REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Mwilu; DCJ & V-P, Ibrahim, Wanjala, Njoki & Lenaola, SCJJ)

PETITION NO. 14 OF 2017

–BETWEEN–

KILUWA LIMITED.....1ST PETITIONER

SULEIMAN SAID SHAHBAL .....2ND PETITIONER

–AND–

BUSINESS LIAISON COMPANY LIMITED.....1ST RESPONDENT

MUORGATE HOLDINGS LIMITED.....2ND RESPONDENT

THE COMMISSIONER OF LANDS.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

(Being an Appeal against the Judgment and Order of the Court of Appeal ***(Makhandia, Ouko & M'inoti, JJ.A)*** *in Civil Appeal No. 89 of 2015 delivered at Mombasa on 11th November 2016)*

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] Before the Court is a Petition of Appeal dated 27th July 2017, and filed on 3rd August 2017. It is brought pursuant to Article 163 (4) (a) of the Constitution, challenging the entire Judgment and Orders of the Court of Appeal *(Makhandia, Ouko & M'inoti, JJ.A)* delivered in Civil Appeal No. 89 of 2015. The Court of Appeal overturned the High Court (*Emukule J.*) in Constitutional Petition No. 8 of 2012.

B. LITIGATION BACKGROUND

(i) At the High Court

[2] The dispute in question revolves around three first-row beach adjoining pieces of land, *MN/I/5901* and *MN/I/5902* (hereinafter *the Suit Properties)* and *LR No. MN/1/18888* situated at Shanzu, Mombasa. By a Constitutional Petition No. 8 of 2012 premised on Articles 10, 22, 23(3), 40(1) and (3), 42 and 47 of the Constitution of Kenya, 2010, and Articles 13 and 14 of the African Charter on Human and Peoples Rights, the appellants sought numerous declaratory, judicial review and injunctive orders against the respondents. It was the appellants' claim that initially, between the first-row beach plots, and the Indian Ocean's high-water mark, there was a strip of land that was reserved for public use (hereinafter *the Reserve Land*).

[3] It was claimed that the Commissioner of Lands in contravention of Survey Regulations made under Section 45 of the Survey of Kenya Act, Cap 299, had on the 14th of April 1992, demarcated from the reserve land MN/I/5902 and granted title to the 1st respondent as a first allottee for a term of ninety-nine years (99) years. The appellants further alleged that in 2011, a survey was carried out by the Commissioner of Lands for the purpose of consolidating various parcels of land owned by the 2nd respondent, and that in the process, the boundary of the consolidated plot was extended from its original location which resulted in the encroachment of a portion of the reserve land and its inclusion as part of the new parcel of land known as LR No. MN/I/5901.

[4] The appellants also claimed that property *LR No. MN/1/18888,* which adjoins the suit properties, was initially owned by the 2nd appellant who acquired it on the 30th of June 2009 and later transferred it to the 1st appellant, a company in which the 2nd appellant had majority shareholding. This property was described as a first-row beach plot next to the Indian Ocean separated from the ocean's high

watermark by the reserved land. The appellants further contended that the 1st Respondents had erected a stone wall along the boundary of the remaining reserve land completely blocking their access to the Indian Ocean. They urged that they had purchased the property for the purpose of erecting a multi-million modern apartment hotel giving the residents of the apartments a view of the beautiful scenery of the Indian Ocean waters, beach and the coastline from their rooms.

[5] It was therefore the appellants' case that the grant of MN/I/5902 to the 1st Respondent and the extension of the boundaries into the reserved land to create LR No. MN/I/5901, was unlawful and a violation of their right to property and unrestricted access to the Indian Ocean sandy beach through the reserve land. They further submitted that the Commissioner of Land's actions were in violation of their littoral rights to access, use and view the Indian Ocean waters and beach. The appellants also submitted that the actions by the Commissioner of Lands had violated their right to equal access to public property guaranteed under Article 13(3) of the African Charter on Human and Peoples Right.

[6] By a Decision delivered on 13th October 2015, the High Court *(Emukule, J.)* allowed the petition. On preliminary issues, the Learned Judge found that Article 22 of the Constitution grants to every person the right to commence proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or threatened. It was also the Court's finding that Article 23(3) sets out the remedies which a Court may grant pursuant to court proceedings brought under Article 22, and that the judicial review remedy was not subject to limitation under Sections 8 and 9 of the Law Reform Act (Cap 26, Laws of Kenya).

[7] On the merits of the petition, the Learned Judge found that the issuance of a new grant known as Number LR 52344 and subsequent LR. No. MN/I/5902 and interference with the appellants' right of access to the oceanic view from its property LR No. MN/1/18888, was a grave violation by the Commissioner of Lands of the national values and principles of governance, integrity, transparency and

accountability as set out in Article 10 of the Constitution, and the rules of natural justice under Article 47 which guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

[8] On the question of littoral rights, the Court found that Section 45 of the Survey Act as read together with Regulation 110(2) of the Survey Regulations clearly require the Commissioner of Lands to maintain a reserve land of at least sixty (60) meters between the high-water mark and the littoral lands. The Judge stated that the 60 meters reserve land was for Government purposes which could only be alienated under the direction of the Minister responsible for Survey of Kenya and in the absence of such direction, the grant and encroachment onto the reserve land was patently unlawful, and hence null and void. The Judge noted that the 60 meters high water mark is held by the State in public trust as a buffer zone before the baseline from which the country's territorial sea is measured and it was therefore unlawful for the 3rd respondent to allot to the 1st and 2nd respondents the reserve land. The Court consequently granted the following declarations and Orders:

