sometime in July 2020, out of an urgent need to secure capital for a tender project that he secured with the Kenya Ferry Services, the Petitioner decided to dispose of the subject property whereof he obtained the Discharge of charge and the original certificate of titles for purposes of effecting the discharge from SBM Bank (the successor in title of Chase Bank Limited). The Petitioner has exhibited a copy of a letter dated 26<sup>th</sup> June 2020 from SBM Bank releasing the original title and the discharge of Charge duly franked awaiting registration. The Petitioner states that he entered into an agreement with an intended buyer for the sale

of the subject property and for purposes of acquiring capital to finance the tender project being undertaken. A copy of the sale agreement has been annexed.

215. The Petitioner states that his advocates duly lodged the Discharge of Charge and transfer for franking and registration together with the Original title deed after the purchaser had paid the necessary stamp duty. Copies of the stamp duty receipt and transfer documents duly franked are also annexed. The Petitioner states that the 1<sup>st</sup> Respondent failed to effect the transfer, at first stating orally to the Petitioner's advocates that the subject file was missing without giving any definite explanation for the same. That upon the Petitioner's advocates insistence; the 1<sup>st</sup> Respondent claimed that the subject property had a restriction. It is the Petitioner's contention that the said property had never had any restriction and the same has always been clean except for the charges duly placed at the Petitioner's instance. That the Petitioner through his advocates on 24<sup>th</sup> July 2020 wrote to the 1<sup>st</sup> Respondent asking for the removal of the said restriction, which letter was not responded to nor the restriction lifted. That to date the 1<sup>st</sup> Respondent has not lifted the restriction nor offered a plausible reason or basis upon which the said restriction was placed. A copy of the letter dated 24<sup>th</sup> July 2020 and a search conducted on 1<sup>st</sup> September, 2020 have been annexed.

216. It is the Petitioner's case that the 1<sup>st</sup> Respondent's action is arbitrary and whimsically placing a restriction on the property is

unlawful, capricious and unreasonable and goes against all known dictates of law and fair hearing. That the said restriction was placed on an unknown date and without any notice to the Petitioner or even an invitation to be heard before the said decision was made. That the same goes against the Petitioner's legitimate expectation and fair hearing as dictated by law.

217. The Petitioner states that what surprised him more was that upon taking back his documents previously lodged with the Respondent, the 1<sup>st</sup> Respondent shamelessly and clandestinely endorsed the said entry of restriction into the Petitioner's original titled deed and backdated the same to 29<sup>th</sup> June, 2016 without signing thereof. A copy of the title deed with the said entry of restriction has been annexed. The Petitioner avers that the said restriction could not have been there when all along the original title was with the bank until the same was released to the Petitioner who states that he has always been in full custody of the same. The Petitioner argues that the actions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are reprehensible and does not reflect the integrity bestowed upon and required of the said public office and the court ought to and has powers to issue remedy against such high handedness. That the Petitioner's rights as guaranteed by the constitution have been contravened by the Respondent through the action of placing a restriction on the Petitioner's property without hearing and amounts to arbitrarily taking away the Petitioner's property. That being a public officer, the 1<sup>st</sup> Respondent is bound by the constitutional

edicts on the national values and principles of governance captured by Article 10 of the Constitution which demands the exercise of the Rule of Law, human dignity, equity, social justice, human rights, transparency and accountability. It is the Petitioner's case that the Respondent's actions fail the requirement of transparency and accountability and expressly outside the rule of law. The Petitioner states that he stands to suffer irreparable loss that cannot be remedied in any way since he intended to channel the proceeds of the transaction towards a project tender construction he was engaged to do.

218. The key issues to address are the procedural violations by the Land Registrar in placing restrictions without notice, the constitutional rights infringements, and the conflicting claims about the land's ownership history. The judgment needs to balance statutory requirements under the Land Registration Act with constitutional protections of property rights and fair administrative action.

219. It is not in dispute that Land Reference Number 10121/1/MN CR 32130 is registered in the name of Hezekiah Omondi Adalla, the Petitioner herein. The Petitioner's claim is that the 1<sup>st</sup> Respondent placed a restriction on the land without notifying the Petitioner and without inviting him for a hearing. On his part, the 1<sup>st</sup> Respondent avers that the restriction was placed pursuant to a letter dated 2<sup>nd</sup> December, 2019 from Coast Water Development Agency, the 2<sup>nd</sup> Respondent herein. It is not denied that the Petitioner was not notified or given an

opportunity to be heard before the restriction was placed. To be able to really determine the merits of the Petition, the Honourable Court has to determine the following issues: -

**b. Whether the Petitioner is the bona fide registered proprietor of LR No. 10121/I/MN with rights protected under the Land Registration Act and Article 40.**

**c. Whether the restriction was lawfully placed in accordance with Sections 76-77 of the Land Registration Act and Article 47 (and the Fair Administrative Action Act).**

**d. Whether the Respondent's actions infringed the Petitioner's constitutional rights, including legitimate expectation**

220. The Petitioner produced the original certificate of title for LR No. 10121/I/MN, showing registration in his name on 2 May 2003. Under the provision of Section 26 of the Land Registration Act, a certificate of title is "*prima facie* evidence that the registered proprietor is the absolute and indefeasible owner of the land. No party has challenged the authenticity of that title or its registration entry.

221. The Law under the Land Registration Act provides under Section 24 and 25 as follows: -

**"24. 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; and**

**(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 or expressed agreements, liabilities or incidents of the lease.

**25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—**

**1. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and**

**2. to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.**

**(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”**

**222.** Sections 24 and 25 of the Land Registration Act vest in a registered proprietor “absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto,” and protect those rights from being defeated except as provided in the Act. In ***“Ricks - Versus - Chebet & another (Environment & Land Case E232 of 2023) [2025] KEELC 4247 (KLR) (3 June 2025) (Judgment)”*** the Court held that these provisions confer on the registered owner exclusive possession and legal capacity to vindicate proprietary rights against all comers.

**223.** The scope of the rights of a registered owner of landed property were highlighted and elaborated upon in the case of

***“Mohansons (Kenya) Limited - Versus - Registrar of Titles & 2 others [2017] eKLR”***; where the court stated and observed thus:

-

**[18] As held by the Court of Appeal for East Africa held in Moya Drift Farm Ltd. v. Theuri (1973) EA 114 a registered proprietor of land is the absolute and indefeasible owner of land and is entitled to take proceedings for trespass and eviction of a trespasser even if he did not have possession of the property. Spry, V-P at 116, considered the effect of section 23 of the Registration of Titles Act and held -**

**“I cannot see how a person could possibly be described as “the absolute and indefeasible owner” of land if he could not cause a trespasser to be evicted. The Act gives a registered proprietor his title on registration and, unless there is any other person lawfully in possession, such as a tenant, I think that title carries with it legal possession: there is nothing in the Act to say or even suggest that his title is imperfect until he has physical possession.”**

**Sir William Duffus, P. ibid at p.117 agreed with Spry, JA as follows:**

**“In any even I agree with the Vice-President that the fact that the appellant was the registered proprietor as owner in fee simple under the Registration of Titles Act, and as such vested with the absolute and indefeasible ownership of the land, was sufficient to vest legal possession of the land in the appellant and that this possession would be sufficient to support the action of trespass against a trespasser wrongly on the land.”**

**The third member of the Court, Lutta, JA agreed with the judgment prepared by the Spry, V-P.**

224. Likewise, in ***“Gitau - Versus - Muzungu & another (Environment & Land Case 63 of 2020) [2022] KEELC 3098 (KLR) (28 June 2022) (Judgment)”*** the petitioner’s title, once registered, entitled him to unhampered enjoyment of his land under Sections 24 and 25.
225. The 1<sup>st</sup> Respondent, through the testimony by the Land Registrar, admits the suit property is registered in the Petitioner’s name. The certificate of title and official searches corroborate that position. Under Sections 24–26 LRA, registration vests absolute ownership and indefeasible title in the proprietor, subject only to exceptions established through due process. Article 40 protects proprietary rights save where unlawfulness is established in a competent proceeding (Article 40(6)). There has been no proceeding—before the National Land Commission or a court—culminating in a finding that the Petitioner’s title was unlawfully acquired.
226. Article 40 of the Constitution guarantees every person’s right to acquire and own property and protects against arbitrary deprivation. Because the Petitioner’s title was validly registered and indelibly recorded, his proprietary rights are shielded by both the Torrens system and constitutional guarantee. There is no record that his title was lawfully impugned in any forum, and the Registrar’s registry entry remains conclusive evidence of his bona fide proprietorship.
227. The Court finds the Petitioner is the bona fide registered proprietor of LR No. 10121/I/MN and his rights are protected under the LRA and the Constitution.

228. **On whether the restriction was lawfully entered in compliance with Sections 76-77 Land Registration Act and Article 47 (Fair Administrative Action Act)**, the Land Registration Act, 2012 under Section 76(1) empowers the Registrar, “for the prevention of any fraud or improper dealing or for any other sufficient cause,” to enter a restriction on title “after directing such inquiries to be made and notices to be served and hearing such persons as the Registrar considers fit.” Further Section 77(1) mandates that the Registrar “shall give notice, in writing, of a restriction to the proprietor affected by the restriction.”

229. These provisions are further backed up by the Constitution under Article 47 which guarantees every person the right to ***“administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair,” and, where rights are adversely affected, to “written reasons for the action.”***

230. Section 3 of the Fair Administrative Action Act, 2015 extends these standards to all state agencies and persons exercising administrative authority. Further this Court also makes reliance to Section 4(1) which reiterates the right to “administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair” and finally Section 4(2) and (3) which require prior notice, an opportunity to be heard, disclosure of material relied upon, and written reasons when a decision adversely affects legal rights or interests.

231. The Court takes notice there are essential conditions for a valid lawful restriction under Sections 76 - 77 of the Land

Registration Act, No. 3 of 2012 provides must be cumulatively satisfied: -

- a) Inquiries and notice: The Registrar must direct inquiries and serve written notice on the proprietor before entry.
- b) Hearing: The proprietor must be afforded an opportunity to be heard on any proposed restriction.
- c) Reasons: Where the restriction adversely affects proprietary rights, the Registrar must provide written reasons on request (Article 47 of the Constitution; Section 4 of the Fair Administrative Actions Act).

232. The Environment and Land Court has repeatedly held that restrictions entered without notice and hearing are unlawful as was in the case of ***“Susan Sambai Choge & 4 others - Versus - Land Registrar & another [2016] KEELC 1003 (KLR)”***, the Court struck down restrictions imposed without hearing the registered proprietors, emphasizing that Section 76’s requirement to “hearing such persons” is mandatory and that failure to comply fatally taints the restriction.

233. Similarly, in the case of ***“Kinyua & 3 others - Versus - Githunguri Constituency Ranching Company Limited; Land Registrar Ruiru (Interested Party) (Miscellaneous Application E045 of 2022) [2023] KEELC 332 (KLR) (20 January 2023) (Judgment)”***, the Court lifted restrictions entered at the instance of a third party where the registered owners had not been notified or heard, reiterating the constitutional and statutory imperative of fair administrative action

234. In the instance petition, the Court observes that there was no written notice issued to the Petitioner before the restriction was placed. Further no inquiries were demonstrated to have been conducted and no hearing or opportunity to make representations was provided. Despite a formal demand by the Petitioner's advocate, the Registrar never furnished written reasons for the restriction.
235. This Honourable Court notes that reliance on a third party letter (Coast Water Works Development Agency) cannot override statutory procedural safeguards. The Registrar's discretion under the provision of Section 76 is conditioned by compliance with inquiries, notice, hearing, and reasons. Non-compliance renders the restriction ultra vires and unlawful. A request letter from Coast Water Works Development Agency—absent formal allocation instruments (gazette notice, letter of allotment) or a competent determination of unlawful alienation—cannot substitute the procedural requirements of Sections 76-77 LRA and Article 47. The Registrar may not use administrative shortcuts to curtail indefeasible title or bypass fundamental fairness.
236. Because the Registrar neither served written notice nor afforded the Petitioner a hearing or reasons, the restriction fails the statutory test under Sections 76 - 77 Land Registration Act and violates Article 47 of the Constitution and the Fair Administrative Actions Act. Consistent with "**Susan Sambai Choge (Supra)**" and "**Kinyua (Supra)**", the restriction is

ultra vires and must be removed. The Court holds that the restriction was placed in breach of Sections 76 - 77 Land Registration Act and the rules of natural justice.

237. On the issue of **whether the Respondent's actions infringed the Petitioner's constitutional rights, including legitimate expectation**, it is the Honourable Court's observes that by unilaterally restricting dealings on the suit property without notice or hearing, the 1<sup>st</sup> Respondent adversely affected the Petitioner's legal rights, including the ability to complete a sale after discharge of charge, without providing written reasons or an opportunity to be heard. This conduct violates Article 47 and the Fair Administrative Action Act.
238. The right to enjoy one's own property is guaranteed by Article 40 of the Constitution. This constitutional protection is further safe-guarded and ring-fenced by Sections 24 and 25 of the Land Registration Act, 2012. In the absence of any opposition to the application, the court is obliged to accord the applicants the protection conferred by Article 40 of the Constitution and by Sections 24 and 25 of the Land Registration Act.
239. The record shows a consistent pattern of official searches and registered dealings over many years confirming a clean title subject only to bank charges. That administrative record reasonably engendered a legitimate expectation that adverse entries would not be made without due process and notice. The

arbitrary restriction frustrated that expectation and unlawfully impaired the Petitioner's Article 40 rights.

240. The Respondent's witness and the Coast Water Works Development Agency letter point to alleged public utility claims based on historic planning documents (PDPs) and occupation. However, no letter of allotment, gazette notice setting apart, or title in favor of the State or its agency was produced; no statutory process (including proceedings before the National Land Commission or a suit seeking cancellation) has been pursued to impeach the Petitioner's title. The proper course, where public ownership is asserted, is to invoke the legal mechanisms established by the Constitution and statute— investigation, due process, and if warranted, proceedings for review or cancellation. A restriction cannot be used as a shortcut to dispossess or paralyze a registered proprietor without compliance with the law.

241. The Supreme Court has enunciated the principles governing the concept of legitimate expectation in the case of ***“Communications Commission of Kenya & 5 others - Versus - Royal Media Services Limited & 5 others [2014] eKLR”*** as follows:-

***(a) there must be an express, clear and unambiguous promise given by a public authority;***

***(b) the expectation itself must be reasonable;***

***(c) the representation must be one which it was competent and lawful for the decision-maker to make; and***

**(d) there cannot be a legitimate expectation against clear provisions of the law or the Constitution.**

242. Clearly in the instant case, no notice was given, no hearing was held and no written reasons were provided when the Registrar entered the restriction. This conduct offends Section 76(1)-77(1) of the Land Registration Act, which require inquiries, notice and hearing before entry of any restriction, and Article 47 of the Constitution together with Section 4 Fair Administrative Action Act.
243. In the present circumstances, the public interest does not trump statutory and constitutional safeguards; it must be advanced through lawful processes. By placing a restriction without due process—thereby blocking the Petitioner’s sale—the Registrar materially impaired the Petitioner’s Article 40 right to deal with his property. The absence of any lawful finding that the title was tainted means the Registrar’s action was arbitrary.
244. For nearly two decades, official searches and registry entries consistently confirmed a clean, fully transferable title subject only to Petitioner-initiated bank charges. The Petitioner reasonably expected any adverse entry would follow statutory procedure—notice, hearing, and reasons. The Registrar’s abrupt, unexplained entry of a restriction therefore frustrated that legitimate expectation, as held in **“Susan Sambai Choge & 4 Others (Supra)”**, where a restriction placed without hearing was quashed. The Petition has also reference the case of **“Itrade Co. Ltd - Versus - Jane Mukami Mwangi & Another**

(Supra)”, where the restriction was removed where the proprietor had no notice and hearing. Also in **“Republic - Versus - Chief Land Registrar & Another Ex Parte Patrick Mbau Malika & 6 Others [supra]”**, the Registrar acted illegally by placing restriction without notice; Court ordered its removal.

245. In conclusion, the Registrar’s unilateral, procedurally flawed entry of a restriction on the Petitioner’s title contravened: -
- a. Section 76 and 77 of the Land Registration Act (lack of inquiries, notice, hearing);
  - b. Article 47 of the Constitution and Section 4 FAA Act (no fair administrative action or written reasons);
  - c. Article 40 of the Constitution (arbitrary deprivation of property); and
  - d. The Petitioner’s legitimate expectation of procedural fairness built on long-standing registry practice.
246. Accordingly, the Respondent’s actions infringed the Petitioner’s constitutional rights and legitimate expectation, warranting judicial intervention to quash the restriction and award appropriate relief.

**ISSUE No. c). If (b) above is in the affirmative, whether the Petitioner, 1<sup>st</sup> & 2<sup>nd</sup> Respondents are entitled to the reliefs sought?**

247. Under this sub - title, having determined that the Petitioner is the bona fide registered proprietor of LR No. 10121/I/MN, the restriction was entered in breach of Sections 76-77 of the Land Registration Act, 2012, and the 1<sup>st</sup> Respondent’s action

infringed the Petitioner's rights under the provision Articles 40 and 47 of the Constitution and the Fair Administrative Action Act, the Court must now consider whether the Petitioner is entitled to the specific remedies prayed for. The overarching purpose of constitutional petitions is to ensure the lawfulness, procedural fairness, and substantive justice of administratively imposed restrictions.

248. The jurisdiction and remedial powers of the court are well established:

a. Article 23(3) of the Constitution and Section 11 of the Fair Administrative Action Act allow for declarations of rights, prohibitory and mandatory orders, orders of mandamus, compensation, and any ancillary orders necessary for justice.

b. The Environment and Land Court specifically possesses the power to order rectification of the register, removal or variation of restrictions, and to award damages for unlawful interference with property (Land Registration Act, s. 78, 79, 80, 101).

249. On the declaration of illegality, under Section 78(2) of the Land Registration Act, 2012, this Court "may order the removal or variation of a restriction and may issue such other directions as it considers appropriate." Having found the restriction to be ultra vires and procedurally flawed, a declaration that the entry of the restriction contravened Sections 76 - 77 Land

Registration Act and violated Articles 40 and 47 is both necessary and appropriate.

250. On the prayer for mandamus compelling removal, Article 165(3)(b) vests this Court with jurisdiction to enforce compliance with the Constitution. Judicial review remedies—including mandamus—are available where a public officer fails to perform a statutory duty. In ***“Itrade Company Ltd - Versus - Mukami Mwangi & Another (Supra)”*** the Court quashed a restriction entered without notice and compelled its removal by mandamus. Here, the Respondent’s breach of statutory and constitutional duties warrants an order compelling the Registrar to lift the restriction.
251. On the prayer for prohibitory injunction, an order of prohibition is justified to restrain further unlawful interference. As held in ***“Susan Sambai Choge & 4 Others - Versus - Land Registrar & Another (Supra)”***, restrictions placed without hearing infringe procedural fairness and must be restrained. A prohibitory injunction prevents the Registrar from re-imposing or maintaining any adverse entry absent compliance with Sections 76 -77 of the Land Registration Act.
252. On the prayer for general damages, Article 47 and Section 4 FAA Act guarantee remedial relief for procedurally unfair administrative action. Courts have awarded general damages where administrative actions wrongfully prevented proprietors from dealing with land. In ***“Multiple Hauliers East Africa Ltd - Versus - Attorney General (Supra)”***, the Court awarded

damages for breach of fair administrative action. Though not reported on Kenya Law, this principle aligns with awards in **“Geoffrey Kiriimi Itania - Versus - Chief Land Registrar & 3 Others”**, where a sum of Kenya Shillings One One Million (Kshs. 1,000,000/=) was granted for wrongful caveats placed without notice. Considering the Petitioner’s prejudice—lost sale, legal costs, and business opportunity—the Court awards of a sum of Kenya Shillings Three Million (Kshs. 3,000,000/-) in general damages.

253. Having regard to the foregoing, the Petitioner succeeds on all fronts and is entitled to the reliefs sought.

**ISSUE No. d). Who will bear the Cost of the Petition?**

254. It is now well established that the issue of Costs is the discretion of Courts. According to the Black Law Dictionary, “Cost” is defined to mean, *“the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”*. The provisions of Section 27 (1) of the Civil Procedure Act, Cap. 21 holds that Costs follow events. By the events, it means the results or outcome of any legal action or proceedings thereafter. The case before Court being a Constitutional Petition, Rule 26 (1) and (2) of the Constitution of Kenya (Protection of Rights and fundamental Freedoms practice and Procedure Rules 2013) provides :-

***“(1) The award of costs is at the discretion of the Court.***

***(2) In exercising its discretion to award costs, the Court shall take appropriate measures to ensure that every person has access to the Court to determine their rights and fundamental freedoms.”***

255. In the case of ***“Reids Hewett & Company - Versus - Joseph AIR 1918 cal. 717”*** and ***“Myres - Versus - Defries (1880) 5 Ex. D. 180”***, the House of the Lords noted:-

***“The expression “Costs shall follow the events” means that the party who, on the whole succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word ‘event’ should be read distributive and the costs of any particular issue should go to the party who succeeds upon it.....”***

256. Further, these legal principles were upheld in the Supreme Court case of ***“Jasbir Rai Singh - Versus - Tarchalans Singh, (2014) eKLR”*** and the Court of Appeal cases of ***“Cecilia Karuru Ngayu - Versus - Barclays Bank of Kenya & Ano. (2016) eKLR”*** the Courts held:-

***“.....the basic rule on attribution of costs is that costs follow the event.....it is well recognized that the principles costs follow the event is not to be used to penalize the losing party rather it is for compensating the successful party for the trouble taken in presenting or defending the case”.***

257. Therefore, the events in the instant case is that the Petitioner herein have succeeded in establishing his case on preponderance of probabilities. For that very fundamental

reason, therefore, the costs of this Petition will be made out to Petitioner.

## **IX. Conclusion and Disposition**

258. Consequently, having intensively and thoroughly deliberated on all the framed issues herein, this Honorable Court arrives at the finding that the Petitioner herein has succeeded in all the prayers sought from his filed Petition.

259. For avoidance of doubt, the function of the court in cases such as this is not merely to vindicate the rights of an individual proprietor, but to uphold the rule of law and constitutionalism in land administration. Arbitrary or opaque actions by public officers erode public confidence, injure legitimate interests, and subvert the very foundation of land rights in Kenya's constitutional order. The statutory powers conferred on officers such as the Chief Land Registrar are held in trust and for the benefit of the public, and must at all times be exercised transparently, accountably, and in strict fidelity to both the letter and spirit of the Constitution.

260. I allow the Petition dated 13<sup>th</sup> October, 2020 specifically under the following terms:-

**a) THAT Judgement be and is hereby entered in favour of the Petitioner as per the Petition dated 13<sup>th</sup> October, 2020 in its entirety.**

**b) THAT a Declaration be and is hereby made that the entry of a restriction on Land Reference Number 10121/I/MN by the Chief Land Registrar was unlawful,**

unreasonable, arbitrary, capricious, and in breach of Sections 76 and 77 of the Land Registration Act (No. 3 of 2012), Sections 4, 6, and 7 of the Fair Administrative Action Act (No. 4 of 2015), and Articles 10, 40 and 47 of the Constitution.

- c) **THAT** a Declaration be and is hereby made that the Petitioner's rights to property and fair administrative action under Articles 40 and 47 of the Constitution have been violated by the acts of Commission and omissions of the Respondents.
- d) **THAT** an Order be and is hereby made by way of Mandamus that the Chief Land Registrar shall forthwith remove the restriction entered against Land Reference Number 10121/I/MN. Further to the implementation of this Order, the Chief Registrar shall communicate the removal of the restriction to the relevant County Land Registrar, and the Register shall be rectified within 14 days of service of this Order.
- e) **THAT** the 1<sup>st</sup> Respondent directed to file an affidavit of compliance WITHIN 21 DAYS of this Judgment.
- f) **THAT** an Order be and is hereby made that the 1<sup>st</sup> Respondent, the Chief Land Registrar, be and is prohibited from taking any adverse action and/or interfering in any way whatsoever with the Petitioner's ownership, occupation, enjoyment, and exercise of legal rights over Land Reference Number 10121/I/MN, except strictly in accordance with the Constitution and the law, including full compliance

with the requirements of notice, inquiry, and hearing.

- g) **THAT** the Petitioner be and is hereby awarded general damages in the sum of Kenya Shillings Three Million (Kshs 3,000,000) for violation of his constitutional right to fair administrative action and consequent financial loss.
- h) **THAT** on the question of exemplary damages, the court does not find circumstances of intentional malice, but directs that the Chief Land Registrar be guided by the constitutional and statutory edicts on transparency and accountability to avoid future repetition.
- i) **THAT** the costs of this Petition dated 13<sup>th</sup> October, 2020 will be made out to the Petitioner by the 1<sup>st</sup> & 2<sup>nd</sup> Respondents. Interest on damages and costs shall accrue at court rates from the date of Judgment until payment in full.

**IT IS SO ORDERED ACORDINGLY.**

**JUDGMENT DELIVERED THROUGH MICRO SOFT TEAMS  
VIRTUALLY SIGNED AND DATED AT MOMBASA THIS .....7<sup>TH</sup>  
..... DAY OF .....NOVEMBER..... 2025.**

.....  
**HON. MR. JUSTICE L. L. NAIKUNI  
ENVIRONMENT AND LAND COURT  
MOMBASA**

**Judgement delivered in the presence of:-**

- a). M/s. Firdaus Mbula – the Court Assistant.
- b). Mr. Adala Advocate for the Petitioner.

c). No appearance for the 1<sup>st</sup> & 2<sup>nd</sup> Respondents.

Judge's Copy