

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
ELC PET NO. 50 OF 2021

**IN THE MATTER OF: ARTICLES 22, 70 AND 258 OF THE
CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER
ARTICLES 22, 35, 42, 43 OF THE
CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF: CONTRAVENTION OF ARTICLES 2(1)(2)
(4),10(1),(2)(a)(b)(c), 62(1)(g)(i)(3)
(4),67,69 AND 75 OF THE CONSTITUTION
OF KENYA 2010**

BETWEEN

**AINEA RAGEN (*suing on his own capacity and on
behalf of MWEMBELEGEZA community/Residents*)....**

.....PETITIONER

- VERSUS -

ANWARALI AND BROTHERS LIMITED.....1ST

RESPONDENT

COUNTY GOVERNMENT OF MOMBASA.....2ND

RESPONDENT

**WATER RESOURCES AUTHORITY.....3RD
RESPONDENT**

**NATIONAL LAND COMMISSION.....4TH
RESPONDENT**

**NATIONAL ENVIRONMENT MANAGEMENT
AUTHORITY.....5TH
RESPONDENT**

**NATIONAL CONSTRUCTION AUTHORITY.....6TH
RESPONDENT**

**CHIEF LAND REGISTRAR MOMBASA.....7TH
RESPONDENT**

AND

**ETHICS AND ANTI-CORRUPTION
COMMISSION.....1ST INTERESTED
PARTY**

**ATTORNEY GENERAL.....2ND INTERESTED
PARTY**

AND

**ANWARALI & BROTHERS LIMITED.....CROSS-
PETITIONER**

BETWEEN

- 1. CHIEF LAND REGISTRAR**
- 2. NATIONAL LAND COMMISSION**
- 3. COUNTY GOVERNMENT OF MOMBASA**
- 4. WATER RESOURCES AUTHORITY**

5. NATIONAL ENVIRONMENT

MANAGEMENT

AUTHORITY.....

.....RESPONDENTS

AND

ZAIB REAL ESTATE LIMITED.....INTERESTED

PARTY

JUDGMENT

I. Preliminaries

1. This rather lengthy Judgment of this Honourable Court, due to its intricacies and complexity of the subject matter, pertains to the filed Constitution Petition dated 26th October, 2021 by *Ainea Ragen, on his own behalf and on behalf of the Mwembelegeza Community*, the Petitioner herein and the *Anwarali and Brothers Limited, County Government of Mombasa, Water Resources Authority, National Land Commission, National Environment Management Authority, National Construction Authority and Chief Land Registrar - Mombasa*, the 1st, 2nd, 3rd, 4th, 5th, 6th & 7th Respondents herein and *Ethics and Anti - Corruption Commission and Attorney General*, the Interested Parties herein. The Constitution Petition was brought under the dint of the provisions of Articles 2(1)(2)(4), 10(1),(2)(a)(b)(c), 22, 35, 42, 43, 62(1)(g)(i) (3)(4), 67, 69, 70, 75 and 258 of the Constitution of Kenya 2010. The Petition was accompanied by an affidavit in support.
2. Upon service of the Petition, the 1st Respondent entered their appearance through a Memorandum of Appearance and filed a

Cross - Petition dated 2nd December, 2021, Subsequently, the Petitioner responded to the Cross - Petition through filing of a Cross - Cross Petition on 13th February, 2024. In general terms, the rest of the Respondents filed their responses through Replying Affidavits and responses on various dates with the Petitioner filing Supplementary Affidavits in further response to all the replying affidavits.

3. It is instructive to note that this Petition was disposed off by both way of affidavits and adducing of **“Viva - Voce”** evidence herein. Subsequently, during the proceedings, pursuant to a request made by parties, the Honourable Court conducted a site visit (**“Locus in Quo”**) on 24th February, 2023. A report was prepared and shared accordingly. For ease of reference it forms part of this Judgement herein.

II. Description of Parties

4. The Petitioner was described as a resident of Mwembelegeza Community on his own capacity and on behalf of the residents of Mwembelegeza community within Kisauni Constituency of the County of Mombasa who could not represent themselves allegedly for fear of being victimized or harmed pursuant to the provision of Articles 22, 70 and 258 of the 2010 Constitution of Kenya, 2010.
5. The 1st Respondent was described as a legal entity registered pursuant to the Companies Act of 2015 & the company (General) regulations, 2015. The 2nd Respondent was described as the

County Government of Mombasa; it was established under chapter 11 of the devolved government part 2 Article 176 of the Constitution of Kenya 2010 and Section 6 of the County Government Act, Cap 265 as body corporate (Powers of County government). It's charged with the responsibility as stated in Part II Section 6 (1) (2) and (6) of the County Government Act in respect to this suit.

6. The 3rd Respondent was described to be have been established under Water Act, 2016 as a body corporate capable of suing and being sued in its own name as per Water Act, Cap..... Section 11 (1)(2)(a). It's charged with responsibility of; (a) formulating and enforcing standards, procedures and regulations for the management and use of Water resources and flood mitigation;(b) regulate the management and use of water Resources among others.
7. The 4th Respondent was described to have been established under Article 67 of the Constitution of Kenya 2010 and the National Land Commission Act, No. 5 of 2012 as body corporate capable of suing and being sued in its own name. It is charged with the responsibility of managing public land which includes Wetlands/Swamps on behalf of the National Government of the Republic of Kenya.
8. The 5th Respondent was described to have been established under Environmental Management and Coordination Act as body corporate capable of suing and being sued in its own name as per

section 7(1)(2)(a) of NEMA. It's charged with responsibility of "*inter alia*" co - ordinating various Environmental Management activities in the country, carrying out surveys which will assist in the proper management and conservation of the Environment and identifying projects and programs or types of projects and programs, plans and policies for which Environmental Audit or Environmental monitoring must be conducted.

9. The 6th Respondent was described to have been established under the National Construction Authority Act, of 2022 and Section 3(2) (a) as body corporate capable of suing and being sued in its own name. It's charged with responsibility of overseeing the construction industry and coordinate its development and without prejudice to the generality of Section 5 sub-section (1), the Authority shall act per regulations in section 5(2) of the NCA Act in respect to this suit.
10. The 7th Respondent was described to be in charge of the Land registry. Pursuant to the provision of Sections 12 & 13 of the Land Registration Act, No. 3 of 2012 which establishes the office of the Chief Land Registrar and the Land Registrar whose mandate is to maintain in each registration unit, a land registry in which there shall be kept-(a) a land register, in the form to be determined by the Commission; (b) the cadastral map; (c) parcel files containing the instruments and documents that support subsisting entries in the land register. (d) any plans which shall, after a date appointed by the Commission, be geo-referenced; (e) the presentation book,

in which shall be kept a record of all applications numbered consecutively in the order in which they are presented to the registry; (f) an index, in alphabetical order, of the names of the proprietors; and (g) a register and a file of Powers of Attorney.

11. The 1st Interested Party was described as an independent institution established under the provision of Article 79 of the Constitution and Article 252 of the Constitution of Kenya 2010. It is established under Ethics and Anti - Corruption Commission Act as a body legally mandated to fight corruption and the 2nd Interested Party was duly appointed Attorney General of the Republic of Kenya pursuant to the provision of Article 156 of the Constitution of Kenya. It's the principal legal adviser to the National Government. It was described to have duties which include the formulation of legal policy ensuring proper administration of Kenya's legal system including professional legal education.

III. Court directions before the hearing

12. Nonetheless, in the course of time, the Honourable Court fixed the hearing dated on 14th February, 2025 with the parties having fully complied on the provision of Order 11 of the Civil Procedure Rules 2010 and the matter proceed for hearing by way of adducing of "**Viva Voce**" evidence with the 7th Respondent's witnesses testifying in Court on 14th February, 2025 after which they marked their case closed and the Respondents called their witness they marked their case closed on the same day.

IV. The Petitioner's case

A. Background facts to the case

13. The Petitioner provided the Court with a detailed expose of the matter. He attached numerous annextures marked as "MCP" annexed thereto. According to the Petitioner, the land area known as the MWEMBELEGEZA SETTLEMENT SCHEME in the county of Mombasa in the Republic of Kenya was planned and sub - divided by Survey of Kenya into different plots mostly 50 feet by 100 feet. Most of these plots are owned by private individuals, though some were reserved as public land for specific uses. One such public plot is one known as Land No. 1475 MWEMBELEGEZA SCHEME which was surveyed and marked as a SWAMP because of its size, it's nature, the large amount of water that accumulates in this land and it's marine life. It is a habitat for different fishes, birds, amphibious animals and different marine plants.
14. The swamp and it was water (suit land) had been of great benefit to the community of Mwembelegeza and other surrounding communities for the following reasons:-
- (i) Mwembelegeza community used the swamp waters for maize and rice farming hence providing food security to numerous households.
 - (ii) The swamp had all kinds of fishes and the community used the fishes in the swamp as a source of income and food.
 - (iii) Because Mombasa County had poor water drainage system, the swamp served as a water collecting body during periods of rain thus protecting the entire Mwembelegeza community, Kadzandani Community, Bombolulu areas,

Kisauni areas and even areas around Nyali from perennial flooding.

(iv) The swamp had all kinds of marine plants and amphibious animals that made it their habitat. This swamp had capacity to also be an educational research area for those studying and doing research on marine life and habitat among others.

15. Around late year of 2016, a strange man with two pistols struck to his trouser belt came to the suit land and found resident women harvesting their crops within the swamp. The man told the women to leave claiming that the land belonged to him and stating that the women were intruders on his private property. For fear of being shot at and probably getting killed, the women gave way and left the swamp. Sometime in the year 2017, trucks invaded the suit land offloading stones into the swamp and filling it up all of which was done under the protection by armed police.
16. The Residents of Mwembelegeza community were helpless and could not do anything because of the militarized operation and thus only remained as observers because of their fear of being harmed or killed. Upon enquiring who was filling up the swamp with stones, the Residents (Unnamed for their safety), were told the swamp was being filled by its purported owner, ANWARALI AND BROTHERS LIMITED. Upon more enquiries, the residents were told that the “original owner” of the suit land (who is a Resident of Meru county) sold the land to the 1st Respondent. That was how a Swamp became personal property of a resident of Meru county in the Republic of Kenya and finally being owned by the 1st

Respondent remained a mystery to the community of Mwembelegeza. The community had many unanswered questions.

17. The Petitioner averred that the process of the 1st Respondent herein filling up the swamp, was unprocedural as there was no board to show the nature of project being undertaken on the Swamp, there were no details of who was undertaking the project as standard practice and regulations require in construction industry as per NCA Act and regulations.
18. There was no board to show the following details:-
 - a. National Environment Management Authority (NEMA) approvals, license.
 - b. Environmental Impact Assessment (EIA) study and study report from NEMA authorizing the project.
 - c. Gazette notice and advert within the community or on the board as per the change of use procedures showing intention of change of use from a Swamp to mixed use (Residential cum commercial), a CHANGE of USER which the constitution 2010 does not support.
 - d. Nature of the project being undertaken on the Swamp (suit land)
 - e. Name of the Contractor undertaking the project.
 - f. National Construction Authority (NCA) authorization.
 - g. Water Resources Management Authority (WRA) licensing and approvals.
 - h. County Government of Mombasa approvals.

19. Stones were brought and the suit land (swamp/wetland) was filled without the involvement or Public participation by the Mwembelegeza community Residents to approve or disapprove of the project being undertaken in the suit land which is a protected water body by the Constitution of Kenya 2010. Upon the 1st Respondent filling the swamp with stones, they erected a perimeter stoned wall with some parts going beyond four (4) meters high around the swamp and constructed an electric fence on top of the perimeter wall in contravention of the National Construction Authority Act (NCA) since the NCA did not register neither authorized the construction of the wall neither the Construction of the electric fence. Attached to the supporting affidavit to this Petition and marked as "MCP - 26" were the photographs of the perimeter wall, electric fence and the single story building on suit land.
20. The 1st Respondent extended their greed for public land by encroaching and extending the perimeter wall and electric fence on a portion of another Public utility land no.1474 earmarked as OPEN SPACE opposite the Suit land. This public land no.1474 was presently subject to the petitioner's investigations because the remaining part of the open space had already been alienated by a private developer and a permanent structure erected on it.
21. The 1st Respondent embarked on carbo works to fill the suit property and plastering of the walled perimeter fence. The 1st Respondent built a single story building on the suit land and also

built steel structure shades on the suit land without approvals from relevant statutory bodies. Any building must be registered and authorized by the National Construction Authority, the 1st Respondent built, constructed and currently using the suit land as a parking yard for trucks.

22. There was a manned security gate at the entrance into the walled suit land and no one was allowed access into it. What went on inside the wall fenced suit land was shrouded in secrecy and mystery as much as it was portrayed as a parking yard for trucks. This possessed an environmental threat to the community because of lack of information on the activities that went on inside the walled suit land. Sometimes August 2019, the Petitioner who was a private investigator and a Resident of Mwembelegeza community, on his own capacity and on behalf of the community, voluntarily embarked on investigative research to understand any legal and non-legal procedures used in acquiring and developing the suit land and also to understand who authorized what and who signed what that eventually led to the illegal alienation of the suit land since Swamps were protected public land.

23. After conducting thorough investigations and research spanning almost two years, the Petitioner and Mwembelegeza community Residents made a decision to seek for answers from relevant government entities whose operations and core mandate touches directly on the activities carried out on the suit land. It was upon the knowledge and information that the Petitioner got from his

research findings that letters were written to different statutory entities seeking answers from them.

24. On 9th March, 2021, the Petitioner applied for a certified copy of Registry Index Map (RIM) for the Land number 1475 Mwembelegeza scheme from the Regional Surveyor, Coast region with its offices at Mombasa. Upon a payment of the sum amount of Kenya Shillings five hundred (Kshs. 500/=) only, a stamped, signed and certified copy of the Map was availed to the Petitioner dated 9th March 2021. The RIM map was attached to the supporting affidavit to this Petition and Marked as "MCP - 1". The RIM map showed a clear demarcation and boundaries of the swamp with the word SWAMP and No.1475 printed in BOLD letters. This meant that the suit land was and still remained a swamp and Constitutionally a Public land under the provision of Article 62 (1), (g) (i) and Article 62 (3) of the Constitution of Kenya, 2010.
25. The Registry Index Map (RIM) stated in paragraph 21 was a proof that the suit land was and still remained a swamp. Should there had been any changes on the status and boundary of the suit land, it was the responsibility of the owner of the land (the suit land) in conjunction with the Director of Survey of Kenya to initiate those changes and once those changes were initiated, the land was re-surveyed and the new plan effected in the Registry Index Map (RIM). This was never done.
26. On 10th March, 2021, the Petitioner wrote letters to the following statutory entities Registrar, Ministry of lands Mombasa County,

NEMA County Director Mombasa, National Land Commission Mombasa County Co - Ordinator and Mombasa County Chief Officer to furnish the Residents with more information on the project being undertaken on the suit land. On 11th March, 2021, the Petitioner wrote a letter to the NCA requesting the Authority to furnish the Residents with certified copies of authorization license and registration of project being undertaken on suit land. The letter was stamped received by the Authority. The letter was attached to the supporting affidavit to this Petition and marked as "MCP - 6".

27. On 12th March 2021, the Petitioner wrote a letter to the Director/ County Co - Ordinator/Manager of Water Resources Authority (WRA) whose offices are based in Changamwe, Mombasa County requesting the Authority to furnish the community with certified copies of relevant approvals and licenses authorizing the nature of project being undertaken on suit land. The letter was stamped received by the Authority. The letter was attached to the supporting affidavit to this Petition and Marked as "MCP - 7". On 19th March, 2021, the Petitioner wrote a letter to the 1st Respondent whose head office is based in Mtopanga, Kisauni Mombasa County. They blatantly refused to receive the letter and instead directed the Petitioner to go and get information from other relevant statutory bodies. According to them, they had all necessary documents including ownership title to the suit land.

The letter was attached to the supporting affidavit to this Petition and Marked as “MCP - 8” annexed hereto.

28. On 17th March, 2021, the Petitioner received the 1st response letter from National Construction Authority (NCA) with Ref. No. NCA11/301a/VOL 3/ (67). In this letter, the NCA acknowledged that the project undertaken on the suit land had not been registered by the Authority. The letter was attached to the supporting affidavit to this Petition and Marked as “MCP - 9”. On 30th March, 2021, the NCA responded by writing a second letter Ref. No. NCA11/301a/VOL 3(67(2)). The letter was attached to the supporting affidavit to the Petition and Marked as “MCP - 10”. In this letter, the NCA gave details of purported approvals by relevant statutory bodies approving the project being undertaken on the suit land. According to the letter, the 1st Respondent responded to NCA’s request for documents by providing the following approvals and documents (Copies of which were not provided for by NCA to the Petitioner).

- (i) NEMA approvals dated 1st December 2016.
- (ii) An improvement order from NEMA Ref. No. NEMA/PR/MSA/5/2/3521 dated 17th February 2017 suspending preciously issued license No. 0038884.
- (iii) A letter of no objection to approval of the development from Water Resources Management Authority (WRMA) Ref. No. WRMA/CA/CM/3/14/1(77) dated 30th November 2016.

- (iv) Letter from Mombasa County Ref. P/2016/624/1 dated 31st January 2017 lifting previously issued enforcement notice PPA7 dated 20th January 2016 stopping all development on the land.
- (v) County approved drainage layout drawing dated 31st January 2017.
- (vi) Change of user approval from the County Government of Mombasa from RESIDENTIAL to MIXED USE (RESIDENTIAL-CUM-COMMERCIAL). Ref.No.TP.6/CU/36/2017 dated 16th May 2017.
- (vii) Planning brief for the proposed Change of User prepared by one, Mr. CYRUS MBISI, a registered Physical Planner (RPP0216) dated 3rd May 2017.
- (viii) Public Notice published on Change of User placed on one of the local dailies "**The Daily Nation**" newspaper edition of 27th April 2017.
- (ix) County approved Boundary wall/location plan dated 6th January 2017

29. On 25th March, 2021, the Petitioner received a response letter from the Water Resources Authority (WRA) with Ref. No. WRA/ACA/CA/HRD/1/5/4(98). In the letter which was attached to the supporting affidavit to this Petition and Marked as "MCP - 11", the Authority acknowledged receiving a request from the 1st Respondent to fill up the suit land and use it for parking. According to the letter, the application by the 1st Respondent was received on 20th November 2018 and was subsequently approved on the basis of the following documents purportedly provided by 1st Respondent.

- (i) Copy of identification.
- (ii) Copy of land ownership (title deed) for proof of ownership.
- (iii) Environmental Impact Assessment (EIA) study report from NEMA that informs the anticipated negative impact and proposed mitigation measures, this includes public participation.
- (iv) Hydrological assessment report which informed about the characteristics of water in the area.

30. On the 1st April, 2021, the petitioner received a response letter from NEMA Mombasa Office Ref. No. NEMA/CDE/MSA/4/9/VOL.1. The letter was attached to the supporting affidavit to this Petition and Marked as “MCP - 12”. In the letter, NEMA categorically stated that it had NOT received any EIA project report for proposed development on Land no.1475 Mwembelegeza Scheme, which was contradicting the statements made by the National Construction Authority and Water Resources Authority calling into question whether those Authorities did due diligence on documents the 1st Respondent purportedly presented to them before approving and authorizing the project on suit land.

31. After being denied requested information from the office of the Land Registrar of the County of Mombasa, the Petitioner sought the help of the Commission on Administrative Justice (Office of the Ombudsman). The said office of the Ombudsman wrote a letter dated 16th April 2021; the letter was attached to the Supporting Affidavit to the petition and marked as “MCP - 24” and through

them, the Petitioner was able to get a response letter attached to the Supporting Affidavit of the Petition and marked as “MCP - 25”. The letter from office of ombudsman and Certificate of lease were also attached to Supporting Affidavit to the Petition and Marked as “MCP - 13” and “MCP - 14” respectively. It had a certified copy of purported “land ownership” of land no. 1475 Mwembelegeza scheme in form of a Certificate of Lease for term of Ninety Nine (99) years. The lease was from 1st February 2018. The Certificate of Lease was issued on 5th September 2018 to the 1st Respondent. From the said lease it was indicative to have been leased the suit land even before the Certificate of Lease was issued. This was fraudulent. The size of swamp/land leased was 2.56HA (hectares) as per the LEASE CERTIFICATE. This size of land in Mwembelegeza scheme at the location it was, had a present market value of not less than two a sum of Kenya Shillings Hundred and Fifty Million (Kshs. 250,000,000/-).

32. Even after writing to the Mombasa County Co - ordinator of the NLC on 10th March 2021 and seeking the help of the Office of the Ombudsman to get the NLC to respond to his concerns and queries, it took over three months for the NLC to respond to him. The NLC being the administrator of Public land ignored his pleas until the office of Ombudsman came in to the matter. The letter of the ombudsman to NLC was attached to the supporting affidavit to this Petition and Marked as “MCP - 15”. On 20th March, 2021, the Petitioner wrote a letter of enquiry addressed to the County Land

Adjudication and Settlement Officer (CLASO) requesting to know if a survey or Change of User had been done on the suit land. Whether there had been any proof of the same from Regional Surveyor showing any Map Adjustments. Upon follow up with the County adjudication and settlement officer in his office at the Bima Towers offices, he showed the Petitioner the file for the suit land. Within the file there was no proof of any Change of User or any information seeking the Change of User. The officer assured the Petitioner that as far as his office was concerned, the suit land still was a Public land and a Swamp. There had never been any Change of User. Upon seeking a written and signed letter from the officer to this effect, he refused citing fear for his life and that he could only write an official letter if an entity like Ethics and Anti - Corruption Commission (EACC) requested for the said information from him.

33. Even after writing to the Mombasa County Chief Officer, Department of Lands, Planning and Housing, almost seven (7) months down the line, the department was yet to respond to the Petitioner's concerns. The Petitioner had visited their office several times and on one occasion being accompanied by Mr. Fred Mutunga, a resident of Mwembelegeza Scheme. At none of these occasions was any substantive information provided by the Department.
34. To get further information, on 7th May 2021, the Petitioner wrote an E-Mail via the Petitioner personal e-mail address;

azoragen@gmail.com to one M/s. Wangui Kabala of the NCA, headquarters, Nairobi enquiring more about whether it's within their mandate to register and authorize Construction of perimeter wall and electric fence. Attached to the supporting affidavit to this Petition was the letter Marked as "MCP -17". On 17th May, 2021, M/s. Kabala responded to the Petitioner's email enquiry and confirmed that NCA covered all construction activities, including a perimeter wall and electric fence which must be registered before any Construction activities was commenced. Attached to the supporting Affidavit to the Petition were response letters Marked as "MCP - 18" and "MCP - 19"..

35. Following the expiry of the Twenty-One (21) days given by the office of the Ombudsman to the National Land Commission, on 19th May 2021 the Petitioner wrote an E-Mail to the Ombudsman asking them of any response from NLC. The Email was attached to the supporting affidavit to the Petition and Marked as "MCP - 20". The Office of the Ombudsman responded to the petitioner's enquiry by writing a 1st reminder E-mail to the National Land Commission Mombasa County Coordinator. The letter was attached to supporting affidavit to the Petition and Marked as "MCP - 21".
36. NLC later responded after a follow up by the Office of the Ombudsman. The NLC response letter to the Petitioner via the office of the Ombudsman Ref. No. NLC/CC/MSA/VOL.II/71 and their letter to the acting CEO NLC informing her office of the Petitioner's complaints with Ref. No. NLC/CC/MSA/VOL.II/70 were both

attached to the supporting Affidavit to the Petition and marked as “MCP - 22” and “MCP - 23” respectively. The Petitioner took photographic images of the perimeter walled fence including the electric fence and the single story building inside the suit land at the main entrance gate. The images were attached to the supporting Affidavit to the Petition and marked as “MCP - 26”.

**B. Statutory Provisions in respect to
Swamp/Wetland/Riparian land in Kenya.**

37. The definition of a Wetland under the Water Resource Management Rules of 2006 - Rule 52 (1):- **“Any portion of land in excess of one hectare which is naturally subject to seasonal or permanent flooding and has ecological characteristics of a SWAMP or Marsh shall be considered to be a WETLAND under these rules”.**
38. Under Chapter five of the Constitution of Kenya, 2010.

On the Land

- a. Article 60(1) States: **“Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable and in accordance with the following principles: (b). security of land rights; (c) sustainable and productive management of land resources; (d) transparent and cost effective administration of land; (e) sound conservation and protection of ecologically sensitive areas.**
- b. Article 62 (1), defines PUBLIC LAND is: (g) Government forests other than forests to which Article 63 (2) (d)(i) applies, government game reserves, WATER CATCHMENT AREAS, National parks, government animal sanctuary, and specially protected areas. (i) All rivers, lakes and other WATER BODIES as defined by an Act of parliament.
- c. Article 62 (3) Public land classified under clause (1) (f) to (m) shall vest in and be held by the NATIONAL GOVERNMENT in

trust for the people of Kenya and shall be administered on their behalf by the National Land Commission.

On the Environment

- a) Article 42 (Right to a clean and healthy environment). (a)...to have Environment protected for the benefit of present and future generations through legislative and other measures particularly those contemplated in Article 69 and (b) to have obligations relating to the Environment fulfilled under Article 70.
- b) Article 69 (1)(a) sustainable exploitation, utilization, management and conservation of Environment. (d) PUBLIC PARTICIPATION in the management, protection and conservation of the Environment. (e) Protect genetic resources and biological diversity. (f) Establish systems of Environmental Impact Assessment (EIA), Environment Audit and monitoring of the Environment. (2) Cooperation with state organs and other persons to protect and conserve the environment....
- c) Article 70 (1) Rights to legal redress on violations of Environmental rights. (2)(a)(b)(c) Response by court of law on violations of Environmental rights.
- d) Under the NEMA ACT PART V (Protection and conservation of the Environment). Section 42(1) No person shall, without the prior written approval of the Director-General given after an environmental impact assessment, in relation to a river, lake

or wetland in Kenya, carry out any of the following activities-

- (a) erect, reconstruct, place, alter, extend, remove or demolish any structure or part of any structure in, or under the river, lake or wetland;
- (b) excavate, drill, tunnel or disturb the river, lake or wetland;
- (c) introduce any animal, whether alien or indigenous, dead or alive, in any river, lake or wetland;
- (d) introduce or plant any part of a plant specimen, whether alien or indigenous, dead or alive, in any river, lake or wetland;
- (e) deposit any substance in a lake, river or wetland or in, on or under its bed, if that substance would or is likely to have adverse environmental effects on the river, lake or wetland;
- (f) direct or block any river, lake or WETLAND from its natural and normal course; or
- (g) drain any lake, river or wetland.

5) Any person who contravenes or fails to comply with any orders, regulations or standards issued under this section shall be guilty of an offence.

- e) Under the NEMA ACT PART VI (Environmental Impact Assessment) EIA. Section 58 (Application for EIA License),
- (1) Notwithstanding any approval, permit or license granted under this Act or any other law in force in Kenya, any person, being a proponent of a project, shall before for an financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the Second

Schedule to this Act, submit a project report to the Authority, in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.

(2) The proponent of a project shall undertake or cause to be undertaken at his own expense an environmental impact assessment study and prepare a report thereof where the Authority, being satisfied, after studying the project report submitted under subsection (1), that the intended project may or is likely to have or will have a significant impact on the environment, so directs.

(3) The environmental impact assessment study report prepare under this subsection shall be submitted to the Authority in the prescribed form, giving the prescribed information and shall be accompanied by the prescribed fee.

(4) The Minister may, on the advice of the Authority given after consultation with the relevant lead agencies, amend the Second Schedule to this Act by notice in the Gazette.

(5) Environmental impact assessment studies and reports required under this Act shall be conducted or prepared respectively by individual experts or a firm of experts authorized in that behalf by the Authority. The Authority shall maintain a register of all individual experts or firms of all experts duly authorized by it to conduct or prepare environmental impact assessment studies and reports respectively. The register shall be a public document and

may be inspected at reasonable hours by any person on the payment of a prescribed fee.

(6) The Director-General may, in consultation with the Standards Enforcement and Review Committee, approve any application by an expert wishing to be authorized to undertake environmental impact assessment. Such application shall be made in the prescribed manner and accompanied by any fees that may be required.

(7) Environmental impact assessment shall be conducted in accordance with the environmental impact assessment regulations, guidelines and procedures issued under this Act.

(8) The Director-General shall respond to the applications for environmental impact assessment license within three months.

Section 59 (Publication of EIA report), Section 69 (Comments on EIA Report by lead agencies), Section 62 (Further EIA), Section 63 (Environmental Impact License)

f) Under the NEMA ACT PART IX (Environmental restoration orders, Environmental conservation orders and Environmental assessments) Sections 108, 110, 111, 112, 113, 114, 115, 116.

g) Under the NEMA ACT PART XIII (Environmental Offences) Section 138 Offences relating to Environmental Impact Assessment (EIA).

Under Water Act 2006.

- a) Under the WATER ACT - Section 22 provides for protection of water catchment areas.
- b) WATER ACT - Section 135 Provides for authentication of documents
- c) WATER ACT Section 86 (Procedure and requirements for obtaining license and it takes 6 months before the license is approved by Water Management Board, Section 87 (Application of license subject to public participation), Section 139 provides for public participation before any project is undertaken in any land.
- d) WATER ACT - Section 143 Obstruction to a water course.
- e) Water Resources Management rules; Seventh Schedule (Rule 118,120,123) Provides for Activities Proscribed on Riparian /Wetlands/Swamp land which are the following: 1(b) Clearing of indigenous trees or Vegetation. (b) Building of Permanent structures. (g) or any other activity that in the opinion of the Authority and other relevant stakeholders may degrade the water resource.
- f) WATER RESOURCES MANAGEMENT RULES PART VII (Conditions of Authorization). Rule 97 (Compliance with Environmental Management and Coordination Act.) Environmental Impact Assessment (EIA) project report must be done before Water Resources Management Authority authorizes and give license to any project on a WETLAND/SWAMP.

g) WATER RESOURCES MANAGEMENT RULES PART IX (Conservation of RIPARIAN and WATER CATCHMENT areas.) Rule 116 (Determination of the riparian land), Rule 117 (Demarcation of riparian land), Rule 118 (Proscribed activities on riparian land).

h) WATER RESOURCES MANAGEMENT RULES PART I Rule 7 (Public Participation), PART II Rule 16 (Types of activities that require approval by Authority), Rule 28 (Public Notification of permit application).

National Land Commission (NLC) Act

a) Article 67 of the 2010 Constitution of Kenya (2) Functions of NLC. (a) to manage public land on behalf of National and County government. (e) to initiate investigations on its own initiative or on a complaint, in respect to present or historical land injustices and recommend appropriate redress. (h) to monitor and have oversight responsibilities over land use plans throughout the country.

b) NLC ACT PART II (Functions and Powers). (2) In addition to the functions set out in subsection (1), the Commission shall, in accordance with the provision of Article 67(3) of the Constitution-(a) on behalf of, and with the consent of the national and county governments, alienate public land; (b) monitor the registration of all rights and interests in land; (c) ensure that public land under the management of the designated state agencies is sustainably managed for the

intended purposes;(d)may develop and maintain an effective land information system for the management of public land;

National Construction Authority (NCA) Act

- a) Section 5(1) (a). to oversee the Construction industry and coordinate it's development.(g) promote and ensure quality assurance in the Construction industry.
- b) No building that includes a perimeter wall or an Electric Fence can be constructed without being registered and authorized by the NCA.
- c) An outside board must be placed right at the construction site to show the following as per NCA regulations: NEMA approval, Name of contractor, County government approval Number, Name of Architectural Engineer, NCA Authorization Number, Name of Client among other.

The County Government Act, Cap. 265A

- a) Article 176 of the Constitution of Kenya 2010 created county governments.
- b) County government Act Section 6(6); in exercising its powers or performing any of its functions a county government shall ensure efficiency, effectiveness and participation of the people.

- c) County Government Act - Section 87. (Principles of citizen participation in counties) Citizen participation in county governments shall be based upon the following principles-
- (i) timely access to information, data, documents, and other information relevant or related to policy formulation and implementation;
 - (ii) reasonable access to the process of formulating and implementing policies, laws, and regulations, including the approval of development proposals, projects and budgets, the granting of permits and the establishment of specific performance standards;
 - (iii) protection and promotion of the interest and rights of minorities, marginalized groups and communities and their access to relevant information
 - (iv) legal standing to interested or affected persons, organizations, and where pertinent, communities, to appeal from or, review decisions, or redress grievances, with particular emphasis on persons and traditionally marginalized communities, including women, the youth, and disadvantaged communities; among others.
- d) County Government Act - Section 88 - Citizen rights to petition and challenge.
- e) County Government Act - Section 91 - Establishment of modalities and platforms for Citizen participation.

- f) County Government Act - PART IX CIVIC EDUCATION. Section 96 Access to information.
- g) County government Act PART XI COUNTY PLANNING. Section 115 on Public Participation in county planning.

The Survey Act and Regulations

- a) Section 24:Boundary marks to shown on a plan
- b) Section 27:Duty of grantee to ascertain that survey marks shown on plan are in place and procedure of grantees unable to find survey marks.
- c) Section 29:Penalty for tampering with survey marks
- d) Section 30: All survey plans and records to be deposited with Director and to become property of Government
- e) Section 32:Authentication of plans.
- f) Section:39:Authenticated Plans to be sufficient compliabce with law requiring notices of boundaries e.t.c
- g) Section 41:Provisions regarding authenticated plans.
 - 1. A plan shall be deemed to be authenticated and identified for the purposes of Sections 39 and 40 if-(a) it is authenticated, by the signature of the Director or of a Government surveyor authorized in writing by the Director in that behalf and by the signature of the authority by whom the notice is given, to be the land or area to which the notice refers; and (b) it is identified by a reference number. (2) Every such authenticated and identified plan shall be deposited in the survey office.

h) Section 43 Proof of Plans.

(1) All plans authenticated under this Act, purporting to be signed by the Director, or by a Government surveyor authorized by the Director in that behalf, or to be sealed with the seal of the Survey of Kenya, shall be presumed, until the contrary is proved, to have been signed by the Director, said, or or by a Government surveyor authorized as aforesaid, to have been sealed with the seal of the Survey of Kenya, as the case may be.(2)The provisions of subsection (1) shall extend to plans approved before the commencement of this Act under section 37 of the Survey Ordinance, 1951 (No.22 of 1951)(now repealed).

The Physical Planning Act (PLUPA)

- a) Section 24 - Preparation of Local Physical development plan
- b) Section 25 (a)(b) - Content of local Physical development plan
- c) Section 29 - Powers of Local Authority

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

Section 30 Development Permission (4) Notwithstanding the provisions of subsection (2)-(a) the local authority concerned shall require the developer to restore the land on which such development has taken place to its original condition within a period of not more than ninety days;

(b) if on the expiry of the ninety days' notice given to the developer such restoration has not been effected, the concerned local authority shall restore the site to its original condition and recover the cost incurred thereto from the developer.

d) Section 32 - Development applications to be referred to the Director.(1),(2),(3)(a)(b)have regard to the health, amenities and conveniences of the community generally and to the proper planning and density of development and land use in the area;

e) Section 52 Publication of Notice in newspapers.

Every notice published in the Gazette under any of the provisions of this Act, except the notices published under sections 49 and 50, shall be simultaneously published in at least two local dailies, one in English and one in Kiswahili and be displayed at the offices of the Chiefs.

Second schedule (Matters which may be dealt with in Local Physical development plan).Part 6Conservation of the natural beauty of the area, including lakes and other inland waters, banks of rivers, foreshore of harbors, and other parts of the sea, hill slopes and summits and valleys.

The Land Registration Act, No. 3 of 2012

a) Section 5 Conflict with other laws

Except as otherwise provided in this Act, no other written law, practice or procedure relating to land shall apply to land registered or deemed to be registered under this Act so far as it is inconsistent with this Act.

- b) Section 7 - the Land registry.
- c) Section 9 - the Maintenance of documents
 - (2) the register shall contain the following particulars: (c) names and addresses of the previous proprietors;
- d) Section 10 - Public access to the register
- e) Section 14 - General powers of land registrars
- f) Section 15 - Cadastral Map
 - 1) The office or authority responsible for the survey of land shall prepare and thereafter maintain a map or series of maps, to be known as the cadastral map, for every registration unit. (2) The parcel boundaries on such maps shall be geo-referenced and surveyed to such standards as to ensure compatibility with other documents required under this Act or any other law.
- g) Section 16 - Power to alter boundary lines and to prepare new editions
- h) Section 17 - Approval of further surveys
 - i. Further surveys may be made for any purpose connected with this Act, but such surveys shall be used to amend the cadastral map only if it is approved by the office or authority responsible for the survey of and. (2) This section

shall not preclude the Registrar from keeping in the registry records of cadastral information and maps approved by the office or authority responsible for survey.(3) The office or authority responsible for the survey of land shall submit to the Commission a copy of the cadastral maps relating to public land and the Commission shall be a depository of the maps.

- i) Section 18 - on boundaries.
 - ii. The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.
- j) Section 19 - On fixed boundaries.
- k) Section 21 - Interference with boundary features
- l) Section 26 - Certificate of title to be held as conclusive evidence of proprietorship.

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

proved to be a party; or (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

m) Section 28 - on Overriding interests

Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register-

(c) rights of way, rights of water and profits subsisting at the time of first registration under this Act; (d) natural rights of light, air, water and support;

n) Section 79 - on rectification of registrar

o) Section 80 - on rectification by order of court

p) Section 103 - Offences (Relating to land registration)

C. Constitutional breach and violations of law by the Respondents

• The 1st Respondent

39. The 1st Respondent submitted purported NEMA approval dated 1st December 2016 for Construction of a perimeter wall to secure the suit land from squatter invasion. The question is which ownership document either in form of a title deed or allotment letter or lease certificate did the 1st Respondent use to get NEMA Authorization? This is simply because the purported Certificate of lease attached to the supporting affidavit to this Petition and Marked as “MCP - 14” of suit land was issued on 5th September 2018.

40. NEMA also responded to the petitioner as attached to the supporting affidavit to this Petition and Marked as “MCP - 12” and stated categorically that they did not receive any EIA Project Report for proposed development on the suit land. It was important to note that before any Environmental Impact Assessment (EIA) is done, the applicant MUST show proof of OWNERSHIP of the land he or she plans to undertake a project on. So the question is; which ownership proof Document did the 1st Respondent use to process the purported NEMA (EIA) approvals?
41. The 1st Respondent submitted an improvement order purported to be from NEMA dated 17th February 2017 suspending previously issued license. The same question still applies, which ownership document of the suit land did the 1st Respondent use to secure license from 5th Respondent (NEMA) when NEMA has responded to the petitioner denying ever receiving any proposal of project for suit land 1475 Mwembelegeza scheme as shown in the annexed letter Marked as “MCP - 12”.
42. The 1st Respondent submitted a letter of no objection to approval of development from the 3rd Respondent herein Water Resources Management Authority to National Construction Authority (NCA). The letter of no objection was dated 30th November 2016 with Ref. No. WRMA/CA/CM/3/14/1(77) and attached to the supporting affidavit to this Petition and Marked as “MCP - 10”. How did the 3rd Respondent (Water Resources Management Authority) approved the development without proof of ownership of suit land in

contravention of Water Act and Water Resources Management Rule 2006 PART VII (Conditions of Authentication) of documents. It means the 1st Respondent applied for approval to the 3rd Respondent - (Water Resources Management Authority) before even they could "OWN" the suit land. The dates of 3rd Respondent approval are on 30th November 2016 while the Certificate of Lease was issued on 5th September 2018 as shown attached to the supporting affidavit to the Petition and Marked as "MCP - 14".

43. As per the response letter to the petitioner from National Construction Authority, the 1st Respondent submitted a letter from the 2nd Respondent herein County Government, Mombasa dated 31st January 2017 to the NCA lifting a previously issued enforcement Notice PPA7 dated 20th January 2016 stopping all development on the land. It shows the 1st Respondent was already undertaking construction without the 2nd Respondent's approvals in contravention of the County Government Act (Planning Regulations).
44. As per the response letter to the Petitioner from National Construction Authority, the 1st Respondent submitted to the NCA a letter from the 2nd Respondent herein County Government of Mombasa of approval of drainage layout drawing dated 31st January, 2017. The same question still applies; which ownership document did the 1st Respondent submit to the 2nd Respondent before approval by the 2nd Respondent of drainage layout drawing.

45. As per the response letter to the Petitioner from National Construction Authority, the 1st Respondent submitted a letter upon enquiry by the NCA a change of use approval from the 2nd Respondent herein referred to as the County Government of Mombasa. The letter showed the suit land which was a swamp was a Residential to mixed use (Residential - cum - commercial) Ref: NO.TP.6/CU/36/2017 dated 16th May 2017. The petitioner reject this purported change of use because of the following violations of Law: -

- (i) Pursuant to Article 62(3), Water bodies which includes; Water Catchment Areas which are Swamps/Wetlands among others are held by the National Government in trust for the people of Kenya. Suit land No. 1475 Mwembelegeza scheme is a SWAMP pursuant to the provision of Article 62(1)(g)(i). The proof is found in the latest annexed RIM Map from the Regional Surveyor dated 9th March 2021 and Marked as "MCP - 1". RIM Map as per Survey Act under the provision of Section 39: Authenticated plans to be sufficient COMPLIANCE with law requiring notices of boundaries etc. and Section 43: Proof of plans The 2nd Respondent herein referred to as County Government of Mombasa has Constitutional rights only for public land under Article 62 (2) of the 2010 Constitution of Kenya which land no. 1475 Mwembelegeza scheme does not fall under. It was an extreme violation of the Constitution and Law for the 2nd Respondent herein referred to as County Government of Mombasa to usurp powers that it doesn't have under the Constitution to effect change of use of a swamp to a residential cum commercial use. This in the view of the petitioner is in violation and contravention of Chapter Six of the 2010 Constitution of Kenya on LEADERSHIP AND INTEGRITY: Leadership and Integrity Act under the provision of Sections 3, 7, 11, 13, 16, 29 and 30, Public Officer Ethics Act Sections 7, 8, 9, 10, 12 and 19.

- (ii) There was no citizen participation in form of Public participation as provided for under the 2010 Constitution and County government Act PART VIII Citizen Participation, Section 87,88, 91 and PART XI County planning, Section 115 Public Participation in county planning. Citizens of a county and especially the affected communities MUST be involved in any project being undertaken by any entity especially if the project involves alienation of public land. There was no public participation in regard to change of use of the suit land. The suit land was and still remains a Public land.
- (iii) There has never been any boundary alterations through naming of the suit land from a SWAMP to residential by the Survey of Kenya under the Survey Act. The survey Map; Registry Index Map (RIM) annexed to this Petition still shows the suit land is a SWAMP (in bold) and Marked no. 1475. The Survey Act Section 27: Duty of grantee to
- (iv) ascertain that survey marks shown on plan are in place and procedure of grantees unable to find survey marks. Survey Act Section 30: All Survey plans and records to be deposited with Director and to become property of Government. The 1st Respondent never bothered to pursue rectification and adjustments on the survey map because in my view that action could have violated the law.
- (v) Purported approvals by relevant entities and ultimate development on the suit land began in as early as 20th January 2016 almost one and half years before the purported fraudulent change of use and more than two and half years before the purported lease certificate is issued. How did 1st Respondent began applying for approvals from relevant statutory entities before change of use was effected and lease certificate given? How did relevant statutory bodies approve of the project before proof of ownership?

(vi) Physical plant Act Section 52 Publication of Notice in Newspapers. Regulations on Change of use requires publication on at least two (2) newspapers of national circulation published in both English and Kiswahili languages. An outside billboard be placed on the land in an open space that the public can see, read, and understand and make recommendations where necessary. This gives the Public an opportunity to make an informed decision on the change of use. To either reject or accept. This was never done. This board MUST have, written in BOLD; the purpose of change of use, the nature of project informing the change of use, remedial measures to mitigate any negative impact of the project on the community, name of the project developer among others. This was NOT done. All the community of Mwembelegeza saw was a hostile takeover, and erection of perimeter wall around the suit land under armed Protection.

(vii) Riparian lands (Swamps/Wetlands) are protected water bodies Pursuant to Article 62(1)(g)(i). Protected area means protected. No intrusion unless by an Act of parliament pursuant to Article 62(1)(i). In the petitioner view, there has never been any Act of Parliament that has changed the protection status of SWAMPS. All Acts of Parliament of the Republic of Kenya touching on SWAMPS as presently enacted, protects SWAMPS. No Act of Parliament presently enacted in the Republic of Kenya has given any constitutional leeway or provision to interfere with or alter or erect permanent structures on any Water body.

(viii) In the purported change of use, the National Lands Commission which manages and administers public land was never involved and was kept in the dark as the activities on the suit land were being carried out by the 1st Respondent

46. As per the response letter from NCA to the petitioner, the 1st Respondent submitted a copy/document showing Public Notice on change of use placed on the Daily Nation dated 27th April 2017.

Physical Planning to Section 52 Publication of Notice in Newspapers. The law/regulations on legal change of use requires a public notice publication on Change of User on two (2) Newspapers of National circulation published on both English and Kiswahili. The 1st Respondent went further to legalize its activities by placing a purported notice of change of use in one (1) newspaper. Even if the change of use was legal, he saw a breach by not placing the notice in two (2) newspapers of National circulation as per the law and regulations.

47. As per the response letter submitted by NCA to the petitioner, the 1st Respondent submitted a letter of approval from the 2nd Respondent herein referred to as County Government of Mombasa approving boundary wall/Location plan dated 6th January 2017. This letter was submitted to the 6th Respondent herein referred to as National Construction Authority upon their request. The letter shows the 2nd Respondent approved the building of a wall before the purported change of use and ultimately proof of ownership. It's also important to note that the 1st Respondent in its pursuit for more public land, also fenced a portion of another public land No. 1474 adjacent/opposite the suit land which was marked Open space and also blocked a feeder road connecting some parts of estates/residentials within Mwembelegeza community. Part of the perimeter wall on the suit land cover a portion of the said open space and a feeder/access road and soon the petitioner would seek a response from Kenya Urban Roads Authority or relevant

roads body to respond to this matter separate from this suit. It's also important to note that the said public land No. 1474 marked open space which is adjacent/opposite the suit land is already alienated by a private developer and a permanent structure built on it. The activities already carried out on public land no.1474 was still under the investigations of Mr. Ainea Ragen and soon this would be raised up with relevant government bodies and the courts if need be.

48. On the matter of the suit land, the question which must be asked is; which one should come first? Change of use/Ownership first then building of the wall or Building of the wall first then change of use? In this case the 1st Respondent wants the Petitioner to believe that if any developer wants to develop any land, he or she should just walk into the offices of the County Government of Mombasa and get approvals without showing proof of ownership of the land in form of a title deed or allotment letter or lease? Because this is exactly what the 1st Respondent did in this matter.
49. If the 1st Respondent legally owned the suit land and that all documents it provided to the 6th Respondent herein referred to as NCA were authentic, then why had there never been Map adjustments of the suit land by the Director of Survey of Kenya? Assuming the 1st Respondent engaged the services of a registered private surveyor as per the Survey Act, why has it taken over four (4) years without any map adjustments and or rectification and re-naming of the survey marks and plans as per Survey Act Section

24: Boundary marks to be shown on plan, and Section 27: Duty of grantee to ascertain that survey marks shown on plan are in place and procedure of grantees unable to find survey marks and Land registration Act Sections 7, 9, 15, 16, 17, 18, 79, 80 and 103. The suit land has a market value of not less than Kenya Shillings Two hundred and Fifty Million (250,000,000/-). Why had the 1st Respondent overlooked crucial provisions of laws in the survey Act, Land Registration Act and Physical Planning Act when actually the value of the suit land runs into Hundreds of Millions of Kenya shillings?

50. The 1st Respondent bore a lot of responsibility in proving how it acquired the documents it submitted to NCA and ultimate acquisition of the suit land. As aggrieved person and community whose rights had been violated, the Petitioner recommended that separate from this suit, Anwarali and Brothers Limited herein the 1st Respondent be investigated further pursuant to Ethics and Anti-Corruption Commission Act, Proceeds of Crime and Anti-Money Laundering Act and other relevant laws of Kenya and appropriate legal action separate from this suit taken against individuals culpable.
51. The 2nd Respondent acted in disregard for due process of the law and abusing its owner by aiding illegal alienation of the suit land. The provision of Article 62 (1)(g). Does not confer any powers and or authority to the 2nd Respondent over public land under this Article which the suit land falls under. The 2nd Respondent only has

powers and hold in trust for the people living in the county, public land under Article 62(2). It's therefore an abuse and an overreach in their Constitutional mandate.

52. As per the letter submitted to NCA by the 1st Respondent, the 2nd Respondent gave different approvals for development on suit land even without proof of ownership of the suit land and change of use. Approvals by the 2nd Respondent began as early as 31st January 2017 while the purported Change of User was approved on 16th May 2017 and the purported Certificate of Lease issued in 5th September 2018. The question is in whose name did the 2nd Respondent process the approvals for development on suit land? Another question is which one of these comes first? Is it the approval of developments first or proof of ownership documents before approval of development? This act by the 2nd Respondent was and still remains a violation and breach of County government planning regulations.

- **The 2nd Respondent**

53. The 2nd Respondent acted as the Authority to effect change of use on a public land that did not fall under its Constitutional mandate pursuant to Article 62(g)(i) and Article 62(3). The suit land was held in trust by the National Government of Kenya for the people of Kenya and administered on their behalf by National Land Commission (NLC). It was the National Government and not County Government of Mombasa, in conjunction with the 4th Respondent herein referred to as National Land Commission

through a Citizen participation to determine change of use of any waterbody to a residential land, assuming the constitution supported that action, but the Constitution and all relevant laws did not support such action. The actions of the County Government of Mombasa in this suit remained extreme violation of the Constitution and law and the 2nd Respondent must be held accountable for its actions.

54. The 2nd Respondent did not involve the input of the 4th Respondent herein National Lands Commission who administered public land pursuant to Article 62 (3). As an analogy; “It's like a son (County Government of Mombasa) breaking into his father's (National Government) locked house using fake keys (fraudulent documents) when the security (National Lands Commission) was asleep and stealing all property (suit land) inside the house which should help all members of that great household and great grandchildren (Mwembelegeza community residents) including the thieving son and sells it to one of the many corrupt great grandchildren who uses the property against the wishes of other laws abiding great grandchildren (Mwembelegeza community residents)” the 2nd Respondent acted with immunity and in violation of the law and by taking actions that the constitution has not mandated it to do.
55. As per the response letter submitted to the petitioner by NCA, the 2nd Respondent on 6th January 2017 approved the Construction of a boundary wall/location plan around the suit land without

authentication of documents presented before it by the 1st Respondent whether the documents were genuine and authentic or not. The law requires authentication of documents before any construction of any building or any project is approved. The 2nd Respondent did not consult or liaise with NEMA and NLC to ascertain authenticity of documents presented to it by the 1st Respondent for approval.

56. In the purported Change of User by the 2nd Respondent, it stated that suit land was previously residential use land. This was a lie and not true to it as the suit land was and still remained a swamp. This was in contravention of Public Officer Ethics Act under the provision of Sections 8, 9, 10, 11, 12 and 19 and Leadership and Integrity Act Sections 6, 7, 8, 11, 13, 16, 29 and 30. The recent RIM map attached to the supporting affidavit to this Petition and Marked as "MCP-1" from the Regional Surveyor of Kenya, Coast region clearly shows in bold the word SWAMP, that the suit land No. 1475 Mwembelegeza scheme, has never changed its status and still remains a swamp which is public land under Article 62(1)(g)(i) and managed by the 4th Respondent herein referred to as National Lands Commission under Article 62(3) of the 2010 Constitution.

57. In the Second Schedule of the Physical Planning Act part 6: Conservation of the natural beauty of the area, including lakes and other inland waters, banks of rivers, foreshore of harbours, and

other parts of the sea, hill slopes and summits and valleys. SWAMPS being inland water be conserved.

58. There had never been any citizen participation or public participation in line with the County Government Act under the provision of Sections 87, 88, 91 and 115 Public participation in county planning to determine whether the project being undertake or proposed to be undertaken is in their best interest and its impact on the community and any mitigation measures incase of negative impact. This was never done. The 2nd Respondent disregarded a crucial Constitutional provision on citizen participation and only pursued selfish interest in aiding illegal alienation of the suit land.
59. The Petitioner wrote a letter addressed to the Chief Officer of Lands, Planning and Housing of the 2nd Respondent dated 10th March 2021 which was received by the officer's secretary. Seven (7) months down the line, the 2nd Respondent had not bothered to address the petitioner's concerns in violation of Article 35(1)(a)(b) of the Constitution of Kenya 2010 and Access to Information Act. This matter was a public interest matter that the Constitution allows anyone access to information that affects the public and it's extremely strange and a wonder why it would take several months without a response from the 2nd Respondent. If the 2nd Respondent believed it acted within the Law in all its approvals in matters touching on the suit land, then why has it refused to respond to the petitioner's concerns? The Petitioner had gone to the offices of

the chief officer of the Department of Lands, Planning and Housing at Bima Towers 3rd Floor and Bima Towers Annex, 2nd and 3rd Floor numerous times but have never received any substantive response from the 2nd Respondent.

60. Therefore, the Petitioner believe that any purported change of use approval, any purported building approval, and any purported approval of whichever nature or form by the 2nd respondent touching on the suit land violated all Constitutional provisions and relevant laws touching on public land and therefore fraudulent, null and void.
61. Informed by private investigations carried out by the Petitioner, Mr. Ainea Ragen on his own capacity and on behalf of Mwembelegeza Community Residents, the petitioner hereby recommend to EACC (Ethics and Anti-Corruption Commission) separate from this suit and pursuant to Public Officer Ethics Act, Leadership and Integrity Act, Proceeds of Crime and Anti-Money Laundering Act and Ethics and Anti-Corruption Commission Act, to move with speed and initiate a parallel investigations in line with its core mandate and where culpability was established, pursue a separate criminal and or Corruption charges in a court of Law against culpable persons and individuals working in the Department of Lands, Planning and Housing in the county Government of Mombasa who were part of the activities touching on suit land even if any of them is or are no-longer a staff in those offices.

- **The 3rd Respondent**

62. The 3rd Respondent approved the development on suit land on 30th November 2016 before authenticating the documents presented to it by the 1st Respondent in contravention of the Water Act Section 86,87,135 and Water Resources Management Rules 2006 Part VII. Approvals can only be done after thorough authentication of documents presented by a developer to the 3rd Respondent. The question was, which land ownership document did the 3rd Respondent use in approving the project on the suit land if the purported proof of ownership in form of a lease only came into effect on 5th September 2018?
63. In his possession upon enquiry and attached to the supporting affidavit to the Petition and marked as “MCP - 11” was a response letter from the 3rd Respondent dated 25th March, 2021 stating that all procedures were followed when the 1st Respondent made an application for approval. The approval was done by the 3rd Respondent on 20th November, 2018 as per their response letter to the Petitioner contradicting the true date which the 3rd Respondent a state officer in contravention of Leadership and Integrity Act, under the provision of Sections 6, 7, 8, 11, 16, 29 and 30 and Public Officer Ethics Act Section 8, 9, 10, 11, 12 and 19. This was over two (2) years after the 1st Respondent had already alienated and developed the suit land.
64. In the letter attached to the supporting affidavit to this Petition and Marked as “MCP - 11” as shown in paragraph 3(b) above, the

3rd Respondent acknowledges receipt of Environmental Impact Assessment (EIA) documents from NEMA (National Environment Management Authority) that informed its approval of the project on the suit land. NEMA has already written a letter addressed to the petitioner as a response to the Petitioner's concerns that no Environmental Impact Assessment (EIA) project report for proposed development on the suit land was done. This in itself violates Chapter six of the 2010 Constitution on leadership and integrity; Public Officer Ethics Act, Leadership and Integrity Act among other Laws of Kenya.

65. Register Index Map (RIM) annexed to this Petition and marked as "MCP - 1" stamped on 9th March, 2021 which was a legal document and property to Government pursuant to Survey Act Section 30: All survey plans and records to be deposited with Director and to become property of Government. Survey Act Section 32. Authentication of plans: No land shall be deemed to have been surveyed or resurveyed until the plan thereof has been authenticated by the signature of the Director or of a Government surveyor authorized in writing by the Director in that behalf, or by the affixing of the seal of the Survey of Kenya. The Director Survey of Kenya keeps all survey marks and plans within the territory of the Republic of Kenya including its territorial water bodies, and any other physical feature within Kenyan territory both past and present Marks and plans and in case there are any survey changes, these changes are adjusted by the Director, Survey of

Kenya pursuant to Survey Act under the provision Sections 39 and 41.

66. Section 32 of the Survey Act as shown in paragraph (d) above is a proof that the suit land was surveyed and the latest signature of the Region Surveyor issued on the Registry Index Map as proof of the suit land status.
67. The 3rd Respondent ignored a critical government document from a critical government department; Survey of Kenya to authenticate their records the status of the suit land.
68. The 3rd Respondent had not shown as proof any document to show that the suit land was changed from a swamp to a different use land through a gazette notice and ultimate alterations of boundary and survey map adjustments. The 3rd Respondent maintained a register and map of all water bodies within the County. Water Resources Management Rules Section 14 Register of Water Bodies 14(1) The Authority will maintain a register and map of all water bodies which will detail the official name and class (if any) of each water body. 14.(2) The official name shall be determined by the Authority after consultation with other government departments and other stakeholders. The 3rd Respondent had not shown any proof of renaming of the suit land as per the above regulation and any proof of consultation with other relevant government agencies in pursuit of renaming the suit land. This means the latest and present official name of the suit land as per Water Resources Authority (WRA) still remained as swamp.

69. Under Water Resources Management Rules 2006, Rule 16 showed the type of activities that required approval of the 3rd Respondent and filling up wetlands and Construction of permanent structures on Swamp was prohibited under these rules.
70. PART IX of Water Resources Management Rules, Rules 116, 117, 118, 119 Conservation of riparian and catchment areas. Rule 118(1) in particular shows proscribed activities on riparian land (Under Seventh Schedule Rule 118, 129, 123). These activities were the following among others:
- (i) Clearing of indigenous trees or vegetation
 - (ii) Building of permanent structures
 - (iii) or any other activity that in the opinion of the Authority and other relevant stakeholders may degrade the water resource.
71. The 3rd Respondent acted contrary to the Water Act and Water Resources Management Rules, swamps/ wetlands/ riparian lands were protected areas under the Constitution and the 3rd Respondent could only approve projects which were water related to be undertaken in a swamp. Filling up a swamp with stones, gravel, concrete, steel and cabro to create a parking yard for truck/ lorries was not water related but a pure abuse of relevant laws and regulations governing riparian lands by a state officer. It's also important to ask; how does a parking yard for Trucks/Lorries benefits the community when the suit land was public land?

72. Section 7 of the Water Resources Management Rules 2006 also shows the importance of public participation. Section 29 of the Rules (Public Notification of permit application). These in the view of the petitioner was not done. Every approval was shrouded in secrecy and in violation of all Relevant Water Laws and water resources Management Rules.

73. It was in the view of the Petitioner that the 3rd Respondent be made accountable for its violation of the 2010 Constitution of Kenya; Chapter Six (Leadership and Integrity), Violations of Water Act, Violations of Water Resources Management Rules, Public Officer Ethics Act, Leadership and Integrity Act and relevant provisions of law and also highly recommend, separate from this suit, a parallel investigations be initiated against the Management of Water Resources Management Authority-Coast Region pursuant to the Ethics and Anti-Corruption Commission (EACC) Act and where applicable, culpable individual(s) and person(s) be held accountable for their actions.

- **The 4th Respondent - National Lands Commission (NLC)**

74. The 4th Respondent is a body legally mandated to manage or administer public land. It manages the suit land on behalf of the National Government who holds it in trust for the people of Kenya pursuant to Article 62 (3) of the 2010 Constitution of Kenya.

75. Even after the petitioner wrote an enquiry letter attached to the supporting affidavit to this Petition and Marked as “MCP - 4” dated

10th March 2021 to the 4th Respondent asking the Commission to address the community concerns; it took over three (3) months for the 4th Respondent to respond. The Petitioner sought the help of the Commission on Administrative Justice (Office of the Ombudsman), and the Commission writing to the 4th Respondent as shown in the annexure Marked as "MCP-15". The NLC initially refused to act on the matter which directly calls to question their ability to manage public land. This in the view of the Petitioner was an admission of negligence, incompetence and "I DON'T CARE ATTITUDE" manifested by state officers on the part of the 4th Respondent.

76. The ombudsman wrote a 1st Reminder letter informed of Email to National Lands Commission (NLC) attached to the supporting affidavit to this Petition and marked "MCP 20" dated 14th May, 2021 seeking to know why NLC had not responded to the concerns of the Petitioner. And that NLC on 8th June 2021 responded to the office of the Ombudsman through a letter. The letter is attached to the supporting affidavit to this Petition and Marked as "MCP-22". The NLC also attached a letter addressed to the Honourable Attorney General. CEO of National Lands Commission, M/s. Esther Murugi dated 28th May 2021. The letter was annexed to this petition and Marked "MCP-23".
77. In the letter marked as "MCP - 22", NLC acknowledged irregularities and alienation of the suit land without their knowledge and their participation as the administrator and

manager of the suit land. They also acknowledged that the suit land was a wetland and that any purported change was an irregularity which they promised to Investigate.

78. In the letter Marked “MCP-23”, written to Esther Murugi, AG. CEO of NLC, the Mombasa county Coordinator Mr. Edward Bosire, acknowledged the following:

- a) No Documentation of whatever nature regarding change of use, public participation by the Petitioners in regards to alienation of the swamp, name and details of the project and its developer, no details of Environmental Impact Assessment (EIA) from NEMA in respect to the suit land and county government approvals of the project on suit land.
- b) County land adjudication and settlement office confirmed the suit land is still a swamp and that no change of use of whichever nature has been done or registered in his office.
- c) The land registrar acknowledged existences of green card that national Government allocated the plot to the 1st Respondent in the year 2018 on a 99 year lease as from 1st February, 2018. The question being; how did the Change of User effected and who signed both the green card and lease certificate if the County adjudication and settlement officer and National Land Commission that manages the suit land was never involved nor consulted.

79. The 4th Respondent as the administrator of the suit land pursuant to Article 62 (3), Article 67 of the 2010 Constitution had shown the highest level of negligence, incompetence and “I DON’T CARE ATTITUDE”. In their response letter, they said that they would investigate, six months down the line, the Mombasa County Coordinator NLC has never bothered to contact the Petitioner,

Mwembelegeza Community residents nor visit the site of the suit land to listen to the Petitioner's concerns and take legal action where applicable as per NLC Act.

80. As a matter of concern it's important that the 4th Respondent take note that there is already another public utility land within Mwembelegeza community land No. 1474 marked OPEN SPACE adjacent/opposite the suit land which was already alienated by a private developer and a permanent structure built on it.
81. The Petitioner reported to NLC Mombasa county office complaints on violations on public land use. The NLC Mombasa County Co-ordinator in his response to the Petitioner was still seeking guidance from the Acting CEO of NLC before he can investigate and take legal action against the violators. REALLY!!! If this was the case then why should NLC have an office in Mombasa if the office could not act on its own, pursuant to complaints from Residents of the county? Was the officer telling the Petitioner that whenever Mwembelegeza community Residents or the larger Mombasa county residents had complaints, then they should go to Nairobi and register the complaints? This was food for thought. It was the Petitioner's view that the 4th Respondent had shown incompetence and negligence.

- **The 5th Respondent - National Environment Management Authority (NEMA)**

82. The 5th Respondent on 1st April, 2021 responded to the Petitioner letter of enquiry denying receiving EIA project report for proposed

development on suit land. After the violations on the suit land were reported, the 5th Respondent had not taken any further steps to investigate and where applicable take legal actions against the developer pursuant to NEMA Act Section 7(1)(2)(a).

83. Section 9(1) of NEMA Act states the objective and purpose for which the Authority is established which is to exercise general supervision and Co-ordination over all matters relating to Environment and to be the principal instrument of Government in the implementation of all policies relating to Environment. The 5th Respondent failed in its supervisory role and should be held accountable for its inaction.

84. The 5th Respondent had remained silent even after the violations on suit land was reported to them. This was an act of prejudice in contravention of Section 9(2)(a)(c)(d)(j)(k) and (l) of NEMA Act.

85. It was therefore in the view of the Petitioner that the 5th Respondent failed to carry out its statutory obligations in contravention of the above provisions of NEMA Act and Chapter SIX of the 2010 Constitution of Kenya on leadership and integrity; Public Officer Ethics Act and Leadership and Integrity Act and must be held accountable for its failures.

• **The 6th Respondent - National Construction Authority (NCA)**

86. The 6th Respondent oversaw construction industry and coordinate its development. After receiving complaints from the Petitioner,

the 6th Respondent had not made any tangible action in line with its statutory obligations.

87. The 6th Respondent had site inspectors who were well facilitated to carry out their obligations. The suit land was by a main feeder road connecting two (2) major settlements (Estates) of Mwembelegeza Scheme and Bombululu and it was the belief of the Petitioner that the 6th Respondent saw the activities carried out on suit land and was privy to the construction activities on the suit land. They only chose to look the other way. The 1st Respondent herein Anwarali and Brother Limited constructed the perimeter wall and the electric fence, a wall that could be seen from far and just by the main road. If the site inspectors of the 6th Respondent were not aware or seen the construction going on in its initial stages were they still in the dark now that the huge perimeter wall was already in place and the complaints reported to them by the Petitioner?
88. If the project undertaken on suit land was not registered and authorized by the 6th Respondent, then why had the 6th Respondent not taken any legal action against the developer on suit land pursuant to NCA Act Section 3(2)(a) as a body corporate capable of suing and being sued in its own name? Why had the 6th Respondent not marked the Perimeter wall on the suit land with a red colour "X" (suspension) as a step forward in addressing the Petitioner's concerns and as their standard practice on condemned structures dictates? Why had the 6th Respondent not acted on the

illegal and unregistered electric fence on top of the perimeter wall erected around the suit land? These shows acts of negligence, incompetence, prejudice and “I DON'T CARE ATTITUDE” by the 6th respondent and the it must take full responsibility for its inaction.

89. What happened if the mote than four (4) meter perimeter wall fell on someone and it became fatal? What happened in case of poor workmanship on electrical fencing already done in case of electrocution of someone? These and many more unanswered questions arise and the 6th Respondent must be held accountable.
90. A single story building had been erected on the suit land without authorization by the 6th Respondent and even after the Petitioner reported these violations, the 6th Respondent had done nothing to act decisively. It was a welcomed move in that the 6th Respondent had responded in writing to the concerns of the Petitioner, nevertheless what extra steps had NCA taken in line with their statutory obligations to legally address the matter? The suit land was a swamp and during the rainy seasons, large amount of water collected on it and the possibility of the perimeter wall, electric fence and the storey building giving way to swollen water was high. It wad irresponsibility on the part of the 6th Respondent to look the other way when the Petitioner and Mwembelegeza Community residents who were the affected were faced with a danger right on their doorstep.
91. It was therefore the belief of the Petitioner that the 6th Respondent had acted with prejudice, acted with negligence, and shown to be

incompetent in its actions in contravention of Chapter Six of the 2010 Constitution (Leadership and Integrity), and contravention of above NCA Act and regulations, Public Officer Ethics Act among other relevant laws of Kenya.

- **The 7th Respondent - The Chief Land Registrar Mombasa**

92. The Attorney General's duties included formulation of legal policies and ensuring administration of Kenya's legal system including legal education. It was the principal adviser to the National Government of the Republic of Kenya who holds in trust the suit land for the people living in Kenya.
93. The County Adjudication and Settlement officer was under the legal supervision of the Attorney General. The County Adjudication and Settlement Officer responsibilities including establishing ownership of land and settling individuals, persons, and entities into their rightful land as owners. They also adjudicate on matters land and settle ownership of land.
94. The County Adjudication and Settlement officer kept records also of land ownership of settlement schemes in the Country and by the and by the office acknowledging the suit land was Public Land and still a SWAMP, it would be of necessity that the Adjudication and Settlement office through the Attorney General shed more light on how the suit land which was public land, became a private property under the watch of officers the Attorney general legally advise.

95. The land registry was under the supervision of Chief Land Registrar whose primary functions were registration, rectification and safe storage of land register.
96. Pursuant to Land Registration Act, Section 9 (Maintenance of documents)(c) Names and addresses of previous proprietors. It was upon the Land Registrar of the Republic of Kenya to provide parcel file for the suit land showing all previous owner(s) of the suit land including his/her/their addresses and respective names.
97. The Petitioner view that since it's the functions of the Department of Lands registry in the Ministry of Lands, the Attorney General should shed light on how the department it legally advises and represent illegally registered public land under Article 62(3)which is a protected public land in the name of the 1st Respondent. How did the land registrar at Mombasa Land Office allow himself/herself be used as a stamping Authority in an illegality?
98. Did it meant that the National Government pursuant to this suit had employed incompetent individuals to run its affairs at the Lands registry at Mombasa? This is food for thought. The reason being the Petitioner had other matters at the High Court at Mombasa separate from this matter involving public land and the office of land registrar has been adversely mentioned.
99. Informed by private investigations carried out by Ainea Ragen herein the Petitioner, recommendation is hereby made to the Director, Ethics and Anti-Corruption Commission to move with speed and investigate further the persons and individuals working

at the Ministry of Lands specifically the Lands registry at Mombasa lands Office and those found culpable be held accountable.

- **1st Interested Party - Ethics and Anti - Corruption Commission**

100. Pursuant to the provision of Article 79, Article 253 and Ethics and Anti-Corruption Commission Act, it was the Petitioner's view that Ethics and Anti - Corruption Commission (EACC) be involved in this matter as the matters raised against all the respondents touches on their core mandate of fighting corruption.
101. The Commission input on this matter of Public Interest as a legally mandated body tasked with fighting Corruption will shed more light on any matter that may arise in the process of Litigation.
102. The Petitioner in this Petition had made recommendations to the Ethics and Anti-Corruption Commission to further investigate persons and entities adversely mentioned in this suit and those not mentioned in this suit those found culpable should be made to account.

D. Prayers

103. The Petitioner prayed for the following reliefs:-
- a) A declaration that the SUIT land number 1475 Mwembelegeza scheme was a SWAMP and still remains Public land;***
 - b) A declaration that the purported LEASE CERTIFICATE issued to the 1st Respondent is Null and Void and the same was FRAUDULENTLY acquired through corrupt scheme;***

- c) An order compelling the 7th Respondent herein Chief Land Registrar Mombasa to cancel the illegal lease certificate dated 5th September, 2018 in reference to the suit land No. 1475 issued to the 1st Respondent and all illegal entries registered in the parcel of land No. 1475 to be cancelled forthwith.**
- d) A Permanent Injunction does issue restraining the Respondents or any private organization or any person not mentioned in this suit working either individually or by their staff or their agents or their representative from trespassing, constructing, sub - dividing, transferring, developing, selling or occupying the suit land number 1474 Mwembelegeza scheme in Mombasa.**
- e) An order compelling the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Respondents to within thirty (30) days of the Court's judgment, demolish the perimeter wall and the Electric fence around the suit land number 1474 Mwembelegeza scheme and Excavate by removal of any debris of stones, sand, cabros, steel, gravel, cement, iron roofs and any other foreign material or matter used to fill up the suit land number 1474 Mwembelegeza Scheme.**
- f) An order compelling the 3rd, 4th, 5th and 7th Respondents in conjunction with the Director Survey of Kenya, and in conjunction with the Director National Lands Adjudication and Settlement Office to within sixty (60) days of the Court's judge demarcate and delimit the exact boundary of the suit land number 1475 Mwembelegeza scheme including removal of any individual (s) or person(s) not mentioned in this suit who might have encroached on any party of the suit land number 1475 Mwembelegeza scheme in Mombasa County.**
- g) An order directing the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th Respondent to within Ninety (90) days of the Court's judgment to file affidavit in this Court detailing out their compliance with prayers 3, 5 and 6 above.**
- h) Mesne profits calculated at Kshs. 3,600,000 per month for the unlawful continued occupation of the Petitioners property being MN/V1/2444 from the year 2012 till payment in full.**
- i) The Honourable Court be pleased to issue and Order that this Petition is in the public interest, each party should bear their own costs.**

j) This Honourable court to issue such further orders and give such directions as it may deem fit to meet the end of justice and Protection of the Constitution of the Republic of Kenya and Rights and Fundamental freedoms of the Petitioner.

104. The Petition was supported by a 53 paragraphed affidavit sworn by AINEA RAGEN, the Petitioner herein on the same date as the Petition with Twenty Three (23) annexures marked as “MCP - 1 to 23” where he averred that: -

- a. The MWEMBELEGEZA COMMUNITY RESIDENTS were individuals who own property, land, buildings, Landlords, Tenants, Business persons doing business within Mwembelegeza scheme and those who live having families including children and those who are employed and work within Mwembelegeza scheme.
- b. Mwembelegeza scheme was planned and subdivided by Survey of Kenya into different plots mostly 50 feet by 100 feet. Most of these plots are owned by private individuals, though some were reserved as public land for specific uses.
- c. One such public plot was Land No. 1475 Mwembelegeza scheme which was surveyed and marked as SWAMP because of its size, it's nature, the large amount of water that accumulates in this land and it's marine life. It is a habitat for different fishes, birds, amphibious animals and different marine plants.
- d. The swamp and it's waters (suit land) have been of great benefit to the community of Mwembelegeza and other surrounding communities for the following reasons:
 - a) Mwembelegeza community used the swamp waters for maize and rice farming hence providing food security to numerous households.

- b) The swamp had all kinds of fishes and the community used the fishes in the swamp as a source of income and food.
- c) Because Mombasa County has poor water drainage system, the swamp serves as a water collecting body during periods of rain thus protecting the entire Mwembelegeza community, Kadzandani Community, Bombolulu areas, Kisauni areas and even areas around Nyali from perennial flooding.
- d) The swamp had all kinds of marine plants and amphibious animals that made it their habitat. This swamp had capacity to also be an educational research area for those studying and doing research on marine life and habitat among others.
- e. Around late 2016, a strange man with two pistols stuck to his trouser belt came to the suit land and found resident women harvesting their crops within the swamp who told the women to leave claiming that the land belonged to him and stating that the women were intruders on his private property.
- f. For fear of being shot at and probably getting killed, the women gave way and left the swamp.
- g. Around mid-2017, trucks invaded the suit land offloading stones into the swamp and filling it up all of which was done under protection by armed police.
- h. The Residents of Mwembelegeza community were helpless and could not do anything because of the militarized operation and thus only remained as observers because of their fear of being harmed or killed.

- i. Upon enquiring who was filling up the swamp with stones, the Residents (Unnamed for their safety), were told the swamp was being filled by its purported owner, the 1st Respondent.
- j. Upon more enquiries, the residents were told that the “original owner” of the suit land (who was a Resident of Meru county) sold the land to the 1st Respondent.
- k. How a SWAMP became personal property of a resident of Meru county in the Republic of Kenya and finally being owned by the 1st Respondent remained a mystery to the community of Mwembelegeza. The community had many unanswered questions.
- l. During the process of the 1st Respondent filling up the swamp, there was no board posted to show the nature of project being undertaken on the SWAMP, there were no details of who was undertaking the project as standard practice and regulations require in construction industry as per NCA Act and regulations.
- m. There was no board to show the following details:
 - (a) National Environment Management Authority (NEMA) approvals, license.
 - (b) Environmental Impact Assessment (EIA) study and study report from NEMA authorizing the project.
 - (c) Gazette notice and advert within the community or on the board as per the change of use procedures showing intention of change of use from a SWAMP to mixed use (Residential cum commercial), a CHANGE of USE which the constitution 2010 does not support.
 - (d) Nature of the project being undertaken on the SWAMP (suit land).
 - (e) Name of contractor undertaking the project

- (f) National Construction Authority (NCA) authorization
 - (g) Water Resources Management Authority (WRA) licensing and approvals.
 - (h) County government of Mombasa approvals.
- n. Stones were brought and the suit land (swamp/ wetland) was filled without the involvement or public participation by Mwembelegeza community Residents to approve or disapprove of the project being undertaken in the suit land which was a protected water body by the Constitution of Kenya 2010.
- o. Attached to this supporting affidavit to Petition and Marked as "MCP-1" to 26" were list of documents showing the Petitioner's communications with relevant statutory bodies and their subsequent responses in pursuit for answers to the illegal Alienation of Public land no.1485 Mwembelegeza scheme including photographic images and land valuation certificate.
- p. Soon after, the 1st Respondent filled the swamp with stones, embarked on cabro works and filled the suit land, erected a perimeter stoned wall with some parts going beyond four (4) meters high around the swamp and constructed an electric fence on top of the perimeter wall in contravention of the National Construction Authority Act (NCA) since there was NO proof of registration and authorization of the project by NCA. Attached to this supporting affidavit to the Petition and Marked as "MCP - 26" were the pictures of the perimeter wall, electric fence and the single story building on suit land.
- q. The 1st Respondent encroached and extended the perimeter wall and electric fence on a portion of another Public utility land no. 1474 marked OPEN SPACE opposite the Suit land. This

public land no. 1474 was presently subject to our investigations because the remaining part of the OPEN SPACE had already been alienated by a private developer and a permanent structure erected on it.

- r. The 1st Respondent built a single story building on the suit land and also built steel structure shades on the sui land without approvals from relevant statutory bodies. Any building must be registered and authorized by the NCA. The 1st Respondent built, constructed and currently using the suit land as a parking yard for trucks.
- s. There was a manned security gate at the entrance into the walled suit land and no one was allowed access into the suit land. What goes on inside the wall fenced suit land is shrouded in secrecy and mystery as much as it is portrayed as a parking yard for trucks. This possesses an environmental threat to the community because of lack of information on the activities that goes on inside the walled suit land.
- t. Around August 2019, the Petitioner as a private investigator and a Resident of Mwembelegeza community, on his own capacity and on behalf of the community, he voluntarily embarked on investigative research to understand any legal and non-legal procedures used in acquiring and developing the suit land and also to understand who authorized what and who signed what that eventually led to the illegal alienation of the suit land since swamps were protected public land.
- u. After thorough investigations and research spanning almost two years, the Petitioner and Mwembelegeza community Residents made a decision to seek for answers from relevant government entities whose operations and core mandate touches directly on the activities carried out on the suit land.
- v. It was upon the knowledge and information he got from research findings that he wrote letters to different statutory

entities seeking answers from them. The letters were all annexed to the Petition.

- w. On 9th March, 2021, he applied for a certified copy of REGISTRY INDEX MAP (RIM) for Land number 1475 Mwembelegeza scheme from the Regional Surveyor, Coast region with its offices at Mombasa. Upon payment of the sum amount of Kenya Shillings five hundred (Kshs. 500/=) only, a stamped, signed and certified copy of the MAap was availed to me dated 9th March 2021. The RIM map was attached to this supporting affidavit to the petition and Marked "MCP - 1". The RIM map shows a clear demarcation and boundaries of the swamp with the word SWAMP and No.1475 printed in BOLD letters.
- x. On 10th March 2021, the Petitioner wrote a letter to the following statutory entities to furnish the Residents with more information on the project being undertaken on the suit land.
- a) To the Registrar, Ministry of Lands Mombasa County. The letter was stamped received by the registrar. The letter was attached to this supporting affidavit to the Petition and marked as "MCP - 2".
 - b) To the Mombasa County Director, National Environment Management Authority. The letter was stamped received by the Authority. The letter was attached to this supporting affidavit to the Petition and marked as "MCP - 3".
 - c) To the Mombasa county coordinator, National Land Commission Mombasa County. The letter was stamped received by the Commission. The letter was attached to this supporting affidavit to this Petition and marked as "MCP - 4".
 - d) To the Mombasa County Chief officer, Department of lands, Planning and Housing. The letter was stamped received by

the secretary. The letter was attached to this supporting affidavit to this Petition and marked as "MCP-5".

- y. On 11th March, 2021, the Petitioner wrote a letter to NCA requesting the Authority to furnish me with certified copies of authorization license and registration of project being undertaken on suit land. The letter was stamped received by the Authority. The letter is attached to this supporting affidavit to the Petition and marked as "MCP-6".
- z. On 12th March, 2021, the Petitioner wrote a letter to the Director/ County Co - Ordinator/ Manager of Water Resources Authority whose offices are based in Changamwe, Mombasa County requesting the Authority to furnish the community with certified copies of relevant approvals and licenses authorizing the nature of project being undertaken on suit land. The letter was stamped received by the Authority. The letter was attached to this supporting affidavit to the Petition and marked as "MCP - 7".
- aa. On 19th March, 2021, the Petitioner wrote a letter to the 1st Respondent whose head office was based in Mtopanga, Kisauni Mombasa County seeking answers to concerns raised touching on the suit land. The letter was rejected by the 1st Respondent. The letter was attached to this supporting affidavit to the Petition and marked as "MCP - 8".
- bb. On 17th March, 2021, the Petitioner received the 1st response letter from NCA with Ref. No. NCA11/301a/VOL 3/ (67). In this letter, the NCA acknowledged that the project undertaken on the suit land had not been registered by the Authority. The letter is attached to this supporting affidavit to the Petition and marked as "MCP - 9".

cc. On 30th March, 2021, the NCA responded by writing a 2nd letter Ref. No. NCA11/301a/VOL 3(67(2)). The letter was attached to this supporting affidavit to the Petition and marked as "MCP -10". In this letter, the NCA gave details of purported approvals by relevant statutory bodies approving the project being undertaken on the suit land. According to the letter, 1st Respondent responded to NCA's request for documents by providing the following approvals and documents (Copies of which were not provided by NCA to the Petitioner):-

- a) NEMA approvals dated 1st December 2016.
- b) An improvement order from NEMA Ref. No. NEMA/PR/MSA/5/2/3521 dated 17th February 2017 suspending preciously issued license No. 0038884.
- c) A letter of no objection to approval of the development from WARMA Ref. No. WRMA/CA/CM/3/14/1(77) dated 30th November 2016.
- d) Letter from Mombasa County Ref. P/2016/624/1 dated 31st January 2017 lifting previously issued enforcement notice PPA7 dated 20th January 2016 stopping all development on the land.
- e) County approved drainage layout drawing dated 31st January 2017.
- f) Change of User approval from County Government, Mombasa from RESIDENTIAL to MIXED USE (RESIDENTIAL - CUM - COMMERCIAL) Ref. No. TP.6/CU/36/2017 dated 16th May 2017.

- g) Planning brief for the proposed change of use prepared by one, Mr. Cyrus Mbisi, a registered physical planner (RPP0216) dated 3rd May, 2017.
 - h) Public notice published on change of use placed on the Daily Nation dated 27th April 2017.
 - i) County approved Boundary wall/location plan dated 6th January 2017.
- dd. On 25th March, 2021, the Petitioner received a response letter from Water Resources Authority with Ref. No. WRA/ACA/CA/HRD/1/5/4(98). In the letter which is attached to this supporting affidavit to the Petition and marked as "MCP - 11", the Authority acknowledged receiving a request from the 1st Respondent to fill up the suit land and use it for parking. According to the letter, the application by the 1st Respondent was received on 20th November 2018 and was subsequently approved on the basis of the following documents purportedly provided by the 1st Respondent.
- i. Copy of Identification.
 - ii. Copy of land ownership (title deed) for proof of ownership.
 - iii. Environmental Impact Assessment (EIA) study report from NEMA that informs the anticipated negative impact and proposed mitigation measures, this includes public participation.
 - iv. Hydrological assessment report which informs about the characteristics of water in the area.
- ee. On 1st April, the Petitioner received a response letter from NEMA Mombasa Office Ref. No. NEMA/CDE/MSA/4/9/VOL.1. The letter is attached to this supporting affidavit to this

Petition and Marked "MCP-12". In the letter, NEMA categorically stated that it has NOT received any EIA project report for proposed development on Land no. 1475 Mwembelegeza scheme, contradicting the statements made by Water Resources Authority, calling into question whether WRA did due diligence on documents the 1st Respondent purportedly presented to them before approving and authorizing the project on suit land.

ff. After being denied requested information from the office of the registrar of Lands Mombasa County, the Petitioner sought the help of the Commission on Administrative Justice (Office of the Ombudsman). The office of the Ombudsman wrote a letter dated 16th April 2021. The letter is attached to this supporting affidavit to the Petition and marked as "MCP - 24" and through them, the Petitioner was able to get a response letter attached to this supporting affidavit to the petition marked as "MCP - 25" and a certified copy of purported "land ownership" of land no. 1475 Mwembelegeza scheme in form of a lease of ninety nine (99) years. The letters from office of ombudsman and Certificate of lease are attached to this supporting affidavit to this Petition and marked as "MCP - 13" and "MCP - 14" respectively. It was a lease of a term of 99 years from 1st February, 2018. The Certificate of Lease was issued on 5th September, 2018 to the 1st Respondent. The size of swamp/land leased was approximately 2.56 HA as per the Certificate of Lease. This size of land in Mwembelegeza scheme at the location it was, had a present market value of not less than a sum of Kenya Shillings Two Hundred and Fifty Million (Kshs. 250, 000,000/-).

gg. Even after writing to the Mombasa County Co - ordinator NLA on 10th March 2021 and seeking the help of the Office of the Ombudsman to get the NLC to respond to my concerns and queries, it took over three months for the NLC to respond to him. The NLC being the administrator of Public land ignored his pleas until the office of Ombudsman came in to the matter. The letter of the Ombudsman to NLC was

attached to this supporting affidavit to the Petition and marked as “MCP - 15”.

- hh. On 20th March, 2021, the Petitioner wrote a letter of enquiry addressed to the County Land Adjudication and Settlement Officer requesting to know if a survey or Change of User was done on the suit land and proof of the same from Regional Surveyor showing map adjustments. upon follow up with the County adjudication and settlement officer in his office at BIMA Towers, he showed him the file for the suit land and within the file there was no proof of any Change of User or any information seeking the change of use. The officer assured him that as far as his office was concerned, the suit land still was a PUBLIC LAND, a SWAMP and there had never been any Change of use. Upon seeking a written and signed letter from the officer to this effect, he refused citing fear for his life and that he could only write an official letter if an entity like EACC asked him to do so.
- ii. Even after writing to the Mombasa County Chief Officer, Department of Lands, Planning and Housing, over six months down the line, the department was yet to respond to his concerns. The Petitioner had visited their office several times and on one occasion being accompanied by Mr. FRED MUTUNGA, a resident of Mwembelegeza Scheme. On none of these occasions was any substantive information provided by the Department.
- jj. To get further information, on 7th May, 2021, the Petitioner wrote an E-Mail via the Petitioner’s personal e-mail address; azoragen@gmail.com to one M/s. Wangui Kabala of NCA, HQ enquiring more about whether it's within their mandate to register and authorize Construction of perimeter wall and electric fence. Attached to this supporting affidavit was the letter marked as “MCP - 17”.

- kk. On 17th May, 2021, M/s. Kabala of NCA responded to the Petitioner's email enquiry and confirmed that NCA covers all construction activities, including a perimeter wall and electric fence which must be registered before any Construction activities were commenced. Attached to this supporting affidavit and marked as "MCP - 18" and 19" to this Petition were response letters by one M/s. Kabala of NCA headquarters in Nairobi.
- ll. Following the expiry of the Twenty-One (21) days given by the office of the Ombudsman to the National Land Commission, on 19th May 2021, the Petitioner wrote an E-Mail to the Ombudsman asking them if they had received any response from NLC. The Email was attached to this supporting affidavit to this Petition and as marked "MCP - 20".
- mm. The office of the ombudsman responded to his enquiry by writing a 1st Reminder E- mail to the National Land Commission Mombasa County Coordinator. The Letter was attached to this supporting affidavit and marked as "MCP - 21".
- nn. NLC later responded after a follow up by the Office of the Ombudsman. The NLC response letter to me via the office of the Ombudsman Ref. No. NLC/CC/MSA/VOL.II/71 and their letter to the acting CEO NLC informing her office of the Petitioner complaints with Ref. No. NLC/CC/MSA/VOL.II/70 was both attached to this supporting affidavit to this Petition and marked, as "MCP - 22" and 23" respectively.
- oo. Mwembelegeza community Residents were intimidated and threatened prior to the alienation of the suit land with some powerful individuals involved brandishing firearms on their trouser belts.
- pp. The suit land was a swamp and still remained a SWAMP as shown by the latest REGISTRY INDEX MAP (RIM) attached to this supporting affidavit to this Petition and Marked as "MCP-1" and

that the purported Change of User was a gross violation of the 2010 constitution of Kenya and the law.

- qq. There was a well - orchestrated plan by the 1st Respondent assisted by and protected by state officers working at the Department of Lands, planning and housing in the County Government of Mombasa and state officers working at WARMA based in Changamwe Mombasa County to illegally alienate the suit land.
- rr. The 1st Respondent in their pursuit to protect the illegally alienated suit land, also encroached on an adjacent public land no. 1474 which was Marked "OPEN SPACE" by extension of their perimeter wall to part of the OPEN SPACE and ending up blocking a critical feeder road. The said public land no. 1474 Marked "OPEN SPACE" has since been alienated by a different private developer and a permanent structure erected on it, a matter currently under our investigations.
- ss. All the documents in possession of the 1st Respondent supporting their purported ownership of the suit land and subsequent authorization by statutory bodies to fill up the suit land (SWAMP), the documents which the 1st Respondent forwarded to the NCA were fraudulent.
- tt. The suit land was and still remained a SWAMP and that the purported Change of User from a residential to residential-cum-commercial land was an illegality.
- uu. County Government of Mombasa had NO Constitutional rights and Authority over any WATER BODY within its territory and that includes the suit land which was a swamp/wetland/riparian land and that constitutionally, all water bodies which the suit land falls under are held by and under the custody of the National Government of the Republic of Kenya. The County Government of Mombasa went beyond its Constitutional mandate by mutilating and canibalizing the Constitution of Kenya, usurping

powers it doesn't have, to illegally aid, process, ratify and authorize change of use and to illegally authorize development of the nature and form it did on the suit land.

vv.NEMA, the NCA and NLC (a body Constitutionally mandated to administrate and manage Public land which the suit land falls under) never authorized nor were they informed and or involved in any of the processes involved during the alienation and ultimate development on the suit land.

ww.As the Petitioner who was a resident of Mwembelegeza scheme and on behalf of Mwembelegeza community Residents, stand to suffer irreparable suffering, loss and damages as the public land; swamp/wetland/riparian land (water body) will be lost forever should the project be allowed to remain in the suit land.

xx.In public interest, the Petitioner decided to sought legal redress from the Honourable Court.

V. The Respondents' response

A. The 2nd Respondent's response to Petition

105. The 2nd Respondent opposed the Petition through a 22 Paragraphed response to Petition sworn by Paul Manyala, the County Director of Physical planning of the 2nd Respondent on 27th January, 2022 who contended that:-

(a) The Government had a duty to safeguard the rights of citizens and to ensure equitable access and use of land and that under Article 62(4), public Land shall not be disposed of or otherwise used except in terms of the Act of Parliament specifying the nature and terms of the disposal and use.

(b) The onus of proving that a land in question was public or private was vested on the party alleging the contrary and whose evidence documentary or otherwise can be

countenanced vis-à-vis the parcels file kept with the relevant Land Registries and or the 4th Respondent.

- (c) The mandate, obligation and scope of the 2nd Respondent herein vis-a-avis the land in question was Limited to the Consideration, approval and grant or denial of Development permission within its planning and approval mandate of Development within Mombasa County and in so doing the evidence of proprietorship of the subject property is sufficient amongst other consideration pursuant to the Provisions of the Physical and Land Use Act No. 13 of 2019.
- (d) It was indeed true that an application was made for development permission and Change of User by the 1st Respondent to the 2nd Respondent over MOMBASA/MWEMBELEGEZA/1475 which applications were subjected to the requisite due process prior to approval of the same.
- (e) Having received an application for Change of User from residential to mixed use (residential cum commercial and parking) the process of Change of User was initiated by notification to the public vide publication in "***the Daily Nation***" newspaper of Thursday, 27th April 2017 and site board which elicited no objection both from the public nor the Petitioner.
- (f) The approval process was subjected to environmental Impact Assessment with adequate Public participation where the local members of Mwembelegeza area were involved and registered no objection whatsoever in respect thereof thus culminating to the approval by the 2nd Respondent as explicit vide Notification of approval dated 16th May, 2017 and 7th February 2018 by the Department of Lands.
- (g) In sanctioning the said change of user and development permission, the 2nd Respondent was appraised of the requisite Hydrological assessment done and ultimately Dhanjal Brothers

Limited granted permission for road cutting and storm water drainage in Mwembelegeza area vide the letter dated 10th February 2017 together with the proposed drainage layout

- (h) The 2nd Respondent in granting the Change of User was also appraised of the approval granted by the other relevant authorities such as the Water Resources Management Authority who approved the construction works for the storm drainage system for the subject property and linked to the existing drainage system.
- (i) Whereas Development permission was granted for a proposed boundary wall by the 1st Respondent on Plot No. 1475/MWEMBELEGEZA on 1st December 2016, vide Notification of Approval of Development Permission dated 6th January 2017, the same was subject inter-alia to the following conditions:-
- i. All buildings under construction MUST be inspected by the eminent registered Engineer and Architect otherwise the County will not accept any liability for stability or any work or other shortcoming in the building.
 - ii. To execute the proposal in strict conformity with the Architectural and structural plans approved by the Director of planning and City Engineer respectively.
 - iii. On the understanding that the subject land does not constitute part of disputed public/private land..
- (j) Indeed the 2nd Respondent has at all times been vigilant with the developments ensuing vis-à-vis the conditions contained including issuance of enforcement notice stopping construction until compliance is met or achieved as evidenced by enforcement Notice effective from 20th January 2017.

- i. That the aforesaid Notice was subsequently reviewed and lifted by the 2nd Respondent following compliance explicit of:-
 - ii. Evidence of public (neighborhood) approval of the proposed boundary wall through the attached signed list by project affected persons,
 - iii. License by National Environment Management Authority (NEMA) and recommendation from water resource Management Authority.
 - iv. Official Land search verifying ownership.
 - v. Proposed 900 mm dia-culvert outfall on Plot No. 1474/Mwembelegeza to existing storm drain 7.5m deep plan.
- (k) The order lifting the enforcement notice by the 2nd Respondent was conditioned to the following terms:-
- i. Construction of the boundary wall to resume upon completion of the drainage system as per the drainage plan.
 - ii. Submit the drainage systems designs to the County Engineer for assessment and approval.
 - iii. Ensure the Children's home on plot No. 1474/Mwembelegeza had been allowed adequate access.
 - iv. To ensure that the drainage system has been constructed to the satisfaction of the County Engineer.

(l) Indeed the 2nd Respondent in considering the development permissions and Change of User subjected the same to the

requisite due process involving public participation as could be noted from the foregoing. Annexed in the affidavit and mark as follows, the documents hereunder:-

- i. Annexure RM - 1 - Official search for MOMBASA/MWEMBELEGEZA/1475.
- ii. Annexure RM 2 - Copy of Title document for MOMBASA /MWEMBELEGEZA/1475 indicative of the registered owner.
- iii. Annexure RM - 3 - Application for Change of user with the Physical planner's report
- iv. Annexure RM - 4 - Publication on the Daily Nation Newspaper.
- v. Annexure RM - 5 - Consents by members of the public.
- vi. Annexure RM - 6 - Notification of approval.
- vii. Annexure RM - 7 - Letter dated 10th February 2017 being response to the request for road cutting and storm water drainage.
- viii. Annexure RM - 8 - Hydrological Assessment Report.
- ix. Annexure RM - 9 - Notification of approval by the Water Resources Authority.
- x. Annexure RM - 10 - Notification of approval of Change of User by the Department of Lands, Planning and Housing of the 2nd Respondent.
- xi. Annexure RM - 11 - Notification of approval of Development permission dated 6th January 2017.

- xii. Annexure RM - 12 - Enforcement Notice effective from 20th January 2017.
 - xiii. Annexure RM - 13 - Conditional order lifting enforcement Notice vide letter dated 31st January 2017.
 - xiv. Annexure RM - 14 - Letter dated 20th April 2017 lifting suspension and or enforcement notice on approval granted on 6th January 2017
- (m) It was not within the province or mandate of the 2nd Respondent to review, cancel or revoke Certificates of Title and or Title Deeds issues by the mandated Land agencies and or Registries and or authorities.
- (n) In such instances, the mandate of the 2nd Respondent was confined to planning and approval of Developments within its respective County pursuant to the provisions of the County Government Act and Physical and Land Use Act No. 13 of 2019.
- (o) The said Laws in particular Physical and Land Use Act No.13 of 2019 had very elaborate dispute resolution mechanism in the event a party was aggrieved with the grant or denial of a development permission and was very emphatic under Sections 61 (3) and (4) thereof that:-

“An applicant or an interested party that is aggrieved by the decision of a County Executive Committee member regarding an application for development permission may appeal against that decision to the County Physical and Land use Planning Liaison Committee within fourteen days of the decision of the decision by the County Executive Committee member and that Committee shall determine the appeal within fourteen days of the appeal being filed.

An applicant or an interested party who files an appeal under sub-section (3) and who is aggrieved by the decision

of the Committee may appeal that decision to the Environment and Land Court.”

- (p) It therefore follows that in the absence of any dispute or appeal lodged with the County Physical and Land Use Planning Liaison Committee by any party aggrieved by the decision of the County Executive Committee Member, none can possibly be entertained by this Honourable Court pursuant to the clear provisions of the Physical and Land use Act No. 13 of 2019 in relation to the grant of development permission by the 2nd Respondent.
- (q) It therefore followed that this Honourable is not seized with the requisite Jurisdiction to entertain any challenge lodged or made in respect of the exercise of mandate by the 2nd Respondent in granting, denial and or revocation of Development permission pursuant to the clear provisions of the Physical and Land Use Act No.13 of 2019.
- (r) Consequently, the Petitioner’s Petition herein was not merited and the same ought to be dismissed with costs.

B. The Replying Affidavit of the 5th Respondent

106. The 5th Respondent also filed an 20 paragraphed Replying Affidavit sworn on 18th January, 2022 by SAMUEL LOPOKOIYIT, the County Director of Environment of Mombasa in the employment of the NEMA, the 5th Respondent herein, who averred that:

- a) The National Environment Management Authority (“NEMA”) is the principal instrument of government established under Section 7 of the Environmental Management and Co-ordination Act (EMCA) to exercise general supervision and coordination over all matters relating to the environment.

b) The 5th Respondent is tasked with the following duties as provided under the Environmental Management and Co-ordination Act 1999 (hereinafter referred to as the “EMCA 1999”): -

(a) Identify projects and programs or types of projects and programs, plans, policies for which environmental audit or environmental monitoring must be conducted under the Act; and

(b) Monitor and assess activities being carried out by relevant lead agencies, in order to ensure that the environment is not degraded by such activities, environmental management objectives are adhered to and adequate early warning of impending environmental emergencies is given.

c) The 5th Respondent received a letter dated 10th March, 2021 from the Petitioner. In the said letter, the Petitioner raised the following issues in regards to Land Number 1475 in the Mwembelegeza Scheme (hereinafter referred to as the “suit land”):-

(a) That a private developer had illegally alienated the alleged swamp/wetland that was public utility land in contravention with the Constitution of Kenya, 2010, EMCA,1999 and the National Land Commission Act; and

(b) That the said private developer was allegedly both filling the swamp with stones and obstructing water flow, and erected a perimeter wall around the wetland/swamp. (Attached in the affidavit and marked as “SL - 1” was a copy of the letter dated 10th March, 2021 to the 5th Respondent)

d) The 5th Respondent responded to the abovementioned letter dated 10th March,2021 vide a letter dated 1st April, 2021 and

mentioned that they were yet to receive any Environmental Impact Assessment Project Report in relation to the alleged proposed development on the suit land. (Attached in the affidavit and marked as "SL - 2" a copy of the letter dated 1st April, 2021).

- e) Pursuant to the prescribed rules and guidelines, it was a requirement that a proponent of any project specified in the Second Schedule of the EMCA 1999, undertakes an Environmental Impact Assessment and submit an Environmental impact assessment project report to the Authority prior to being issued with any licence by the Authority.
- f) Furthermore, the 5th Respondent exercises its supervisory and assessment mandate where there was an act or omission by a party entrusted with the responsibility of protecting the environment under the EMCA, 1999 had neglected to do so and such conduct has not only been brought to the attention of the 5th Respondent but assessed by the Authority thereafter.
- g) Following the commencement of the present suit, the 5th Respondent conducted an investigation of the land in dispute to evaluate the Petitioners' claims regarding the 5th Respondent's alleged violations and breach of statutory duties.
- h) During the site visit/investigation conducted by the Affiant's team of Environmental Inspectors it was observed as follows:-
 - a. that the area in which the suit land was located was primarily residential with housing estates, multi-dwelling apartments and the local police station surrounding the suit land;

- b. The suit land has a perimeter masonry wall erected around it;
 - c. There was no activity within the perimetered suit land save for four (4) parked lorries and no staff save for one (1) security guard;
 - d. The suit land was paved; and
 - e. The area surrounding the suit land was an active residential area that is served with infrastructure amenities of water, tarmacked roads, electricity and other social amenities. (Attached in the affidavit and marked as "SL - 3" photos from the said site visit taken by officers under the employ of the 5th Respondent).
- i) The conclusion of the abovementioned site visit was summarized as hereunder: -
- a. The entire area in which the suit land was located was developed and there was no evidence of a wetland;
 - b. There was existing residential houses and public infrastructure surrounding the suit land; and
 - c. It would be deleterious to infer that the suit land was a wetland
- j) Based on the findings and recommendations from the site visit, the suit land did not qualify as a wetland as defined in the Environmental Management and Coordination (Wetlands, Riverbanks, Lakeshores and Seashore Management) Regulations, 2009 (hereinafter referred to as the "Wetland Regulations").

- k) The Wetland Regulations define a Wetland as "...areas permanently or seasonally flooded by water where plants and animals have become adapted; and include swamps, areas of marsh, peat land, mountain bogs, banks of rivers, vegetation, areas of impeded drainage or blackish, salt or alkaline; including areas of marine water the depth of which at low tide does not exceed 6 metres. It also incorporates riparian and coastal zones adjacent to the wetlands" and as there was no proof of the elements of the aforementioned definition on the suit land, it could not be classified as a wetland as the Petitioners asserted.
- l) The suit land was neither a protected wetland as defined in Regulations 8 and 9 of the Wetland Regulations, nor is it included in the inventory of wetlands as defined in Section 10 of the Wetlands Regulations, and thus the Petitioner's allegations that the suit land is a swamp/wetland are inaccurate.
- m) Furthermore, there was no development on the suit land and the evidence brought forward to this Honourable Court was not sufficient that the proposed developments would require the 1st Respondents to apply for an EIA License, the mandate of the 5th Respondent was limited.
- n) For this Honourable Court to issue injunctive orders sought, the Petitioner ought to have demonstrated a prima facie case with probability of success, must demonstrate irreparable damage, balance of convenience must be shown to tilt in their favour and must disclose ALL facts that would assist this court in arriving at a just decision.
- o) The burden of proof lied with the Petitioner and not on the Respondents, and the Petitioner has failed to demonstrate a prima facie case with probability, and thus the injunctive orders sought by the Petitioners lack merit.

p) The 5th Respondent had, at all times, remained conscious of the Statute and Regulations in place and had made every step necessary in ensuring that they adhere to the correct procedure outlined in the Environmental Impact Assessment and Audit Regulations, 2003.

q) Thus, the Petition should be dismissed with costs to the Petitioner.

VI. The Supplement Affidavit of the Petitioner

107. The Petitioner responded to the Replying Affidavits by the Respondents through a 70 Paragraphed Supplementary Affidavit sworn on 31st January, 2021 by Ainea Ragen where the Affiant deposed as follows: -

- a. The 1st Respondent constructed a more than 4 Meter perimeter wall around the suit land and erected an electric fence on top of the perimeter wall without registration and authorization by national construction Authority (NCA). Hence the perimeter wall and the electric fence are illegal structures that pose serious threat and danger to the public and it is in the best interest of the public and the Law that they be demolished.
- b. None of the Respondents including the 1st Respondent had brought any document before this court showing authorization and registration from NCA of the more than 4 Meter perimeter wall and the electric fence around the suit land.
- c. The 1st Respondent had not brought before this court any document from Surveyor of Kenya inform of Registry Index Map (RIM) to show the suit land was not Swamp and neither has the 1st Respondent opposed or challenged or rejected or disapproved or countered the existence of Registry Index

Map annexed to the main Petition and marked as “MCP - 1” showing the suit land was swamp.

- d. The Response from 1st respondent page 16, shows the beacon certificate had no official stamp of survey of Kenya. He had documents from survey of Kenya and they have always carried official stamp.
- e. On page 53 of the 1st Respondent’s bundle of documents showed the 1st Respondent was given title deed of area 3.00 Ha on 19th January, 2017 while the size of the suit land was 2.56 HA as per the Certificate of Lease. It showed the records at government agencies whose mandate fell on the suit land’s size was being manipulated to suit the illegal alienation of the suit land.
- f. On page 138 of the 1st Respondent’s bundle of documents showed a Notification approval of the application for development permission; section (a) Change of User subject to endorsement by NLC.
- g. The NLC did not endorse the Change of User and Section (c) of the Approval states: Subject to the comments provided by the office of Director of survey approved the purported change of use because the Registry Index Map still shows the suit land is SWAMP and also the letter from Mombasa County coordinator of NLC annexed to the main Petition and marked as “MCP - 22” shows the land is a Wetland.
- h. Around the month of November shortly after he filed this matter at the ELC Court at Mombasa, the 1st Respondent went on a bribery spree by bribing people and desperate passersby within Mwembelegeza and in particular areas around Mwatamba and Kadzandani areas giving each Kenya Shillings One thousands (Kshs. 1, 000/=) to any person who was willing to append his/her name, ID Number and signature on the list he had annexed on Pages 130,131,132,133,134 of

his Reply Affidavit and also a list of strangers including his own employees at his firm/organization (Anwarali & Brothers Limited) in Mtopanga whose names, ID Numbers, Phone numbers and signatures appeared as shown on pages 135 and 136 of his list of bundles.

- i. It was for fear of reprisal and victimization by the 1st Respondent against those who were bribed by the 1st Respondent and because of their safety that the Petitioner chose not to disclose their identities in this affidavit.
- j. On page 141 of the Replying Affidavit, the 1st Respondent was concerned so much with the size of the suit land and not the adjustments on RIM map by Regional surveyor. Why were both the RIM map and the ground where the suit land is located has discrepancies? Why was the latest RIM showing SWAMP? It was the Petitioner's belief that the Coast Regional Surveyor stood his/her ground against an illegality perpetuated by the 1st Respondent.
- k. On page 151 as per the 1st Respondent annexure attached to their response, the National Government leased the suit land to the 1st Respondent for a period of 99 years. The legal question here was; how did a private land herein the suit land became National Government property since in the annexures the Petitioner had also seen Title Deed in the name of 1st Respondent as shown on page 53 of their annexures/Reply Affidavit. What transpired that suddenly a purported private land herein the suit land, the National government became the Landlord? Who robbed the other?
- l. The Petitioner was left to believe that the national government cancelled the title deed in the name of the 1st Respondent as shown on page 53 of their Reply Affidavit and replaced it with a Certificate of Lease as shown on page 151 of the 1st Respondent Reply Affidavit because it was irregularly allocated.

- m. The 1st Respondent had not shown any proof or reasons in their Reply Affidavit why their purported private land herein the suit land which they possessed its title deed as shown on page 53 suddenly was taken over by the National Government and the same title Deed replaced by Certificate of Lease as shown on page 151 of their reply affidavit.
- n. The 1st Respondent had not brought to the Honourable Court any Registry Index Map (RIM) that agrees and corresponds with the purported ownership documents of the suit land showing the suit land as private land.
- o. The 1st Respondent in the lease attached to their response on page 151, the lease did not show the Registry Index Map Number of the suit land and the deed plan number was not available hence it was fraudulently acquired.
- p. On 153 of the response submitted by the 1st Respondent on the lease dated 1st February, 2018, the signature of the officer who signed the lease is not the same signature as that of the Chief Lands Registrar at Mombasa. He had noted the Chief Lands Registrar's signature at Mombasa in a number of documents except the Certificate of Lease. It was only the Deputy Chief Land Registrar at Mombasa pursuant to Land Registration Act under the process of Section 14 (3) who could sign Certificate of Lease in the absence of the Chief Lands Registrar and therefore whose signature was it?
- q. It was required by Land Registration Act, under Section 14 that signing of title deed and lease among other land documents be done by the Chief Land Registrar and the Deputy Chief Land Registrar shall be the Principal Assistant of the Chief Land Registrar in the execution of the functions of the Chief Land Registrar. Any other signature purporting to be or assigned by Chief Land Registrar in the lease certificate submitted by 1st respondent was fraudulent.

- r. By the 1st Respondent submitting names, National Identity cards details, phone contacts and signatures of persons as stated in paragraph 17 of the Supplementary Affidavit agreeing to alienation of the suit land measuring almost 3.0HA in size which was SWAMP and a public land by law because of mosquitoes and snakes was laughable and should be dismissed by this Court. It was not the responsibility of the 1st Respondents to handle snakes.
- s. The Constitution of Kenya, 2010 or any Act of Parliament of the Republic of Kenya as presently enacted, had not given the 1st Respondent license to handle snakes. It was only the Kenya Wildlife Service (KWS) which had the Constitutional mandate and rights to handle snakes. These rights could only be extended and or donated to persons and or organizations which had been vetted, approved and licensed by KWS.
- t. The 1st Respondent had only shown in their affidavit that it was a logistic private company dealing with transport and logistics and that the 1st Respondent had not produced any license or legal document before this court as proof that it handled wildlife animals and therefore, the 1st Respondent's activities, attitude and behavior touching on the Suitland are pure violation and abuse of the Wildlife Conservation and Management Act 2013 punishable under this Act.
- u. If there were presence of snakes as purported by the 1st Respondent in his affidavit, the 1st Respondent had not produced any document before this court showing complaints from Mwembelegeza community Residents addressed to KWS and subsequently it contracting the 1st Respondent to move to the suit land and address the problem of snakes.
- v. There was no document brought before this Court by the 1st Respondent showing any correspondences between KWS and 1st Respondent and or between Mwembelegeza

community residents and KWS and or between Mwembelegeza residents and 1st Respondents seeking help in eliminating snakes within the swamp. This was a knee jerk cover-up reaction by 1st respondent to cover up their illegal activities touching on the suit land.

- w. The Government of Kenya through the ministry of Health provided free treated mosquito nets yearly, latest being year 2021 in COASTAL Kenya Mwembelegeza residents being a beneficiary and the lake/riverine areas like the Nyanza Regions. The 1st Respondent had no reason to illegally alienate a water body because of mosquitoes. Mosquito menace had been addressed by the relevant government agencies including ministry of health and other developments partners of the Kenyan state.
- x. The Republic of Kenya was endowed with numerous swamps/wetlands all over the country and that these swamps/wetlands was habitat for all kinds marine creatures including snakes and mosquitoes and that the act by the 1st Respondent by alienating the suit land, in this suit which was swamp and a public land if entertained by this court, would set a jurisprudence that would give impetus to moneyed and influential people who would alienate these kind of lands with impunity and Kenya will be turned into a desert. The court must assert its authority and save Kenya for future generations.
- y. Pursuant to PART VI - Conservation, Protection and Management of Wildlife of the Wildlife Conservation and Management Act 2013 Sections 26, 27, 28, 29, 30, 39,(Any person or community who own land on which wildlife inhabits may individually or collectively establish a wildlife conservancy or sanctuary in accordance with the provisions of this Act.-Section 39).

- z. ART IX-HUMAN - wildlife conflict Section 77 (1)(2)(3) of the Wildlife Conservation and Management Act 2013 only give permission to an authorized officer of the service herein KWS to kill or destroy problem animals. The 1st Respondent acted with impunity by destroying marine/snake life habitat hence destroying animals without approval from Kenya Wildlife Service.
- aa. The 1st Respondent had agreed with him that the suit land was a habitat for marine animal including snakes and therefore its preservation was of great necessity.
- bb. The 1st Respondent had committed an offence pursuant to Prevention of Cruelty to Animals Acts Section 3(1)(d),(2),(3).
- cc. On page 1 to 45 of the Reply Affidavit by the 1st Respondent, the Petitioner had noted in this suit, the existence and activities of a company called Zaib Real Estate Limited whose directors are Shabaz Khan Mohammad and Shahbaz Rani Shahida both of Pakistani nationality and the Petitioner thereby recommended to the 1st Interested Party herein the Ethics & Anti - Corruption Commission (EACC) to further investigate the activities of this company and its director.
- dd. The Petitioner agreed with the 2nd Respondent at paragraph 5 of his affidavit and the Petitioner reiterated by stating that the National Lands Commission which was the administrator of public land herein the 4th Respondent in their reply letter annexed to this Petition and marked as "MCP - 22" acknowledged that the suit land was public utility (swamp/wetland) which was illegally allocated and they earmarked it for investigation and subsequent repossession.
- ee. The 2nd Respondent had not brought any evidence of proof of sign board that gave Mwembelegeza opportunity to make informed choice on change of use. The community was threatened by gun wielding goons and a hostile takeover of

the suit land under armed police protection and that Mwembelegeza community feared for their lives and only became observers as the illegal activities were being achieved.

- ff. The 2nd Respondent had not brought before this court any other document inform of an advertisement in Kiswahili language from a second newspaper of national circulation pursuant to Physical Planning Act (on Change of User) Section 52 Publication of Notice in Newspapers. The Law and regulations on legal Change of User requires a public notice publication on change of use on two (2) Newspapers of National circulation published on both English and Kiswahili. It was important to note that many residents of Mwembelegeza do not understand English and so ignoring a critical provision of Law in change of use and failing to advertise in Kiswahili was in itself a violation and should not be entertained by the court.
- gg. The purported public participation to have been carried out as stated by the 2nd Respondent in his reply affidavit in paragraphs 9, 13(ii) and 15(v) were untrue and misleading and that the annexed document to their affidavit Marked as "RM - 5" showing lists of names of persons as Mwembelegeza residents agreeing to alienation of the suit land as a result of snakes and mosquitoes was the highest abuse of relevant laws governing public land and wild animals that the court should not entertain and should be dismissed by the court.
- hh. As the Petitioner stated in his main Petition, on 10th March, 2021, the Petitioner wrote a complaint letter annexed to the main petition and marked as "MCP - 5" addressed to Chief Officer Department of Lands, Planning and Housing of the 2nd Respondent seeking answers to the illegal alienation of the suit land and that for seven (7) months, he sought answers from the 2nd Respondent's officers but there was none and that they took men from pillar to post without any

substantive response. The Petitioner was left with no option but to seek legal redress from this court.

- ii. The Chief Officer, Department of Lands, Planning and Housing of the 2nd Respondent in one of the days after numerous visits to her office, referred the Petitioner to MR. PAUL MANYALA the Director of Planning of the 2nd Respondent. He had sworn the Reply Affidavit for the 2nd Respondent in this suit. On many occasions the Petitioner visited and had a one on one conversation with him seeking answers. Nonetheless, he was unwilling to give the Petitioner any substantive response and only took the Petitioner on the proverbial rollercoaster of come back tomorrow – giving mere promises.
- jj. The 2nd Respondent response as shown in his Reply Affidavit Paragraphs 18, 19, 20 and 21 stating that the Petitioner never raised complaints or concerns were untrue and misleading and should be dismissed by the Court.
- kk. The 2nd Respondent had not opposed or challenged or rejected or disapproved or countered the existence of Registry Index Map from the Surveyor of Kenya annexed to the main Petition and Marked as “MCP - 1” showing the suit land was swamp.
- ll. The Application for water permit marked as “AAM - 1” on page 7 submitted by the 3rd Respondent was for water permit and not for filling wetland with stones, steel, cement and cabro to create a parking yard for tucks.
- mm. The Application for water permit marked as “AAM - 1” submitted by 3rd Respondent was doctored and covered by a dark paint to hide and cover class of water resource, effluent of water resource and category of application or class of permit given. They did this so the court doesn't recognize this detail because in the subsequent annexures marked as “AAM - 9” on page 90 of the 3rd Respondents Response; Notification

Approval For Construction of Works and Use of Water, shows faint letters/writings on (1) Class of Water Resources. While in the first one it's covered to hide water resource details. The category of applicant (Class of permit) was also missing. This was an act of copy and paste from a strange source only known to the 3rd respondent and the purported application for water permit should be dismissed by the Honourable court.

nn. The 3rd Respondent had not brought before this court any valid discharge permit pursuant to Water Resources Management Rules; Rule 82.(1) No person shall:(a)Discharge effluent into a water resource without a valid discharge permit issued by the Authority(WRA) permitting the 1st Respondent to discharge effluent into the purported Mtopanga river. And Rule 82 (3) Any person who contravenes the rules under this section shall be guilty of an offence.

oo. The hydrological assessment report marked as "AAM - 45" submitted by 3rd Respondent was for Mtopanga River and not for the suit land (swamp). The Petitioner did not see any correlation between the suit land and Mtopanga river. Their submission was an act of copy and paste from a strange source only known to the 3rd Respondent to mislead the Honourable court. The report was a cover-up, misleading, and inconsequential and should be dismissed by the Honourable court.

pp. The 3rd Respondent submitted a notification of approval for construction of works and use of water on page 89 of their submission; the water resource details on the following page 90 are crucial details on Class of Water resource, effluent and Class of permit has also been painted and or rubbed showing massive cover-up to mislead the Honourable court. The court should NOTE that Class of permit reveals the intended purpose, details, nature of the permit and usage of water why permit was given. But this was covered in the notification form because the, 3rd Respondent's objective in the suit land

was to aid the illegal alienation of the suit land hence the details stated in this paragraph were hidden.

- qq. The 3rd Respondent's core mandate was water related as earlier mentioned in the main petition and that the Water Act and Water Resource Management rules does not confer any powers and authority to the 3rd Respondent to license construction of permanent structures on a swamp/wetland.
- rr. The 3rd Respondent in paragraph 4 of his Reply Affidavit had agreed with the Petitioner that his mandate was to receive; permit application for water abstraction and water use and that filling up swamps/wetlands with stones, cement, cabros, steel to create a parking yard for trucks was extreme abuse and violation of the Water Act and Water Resources Management Rules.
- ss. The EIA report annexed to the 3rd Respondent's affidavit in this suit by one Zaib Real Estate Ltd paragraph 1.1.5 (pollution control measures) was talking about a strange Island and not the suit land and the Petitioner quoted: (Spill kits would be maintained around island to handle any liquid spills) end of quote. The suit land was not an island and so this report by one Zaib Real Estate Limited was untrue and misleading and reveals massive cover-up through copy and paste from a strange source and that EIA report for the suit land was not done and therefore this report purporting to be EIA for the suit land should be dismissed by the court.
- tt. The 3rd Respondent had not opposed or challenged or rejected or disapproved or countered the existence of Registry Index Map from the surveyor of Kenya annexed to the main Petition and Marked as "MCP - 1" showing the suit land was Swamp.
- uu. The 5th Respondent had continued to show a 'I DON'T CARE ATTITUDE' in their Reply Affidavit by admitting that even

after the Petitioner reported the complaints to their office at Mombasa on 10th March 2021, they did not bother to immediately visit the site of the suit land and do a thorough inspection following the Petitioner's complaints. The 5th Respondent only acted after the Petitioner filed the Petition/suit at the ELC Court at Mombasa and served them with court documents and that should the Petitioner have failed to file this matter before the Honourable court, the 5th Respondent would not have acted even to date.

- vv. The 5th Respondent failed to do due diligence and also failed to counter check with relevant government statutory bodies like survey of Kenya and National Lands Commission to ascertain the original status of the suit land as per his complaints.
- ww. The 5th Respondent had not brought before this Court any document from surveyor of Kenya informed of Registry Index Map to show the suit land was not swamp and neither had the 5th Respondent opposed or challenged or rejected or disapproved or countered the existence of Registry Index Map annexed to the main petition and Marked as "MCP - 1" showing the suit land was swamp.
- xx. The 5th Respondent only based his response to this suit (as shown in their Replying Affidavit) on the present and current state of the suit land which could not reveal the true original status of the suit land since the land's original status of swamp had been highly degraded and unrecognizable.
- yy. The Petitioner referred the Honourable Court to the Ruling given on 10th May, 2021 by Hon. Justice Sila Munyao in a separate matter touching on public Land in reference to ELC PET. 35 of 2020 at Environment and Land Court at Mombasa; a matter in which he was a party. On pages 4 and 5 paragraph 10 Court held that the RIM (Registry Index Map) signed by the Regional Surveyor of Kenya Coast Region. The

court identified the RIM (Registry Index Map) being a crucial document showing the identity of the suit land and its number as the Original status of the land. This Honourable Court must not deviate or be tempted to deviate from the jurisprudence that was set out from this Ruling. This Court must give preeminence to the Registry Index Map (RIM) showing the suit land was swamp. The copy of the RIM was annexed to the main petition. Attached to the affidavit and marked as “RSA - 1” was a copy of the said ruling.

zz. The 5th Respondent in his Reply Affidavit as shown on Paragraphs 11(a), (c) and 12 were misleading and mischievous and should not be entertained by the Court. The 5th respondent only sent inspectors after the suit land had already been developed and its status of swamp degraded as shown in the 5th Respondent’s annexures attached to their reply affidavit and Marked as “SL - 3”.

aaa. It was required by law that all government entities work in constitutional conformity, unity and in consultation with one another and that no law or Act of Parliament of Kenya touching on swamps/wetlands and other water bodies as presently enacted within the Republic of Kenya negate another law. If by law and by consultation with other relevant government entities, the Survey Act through the Coastal Regional Surveyor some years back as the Suit land was being surveyed and planned, declared the suit land no. 1475 a swamp, then all the statements by the 5th Respondent in their Reply Affidavit to this suit as shown in paragraphs 11,12,13,14,15,16,17,18 and 19, of their Reply Affidavit that intended to question the legality and to rubbish the Survey Act in this suit in reference to Registry Index Map (RIM) be dismissed by the Court and be declared null and void.

bbb. On 12th January, 2022, the Petitioner went to the offices of Counsel for the 7th Respondent and 2nd Interested Party on 9th Floor, NSSF building at Mombasa to remind the counsel of the

need to serve the Petitioner with their response. The Petitioner met the counsel and she promised to serve him with the response the following week. The Petitioner had waited for the counsel to respond including several phone calls to her but she had not been forthcoming.

ccc. On numerous occasions the Petitioner had spoken to the counsel for the 6th Respondent to serve the Petitioner with their response. The Petitioner had sent Whatsapp messages on 13th, 25th and 27th January, 2022 and a follow-up via phone call but the 6th Respondent was yet to comply with the court's directive of serving the Petitioner with their responses.

ddd. On 24th January, 2022, the Petitioner sent an e-mail to the counsel for the 4th Respondent through their E-Mail address: nlc.legal@landcommission.go.ke but the Petitioner was yet to receive any substantive response from them.

eee. The Affiant's response herein was only limited to the replying affidavits of the 1st, 2nd, 3rd and 5th Respondents.

fff. The suit land was swamp and a public land and this court must send a strong message to powerful, influential and moneyed individuals and persons who believe and think that they could arm-twist, compromise, mutilate and cannibalize the law and the Constitution of Kenya 2010 to illegally acquire public land.

ggg. This matter was of great public interest and that the decision that the Honourable Court would make touching on the suit land with either (1). Encourage fraudulent activities in Coastal Kenya touching on Public lands by Empowering corrupt state officers working in government in Cahoots with Corrupt individuals working in private sector or (2) the decision that this Honourable Court would make touching on this suit land would set highest standards of fidelity to the rule of Law in matters touching on Public land. The Court

must be on the side of the law and the Constitution of Kenya 2010.

hhh. The Affidavit was sworn in response to the responses by the 1st, 2nd, 3rd and 5th Respondents.

VII. The response by the 6th Respondent

108. The 6th Respondent responded to the Petition through a 20th paragraphed response to Petition dated 1st April, 2022 where it was averred: -

- a. The National Construction Authority was established under section 3(1) of the National Construction Authority Act No. 41 of 2011 with a mandate to oversee the construction industry and coordinate its development. Further pursuant to the provision of Section 5 (2) (g) of the Act, the Authority in furtherance of its mandate promotes and ensures quality assurance in the construction industry.
- b. The National Construction Authority Regulations 2014 commenced on 6th June 2014 (herein referred to as the Regulations) and under Regulation 17 of the said Regulations provides for registration of all construction works, contracts or projects either in public or private sector shall be registered with the Authority in accordance with the Act.
- c. The 6th Respondent admitted the contents of paragraph A (1 -9) of the Petition as the same was merely descriptive of the parties herein.
- d. In response to paragraphs (A - D) Legal Foundations of the Petition the 6th Respondent stated that averments in the

petition did not close any violations of the Petitioners rights as alleged.

- e. In response to paragraphs 1 - 41 on the Factual and Background of the Petition the 6th Respondent averred that it was a stranger to the allegations therein and that its mandate is to register construction works once a construction project has been approved by the relevant County Government, in this case the 2nd Respondent and also not to conduct Environmental Impact Assessment on construction sites as this was the mandate of the 5th Respondent.
- f. In response to paragraph 13 on the factual and background of the Petition the 6th Respondent averred that the development on the swamp was not registered as per Regulation 17(1) of the National Construction Authority Regulations 2014.
- g. The 6th Respondent in response to paragraph B (25) received a complaint from the Petitioner via a letter Reference NCA 11/301a/ Vol 3/(67) dated 11th March 2021 on the construction on Swamp/Wetland 1475.
- h. The 6th Respondent carried its investigations and requested the 1st Respondent to furnish the 6th Respondent the following details vide a letter Ref. No. NCAII/301a/VOL 3/67-1 dated 17th March 2021:
 - (a) Details of county approvals;
 - (b) NEMA approvals for the said piece of land;
 - (c) Change of Use for the said piece of land;
 - (d) Ownership documents of the land;

- (e) Details of the professional team engaged during construction;
 - (f) Details of the contractor engaged to carry out the works;
 - (g) Contract document between the contractor and the developer for the development;
- i. The 1st Respondent responded and furnished the following documents;
- (a) NEMA approvals dated 1st December 2016 for “construction of a perimeter wall to secure plot from squatter invasion” issued to Zaib Real Estate Limited.
 - (b) An improvement order from NEMA REF: NEMA/PR/MSA/5/2/3521 dated 17th February 2017 suspending previously issued license No. 0038884;
 - (c) A letter of no objection to approval of the development by water resources management authority REF: WRMA/CA/CM/3/14/1 (77) dated 30th November 2016;
 - (d) Letter from Mombasa County REF: P/2016/624/1 dated 31st January 2017 lifting a previously issued enforcement notice PPA7 dated 20th January 2016 stopping all development on the land (Enforcement notice not provided);
 - (e) County approved drainage layout dated 31st January 2017;
 - (f) Change of User approval from Mombasa County Government from residential to mixed use (Residential - cum- commercial) REF: TP.6/CU/36/2017 dated 16th May

2017 issued to Anwarali and Brothers Limited, P.O.BOX 97024, MOMBASA;

- (g) Planning Brief for the proposed change of use prepared by Mr. Cyrus Mbisi, a registered Physical Planner (RPP0216) dated 3rd May 2017.
- (h) Public Notice published on change of use placed on "***the Daily Nation***" newspaper dated 27th April 2017.
- (i) County approved Boundary wall/ location plan dated 6th January, 2017.
- j. In response to paragraph B(29) the 6th Respondent after carrying out its investigations responded to the Petitioner vide a letter REF. No. NCA 11/301a/VOL3/(67(2) dated 30th March 2021 and indicated that the 1st Respondent had provided the following documents;
 - (a) NEMA approvals dated 1st December 2016 for "*construction of a perimeter wall to secure plot from squatter invasion*" issued to Zaib Real Estate Limited.
 - (b) An improvement order from NEMA REF: NEMA/PR/MSA/5/2/3521 dated 17th February 2017 suspending previously issued license No.0038884;
 - (c) A letter of no objection to approval of the development by water resources management authority REF: WRMA/CA/CM/3/14/1 (77) dated 30th November 2016;
 - (d) Letter from Mombasa County REF:P/2016/624/1 dated 31st January 2017 lifting a previously issued enforcement notice PPA7 dated 20th January 2016 stopping all development on the land (Enforcement notice not provided);

- (e) County approved drainage layout dated 31st January 2017;
- (f) Change of user approval from Mombasa County Government from residential to mixed use (Residential - cum- commercial) REF:TP.6/CU/36/2017 dated 16th May 2017 issued to Anwarali and Brothers Limited, P.O.Box 97024, MOMBASA;
- (g) Planning Brief for the proposed change of use prepared by Mr. Cyrus Mbisi, a registered Physical Planner (RPP0216) dated 3rd May 2017.
- (h) Public Notice published on change of use placed on the Daily Nation dated 27th April 2017.
- (i) County approved Boundary wall/Location Plan dated 6th January 2017.

k. From the above the 6th Respondent established that: -

- i. The Plot of land is currently under the ownership Anwarali and Brothers Limited as indicated in the Change of User details.
- ii. The previous owner of the plot of land was Zaib Real Estate Limited.
- iii. No ownership/transfer of ownership documents from Zaib Real Estate Limited to Anwarali and Brothers Limited had been provided.
- iv. There was a change of use from residential to mixed use (Residential cum Commercial) dated 16th May 2017 issued to Anwarali and Brothers Limited by the County of Mombasa.

- v. There owner had not provided Change of User details from Swamp to Residential. The owner claims that when the land was acquired from the previous owner, it was already zoned for Residential use.
 - vi. The developer did not demonstrate having received clearance to proceed with the construction after the suspension by NEMA.
 - vii. The development was not registered with the 6th Respondent.
 - viii. The developer failed to provide proof of engagement of registered consultants and contractor for the development
- l. In response to paragraph B (36-37), the 6th Respondent avers that it received an email from the Petitioner on 7th May 2021 enquiring about whether the 6th Respondent's mandate is to register and authorize Construction of a perimeter wall and electric fence and the 6th Respondent confirmed that it covered all construction activities, including a perimeter wall and electric fence which must be registered before any Construction activities were commenced.
- m. The 6th Respondent admitted the contents of paragraph C (4) of the Petition as the same was merely descriptive of its mandate.
- n. In response to paragraph D (6)(a) on Constitutional Breach and Violations of Law by Respondents, the 6th Respondent admitted its contents as the same was merely a description of its mandate.
- o. In response to paragraph D (6) (b-g) on Constitutional Breach and Violations of Law by Respondents, save what was herein

expressly admitted, the 6th Respondent averred that it was a stranger to the allegations therein.

- p. The 6th Respondent upon receiving of the complaint, carried out its investigations and established that no construction works were ongoing at the time of inspection and the site on site appeared to be a motor vehicle yard with several vehicles parked.
- q. The 6th Respondent submitted that the works by the 1st Respondent were non - compliant to the requirements of the 6th Respondent regulations in regards to the perimeter wall, electric fence and the one - storey building.
- r. Further the 1st Respondent was required to conduct a structural integrity for the perimeter wall over and above complying with the other requirements, as the 6th Respondent did not have a mechanism to demolish non - compliant but it's the mandate of the 2nd Respondent.
- s. For reasons thereof the 6th Respondent invited this Honourable Court to find and hold that:
 - i. The development by the 1st Respondent is non-compliant;
 - ii. Such other orders as this Honorable Court may grant

VIII. The 7th Respondent and 2nd Interested Party's replying Affidavit

109. The 7th Respondent and 2nd Interested Party responded to the Petition through a 10 Paragraphed Replying Affidavit sworn by Josephine Rama, the Land Registrar in the Ministry of Lands and

Physical Planning and currently stationed in Mombasa County Lands office on 1st February, 2022 where she averred that: -

- a. She had read and understood the Petition dated 26th October, 2021 and the Supporting Affidavit thereto and wished to respond as hereunder:-
- b. As per the records held in their office, the suit property herein; Mombasa/Mwembelegeza/1475 measured 2.56 Ha and was first registered in the names of Andrew P. Ngirici who was issued with a Title Deed on 6th September, 2012. Annexed in the affidavit and marked as Exhibit "JR-1" a bundle of ownership documents in the name of ANDREW P. NGIRICI.
- c. On the 10th December, 2012, Andrew P. Ngirici transferred the suit property to Zaib Real Estate Limited and subsequently a Title was issued to him as the second registered owner. Annexed in the affidavit and marked as Exhibit "JR - 2" a bundle of Transfer documents to Zaib Real Estate and thereafter ownership documents.
- d. Zaib Real Estate transferred to Anwarali Brothers Limited on 19th January, 2017 who then became the 3rd registered owners and subsequently title was issued upon them. Annexed hereto and marked as Annexure "JR - 3" a bundle of Transfer documents to Anwarali Brothers Limited and ownership documents in the affidavit.
- e. Sometimes in 2018, Anwarali Brothers Limited applied to the Ministry of Lands for Change of User from a residential to a Mixed use; Residential cum Commercial. On 5th September, 2018, Anwarali Brothers Limited surrendered the Freehold Title in exchange to Change of User and hence obtained a Leasehold Title with terms and Conditions stated therein. The Application after going through all the necessary steps and fulfilling all the required conditions was approved and A lease was created to that effect. Annexed in the affidavit and

marked as “JR-4” a bundle of the Applications for Change of User and the Leasehold title thereon.

- f. The records at the Lands officer did not indicate any of the allegations by the Petitioner that this was a Swamp. If anything, some of the records emanating from the Adjudication office in the year 2012 show that the suit property was actually being cultivated on. Hence, they were not able to confirm that this was a Swamp as alleged by the Petitioner. Annexed in the affidavit and marked as Exhibit “JR-5” a bundle of documents from Adjudication and Settlement Office; Mombasa.
- g. All the registered by the Land Registrar were done after all the necessary documents were presented and any payments necessary done. It was proper to also note that by the time these documents were presented to the Land Registrar for registration, they had gone through different departments and approvals obtained. If the suit property was indeed a SWAMP, it could not have gotten to a point of registrations at the Lands Office or Titles being issues. Instead, the same could have been rejected from the word go by the Approving departments.
- h. All allegations being raised against the 7th Respondents were vehemently denied and the same lacked basis. The 7th Respondent and 2nd Interested Party prayed that this Petition be dismissed with costs.

110. The 7th Respondent called its first witness on 14th February, 2025 who testified that: -

A. Examination in Chief of the Land Registrar by M/s. Waswa Advocate.

111. The witness testified under oath and in English language. She was called CHEPKEMOI MERCY. She informed the court that she

was the Land Registrar Mombasa P/F. No. 2150000412. She had been in Mombasa from the year 2021. She joined the Government in February 2015. At the time of her testimony she was Chief Land Registrar Officer. She understood why she was in court. She relied on the averments on the affidavit dated 1st February by Josephine Rama, the Land Registrar, who was based at the Land Registry in Mombasa but currently at Kilifi County Registry. She relied on the Affidavit together with annexures on the suit property MSA/Mwembelegeza/1475 measuring 2.56 acres. The witness had read and fully understood the contents of the affidavit and she relied on it.

112. The witness told the court that in a nutshell it held that the current registered owner to the suit land was Anwarali Bro Limited leasehold of 99 years from 1st February, 2018 following a change of user against the property – the Annexure 3 of the Affidavit are the ownership property. They bought it on 19th January, 2017 as the 3rd owner. There was history of the property: -

- (a) 6th September, 2012 – from Andrew Kingi Ngirichi from S.F.T.
- (b) 10th December, 2012 - Zaid Real Estate Ltd transferred to
- (c) 19th January, 2017 – transferred to Anwarali Bro. Limited who applied for the Change of User from Government and they go a lease for term of 99 years from residential to Commercial/Residential multi dwelling user and the title was issued to them on 5th September, 2018 to the Anwarali Bro. Ltd.

113. According to the witness from her records, there was nothing to show that the property was a SWAMP. She had not received any communication from any person or department to cancel the title deed on ground of it being a swamp. She adopted the documents annexed to the Affidavit of Josephine Rama.

B. Cross Examination of the Land Registrar by Mr. Mogaka Advocate.

114. According to the witness, there was a valuation report of holding property for being worth a sum of Kenya Shillings Three Hundred Million (Kshs. 300. 000, 000/=). She never had any document to contradict that. For the land to be transferred there had to be stamp duty paid. For the Change of User from a Freehold to Leasehold there had to be approval and payment is made. For the sub-division and acreage change of the land the Director of Surveyor had to be involved. The lease was issued by the National Government and are the same who approve the change of user. By the time Anwarali Brohers Limited became owners to the property on 19th February, 2018 there were already 2 other owners. There were no restrictions preventing the Anwarali Brothers Ltd from acquiring the property. There was no doubt it was Zaib Real Estate who were the owners of the property.

115. The witness told the court that there was no objection for the ownership and change of user by the Commissioner of Lands for the change of user the Director of Physical Planning and County Government were involved. The property belonged to Anwarali

Brothers Limited. She had no record to indicate that the land was a swamp.

C. Cross Examination of the Land Registrar by Mr. Otieno Advocate.

116. The witness confirmed that the development approvals were issued based on the ownership of the land. The 1st Allottee was done by the National Government, but the Settlement Fund Trustees (S.F.T) were in charge of this process. There was no restriction which would impede the issuance of the title to the 1st Respondent.

D. Cross Examination of the Land Registrar by M/s. Lianza Advocate.

117. According to the Land Registrar before a Change of User was registered by them, there were verification factors but that was not her domain. They only registered the Grant.

E. Cross examination of the Land Registrar by Mr. Gikandi Advocate.

118. The witness told the court that she had submitted the Green Card for the suit property. Entry No. 8 it was registered under S.F.T. Settlement Fund Trustees. They were under the Land Adjudication Officer and it administers the land for the Settlement Scheme and the Letter of Allotments were under the S.F.T. with regard to this

property it was issued to Andrew P. Ngirichi as per and he got a Discharge by S.F.T. She expected the 1st Respondent would have been the S.F.T.

119. Further the witness told the court that the registration was in the year 2012 upto the time the green card was surrendered there were no complaints, caveats or restrictions against the property. With reference to the document No. 10 after the Green Card, the witness told the court that there was a word "swamp". It did not indicate the source of it but there was a stamp of the Regional Surveyor's office. It did not specify which particular "swamp" it was. She did not have any official record that showed the property was a swamp.

120. The witness told the court that when the transfer from Andrew P. Ngirichi to ZAIB REAL ESTATE a valuation was undertaken. When this was done it would have indicated there was a swamp. Likewise, for the transfer from ZAIB REAL ESTATE Ltd to Anwarali Bro a valuation must have been done and it would have picked that there was swamp. This was never indicated. Her role was to restrict and await the decision of the court on the legality of the title. She had not seen any irregularity in the manner the suit land was allotted from the S.F.T. to Andrew P. Ngirichi to Zaib Estate Ltd to Anjarwali Bros.

F. Cross Examination of the Land Registrar by Mr. Ainea.

121. The Land Registrar told the court that she had worked in that capacity since February 2015. S.F.T. was owned by the Ministry of

Lands. She had dealt with the issues of S.F.T. Before registration of property from S.F.T. they required a Transfer and the Discharge. The documents showed the owners were S.F.T to Andrew P. Ngirichi. There was a title deed, she believe before documents showed the owners were the Green card was opened the transfer were presented but she did not have them.

122. The witness told the court that he had not seen the letter of allotment and one issued to Mr. Andrew P. Ngirichi. With reference to the documents dated 15th August, 2012 written by the Mwembelegeza Community, the witness referred to the title deed dated 6th September, 2012. See the part A.O.B. of the document. Paragraph 1 “Mr. Caroline Salim, Mr. Kanyotu was given the property yet there was a ban”. Members agreed to follow on the issue of the ban of this land with their member of Parliament. There was no other document to that effect.

123. With reference to the MAP, the witness told the court that there was the word “Swamp”; her officer did not act in isolation from the offices of survey or the planner DLASO e.t.c. they did consult with these departments/ legal entities and if the documents were proper they register but if there were doubt they consult. This being S.F.T. the officer who register concerned must have consulted the DLASO and there is a letter dated 10th August, 2012 and marked as “JRN - 1 to that effect - With reference to the last paragraph 1 Page 83 - the witness stated that:-

“I am therefore writing to you so that you may inform the other members of the status of the land”

124. They had had communication by the community on the ban. He did not know whether the Government lost money. With reference to a letter by DLASO dated 28th February, 2007 to in the Petitioner’s bundle i.e. it was a caveat letter to the Land Registrar - on all the land within the Mwembelegeza Land. She had not seen the said letter.

G.Re - Examination of the Land Registrar by M/s. Waswa Advocate.

125. From the bundle (of the Affidavit by M/s. Rama), the witness confirmed that the documents were forwarded to the Land Registrar from the DLASO, Mombasa. The Letter of Allotment and the Discharge is not part of the bundle. She was not able to state whether there was any contradictory evidence on the value being a sum of Kenya Shillings Three Hundred Million (Kshs. 300,000,000/-). Before the documents get to the Land Registrar, they were not part of the said process. The documents were forwarded to their office.

126. The 7th Respondent marked their case closed on 14th February, 2025 through their advocate M/s Waswa.

IX. The Petitioner’s Supplementary Affidavit in compliance with Court’s directive to file CAVEAT letter

127. The Petitioner filed a 9 Paragraphed Supplementary Affidavit sworn on 2nd March, 2023 by Ainea Ragen where the Affiant deposed as follows: -

- (a) On 24th February, 2023, the Honourable Court in his presence and in the presence of advocates representing the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th Respondents and 2nd Interested Party and Interested Party to the Cross - Petition conducted a Site Visit (*'locus ni quo'*) at Mwatamba, Mwembelegeza scheme near Mwatamba - Kadzandani Police Station where the suit land was situated.
- (b) On 10th November, 2022, he was duly served with a document containing Lists of all Public Utility Lands in Mwembelegeza by Counsel representing Attorney General in a case Ref. ELC Pet 35 of 2020 at ELC Mombasa in which he was one of the Petitioners. In this referenced case, public land no. 1476 in Mwembelegeza Scheme reserved for construction of Nursery School was illegally alienated.
- (c) In the said document served upon the Affiant as stated in paragraph 4 of this Affidavit which also contained a sworn commissioned affidavit signed by Mr. Sammy A. Mchombo who was the present Mombasa County Land adjudication and settlement officer, one of the very many lands which had caveat placed on vide a letter Ref. No. DLASO/MSA/208VOLIII/154, dated 28th February, 2007 by the then Mombasa District land adjudication and settlement officer; Felix M. Kiteto was the suit land no. 1475 Mwembelegeza Scheme. The caveat letter stated plot no. 1475 was swamp. The said caveat letter was addressed to the then Mombasa District land officer (presently Chief land registrar at Mombasa). The letter stated and he quoted:-

“Please note that the following public utility plots were set aside in the above mentioned scheme (Mwembelegeza): 1475 - SWAMP. This is therefore to request you to place a

CAVEAT on these public utility plots as they are meant for public purpose only. Signed by “FELIX M KITETO and copied to the following:

- i. Director of Land adjudication and settlement, Nairobi**
- ii. District commissioner Mombasa**
- iii. District surveyor Mombasa**
- iv. District Physical Planning officer Mombasa**

(d) Upon receiving this crucial evidence/ information touching on the suit land from the office of the Attorney General, that on 24th February, 2023 during the Honourable Court’s site visit to the suit land that he sought the Honourable Court’s leave (which was granted) to file the said documents as stated in Paragraph 5 herein. Copy of the said caveat letter and affidavit sworn by Sammy A. Mchombo were annexed to the Supplementary Affidavit and marked as “CL - 1” respectively.

(e) None of the Respondents had produced before the Honourable Court any document or letter from the same office of adjudication and settlement at Mombasa that lifted the said caveat and placed on the suit land and that the Respondents violated the caveat restrictions placed by the then District Land Adjudication and Settlement Officer on the suit land being swamp.

(f) This suit had generated huge public interest.

(g) The Supplementary affidavit was sworn in compliance with the Court’s directive during suit land visit (*‘locus ni quo’*) on 24th February, 2023.

X. The Response by the Interested Party in the Cross Petition

128. SHABHAZ KHAN, a Managing Director of Zaib Real Estate Limited responded to the Petition and Cross Petition through a 17 Paragraphed Replying Affidavit sworn on 6th February, 2022 wherein he averred that:-

- a. Zaib Real Estate Limited is a duly incorporated entity (hereinafter referred to as 'the company'). Annexed in the affidavit a copy of the Certificate of Incorporation and mark and the same as annexure 'SK-1'.
- b. Sometimes in 2012, one Andrew P. Ngirici offered to the company for sale a then property known as Mombasa/Mwembelegeza/1475. He proceeded to visit the said property to ascertain its existence. He did not see any squatters neither were there any encumbrances notes on the register of the property. Indeed, there was no even any notices placed on the property bespeaking any objections with regard to the said property.
- c. In the course of due diligence an official search was carried out it showed that Andrew P. Ngirici was the absolute owner, free of any encumbrances of the said piece of land. Annexed in the affidavit were copies of the Title Deed and Official Search which marked as annexure 'SK - 2'.
- d. The company agreed to purchase the said property as witnessed in the agreement for sale dated 6th December, 2021. Annexed in the affidavit and marked as Annexure 'SK - 3'.
- e. Thereafter, a transfer of title was executed between the company and Andrew P. Ngirici, stamp duty was also paid to the Government. Annexed in the affidavit were copies of the transfer and title which the Affiant mark as annexure "SK-4".The company was then issued with a certificate of title of the said property.

- f. Subsequent as set out in paragraph 5 - 13 of the Affidavit dated 2nd December, 2021 sworn by Salim Haji on behalf of the Cross-Petitioner, the company entered into an agreement for sale with Anwarali Brothers Limited in the sum of Kenya Shillings Seventy Five Million (Kshs. 75,000,000.00/=). Subsequently, the property was transferred to the Cross-Petitioner as more clearly set out in the said affidavit.
- g. The process of surveying any land in Kenya and registering the same was exclusively under the domain of the Government of Kenya, it was the government that registered Andrew P. Ngirici as the owner of the suit property herein after the government had issued him a Letter of Allotment dated 23rd May, 2003. Upon Ngirici complying with the set conditions he was issued with a Title Deed and later Andrew P. Ngirici decided to sell the property. The government collected stamp duty and has been collecting land rates from the transactions.
- h. Zaib Real Estate Limited was registered as the owners of the suit property on 10th December, 2012; since that time nobody has ever raised any complaint with regard to the said property; consequently, since the company entered into an agreement for sale with Anwarali and Brothers Limited and further effected a transfer of their title to the said purchaser. Annexed in the affidavit a copy of the Title Deed and mark the same annexure "SK - 5".
- i. The Petitioner had not shown why it had taken him so long to lodge the complaint.
- j. One of the cardinal principles in the law relating to the environment is this: That sustainable development should be allowed to take root. In other words, this is the principle: live and let live and only where it was shown that a

development would be so injurious to the wellbeing of the people in that locality would adverse orders be made against such a development. This has not been shown to be the case here.

- k. In the petition presented herein, the Petitioner had not availed any independent evidence to prove that the existing development in plot no. Mombasa/Mwembelegeza/1475 had impacted negatively on the environment. In fact, the suit property is one among other plots that were allocated by the government when the Mwembelegeza Settlement Scheme was being carried out prior to the issuance of letters of offer as witnessed in the Letter of Allotment of 23rd May, 2003 (supra).
- l. The Court should take judicial notice of the fact that when adjudication or allotment of land was made by the government, such are matters that all the people in the affected locality get to know even before the government officers arrive on the ground. Therefore, by the time Letters of Offer were issued in 2003, the Petitioner should have loudly aired any complaint that he had with regard to allocation of the land now known as Mombasa/Mwembelegeza/1475; but to wait for over twenty (20) years and later start complaining about the land was clear evidence of one who is acting maliciously.
- m. In the circumstances he completely dispute that Zaib Real Estate Limited could ever be liable to Anwarali & Brothers Limited as claimed or at in the Cross - Petition and he stated that should there be any claim for compensation, then the same must be channeled against the government who processed the Title deed initially in the name of Andrew P. Ngirici thereafter to Zaib Real Estate Limited and thereafter to Anwarali & Brothers Limited which processes were undertaken after the government was paid all fees in the form of charges and stamp duty due to it. The

government received a lot of revenue through the said transactions and so must take full responsibility should the allocation it made be nullified by Court of Law.

- n. The interested party did not in any way had control of the usage of the suit property and was only a vendor whose title and interest in the property had passed.
- o. The affidavit was in response to the cross petition.

XI. The 2nd Supplementary Affidavit by the Petitioner

129. The Petitioner responded to the Replying Affidavits by the Respondents through a 43 paragraphed Supplementary Affidavit sworn on 15th February, 2021 by Ainea Ragen where the Affiant deposed as follows: -

- a. The Affiant had noted serious factual and constitutional discrepancies in the 7th Respondent's reply affidavit and responded as follows:-
- b. The Affiant had faced serious frustrations from the 7th Respondent in respect to the nature of bundle of documents annexed to her reply affidavit which she served me. Some of the documents were not marked and some marked with same number and so he had sworn this supplementary affidavit pleading with the court to give keen attention on the bundle of documents filed at the court by the 7th Respondent.
- c. The 7th Respondent had not brought before the Court any document from Surveyor of Kenya inform of Registry Index Map (RIM) to show the suit land was not swamp neither had the 7th Respondent opposed or challenged or rejected or disapproved or countered the existence of Registry Index Map (RIM) annexed to the main Petition and marked MCP 1 showing the suit land was a swamp.

- d. In the annexures of the 7th Respondent to her reply affidavit paragraphs 3, 4 and 5 are purported title deeds of the suit land in the name of the purported first owner ANDREW NGIRICI marked as “JR-1” and the purported third owner of the suit land herein the 1st respondent Marked as “JR - 3” did not show Registry map sheet number and the space for the registry map number replaced by MOMBASA/MWEMBELEGEZA (Mombasa/Mwembelegeza was NOT a number). It was important to note that in the title Deed copy of the purported second owner of the suit land herein Zaib Real Estate Limited, the registry map sheet number shows No. 4. The question is what transpired that suddenly the suit land had NO registry map number in the two title deeds? It is because the registry sheet number could have revealed the exact identity of the suit land which corresponds with the registry Index number hence they omitted it in the two title deeds to hide this crucial and important part of the document.
- e. The 7th Respondent in her Replying Affidavit paragraph 7 had vehemently denied the suit land was swamp even after the Petitioner served the 7th Respondent with RIM map showing suit land was swamp including his complaints letter to the 1st Respondent dated 10th March 2021 attaching a copy of RIM map to the said letter. The letter was annexed to the main Petition and marked as “MCP - 2”. This was deceit and lying under oath by the state officer herein the 7th Respondent.
- f. The 7th Respondent failed to do due diligence on documents brought on documents brought to her in request to issue title deed to the 1st Respondent. The 7th Respondent did not consult with the Coast Regional Surveyor of Kenya and institute a separate investigation upon my complaints to ascertain the registry map number of the suit land. The 7th Respondent was bent on illegally aiding the alienation of the

suit land and could not listen to any other voice of reason in law. The action of the 7th Respondent was what has informed the discrepancies in the registry map sheet numbers in the three different title deeds offered to the three purported owners with the main goal of alienating the suit land.

- g. The Land Registration Act Section 5, CONFLICT WITH OTHER LAWS (Except as otherwise provided in this Act, no other written law, practice or procedure relating to land shall apply to land registered or deemed to be registered under this Act so far as it is inconsistent with this Act). Land registration Act does not conflict with Survey Act. There is uniformity in that what the Survey Act declares a particular land to be is what the Land registration Act declares the same land to be. Survey Act declared the suit land swamp since the time it was surveyed and planned, the Land registration Act declared the same except that corrupt state officers at Lands registry at Mombasa bent the law for selfish reasons to aid illegal alienation of this suit land.
- h. Before any land was processed in the name of the owner, survey was carried out and boundaries marked and this was effected in the Survey Map (Registry Index Map). That it was the latest Registry Index Map that shows the exact identity of the suit land.
- i. The Petitioner wrote a letter to the 7th Respondent annexed to the main Petition and marked as "MCP - 2" registered their concerns as a community seeking answers to the illegal alienation and that in this letter, he attached a copy of the Registry Index Map (RIM) showing the number of suit land 1475 and word swamp in bold. By the 7th Respondent denying this fact as shown in their Reply Affidavit Paragraphs 7 and 8 was in itself lying under oath and should be penalized by the court.

- j. The suit land was a seasonal swamp and whenever it had water, residents use part of it for farming and fishing.
- k. The content of the letter annexed to the 7th Respondent's reply affidavit and Marked JR-5 showing the District Land adjudication and settlement officer S.A MCHOMBO seeking clarity from Mwembelegeza residents only after one ANDREW PETER KANYOTU claimed ownership of the suit land. And that S.A MCHOMBO sought detailed report on the status of the suit land which was never availed to the District Land adjudication and settlement officer by the purported Chairman of Mwembelegeza scheme. The existence of such a group or committee within Mwembelegeza speaking for and on behalf of the community was a creation of the 7th Respondent and her cahoots and not known anywhere in the community nor supported by law. This purported committee who purportedly sat somewhere in a room to make decision on public land herein suit land, a group of individuals whose names are annexed to the Reply Affidavit of the 7th Respondent without public participation involving the entire Mwembelegeza community residents as provided for in the 2010 constitution, County government Act, NEMA Act, Physical Planning Act among many other Acts of parliament and this purported existence of such a committee should be dismissed by the court.
- l. There was no law or any Act of Parliament of Kenya presently enacted that gave power and/ or authority to a strange group of people within any community to decide how public land should be alienated. Alienation of any Public Land solely lies with National Lands Commission; Pursuant to National Land Commission Act Sec. 5(2). In addition to the functions set out in subsection (1), the Commission shall, in accordance with Article 67(3) of the Constitution-(a) on behalf of, and with the consent of the national and county governments, alienate public land; The purported

Mwembelegeza committee is an illegal entity that should be condemned and dismissed by this court.

- m. In the bundle of documents annexed to the 7th Respondent's affidavit and marked as "JR - 5", there existed a letter that the Officer S.A. Mchombo as stated in paragraph 13 above sought advice from the then District Commissioner Kisauni because it was of necessity but there was no substantive input from the District Commissioner. The question was why did S.A. Mchombo sought the advice of the District Commissioner if the suit land was legally owned by Andrew Peter Kanyotu as stated in the 7th Respondent's replying affidavit.
- n. In the annextures of the 7th Respondent reply affidavit marked JR 5 there was a purported meeting which purportedly took place at the residence of one DANIEL NGONYO a purported elder of Mwembelegeza scheme on 15th August, 2012 attended by purported members of Mwembelegeza scheme and that in paragraph 3 of their minutes at the meeting, the purported owner of the suit land one Andrew Peter Kanyotu showed the committee documents of ownership of the suit land, documents which the 7th Respondent had not produced before this court.
- o. If the meeting as stated in paragraph 17 of this supplementary affidavit took place on 15th August, 2012 while the purported title deed was issued on the 6th September, 2012 in the name of Andrew Peter Kanyota, then which land ownership document in the name of Andrew Peter Kanyota did he show the said committee of Mwembelegeza Scheme?
- p. In the said Mwembelegeza committee meeting as stated in Paragraph 17 above of his Supplementary Affidavit, in their minutes sub-title A.O.B paragraph 1, a concern was raised by one CAROLINE SALIM and the Petitioner quoted "*she asked*

why Mr. Kanyotu was given priority on his plot 1475 yet there was a BAN on the plot end of quote". In paragraph 2 minutes of the committee, sub-title A.O.B of the said meeting, the said members resolved this and the Petitioner quoted, "Members (committee) agreed to follow up the issue of the ban on Mwembelegeza scheme with our leaders-MP and lead officials to solve the issue once for all, end of quote".

- q. The 7th Respondent had not shown what transpired after the purported meeting and what Member of Parliament (MP) for Nyali Constituency by then including other leaders of Mwembelegeza community resolved and the reasons behind the BAN on this particular land herein the suit land. And that no other meeting was held again by the said committee together with one Andrew Peter Kanyotu the purported owner of the suit land and that the Petitioner was left to believe that all that Kanyotu wanted was a meeting with this illegal and amorphous committee, get their signatures and names and use it as a legal right and fool this court that Public Participation was done that informed the alienation of the suit land. The court must not entertain this illegality.
- r. The 7th Respondent had not brought before this Court any document (s) that informed the processing the title deed of the suit land in the name of Andrew Peter Kanyotu the purported first owner.
- s. The 7th Respondent had not brought this Court any ownership document of the suit land in the name Andrew Peter Kanyotu's father as purported by Kanyotu in the illegal committee meeting of Mwembelegeza scheme leaders that shows the later father legally owned the land and so it was processed and ultimately transferred into the son Kanyotu's name.
- t. In the Replying Affidavit and annexures by the 7th Respondent, the Petitioner had not seen a copy of the Green

Card annexed to the Replying Affidavit and marked as “JR – 4” showing the name of Andrew Peter Kanyotu’s father as the original owner and his transferring the suit land to his son Andrew Peter Kanyotu.

- u. The 7th Respondent had brought before this Court a fraudulent title deed in the name of Andrew Peter Kanyotu which the 7th Respondent could not defend and prove how the suit land “miraculously” was owned by Kanyotu without proof of relevant documents used to process the title; an illegality which the Court must condemn and penalize and that the entire replying affidavit by the 7th Respondent was deceptive, malicious, fraudulent and should be dismissed by the Court.
- v. The 7th Respondent had stated in the replying affidavit in paragraph 8 and the Petitioner quoted; (that all registration by the Land Registrar were done after all necessary documents were presented and any payments necessary done, end of quote). If this was true, then which documents were presented to the Land Registrar by Andrew Peter Kanyotu in the name of his late father that informed his ultimate ownership of the suit land and eventually a title deed by the Land Registrar in his name? And that there was no proof of copies of financial transaction charges levied by the Lands ministry in processing the suit land title deed in the name of Andrew Peter Kanyotu. So how was the title deed of the suit land in the name of one Andrew Peter Kanyoru processed by the 7th Respondent?
- w.** Mwembelegeza scheme being a scheme, was surveyed, planned and sub-divided into 50 feet by 100 feet plots, and different other sizes of land portions and some portions were left for amenities, public utility, riparian and wetlands (swamps) and for private individuals. One such Land was number 1475 herein the suit land a SWAMP. AND that all privately owned plots/lands within Mwembelegeza

scheme were processed by District/County land adjudication and settlement officer in conjunction with other relevant state agencies and allotment letters issued to the owners during this period of survey and planning, and that the allotment letters issued by the national government had a grace period of Ninety Days (90 days) and that the owners issued with allotment letters were required by Law to pay to the National Government an amount determined by the Ministry of Lands and that upon the payment of this amount of money within this 90 days period, a discharge certificate in the name of the individual was processed and issued by the Ministry of Lands that showed ownership details of the land. That this discharge certificate was the document used in processing title deed in the name of the owner of the land.

- x. The 7th Respondent had not brought before this Court allotment letter showing original owner of the suit land, discharge certificate from Lands Office in Nairobi and other relevant documents like copy of National Identity card or a will (of transfer of property) in the name of the late father to Andrew Peter Kanyotu that informed the processing of and transfer of the title deed to one Andrew Peter Kanyotu.
- y. The 7th Respondent had not brought before this Court, death certificate, copy of identity card, will and ownership documents of the suit land from lands ministry all in the name of the later (dead) father of Andrew Peter Kanyotu, the purported first owner of the suit land.
- z. The Petitioner was left to believe that one Andrew Peter Kanyotu in cahoots with state officers at Lands ministry at Mombasa took advantage of the illiteracy amongst Mwembelegeza community aided by the 7th Respondent to illegally acquire the suit land and quickly sell it to the purported second owner Zaib Real Estate Limited within a period of three months and that Andrew Peter Kanyotu

made a sum of Kenya Shillings Eleven Million (Kshs.11,000,000/=) from the sale without much sweat which was the sale price of the suit land to the purported second owner as shown in the 7th Respondent annexure to her affidavit marked as “JR - 5” (transfer of land/memorandum).

- aa. Andrew Peter Kanyotu got the purported title deed of the suit land on 6th September, 2012 and sold it to the purported second owner in record time and title deed in the name of Zaib Real Estate Limited processed and signed on 10th December, 2012 in record time.
- bb. Mwembelegeza scheme being a scheme, was surveyed, planned and sub-divided into 50 feet by 100 feet plots, and different other sizes of land portions and some portions were left for amenities, public utility, riparian and wetlands (Swamps) and for private individuals. One such Land was number 1475 herein the suit land a swamp. And that all privately owned plots/lands within Mwembelegeza scheme were processed by District/County Land Adjudication and Settlement officer in conjunction with other relevant state agencies and allotment letters issued to the owners during this period of Survey and Planning. And that the allotment letters issued by the National Government had a grace period of ninety days (90 days) and that the owners issued with allotment letters were required by law to pay to the National Government an amount determined by the Ministry of Lands and that upon the payment of this amount of money within this 90 day period, a discharge certificate in the name of the individual is processed and issued by the Ministry of lands that shows ownership details of the land. That this discharge certificate is the document used in processing title deed in the name of the owner of the land.
- cc. The Petitioner noted different signatures signed under Land Registrar as shown hereunder in the 7th Respondent's Replying affidavit averred that:-

- (i) from 6th September 2012 to 19th January 2017 there was a consistent signature of lands registrar as shown in the annexure of the green card and title deeds in the name of Andrew Peter Kanyotu and Zaib Real Estate limited.
- (ii) the 7th Respondent in their Replying Affidavit, annexed a letter addressed to Andrew Peter Ngirici which the Petitioner believed was the same person as Andrew Peter Kanyotu, on amendment of acreage dated 11th December, 2012 and that this letter was signed by one Hashim G. S. as the Land Registrar. The question was how many Land Registrars existed at lands ministry at Mombasa during this period between the years 2012 and 2017? And that pursuant to Lands Registration Act Section 14(3) other land documents be done by the Chief Land Registrar and the Deputy Chief Land Registrar shall be the Principal Assistant of the Chief Land Registrar in the execution of the functions of the Chief Land Registrar. Any other signature purporting to be or assigned by Chief Land Registrar in the lease certificate submitted by the 1st Respondent was fraudulent.
- (iii) the Petitioner had also seen in the 7th Respondent's annexures to their Replying Affidavit, different signatures by one Antony T. Karani (His signatures are not the same in two documents namely certificate official search and a letter to Director of survey on correction of acreage) and he has signed as Land Registrar but different signatures, same name. And that this was an illegality that the court must not entertain.
- (iv) the Petitioner had seen in the 7th Respondent's annexures to her Replying Affidavit, a Certificate

Lease dated 5th September, 2018 in the name of the 1st Respondent signed by a stranger as the Lands Registrar, a stranger only known to the 7th Respondent. It was required by law that only the Chief Lands Registrar or Deputy Registrar signed land documents including title deeds and lease certificates.

- dd. The 7th Respondent had not brought before this Court any document(s) showing endorsement by the National Lands Commission and approval by the Director of survey as a requirement of any change of use because the latest Registry Index Map still shows the suit land was swamp and the letter from Mombasa County coordinator of National Land Commission annexed to the main petition and Marked as "MCP - 22" showed the land was a Wetland which was illegally acquired.
- ee. If the purported Change of User was legal as stated by the 7th Respondent in her Reply Affidavit, and that all due process of LAW was followed, then where was the Deed Plan for the suit land? And that in the absence of a Deed Plan, where is the Registry Index Map which showed detailed information of the suit land and many other lands in the surrounding area. The 7th respondent had not produced registry index Map for the suit land to support her Reply Affidavit and therefore the court should dismiss entirely the Replying Affidavit of the 7th Respondent.
- ff. Pursuant to Article 62(3) of the 2010 Constitution: Public land classified under clause (1)(f) to (m) shall vest in and be held by the national government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission. AND Article 67(2) of the 2010 constitution; The functions of the National Land Commission are-(a) to manage public land on behalf of the national and county governments; The National Land Commission which

is the administrator of public land herein the 4th respondent in their reply letter annexed to the main petition and Marked MCP-22 acknowledged that the suit land was public utility (swamp/wetland) which was illegally allocated and that the National Land Commission earmarked it for investigation and subsequent repossession, a letter that the 7th Respondent had not challenged, denied or opposed.

- gg. The Petitioner invited the Honourable Court and the parties to this suit to ruling given by Hon. Justice Sila Munyao in a separate matter touching on public Land in reference to ELC PET.35 of 2020 at Environment and Land Court at Mombasa; a matter in which he was a party. Part of what formed the Hon. Judge's ruling is found on marked page 1 of the preamble of his ruling, marked page 4 and marked page 5 paragraph 10 of his Ruling which was the RIM (Registry Index Map) signed by the Regional Surveyor of Kenya Coast Region. The Hon. Justice identified the RIM (Registry Index Map), a crucial document showing the identity of the suit land and its number as the original status of the land.
- hh. This Honourable Court must not deviate or be tempted to deviate from the jurisprudence that was set by Justice Munyao through his Ruling given on 10th May 2021 in the matter mentioned in paragraph 35 of this Supplementary affidavit. This court must give pre-eminence to the Registry Index Map (RIM) showing the suit land was swamp. The copy of the RIM was annexed to the main Petition and marked as "MCP - 1". (Annexed in the affidavit and marked "RSA-1" the copy of the said ruling).
- ii. It was required by law that all government entities work in constitutional conformity, unity and in consultation with one another and other stakeholders and that no law or Act of Parliament of Kenya touching on swamps/ wetlands and other water bodies as presently enacted within the Republic

of Kenya negate another law. If by law and by consultation with other relevant government entities, the Survey Act through the Coastal Regional Surveyor some years back as the Suit land was being surveyed and planned, declared the suit land no. 1475 a swamp, then all the statements by the 7th Respondent in their Reply Affidavit to this suit as shown in paragraphs 3, 4,5, 6,7,8 and 9 of their reply affidavit that intends to question the legality and to rubbish the Survey Act in this suit in reference to Registry Index Map (RIM) be dismissed by the Court and be declared null and void.

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

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

(b) where the certificate of title has been acquired ILLEGALLY, UNPROCEDURALLY or through a CORRUPT SCHEME.

kk. And that in law, the product is as good as the process/procedure. There was no product without following the Laws and regulations that govern the production of that product. And that the title deeds and lease certificate which are the products in this suit and are annexed to the reply affidavit of the 7th Respondent, were unprocedurally and fraudulently and through a corrupt scheme acquired and the court MUST pronounce itself boldly within the law in this matter to protect public land and environment and declare

that the said title deeds, lease certificate and all entries in the green card touching on the suit land null and void.

II. The 7th Respondent violated the 2010 Constitution of Kenya and the following Acts: -

- (a) Land registration Act Section 9(2)(c)(d) The register shall contain the following particulars: (c) names and addresses of the previous proprietors; (d) size, location, user and reference number of the parcel. The 7th Respondent had not shown ownership details and name of first owner of the suit land either in the green card nor copies of allotment letter or title deed or discharge certificate that informed transfer of ownership to one Andrew Peter Kanyotu.
- (b) Survey Act Section 43. Proof of plans (1) All plans authenticated under this Act, purporting to be signed by the Director, or by a Government surveyor authorized by the Director in that behalf, or to be sealed with the seal of the Survey of Kenya, shall be presumed, until the contrary is proved, to have been signed by the Director, said, or by a Government surveyor authorized as aforesaid, to have been sealed with the seal of the Survey of Kenya, as the case may be. The 7th respondent had not brought any plan that counters or challenges the signed and sealed document annexed to the main petition herein Registry Index Map and Marked as "MCP - 1" from survey of Kenya.
- (c) Physical Planning Act Section 8(3)(4) and Section 10 (2)(c) to determine development applications for Change of User or sub - division of land which may have significant impact on contiguous land or be in breach of any condition registered against a title deed in respect of such land; and section 10 (2)(e) to hear

appeals lodged by persons aggrieved by decisions made by the Director or local authorities under this Act. The 7th Respondent being a member of the District Physical Planning Liaison Committee Pursuant to Physical planning Act Section 8(3)(d) acted alone in disregard of the Physical planning Act section 8(3)(e) by making a unilateral decision on the suit land without consultation with other government entities as shown in the Act and subsequent sections and sub-sections as shown in this paragraph.

(d) The 7th Respondent fraudulently, unprocedurally and through corrupt scheme allocated the suit land which was swamp, a public land under Article 62(1)(g), (i) of the 2010 Constitution thereby contravening Article 62(4) of the Constitution.

mm. The suit land was swamp and a public land and this Court must send a strong message to powerful, influential and moneyed individuals and persons who believed and thought that they could arm - twist, compromise, mutilate and cannibalize the law and the constitution of Kenya 2010 to illegally acquire Public Land.

nn. This matter is of great public interest and that the decision that the Honourable Court would make touching on this land would either:

i. Encourage fraudulent activities in Coastal Kenya and in Kenya as a whole touching on public lands by empowering corrupt state officers in cahoots with corrupt individuals working in private sector; or

ii. The decision that this Honourable Court would make touching on this suit would set high standards of fidelity to the rule of law in matters touching on Public

land. The court must be on the side of the law and the Constitution of Kenya 2010.

oo. Pursuant to Article 2 of the 2010 Constitution of Kenya: supremacy of this constitution:

(i) This Constitution is the Supreme Law of the Republic and binds all persons and all state organs at both levels of government.

(ii) No person may claim or exercise state authority except as authorized under this Constitution.

pp. The Supplementary Affidavit is sworn in response to the 7th Respondent's Replying Affidavit.

XII. The 3rd Respondent's Supplementary Affidavit

130. The 3rd Respondent filed a 14 Paragraphed Supplementary Affidavit sworn by Mr. AHMED. A. MBARAK, the 3rd Respondent's sub Basin Area Coordinator - Kibwezi Sub Basin on 22nd March, 2023 where in the Affiant averred that: -

(a) The 3rd Respondent was a State Corporation originally established under the Water Act, 2002 and subsequently under Section 11 of the Water Act, 2016 (hereinafter referred to as "The Act").

(b) Pursuant to Section 6 of the Act, the 3rd Respondent is designated as an agent of National Government responsible for regulating the management and use of water resources in the country. In implementing this mandate, the 3rd Respondent was guided by the following functions assigned to it under Section 12 of the Act:

- a) Formulate and enforce standards, procedures and Regulations for the management and use of water resources and flood mitigation.
 - b) Regulate the management and use of water resources.
 - c) Enforce Regulations made under the Act.
 - d) Receive water permit applications for abstraction, water use and recharge and determine, issue vary water permits; and enforce the conditions of those permits.
 - e) Collect water permit fees and water use charges.
 - f) Determine and set permit and water use fees.
 - g) Provide information and advice to the Cabinet Secretary for formulation of policy on national water resources management, water storage and flood control strategies.
 - h) Coordinate with other regional, national and international bodies for better regulation of management and use of water resources and
 - i) Advise the Cabinet Secretary generally on the management and use of water resources
- (c) In accordance with the mandate vested on the 3rd Respondent under Section 12(c) of the Act, the 3rd Respondent had been implementing the provisions of the Water Resources Management Rules, 2007 ("Rules")(now repealed).
- (d) The Rules defined a wetland as an area where plants and animals had become adapted to temporary or permanent flooding by saline, brackish or fresh water.

(e) Rule 52(1) of the Rules further provided that any portion of land in excess of one hectare which was naturally subject to seasonal or permanent flooding and has the ecological characteristics of a swamp or marsh shall be considered to be a wetland.

(f) The Rules made provisions for the approval process required prior to undertaking activities on a wetland. Rule 52 (3) provided that:

“The land owner or legally authorized operator of the land on which a wetland is situated is required to apply to the Authority for approval for any proposed or existing developments such as drainage, discharge into or construction that would affect the wetland.”

(g) Rule 52(4) further provided that:

“Whenever any proposal for the drainage and reclamation of a swamp involves the subsequent use by the applicant of all or any of the water conserved by the drainage or reclamation of such swamp, the applicant shall submit an application for a permit for the diversion, abstraction, storage or use of such water with a Hydrological Assessment Report and Environment Impact Assessment.”

(h) From the above statutory provisions, it was clear that the law authorized one to reclaim a swamp for purposes of undertaking developments on a wetland.

(i) Following the site visit conducted by Court and which took place on 24th February, 2023, he clarified the same as follows:-

a. The suit property was located in one of the wetlands within Kisauni constituency which received water from surface run off emanating from Nguu Tatu hills and

other areas within Kisauni as it flows downstream to the Indian Ocean.

- b. As the run off flowed, it collected into seasonal wetlands which were scattered and appeared in mosaic patterns and some flows into seasonal streams and over land.
- c. When these seasonal wetlands fill upstream, they overflow and run downstream over land and ultimately fills other seasonal wetlands downstream.
- d. The flow continued downstream and flowed into the Indian Ocean.

(j) The documents that accompanied the Application seeking approval, demonstrated that:-

- a. The perimeter wall constructed by the 1st Respondent had in-let holes that allowed water inside the 1st Respondent's premises, which collected into concrete canals.
- b. The rain water that fell into the suit property collects itself and is channeled into the concrete canal which ultimately channels the water into Mombasa County storm drains which discharges into Mtopanga Seasonal stream near Pastor Lai church and eventually discharges into the Indian Ocean at Jomo Kenyatta public beach.

(k) It was in the interest of the public, justice and fairness that the orders sought by the Petitioner in the Petition were accordingly dismissed.

XIII. The Respondents' response to the Cross - Cross Petition

131. The Respondents' responded to the Cross - Cross Petition dated 13th February, 2024 through a 3 paragraphed reply dated 29th November, 2024 where it was contended that:-

- a. The Respondents referred to paragraphs 1, 2 and 3 of the Cross Cross-Petition and agrees with the descriptive of parties and stated that their address for purposes of this Petition is care of Hon. Attorney General Attorney General's Chambers, NSSF Building, 9th Floor, P.O. Box 82427-80100 Mombasa.
- b. The Respondents in response to paragraph 4,5,6,7,8,9 and 10 of the Cross Cross-Petition state that they shall rely on the facts as adduced in the Affidavit already filed in this Petition on 1st February, 2022.
- c. The Respondents therefore states that this Cross Cross-Petition herein did not raise any cause of action against them and hence the prayers being sought are not merited hence prays that the same be dismissed with costs.

XIV. Submissions

132. While all the parties were in court, it was consented that the Petition dated 12th July, 2022, the Cros Petition and Cross - Cross Petition be dispensed off by way of written submissions. Pursuant to that on all parties fully complied. Subsequently, on 5th December, 2025 the Honourable Court delivered its Judgment accordingly.

A. The Written Submissions by the Petitioner

133. The Petitioner in person filed written submissions on 11th April, 2021. Mr. Ragen the Petitioner commenced the submission by stating that the submissions was in support of the Petition dated 26th October 2021 and the Petitioner's statement of facts also dated 26th October 2021. The Petitioner's claim against the Respondent was illegal alienation of land No. 1475 Mwembelegeza Scheme which was swamp and a public land and that the Petitioner had provided the Respondents with all the necessary documents to justify and support his claim.
134. Further, the Respondents through their actions touching on the suit land had subjected the Petitioner, Mwembelegeza Community and the neighboring communities of Kisauni, Kadzandani, Bombolulu and parts of Nyali into untold suffering during the rainy seasons as homes and houses were flooded because of the 4 meter perimeter wall around the entire alienated swamp and so rain and stormy water could not find its way into the swamp.
135. On the background of the case, the Petitioner submitted that Mwembelegeza Scheme in the county of Mombasa in the Republic of Kenya was planned and subdivided by Survey of Kenya into different plots mostly 50 feet by 100 feet of these plots were owned by private individuals, though some were reserved as public land for specific uses. One such public plot is Land NO. 1475 Mwembelegeza Scheme which was surveyed and marked as a swamp because of its size, it's nature, the large amount of water that accumulates in this land and it's marine life. It is a habitat for

different fishes, birds, amphibious animals and different marine plants.

136. The swamp and its waters (suit land) had been of great benefit to the community of Mwembelegeza and other surrounding communities for the following reasons:

- a. Mwembelegeza community used the swamp waters for maize and rice farming hence providing food security to numerous households.
- b. The swamp had all kinds of fishes which is a source of income and food for the community hence offering FOOD SECURITY.
- c. Because Mombasa County has poor water drainage system, the swamp serves as a water collecting body during periods of rain thus protecting the entire Mwembelegeza community, Kadzandani Community, Bombolulu areas, Kisauni areas and even areas around Nyali from perennial flooding.
- d. The swamp had all kinds of marine plants and amphibious animals that made it their habitat. This swamp had capacity to also be an educational research area for those studying and doing research on marine life and habitat among others.

137. Around late year 2016, a strange man with two pistols stuck to his trouser belt came to the suit land and found resident women harvesting their crops within the swamp. The man told the women to leave claiming that the land belonged to him and stating that the women were intruders on his private property. For fear of being shot at and probably getting killed, the women gave way

and left the swamp. Sometimes in the year 2017, the Petitioner and the community herein Mwembelegeza, experienced a 4 meter perimeter wall being erected around the entire Swamp under armed Kenya police protection. Soon after, trucks invaded the suit land which had swollen waters to the banks, offloading stones into the swamp and filling it up all of which was done under protection by armed police.

138. The Learned Counsel submitted that as the swamp was being filled up with stones, the swollen waters exited into nearby homes and roads causing great havoc. The Petitioner and the community were helpless and could not do anything because of the militarized operation and thus only remained as observers because of fear for their lives. Upon enquiring who was filling up the swamp with stones, the Residents (Unnamed for their safety), were told the swamp was being filled by its purported owner, the 1st Respondent herein the 1st Respondent. Upon more enquiries, the residents were told that the purported "original owner" of the suit land (who was a Resident of Meru County) sold the land to the 1st Respondent. The information given in paragraph 14 above was what the Petitioner and the residents knew by then. How a swamp became personal property of a resident of Meru County in the Republic of Kenya and finally being owned by Anwarali and Brothers Limited herein the 1st Respondent remained a mystery to the community of Mwembelegeza. The community had many unanswered questions.

139. The Petitioners averred that the process of the 1st Respondent filing up the swamp, was, unprocedural as there was no board to show the nature of project being undertaken on the swamp, there were no details of who was undertaking the project as standard practice and regulations require in construction industry as per NCA Act and regulations and building codes. There was no board to show the following details: -

- a. National Environment Management Authority (NEMA) approvals, license.
- b. Environmental Impact Assessment (EIA) study and study report from NEMA authorizing the project.
- c. Gazette notice and advert within the community or on the board as per the change of use regulations showing intention of change of use from a swamp to mixed use (Residential cum commercial), a Change User which the constitution 2010 did not support.
- d. Nature of the project being undertaken on the Swamp (suit land)
- e. Name of contractor undertaking the project.
- f. National Construction Authority (NCA) authorization.
- g. Water Resources Management Authority (WRA) licensing and approvals.
- h. County government of Mombasa approvals.

140. The stones were brought and the suit land (swamp/wetland) was filled without the involvement of public participation by

Mwembelegeza community Residents to approve or disapprove of the project being undertaken in the suit land. The 1st Respondent extended their appetite for public land by encroaching on a portion of another Public utility land no.1474 earmarked open space opposite the Suit land thus extending the 4 meter perimeter wall and also erecting an electric fence around the entire swamp and part of the public land no. 1474. The encroachment by the 1st Respondent on Public land no. 1474 marked open space was presently subject to the Petitioner's investigations because the remaining part of the open space has already been alienated by a private developer and a permanent structure erected on it. The 1st Respondent embarked on cabro works to fill the suit land and plastering of the perimeter wall around the suit land, they built also a single storey building on the suit land and steel structure shades. All these were carried out without approvals from relevant statutory bodies. Any building must be registered and authorized by the National Construction Authority herein the 6th Respondent. The 1st Respondent built a 4 meter perimeter wall, erected an electric fence around the entire land, constructed a single storey building, steel structure shades without the 6th Respondent's registration and authorization and currently using the suit land as a parking yard for trucks.

141. According to the Petitioner, there was a manned security gate at the entrance into the walled suit land and no one was allowed access into the suit land. What went on inside the wall fenced suit

land is shrouded in secrecy and mystery as much as it is portrayed as a parking yard for trucks. This possess an environmental threat to the community because of lack of information on the activities that goes on inside the walled suit land. Some times August 2019, the Petitioner who was a private investigator and a resident of Mwembelegeza Community, on his own capacity and on behalf of the community, voluntarily embarked on investigative research to understand any legal and non - legal procedures used in acquiring and developing the suit land and also to understand who authorized what and who signed what that eventually led to the alienation of the suit land since swamps were public land as per the constitution.

142. After thorough investigations and research spanning almost two years, the Petitioner and Mwembelegeza community Residents made a decision to seek for answers from relevant government entities whose operations and core mandate touches directly on the activities carried out on the suit land. And that it's upon the knowledge and information that the petitioner got from his research findings that letters were written to different statutory entities seeking answers from them. On 9th March, 2021, the Petitioner applied for a certified copy of registry index map (RIM) for Land Number 1475 Membelegeza scheme from the Regional Surveyor, Coast Region with its offices at Mombasa. Upon a payment of the sum amount of Kenya Shillings five hundred (Kshs. 500/=) only, a stamped, signed and certified copy of the Map was

availed to the Petitioner dated 9th March 2021. The RIM map was annexed to the supporting affidavit to this Petition and Marked as “MCP-1”. The RIM map shows a clear demarcation and boundaries of the swamp with the word swamp and No.1475 printed in bold letters.

143. The Registry Index Map (RIM) stated in paragraph 25 above was proof that the suit land was and still remains swamp and a public land that should there had been any changes on the status and boundary of the suit land, it was the responsibility of the owner of the land (the suit land) in conjunction with the Director of Survey of Kenya to initiate those changes and once those changes are initiated, the land is re-surveyed and the new plan effected in Registry Index Map (RIM). This was never done.

144. On 10th March, 2021, the Petitioner wrote letters to the following statutory bodies: Registrar of Lands Mombasa County, NEMA county Director Mombasa, National Land Commission Mombasa county coordinator and Mombasa county chief officer department of lands, planning and Housing to furnish the Residents with more information on the project being undertaken on the suit land. Copies of these letters are annexed to the affidavit supporting this Petition and Marked as “MCP - 2”, “MCP - 3”, “MCP - 4” and “MCP - 5” respectively. On 11th March, 2021, the Petitioner wrote a letter to National Construction Authority herein the 6th Respondent requesting the Authority to furnish the Residents with certified copies of authorization license and registration of project being

undertaken on suit land. The letter was stamped received by the Authority. Copy of the letter was annexed to the supporting affidavit to this Petition and Marked as “MCP - 6”.

145. The Petitioner submitted that on 12th March, 2021, he wrote a letter to the director/county coordinator/Manager of WRA whose offices are based in Changamwe, Mombasa County requesting the Authority to furnish the community with certified copies of relevant approvals and licenses authorizing the nature of project being undertaken on suit land. The letter was stamped received by the Authority. Copy of the letter was annexed to the supporting affidavit to this Petition and marked as “MCP-7”.

146. On 19th March 2021, the Petitioner wrote a letter to the 1st Respondent whose head office is based in Mtopanga, Kisauni Mombasa County. They blatantly refused to receive the letter and instead directed the petitioner to go and get information from other relevant statutory bodies. According to them, they had all necessary documents including ownership title to the suit land. Copy of the letter is annexed to the supporting affidavit to this Petition and Marked as “MCP - 8”. On 17th March 2021, the petitioner received the 1st response letter from NCA with Ref. No. NCA11/301a/VOL 3/(67). In this letter, the NCA acknowledged that the project undertaken on the suit land had not been registered by the Authority. Copy of the letter was annexed to the supporting affidavit to this Petition and Marked as “MCP - 9”.

147. On 30th March 2021, the NCA responded by writing a 2nd letter Ref. No. NCA11/301a/VOL 3(67(2)). Copy of the letter is annexed to the supporting affidavit to the petition and marked as “MCP-10’. In this letter, the NCA gave details of purported approvals by relevant statutory bodies approving the project being undertaken on the suit land. According to the letter, the 1st respondent responded to NCA’s request for documents by providing the following approvals and documents (Copies of which were not provided by NCA to the petitioner).

- a. NEMA approvals dated 1st December 2016
- b. An improvement order from NEMA Ref. No. NEMA/PR/MSA/5/2/3521 dated 17th February 2017 suspending preciously issued license No.0038884
- c. A letter of no objection to approval of the development from WARMA Ref. No. WRMA/CA/CM/3/14/1(77) dated 30th November 2016.
- d. Letter from Mombasa County Ref. P/2016/624/1 dated 31st January 2017 lifting previously issued enforcement notice PPA7 dated 20th January 2016 stopping all development on the land.
- e. County approved drainage layout drawing dated 31st January 2017
- f. Change of user approval from Mombasa County Government from residential to mixed use (residential-cum-commercial). Ref. No. TP.6/CU/36/2017 dated 16th May 2017.

- g. Planning brief for the proposed change of use prepared by one, Mr. CYRUS MBISI, a registered physical planner (RPP0216) dated 3rd May 2017.
- h. Public notice published on Change of User placed on "***the Daily Nation***" dated 27th April 2017.
- i. County approved Boundary wall/location plan dated 6th January 2017.

148. The Petitioner submitted that on 25th March, 2021, the Petitioner received a response letter from Water Resources Authority herein the 3rd Respondent with Ref. No. WRA/ACA/CA/HRD/1/5/4(98). In the letter copy of which was annexed to the supporting affidavit to this Petition and Marked "MCP-11", the Authority acknowledged receiving a request from the 1st Respondent to fill up the suit land and use it for parking. According to the letter, the application by the 1st respondent was received on 20th November 2018 and was subsequently approved on the basis of the following documents purportedly provided by 1st Respondent.

- a. Copy of Identification
- b. Copy of land ownership (title deed) for proof of ownership.
- c. Environmental Impact Assessment (EIA) study report from NEMA that informs the anticipated negative impact and proposed mitigation measures, this includes public participation.
- d. Hydrological assessment report which informs about the characteristics of water in the area

149. On 1st April, 2021, the Petitioner received a response letter from National Environment Management Authority (NEMA) herein the 5th Respondent Mombasa Office Ref. No. NEMA/CDE/MSA/4/9/VOL.1. Copy of the letter was annexed to the supporting affidavit to this Petition and Marked as “MCP-12”. In the letter, NEMA categorically states that it has NOT received any EIA project report for proposed development on Land no. 1475 Mwembelegeza scheme, contradicting the statements made by the National Construction Authority herein 6th Respondent and Water Resources Authority herein 3rd Respondent, calling into question whether those Authorities did due diligence on documents 1st Respondent purportedly presented to them before approving and authorizing the project on suit land.

150. After being denied requested information from the office of the registrar of Lands Mombasa County, the petitioner sought the help of the Commission on Administrative Justice (Office of the Ombudsman). The office of the Ombudsman wrote a letter dated 16th April 2021; copy of which is annexed to the Supporting Affidavit to the petition and marked as “MCP - 24” and through them, the petitioner was able to get a response letter copy of which was annexed to the Supporting Affidavit to the Petition and marked as “MCP-25” and a certified copy of purported “land ownership” of land no. 1475 Mwembelegeza scheme in form of a lease of ninety nine (99) years. Copies of letters from office of ombudsman and Certificate of lease are also annexed to

Supporting Affidavit to the Petition and marked as “MCP-13” and “MCP-14” respectively. It is a lease of a term of 99 years from 1st February 2018. The Certificate of lease was issued on 5th September 2018 to the 1st Respondent. Which means the 1st Respondent was leased the suit land even before the certificate of lease was issued. This was questionable.

151. According to the Petitioner, it took the assistance of the office of the ombudsman to get a response from the National Lands Commission herein the 4th Respondent on behalf of the Petitioner after all the Petitioner’s efforts failed and that finally after three months the National Land Commission responded. The NLC being the administrator of Public land ignored the petitioner’s pleas until the office of Ombudsman came in to the matter. Copy of the letter of the ombudsman to NLC was annexed to the supporting affidavit to this Petition and Marked as “MCP-15”.

152. On 20th March, 2021, the Petitioner wrote a letter of enquiry addressed to the County Land Adjudication and Settlement Officer requesting to know if a survey or change of use was done on the suit land and proof of the same from Regional Surveyor showing Map adjustments. Upon follow up with the County Adjudication and settlement officer in his office at Bima Towers, he showed the Petitioner the file for the suit land and within the file there was no proof of any change of user or any information seeking the change of use. The officer assured the Petitioner that as far as his office was concerned, the suit land still was a public land, a swamp and

there had never been any Change of User. Upon seeking a written and signed letter from the officer to this effect, he refused citing fear for his life and he could only write an official letter if an entity like Ethics and Anti - Corruption Commission asked him to do so.

153. Even after the Petitioner writing to the Mombasa County Chief Officer, Department of Lands, Planning and Housing, almost seven months down the line, the department did not bother to respond to the Petitioner's concerns. The Petitioner had visited their office several times and on one occasion being accompanied¹ by Mr. Fred Mutunga, a resident of Mwembelegeza Scheme. On none of these occasions was any substantive information provided by the Department. To get further information, on 7th May, 2021, the Petitioner wrote an Email via the Petitioner personal email address ; azoragen@gmail.com to one Wangui Kabala of NCA enquiring more about whether it's within their mandate to register and authorize Construction of perimeter wall and electric fence. Copy of the email was annexed to the supporting affidavit to this Petition and Marked as "MCP-17".

154. According to the Petitioner, on 17th May, 2021, Wangui Kabala of National Construction Authority herein the 6th Respondent responded to the Petitioner's email enquiry and confirmed that NCA covered all construction activities, including a perimeter wall and electric fence which must be registered before any construction activities are commenced. Copies annexed to the supporting Affidavit to the petition were response letters Marked

as “MCP-18” and “MCP-19” by one M/s. Kabala of NCA headquarters in Nairobi.

155. Following the expiry of the Twenty-One (21) days given by the office of the Ombudsman to the National Land Commission, on 19th May 2021 the petitioner wrote an E-Mail to the Ombudsman asking them of any response from NLC. Copy of the Email was annexed to the supporting affidavit to the Petition and marked as “MCP - 20”. The office of the ombudsman responded to the Petitioner’s enquiry by writing a 1st Reminder email to the National Land Commission Mombasa County Coordinator, copy of the letter was annexed to supporting affidavit to the Petition and marked as “MCP - 21”.

156. NLC herein the 4th Respondent later responded after a follow up by the Office of the Ombudsman. Copy of the NLC response letter to the petitioner via the office of the Ombudsman Ref. No. NLC/CC/MSA/VOL.II/71 and copy of their letter to the acting CEO NLC informing her office of the Petitioner's complaints with Ref. No. NLC/CC/MSA/VOL.II/70 were both annexed to the supporting Affidavit to the Petition and marked as “MCP - 22” and “MCP - 23” respectively. The Petitioner took photographic images of the perimeter walled fence including the electric fence and the single story building inside the suit land at the main entrance gate. The image were annexed to the supporting affidavit to the Petition and marked as “MCP - 26”.

157. It was the Petitioner's humble Petition that the suit land No. 1475 Mwembelegeza Scheme was swamp/wetland and public land for the following constitutional reasons:

- a. Under WATER RESOURCES MANAGEMENT RULES 2006 Rule 52(1) Defines a wetland as any portion of land in excess of one hectare which is naturally subject to seasonal or permanent flooding and has ecological characteristics of a swamp or marsh shall be considered to be a wetland under these rules. The suit land is 2.56 hectares and is subject to seasonal flooding.
- b. Article 60 (1) of the 2010 Constitution of Kenya States: Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable and in accordance with the following principles: (b). security of land rights; (c)sustainable and productive management of land resources; (d) transparent and cost effective administration of land; (e) sound conservation and protection of ecologically sensitive areas. The suit land has ecological characteristics of SWAMP hence was planned and surveyed by survey of Kenya and the Registry Index Map from Coast regional surveyor shows in bold it was swamp.
- c. Article 62(1) of the 2010 constitution of Kenya, defines PUBLIC LAND is: (g)Government forests other than forests to which Article 63(2)(d)(i) applies, government game reserves, WATER CATCHMENT AREAS, National parks, government animal sanctuary, and specially protected areas. (i) All rivers, lakes and other water bodies as defined by an Act of parliament. The suit land is water body as it holds water during rainy season.
- d. Article 62(3) Public land classified under clause (1) (f) to (m) shall vest in and be held by the National Government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission. The NLC responded

by confirming in their reply letter to the petitioner dated 8th June, 2021 whose copy is annexed to the supporting affidavit to this Petition and marked as “MCP-22” and the Petitioner quoted: *“In deed my office received a complaint by Mwembelegeza residents regarding illegal allocation and development of a public utility (SWAMP/WETLAND) within Mwembelegeza settlement scheme. I added the property to the list of public land in Mombasa earmarked for investigations and subsequent REPOSSESSION”* end of quote.

e. Environmental Management and Coordination Act (EMCA/NEMA) ACT PART V (Protection and conservation of the Environment). Section 42(1) holds that:- **No person shall, without the prior written approval of the Director-General given after an environmental impact assessment, in relation to a river, lake or WETLAND in Kenya, carry out any of the following activities-(a) erect, reconstruct, place, alter, extend, remove or demolish any structure or part of any structure in, or under the river, lake or WETLAND; (b) excavate, drill, tunnel or disturb the river, lake or WETLAND;(c) introduce any animal, whether alien or indigenous, dead or alive, in any river, lake or WETLAND; (d) introduce or plant any part of a plant specimen, whether alien or indigenous, dead or alive, in any river, lake or WETLAND; (e) deposit any substance in a lake, river or WETLAND or in, on or under its bed, if that substance would or is likely to have adverse environmental effects on the river, lake or WETLAND; (f) direct or block any river, lake or WETLAND from its natural and normal course; or (g) drain any lake, river or WETLAND.**

Section 42 (5) Any person who contravenes or fails to comply with any orders, regulations or standards issued under this section shall be guilty of an offence.

f. WATER ACT Section 22 provides for protection of water catchment areas.

g. SURVEY ACT Section: 39: AUTHENTICATED Plans to be SUFFICIENT COMPLIANCE with law requiring notices of boundaries etc. Section 41: **Provisions regarding authenticated plans. 1. A plan shall be deemed to be authenticated and identified for the purposes of sections 39 and 40 if-(a)it is authenticated, by the signature of the Director or of a**

Government surveyor authorized in writing by the Director in that behalf and by the signature of the authority by whom the notice is given, to be the land or area to which the notice refers; and (b) it is identified by a reference number.(2) Every such authenticated and identified plan shall be deposited in the survey office.

h. Section 43 Proof of Plans:-

(1) All plans authenticated under this Act, purporting to be signed by the Director, or by a Government surveyor authorized by the Director in that behalf, or to be sealed with the seal of the Survey of Kenya, shall be presumed, until the contrary is proved, to have been signed by the Director, said, or by a Government surveyor authorized as aforesaid, to have been sealed with the seal of the Survey of Kenya, as the case may be.(2) The provisions of subsection (1) shall extend to plans approved before the commencement of this Act under section 37 of the Survey Ordinance, 1951(No. 22 of 1951) (now repealed).

158. The Petitioner submitted that therefore the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and the Interested Party to the Cross - Petition actions violated the Constitution of Kenya 2010 and all relevant laws governing public land and wetlands as he would further stated hereunder. The 1st Respondent constructed a more than 4 meter perimeter wall around the suit land and erected an electric fence on top of the perimeter wall without registration and authorization by National Construction Authority (NCA)violating Section 15 (1)(2) of the National construction authority Act:-

Section 15. (1) A person shall not carry on the business of a contractor unless the person is registered by the Board under this Act. (2) A person seeking registration under subsection (1) shall, in the case of a firm, be eligible for registration if at least one of the partners or directors of the firm possesses such technical qualifications, skills or experience as the Board may from time to time prescribe.

Hence attracting an offence under Section 15(3) of the NCA Act. Section (3) Any person who contravenes subsection (1) commits an offence and shall be liable on conviction to a fine not exceeding one million shillings, or to imprisonment for a term not exceeding three years or to both, and in the case of a continuing offence, to a fine not exceeding one hundred thousand shillings for every day or part thereof during which the offence continues.

159. This could be interpreted by Section 16(1) of the NCA Act. The 1st Respondent had not provided to the court or to NCA, the name of the contractor who built and erected the perimeter wall hence violating this Act. The perimeter wall and the electric fence are illegal structures that pose serious threat and danger to the public and it is in the best interest of the public and the Law that they be demolished.

160. The Petitioner submitted that the 1st Respondent had not brought before this Court any document from surveyor of Kenya inform of Registry Index Map or in the absence of the Registry Index Map, a Deed Plan to show the suit land was re planned and that it was not swamp hence the 1st Respondent violated the Physical Planning Act:

- a. Section 17 sub-section (1)(e), (Content of regional physical development plan),**
- b. Section (21) sub-sections (1)(2)(3), (Publication of approved regional physical development plan)**
- c. Section 27 sub-sections (1)(2) (Approval of local physical development plan) of the Physical Planning Act.**

AND neither has the 1st Respondent opposed or challenged or rejected or disapproved or countered the existence of Registry Index Map showing the suit land was planned as and still is SWAMP.

161. It was the Petitioner's humble submission that in any notification approval of the application for development permission by County Department of Planning, the following conditions must be met: (a) change of user subject to endorsement by National Land Commission (NLC). According to the Petitioner, the National Land Commission must give its input so that any development by private developers on any land is not on public land. For alienation of any Public Land solely lies with National Lands Commission Pursuant to National Land Commission Act Sec. 5(2) In addition to the functions set out in subsection (1), the Commission shall, in accordance with Article 67(3) of the Constitution-(a) on behalf of, and with the consent of the national and county governments, alienate public land.

162. The Petitioner submitted that the National Lands Commission never endorsed the Change of User. And Section (c) of the notification as shown in paragraph 49 above states: Subject to the comments provided by the office of Director of survey and National Land commission at sub-county level. Neither NLC nor Director of survey approved the purported change of use because the Registry Index Map still shows the suit land was a Swamp. It was not legally tenable for National Government of Kenya through

the Department of Lands to revoke title deed issued to a private developer or citizen and replace the same with a 99 year lease as the 1st and 7th Respondent have shown in their reply affidavits and annexures unless the issuance of the title violated the law.

163. It is the humble submission of the Petitioner that the 1st Respondent as shown on Page 153 of his response and subsequent annexures on the Lease dated 1st February 2018, the signature of the officer who signed the lease was not the same signature as that of the Chief Lands Registrar at Mombasa. He had noted the Chief Lands Registrar's signature at Mombasa in a number of documents except the lease certificate. This contravenes Land registration Act Section 14(3) who can sign lease certificate in the absence of the chief lands registrar and therefore whose signature was it? That was required by Land Registration Act section 14 (1)(2) and (3) The Deputy Chief Land Registrar shall be the principal assistant of the Chief Land Registrar in the execution of the functions of the Chief Land Registrar that. Deputy Chief Land Registrar shall be the principal assistant of the Chief Land Registrar in the execution of the functions of the Chief Land Registrar. Any other signature purporting to have signed the LEASE certificate submitted by 1st Respondent in the Petitioner's humble submission was violated this Act.

164. The Petitioner submitted that by the 1st Respondent submitting names, ID details, phone contacts and signatures of persons as

shown in his replying affidavit and annexures agreeing to alienation of the suit land because of mosquitoes and snakes, the 1st Respondent violated the Wildlife Conservation and Management Act 2013 Sections 26, 27, 28, 29, 30, 39 (Conservation, Protection and Management), Section 77(1)(2)(3) (Human-Wildlife Conflict) and the 1st Respondent has committed an offense pursuant to Prevention of Cruelty to Animals Act Section 3(1)(d),(2),(3).

165. The Constitution of Kenya 2010 or any act of parliament of the Republic of Kenya as presently enacted, had not given the 1st Respondent license to handle snakes only Kenya Wildlife Service had Constitutional mandate and rights to handle snakes and these rights could only be extended and or donated to persons and or organizations which had been vetted, approved and licensed by Kenya Wildlife Services (KWS). It was important to note that the 1st Respondent had only shown in their affidavit that it was a logistic private company dealing with transport and logistics and that the 1st Respondent had not produced any license or legal document before this Court as proof that it handles Wildlife Animals and therefore the 1st Respondent's activities, attitude and behavior touching on the suit land are pure violation and abuse of the Wildlife Conservation and Management Act 2013 punishable under this Act. The 1st and 2nd Respondent had not brought before this Court any other document inform of an advertisement in Kiswahili Language from a second newspaper of national circulation

pursuant to Physical Planning Act (on change of use) Section 52 Publication of Notice in Newspapers which states:

Every notice published in the Gazette under any of the provisions of this Act, except the notices published under sections 49 and 50, shall be simultaneously published in at least two local dailies, one in English and one in Kiswahili and be displayed at the offices of the Chiefs.

166. It's important to note that many residents of Mwembelegeza do not understand English and so ignoring a critical provision of Law in change of use and failing to put up a notice in KISWAHILI is in itself a violation of this act.

167. It was the Petitioner's humble submission that there was no citizen/ public participation as provided for under the 2010 Constitution and County Government Act Part VIII Citizen Participation, Sections 87, 88,91 and PART XI County planning, AND Section 115 Public Participation in county planning.

115.(1) Public participation in the county planning processes shall be mandatory and be facilitated through-(a) mechanisms provided for in Part VIII of this Act; and (b) provision to the public of clear and unambiguous information on any matter under consideration in the environmental impact assessment reports; (iii) expected development outcomes; and (iv)planning process, including-(i) clear strategic environmental assessments; (ii) clear development options and their cost implications. (2) Each county assembly shall develop laws and regulations giving effect to the requirement for effective citizen participation in development planning and performance management within the

county and such laws and guidelines shall adhere to minimum national requirements.

168. Citizens of a county and especially the affected communities MUST be involved in any project being undertaken by any entity especially if the project involves alienation of public land. There was no public participation in regard to change of use of the suit land. The suit land was and still remains a public land. The 1st and 2nd Respondents ignored a crucial constitutional provision and pursued personal interest in alienating and ultimate approval of development on the suit land.

169. The Petitioner submitted that the 2nd Respondent acted as the Authority to effect change of use on a public land that does not fall under its Constitutional mandate pursuant to Article 62(1)(g)(i) and Article 62(3) as shown in paragraph 45(c) and (d) above. The suit Land is held in trust by the National Government of Kenya for the people of Kenya and administered on their behalf by National Land Commission (NLC). It was the National Government and not County Government of Mombasa, in conjunction with the 4th Respondent herein referred to as National Land Commission through a citizen participation to determine Change of User of any public land to a residential land use. However the constitution and all relevant Laws does not support alienation of a swamp/wetland as was done by the respondents. The actions of the County Government of Mombasa herein the 2nd Respondent in this suit remained extreme violation of the Constitution and Law and the

2nd Respondent. The 2nd Respondent did not involve the input of the 4th Respondent herein National Lands Commission who administer public land pursuant to Article 62(3). As an analogy;

“It's like a son (COUNTY GOVERNMENT OF MOMBASA) breaking into his father's (NATIONAL GOVERNMENT) locked house using fake keys (FRAUDULENT DOCUMENTS) when the security (NATIONAL LANDS COMMISSION) is asleep and stealing all property (SUIT LAND) inside the house which should help all members of that great household and great grandchildren (MWEMBELEGEZA COMMUNITY RESIDENTS) including the thieving son and sells it to one of the many corrupt great grandchildren who uses the property against the wishes of other law abiding great grandchildren (MWEMBELEGEZA COMMUNITY RESIDENTS)”.

170. The 2nd Respondent acted in disregard and in violation of the law by taking actions that the Constitution had not mandated it to do.

171. The Petitioner submitted that the Chief Officer of Lands, Planning and Housing of the 2nd Respondent for over seven (7) months did not bother to address his concerns in violation of Article 35(1)(a) (b) of the Constitution of Kenya 2010 and Access to information on Act.

(1) Every citizen has the right of access to-(a) information held by the State; and (b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

172. This matter is a public interest matter that the Constitution allows citizen access to information that affects the public and it's

extremely strange and a wonder why it would take several months without a response from the 2nd Respondent. If the 2nd Respondent believed it acted within the law in all its approvals in matters touching on the suit land, then why has it refused to respond to the petitioner's concerns?

173. It was the humble submission of the Petitioner that the 3rd Respondent herein Water Resources Authority violated the Water Resources Management Rules;

Rule 82.(1) No person shall: (a) Discharge effluent into a water resource without a valid discharge permit issued by the Authority(WRA) by permitting the 1st Respondent to discharge effluent into the purported Mtopanga river without a DISCHARGE PERMIT; and

Rule 82. (3) Any person who contravenes the rules under this section shall be guilty of an offence.

174. The 3rd Respondent's mandate was to receive; permit application for water abstraction and water use and that authorizing and permitting filling up swamps/ wetlands with stones, cement, cabros, steel to create a parking yard for trucks as was done on the suit land was a violation by the 3rd Respondent of Water Act and Water Resources Management Rules 116, 117, 118 and 119 Conservation of Riparian and Catchment areas. Rule 118 (1) in particular showed proscribed activities on riparian land (under Seventh Schedule Rule 118, 129, 123). These activities were the following among others:-

(i) Clearing of indigenous trees or vegetation

(ii) Building of permanent structures

(iii) or any other activity that in the opinion of the Authority and other relevant stakeholders may degrade the water resource.

175. The Petitioner submitted that the 4th Respondent herein National Land Commission, did not take any action as per its Constitutional mandate against the illegal alienation of the suit land and only became a bystander and an observer from far in violation of **Sections 5(1)(a)(e) and (h) and Section 6(2)(a)(c) of the National Land Commission Act:**

5(1) Pursuant to Article 67(2) of the Constitution, the functions of the Commission shall be-

(a) to manage public land on behalf of the national and county governments. (e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress; (h) to monitor and have oversight responsibilities over land use planning throughout the country.

6(2) Without prejudice to the generality of subsection (1), the Commission shall have powers to-(a) gather, by such means as it considers appropriate, any relevant information including requisition of reports, records, documents or any information from any source, including any State organ, and to compel the production of such information where it considers necessary; (c) take any measures it considers necessary to ensure compliance with the principles of land policy set out in Article 60(1) of the Constitution.

176. According to the Petitioner, the 6th Respondent herein the National Construction Authority did not take any legal action in line with their mandate against the 1st Respondent during and after the perimeter wall and electric fence erected and the complaints reported to them. The suit land is by a main feeder road and it will be strange for the 6th Respondent to admit that its inspectors did

not see the 4 Meter perimeter wall and electric fence being erected. This is in violation of **Section 5(1) of the National Construction Authority Act:**

Section 5(1) The object for which the Authority is established is to oversee the construction industry and coordinate its development.

177. The 7th Respondent herein the Chief Land Registrar at Mombasa bent the law by registering the suit land in an individual's name which the Survey Act had declared swamp hence contravening Land Registration Act Section 5, conflict with other laws:

(Except as otherwise provided in this Act, no other written law, practice or procedure relating to land shall apply to land registered or deemed to be registered under this Act so far as it is inconsistent with this Act).

178. Land registration Act does not conflict with Survey Act. There is uniformity in that what the Survey Act declares a particular land to be is what the Land registration Act declares the same land to be. Survey Act declared the suit land swamp since the time it was surveyed and planned, the Land registration Act declared the same except that the 7th Respondent bent the law for selfish reasons to aid illegal alienation of this suit land. Before any land was processed in the name of the owner, survey was carried out and boundaries marked and this was effected in the Survey Map (Registry Index Map). That it's the latest Registry Index Map that showed the exact identity of the suit land which was swamp and a public land.

179. The Petitioner submitted that Mwembelegeza being a scheme was surveyed and planned and every deserving owner was allocated part of the scheme and allotment letters issued to the deserving owners by the Land Adjudication and Settlement Office. It was the allotment letter that the owner of the land uses to process discharge certificate upon a payment to the land ministry within a period of 90 days. This discharge was only processed at lands office at Nairobi. Once the owner of the land has received discharge certificate, he pays stamp duty and after this the owner pays for registration of new title and finally apply for new title.

180. It was the Petitioner's humble submission that the 7th Respondent herein the Chief Land Registrar at Mombasa had not provided the following in all her responses including the replying affidavit, annexures and bundle of documents:

- i. Allotment Letter issued by the Land adjudication and Settlement office at Mombasa bearing the name of Andrew Peter Kanyotu's father (who is late/dead) the alleged original owner of the suit land.
- ii. And in the absence of the father as stated in paragraph 66(i) above, allotment letter issued by the Land Adjudication and Settlement office at Mombasa bearing the name of Andrew Peter Kanyotu.
- iii. Discharge Certificate from lands office at Nairobi in the name of Andrew Peter Kanyotu or his late father as the first owners of the suit land.

- iv. Stamp Duty and relevant charges levied upon Andrew Peter Kanyotu and or his late father by the Lands ministry that led to him being issued with Title deed for the suit land.
- v. Death Certificate, copy of identity card, will and ownership documents of the suit land from lands ministry all in the name of the Late (dead) father of Andrew Peter Kanyotu, the purported original owner of the suit land.

181. The Petitioner submitted that the 7th Respondent contravened Land Registration Act, Section 9(2)(c)(d) The register shall contain the following particulars: (c) names and addresses of the previous proprietors; (d) size, location, user and reference number of the parcel. The 7th Respondent had not shown ownership details and name of first owner of the suit land either in the green card nor copies of allotment letter or title deed or discharge certificate that informed transfer of ownership to one Andrew Peter Kanyotu. That one, Peter Andrew Kanyotu miraculously appeared from nowhere and was issued a title of the suit land in a settlement scheme without allotment letter or stamp duty or discharge or any other levy receipts. This is a violation of the law.

182. The 7th Respondent had violated the Survey Act Section 43. Proof of plans (1) All plans authenticated under this Act, purporting to be signed by the Director, or by a Government surveyor authorized by the Director in that behalf, or to be sealed with the seal of the Survey of Kenya, shall be presumed, until the contrary is proved, to have been signed by the Director, said, or by a Government surveyor authorized as aforesaid, to have been sealed with the seal of the Survey of Kenya, as the case may be. The 7th

Respondent had not brought any deed plan that countered or challenged the signed and sealed document annexed to the main Petition herein Registry Index Map and marked as “MCP – 1” from Survey of Kenya.

183. It was the humble submission of the Petitioner that the 7th Respondent had violated Physical Planning Act Section 8(3)(4) and Section 10 (2)(c) to determine development applications for change of user or subdivision of land which may have significant impact on contiguous land or be in breach of any condition registered against a title deed in respect of such land; and Section 10(2)(e) to hear appeals lodged by persons aggrieved by decisions made by the Director or local authorities under this Act. The 7th Respondent being a member of the District Physical Planning Liaison Committee Pursuant to Physical Planning Act Section 8(3) (d) acted alone in disregard of the Physical planning Act section 8(3)(e) by making a unilateral decision on the suit land without consultation with other government entities as shown in the Act and subsequent sections and sub-sections as shown in this paragraph.

184. The Petitioner averred that the 7th Respondent fraudulently, unprocedurally and through corrupt scheme allocated the suit land which was swamp, a public land under Article 62(1)(g)(i) of the 2010 Constitution contravening Article 62(4) of the 2010 Constitution of Kenya.

Article 62(4) Public land shall not be disposed of or otherwise used except in terms of an Act of Parliament specifying the nature and terms of that disposal or use.

185. Pursuant to Land Registration Act under the provision of Section 26(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, EXCEPT-

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

OR

(b) where the certificate of title has been acquired ILLEGALLY, UNPROCEDURALLY or through a CORRUPT SCHEME.

186. In law, the product is as good as the process/ procedure. There was no product without following the Laws and regulations that govern the production of that product. And that the title deed for the suit land in the name of Andrew Peter Kanyotu and Zaib Real Estate Limited and the 1st Respondent herein Anwarali and Brothers Limited and its subsequent lease certificate in the name of the 1st Respondent which were the products in this suit and are annexed to the reply affidavits of the 1st, 2nd, 3rd and 7th Respondent and the Interested Party to the cross petition, were

illegally, unprocedurally and through a corrupt scheme acquired and that the said title deeds, lease certificate and all entries in the green card touching on the suit land be declared null and void pursuant to Land Registration Act, No. 3 of 2012 under the provision of Section 26 sub-section 1(b) as shown in this paragraph.

187. In response to the Replying Affidavit by the Interested Party to the cross petition paragraph 10 where he wondered why they took long to lodge a complaint. It was not in their knowledge of the underhand and secretive deals which were being engineered by the purported first owner of the suit land one, Andrew Peter Kanyotu and the interested party to the cross petition and finally between the interested party to the cross petition and the 1st Respondent all assisted by the 7th Respondent. These were underhand secretive deals that the community of Mwembelegeza were not privy to. Mwembelegeza community only acted when the 1st Respondent around year 2017 began to put up a 4 Meter perimeter wall and an electric fence around the suit land and filling up the suit land with stones, rocks, sand and cabros to create a parking yard for trucks all under armed police protection. That is when the community realized that the suit land which was swamp and a public land had been illegally alienated and the community acted within the timelines that was convenient ad having all the necessary evidences against the Respondents.

188. It was the humble submission of the Petitioner in response to the Replying Affidavit of the Interested Party to the Cross Petition paragraph 12 expecting they avail evidences to prove any negative impact of the development on the suit land. It was important to note that the matter before the court was a constitutional petition and the court must make a determination on whether the suit land was swamp and a public land and whether the Constitution and all laws and regulations governing alienation and usage of public land were followed. Two wrongs do not make a right. Besides they had availed a number of evidences which he had annexed to the Petition that the Honourable Court must keenly look at and make a determination.

189. It was the Petitioner's contention in response to the Replying Affidavit of the Interested Party to the Cross Petition paragraphs 8 and 12 stating that the National government issued one, Andrew P. Ngirici with an allotment letter dated 23rd May, 2003 for the suit land. This was not true because the Interested Party to the Cross Petition including the 7th Respondent herein the Chief Land Registrar at Mombasa had not brought before this Honourable court the said Letter of Allotment as proof that one, Andrew P. Ngirici was allocated the suit land by the national government. There were no records at Lands registry at Mombasa pursuant to Land registration Act section 9. Maintenance of documents (1) the Registrar shall maintain the register and any document required to be kept under this Act in a

secure, accessible and reliable format including-(a) publications, or any matter written, expressed, or inscribed on any substance by means of letters, figures or marks, or by more than one of those means, that may be used for the purpose of recording that matter;

(b) electronic files; and (c) an integrated land resource register.

(2) The register shall contain the following particulars-(a) name, personal identification number, national identity card number, and address of the proprietor; (b) in the case of a body corporate, name, postal and physical address, certified copy of certificate of incorporation, personal identification numbers and passport size photographs of persons authorized and where necessary attesting the affixing of the common seal; (c) names and addresses of the previous proprietors; (d) size, location, user and reference number of the parcel; and (da) passport number, telephone number and email address, where applicable; (e) any other particulars as the Registrar may, from time to time, determine.

190. On the issues for determination for the Honourable Court, the Petitioner relied on the following:

- i. Whether any individual in this matter Andrew Peter Ngirici the purported first owner of the suit land can appear from nowhere and claim ownership of a swamp within a settlement scheme herein Mwembelegeza scheme and a title deed issued in his name without allotment letter from the Land adjudication and settlement office at Mombasa and without discharge certificate from Lands office at Nairobi and without relevant stamp duty by**

the lands office at Mombasa and without relevant processing fee for the said title deed at Mombasa Lands office.

- ii. Whether the said title deed processed in the name of Andrew Peter Ngirici is a legal title deed or illegal title deed and if it is illegal title deed then what is the state of the subsequent title deeds transferred to Zaib Real Estate Limited the purported second owner of the suit land and the subsequent title deed and a Lease certificate transferred to Anwarali and Brothers Limited the purported third owner**
- iii. Whether the suit land is a wetland/ swamp and by law a public land as per the National Land Commission's record statement annexed to the Petition and marked "MCP - 22" and also as per the Registry Index Map signed and sealed by the Coast Regional Surveyor showing the suit land is swamp and annexed to this Petition and marked "MCP - 1".**
- iv. Whether the activities carried out by Anwarali and Brothers Limited herein the 1st Respondent by filling up the suit land with rocks, stones, sand, cement and cabros and erecting an unregistered 4 meter perimeter wall around the suit land and unregistered electric fence on top of the perimeter wall to create a parking yard for trucks was within the law.**
- v. Whether Water Resources Authority violated the law by issuing license to the 1st Respondent to fill up the suit land with stones, rocks, sand, cement and cabros to create a parking yard for tucks.**
- vi. Whether the suit land constitutionally is held in trust by County Government of Mombasa herein the 2nd Respondent for the people resident in the county or by the National Government**

for the people of Kenya and, if the 2nd Respondent followed the law by initiating and processing change of use of the suit land.

vii. Whether change of use of the suit land which is swamp without the endorsement of the National Land Commission is within the law.

viii. Whether change of use initiated on the suit land by the 1st and 2nd Respondents with publication on only one newspaper of English language and not in Kiswahili language and without placing a notice board outside the suit land to show intention of change use within Mwembelegeza community is within the law.

ix. Whether the National Environment Management Authority herein the 5th Respondent is empowered by the law to issue license to fill the suit land a wetland/swamp with stones, rocks, sand, cement and cabros to create a parking yard for trucks

191. On whether any individual in this matter Andrew Peter Ngirici the purported first owner of the suit land can appear from nowhere and claim ownership of a swamp within a settlement scheme herein Mwembelegeza scheme and a title deed issued in his name without allotment letter from the Land adjudication and settlement office at Mombasa and without discharge certificate from Lands office at Nairobi and without relevant stamp duty by the lands office at Mombasa and without relevant processing fee for the said title deed at Mombasa Lands office, the Petitioner submitted that the Registrar of Lands being authorized by Section 9 of the Land registration Act in maintaining land documents including allotment letters offered to deserving individuals in a settlement scheme, discharge certificate, stamp duty by lands ministry and relevant

levies by Ministry of Lands that informs the processing of Title. If these documents were missing then it was in their submission that Andrew peter Ngirici irregularly, unprocedurally and through corrupt scheme acquired the suit land.

192. On whether the said title deed processed in the name of Andrew Peter Ngirici was a legal title deed or illegal title deed and if it was illegal title deed then what was the state of the subsequent title deeds transferred to Zaib Real Estate Limited the purported second owner of the suit land and the subsequent title deed and a Lease certificate transferred to Anwarali and Brothers Limited the purported third owner, the Petitioner submitted that pursuant to Section 26 (1) (a) (b) of the Land registration Act, the title deed in the name of Andrew Peter Ngirici is illegal and was irregularly, unprocedurally and through corrupt means acquired hence the other Title deeds in the name of the Interested Party to the Cross Petition and the Title deed and subsequent Lease certificate in the name of the 1st Respondent were all illegal documents.

193. On whether the suit land was a wetland/ swamp and by law a public land as per the National Land Commission's record statement annexed to the Petition and marked as "MCP - 22" and also as per the Registry Index Map signed and sealed by the Coast Regional Surveyor showing the suit land is swamp and annexed to this Petition and marked as "MCP - 1". The Petitioner asserted that the Survey act Sections 32, 39, 41 and 43 had authorized the Director of Survey and through the Coast regional surveyor, the

suit land was declared swamp. The National Land Commission Act Section 5(1)(a)(e)(h) has authorized NLC, Mombasa County Co - ordinator to manage and administrate the suit land, a public land on behalf of the National Government of Kenya. This was confirmed by a response letter by the National Land Commission herein the 4th Respondent annexed herein and marked as “MCP - 22”.

194. On whether the activities carried out by Anwarali and Brothers Limited herein the 1st Respondent by filling up the suit land with rocks, stones, sand, cement and cabros and erecting an unregistered 4 meter perimeter wall around the suit land and unregistered electric fence on top of the perimeter wall to create a parking yard for trucks was within the law. The Petitioner submitted that Water Resources Management Rules, Rule 118(1) in particular shows proscribed activities on riparian land (Under Seventh Schedule Rule 118,129,123) were activities proscribed on Riparian land/wetland/Swamp. It the Petitioner’s humble submission also that Environmental Management and Coordination Act (EMCA) Section 42(1)(2)(3) outlines activities which are proscribed on a wetland. It is our humble submissions that the 1st Respondent herein Anwarali and Brothers Limited did not act within the law in respect to the development on the suit land.

195. On whether the Water Resources Authority violated the law by issuing license to the 1st Respondent to fill up the suit land with stones, rocks, sand, cement and cabros to create a parking yard

for tucks, the Petitioner argued that the Water Resources Authority herein 3rd Respondent was empowered by the Water Act Section 12(d) to receive permit applications for water abstraction, water use and enforce conditions of those permits. The Petitioner submitted that by issuing permit to the 1st Respondent herein Anwarali and Brothers Limited to develop and alter and degrade the suit land in the manner they did it, water resources authority violated the law.

196. On whether the suit land constitutionally is held inn trust by County Government of Mombasa herein the 2nd Respondent for the people resident in the County or by the National Government for the People of Kenya and if the Respondent followed the law by initiating the processing Change of User of the suit land. It was the humble submission of the Petitioner that pursuant to Article 62(3) of the 2010 constitution, the suit land is held in trust by the National Government of Kenya for the people of Kenya and not by the County Government of Mombasa. It was also the Petitioner's submission that the county government of Mombasa violated the law since it only has constitutional rights on Public land pursuant to the provision of of Article 62(2) of the 2010 Constitution.

197. On whether Change of User of the suit land which was swamp without the endorsement of the NLC was within the law. The Petitioner averred that NLC acknowledged that the suit land is public land and a Wetland/Swamp. The NLC never endorsed the Change of User hence it was a violation of the law.

198. On whether the change of use initiated on the suit land by the 1st and 2nd Respondent with publication on only one newspaper in English language and not in Kiswahili Language and without placing a notice board outside the suit land to show intention of change use among Mwembelegeza community is within the law, the Petitioner submitted that pursuant to physical Planning Act Section 52 publication be done on two newspapers of National circulation in both English and Kiswahili languages and NOT on one as was done in Nation Newspaper which is in English by the 1st Respondent. It was also the Petitioner's humble submissions that by failure to place a notice board, the change of use not within the law.

199. According to the Petitioner, on whether the National Environment Management Authority herein the 5th Respondent was empowered by the law to issue license to fill the suit land a wetland/swamp with stones, rocks, sand, cement and cabros to create a parking yard for trucks, Environmental Management and Coordination Act (EMCA) Section 42(1)(2)(3) outlines activities which are proscribed on a wetland. It was the Petitioner's humble submission that the NEMA was not empowered by the Act herein to license filling up of a swamp with rocks, stones, sand, cement and Cabros to create a parking yard for trucks.

200. In conclusion, the Petitioner held that they had demonstrated clearly why this Petition should be allowed. They had demonstrated that the actions of the Respondents violated the

2010 Constitution of Kenya and all relevant laws and regulations governing alienation and usage of public land. Further they believed that they had demonstrated and shown that the Respondents unlawful actions touching on the suit land had brought serious negative Environment impact that if not stopped, will not only impact this generation but also generations to come. Finally, they had demonstrated that this Honourable Court had jurisdiction to grant the prayers and reliefs sought by the Petitioner. Therefore, they urged this Honourable Court to make a decision in favour of the Petitioner as prayed.

B. The Written Submissions by the 2nd Respondent

201. The 2nd Respondent through the Law firm of Messrs. Otieno B.N. Associates Advocates filed their written submissions dated 8th June, 2022. Mr. Otieno Advocate commenced his submissions by stating that these were the written submissions made on behalf of the 2nd Respondents in support of the Replying Affidavit dated 27th January, 2022 and in response to the Petition dated 26th October, 2021 (hereinafter referred to as “the Petition”). Vide the said Replying Affidavit, the 2nd Respondent contend that it discharged its duties diligently in line with the provisions of the law, it lacked capacity to revoke the title of the 1st Respondent considering that that was never in issue at the time the application for approvals was made and that in matters touching on the 2nd Respondent's conduct and action the Petitioner has instituted the

suit against it prematurely and as such the Court ought to dismiss the same.

202. On the background, the Learned Counsel submitted that an application was made for development permission and change of user by the 1st Respondent to the 2nd Respondent over MOMEASA/MWEMBELEGEZA/1475 which applications were subjected to the requisite due process prior to approval of the same. Having received an application for change of user from residential to mixed use (residential cum commercial and parking) the process of change of user was initiated by notification to the public vide publication in the Daily Nation Newspaper of Thursday, 27th April 2017 and site board which elicited no objection both from the public nor the Petitioner. Appearing at page 25 of the 2nd Respondent's Replying Affidavit.

203. The Learned Counsel averred that the approval process was subjected to environmental Impact Assessment with adequate public participation where the local members of Mwembelegeza area were involved and registered no objection whatsoever in respect thereof thus culminating to the approval by the 2nd Respondent as explicit vide Notification of approval dated 16th May 2017 and 7th February 2018 by the Department of Lands. Appearing at pages 26 to 31 of the 2nd Respondent's Replying Affidavit. In sanctioning the said change of user and development permission, the 2nd Respondent was appraised of the requisite Hydrological assessment done and ultimately Dhanjal Brothers

Limited granted permission for road cutting and storm water drainage in Mwembelegeza area vide the letter dated 10th February 2017 together with the proposed drainage layout. Appearing at page 33 of the 2nd Respondent's Replying Affidavit.

204. The 2nd Respondent in granting the Change of User was also appraised of the approval granted by the other relevant authorities such as the Water Resources Management Authority who approved the construction works for the storm drainage system for the subject property and linked to the existing drainage system. Whereas Development permission was granted for a proposed boundary wall by the 1st Respondent on Plot No. 1475/MWEMBELEGEZA on 1st December 2016, vide Notification of Approval of Development Permission dated 6th January 2017, the same was subject inter-alia to the following conditions:-

- i. All buildings under construction must be inspected by the eminent registered Engineer and Architect otherwise the County will not accept any liability for stability or any work or other shortcoming in the building...
- ii. To execute the proposal in strict conformity with the Architectural and structural plans approved by the Director of planning and City Engineer respectively.
- iii. On the understanding that the subject land did not constitute part of disputed public/private land.. Appearing at page 52 of the 2nd Respondent's Replying Affidavit.

205. The Learned Counsel submitted that the 2nd Respondent had at all times been vigilant with the developments ensuring vis-à-vis the conditions contained including issuance of enforcement notice stopping construction until compliance is met or achieved as evidenced by enforcement Notice effective from 20th January 2017.

- i. THAT the aforesaid Notice was subsequently reviewed and lifted by the 2nd Respondent following compliance explicit of:-
- ii. Evidence of public (neighborhood) approval of the proposed boundary wall through the attached signed list by project affected persons,
- iii. License by National Environment Management Authority (NEMA) and recommendation from water resource Management Authority.
- iv. Official Land search verifying ownership.
- v. Proposed 900mm dia-culvert outfall on Plot No. 1474/Mwembelegeza to existing storm drain 7.5m deep plan. Appearing at page 53 of the 2nd Respondent's Replying Affidavit.

206. The order lifting the enforcement notice by the 2nd Respondent was conditioned to the following terms: -

- a. Construction of the boundary wall to resume upon completion of the drainage system as per the drainage plan.
- b. Submit the drainage systems designs to the County Engineer for assessment and approval.

- c. Ensure the Children's home on plot No. 1474/Mwembelegeza has been allowed adequate access.
- d. To ensure that the drainage system has been constructed to the satisfaction of the County Engineer. Appearing at page 55 of the 2nd Respondent's Replying Affidavit.

207. Based on the foregoing, the Learned Counsel reckoned that the issues for determination particularly as against the 2nd Respondent and in view of the facts outlined above are:-

- i. What are the County's obligations in respect of the developmental approvals?**
- ii. Whether the 2nd Respondent extends to revocation of certificate of title or grants in reviewing an application for development permission**
- iii. What are the available remedies for a party aggrieved by the 2nd Respondent's decision in issuing development permissions to pursue?**

208. On what were the County's obligation in respect of the developmental approvals. The Learned Counsel averred that the County government is empowered by the law, and drew its functions from the law. Being a creation of the law, including the Constitution of Kenya, the County is expected to direct its activities specifically within the confines of the legislation imposing a duty on it. In matters touching on developmental approvals, the parameters of the County's involvement are elaborately set out in the Physical and Land Use Planning Act. Section 56 of the PLUPA confines the powers of the County to the control of developmental

plans anticipated to happen within the jurisdictional control of the County. The section limits the County's role to the inspection of the documents to ensure that they qualify for an approval, in which case, it is incumbent upon it to pursue the procedure set out in the Act. Where a proprietor sets out to develop land within the control of the County, they are required to make an application as per section 58 of the PLUPA, and ensure that they have lodged the essential documents with the County for proper appraisal. Thereafter the County is expected to look at the documents, ensure that the developer is the proprietor of the property as manifest in the title documents, one would say, the role of the County in looking at the documents is merely cursory and or plain inspection to confirm the details of the developer match those of the proprietor.

209. Further, accompanying the application for development permission, was an application for change of user from residential to mixed use (residential cum commercial parking). This process was duly carried out by the County in line with the law, first the County issued a notice in a newspaper of nationwide circulation informing members of the public of the intention to change the user. Appearing at page 25 of the 2nd Respondent's Relying Affidavit. In commissioning this process, the 2nd Respondent inspected the EIA, invited public participation in line with article 118(1) of the Constitution of Kenya and all relevant laws to enable the members of public give their say on the nature of the

proposed venture. Appearing at pages 26 to 31 of the 2nd Respondent's Replying Affidavit.

210. The Learned Counsel asserted that to this end, by the time the 2nd Respondent was issuing the development permission, it was possessed with sufficient information to believe that the 1st Respondent was the proprietor of the property. It had in its possession the necessary title documents, which identified the name of the proprietors to be that of the 1st Respondent. If anything, the 2nd Respondent had no reasons to doubt the validity of ownership, as there was no claim to dispute the same and in line with section 26(1) of the Land Registration Act, it would have been against the spirit of the LRA to raise objections without any shred of basis, reason, challenge or justification thereto.

211. The provision of Section 26 (1) of the Land Registration Act No. 3 of 2012 which provides 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 of 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 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.”

212. This position enjoyed judicial support and the Court in the case of:- ***“Harrison Kiambuthi Wanjiru & another - Versus - District Land Registrar Nairobi & 3 others [2022] eKLR”*** rendered itself as thus:-

“A certificate of title is conclusive evidence of ownership and is prima facie evidence that the registered proprietor is the owner. Section 24 of the Land Registration Act 2012, gives the registered proprietor absolute rights over land...”

213. Thus, the possession of certificate of title, invokes the recognition that extends to judicial notice that the holder is the proprietor. In this regard, the 2nd Respondent upon receipt of applications for development permissions and or change of user, is merely expected to cross check the details of the applicant to those of the holder of the title. Otherwise, to suggest that the 2nd Respondent ought to run through the system, conducting extreme levels of diligence before proceedings with the process of approval would suggest the amendment of the law to fulfil ends that parliament did not contemplate. Equally, with the limited resources, and personnel such a suggestion is absolutely tenuous.

214. On whether the 2nd Respondent extended to revocation of certificate of title or grants in reviewing an application for development permission. The Learned Counsel held that the Land Registration Act contains substantial provisions for the procedure to be followed before title is revoked and or cancelled. Thus, the process of cancellation of title applies sequentially wherein it must be shown that the principal elements for invalidation of title have

been met. These elements were found in the provision of Section 26 (1) (a) and (b) of the Land Registration Act, to wit:-

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

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

215. Subsequent to the proving to the existence of any of the vitiating factors enunciated above, the LRA prescribes the procedure to commence the process of invalidation, and which is clearly not one that can be invoked at the provocation of one entity, or at the discretion of an entity, let alone the 2nd Respondent. The LRA at section 79 where alteration can be made at the instance of the Registrar or section 80 at the instance of the Court. However, in both positions, the person challenging the title has to sufficiently provide evidence to show that the title arose out of either fraud or mistake in which the proprietor was involved in. This position was further supported by the Court in the case of:- ***“Joseph Gitari - Versus - Muthui Chomba & 7 others [2018] eKLR”*** wherein the Court asserted:-

“The court is, therefore, of the view that even though it has the legal power to order rectification and cancellation of title to land, it can only do so where it is demonstrated that the title holders were privy to any mistake, fraud or omission in the process of its acquisition or that they substantially contributed to such factors. In the circumstances of this case, the Plaintiff did not sufficiently discharge the legal burden of proof placed upon him. The court has, therefore, no basis upon which it could

invoke such jurisdiction of cancellation of title and rectification of the register.”

216. According to the Learned Counsel, it appeared that the Petitioner furthers the position that the 2nd Respondent should have exercised diligence *suo motu*, to bring the alleged perpetration of an illegality to a halt. However, there is no legal provision that permits the exercise of this right in the manner stipulated by the Petitioner. Even if the 2nd Respondent were to exercise extreme vigilance in interrogating the title, unless the issue was first brought to its attention, it would have amounted to a moot process as by the time of issuing the approvals everything was in order. Indeed, the 2nd Respondent even invited the participation of the public to give credence to the process of issuing the necessary approvals and it was at this juncture that an objection would have sufficed to bring to the attention the issues purported by the Petition. Even then, the same would have only acted to prevent the 2nd Respondent from issuing the approvals and not revoking the titles subject to the following of proper procedures for revocation.

217. On what were the available remedies for a party aggrieved by the 2nd Respondent's decision in issuing development permissions to pursue, the Learned Counsel submitted that the ability to institute proceedings was one that is anchored in law thus, a party can only validly bring a suit within the confines of the statute giving recognition to their claim. Otherwise, a party is devoid of standing

where they fail to strictly adhere to the procedural provisions of a statute, and any decision in respect thereof falls short of the force of law. Courts were advised by the Supreme Court in the case of:- ***“Benson Ambuti Adegga & 2 others - Versus - Kibos Distillers Limited & 5 others [2020] eKLR”*** to exercise judicial abstention and restraint to pave way for other statutorily established bodies to deal with the dispute at hand. This position was restated by the case of:- ***“Susan Wanjiku Maina - Versus - Director, Physical and Land Use Planning Kiambu County Government & another [2022] eKLR”*** when citing with approval the Supreme Court decision:-

“There is a general interpretation of the law to the effect that where Parliament has, through statute, established other primary adjudicatory bodies, this court should let those primary adjudicatory bodies exercise their primary jurisdiction, and this court should only exercise appellate jurisdiction. Indeed, this was the principle emphasized by the Court of Appeal in Kibos Distillers Limited & 4others v Benson Ambuti & 3 others [2020] eKLR. The Supreme Court, while declining to grant leave for an appeal to the apex court, agreed with the Court of Appeal on this interpretation of the law in Benson Ambuti Adegga v Kibos Distillers Ltd & 5 others [2020] eKLR.”

218. According to the Learned Counsel, it was imperative that where a dispute resolution mechanism exists out of the conventional judicial forums, the same ought to be exhausted before the jurisdiction of Courts is invoked. Thus, to make the judicial organs the first port of call bypassing the administrative forums established by the Acts goes against the procedural propriety

envisaged by parliament. This position was pronounced by the Court in the case of:- ***“Samson Chembe Vuko - Versus - Nelson Kilumo & 2 others [2016] eKLR”*** wherein it stated-

“It has been said time without number, that whenever an Act of Parliament provides for a clear procedure or mechanism of redress, the same ought to be strictly followed.”

219. Similarly, for the Court to entertain the instant dispute, it is the provisions of the Physical and Land Use Planning Act and the attendant rules and regulations that determine when to invoke and claim the rights before this Honourable Court. They drew support for the purposes of the instant suit from the provision of :- Section 61(3) and (4) of the PLUPA and they reproduced the provision as hereunder-

a) “(3) An applicant or an interested party that is aggrieved by the decision of a county executive committee member regarding an application for development permission may appeal against that decision to the County Physical and Land Use Planning Liaison Committee within fourteen days of the decision by the county executive committee member and that committee shall hear and determine the appeal within fourteen days of the appeal being filed.

b) (4) An applicant or an interested party who files an appeal under sub-section (3) and who is aggrieved by the decision of the committee may appeal against that decision to the Environment and Land Court.”

220. According to the Learned Counsel, the Petitioner, if at all, he felt aggrieved by the procedure that was followed in granting the approvals ought to have pursued the remedy available under the PLUPA, otherwise to bypass the statutorily established avenues only results in a premature institution of the suit. This position was equally reinforced by the Court in the case of:- **“Susan Wanjiku Maina (supra)”** wherein it buttressed the position as follows:-

“Similarly, Section 61(3) and (4) of the PLUPA contains the following framework on adjudication of disputes relating to decisions made in relation to development permissions... Having reflected on the gist of the dispute in this petition vis-à-vis the above legal framework on primary adjudication of disputes relating to enforcement notices and development permissions, I entirely agree with the respondents that this dispute has been placed before this court prematurely. It is my view that the petitioner ought to exhaust the primary dispute adjudication mechanism provided under the PLUPA before invoking the jurisdiction of this court.”

221. Having effectively demonstrated that the Petitioner did not pursue the relevant avenues before instituting the instant dispute against the 2nd Respondent, it is proper to conclude, as did the Court in the above dispute, that the instant Petition especially as against the 2nd Respondent was prematurely brought before court and the same ought to be dismissed for want of exhaustion of alternative dispute resolution mechanisms.

222. In conclusion, the Learned Counsel submitted that for the reasons enumerated above, the Petition was without merit and as such this Honorable Court should not entertain it. Accordingly, the Petition dated 26th October, 2021 should be dismissed with costs.

C. The Written Submissions by the 3rd Respondent

223. The 3rd Respondent through the Legal Counsel Tacey Makori, filed their written submissions dated 18th March, 2022. M/s. Makori Advocate commenced the submissions by stating that what was before the Honourable Court for determination was the Petition dated 26th October, 2021 seeking various orders as they appear on the face of the Petition. The 3rd Respondent filed a Replying Affidavit dated 26th November 2021 sworn by Ahmed A. Mbarak opposing the said application. On the issues for determination, the Learned Counsel relied on the following issues arising from the application mentioned above:-

224. On the issue of whether the Petitioner was entitled to the reliefs sought, the Learned Counsel submitted that the 3rd Respondent was designated by the Water Act, 2016 (hereinafter “the Act”) as an agent of the National Government responsible for regulating the management and use of water resources in the country. The said regulatory power was vested on the Respondent on the basis of the power given to the State under Article 66 of the Constitution of Kenya, 2010 to regulate the use of any land, or any interest in or right over any land.

225. By virtue of its statutory mandate, the Authority is empowered under Section 12 of the Act to regulate activities in or in relation to the protection of a water resource. In so doing, Section 36 requires all water uses to be authorized by the Respondent. Particularly, the 3rd Respondent is empowered under Section 12(d) of the Act to receive permit applications for water abstraction, water use and enforce conditions of those permits amongst others. Section 36 of the Act requires all persons desirous of undertaking works on a water resource to obtain a permit from the Respondent. Section 40 of the Act read together with Part II of the Water Resources Management Rules, 2007 (hereinafter “the Rules”), makes provisions for the manner in which applications for permits ought to be made to the 3rd Respondent.

226. On 19th November 2018, the 1st Respondent made an application to the 3rd Respondent seeking approval to construct concrete canals (in stream works) to drain runoff from the wetland during rainy season into the municipal storm drains to Mtopanga stream so as to provide parking space for lorries and trucks. A copy of the application for water permit is annexed and marked as “AAM - 1” in the Replying Affidavit. Additionally, the 1st Respondent submitted various documents to accompany the application for water permit. Copies of the Certificate of Lease, Certificate of Incorporation, KRA Pin Certificate, Hydrological Assessment Report, EIA Project Report and License and Design Plans have been annexed and marked as “AAM - 2”, “AAM - 3”, “AAM - 4”,

“AAM - 5”, “AAM - 6” and “AAM - 7” in the Replying Affidavit. Upon receiving the abovementioned application for permit, with all required attachments being provided, a technical team from the 3rd Respondent’s Mombasa Sub Basin office visited the site for assessment on 21st November 2018. A copy of the Site Assessment Report was annexed and marked as “AAM - 8” in the Replying Affidavit.

227. Rule 23 of the Rules provides that:

(1) “Any person whose works or water use activity falls within Category A is required to notify the Authority, prior to construction or installation of works, of the water use activity using the prescribed Form WRMA 001 set out in the Twelve Schedule and will be required to pay the prescribed fee.”

(2) “Endorsement by the Authority on the submitted Form WRMA 001 will confer approval for the applicant to undertake the water use activity described in the application and limited by any conditions imposed on Category A water users.”

228. Rule 33 of the Rules further provides that:

33.(1) Upon the approval of an application for a water use permit, the Authority shall issue an authorization to construct works in the prescribed Form WRMA 004 set out in the Twelfth Schedule.

229. On 23rd November, 2018, the 3rd Respondent approved the 1st Respondent’s application and issued it with a Notification of Approval for Construction of Works and use of Water. A copy of the Notification was annexed and marked as “AAM - 9” in the

Replying Affidavit. Sometime in March 2021, the 3rd Respondent received a complaint from the Applicant regarding an alleged encroachment of a portion of Mwembelegeza wetland in Mwembelegeza. Following this, an inspection to ascertain the issues raised in the complaint was carried out on 23rd March 2021 by officers from the 3rd Respondent's Sub Basin Office in Mombasa. A copy of the Report was annexed and marked as "AAM - 10" in the Replying Affidavit.

230. From the inspection, the following observations were made inter alia:

- a) The area is located in Mwembelegeza near a police station and surrounded by residential houses including gated communities such as Vescon 'A' and 'B'.**
- b) The 1st Respondent had constructed a masonry perimeter wall around the suit property.**
- c) The suit property was covered with cabro blocks, small office, garage, drainage canals and a storm water collection chamber. The wall had openings to let in storm water into the canals.**
- d) The suit property was covered with cabro blocks, small office, garage, drainage canals and a storm water collection chamber. The wall had openings to let in storm water into the canals.**

231. From the inspection, it was concluded that the authorized water works were adequate to drain storm water safely and that the 1st Respondent would be required to carry out regular maintenance as well as clear any vegetation, silt or debris in the works to reduce the chances of flooding. It was therefore clear from the

foregoing that the 3rd Respondent, in issuing the Authorization to Construct Works, followed due process and ensured that all prerequisite requirements had been met by the 1st Respondent before issuing the same.

232. The Learned Counsel argued that the 3rd Respondent duly monitored compliance of the conditions prescribed in the approval as well as the statutory requirements and was satisfied that the works were completed in accordance with the conditions of the approval.

233. In conclusion, the Learned Counsel submitted that the 3rd Respondent prayed that the Petition dated 26th October, 2021 be dismissed as against the 3rd Respondent with costs.

XV. Analysis and Determination

234. I have carefully assessed and considered all the filed pleadings pertaining to the Petition dated 26th October, 2021, the Cross - Petition and the Cross - Cross Petition, the detailed Affidavits by the Petitioner and the Respondents plus Interested Parties, the articulate written submissions by both the Petitioner and the Respondents, the myriad of cited authorities, the appropriate provisions of the Constitution of Kenya, 2010 and the statutes.

235. For the Honorable Court to reach an informed, just, fair and reasonable decision, it has condensed the Subject matter into the following seven (7) salient issues for its determination. These are:-

a) Whether the Petition by the Petitioner meets the threshold for Constitution Petitions.

- b) Whether the suit property is public land (swamp/wetland) incapable of private ownership.**
- c) Whether the 1st Respondent's title was acquired fraudulently, illegally, or unprocedurally.**
- d) Whether the Cross - Petitioner is entitled to compensation in the alternative.**
- e) Whether the statutory bodies (WRA, NEMA, NLC, Chief Land Registrar, County Government, etc.) failed in their constitutional and statutory duties**
- f) Whether the Constitution Petition, Cross Petition and Cross - Cross Petition have any merit and, if affirmative, if the Petitioners are entitled to the reliefs sought?**
- g) Who should bear the costs of the Petition, Cross-Petition and Cross - Cross Petition?**

ISSUE No. a). Whether the Petition by the Petitioner meets the threshold for Constitution Petitions.

236. 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.

237. 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.....”**

238. 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.

239. 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.”

240. The provision of 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.

241. Turning to the present Petition, the Petitioner invoked the provisions of Articles 2, 10, 22, 35, 42, 43, 62, 67, 69, 70, 75 and 258 of the Constitution, alleging that the alienation of the suit property violated the community’s right to a clean and healthy environment, the principles of sustainable land management, and the protection of public land. The Petition is accompanied by a detailed supporting affidavit, attached numerous and assorted annexures marked as “MCP” which included the Registry Index Map (RIM) of the area where the suit land is situated, several correspondence exchanged between him and the various statutory

bodies over the subject matter, and photographs of the developments on the suit property.

242. In a nutshell, the Petitioner in this Petition identifies: -

- a) The provisions allegedly violated: e.g., Article 62 (public land), Article 42 (right to a clean and healthy environment), Article 69 (state obligations in respect of the environment).
- b) The manner of violation: alienation of land alleged to be a swamp/wetland, filling up of the swamp, erection of perimeter walls with razor electric and developments without due approvals, and deprivation of the community's environmental rights.
- c) The reliefs sought: cancellation of the lease, demolition of structures, restoration of the land, and declarations of public interest.

243. While the Respondents argue that the Petition is imprecise and raises evidentiary rather than constitutional issues, the Court is persuaded that the Petition, on its face, meets the "**Anarita Karimi Njeru (Supra)**" test. It sets out the constitutional provisions alleged to have been violated and the manner of violation with sufficient clarity to enable the Respondents to respond and the Court to adjudicate.

244. The Court also notes that under Article 22 (1) and (2) of the Constitution, every person has the right to institute court proceedings claiming that a right or fundamental freedom has been denied, violated, or infringed, and such proceedings may be

brought on behalf of others or in the public interest. The Petitioner has expressly invoked this provision, claiming to act on behalf of the Mwembelegeza community.

245. The Petition meets the threshold for Constitutional Petitions as established in *“Anarita Karimi Njeru (Supra)”* and subsequent jurisprudence. The Court is therefore properly seized of the matter.

ISSUE No. b). Whether the suit property is public land (swamp/wetland) incapable of private ownership?

246. The Site Visit Report

247. As indicated, on 24th February, 2023 the Honourable Court conducted a Site Visit (*“locus in Quo”*) in the presence of all parties. A report was prepared. It is hereby produced verbatim for ease of reference herein below:-

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
ELCC CASE NO. 50 OF 2021
AENEA RAGEN
- VERSUS -
ANJARWAL BROTHERS LIMITED & OTHERS

A SITE VISIT REPORT FOR THE VISIT (“LOCUS IN QUO”) CONDUCTED AT KADZANDANI MWAFA MBA - MWEMBELEGEZA ON 24TH FEBRUARY, 2023 AT 12.10 P.M.

I. Preliminaries.

The site is situated at a place known as Kadzandani Mwafamba within the Mwembelegeza location of the Kisauni Constituency of the County of Mombasa. It is close to five (5) kilometres from the Bamburi Cement Company Limited off the Mombasa – Malindi highway.

The team assembled at site which is adjacent to the Kadzandani police station at around 12.30pm. The session commenced with a word of prayer. Subsequently, they were briefed by the Judge prior to the commencement of the actual tour around and within the site.

II. The Court.

- a) Justice Hon. L. L. Naikuni – ELC. 3, Mombasa.
- b) M/s. Yumna Hassan – The Court Assistant.
- c) Mr. John Ngari Mwaniki – The Judge’s Driver/Assistant.

III. THE PARTIES.

1. The Petitioner.

Mr. Ainea Ragen – The Petitioner.

2. The Respondents

- a) Mr. Mogaka Advocate for the 1st Respondent.
- b) Mr. Hassan Yakub – A Representative.
- c) Mr. Anwar Abdalla – Director of the 1st Respondent.
- d) Mr. Otieno Advocate for the 2nd Respondent.
- e) M/s. Makori Advocate for the 3rd Respondent.
- f) Mr. Ahmed Abdalla Mbarak – The Co - ordinator for Water Resources Co - ordination Base – the 3rd Respondent.
- g) M/s. Waswa Advocate holding brief for Mr. S. Mbutia for NLC.
- h) M/s. Sakani Advocate for the 5th Respondent.
- i) Mr. Samuel Lepokoyiet – The County Director – NEMA (Mbsa)
- j) Mr. James Mutinda (Senior Environment Officer – County of Mombasa for the 5th Respondent.

- k) M/s. Gitugi Advocate holding brief for Mrs. Korir Advocate for the 6th Respondent.
- l) Mrs. Maloba Nakali - Compliance Officer - 6th Respondent
- m) M/s. Waswa Advocate for the 7th Respondent.
- n) M/s. Cecilia Hore - Government Land Valuer - Mbsa - the 7th Respondent.
- o) M/s. Randa holding brief for Mr. Gikandi for the Interested Party in the Cross Petition.

Hereinafter referred to as **“The Team”**)

XI. The Security Operatives

- a) Sergeant Hassan Juma - Kadzadani Police Station.
- b) Corporal Mariam Mohamed - Makupa Police Station.
- c) P.C. Safari Chea - Makupa Police Station.
- d) P.C. Kipngetich Ngeno - Kadzadani Police Station.
- e) P.C. Wilfred Nyange - Kadzandani Police Station.

IV. The Purpose for the Visit.

3. The Court explained the purpose of the site visit to the participants. It stated that it was conducted pursuant to a Court Order made on 18th June 2025 in accordance with the provision of Section 173 of the Evidence Act, Cap. 80; Order 18 Rule 11 and Order 40 Rule 10 of the Civil Procedure Rules, 2010. The provisions of Order 18 Rule 11 of Civil Procedure Rules, *to wit*: -

Power to court to inspect;

“The court may at any stage of a suit inspect any property or thing concerning which any question may arise”

While **Order 40 Rule 10 (1) (a)** provided *to wit*: -

“The Court may, on the application if any party to a suit, and on such terms as it thinks fit: -

(a) Make an order forInspection of any property which is the subject matter to which any question may arise therein.

IV. The Procedure

4. The site visit essentially entailed walking around the whole of the suit land and the surrounding vicinity. The team was to make observation in terms of what was on the ground. The team would be guided by some of the already existing sketches – drawings and maps of the site. These documents had already been filed by the parties in the matter.
5. It was led by the Land Surveyor and a Land Valuer.
6. The Judge elucidated that the site visit was not with a view of gathering further evidence on the case but to make observation on the factual realities on the ground to enable the Court in making a fair, just and equitable decision. Ideally, the Honorable Court informed the team that the visit was purely to look, feel and observe on the issues brought in Court while inspecting the place.
7. Additionally, the Honourable Court explained to the parties that the purpose was not to adduce fresh evidence nor venture onto the veracity of the evidence already adduced, fill in gaps the parties' evidence but purely to check and confirm the evidence lest the court runs into the risk of turning itself a witness in the case. A visit is an exception rather than the rule.
8. Further, the parties were advised to sustain high dignity, decorum and decency during the visit. It would be a team work driven process. While recording of the proceedings using electronic devices or manual writing would be allowed, photography or video shooting was strongly condemned due to the likely hood of being abused particularly through social media.

V. The Observations.

9. The team made the following observations. There were:-

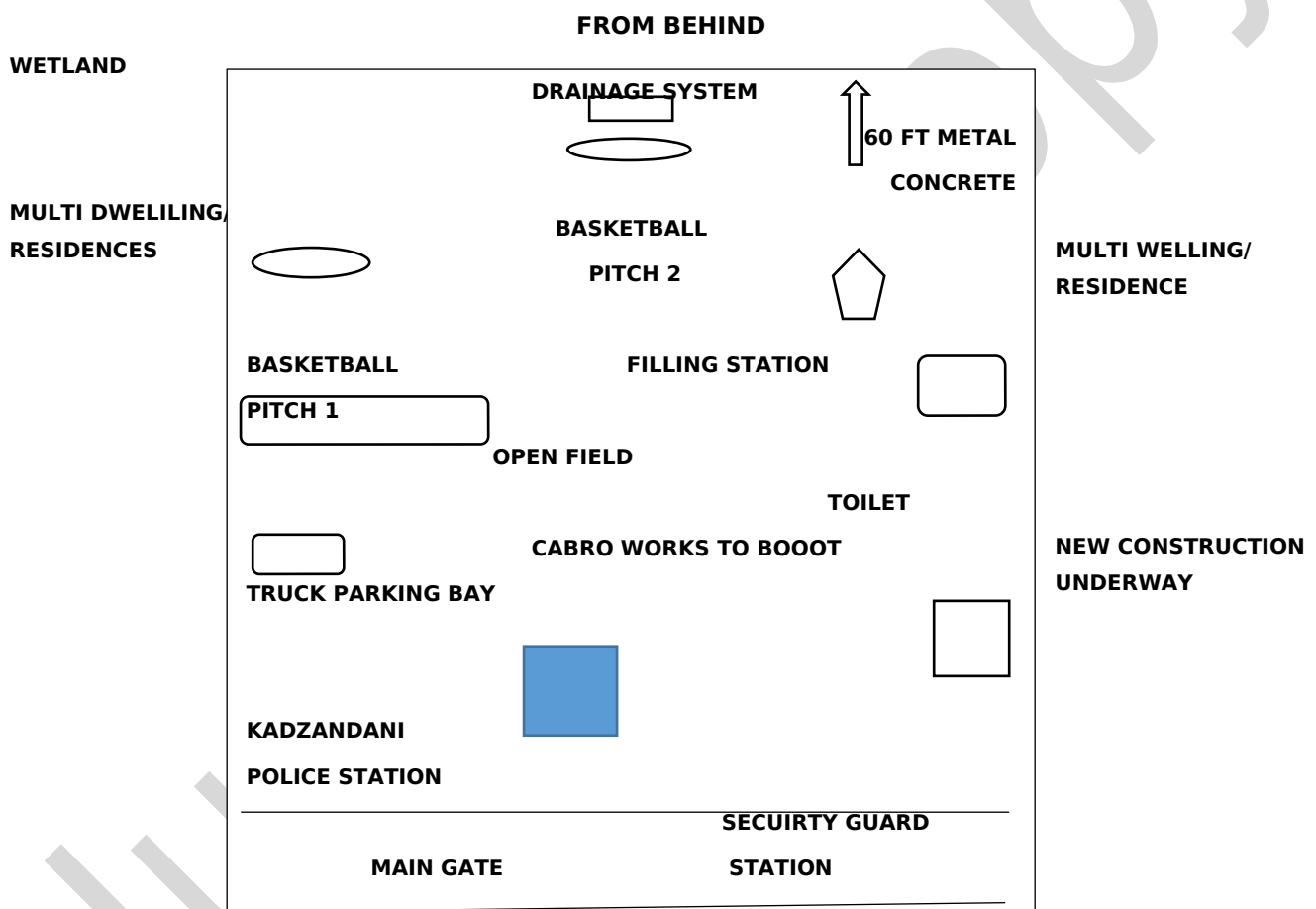
A. The Location of the site:-

- The site is situated at a place known as Kadzandani Mwafamba within the Mwembelegeza location of the Kisauni Constituency of the County of Mombasa. It is close to five (5) kilometres from the Bamburi Cement Company Limited off the Mombasa – Malindi highway.

- The land measured 6.5 acres. It was all fenced up using a 9 feet high - concrete perimeter wall all round with razor wire on top for security reasons. The concrete fence had a one metre radius of protruding pillars on both side of the wall. At the entrance was a high density security gate and one story Guards room.

B. The compound

It is a trapezium shaped compound



- The compound had a complete Cabro works all through. It had two basketball pitches.
- There was a a “diesel” pump filling station and 50,000/= litre diesel tank by the side.

- A well built permanent wash room- with 5 toilets and 5 bathrooms with neatly done floor and a changing area. There was a septic and sock pit tank. The team learnt that these facilities were built to cater for the staff members and customers who frequented the premises for business purposes.
- There was 2,500 liters Exo tank plastic water plastic water tank.
- Surrounding the compound, there was detailed long drainage system with man holes of rain water into a large reservoir that channels the water outside the compound and drains it to the County Government system - to Mtopanga River and Jomo Kenyatta Public Beach and to the Indian Ocean. We learnt that water would be flowing from the upper side of Nguu Tatu particularly during the rainy seasons.
- There were several motor vehicles in the compound for Anwarali Brothers.
 - a. 7 trailers.
 - b. 8 tricks without trailers.
 - c. 26 trucks with trailers.
- They did not seem to be operational.
- There were 8 flood lights around the compound and 1 high tower.
- There was a 30 feet long by 12 X 15 high open parking shed for the trucks.

C. Outside the suit land.

- The population within the area is dense. The place was not well planned at all.
- There are several high rise multi dwelling buildings all around the suit land. These were mainly for residential and commercial purposes. The team was able to visit a next door huge construction going on intended for apartments. It would be for 6 stories.
- There were also several gated estates within the vicinity e.g. trading in the names of **“Vescon 1 & 2”**; **“Amani Estate”**, **“Fountain Estate”**; **“Legend Victoria Hotel”** among others.

- There was the Kadzandani Police Station close to 200 metres from the front gate of the Suit land.
- Right behind the suit land was an area that appeared to be Swampy. It had swamp grass (Reeds) grown all over the place. It was a wet land area. It occupied close to a radius about 2 ½ acres or thereabout. Within the area, there were several habitations of permanent structures. For instance the team saw a long and deep concrete foundation block plus a wall, It had strong metal columns an indication that the construction was a story building. The team learnt that the construction had stalled for a while but no specific reason was given,
- There was an access road to the area. However, the team saw a house constructed right on the road.
- The team saw another plot which was well gated but with the swamp inside.
- The team learnt that some people occupying the swampy area had titles issued to them by the Government.
- Most of the plots were fenced while others were not.
- There were several electric poles with it
- The team was informed that Reeds plantations were caused by deposition when water is collected by nutrients. This was when the water got collected from the higher end - Nguu Tatu hills then its deposited at the Indian Ocean through the Reef Hotel.
- The soil at swampy area had several cracks due to dryness caused by the hot weather.
- The team leant that on the swampy area, there would flooded during rainy seasons. The inlet and outlet of water would bet blocked and hence water tends to raise to higher levels when it got full. The team was informed that that was why the detained drainage system was constructed by the 1st Respondent in order to mitigate that environmental nuisance by draining the waste and flooded water into the Indian Ocean.

VI. Conclusion & Direction by Court.

10. At the conclusion of the site visit, the Honourable Court provided the team with the following directions: -

- a) **That the Honourable Court to prepare and supply all the parties with a draft Site Visit report for their further input accordingly preferably before the mention date in seven (7) days.**
- b) **That there be a further hearing of the matter on 11th July, 2023 to ascertain full compliance of the orders and further directions.**
- c) **That the Petitioner be and is hereby granted 14 days leave to file and serve the letter of caveat by the County Land Adjudication Officer, Mombasa which had been inadvertently.**
- d) **That all the other parties also granted corresponding leave within the next 14 days to file and serve any further documents they may deem fit to do.**
- e) **That the coast Regional surveyor Mombasa directed within the next 21 days to conduct a full pledge survey of the suit land and file a report. The other parties to be at liberty to also engage their independent surveyor to accompany the Government of Kenya Surveyor and may consider filing a joint report.**
- f) **That there be further hearing on 11th July, 2023.**

There being no other business, the site visit was concluded at 3.30pm.

**THE SITE VISIT REPORT PREPARED, SIGNED AT MOMBASA AND DATED THIS
25TH DAY OF MARCH 2023.**

.....
HON. MR. JUSTICE L.L. NAIKUNI,
ENVIRONMENT & LAND COURT

AT MOMBASA

248. Under this sub title, the Honourable Court shall examine the validity of the suit property being public land (swamp/wetland) incapable of private ownership. The Petitioner's central contention is that parcel Mombasa/Mwembelegeza/1475 is a swamp/wetland and therefore constitutes public land incapable of alienation to private individuals or better still for private purposes. He relies on the Registry Index Map (RIM) which bears the annotation "SWAMP," as well as community usage of the land for agriculture, fishing, and flood control. To buttress his point, the Petitioner relied on several provisions of the law. Particularly, he invoked the provision of Articles 62 (1)(g) and (i) of the Constitution of Kenya, 2010, which classify as public land:

"Government forests, water catchment areas, national parks, government animal sanctuaries, and specially protected areas";

and

"All rivers, lakes and other water bodies as defined by an Act of Parliament."

249. Further, the provision of Article 62 (3) provides that such land vests in the national government in trust for the people and is administered by the National Land Commission. The Petitioner also cites the provision of Article 42 (right to a clean and healthy environment) and Article 69 (State obligations in respect of the environment), as well as Section 42 of the Environmental Management and Coordination Act (EMCA), 1999, which prohibits reclamation or disturbance of wetlands without prior approval of

NEMA. Further, the Water Resources Management Rules, 2007, at Rule 52(1), define wetlands as land exceeding one hectare naturally subject to flooding and having ecological characteristics of a swamp or marsh.

250. Wetlands are further protected under Article 69(1)(g), which obligates the State to protect and conserve the environment. Wetlands and riparian reserves fall within environmental assets protected through the State's stewardship obligations, although their classification as public land depends on positive legal designation or reservation.

251. Article 69(1)(g) of the Constitution obligates the State to protect and conserve the environment and natural resources, including wetlands, while Article 66 empowers the State to regulate land use in the public interest. Article 40 of the Constitution protects property rights, subject to lawful limitation. A registered title is prima facie evidence of ownership under Section 26(1) of the Land Registration Act; it may be impeached only for fraud or illegality proven to the requisite standard.

252. Wetlands are defined and regulated under the Environmental Management and Coordination Act (EMCA) and subsidiary regulations (e.g., Wetlands Regulations), and works affecting water resources are regulated under the Water Act, 2016. Physical planning controls (setbacks, riparian protection) are addressed under the Physical and Land Use Planning Act (PLUPA).

253. Basically, all the Respondents vehemently hold that the suit land was not wetland nor a Swamp. They and in particular the testimony and evidence by the Land Registrar, Mombasa M/s. Mercy Chepkemoi, maintain that the suit property was lawfully alienated from the Settlement Fund Trustees (SFT) to Andrew P. Ngirichi in the year 2012, then transferred to Zaib Real Estate Limited, and finally to the 1st Respondent in the year 2017. The Land Registrar, testified that the Green Card and registry records for the suit land in their custody do not classify the land as a swamp/wetland, and no restriction, caveat, or encumbrance was ever registered against it. In other words, the title deed was never challenged in any way by anyone as far as the record was concerned. Indeed there were several residential houses within the area. The 3rd Respondent and a witness from the Water Resources Authority informed the Court that although the area had a swamp of waters emanating from the Nguu Tatu Hills, he confirmed that the 1st Respondent applied for and was granted approval to construct drainage canals in the year 2018, after site inspection, and that the land was found to be dry and adequately drained into the Indian Ocean. This was evidenced during the site visit by Court. Although, the Petitioner attempted to vehemently challenge this assertion but unfortunately with not much persuasive legal basis.

254. Courts in the past have required cogent documentary proof—survey plans, gazette notices, statutory reservations, or official

records—to establish that land is a wetland or riparian reserve reserved for public use. Mere labels on maps or community assertions are insufficient. See the case of:- **“Funzi Island Development Limited & 2 others - Versus - County Council of Kwale & 2 others [2014] eKLR”** (reservation must comply with constitutional and statutory processes); **“Kenya National Highways Authority - Versus - Shalien Masood Mughal & 5 others [2017] eKLR”** (public land claims must be supported by official records).

255. The law on the principle of **“The Burden of proof”** is graphically clear. The provision of Sections 107–109 of the Evidence Act, Cap. 80 places the burden on the party asserting a fact. In other words, it is he/she who alleges has to prove. In the case of **“R.G. Patel - Versus - Lalji Makanji (1957) EA 314”**, the Court of Appeal for Eastern Africa held that allegations of fraud or illegality must be strictly proved, to a standard higher than a balance of probabilities. Similarly, in **“Anarita Karimi Njeru - Versus - Republic (supra)”**, the Court emphasized that constitutional violations must be pleaded with precision.

256. The jurisprudence on public land is also instructive. In the case of **“Funzi Island Development Ltd (Supra)”**, the Court of Appeal held that foreshore and mangrove areas are public land incapable of private ownership. In the case of:- **“Republic - Versus - Minister for Transport & Communication & 5 Others ex - parte Waa Ship Garbage Collector & 15 Others [2006] eKLR”**, the High Court underscored that wetlands and sensitive ecosystems are held in trust for the

public. However, in both cases, cogent expert evidence was adduced to establish the ecological character of the land.

257. On the factual matrix pertinent to this Petition, the Green Card shows an elaborate historical roots of the title and hence ownership of the suit land. Critically, the first registration was under the Mwembelegeza Settlement Fund Trustees (SFT) of the Kisauni Constituency of the County of Mombasa, a transfer was done to Andrew P. Ngirichi (2012), then Zaib Real Estate Ltd (2012), and to Anwarali & Brothers Ltd (2017); title was converted to a 99-year lease (issued 5th September 2018) after an application was undertaken and the Change of User approvals provided for pursuant to the laid - down requirement of the law. The Land Registrar testified no caveats, reservations, or official designation of the parcel as swamp/wetland appear in the registry. Fundamentally, to counter all these legal position, the Petitioner heavily relies on mere community correspondence exchanged between himself and various statutory bodies and a map bearing the word “swamp,” without an accompanying gazette notice, statutory reservation, survey plan demarcating a riparian/wetland area, or an NLC/Survey of Kenya record reserving the parcel as public land. The Petitioner extensively cited the Ruling given on 10th May, 2021 by Hon. Justice Sila Munyao in a separate matter touching on public Land in reference to ELC PET. 35 of 2020 at Environment and Land Court at Mombasa; a matter in which he was a party. On pages 4 and 5 paragraph 10 Court held that the

RIM (Registry Index Map) signed by the Regional Surveyor of Kenya Coast Region. The court identified the RIM (Registry Index Map) being a crucial document showing the identity of the suit land and its number as the Original status of the land. Further, the Petitioner informed Court that upon follow up on the matter with the County Adjudication and Settlement officer in his office at Bima Towers, he showed the Petitioner the file for the suit land and within the file there was no proof of any Change of User or any information seeking the Change of User. The officer assured the Petitioner that as far as his office was concerned, the suit land still was a public land, a swamp and there had never been any Change of User. Upon seeking a written and signed letter from the officer to this effect, he refused citing fear for his life and he could only write an official letter if an entity like Ethics and Anti - Corruption Commission asked him to do so. To the Honourable Court such statements are purely hearsay, a travesty of justice and prejudicial to say the least.

258. WRA processed and approved Category A in-stream drainage works (2018), conducted site assessments (2018, 2021), found the yard paved, canals and storm-water chamber functioning, and recommended maintenance—consistent with regulation of water resource impacts, not designation of the parcel as a protected wetland. No NEMA, NLC, or County record declaring the parcel a wetland reserve was produced.

259. The constitutional protection of wetlands (Articles 62 and 69) is implemented through EMCA, Water Act, and PLUPA. For a parcel to be “public land” by reason of being a swamp/wetland, there must be a lawful designation or reservation evidenced in official records (survey, gazette, plans, statutory instruments). The “**Funzi Island case**” teaches that land-use changes and reservations must strictly follow constitutional and statutory procedures; absent such proof, courts will not deem land public by assertion alone.

260. The Petitioner bears the evidentiary burden, as dictated under the provision of the Sections 107 - 109, of (Evidence Act, Cap. 80 to prove the parcel is a wetland reserved as public land. A map annotation “swamp,” without provenance and legal effect, does not displace a clean registry chain from SFT to the current proprietor. Section 116 reinforces the presumption that a person in possession is the owner unless the contrary is proved. The Land Registrar’s evidence was that no reservation, restriction, or swamp notation in the registry—and the WRA’s approvals/assessments indicate that competent authorities treated the land as privately held and subjected development to regulatory controls, not as a legally designated wetland.

261. In the present case, while the Petitioner produced a RIM map annotated “SWAMP” and community testimony, he did not produce expert evidence such as a hydrological survey, gazette notice, or NEMA declaration formally classifying the land as a protected wetland. On the contrary, the evidence by the

Respondents being the registry records – the title deed and the Certificate of lease as “*prima facie evidence*” on ownership to the suit land, lack of any encumbrances, the Valuation reports, and approvals for the Change of User and the reports by the Water Resource Authority experts all treated the land as alienated private property and not public land by any means.

262. Consequently, the Court finds that the Petitioner has not discharged the evidentiary burden of proving that the suit property is public land (swamp/wetland) within the meaning of the provision of Article 62 of the Constitution. The presumption of validity of the 1st Respondent’s registered title under the provision of Article 40 (1) of the Constitution of Kenya, 2010 and Sections 24, 25 and 26(1) of the Land Registration Act, 2012 therefore remains intact. Legally speaking therefore, the suit land is legally registered in the name of the 1st Respondent with all indefeasible rights, title and interest vested in them by law.

263. The Petitioner’s evidence does not dislodge the presumption arising from the registry chain and possession, nor does it satisfy the strict standard for impeaching title. Therefore, the issue is answered in the negative.

ISSUE No. c). Whether the 1st Respondent’s title was acquired fraudulently, illegally, or unprocedurally?

264. Under this sub title the Court is called upon to examine whether the 1st Respondent obtained title of the suit property through any fraudulent means. The Petitioner contends that even if the suit

property were not public land, the registration of the 1st Respondent as proprietor was tainted with fraud, illegality, and procedural impropriety. He points to the issuance of a 99-year lease dated 5th September 2018, allegedly granted before the title was formally issued, and argues that the process lacked transparency and violated constitutional principles of accountability and sustainable land management under the provision of Articles 10 and 60 (1) of the Constitution of Kenya, 2010 .

265. The 1st Respondent, on the other hand, based on the land registry records and the Green Card, maintains that it is a bona fide purchaser for value, having acquired the property from Zaib Real Estate Ltd in 2017, paid valuable consideration, and obtained approvals for change of user. The 7th Respondent (Chief Land Registrar) testified that the chain of ownership was duly recorded, supported by discharges, transfers, and approvals, and that no caveats or restrictions were registered against the property. The Court reiterates the legal basis of Article 40 (1) of the Constitution of Kenya, 2010 and Sections 24, 25 and 26 of the Land Registration Act, No. 3 of 2012.

266. The provisions of Section 26 (1) of the Land Registration Act, 2012 provides:-

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor, shall be taken by all courts as

prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge, except—

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

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

267. It holds that a certificate of title shall be taken by all courts as prima facie evidence that the person named is the absolute and indefeasible owner. It may only be challenged on grounds of fraud, mistake or misrepresentation to which the person is proved to be a party, or where the title has been acquired illegally, unprocedurally, or through a corrupt scheme. Sections 107-109 of the Evidence Act place the burden of proof upon the party alleging invalidity. Allegations of fraud must be specifically pleaded and strictly proved, to a standard higher than a balance of probabilities though not to the criminal threshold: **“R.G. Patel - Versus - Lalji Makanji (1957) EA 314”**.

268. Where a registered proprietor’s root of title is challenged, he must explain the acquisition; but the challenger must prove fraud/illegality attributable to the proprietor or show a fundamentally defective process: see **“Munyu Maina - Versus - Hiram Gathiha Maina [2013] eKLR”**; **“Elijah Makeri Nyang’wara - Versus - Stephen Mungai Njuguna & Another [2013] eKLR”**. Even where public land concerns arise, courts require cogent evidence of reservation, statutory process breach, or corrupt allocation.

Without such proof, indefeasibility stands: see ***“Kenya National Highways Authority - Versus - Shalien Masood Mughal & 5 others [2017] eKLR”***; ***“Chemey Investment Ltd - Versus - Attorney General & 2 others [2018] eKLR (CA)”***. In ***“Arthi Highway Developers Ltd - Versus - West End Butchery Ltd & 6 Others [2015] eKLR”***, the Court of Appeal emphasized that indefeasibility of title is only lost where fraud or illegality is proved, and that fraud must be attributable to the registered proprietor.

269. In this instant case, the records on the land being the green Card shows first registration under Settlement Fund Trustees (SFT), transfer to Andrew P. Ngirichi (2012), then to Zaib Real Estate Ltd (2012), and finally to Anwarali & Brothers Ltd (2017). A change of user was processed, and a 99-year lease was issued on 5th September 2018. The Land Registrar (Mercy Chepkemoi) testified there were no caveats, restrictions, or registry notations of reservation or illegality. Transfers bore requisite valuations and stamp duty; the change of user involved the relevant authorities (Commissioner of Lands/National Government, Director of Physical Planning, County).

270. The record indicates involvement of DLASO/SFT for discharge, Survey for subdivision/acreage, and subsequent lease issuance by National Government. No official complaint or recall of documents from statutory bodies was produced. The Petitioner alleged fraud/corrupt acquisition, largely anchored on the assertion that the parcel was a “swamp,” but did not tender proof of forgery,

fraudulent instruments, collusion by the Registrar, or a corrupt scheme implicating the 1st Respondent.

271. Fraud must be particularized and strictly proved: The pleadings did not set out specific particulars of fraud (e.g., forged transfer, falsified consents, non-existent or falsified approvals) nor was evidence adduced to connect the 1st Respondent to any fraudulent act. **“R.G. Patel (Supra)”** requires more than suspicions or general allegations.

272. Section 26(1)(b) contemplates impeachment where the process was illegal or unprocedural. The registry chain from SFT through successive transfers is supported by valuations, stamp duty, and change of user culminating in a government lease. The Land Registrar’s evidence that the file carried no restrictions and that inter-agency processes (Survey, Planning, County) preceded registration rebuts claims of procedural infirmity. Absent official evidence (e.g., NLC revocation proceedings, gazetted cancellation, audit finding of irregular allocation), the Court will not infer illegality.

273. Consistent with **“Munyu Maina (Supra)”**, the 1st Respondent’s root of title was explained through the chain of transfers and lease issuance. Without proof that any link in the chain was tainted, indefeasibility remains. The assertion that the land is a “swamp” does not establish fraud. Courts require objective official records to show reservation or legal prohibition at the time of allocation/registration(**“Shalien Masood (Supra)”**; **“Funzi Island**

(Supra)”). None was produced. Under Sections 107–109 of the Evidence Act, the Petitioner bore the burden to prove fraud/illegality. Under the provision of Section 116 of the Land Act, No. 6 of 2012, possession and registered ownership favour the 1st Respondent unless disproved.

274. The Petitioner did not particularize the acts of fraud attributable to the 1st Respondent. While he alleged irregularities in the issuance of the lease, no evidence was produced to show that the 1st Respondent colluded with land officials or participated in fraud. On the contrary, the evidence shows that the 1st Respondent purchased the land from Zaib Real Estate Limited, paid consideration, and obtained approvals for change of user.

275. The Court is persuaded that the 1st Respondent qualifies as a bona fide purchaser for value having bought it at a sum of Kenya Shillings Seventy Five Million (Kshs. 75, 000, 000.00/=). In the case of:- **“Katende - Versus - Haridar & Company Ltd [2008] 2 EA 173”**, the Court defined a bona fide purchaser as one who acquires property for value, in good faith, without notice of fraud, and without participation in any illegality. The 1st Respondent perfectly fits this description.

276. On the contrary, the Petitioner has not proved, to the requisite standard, that the 1st Respondent’s title was acquired fraudulently, illegally, or unprocedurally. The chain of title from SFT to the 1st Respondent, supported by official processes and the Land Registrar’s testimony, stands unimpeached. No evidence of

collusion, forgery, corrupt allocation, or statutory breach attributable to the 1st Respondent has been tendered. By virtue of the provision of Article 40 of the Constitution of Kenya, 2010, Sections 24, 25 and 26 (1) of the Land Registration Act, the 1st Respondent's title remains valid and indefeasible.

277. Consequently, the Court finds and holds that the registration of the 1st Respondent as proprietor of MOMBASA/MWEMBELEGEZA/1475 was not fraudulent, illegal, or unconstitutional. The title held by the 1st Respondent is therefore valid and enjoys the protection of Section 26 (1) of the Land Registration Act, 2012. Hence, that allegation must fail.

ISSUE No. d). Whether the Cross - Petitioner is entitled to compensation in the alternative

278. Under this sub title, the Court is called upon to examine, the Cross - Petitioner being the 1st Respondent in the Petition is entitled to the prayers sought in the alternative. The 1st Respondent, in its Cross-Petition dated 2nd December 2021, sought in the alternative to a declaration of ownership, an order for compensation in the sum of Kenya Shillings Seventy Five Million (Kshs. 75, 000, 000/=) plus interest at 14% from 2nd February 2017, being the alleged purchase price of the suit property.

279. I reiterate that the right to property is protected under the provision of Article 40(1) of the Constitution, which guarantees every person the right to acquire and own property of any

description in any part of Kenya. However, Article 40 (3) provides that:

“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; and

(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.

280. The provisions of Sections 107 -111 of the Land Act, No. 6 of 2012 provides the statutory framework for compulsory acquisition of land by the State, including the requirement for prompt, adequate and just compensation.

281. In the case of ***“Kenya National Highways Authority - Versus - Shalien Masood Mughal & 5 Others [2017] eKLR”***, the Court of Appeal emphasized that compensation arises only where there is lawful deprivation of property through compulsory acquisition. Similarly, in ***“African Line Transport Co. Ltd - Versus - The Hon. Attorney General, Mombasa HCCC No. 276 of 2013”***, the Court held that compensation is payable where the State compulsorily acquires private land for public use.

282. The 1st Respondent's claim for compensation is premised on the possibility and/or presumption that its title might be revoked. However, this Court has already found that:

- a. The suit property has not been proved to be public land under Article 62; and
- b. The registration of the 1st Respondent was not fraudulent, illegal, or unconstitutional, and therefore its title stands protected under Section 26(1) of the Land Registration Act, 2012.

283. There has been no compulsory acquisition by the State, nor has the Court ordered revocation of the 1st Respondent's title. The conditions precedent for compensation under Article 40(3) and the Land Act, 2012 are therefore absent.

284. From the foregoing, therefore, it is this Court's finding that the 1st Respondent is not entitled to compensation under its Cross - Petition. The prayer for refund of the purchase price and interest is misplaced and thus accordingly declined.

ISSUE No. e). Whether the statutory bodies (WRA, NEMA, NLC, Chief Land Registrar, County Government, etc.) failed in their constitutional and statutory duties?

285. Under this subtitle the Honourable Court shall examine whether the statutory bodies failed in their Constitutional and Statutory duties. The Petitioner alleged that several statutory bodies — namely the Water Resources Authority (3rd Respondent), the National Environment Management Authority (5th Respondent), the

National Land Commission (4th Respondent), the County Government of Mombasa (2nd Respondent), the National Construction Authority (6th Respondent), and the Chief Land Registrar (7th Respondent) — failed in their constitutional and statutory mandates, thereby facilitating the alleged unlawful alienation and development of the suit property.

286. On the part of the Water Resource Authority, the 3rd Respondent, it is established under the Water Act, 2016. Under the provision of Section 12, it is mandated to regulate the management and use of water resources, including receiving applications for permits for water abstraction and works. Section 36 requires all water uses to be authorized by the Authority, while Section 40 provides for the issuance of authorizations for construction of works.

287. The evidence shows that the 1st Respondent applied for approval to construct drainage canals in the year 2018. The WRA conducted a site inspection, reviewed supporting documents (including hydrological assessments and NEMA approvals), and issued a conditional authorization. A follow-up inspection in March 2021 confirmed that the works were adequate to drain storm water and that the land was dry.

288. The Court is satisfied that the 3rd Respondent acted within its statutory mandate, transparently and lawfully. There is no evidence that it acted ultra vires or in collusion with the 1st Respondent.

289. The National Environment Management Authority, 5th Respondent herein is established under the Environmental Management and Coordination Act (EMCA), 1999. Section 42 prohibits reclamation or disturbance of wetlands without prior approval of NEMA. The Petitioner produced correspondence suggesting that NEMA had not received an Environmental Impact Assessment (EIA) report for the project. However, the National Construction Authority and WRA referenced EIA documentation in their records. This contradiction raises concerns about inter-agency coordination, but it does not conclusively prove dereliction of duty by NEMA.

290. The National Land Commission, the 4th Respondent herein; under Article 67 of the Constitution and the National Land Commission Act, the NLC is mandated to manage public land on behalf of the national government. The Petitioner alleged that the NLC failed to protect the suit property as public land. However, the evidence shows that the land was alienated from the Settlement Fund Trustees and transferred through private ownership. No gazette notice or formal declaration was produced to show that the land was reserved as public land.

291. Accordingly, the Court cannot fault the NLC for failing to intervene in the absence of such evidence.

292. The 2nd Respondent being the County Government of Mombasa herein is mandated under the Physical and Land Use Planning Act, 2019 to regulate development approvals and change of user applications. The evidence shows that the County Government

issued approvals for change of user from residential to mixed use (residential-cum-commercial) and approved drainage plans. The Petitioner did not prove that these approvals were issued unlawfully or without due process.

293. The National Construction Authority, the 6th Respondent herein is established under the National Construction Authority Act to regulate the construction industry. The Petitioner alleged that the perimeter wall and electric fence were constructed without NCA registration. While the NCA initially indicated that the project had not been registered, it later confirmed that the 1st Respondent had provided supporting approvals. The Court finds that any lapse in registration were administrative in nature and did not amount to constitutional violations.

294. Finally the Chief Land Registrar, the 7th Respondent herein is mandated under the Land Registration Act, 2012 to maintain land registers and issue titles. The Land Registrar, Mercy Chepkemoi, while spelling out the root of title to the suit land, testified that the chain of ownership was duly recorded and supported by discharges, transfers, and approvals. No caveats or restrictions were registered against the property. In the case of:- **“Busia ELC No. 23 of 2022, Novu Ogoti Rongai - Versus - Busia Land Registrar”**, the Court held that **absent proof of collusion or ultra vires action, the Registrar cannot be faulted**. Similarly, in **“Pastorali - Versus - Kabale District Local Government Council [2008] 2 EA 300”**, the Court explained that irrationality arises only where a decision is so

unreasonable that no reasonable authority would have made it. No such irrationality has been demonstrated here.

295. In conclusion of this subtitle, the Court finds that none of the statutory bodies — the 3rd, 4th, 5th, 6th, or 7th Respondents — were shown to have acted unlawfully, unreasonably, or in breach of their constitutional or statutory mandates. The Petitioner's allegations of dereliction of duty are therefore unproven and hence must not succeed.

ISSUE No. f). Whether the Constitutional Petition, Cross - Petition and Cross - Cross Petition have any merit and, if affirmative, if the Petitioner is entitled to the reliefs sought?

296. Under this sub heading, it's imperative to extrapolate in depth on the merits of the Constitutional Petition, Cross - Petition and Cross - Cross Petition. Whether the Petitioner, Respondents and the Interested Parties are entitled to the prayers sought in it. The Petitioner sought wide-ranging reliefs, including declarations that the suit property is public land under Article 62 of the Constitution, cancellation of the 1st Respondent's title, demolition of structures erected thereon, restoration of the land to its original state, and ancillary orders compelling statutory bodies to enforce environmental and land-use laws.

297. Under Article 22(1) of the Constitution, every person has the right to institute court proceedings claiming that a right or fundamental freedom has been denied, violated, or infringed. Article 70 further empowers the Court to grant appropriate reliefs where the right to

a clean and healthy environment under Article 42 has been violated.

298. The meaning and intent of the Article 40 (3) of the Constitution. Article 40, reads in part as follows:

40. (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.

299. The provision of Article 258 extends this right to enforcement of constitutional provisions generally. Article 22 (2)(b) of the Constitution allows a person to act on behalf of a group or in the public interest. The Petitioner herein sues on behalf of the Mwembelegeza community.

300. Constitutional violations must be pleaded with specificity. In **“Anarita Karimi Njeru - Versus - Republic (1979) KLR 154”**, the Court held that a party must set out with reasonable precision the constitutional provisions violated, the manner of violation, and the relief sought. This principle was reaffirmed in **“Mumo Matemu - Versus - Trusted Society of Human Rights Alliance & 5 others [2013] eKLR”**. Article 23(3) of the Constitution empowers the Court to grant appropriate reliefs including declarations, injunctions, conservatory orders, compensation, and judicial review remedies. However, reliefs are discretionary and must be grounded in proven violations.

301. The Petitioner alleges that the suit property is a swamp and therefore public land under Article 62(1)(i) of the Constitution, and that its allocation and registration to the 1st Respondent was fraudulent and unconstitutional. He seeks declarations that the land remains public, cancellation of the 1st Respondent’s title, demolition of developments, restoration of the land, and injunctive reliefs. He invokes Articles 22, 35, 42, 43, 69, and 75 of the

Constitution, alleging environmental degradation, breach of public trust, and denial of access to information. The Petition is supported by community letters, maps, and general assertions of swamp status.

302. Critically speaking, the Petition fails the “*Anarita Karimi (supra)*” precision test. While constitutional provisions are cited, the manner of violation is not particularized with supporting evidence. No gazette notice, survey plan, or statutory reservation was produced to prove the land is a swamp or public land. Allegations of environmental harm must be supported by expert reports or regulatory findings. No NEMA report, hydrological study, or environmental audit was tendered to show degradation or breach of Article 42.

303. The Petitioner did not demonstrate that he requested and was denied access to public records as prescribed by Article 35 of the Constitution. These provisions impose obligations on the State, but enforcement requires proof of breach. The Petitioner did not show that any public authority acted ultra vires or in breach of duty. As analyzed earlier, the title held by the 1st Respondent was lawfully acquired. No fraud or illegality was proved. The reliefs—cancellation of title, demolition, restoration—are drastic and require compelling evidence. The Petitioner has not met the threshold for such remedies.

304. It is my own strong finding under this sub title that although the Constitutional Petition raises important questions of public

interest, unfortunately it graphically lacks the empirical documentary and oral evidentiary foundation necessary to establish violations of the Constitution or statutory law and therefore lacks merit. The issues on the Cross - Petition and Cross - Cross Petition has already been deliberated above in this Judgement. The Court need not belabour the point. Accordingly, the Petition, Cross - Petition and Cross - Cross Petition are dismissed. Thus, the Petitioner is not entitled to the reliefs sought.

ISSUE No. g). Who should bear the costs of the Petition, Cross-Petitions and Cross - Cross Petition.

305. It is now well established that the issue of Costs is the discretion of Courts. Costs is an award that a party is granted at the conclusion of a legal action or proceedings in any litigation. 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 (**The Mutunga Rule**) 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.”

306. 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.....”

307. 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”.

308. The court retains discretion to depart from the general rule and may deny costs where public interest, constitutional litigation, or equitable considerations justify such departure. In constitutional or environmental matters brought in the public interest, courts often order each party to bear its own costs to avoid discouraging bona fide litigants. See **“Kenya Bus Services Ltd & 2 others - Versus -**

Attorney General & 2 others [2005] eKLR"; ***"Okiya Omtatah Okoiti - Versus - Attorney General & another [2020] eKLR"***. The Court notes that where a claim is found to be frivolous, vexatious or brought in bad faith, courts may award costs against the Claimant to deter abuse of process.

309. The Honourable Court takes judicial notice that the Petition was brought by a community representative asserting that the suit land was public (a swamp) and had been fraudulently allocated. The Petition has been dismissed for lack of proof; the title was upheld. Likewise, the Cross-Petition and Cross - Cross - Petition were also dismissed. The matter involved multiple public agencies and raised environmental and land governance concerns. The Petitioner acted in public interest, albeit unsuccessfully. No party demonstrated bad faith or abuse of process.

310. The Petition, though unsuccessful, raised legitimate questions about land governance, environmental protection, and public accountability. The Petitioner acted on behalf of a community and invoked constitutional and statutory provisions. The Respondents and Interested Parties defended their positions but did not incur extraordinary costs or demonstrate prejudice beyond ordinary litigation. The Cross-Petition and Cross-Cross-Petition were defensive and contingent in nature. In light of the public interest dimension and the absence of bad faith, it would be inequitable to penalize the Petitioner or Cross-Petitioners with adverse costs orders.

311. Therefore, the events in the instant case, each party bears its own costs of the Petition, Cross - Petition and Cross - Cross Petition. This is in recognition of the public interest nature of the proceedings and the Constitutional Importance of encouraging access to justice without fear of financial retribution.

XVI. Conclusion and Disposition

312. This Court reiterates that while the Constitution guarantees the right to a clean and healthy environment under the provision of Article 42, and obliges the State to protect ecologically sensitive areas under Article 69, such claims must be supported by cogent evidence. The sanctity of registered title under Article 40 of the Constitution of Kenya, 2010 Sections 24, 25 & 26 of the Land Registration Act, No. 3 of 2012 remains a cornerstone of land law, subject only to the exceptions of fraud, illegality, or unprocedural acquisition — none of which have been proved in this case. In a nutshell, the Honourable Court spells out as follows:-

- a. The Petition meets the threshold for constitutional petitions under “Anarita Karimi Njeru - Versus - Republic (1979) KLR 1272” and “Mumo Matemu - Versus - Trusted Society of Human Rights Alliance [2013] eKLR”.**
- b. The Petitioner has not discharged the evidentiary burden of proving that the suit property is public land (swamp/wetland) within the meaning of Article 62 of the Constitution.**
- c. The registration of the 1st Respondent as proprietor was not fraudulent, illegal, or unconstitutional, and the title is protected under Article 40 (1) & (2) of the Constitution of**

Kenya, 2010, Sections 24, 25 & 26 (1) of the Land Registration Act, No. 3 of 2012.

- d. The 1st Respondent is not entitled to compensation under its Cross - Petition, as there has been no compulsory acquisition or revocation of its title within the meaning of the provision of Article 40 (3) of the Constitution of Kenya, 2010 and the Land Act, No. 6 of 2012.
- e. No breach of duty has been proved against the statutory bodies, including the Water Resources Authority, National Environment Management Authority, National Land Commission, County Government of Mombasa, National Construction Authority, or the Chief Land Registrar.
- f. Although the Petition was filed in the public interest but it lacks merit and hence cannot succeed.

313. Be that as it may, and for avoidance of doubt, this Honourable Court proceeds to specifically make the following findings:-

- a) **THAT Judgement be and is hereby entered to the effect that the Petition dated 26th October, 2021 is dismissed in its entirety for lacking merit.**
- b) **THAT the Cross - Petition by the 1st Respondent dated 2nd December, 2021 be and is hereby dismissed for lack of merit.**
- c) **THAT the Cross - Cross Petition by the Petitioner dated 13th February, 2024 be and is hereby found to lack merit and the same is likewise dismissed in its entirety.**
- d) **THAT a declaration that Petitioner has not proved that the suit property known as MOMBASA/MWEMBELEGEZA/1475 is public land by virtue of being a swamp or wetland within the meaning of the**

provision of Article 62 (1) of the Constitution of Kenya, 2010 or any other applicable law, consequence of which the Petition dated 26th October, 2021 be and is hereby found to lack merit and the same is hereby dismissed in its entirety. The Constitutional Petition, though brought in public interest, fails for want of precision, evidentiary support, and legal merit. The Petitioner is not entitled to the declaratory, injunctive, or restorative reliefs sought.

- e) **THAT** a declaration that the Petitioner has not established, to the requisite standard, that the 1st Respondent's title was acquired fraudulently, illegally, or unprocedurally. The title held by the 1st Respondent is valid and enjoys the protection of Article 40 (1) & (2) of the Constitution of Kenya, 2010 and Sections 24, 25 & 26 (1) of the Land Registration Act, No. 3 of 2012.
- f) **THAT** in view of the public interest nature of the Petition and the absence of bad faith or abuse of process, this Court exercises its discretion under Section 27 of the Civil Procedure Act, Rule 26 (1) and (2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms Practice and Procedure Rules) 2013 (*The Mutunga Rules*) directs that each party shall bear its own costs.

IT IS SO ORDERED ACCORDINGLY.

JUDGMENT DATED, SIGNED AND DELIVERED AT MOMBASA THROUGH MICROSOFT TEAMS VIRTUALLY THIS5TH DAY OFDECEMBER..... 2025.

.....
HON. MR. JUSTICE L. L. NAIKUNI
ENVIROMNENT AND LAND COURT
AT MOMBASA

1.

In the presence of:-

- a. M/s. Firdaus Mbula - the Court Assistant.

- b. Mr. Aienea Ragen the Petitioner in Person.
- c. Mr. Masea Advocate holding brief for Mr. Otieno for the 2nd Respondent.
- d. M/s. Oluoch Advocate holding brief for Mr. Gikandi Advocate for the Cross Petition.
- e. M/s. Makori Advocate for the 3rd Respondents.
- f. No appearance for the 1st , 4th , 5th , 6th , 7th , 8th & 9th Respondents and Interested Parties.

Judge's Copy