IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 78 OF 2016

BETWEEN

1. NELSON KAZUNGU CHAI

2. LAWRENCE KAZANI GOHU

3. WYCLIFFE TEMBO MWAGOME

4. SAID HASSAN HEMED

5. IBRAHIM ABDI

6. FESTUS MWARERE LENGA

7. KENGA KILUMO CHARI

8. LEONNOX MKUTANO NGALA

9. SHADRACK NDHULI

10. PRUDENCE MAPENZI MWANGORI……..……APPELLANTS

VERSUS

PWANI UNIVERSITY COLLEGE……..…….....……RESPONDENT

(Appeal against the Judgment and Decree of the High Court of Kenya at Malindi (Angote,J) dated 31st day of October, 2014

in

ELC Civil Case No. 70 of 2009)

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JUDGMENT OF THE COURT

1. The appellants filed before the High Court of Kenya at Malindi, a representative suit on their own

behalf and on behalf of 308 others regarding the ownership and occupation of land described as LR No. 5046/1 and LR No.5024/1 *(the suit land)*, situated in Kilifi County. They alleged that the respondent, a body corporate and a constituent college of Kenyatta University, had threatened to evict them from the suit land, despite the same having been lawfully allocated to the appellants.

2. To put this matter in perspective, a brief background is necessary. According to the appellants, the Government of Kenya, under a donor funded squatter resettlement program proposed to allocate land to squatters in Kilifi. The appellants were among the proposed beneficiaries. The land was allocated and subdivision thereof done, with the appellants settling on part of the land sometime in 1995 and subsequently developing the premises at great expense; even as they awaited the issuance of certificates of title by the then Commissioner of Lands. However, it transpired later that the areas the appellants had occupied were meant for public utility. Consequently, alternative land was identified where they would be relocated. That latter land forms the suit land herein. Upon such relocation, it came as a shock to them that sometime in 2009, the respondent, claiming ownership of the said land purported to erect a perimeter wall around it. The respondent also caused a *caveat emptor* notice to be placed in the Daily Nation newspaper of 23rd June, 2009 terming the appellants trespassers and threatening them with eviction from the suit land.

3. Fearing that the unlawful notice of eviction would be effected to their detriment, the appellants moved to court seeking the following orders:-

> *"**a) An order of permanent injunction restraining the defendant by itself, its agents, servants or through other persons from fencing, occupying, taking possession or interfering in any manner with the plaintiff's use, possession and occupation of parts of land known as LR No 5046/1 and 5024/1, Kilifi occupied by the plaintiffs.***
>
> ***b) General Damages for trespass and wrongful interference with property.***
>
> ***c) A declaration that parts land (sic) parcels known as LR No. 5046/1 and 5024/1 occupied by the plaintiffs belong to the plaintiffs.***
>
> ***d) Costs of the suit."***

4. The suit was opposed vide an amended statement of defence and counterclaim, whereby the respondent denied the allegation that the appellants owned the suit property. To the contrary, the respondent stated that the suit land is hers, the same having been allocated to her predecessor, the Kilifi Institute of Agriculture *(the institute)* by the government. Additionally, that as such owner, the respondent had never consented to occupation thereof by the appellants. Further, that by a presidential order issued on 21st February, 2002, the government banned allocation of government and trust land, including land reserved for public use such as the land herein. Consequently, that the appellants' alleged allocation of the land and any developments thereon were unlawful for they offended the presidential directive aforesaid. The respondent also asserted that the contention that the suit land is private is equally false as the same is public land. The appellants' occupation of the land was said to be couched in fraud as the same was founded on forged documents and illegitimate claims which flew in the face of the fact that the suit land was owned by the respondent. Further, that the appellants' application for allocation was never approved and by proceeding to develop land that was not theirs, the appellants were the authors of their own misfortunes, thus disentitled to any compensation upon eviction. The respondent also termed the appellants as busybodies intent on reaping where they have not sown and in her counterclaim, the respondent sought judgment against the appellants for:-

> *"**a) Eviction of the plaintiffs (Defendants in the counterclaim) and other trespassers in occupation of the defendant's (plaintiff's in the counterclaim) land.***
>
> ***b) A permanent mandatory injunction restraining the plaintiffs (the defendants in the counterclaim) from continuing being in occupation and/or trespassing onto the defendant's (plaintiff's in the counterclaim) land either by themselves, their agents, servants and/ or any***

person(s) drawing title from them.

c) Mesne profits.

d) Costs of the suit."

5. At the hearing of the suit, the appellants called a total of four witnesses while the respondent called three witnesses. According to the appellants, the land claimed to be owned by the respondent is separate and is comprised of three parcels of land, spanning 623 acres. The land was occupied by some 308 persons and their families since 1995. The settlement is said to have been precipitated by a project known as Mtaani/Kisumu Ndogo upgrading scheme, which was a joint venture between the then Ministry of Lands and the German Technical Corporation (GTZ). As a result, the appellants as the proposed beneficiaries were advised to form a hierarchy of three committees; the lowest being the residence committee, which would be overseen by the task force committee which in turn was overseen by the project promotion committee. PW1 (Nelson Kazungu Chai), was elected as the Chairman of the residence committee in 1992 while the task force committee and the Project Promotion Committee had the Kilifi Town Clerk and the Deputy Commissioner of Lands as their respective chairs.

6. A cadastral survey was conducted and the appellants were the squatters identified as eligible to settle on that land. However, in the course of the squatter settlement, it was discovered that some of the squatters had been erroneously settled on land reserved for public utilities. It was thus imperative that they be resettled elsewhere and the alternative land identified in this regard was known as the Kibaoni extension, which is the suit property herein. PW1 stated that the suit land had been part of land owned by the Institute and that indeed it was the institute's principal (Daniel Silo- DW1) who pointed out the land to him. He added that part of the parcel had previously been donated by the Institute to a primary school, a school for the deaf and a secondary school with the remaining 50 acres being given to the appellants as aforesaid. To the appellants' dismay however, though the schools were left to retain their allotments, attempts were made by the respondent to dispossess the appellants of their parcels, despite the allocations having been sanctioned by the erstwhile Ministers for Agriculture, Hon. D. Mbela and his counterpart Hon. Katana Ngala, Minister for Lands. The appellants emphasized that the respondent had no valid claim to the 50 acres that formed the suit land and that to the contrary; it is the appellants who were in active occupation and even had the graves of their departed on the land and had put up a lot of developments thereon at great expense, which development included schools, churches, and permanent dwellings.

7. Though the appellants acknowledged that for one to acquire government land, a PDP must be prepared and letters of allotment issued in accordance with the PDP, PW3 (Walter Okoth Ombogo) a land surveyor, conceded that by the time he was preparing his survey report, no such PDP had been prepared. Nonetheless, the appellants reiterated that they stood to suffer great financial loss if the respondent is allowed to evict them from the property. A report of these losses was produced in evidence by PW4 (Maina Chege) a valuer; who however conceded that he did not know of the land's ownership particulars. Nevertheless, the appellants were quick to add that even though they had no title documents to the land, they had usufructuary rights and that possession was in this case as good as ownership, more so given the manner in which they had utilized the property, including the presence of burial grounds thereon.

8. On the other hand, the respondent's case before the trial court was that the suit land was acquired by the institute, which was the respondent's predecessor. According to DW1, contrary to the appellants' allegation, the three schools had already been allocated their 30 acres and were already in occupation at the time the institute was allocated its share by the government. He denied having authorized any subsequent allocation of the institute's land to the appellants as alleged; adding that as the respondent's principal, he in fact opposed such allocation and as a result none was ever done. Further, that though sought by the appellants, no PDP was approved. To the contrary, when DW1 went to see the District Physical Planner over a PDP dated 19th February, 2003, which was allegedly circulating around town, the latter disowned it. To the respondent, this lent credence to her assertion that no PDP was ever issued, nor was any valid allocation ever made n favour of the appellants. The above notwithstanding, the appellants had in the meantime unlawfully taken occupation without any colour of right and according to DW2

(Jonathan Wilson Sulubu), though the ministry of Agriculture directed them to vacate, they refused to do so.

9. After hearing the parties and their witnesses, the court **(Angote, J.)** rendered the now impugned judgment on 31st October, 2014; whereby he found the appellants' suit unmerited and dismissed it. To the Judge's mind, the appellants had failed to prove their ownership of the land, meaning their occupation thereof was illegitimate and illegal. As such, that they were merely squatters who had invaded government land without following due process and any attempt by the court to grant them the property would amount to a usurpation of the powers of the Commissioner of Lands and the National Land Commission. Conversely, the learned Judge found that the respondent had established her case and consequently, the learned Judge granted orders as prayed in the respondent's counterclaim.

10. That judgment has in turn provoked the present appeal, in which the appellants have proffered a prolix of not less than 10 lengthy grounds of appeal namely;

> ***"1. That the learned judge failed to distinguish between the sets of facts in leading to the decision of this court in Msa Civil Appeal Number 1982, Mombasa Technical & Training institute v. Agnes Nyevu Charo & others and the facts of the suit before him when the honourable judge failed to weigh in on the fact that the appellant's possession of the suit premises came about through the actions and representations of the government of Kenya.***
>
> ***2. That the learned Judge erred in failing to distinguish all other decisions of this Honourable court cited in the judgment appealed against especially when attempting to apply them to the circumstances of this case by failing to further appreciate that the appreciate that that the government of Kenya was a key proponent in the project of settling the appellants and hence it was/ is not accurate to consider the appellants 'illegal squatters' or 'land grabbers' as either phrase/ term was used to describe litigants in two of the earlier decisions of this honourable court as followed by the honourable judge.***
>
> ***3. That the learned judge failed to appreciate that the director of physical planning's letter dated 20th September, 2002 produced by the respondent in its evidence, and whereby the said official confirms having planned and prepared a Physical Development Plant for the suit premises for the ultimate occupation by the appellants vindicated the appellants from any allegation of trespass or illegality of possession of the suit premises.***
>
> ***4. That on the whole, the learned judge erred in failing to appreciate the evidence of the appellants particularly correspondence passing between various government officials that set the stage for the appellant's legitimate expectation of settling on the suit premises.***
>
> ***5. That the learned judge erred in not considering that the appellants were not privy to the evidence tendered by the respondent of correspondence as they passed or were passing between the various government departments and the respondent touching on the alleged vitiation of the project to settle the appellants on the suit premises.***
>
> ***6. That the learned judge erred in fact by failing to arrive at a finding that the respondent's correspondence evidence referred to in ground 5 hereinabove, some going back to the early 90's, their contents and purport being in the knowledge of the respondent and the government, were kept away from the knowledge of the appellants even as the appellants innocently held strong legitimate expectation to the contrary, and even as the appellants continued to heavily invest in developing the suit premises.***
>
> ***7. That the learned judge erred in fact and law in implying that the burden of undertaking due diligence of the suit premises lay with the appellants, even in the circumstances of this suit, where the property belonged to the government and the same government is documented as respresenting to the appellants of its capability of settling the appellants on the suit premises.***

8. That the learned judge erred in fact and in law in condemning the appellants for being complicit in purportedly depriving the respondent of its land when uncontroverted evidence in the appellants possession is indicative of the appellants relying on the government to provide direction.

9. That while holding that the Environment and Land Court ought not usurp the powers of the president or the Commissioner of Lands as those powers relate to alienation of government land, the learned judge failed, on the strength of the appellants evidence to order the government and the respondent to render the appellants compensation for the value of their developments prior to the appellants rendering vacant possession, if at all.

10. That the learned judge. (sic)"

Based on the above grounds, the appellants have prayed that the appeal be allowed, the impugned judgment set aside and substituted with orders that the appellants are entitled to be the registered proprietors of the portions of the suit land in their possession. In the alternative, that the Government of Kenya be directed to compensate the appellants for the value of the developments on the land prior to yielding possession to the respondent.

10. With leave of this Court, the parties filed their respective submissions, with oral highlights at the hearing hereof. Appearing for the appellant, learned Counsel, **Mr. Mwadilo,** who held brief for **Dr. Khaminwa (SC),** urged this Court to re-evaluate the evidence, bearing in mind that the appellants settled on the suit land under the initiative of the government. Further reliance was placed on the written submissions, in which the appellants contend that from the correspondence produced in evidence in the affidavits of Nelson Kazungu Chai, there was an overwhelming indication that the government encouraged the appellants to settle on the suit land. As such, the appellants are entitled to unimpeded ownership and possession of the suit land as they await the issuance of certificates of title. The appellants pointed out that the same authority that allocated the suit land to the respondent is the same one that allocated the same land to the appellants. That the appellants, having been lured onto the land by the government of the day, had a legitimate expectation that the land had not only been legally allocated to them, but that the title documents thereof would ultimately issue. The appellants further contended that the ban on allocation of land had no effect on prior allocations as it did not include a variation of prior allocations. Citing **section 83** of the Evidence Act, the appellants submitted that all things are presumed to be legitimately done until the contrary is proved and in particular, that the representation relied upon by the appellants ought to be presumed legitimate unless the contrary is proven. Further, that under **section 23** of the Registration of titles Act *(repealed)*as well as **section 26(1)** of the Land Registration Act, certificates of title issued by the registrar of lands upon registration are *prima facie* evidence that the person named as proprietor is the absolute and indefeasible owner of the land in question. As such, the appellants' contention is that since their allotments have never been cancelled, the same remain in force to date and the respondent is estopped from asserting that the appellants' occupation is unlawful. In addition, that the land never belonged to the Kilifi Institute of Agriculture and any forced eviction perpetrated against the appellants offends both domestic as well as International law.

11. The appellants emphasized that forced evictions are illegal and that it matters not whether they have title to the property in question, whether or not the title holder is the government, or whether or not the intended evictee is a trespasser who has no colour of title. The appellant reiterated their assertion that not only had they developed the land at great expense, but that they had also buried their ancestors on the said parcel and it would be a travesty to disturb the graves of their deceased, bearing in mind that death rituals in Africa are deeply rooted in cultural beliefs. In conclusion, that any eviction meted out on the appellants would defy the provisions of **Articles 28** and **44(2) (a**) of the Constitution as it would be tantamount to curtailing the appellants' right to practicing their cultural beliefs.

12. Opposing the appeal was learned counsel **Mrs. Omung'ala** for the respondent, who began her submissions by stating that the word 'squatter' means the settling on publicly owned land without permission in order to acquire ownership. Since there was no document given to the appellants allowing them to occupy the land, to counsel, it could only mean that the appellants are squatters on the suit land.

Conversely, the respondent acquired the land from its predecessor, the Kilifi Institute of Agriculture who had been allocated the same by the government. Further, that the government had acquired the land totaling 622 acres for use by the institute. Thereafter, the institute donated part of the land to Kibarani Township primary school, Kibarani School for the deaf and Kilifi Township secondary school. The respondent was categorical that no part of the land was ever donated to the appellants and therefore, their interference and invasion of the land is an act of trespass, fraudulent and unlawful. With regard to the decision in *Mombasa Technical & Training institute case (supra),* counsel submitted that the facts in that case are similar to those herein with similar issues arising in both and the learned Judge cannot be faulted for relying on the said decision. Similarly, that the decision in the case of **Mohamed Salim Hussein & 3 others v. Egerton University [2013] Eklr** is also on all fours with the circumstances herein and the Judge cannot be faulted for relying on it either.

13. With regard to the contention that the Physical Development Plan (PDP) vindicated the appellants from any allegation of trespass, counsel submitted that the PDP was based on misrepresentations and was cancelled. Besides, counsel added, the PDP does not connote permission to occupy the property. The process of allotment must be followed. On legitimate expectation, counsel contended that the doctrine does not arise in this case, as the correspondence between the government and the appellants never insinuated any promise or indication that the government intended to allocate the suit land to the appellants and that in any event, an expectation that requires the making of an illegal decision cannot be legimate. He also added that the burden of conducting due diligence lay with the appellants and that the first attempt by the appellants to acquire the suit property was made on 2nd April, 1996 when the appellants wrote to the then District Commissioner Kilifi. The blame can thus not be placed on the government, as the government never promised to settle the appellants on the said land as alleged.

14. Lastly, with regard to compensation of the appellants for their loss, counsel submitted that occupation of the land does not sanitize and legitimize an otherwise unlawful process. It would be illegal and unfair to compel a victim to compensate a squatter for illegal acts the squatter has done on the victim's property; for no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. For those reasons, she urged that the appeal be dismissed.

15. This being a first appeal, the primary role of this Court is to re-evaluate, re-assess and re-analyze the evidence on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way (See the case of ***Kenya Ports Authority v. Kuston (Kenya) Limited (2009) 2EA 212)*** wherein the Court of Appeal held inter alia that :-

> ***"On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."***

We have already summarized above the evidence adduced before the trial court. We shall now consider that evidence vis a vis the grounds of appeal raised by the appellant, submissions of both counsel and the law and draw our own conclusions.

16. That said, from the grounds of appeal and the submissions by counsel, two main issues arise for this court's determination:

a) Whether the appellants were entitled to the suit land and by extension, to any relief and;

b) Whether the decisions relied upon by the learned Judge are distinguishable in the circumstances.

In addressing the first issue, the appellants adopted a two-pronged approach. On one hand, they claimed to have been allocated the suit land by the government and on the other they alleged that even if title was yet to issue, they were nonetheless entitled to the land by virtue of the doctrine of legitimate expectation. Looking at it firstly from the perspective of allocation, the appellants produced a letter dated 2nd April,

1996, which appears to have been the genesis of the allocation application. The letter, written by the residence committee and addressed to the Kilifi Town Clerk began by stating:

> ***"RE: EXTENSION OF PROJECT."***
>
> ***I wish to remind you to (sic) the speech made by the P.C Coast on 27/09/1995 regarding the issue of plot allocation in the Mtaani/ Kisumu Ndogo upgrading project. I understand that the Provincial Commissioner had suggested that a site be found to accommodate the genuine complainants so that the project could be carried out smoothly without much problems…"***

The import of this introductory paragraph shall be apparent shortly.

The letter went on to state that during the initial allocation under the project, some persons appear to have been left out, as their land failed to fall within the area envisioned under the PDP. The end result was that a number of people in the project area had missed out on plots, for the land had become less than the people entitled to allocation. Consequently, the chairman of the appellants' residence committee was of the view that;

> ***"...to leave them out of the project may not be the best idea. It is for this reason that many of these people have complained all along to be considered for allocation of the plots they partially developed or be considered for fair alternative plots elsewhere…"***

By a letter dated 25th October, 1996, the Town clerk forwarded these concerns to the Minister for Agriculture, but the same elicited no response. The Town Clerk thus sent a follow up letter dated 10th March, 1998. This provoked a response dated 3rd April, 1998, from the Commissioner of Lands, who informed the Permanent Secretary for Agriculture as follows:

> ***APPLICATION FOR LAND FOR EXTENSION OF SQUATTER UP GRADING PROJECT-KILIFI TOWNSHIP***
>
> ***I wish to refer to an application ref. KFI/TC/LND/22/VOL II/56 dated 10th March, 1998 from Kilifi Town Council addressed to you and copied to me among others.***
>
> ***I have noted that this proposal has the blessings of the provincial administration and had been recommended by the former minister, Hon. D. Mbela.***
>
> ***In this regard, kindly favour me with your comments and/ or recommendations in respect of the same as the land involved is part of Kilifi Institute of agriculture.*** **(emphasis added)**
>
> ***W. GACANJA***
>
> ***COMMISSIONER OF LANDS.***
>
> ***Cc: The permanent secretary***
>
> ***Ministry of Lands and settlement***
>
> ***Nairobi***
>
> ***The District Commissioner,***
>
> ***Kilifi***
>
> ***The Chairman,***

The Resident Committee

<u>Kilifi</u>

17. To begin with, on the face of it, the latter letter was acknowledged as having been received by the Permanent Secretary as well as all the four recipients to whom the letter was copied among them, the appellants' residence committee. The allegation that the appellants were never privy to the fact that the land had been reserved for the institute cannot therefore be true.

Worth noting as well is that no PDP was produced to back the appellants' claim that due process had been followed as alleged. Nevertheless, while the trial court's judgment and the respondent's evidence have alluded to such a PDP they have also stated that the same was revoked. Indeed, in a letter dated 20th September, 2002, sent by the Director of Physical Planning to the Commissioner of Lands, it appears that the Director of Physical Planning cancelled the said PDP when he stated in part as follows:

> ***"<u>RE: CANCELLATION OF PART DEVELOPMENT PLAN AFFECTING KILIFI AGRICULTURAL INNSTITUTE LAND- APPROVED BY THE HON. MINISTER FOR LANDS AND SETTLEMENT ON 11TH JULY, 2002</u>.***
>
> ***'… At the time the Part Development Plan was presented to me, I was assured that the site was falling within government land and I assumed that your office was aware of the request by the applicants.***
>
> ***I have since discovered that this particular site forms part of land owned by the Agricultural Institute, Kilifi and I wish to officially withdraw the said Part Development Plan. <u>On approval by the Hon. Minister, the part development plan ought to have been returned back to this office for further vetting and documentation which would have included issuance of approved plan number. However, this was not done and this renders the approval null and void…."</u>(***emphasis added***)***

18. From the foregoing, it is not in doubt that according to the Commissioner for lands and the director of physical planning, the land in question was at all material times government land reserved for the Institute. It is little wonder therefore, that no PDP was in the offing. Additionally, from the above correspondence, it is clear that once allotted to the institute, the suit land ceased being unalienated land as defined under **section 2** of the repealed Government Lands Act. Consequently, the Commissioner of Lands could not cause allocation to issue in respect of the same because under **section 3** of the Act, the only land that could be so allocated was unalienated land. Therefore under statutory law, the Commissioner of lands ceased to have the mandate to allocate the land the moment the same was allocated to the institute. Even if the Commissioner were to purport to allocate the land, the same would be null and void. As stated by the predecessor of this court in the case of ***<u>Said Bin Seif v. Shariff Mohammed Shatry</u>, (1940)19 (1) KLR 9***; an action taken by the Commissioner of Lands without legal authority is a nullity and such an action, however technically correct, is null and void and is of no effect whether under legitimate expectation, estoppel or otherwise.

19. The other aspect raised by the appellants and which they went to great lengths to emphasize; was that the government should not be allowed to renege on its promise of allocating the land to the appellants. To the appellants, that promise created a legitimate expectation that must be met, and the government is estopped from going back on its word. The doctrine of legitimate expectation is a principle of administrative law which requires that a public authority or administrative body should not renege on legitimate promises which have been made and relied upon to a person's detriment. As was captured by t**he House of Lords in the case of <u>Council of Civil Service Unions & Others v. Minister for the Civil Service</u>** [1984] 3 All ER 935;

> ***"even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the courts will protect his expectation by judicial review as a matter of public law."***

In order to successfully invoke the doctrine, it must be shown that the act or decision complained of affected such other person either; (a) by altering rights or obligations of that person which are enforceable by or against him in private law or (b) by depriving him of some benefit or advantage which he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do (Per Lord Diplock in ***Council of Civil Service Unions (supra).***

20. As indicated earlier, the introductory part of the appellants' request for land was based on a promise made by a Provincial Commissioner (P.C) at a public speech. That promise was however not made by the Commissioner of Lands. On the contrary, the response the Commissioner gave indicated that the land in question was already part of the Kilifi Institute of Agriculture. On those premises, how could the appellants succeed in saying that the government had aroused in them a legitimate expectation of getting the land? An expectation can only be legitimate if it is couched in law and if the promise made by the authority falls within its mandate to fulfil. This position was appreciated by the Supreme Court of India in **Jitendra Kumar & Others v. State of Haryana & Another; Supreme Court of India Civil Appeal No. 5803 of 2007,** where it was stated that:

> ***"A legitimate expectation is not the same thing as an anticipation. It is distinct and different from a desire and hope. It is based on a right. [See also. Chanchal Goyal (Dr.) v. State of Rajasthan (2003) 3 SCC 485 and Union of India v. Hindustan Development Corpn. (1993) 3 SCC 499] It is grounded in the rule of law as requiring regularity, predictability and certainty with the Government's dealings with the public."*** **(emphasis added)**

In this case, not only was the perceived promise not made by the Commissioner for lands, but the same concerned land that was no longer within his mandate to grant. In any event, even if legitimate expectation had arisen, the appellants would still be disentitled to relief, for they had not enjoined the Commissioner of Lands as a defendant, yet his office is the one being alleged to have owed them a duty of fulfilling that legitimate expectation. The contention that the appellants had a legitimate expectation fails to find ground and the learned Judge cannot be faulted for having so found.

21. The other main issue raised in this appeal was that the learned Judge erred in failing to appreciate that the cases of **Mombasa Technical & Training institute** *(supra)* and all the other case law upon which he based his decision pertained to squatters. For that reason, the appellant contended that the Judge should have distinguished those cases from the present one because in the present case, the appellants were not squatters and the law pronounced in those cases is inapplicable herein. The question that begs an answer is, were they or were they not squatters?

The definition of a squatter as per the **Black's Law Dictionary, 9th Edition** is;

> ***"a person who settles on property without any legal claim or title."***

As stated earlier, by the appellants' own admission, no allotment letters were ever issued in their favour in respect of the suit property. Their ownership was pegged on occupation, which occupation was in turn pegged on promises of allotment allegedly made to them by government officials. In fact, in his submission before the trial court, learned counsel for the appellants went so far as to say that having occupied and developed the property at great expense, the appellants were entitled to the land.

It bears repeating that allocation of land under the Government Lands Act was only possible where the land was unalienated. Such was not the case herein. The land in question had already been reserved for the institute, which was the respondent's predecessor. Additionally, the appellants' letter dated 2nd April, 1996 intimates that at the time the letter was written, the appellants had already settled on the suit land. It can only be presumed that they did so based on their now debunked allegation of legitimate expectation.

22. Before we conclude, we need to say something about Dr. Khaminwa's submission about the appellants' human rights being violated, and also on forceful evictions. A right can only be protected when it exists in reality and not where it remains an illusion or a mere expectation. Right to property is not one of those rights that inhere to every human being upon birth. They are acquired in different ways

after one comes into this world. One cannot acquire property rights over another's property other than in a manner prescribed in law. In this case the appellants' claim to the suit property was in our view merely aspirational or rhetorical. This is so both under our very progressive Constitution and also under International Law. Indeed other than call in aid International Law, learned counsel Dr. Khaminwa did not cite any specific instrument that the appellants can leverage on to elevate the appellant's right to practice and enjoy their culture on the respondent's property over the respondent's rights under Article 40 of the Constitution. In the absence of any right under the doctrine of legitimate expectation and of any other valid colour of right, the trial court could not have arrived at any other finding. Our conclusion is that the learned Judge arrived at the right decision based on the evidence placed before him, and he cannot be faulted.

23. In sum, we are satisfied that this appeal lacks merit and the same is dismissed, with an order that each party bears its own costs.

Dated and delivered at Mombasa this 23rd day of November, 2017.

ALNASHIR VISRAM

……...…

JUDGE OF APPEAL

W. KARANJA

……..……

JUDGE OF APPEAL

M. K. KOOME

……

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR