



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MOMBSASA**  
**ELC PETITION NO. 9 OF 2017**

**SAVTRI V. GIDOOMAL**

**VIJAY V. GIDOOMAL**

**ASHWIN V. GIDOOMAL (As legal representatives**

**Of estate of V. H. Gidoomal).....PETITIONERS**

**-VERSUS-**

**NATIONAL LAND COMMISSION.....1<sup>ST</sup> RESPONDENT**

**MINISTRY OF LANDS, HOUSING &**

**URBAN DEVELOPMENT.....2<sup>ND</sup> RESPONDENT**

**KWALE COUNTY GOVERNMENT.....INTERESTED PARTY**

**JUDGEMENT**

1. The 3 Petitioners here brought the petition dated 18<sup>th</sup> September 2014 as the legal representatives of the late Vasher Hriand Gidoomal. They named the National Land Commission and Ministry of Lands, Housing & Urban Development as Respondents. The petition was later amended on 2<sup>nd</sup> April 2015 joining the County Government of Kwale as an Interested Party. In the amended petition, the Petitioners pray that:

**A) Pending the hearing and determination of this Petition conservatory orders be issued restraining the Respondents and Interested Party, their servants, agents or assigns or otherwise howsoever from alienating, transferring, disposing, publishing or sending a notice of action to the public and interested parties in any manner whatsoever offering for allocation the parcel of land Mombasa/M.S/Tiwi Beach/18 comprising 781 acres or thereabouts being the subject matter of extension to lease by the Petitioners.**

**B) A declaration that the Petitioners have a legitimate expectation that the lease over 501 acres excised from the original 781 acres or thereabouts from Mombasa/M.S/Tiwi Beach/18 would be renewed when all relevant government departments have approved the extension.**

**C) An order of mandamus be issued against the National Land Commission to grant an**

**extension of lease to the Petitioners for a term of 50 years with effect from 2<sup>nd</sup> January 2013 for 501 acres arising from Mombasa/M.S/Tiwi Beach/18.**

**D) An order of mandamus be issued against the National Land Commission and the Interested Party to ensure that genuine squatters be settled on the 280 acres and leave the 501 acres free of any squatters.**

**E) An Order of Mandamus be issued directing the National Land Commission to forthwith make rules under Section 13 (2) of the Land Act, 2012 regarding a Lessee's preemptive rights to allocation of land.**

**F) Costs of the Petition.**

2. The petition is opposed by the National Land Commission (1<sup>st</sup> Respondent) vide a replying affidavit of Silas K. Mburugu deposed on 9<sup>th</sup> February 2015. The 2<sup>nd</sup> Respondent and the Interested Party did not file any responses. Mr Mburugu deposed that the suit land was initially allocated to East African limited for a term of 99 years from 1<sup>st</sup> January 1914 for use as grazing and agricultural purposes only. The Petitioners interest was registered in 1945 by way of transfer. According to the 1<sup>st</sup> Respondent, the land was already in use by the Digo as far as 1939. He annexed letters dated 17<sup>th</sup> December 1938 & 23<sup>rd</sup> December 1938 as well as a plaint in civil case No 22 of 1939 to support the occupation by the natives.

3. Mr Mburugu deposed that the Petitioners have never utilized any part of the suit property for the purpose which it was allocated since acquiring it. That in 2010 the County Council of Kwale gave provisional approval for extension if land was to be used for the establishment of a coconut processing plant by the Petitioners. Further that a ground report carried by the Commissioner of Lands revealed that there were about 600 households squatting on the suit property and several developed public utilities e.g. police camp. Based on this finding, the Petitioners were requested to surrender 281 acres before final approval was granted. The Petitioners acceded to this request on 12<sup>th</sup> October 2012 but which according to the 1<sup>st</sup> Respondent was after the enactment of the Land Act thus the processing of the lease could only be done in accordance of this Act.

4. Mr Mburugu deposed further that upon expiry of the lease in 2013, the Petitioners failed to make an application for extension and therefore the 1<sup>st</sup> Respondent could therefore not proceed with processing or renewal without a formal application. That upon the expiry of the lease, the suit land automatically reverted to its original status i.e. public land vested under the County Government of Kwale in line with article 62 (1) (c) and 62 (2) of the Constitution. The 1<sup>st</sup> Respondent also deposes that by a letter dated 14<sup>th</sup> April 2011, the County Government of Kwale expressed its objection to any renewal of the lease on account of the grounds stated under paragraph 14 (a) – (e) of the Replying affidavit i.e.: -

**a) That the County Government required the land for settlement of squatters through creation of a settlement scheme.**

**b) That the County Government required the land for implementation of public community projects.**

**c) That the County Government allocation of suit property occasioned a historical injustice to the local Digo community.**

**d) That since inception of the suit property in 1914 the former leases including the petitioner had never put the land into any viable use that could benefit the economy of the local communities.**

**e) That the petitioners did not have any concrete plans for use of the land.**

5. The 1<sup>st</sup> Respondent found these reasons to be tenable as resettling the squatters is for the public good. That the 1<sup>st</sup> Respondent being manager of all public land cannot go contrary to the express authority of the principal. Further that in the absence of a formal application for renewal, the Petitioners cannot have legitimate expectation that the same will be approved and processed by the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent also deposed that they have prepared rules of procedure under section 13 (1) of the Land Act 2012 and tabled before Parliament. For the reasons given, the 1<sup>st</sup> Respondent urged the Court to dismiss the petition herein.

6. The petition was heard by way of filing written submissions. The Petitioners filed their written submissions on 21<sup>st</sup> October 2016. The 1<sup>st</sup> Respondent filed his on 20<sup>th</sup> September 2017. The Interested Party's advocate sought to file their submissions within 7 days of 14.12.2017 but none was filed on time or at all. The Petitioners opened their submissions with what they called the undisputed facts to include; that they are the land owner of LR No Kwale/Tiwi Beach/18 comprising 781 acres whose lease expired in 2013. That prior to the expiry of the lease, they applied for extension on 3<sup>rd</sup> February 2008. The Petitioners submit that various government departments over the years granted approval for the extension subject to the Petitioners surrendering 280 acres for purposes of resettling the squatters. They itemized the correspondences detailing particulars leading to the approved extension of lease.

7. The Petitioners' case is that by a letter dated 19<sup>th</sup> March 2014 and 15<sup>th</sup> May 2014, their advocates informed the 1<sup>st</sup> Respondent of the Petitioners' pre-emptive rights to allocation pursuant to section 13 of the Land Act but there was no response. That in the standard newspaper of 16.9.2014 and Daily Nation of 17.9.2014, the 1<sup>st</sup> Respondent reported that they will resettle squatters on the Petitioners land and that it had declined to renew the lease. Yet the 1<sup>st</sup> Respondent had not expressed its refusal to renew the lease to the Petitioners. The Petitioners argue this is an infringement of their fundamental rights to property under article 40 of the Constitution. Further that the 1<sup>st</sup> Respondent breached the law (section 13 of Land Act) by not offering the land to the Petitioners assuming no application for extension of the lease had been made.

8. The Petitioners submitted further on what they termed rebuttal of Respondents' replying affidavit. That the Respondents have raised irrelevant issues that have zero significance to the simple issue of extension of a lease. That the Replying Affidavit comprises speculations and unsubstantiated allegations whose purpose is to deny the Petitioners the extension of lease without any legal basis in law. To buttress their submissions, the Petitioners cited the High Court decisions of **Seru Mweru Mulu vs Commissioner of Lands & 2 others (2014) eKLR; Abdul Waheed Sheikh & Another vs Commissioner of Lands & 3 others (2012) eKLR and R vs National Land Commissioner & 2 others & Grove Development Ltd exparte (2015) eKLR**. The Petitioners have urged the Court to grant the declaratory orders as well the orders of Mandamus together with costs of the Petition.

9. The 1<sup>st</sup> Respondent on its part submitted that the orders cannot be granted. The 1<sup>st</sup> Respondent submits that as at the time of the expiry of the lease, no final approval of the extension of the lease had been granted by either the Commissioner of Lands or National Land Commissioner. Therefore raising the question whether upon compliance with the Commissioner's letter dated 10<sup>th</sup> October 2010 there was indeed legitimate expectation that the extension of the lease would be granted. The 1<sup>st</sup> Respondent submitted that legitimate expectation can only arise where there has been specific undertaking, defined in nature and directed at a particular individual or group. According to the 1<sup>st</sup> Respondent, the letter of 10.10.2010 which they reproduced only inferred that application for extension would only be considered upon excision and surrender of 280 acres to the government for settlement of the squatters but the letter did not imply that upon the excision the 1<sup>st</sup> Respondent would grant the extension of the lease.

10. The 1<sup>st</sup> Respondent submits that it did indeed consider the application and upon recommendation by the Interested Party declined to issue its approval for the extension. The 1<sup>st</sup> Respondent contends further that section 13 (1) of the Land Act although grants previous holder pre-emptive rights to allocation, the said right is limited to where the land is not required by the national or county government for public

purposes. That in the instant case, the land was required for public purpose and the failure to grant the extension of the lease was for valid reasons and does not amount to breach of right to property. The 1<sup>st</sup> Respondent cited the cases of **CCK & 5 others vs Royal Media Services & 5 others S. C Petition Nos 14, 14A, 14 B & 14C of 2014** and **Justice Kalpana H. Rawal vs JSC & 3 others (2016) eKLR**.

11. The 1<sup>st</sup> Respondent submitted further on whether the orders of mandamus sought can be issued. They opened their submission by stating what the order of mandamus entailed as was brought forth in the case of **KNEC vs Republic Exparte Geoffrey Gathanji Noroge & 9 others (1997) eKLR** i.e. that ***“the order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once.”*** The 1<sup>st</sup> Respondent submits that mandamus will only issue to compel the performance of a statutory duty owed to the applicant. According to the 1<sup>st</sup> Respondent, the wordings of section 13 (1) of the Land Act gives the 1<sup>st</sup> Respondent discretion in renewing the lease so long as the land is not required for public purpose. Hence prayer (C) of the Petition cannot issue as sought as it is specific.

12. In answer to prayer (D) of the Petition, the 1<sup>st</sup> Respondent submits that by dint of section 134 of the Land Act, settlement of squatters and the landless is now under the domain of the National Government. That it is not the duty of the 1<sup>st</sup> Respondent to ensure that more squatters do not occupy the Petitioners’ parcel. Lastly on prayer (E), it’s the 1<sup>st</sup> Respondent’s submission that they have submitted draft rules before parliament for approval before the same can be operational. In the circumstance, issuing the orders of mandamus would be in vain. The 1<sup>st</sup> Respondent concluded that the suit raises no Constitutional issues and should consequently be dismissed.

13. Taking into considerations the issues raised in the pleadings as well the submissions, I frame two questions for determination of this Petition i.e.:

**i) Whether there was a valid application for extension of the lease over the suit property.**

**ii) If answer to (i) is yes, whether the Respondents have breached the Petitioners’ rights under article 40 hence prayers (a) – (e) of the Petition should be granted.**

14. The Petitioners pleaded in the Petition that on 10<sup>th</sup> June 2008 they presented an application to the County Council of Kwale for extension of lease. The documents presented with the Petition however shows the request for extension of lease was first made vide a letter dated 7<sup>th</sup> April 2003 addressed to the Ministry of Lands, Mombasa and copied to the Ministry of Lands & Settlement Nairobi. There is a letter dated 24<sup>th</sup> April 2003 addressed to the District Land Officer Kwale/Mombasa and copied to Ashwin Gidomal stating that the lease would be renewed on condition that the owners surrender 100 acres for settlement of squatters and urban development (in view of the developments currently coming up within the area).

15. The County Council of Kwale also writing to the District Land Officer Mombasa on 25.4.2003 also stated that the application for extension of the lease would be considered subject to the owner surrendering some portion for settlement of residents squatting on the plot and other use. Similarly on 26.4.2006 the Commissioner of Lands wrote to the DLO, DPPO & Town Clerk seeking their views before he processed the extension of the lease over the suit property. The letter was copied to the Petitioners. The 1<sup>st</sup> Respondent was aware of this letter as admitted in paragraph 7 of the Replying Affidavit. It is thus a contradiction when in the subsequent paragraphs, Mr Mburugu deposes that the Petitioners had not made an application for extension of the lease for the 1<sup>st</sup> Respondent to process and approve and or from which it could derive a legitimate expectation to be allocated the land.

16. In response to the application for extension of the lease, the County Council of Kwale vide its letter dated 6<sup>th</sup> May 2010 enclosed minutes of the Council Planning, Housing Trade & Market Committee meeting held on 29.4.2010 where in minute 96 it was resolved that ***“the request for extension of lease on plot No 18/Tiwi Beach be approved and extended for 40 years.”*** On 10<sup>th</sup> June 2008, Mr Ashwin

Gidoomal wrote to the County Council stating they were still interested in extension of the lease. On 9.4.2010 the Commissioner of Lands advised the Petitioners to make their application for extension to the County Council of Kwale which they did vide their letter dated 14.4.2010.

17. There are also letters from the District Lands Officer dated 1.7.2010, District Surveyor Kwale dated 25.6.2010, District Physical Planning Officer Kwale dated 2.7.2010 all addressed to the County Clerk, Kwale County Council stating they had no objection to the extension of the lease. In a letter dated 6<sup>th</sup> July 2010, headed as **“notification of approval/refusal/Deferment of development permission”** addressed to the Petitioners, the County Council granted approval for extension of the lease for 45 years subject to the grant of the consent by the Commissioner of Lands and fulfilment of the requirements by other departments. The District Land Officer also expressed approval for extension for 50 years subject to: -

**i) That the portions occupied by squatters will be set aside for formalization of the squatter settlement.**

**ii) Alternatively the extension of lease be granted and the government negotiates with the registered owners for purchase of the entire plot after valuation of the same to pave way for a planned squatter resettlement programme.**

18. The Petitioners also annexed a letter of consent from the Land Control Board dated 19<sup>th</sup> August 2010 for the extension of lease. The Commissioner of Lands later wrote on 10<sup>th</sup> October 2010 stating that the proposed extension of lease will be considered on excision and surrender of the area occupied by the squatters free of charge to the government for purposes of squatter settlement. The Petitioners agreed to this proposition by the Commissioner of Lands vide their letter dated 12<sup>th</sup> October 2012. The Petitioners' letter stated the approximate area was 280 acres.

19. The 1<sup>st</sup> Respondent in reacting to the application for extension wrote a letter dated 13<sup>th</sup> March 2014 to the Governor, Kwale County. In the letter, they said the Petitioners had applied for renewal. It went on further to state. **“However the entire parcel has long been occupied by squatters who have put up permanent and semi-permanent structures.”** The Governor responded vide his letter dated 14.4.2014 thanking the 1<sup>st</sup> Respondent. The Governor stated that the County faces a big challenge in identifying land to implement its projects as identified by communities and will seize every opportunity to identify land for these projects and settle the landless squatting in expired leases. For these reasons, his government was not in favour of the extension of the lease over the suit property. That the suit land be planned and managed properly with a view of controlling the flourishing township of Waa/Kombani,, setting aside land for development & settling the squatters on the ground.

20. The questions which beg answers are; if the 1<sup>st</sup> Respondent submits that there was no application for renewal at the lease presented to them after the operationalization of the Land Act for them to process and approve, why then did they refer to an application as having been made in their letter of 13<sup>th</sup> April 2014? Secondly, the application having been processed under the old regime of the Land laws, was it still open for the 1<sup>st</sup> Respondent to re-start the process by seeking the views of the County Government now joined as an Interested Party whose predecessor in title had given consent? Thirdly, can the previous approvals/no objections granted by the various government agencies be treated to amount to legitimate expectation on the Petitioners that their lease would be renewed?

21. On the first question, I have already answered part of it in paragraph 14 – 17 above. The new Land law did not place a requirement that the Petitioners were under a duty to submit a fresh application for renewal of their lease. At least the 1<sup>st</sup> Respondent has not drawn this Court's attention to such a provision in the law. Instead the transitional clauses both in the Constitution and the Land Act consider as done that which was done under the old statutes as provided under article 262 of the Constitution and section 162 of the Land Act. It is my finding that the 1<sup>st</sup> Respondent therefore was under a duty to continue with the processing of the application for extension of lease over the suit property from where

the Commissioner of Lands who was its predecessor in title had reached.

22. On whether the 1<sup>st</sup> Respondent found it plausible to refuse to extend the lease on account of objection of the Principal i.e. the County Government of Kwale. The County Government in its letter of 14<sup>th</sup> April 2014 did not give specifics of the community developments intended to be undertaken over the disputed land. Secondly the issue of settling squatters was already determined by the proposals set forth in the letters of the District Land Officer and the Commissioner of Lands when they stated that the lease ought to be renewed subject to the Petitioners agreeing to surrender a portion occupied by the squatters free of charge to the government. The Petitioners responded via their letter of 12<sup>th</sup> October 2012 of their acceptance to surrender **280 acres** which was the area occupied by the public utilities and the squatters. The letter of H. E the Governor did not give any reasons why he was unhappy with the decision passed by the full Council meeting who was his predecessor in title. Further after being joined to these proceedings and given time to file a response to the petition, they chose not to. This Court does not find any valid reason offered by the Interested Party in objecting to the extension of the lease on the conditions put forth by Commissioner of Lands' letter.

23 The 1<sup>st</sup> Respondent submitted that the Petitioners have not put to use any part of the land since their interest was registered on the title. However the correspondences annexed shows the intention the Petitioners wanted to use the land for. In their first letter dated 7<sup>th</sup> April 2003 to the Ministry of Lands they stated that having had lengthy discussions with their bankers regarding their future development over the land, the bankers pointed out that they would require a minimum unexpired portion of the lease hold of forty (40) years. The Petitioners immediately began to process application for extension of the lease with 10 years to go. The 1<sup>st</sup> Respondent also submitted that the Petitioners were planless and wanted to sell the suit land to the government. I note that the proposal of selling the suit land to the government was mooted by the District Land Officer in his letter of 7<sup>th</sup> July 2010. It is thus not true that it is the Petitioners who proposed to sell the suit land to the government.

24. Did the Petitioners derive legitimate expectation that their lease will be renewed? The 1<sup>st</sup> Respondent put reliance on the case of **Justice Kalpana H. Rawal vs JSC supra** where the Court of Appeal held that ***“for an expectation to be legitimate therefore, it must be founded upon a promise or practice by a public authority that is expected to fulfill the expectation.”*** The 1<sup>st</sup> Respondent also took the proposition of the Court in the case of **Kevin K. Mwiti & others vs Kenya School of Law & 2 others (2015) KLR** where the Court held thus;

***“The basic features of the doctrine of legitimate expectation are well established: where a public authority represents that it will conduct itself in a particular way, that representation may give rise to a legitimate expectation on the part of the representee that the public authority will so act. Where legitimate expectation so arises, the public authority may have to give effect to that expectation.”***

25. It is the 1<sup>st</sup> Respondent's submission that legitimate expectation can only arise where there has been a specific undertaking which is defined in nature and directed to a particular individual/group. The case herein deals with steps taken for the extension of lease of a specified land and a known individual – the Petitioners. The application was made to a public authority – the Commissioner of Lands who first directed the Petitioners to make the application to the County Council of Kwale. The Council after deliberating on the application resolved to approve extension of the lease for a period of 40 years. The other concerned government agencies also wrote stating they had no objection to the renewal of the lease. The District Land Officer also had no objection but requested that provision be made for people squatting on a portion of the land. The Commissioner (then the person mandated to extend the lease) said the approval would be considered if a portion of the land was surrendered to the government free of charge to settle the squatters.

26. All these government departments having not objected to the renewal of the lease, it follows that the Petitioners expected the Commissioner to renew the lease subject to a portion being surrendered by them (Petitioners) for squatter settlement. Therefore even if the renewal was an exercise of discretion by the

Commissioner, there was nothing shown to the contrary by the concerned public bodies that the discretion would not be exercised in favour of the Petitioners. This also taking into account the duration the whole process took from the year 2003 – 2012. Accordingly, it is my finding that the Petitioners had a legitimate expectation that the lease would be renewed on the basis of the no-objection letters from the various government agencies.

27. The 1<sup>st</sup> Respondent did not communicate to the Petitioners that they had considered the application for extension of the lease and on recommendation by the Interested Party declined to issue such an approval. In any event there was no such recommendation from the Interested Party as the letter dated 14.4.2014 from H. E the Governor in my view does not constitute a recommendation. The recommendation of the Interested Party was as per their minutes of 29.4.2010 which were also adopted by the Ordinary full Council meeting on 5<sup>th</sup> May 2010. The action by the 1<sup>st</sup> Respondent thus amounts to a breach of article 47 (2) of the Constitution on the right to fair administrative action.

28. In conclusion I find the Petitioners have established grounds for the grants of prayer **(B) & (C)** of the Petition. Prayer **A** is already been dispensed with. The 1<sup>st</sup> Respondent stated that it had already presented draft Rules to Parliament thus prayer **E** is overtaken by events. I shall not grant prayer **(D)** as it is not the mandate of the 1<sup>st</sup> Respondent to carry out any eviction exercise. The Petitioners shall follow the laid down process as by law established of obtaining vacant possession on the 501 acres of the suit land if at all the same is occupied. I award them costs of the Petition.

**Dated & signed at Mombasa this 13<sup>th</sup> April 2018**

**A. OMOLLO**

**JUDGE**

**Delivered at Mombasa this 16<sup>th</sup> April 2018**

**L. C. KOMINGOI**

**JUDGE**