> ***(a) A declaration that the 3rd respondent abused its office and acted illegally and unconstitutionally in alienating L.R. No. MN/I/5902, Mombasa which was curved out of a reserve land to the Third Respondent;***
>
> ***(b) A declaration that the 3rd respondent abused its office and acted illegally and unconstitutionally in extending the boundary of L.R. No. MN/I/5901 to cover a portion of the reserve land;***
>
> ***(c) A declaration that the alienation by the 3rd respondent to the 1st respondent of L.R. No. MN/I/5902, Mombasa which is the appellants' access to the Indian Ocean***

beach violated the Petitioners' right to own property and equal access to public property;

(d) A declaration that the extension by the 3rd respondent of the boundary of L.R. No. MN/I/5901 to cover a portion of the reserve land which is the appellants' access to the Indian Ocean beach was a violation of the appellants' right to own property and equal access to public property;

(e) A declaration that the alienation of a reserve land by the 3rd respondent to the 1st and 2nd respondents for private use was a violation of the appellants' right to clean and healthy environment and equal access to public property;

(f) A declaration that the alienation of L.R. No. MN/I/5902, Mombasa by the 3rd respondent to the 1st respondent and a portion of L.R. No. MN/I/5901 that encroaches on the reserve land to the 2nd respondent was done in breach of the rules of natural justice, procedural and administrative fairness and national values and principles of governance;

(g) An order of injunction to restrain the 1st respondent, its officers, servants and/or agents from selling, transferring, mortgaging, charging, leasing, developing, putting up a wall or fence or blockage of any nature on and from having any other or further dealing with all that parcel of land known as L.R. No. MN/I/5902, Mombasa;

(h) A permanent injunction to restrain the 1st and 2nd respondents, their officers, servants and/or agents from

blocking the Petitioners' access to and view of the Indian Ocean through L.R. No. MN/I/5902 and L.R. No. MN/I/5901 in any manner whatsoever;

(i) A mandatory injunction compelling the 1st and 2nd respondents to demolish a stone wall that they have constructed on L.R. No. MN/I/5902 and L.R. No. MN/I/5901, Mombasa;

(j) An order of Judicial Review in the nature of Certiorari to bring into this court and quash the decision of the First Respondent to alienate L.R. No. MN/I/5902, Mombasa to the 1st Respondent;

(k) An order to Judicial Review in the nature of Certiorari to bring into this Honourable Court and quash the decision of the 3rd respondent to extend the boundary of L.R. No. MN/I/5901 to cover a portion of the reserve land;

(l) An order of Judicial Review in the nature of mandamus to compel the 3rd Respondent and/or its successors in title to cancel Grant No. C.R. 22652 dated 4th April, 1992 for L.R. No. MN/I/5902, Mombasa;

(m) An order of Judicial Review in the nature of a Mandamus to compel the 3rd respondent and/or its successors in title to amend Grant No. C.R. 52344 dated 10th June, 2011 for L.R. No. MN/I/5901 and remove therefrom the portion thereof that extends to the reserve land;

(ii) At the Court of Appeal

[9] Aggrieved, the 1st and 2nd respondents filed Mombasa Civil Appeal No. 89 of 2015, citing the following summarized grounds: *that all the transfers affecting both parcels of land were commenced and concluded between 1989 – 1992 while the petition was filed over 20 years later, and the learned High Court Judge therefore erred in applying Article 47(1) and (3) of the Constitution which guarantees the right to fair administrative action while failing to appreciate that the same is forward looking and not retrospective in nature; that the learned Judge erred by failing to appreciate that the law applicable to the dispute was the Law Reform Act and that under that law, the claim for certiorari was time barred having been made outside the prescribed period of six months from the date of the impugned decision; that the learned judge failed to appreciate the concept of indefeasibility of title under the Registration of Titles Act; that the High Court erred in ignoring the fact that prayers 1(a), (c), (e), (f), (h), (i), (j) and (l) in the Petition were predicated on a retrospective application of Article 47 of the Constitution; and that the trial court erred in failing to conduct a site visit to ascertain whether there was indeed encroachment on the 1st and 2nd respondent land and failing to hold that any complaint by the Respondents ought to be determined by the National Land Commission and not the High Court.*

[10] In a Judgment delivered on 11th November 2016, the Court of Appeal allowed the appeal with costs and set aside the trial court's decision and orders. Regarding the issue of the correct forum for dispute resolution available to the appellants, the Learned Judges held that the appellants' petition before the High Court alleged violation of the Constitution and that even if the appellants could have applied for judicial review orders under the Law Reform Act, this did not preclude them from applying for enforcement of their constitutional rights by way of a constitutional petition. The Judges also held that a party must exhaust all remedies available before moving the courts. They however noted that the appellants could not have

found recourse in the National Land Commission as at the time of filing the Petition, that Commission was not in existence.

[11] On whether the trial court erred in applying the provisions of the Constitution, 2010 and by implication the Fair Administrative Action Act, 2015, the Appellate Court found that Article 47 could not be applied retrospectively. The Judges opined that the Constitution required parliament to enact legislation to give effect to the right to fair administrative action, which act came into force on the 17th of June 2015 long after the cause of action had arisen. The Judges therefore held that by dint of Article 263, the Constitution came into effect on the day it was promulgated and the appellants could not invoke Article 47 of the Constitution and by implication the Fair Administration Act to divest the 1st and 2nd respondents of their property that had vested more than twenty years before the promulgation of the Constitution, 2010.

[12] On whether the appellants were deserving of the Orders from the High Court, the Judges, while noting that judicial review and injunctive Orders are discretionary, were of the view that the appellants were undeserving of the Orders sought and granted. The Judges attributed this to the unexplained 20 years delay in lodging of the claim despite the fact that the appellants were aware of the allotment of the adjoining parcels and the surrounding circumstances. It was the Appellate Court's further finding that the appellants could not protest or purport to rely on the construction of the wall to challenge the 1st and 2nd respondents' titles while the 2nd appellant purchased the property from the 1st appellant, perfectly aware of the allocation of the adjacent properties to the 1st and 2nd respondent and existence of a zigzag wall that was later replaced with the wall that was the subject of contention.

[13] On indefeasibility of title, the Court of Appeal found that under the Land Registration Act 2012, a proprietor of land had an indefeasible title which could not be defeated unless it was acquired by fraud. The Judges noted that as fraud was

not pleaded or proved on the part of the respondents, even if the allotment was irregular, the only available recourse to the appellants was damages. It was thus held that nullification of the respondents' title by the High Court, disregarding the provisions of the Land Registration Act 2012 was in error.

(iii) At the Supreme Court

[14] Dissatisfied by the Court of Appeal Judgment, the appellants moved this Court, citing ten (10) grounds of appeal summarized as follows, that the learned Judges erred in law and fact in:

(i) In finding that the titles to the suit properties were indefeasible and, in any case, the only available recourse to the appellants was damages;

(ii) In exercising their discretion without a legal basis in making the finding that the appellants were not entitled to the orders granted by the High Court;

(iii) In misconstruing and misapplying crucial material facts and evidence before them thus arriving at a wrong conclusion in law and fact;

(iv) In misinterpreting Article 47 of the Constitution of Kenya 2010 by failing to give any proper or due consideration to the fact that Article 47 of the Constitution also had retrospective applicability wherein it provided for the right of every individual to administrative action that is just, fair and expedient and in failing to appreciate that right was inherent, inalienable and fundamental constitutional right which had always been in existent prior to the promulgation of the Constitution on the 27th of August 2010;

(v) In concluding that the orders of certiorari, injunction and declaration were hinged on the 3rd respondent's actions and erred in

making the finding that all the orders granted by the High Court through its retrospective approach [were] automatically vacated;

(vi) *In relying on Section 23 and 24 of the Registration of titles Act (repealed) which sections were neither relevant to nor applicable to the suit property MN/I/5902 which was not transferred but alienated by way of allotment by the 3rd Respondent to the 1st Respondent;*

(vii) *In determining an issue that was not before them on appeal; as to "whether the petitioners were deserving of the orders they obtained from the High Court", being issue which had no legal basis since the issue did not arise from any of the grounds of appeal in the Memorandum of Appeal and as argued by the parties in the Appeal;*

(viii) *In disregarding the surveyor's report dated 30th November, 2011 which was produced as evidence and which was clearly demonstrated that the 'reserve land' was indisputably public land and was incapable of alienation by the 3rd Respondent;*

(ix) *In falling to appreciate that there was sufficient evidence adduced by the Petitioner to show that the 'reserve land' was public land which was incapable of alienation and by allotting the same to the 1st and 2nd Respondent, the 3rd Respondent had unconstitutionally and illegally conspired to defeat the public interest of all persons including Kenyans and tourists who have a right to access the ocean, was nullity ab initio; and*

(x) *failing to exercise their discretion judiciously thereby misdirecting themselves in fact and in law by failing to consider relevant factors and matters which ought to have been considered and thereby came to a wrong decision resulting in a gross miscarriage of justice and the defeat of the Petitioner's interest and the public interest.*

[15] The appeal seeks the following reliefs:

> *(i) The Appeal herein be allowed with costs;*
> *(ii) The judgment and orders of the Court of Appeal sitting at Mombasa delivered on the 11th November 2016 in Civil Appeal No 89 of 2015 be set aside and the decision, orders and declarations granted by the High Court be upheld;*
> *(iii) The Costs of the proceedings before the Court of Appeal be awarded to the appellants;*
> *(iv) Any other orders that this Honourable Court may deem fit in the circumstances.*

C. PARTIES' RESPECTIVE CASES

(i) The Appellants

[16] The appellants' written submissions are dated 20th December 2019 and filed on 24th December 2019. Their supplementary submissions are dated 24th September 2020 and filed on 28th September 2020. It is the appellants' case that the Appellate Court *erred in misconstruing and misapplying crucial and material facts and evidence*. They urge that first, the Judges erroneously held that MN/*1*/5901 was also known as LR MN/*1/1*8888, and that it was owned by the appellants, while the former, they urge, is registered in the name of the 2nd respondent and the latter registered in the name of the 1st appellant. It is their further submission that the learned Judges erroneously adjudicated over only one property namely, MN/*1*/5902, while the claim concerned the two suit properties namely, MN/*1*/5901 and MN/*1*/5902.

[17] Secondly, the appellants urge that the Court of Appeal Judges made several erroneous findings which conflicted with the evidence tendered before the High

Court. They specifically refer to the finding by the Appellate Court that the wall, the subject of contention, existed at the time of purchase of LR MN/*1/1*8888 by the 1st appellant and that they could not lodge a complaint over the same when they were aware of its existence at the time of the purchase.

[18] They urge that on the contrary, and as averred in the 2nd appellant's further affidavit sworn on 16th March 2017, the zigzag was a low-lying decorative wall which blended with the landscape and didn't restrict access and view of the Indian ocean from the appellants' property. They add that the wall subsequently constructed by the 1st respondent, which is the subject of contention, blocked their view and denied them access to the Indian Ocean.

[19] The appellants also submit that there was no unreasonable delay in bringing a claim against the respondents. They contend that the stone wall was erected in August 2011, while they filed the petition before the High Court on 17th February 2012, approximately 7 months after the construction. It is their submission that, in view of these facts, they were deserving of the Orders granted by the High Court and that there was no legal basis for the Court of Appeal to arrive at a contrary finding.

[20] The appellants' case with regard to *fair administrative action* is directed at the 3rd respondent. They urge that the 3rd respondent failed to consult their predecessors in title, the area residents and all other interested parties and shareholders, before alienating the reserve land. It is also the appellants' case that the land comprised in MN/*1/5*902 and part of MN/*1/5*901 was public land as set out in the Land Act, 2012 and Article 62 of the Constitution. As such, they submit, the 3rd respondent had no rights to alienate the same. They therefore urge that the alienation and allotment was illegal, unconstitutional and contrary to Section 45 of the Survey of Kenya Act, Cap. 299, Laws of Kenya and Regulation 110 (1) of The Survey Regulations 1994 and Sections 9 and 82 of the Government Lands Act Cap 280 (repealed).

[21] On the issue of the *applicability of Article 47 of the Constitution*, it is the appellants' submission that Article 47 is both forward and backward looking. It is their argument that this being the case, the Article applies retrospectively to every person who is entitled to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Further, they urge that the rights under Article 47 of the Constitution are inherent, inalienable and fundamental, meaning, they cannot be limited by the passage of time.

[22] Additionally, they submit that the right to administrative action is co-terminus with similar rights under common law and natural justice, which rights are expressly protected under Article 22 (1) of the Constitution. They add that Section 12 of the Fair Administration Act, 2015 was intended to apply retrospectively as it encapsulates the general principles of common law and natural justice which applied prior to the promulgation of the Constitution. Moreover, they submit that under Article 165 (3) (b) of the Constitution, the High Court has jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

[23] It is the appellants' further case that in any event, the Court of Appeal had confined itself only to Article 47 of the Constitution, thereby ignoring or failing to consider the enforcement of the appellants' other fundamental rights claimed under Articles 10, 22, 23 (3), 40 (1) & (3), 42 and 47 of the Constitution. They add that the High Court having decided on these other fundamental rights and freedoms, the same were properly before the Appellate Court for consideration.

[24] Second, they urge that the Supreme Court has jurisdiction to determine a dispute that predates the promulgation of the Constitution. They rely on this Court's decision in ***Narok County Government v. Livingstone Kunini Ntutu & 2 Others***; SC Petition No. 3 of 2015, [2018] eKLR, to urge that this Court's jurisdiction is an enlarged one, clothing it with the authority to settle disputes to ensure certainty and stability of judicial decisions.

[25] On the *issue of indefeasibility of title* under Section 23 of the Registered Land Act (repealed), the appellants submit that the alienation of the suit properties was a nullity *ab initio* and that the issue of indefeasibility of title cannot be pleaded successfully. It is their submission that in any case, Section 23 of the Registered Land Act only applies to certificates of title issued by the Registrar to a purchaser of land upon transfer or transmission. They further urge that Sections 23 and 24 of the Registered Land Act do not apply to the suit properties, more specifically MN/*1/5*902 and part of MN/*1/5*901, which was allotted to the 1st and 2nd respondents by way of an allotment letter. The appellants rely on the Court of Appeal's Decision of ***Town Council of Ol'Kalou v. Ng'ang'a General Hardware*** C.A No. 269 of 1997 (Unreported) to support this argument. They therefore urge the Court to allow the appeal with costs.

(ii) The 1st and 2nd Respondents

[26] The 1st and 2nd respondents oppose the appeal through their Grounds of Objection dated 21st August 2017 and filed on 22nd August 2017 and submissions dated 17th September 2020 and filed on 28th September 2020. In objection, they urge that Article 47 of the Constitution is not retrospective in nature. They further submit that, the appellants were guilty of inordinate delay having slumbered for 20 years before filing the present petition. Finally, the respondents submit that the High Court lacked jurisdiction to determine a dispute that predated the promulgation of the Constitution.

[27] Regarding the issue as to *whether Article 47 of the Constitution of Kenya 2010 applies retrospectively,* the respondents submit that the Constitution is forward looking and does not have retrospective application. They urge that it is an admitted fact that the alienation in question was concluded in 1989 and 1992 before the promulgation of the 2010 Constitution, hence one cannot claim to enjoy a right or alleged violation of a right that had not been recognized at the time the events complained of occurred. They rely on the Decisions of ***Samuel Kamau***

Macharia v. Kenya Commercial Bank; SC Application No. 2 of 2011, [2012] eKLR, ***(S.K Macharia Case)***; ***Jane Wanjiku Maina & 185 Others v. The Attorney General & Another***; H.C Petition 20 of 2011, [2012] eKLR and ***B.A & Another v. Standard Group Limited & Another***; H.C Petition No. 48 of 2011, [2012] eKLR to support the argument that the Constitution does not apply retrospectively.

[28] It is the respondents' further case that Article 47 (3) of the Constitution provides that the right to fair administrative action was to be given effect through the enactment of a future legislation that is the Fair Administrative Action Act, which came into force on the 17th of June 2015. They urge that any attempt to import retrospective application of the provisions of Article 47 has no foundation in the Constitution and ought to be dismissed. The respondents add that this court in the ***S. K. Macharia Case*** cautioned against retrospective application of constitutional provisions where it would have the effect of divesting an individual of their rights legitimately occurring before the commencement of the Constitution. In view of the above assertion, it is the respondents' case that this Court lacks jurisdiction to entertain the appeal before it.

[29] The 1st and 2nd respondent, in addition, contend that the applicable law in this appeal is the law in force prior to the promulgation of the Constitution, that is Sections 8 and 9 of the Law Reform Act which codified the common law rules of natural justice. They add that these rules were saved under Section 12 of the Fair Administrative Action Act, 2015.

[30] On *indefeasibility of title* under Section 23 of the Registered Land Act, the respondents submit that the suit properties were registered under the Registered Land Act and pursuant to Section 23 the said titles were indefeasible, and could only be challenged on grounds of fraud or misrepresentation. They rely on the decisions in ***Dr. Joseph Arap Ngok v. Justice Mojo Ole Keiwua*** Civil Application No 60 of 1997 (unreported) and ***Charles Karathe Kiarie & 2***

Others v. Administrators of the Estate of John Wallace Mathare (Deceased) and 5 Others; C.A Application No. 12 of 2013, [2013] eKLR to support the argument that Section 23 (1) of the Act gives an absolute and indefeasible title to the owner of the property. They add that the appellants neither pleaded fraud or misrepresentation on the part of the respondents, nor gave a reason for the delay in challenging the titles allocated. Consequently, they argue, the Orders of *certiorari* and *mandamus* which are discretionary were not available to the appellants under Article 22 of the Constitution.

[31] On the issue as to *whether the suit property was excised from public land*, it is the respondents' submission that the suit property was neither public land nor was it reserved for public use. They urge that it was Government land reserved for Government purposes as provided for in Regulation 110 (1) of the Survey Regulations 1994. It is their contention that the reserve land being Government land was subject to the provisions of Section 3 (a) of the Government Lands Act (repealed) which empowered the President to make grants or dispositions of any estate, interests or right in or over unalienated Government land. It is therefore their submission that the suit properties were alienated and granted to them by Presidential Decree in accordance with Section 3(a) of the Act. They also urge that the suit properties were alienated before the enactment of the Constitution and do not fall within the scope of Article 62 of the Constitution.

[32] On *whether the appellants have the right of access* to the public beach and Indian Ocean through the suit properties, it is submitted that following the assertion that the suit properties were not public land but Government land which has since been alienated and allotted to the 1st and 2nd respondents, in absence of any easement over the suit properties, the appellants cannot claim any right of access through the suit properties

[33] On whether the *appellants were entitled to declaratory orders* sought under Article 22 of the Constitution, the respondents submit that in the absence of proof

of violation of their rights under Articles 40 and 42 of the Constitution, the appellants are not entitled to the declaratory or injunctive orders granted by the High Court. In conclusion they urge the Court to dismiss the appeal with costs.

(iii) The 3rd and 4th Respondents

[34] The 3rd and 4th respondents' submissions are dated 22nd September 2020 and filed on the 23rd of September 2020. The Attorney General submits on three limbs on behalf of the 3rd and 4th respondents. On *whether Article 47 of the Constitution of Kenya 2010 has retrospective effect*, it is argued that the 3rd Respondent's decisions to allot the suit properties to the 1st and 2nd respondents were made before the enactment of the Constitution, 2010 and therefore cannot be challenged as offending the provisions of Article 47. It is submitted that Article 47 has no indication that it was intended to have retrospective effect. This, they submit, is reflected in the reading of Article 47 (b) of the Constitution which mandates Parliament to enact legislation to give effect to Article 47 (1) and resulted in the enactment of the Fair Administrative Action Act in 2015. To support this argument, the respondents rely on this Court's decision in the ***S. K. Macharia Case.*** They further submit that Article 163(4) of the Constitution does not confer upon the Supreme Court, appellate jurisdiction to entertain matters that had been finalized by the Court of Appeal before the commencement of the Constitution.

[35] On the issue as to *which party bears the burden of proving that the reserve land was public land,* the Attorney General submits that the burden lies with the appellants, and that they failed to discharge this evidentiary burden. It is further submitted that Article 62 of the Constitution defines public land as land which at the effective date was un-alienated Government land as defined by an Act of Parliament in force at the effective date including all land between the high and low water marks, and any land not classified as private community land under the Constitution, any other land declared to be public land by an Act of Parliament in force at the effective date or enacted after the effective date. To this end, it is the

3rd and 4th respondents' case that parcel L.R Number MN/1/5902 and part of L.R No. MN/1/5901 was un-alienated Government land and had never been public land or land reserved for public use. For these reasons, the Attorney General contends that the alienation to the 1st and 2nd respondents was done within the scope of statutory authority under Section 3 of the Government Lands Act. The suit properties, in the view of the Attorney General, do not fall under the categories of public land defined under Article 62 of the Constitution.

D. ISSUES FOR DETERMINATION

[36] Having considered the respective cases by the parties and attendant submissions in support thereof, we have concluded that four issues commend themselves to our attention in order to dispose of this appeal. The four issues are:

(i) Whether this Court has jurisdiction to determine the appeal herein;

(ii) Whether the 2010 Constitution** (Article 47) **applies retrospectively to this dispute;

(iii) Whether the appellants were time-barred in lodging their claim;

(iv) Whether the portion of land which is the subject matter of the dispute was public land, and if so, whether it was available for allocation.

E. ANALYSIS

(i) On Jurisdiction

[37] The respondents have tangentially challenged the jurisdiction of this Court to determine the appeal. In this regard, the 1st and 2nd Respondents argue that the High Court lacked jurisdiction to determine a dispute that predated the

promulgation of the Constitution. On their part, the 3rd and 4th Respondents submit that the Supreme Court has no jurisdiction to entertain matters that had been finalized by the Court of Appeal before the Commencement of the 2010 Constitution.

[38] We find these arguments baffling for two reasons; firstly, the jurisdiction of the High Court was never challenged at the Court of Appeal, nor was the issue raised in any manner at the two superior courts. Secondly, the basis upon which the jurisdiction of this Court is being impugned is not borne out of fact, in that, the dispute before us had never been finalized by the Court of Appeal, before the commencement of the Constitution. Suffice it to say that the judgment of the Court of Appeal which gave rise to this appeal, was delivered on 11th November, 2016.

[39] Without further belabouring this issue therefore, we have no hesitation in holding that this Court is properly seized with jurisdiction to entertain and determine the appeal.

(ii) On whether the 2010 Constitution (Article 47) can retrospectively apply to this dispute

[40] The respondents have made heavy weather of the issue of the retrospectivity of the 2010 Constitution and in particular, Article 47 thereof. It is their argument that the Constitution is forward looking and should never be applied retrospectively, especially, if such application can lead to the deprivation of rights legitimately acquired. In support of this position, they cite the ***S. K. Macharia Case*** *[Supra].* It is their further argument that Article 47 of the Constitution ought not to have been applied to the dispute because, sub-article 3 of the same, provides that:

> ***Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall-***

a. Provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

b. Promote efficient administration

[41] The respondents found support for their argument, in the Court of Appeal's conclusion, that Article 47 ought not to have been resorted to by the High Court, in the absence of the legislation envisaged under sub-Article 3 above. Such legislation, was only enacted in 2015, long after the impugned Judgment of the High Court.

[42] In the ***S. K. Macharia Case*** *(Supra)* cited by the respondents in support of their submissions regarding the non-retrospectivity of the 2010 Constitution, this Court rendered itself thus at paragraph 62:

> ***"At the onset, it is important to note that a Constitution is not necessarily subject to the same principles against retrospectivity as ordinary legislation. A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods. In this way, a Constitution may and does embody retrospective provisions, or provisions with retrospective ingredients. However, in interpreting the Constitution to determine whether it permits retrospective application of any of its provisions, a Court of law must pay due regard to the language of the Constitution. If the words used in a particular provision are forward-looking, and do not contain even a whiff of retrospectivity, the Court ought not to import it into the language of the Constitution. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an***

individual of their rights legitimately acquired before the commencement of the Constitution."

[43] A clear reading of the foregoing pronouncement, leaves no doubt that this Court did not out-rightly rule out the retrospective application of the 2010 Constitution. The Court however cautioned that where the language of a particular provision in the Constitution does not contain even a whiff of retrospectivity, then such provision cannot apply retroactively. The Court was to return to this question later in ***Town Council of Awendo v. Nelson O. Onyango & 13 Others; Abdul Malik Mohamed & 178 Others*** (Interested Parties), SC Petition No. 37 o 2014; [2019] eKLR at paragraph 54 when citing ***S.K Macharia*** with approval, it stated:

"Even as the law as we have pronounced it, appears to be clear, it is imperative that we consider the provisions of the 2010 Constitution to determine whether any insights can be drawn therefrom for a just and fair resolution of the dispute at hand. In this regard, we derive inspiration from this Court's dictum in Samuel Kamau Macharia & 2 Others v. Kenya Commercial Bank & 2 Others [2012] eKLR; on when a court of law may fall back to the provisions of the Constitution of 2010 in determining a dispute that may have crystallized before the promulgation of the Constitution.

when certifying this appeal as one involving a matter of general public importance, the determination of which, goes beyond the interests of the parties, we were cognizant of the fact that similar disputes were likely to occur in other parts of the Country. In resolving such disputes as may occur post the 2010 Constitution, our decision in this appeal will no doubt be instructive, hence the need to consider the relevant provisions of

the Constitution, to the extent that the same are backward and forward looking."

[44] The Court then went on to identify a number of provisions in the 2010 Constitution, which it considered relevant to the dispute then before it, notwithstanding the fact that the questions before it, had arisen out of a set of circumstances that had long crystallized before the promulgation of the Constitution. Such provisions were considered to be both backward and forward looking.

[45] It is in this context that we must consider the issue as to whether Article 47 of the Constitution can be applied retrospectively to the dispute at hand. First and foremost, in agreement with the appellants, we note that Article 47 is a Bill of Rights provision which is stated in deliberate and clear normative terms. Thus, sub-Article 1 thereof provides that:

> ***"Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair"***

While sub-Article 2 provides that:

> "***If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action."***

[46] These provisions set out clear and un-ambiguous entitlements within the language of the Bill of rights. They are expressed in normative terms, as opposed to general principles that would require the further input of the legislature so as to attain prescriptive force. In our view, contrary to the holding by the Court of Appeal, these are substantive entitlements whose enjoyment was not intended to be suspended by sub-article 3 thereof. The legislation contemplated was not meant to create any other norms apart from the ones provided for by the Constitution. The Supreme law thus required that such legislation provide for review of

administrative action by either a court or independent tribunal. The legislation was also to provide for efficient administration. The basis for review of administrative action is already provided for in sub-article 1 (expedition, efficiency, lawfulness, reasonableness and procedural fairness). The effect of sub-article 3 was therefore to perfect the enjoyment of these rights, as opposed to suspending such entitlement by divesting the High Court of Jurisdiction to review administrative action.

[47] In this regard, the absence of legislation does not render a Court helpless given the interpretative refuge afforded by Article 20 (3) of the Constitution. It provides that:

> ***"In applying a provision of the Bill of Rights, a court shall-***
>
> ***a. develop the law to the extent*** *that it does not give effect to a right or fundamental freedom; and*
>
> ***b. adopt the interpretation that*** *most favours the enforcement of a right or fundamental freedom.*

[48] In view of the foregoing analysis, we must answer in the affirmative, the question as to whether Article 47 of the Constitution was correctly applied by the High Court in addressing the original claim.

(iii) Whether the appellants were time barred in lodging their Claim

[49] The respondents submit that the appellants are guilty of inordinate delay, having waited for twenty years before filing suit at the High Court. The Court of Appeal held in favour of this argument, finding that the process of transfer, affecting both parcels of land, had been commenced in 1989 and concluded in 1992, while the petition was filed over twenty years later. On the other hand, the appellants contend that they acted promptly as soon as they became aware of the

construction of the wall whose effect was to block their view of and access to the Ocean. It is their case that, the offending wall was constructed in August 2011, while they filed their petition on 17th February 2012; exactly seven months after the commencement of the wall.

[50] The assertions by both parties, regarding the dates of completion of the transfer of the suit lands, and the commencement of the erection of the wall, have not been factually controverted. It is trite law that for a party to be time-barred from litigating its claim, such limitation of time must be stated in the Constitution, statute or as a principle of Common law. To be successfully raised against a litigant, a court must determine when the time started running. In other words, the question as to when the cause of action arose has to be settled so as to shut out a litigant on grounds of passage of time. These principles/conditions were never at play in the appeal, nor are they evident on the face of the Appellate Court's conclusions. It is not lost to us, that the gravamen of the appellants' grievance, was the allocation of the disputed land by the 3rd respondent to the 1st and 2nd respondents and consequent erection of the wall thereon by the latter. Therefore, the cause of action arose, not at the time of the completion of the transfers, but at the commencement of the erection of the wall. We therefore find no basis upon which the appellants can be said to have slept on their rights.

(iv) Whether the disputed land was public land, and if so, whether the same was available for allocation

[51] It is the appellants' case that the land known as MN/1/5901 was allocated to the 2nd respondent after the 3rd respondent had consolidated three plots, namely MN/1/3622/ A&B and MN/1/856. It was after consolidation that an additional portion measuring 6.0 Ha was allocated to the 2nd respondent through a Letter of Allotment dated 2nd June, 2011. They therefore submit that the 3rd respondent's action of extending the boundary of MN/1/5901 to the High-Water Mark was unlawful as it violated the appellants' right to property (Easement of view) and also

breached the provisions of Section 45 of the Survey of Kenya Act (Cap. 299) and Regulation 110 (1) of the Survey Regulations. The appellants argue that this portion of land was excised out of the "foreshore" which is land reserved for public use, including recreation, and therefore not available for allocation to private entities. In support of their position, they cite the contents of a Survey Report which had been tabled in evidence at the High Court, confirming the public status of the land.

[52] The respondents on the other hand, submit that the land in question, was un-alienated government land, within the meaning of Section 3 of the Government Lands Act (repealed) pursuant to which it was allocated. The said Section, submit the respondents, empowers the President to make grants or dispositions of any estate, interest, or right in or over un-alienated government land. It is their contention that the allocation having been made under this Section, conferred absolute and indefeasible title upon the 1st and 2nd respondents, which title could not be defeated, unless on grounds of fraud. It is their further argument, that absent an easement over the land, no right of access to the ocean could be claimed by the appellants. They are categorical that land parcels MN/1/5901 and MN/1/5902 had never been public land, nor had they ever been reserved for public use. As such, they conclude, these parcels do not fall under the categories of public land as defined under Article 62 of the Constitution.

[53] The status of the two parcels of land, can only be determined by an examination of the relevant provisions of the Constitution and applicable statutes. Towards this end, Article 62 (1) (a) and (l) provides that Public Land is *inter alia;*

> ***a. land which at the effective date was un-alienated government land as defined by an Act of Parliament in force at the effective date;***
>
> ***l. all land between the high and low water marks.***

[54] Pursuant to Section 45 of the Survey Act, the *Survey (Amendments) Regulations 1994,* were enacted. Regulation 110 thereof provides as follows:

Coastal offshore reservation

> ***"110. (1) Where unalienated Government land fronting on the area coast is being surveyed for alienation, a strip of land not less than 60 metres in width shall normally be reserved above the high-water mark for Government purposes:***
>
> ***Provided that, if the interests of development require, the Minister may direct that the width of this reservation shall be less, than 60 metres in special cases.***
>
> ***(2) High-watermark in all cases in these Regulations means the 'Mean High Water Mark of Spring Tides."***

Section 82 of the repealed Government Lands Act provides:

> "***a conveyance, lease or license under this Act shall not, unless otherwise expressly provided therein, confer any right to the foreshore".***

[55] A number of conclusions can be derived from the foregoing provisions as quoted. Firstly, *un-alienated government land* is public land within the context of Article 62 of the Constitution and the Government Lands Act (repealed). This notwithstanding the fact that, the expression "Public Land" only came to the fore with the promulgation of the 2010 Constitution. What Article 62 of the Constitution does is to clearly delimit the frontiers of public land by identifying and consolidating all areas of land that were regarded as falling under the province of "public tenure". The retired constitution used the term "government" instead of "public" to define such lands. Therefore, it is incorrect for the respondents to assert

that the lands in question were *un-alienated government land* but not *public land.* It is even more inaccurate to argue that the said parcels had never been *public land.* Un-alienated government land remains public until it is privatized through allocation to individuals or other private entities.

[56] Secondly, to the extent that this assertion by the appellants remains un-controverted, the additional portion of land (6.0 Ha. thereof), which land is comprised within Plots MN/1/5901 and MN/1/5902 (allocated to the 2nd and 1st respondents respectively) was hived off the coastal foreshore by the 3rd respondent. Such foreshore consists of land lying between the Low-Water Mark and the High-Water Mark plus an additional 60 metres above the High-Water Mark within the meaning of Regulation 110 (1) of the Survey Regulations of 1994. Such land is reserved for Government/Public use.

[57] Although Article 62 (1) (l) of the Constitution makes no reference to the 60 metres above the High-Water Mark (only limiting itself to the language of "the high and low water mark") sub-article (1) (n) provides for another category of public land as being *any other land declared to be public land by an Act of Parliament in force at the effective date; or enacted after the effective date;* hence the relevance of Regulation 110 (1) which was enacted before the effective date pursuant to Section 45 of the Survey Act. Furthermore, Section 82 of the Government Lands Act (repealed) which predates the Survey Act, and under which the lands herein fell as *un-alienated government land,* out-rightly forbids the conferment of any *right to the foreshore* by a conveyance, lease or license.

[58] Thirdly, the right of access to the Ocean through the foreshore by members of the public or any other owner of land along the coast (i.e, the appellants) whether for economic, recreational or aesthetic reasons, is a public right secured by a public easement. Such right is not acquired through a private treaty. It follows that a person or private entity who has encroached on the foreshore cannot interfere with or limit the enjoyment of a public easement through acts of commission or

omission. On the other hand, the Government may interfere with or limit such easement only in promotion or protection of the Public Interest as guaranteed by the Constitution and the law.

[59] The foregoing determination of the issues, leads us to make the following declarations:

(a) The 3rd respondent herein, acted illegally by allocating land parcel No. MN/1/5901 to the 2nd respondent, which land he had partly curved out of the foreshore contrary to Section 82 of the Government Lands Act (repealed) and Regulation 110 (1) of the Survey Regulations of 1994.

(b) The 3rd Respondent herein, acted illegally by allocating land parcel No. MN/1/5902 to the 1st respondent, which land he had curved out of the foreshore contrary to Section 82 of the Government Lands Act (repealed) and Regulation 110 (1) of the Survey Regulations of 1994.

(c) The actions of the 3rd respondent herein, violated the appellants' right to fair administrative action as guaranteed by Article 47 of the Constitution.

[60] As a consequence of the foregoing declarations, we make the following Orders:

F. ORDERS

(i) The appeal is hereby allowed.

(ii) The Judgment of the Court of Appeal dated 11th November, 2016 is hereby set aside.

(iii) The Judgment of the High Court dated 13th October 2015 is hereby affirmed only to the extent consistent with and limited to our declarations in (a) (b) and (c) above.

***(iv) The 1st and 2nd respondents herein, shall take immediate action to remove the offending wall and any other structures that they may have caused to be erected on land parcels* No. MN/1/5901 and MN/1/5902.**

(v) The Costs of this Appeal shall be borne by the 1st and 2nd respondents.

It is so Ordered.

DATED and **DELIVERED** at **NAIROBI** this 6th **Day** of August **2021.**

.....	.....
P. M. MWILU **DEPUTY CHIEF JUSTICE &** **VICE-PRESIDENT** **OF THE SUPREME COURT**	**M. K. IBRAHIM** **JUSTICE OF THE SUPREME COURT**
.....	.....
S. C. WANJALA **JUSTICE OF THE SUPREME COURT**	**NJOKI NDUNGU** **JUSTICE OF THE SUPREME COURT**

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA