IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: WARSAME, MUSINGA & MURGOR, JJ.A)

CIVIL APPEAL NO. 150 OF 2019

BETWEEN

DINA MANAGEMENT LIMITED.....APPELLANT

AND

COUNTY GOVERNMENT OF MOMBASA.....1ST RESPONDENT

THE CHIEF LAND REGISTRAR.....2ND RESPONDENT

THE LAND REGISTRAR MOMBASA.....3RD RESPONDENT

THE DIRECTOR OF SURVEYS.....4TH RESPONDENT

THE DIRECTOR, PHYSICAL PLANNING.....5TH RESPONDENT

THE ATTORNEY GENERAL.....6TH RESPONDENT

(Being an appeal from the judgment and decree of the Environment and Land Court

of Kenya at Mombasa (Lady Justice A. Omollo) dated the 10th September 2019 and delivered on

19th September 2019) in ELC* Petition No.*8 OF 2017as consolidated with ELC* Petition No.*8 OF 2017)

****

JUDGMENT OF THE COURT

Background

1. The appellant is aggrieved by the whole decision of A. Omollo, J. dated the 10th September 2019 and delivered by Yano, J. on 19th September 2019. The appellant filed a petition before the Environment and Land Court (ELC) at Mombasa against the County Government of Mombasa, the 1st respondent herein, in respect of plot number MN/I/6053 situated on Nyali Beach (the suit property). The appellant's case was that it purchased the suit property from Bawazir & Company (1993) Ltd and that sometime in September 2017, the 1st respondent invaded the suit property, broke a stone wall, demolished the entire perimeter wall facing the beach front and flattened the property, ostensibly to create a thoroughfare through the property to the beach, and thereafter flattened the suit property to be at the same level with the beach. Aggrieved by these actions, the appellant filed a petition against the 1st respondent for violating the appellant's rights under **Articles 27(1) & (2), 29** and **47(1) & (2)** of the Constitution of Kenya, 2010, (The Constitution). The petitioner sought to assert its ownership of the suit property, declare the actions of the 1st respondent as unconstitutional and generally restore the property to its initial state by compelling the 1st respondent to meet the costs of reversing its actions and thereafter be barred from interfering with the appellant's possession and ownership rights over the suit property.

2. In addition to opposing the petition, the 1st respondent filed a separate petition against the appellant and further introduced the 2nd to 6th respondents. It is the 1st respondent's case that the suit property was designated as an 'open space' in 1971 within the limits of the high and low water marks of the Indian Ocean, and any conversion of the space to private property was illegal and unlawful as none of the mandatory statutory procedures were followed. The 1st respondent pleaded that the conversion to private property contravened **Article 62** of the Constitution and that **Article 40(6)** of the Constitution only protects lawfully acquired property. The 1st respondent therefore sought a

declaration that the suit property is public utility land that was never available for alienation or use for private personal purposes. Specifically, the 1st respondent sought:

> ***a) A declaration that all that open public utility space unlawfully delineated as L.R MN/I/6053 is unalienable public utility land and was never at any time available for alienation for use for private personal purposes;***
>
> ***b) A declaration that the property delineated as L.R MN/1/6053, Grant No. 19905 is an open public utility parcel of land forming part of beach property within the high and low water marks of the Indian Ocean;***
>
> ***c) A declaration that the issuance of Grant No. 19905 over L.R No. MN/I/6053 and its subsequent transfer and/or acquisition was from inception null and void;***
>
> ***d) A mandatory order of injunction compelling the 2nd Respondent, Chief Land Registrar, to revoke and/or cancel and expunge the Grant, Title and any other instrument of title issued in respect of L.R MN/1/6053 to the appellant or any other person;***
>
> ***e) A prohibitory order restraining the appellant herein and the 2nd to 5th respondents herein from dealing in any way with all that parcel known as L.R MN/1/6053 in any manner whatsoever other than that of an open public utility plot or public beach;***
>
> ***f) An eviction order against the appellant directing her to vacate and give up vacant possession of the suit property;***
>
> ***g) An order to the 4th respondent herein, the Director of Surveys, to cancel and expunge all survey plans and survey records over the suit property that originated after 26th July 1971; and***
>
> ***h) An order for general damages for trespass.***

3. The 6th respondent filed an affidavit in response to the 1st respondent's petition. The affidavit was sworn by Gordon Odeka Ochieng, a Senior Assistant Director of Land Administration in the Ministry of Lands and Physical Planning. He deponed that the Commissioner of Lands allotted an unsurveyed residential plot to H.E Daniel Toroitich Arap Moi on 23rd November 1989 in compliance with section 9 of the Government Lands Act (*repealed*). On the strength of the allotment, the plot was then surveyed by the Director of Surveys who submitted a deed plan to the Commissioner of Lands and a grant of title was ultimately processed in his favour. Prior to the allocation, the records held in their Survey Office indicated that the suit property was an open space and there was no document to support the allocation of the suit property to H.E. Daniel Toroitich Arap Moi, which documents would include an application letter and a Part Development Plan (PDP) to show the location of the suit property in relation to the neighbouring parcels.

4. The two petitions were consolidated, heard and determined together. The petitioner framed five questions which formed the basis upon which the learned judge made her determination. These are: whether the suit property was a public utility and whether there is a public access road through it to the beach; whether the plot lies within 60 metres of the high water mark; whether illegalities were committed by those responsible for alienating the plot, and whether the petitioners should suffer the faults of those parties (if any); whether the 1st respondent's suit was *res judicata* and/or an abuse of court process; whether the suit was time barred by limitation of action; and whether the petitioner is the lawful owner of the suit property.

5. From her analysis, the learned judge made three conclusions. First, that the alienation of the open space was done unprocedurally to the extent of blocking existing access to the sea and unlawfully for lack of an approved PDP by the Director of Physical Planning and Central/Regional Authority in compliance with the provisions of the Land Planning Act, Cap. 303 (repealed by the Physical Planning Act 286). Secondly, that there existed an access road through the open space, later alienated as the suit property through to the sea. The said road was thus blocked by the creation of the suit property in disregard to the provisions of **section 85** of the repealed **Government Lands Act.** The ELC thus found that the 1st respondent acted within the law in removing the wall which blocked the said access road. The judge therefore dismissed the appellant's petition and partially allowed the 1st respondent's petition, effectively nullifying the title to the suit property and ordering eviction of the appellant from the same.

6. Dissatisfied with this decision, the appellant preferred this appeal on twenty grounds set out in her memorandum of appeal. These grounds were reduced to ten in the appellant's written submissions and were ably compressed at the oral highlighting of the appeal by its counsel. The 1st respondent filed its Notice of Grounds for affirming the decision and the 2nd to 6th respondents filed a cross appeal. In addition, an application dated 10th July 2021 was filed before this Court seeking joinder of the National Land Commission as an interested party on the grounds that the substratum of the petitions and judgment by the ELC fell within the Commission's primary mandate to manage and administer public land on behalf of the National and County Governments. The 1st respondent on the other hand filed an application under **rules 42** and **45** of this Court's Rules seeking to strike out the said application by the National Land Commission on the grounds that it was not lodged in the registry.

7. All parties filed written submissions in support of the positions advanced. The parties through their respective counsel highlighted their submissions orally before us. Prof. Githu Muigai, senior counsel, teaming up with Mr. K'Bahati appeared for the appellant, Mr. Wachira, Principal Litigation Counsel, appeared on behalf of the 2nd to 6th respondents and Mr. Buti appeared for the 1st respondent. The parties reiterated their arguments as had been made before the ELC and as contained in their written submissions both before the trial court and before this Court.

8. Prof. Muigai, urging us to set aside the judgment by the ELC, submitted that the trial judge made a fundamental error in her finding by contradicting the judgment of Mukunya, J. in a matter involving the suit property, which had settled the legality of the suit property. Learned senior counsel argued that Mukunya, J. in that case had visited the locus in quo and found that the suit property was not riparian land yet the trial judge in this instance had not visited the suit property. Counsel added that the applicable law on part development plan was **part IV** and **section 7** of the **Land Planning Act**.

9. Mr. Wachira supported the allotment that was made to the former President H. E. Daniel Toroitich arap Moi. arguing that it was lawful and procedural. He also argued the cross appeal by submitting that the Constitution does not support the settlement of this kind of dispute by the court as it falls under the Inter-Governmental Relations Act which sets out legal mechanisms that ought to be followed.

10. Mr Buti submitted that the suit property was trust land and that there was no document supporting any allotment that had been done. Accordingly, the land vested in the County Council of the respective area and such land was not government land available for alienation and any alienation contravened **section 6** of the **Trust Land Act**. He queried the surveys that were done over the property based on verbal instructions from unidentified people. Relying on the survey map of 1971, he submitted that the map shows that the road leads to an open space and no road can be closed without involvement of a proper competent authority. His position was that even if the suit property was a grant, the appropriate modalities were not followed. On limitation under **section 41, 42** and **43** of the **Limitation of Actions Act**, he argued that trust land or grant of land cannot limit such an action.

11. In reply, Mr. K'Bahati maintained that the property was not trust land; that the 1st respondent had not pleaded that the suit property was trust land; and that the issue was introduced during submissions, thus denying the appellant a chance to respond on it. He submitted that there was no PDP or approved scheme as it was not a requirement. In addition, that there was no requirement that any survey should not be conducted through verbal instructions. Finally, he submitted that the title for the suit property was issued under **section 23(1)** of the **Registration of Titles Act** (now repealed) and the appellant was the third registered owner who could not have known the history of the title. To that end, **section 26** of the repealed Act is inapplicable.

Issues for determination

12. This Court derives its appellate jurisdiction from **Article 164(3)** of the Constitution and **section 3(1)** of the Appellate Jurisdiction Act to hear appeals from the High Court and any other Court or Tribunal as prescribed by an Act of Parliament in cases in which an appeal lies to the Court. **Section 16** of the Environment and Land Court Act provides that appeals from that court shall lie to this Court against any judgment, award, order or decree issued by the court in accordance with **Article 164(3)** of the Constitution. This being a first appeal, we are obliged to re-appraise the evidence and draw inferences of fact. This is the import of **rule 29(1)(a)** of this Court's Rules. In doing so, we cannot interfere with any exercise of judicial discretion involved unless we are satisfied that the judge misdirected herself in some matter and as a result arrived at a wrong decision, or if it is manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice by such wrong exercise.

13. Based on the perusal of the record and pleadings filed herein, the following are the issues for our determination:

a) Whether the appeal relates to an inter-governmental dispute and therefore beyond the jurisdiction of the Court;

b) Whether the dispute is *res judicata;*

c) Whether the dispute is statute barred under the Limitation of Actions Act;

d) What is the nature of the suit property, including the road leading to the property?

e) Whether the title to the suit property was lawfully acquired;

f) Whether the appellant is an innocent purchaser for value without notice; and

g) What remedies are appropriate under the circumstances?

In considering these issues, we have regard to the appellant's contention that the trial judge failed to properly consider the evidence and submissions before her.

Preliminary matters

14. Before delving into the appeal, some issues need to be dispensed with at this juncture. By an order of this Court made on 27th July 2020, the appeal was taken out of the hearing list to enable the National Land Commission to canvass its application for joinder as an intended interested party. The Court also directed the appellant to avail a legible copy of the judgment appealed from, and further directed that any preliminary objections be taken up during the hearing of the substantive appeal. However, from the record, it is not clear whether the application for joinder was canvassed or the soft copy of the judgment availed by the appellant, and the appellant did not make it any easier when its counsel opted not to make any further reference to our previous orders.

15. During the hearing, we also noted that there was no appearance on behalf of the National Land Commission, and none of the parties who appeared before us made any reference to our earlier directions. It is against this background that we have considered the application alongside the opposition by the 1st respondent. On the face of it, it is apparent that as the 1st respondent pointed out, there is no compliance with rules 45(1) and 42 of this Court's Rules. That was not rebutted. Since the application was not canvassed, we would say no more about it. Besides, the applicant only raised questions in its application, which it sought to argue but no arguments were eventually made for us to consider.

16. Back to the issues as we have framed, we note that the first three may have the effect of determining the suit at a preliminary stage. We therefore proceed to address them sequentially.

17. On the first issue, the same was raised in the cross appeal. The cross appellant challenges the court's jurisdiction over the dispute on

account of it being in the nature of an Inter-Governmental relations dispute that ought to be dealt with as provided for under **Articles 6, 159(c)** and **189 (3)** and **(4)** of the Constitution, as read with **section 30** to **35** of the Inter-governmental Relations Act No.2 of 2012. While it is framed as a ground of appeal, its effect, if upheld, is in the nature of a preliminary objection in so far as it challenges our jurisdiction to hear and determine the matter.

18. It is trite that whenever a jurisdictional challenge is raised, the same should be dealt with pronto as 'jurisdiction is everything'. At the outset, we note that this issue was never raised before the trial court and is therefore not part of the decision subject to this appeal. This does not by any means preclude the issue from being raised at any stage including at the appellate stage. The legal jurisprudence on jurisdiction is that it can only be conferred by the Constitution or Statute, the absence of which incapacitates the court.

19. What we understand the cross appellant to be stating is that this Court does not have jurisdiction, as an appellate court, to hear and determine this matter and not the ELC. This is notwithstanding the fact that the issue was never raised or canvassed by any of the parties, especially the cross appellant, before the ELC. This Court's jurisdiction is derived from **Article 164(3)** of the Constitution which includes hearing of appeals from the High Court and any other courts as prescribed by an Act of Parliament. As stated before, issues of jurisdiction need not have transcended through the appellate hierarchy as they can be dealt with at any time, even if at the first instance court they were not raised.

20. As stated above, **section 16** of the **Environment and Land Court Act** grants this Court unlimited jurisdiction to hear and determine appeals from the ELC without exception. The challenge to our jurisdiction is not in this respect. The germane issue for our disposal is whether indeed the dispute can only be determined as an inter-governmental dispute.

21. From the record, this dispute arose at the appellant's instance based on the activities of the 1st respondent on the suit property. In response, the 1st respondent filed another petition through which the 2nd to 6th respondents were introduced. The mere introduction of the 2nd to 6th respondents by the 1st respondent does not, in our view, convert the dispute into an inter government dispute. This is because while the two levels of government are involved in the dispute, the ultimate objective of the dispute is to determine the status of the suit property as against the appellant who had moved to court to assert its ownership. Any issues arising and in contention between the two level of governments in this matter are, in our view incidental to that main issue in dispute. The test for determining whether the matter is an inter-governmental dispute for purposes of application of Inter-Governmental Relations Act is not simply to look at the parties to the dispute but the nature of the claim. Rendering the matter to be an inter-governmental dispute will automatically exclude the appellant as it is not a party to any of the levels of government contemplated under **Articles 6, 159(c)** and **189 (3**) and **(4)** of the Constitution as read with **section 30** to **35** of the Inter-governmental Relations Act.

22. At any rate, we do not see any hindrance of the other respondents resorting to the measures of resolving inter-governmental disputes between them touching on the present dispute. The mechanisms contemplated under the inter-governmental relations legislation do not require to be triggered by a court determination. The same could have been raised before the matter was heard and determined, it therefore means that the parties submitted to the jurisdiction of the High Court and Court of Appeal. We therefore affirm that the dispute transcends inter-governmental dispute and we have jurisdiction to hear and determine the same.

23. As to whether the suit is *res judicata*, the appellant founds this argument on the existence of a judgment by Mukunya J. in Mombasa High Court Civil Case No. 131 of 2011 **Elizabeth Karunguri Githunguri vs Dina Management Limited** dated 12th March 2015 and delivered on 27th March 2015. From the appellant's petition, the present case was pleaded at paragraph 31 of the petition as follows:

> ***"31. The petitioner states that the previous owner of MN/I/908 Elizabeth Karunguri Githunguri had filed a case against the petitioner herein in HCC No.131 of 2011 making the same allegation that there was an access road through the property. The said suit was dismissed with the Court finding no merit in the claim."***

24. The trial court noted that the petition subject to this appeal had been brought by the appellant against the 1st respondent who was not a party to the previous case. To the judge, it was therefore inconceivable how the 1st respondent would not have been expected to be defend itself against the appellant's petition on account of *res judicata*. The doctrine of *res judicata* is founded on **section 7 of the Civil Procedure Act** thus:

> ***"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."***

25. This clearly portends to there being five main elements that have to be rendered conjunctively and not disjunctively – the suit was directly and substantially in issue in the former suit; the former suit was between the same parties or parties under whom any of them claim; the parties were litigating under the same title; the issue was heard and finally determined in the former suit and that the court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised. (see ***The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others***, Nairobi CA Civil Appeal No. 105 of 2017 [2017] eKLR).

26. Apart from the last element, we do not see how the other elements favour the appellant's argument on this issue. For instance, the appellant's own perception of the former suit as cited above related to the access road and a dispute between neighbours. The petition on the other hand went to the root of ownership of the title. Without belabouring the matter, we find that the appellant's assertion that the suit is *res judicata* devoid of merit and the trial judge was correct in finding that the petition was not *res judicata*.

27. Turning to the third issue of limitation, the appellant takes issue with the trial judge's finding at paragraph 32 in the following manner:

"32. The petitioner herein has not demonstrated to this court how the late filing has vexed her taking into consideration that her suit against the 1st respondent seeking protection of the law was filed first."

28. This is a claim the appellant argues that the trial judge invented, as it is not known in law. In addition, the appellant faults the trial judge's reasoning in distinguishing the appellant's case from those relied upon by him in High Court **Petition No. 306 of 2012** ***Ochieng' Kenneth K'Ogutu v Kenyatta University and 2 others***. The appellant also faults the trial judge's for explaining away the delay by the 1st respondent.

29. From our understanding, the trial judge was guided by the two cases cited by the appellant to the effect that violations complained of were of a continuing nature and that there is no limitation of action with respect to constitutional petitions alleging violation of fundamental rights. Without interpreting it, what we discern from the trial judge's finding under this ground is twofold. First, that the appellant had approached the court to enforce fundamental rights against the 1st respondent and secondly, that the 1st respondent's petition was only filed as a result of the need to respond to the appellant's petition. It is common ground that the petitions filed before the ELC arose out of activities that took place in the year 2017.

30. A closer perusal of the petitions reveal that the appellant's petition was for relief against violation of its rights under **Articles 27(1)** and **(2), 29** and **47(1)** and **(2)** of the Constitution. The 1st respondent's petition on the other hand sought declaratory reliefs but was not founded on any particular provision of the Constitution, save that the supporting affidavit by Jabu Salim Mohammed, the 1st respondent's Land Secretary deponed in paragraph 10(c) that Article 40(6) of the Constitution forbids protection in respect of land illegally acquired by the appellant. Does this render it a constitutional petition? The answer to that question does not discount the arguments raised in response to the appellant's petition.

31. What then is the course of action in this matter and is it affected by the doctrine of limitation? Is it the assertion of rights over the suit property by both parties? Or is it against the petition for enforcement of fundamental rights? We are constrained to find that the course of action subject to the dispute is the latter. In so far as the suit was framed as a constitutional petition seeking to enforce fundamental rights and freedoms, then we agree with the trial judge that the doctrine of limitation does not apply to constitutional petitions. The investigation of title as was extensively done by the parties was only necessary to appreciate the context in which to address the potential violation of human rights. The parties having sought mandatory and prohibitory reliefs, it can only mean the violations were of a continuing nature as the trial judge duly pointed out. The initial allocation of the suit property may have been done 30 years ago but the dispute before court, revolving around enforcement of fundamental freedoms, was only filed in 2017.

32. We therefore agree with the trial judge that the issue of limitation does not arise under the circumstances. In any event, sections 41 and 42 of the Limitation of Actions Act expressly exclude the application of the Act on matters concerning government land, including proceedings towards recovery of government land.

33. Turning to the fourth issue, the nature of the suit property can only be discerned from the pleadings. The appellant in this respect framed two questions which were adopted by the trial judge. The first one is whether the suit property is a public utility land with a public access road through it to the beach, and whether the suit property lies within the 60 metre water mark. The main contention by the parties as noted by the trial judge is the status of the property prior to 1989 and the ensuing allocation. According to the appellant, it was unalienated government land and according to the 1st respondent it was unalienated trust land. The trial judge, while appreciating the appellant as the title holder, went ahead to investigate whether the proper procedure was followed in acquiring the title and the applicable legal regime, at the end of which she concluded that the appellant's title was not acquired lawfully. This is an issue that each party had submitted on extensively.

34. We appreciate that it is the 1st respondent who introduced the argument that the suit property was public land and that it had not been lawfully acquired as to enable good title to pass to the appellant. It proceeded to list incidences of illegality committed in having the property allotted to the appellant's predecessor in title. First that the allotee ought to have applied to the 2nd respondent. Second that conversion of public land into private land offended **Article 62** of the Constitution which defines public land to include land between the high and low water marks. Third, that the allotment could not have been issued as freehold but as a lease for a term not exceeding 100 years under section 10 of the repealed Government Lands Act. Fourth, that the land was part of the foreshore which makes it public land under section 85(1) of the repealed Government Lands Act that was forbidden under section 82 of the said Act. The 1st respondent referred to further transgressions involving the land being riparian land that could be alienated for personal or private use. In response, the appellant through a further affidavit by Ratilal Ghela Shah, its director, sworn on 22nd July 2018 maintained that it was unalienated government land which *ipso facto* belongs to the government with the right to use it as it deems fit including alienation and allocation.

35. It is not in dispute, as noted by the trial judge, that there existed an open space and that the applicable law as at 1989 when the allotment was done was the Government Lands Act. Interestingly, as much as the 1st respondent was categorical that the suit property was public land, at no time did the 1st respondent claim ownership of the said land as trust land or otherwise. Indeed, none of its prayers mentions the trust land element of the suit property. The 1st respondent nevertheless urged that the same could only be alienated by complying with section 116 of the Independence Constitution contained in the Kenya Independence Order in Council, 1963 (repealed). To the 1st respondent, this land was automatically vested in the regions by virtue of Section 204 of the said repealed Constitution. The said provision provides:

"204. Subject to the provisions of section 205 and 208 of the Constitution, all estates, interests and rights in or over land situate in a Region that, on 31st May 1963 were vested in Her Majesty…shall be deemed to be vested in the Region on 1st June 1963."

36. Section 208 of the Independence Constitution specifically provided for trust lands which were described in four ways. First, land in special areas vested in the Trust Land Board. Second, areas of the land that were known before 1st June 1963 as Special Reserves, Temporary Special Reserves, Special Leasehold Areas and Special Settlement areas the boundaries of which were described in schedules. Third, land situate in a Region the freehold title to which is registered in the name of a county council and lastly, the land the freehold title to which is vested in a county council by virtue of escheat under the provisions of section 211 of that Constitution. It remained incumbent upon the 1st respondent to also indicate the basis upon which it was claiming the suit property to be described as trust land and how such property vested on the 1st respondent which, burden it had not discharged.

37. This then takes us back to the Government Lands Act Cap. 280 (repealed). Under that Act "government land" was defined as land for the time being vested in the Government by virtue of sections 2014 and 205 of the (1963 Independence Constitution). This definition therefore encompasses the 1st respondent's claim over the suit property under section 204 of the 1963 Constitution. From the abovementioned decision by Mukunya, J., it is also evident that the 1st respondent acknowledged the appellant's title and even went a step further to grant some approvals for proposed construction works to renew a boundary wall as late as 2011 through its predecessor, the Municipal Council of Mombasa. It appears this is the very wall that was subsequently flattened by the 1st respondent, leading to the institution of proceedings subject of the present appeal.

38. Having discounted the fact that the suit property is trust land and that it was instead an open space, and since parties agree as to applicability of the Government Lands Act, we find that this takes the issues from the realm of the 1st respondent back to the 2nd to 6th respondents. The Government Lands Act defined "unalienated Government land" to mean government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment. We therefore have no difficulty finding that the land was unalienated government land, there having been no evidence of any previous lease or allotment.

39. From the affidavit filed on their behalf and sworn by Gordon Ochieng, it appears that the suit property was surveyed and the title issued on the strength of a letter of allotment and that prior to that, the records held by the 4th respondent did not indicate that the suit property was an open space. Of note is what is contained in paragraph 12 of the affidavit in which he depones as follows:

> ***"12. THAT there is no document to support the allocation of the suit property to H.E Daniel Arap Moi and such documents would include:***
>
> ***(a) A letter of application addressed to the Commissioner of Lands seeking to be allocated the suit land***
>
> ***(b) A part Development Plan showing the suit property in relation to the neighbouring parcels of land".***

40. He added that the Commissioner of Lands issued the allotment in respect of the suit property in compliance with section 9 of the Government Lands Act (repealed). The said provision allowed the Commissioner discretion to cause any portion of a township which is not required for public purposes to be divided into plots suitable for the erection of buildings for business or residential purposes, and such plots may from time to time be disposed of in the prescribed manner. For section 9 to apply, the suit property must have fallen within a township. A "township" was defined under the Act to means a township, a municipality or an area reserved for a township. There seems to be no contention that the land fell within the municipality as the letter of allotment was copied to the Town Clerk, Mombasa. The grant (title) issued also described the property as situate in the Municipality of Mombasa.

41. With the above findings, it was incumbent that the land be allotted in accordance with the provisions of the Act which includes the requirement of section 10 thus:

> ***"10. Leases of town plots may be granted for any term not exceeding one hundred years"***

42. A perusal of the letter of allotment as well as the grant reveal otherwise. It shows that the suit property and the grant were issued on a freehold basis. While at the time, the President through the Commissioner of Lands had some latitude over allotment of government land, there existed parameters such as those set out governing the allotment process.

43. Moreover, and in line with the affidavit by Gordon Ochieng and supported by the issues as framed by the appellant before the ELC, the trial judge embarked on investigating whether the proper procedure had been adopted. She interrogated the failure to adhere to the provisions of the Land Planning Act and the irregular manner in which the survey of the suit property had been undertaken. The learned judge concluded, and in our opinion rightly so, that the breach of the mandatory statutory provisions warranted evidence by the appellant which was not and could not be availed despite the appellant being a third owner.

44. On the last two issues on acquisition of title and whether the appellant was an innocent purchaser for value, we shall determine the same jointly. On the acquisition, the trial court extensively considered the relevant provisions of the applicable law at the time of purported alienation in 1989 under the Government Lands Act Cap 280 (repealed), the Land Planning Act Cap 303 (repealed) and the Physical Planning Act Cap 286. The trial court found that the PDP was a mandatory requirement before issuance of allotment as only on account of a duly approved PDP could a survey be done and a grant therefrom issue. The trial court also found that the sketch map attached to the allotment letter dated 19th December 1989 did not show who had prepared the same, when it was prepared or whether it had been approved. Indeed, in reference to the importance of a PDP, the trial court explained that the PDP would have settled the issue of whether there was a public access road to the beach through the suit property or at what point in relation to the high water mark the suit property lies. Having found that the alienation of the open space had been done unprocedurally, the trial court duly moved to consider whether the appellant enjoyed protection under the principle that an innocent purchaser for value without notice should not suffer wrongs that were not of their making. Citing this court's decisions in ***Kenya National Highways Authority v. Sharlen Masood Mughai & 5 Others (2017) eKLR*** and ***Arthi High way Development v. West End Butchery Developers Limited & 6 Others (2015) eKLR***, the trial court considered a number of issues that militated against the appellant's imploration. The court found that the appellant failed to illustrate the steps she had taken to establish whether the existing access road, which ended in an unfenced property, went up to the sea. The trial court also noted the fact that the Survey Regulations 1994 creating the 60 metre high water mark had come into force by the time the appellant purchased the suit property in 2006. The trial court queried why the appellant was re-establishing beacons when the same ought to have been pointed out by the vendor at the time of purchase. The trial court also queried why the vendor, represented by an advocate at the time of purchase, had failed to note that the interest in the land was freehold whilst it was apparent that the only interest capable of being passed in the suit property, described in the grant as falling within Mombasa Municipality, was leasehold. The trial court concluded, a conclusion to which, on consideration of the evidence and submissions herein, we concur, that the appellant cannot enjoy protection under the doctrine of innocent purchaser for value without notice.

45. The question is whether the proprietary interest of the appellant was acquired lawfully. It is clear to us that the guarantee to protection under **Article 40** of the Constitution of Kenya 2010 also existed under **section 75** of the repealed Constitution. It is correct to say that the appellant has a right to own property and that it is entitled to its property only to the extent that the said property was acquired and purchased in accordance with the correct procedure and within the framework of the law. In our view, where property is acquired through a procedure against the law, the title cannot qualify for indefeasibility. The land in question was reserved for public use or utility and the access road leading to the said land for entry, use and enjoyment of the original purpose for which the land was created or reserved. Any attempt to deviate or depart from the original purpose, no matter the persons involved and subsequent interests acquired, is defeasible to that extent. In essence, it was not possible or open to any person or entity to alienate it for private use. In our view, the moment a property is reserved for public use, it remains public utility land incapable of giving rise to a private proprietary interest capable of being protected by a court of law.

46. The suit property was public land reserved for public utility. No notice was issued to the public, whom the land was reserved for their use and enjoyment, that the said land would be turned into a private one, where there would be no access road and the vacant land adjacent to the sea would no longer be available for public purpose. Any subsequent acquisition, sale or transfer would be contrary and in conflict with the original purpose (public use) and therefore void, and does not give rise to a right capable of protection by a court of law.

47. Article 40 protects the right to property except where, pursuant to sub-section 6, the property has been found to have been unlawfully acquired. **Section 26 of the Land Registration Act No. 3 of 2012** provides that a certificate of title shall be held as conclusive evidence of ownership except where, inter alia, the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. The protection under **Article 40(6)** of the Constitution cannot extend to land acquired unlawfully and unprocedurally. More importantly, **section 26(1)(b) Land Registration Act No. 3 of 2012** provides that a title can be challenged if the same was acquired illegally, unprocedurally or through a corrupt scheme.

48. Based on the foregoing, the non-compliance with the relevant law as highlighted nullified and/or extinguished rights acquired through a process against the public interest and hence the title subsequently issued is invalid. In ***Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v. Attorney General & 4 Others [2017] eKLR,*** this court cited the case of ***Katende v. Haridar & Company Limited [2008] 2 E.A.173*** where the Court of Appeal in Uganda held that:

> ***"For the purposes of this appeal, it suffices to describe a*** *bona fide* ***purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the*** *bona fide* ***doctrine, … (he) must prove that:***
>
> ***(a) he holds a certificate of title;***
>
> ***(b) he purchased the property in good faith;***
>
> ***(c) he had no knowledge of the fraud;***
>
> ***(d) he purchased for valuable consideration;***
>
> ***(e) the vendors had apparent valid title;***
>
> ***(f) he purchased without notice of any fraud;***
>
> ***(g) he was not party to any fraud."***

49. In our view, the title of the appellant was acquired illegally and unprocedurally. We are saying illegally because the land in question was not available for alienation other than for public use. Again, unprocedurally because the correct procedure was not followed. In our view, the moment the land in question was reserved for public use, it reverted to the predecessor of the 1st respondent as the custodian or holder in trust for the members of the public.

50. In ***Elizabeth Wambui Githinji & 29 Others v. Kenya Urban Roads Authority & 4 others [2019] eKLR,*** this court cited the dicta of Maraga, J. (as he then was) in ***Republic v. Minister for Transport & Communication & 5 Others Ex Parte Waa Ship Garbage Collector & 15 Others Mombasa HCMCA No. 617 of 2003 [2006] 1 KLR (E&L) 563*** where he stated:

> "***Courts should nullify titles by land grabbers who stare at your face and wave to you a title of the land grabbed and loudly plead the principle of the indefeasibility of title deed...It is quite evident that should a constitutional challenge succeed either under the trust land provisions of the Constitution or under section 1 and 1A of the Constitution or under the doctrine of public trust a title would have to be nullified because the Constitution is supreme law and a party cannot plead the principle of indefeasibility which is a statutory concept. A democratic society holds public land and resources in trust for the needs of that society. Alienation of land that defeats the public interest goes against the letter and spirit of section 1 and 1A of the Constitution."***

51. The Court in ***Elizabeth Wambui Githinji & 29 Others (supra)*** further cited the finding in ***Chemei Investments Limited vs The Attorney General & Others Nairobi Petition No. 94 of 2005*** at para. 64 where it was held:

> "***The Constitution protects a higher value, that of integrity and the rule of law. These values cannot be side stepped by imposing legal blinders based on indefeasibility. I therefore adopt the sentiments of the court in the case of Milankumar Shah and 2 Others -vs-City Council of Nairobi & Attorney General (Nairobi HCC Suit No. 1024 of 2005 (05) where the Court stated as follows, "We hold that the registration of title to land is absolute and indefeasible to the extent, firstly, that the creation of such***

title was in accordance with the applicable law and secondly, where it is demonstrated to a degree higher than the balance of probability that such registration was procured through persons or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law and the public interest."

52. Having irregularly obtained the allocation of the suit property, H. E. Daniel Arap Moi had no legal interest therein which he could pass to M/s. Bawazir & Co. (1993). The latter thus had no valid legal interest that in turn could pass to the appellant. (See this Court's decision in ***Jane Gathecha v. Priscilla Gitungu & Another 2008 eKLR***). The appellant's title is not protected by **Article 40** of the **Constitution** because of the provisions under sub – article (6). Having found that the suit property was allotted unprocedurally and illegally and that the appellant is not an innocent purchaser for value without notice, we concur with the trial court that the suit property is public land which automatically vests in the 1st respondent pursuant to **Article 62(2)** of the **Constitution**.

53. It is agreed by all parties to this suit that prior to the impugned allocation of the suit property to H. E. Daniel Arap Moi, official records indicated that the suit property was an open space. There was thus a road, leading to the beach, through the open space that was the suit property. The effect of the allocation of the suit property was thus to block existing access to the sea from the road, through the open space that is the suit property. We concur with the trial court's finding that the 1st respondent herein, in whom the public land that is the suit property vests, acted within the law to remove the wall that blocked such access.

54. In the end therefore, the appeal is wholly unmeritorious; the cross appeal is also unmerited and stands dismissed and the decree of the Environment and Land Court is affirmed. We award the costs of the appeal and the cross-appeal to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF JUNE, 2021.

M. WARSAME

.....

JUDGE OF APPEAL

D. K. MUSINGA

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

Signed

DEPUTY REGISTRAR