



REPUBLIC OF KENYA

High Court at Malindi

Judicial Review 8 of 2011

IN THE MATTER OF: AN APPLICATION UNDER ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF: AN APPLICATION BY CAPOTERRA FOR AFRICA LIMITED FOR JUDICIAL REVIEW ORDERS OF MANDAMUS AND PROHIBITION AGAINST THE REGISTRAR OF TITLES, MOMBASA

AND

IN THE MATTER OF: THE REGISTRATION OF TITLES ACT CHAPTER 281 LAWS OF KENYA

AND

IN THE MATTER OF: LEGAL NOTICE NO. 99 OF 1968 OPERATING THE MALINDI NATIONAL MARINE RESERVE

AND

IN THE MATTER OF: THE LAW REFORM ACT CHAPTER 26 OF THE LAWS OF KENYA

BETWEEN

REPUBLICAPPLICANT

VERSUS

THE REGISTRAR OF TITLES, MOMBASARESPONDENT

exparte **CAPOTERRA FOR AFRICA LIMITED**

1. **FRANCI LIMITED.....1ST INTERESTED PARTY**
2. **KENYA WILDLIFE SOCIETY2ND INTERESTED PARTY**
3. **THE NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY3RD INTERESTED PARTY**
4. **THE COMMISSIONER FOR LANDS4TH INTERESTED PARTY**
5. **THE COMMISSIONER OF LANDS.....5TH INTERESTED**
6. **THE MINISTER FOR LANDS AND SETTLEMENT6TH INTERESTED PARTY**

7. **THE ATTORNEY GENERAL7TH INTERESTED PARTY**

REASONS FOR JUDGMENT GIVEN ON 5TH NOVEMBER, 2012

INTRODUCTION

1. The Notice of Motion dated 10th March, 2011 seeks several orders:

(i) That an order of mandamus directed against the Registrar of Titles Mombasa requiring him to forthwith summon the 1st Interested Party herein, *Fanci Limited*, requiring the said 1st Interested Party to deliver up Certificate of Title to property known and described as portion number 10815 Malindi contained in Grant number LR. 34651 together with land survey plan number 235937 for the purposes of it being corrected, does issue.

(ii) That an order of mandamus directed against the Registrar of Titles Mombasa directing him that upon the 1st Interested Party, *Fanci limited*, delivering up to him certificate of Title of property known and described as Portion Number 10815 Malindi contained in grant Number L. R. 34651 to forthwith cancel the said certificate of title and any memorandum of entry related thereto, does issue.

(iii) That an order or prohibition directed against the Registrar of Titles Mombasa from in any way alienating by transfer or otherwise the area of land measuring approximately 0.1667. of a hectare or thereabouts situate within the Malindi National Marine Reserve and by further description situate on the shoreside of the applicant's property known as portion number 1783 to any third party apart for the sole intent and objectives of the Malindi National Marine Reserve as created vide Legal Notice Number 999 of 1968 does issue.

(iii) That costs be provided for.

2. On the face of the Notice of Motion are lengthy grounds (a-w) which are replicated in the supporting affidavit of Mario Moccagatta who describes himself as the Managing Director (MD) of

Cappoterra for Africa, the exparte applicant.

3. In opposition to the Notice of Motion several affidavits were filed in reply. The 1st Interested Party, Franci Ltd. through its MD Paolo Tarsia Incuria swore two affidavits filed on 18th March, 2011 and 10th May, 2011.

4. The 2nd Interested Party, the Kenya Wildlife Services (KWS) filed a replying affidavit sworn by its corporation secretary Thomas Ogola on 20th April, 2011. The National Environmental Management Authority (NEMA) is the 3rd Interested Party. NEMA did not file any papers or participate in the matter. The Kenya Anticorruption Commission (KACC as it was then called) put in a replying affidavit sworn by an advocate and investigator of the commission Philip Kagucia, and dated 12th July, 2011. KACC is the 4th Interested Party.

5. The Respondent was initially served with the process on 18th March 2011 but no pleadings or responses were filed on behalf of the Respondent. On 20th June, 2011 the counsel for the 4th Interested Party wrote to the Respondent (letter marked PG K1 annexed to replying affidavit by KACC filed on 12th July, 2011). The relevant part states:

“Note also that this parcel is the subject of an application for Judicial Review in Malindi High Court Misc. Appl. No. 8 of 2011 (Instant suit) wherein you are cited as the First Respondent yet no pleadings have been filed on your behalf by way of reply”

6. According to the affidavit of service by the process server Geoffrey Mwakulomba filed on 23-3-2011, the Respondent (erroneously referred to therein as the Land Registrar Mombasa Land Registry) was served through one Ingonga who having accepted service declined to sign claiming that the Attorney General (AG) had been served on his behalf. (This name Ingonga appears on the search certificate on the subject matter herein annexed to the supporting affidavit.)

The AG however, only entered appearance on behalf of the 5th, 6th and 7th Defendants, namely the Commissioner for Lands, Minister for Lands and the Attorney General. Hence the Respondent did not file any affidavit or grounds in opposition to the Notice of Motion.

7. The 5th to 7th Interested Parties while not filing any affidavit, put in submissions as did the exparte applicant, the 1st, and 4th Interested Party (submissions erroneously headed as the Respondent's submissions). This was pursuant to the agreement among the parties' counsel on 25th July, 2012 to dispose of the Notice of Motion by way of written submissions.

COMMON GROUND

8. After reading through the Notice of Motion, the respective affidavits and submissions by the parties it is possible to state the undisputed facts of this case, and the disputed claims of the respective parties.

9. The exparte applicant became the registered owner of land Portion No. 1783 (original portion no. 643/3), Malindi which has existed since 1960 (vide survey map no. 88728) by virtue of an indenture registered with the Registrar of Titles, Mombasa on 26th September, 2005. The said portion is developed. Since the year 1968 the sea ward area fronting this property was treated as part of the Malindi National Marine Reserve by dint of the Legal Notice No. 99 of 26th March, 1968.

10. Temporary Occupation Licences (TOL) authorizing use of the frontage portion by the

occupants of Plot 1783 or other parties were occasionally granted by the Municipal council of Malindi. Prior to the exparte applicant coming into possession of portion 1783, a grant number CR 34651 in the name of the 1st Interested Party registered in its favor in the year 2001 in respect of a land portion No. 10815 comprised of the frontage to the Portion no. 1783. Subsequently the first Interested Party fenced off this portion. This portion is the subject of the present dispute regarding which the parties have adopted different positions.

The position taken by respective parties: the dispute

11. The exparte applicant, the 2nd, 4th Interested parties now challenge the alienation of the parcel no. 10815 and assert that it was irregularly carved out of the Malindi Marine National Reserve. In this they are supported by the 5th, 6th and 7th Interested parties who have urged the court to “uphold and protect public/reserved land and interest.”

12. The respective affidavits and arguments presented by the above parties generally converge but in brief, they are as follows:

i. By the Exparte Applicant

- a) The alienated parcel is a part of the Malindi Marine National Reserve.
- b) The Principal Registrar of Titles having so satisfied himself concerning the 'unlawful' allocation directed the Respondent to cancel the title.
- c) There exist no supporting records in respect of the disputed title.
- d) The alienation goes against public policy and environmental conservation and the respondent ought to be compelled by a order of mandamus to perform his statutory duty which he has hitherto neglected.

ii. By the 2nd Interested Party

- a) The disputed plot no. 10815 falls within the Malindi Marine National Reserve, created under Legal Notice No. 99 of 1968.
- b) The alienation and transfer of the disputed plot from the trusteeship of the 2nd Interested Party to “unscrupulous individuals” is fraudulent and poses a threat to the ecosystem.
- c) Article 69 of the Constitution provides for the protection of the environment. Protestations by the 2nd Interested Party to the land registry have not been acted upon thus the court should “allow the order of *mandamus* “*ex-debito justitiae*”

iii. By the 4th Interested Party

- a) There is failure by the 1st Interested Party or indeed the Respondent to authenticate the creation of parcel 10815; through production of Part Development Plan (PDP), Letter of Allotment or Register Index Map (RIM).
- b) Deed Plan No. 88728 of 1960 relating to Plot 1783 shows sixty metre reserve between its boundaries and the high water mark on the shore of the Indian Ocean as required by Survey

Regulations 110 made under the Survey Act. There is no evidence that reservation of the sixty metre strip has been revised or altered.

c) The Registrar of Titles is empowered by Section 60 of the Registration of Titles Act to deal with fraudulent or wrongful grants, entries or endorsement (but has neglected this duty in this case).

iv. By the 5th, 6th and 7th Interested Parties

The 5th-7th respondents' grounds purportedly filed in opposition to the application seem out of sync with their written submissions which, are basically in support of the exparte applicant, and are inter alia that:

a) Malindi Marine National Reserve was created vide legal notice no. 99 of 1968. The reserve is managed by the 2nd Interested Party under the Wildlife Conservation and Management Act and previously by the former trustees under the National Parks of Kenya Act.

b) The case involves an important element of public interest and the court must exercise its discretion in protection thereof.

v. Position of the 1st Interest Party

a) The exparte applicant is not driven by public interest or conservation concerns but is more interested in free access to the use of the disputed portion as it has previously done on the strength of a TOL and is therefore guilty of non-disclosure and has no locus standi.

b) The reservation creating the marine reserve is not absolute and besides the map relied on by the applicant is not authenticated. In submissions it was argued that no evidence was adduced to prove that plot is a marine park or it is a turtle nesting area.

c) The land was nalienated government land and last TOL was extinguished upon issuance of title document. The 1st Interested Party acquired indefeasible title through purchase from one Samson Kaingu Mwandoro the original beneficiary of a proper allotment to the suit property, several years before the applicant acquired plot 1783. Due process was followed during the alienation.

d) The 1st Interested Party was not party to any fraud or irregularity. The first Interested Party as a bona fide purchaser for value was entitled to take possession of the alienated plot from the licensee then in occupation, namely, Malindi Sports and Leisure Complex.

e) No public access to the beach has been denied by the fencing of the portion no. 10815.

f) The 1st Interested Party was denied a hearing by the Principal Registrar and these proceedings are an attempt to enforce the Principal Registrar's unfair order.

g) Discrimination by 2nd Interested Party against the 1st Interested Party: Other properties adjoining the disputed plot have boundaries encroaching upon the reserve and the High Water Mark.

ANALYSIS

13. In my considered view, there are six issues calling for determination. These are:

1. Whether these judicial review (JR) proceedings are legally viable.
2. Whether plot 10815 falls within the Malindi Marine National Reserve.
3. Whether the alienation and issuance of a title in respect of the above portion to the 1st Interested Party was irregular or fraudulent.
4. Whether the 1st Interested Party was privy to such fraud or irregularity.
5. Whether the respondent exercised his power in an irregular/illegal manner by issuing the said title and declining to cancel the title as required by the Principal Registrar.
6. Whether this case incorporates a public interest element.

14. First, it is useful to get technical aspects in the first issue out of the way. The 1st Interested Party has submitted that these proceedings are statute barred as the disputed title was acquired well over seven years ago. It is true that the dispute relating to the subject matter started in 2001 when the 1st Interested Party attempted to take possession of the suit property. There is on record undisputed correspondence from KWS and the Principal Registrar and other parties in relation thereto.

15. Eventually the dispute was brought before the KACC on 29th September, 2010 by way of a report to one Philip Kagucia an investigator, to the effect that there was "suspected irregular alienation of land in Malindi comprising the high water mark ... by Francis Paul Tarsia" (*see Replying affidavit of the 4th Interested Party*). A further report was received by KACC on 20th January, 2011 from the exparte applicant. However, efforts to investigate the complaint were thwarted by the Respondent's failure to produce title records for scrutiny by the investigator. These JR proceedings were therefore commenced on 28th February, 2011.

16. In these circumstances the question of limitation of time cannot arise in my view. Neither can it be said that these proceedings constitute the use of public law to ventilate a private wrong. I will be saying more about that later on. With regard to the question of authorization of the ex-parte applicant by the Board of Directors to bring this suit, it is beyond question that the authorities cited by the 1st Interested Party state the correct legal position. However, I think the timing of that objection is fatal.

17. The 1st Interested Party did not raise this matter early enough as a preliminary point to be dealt with at the earliest opportunity. To my mind bringing up the issue at the latest moment possible is suggestive of litigation by ambush, on the part of the 1st Interested Party.

18. This court has a duty to administer substantive justice and it will be unjust to bring down the entire proceedings on the basis of a technical aspect for which, in all likelihood, the exparte applicant has a solid answer if only it was raised in good time. In the circumstances of this case the court must presume that the Managing Director of the exparte applicant had the necessary authority.

19. Similarly, the 1st Interested Party rightly submitted that it cannot hold brief for the 5th to 7th

Interested Parties. However it goes on to submit that the joinder of these parties on behalf of the Respondent is erroneous. Again this objection was not made when Ms. Lutta appeared on behalf of the said Interested Parties. Besides, the affidavit of service in respect of service on the Respondent states that the Respondent (through one Mr. Ingonga) was served but refused to sign the process asserting that the AG (7th respondent) had been served on his behalf. Nevertheless, he did receive service but did not participate in these proceedings.

20. The Commissioner of Lands, the Minister of Lands and Settlement are joined as interested parties alongside KWS, Franci Ltd, NEMA and KACC. It is not clear why the 1st Interested Party has concluded that the Commissioner of Lands, the Minister for Lands and Settlement and the AG were “enjoined on behalf of the Registrar of Titles contrary to section 24(1), 59, 60, 61 and 62, of the Registration of Titles Act (now repealed)”

21. This submission therefore does not in any way advance the cause of the 1st Interested Party. More so because the 1st Interested Party seemingly acquiesced to their participation in the proceedings, by failing to raise this objection at the outset. In conclusion therefore I am of the firm view that these proceedings as brought by the exparte applicant surmount the technical issues raised by the 1st, Interested Party and are therefore viable.

22. I now proceed to deal with issues no. 2, 3 and 5 together as they are related. On the question of the location of plot 10815, there is uncontroverted evidence that the same is located within the Malindi Marine National Reserve. A perusal of several documents before me leaves no doubt about this fact. The first is Legal Notice No. 99 of 1968 made under the National Parks of Kenya Act (Cap 377 of 1972) the predecessor to the Wildlife (Conservation and Management) Act Cap 376. The Notice states inter alia

“ESTABLISHMENT OF MALINDI AND WATAMU MARINE NATIONAL RESERVES IN EXERCISE of the powers conferred by Section 9 of the National Parks of Kenya Act, and in consultation with the Minister for Lands and Settlement, the Trustees hereby give notice that they have accepted complete control of the areas described in the schedule hereto which shall henceforth be national reserves.

The trustees have been authorized to exercise in relation to such national reserves all the powers, duties and functions conferred upon them by the National Parks of Kenya Act in respect of National Parks

SCHEDULE MARINE NATIONAL RESERVE

An area comprising of the Indian Ocean within Kenya Territorial Limits as between Malindi and a point to the south of Mida Creek and a strip of government land 100 feet wide on the adjoining mainland within Kilifi District of the Coast Province”

23. The Legal Notice is signed by D.P.S. Wasawo Chairman, Board of Trustees of the Kenya National Parks and P. M. Olindo, director, Kenya National Parks. The former trustees under the National Parks of Kenya Act took over the control of the reserve and later the KWS. The 1st Interested Party's argument that the ownership of the reserve remained with government is correct. Upon the enactment of the wildlife (Conservation and Management) Act Cap 376 in 1976 the National Parks of Kenya Act was repealed.

24. The interpretation part of the Wildlife (Conservation and Management Act) describes former

“Trustees” as the “Trustees of the National Parks of Kenya established by the National Parks of Kenya Act now repealed.”

25. The new Board of Trustees provided for under Section 3B are mandated to manage the Kenya Wildlife Service, the body responsible for the management of parks and national reserves. In particular, the functions and powers of the former trustees with regard to reserves and parks were placed in the hands of the KWS director (see section 18(4) of Cap 376.

26. The delineation of the entire Malindi Marine Reserve is contained in boundary plan no. 216/17 (annexture MM6 to supporting affidavit) which the 1st Interested Party says is not authenticated. However it is the position of the KWS that the plot 10815 was carved out of the 100 foot reserve from the high water mark. (See letter dated 28th November, 2001). The survey report by land surveyor Okoth Ombogo in the year 2010 authenticates the assertions of the exparte applicant.

27. He observes:

“5. Portion 1783(643/3) is one amongst nineteen plots created as a result the of the subdivision of portions 426 which all left a 30 metre marine reserve from the High Water Mark.

6. Portion 10815 which is a strip of land measuring 25 metres wide by 60 metres long approximately as delineated on the Director of Survey Plan

F/R 392/162(which) clearly shows that the land was carved out (of the) area set apart as 30 metre marine reserve directly at the frontage of portion 1783 towards the sea..... The survey plan completed in July, 1999 clearly indicates that the high water mark which forms part of the boundary of portion 10815 was picked and plotted and by then was only 26 metres on average from the boundary of portion 1783....portion 10815 was curved (sic) out of an area set aside as part of the Marine Reserve directly in front of portion 1783....”

28. From the indenture annexed by the exparte applicant as MM1 and attached plan No. 88728, portion 1783 existed as early as 1963 and its seaward boundary abutted upon the Indian Ocean. The 1st Interested party did not and cannot seriously challenge the location of its own plot as lying right in front of the seaward side of portion 1783. In its replying affidavit the 1st Interested party appeared to admit that the portion 10815 was indeed part of the original 100 feet (30 metres) reserved strip but complained that other owners of adjacent pieces have encroached on the reserve as well. Repealed violation by others cannot be used to justify the further alienation of the reserve.

29. Indeed as I understood the case put forth by the 1st Interested Party, it was an admission that the land out of which the portion 10815 was carved was a marine reserve but that its status at alienation was unalienated government land. Hence in 1999 the same was available for alienation by private individuals and was properly allotted to one Samsong Kaingu Mwandoro who later sold it to the 1st Interested Party, who was therefore an innocent purchaser for value. Besides, others have also encroached upon the reserve but the authorities including KWS, KACC and the Principal Land Registrar of Titles have discriminately only picked upon the 1st Interested party. Thus the submission by the 1st interested party that there exists no proof that portion no. 10815 is part of the marine reserve appears contradictory and out of place.

30. The much maligned instructions from the Principal Registrar of Titles directing the Respondent to cancel the title to plot 10815 (see letter of 30th April 2004 annexture MM18) states inter alia that the allocation, registration and issuance of titles in respect of portion 10815 (among others) “is irregular as they are within the Marine National Reserve gazetted and publishedunder Legal Notice No. 98 AND

99 DATED 26TH March, 1968.”

The letter goes on to state that:

“The Marine National Reserve are under under the full custody of Kenya Wildlife Services and still gazetted as suchregistration and issuance of any title to any other beneficiary (is) invalid”

31. This letter was probably written without giving the 1st Interested Party a hearing. Hence the complaint by the said party. However, it did not direct the Respondent not to give the 1st Interested Party a hearing albeit directing cancellation of title. Besides the Respondent did not act on it, hence this case. Although the non-compliance is unexplained, one may surmise that the Respondent feared that he lacked the legal power to cancel the title. And there is now a growing string of judicial decisions to support such a position.

32. However, and this issue also takes us to the next set of issues, namely No. 4 and 6 now that the respondent and the 1st Interested Party have been given a chance to be heard the respondent elected to stay away. The 1st Interested party, despite the preponderance of evidence that the plot in dispute was carved out of a marine reserve, has opted to play with cards close to the chest. The exparte applicant having established, and I so find, that the disputed portion was indeed a part of the Marine Reserve, it behoves the Respondent and the 1st interested party to demonstrate how the alienation was carried out. It must be recalled that legal notice no. 99 of 1968 placed the entire marine reserve under the control of the trustees (today the Director of KWS under the Wildlife (Conservation and Management) Act).

33. The reserve retained that status even after the enactment of the act. Section 7 of the Act prescribes the procedure for cessation of an area as a national park or reserve. It requires, firstly, that the minister responsible for matters related to wildlife after consultations with minister for lands (in this case the subject matter being Government Land) to declare by order such cessation.

Section 7(2) provides however, that:

“No order shall be made under subsection (1) unless:

a) a notice of the intention to make the order, with details thereof, and inviting objections thereto within a period of not more than sixty days has been published in the Gazette and in at least one newspaper circulating through out Kenya; and

b) not earlier than sixty days after the last date of such publication a draft of the order has been laid before the national Assembly and the National Assembly has by resolutions approved the order.”

34. In the case before us, the director of Wildlife the legal trustee is protesting the allocation terming it arbitrary, fraudulent and contrary to Article 69(1) (e) of the Constitution (see Replying affidavit of KWS corporation Secretary). Clearly the director (hence the ministry concerned) did not initiate the alienation process.

35. If the 1st Interested party now complains that the Principal Registrar of Titles did not give him audience, this suit was the ideal occasion for it to tender their side of the story in support of the claim they lay to portion 10815.

36. I have read carefully through the two lengthy replying affidavits of Paolo Tarsia Incuria on behalf of the 1st Interested Party. Most of its paragraphs are dedicated to faulting the depositions in the supporting affidavit of the applicant and to blaming the exparte applicant for its troubles but fall short on the actual procedure of their acquisition of the disputed portion.

37. Paragraph 12-14, and 19 of the affidavit filed on 18th March, 2011 assert that “due process was followed and title eventually issued”; and that the original allottee Samson Kaingu Mwandoro having been allocated the land by the Commissioner of Lands sold it to the 1st Interested Party. The sale agreement is annexed but not the letter of allotment. In the second affidavit (filed on 10th May, 2011) the deponent states inter alia in paragraph 13 that:

“The 1st Interested Party bought the portion 10815 in the year 2000 from the original allottee who assigned all his rights thereunder to the 1st interested Party and upon which the title was issued directly to the 1st Interested Party.”

38. The paragraph goes on to say that if there was any irregularity in the process, the 1st Interested Party was not privy thereto. In paragraph 15 the deponent describes the disputed portion as Government Land and proceeds to argue that:

“All land falling under the jurisdiction of the Government Lands Act is administratively under the commission of lands (sic).”

The applicant has not (shown any reason why the land cannot be administered as Government Land. They also have nor indicated if anyone else holds title....gazette notice does not confer any (or) proprietary rights on anybody.”(sic)

39. Kaingu Mwandoro has not sworn an affidavit in support of the claims of the 1st Interested Party. Neither has the 1st Interested Party tendered a copy of the letter of allotment obtained by Kaingu and used to process title in its name. In this case the agreement alone cannot suffice. It would appear that both the respondent and the 1st Interested Party have balked at producing any of the documents used to issue the title to portion 10815. Why"

40. The degazettement process anticipated under Section 7 of the Wildlife (Management & conservation Act) has clearly not taken place; the 1st Interested Party does not even refer to this.

The land parcel, he seems to admit and correctly, was government land but it was also a gazetted marine reserve. Even if we accept that it was a government reserve therefore government land the reserve was in the custody of the director of KWS or his predecessor the former trustees under the National Parks of Kenya Act. The objects of the marine reserve are conservation.

41. The Commissioner of Lands having released the reserve to the appropriate trustees in 1968 could not arbitrarily decide to parcel it out to individuals as private property as he purportedly did in this case. I say purportedly because we have not seen the alleged allotment letter, the Part Development Plan (PDP) or Registry Index Map in support of the alienation. Neither has the 1st Interested Party tendered a deed plan in respect of portion 10815. Indeed the only copy of title on record is that tendered by the exparte applicant.

42. In these circumstances I must agree that the alienation of the marine reserve and the subsequent creation of portion 10815 and issuance of title thereto was irregular as it was clearly carried out in contravention of Section 7 of the Wildlife Conservation and Management Act. That must explain the

respondent's studious avoidance of these proceedings and failure to produce records to the 4th Respondent, and the less than candid protestations of the 1st Interested Party.

43. From his two affidavits Paolo Incuria was on the ground long before the exparte applicant came into portion 1873. He seems to be familiar with the history of the disputed portion and its status as "government land" occupied by different persons under a temporary occupation licence. Did he shell out shs. 800,000/- without due diligence to confirm that Kaingu's letter of allotment if such existed, was valid. Where is the letter of allotment and related alienation records" Why does the 1st Interested Party not explain the failure to produce them or to get Kaingu to confirm their statements"

44. The circumstances of this case appear to suggest that the 1st Interested Party was not an innocent party and neither can the sum of Shs. 800,000 be said to be value for a first row beach property even in the year 2001. The 1st Interested Party and the respondent were accomplices in the irregular alienation of a marine reserve into private property.

45. Even if I had found that the 1st Interested Party was innocent, the public interest question looms large in this matter because the land portion is not only public land but also an environmental conservation site. In my considered view this dispute represents a proper case where the rights of the individual have to give way to the public – see **Peter Bogonko v National Environment Management Authority [2006]eKLR.**

46. In the case of **John Peter Mureithi & 20 others v Attorney General & 4 others [2006]eKLR** Justice Nyamu discussed the doctrine of public interest and public trust. He stated that the doctrine applies to public land and was recognized by the 1963 Constitution (and now Article 62 of the 2010 Constitution). Thus a guilty party could not avail himself the principle of indefeasibility of a title which arises from statute, in this case the RTA. He delivered himself as followed:

“A democratic society holds public land and resources in trust for the needs of that society... alienation of land that defeats the public interest goes against the letter and spirit of ...the constitution...the doctrine of public trust...is certainly a ready enemy of alienation of natural resources and land grabbing...and should serve as a perpetual protection of public land, forests, wet lands, riparian rights, river beds and kayas....”

47. In my considered view a marine reserve qualifies to be in the above category and the commissioner of lands and the respondent cannot and should not purport to arbitrarily and unlawfully alienate it under the Government Lands Act. Such resources cannot arbitrarily be converted into private ownership as they are of great importance to the public, and ought to be used for their benefit. Private ownership that is dubious is not protected under Article 40(6) of the Constitution.

48. Omondi J also discussed these matters at length in **Prof. Samson Koigengo Ongeru vs Green Bays Holdings and others [2011]eKLR** which the 5th – 7th respondents have cited in their submissions. The present case involves both private rights of the exparte applicant, but also public interest, both with respect to the applicant's right of access to the beach and the protection of a natural resource namely, the marine reserve. In her ruling in respect of the interim application in the present case, Omondi J had occasion to consider this aspect. She quoted a passage that I consider apt for the present situation:

“But a private individual will have locus standi where the interference with a public right involves interference with some private right of his own (e.g where an obstruction is so placed on a highway that the owner of the premises obstructing on the highway is specially affected by

the obstruction interfering with his private rights of access from his premises...If the private individual cannot bring himself within either of those classes he can go to the Attorney General and ask him to intervene either ex-officio or by giving him permission to use his name....The latter is known as a relator action."

See FOULKES "Introduction to Administrative Law" 4th Edn. p.198)

49. Thus in this case the locus standi challenge thrown at these proceedings by the 1st Interested Party cannot be allowed to succeed as that would be inimical to public interest and the rule of law. In the **Peter Murithi case**, Justice Nyamu while dealing with a similar objection on standing had this to say:

"Judicial review courts have generally adopted a very liberal approach on standing for the reason that judicial review is now regarded as an important pillar in vindicating the rule of law and constitution. The party who wants to challenge illegality, unreasonableness, arbitrariness, irrationality and abuse of power...ought to be given a hearing by a court of law...under the English Order 53 now replaced in that country...since 1977 and which applies to us by virtue of the Law Reform Act Cap 26, the test of locus is that of a person aggrieved. After 1977 the test is whether the applicant has a sufficient interest in the matter...although under statute law our test is not that of sufficient interest...it would be difficult to restrain the great achievements in this area (judicial review)...to restrain the public spirited citizen or well organized or well equipped pressure groups from articulating issues of public law into our courts... I think the courts have a wide discretion on the issue of standing and should use it well in the circumstances of each case."

50. Applying these words to the present case it is self evident that the issues raised in this case are predominantly issues of a public interest nature albeit converging with the exparte applicants' private interest. Hence the court must not only adopt the most facilitative approach in respect of locus standi but also give priority to the public interest vis-a-vis the private interest of the 1st Interested Party.

51. For all the foregoing reasons I was satisfied that the notice of Motion filed on 11th March, 2011 had merit. Although I may not go as far as using the phrase '*ex debito justitiae*' in this instance as canvassed by the applicant I think that the justice of the situation dictated that I allow it in terms of prayers 1-3. Each party will bear its own costs in light of the nature of the litigation.

Delivered and signed this **21st December, 2012** in the presence of Ms. Baraza for the 1st Interested party, Mr. Matata holding brief for Dr. Khaminwa for the exparte applicant.

Court clerk – Evans

C. W. Meoli

JUDGE

MS. BARAZA – I ask for copies of proceedings and judgment for purposes of appeal.

C. W. Meoli

JUDGE

COURT – Judgment and proceedings be supplied.

C. W. Meoli

JUDGE

MS. BARAZA – I would like to apply for stay

C. W. Meoli

JUDGE

COURT – Let formal application be made before the Environment and land Court Judge.

C. W. Meoli

JUDGE



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