



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MALINDI**  
**ELC CIVIL CASE NO.102 OF 2008**  
**(Formally Nairobi HCCC No. 3107 of 1997)**

- 1. MARIAN MUENI MUSEMBI**
- 2. TIMOTHY MUCHINA CHEGE.....PLAINTIFFS**
- =VERSUS=**
- 1. COMMISSIONER OF LANDS**
- 2. LANDS REGISTRAR KILIFI**
- 3. ATTORNEY GENERAL**
- 4. WILSON GACHANJA**
- 5. ALFRED CHERWON**
- 6. JAMES RAYMOND NJENGA**
- 7. HOLBURN PROPERTIES LTD.....DEFENDANTS**

**J U D G M E N T**

1. The Plaintiffs commenced this suit by way of a Plaint dated 5<sup>th</sup> October 1997. On 25<sup>th</sup> June 1998, the Plaintiff filed and served on the Defendants an Amended Plaint.
2. In the Amended Plaint, the Plaintiffs alleged that on 22<sup>nd</sup> December 1986, the 1<sup>st</sup>, 2<sup>nd</sup> and 6<sup>th</sup> Defendants, acting unconstitutionally, illegally and high handedly purported to cancel the 1<sup>st</sup> Plaintiff's registration of the suit land being Kilifi/Jimba/427 and Chembe Kibabamshe/428.
3. The Plaintiffs have averred in the Amended Plaint that the 1<sup>st</sup>, 2<sup>nd</sup> and 6<sup>th</sup> Defendants proceeded to register the government as the proprietor of the suit properties and have been unconstitutionally and unlawfully administered the said parcels of land as Government land.
4. The Plaintiffs have prayed for the following orders: a declaration that the area where the suit lands are situated has at all material times been Trust land; a declaration that the transfer of the suit properties to the Government on 22<sup>nd</sup> November 1986 and all the other subsequent transactions were unconstitutional, illegal, null and void and the Plaintiffs to be paid general and punitive or exemplary damages with interest from 22<sup>nd</sup> December 1986 to the date when the suit lands shall be re-transferred back to them.

5. The record shows that on 12<sup>th</sup> February 1999, M. Kimani, counsel for the Attorney General, entered appearance for all the six Defendants. However, the Attorney General never filed a Defence.
6. On 10<sup>th</sup> November 1999, the court entered interlocutory judgment against the 1<sup>st</sup>, 2<sup>nd</sup> and 6<sup>th</sup> Defendants.
7. After the entry of interlocutory judgment against the then six Defendants, “a Preliminary Decree” was issued by the Deputy Registrar on 10<sup>th</sup> July 2003.
8. The Preliminary Decree was based on the interlocutory judgment that had been entered against the Defendants.
9. On 18<sup>th</sup> February 2005, a long consent between the Plaintiffs' advocate and “M/S D.O. Raballa, the litigation counsel for the Honourable Attorney General for all the Defendants” was filed in this court.
10. In the consent, the Attorney General, on his own behalf and on behalf of the other five Defendants conceded to all the allegations raised by the Plaintiffs in the Amended Plaint.
11. The opening paragraph of the consent, which I shall allude to later, shows that the same was entered into as a result of the orders of the High Court in Nairobi Judicial Review Miscellaneous Application No. 185 of 1987; Nairobi High Court Miscellaneous Application No 730 of 1989 and Nairobi HCCC No. 2387 of 1987.
12. The penultimate paragraphs of the consent between the Plaintiffs and the Attorney General provided as follows:

**“IT IS THEREFORE HEREBY AGREED AND CONSENTED BY LITIGATION COUNSEL for all and on behalf of the Honourable Attorney General and on behalf of officers of the Government of Kenya who are Defendants in this suit and M/S S.K. Ritho and Company Advocates for and on behalf of the Plaintiffs as follows:-**

**(1) THAT all researches in land from 14<sup>th</sup> December 1895 to the day of signing this consent the area of the former Protectorate of Kenya was never Crown Land or Government Land and any claim by the Commissioner of Lands or any officer of the Ministry of Lands and Settlement who makes such claim the claim has no support of any Constitutional legal law in the form of Kenya Order in Council or any Provisions of Kenya Constitution and this has been confirmed by the Court in HCCC Miscellaneous Application No.185 of 1987, 730 of 1989 and HCCC No.2387 of 1987 and the research conducted by the Director of Survey has confirmed that between 1895 and present day there has never been Crown or Government Land within the former Protectorate of Kenya.**

**(2) THAT the suit lands in this suit were at all material times before 31<sup>st</sup> May 1963 private land under the sovereignty of the Sultan of Zanzibar in accordance with the Agreement between the Sultan of Zanzibar and Great Britain Crown dated 14<sup>th</sup> December 1895, Kenya (annexation) Order in Council 1920, Kenya Native Areas Order in Council 1939 and from 1<sup>st</sup> June 1963 to present day the same area did become Trust Land under Kenya Order in Council 1963 L.N.245 of 1963 Second Schedule Section 193,198 and 199 Kenya (Independence) Order in Council 1963 L.N.718 of 1963 Second Schedule Section 208 and since then has been at all material times Trust Land.**

**(3) THAT the claim by the Commissioner of Lands under the Commissioner of Land circular Letter No. 1139336/55 of 1986 and Gazette Notice No.2505 of 30<sup>th</sup> May 1986 were all unconstitutional and illegal claims and null and void ab initio and this legal status was confirmed by High Court in H.C.C.C Miscellaneous Application No. 185 of 1987 Nairobi, Miscellaneous Application No.730 of 1989 Nairobi and H.C.C.C No.2387 of 1987 Nairobi which have declared that the area of the former protectorate of Kenya has at all material times been Trust Land and the adjudication programmes were all carried out constitutionally and legally.**

**(4) THAT the former Commissioner of Lands M/S James Raymond Njenga as he was then**

circular letter NO.113936/55 of 28<sup>th</sup> May 1986 and Kenya Official Gazette No.2505 of 30<sup>th</sup> May 1986 were declared in HCCC Miscellaneous Application No. 730 of 1989 unconstitutional, illegal, null and void ab initio and the Commissioner of Land is liable for damages caused by the unconstitutional, illegal and null and void ab-initio circular letter No.113936/55 of 28<sup>th</sup> May 1986 and Gazette Notice No.2505 of 1986. The compensation do be calculated based on accepted principles in Judgments, rulings and orders of the High Court and Civil Appeals and in accordance with Professional valuers principles of market values of the suit lands which as at the date for these consents is agreed and consented to be Kenya Shillings Five Million (Kshs.5,000,000) per acre the actual payable compensation for non-use of the land to be average overdraft Commercial Banks rates of interest between 1987 and 2004 which is about fifteen percent 15% per annum calculated on annual rates the way commercial banks do calculate their interests and once they are calculated the calculation do be approved arithmetically only by the Deputy Registrar High court after which without any further reference to the Court the necessary decree do be drawn based on the said arithmetical calculations plus interest of Bank overdraft rates from the date of these consents do be issued and it do be executed as such, without any further reference to court against all the Defendants jointly and severally.

(5) THAT where there are development programmes the compensation payable do be based on the difference of cost of construction on 22<sup>nd</sup> December 1986 and 31<sup>st</sup> December 2004 plus loss of revenue from the development based on average interest at bank overdraft rates of 15% per annum of the market value of the land plus development value in 1986 calculated on annual rates from 22<sup>nd</sup> December 1986 the date the Plaintiffs titles were cancelled by the Commissioner of Lands until when the total sum shall be paid in full. The arithmetic details based on professional valuers, architects and quantity surveyors estimates once arithmetically confirmed by the Deputy Registrar High Court to be correct, they do become the Court Decree without any further reference to the court.

(6) THAT the Commissioner of Lands do be ordered to pay exemplary damages based on 5% of the total sum of damages agreed upon during the negotiations or quantified sum payable in accordance with the professional assessments as ordered by the Honourable Court do be paid to the Plaintiffs together with compensation referred to herein before within the shortest time possible and not latter than six months from the date of service of the final decree and if full payment would not be made to the Plaintiffs then the Plaintiffs do apply for the orders of Mandamus to compel the Accounting Officer of the Ministry of Lands and Settlement, Commissioner of Lands and the other Defendants to pay the Decretal sum jointly and severally without any further delay and within a set out time table failing which execution process do be commenced against the Defendants jointly and severally.

(7) THAT it is consented that the issues involved in this suit are very complicated and the relevant laws are also of not easy interpretation and for this reason it is agreed and consented that the costs awarded to the Plaintiff do be fifteen 15% percent of the total compensation payable to the Plaintiffs plus interest at the rate of fourteen 14% percent per annum calculated on annual rates the way commercial banks do calculate the overdraft interests bank loans from the date of filing this suit until when the total sum shall be paid in full.

(8) THAT Il proprietors purported to have been entered in the land registers of the suit land from 22<sup>nd</sup> December 1986 are all declared to be trespassers, the entries in the land registers do be declared to be unconstitutional and null and void ab initio, revoked from the time they were entered in the land registers and the Plaintiffs in this suit do be re-registered as the sole proprietors at all material times from 22<sup>nd</sup> December 1986 to the date of the execution of these consents and preliminary decree which may have been drawn before the final decree.

(9) THAT the Director of Surveys, Provincial Surveyor, District Surveyor, the Chief Land

**Registrar, District Land Registrar Kilifi and the Commissioner of Lands do revoke and cancel all land Registers, index, maps and plans and all land registers drawn and written on or there after the 22<sup>nd</sup> December 1986 and register in all official documents the names of the Plaintiffs or as directed by the Plaintiff's advocates.**

**(10) THAT these consents and arithmetical certified correct amount by the Deputy Registrar together with any specific orders sought in the prayers of this suit do become together with the other said orders sought and also the orders granted through the interlocutory judgments part of decree to be finally drawn and executed against all the Defendants jointly and severally.**

**(11) THAT the final decree do incorporate these consents and prayers in this suit as set out in the interlocutory Judgment and Preliminary decree.”**

13. The 7<sup>th</sup> Defendant, Holburn Properties Limited was enjoined in this suit on 8<sup>th</sup> July 2013 by virtue of having been registered as the proprietor of Chembe/Kibabamshe/428 after the 1<sup>st</sup> Plaintiff's title deed was revoked by the 1<sup>st</sup> Defendant. The 7<sup>th</sup> Defendant filed its Defence on 12<sup>th</sup> August 2013.
14. However, the Plaintiffs withdrew the suit against the 7<sup>th</sup> Defendant and informed the court that they shall be pursuing the prayer for compensation.
15. The matter proceeded for hearing of the Plaintiffs' case on 14<sup>th</sup> October 2014, seventeen (17) years after it was filed in the High Court in Nairobi.

**The Plaintiffs' case:**

16. The 1<sup>st</sup> Plaintiff, PW1, informed the court that she has retired from the public service. It was the evidence of PW1 that she acquired parcels of land number Chembe/Kibabamshe 428 and Kilifi/Jimba 427 in 1979.
17. PW1 produced in evidence the original Land Certificate of Kilifi/Jimba/427 as PEXB1. PW1 informed the court that Land Certificate for Chembe Kibabamshe is being held by the National Bank of Kenya after she borrowed money using the said title as security.
18. PW1 stated that they entered into a consent with the Defendants on 18<sup>th</sup> February 2005 for compensation for the repossession of her land. PW1 informed the court that she was only interested in the compensation considering that suit properties are already registered in favour of other persons.
19. PW1 informed the court that she was relying on clauses 4,5,6,7,10 and 11 of the consent that she entered into with the Defendants on 18<sup>th</sup> February 2005. The consent was produced by PW1 as PEXB2.
20. It was the evidence of PW1 that in the consent, the Government agreed to compensate her for the land that it had unconstitutionally taken away from her.
21. PW1 stated that she engaged Interconsult Valuers Limited who valued the land and gave the current open market value for Chembe/Kibabamshe/428 as Kshs.86,000,000.
22. It was her evidence that the value of Kilifi/Jimba/427 as at 25<sup>th</sup> March 2014 was Kshs.35,000,000.
23. In cross examination, PW1 stated that the Government revoked her freehold title and converted the land into unalienated Government land. It was her evidence that she purchased the land from the locals after which the Land Certificates were issued to her.
24. According to PW1, the two suits properties were later on allocated to other people who are occupying them and have title deeds for them.
25. The valuer, PW3, informed the court that he visited the two suit properties on 21<sup>st</sup> February 2014 for the purposes of valuing them.
26. It was the evidence of PW3 that when he visited Kilifi/Jimba 427, he found the property was fully developed. He valued the land without the developments thereon at Kshs.39,000,000. He produced the valuation report as PEXB 4.
27. PW3 also produced the valuation report in respect of parcel of land number Chembe/Kibabamshe 428 as PEXB 3.

28. According to PW3, the value of Chembe/Kibabamshe as at 21<sup>st</sup> February 2014 was Kshs.86,000,000.
29. In cross examination, PW3 stated that he was unable to conduct an official search in respect to the two properties to ascertain the current registered owner.

**The Defendants' case:**

30. The 1<sup>st</sup> to 6<sup>th</sup> Defendants never filed a Defence in this matter.
31. Nonetheless, the matter was scheduled for Defence hearing on 9<sup>th</sup> February 2015. On that day, the Defendants' counsel informed the court that although Mr. Rabala, the advocate who signed the consent of 7<sup>th</sup> April 2003 was in court, he had not recorded his statement.
32. When the court directed that Mr. Rabala should testify, the Defendants' counsel stated that the evidence of Mr. Rabala will not be favourable to the Defence case. Counsel applied for adjournment to call another witness. The matter was then adjourned to 11<sup>th</sup> March 2015.
33. The Defence hearing could not proceed on 11<sup>th</sup> March, 2015 because Mr. Ngari, counsel for the Defendants, was said to be indisposed. Consequently, the court directed the matter to proceed for defence hearing on 20<sup>th</sup> March 2015.
34. On 20<sup>th</sup> March 2015, the Defendants' counsel closed his case without calling any witness.

**The Plaintiffs' submissions:**

35. The Plaintiffs' counsel submitted that the claim before the court is against the Government represented by the Attorney General.
36. Counsel submitted that on 7<sup>th</sup> April 2003 (sic), the Plaintiffs' advocates on record and the Litigation counsel for the Attorney General executed a lawful and valid consent which was filed in court on the same day. Counsel referred the court to the consent that was produced in evidence.
37. The Plaintiffs' counsel submitted that the Defendants admitted in the said consent that the suit properties were at all material times before 1<sup>st</sup> May 1963 private land under the sovereignty of the Sultan of Zanzibar pursuant to the Agreement between the Sultan of Zanzibar and Great Britain dated 14<sup>th</sup> December 1895.
38. It was submitted that the suit properties became Trust land under Kenya Order in Council 1963, Legal Notice No.245 of 1963, Second Schedule Sections 193, 198 and 199 and Kenya (Independence) Order in council in 1963 Legal Notice No. 718 of 1963, Second Schedule Section 208 and has remained as such since then.
39. Counsel submitted that the Commissioner of Lands circular letter number 113936/55 of 1986 and gazette notice number 2505 of 30<sup>th</sup> May 1986, which purported to cancel the Plaintiffs' title documents were all illegal, null and void, thus the current suit.
40. Having withdrawn the suit against the current registered owner(s) of the suit property, counsel submitted that the court should award to the Plaintiffs compensation as captured in paragraphs 4, 5, 6, 7, 10 and 11 of the consent and that the Defendants did not object to the valuation reports that were produced in this court which give the current open market value of the suit properties.
41. Counsel submitted that pursuant to the consent produced in this court, the costs that are to be awarded to the Plaintiffs should be 15% of the total compensation payable to the Plaintiffs plus interest at the rate of 14% per annum calculated on annual rates from the date of filing the suit.
42. The Plaintiffs' counsel submitted that according to the valuation reports, the open market value of Chembe/Kibabamshe/428 and Kilifi/Jimba 427 is Kshs.125,000,000/-.
43. In addition to an award of Kshs.205,000,000 as compensation, counsel submitted that the Plaintiffs are entitled to a whopping Kshs.663,974,396.64 being damages for non user of plot no.428 since 1988 to the year 2015 and Kshs.894,241,611.63 for plot no.428. The total payable damages for loss of user for the two plots, it was submitted, is Kshs.2,231,541,176.71.
44. In addition to the said figure of Kshs.2,231,541,176.71, counsel submitted that the Plaintiffs are entitled to exemplary damages which should be 5% of Kshs.2,231,541,176.71 pursuant to paragraph 6 of the consent.
45. The Plaintiffs' counsel finally submitted that the counsels who executed the consent on 7<sup>th</sup> April

2003 (sic) did so with the full knowledge of their respective principals and that this court should enforce the consent as it is.

### **The Defendants' submissions**

46. In brief submissions, the Defendant's counsel submitted that the 1<sup>st</sup> Plaintiff admitted in evidence that she was still the registered owner of Plot numbers 427 and 428.
47. On the issue of the consent, the Defendants' counsel submitted that "a consent" is supposed to finalise a suit as per the agreed terms; that the court became functus officio from the date the "purported consent" was signed and that any proceedings thereafter are of no legal consequences.
48. The Defendants' counsel submitted that the record does not show that the consent was ever adopted as an order of the court and does not therefore have any legal effect and that because the said consent has no legal effect, it was submitted, the suit should be dismissed.

### **Analysis and findings:**

49. The issues for determination in this matter are as follows:

- (a) Whether the consent of 8<sup>th</sup> February 2005 between the Plaintiffs' advocate and the Defendants' Litigation counsel binds the Defendants.**
- (b) Whether the consent of 8<sup>th</sup> February 2005 amounted to admission of liability by the Defendants.**
- (c) Whether the Plaintiffs are entitled to damages and if so the quantum thereof.**
- (d) The payable costs.**

50. In the Amended Complaint, it was averred that the 1<sup>st</sup> Plaintiff was at all material times the registered proprietor of land known as Chembe/Kibabamshe/428 and Kilifi Jimba/427 and that she was the first registered owner of the suit properties within the meaning of Sections 14 and 143 of the Registered Land Act (repealed). The 2<sup>nd</sup> Plaintiff, it was averred, is an interested party by way of having purchased interest in the land.
51. It is the Plaintiff's case that on 22<sup>nd</sup> December 1986, the 2<sup>nd</sup> Defendant, acting unconstitutionally and illegally purported to cancel the 1<sup>st</sup> Plaintiff's registration as proprietor of the aforesaid parcels of land and purported to register the Government of the Republic of Kenya as the proprietor of the said parcels of land, which, according to the Plaintiffs, the Defendants have been administering as Government Land.
52. The 1<sup>st</sup> Plaintiff has averred in the Amended Complaint that the registration of the three parcels of land in her name was a first registration having bought the same from the locals whose undisputed customary law land rights had been established through the land adjudication process.
53. Consequently, it was averred, the Defendants could only acquire the suit properties by either setting it apart or compulsorily acquiring the land for the Government pursuant to the provisions of Sections 75 and 118 of the repealed Constitution.
54. The contention by the Plaintiffs in the Complaint is that the suit properties are situated within Gede Special Settlement area which was gazetted as a special settlement area in 1962 and that they are within the Boundary Plan No. 179 which appears in the 1<sup>st</sup> Schedule of the Trust Land Ordinance Cap 288 (1962 Ed); that they purchased the suit land from the locals who were declared lawful title holders of the land during the adjudication process between 1974-1981 and that the 1<sup>st</sup> Plaintiff was subsequently registered as the first proprietors of the said land.
55. According to the Plaintiff's averment, the Commissioner of Lands and his officers took part in the investigations which took place between December, 1977 and April 1978 as a result of objections that were raised by the then District Commissioner, Kilifi.
56. According to the Complaint, the investigations that were undertaken in January and February, 1978 concluded that the area was Trust land and the adjudication process was allowed to proceed and

was finalised. The Plaintiffs have averred that neither the Commissioner of Lands, nor any other Government Officer appealed against the decision of the Land Adjudication Officer of February, 1978 which was made pursuant to the provisions of Section 26 of the Land Adjudication Act.

57. The Plaintiffs' prayers in the Amended Plaint are as follows:

**(a) A declaration that the area where the suit land Chembe/Kibabamshe/428 and Kilifi/Jimba 427 are situated has at all material times been Trust land before adjudication and registration under the Registered Land Act Cap.300 of Laws of Kenya took place on 30/5/1978.**

**(b) A declaration that the purported cancellation of the Plaintiff's titles and subsequent purported transfer of the Plaintiffs properties titles Chembe/Kibabamshe/428 and Kilifi/Jimba 427 to the Government of Kenya on 22/12/1986 was illegal, unconstitutional, null and void ab initio.**

**(c) A declaration that all transactions in respect of the suit land Kilifi/Jimba/427 and Chembe/Kibabamshe/428 from 22/12/1986 are illegal and null and void ab initio.**

**(d) An order directed to the Land Registrar Kilifi the 2<sup>nd</sup> Defendant to rectify the Land Register by canceling all registration from 22/12/1986, and re-registering the 1<sup>st</sup> Plaintiff as the sole proprietor of the suit lands Chembe/Kibabamshe428 and Kilifi/Jimba 427 and from the time they were registered under the Registered land Act cap.300.**

**(e) The Plaintiffs to be paid general and punitive or exemplary damages quantum to be determined by the Court and be paid interest at the rate of bank commercial rate of interest of 35% of the said sum of damages from 22/12/1986 to the date when all money shall be paid in full to the Plaintiffs.**

**(f) Costs of this suit and interest of damages at Court rates.**

**(g) Any other relief which this Honourable Court may find justified in the circumstances.**

58. On 8<sup>th</sup> February, 2005, a long consent between the Plaintiffs' advocate and "M/S D.O. Raballa, the litigation counsel for the Honourable Attorney General for all the Defendants" was filed in this court.

59. In the consent, the Attorney General, on his own behalf and on behalf of the other five Defendants, conceded to all the allegations raised by the Plaintiffs in the Amended Plaint.

60. The opening paragraphs of the consent shows that the same was entered into as a result of the orders of the court in Nairobi Judicial Review Miscellaneous Application No. 185 of 1987, Nairobi High Court Miscellaneous Application No 730 of 1989 and Nairobi HCCC No. 2387 of 1987.

61. The penultimate paragraphs of the consent provided as follows:

**"IT IS HEREBY AGREED AND CONSENTED BY LITIGATION COUNSEL for all and on behalf of the Honourable Attorney and on behalf of officers of the Government of Kenya (who are Defendants in this suit and M/S S.K. Ritho and Company Advocates for and on behalf of the Plaintiff as follows:-**

**(1) THAT all researches in land from 14<sup>th</sup> December 1895 to the day of signing this consent the area of the former Protectorate of Kenya was never Crown Land or Government Land and any claim by the Commissioner of Lands or any officer of the Ministry of Lands and Settlement who makes such claim the claim has no support of any Constitutional legal law in the form of Kenya Order in Council or any Provisions of Kenya Constitution and this has been confirmed by the Court in HCCC Miscellaneous Application No.185 of 1987, 730 of 1989 and HCCC No.2387 of 1987 and the research conducted by the Director of Survey has**

confirmed that between 1895 and present day there has never been Crown or Government Land within the former Protectorate of Kenya.

(2) THAT the suit lands in this suit were at all material times before 31<sup>st</sup> May 1963 private land under the sovereignty of the Sultan of Zanzibar in accordance with the Agreement between the Sultan of Zanzibar and Great Britain Crown dated 14<sup>th</sup> December 1895, Kenya (annexation) Order in Council 1920, Kenya Native Areas Order in Council 1939 and from 1<sup>st</sup> June 1963 to present day the same area did become Trust Land under Kenya Order in Council 1963 L.N.245 of 1963 Second Schedule Section 193,198 and 199 Kenya (Independence) Order in Council 1963 L.N.718 of 1963 Second Schedule Section 208 and since then has been at all material times Trust Land.

(3) THAT the claim by the Commissioner of Lands under the Commissioner of Land circular Letter No. 1139336/55 of 1986 and Gazette Notice No.2505 of 30<sup>th</sup> May 1986 were all unconstitutional and illegal claims and null and void ab initio and this legal status was confirmed by High Court in H.C.C.C Miscellaneous Application No. 185 of 1987 Nairobi, Miscellaneous Application No.730 of 1989 Nairobi and H.C.C.C No.2387 of 1987 Nairobi which have declared that the area of the former protectorate of Kenya has at all material times been Trust Land and the adjudication programmes were all carried out constitutionally and legally.

(4) THAT the former Commissioner of Lands M/S James Raymond Njenga as he was then circular letter NO.113936/55 of 28<sup>th</sup> May 1986 and Kenya Official Gazette No.2505 of 30<sup>th</sup> May 1986 were declared in HCCC Miscellaneous Application No. 730 of 1989 unconstitutional, illegal and null and void ab initio and the Commissioner of Land is liable for damages caused by the unconstitutional, illegal and null and void ab-initio circular letter No.113936/55 of 28<sup>th</sup> May 1986 and Gazette Notice No.2505 of 1986. The compensation do be calculated based on accepted principles in Judgments, rulings and orders of the High Court and Civil Appeals and in accordance with Professional valuers principles of market values of the suit lands which as at the date for these consents is agreed and consented to be Kenya Shillings Five Million (Kshs.5,000,000) per acre the actual payable compensation for non-use of the land to be average overdraft Commercial Banks rates of interest between 1987 and 2004 which is about fifteen percent 15% per annum calculated on annual rates the way commercial banks do calculate their interests and once they are calculated the calculation do be approved arithmetically only by the Deputy Registrar High court after which without any further reference to the Court the necessary decree do be drawn based on the said arithmetical calculations plus interest of Bank overdraft rates from the date of these consents do be issued and it do be executed as such, without any further reference to court against all the Defendants jointly and severally.

(5) THAT where there are development programmes the compensation payable do be based on the difference of cost of construction on 22<sup>nd</sup> December 1986 and 31<sup>st</sup> December 2004 plus loss of revenue from the development based on average interest at bank overdraft rates of 15% per annum of the market value of the land plus development value in 1986 calculated on annual rates from 22<sup>nd</sup> December 1986 the date the Plaintiffs titles were cancelled by the Commissioner of Lands until when the total sum shall be paid in full. The arithmetic details based on professional valuers, architects and quantity surveyors estimates once arithmetically confirmed by the Deputy Registrar High Court to be correct,they do become the Court Decree without any further reference to the court.

(6) THAT the Commissioner of Lands do be ordered to pay exemplary damages based on 5% of the total sum of damages agreed upon during the negotiations or quantified sum payable in accordance with the professional assessments as ordered by the Honourable Court do be paid to the Plaintiffs together with compensation referred to herein before within the shortest time possible and not latter than six months from the date of service of the final

**decree and if full payment would not be made to the Plaintiffs then the Plaintiffs do apply for the orders of Mandamus to compel the Accounting Officer of the Ministry of Lands and Settlement, Commissioner of Lands and the other Defendants to pay the Decretal sum jointly and severally without any further delay and within a set out time table failing which execution process do be commenced against the Defendants jointly and severally.**

**(7) THAT it is consented that the issues involved in this suit are very complicated and the relevant laws are also of not easy interpretation and for this reason it is agreed and consented that the costs awarded to the Plaintiff do be fifteen 15% percent of the total compensation payable to the Plaintiffs plus interest at the rate of fourteen 14% percent per annum calculated on annual rates the way commercial banks do calculate the overdraft interests bank loans from the date of filing this suit until when the total sum shall be paid in full.**

**(8) THAT Il proprietors purported to have been entered in the land registers of the suit land from 22<sup>nd</sup> December 1986 are all declared to be trespassers, the entries in the land registers do be declared to be unconstitutional and null and void ab initio, revoked from the time they were entered in the land registers and the Plaintiffs in this suit do be re-registered as the sole proprietors at all material times from 22<sup>nd</sup> December 1986 to the date of the execution of these consents and preliminary decree which may have been drawn before the final decree.**

**(9) THAT the Director of Surveys, Provincial Surveyor, District Surveyor, the Chief Land Registrar, District Land Registrar Kilifi and the Commissioner of Lands do revoke and cancell all land Registers, index, maps and plans and all land registers drawn and written on or there after the 22<sup>nd</sup> December 1986 and register in all official documents the names of the Plaintiffs or as directed by the Plaintiff's advocates.**

**(10) THAT these consents and arithmetical certified correct amount by the Deputy Registrar together with any specific orders sought in the prayers of this suit do become together with the other said orders sought and also the orders granted through the interlocutory judgments part of decree to be finally drawn and executed against all the Defendants jointly and severally.**

**(11) THAT the final decree do incorporate these consents and prayers in this suit as set out in the interlocutory Judgment and Preliminary decree.”**

62. That consent was produced by PW1 as PEXB2. The record shows that the consent between the Plaintiffs and the Defendants was filed in this court on 18<sup>th</sup> February 2005, the same day it was signed by the advocates who were then on record.

63. The consent dated 18<sup>th</sup> February 2005 has never been set aside, varied or appealed against.

64. Although Mr. Rabala, the Litigation counsel who signed the consent on behalf of the Attorney General was in court when the matter came up for Defence hearing, counsel fro the Defendants informed this court that his evidence was not favourable to the Defendants. He therefore did not call him as a witness in this matter.

65. The Defendants' counsel has submitted that the said consent was never adopted as an order of the court, and that consequently the same is invalid.

66. The Plaintiffs' case, as I understand it, is not that the consent that was signed on 18<sup>th</sup> February 2005 and filed in court on the same day is an order of the court. What I understand the Plaintiffs to be saying is that the Defendants, by authorizing their counsel to sign the consent, were bound by the contents of the consent.

67. What the Plaintiffs want is for the court to enforce the terms of the consent, which is as good as a contract, between themselves and the Defendants.

68. Having not denied that indeed a consent between the Plaintiffs and the Defendants was executed by the parties' advocates, the Defendants cannot run away from the consent just because it was not adopted by the court as an order.

69. The Defendants had an opportunity to challenge the authority of the Litigation Counsel who

signed the consent, Mr. Rabala, had, when he presented himself to court to testify on 9<sup>th</sup> February 2015. The Defendants' advocate however declined to put Mr. Rabala in the witness box to enable him testify on the circumstances under which he signed the consent on behalf of the Attorney General and the other Defendants.

70. The only inference that this court can draw for the refusal by the Defendants to call Mr. Rabala to testify is because Mr. Rabala signed the consent of 18<sup>th</sup> February 2005 with the authority of his Principals, that is, the Attorney General and the other Defendants.

71. The Black Law Dictionary, 9<sup>th</sup> edition, has defined “a consent” as follows:

**“Agreement, approval or permission as to some act or purpose, given voluntarily by a competent person; legally effective assent.”**

72. Until it is set aside or varied, the consent that was entered into between the Plaintiffs advocate and the Defendants' advocate, on instructions from their principals, is binding on both parties, notwithstanding that the same was not adopted as an order of the court.

73. There is no evidence before me to show that the Defendants did not instruct Mr. Rabala to sign the consent of 7<sup>th</sup> April 2003. In the case of **Kenya Commercial Bank Limited Vs Benjoh Amdgamated Limited (1998) e KLR**, the Court of Appeal quoted with approval the **Supreme Court Practice (1976) (Vol.2) paragraph 2013 page 620** the extent of authority of a solicitor to compromise a suit which states as follows:

**“Authority of solicitor – a solicitor has a general authority to compromise on behalf of his client, if he acts bona fide and not contrary to express negative directions; and it would seem that a solicitor acting as agent for the principal solicitor has the same power (Re-Newman, [1903] 1ch pp 817,818; Little Vs Spreadbrury, [1901]2 KB658). No limitation of the implied authority avails the client as against the other side unless such limitation has been brought to their notice-see Welsh Vs Roe (1918-9) ALLER 620.”**

74. In the absence of evidence to show that the litigation counsel who was acting for the Defendants did not act bona fide or that he was not acting on the express instructions of the Defendants, and considering that the Defendants have never attempted to set aside or vary the consent of 18<sup>th</sup> February 2005, I find and hold that the said consent is binding on the Defendants, and by extension the Government of Kenya.

75. As I have already stated, the consent of 18<sup>th</sup> February 2005 was signed by the parties principally because the High Court had stated in numerous other cases that the cancellation by the Commissioner of Lands of the title deeds falling within the 10 mile coastal strip in 1986 was unconstitutional, null and void.

76. The decisions which were quoted in the said consent are Nairobi Civil Miscellaneous Application No. 185 of 1987, 730 of 1989 and Nairobi HCCC No. 2387 of 1987.

77. In **Nairobi Civil Miscellaneous Application No. 730 of 1989, Helena Kithinji Vs The Attorney General, Rawal J**, as she then was, held as follows:

**“In all respect the actions of the Commissioner of Lands of cancelling the titles of the applicant without hearing the applicant is illegal, invalid and unconstitutional and has to be set aside....i also declare that she has been deprived of the proprietorship of the land registered in her name in pursuance of the circular which is unconstitutional and in flagrant violation of the rules of natural justice. I therefore decree that she is still the registered owner of titles No. Kilifi/Madeteni/410 and Kilifi Madeteni 414.”**

78. Indeed, after the filing of the consent in this matter, Ang'awa J in **Nairobi HCCC No. 3106 of 1997, Regina Ngaku & Others Vs Commissioner of Lands & 4 Others** held as follows:

**“36. The Commissioner of Lands cancelled titles within Kilifi/Chembe/Kibabamshe despite parties having held title for the same area.”**

**37. This cancellation of title by the Commissioner of Lands in 1986 has already been determined by Rawal J and the position therefore lies that the cancellation was null and void.**

**38. The consent (entered into by the state and S. K. Ritho) has admitted the material facts herein and the government is accordingly bound by it.**

79. I will not, in this Judgment, state whether I agree with the decisions of Angawa J and Rawal J (as she was then) in the above matters or the decisions of the other judges of the High Court on the constitutionality or otherwise of the cancellation of the title documents by the Commissioner of Lands vide his circular letter no.113936/55 of 1986 and gazette notice number 2505 of 30<sup>th</sup> May, 1986.
80. All I can state in this particular matter is that at paragraph 3 of the consent of 18<sup>th</sup> February 2005, the State agreed with the decisions of the High Court that the cancellation of the Plaintiffs title deeds in respect to the suit properties in 1986 was unconstitutional, null and void ab initio.
81. The State also agreed at paragraph 4 of the consent of 18<sup>th</sup> February 2005 to compensate the people whose titles were revoked in 1986 by the Commissioner of Lands “in accordance with professional valuers principles of market values”. The State was also supposed to compensate the Plaintiffs for non use of the land.
82. The consent further provided that the Commissioner of Lands was to pay “exemplary damages based on 5% of the total sum of damages agreed upon during the negotiation or quantified sum payable in accordance with the professional assessment as ordered by the court.”
83. Paragraph 7 of the consent further provided that the costs awarded to the Plaintiffs was to be 15% of the total compensation payable to the Plaintiffs plus interest at the rate of 14% from the date of filing the suit until when the total sum shall be paid in full.
84. The Defendants having admitted liability and considering that the Defendants did not call witnesses to rebut the Plaintiffs' claim, this court can only assess the payable damages in accordance with the consent of 18<sup>th</sup> February 2005 and the rules of evidence.
85. The 1<sup>st</sup> Plaintiff, PW1, informed the court that she was registered as the proprietors of Chembe/Kibabamshe/428 and Kilifi/Jimba/427
86. According to PW1, the said titles were recalled by the Government and revoked in 1986 on the basis that the land in question was Government Land and not Trust land. The Government, according to PW1, proceeded to revoke titles for plot numbers 427 and 428 and proceeded to allocate the said land to other people.
87. PW1 informed the court that he was only pursuing compensation for the two parcels of land in accordance with the consent of 18<sup>th</sup> February 2005.
88. PW1 produced in evidence the copies of the original Land Certificate for parcel of land number Chembe Kibabamshe/428 issued in her name. For the title deed for Kilifi/Jimba/427, PW1 informed court that the same is being held by National Bank despite the land having been allocated to someone else.
89. According to Interconsult Valuers Limited, the current value of parcel of land numbers 427 and 428 is Kshs.39,000,000 and Kshs.86,000,000 respectively.
90. Mr. Gitonga Akotha of Interconsult Valuers Limited, PW2, produced the valuation reports for the two parcels of land.
91. PW2 stated that the said land was being developed with some permanent structures. He noted in his report that similar properties are in high demand in the neighbourhood and due to very low supply to the market, the value is very high.
92. The two valuation reports were produced as PEXB 2 a and b.
93. The Defendants did not produce any valuation reports to rebut the evidence of PW2. In fact, the Defendants did not adduce any evidence in this matter.
94. The only damages which have been proved pursuant to the consent of 7<sup>th</sup> April 2003 is the current open market value of the two suit properties.
95. Although the Plaintiffs' advocate submitted that the Plaintiffs are also entitled to Kshs.2,231,541,780.07 for loss of business (non-user of land), no evidence was produced to show how the Plaintiffs intended to use the property after the same was allocated to them. Consequently, this court declines to award the Plaintiffs the said amount.

96. Before I make my final orders, I would like to state that where an individual is issued with a title document by the government and the government revokes that title without following due process, the individual whose title has been unlawfully revoked or cancelled is entitled to either get his land back or to be compensated monetarily, with or without the consent of the Government.
97. I say so because Article 40 (1) and (3) of the Constitution gives every person the right to acquire and own property and the State cannot deprive such a person of his property without prompt payment for it.
98. Section 144 of the Registered Land Act (repealed) and Section 81 of the Land Registration Act compliments Article 40 of the Constitution. According to those Sections, any person suffering damages by reason of any rectification of the register or an error in the register is entitled to indemnity unless it is shown that the person has caused or substantially contributed to the damage by fraud or negligence.
99. In this matter, the Defendants did not adduce evidence to rebut the 1<sup>st</sup> Plaintiff's evidence that she was registered as proprietor of the suit properties in 1978 before the said titles were revoked or cancelled by the 1<sup>st</sup> Defendant in 1986.
100. The Defendants did not also adduce any evidence to show that the 1<sup>st</sup> Plaintiff acquired the suit properties unlawfully or fraudulently.
101. Consequently, even without the consent of 18<sup>th</sup> February 2005, the Plaintiffs would still be entitled to indemnity, being the value of the suit properties considering that the said properties have since been allocated to other people after the revocation of the titles.
102. Having proved that they are entitled to compensation in respect to the two suit properties, being the current market value of the suit properties, to the tune of Kshs.125,000,000, I find and hold that the Plaintiffs are also entitled to exemplary damages of Kshs.6,240,000 being the 5% of the total sum of the quantified damages (Kshs.125,000,000) pursuant to paragraph 6 of the consent dated 18<sup>th</sup> February, 2005. The 1<sup>st</sup> Plaintiff is also entitled to costs of the suit being 15% of the total compensation as provided for under clause 7 of the consent, the total compensation being Kshs.125,000,000.
103. For the foregoing reasons, I allow the Plaintiffs' Amended Complaint dated 25<sup>th</sup> June, 1998 in the following terms;

**(a) The Defendants, or their successors in office, to pay to the Plaintiff compensation in respect of parcels of land number Chembe/Kibabamshe/428 and Kilifi/Jimba 427 Kshs.125,000,000 being the market value of the said parcels of land.**

**(b) The Defendants, or their successors in office, to pay to the 1<sup>st</sup> Plaintiff exemplary damages of Kshs.6,250,000, being 5% of the quantified damages.**

**(c) The Defendants, or their successors in office, to pay to the 1<sup>st</sup> Plaintiff costs of the suit amounting to Kshs.19,687,500, being 15% of the quantified damages.**

**(d) The Defendants to pay to the 1<sup>st</sup> Plaintiff interest on (a), (b) and (c) above at the rate of 14% per annum from the date of this Judgment until payment in full.**

Dated and delivered in Malindi this 25<sup>th</sup> day of September 2015.

**O. A. Angote**

**Judge**