



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MALINDI**

**ELC. CONST. PETITION NO. 19 OF 2015**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: ALLEGED CONTRAVENTIONS OF FUNDAMENTAL RIGHTS OF THE INDIVIDUAL UNDER ARTICLES 40 AND 43 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: THE ENFORCEMENT OF FUNDAMENTAL RIGHTS OF INDIVIDUALS UNDER (SUPERVISORY JURISDICTION) PRACTICE PROCEDURE RULES 2006 AND PART 5 RULE 19 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: UNIVERSAL DECLARATION OF HUMAN RIGHTS 1948, INTERNATIONAL CONVENTION ON CIVIL AND POLITICAL RIGHTS 1966, INTERNATIONAL CONVENTION ON ECONOMIC, CULTURAL AND SOCIAL RIGHTS, AMERICAN CHARTER ON HUMAN RIGHTS AFRICAN (BANJUL) CHARTER ON HUMAN RIGHTS**

**AND**

**IN THE MATTER OF: THE SALIENT PRINCIPLES OF FAIRNESS, REASONABLENESS AND LEGITIMATE EXPECTATION**

**BETWEEN**

**FAROOQ IMTIAZ MOHAMED MALIK.....PETITIONER**

**AND**

**DIRECTOR OF POLICE INVESTMENTS.....1<sup>ST</sup> RESPONDENT**

**INSPECTOR GENERAL, NATIONAL POLICE SERVICE.....2<sup>ND</sup> RESPONDENT**

**THE HON. THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**AND**

**ETHICS & ANTI-CORRUPTION COMMISSION.....INTERESTED PARTY**

**JUDGMENT**

**Introduction:**

1. This matter was commenced by way of a Petition dated 2<sup>nd</sup> December, 2015. In the Petition, the Petitioner has averred that he became the proprietor of land known as L.R. No. 7547 situated in Malindi along Silver Sands (*the suit land*) by virtue of a transfer on 13<sup>th</sup> January, 2011 and that when he instructed a contractor to commence the development of the suit land, he was ejected from the land by the 2<sup>nd</sup> Respondent.

2. To the extent that the 2<sup>nd</sup> Respondent has restrained him from developing the suit land, the Petitioner averred that his constitutional rights to own property have been infringed.

3. After filing the Petition, the Ethics and Anti-Corruption sought to be enjoined in the suit, which prayer was allowed by the court.

4. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed an Answer to the Petition and a Cross-Petition in which they averred that the title document exhibited by the Petitioner does not confer on the Petitioner an unimpeachable right of ownership of the suit land; that by dint of the provision of Article 40(6) of the Constitution, the right to own property is not absolute and that the right to own land does not extend to any property that has been found to have been unlawfully acquired.

5. It is the Respondents' case that at all material times, L.R. No 7547 was reserved for "government pool housing" on the Malindi Development Plan and was therefore not available for allocation or alienation; that the suit land houses government buildings for head of various Government Departments including the premises of the Resident Judge, the Magistrate, the OCPD, the DCIO, the Deputy County Commissioner, the National Police Service Leave Centre, the Prisons and the Water Department.

6. The Respondents finally stated that the suit property was illegally alienated by a private developer who thereafter sold it to the Petitioner. The Respondents have sought for the following orders in the Cross-Petition: a declaration that the suit land is public land reserved for pool housing; the title document that was issued to the Petitioner to be cancelled and that the register in respect of the suit land to be rectified and to read Permanent Secretary, National Treasury.

7. The Interested Party's investigator deponed in his Affidavit that he obtained the copies of the parcel file in respect of the suit land from the Registrar of Titles in Mombasa; that he also obtained a copy of the corresponding file from the Ministry of Lands; that he discovered that the basis of the alienation of the suit land in favour of one Arthur K. Kiseve was a letter of allotment which was accompanied by a Part Development Plan and that she later discovered that there was no approved Part Development Plan that was issued to the allottee.

8. The Interested Party deponed that the suit land was in an area which was reserved for government housing pool as indicated in the Development Plan for Malindi and that the letter of allotment that was purportedly issued to Mr. Kiseve and then transferred to Omar Khamis Balleth was null and void *ab initio*.

#### **The Petitioner's case:**

9. The Petition proceeded by way of *viva voce* evidence. The Petitioner, PW1, informed the court that he is the registered proprietor of the suit land which he purchased from Mr. Omar, PW2. According to PW1, his lawyer conducted a search in the year 2010 which showed that the suit land was in the name of Mr. Omar.

10. After ascertaining that the land was vacant, PW1 informed the court that he entered into a Sale Agreement with Mr. Omar whereafter he paid the purchase price of Kshs. 2,000,000; that Mr. Omar was personally known to his family and that the land was transferred to him on 10<sup>th</sup> January, 2011 after paying stamp duty of Kshs. 80,140.

11. It was the evidence of PW1 that he has an official search showing that the land is registered in his name; that he was not aware that the land is public land and that his application to put up a perimeter wall around the suit land was approved in the year 2011. However, when they commenced the construction of the perimeter wall, the Respondents stopped them.

12. In cross-examination, PW1 stated that the suit land was bushy when he bought it; that the land is surrounded by houses and that he paid for the land whereupon it was registered in his name.

13. PW2 informed the court that the Petitioner is her son; that she is the one who negotiated for the sale of the suit land with Mr. Omar and that she paid Mr. Omar the purchase price of Kshs. 2,000,000 in installments. PW2 stated that after the land was transferred in favour of the Petitioner, they started putting up a perimeter wall but they were stopped by the OCPD. That is when they filed the Petition.

14. In cross-examination, PW2 stated that she has been in Malindi since the year 1981; that she is the proprietor of Silver Sands School which is directly opposite the suit land and that she conducted due diligence before she paid Mr. Omar the purchase price.

15. The Petitioner's advocate, PW3, informed the court that he is the one who drafted the Transfer document between the Petitioner and Mr. Omar in respect of the suit land; that he was given the demand rent by the Ministry of Lands and that when her client settled the rent, she was issued with a rent Clearance Certificate. After paying the requisite stamp duty, PW3 stated that the suit land was transferred to the Petitioner on 13<sup>th</sup> January, 2011.

16. Mr. Omar, PW3, stated that the Petitioner is the owner of the suit land which he sold to him, and that it was a surveyor by the name of Mr. Yego of Challan Associates who informed him about the land and told him that the land was owned by Mr. Arthur Kiseve.

17. It was the evidence of PW3 that he purchased the land from the said Mr. Yego, who was Mr. Kiseve's agent in 1991 for Kshs. 700,000; that he paid him Kshs. 200,000 in cash and that he was then shown a Sale Agreement which had been signed by Mr. Kiseve. After signing the Sale Agreement, PW3 stated that he signed an informal Transfer and the title document was issued in his favour.

18. PW3 stated that the suit land was part of government land which was sub-divided and allocated to individuals. It was the evidence of PW3 that he used the plot for seventeen (17) years by grazing goats; that the police did not have an objection with his presence on the land and that he even fenced the land using a barbed wire. However, until the year 2008, he started experiencing financial problems and that is

why he sold the suit land to the Petitioner's mother.

19. In cross-examination, PW3 stated that he bought the land from Mr. Kiseve although he never met him; that he was made to sign an informal Transfer and that Mr. Kiseve was to sign his part later. PW3 stated that although the land was earmarked as "residential", he agreed with Mr. Yego that they change the user to commercial and that the change of user was effected in the year 1993.

**The Respondents' and the Interested Party's cases:**

20. DW1 informed the court that he is an Assistant Inspector General, National Police Force and currently the Director of Administration, Planning and Finance. It was the evidence of DW1 that the National Police Service has three "Leave Centres" in the Coast, Malindi being one of them, which is meant for the retired and serving police officers.

21. According to DW1, he was informed that the land which had been set aside as a police leave centre in Malindi had been illegally allocated to the Petitioner and that he gathered evidence to that effect.

22. DW1 informed the court when Part Development Plan number PDP NRB/55/92/26 was drawn, the Physical Planner indicated in his letter dated 4<sup>th</sup> December, 1992 that the land represented in the Part Development Plan falls within an area reserved for housing pool; that the letter was copied to the Commissioner of Lands and that the land was not available for allocation.

23. It was the evidence of DW1 that the Commissioner of Lands was advised by the Director of Physical Planning not to allocate the land to a private entity but instead issue a title document to the National Police Service; that the suit land is within the proximity of the houses of the Sub-County Commissioner, the DCIO, the OCPD, amongst other Senior Government Officers. DW1 informed the court that the purported initial owner of the land, Mr. Kiseve, has denied ever owning the land.

24. DW2, a Government Surveyor, informed the court that the suit land is part of a bigger portion of land with government houses and that Malindi Development Plan shows that the suit land falls within land reserved for a housing pool which should only be used for the construction of government houses.

25. The Assistant Chief of Kijiwetanga, DW3, informed the court that the Petitioner's agent went to his office to seek permission to cut down trees which were standing on the suit land; that he declined to give the Petitioner a permit to cut down the trees because he was aware that the land belonged to the government and that Senior Government Officers have houses on the suit land.

26. A Senior Estate Manager with the Ministry of Transport, Housing and Urban Development, DW4, stated they have a total of nine (9) units in Silver Sands area, Malindi; that the suit land is in between the DC's, DCIO's, OCPD's and the Police Leave Centre's houses and that the suit land is part of the land reserved for the Police Leave Centre.

27. DW5 was the Physical Planner working with the Ministry of Lands. DW5 informed the court that the letter dated 4<sup>th</sup> December, 1992 by the Director of Physical Planning was in respect to a proposed residential plot in Malindi; that the letter was referring to a drawing which was to be approved by the Director of Physical Planning (a Part Development Plan) and that when the Part Development Plan was forwarded to her for comments, she indicated on the draft Part Development Plan that the land was reserved for housing pool. DW5 stated that her comments were based on the Malindi Development Plan which is dated 29<sup>th</sup> September, 1980.

28. It was the evidence of DW5 that a Part Development Plan is usually the basis of a letter of allotment after it has been approved; that P.D.P number 55/92/26 was never approved because the area had been reserved for pool housing and that there is no approved Part Development Plan to support the Petitioner's title document.

29. In cross-examination, DW5 stated that an approved Part Development Plan must have a development plan number at the bottom which number is then entered in their register, which never happened in this case. It was the evidence of DW5 that an approved Part Development Plan is usually issued first before a letter of allotment is issued.

30. The Kilifi Physical Planner, DW6, informed the court that he can identify the suit land both on the ground and on the Development Plan of Malindi; that the plan for Malindi that has always been in use is the 1980 one and that the physical location of the plot is designated as "housing pool". It was the evidence of DW6 that P.D.P number NRB/55/92/26 was never approved by the Kilifi office neither was it prepared by her office. It was the evidence of DW6 that although a Part Development Plan for Kilifi could be prepared in Nairobi, a copy had to be sent to the Kilifi or Malindi office. However, the Part Development Plan that the Petitioner is relying on was never forwarded to her office.

31. The Senior Physical Planning Assistant, DW7, informed the court that when the file in respect of the suit land was forwarded to his office in October, 2015 for comments, he noted on the file that although a title document had been issued to a private person, the suit land was part of government pool houses. It was the evidence of DW7 that he gave to the National Land Commission this information; that he did not come across records in his office showing that the Senior Planning and Records Officer (SPRO) checked the status of the suit land before the same was allocated to Mr. Kiseve in 1992 and the land has always been reserved for government houses.

32. An investigator with the Interested Party (*the Ethics and Anti-Corruption Commission*), informed the court that the Ethics and Anti-Corruption Commission received a complaint in respect to the suit land; that the suit land is located along Silver Sands Road and is directly opposite Silver Sands Academy and that they found people cutting down trees on the land.

33. DW8 stated that the suit land is surrounded by several houses which houses Senior Police Officers, including houses for the Magistrates. DW8 stated that upon retrieving documents from the Ministry of Lands, they came across a letter of allotment which had been purportedly

issued to Mr. Kiseve and that the Director of Physical Planning informed them that the Part Development Plan that was annexed on the letter of allotment was never approved by his office because the land was reserved for government houses.

34. DW8 produced in evidence the entire correspondence file number 146947 which he retrieved from the Ministry of Lands. It was the evidence of DW8 that after investigations, they found that the suit land was public land reserved for government houses and was not available for allocation.

35. Mr. Arthur Kitonga Kiseve, DW9, informed the court that he is the Archbishop of the Redeemed Gospel Church; that he has been serving as a Minister of God for over fifty (50) years and that he has no idea about the suit land. When DW9 was shown the letter of allotment dated 14<sup>th</sup> December, 1992 which was purportedly issued in his name, he denied ever applying to be allocated the suit land.

36. DW9 denied that he signed the letter of acceptance dated 15<sup>th</sup> December, 1992. It was his evidence that he did not draw the cheque of Kshs. 46,000 on 16<sup>th</sup> December, 1992 being payment for the said land neither did he sign an informal Transfer document transferring the land to Mr. Omar.

37. DW9 stated that he has never owned the suit land neither has he met Mr. Omar who purportedly bought the land from him. DW9 denied that he received the purchase price of Kshs. 700,000 from Mr. Omar and that someone must have used his rubber-stamp which used to have his signature to carry out the purported transactions. DW9 informed the court that Mr. Yego, who is a Surveyor for his church, and his Secretary, had access to his rubber-stamp. However, neither his Secretary nor Mr. Yego told him about the suit land. According to DW9, he only learnt about the dispute on 26<sup>th</sup> April, 2016 when the CID contacted him and asked him to record a statement.

38. In cross-examination, DW9 stated that he destroyed his rubber-stamp which had his signature when he realised it was being misused; that the former President approved the allocation of many plots in favour of his church and that he did not recall ever applying to be allocated the suit land.

#### **Submissions:**

39. The Petitioner's advocate submitted that by virtue of the provision of Section 23(1) of the repealed Registration of Titles Act, the Petitioner's title was protected; that under that Section, a bona fide purchaser is assured of protection notwithstanding the previous dealings which might have been mired in fraud and that in event, no fraud on the part of the Petitioner was proved by the Respondents and the Interested Party.

40. Counsel submitted that the Malindi Development Plan is not a authentic document for lack of authentication by the Physical Planning Office; that the Respondents had no proof of ownership of the land or reservation of the suit land in the name of the Commissioner of Police and that the Petitioner is in possession of a good title. Counsel relied on several authorities which I have considered.

41. The Respondents' counsel submitted that the registration of the suit land in favour of the Petitioner was not a first registration; that Section 23(1) of the Registration of Titles Act does not apply and that Article 40(6) of the Constitution read together with Section 26 of the Land Registration Act ousts the doctrine of sanctity of title.

42. Counsel submitted that the land in question was public land and was not available for allocation to an individual. Counsel relied on several authorities which I have considered.

43. The Interested Party's advocate submitted that the registration of the suit property is shrouded in controversy; that DW9 testified that he never applied for the allocation of the suit land and that there is no evidence of any sale that transpired between Mr. Kiseve (DW9) and Mr. Omar Khamis (PW4). Counsel submitted that the defects in the title held by the Petitioner cannot be cured by reliance on indefeasibility of a first registration.

44. Counsel submitted that not only did the Petitioner fail to prove acquisition of a valid title, he was also unable to demonstrate that he conducted any due diligence that would reasonably be expected of a *bona fide* purchaser. Counsel submitted that the Petitioner has not demonstrated to the required standards that there was any infringement of his rights under Article 40 of the Constitution. The Interested Party's counsel relied on several authorities which I shall allude to in this Judgment.

#### **Analysis and findings:**

45. The Petitioner was registered as the proprietor of land known as L.R. No. 7547 on 13<sup>th</sup> January, 2011. According to the Certificate of Title that was produced by the Petitioner, the land was registered in the name Omar Khamis Balleth (PW4) on 17<sup>th</sup> March, 1993 before he transferred the same to the Petitioner.

46. The Respondents and the Interested Party have alleged that the suit land was reserved for "*pool housing*" on the Malindi Development Plan and was therefore not available for alienation. The issues that this court has been called upon to determine are therefore as follows:

**a. Whether the suit property is public land alienated for purposes of government housing;**

**b. Whether the Petitioner is in possession of a valid title in respect of Malindi L.R. No. 7547;**

**c. Whether the Petitioner's right to property under Article 40 has been infringed;**

**d. Who should bear the costs of the Petition?**

47. The Petitioner in this matter informed the court that he purchased the suit land, which is opposite Silver Sands Academy, along Silver Sands Road in Malindi. Although the suit land is registered in the name of the Petitioner, it is the Petitioner's mother (PW2) who negotiated with Mr. Omar for the purchase of the land. Without entering into a formal agreement with Mr. Omar, the initial registered proprietor, PW2 informed the court that the land was transferred to the Petitioner after she paid Mr. Omar KShs. 700,000 in installments. PW2 is the proprietor of Silver Sands Academy.

48. The evidence of Mr. Omar (PW4) was that he purchased the land from Mr. Kiseve (DW9) in 1993. According to PW4, it is Mr. Yego who informed him that DW9 was selling the land which had been allocated to him. Although he never met the Vendor (DW9), it was his testimony that he signed the informal Transfer on 8<sup>th</sup> January, 1993 in the presence of an advocate whereafter Mr. Kiseve (DW9) was to sign his part later. He thereafter paid the requisite stamp duty and the Certificate of Title was issued to him.

49. Mr. Arthur Kitonga Kiseve (DW9) denied that he ever sold the suit land to PW4. Indeed, it was the evidence of DW9 that he neither applied for nor paid for the suit land. DW9 denied that he was issued with a letter of allotment dated 14<sup>th</sup> December, 1992. However, he admitted that Mr. Yego, the person who contacted Mr. Omar and offered him the land for sale, was a Surveyor who had been retained by Redeemed Gospel church, where he is a Bishop. According to DW9, the said Surveyor and his Secretary were in possession of his signature rubber-stamp which could have been used to sign the informal Transfer.

50. The Petitioner did not call Mr. Yego to testify on whether he had the authority of Mr. Kiseve to sell the land, and whether the land was ever allocated to Mr. Kiseve. Indeed, Mr. Omar admitted that he never saw Mr. Kiseve sign the Transfer form. I have perused the Transfer form that was purportedly signed by Mr. Kiseve. The said Transfer form shows that the land that Mr. Kiseve was selling is an unsurveyed piece of land in Malindi Municipality allocated to him vide a letter of allotment of TP47/I/X/177. Although the Transfer document shows that Mr. Omar (PW4) signed it in the presence of Nyamura Musyimi advocate, the purported signature of Mr. Kiseve was never witnessed. This buttresses Mr. Kiseve's testimony that he never signed the Transfer document of 8<sup>th</sup> January, 1993 in favour of Mr. Omar Khamis Balleth.

51. On the basis of the evidence before me, I am satisfied that the suit property was never allocated to Mr. Kiseve, neither did he sell it to Mr. Omar vide the Transfer of 8<sup>th</sup> January, 1993. Indeed, no evidence was produced to show that Mr. Kiseve received the consideration for the said land from Mr. Omar, or that he paid the requisite stand premium to the government of the said land.

52. Consequently, it is the finding of the court that the letter of allotment number TP47/I/X/177 purportedly issued to Mr. Kiseve and the Transfer document of 8<sup>th</sup> January, 1993 purportedly signed by Mr. Kiseve are forgeries. The two documents were used to generate the Certificate of Title in favour of Mr. Omar who subsequently sold the land to the Petitioner. The registration of the suit land to Mr. Omar is a nullity *ab initio* considering that the land was never allocated to Mr. Kiseve in the first place, and he never sold it. The title document to Mr. Omar being a nullity, he had no title to pass to the Petitioner.

53. What if indeed the suit land was allocated to Mr. Kiseve? Was the said allocation legal? The entire correspondence file number 46947 in respect of the suit land, and which is held by the Ministry of Lands, was produced by the Interested Party's investigator (DW8). The file shows the genesis of the title in dispute.

54. According to the letter dated 4<sup>th</sup> December, 1992, a Mr. Gichohi, for the Director of Physical Planning, forwarded to the Commissioner of Lands three copies of drawings for NRB/55/92/26 for approval. The drawing was the Part Development Plan (PDP) for a proposed residential plot and was signed by the Physical Planner on 3<sup>rd</sup> December, 1992. That letter was copied to the Physical Planner in charge of Kilifi District. In his letter dated 12<sup>th</sup> January, 1993, which was in response to the letter of 4<sup>th</sup> December, 1992, the Kilifi District Physical Planner informed the Director of Physical Planner as follows:

***“Please note that according to the Malindi Development Plan the above proposal falls on an area reserved for housing pool.”***

That letter was copied to the Commissioner of Lands.

55. It is not clear why the Director of Physical Planning sought for the approval of the Part Development Plan by the Commissioner of Lands before consulting the Kilifi Physical Planner if indeed the plot was available for alienation. However, vide the letter of 12<sup>th</sup> January, 1993 by the Kilifi Physical Planner, it was clear that the land was not available for allocation.

56. It would appear that on the same day the Director of Physical Planning was seeking for the approval of the Part Development Plan, that is on 14<sup>th</sup> December, 1992, a letter of allotment was purportedly issued to Mr. Kiseve. This was unprocedural considering that a letter of allotment is usually issued after a Part Development Plan has been approved. Although the letter dated on 15<sup>th</sup> December, 1992 purportedly by Mr. Kiseve accepting the offer is in the corresponding file, Mr. Kiseve denied that he made a payment of KShs. 46,000 as indicated in the said letter.

57. The evidence before me shows that Mr. Yego of Challan Associates Ltd, forwarded the Deed Plan for the suit land to the Commissioner of Lands on 28<sup>th</sup> January, 1993. Mr. Yego is the same person who had offered to Mr. Omar the suit land. After the Deed Plan was received, a Grant was forwarded to the Registrar of Titles in Mombasa by a Mr. Osoro for the Commissioner of Lands vide a letter dated 17<sup>th</sup> February, 1993. By this time, Mr. Kiseve had purportedly sold the land to Mr. Omar for KShs. 700,000. All along, no one cared to address the objections that had been raised by the Kilifi District Physical Planning Officer in her letter dated 12<sup>th</sup> January, 1993, about the non-availability of the land for allocation.

58. The evidence before me shows that before the Certificate of Title in respect of L.R No. 7547 was issued to Mr. Omar, the District Physical Planner had already indicated that the land was already reserved for government houses. There is no evidence to indicate that the Commissioner of Lands investigated that issue before issuing the Certificate of Title to Mr. Omar on 17<sup>th</sup> March, 1993.

59. The objection by the Physical Planner to the allocation of the land was based on the Malindi Development Plan of 1980. Although the said plan might not have been amended for many years, just like other development plans in the country, it is meant to guide the public in knowing the government land that has not been allocated or reserved for public purpose. Indeed, a Development Plan of any county is the only authority that is used by planners to approve Part Development Plans. There is no evidence that the Commissioner of Lands consulted the Development Plan of Malindi to ascertain if the land he purported to allocate to Mr. Kiseve was available for allocation.

60. Having perused the Development Plan of Malindi, and in the absence of evidence to the contrary, I am satisfied that the suit land is part of the land that was reserved for government houses. The said land could not be allocated until the Development Plan shows the change of user from “government houses” to “residential purposes”. The issue of land reserved for public purpose being allocated to private persons has been litigated upon in our courts. I will highlight what the Court of Appeal has said in a few cases.

61. In the case of *Supa Nova Properties Ltd vs. The Land Registrar & Others, Mombasa Civil Appeal No. 98 of 2016*, the court stated as follows:

**“... the government through its state and public officers who are entrusted with public trust to be exercised for the good of the public also need to be checked and stopped from allocating public land...”**

**Waki JA stated as follows:**

**“Mughal was entitled to his property to the extent that such property did not encroach upon land that was acquired and set aside for a public purpose. It would otherwise be unlawful to superimpose a Grant/Certificate of Title on land which is already lawfully alienated for public purpose.”**

62. On the issue of sanctity of title as provided under Section 23 of the Registration of Titles Act (RTA), the Judge stated as follows:

**“If violation of such sanctity which is guaranteed by the State is proved, then Section 24 of the same Act kicks in ... it is my finding that the pursuit for damages is one of the remedies open to an offended party...”**

63. In the same decision, Kiage JA wrote as follows:

**“...the courts of this country cannot countenance a situation where the public good is subjugated to and sacrificed at the multifarious altars of private interests. Nor will they sit idly by and see land cartels, brief-case investors and speculators with high connections use public land as tickets to individual largesse in the wake of public pain or inconvenience.”**

64. In the case of *Henry Muthee Kathurima vs. Commissioner of Lands & Another (2015) eKLR*, the Court of Appeal was emphatic that the concept of indefeasibility or conclusive nature of title is inapplicable to the extent that title to the property was unlawfully acquired.

65. The suit land was set aside for a public purpose, that of putting up government houses as and when funds were available. It could not, be allocated to a private person at the whim of the Commissioner of Lands, who was mandated by the Constitution to hold it in trust for the public. When the Commissioner of Lands, or any other public body purports to allocate land set aside for a public purpose, the court will not hesitate to cancel such a title.

66. Indeed, Section 23 of the Registration of Titles Act (RTA), is subject to Article 40(6) of the Constitution. Section 23 of the Registration of Titles Act (RTA), or Section 26 of the Land Registration Act, cannot qualify the provisions Article 40(6) of the Constitution whose reading shows that any title that has been acquired unlawfully should be cancelled by the court, regardless of the circumstances.

67. Having found that the suit land was never allocated to Mr. Kiseve and that the suit land was reserved for government houses, I find that the Certificate of Title that was issued to Mr. Omar on 17<sup>th</sup> March, 2011 was null and void *ab initio*. Mr. Omar could not have therefore transferred a null and void title to the Petitioner.

68. For those reasons, I find that the Petitioner does not have a valid title in respect of L.R. No. 7547 that is capable of being protected by this court. I therefore dismiss the Petition with costs and allow the Respondents’ cross-appeal in the following terms;

**a) The Certificate of Title for L.R. No. 7547 (CR 23816) be and is hereby cancelled.**

**b) The Petitioner to pay the Respondents the costs of the Cross-Petition.**

**DATED AND SIGNED AT MACHAKOS THIS 12<sup>TH</sup> DAY OF JULY, 2018.**

**O.A. ANGOTE**

**JUDGE**

DATED, DELIVERED AND SIGNED AT MALINDI THIS 19<sup>TH</sup> DAY OF JULY, 2018.

J.O. OLOLA

JUDGE