



**Shee & 2 others v Alliance Hotels Limited & 2 others (Environment & Land
Petition 2 of 2023) [2024] KEELC 5799 (KLR) (6 August 2024) (Judgment)**

Neutral citation: [2024] KEELC 5799 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND PETITION 2 OF 2023**

**AE DENA, J
AUGUST 6, 2024**

BETWEEN

**MOHAMED SULEIMAN SHEE 1ST PETITIONER
BAKARI OMARI CHALA 2ND PETITIONER
ABDALLA MBARUK MWAROPIA & MBARUKU ABDALLA MWAROPIA
(SUING AS PERSONAL REPRESENTATIVES OF THE ESTATE OF MBARUKU
MWARUPIA) 3RD PETITIONER**

AND

**ALLIANCE HOTELS LIMITED 1ST RESPONDENT
ALLIANCE NOMINEES LIMITED 2ND RESPONDENT
REGISTRAR OF LANDS – KWALE 3RD RESPONDENT**

JUDGMENT

History

1. The petition instituting this suit was filed before court on 14/3/2023. The Petitioners aver that at all material times to this suit they were the registered proprietors of land parcels Kwale/Galu Kinondo/667,668 and 669 (suit properties). That Kwale/Galu Kinondo/667 is registered in the name of Abdallah Mbaruk Mwarupia the 3rd Petitioner, Kwale/Galu Kinondo/668 in the name of Mohammed Suleiman Shee the 1st Petitioner and Hamisi Ayub Mwanjiti the deceased. Parcel number Kwale/Galu Kinondo/668 in the name of Mohammed Suleiman Shee and Bakari Omari Chala the 1st and 2nd Petitioners.
2. According to the Petitioners the properties were acquired by virtue of the same belonging to their family which used to reside and work for gain by the sea on the said properties.



3. The Petitioners state that their late fathers and grandfathers lived on the suit properties until 1974 when one Ayub Mohammed who is now deceased and an uncle to the Petitioners was from a fishing expedition when he met Robert Matano and Stanley Muoka on the suit property. It is averred that Robert Matano and Stanley Muoka made inquiries as to the ownership of the land and promised to return with buyers who were keen on establishing a big hotel on the land and which would create employment to the owner and his children. That following a period of waiting the alleged buyer never turned up.
4. According to the Petitioners, sometime in the year 1995 they visited the Kwale Lands Registry to follow up on issuance of title deeds to the suit properties. That to their utter shock they discovered that the suit properties were registered in the names of Alliance Nominees Limited and Alliance Hotel Limited. The Petitioners state that efforts to follow up on the illegal registration of the Respondents as the owners of the suit properties bore no fruit until 2005 when a tribunal was formed by the then President Mwai Kibaki to inquire into historical land injustices. That several suits were filed and heard before the tribunal with regard to ownership of the suit properties. The suits were; -
 1. Msambweni Land Disputes Tribunal decision vide Land Dispute Case No 7 of 2005 Omari Bakari Mwachala & 3 Others Versus Robert Matano & Alliance Nominees Limited.
 2. Msambweni Land Dispute Case No 10 of 2005; Mohammed Mbaruk & Ali Mohamed Kheri Vs Francis Juda Muoka.
 3. Msambweni Land Disputes Tribunal Case No 13 of 2005 Mohammed Suleiman Shee & 4 Others Vs Francis Judah Muoka & Alliance Nominees Limited.
5. The Petitioners state that the findings of the tribunal were that the Petitioners were the lawful proprietors of the suit property, they were awarded the same. That the Petitioners then moved to the Kwale Resident Magistrates court to have the decision ratified. It is stated that the award by the tribunal was challenged vide Mombasa judicial review case number 2 of 2006 and in their absence and without the knowledge of the Petitioners a consent was recorded setting aside the award granted to the Petitioners by the tribunal.
6. The Petitioners deny any involvement in the consent and state that the same was recorded without their authority. They further deny having ever sold the suit properties and claim that the Respondents were holding the titles illegally. That that the revocation of their titles was illegal, unconstitutional, fraudulent and led to a great miscarriage of justice. The grounds are listed under paragraph 22 of the petition. The Petitioners further aver they have been deprived the use of their land and ownership of the same. At paragraph 23 of the petition, the Petitioners list and expound the various articles of *the Constitution* upon which their respective rights are premised and have been allegedly violated by the Respondents' actions being articles 19, 22, 23, 40, 47, 50, 64, 159, 258. Section 4 of the Fair Administrative Actions Act.
7. The Petition is supported by the Affidavit of Mohamed Suleiman Shee with the authority of the rest of the Petitioners and reiterates the averments in the petition and attaches several documents supporting their case.

Prayers in the Petition

8. The Petitioners pray for the following orders;
 1. A declaration that the decision and award by the Msambweni Land Disputes Tribunal in the Msambweni Land Disputes Tribunal Decision Vide Land Dispute Case No 7 Of 2005; Omari



Bakari Mwachala & 3 Others Vs Robert Matano & Alliance Nominees Limited, Msambweni Land Disputes Tribunal Case No 10 Of 2005 Mohammed Mbaruk & Ali Mohammed Kheri Vs Francis Judah Muoka and Msambweni Land Disputes Case No 13 of 2005 Mohammed Suleiman Shee & 4 Others Versus Francis Judah Muoka & Alliance Nominees Limited was regular and fair and is upheld.

2. A declaration that the consent order and proceedings of Mombasa Judicial Review No 2 of 2006 with regards to the suit properties are irregular, null and void.
3. A declaration that the title deeds issued to the 1st and 2nd Respondents by the 3rd Respondent with respect to the land parcel no Kwale/Galu Kinondo/667,668 & 669 are null, void and stand revoked by this Honourable court.
4. An order of permanent injunction restraining the 1st and 2nd Respondents jointly and severally whether by themselves, their agents, servants or other person claiming through them or their successor in title from trespassing, charging encroaching and/or developing the suit land parcels.
5. A declaration that the Petitioners are the legal and equitable owners of the land parcel Number Kwale/Galu Kinondo/667, 668 & 669.
6. An order directed to the 3rd Respondent to cancel any and all titles to the suit properties issued to the 1st and 2nd Respondents or any other third parties and for the regularisation of records at Kwale Lands Registry confirming the Petitioners herein as the legal and equitable owners of the suit property.
7. Costs of this suit and interest thereon.

Response

9. In response to the petition, the 1st and 2nd Respondents filed replying affidavit sworn by Raymond Matiba a Director of the 2nd Respondent on 23/11/23. It is averred that at all material times to the suit, the 1st Respondent was the registered owner of title Kwale/Galu Kinondo/669 having purchased the same from one Robert Matano in the year 1983 and obtained title to the same. That the 2nd Respondent on the other hand is the registered owner of parcels Kwale/Galu Kinondo/667 & 668 having purchased the same from Francis Judah Muoka in the year 1994. That sometime in the year 2005 several disputes with regards to the suit properties were filed at the Msambweni Land Disputes Tribunal. These are listed at paragraph 6 of the affidavit.
10. At paragraph 7, it is averred that the Tribunal made a finding in favour of the complainants therein and who are the Petitioners in the instant suit. The tribunal rendered all the titles held by the 1st and 2nd Respondent's void. The Petitioners then moved to the Resident Magistrate's Court in Kwale to have the Tribunal's decision adopted as a judgement of the court. The 1st and 2nd Respondents stated that they moved to the High Court vide Judicial Review No 2 of 2006 seeking orders of certiorari to quash the said decision of the tribunal and further orders of prohibition barring the Land Registrar Kwale from revoking their titles.
11. The 1st and 2nd Respondents state that on 5/5/2008 a consent was recorded in the Judicial Review case by all parties therein quashing the decision/award of the Msambweni Land Disputes Tribunal and prohibited the Land Registrar from revoking the titles to the suit properties. It is stated that all the parties in the judicial review proceedings had been served and were aware of the same. It is averred that



by this consent judgement, the disputes surrounding the suit properties were determined in finality and the 1st and 2nd Respondents have since then been in occupation of the suit properties.

12. According to the 1st and 2nd Respondents, in November 2016 the Petitioners herein dropped a brown envelope at the Safari Beach Hotel gate and the contents thereof were a determination by the National Land Commission dated 23/11/2016 directing the revocation of the titles to the suit property. It is stated that the public sittings by the National Land Commission held on 13/12/2015 involved Robert Matano and Francis Judah Muoka. The findings of the National Land Commission were then made part of three suits instituted at the Environmental & Land Court in Mombasa. The same are listed under paragraph 14 of the affidavit. That eventually the suits were compromised by a consent and the National Land Commission caused a Gazette Notice to be published on 17/7/2017 revoking the titles held by the 1st and 2nd Respondents.
13. The 1st and 2nd Respondents stated that the National Land Commission decision was challenged before this court as Kwale ELC Petition No 18 of 2021 and vide the judgement delivered on 13/3/2023 the court made a finding in favour of the 1st and 2nd Respondents. The Respondents state that the instant suit is therefore res judicata and an abuse of the court process as the court has already pronounced itself on the same. That the Petitioners if aggrieved with the decision of the court ought to have appealed the same instead of filing the petition herein. The Respondents maintain that the court is functus officio and the instant petition ought to be dismissed.

Preliminary Objection

14. The 1st and 2nd Respondents further to the affidavit in response to the application filed a notice of preliminary objection dated 27th March 2023. The same was based on the following grounds; -
 1. This Honourable court cannot hear and/or determine the instant suit or application as matters substantially in issue herein are res judicata.
 2. This Honourable court cannot hear and/or determine the instant suit or application as the entire claim is time barred.
 3. The filing of the instant suit amounts to an abuse of the court process and as such, the entire proceedings ought to be dismissed with costs.
15. The 3rd Respondent Land Registrar Kwale filed an amended preliminary objection to the petition and which raised the following grounds;
 1. That the court lacks jurisdiction to hear the dispute as the court of competent jurisdiction heard and determined the issue at hand in Mombasa Judicial Review No. 2 of 2006.
 2. That the court lacks jurisdiction to hear the dispute as a court of competent jurisdiction made a determination between the same parties and on the same subject matter being Kwale/Galu Kinondo/667,668 and 669 in Kwale ELC Petition Number 18 of 2021 Alliance Hotels Ltd & Alliance Nominees Ltd, the National Land Commission and 9 Others hence the matter is Res Judicata subject to Section 7 of the *Civil Procedure Act*.
 3. That the court lacks jurisdiction to hear an appeal from the High Court in judicial review matter as the petition seeks orders that can only be granted on appeal of decision of the court in Mombasa Judicial Review No 2 of 2006.
 4. That the 3rd Petitioners have no standing nor the authority to institute a suit on behalf of the estate of Mbaruku Mwarupia as they have not provided a grant of probate or a grant of letters



of administration to prove themselves as personal representatives of the estate of Mbaruku Mwaropia.

16. The 3rd Respondent prays that the petition be struck out for want of jurisdiction and costs be awarded to the 3rd Respondent.

Directions

17. Initially the court gave directions on the disposal of the preliminary objection which directions in retrospect I reviewed as part of case management for efficiency on 6/11/2023 to enable both the preliminary objection and the petition to be canvassed at the same time. It is appropriate that I set out the orders that issued;
1. Both the preliminary objections and the petition shall be canvassed and determined at the same time.
 2. Nothing that Respondents have not responded substantially to the petition, they shall do so with 21 days of today's date. The petitioner shall respond further if they deem it necessary within 10 days of service.
 3. The preliminary objection and the petition shall be heard together by way of written submissions. Parties having filed submissions in respect of the preliminary objection shall both be required to file any further submissions in this regard.
 4. With regard to the petition the Petitioner shall file and serve written submissions in respect of the petition within 14 days of service of the respondent's reply to the petition and the Respondents shall file theirs within 14 days as well. With leave to the petition to respond on issues of law with 7 days of service.
 5. The status quo orders agreed upon and issued on 15/5/2023 shall be maintained pending the hearing and determination of the preliminary objection and the petition.
 6. Hearing of the petition shall be on 29/01/2023 at 8.30 am.

Submissions

Petitioners' Submissions

18. The Petitioners filed written submissions on 22/6/2023 responding to preliminary objections and in support of the Petition The following issues for determination were highlighted;
1. Whether the petition and application are Res Judicata
 2. Whether the petition is time barred
 3. Whether the 3rd Petitioner have the legal standing to institute the suit on behalf of the estate of Mbaruk Mwaropia
 4. Whether the petition is an abuse of the court process.
19. On the 1st issue for determination, it is submitted that the prayers in ELC Petition No. 18 of 2021 and the current grounds in the petition are different. That the former petition sought to nullify the decision of the National Land Commission while the instant petition is on the legal and equitable ownership of the suit property. That based on this, the petition herein cannot be termed as being res judicata as issues of ownership of the suit properties have not been determined.



- 20 . On whether the petition is time barred it is submitted that in determining time limits for petitions, the court has to deal with the same on a case-to-case basis based on the circumstances of each case. That the delay in filing the petition was occasioned by the numerous disputes over the suit properties and which were before different forums.
- 21 . The Petitioners further submit that the 3rd Petitioners have the requisite authority to file the instant suit pursuant to a grant issued in Kwale Succession Cause No 29 of 2022.
- 22 . The Petitioners state that the suit cannot be termed as an abuse of the court process as it has been stated under Article 22 of *the Constitution* that every citizen has an unrestricted right to institute proceedings seeking redress over an abuse of a fundamental right.
- 23 . With regard to the main Petition the Petitioner filed submissions on 23/01/24 rehashing the facts in the petition and the evidence led in the Msambweni Land Disputes Tribunal and its determination the Petitioners identified the following issues for determination; -
1. Whether the Msambweni Land Disputes Tribunal in the Land Dispute Cases No. 7 of 2005, 10 of 2005 and 13 of 2005 was regular and fair and should be upheld.
 2. Whether the Petitioners are entitled to the orders sought
 3. Who should bear the costs of these proceedings?
- 24 . On the 1st issue the Petitioners recalled that the 1st and 2nd Respondents were holding titles to the suit property by dint of the court decision of 13/3/23 which found that the process at the National Land Commission was irregular for failure to serve notice on the respondents. It is submitted that the filing of the dispute at the NLC was a calculated move by counsel who had been compromised and were out to serve their own personal gain and interests. That this was evidenced by the Petitioners move to present themselves to the jurisdiction of the Land Tribunal.
- 25 . It was submitted on behalf of the Petitioners that the Tribunals proceedings were legally constituted, fair and every party affected by the suit properties were given an opportunity to be heard before a decision was rendered. That the Judicial review proceedings did not challenge the procedure of the proceedings in the tribunal. To quash such a decision by mere consent is underrating the work done by the tribunal, a government organ created to aid it in execution of its functions and locking out laymen who went to the tribunal to fight hard for their land. That it is just that the said Tribunal did not have powers to order the Land Registrar to issue new titles to the Petitioners that the said Petitioners were forced to go to Kwale Resident Magistrate for ratification of the Tribunals decision.
- 26 . Counsel raised suspicion that after the Petitioners labouring for many years to obtain title and after full hearing, it would not make sense that a consent adversely affecting the Petitioners would be recorded by counsel to set aside the proceedings. Reliance was placed on the decided case of Bank of Africa Kenya Vs Put Sarajevo General Eng. Co. Ltd & 2 Others [2018] eKLR where it was held that where counsel has made a mistake the court ought to do whatever is necessary to rectify the mistake if the interest of justice so dictates. Belinda Murai & 9 Others Vs Amos Wainaina [1979] eKLR was cited in further support of the same holding. Further reliance was placed on the spirit of sections 1B and 3A of the *Civil Procedure Act* and Article 159(2) of *the Constitution* of Kenya 2010 to encourage the ends of justice to be met.
- 27 . It was further submitted on the orders sought by the Petitioners that the court has powers by dint of article 23(3) of *the Constitution* to make appropriate orders. Citing the decided case of Daudi Ledama Morintat Vs. Mary Christie Karie & 2 Others [2017] eKLR and section 3(3) of the *Law of Contract Act* and it was contended that during the various proceedings no sale agreements were produced to



support the titles held by the 1st and 2nd Respondents. That the said Respondents have never at any point occupied, used or developed the suit properties. That the Respondent has its hotels on other land parcels far from the suit properties. Counsel reiterated that the Petitioners were misled into going to the NLC only for the process thereat to be faulted by this court leaving the petitioners with no land. The court was urged to rectify the wrongs and well-orchestrated injustice and sustain the decision of the Tribunal.

28. As to costs it was submitted that the same be borne by the Respondents

The 1st and 2nd Respondents' Submissions

29. The 1st and 2nd Respondents filed their submissions in support to the preliminary objection and in response to the petition on 13/6/2023 dated 29/05/23 and 5/2/2024. They identified the following issues for determination; -

1. Whether the instant petition is res judicata
2. Whether the present suit is time barred
3. Whether the Petitioners are the legal and equitable owners of the suit properties
4. Whether the decision and award by the Msambweni Land Disputes Tribunal can be upheld as a final determination in regard to the suit properties
5. Whether this Honourable court can declare that the consent order and proceedings in Mombasa Judicial Review No 2 of 2006 as irregular, null and void

30. On whether the Petitioners are the legal and equitable owners of the suit properties reiterating that instances of irregularities in the cancellation of the 1st and 2nd Respondents titles by the National Land Commission, it is submitted that the revocation of the titles by the National Land Commission was illegal leading to the quashing of the said decision by the court in Kwale ELC Petition No.18 of 2021. That the orders sought therein were for revocation of the Petitioners titles and for the 1st and 2nd Respondents to be declared the legal and equitable owners of the suit property. That as such the 1st and 2nd Respondents are the legal and equitable owners of the suit properties.

31. As to whether the decision and award by the Msambweni Land Disputes Tribunal case can be upheld as a final determination in regard to the suit properties it is submitted that the said decision was challenged at the Mombasa High Court in judicial review No. 2 of 2006. The case was then compromised by a consent dated 5/5/2008. That this court cannot therefore make any finding on the same as the High court in Mombasa which had the requisite jurisdiction under article 165(6) of *the Constitution* already reviewed the tribunals decision and pronounced itself on the issue.

32. On whether this court can declare the consent order and proceedings in Judicial Review No 2 of 2006 as irregular, null and void it is submitted that this court lacks supervisory jurisdiction to exercise powers over the High court as a court of same status. That the same is a preserve of the Court of Appeal and the Supreme Court. The court is referred to the case of Kantet Japit Vs. Koya ole Kimolol (2018) eKLR. In conclusion the court is urged to dismiss the petition with costs for being devoid of merit.

3rd Respondent's Submissions

33. The 3rd Respondent's filed submissions on 3/5/2023 and 29/6/2023. It is submitted that Kwale ELC Petition No. 18 of 2021 and the present suit concern the same parcels of land and the respective Petitioners moved the court for revocation of the adverse parties' titles to the same. That the court



directed the Land registrar Kwale to cancel all the titles issued to the 3rd - 10th Respondents and reinstate the registration of the Petitioners. That it was apparent that the Petitioners are unsatisfied with the decision in Kwale ELC Petition No.18 of 2021 and are seeking to overturn it by having the court seat on appeal over its decision.

- 34 . It is further submitted that there is similarities in the parties to both suits and that the Petitioners in the present suit featured as the 3rd, 4th and 8th Respondents in the former suit. Reliance is placed on the case of Gladys Nduku Nthuki Vs Letshego Kenya Ltd; Mueni Charles Maingi (intended Plaintiff) [2022] eKLR where the court pointed that a party cannot escape the doctrine of res judicata by undertaking a cosmetic surgery to the pleadings and where the added parties peg their claim on the same title as the parties in the earlier suit the doctrine will be invoked. The court is further urged to be guided by the Supreme Court in *John Florence Maritime Services Limited & Another Vs. Cabinet Secretary Transport & Infrastructure & 3 Others (Petition 17 of 2015)* [2021].
- 35 . On locus standi it is stated that the alleged grant ad litem obtained vide Kwale Succession Cause No. 29 of 2022 has not been availed as evidence in court. That introducing the same by way of submissions is not enough. *Julian Adoyo Ongunga Vs. Francis Kiberenge Abano Migori Civil Appeal No.119 of 2015* and Edema & 2 Others Vs. Edema & 5 Others [2022] KEKC 9960 (KLR) is relied upon to buttress this point.
- 36 . It further stated that the suit before the court is a land matter disguised as a petition to defeat the relevant statutes of limitation of time.

Analysis and Determination

- 37 . I have considered the petition before this court, the responses, the material on record and submissions of the parties. The court has identified the following issues for determination in this matter:
1. Whether this petition is res judicata
 2. Whether the Msambweni Land Disputes Tribunal in the Land Dispute Cases No. 7 of 2005, 10 of 2005 and 13 of 2005 was regular and fair and should be upheld.
 2. Whether this Honourable court can declare the consent order and proceedings in Mombasa Judicial Review No 2 of 2006 as irregular, null and void.
 3. Are the Petitioners entitled to the orders sought?
 4. Who should bear the costs of this petition?

Whether this petition is res judicata

- 38 . The issue as to whether this court has the requisite jurisdiction to determine the dispute herein was raised vide preliminary objections by the 1st and 2nd Respondents and the 3rd Respondent through State Counsel in the office of the Attorney General. According to the Respondents, the issues in the petition have already been conclusively litigated upon in Kwale ELC Petition No.18 of 2021 and hence the petition herein is res judicata.
- 39 . The test for determining the application of the doctrine of res-judicata is spelt out under section 7 of the *Civil Procedure Act* as follows; -

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.

40. The doctrine of res judicata has also been explained in various court decisions up to the apex court of this land. In *Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others* [2017] eKLR, the Supreme Court of Kenya while considering section 7 above held that all the elements outlined thereunder must be satisfied to with; -
- a. “The suit or issue was directly and substantially in issue in the former suit.
 - b. That former suit was between the same parties or parties under whom they or any of them claim.
 - c. Those parties were litigating under the same title.
 - d. The issue was heard and finally determined in the former suit.
 - e. 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.”
41. The Court of Appeal while propounding further on the essence of the doctrine of res judicata in *John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others* [2015] eKLR pronounced itself as follows:
- “The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unravelling uncontrollably.”
42. The Respondents argue that the issues raised in the instant petition have already been conclusively dealt with by this court in its verdict rendered on 13/3/2023 in Kwale ELC Petition Number 18 of 2021. For ease of reference, I will reproduce the final orders of the court here below;
- a. That a declaration shall issue that the proceedings of the National Land Commission, the 1st Respondent dated 14th December 2015 and 23rd November 2016 respectively with regards to LR No’s Kwale/Galu Kinondo/667, 668 and 669 are null and void.
 - b. That a declaration shall issue that the gazette notice dated 17th July 2017 published by the National Land Commission, the 1st Respondent and revoking titles to properties LR Nos Kwale/Galu Kinondo/667, 668 and 669 and further directing the Registrar of Lands Kwale to create new titles for the said properties is null and void.
 - c. That a declaration shall issue that all titles issued to the 3rd – 10th Respondents by the Registrar of Lands Kwale with respect to properties as LR Nos Kwale/Galu Kinondo/667,668 and 669 are null and void and stand revoked by the court.
 - d. That an order shall issue directed to the Registrar of Lands Kwale to cancel all titles to LR Nos Kwale/Galu Kinondo/667,668 and 669 issued to the 3rd - 10th Respondents and reinstate the registration of the Petitioners.



- e. Let parties bear their own costs.
43. Before the court embarked on the preparation of this judgement it was necessary to revisit and refresh its memory of the above judgement since the said judgement is the substratum of the upon which this objection was raised. A copy of the same was attached to the Respondents Replying Affidavit. But I must make a disclaimer that the court is aware this is not the forum for review of the said judgement. The court will be careful not to go into the merits of the judgement.
44. The gist of Kwale ELC Petition Number 18 of 2021 was the findings by the National Land Commission on the ownership of the suit properties. In my analysis on the same, a finding was made that the proceedings by the National Land Commission were null and void. The National Land Commission went a step further in revoking the titles and having the Petitioners registered as the owners of the suit properties. The prayers sought by the Respondents in Kwale ELC Petition Number 18 of 2021 were for the said decision by the NLC to be declared null and void and for the titles held by the Respondents therein to be revoked.
45. It is the Petitioners contention that the orders made in Kwale ELC Petition Number 18 of 2021 were not on ownership of the suit properties but rather on the mandate of the National Land Commission having been overstepped. From the judgement I picked paragraph 48 which I found pertinent where the court observed thus; -

"My understanding of this petition is that it is seeking the nullification of the proceedings and determination of the National Land Commission being the 1st Respondent dated 14/12/15 and 23/11/2016 respectively and all subsequent action emanating therefrom. Infact this is supported at the opening statement of paragraph 11 where the Petitioners state it is the series of events in the months of November 2016 and September 2017 that form the substratum of this petition..."

That was the understanding upon which the judgement was made. There was a prayer seeking that the Petitioners therein be declared the legal and equitable owners of the suit properties which I declined to grant. I would therefore not render the present petition *res judicata* on this point.

46. But having stated the above it has also been contended that the court lacks jurisdiction to hear the dispute as the court of competent jurisdiction heard and determined the issue at hand in Mombasa Judicial Review No. 2 of 2006. This limb of the preliminary objection is related to the declaratory order being sought in the present petition inviting the court to nullify the consent order and proceedings of Mombasa Judicial Review No 2 of 2006. I will first address the issue of finality of the said proceedings guided by the principles already outlined under section 7 above and the case law I have cited.
47. The law and precedent anticipate a hearing and final determination on merits. The Black's Law Dictionary 10th edition defines the terms "heard and determined" as follows: -

"Of a case, having been presented to a Court that rendered Judgment."

The term "hearing" is defined in the same dictionary as follows: -

"A judicial session usually open to the public held for the purpose of deciding issues of fact or of law sometimes with witnesses testifying."

48. It is apparent from the proceedings and it is not in dispute that the Judicial Review proceedings were determined by way of consent order. This is an order that is negotiated between counsels and is not based on a determination of a judge. This is the same position I took in the former suit (see paragraphs



58, 59 & 71). In my view the consent recorded before Serگون J cannot be termed as a final judgement for purposes of the doctrine of res judicata.

- 49 . But there is another dimension raised by the Respondents to the effect that this court lacks jurisdiction to pronounce itself on the illegality or otherwise of the consent of a court of concurrent jurisdiction having considered the matter ostensibly on the basis that the court will be sitting on appeal of the same. This clearly arises from the Petitioners prayer for a declaration that the consent order and proceedings of Mombasa Judicial Review No 2 of 2006 with regards to the suit properties are irregular, null and void.
- 50 . The consent alluded to was adopted as a judgement of the court on 5/5/2008. I must point out that the court that recorded the consent had the requisite jurisdiction to record the consent being the High Court. This court notes that in the former judgement (see paragraph 59) with regard to the said consent which is being impugned the court stated thus;

The only thing I will add is that the said consent still stands as the respondents did nothing to set them aside but decided to approach the 1st Respondent.

This court is deemed as the same court sitting then and I would guard against revising the same being a court of concurrent jurisdiction. An opportunity existed for the review of the same which the Petitioners herein squandered. The Petitioners now want to review the same through the back door by way of this petition. I respectfully refuse to be led into that trap in the guise of a petition or constitutional right.

- 51 . But assuming this court were wrong on the above position. I have perused the contents of the consent and it can be deduced that orders of certiorari were issued quashing the judgements of the Msambweni Land Disputes Tribunal. The court further quashed the adoption of the said judgement by the Senior Resident Magistrates Court at Kwale and issued a prohibitory order to the Land Registrar from revoking and cancelling the titles deed issued to the 1st and 2nd Respondents herein.
- 52 . With regard to the above the Petitioners herein urge that they were not involved in the consent by their Counsel on record then and I have noted present counsels attempt to impute malafides on the part of the previous counsel. The court is aware of the circumstances under which a consent judgement may be set aside by the court for instance, the Court of Appeal in the case of Kenya Commercial Bank Ltd v. Specialized Engineering Co. Ltd [1982] KLR P. 485 held that:

"A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or by an agreement contrary to the Policy of the Court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the Court to set aside an agreement."

In the same case the Court further held that:

"An advocate has general authority to compromise on behalf of his client as long as he is acting bona fide and not contrary to express negative direction. In the absence of proof of any express negative direction, the order shall be binding".

- 53 . Firstly, I have not come across any evidence that a complaint was lodged with the Bar Association in this regard. If there was fraud on the part of the previous advocates it cannot be imputed by the Petitioners urging the court to find that something was amiss in a litigant conceding to adverse orders which would negate their long struggle to obtain title. It is trite that the standard of proof for fraud is slightly higher



than that of a balance of probabilities and in this regard the court is guided by the decided cases in Ratil Patel Vs. Lalji Makanji EA 1957 and Vijay Morjaria Vs. Nansigh Darbar & Another [2000]. The court is further aware of decided cases allowing for the setting aside of consent judgements on exceptional circumstances and fraud which as I have already noted were not demonstrated by the Petitioners.

54. The court has noted the argument that the Petitioners were misled by counsels for the lawyers own selfish interests and that the proceedings at the National Land Commission should never have been instituted. In my view this is not helpful to the Petitioners quest herein and I must add if at all the argument is misplaced as it would only be properly raised within the proceedings in Kwale ELC Petition Number 18 of 2021 of which this court is functus officio with regard to what transpired before the Commission or on appeal of the same to the Court of Appeal. This is for the reason that issues on the proceedings of the Commission were discussed substantively in the earlier judgement.
55. For the foregoing reasons this court declines the invitation to tamper with the consent Judgement recorded in Mombasa Judicial Review No 2 of 2006.

Whether the Msambweni Land Disputes Tribunal in the Land Dispute Cases No. 7 of 2005, 10 of 2005 and 13 of 2005 was regular and fair and should be upheld.

56. This issue arises from the Petitioners prayer for orders that this court declares the decision and award by the Msambweni Land Disputes Tribunal Vide Land Dispute Case No 7 Of 2005; Omari Bakari Mwachala & 3 Others Vs Robert Matano & Alliance Nominees Limited, Msambweni Land Disputes Tribunal Case No 10 Of 2005 Mohammed Mbaruk & Ali Mohammed Kheri Vs Francis Judah Muoka and Msambweni Land Disputes Case No 13 of 2005 Mohammed Suleiman Shee & 4 Others Versus Francis Judah Muoka & Alliance Nominees Limited was regular and fair and is upheld. The courts understanding is that it is being moved to review the evidence led before the Tribunal and its decision and uphold it.
57. The Petitioners have produced before court copies of the proceedings of the Msambweni Land Disputes Tribunal and which I perused and noted the outcome of the proceedings thereof. It has been urged by the Petitioners that the tribunal was a lawful tribunal and which I agree. The court has noted the Petitioners robust analysis of the evidence led during the proceedings of the tribunal and the tribunals decision. Counsel for the Petitioners based on the same makes an invitation that the decision be upheld as lawful and for the reasons among others that it was the only forum where parties were substantively heard and evidence taken. That input and output of the said proceedings should not be wasted.
58. Firstly let me make it clear that the above would only be possible had this court been convinced to review the consent orders in the Judicial Review Proceedings which invitation has been declined for the reasons stated elsewhere in this judgement. Further as it is, the judgement of the Tribunal therein was quashed and stands quashed and this goes with the proceedings therein, they cannot be delinked by arguing that the Respondents did not fault the procedure and or process at the Tribunal. Neither can the two be delinked for purpose of this petition and the reasons canvassed by counsel for the Petitioners. But having stated this the court finds it pertinent to have a look at the jurisdiction of the tribunal then.
59. Secondly the jurisdiction of the Land Disputes Tribunal is established under Section 3(1) of the Land Disputes Tribunal Act 1990 (CAP 303A (now repealed) which states as follows:
Subject to this Act, all cases of a civil nature involving a dispute as to -
- a. The division of, or the determination of boundaries to land, including land held in common;
 - b. A claim to occupy or work land; or



- c. Trespass to land shall be heard and determined by a Tribunal established under section 4.”
60. The Tribunal after listening to evidence rendered a decision which effectively cancelled the titles of the 1st and 2nd Respondents herein. Did the Tribunal have jurisdiction to cancel title? The answer in my view is in the negative. Firstly, this is imputed from the below except from the Petitioners submissions (unfortunately the Petitioners submissions are not paginated neither are the paragraphs numbered).
- “It is just that the said tribunal did not have powers to order the land registrar to issue new title deeds to the Petitioners that the said Petitioners were forced to go to Kwale Resident Magistrate for ratification of the tribunals decision.”
61. The proceedings in the Msambweni Land Disputes Tribunal made a finding with respect to the legality of the titles that had been issued. I have already laid out the provisions in Section 3(1) above. In *Masagu Ole Naumo Vs. Principal Magistrate Kajado Law Courts & Another*, Nairobi, High Court JR 370 of 2013 [2014] eKLR Odunga J stated thus on the jurisdiction of the Tribunal; -
- “In my view that the tribunal had no powers to deal with registered land is incorrect. What the Tribunal was prohibited from undertaking is a determination with respect to title to land.” (Emphasis is mine).
62. This court is persuaded and agrees with the above finding. In the present proceedings, the court is invited to uphold the decision of the Tribunal as regular in other words lawful. Indeed, if the judgement of the decision of the Tribunal was of no legal effect, it would not have mattered if it was adopted by the Magistrate Courts. Nothing comes out of an illegality. In *Macfoy Vs United Africa Co.Ltd* (1961) 3 All ER 1169 the court persuasively stated that; -
- “If an act is void, then it is in law a nullity. it is not only bad but incurably bad.....and every proceeding which is founded on it is also bad.”
63. I think based on the entire analysis of the court; it is apparent that for the reasons stated the Petitioners are not entitled to the orders sought in this Petition.
64. The upshot of the foregoing is that I find the Petition to be lacking in merit and it is hereby dismissed.
65. I have noted the protracted proceedings in respect of the suit properties and invoking this courts discretion each party should bear their own costs of this petition.

JUDGEMENT DATED, SIGNED AND DELIVERED THIS 6TH DAY OF AUGUST 2024.

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A.E DENA

JUDGE

Mr. Osodo for the Petitioners

Ms. Wamuyu Holding Brief for Mr. Njoroge for the 1st and 2nd Defendants

Mr. Penda for the 3rd Respondent

Mr. Daniel Disii – Court Assistant

