



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC PETITION NO. 2 OF 2010

ZINJI LIMITED.....PETITIONER

VERSUS

- 1. THE HONOURABLE ATTORNEY GENERAL**
- 2. THE COMMISSIONER OF LANDS**
- 3. THE PRINCIPAL REGISTRAR OF TITLES**
- 4. THE CHIEF LAND REGISTRAR**
- 5. DEPARTMENT OF DEFENCE.....RESPONDENTS**

JUDGMENT

1. By a Petition dated 13th September 2015 as amended on 28th August 2015, Zinj Limited, a Limited Liability Company incorporated and carrying on business in Kenya prays for numerous Orders listed as from page 10 of the Amended Petition as follows:-

A. A declaration that the Petitioner was at all material and still is the proprietor and the holder of the indefeasible title and the whole and absolute interest in and right over LR No. 25528 and is entitled in relation to the said property to all the rights and protections provided by the Constitution of Kenya, in particular by, but not limited to, Articles 19, 20, 21, 22, 23 and 40 thereof, by the Registration of Titles Act, Cap 281 and by all provisions of law.

B. A declaration that the deprivation and or taking possession of parts of the said LR No. 25528 by the Government of Kenya under the Registered Land Act Cap 300 was and is unlawful and a nullity.

C. A declaration that the said taking of possession of parts of the said LR No. 25528 without any lawful and prescribed process under the law relating to acquisition was and is a compulsory taking and or deprivation of the Petitioner's said property.

D. A declaration that the said taking of possession and or deprivation by the Government of Kenya of the Petitioner's said properties is without the Government having satisfied the preconditions prescribed by the Constitution of Kenya(Article 40) and the law thereunder, in particular of the requirement of prompt payment of full and just compensation.

E. An order that the Government of Kenya do forthwith cancel the said duplicate titles under the Registered Land Act Cap 300 affecting the said LR No. 25528 and do return vacant possession of the said land to the Petitioner.

F. A prohibitory order and or an order of prohibition directed to the Chief Land Registrar of the Republic prohibiting any further or other issuance of any title under the Registered Land Act Cap 300 in respect of land within the Petitioner's said property LR No. 25528.

G. A prohibitory order and or an order of prohibition against the Respondents and each of them, prohibiting the issuance of any titles in respect of the same property as the Plaintiff's land LR No. 25528 or any part thereof, or any title in replacement thereof as ordered by this Honourable Court.

H. A declaration that the taking of possession of the part (purportedly known as LR No. 24853) of the said LR No. 25528 by the Government of Kenya under the Registration of Titles Act Cap 281 was and is unlawful and a nullity.

I. A declaration that the said taking of possession of part of the said LR No. 25528 under the Registration of Titles Act 281 was and is without any lawful and prescribed process under the law relating to acquisition and was and is a compulsory taking over and or deprivation of the petitioners said property.

J. A declaration that the said taking of possession under the Registration of Titles Act Cap 281 by the Government of Kenya of the Petitioner's said properties without first satisfying the conditions prescribed by the Constitution of Kenya and the law thereunder was and is a contravention by the Government of Kenya of Article 40, Constitution of Kenya in relation to the Petitioner.

K. An order that the Government of Kenya do forthwith cancel the said title LR No. 24853 under the Registration of Titles Act Cap 281 affecting the said LR No. 25528 and do return vacant possession of the said land, demarcated as LR No. 24853, to the Petitioner.

L. A prohibitory order and or an order of prohibition directed to the Commissioner of Lands prohibiting the issuance of any further or other title under the Registration of Titles Act, Cap 281, in respect of the same property as the Petitioner's said land LR NO. 25528 or any part thereof.

M. A prohibitory order and or an order of prohibition directed to the Chief Land Registrar of the Republic prohibiting the issuance of any title under the Registered Land Act, Cap 300 or any law in respect of the same property as the Petitioner's land or any part thereof under or in respect of any title in replacement thereof as ordered by this Honourable Court.

Alternatively:

N. The Government of Kenya do promptly pay to the Petitioner full compensation for the said deprivation , taking over and compulsory possession of parts of the Petitioner's said land in contravention of the Petitioner's constitutional rights.

O. An order that the Respondents do pay to the Petitioner damages for unlawful entry and continued occupation and alienation of the said properties in a sum of Kshs 100/= per day per acre under duplicate title under the Registered Land Act Cap 300 from the date possession was taken away from the Petitioner until full and prompt compensation as prescribed by the Constitution and law applicable is fully paid to and received by the Petitioner, and interest thereon at Court rates.

P. An order that the Respondent do at its sole cost including of any stamp duties or survey costs, forthwith and promptly issue a new title for the land remaining in the ownership and possession of the Petitioner, with a new title deed and a new deed plan, for a leasehold term of 99 years from the date of this order.

Q. An order that the Government do pay the full cost of the survey and fencing of the remaining portion of the Petitioner's original property.

R. An order that the Government do pay to the Petitioner general damages for failure to protect the Petitioner's Constitutional rights, together with aggravated damages as this Honourable Court deems fit by reason of the Respondents and each of them having been and still being also in breach of the provisions of the Public Officer Ethics Act.

S. A prohibitory order and or an order of prohibition directed to the Commissioner of Lands prohibiting the issuance of any second title under the Registration of Titles Act, Cap 281, or any other law in respect of the same property as the Petitioner's land or any part thereof, the subject of the title in replacement thereof as ordered above by this Honourable Court.

T. A prohibitory order and or an order of prohibition directed to the Chief Land Registrar of the Republic prohibiting the issuance of any title under the Registered Land Act, Cap 300 or any other law in respect of the same property as the petitioner's land or any part thereof, the subject of the title in replacement thereof as ordered above by this Honourable Court.

And

U. This Honourable Court do grant appropriate relief and do make such further or other orders, issue such further or other writs and give such further or other directions as this Honourable Court may consider appropriate for the purposes of enforcing or securing the enforcement of the provisions of Articles 19, 20, 21, 22, 23 and 40 and any other articles, of the Constitution of Kenya in relation to the Petitioner and this Petition.

V. The Respondents do jointly and severally pay damages to the Petitioner for the loss, injury and damaged suffered by it, including loss of business opportunities, by all the aforesaid violations set out in this petition against the Petitioner's rights, title and interest in the suit land and otherwise.

W. The Respondents jointly and severally do pay the costs of this Petition.

X. In addition to general damages as hereinabove set out and otherwise the Respondents, jointly and severally, do pay to the Petitioner, special damages under the heads and in the sums set out hereinabove in paragraph 66 of the Petition.

2. In the course of the proceedings however the Petitioner opted to abandon and withdraw prayers E, F, G, K, L, M, O, P, Q, S and T. At present therefore the Petitioner prays for determination of Prayers A, B, C, D, H, I, J, N, R, U, V, W and X of the Amended Petition.

3. The Petition is premised on the Petitioner's assertion that it is the registered legal proprietor of all that land known as LR No. 25528 situated in the Coast Province comprising of 425.7 hectares (hereafter the suit property) with effect from 1st April 1977. The Petitioner contends that by virtue of such registration under the Registration of Titles Act, Cap 281(now repealed) it has an absolute right, title and interest in the suit property and has as a consequence thereof at all material times been in occupation of, and carried on business on the said land.

4. It is further the Petitioner's case that as a legal person, it is in law entitled in respect of the said property to the protection of the law and to protection by all offices of the Government and its officers as guaranteed, particularly by Articles 19, 20, 21, 22 and 23 of the Constitution of Kenya and consequential statutes.

5. The Petitioner contends that in utter violation of its entitlements to the suit property as aforesaid, in or about the year 2007, during the pendency of the Petitioner's said title, the Government issued numerous other titles over parts of the suit property under the Registered Land Act, Cap 300 (also now repealed). It is the Petitioner's case that the duplicate titles were issued partly to persons who had earlier invaded certain parts of the suit property, and were trespassing thereon by the said invasion and by remaining thereon; and partly to other persons.

6. The Petitioner avers that the issuance of two sets of titles over the same land by the Government during the pendency of the Petitioner's title was illegal and constitutes compulsory taking of possession by the Government of parts of the Petitioner's said land, and is a manifest contravention of Article 40(1) and (3) as well as other provisions of the Constitution.

7. The Petitioner states that it has protested at the alleged unlawful compulsory taking of the said parts of its land and sought protection from the Government but the Respondents have refused, failed and or neglected to protect the suit property and the Petitioner's Constitutional rights over it. It is further the Petitioner's case that the Government has not paid any compensation or other dues for the portion of land taken as aforesaid and that the said refusal is in violation of the principle and constitutional requirement of prompt payment of full and just compensation. Such actions on the part of the Government have caused continuing loss, damage and injury to the Petitioner and it claims damages therefor.

8. It is further the Petitioner's case that in addition to the issuance of the duplicate title and title deeds to various individuals, the Government has issued another duplicate title deed for a Portion of land known as LR No. 24853 to the Department of Defence which portion of land includes part of the suit property. According to the Petitioner, the allocation and issuance of this second duplicate title deed (LR No. 24853) over land already forming part of the suit property amounts to a further compulsory taking of possession of the Petitioner's land.

9. By reasons of the foregoing, the Petitioner prays for Kshs 3,445,666,800/= special damages made up as follows:-

a) Compensation for loss of the suit property together with interest from the date of filing the Petition-Kshs 2,996,232,000/=

b) 15% Constitutional and Statutory addition together with interest from the date of filing the petition.

Kshs 449,434,800/=

10. Alternatively, the Petitioner prays for the sum of Kshs 3,799,708,930/= made up as follows:-

a) Compensation for damages and loss of the suit property- Kshs 3,052,817,000/=

b) 15% Constitutional and Statutory Addition together with Interest

Kshs 457,930,650/=

c) 7.5% Disturbance Statutory Addition together with Interest

Kshs 288,961,280/=

11. Further and in addition to either of the payments sought as above, the Petitioner prays for Kshs 2,648,978,000/= being the loss of income between 2009 and 2014.

12. In a Replying Affidavit sworn by Paul Kiiru Mwangi a Senior Deputy Director of Adjudication & Settlement at the Ministry of Lands on 19th September 2016 and filed herein on 31st October 2016, the Respondents aver that the Government established the Ngomeni Settlement Scheme in 1994. The intention of the Government then was to identify the squatter families already occupying the land and to proceed to demarcate the land and to allot the families the portions that they occupied.

13. It is the Respondents case that during the investigation on the history and status of the land before the demarcation exercise, it was alleged that there were previous owners who had title documents to portions of the land where the scheme was to be established. Accordingly on 24th January 2011, the then Commissioner of Lands put out a public notice in the Nation Newspaper informing all persons with letters of allotment and/or title documents to any area lying within the intended scheme as laid out in the Notice to attend to the Commissioner's office in Kilifi to ascertain the claim within a period of 21 days.

14. Subsequent to the Notice in the media all persons who presented their claim to the Ministry of Lands and whose portions of land were found to have been encroached by the Scheme were marked and the said portions were excluded by amendments to the RIM Map. It is the Respondents case that the process of adjudication of the squatter scheme thereafter proceeded without any interference, complaint or protest

by any person. It is therefore the Respondent's conclusion that the Petitioners claim is unfounded, time-barred and ought not to be granted.

15. On 13th February 2017 the parties agreed by consent to canvass the Petition by way of the pleadings and documents already filed. The parties also agreed to file written submissions and to proceed to highlight the same orally. I have considered the Petition and the response thereto. I have also taken into account the elaborate submissions by Mr. Nowrojee, Learned Counsel for the Petitioner and the detailed response thereto by Ms Lutta, Learned Counsel for the Respondents.

16. The Petitioner, Zinj Limited is a Limited Liability Company incorporated and carrying on business within the Republic of Kenya. A certificate of incorporation attached to the Affidavit of Mohammed Abubakar, its Director and Chief Executive shows that it was so incorporated on 11th April 1978. The First Respondent is the Honourable the Attorney-General and is sued on behalf of the Government of Kenya and the Commissioner for Lands; the Principal Registrar of Titles; the Chief Land Registrar and the Department of Defence all who are enjoined herein as the 2nd, 3rd, 4th and 6th Respondents. The case against San Marco Development Project previously named as the 5th Respondent was by the consent of the parties withdrawn on 4th November 2013.

17. As I understand it, it was not contested that the Petitioner is the registered proprietor of all that parcel of land known as LR No. 25528 situated North East of Mambui Town in Kilifi Country containing by measurement 425.7 hectares or thereabouts. It was the Petitioner's case that by virtue of such registration, it has an absolute right, title and interest in the said property which right, title and interest entitles it as a person to protection of the law.

18. The Petitioner contends that in violation of its rights and entitlements as aforesaid, in 2007, during the pendency of the Petitioner's title to LR No. 25528 aforesaid, the Government and the Respondents proceeded to issue other title deeds over parts of the same land to third parties, some of whom had earlier invaded the said Petitioner's land and were trespassing thereon. In addition, the Petitioner also accuses the Respondents of issuing another duplicate title, being LR No. 24853 to the Department of Defence-6th Respondent. The land comprised in the title issued to the 6th Respondent is already part of the land registered under LR NO. 25528 belonging to the Petitioner.

19. It is the Petitioner's case that the allocation and issuance of the duplicate title deeds over land already forming part of LR No. 25528 owned by the Petitioner is a violation of its rights under Section 70(a) and (c) and Section 75 of the former Constitution as well as Articles 10, 19, 20, 21 and 40 of the Constitution of Kenya, 2010.

20. While denying that there has ever been an intention to acquire the Petitioner's property compulsorily, the Respondents respond that they followed due process in setting up Ngomeni Settlement Scheme whose beneficiaries the Petitioner claims were issued with duplicate title deeds over its already registered land. It was the Respondents position that the Government put out a public notice on 24th January 2011 in the Nation Newspaper informing all persons whose titles were likely to be affected by the establishment of the Scheme to report to the Kilifi District Lands Office within 21 days. All those who complied had their titles verified and were subsequently unaffected by the subsequent allotments to squatters in the Scheme. It is the Respondents case that the Petitioner failed to report any encroachments and/or likely interference with its title within the given time and is thus time-barred in raising this complaint.

21. As it were, the Petitioner has a title issued under the Registration of Titles Act, Cap 281(now repealed). The Respondent's own affidavit sworn on 13th June 2012 by one Edwin Wafula, a Land Registrar based at the Ministry of Lands confirms this position. The said Affidavit was filed herein in response to the Amended Petition by the Respondents on 22nd June 2016.

22. I am not therefore persuaded by the inference in the Replying Affidavit sworn by Paul Kiiru Mwangi for the respondents on 19th September 2016 that the failure by the Petitioner, if at all it had notice of the media advertisement, had the effect of forfeiting or extinguishing the Petitioner's rights and interest over the suit property. A perusal of the said public notice in fact reveals that no law was relied upon or cited to enable the then Commissioner of Lands to exercise such power or to give any such ultimatum of forfeiture to registered holders of land. In my view, the Constitutional rights to property cannot be "deemed to have been forfeited" whether by the said newspaper advertisement or at all. Article 40(3) of the Constitution provides that:-

“(3) The State shall not deprive a person of property of any description, of any interest in, or right over, property of any description, unless the deprivation-

(a) Results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) Is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that-

(i) Requires prompt payment in full, of just compensation to the person; and

(ii) Allows any person who has an interest in, or right over, that property a right of access to a Court of law.

23. Indeed, the protection from arbitrary deprivation of property existed even before 2010 in the repealed Constitution where Section 75 thereof provided that:

“75. No property of any description shall be compulsory taken possession of, and no interest in or right over the property of any description shall be compulsory acquired, except where the following conditions are satisfied:

a) The taking of possession or acquisition is necessary in the interest of defence, public safety, public order, public morality, public health, town and county planning or the development or utilization of property so as to promote the public benefit; and

b) The necessity therefor is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property; and

c) Provisions is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.

24. Accordingly, under whatever law the Commissioner of Lands was acting, he had no jurisdiction to deem the Petitioner's title forfeited whether in default of the performance of what was required in his public notice or any other condition. It is indeed noteworthy that on 24th January 2011 when the said Notice appeared in the media, this Petition had already been filed a couple of months earlier. From an Affidavit of Service sworn by one Titus Mhuri, an authorized Court Process Server filed herein on 27th October 2010 this Petition documents including conservatory order issued by this Court on 15th September 2010 had on the 5th day of November 2010 been served upon the same Commissioner of Lands who is sued herein as the 2nd Respondent. That being the case, it can only be but surmised that the public notice was in itself an admission of the Respondents knowledge that the rights of existing title holders were going to be affected or had already been affected by their actions. That notice was therefore tainted with malice and in any case, offers no defence to the Respondents.

25. At any rate, the Notice was in itself a lie. From the Respondents Affidavit sworn by the said Paul Kiiru Mwangi and filed herein on 31st October 2016, Ngomeni Squatter Settlement Scheme was started in 1994. From the Affidavit of Mohammed Abubakar sworn on 13th September 2010 in support of the Petition, the titles issued to a number of people purported to be squatters were issued in 2007 when no such Public Notice had been issued by the Respondents.

26. A perusal of paragraph 32 of the Petitioner's Supporting Affidavit reveals that the new duplicate titles prepared under the Registered Land Act, Cap 300 (also now repealed) were hurriedly prepared without a proper survey of the whole area and were then handed out at a public meeting before a by-election which was pending in the area in the presence of the Minister then responsible for Lands. The issuance of such duplicate titles, a fact not controverted by the Respondents amounted to a gross abuse of office and the statutory powers conferred upon the Respondents.

27. Similarly, registration of LR NO. 24853 to the Permanent Secretary Treasury on behalf of the Department of Defence when the said land is still within the area covered by the Petitioner's LR No. 25528 was extremely irregular, unprocedural and in blatant violation of the Constitution.

28. The Certificate issued to the Petitioner is recognized under Sections 27 and 28 of the Registration of Lands Act which stipulate that "**the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto**" and neither the 2nd Respondent nor the other Respondents herein could purport to cancel and/or forfeit the same as is evident herein.

29. In my view, the failure to provide any compensation of whatever nature to the Petitioner for the dispossession of large chunks of its property amounted to an unlawful compulsory acquisition thereof. In *Virenda Ramji Gudka & 3 Others -vs- Attorney General (2014) eKLR Mutungi J* stated and I agree that:-

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

30. As it were, where two Certificates of title are issued for the same property as in this case, the first in time prevails. In this regard, I concur with Khaminwas J's observations in *Govas Holdings Ltd -vs- Tom Mayani Omami & 2 Others (2004) eKLR* that:-

"The government cannot allot or in any way alienate land which has already been allocated to another person and that the Commissioner of Lands carrying a survey of the land and allocating it to the first and second defendants is unlawful and illegal."

31. Arising from the foregoing, it is clear to me that either from deliberate intent, the desire for electoral advantage, sheer negligence or any other reason, or purposes, the Respondents were in breach of their Constitutional and derivative statutory duties in relation to the Petitioner when they knowingly proceeded to issue fresh titles under the repealed Registered Land Act when the land in question was already registered to the Petitioner under the Registration of Titles Act (also repealed).

32. As to whether or not the Petitioner is entitled to compensation, Mr. Nowrojee for the Petitioner submitted that the suit property is now unusable for the unique purpose for which it was intended. It was Learned Counsel's submissions that the persons now on the land including those issued with the duplicate titles as well as other members of the public who have since encroached into the suitland on hearing that the Government was allocating the land can no longer be evicted from the suitland. The result is that the Petitioner is dispossessed of the same and can no longer use it as an owner. As a result it was Counsel's submission that the Petitioner is entitled to general and special damages as pleaded.

33. In response, Ms Lutta, Learned Senior State Counsel appearing for the Respondents submitted that the petitioner has not proved any fault or liability arising from the Respondents action which would require or justify awarding the prayers sought. It was Counsel's submissions

that the special damages are unsubstantiated and all the reports presented herein in support thereof are based on a feasibility study. There was no document presented showing the actual project carried out by the Petitioner in the land.

34. In *Gitobu Imanyara & 2 Others –vs- Attorney General(2016)eKLR* the Court of Appeal quoted with approval the South African case of *Dendy –vs- University of Witwatersrand, Johannesburg & Others(2006)1LRC 291* where the Constitutional Court of South Africa held that:

“...The primary purpose of a Constitutional remedy was to vindicate guaranteed rights and prevent or deter future infringements. In this context an award of damages was a secondary remedy to be made in only the most appropriate cases.

“ ...The primary object of Constitutional relief was not compensatory but to vindicate the fundamental rights infringements and to deter their future infringements. The test was not what would alleviate the hurt which the Plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed. Public policy considerations also played a significant role. It was not only the Plaintiff’s interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.”

35. The same Court in *Gitobu Imanyara(supra)* also cited with approval the Eastern Carribean Supreme Court decision in *Peters- vs-Marksman & Another(2001) 1 LRC* where the Court held that:

“It is incumbent on the Courts to develop appropriate principles and guidelines as to the quantum of awards of compensation where applicable.....Where an award of monetary compensation is appropriate the crucial question must be what is a reasonable amount in the circumstances of the particular case. The infringement should be viewed in its true perspective as an infringement of the sacrosanct fundamental rights and freedoms of the individual and a breach of the Supreme law of the land by the state itself. But that does not mean that the infringement should be blown out of all proportion to reality nor does it mean that it should be trivialised. In like manner the award should not be so large as to be a windfall nor should it be so small as to be nugatory.”

36. In the matter before me, the Petitioner prays for a sum of Kshs 3,445,666,800/= or in the alternative Kshs 3,799,708,930/= as compensation from the Government for what are termed Constitutional damages, or damages for loss of the suitland. The two figures are based on different reports commissioned by the Petitioner on the basis that the land was set to be used by the Petitioner for Prawn and/or Mariculture farming. Further and in addition to the above figures sought as compensation, the Petitioner prays for Kshs 2,648,978,000/= being the loss of the projected income from the year 2009 to 2014 when the reports were done.

37. I have perused the Reports prepared meticulously by a number of experts including the following:-

(a) George E. Mjomba-Variou Reports on the Environment and Mariculture Farming after Further Occupation on LR No. 25528 Ngomeni Kilifi County.

(b) Herman Kivumira- Wesco Property Report and Valuation of LR No. 25528 Kilifi

(c) W. J.G. Mukhongo- Wyco Valuers Report and Valuation of LR No. 25528 Kilifi

(d) Clyde A. Mutsotso-Clyde & Associates Loss of Income Report-LR No. 25528 Kilifi; and

(e) Maina Chege-Report and Assessment of Costs and Losses Occasioned by Stoppage of Development on LR No. 25528- NE of Mambui Town, Kilifi County

38. I note that in a number of the Reports submitted, an assumption is made that the Petitioner was carrying out the business of prawn farming on the land and that the same were disrupted by the encroachment of the land. In one of the Reports fish ponds and other structures are evaluated on the basis that the same were put up by the Petitioner for fish farming. I did not however hear the Petitioner to be stating that it had incurred expenses starting up a Prawn or any other fish farming business. The Petitioner’s case as I understood it was that they intended to start up business of that nature but could not proceed due to the disruptions and interference with the title. Indeed if there were any fishing ponds and structures for fish farming on the land, the possibility is that the same were put up by the Government and not the Petitioner. This is so because the Petitioner concedes that for a number of years, they had leased out the land to the Government through the Ministry of Fisheries to use part of the premises to carry out feasibility studies for aquaculture and fish farming. At the end of the agreed lease period the property was handed back to the Petitioner.

39. Echoing Article 40(3) the Constitution, Section 111(1) of the Land Act 2012 provides that:-

“If land is acquired compulsory under this Act, just compensation shall be paid promptly in full to all persons whose interests in the land have been determined.”

40. Under Section 111(2) of the Land Act, the National Land Commission was supposed to make rules to regulate the assessment of just compensation for land acquired compulsorily. It would appear that no such rules have been made as I could not find any. The repealed Land Acquisition Act, Cap 295 Laws of Kenya had a schedule that set out the principles upon which compensation for land acquired compulsorily was to be determined. In the absence of similar rules under the Land Act, 2012, this Court is compelled to rely on the principles in the said repealed Act for guidance. Under the scheduled to the repealed Act, it was stated that in determining compensation, the following matters shall be taken into account:-

i) The Market Value of the land

ii) Damages sustained or likely to be sustained in the land at the time of taking possession of the acquired land by reason of severing the land from other and

iii) Damages sustained or likely to be sustained by persons interested in the land at the time of taking possession of the acquired land by reason of such acquisition injuriously affecting his other property whether movable or immovable in any other manner or his actual earnings

iv) Reasonable expenses incidental to change of residence if occasioned by the acquisition of the land; and

v) Damages genuinely resulting from diminution of profits of the land between the date of publication of notice of intention to acquire the land and the date possession of the acquired land is taken.

41. The said Regulations further provided that “to the amount of compensation determined to be payable shall be added a sum equal to 15% of the Market Value for disturbance.

42. I have considered the provisions and the need for a fair compensation to the Petitioner for the land. From the documents presented before me, the Valuation Report by Wesco property Consultants dated 25th November 2014 puts the open Market Value of the property at Kshs 2,996,232,000/= An additional 15% of that value as per the Regulations in the Schedule to the repealed Land Acquisition Act brings out a sum of Kshs 449,434,800/= These figures cited by Wesco are lower than the figure cited by W.J. Mukhongo of Wyco Valuers which places the value at Kshs 3,052,817,000/= Before me I have no evidence that the Valuation made by Mr. Wesco Kivumira of Wesco Property Consultants is inordinately high or unreasonable. The Respondents did not provide me with any reason to doubt the same and there was no counter valuation of the suitland. The valuation done by Wyco Valuers who were also commissioned by the Petitioners put the total figure due at Kshs 3,737,708.930/=

43. Those figures however presuppose that the entire land measuring 425.7 ha has been forcibly taken by the Government in the manner aforesaid. From the record, it is clear to me that on 5th December 2011, this Court ordered the District Surveyor Malindi to determine the actual and exact extent of the suit property affected by the duplicate title deeds. In a Report dated 12th January 2012, the Surveyor established that other than the area occupied by the squatters, a total area comprising 28.659 Hectares was not available to the Petitioner due to various overlaps as follows:-

a) LR No. 24853(Ministry of Defence Land)- 6.318 Ha

b) Ngomeni Settlement Scheme- 15.869 Ha

c) Road(20m)- 6.189 Ha

d) Existing Muslim Cemetery- 0.2827 Ha

44. The Surveyors Report shows that an additional area measuring approximately 22.47 Ha was encroached by squatters. These figures would therefore mean that the total area affected by the Respondents actions complained of herein is 51.129 Ha. While the Petitioner takes cue from the Survey Report to state that the remaining area of land is now majorly swampy and unsuitable for use, there was nothing to show that the said swamp was not there at the point the Certificate of Grant was issued to the Petitioner and/or that it was the result of the Government acquisition and/or issuance of the duplicate title deeds. Besides, that statement by the Surveyor is rather misleading considering that from the Petitioner’s documents herein, since 8th February 2002, the Petitioner has charged the land to Habib Bank Ag Zurich for a loan of Kshs 10,000,000/=

45. While a perusal of the Wesco Valuation Report does not give the value of the land per acre, it is clear that the figures of Kshs 2,996,232,000/= represents the total area of 425.7 hectares. A division of the two figures informs me that the said Auctioneers valued an hectare of the land at the suit property at Kshs 7,038,365/= That being the case, the value of the 51.129 ha which in my view is the correct area of the land affected by the encroachment would come to Kshs 359,863,564.10/= To this should be added 15% of that value which is Kshs 53,979,684.60/= These figures add to the sum total of Kshs 413,844,248.70/=

46. In the circumstances, and in agreement with the Wesco Valuation I shall award the Petitioner the total sum of Kshs 413,844,248.70/= as the value of the suitland.

47. Regarding the claim for Kshs 2,648,978,000/= for loss of income, I did not find this claim proven. With respect and based on the principle that special damages must be pleaded and proved, I found no basis for this claim in the largely generalized reports and the assumption that a Prawn Farm was to be established by the petitioner. Accordingly I decline to grant the same.

48. Regarding general damages for breach of the right to property under Article 40 of the Constitution, I agree that by dispossessing the Petitioner of its land, some compensation is awardable under Article 23(3) of the Constitution which provides that:-

“(1).....

(2)

(3) In any proceedings brought under Article 22, a Court may grant appropriate relief including

(a) A declaration of rights;

(b) An injunction;

(c) A conservatory order

(d) A declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of rights and is not justified under Article 24;

(e) An order for compensation; and

(f) An order of Judicial Review.

49. In invoking the above Article of the Constitution and the authorities cited herein above, I am satisfied that an award of Kshs 1000, 000/= per hectare would be sufficient. Given that the total area of the land affected is 51.129 ha, I shall award the Petitioner a sum of Kshs 51,129,000/= as general damages for breach of its rights as enshrined under Article 40 of the Constitution.

Conclusion

50. In the end, I hereby enter Judgment for the Petitioner as against the Respondents in the following terms:-

I a. A declaration that the Petitioner was at all material and still is the proprietor and the holder of the indefeasible title and the whole and absolute interest in and right over LR No. 25528 and is entitled in relation to the said property to all the rights and protections provided by the Constitution of Kenya, in particular by, but not limited to, Articles 19, 20, 21, 22, 23 and 40 thereof, by the Registration of Titles Act, Cap 281 and by all provisions of law.

b. A declaration that the deprivation and or taking possession of parts of the said LR No. 25528 by the Government of Kenya under the Registered Land Act Cap 300 was and is unlawful and a nullity.

c. A declaration that the said taking of possession of parts of the said LR No. 25528 without any lawful and prescribed process under the law relating to acquisition was and is a compulsory taking and or deprivation of the Petitioner's said property.

d. A declaration that the said taking of possession and or deprivation by the Government of Kenya of the Petitioner's said properties is without the Government having satisfied the preconditions prescribed by the Constitution of Kenya (Article 40) and the law thereunder, in particular of the requirement of prompt payment of full and just compensation.

e. A declaration that the taking of possession of the part (purportedly known as LR No. 24853) of the said LR No. 22528 by the Government of Kenya under the Registration of Titles Act Cap 281 was and is unlawful and a nullity.

f. A declaration that the said taking of possession of part of the said LR No. 25528 under the Registration of Titles Act 281 was and is without any lawful and prescribed process under the law relating to acquisition and was and is a compulsory taking over and or deprivation of the petitioners said property.

g. A declaration that the said taking of possession under the Registration of Titles Act Cap 281 by the Government of Kenya of the Petitioner's said properties without first satisfying the conditions prescribed by the Constitution of Kenya and the law thereunder was and is a contravention by the Government of Kenya of Article 40, Constitution of Kenya in relation to the Petitioner.

h. The Government of Kenya do promptly pay to the Petitioner full compensation for the said deprivation, taking over and compulsory possession of parts of the Petitioner's said land in contravention of the Petitioner's constitutional rights.

and

II Kshs 413,844,248.70/= being the compensation for the value of the suitland

III General damages of Kshs 51,129,000/=

Iv Interest on all monetary awards, at Court rates from the date of Judgment until payment in full.

V Costs to the Petitioner

51. Orders accordingly.

Dated, signed and delivered at Malindi this 15th day of March, 2018.

J.O. OLOLA

JUDGE