Pati Limited v Funzi Island Development Limited & 4 others (Petition 37 of 2019) [2021] KESC 29 (KLR) (Civ) (16 July 2021) (Judgment)

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Neutral citation: [2021] KESC 29 (KLR)

Republic of Kenya

In the Supreme Court of Kenya

Petition 37 of 2019

PM Mwilu, DCJ & V-P, MK Ibrahim, SC Wanjala, NS Ndungu & I Lenaola, SCJJ

July 16, 2021

Between

Pati Limited

Petitioner

and

Funzi Island Development Limited

1st Respondent

J.B Havelock

2nd Respondent

M.E Havelock

3rd Respondent

County Council of Kwale

4th Respondent

Commissioner of Lands

5th Respondent

(Being an appeal from the Judgment of the Court of Appeal of Kenya (Githinji, Karanja & Maraga, JJ.A) sitting in Nairobi delivered on the 27th day of February 2014 in Nairobi Civil Appeal No. 252 of 2005)

Judgment

A. Introduction

1.This is a Petition of Appeal dated 3rd September, 2019 and filed on 5th September, 2019 pursuant to its admittance as one involving a matter of general public importance under Articles 163(4)(b) and 163 (5) of the Constitution. The Appellant is challenging the entire Judgment and Orders of the Court of Appeal (Githinji, Karanja & Maraga, JJ.A) at Nairobi in Civil Appeal No. 252 of 2005 delivered on the

27th day of February 2014. In certifying the Appeal as one involving a matter of general public importance, in Supreme Court Civil Application No. 4 of 2015, Pati Limited v. Funzi Island Development Limited & 4 Others [2019] eKLR; this Court (Mwilu,DCJ & VP, Ibrahim, Wanjala, Njoki & Lenaola SCJJ); stated:“(41)…. Consequently, in this matter, duly guided by the issues that the Court of Appeal considered and for pragmatism, we certify the following as the issue of general public importance which this Court should consider in the intended appeal:“Whether the land subject matter of this suit was initially Trust Land, a public beach or a mangrove forest protected under the Forest Act; and if it was Trust Land and or public land, it was properly, regularly and legally allocated to Hon. Mwamzandi who later re-allocated it to Pati Limited, the Appellant herein.”

B. Background

(i) At the High Court

2.The genesis of this appeal can be traced to a Judicial Review Miscellaneous Application No. 272 of 1994 filed in the High Court and brought under the provisions of Order 53 Civil Procedure Act Rules; 2010 and the Forest Act Section 4 Cap. 385, Laws of Kenya. The dispute arose consequent upon the allocation by the Commissioner of Lands, for and on behalf of the County Council of Kwale of the piece of land known as LR. No. 20247 comprised in Grant registered as No. CR 106 (the suit land) to Pati Limited, (the Appellant herein and an interested party before the High Court), which the 1st to 3rd Respondents contended was forest and/or public land. On learning of the allocation, the 1st to 3rd Respondents filed the said Judicial Review Application seeking the following Orders:1.That the Gazette Notice No. 3831 dated 24.6.1994 setting apart Land on Funzi Island and letter dated 27.7.1994 addressed to interested party Pati Limited relating to the allotment of un-surveyed Plot 0.1. ha for the purpose of boat landing base issued by the Commissioner of Lands be quashed and or set aside being null and void.2.That the grant issued CR106 under Registration of Titles Act to Pati Limitedby respondents be quashed and or set aside as being null and void.3.That Pati Limited, its employees, servants and agents be prohibited from having any dealings whatsoever, or carry out any development, or occupation entry upon or any access or otherwise on the said land on Funzi Island.4.That the costs of and incidental to this application be the applicants’ and be paid by the respondents.

3.The main contention by the Respondents in the Judicial Review proceedings, was that the original piece of land set apart under Section 7 of the Trust Land Act Cap. 288, and allocated to Pati Limited, was at all material times forest land as opposed to Trust Land. They submitted that under Section 4(2) of the Forests Act Cap. 385, the Minister is supposed to declare the boundaries and size of such forest areas after publishing a 28 days’ Notice. They further submitted that under the Forest Act Proclamation No. 44/32 and Legal Notice no. 174 of 1964, the suit land had already been declared as a “Forest Area”. It was the Respondent’s argument that once the suit land had been declared forest land, it was no longer available for allocation unless it had ceased to be such. They submitted that the allotment and consequent title to Pati Ltd was null and void.

4.On their part, the 4th and 5th Respondents (also the respondents at the High Court) argued that the suit land was Trust Land. They submitted that the Letter of Allotment clearly indicated that the suit land had been set apart for use and occupation under Section 117 (c) of the retired Constitution. They further argued that all legal procedures required under the Trust Land Act had been complied with prior to the allotment of the plot and issue of grant to the Appellant. The Respondents also submitted that the suit land was not forest land, as no evidence had been led to support its status as such.

5.The Appellant agreed with the 4th and 5th Respondents, adding that, the 1st to 3rd Respondents had no *locus standi* in the matter, since they did not fall under Section 117 (4) of the retired Constitution.

6.The Court framed two issues for determination; Whether the land in dispute was trust land under the Constitution and the Trust Land Act; and whether it was forest land falling under the provisions of Forest Land Act. In a judgement delivered on 14th October 2004, the High Court, (Khaminwa, J), declined to issue the orders sought and dismissed the Application with costs. Regarding the issue as to whether the suit land was forest land, falling under the provisions of the Forest Land Act, the Court opined that no conclusive evidence been tendered in support of such claim. The court held that Proclamation No. 44/32 and Legal Notice no. 174 of 1964 referred to by the 1st to 3rd Respondents, was not adduced in evidence.It was the learned Judge's view that the 1st to 3rd Respondents, had not made any effort to prove that, the land in dispute was forest land under the provisions of the Forest Land Act.

7.The High Court held that the land had been legally transferred and hence dismissed the suit.

(ii) At the Court of Appeal

8.Aggrieved and dissatisfied with the entire Judgment and directions of the High Court, the 1st, 2nd and 3rd Respondents filed an appeal to the Court of Appeal on several grounds. Subsequently the appellate Court condensed the grounds of appeal into the following: whether:(i)The Judge erred in holding that the Appellants had no locus standi in the matters as it is only the Minister in charge of forests that could challenge the allocation of the suit land to Pati Limited;(ii)The Judge erred in finding that the suit land was Trust Land and not forest or beach land;(iii)That even if the suit land was Trust Land, the judge erred in finding that it had properly been set aside and allocated to Pati Limited, a private developer.

9.To determine the appeal, the Appellate Court framed three issues for determination namely: whether or not the applicants have locus standi in the matter; whether or not the suit land was initially Trust Land, a public beach or a mangrove forest protected under the Forest Act; and If it was Trust Land, whether or not the Council had authority to and did properly and regularly alienate it to one, Hon. Mwamzandi at whose request it later re-allocated it to Pati Limited.

10.In its Judgement delivered on 27th February 2014, the Court of Appeal (Maraga, Karanja & Githinji, JJ.A) unanimously allowed the appeal and granted an Order quashing the allocation of the suit land to Hon. Mwamzandi and later to the Appellant. It also quashed the letter of allotment dated 27th July 1994 as well as the Grant No. 106 relating to L.R 20247.

11.The three learned Justices wrote their Judgments separately. Maraga, JA (as he then was) found that the suit land was forest land, while on the second issue, the Judge held that the suit land was neither trust land, nor had it been properly allocated. His reasoning was that by dint of Proclamation No. 44 of 1932, as restated by Legal Notice No. 174 of 1964, the suit land was forestland. He observed that such land could only have ceased to be forestland pursuant to Section 4(1)(a) of the Forests Act Cap 385, of the Laws of Kenya, which requires the Minister in charge of forests to make a declaration to that effect. He clarified that by Legal Notice No. 174, the Minister for Natural Resources, after consultation with the National Forest Authority, declared as forest area, inter alia, "Those pieces of land approximately 111, 366 acres, situated between the high and low water-mark on the coast of Kenya, which were declared to be forest areas by Proclamation No. 44 of 1932." The Judge added that it was conceded by the Appellant's managing director in paragraph 13 of his Affidavit sworn on 13th January 1995, that the suit land always became completely submerged at high tides two times a year. The learned Judge concluded that from this concession, and as stated in Legal Notice No. 174 of 1964, the suit land was situated between the high and low water mark on the coast of Kenya.

12.Recalling Proclamation No. 44 of 1932, to the effect that the "Islands adjacent to the Coast from

Chale point in the North to the boundary of the Trust Territory of Tanganyika in the South: Provided that any areas that lie within the foregoing boundaries which may have been, or may be, declared private property under the Land Titles Ordinance, or which are subject to grants from the Crown, are excluded from forest reserve" the Judge concluded that from this proviso, there was no dispute that the suit land fell within the area covered by that Proclamation.

13.In agreeing with Judge Maraga, Githinji J.A, held that the suit land was not trust land, for had it been trust land, it would have been adjudicated together with Funzi Island in the 1990s. The learned Judge concluded that the land was part of the foreshore which, in terms of the provisions of Section 102 of the Crown Lands Ordinance Chapter 155 of Laws of Kenya, 1948 as read with Section 82 of Government Lands Act (Cap 280) of the Laws of Kenya, was not available for allocation to private entities or individuals. In conclusion, the learned Judge observed that following the promulgation of the Constitution of Kenya 2010, by dint of Article 62(1)(c) thereof, all land between high and low water marks (foreshore) is public land. Finally, the learned Judge held that the suit land was part of the mangrove swamp forest reserve as described in Proclamation No. 44 of 1932.

14.Karanja J.A agreed entirely with her colleagues' findings of fact, analysis of the legal issues arising from the appeal, and conclusions.

(iii) At the Supreme Court

15.The appellants moved this court, citing twelve (12) broad grounds of Appeal; namely that the learned Judges erred:(i)In concluding that one does not need to go to foreign countries to see that public beaches are public property before ascertaining whether the suit property was either a public breach or trust land;(ii)In concluding that the high and low watermarks (ordinary tides) on the Island adjacent to the Coast included the Appellant's disputed parcel of land, when evidence provided, this property does not fall within those limits as defined;(iii)In concluding that the subject land fell within a protected mangrove forest, when it is not;(iv)In holding that the subject land fell within a mangrove forest on the basis of the bare affidavit evidence of one Charles Kariuki, and without any cogent proven evidence in support;(v)In concluding that to present Forest Act No 7 of 2005 reintroduced the omitted proclamation of forest areas into the present law, when it had held that the proclamation of forests by a minister under section 4 of the repealed Forest Act (Cap 385) were omitted from the schedule in that subsidiary legislation;(vi)In re-introducing and applying both the provisions of the Forest Act, 2005 and Article 62(1)(c) of the Constitution, 2010 in resolving the dispute before, it in a litigation commenced in 1994, when none of these laws were in force;(vii)In applying the provisions of the repealed Sections of the Forest Act (Cap 385) without considering that the in the schedules of the repealed Act, proclamations of forest areas were completely omitted as held by Githinji J, creating disharmony and conflicting findings which lead to the conclusion that the suit land was a forest area at the time of alienation when indeed it was not;(viii)In visiting the suit property and recording its observations when the same had been done by the trial court and subsequently in dismissing the finding of the trial court that the suit land was a loose description of an Island which was not part of the Funzi Island;(ix)In concluding that the suit land was not trust land and in holding that the procedure followed in privatizing the suit land was a nullity;(x)In proceeding as a matter of law, to conclude that the suit land was not trust land despite correctly referring to the Trustland Ordinance 1962, revised edition and correctly concluding the definition of trust lands set out therein;(xi)In concluding that even if the suit land was trust land, the same had been erroneously alienated;(xii)In failing to consider and evaluate all the evidence tabled before the trial court, especially which confirmed that the suit land was properly alienated, allotted and registered in the name of the Appellant; and(xiii)In failing to correctly apply the provisions of the repealed Constitution, the Trustland Act and the Land Control Act, which are laws that applied at the time of the impugned transaction.

16.The Appellant seeks the following reliefs;a.That this appeal be allowed and the Orders of the Court of Appeal, given on the 27th February, 2014 and issued on the 17th February, 2015 all be set aside;b.In its place, there be sustained an Order (s) that the Appellant's suit property was trust land that was correctly alienated and registered in the name of Pati Limited, the Appellant herein;c.The Orders of the High Court given on the 14th October 2004 dismissing the Notice of Motion of the 1st, 2nd & 3rd Respondents as variously Re-Amended up to 30th June 1999 be reinstated; andd.Costs of the Appeal and in the Courts below

C. Parties' Respective Submissions On The Issue

(a) The Appellant's submissions

17.The Appellant's submissions are dated 24th October 2019, and filed on 1st November, 2019. On the first issue framed by this Court, whether the suit land was mangrove forest protected under the Forest Act, the Appellant in its written and oral submissions, contends that the High Court was correct in holding that the subject land was not a Mangrove Forest. In that regard, the Appellant submits that none of the Respondents (1st, 2nd & 3rd) placed before the Court the contents of the Proclamation Number 44 of 1932 which they sought to rely on in their quest to show that the land was a Mangrove Forest. The Appellant claims that even if the said land was a Mangrove Forest in the year 1932, there was no material placed before Court to show that the same was still a Mangrove Forest in 1994, when the Appellant was registered as owner of the parcel of land.

18.The Appellant contends that Proclamation Number 44 of 1932 was not in force in the year 1994 since the same ceased to be of legal force at the advent of the Forests Act Cap 385 of the Laws of Kenya, which replaced the Forest Ordinance Cap 176 of the Laws of Kenya in 1963. It adds that since the Proclamation was made in the year 1932, and since the Respondents failed to state under which law the proclamation was made, it can be presumed that the same was made under the Forests Ordinance (cap 176), which it urges further ceased to have legal effect in 1963.

19.It is the Appellant's submission that the Forests Act, Cap 385 of the Laws of Kenya, omitted all proclamations of forest areas under Section 4, meaning that the Proclamation No. 44 of 1932 contained in the Forest Ordinance Cap 176, revised in 1948, was omitted from the subsidiary legislation of the 1962 edition of the Forests Act. Further, that the revisions made to the Act in 1982 and 1992 also omitted all proclamations which should have been made pursuant to Section 4 of the Act.

20.It is further submitted that Proclamation No. 44 of 1932 was omitted under Section 5 of the Forests Act Cap 385, of the Laws of Kenya, and such, was not part of Kenya's legal system pursuant to Section 23(3) of the Interpretation and General Provisions Act. The appellant places reliance on the Interpretation and General Provisions Act, which provides that, where a written law repeals in whole or in part another written law, then unless a contrary intention appears, the repeal shall not revive anything not in force or existing at the time the repeal takes effect. It also relies on the House of Lords holding in John Lemm v. Thomas Alexander Mitchell (1912) AC400 to buttress this submission.

21.The appellant further considers as erroneous, the finding by the Court of Appeal to the effect that, the provisions of Section 5 of the Revision of Laws Act, as read together with Section 65(1)(a) of the Forest Act No 7 of 2005, mean that Proclamation No. 44 of 1932 was in force, at the time of the purported allocation of the suit land. The Appellant adds that, the Forest Act Cap 385, having omitted Proclamation No. 44 of 1932, had stripped the latter, of any legal force

22.As to whether the subject land was trust land, the Appellant submits that it is clear from the wording of the Trust Land Actin force on 31st May 1963, the whole of Funzi Island, together with the islets lying to the South were all defined as trust Land. It also agrees with the trial court finding that only the “small Island” in front of the Main Is land is what is referred to as trust land in the Trust Land Act in force in 1963 together with its islets. It therefore faults the Court of Appeal’s determination that the suit land did not fall within the definition of Trust land under the Act. The Appellant urges that the learned Judges failed to apply, the golden rule of interpretation by failing to give clear words their ordinary and natural meaning, and for resorting to other extraneous facts and matters not contained in the Trust Land Act, to reach its conclusion. The Case of Duport Steels Limited & others vs Sirs & others [1980] 1 AIIER 529 was cited to support the argument that properly interpreted “the small island” fell within the meaning of trust land, and remained such trust land up to the time of its alienation.

23.On the issue whether the alienation of the suit land was in accordance with the law, while citing Sections 116 and 117 of the repealed Constitution, it is the Appellant’s case that, the County Council is empowered to set apart any trust land for use and occupation by any person or persons, which in the opinion of that County Council is likely to benefit the persons ordinarily resident in that area. The Appellant urges that Kwale County Council was consequently empowered to alienate the suit land to Hon. Mwamzandi and subsequently to the appellant. The Appellant submits that the suit land was set apart in accordance with the provisions of Section 117 of the repealed Constitution, and the modalities of allotment and procurement of the consent of the local land control board properly effected. It therefore concludes that all legal procedures were complied with.

24.The Appellant also urges that the 1st, 2nd and 3rd Respondents did not adduce any evidence before the trial Court to prove that its title deed was illegally acquired. The Appellant submits that it was an innocent purchaser of the interests and rights in the suit property for value, and without notice of any defects therein, if any existed which is denied.

25.Finally, the Appellant urges that the suit property was not a Mangrove Forest as at November 1994, when the same was set apart by Kwale County. that the said property was trust land and at that time was properly dealt with as such and that the alienation and consequent registration in the name of the Appellant was regular, legal and properly done in all respects.

(b) The 4th and 5th Respondents’ submissions

26.The 4th and 5th Respondents filed their joint submissions dated 31st December 2019 on 2nd January, 2020 in support of the Appellant’s case. In their written and oral submissions, the 4th and 5th Respondents urge in support of the High Court’s decision that the suit property is trust land as provided under Section 114(1) of the repealed Constitution and the Trust Land Actwhich expressly provided that trust land is vested in the County Council within whose jurisdiction it is situated. In that context, they urge that the County Council of Kwale had the power to set apart the land in accordance with the purpose outlined under Section 117 (a), (b) and (c) of the repealed Constitution as well as Section 13 of the Trust Land Act.

27.The 4th and 5th Respondents submit further that the suit land, could be set apart for occupation or use by any individual for a purpose which in the opinion of that County Council, was likely to benefit the person ordinarily resident in that area, or any other area of trust land, in that County Council either by reasons of the use to which the area set apart was to be put, or by reasons of revenue to be derived for rent in respect thereof.

28.The Respondents urge further that the suit property was not public land as held by the Court of Appeal and that due process was followed in allocating the same to the Appellants pursuant to the powers vested on the 4th Respondent under Section 117 of the repealed Constitution and Sections 7 and 13 of the Trust Land Act. They urge that letters from the 4th Respondent dated 23rd January 1993, 7th January 1993, the minutes of the Msambweni Land Control Board dated 9th June 1993, and the approval given on the 9th June 1993, and the subsequent letter dated 11th June 1993, confirm that due process was followed in setting apart the suit property. They add that full compensation assessed as Kshs 400,000 in regard to the suit property, was paid as provided for under Section 13(4) of the Trust Land Actand that Gazette Notice No. 3831 published on 8th July 1994, set apart and stipulated the dimensions of the suit land in accordance with sections 13(2)(d) and 7(3) of the Trust Land Act.

29.As to whether the suit property was a Mangrove Forest pursuant to Proclamation No. 44 of 1932, it is the 4th and 5th Respondents' submission, that the issue was introduced by an affidavit that was never produced in Court. They reiterate the Appellant's submissions that Proclamation no. 44 of 1932 was made under the Forest Ordinance cap 176, which was in turn replaced by the Forests Act Cap 385, of the Laws of Kenya. The said Act was revised in 1982, omitting all Proclamations that had delineated "forest areas" under Section 4. They conclude that the Respondent, did not provide substantial evidence to confirm that, the said land was mangrove forest and not trust land.

30.On the alleged issue of fraudulent acquisition of the suit property, the 4th and 5th Respondents submit that, under Section 23 of the repealed Registration of Tiles Act, for a title to be vitiated on account of fraud, the fraud must be proved against that person to the required standard, and that it must be proved that the person participated in the fraud. To buttress this submission, they cite the Court of Appeal decision in the case of Kuria Kiarie & 2 Others v. Sammy Magera [2018] eKLR. It is their contention that the alleged fraud or misrepresentation was never proved to the required standard.

(c) The 1st, 2nd and 3rd Respondents' submissions

31.The Respondents filed their written submissions dated 21st November 2019, on 26th November 2019. They submit both orally and in writing, that Grant No. CR106 issued to the Appellant in respect of the suit land, was never set apart by the 4th Respondent (Kwale County) for the purpose of a boat landing base under the Trust Land Act. They maintain that the whole land comprised in the said Grant was not trust land. It is their contention that, the suit land was a public beach, which is a protected Mangrove Forest, connecting to the main Funzi Island measuring 50 meters wide all along the Island. They submit that pursuant to Gazette Notice No. 3831, the suit land is described as lying along Funzi beach on the Western side of Funzi Island.

32.The Respondents urge that after the said grant was issued to the Appellant under the registration of Titles Act, the latter took over exclusive possession of the Public beach, and converted it to a private beach for its own use thereby displacing the local fishermen, and preventing the 1st, 2nd and 3rd Respondents and all members of the public including the villagers on Funzi Island from gaining any access whatsoever thereto.

33.Contrary to the Appellant's submissions, the Respondents also submit that the suit property is a Mangrove Forest protected under the Forest Act, 2005. They urge, that the Forest Ordinance Cap 176 (1948) has not been repealed and is still in force. They maintain that the said Ordinance has neither been, nor could it have been, replaced by the Forests Act, which commenced on 1st March 1942, and only applied to central forests, forests and forest areas in the Nairobi areas and on unalienated Government land.

34.Further, the Respondents submit that Section 4(1) of the Repealed Forests Act cap 385, of the Laws of Kenya, only applied to declarations made by the Minister by Notice in the Gazette with effect from 1st March 1942, hence it could not have applied retrospectively. They therefore submit that, there is no legal edict indicating that, the Forest areas No. 45 Mangrove Swamp Forest Reserves set out in proclamation No. 44 of 1932 have ever ceased to be such.

35.The Respondents urge that the trial Judge overlooked their submissions in regard to the Forest Ordinance Cap 176 as well as submissions that the Proclamation 44 of 1932 were still in force as at 1994. They contend that both the Forest Act (Cap 385) and The Forest ordinance (Cap 176) came into operation on 1st March 1942, and therefore it is not possible for either of the two legislations to replace the other. The Respondents further urge that that The Forest Ordinance has been expressly referred to and applied to the Forest Act (Cap 385) as subsidiary legislation and hence cannot have been replaced by the latter Act.

36.It is their submission that The Forest ordinance was revised in 1948, but under Section 4 of the Ordinance, forest areas are maintained since the main purpose of the said Ordinance, was to amend and consolidate the laws relating to forests. Furthermore, they submit that Section 5 of the Revision of Laws Act has not been implemented in respect to the Forest Ordinance, contrary to the Appellant's arguments. In their view, the Proclamations made under Section 4 of The Forests Ordinance (Cap 176), have not been omitted by virtue of Section 5 of The Revision of Laws Act and are therefore still in force. They submit that both laws have co-existed as laws of Kenya until the Forest Act (Cap 385) was repealed but the Ordinance still remains in force to date.

37.Additionally, the Respondents urge that, both the beach and the Mangrove Swamp, are in between the high and low watermark as both these areas are usually flooded and sub-merged during high spring tides. Finally, the Respondents submit that, Proclamation No. 44 of 1932 has not been omitted by the Subsidiary Legislation in the Forests Act, and that the suit property remains a Mangrove Forest protected under the Forest Ordinance, as read with L.N 174 of 1964 and the Forests Act, 2005.

38.As to whether the suit property is trust land, the Respondents submit to the contrary. They urge that although the suit property is situated within the jurisdiction of the County Council of Kwale within the area described as Trust Land, the same could not have been vested in the Council nor could it be set apart under Part IV of the Trust Land Act, as the area where it is situate was a public beach and a Mangrove Swamp Forest Reserve under proclamation 44 of 1932 as read with L.N 174 of 1964.

39.The 1st, 2nd and 3rd Respondent further submit that since the suit property is not trust land, any allocation of the same to the Appellant was illegal. They maintain that Gazette Notice 3831 was defective since the land referred to therein, had not been set apart in accordance with the provisions of Part IV of the Trust Land Act. The Respondents add that the suit land was never surveyed as required by the law. This omission led to an unwarranted increase in size of the same from 0.7 Ha to 3.126 Ha, as at the time the Grant was made in favour of the Appellant.

40.They add that there is no specification of the compensation date in the Gazette Notice, as required by Sections 7(4), 9 and 13(4) of the Trust Land Act, and neither is there proof that the land was initially allocated to Hon. Mwamzandi, as the letter of allotment dated 27th July 1994, was issued to the Appellant. It is their argument that the absence of this crucial evidence, confirms that there was no formal transfer of the suit land to the Appellant.

41.Consequently, the 1st to 3rd Respondents urge that should the Court hold that the land was initially trust land, then it should find that the same was not legally allocated to Hon. Mwamzandi who allegedly

re-allocated it to the Appellant.

D. Analysis

42.The central issue for determination in the Petition before Court is the legal status of the suit land. The appellant argues that the suit land is not a forest reserve, as Proclamation No. 44 of 1932 relied on by the 1st to 3rd respondents to contend that the suit land was a mangrove forest, ceased to have effect after the Forests Act (Cap 385, Laws of Kenya) came into effect and omitted the content of the Proclamation.

43.The 4th and 5th respondents argue that no conclusive evidence had been placed on record to show that the suit land was part of a mangrove forest reserve. It is urged that the same is Trust land within the meaning of Sections 114(1) and 115(1) of the retired Constitution as read with Section 2 of the Trust Land Act, Cap 288 of the Laws of Kenya (repealed). They add that the suit land was vested in the Council by virtue of Section 115(1) of the retired Constitution and that the Council had jurisdiction to set aside and alienate it.

44.The 1st to 3rd respondents on the other hand, urge that the suit land was at all times a mangrove forest and not trust land. They rely on the provisions of the Forest Ordinance Cap 176, Proclamation No. 44/32 and Kenya Independence Order-in-Council Legal Notice No. 174 of 1964, to urge that the suit land was declared a mangrove forest protected under the Forest Act. The respondents further rely on the sworn affidavit of Charles Kariuki, the Forests Officer at Buda Forest Station at Msambweni, to urge that the suit land is a protected forest area, declared in Legal Notice No. 174 of 1963 and Proclamation No. 44 of 32. It is added that the Proclamation was made under the Forests Ordinance Cap 176 (1948) which has not been repealed to date.

45.In the alternative, the respondents urge that, even if the Court was to find that the suit land was indeed trust land, which the Council had authority to alienate, the alienation was irregular. It is contended that contrary to Section 7 of the Trust Land Act, Cap 288, Laws of Kenya (repealed), the suit land was not surveyed and no Notice of the date for applications for compensation was given. It is also the respondent's argument that the Letter of Allotment refers to the un-surveyed land as comprising approximately 0.7 of a hectares, while the land eventually allocated was 3.126 hectares, which is ultra vires the provisions of Section 7(2)(a) and (3) of the Trust Land Act. It is also contended that since Gazette Notice No. 3831 of 1994 did not specify the date for submission of applications for compensation, none were consequently made. A further ground relied on to support the assertion that the land was irregularly allotted, is that only land registered under the Registered Land Act Cap 300, Laws of Kenya (repealed), would, by dint of Section 2(d) thereof, be available for setting aside by virtue of Sections 117 and 118 of the former Constitution. The respondents urge that the Grant in this case was issued under the Registration of Titles Act (repealed), which has no similar provision. It is urged that contrary to the provisions of Gazette Notice No. 3831 of 1994, and the conditions on Grant No. 106, the suit land has not been put to use for the purpose for which it was allocated, that is, as a boat landing base, but instead, the appellant has constructed a five-star hotel on it for individual commercial gain.

(a) **Forest or Trustland"**

46.For us to determine the legal status of the suit land herein, we have to revisit the laws relied upon by the parties in support of their divergent submissions.

47.The Forests Ordinance Cap 176 was enacted to amend and consolidate the law relating to Forests in

Kenya. Section 4 of the Ordinance provided that;"'The Governor-in-Council may from time to time, by proclamation in the Gazette, declare any unalienated and unreserved Crown Land and, subject to the provisions of the Natives Lands Trust Ordinance, any area in any native land to be forest area and may in like manner declare that any forest area or any part thereof shall cease to be a forest area.'Further, Section 5 provided that:"'The Governor-in-Council may from time to time, by proclamation in the Gazette, declare any forest area or any part thereof to be a demarcated forest.'

48.By Proclamation No. 44 of 1932, mangrove swamp forest reserves were declared as follows;"'All land between high water and low water marks (ordinary spring tides) in the localities as described below, viz on the mainland and islands adjacent to the coast from Chale Point in the North, to the boundary of the Trust Territory of Tanganyika in the South.Provided that any areas that lie within the foregoing boundaries which may have been, or may be, declared private property under Crown, are excluded from the forest reserves.'

49.Subsequently, Legal Notice No. 174 of 1964 was issued by the then Minister for Natural Resources, in consultation with the then National Forest Authority, declaring all central forests situated in various districts in Kenya. It is worth noting that the Legal Notice makes pointed references to various Proclamations made between 1932 to 1960s, declaring various pieces of land central forest areas in Kenya.

50.In this Legal Notice, Mangrove swamp forests in Mombasa, Kwale, Lamu and Kilifi Districts were declared as comprising;"Those pieces of land approximately 111.366 acres, situated between the high and low water marks on the coast of Kenya, which were declared to be forest areas by Proclamation No 44 of 1932."

51.The Forest Act Cap 385 was enacted in 1942 and revised last in 2012. It was an Act of Parliament to provide for the establishment, control and regularization of central forests, forests and forest areas in the Nairobi area and on unalienated Government land. Section 4 of the Act provided that;"'The Minister may from time to time, by notice in the gazette declare any unalienated Government land to be a forest area; declare the boundaries of a forest and from time to time alter those boundaries and declare that the boundaries shall cease to be a forest area……'

52.In its Subsidiary Legislation, the Act provides that, 'all proclamations under Section 4 are omitted, by virtue of Section 5 of the Revision of the Laws Act.' Section 5 of the Revision of the Laws Act Cap 1 provides as follows;'There may be omitted from Laws of Kenya–a.Annual appropriation Actb.Specific loan or specific loan guarantees Actsc.Any act which, in the opinion of the Attorney-General, is-i.of temporary effect; orii.of local or limited application; oriii.of application only to a time pastd.Any Constitution of Kenya (Amendment) Act or provisions in such Act which does not become incorporated in the Constitution;e.Any Act which in the opinion of the Attorney General ought to be temporarily omitted by reason of-i.proposed substantial amendment to the Act or subsidiary legislation made thereof; orii.the proposed making of a substantial quantity of new subsidiary legislation thereunder;iii.the Act in question not yet being in force at the time of a given revision

53.The Forest Act Cap 385, Laws of Kenya was repealed by the Forest Act No. 7 of 2005 while the latter was repealed by the Forest Conservation and Management ActNo. 34 of 2016.

54.The appellant relies on the provisions of the Forest Act, Cap 385 as read with its Subsidiary Legislation and Section 5 of the Revision of Laws Act, set out above, to urge that Proclamation No. 44 of 1932 ceased to have effect after the enactment of the Forest Act Cap 385, as the latter omitted the content of the Proclamation. However, it should be noted that Proclamation No. 44 of 1932 was not

made under the Forest Act Cap 385. The Proclamation was made under the Provisions of the Forests Ordinance Cap 176, which is not one of the laws repealed by the Forest Act Cap 385, the Forest Act No 7 of 2005 or the Forest Conservation and Management Act No. 34 of 2016. Of significance, is the fact that the Minister, never degazetted the suit land as a mangrove forest. A clear reading of Section 5 of the Revision of Laws Act, leaves no doubt that Proclamation No. 44 of 1932 could not have formed part of the contents of that which was omitted by Section 4 of the Forests Act, Cap 385 of the Laws of Kenya.

55.Besides, the Forests Act No 7 of 2005 at Section 65 and the Forest Conservation and Management Act No. 34 of 2016 at Section 77, provide (d) that, notwithstanding the repeal of the preceding Act, 'any land which, immediately before the commencement of the subsequent Act was a forest or nature reserve under that Act, shall be deemed to be a state or local authority forest or nature reserve, as the case may be, under the succeeding Act.' Section 77 of the Forest Conservation and Management Act specifically sets out that all gazetted or land registered as a forest reserve in its Third Schedule or under any other relevant law shall be deemed to be a public forest under the Act. The Third Schedule identifies mangrove swamp forests as land declared under Notice No. 44 of 1932. Although the word 'Proclamation' is not used, we have no doubt that the 'Notice' referred to, can only be "Proclamation No. 44 of 1932". The conclusion to which we must therefore arrive, is that the legal status of mangrove forests as declared in Proclamation No. 44 was saved by the Third Schedule of the Forest Conservation and Management Act.

56.Having so found, the next issue that we must determine is whether, the suit land falls within the frontiers identified in Proclamation No 44 of 1932. The Proclamation describes a mangrove forest as;"All land between high water and low water marks (ordinary spring tides) in the localities as described below, viz …..on the mainland and islands adjacent to the coast from Chale Point in the North, to the boundary of the Trust Territory of Tanganyika in the South."

57.The 1st to 3rd respondents urge that the suit land is between the high and low watermarks and is therefore, a mangrove forest. The appellant disputes this assertion. However, at paragraph 13 of the affidavit sworn by its Managing Director, Alessandro Torriani on 13th January 1995, a concession is made of the fact that 'the suit land floods and becomes completely submerged only at very high tides about twice a year.'

58.The status of the suit land is first and foremost a matter of law and as declared in Proclamation No. 44 of 1932, and subsequently in Legal Notice No. 174 of 1964, the said land is situated between the high and low water-mark on the Coast of Kenya. The inescapable conclusion is that the suit land falls within the frontiers of what constitutes a mangrove forest as per the Proclamation. The same could therefore, not have been available for allocation within the meaning of the retired Constitution or the Trust land Act. This was a mangrove forest which has never ceased to be such, not because (as submitted by the first respondent, and wrongly so in our view) the Ordinance under which the Proclamation creating it is still part of the Law of Kenya, but because its status as a forest was saved by the Forest Conservation and Management Act.

(b) Was the Suit Land, Trust Land" And if so, was it legally set apart"

59.Assuming for purposes of argument that the land in question was Trust land, we have to determine whether the same was regularly set apart, in accordance with the applicable law at the time.Section 114 (1) of the retired Constitution defined Trust land to include:(a)land which is in the Special Areas (meaning the areas of land the boundaries of which were specified in the First Schedule to the Trust Land Actas in force on 31st May, 1963,) and which on 31st May, 1963 vested in the Trust Land Board by virtue of any

law or registered in the name of Trust land board;(b)the areas of land that were known before 1st June, 1963 as Special Reserves, Temporary Special Reserves, Special Leasehold Areas and Special Settlement Areas and the boundaries of which were described respectively in the Fourth, Fifth, Sixth and Seventh Schedules to the Crown Lands Ordinance as in force on 31st May, 1963, the areas of land that were on 31st May, 1963 communal reserves by virtue of a declaration under section 58 of that Ordinance, the areas of land referred to in section 59 of that Ordinance as in force on 31st May, 1963 and the areas of land in respect of which a permit to occupy was in force on 31st May, 1963 under section 62 of that Ordinance; and(c)land situated outside the Nairobi Area (as it was on 12th December, 1964) the freehold title to which is registered in the name of a county council or the freehold title to which is vested in a county council by virtue of an escheat:Provided that Trust land does not include any estates, interests or rights in or over land situated in the Nairobi Area (as it was on 12th December, 1964) that on 31st May, 1963 were registered in the name of the Trust Land Board under the former Land Registration (Special Areas) Ordinance.

60.By virtue of Section 115 of the retired Constitution, all Trust land within the jurisdiction of any County Council, is vested in the Council for the benefit of the persons ordinarily resident on that land. However, this Section excludes any body of water that immediately before 12th December 1964 was vested in any person or authority, or any mineral oils.

61.According to Section 116 of the retired Constitution, ‘A County Council could, in such manner and subject to such conditions as may be prescribed by or under an Act of Parliament, request that any law to which this subsection applies shall apply to an area of Trust land vested in that County Council, and when the title to any parcel of land within that area is registered under any such law otherwise than in the name of the County Council, it shall cease to be Trust land. The laws to which this proviso applied were; the Land Consolidation Actand the Land Adjudication Act, and any other law permitting the registration of individual titles to estates, interests or rights in or over land that, immediately before registration, was Trust land (except so far as the law permitted the registration of estates, interests or rights vested in persons or authorities for whose use and occupation the land had been set apart.

62.In accordance with Sections 117 and 118 of the retired Constitution, a County Council had the power to set apart an area of Trust land for use and occupation by a public body or for purposes specified therein. Of significance to the issue before us, is Section 117 (1) (c) which provided that the Council could set apart an area of trust land for use and occupation by “any person or persons for a purpose which in the opinion of that county council is likely to benefit the persons ordinarily resident in that area or any other area of Trust land vested in that county council, either by reason of the use to which the area so set apart is to be put or by reason of the revenue to be derived from rent in respect thereof”. Even then, a county council could only set apart an area of Trust land pursuant to an enabling Act of Parliament, to wit, the Trust land Act. In line with Sections 117 and 118 of the retired Constitution, the Trust Land Act Cap 288 (repealed) was enacted, as an Act of Parliament to make provision for Trust land. Part IV of the Act provided for setting apart of Trust land.

63.Having set out the law regulating the setting aside of trust land, and supposing the suit land in this matter was trust land, was the setting aside in accordance with the law in place at the time" The answer to this question is in the negative, due to the following uncontroverted findings of law and fact. Firstly, the Gazette Notice No. 3831 of 1994 specified the size of the land set apart as comprising approximately 0.7 of a hectare. However, the land ultimately set apart and allocated to the appellant was 3.126 hectares. There is no further Notice on record in respect of the change of size of the suit land. By the same token, the Msambweni Land Control Board, gave Consent to set apart 0.7 of an hectare of land, yet there is no further Consent from that Board, for the change of the acreage to 3.126 hectares. Thirdly, contrary to the requirement under Section 7(3) of the Trust Land Act (repealed), Gazette Notice No. 3831 of 1994 did

not specify a date before which applications for compensation were to be made to the District Commissioner. Fourthly, the suit land was set apart for use as a boat landing base, (a purpose that would have benefitted the local communities ordinarily resident in the area) yet the appellant has constructed a five-star hotel on it. There is no further Notice on record for change of purpose of setting aside. This is in contravention of the provisions of Section 117 of the former Constitution and Section 7(3) of the Trust Land Act (repealed), which required the Notice of an intended alienation to specify the purpose for which the land is required to be set apart.

64.The entire process and Notice for setting apart, fell far short of the requirements of the Constitution and the law. In view of these shortcomings and our conclusion regarding the legal status of the suit land, we find no reason to upset the judgment of the Court of Appeal.

E. Orders(i)The Petition of Appeal dated 3rd September 2019 is hereby dismissed(ii)The Judgment of the Court of Appeal dated 24th February 2014 is hereby affirmed(iii)The Appellant shall bear the Costs of the Appeal.Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JULY, 2021.....P. M. MWILUDEPUTY CHIEF JUSTICE &VICE-PRESIDENTOF THE SUPREME COURT.....M. K. IBRAHIMJUSTICE OF THE SUPREME COURT.....S. C. WANJALAJUSTICE OF THE SUPREME COURT.....NJOKI NDUNGUJUSTICE OF THE SUPREME COURT.....ISAAC LENAOLAJUSTICE OF THE SUPREME COURT*I** certify that this is a true copy of the original Registrar* **SUPREME COURT OF KENYA**