IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL NO. 30 OF 2018

BETWEEN

THE ATTORNEY GENERAL .....1ST APPELLANT

THE CHIEF LAND REGISTRAR .....2ND APPELLANT

AND

RAHIMKHAN AFZALKHAN RAHIMKHAN .....1ST RESPONDENT

SHAMSHAD BEGUM AFZALKHAN RAHIMKHAN .....2ND RESPONDENT

DANIEL MWANGI .....3RD RESPONDENT

PAULINE KAVINYA MWONGELA .....4TH RESPONDENT

SAYED MUSHTAQ HUSSAIN.....5TH RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Mombasa (Ogola, J.) dated 20th June, 2017

in

Constitutional Petition No. 47 of 2012)

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JUDGMENT OF THE COURT

1. The significance of land and in particular proprietorship thereof in the Kenyan society cannot be gainsaid. This Court in ***Gitamaiyu Trading Company Ltd vs Nyakinyua Mugumo Kiambaa Co. Ltd & 11 Others [2019] eKLR,*** alive to the centrality of land expressed itself as follows:

> ***"Land, no doubt, is not only the most important factor of production but also a very emotive issue in Kenya. Land remains the most notable source of frequent conflicts between persons and communities."***

This explains why a good number if not the bulk of disputes before courts are related in one way or another to the issue of land, such as this appeal.

2. The subject of the dispute before us is land parcel Mombasa/M.S/Diani Beach Block/10 (suit property) and dates back to the late 1970's. It seems that around the year 1978, the then registered owner, one Mrs. Reaby Eleanor Vere Wailes, on one part and Afzalkhan Rahimkhan (the deceased), **Daniel Mwangi** (3rd respondent), **Pauline Kavinya Mwongela** (4th respondent) and **Sayed Mushtaq Hussain** (5th respondent), on the other, engaged in a sale transaction of the suit property for a consideration of Kshs.140,000.

3. Towards that end, Mrs. Wailes obtained consent for the said transaction from the Kwale Land Control Board (LCB) on 22nd March, 1978 since the suit property was agricultural land and subject to the provisions of the ***Land Control Act***. Thereafter, a transfer of the lease dated

7th April, 1978 in favour of the deceased, the 3rd, 4th and 5th respondents was registered and a certificate of lease issued on 8th April, 1978 to that effect.

4. Barely a couple of weeks later, a controversy over the title held by the deceased, the 3rd, 4th and 5th respondents ensued. For instance, the Director of Agriculture by a letter dated 28th April, 1978 addressed to the 3rd respondent, sought to bar the deceased, the 3rd, 4th and 5th respondents from dealing in any way with the suit property. The reason being that a member of the public, who was described as Mr. Kahara had an interest in the suit property. Afterwards it would appear that the deceased, the 3rd, 4th and 5th respondents were directed to surrender their title which they declined to do.

5. Thereafter, vide a letter dated 16th May, 1978 the Land Registrar reprimanded them for not surrendering their title. Once again, on 17th May, 1978 the Director of Agriculture wrote to the 3rd respondent concerning the surrender of the title in question to Mr. Kahara for purposes of facilitating the process of registration of the suit property in his favour.

6. Be that as it may, a consent for the transfer of the suit property to Kasika Developers Limited was subsequently issued by the Kwale LCB on 24th May, 1978. Supposedly, the said consent was obtained after the Chief Land Registrar cancelled the initial consent granted with respect to the transaction between Mrs. Wailes and the deceased, the 3rd, 4th and 5th respondents. The explanation advanced for cancellation of the initial consent was that it was issued in contravention of ***section 15*** of the ***Land Control Act*** since at the time the requisite quorum of the LCB had not been met.

7. By a letter dated 19th March, 1979 the Chief Land Registrar directed the Land Registrar, Mombasa to invoke the powers conferred by ***section 17*** of the repealed ***Registered Land Act*** (***RLA***) and cancel registration of the title in favour of the deceased and 3rd to 5th respondents. The deceased, the 3rd, 4th and 5th respondents were later informed as much by a letter dated 22nd May, 1979.

8. Protests by the deceased and the 3rd state of affairs came to a naught. to 5th respondents against the aforementioned Years later after the demise of the deceased, **Rahimkhan Afzalkhan Rahimkhan** (1st respondent) and **Shamshad Begum Afzalkhan Rahimkhan** (2nd respondent), the deceased's son and wife respectively took up the issue as the administrators of his estate. They filed a constitutional petition in the High Court being **Petition No. 47 of 2012** against the **Attorney General** (1st appellant) and the **Chief Land Registrar** (2nd appellant) claiming that the deceased's as well as the 3rd to 5th respondents' rights had been violated.

9. Their claim was founded on the ground that once the deceased, the 3rd, 4th and 5th respondents were registered as proprietors their rights under ***section 27 & 28*** of the ***RLA, section 75*** of the former ***Constitution*** and ***Article 40*** of the current ***Constitution*** had crystalized and could not be defeated in the manner resorted to by the appellants. According to the 1st and 2nd respondents, it was no coincidence that the same Mr. Kahara was a Director of Kasika Developers Limited. They believed that both Mr. Kahara and the company were fronts for government officials who were intent on forcefully taking over the suit property by any means possible.

10. The 1st and 2nd respondents also claimed that the unnamed government officials unlawfully employed mechanisms of government agencies to intimidate and harass the deceased, the 3rd, 4th and 5th respondents. According to them, the deceased, the 3rd, 4th and 5th respondents were victimized, beaten and harassed by the Kenya Police as well as officials from the then Ministries of Lands and Agriculture. As a result of the constant torture and harassment, the deceased fled to Tanzania where he died.

11. Nonetheless, the harassment and intimidation continued against the deceased's next of kin with the aim of stopping them from making any claims to the suit property. As per the 1st and 2nd respondents, the 1st respondent and his brother Mr. Samir Khan were falsely implicated and charged with a criminal offence of allegedly being members of the outlawed Al-Shabaab militants of Somalia. Sadly, at least according to the 1st and 2nd respondents, Mr. Samir Khan was murdered by the Anti-terrorism unit of the Kenya Police prior to filing of the suit.

12. It is on the aforementioned background that the respondents claimed that their rights to property, protection from discrimination, fair protection under the law, protection from inhuman treatment, dignity, fair hearing and fair administrative action, most of which were protected under the former ***Constitution*** and are still protected under the current ***Constitution,*** were infringed by the appellants actions. Consequently, the respondents sought an array of declarations and compensation for the perceived infringement of their rights.

13. In response, the appellants contended that this was simply a case of a failed private transaction which pitted the respondents against Mr. Kahara. Evans Marwanga, the then District Land Registrar for Kwale District, deposed that any transaction over the suit property was subject to the certificate of possession vesting a portion thereof to the government and a caution registered by the government.

14. He further deposed that the registration of the suit property in favour of the deceased, the 3rd, 4th and 5th respondents had been obtained fraudulently hence could not be protected under the ***Constitution***. He claimed that the 3rd respondent abused his office as a District Agricultural Officer, to advance the fraudulent transfer and registration whilst being aware that the suit property had already been set to be sold to Mr. Kahara.

15. In any event, Evans deposed that the respondents were informed that the initial consent had not been properly obtained hence the cancellation thereof. In his replying affidavit, Evans went on to challenge the competency of the petition as well as the 1st and 2nd respondents standing to institute the suit on behalf of the 3rd to 5th respondents. In the appellants' view, the only remedy available to the respondents was a refund of the purchase price paid to Mrs. Wailes.

16. At the end of the trial, the learned Judge (Ogola, J.), by a judgment dated 20th June, 2017 found in favour of the respondents and issued the following orders:

(i) It is hereby Declared that the following actions of the Respondents, their agents, servants and any and all other officers acting under their instructions were unconstitutional, unlawful, null and void;

> ***(a) Purporting to cancel the Kwale Land Control Board Consent issued on 22nd March 1978 under Minute 327/78 for the transfer of the property from Mrs. Wailes to Daniel Mwangi, Pauline Mwongela, Afzalkhan Rahimkhan and Sayeed Mushtaq Hussain; and***
>
> ***(b) Purporting to cancel the registration of Daniel Mwangi, Pauline Mwongela, Afzalkhan Rahimkhan and Sayeed Mushtaq Hussain as the registered owners of the Property; and***
>
> ***(c) Purporting to issue a parallel Certificate of Lease to Kasika Developers Limited for the Property in the pendency of the Certificate of Lease in the names of Daniel Mwangi, Pauline Mwongela, Afzalkhan Rahimkhan and Sayeed Mushtaq Hussain.***

(ii) It is hereby declared that the constitutional rights of Daniel Mwangi, Pauline Mwongela, Afzalkhan Rahimkhan and Sayeed Mushtaq Hussain of Right to Property, Protection from Discrimination, Right to fair protection of the law, Protection from Inhuman Treatment and Right to Human Dignity, Right to Fair Administrative action and Right to Fair Trial were violated.

(iii) It is hereby Declared that Daniel Mwangi, Pauline Mwongela, Afzalkhan and Sayeed Mushtaq Hussain are entitled to the prompt payment in full of just compensation for;

> ***(a) Deprivation of their property; and***
>
> ***(b) Infringement of their constitutional rights.***

(iv) Compensation as provided under the Constitution of Kenya 2010 for the 328.5 Acres valued as Kshs.30 million per Acre totaling to 9.855 Billion.

(v) Damages for loss of use of the Property, physical, mental and psychological torture assessed at Kshs.60,000,000.

(vi) Interests on (iv) and (v) above until date of payment.

(vii) Costs of the Petition to be paid by the Respondents.

17. Aggrieved with that decision, the appellants preferred the appeal before us which is predicated on a total of 17 grounds some of which are repetitive and contain arguments. It is worthwhile to restate as this Court has done time and time again that grounds in a memorandum of appeal should not contain narratives or evidence.

Rather they ought to be concise as envisioned under ***Rule 86*** of the ***Court of Appeal Rules***. Nonetheless, the appellants grounds can be summarized as follows:

The learned Judge erred in law and fact by -

a) Finding that the 1st respondent could institute the suit on behalf of the 3rd to 5th respondents without their consent.

b) Considering extrinsic facts and making a misleading finding that the suit property formed part of the current Diani Complex.

c) Failing to appreciate that the suit property was subject to the Land Control Act.

d) Finding that the respondents were the legal proprietors of the suit properties.

e) Finding that the acreage of the suit property was 328.5 acres without any justification.

f) Failing to take into account the principles governing the award of damages.

g) Awarding the sum of Kshs.30 million per acre as compensation for the suit property.

h) Failing to consider the law concerning mesne profits thus erroneously awarding the sum of Kshs.60 million without any basis.

18. At the plenary hearing, learned state counsel, Mr. Wachira, appeared for the appellants while learned counsel, Mrs. Osman appeared for the respondents. The appeal was disposed of by way of written submissions on record and oral highlights by the parties' respective counsel.

19. In his opening remarks, Mr. Wachira stated that the 1st and 2nd respondents had no *locus standii* to file the petition on behalf of the other respondents. Expounding further, he argued that there was no written authority by the 3rd to 5th respondents on record granting the 1st and 2nd respondents instructions to act and/or file the petition on their behalf. More so, taking into account that the respondents allegedly held the

suit property as proprietors' in common and the rights alleged to have been violated were rights in personam. In his opinion, the lack of participation by the 3rd to 5th respondents meant that they were no longer interested in the suit property.

20. The appellants took issue with the learned Judge reference to the suit property as a 'jewel' in the south coast which sentiment they believed was never introduced at the trial court and was also irrelevant. It was argued that neither was the map of the suit property tendered in evidence nor did the parties agree on which part of Diani the suit property was located. Therefore, there was no basis for the learned Judge to find as he did. The appellants further believe that the aforestated erroneous position is what led the learned Judge to grant an outrageous amount as compensation to the respondents.

21. Regarding the ownership of the suit property, Mr. Wachira argued that the learned Judge erred in finding that the same belonged to the respondents. To begin with, the deceased had no interest in the suit property. This was evident, according to counsel, from the fact that the deceased did not include it as part of his estate in his written will. Furthermore, the one page copy of the certificate of lease produced at the trial court was illegible. Therefore, in the absence of the full certificate of title and by virtue of ***section 32*** of the ***RLA***, the respondents failed to prove ownership of the suit property. Similarly, the records at the Land Registry did not corroborate the respondents' alleged proprietorship.

22. Mr. Wachira went on to submit that the suit property being agricultural land was subject to the provisions of the ***Land Control Act***. Therefore, any transactions in respect of the suit property required the consent of the LCB. The absence of the consent in question rendered the respondents' transaction void for all purposes. To bolster that proposition, this Court's decision in ***David Sironga Ole Tukai vs Francis Arap Muge & 2 Others [2014] eKLR*** was cited. Moreover, it was urged that the consent alleged to have been obtained by the respondents had been cancelled by the government. In the circumstances, Mr. Wachira reiterated that the remedy available to the respondents was a refund of the purchase price of Kshs.140,000.

23. Disagreeing with the award and assessment of damages granted to the respondents, counsel claimed that the learned Judge overlooked the principles of awarding damages. More specifically, the learned Judge failed to appreciate that the objective of damages issued as a form of redress for violation of a right under the ***Constitution*** are not meant for enrichment of the affected party.

24. He added that the learned Judge misconstrued the essence of *mesne* profits. Illustrating the misconception, counsel relied on the case of ***Siree vs Lake Turkana El Molo Lodges [2002] 2EA 521***, which he argued defined *mesne* profits as profits derived from land whilst its possession has been improperly withheld from the proprietor. It was submitted that assessment of *mesne* profits would require proof of ownership of the land in question and the amount lost as well as the period the possession was withheld from the legal proprietor. In other words, *mesne* profits are in the nature of special damages thus must be specifically pleaded and proved. In the appellants' view, there was no evidence to that effect.

25. It was further argued that, other than praying for damages, the respondents did not quantify the damages in their amended petition. What is more, right from the onset ownership of the suit property was disputed and the respondents had never set foot thereon. Equally, the registration officer who allegedly carried out a valuation of the suit property did not know the particulars of ownership or the size thereof and used google maps to allegedly determine its size.

26. Relying on the persuasive decision of the High Court in ***Kahindi Fundi Mukamba & 4 Others vs Fleetwood Enterprises Ltd. [2009] eKLR***, Mr. Wachira reiterated that only the certificate of lease would give accurate details of the proprietorship and size of the suit property. As such, the learned Judge was faulted for awarding Kshs.60 million as damages for loss of use of the property, physical and mental torture of the respondents. In the appellants' view, the sum was colossal and manifestly unjust.

27. Counsel also questioned the manner in which the learned Judge computed the compensation for the suit property to the respondents. He claimed that the sum of Kshs.30 million per acre applied by the learned Judge as the market price was unsubstantiated. In point of fact, the valuation report by the respondents indicated the value as Kshs.25 million per acre. Nonetheless, the veracity of the valuation report was also challenged on the ground that the valuer did not obtain an official search from the land registry or take into account any encumbrances thereon. Likewise, the learned Judge was criticized for awarding overlapping awards of damages, namely, compensation for the suit property and damages for violation of constitutional rights.

28. Citing ***Article 22*** of the ***Constitution***, Mrs. Osman urged that the provision eliminates technical obstacles when it comes to filing a suit for enforcement of the Bill of Rights. Further, the issue of *locus standii* in the aforementioned context has been considered by both this Court and High Court which concur that the locus thereunder has considerably been extended. In this case, the substratum of the dispute is the suit property which is jointly owned by the respondents in equal shares and cannot be fragmented as alluded to by the appellants. Consequently, the petition was rightly before the High Court.

29. Responding to the argument that the learned Judge had no basis to perceive the suit land as a 'jewel' of the south coast, the respondents contended that the learned Judge merely took judicial notice and rightly so, of the obvious facts presented before the court. The respondents argued that it was evident throughout the trial that the suit property was very valuable and lies at the heart of Kenya's tourism industry. Apart from the foregoing, the valuation report described in detail the value of the suit property and even annexed photographs therein.

30. Laying emphasis that the status and geographical location of the suit property are of general notoriety warranting the perception taken by the learned Judge, counsel made reference to ***section 60 (1)*** of the ***Evidence Act***. She also relied on the case of **Commonwealth Shipping Representative vs P & O Branch Service [1922] ALL ER Rep 207** wherein Lord Summer expressed:

> ***"Judicial notice refers to facts which a judge can be called upon to receive and to act upon, either from his general knowledge of them, or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer."***

31. Mrs. Osman maintained that the respondents had proved that they were the registered proprietors of the suit property. She stressed that

the fact that the suit property was not included in the deceased's will did not impeach or affect the certificate of lease of the suit property which was conclusive proof of proprietorship. She expressed that she was at a loss as to why the appellants allege that the necessary consent from the LCB had not been obtained with regard to the transfer of the suit property to the respondents. It was clear from the record, that the appellants acknowledged that the consent was obtained and only purported to cancel it on the ground that at the time the consent was issued there was no quorum of the LCB. In any event, counsel argued that the Chief Land Registrar had no power to cancel her clients' title and only a court of law could do so.

32. Counsel moved on to argue that the respondents had established that the size of the suit property is 382.5 acres by the copy of what she termed as the colonial title produced in evidence which was further corroborated by the green cards of the suit property included in the record by the appellants. She submitted that in as much as the green cards supported the respondents' case they should be expunged because they were not produced at the trial hence did not form part of the High Court's record. Nevertheless, at the trial the 2nd respondent in her testimony availed the original title which was examined by the court.

33. On damages, it was submitted that principles governing the award of damages were set out by the House of Lords in **Attorney General of Trinidad and Tobago vs Siewchand Ramanoop (Trinidad and Tobago) [2005] UKPC 15.** This Court's attention was drawn to the words of Lord Nicholls thus;

> ***"An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award … may be needed to reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in the additional award."***

Reference was also made to the case of **Alphie Subiah vs The Attorney General of Trinidad & Tobago (Trinidad & Tobago) [2008] UKPC 47**. As far as respondents were concerned, the learned Judge did not deviate from the foregoing principles.

34. Expounding further, counsel contended that the award of Kshs.60 million was damages for the physical abuse, psychological torture and loss of use of the suit property and not on account of *mesne* profits as purported by the appellants. To her, loss of use of the property is distinct from *mesne* profits as night and day. It was posited, the relationship between the parties was not one of landlord/trespasser to warrant a claim of *mesne* profits. Rather the respondents claim against the appellants was hinged on the infringement of their rights, that is, deprivation of property contrary to ***Article 40*** of the ***Constitution*** which deprivation was akin to an unlawful compulsory acquisition.

35. Having proved their proprietorship over the suit property, Mrs. Osman submitted, the learned Judge correctly applied the figure of Kshs.30 million per acre in calculating the value of the suit property. She argued that the sum in question was the current market value as at the time the hearing was proceeding before the High Court. It was the respondents position that the appellants never challenged the valuation report prepared by Edwin Muturi Mbugua, a registration officer, or his oral testimony in that respect. Therefore, there was nothing wrong with the learned Judge relying on the report or Edwin's testimony.

36. Mrs. Osman urged that the remedies issued by the trial court were in line with ***Article 23 (3)*** of the ***Constitution***. To buttress that proposition, reliance was placed on the sentiments of Lord Kerr in the case of **Attorney General of Trinidad and Tobago vs Siewchand Ramanoop (supra)**:-

> ***"The constitutional dimension adds an extra ingredient. The violated right requires emphatic vindication. For that reason, careful consideration is required of the nature of the breach, of the circumstances in which it occurred and of the need to send a clear message that it should not be repeated. Frequently, this will lead to the conclusion that something beyond a mere declaration that there has been a violation will be necessary… close attention to the facts of each individual case is required in order to decide on what is required to meet the need for vindication of the constitutional right which is at stake."***

37. We were also referred to **Ntandazeli Fose vs Minister of Safety and Security (CCT14/96) [1997] ZACC 6** wherein the South African Court stated:-

> ***"For awards to have any conceivable deterrent effect against the government they will have to be very substantial and the more substantial they are the greater the anomaly that a single plaintiff receives a windfall of such magnitude…"***

In conclusion, Mrs. Osman asked us to dismiss the appeal.

38. In a brief rejoinder, Mr. Wachira reiterated that the valuation report disclosed the value of the suit property as Kshs.25 million per acre. Furthermore, the colonial title produced by the respondents ceased to exist and the size of the suit property had also changed. It is evident on the title that there are encumbrances registered against the title. Therefore, according to him, the assessment of the value of the suit property was not sound.

39. Taking into account the record, rival submissions by counsel and the law, we bear in mind our mandate as espoused under ***Rule 29 (1) (a)*** of the ***Court of Appeal Rules*** is akin to a retrial. However, unlike the trial court, we do not have the benefit of seeing and hearing the witnesses as they testified. The long and short of our jurisdiction as the first appellate court is to reconsider the evidence on record, evaluate it ourselves and draw our own independent conclusions.

40. To begin with, it is now settled that the strictures which would normally apply in civil litigation with respect to who is a proper party to institute a suit have no place in a case of enforcement of the Bill of Rights. This shift was observed by this Court in ***Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR*** as follows:-

> ***"Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of the Constitution by necessity and logic broadens access to the courts. In this broader context, this Court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hurdles on access to the courts, except only when such litigation is hypothetical, abstract or is an abuse of the judicial process… we agree with the superior court below that the standard guide for locus standi must remain the command in Article 258."***

41. Similarly, in his own words, Ouko, J.A in ***Randu Nzai Ruwa & 2 Others vs Secretary, the Independent Electoral and Boundaries Commission & 9 Others [2016] eKLR*** restated the position in the following manner:-

> ***"I come to the conclusions on this ground that the strict common law rule of standing which insists that a person or group of people will only have the requisite locus standi if they can show that they have a personal and sufficient interest in the matter, a greater interest than that of the rest of the public, has now been evolved and broadened under the Constitution. The Constitution today gives standing to any member of the public who is not a mere busy-body or a meddlesome interloper, and who acts in good faith to institute proceedings challenging any violations under the Bill of Rights."***

42. It follows therefore, by virtue of ***Article 258*** of the ***Constitution***, the 1st and 2nd respondents, apart from suing as administrators of the deceased could also do so on behalf of the other respondents. This is because the rights alleged to have been violated related to the proprietorship of the suit property and could not strictly speaking be adjudicated to the exclusion of the 3rd to 5th respondents' rights thereon, if any. Accordingly, we concur with the learned Judge that the 1st and 2nd respondents did not require a signed authorization to institute the suit on behalf ofthe other respondents.

43. Moving on, the respondents' case was grounded on the fact that they are the registered owners of the suit property. However, the appellants challenged that assertion on three fronts. Firstly, despite contending that the respondents' registration was obtained through fraudulent means no evidence to that effect was adduced.

44. Secondly, it was argued that the respondents had not obtained the requisite consent from the LCB for transfer of the suit property. It is instructive to note that there was indeed a consent issued on 22nd March, 1978 which was supposedly cancelled by the 2nd appellant for being invalid. Did the 2nd appellant have such powers? Having gone through the ***Land Control Act*** which prescribes for consent to be obtained from the LCB for any transaction touching on agricultural land, we have not come across any provision that allows the 2nd appellant to cancel any consent issued thereunder even in the event, as the appellants put it, it is invalid.

45. In point of fact, the only avenue for challenging such consent is through the appellate process prescribed under the ***Land Control Act***. In that regard, ***section 8 (2)*** of that Act stipulates:

> ***"The land control board shall either give or refuse its consent to the controlled transaction and, subject to any right of appeal conferred by this Act, its decision shall be final and conclusive and shall not be questioned in any court."*** *[Emphasis added]*

46. Be that as it may, there was also the directive from the 2nd appellant for cancellation of respondents' title pursuant to ***section 17*** of the ***RLA***. ***Section 17*** read:

> ***"The Registrar may cancel any entry in the register which he is satisfied has ceased to have any effect."***

Did the above provision empower the 2nd appellant to cancel the registration of the title in favour of the respondents? We do not think so. The provision in question only allows the cancellation of entries in the register which are obsolete and have ceased to have effect. See this Court's decision in ***Jane Wangechi Wariari (suing as the legal representative of the estate of Hiram Ndung'u Ng'ayu (Deceased) vs Registrar Nyeri & Another [2015] eKLR***. In these circumstances, could the respondents' title be said to be obsolete? The answer is a resounding no.

47. Besides, it is trite that under the provisions of the ***RLA***, the 2nd appellant was devoid of any power to cancel a title registered under that regime. Our position is fortified by ***section 142 & 143*** of the ***RLA***. Under ***section 142*** it was clear that the 2nd appellant could only rectify the register under the circumstances enumerated thereunder, which did not affect interests of a proprietor. On the other hand, ***section 143*** was explicit that only the court could rectify the register by directing the cancellation of any registration obtained through fraud or mistake.

48. Thirdly, and quite oddly, the appellants advanced that the respondents had not established that they were registered as proprietors of the suit property. It is common ground that the copies of the titles on record indicate that the respondents were registered as the proprietors of the suit property. It is also not in dispute that the appellants admitted to such registration when the 2nd appellant purported to not only cancel the initial LCB consent but also the registration in favour of the respondents. Therefore, the appellants cannot reprobate and approbate at the same time. Sir Evershed in **Banque De Moscou vs Kindersley (1950) 2 All ER 549** best described the above unacceptable conduct in the following terms:

> ***"This is an attitude of which I cannot approve, nor do I think in law the defendants are entitled to adopt it. They are, as the Scottish Lawyers (frame it) approbating and reprobating or, in the more homely English phrase, blowing hot and cold."***

49. In the alternative, the appellants' contention was that the 1st and 2nd respondents had not proved that the deceased was entitled to the suit property. More so, taking into account the suit property was not included as part of the deceased's estate in his will. In this regard, we agree with the trial court that the exclusion of the suit property did not derogate the fact that the title thereto had been issued in favour of the deceased and the other respondents.

50. The respondents having established that they were the registered proprietors of the suit property, the natural consequence was that their rights thereon were protected under the ***Constitution***. The Supreme Court in **Rutongot Farm Ltd. vs Kenya Forest Service & 3 Others [2018] eKLR**, expressed this position thus:-

> ***"Once proprietary interest has been lawfully acquired, the guarantee to protection of the right to property under Article 40 of the Constitution is then expressed in the terms that no person shall be arbitrarily deprived of property. The same guarantee existed in Section 75 of the repealed Constitution."***

51. The inviolability of that right was also succinctly appreciated by this Court in ***Chief Land Registrar & 4 Others vs Nathan Tirop Koech & 4 Others [2018] eKLR*** as follows:-

> ***"Land ownership and land rights is both a historical and emotive subject in Kenya. A right to hold property is a constitutional right as well as a human right and no person can be deprived of his property except in accordance with the provisions of the Constitution or Statute. The condition precedent to taking away anyone's property is that the authority must ensure compliance with the Constitution and Statutory provisions."***

52. In light of the aforementioned right to property and the attendant protection from unlawful deprivation, we find that the conduct of the appellants not only violated those rights but also amounted to unlawful compulsory acquisition of the suit property. Our finding is informed by the fact that following the appellants' conduct, the suit property has since been subdivided and developed by third parties thus incapable of being restored to the respondents. In addition, the acquisition in question was not within the confines of the law as stipulated under ***section 75*** of the former ***Constitution***.

53. ***Section 75*** partly read as follows:

> ***"75***
>
> ***(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied-***
>
> ***...***
>
> ***(c) Provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation…".*** *[Emphasis added]*

The law alluded to in the above provision is the ***Land Acquisition Act (repealed).*** It is without doubt that the respondents were not compensated following the compulsory acquisition of the suit property.

54. Turning to the other alleged violations of the respondents rights under the ***Constitution***, we concur with the trial court that save for the averments that the deceased, the 3rd, 4th and 5th respondents were tortured and harassed there was no evidence to substantiate the same. As a result, the respondents did not establish that their rights to human dignity or protection from inhuman treatment were violated.

55. However, the trial court found that the respondents' rights to a fair hearing and fair administrative action were violated. In making that finding, the trial court rendered as follows:-

> ***"It is also the finding of this court that although Articles 47 and 50 - Right to Fair Administrative Action and Fair Hearing - were not anchored in the old Constitution, the essential components of fairness in any administrative hearing are reasonable advance notice, reasonable opportunity to be heard and an impartial, competent and independent decision maker. This is to ensure that a party is able to present their case and is not disadvantaged. The 1st Respondent did not follow these provisions when he revoked the Petitioners' title. If it is to be assumed that the Respondents had the power to revoke the Petitioners' title then the Petitioners should have been given a hearing and this was not done hence there was a breach of rules of natural justice. The Petitioners should have been afforded an opportunity to state their case before the Respondents made any decision. Further, this right is now embedded in the Constitution. But it is a principle of natural justice which has always been there even in 1978 when the Petitioners' were being deprived of their land."***

On our part, we depart with the above findings to the effect that the appellants should have given the respondents an opportunity to be heard before they revoked their title to the suit property. This is because as we have discussed in the preceding paragraphs of this judgment, the 2nd appellant had no authority or mandate to cancel the title in favour of the deceased, the 3rd, 4th and 5th respondents.

56. Accordingly, we find that save for the violation of the respondents' right to property there was no evidence to support the infringement of the other alleged rights.

57. Going back to the issue of compulsory acquisition of the suit property, we, like the trial court, find that the respondents were not compensated for the said acquisition. Nevertheless, we disagree with the manner in which the trial court assessed the compensation due to the respondents. Why do we say so? The learned Judge in his computation relied solely on the valuation report prepared by Edwin Muturi Mbugua, a registration officer, who was engaged by the respondents to carry out a valuation of the property, as well as his testimony.

58. We cannot help but note that Edwin in his own evidence admitted that the title did not disclose the size of the suit property and that he

did not take into account any encumbrances on the suit property. It is also instructive to note that he testified that in carrying out his task he only relied on the documents supplied to him by the respondents. In his testimony, Edwin adjusted the market value of an acre of the suit property from Kshs.25 million as indicated in his report to Kshs.30 million.

59. In light of the foregoing coupled with the fact that there are encumbrances registered against the title which certainly affected the acreage of the suit property, the respondents were entitled to have the veracity of the valuation report called into question. We find that the learned Judge should not have relied on the report as he did.

60. It is common ground that the award of damages to the tune of Kshs.60 million was with respect to the infringement of the respondents' rights to the suit property and more specifically, the deprivation thereof. The justification for issuing the said award, in the learned Judge's own words was as follows:

> ***"However, the act of deprivation of the suit property necessarily caused the Petitioners to suffer loss of enjoyment of their property rights, and they also thereby suffered physical, mental and psychological torture for which they deserve compensation from the Respondents."*** *[Emphasis added]*

61. It is trite that an award and assessment of damages is at the discretion of the court.

See this Court's decision in ***Peter M. Kariuki vs Attorney General [2014] eKLR.*** We are also cognizant that an appellate Court can only interfere with an award of damages, as we have been called upon to do, under settled circumstances. In ***Johnson Evan Gicheru vs Andrew Morton & Another [2005] eKLR*** this Court reiterated those circumstances in the following words:-

> ***"It is trite that this court will be disinclined to disturb the findings of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgement of this court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."***

62. This Court in ***Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR*** while discussing the rationale of an award of damages for constitutional violations under the Constitution, expressed itself as follows:

> ***"Consistent with the above judicial experience and philosophy, it seems to us that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court, however, the court's discretion for award of damages in Constitutional violation cases though is limited by what is "appropriate and just" according to the facts and circumstances of a particular case. As stated above the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration. Public policy considerations is also important because it is not only the petitioner's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy."*** *[Emphasis added]*

63. Applying our minds to the above principles, we respectfully find that the learned Judge erred in granting the award of damages of Kshs.60 million. It is not in dispute that the respondents were deprived of the suit property and in our view, such deprivation, in the circumstances of this case, requires to be vindicated by an award of compensation for the compulsory acquisition. Furthermore, there was no evidence to substantiate the trial court's finding that the deprivation of the suit property resulted in the physical, mental and physiological torture of the respondents.

64. The upshot of the foregoing is that we find that the appeal herein succeeds in part to the extent that we set aside the declaration that the deceased, and the 3rd to 5th respondents' rights to protection from discrimination, protection of the law, protection from inhuman treatment, human dignity, fair administrative action and fair trial were violated; damages for loss of use of property, physical, mental and physiological torture assessed at Kshs.60 million and compensation for the suit land assessed at Kshs.9.855 billion.

65. We substitute the same with an order that the matter be placed before any other High Court Judge apart from Ogola, J. for reassessment of the compensation due to the respondents for the compulsory acquisition of the suit property. We direct that such assessment should take into account the encumbrances registered against the title and the principles set out in the Schedule to the ***Land Acquisition Act***. We also award costs of this appeal to the respondents.

Dated and delivered at Mombasa this 21st day of August, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

…….....……..

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR