Case Number:	Civil Appeal 252 of 2005
Date Delivered:	27 Feb 2014
Case Class:	Civil
Court:	Court of Appeal at Mombasa
Case Action:	Judgment
Judge:	David Kenani Maraga, Erastus Mwaniki Githinji, Wanjiru Karanja
Citation:	Funzi Island Development Limited & 2 others v County Council of Kwale & 2 others [2014] eKLR
Advocates:	-
Case Summary:	**The Commissioner for Lands or the County Council cannot set aside Public Land** **Funzi Island Development ltd & 2 others v County Council of Kwale& 2 others** **Civil Appeal No 252 of 2005** **Court of Appeal at Mombasa** **DK Maraga. W Karanja, EM Githinji JJA** **February 27, 2014** **Reported by Andrew Halonyere &Valarie Adhiambo** **Brief Facts** This was an appeal against a High Court decision dismissing the appellants judicial review where the appellants had sought orders of certiorari to quash the decision by County Council of Kwale to set apart a portion of alleged trust land for purposes of boat landing base and subsequent grant of lease to PATI ltd (3rd respondents) as gazetted by the

commissioner of lands. The disputed land was next to Funzi Island which was specified as trust land under the 1st schedule to the Native Lands Act and the two were divided by a high water mark at the nearest edge of the inlet. It was the case of the appellants that the setting apart was ultra vires as the land was not trust land and the stipulated procedures for setting apart were not followed nor the setting apart made for the benefit of local residents. Further that the land in question was a government forest reserve.

Issues

1. Whether judicial review was proper procedure for nullifying a title which was on the face of it granted by law.
2. Whether a person other than the ministry in charge of forest could challenge an allocation of land claiming the same to be forest land.
3. Whether or not the suit land was initially trust land, a public beach or a mangrove forest protected under the Forests Act;
4. If the suit land was trust land, whether or not the Council had authority to and did properly and regularly alienate the land.

Civil practice and procedure *– appeal – first appeal to the Court of Appeal – duty of the appellate court to re-evaluate the evidence on record and reach its own conclusions.*

Judicial Review *– certiorari – application for certiorari to quash the decision of County Council to set apart a portion of alleged trust land - whether judicial review was the proper procedure for nullifying a title which was on the face of it granted by law – whether Kenya's Judicial Review process was broad enough to ventilate other issues arising from a matter other than legal process*

Land law *-trust land - setting apart of trust land- what was the correct procedure to be applied in setting apart of trust land – whether the Council had authority to and did properly and regularly alienate the land - Registration of Titles Act*

section 23;Trust Land Act section 13; Constitution of Kenya (repealed) section 114(1)

Held

1. The case being a first appeal, the law required the Court of Appeal to handle the matter as though it were a retrial; exhaustively re-evaluate the evidence on record and reach its own conclusions. Thus determining whether or not the High Court's findings were supported by the evidence on record and in so doing, the appellate court would have to bear in mind the caution that having not seen and/or heard the witnesses testify.
2. A court sitting in its civil jurisdiction would have been better suited to hear all the issues that had been raised and make its ruling on the same. As its appreciated, that a court sitting on Judicial Review exercises a sui genesis jurisdiction which is very restrictive in the sense that it principally challenges the process, and other technical issues, like excessive jurisdiction, rather than the merits of the case. It is also very restrictive in the nature of the remedies or reliefs available to the parties.
3. A case like the one before the court ought to have been fully heard as a civil claim where all the parties would have had an opportunity to bring all their legal ammunition in support of their claim. That way, issues of fraud as envisaged under the Registration of Titles Act (R.T.A), and other disputed facts would have been fully canvassed and conclusive determinations made on the same.
4. Unlike in England, Canada and India, Kenya's Judicial Review process is not broad enough to accommodate a party who is not just aggrieved by the process but who may also want to ventilate other issues arising from the matter, or lay a claim for compensation or damages against some of the parties in the suit.
5. The disputed land which the Commissioner of Assize loosely described as a small

island was not part of Funzi Island. Had it been Trust Land, it could have been adjudicated together with Funzi Island and registered as such in the name of the council in 1990s when Funzi Island was adjudicated and individual titles issued to local residents. It was part of the foreshore and was a sandy beach as the Court observed when it visited the land.

6. Section 102 of the Crown Lands Ordinance, and section 82 of Government Lands Act similarly stipulated, that the foreshore was reserved and a conveyance, lease or licence did not confer any right to the foreshore. The foreshore was State land and article 62(1)(c) of the Constitution of Kenya 2010 clarifies that all land between high and low water marks (foreshore) is public land. Moreover, the land was a part of the mangrove swamp forest reserve as described in the proclamation No. 44 of 1932. Therefore the appellants proved to the required standard that the land was not Trust land vested in the council and the High Court erred in holding to the contrary.
7. The Grant was a single whole and the excess area was not severable from the approved area. By granting more land than set apart by the council in accordance with the statute, the Commissioner of Lands exceeded his statutory powers rendering the Grant illegal. In addition, no attempt was made by the council to show that the setting apart was genuinely for the benefit of the persons ordinarily residents in the area which was a mandatory prerequisite.
8. As the property in question was not Trust Land, then the 1st respondent lacked the requisite jurisdiction to set it aside for allocation to anybody. Having set it aside for allocation illegally, the 2nd respondent went further to issue the Grant No. C. R. No. 106 under the R.T.A., which again was in blatant contravention of section 2(d) of the RLA which clearly stipulated that all land set aside under sections 117 or Section 118 of the Constitution i.e Trust land was supposed to be registered under that statute. Issuing the Grant herein

under the R.T.A was in itself an act in excess of jurisdiction and squarely within the ambit of the Judicial Review process.

9. The suit land was a beach directly in front of the appellants' pieces of land and tourists staying in the 1st appellant's tourist camp and the local villagers had, for a long time prior to its allocation, been using it for recreational purposes. The local fishermen had also been using it as a boat landing base. They had therefore an overriding interest under section 30 of the repealed Registered Land Act**.** Since alienation, the 3rd respondent had stationed guards on the suit land who had prevented all those groups of people from accessing it. In the circumstances, the appellants had locus standi in the matter and their judicial review application was competently before court.
10. Section 107 of the Evidence Act places the burden of proof of any fact upon the person who asserts it. The appellants asserted that the suit land was forest land and as proof of that fact, they cited Legal Notice No. 174 of 1964 as read with Proclamation No. 44 of 1932. Under that Legal Notice and Proclamation, the suit land was indeed declared a forest area. In the circumstances, the burden of proof shifted to the 3rd respondent to show that the suit land ceased to be forestland.
11. There was nothing on record to show that the Minister subsequently degazetted the suit land as a forest area. The 3rd respondent therefore failed to discharge that burden of proof. In the circumstances, the suit land was forestland which was not available for alienation.
12. The 3rd respondent knew that its acquisition of the suit land was seriously opposed. That notwithstanding, it went ahead and acquired it. The 3rd respondent was therefore complicit in the irregular allocation of the suit land to it. It could not therefore seek shelter under the indefeasibility of title under section 23 of the repealed Registration of Titles Act which was in operation then and under which the land was registered or the

developments it had carried out on the land.

Appeal allowed, order of the High Court dismissing the appellants notice of motion set aside and substituted with an order quashing the allocation of the suit land.

Cases

East Africa

1. *Commissioner of Lands v Kuntse Hotel Limited* – Civil Appeal No 234 of 1995 – (Followed)
2. *Housing Finance Company of Kenya Ltd v RichardNdere Johnson & 3 Others* Civil Application 7 of 2005 - (Mentioned)
3. *Kenya National Examinations Council v Republic, Ex-Parte GodffreyGathe& 9 Other*s Appeal No 266 of 1996– (Mentioned)
4. *Nairobi Permanent Markets Society & Others v Salma Enterprises & Others* [1995 – 1998] 1 EA – (Mentioned)
5. *Ngo'k v Ole Keiwa Civil Application No Nai 60 of 1997*- (Mentioned)
6. *Njlux Motors Ltd v Kenya Power & Lighting Ltd*, [2000]2 EA – (Mentioned)
7. *Selle& Another v Associated Motor Boat Co Ltd & Others* [1968] EA 123 at 126 - (Followed)
8. *Town Council of Ol'Kalou v Nganga General Hardware*, Civil Appeal No 269 of 1997 - (Explained)

India

1. *Rajkot Municipal Corporation v Manjulben Jayantilal Nakum* [1997] SCC 552 111 79 - (Mentioned)

United Kingdom

1. *Anns v Marton London Borough Council* [1978] AC 728 – (Mentioned)
2. *Grunwick Processing Laboratories Ltd v Advisory, Conciliation and Arbitration Services* [1978] AC 655 - (Mentioned)
3. *House of Lords decisions, O'reilly v Mackman* [1983] QBD page 237- (Mentioned)
4. *In re The Union of the Beneficiaries of Whippingham Church Commissioners for England* [1954] AC 245 – (Mentioned)
5. *O'Rouke v Camden London Borough Council* [1998] AC 188 - (Mentioned)
6. *R v Inspectorate of Pollution & Another, Ex-*

	parte Greenpeace Ltd No 2 [1994] 4 AII ER -(Mentioned) 7. *Reg v Home Secretary, Exparte Khawaja* [1984] 1AC 74;[1995] 3 FCR 1, [1995] 1 FLR 293, [1995] Fam Law 124 – (Mentioned) 8. *Stovin v Wise* [1996] 3 ALL ER 801- (Mentioned) **Statutes** ***East Africa*** 1. Constitution of Kenya 2010 article 62(1)(c) - (Interpreted) 2. Constitution of Kenya, 1963 (Repealed) sections 114(1); 115(1) ;117(3)(4);118 - (Interpreted) 3. Evidence Act (cap 80) section 107 - (Interpreted) 4. Crown Lands Ordinance,1948 (cap 155) section 102 - (Interpreted) 5. Forests Act, 1942 (cap 176) Repealed section 4 - (Interpreted) 6. Forest Ordinance,1948 (cap 176) section 4 - (Interpreted) 7. forests Act (cap 385) (Repealed) section 4(1)(a) - (Interpreted) 8. Forests Act, 2005,(Act No 7 of 2005) section 65(1) (9) - (Interpreted) 9. Native lands Trust Act,1948 (cap 100) first schedule, Part 1 section 1, XXX Part XVI - (Interpreted) 10. Registration of Titles Act, (cap 281) section 23(1) - (Interpreted) 11. Registered Land Act (Repealed) (cap 300) sections 2(d); 30 - (Interpreted) 12. Revision of Laws Act (cap 1) section 5 - (Interpreted) 13. Trust Land Act (cap 288) sections 7(2)(a) (3)(b)(4); 8 (1); 9;10;11;12;13(1)(c)(2)(3)(4); 53(a) - (Interpreted) 14. The Kenya Independence Order in Council 1963 LN 718 of 1963 - (Interpreted) **United Kingdom** 1. Senior Courts Act 1981 **Texts & Journals** 1. Flower HW., et al (Eds) (1995) *Concise Oxford Dictionary* London: Clarendon Press 9th Revised edn

Court Division:	Civil
History Magistrates:	-
County:	Mombasa
Docket Number:	-
History Docket Number:	272 of 1994
Case Outcome:	Appeal allowed
History County:	Mombasa
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

MOMBASA

(CORAM: GITHINJI, KARANJA & MARAGA, JJ.A)

CIVIL APPEAL NO. 252 OF 2005

BETWEEN

FUNZI ISLAND DEVELOPMENT LIMITED…..…… 1ST APPELLANT

J.B. HAVELOCK……..…….. 2ND APPELLANT

M.E. HAVELOCK ……..……..……. 3RD APPELLANT

AND

COUNTY COUNCIL OF KWALE..... 1ST RESPONDENT

COMMISSIONER OF LANDS..... 2ND RESPONDENT

PATI LIMITED ……..…….…..... 3RD RESPONDENT

(*An appeal against the decision of the High Court of Kenya at Mombasa (****J. Khaminwa, J****.) dated 14th October, 2004*

in

H.C. MISC. CIVIL APPLICATION NO. 272 OF 1994)

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JUDGMENT OF GITHINJI, JA.

[1] This is an appeal from the judgment of the High Court (**Khaminwa, J.**) dismissing the appellants' judicial review application for orders of certiorari and prohibition.

[2] The subject matter of the application was the setting apart by the County Council of Kwale – 1st respondent herein (**the Council**) of a portion of alleged Trust land for the purpose of Boat Landing Base and subsequent grant of a lease to PATI Limited (the 3rd respondent herein (PATI).

[3] The strip of land in question lies at the shores of Indian Ocean in Msambweni, Kwale District, Coast Province on the western side of Funzi Island. On or about 1992, **Hon. K. B. Mwanzandi** the area member of parliament whose letter head shows that he was an Assistant Minister for Public Works and Housing, apparently applied to the council for the setting apart of, and allocation of 0.7 hectares of the strip of land for use as Boat Landing Base. By a letter dated 23rd April, 1993 addressed to the District Commissioner, the Council expressed its intention to set apart the area stating:

"This is seen as a way to give the council opportunity to promote the interest of the local public as well as an opportunity to earn the council some revenue in this extremely difficult economic situation."

On 9th June 1993 the Msambweni Divisional Land Control Board (**the Divisional Board**) gave its consent to the council to set apart the land measuring approximately 0.7 of a hectare for Funzi Island Boat Landing. By a letter dated 11th June, 1993 the District Commissioner informed the council that the consent given by the Divisional Board ***"should be discussed and minuted by the relevant Council Committee or possible a full council meeting (sic)"***

[4] By a letter dated 13th April, 1994 the District Commissioner forwarded to the Commissioner of Lands his recommendation for setting apart the land, and the minutes of the Divisional Board. This is apparently because the Commissioner of Lands is given power by **section 53** of **Trust Land Act** (TLA) to administer Trust land as agent of the council and is further authorized to execute a grant, lease, licence on behalf of the council. By Gazette Notice No 1831 dated 14th June, 1994 the Commissioner of Lands gazetted the setting apart of the land for purposes of Boat Landing Base. On 12th July, 1994 Hon. K.B. Mwanzandi asked the Commissioner of Lands to allocate the land to PATI Limited. Subsequently the Commissioner of Lands issued Grant of lease No. CR.N 106 dated 9th November, 1994 to PATI Limited under the Registration of Titles Act (RTA) of land reference No. 20247 measuring approximately 3.126 Hectares situated on Funzi Island Township for a term of 99 years from 1st August, 1994. The Grant shows that it is the council which granted the lease and special condition No. 5 thereof specified that the land shall only be used for Boat Landing and offices.

[5] The appellants filed an application for leave to apply for judicial review orders in early November 1994 before they were aware that a Grant of lease had been made to PATI. They subsequently filed the substantive application for judicial review orders on/or about 21st November, 1994. When **Alessandro Torrian** the managing director of PATI filed a replying affidavit disclosing that a Grant had been made to him, the appellants amended the application. Later, the application and the supporting statement were re-amended. The first relief sought in the re-amended application was for orders of certiorari to quash the Gazette Notice No. 3831 and the letter of allotment dated 27th July 1994. The grounds for quashing the Gazette Notice and the letter of allotment as disclosed in the statement and affidavits are broadly that, the setting apart was *ultra vires* and made without jurisdiction as the land is not Trust land and as the stipulated procedures were not followed nor the setting apart made for the benefit of local residents.

The second relief sought was an order of certiorari to quash the Grant No. LR.N 106 as being illegal and *ultra vires* as the land is Government Forest Reserve and not Trust land and as it was issued under RTA in breach of the law, nor was the Grant issued for the benefit of local residents.

The application was opposed by the respondents. The trial Judge ultimately dismissed the application after full hearing, holding in essence that:

i. the legal requirements for setting apart land under the Trust Land Act were complied with.

ii. there was no evidence that the disputed land was reserved for public use.

iii. there was no conclusive evidence to show that the land was forest land.

iv. the appellants had no *locus standi* in the disputed land as their properties are 200 metres away from the disputed land and as the right people to defend forest land if it was forest land, are the authorities in charge of forests.

The grounds of appeal essentially fault those findings.

[6] The central issue in the application was the status of the land. The appellants claimed that it was not Trust land while the respondents claimed it was Trust land. By virtue of **section 115** of the Constitution of Kenya 1963, all Trust land within the jurisdiction of any County Council vested in the council for the benefit of the persons ordinarily resident on that land. However, in pursuance of **section 117** and **118** of the Constitution and **sections 7** and **13** of the TLA the council has power to set apart an area of Trust land either for purposes of Government on application by Government or by the council on its own volition for other purposes, including purposes which in the opinion of the council are likely to benefit the residents of the area by reason the use to which the area is to be put or by reason of the revenue to be derived from rent in respect thereof. However, there are stipulated procedures in the TLA to be followed by the council in setting apart an area of Trust land in either case.

[7] Section 114(1) of the 1963 Constitution defined Trust land by description. Pursuant to that definition Trust land includes:

"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 Act as 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."

As **Maraga, JA** has correctly found in his judgment, the whole of Funzi Island falls under the definition of Trust land which is under the jurisdiction of the council. Indeed, under the first schedule to Native lands Trust Act, chapter 100 of 1948 Laws of Kenya, Funzi Island was specified as Native Land in Part 1 Section 1, .XXX Part XVI which was under the jurisdiction of Native Lands Trust Board. It should be noted that the boundary of Funzi Island is described in the aforesaid first schedule as …"***down to high-water mark of the Indian Ocean***."

[8] However, the question still remains whether the land which the council set apart is a part of Funzi Island. An island is a piece of land surrounded by water. The Deed plans of LR 20247 granted to Pati indicates that it is bordered by Indian Ocean on both sides, the boundary being the high water mark on either side. The 1st appellant owns Land Reference No. Kwale/Funzi Island/103 which it purchased which is on Funzi Island. The title was issued under Registered Land Act (RLA) on 30th June 1990. The 2nd and 3rd appellants are the proprietors of adjacent land title No. Kwale/Funzi Island/102 which is also on Funzi Island whose title was issued on 5th May 1994 under the RLA

Anthony Duckworth (**Duckworth**) the managing director of the 1st appellant deponed in the supporting affidavit that Pati's land is immediately in front of the land of 1st and 2nd appellants on the beach along Funzi Island and Pati's land goes through the sea and becomes completely submerged at high tide. Allessandro Torrian (**Allessandro**) the Managing Director of Pati swore a replying affidavit in which he deposed, among other things, that, Pati's land is not immediately in front of the appellants' land on the beach as there is an inlet of water in between and that Pati's land is part of the demarcated land. He also denied that Pati's land becomes completely submerged at high tide but admitted that it becomes completely submerged only at very high spring tides about twice a year.

In his affidavit in reply Duckworth admits that there is an inlet of water between appellant's land and the beach but states that the inlet is a mangrove swamp which fills up at high tide. The survey plan of Funzi

Island registration section annexed to Duckworth's affidavit shows that Funzi Island is bordered by a stretch of 50 metre high water mark. The impugned Gazette Notice no. 3831 describes the site partly thus:

"The site lies along Funzi beach on the western side of Funzi Island…."

The Commissioner of Assize P. M. Tutui who partly heard the application in the High Court visited the site and noted partly thus:

"The disputed beach is a kind of a bay. The applicant's property is about 200 metres from that of interested party (Pati Limited). Between the two properties are mangroves and the area is under water during high tide. The stretch of mangrove between the two properties is about 50 m wide. The interested party's property is therefore a small island in front of the main island on which the applicant's property stands" and lastly, ***"the main controversy is the Beach which Pati Limited says was allocated to it by the Commissioner of Lands".***

[9] The appellants' application was also supported by the affidavit of **Charles G. Kariuki**, a Forester employed by the Ministry of Environment and Natural Resources and stationed at Buda Forest Station at Mswambweni. He deposed in paragraphs 6, 7, 8 and 9 thus:

"6. That the whole area of the land granted to Pati limited between high and low water mark on Funzi Island is a mangrove forest which has been declared to be a protected forest area by proclamation No. 44 of 1932.

7. That I verily believe that this area has not been degazetted as a forest by the Minister in charge of forests.

8. That the said land is still protected forest area and neither the Commissioner of Lands nor Kwale County Council had any statutory powers to set apart and allocate this land to Pati Limited.

9. That the said land being protected forest area is not Trust Land nor is it vested in the County Council of Kwale."

[10] Proclamation 44 of 1932 referred to by Kariuki is contained in the schedule to Forest Ordinance, Chapter 176 of Laws of Kenya, 1948 revised edition. The schedule contains the areas which the Governor by virtue of section 4 of the Ordinance declared as mangrove swamp forest reserves. The forest areas declared under the proclamation include:

"All land between high water and low water marks (ordinary spring tides) on the main land and islands adjacent to the coast from Kimbo Creek in the south to the village of Kiunga on the mainland and the island of Kiunga Mwini in the north" ...

and

"On the main land and islands adjacent to the coast from Chale point in the north to the boundary of Trust Territory of Tanyanyika in the south."

There is a proviso to the proclamation which excludes areas within the boundaries which have been or may be declared private property under the Land Titles Ordinance or which are subject to grants from

the Crown. Further by LN No. 174 of 1964 – entitled ***"The Kenya Independence Order in Council 1963 LN 718 of 1963***" which took effect retrospectively from 1st June 1963, the Minister for Natural Resources declared the said mangrove swamp forest reserves contained in proclamation No. 44 of 1932 to be central forests by virtue of the powers given by the schedule to the 1963 Constitution.

[11] Although the proclamations of forest area by a Minister under section 4 of the repealed forests Act (Cap 385) were omitted from the schedule in the subsidiary legislation by virtue of section 5 of the Revision of Laws Act (Cap 1), section 65(1) (9) of the current Forests Act, 2005, No. 7 of 2005 states *inter alia* that any land which, immediately before the commencement of the Act was Forest under the repealed Act shall be deemed to be a State Forest under the current Act. Further, under the Forests Act, 2005, mangrove forests are classified as indigenous forests. It follows from the above analysis that proclamation No. 44 of 1932 was in force at the material time and is still in force today.

[12] The appellants' case was that the land set apart and subsequently leased to Pati was not Trust land but both a public beach and a mangrove forest. The respondents' case was that it was Trust land and neither a public beach nor forest land. The learned Judge made a finding that there was no evidence that the land was set aside for public use nor conclusive evidence that it was forest land. This was an administrative law action which was essentially civil in nature. Like in civil cases, the standard of proof was on a balance of probabilities. However, the standard of proof may vary from case to case depending on the nature and gravity of the case. Further, although the burden of proof lies in the first instance on the plaintiff, it may also shift according to the circumstances of each case (See **Reg. v. Home Secretary, Exparte Khawaja [1984] 1AC 74**). By way of example, where the presumption of regularity applies so that the decision challenged is *prima facie* lawful the burden of proof is on the plaintiff to prove to the contrary. There are also cases where it is sufficient for plaintiff to prove a *prima facie* case of breach of duty by a statutory body thereby shifting the burden of proof to a statutory body to show justification.

[13] It has been submitted by **Mr. Gatonye** learned counsel for Pati that judicial review is not the proper procedure for nullifying a title which on the face of it is granted in accordance with the law. The written submissions by Pati refer to several allegations of fact which according to it should have been proved by expert evidence from Marine experts, Survey Department and Forests Department. It is true that generally speaking, judicial review procedure is not well suited for resolving disputes on material facts. Indeed, there has been, again, generally speaking, judicial restraint from giving relief where there is material conflict of evidence on which the relief depends. In England, the procedural law has been reformed to allow disclosure of documents, interrogations and cross-examination in judicial review procedures. [See **Senior Courts Act 1981**].

In this case however, the primary issue was whether the land set apart was Trust land vested in the council by law. It was a jurisdictional question whose resolution necessarily depended substantially on documentary evidence. Ultimately, the only material conflict of evidence as between Duckworth and Alessandro was whether the land lies between high water mark and low water mark and whether it is completely submerged at high tide. The first issue whether the land lies between high and low water marks could have been resolved from the documents describing both the boundaries of Funzi Island and the land in question. The second issue is immaterial for, if the land in question lies between the specified water marks it is immaterial that it is completely submerged at high tides. Thus the case depended on the construction of the undisputed documents and the interpretation of the law and there was no material conflict of evidence to warrant the trial court or this Court to decline jurisdiction to resolve the dispute through judicial review procedure.

[14] I now briefly turn to the analysis of evidence. It is not necessary to reproduce the respective

submissions by counsel, a task commendably done by Maraga, JA. The boundaries of Funzi Island extend down to the high water mark of the Indian Ocean. The disputed piece of land is a narrow strip of land which according to Alessandro measures about 30 metres wide at the widest part and about 1 kilometre long. According to its Deed Plan it is bordered by high water mark of the Indian Ocean on either side. The survey plan of Funzi registration section shows that Funzi Island is bordered by a 50 metres wide high water mark. The Commissioner of Lands vide Gazette Notice No. 3831 described the side as lying along Funzi beach on the western site of Funzi Island. P M Tutui the learned Commissioner of Assize who visited the locus quo described the disputed land as a beach. She also found that between the 1st and 2nd appellants' properties and the disputed land is a 50 metres wide mangrove forest and also that the area is under water during high tide. Both Duckworth and Alessandro are in agreement that there is an inlet of water which is navigable at high tide between Pati's land and the land of the 1st and 2nd appellants. Duckworth however deposes that this inlet of water is in fact the mangrove swamp which fills up at high tide and that at low tide, one walks through the swamp on to the beach in order to gain access to the creek (small bay) leading to open sea.

Lastly, by proclamation No. 44 of 1932 all land between the high and low water marks (ordinary spring tides) on the main land and islands adjacent to the coast in the specified areas, which from my reckoning includes the disputed land, was at the material time proclaimed as mangrove swamp forest reserve.

[15] The Concise Oxford Dictionary of Current English 9th edition, defines a foreshore *inter alia* as part of the shore between high and low water marks and a beach as a pebbly or sandy shore especially of the sea between high and low water marks.

The totality of the above evidence shifted the burden of proof to the respondents particularly the 1st and 2nd respondents to show that, nevertheless, the land was Trust land vested in the council. The 1st and 2nd respondents were represented by a State Counsel both in the High Court and in this Court. In the course of proceedings in the High Court the State Counsel indicated that the council intended to file a replying affidavit and the proceedings were adjourned for that purpose. The council failed to file a replying affidavit. The affidavit sworn by John Nyaga Gacivih, a State Counsel on behalf of the 2nd respondent lacked concrete evidence such as documentary evidence to show that the disputed land was Trust land vested the in council. In the end the assertion that the land was Trust land vested in the council remained a mere allegation.

[16] On analysis it is crystal clear that the high water mark forming the boundary of Funzi Island is at the nearest edge of the inlet which divides Funzi Island from the disputed land which inlet is, in fact, a mangrove swamp spanning 50 metres. The disputed land which the Commissioner of Assize loosely described as a small island is not part of Funzi Island. Had it been Trust Land, it could have been adjudicated together with Funzi Island and registered as such in the name of the council in 1990s when Funzi Island was adjudicated and individual titles issued to local residents. It is indeed a part of the foreshore and is a sandy breach as this Court observed when it visited the land. As section 102 of the Crown Lands Ordinance, Chapter 155 of Laws of Kenya, 1948, and as section 82 of Government Lands Act (Cap 280) similarly stipulate, the foreshore is reserved and a conveyance, lease or licence does not confer any right to the foreshore. The foreshore is State land and Article 62(1)(c) of the Constitution of Kenya 2010 now clarifies that all land between high and low water marks (foreshore) is public land. Moreover, the land is a part of the mangrove swamp forest reserve as described in the proclamation No. 44 of 1932. It follows that the appellants proved to the required standard that the land was not Trust land vested in the council and the learned Judge erred in holding to the contrary. In setting apart land which was not Trust land vested in it and gazetting the setting apart and granting of lease, the council and the Commissioner of Lands acted illegally and *ultra vires* and the resultant Grant of lease is a nullity.

[17] It has been submitted that the Grant of lease is protected by section 23 of the RTA. However, it is clear from the provisions of section 23(1) that the Act only protects a Certificate of Title issued to a *purchaser of land upon transfer or transmission,* which is not the case here.

[18] The appellant also impugned the validity of the setting apart and the Grant on grounds of procedural irregularities. Apparently, the land was set apart by the council under section 13(1)(c) of the TLA for purposes which was likely to be beneficial to the persons ordinarily resident in the area

Section 13(2) provides:

"The following procedure shall be followed before land is set apart under sub section (1) of this section –

a. ***The council shall notify the Chairman of the relative Divisional Board of the proposal to set apart the land, and the Chairman shall fix a day, not less than one and not more than three months from the date of receipt of the notification, when the Board shall meet to consider the proposals, and the chairman shall forthwith inform he council of the day and time of the meeting;***

b. ***The council shall bring the proposal to set apart the land to the notice of the people of the area concerned, and shall inform them of the day and time of the meeting of the Divisional Board at which the proposal is to be considered;***

c. ***The Divisional Board shall hear and record in writing the representations of all persons concerned who are present at the meeting and shall submit to the council its written recommendation concerning the proposal to set apart land, together with a record of representations made at the meeting;***

d. ***The recommendations of the Divisional Board shall be considered by the council and the proposal to set apart the land shall not be taken to have been approved by the council except by a resolution by a majority of all members of the council;***

Provided that where the setting apart is not recommended by the Divisional Board concerned, the resolution shall require to be passed by three quarters of all members of the council"

Section 13(3) requires the council to cause a notice of the setting apart to be published in the Gazette

after the approval of the proposal by the council. Section 13(4) adopts the provisions of section 7(b) and (4); 8(1), 9, 10 and 11 of the Act. Section 7(3) is relevant. It provides that the notice published in the Gazette shall, among other things, specify a date before which applications for compensation (to any resident of the area set apart) are to be made to the District Commissioner.

[19] The irregularities or breaches of the law are particularized in the amended statement and adumbrated in the submissions of **Mr. Khanna**, learned counsel for the appellants both in the High Court and in this Court. They include failure to give notice to the public or effect compensation; setting apart land when it was not for the benefit of the public; giving a Grant under the wrong statute , giving a Grant for excessive land than set apart and for a different purpose.

[20] In this case, no notification by the council to the Divisional Board of the proposal to set apart land nor any notice by the council to the residents of the area of the proposal and date and time of the meeting of the Divisional Board were availed. Further there is no record that the Divisional Board heard the representations of the people nor did it submit to the council the record of the representations made. Lastly, although the District Commissioner by a letter dated 11th June 1993 advised that the consent of the Divisional Board should be discussed by the council there are no minutes and none were sent to the Commissioner of Lands, showing that the recommendations of the Divisional Board were tabled before a council meeting and approved by a resolution by the stipulated quorum.

[21] Turning to the Gazette notice and the Grant, the gazette notice did not give a date before which application for compensation should be made to the District Commissioner. It is a common ground that no compensation was paid to the residents by the council as stipulated by section 13(4) as read with section 8(1) of the Act.

The Grant is for land measuring 3.126 Hectares which is more than 0.7 Hectares set apart by the council and approved by the Divisional Board and specified in Gazette Notice No. 3831. As stipulated by section 53(a) of the TLA, the Commissioner of Lands has no power to grant more land than approved by a resolution of the council passed by a majority of the members of the council. The correspondence shows that the Commissioner of Lands inquired from the Director of Surveys about the increase in the area which the Director of Surveys explained. However the Commissioner of Lands did not refer the matter back to the council and the Divisional Board for approval to set apart the increased area and for the requisite resolution of the council. The Grant is a single whole and the excess area is not severable from the approved area. By granting more land than set apart by the council in accordance with the statute the Commissioner of Lands exceeded his statutory powers rendering the Grant illegal. In addition, no attempt was made by the council to show that the setting apart was genuinely for the benefit of the persons ordinarily residents in the area which is a mandatory prerequisite.

Further it is apparent that the setting apart of the land was obtained by Mwanzandi by misrepresentation that the land was for boat Landing Base when the real intention was to sell the land to Pati for construction of a hotel. The setting apart and the grant obtained by such misrepresentation is invalid.

Moreover, the Grant was issued contrary to the statute. Section 2(d) of the RLA which commenced on 16th September 1963 provides that the Registered Land Act shall apply to:

"All land which from time to time is set apart under section 117 or section 118 of the Constitution."

It follows that the Commissioner of Lands could only have issued a Certificate of Lease in the prescribed form under the Registered Land Act. A Grant which does not conform with the law is invalid.

Lastly, the Grant erroneously describes the disputed land as situated in Funzi Island Township and not along Funzi beach as described by Gazette Notice No. 3831, perhaps to hide the trail of illegality of allocating a foreshore.

[22] The council held the Trust land for the benefit of the residents. Statutory procedural safeguards which are imposed for the benefit of the persons affected by the exercise of administrative powers by a statutory body are normally regarded as mandatory. Further, where the statute imposes a duty to notify the persons affected and to hear their representations, the statutory body should genuinely comply and a full and sufficient opportunity accorded to the persons affected to make their representations (**Grunwick Processing Laboratories Ltd v. Advisory, Conciliation and Arbitration Services [1978] AC 655**; ***In re* The Union of the Beneficiaries of Whippingham Church Commissioners for England [1954] AC 245**. The procedural safeguards in section 13(2) of the Trust Land Act which are described as mandatory particularly the requirement for issuing a notice, hearing and recording the residents' representations and ultimately, and more importantly, approval by council by resolution passed by a majority of the members of the council went to the jurisdiction to set apart Trust land. Even if the land were Trust Land, the non compliance with the mandatory procedural requirements together with the breaches of the law by the Commissioner of Lands as shown above rendered the setting apart *ultra vires* and the subsequent Grant a nullity. The finding by the High Court that the required procedure was complied with is therefore patently erroneous. If the land was indeed Trust land, which it was not, the procedural irregularities and the non compliance with the law by the commissioner of lands, rendered the setting apart *ultra vires* and the subsequent Grant illegal.

[23] As regards the standing of the appellants to apply for judicial review, the affidavits of Duckworth explained the interest of the appellants in the matter of setting apart the land. The first appellant owns adjoining land Kwale/Funzi Island/103 where it has constructed a luxury tented camp comprising five luxury tents for tourist business. It owns several canoes, boats, dhows, used for tourism business and has been using the land set apart to land its boats and to access the sea which fact was admitted by Alessandro in his affidavit. Duckworth deponed that any development on the land set apart would seriously affect all the businesses of the first appellant which would be prevented from having access to the sea or land its boats and canoes and also deny villagers and local fishermen access to the sea. The 2nd appellant is a director of the first appellant and is also the proprietor jointly with his wife of the adjoining land Kwale/Funzi Island/102. When the 1st appellant noticed that some wooden bandas were being constructed on the subject land it objected to the District Commissioner by a letter dated 27th January, 1992.

Section 12 of the Trust Land Act gives a right of access to the High Court to

"any person claiming a right or interest in land set apart"… for among other things ***"determination of the legality of setting apart."***

The word "interest" is very wide and, includes the appellants' commercial interest in the circumstances of this case. In **Commissioner of Lands v. Kuntse Hotel Limited – Civil Appeal No. 234 of 1995** (unreported) this Court held that the respondent (**Kuntse Hotel**) had a sufficient interest in the land in front of its Hotel whose development would have blocked the view of the hotel from the highway thereby affecting the business and was therefore entitled to a hearing before the plot was allocated to the interested party by the Commissioner of Lands. An order of certiorari quashing the allocation was granted.

It follows that although the appellants had no legal right to the land set apart, they nevertheless had sufficient interest in the land and the learned Judge erred in finding to the contrary.

[24] I would for above reasons allow the appeal. As Maraga and Karanja, JJA agree, the appeal is allowed, the setting apart of the land, the Gazette notice No. 3831 dated 24th June, 1994 and the Grant No. CRN. No. 106 in respect of land reference No. 20247are quashed with costs to the appellants.

I would apologise for delay in delivering this judgment which was due to my assumption of onerous special duties and my subsequent posting outside Nairobi.

Dated and delivered at Nairobi this 27th day of February, 2014.

E. M. GITHINJI

……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR

IN THE COURT OF APPEAL

AT MOMBASA

CORAM: GITHINJI, KARANJA & MARAGA JJ.A.

CIVIL APPEAL NO. 252 OF 2005

BETTWEEN

FUNZI ISLAND DEVELOPMENT LIMITED…….....…1ST APPELLANT

J. B. HAVELOCK…..……..……..2ND APPELLANT

M. E. HAVELOCK……..…….3RD APPELLANT

AND

COUNTY COUNCIL OF KWALE…..……..1ST RESPONDENT

COMMISSIONER OF LANDS…….2ND RESPONDENT

PATI LIMITED……..…….3RD RESPONDENT

(An Appeal against the decision of the High Court of Kenya at Mombasa (Khaminwa, J) dated 14th October, 2004

in

H. C. MISC. CIVIL APPL. NO. 272 OF 1994

****

JUDGMENT OF KARANJA, JA.

I have had the advantage of reading the judgment of Githinji and Maraga, JJ.A in draft. I agree entirely with their analysis of the facts and their interpretation of the legal issues arising from the appeal and their findings on the same. I do not wish to belabor them as they have been exemplarily and succinctly covered.

I would only wish to comment on the suitability of the subject matter herein being disposed of by way of Judicial Review. I do not entertain any doubt whatsoever that the High court was properly seised of this matter in its Judicial Review jurisdiction as the primordial issue for determination before the Court was the legality of the allocation of the parcel of land in question. It is common ground that the subject matter herein is property worth a substantial amount of money. There were also serious and weighty arguments, for instance, whether the property in question was Trust Land or not; whether it was forest land or not; whether it formed part of Funzi Island or it formed part of the foreshore which could not be set aside for allocation.

In my view, a court sitting in its civil jurisdiction would have been better suited to hear all these issues and make its ruling on the same. As we all appreciate, a court sitting on Judicial Review exercises a *sui genesis* jurisdiction which is very restrictive indeed, in the sense that it principally challenges the process, and other technical issues, like excessive jurisdiction, rather than the merits of the case. It is also very restrictive in the nature of the remedies or reliefs available to the parties.

Unlike in England, Canada and India (see House of Lords decisions, **O'REILLY VS MACKMAN** [**1983] QBD page 237; O'Rouke vs Camden London Borough Council [1998] A.C. 188** and **Stovin vs Wise [1996] 3 ALL ER 801, Anns vs Marton London Borough Council [1978] A.C. 728 Rajkot Municipal Corporation vs Manjulben Jayantilal Nakum [1997] SCC 552 111 79;** our Judicial Review process is not broad enough to accommodate a party who is not just aggrieved by the process but who may also want to ventilate other issues arising from the matter, or lay a claim for compensation or damages against some of the parties in the suit.

In my view, a matter such as this ought to have been fully heard as a civil claim where all the parties would have had an opportunity to bring all their legal ammunition in support of their claim. That way, issues of fraud as envisaged under the Registration of Titles Act (R.T.A), and other disputed facts would have been fully canvassed and conclusive determinations made on the same.

Having said so however, I am in agreement with my brother Judges that as the property in question was not Trust Land, then the 1st respondent lacked the requisite jurisdiction to set it aside for allocation to anybody. Having set it aside for allocation illegally, the 2nd respondent went further to issue the Grant No. C. R. No. 106 under the R.T.A., which again was in blatant contravention of **Section 2(d)** of the **RLA** which clearly stipulated that all land set aside under **Sections 117** or **Section 118** of the **Constitution** i.e Trust land was supposed to be registered under that statute. Issuing the Grant

herein under the R.T.A was in itself an act in excess of jurisdiction and squarely within the ambit of the Judicial Review process.

All in all, I agree that this appeal has merit and I would therefore, allow it. I also agree with the proposed order of costs.

Dated and delivered at Nairobi this 27th day of February, 2014.

W. KARANJA

……..

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

REGISTRAR

IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: GITHINJI, KARANJA & MARAGA, JJ.A)

CIVIL APPEAL NO. 252 OF 2005

1. FUNZI ISLAND DEVELOPMENT LTD.

2. J.B. HAVELOCK

3. M.E. HAVELOCK…….……..APPELLANTS

AND

1. COMMISSIONER OF LANDS……1ST RESPONDENT

2. COUNTY COUNCIL OF KWALE……...2ND RESPONDENT

(*Being an appeal against the decision of the High Court of*

Kenya at Mombasa (Lady Justice Joyce Khaminwa) dated

14th October 2004

in

MISC. CIVIL APPLICATION NO. 272 OF 1994

****

JUDGMENT OF MARAGA, JA

1. This is an appeal against the judgment of Khaminwa J. delivered on 14th October 2004 in Mombasa H.C. Misc. Application No. 272 of 1994. In that application, the appellants had sought for the judicial review orders of certiorari and prohibition. After hearing the application, the learned Judge dismissed it thus provoking this appeal

2. This being a first appeal, the law obliges us to handle the matter as though it were a retrial; exhaustively re-evaluate the evidence on record and reach our own conclusions thus determining whether or not the trial Judge's findings are supported by the evidence on record. In so doing, as an appellate court, we have to bear in mind the caution that having not seen and/or heard the witnesses testify, we cannot assess their demeanour which is crucial in determining their credibility. In the circumstances we should be slow in disturbing the trial Judge's findings of fact unless they are perverse and/or contrary to the evidence on record. These principles were stated by the predecessor of this Court in the famous case of **Selle& Another v. Associated Motor Boat Co. Ltd & Others [1968] EA 123 at 126**and have since religiously been applied in numerous decisions of this Court and even those of the High Court. In this case the matter was determined on affidavit evidence and no witness testified. So we are in the same position as the learned trial Judge was in assessing the affidavit evidence on record.

3. Pursuant to the above stated duty, I have carefully read the record of this appeal. The genesis of the dispute in this matter is the allocation by the 1st respondent, for and on behalf of the 2nd respondent, of the piece of land known as LR No. 20247 comprised in the Grant registered as No. CR 106 (the suit land) to the 3rd respondent on 27th July 1994,which the appellants contend is forest and/or public beach land. On learning of the allocation the appellants filed the said judicial review application in December 1994 and sought orders of certiorari to quash **Gazettee Notice No. 3831**of **24th June 1994**bywhich the County Council of Kwale (the Council) set apart the suit land for allocation; the letter of allotment dated 27th July 1994 by which the 1st respondent, for and on behalf of the Council, allocated the suit land to the 3rd respondent; and Grant No. C.R. 106 issued to the 3rd respondent in respect of the suit land. They also sought an order of prohibition to prohibit the 3rd respondent, its servants or agents from having any dealings whatsoever or carrying out any developments on the suit land.

4. The application was supported by two affidavits of Anthony Duckworth, the Managing Director of Funzi Island Development Co. Ltd, the 1st appellant, and two others of the 2nd appellant, Jonathan Bowen Havelock, at the material time an advocate but now a Judge of the High Court of Kenya who is also a director of the 1stappellant. The gravamen of the averments in those affidavits was that appellants own pieces of land on the main Funzi Island. The 1stappellanthas developed a luxurious tourist tented camp on its piece of land. In 1991/1992, Mr. AlessandroTorriani, a director of the 3rdrespondent erected illegal temporary structures on the peninsula of land in front of the appellants' pieces of land over which the appellants and the local population had access to the open sea.

5. The appellants complained to the District Commissioner Kwale who ordered Torriani off the Funzi

Island. However, by Gazettee Notice No. 3831 dated 24th June 1994, the Commissioner of lands gave notice of setting aside a piece of land comprising 0.7 of a hectare or thereabouts along Funzi Beach for purposes of a boat landing base. In September 1994 the appellants saw surveyors on the peninsula and upon enquiry they discovered to their horror that the Commissioner of Lands had alienated the peninsula piece of land (the suit land) to the 3rd respondent for a term of 99 years from 1st August 1994. As the suit of land is immediately in front of those of the appellants and any developments on it would prevent their access to the open sea and thus affect their interests especially the tourist business of the 1st appellant, the appellants filed the said judicial review application and sought to quash the allocation and prohibit the 3rd respondent from carrying out any developments on it. Despite service of the order granting leave to commence those proceedings which also operated as a stay of any developments on the suit land, the 3rd respondent went ahead to fence off and erect developments on the suit land thus preventing the appellants' and the local fishermen's right of access to the sea.

6. The appellants also got Charles G. Kariuki, a forester with the Ministry of Environment and Natural Resources in charge of Buda Forest Station at Msambweni, to swear an affidavit in support of their application. Mr. Kariuki averred in that affidavit that the suit land was not trust land but a mangrove forest declared by Proclamation No. 44 of 1932 to be a protected forest area. To the best of his knowledge, the Minister in charge of forests has never degazzetted the suit land as a forest.

7. On the basis of those averments, the said directors of the 1st appellants,in their further affidavits,joined Mr. Kariuki in asserting that neither the Commissioner of Lands nor the Council had authority under **Section 7** of the **Trust Land Act** or **Sections117** or **118** of the former **Constitution**to alienate the suit land. They also asserted that the allocated land is completely submerged during high tide and at any rate is much larger than the piece of land set apart byGazettee Notice No. 3831 of 24th June 1994.

8. In response to the petition and the averments in the affidavits supporting it, the respondents filed affidavits sworn by Alessandro Torriani, the Managing Director of the 3rd respondent, and John NyagahGacivih, then a Senior Principal State Counsel in the Attorney General's chambers Mombasa. The import of those affidavits is that the appellants' application was redundant and bad in law. Prior to allocation, the suit land was trust land whichvested in the Council. Under the Trust Land Act, the Council had authority and power to alienate it to anybody for purposes beneficial to itself and the local public.

9. The land was originally allocated to Hon. Mwamzandi at whose request it was subsequently re-allocated to the 3rd respondent. The latter set aside Kshs.400,000/= to be utilized as compensation should there be any claim. As there was no objection from any local resident and the area Land Control Board having granted its consent, the suit land was set apart under **Section 117** and not **Section 118** of the former **Constitution** and regularly and legally allocated under **Section 7** of the **Trust Land Act** to the 3rd respondent who thereby acquired an absolute and indefeasible title to it under **Section 23** of the **Registration of Titles Act**, Cap 281 of the Laws of Kenya.

10. In addition to these averments, Torriani vehemently disputed the appellants' claim that he or the 3rd respondent defied the court order of stay dated 30th November 1994. He asserted that the order was served upon him on 8th December 1994 while the fencing of the suit land had been completed by 6th December 1994. Regarding the use of the suit land, Torriani averred that except during "very high spring tide about twice a year", the suit land is never completely submerged as the appellants claimed. He said the land was legally and regularly allocated to the 3rd respondent and except that he was temporarily restrained from erecting any developments on it, he has never been ordered to vacate it. He denied that the land is immediately in front of the appellants' pieces of land, adding that there is an inlet of water between the suit land and those of the appellants which is navigable by canoes at most times

except during very low tides. The appellants have therefore direct access to the open sea without going through the suit land. The appellants only used the suit for their own convenience which use cannot be claimed as of right.

11. As stated, after hearing the application the learned Judge dismissed it thus provoking this appeal.

12. The appellant's 10 grounds of appeal can be paraphrased and condensed into three, namely,that the learned Judge erred in holding that the appellants had no *locus standi* in the matteras it is only the Ministry in charge of forests that could challenge the allocation of the suit land to the 3rd respondent; that the learned Judge erred in finding that the suit land was trust land and not forest or beach land; and that even if the suit land were trust land, the learned Judge erred in finding that it had properly been set aside and allocated to the 3rd respondent, a private developer.

13. In both their written and oral submissions before us, besides raising some legal issues, which I shall presently consider, counsel for the parties expounded on the averments in the affidavits filed on behalf of their respective clients as summarized above.

14. In his submissions, Mr. Khanna, learned counsel for the appellants, argued that the issue of the appellants' *locus standi* was raised by the respondents as a preliminary objection but was overruled by Mbogholi J. There having been no appeal from that ruling, the matter was res judicata and the learned Judge erred in entertaining it again. Evenif she was right in entertaining the issue once again, the appellants as well as the local villagers and fishermen had been affected by the alienation of the suit land. The suit land is a beach directly in front of the appellants' pieces of land and tourists staying in the 1stappellant's tourist camp and the local villagers had, for a long time prior to its allocation,been using it for recreational purposes. The local fishermen had also been using it as a boat landing base. They had therefore an overriding interest under **Section 30** of the now repealed **Registered Land Act.** Since alienation, the 3rd respondent has stationed guards on the suit land who have prevented all these groups of people from accessing it. In the circumstances, the appellants have *locus standi* in the matter and their judicial review application was competently before court.

15. On the merits of the appeal, Mr. Khanna submitted that the suit land is not trust land but a sandy public beach island between the high and low tide water-marks and is completely submerged during high tide. He referred us to the notes made by the Commissioner of Assize who first partly heard the application and visited the *locus in quo*and said that it is indeed a public beach. Like other beaches in the country, counsel said we should take judicial notice of the fact that this beach is preserved for public use. He cited this Court's decision in **Town Council of Ol'Kalouv. Nganga General Hardware, CA No. 269 of 1997** for the proposition that land set aside for public use is inalienable.

16. Counsel also submitted that the suit land is also part of a protected forest. He referred us to the averments in the affidavits in support of the application and in particular those in the affidavit of Charles Kariuki, the Forest Officer at Buda Forest Station in Msambweni, which show that the suit land is one of the areas which, as stated in the Kenya Independence Order-in-Council (L.N. 457 of 1963)(Legal Notice No. 174 of 1964),had, by Proclamation No. 44 of 1932,been declared a protected forest area.It has not been degazetted under **Section 4** of the **Forests Act** for alienation. On these two grounds, that the suit land was apublic beach and also part of a protected mangrove forest, counsel submitted that it was not vested in either the Council or in the Commissioner of Lands. Therefore neither of them had authority to alienate it.

17. Mr. Khanna further submitted that even if we overrule him on that argument and find that the suit land was indeed trust land which the Council had authority to alienate, he urged us to find that it was, for

various reasons, irregularly allocated. One, that contrary to **Section 7** of the **Trust Land Act** (Cap 288), the suit land was not surveyed and specified and no notice of the date for applications for compensation was given. The letter of allotment talks of unsurveyed land comprising approximately 0.7 of a hectare but the land eventually allocated was, however, 3.126 hectares. That irregular increase of land was *ultra vires* **Section 7(2)(a)** and **(3)** of the **Trust Land Act.** Counsel contended that itis because Gazette Notice No. 3831 failed to specify the date for submission of applications for compensation that none were made. He dismissed as an afterthought the 3rd respondent's assertion that it set aside Kshs.400,000/= for compensation.

18. The second ground counsel gave for the irregular allocation is that it is only land registered under the Registered Land Act Cap 300 that would by dint of **Section 2(d)** thereof, be set aside under **Sections 117** and **118** of the former**Constitution** for allocation. The Grant in this case was issued under the **Registration of Titles Act,** which has no similar provision.

19. Counsel also submitted that contrary to Gazettee Notice No. 3831 and the conditions in Grant No. 106, the 3rd respondent has never and does not usethe suit land for the purpose for which it was allocated, that is, as a boat landing base. Right from the time of allocation, the 3rd respondent constructed a five star hotel on it which allegedly cost about Kshs.240 million.

20. On those submissions, counsel urged us to allow this appeal and hold that the Judge erred in refusing to issue an order of certiorari to quash the allocation and the ensuing Grant. At the hearing of the application in the High Court, the appellants abandoned the appeal on the prayer for an order of prohibition as it had been overtaken by events.

21. In response to these submissions, Mr. Eredi, the Principal Litigation Counsel in the Attorney General's Chambers appearing for the 1st and 2ndrespondents, submitted that the learned Judge was justified in dismissing the appellant's application as it was misconceived. He dismissed the contention that the suit land was protected forestand/orbeach land as no evidence was placed on record to that effect. He said this is an isolated island in front of the main Funzi Island. Funzi Island, which includes the suit land, is trust land within the meaning of **Sections 114(1)** and **115(1)** of the former **Constitution** as read with **Section 2** of the **Trust Land Act** which, was vested in the Council by **Section 115(1)** of the former Constitution. The Council had therefore jurisdiction to set aside and alienate the suit land.

22. Regarding the procedure of setting apart and alienating trust land, Mr. Eredi submitted that under **Sections 7** and **13** of the **Trust Land Act**,that can be done at the instance of either the Council within whose jurisdiction the land in question is situate or the Government. In this case the suit land being situate within the area of jurisdiction of the Council,by its letter dated 23rd April 1993, the Council formally applied to the local Land Control Board (the Board) for consent to set it aside for allocation and as required by law duly specified the purpose for which the land was to be alienated. The change of user may have come later.Vide **Minute 606/93** the Board deliberated on the application and granted its consent following which the Council published Gazettee Notice No. 3831 under **Sections 13(2),** and **53(a)** of the **Trust Land Act.**

23. As regards the size of the suit land, counsel conceded that the land originally allocated was 0.7 of a hectare or thereabouts but after survey it was found to be 3.126 hectares. In his letter of 19th October 1994 the Commissioner of Lands demanded for additional stand premium which the 3rd respondent duly

paid before being issued with the Grant. Pursuant to **Section 53** of the **Trust Land Act** and **Section 117(3)** of the former **Constitution**the Commissioner of Landsalienated the suit land to the 3rd respondent and on behalf of the Council. Counsel concluded that since all the procedural steps set out in **Section 117(3)** of the former Constitution including the provision for compensation under the Trust Land Act were followed, the appellants' application was for dismissal and this appeal has therefore no merit. He urged us to dismiss it with costs.

24. For the 3rd respondent, learned Counsel Mr. Gatonye submitted that the Appellants had no *locus standi* to bring the application or in any way challenge the allocation of the suit land to the 3rd respondent. Referring us to the definition of the phrase "*locus standi"* in the **Black's Law Dictionary, Halsbury's Laws of England**and the cases of **R v. Inspectorate of Pollution & Another, Ex-parte Greenpeace Ltd No. 2 [1994] 4 ALL ER** and **Nairobi Permanent Markets Society & Others v. Salma Enterprises & Others [1995 – 1998] 1 EA,** counsel submitted that the appellants did not fall within the groups of people covered by the provisions of **Section 117(4)** of the former **Constitution**and **Section 8** of the **Trust Land Act.**They hadtherefore no *locus standi*to bring the application.

25. On the merits of the application, Mr. Gatonye submitted that as the Commissioner of Assize noted, the suit land is a small island in front of Funzi Island. The appellants' pieces of land do not share a common boundary with it. The two are separated by 50metres wide of mangrove trees. He dismissed the Appellants' contention that the suit land is protected forestland saying no evidence was adduced from the Department of Survey to prove that the suit landis part of the land covered by Proclamation No. 44 of 1932. There was also no evidence from any marine survey carried out in the area that the suit land falls within the high and low tide water-marks and no authority was produced that beach land is inalienable public land. Moreover,he said, no objection to the present use of the land was raised.

26. Counsel dismissed the averments in the affidavit of Charles Kariuki as evidence of a junior officer who was procured by his buddy, Mr. Anthony Duckworth, the Managing Director of the 1st appellant, to give misleading information. In counsel's view, this is a substantial matter that required the confirmation of either the Permanent Secretary in the Ministry of Forestry or the Chief Conservator of Forests that the suit land is indeed forestland. The mangrove forest referred to in the Proclamation is the 50 metreswide swamp forest between the suit land and the main Funzi Island. As the court noted, the suit land is a separate island which has a five star hotel on it. That disproves the contention that it is usually completely submerged during high tide.

27. Counsel also dismissed the contention that this was public land as a disguised claim intended to farther the appellants' private interests. He said there is no iota of evidence that the suit land had been set aside for public use. The failure by anyone to claim a share of the Kshs.400,000/= set aside for compensation is proof that nobody was displaced by the allocation of the suit land to the 3rd respondent.

28. Counsel further argued that as stated in the affidavit of John NyagahGacivih, the allocation followed to the letter the procedure set out in **Sections 117** and **118** of the former **Constitution** as well as **Section 13** of the **Trust Land Act.** After Msambweni Land Control Board had granted its consent on 9th June 1993 to the setting aside and alienation of the suit land, the Council issued Gazette Notice No. 3831 of 8th July 1994. After survey the land was found to be 3.126 hectares and not 0.7 of a hectare. The 3rd respondent paid the revised stand premium and was thereafter issued with the Grant. The appellants having not adduced any evidence of fraud, as reiterated in the cases of **Ngo'k v Ole Keiwa Civil Application No. Nai. 60 of 1997;Njlux Motors Ltd v. Kenya Power & Lighting Ltd., [2000]2 EA** and **Nairobi Permanent Markets Society** (supra),the 3rd respondent's title to the suit land is, under **Section 23(1)** of the **Registration of Titles Act**, absolute and indefeasible. In the circumstances and following this Court's earlier decision in **Kenya National Examinations Council v. Republic, Ex-**

Parte GodffreyGathenjiNjoroge& 9 Others [1997] eKLRthe learned trial Judge had no choice but to dismiss the appellants' application.

29. Lastly, Mr. Gatonye cited the case of **Housing Finance Company of Kenya Ltd. V RichardNdere Johnson & 3 Others [2010] eKLR** and submitted that there being no evidence that the learned Judge failed to consider any matter or took into consideration any irrelevant matter or in any way misdirected herself and thereby came to a wrong conclusion, this court has no jurisdiction to disturb her lawful exercise of discretion in dismissing the application. In conclusion he urged us to find that the 3rd respondent constructed on the suit land not only a boat landing base but also a tourist hotel for Kshs.240 million which offers employment to the local community and earns this country the much needed foreign exchange. Judgment having been delivered on 13th October 2004, the provisions of the current Constitution enacted on 27th August 2010 have no application to this appeal. He urged us to dismiss this appeal with costs.

30. Having considered these rival submissions and carefully read the record of appeal, I find that three broad issues fall for our determination in this appeal. They are one, whether or not the appellants have *locus standi* in this matter; secondly, whether or not the suit land was initially trust land, a public beach or a mangrove forest protected under the Forests Act; and thirdly, if it was trust land, whether or not the Council had authority to and did properly and regularly alienate it to Hon. Mwamzandi at whose request it later re-allocated it to the 3rd respondent.

31. I shall deal with the issue of *locus standi* later in this judgment. The first issue I wish to dispose of right away is the status of beaches or beach land. I reject the contention by counsel for the 3rd respondent that one requires proof that beaches or beach lands are public lands set aside for public use. It is common knowledge world over that beaches are public land intended for public use. One does not need to go to foreign countries to see that beaches are public property. One only needs to walk along the Kenyan coastline to verify this. For easy access to beaches, other countries leave inalienated a reasonable stretch of land bordering beaches on which they construct roads and/or footpaths. Although Kenya has alienated to private developers its coastline right to the beaches, none of those developers claims the beach in front of his property as his. Members of the public freely walk along the beaches without any hindrance.

32. I will later in this judgment revert to the issue of whether the suit land is beach land which is intended for public use.

33. On the second issue, the appellants' case is two pronged. One, that the suit land was and still is a protected forest reserve. The respondents on the other hand, contend otherwise. They argue that it is a separate small island in front of the main Funzi Island. The forest referred to in the Proclamation is the 50 metres wide mangrove forest between the suit land and the main FunziIsland. They also contend that even if the suit land includes the said mangrove forest, there is no proof that it is part of the forest included in the Proclamation. In other words there is no evidence that the Proclamation in any way relates to said mangrove forest.

34. Forestland is any unalienated Government land whichthe Minister declares to be forest land. **Section 4(1)(a)** of the **Forests Act** Cap 385 of the Laws of Kenya makes this clear: *"The Minister may, from time to time, by notice in the Gazette … declare any unalienated Government land to be a forest area."*

35. **Section 4** of the 1942 edition of the Forests Act, then known as Cap 176 of the Laws of Kenya, had a similar provision except that instead of the Minister, it was the Governor in Council who would

make that declaration. It follows from this provision that any land declared by the Minister or by the Governor in Council during the colonial period, remained forestland until another declaration was made that such land had ceased to be a forest area.

36. By Legal Notice No. 174, the Minister for Natural Resources, after consultation with the National Forest Authority, declared as a 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."*In paragraph 13 of affidavit his sworn on 13th January 1995, Alessandro Torriani, the Managing Director of the 3rd respondent, conceded that *"the said land does not flood on many occasions as stated in the Second Applicant's said letter or become completely submerged at high tide as averred in paragraph 14 of ANTHONY DUCKWORTH'S Affidavit but only at very high tides about twice a year."* It follows from this concession that, as stated in Legal Notice No. 174 of 1964, the suit land is "*situated between the high and low water-mark on the coast of Kenya."*Proclamation No. 44 of 1932 had declared 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 reserves."*From this proviso, there is therefore no dispute that the suit land falls within the area covered by that Proclamation. The allocation of the suit land in this case was in 1994. So the above proviso applies to it. Before the impugned allocation, there is no evidence of the suit land having been declared private property or excluded from the forest reserve.

37. So the suit land was, by dint of Proclamation No. 44 of 1932, as reiterated by Legal Notice No. 174 of 1964, declared forestland. To cease to be forestland, **Section 4(1)(a)** of the **Forests Act,** Cap 385 of the Laws of Kenya, requires the Minister in charge of forests to make a declaration to that effect. For ease of reference, I would like to also reproduce verbatim the entire section. It reads:

"4(1) The Minister may, from time to time, by notice in the Gazette-

a. **declare any unalienated Government land to be a forest area;**

b. **declare the boundaries of a forest and from time to time alter those boundaries;**

c. **declare that a forest area shall cease to be a forest area.**

(2) Before a declaration is made under paragraph (b) or paragraph (c) ofsubsection (1), twenty-eight days' notice of the intention to make the declaration shall be published by the Minister in the Gazette."

38. **Section 107** of the **Evidence Act** places the burden of proof of any fact upon the person who asserts it. In this case, the appellants asserted that the suit land is forestland and as proof of that fact, they cited Legal Notice No. 174 of 1964 as read with Proclamation No. 44 of 1932. I have already found that under that Legal Notice and Proclamation, the suit land was indeed declared a forest area. In the circumstances, the burden of proof shifted to the 3rd respondent to show that the suit land ceased to be

forestland. There is nothing on record to show that the Minister subsequently degazetted the suit land as a forest area. The 3rd respondent therefore failed to discharge that burden of proof. In the circumstances, I find that the suit land was and still is forestland which was not available for alienation.

39. Even if I am wrong in this, on the second argument of ground two, I find that the suit land was neither trust land nor was it properly allocated.As I have pointed out, the 3rd respondent, relying on **Section 23(1)** of the **Registration of Titles Act**, Cap 281 of the Laws of Kenya, contended that the Grant of the suit land conferred on it an absolute and indefeasible title. I hasten to point out that that Section refers to a certificate of title issued to a purchaser. In the case of allocated land, even if the section is applicable, a registeredproprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot, on the basis of indefeasibility of title, sanction an illegality or give its seal of approval to an illegal or irregularly obtained title.

40. Applying the above principle to the contentious issues in this appeal, I think the starting point in the determination of this appeal is to be clear on the definition of trust land. **Section 114** of the repealed Kenya Constitution had an exhaustive definition of trust land. It stated:

"114(1) Subject to this Chapter, the following descriptions of land are Trust land-

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 Act as in force on 31st May, 1963), and which was on 31st May, 1963 vested in the Trust Land Board by virtue of any law or registered in the name of the Trust Land Board; the area 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 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.

(2) In this Chapter, references to a county council shall, in relation to land within the areas of jurisdiction of the Taveta Area Council, the Pokot Area Council, the Mosop Area Council, the Tinderet Area Council, the Elgeyo Area Council, the Marakwet Area Council, the Baringo Area Council the Olenguruone Local Council, the Mukogodo Area Council, the Elgon Local Council, and the Kuria Local Council, be construed as references to those councils respectively"

41. **Section 115** of the same Constitution vested all Trust lands, as defined above in the county councils within whose areas of jurisdiction they were situate save for any body of water and any mineral oils. **Section 117** authorized county councils to set apart any trust land vested in them for use and occupation by, inter alia, *"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…"*

42. The First Schedulereferred to in Section 114(1) above to the Trust Land Act is not relevant to the matter at hand. It relates to trust land in other areas. Having carefully perused the Crown Land Ordinance in force on 31st May, 1963, I find that the suit land is not included in the lands specified in the Fourth, Fifth, Sixth or Seventh Schedules thereof. Those Schedules cover lands in the inter land and not those on the coastline.The Trust Land Act in force on 31stMay, 1963 was the Trust Land Ordinance 1962 revised edition. The relevant part of the First Schedule to that Act relatingto trust land in"*the areas of land the boundaries of which were specified in the First Schedule to the Trust Land Act as in force on 31st May, 1963),"*is intituled"*Section XVI-Funzi Island."* It defines trust land as*"The whole of Funzi Island (together with the islets) lying to the south of Section XIV, MsambweniGwirani, and to the south-east of Section XV, Shirazi, down to high-water mark of the Indian Ocean."*Read superficially and alone, as the suit land is one of the "islets" in the vicinity of Funzi Island, one would get the impression that this provision includes the suit land in the definition of trust land. However, as I have pointed out, the suit land is between the high and low water-mark, which fact excludes it from the above definitions of trust land.

43. Even if the suit land were trust land, I find that the same was not regularly allocated to the 3rd respondent. This is because **Section 7** of the **Trust Land Act** requires survey to be carried out and the boundaries and size of the land set apart to be specified. Gazette Notice No. 3831 of 24thJune, 1994 specified the boundaries of the land set apart and gave its size as comprising approximately 0.7 of a hectare. The land ultimately allocated was 3.126 hectares. There is no further notice on record in respect of the increased land.Msambweni Land Control Board gave consent to set apart 0.7 of a hectare of land for "Boat Landing." There is no further consent from that Board for the change of the size to 3.126 hectares.As required by **Section 7(3)** of the **Trust Land Act**, Gazette Notice No. 3831 of 24thJune, 1994 did not *"specify a date before which applications for compensation…[were] to be made to the District Commissioner."* The suit land was also set apart for use as *"Boat Landing Base."*It is common ground that the 3rd respondent has constructed a five star hotel on the suit land. Both **Section 117** of the former Constitution and **Section 7(3)** of the **Trust Land Act** require the notice of the intended alienation to specify *"the purpose for which the land is required to be set apart."*There is no further notice on record for change of the "purpose" of allocation.

44. These irregularities debunk the respondents' contention and the learned Judge's finding that the suit land was properly and regularly allocated to the 3rd respondent. I have therefore no doubt in my mind that even if the suit land was trust land, it was irregularly alienated.

45. The inescapable conclusion from the above analysis is that the suit land was, at the material time not trust land. It was, and still is, partly forest and partly beach land not available for alienation. I find that the allocation of the suit land in this case to Hon. Mwamzandi and later to the 3rd respondent was in fraud of the public interest and the contention of the indefeasibility of title cannot avail the 3rd respondent in this case. In the circumstances, I find that the learned Judge therefore erred in rejecting the appellants' prayer for an order of certiorari to quash its allocation to the 3rd respondent.

46. In reaching the above conclusion I have not ignored the fact that the 3rd respondent has considerably developed the suit land. We saw the developments on it when we visited the *locus in quo*and in the absence of any evidence to the contrary, the value of the developments may very well be about KShs. 240 million. I am therefore alive to the fact that my above decision has grave ramifications. But I have a job to do; to apply the law to the facts of this case.

47. As is clear from the affidavit evidence in this case, before the suit land was allocated to Hon. Mwamzandi, the 3rd respondent had attempted to erect temporary structures on it. As soon as the appellants saw that, they complained to the Provincial Administration and, as admitted by its Managing Director Mr. Torriani,the 3rd respondent was restrained, albeit temporarily, from constructing any structures on it. It appears that it is after that that the suit land was allocated to Hon. Mwamzandi, at whose request the land was later re-allocated to the 3rd respondent. It, however, does not matter whether the 3rd respondent developed interest on it before or after it was allocated to Hon. Mwamzandi. What is crucial is that right from the word go, the 3rd respondent knew that its acquisition of the suit land was seriously opposed. That notwithstanding, it went ahead and acquired it. The 3rd respondent is therefore complicit in the irregular allocation of the suit land to it. It cannot therefore seek shelter under the indefeasibility of title under **Section 23** of the now repealed **Registration of Titles Act**which was in operation then and under which the land was registered or the developments it has carried out on the land.

48. As stated, from the word go, the appellants opposed the alienation of the suit land to the 3rd respondent. I have no doubt they would have opposed its allocation to anybody else. The reason for their opposition was that they used the suit land for recreational purposes and for access to the open sea. The local fishermen also used it as boat landing. On those grounds, and having found that besides being forestland this was also a beach they were entitled to freely use, I find that allocation of the suit land to the 3rd respondent affected the appellants' interests. In the circumstances, they had *locus standi* to challenge its alienation and the learned Judge therefore also erred in finding that it was only the Minister in charge of forestry or the Conservator of Forests who could challenge the allocation.

49. For these reasons, I allow this appeal, set aside the learned Judge's order dismissing the appellants' notice of motion as later amended and substitute it with an order quashing the allocation of the suit land to the Hon. Mwamzandi and later to the 3rd respondent as well as the letter of allotment dated 27th July, 1994 and the Grant No. CR 106 relating to LR No. 20247. The appellants shall have the costs of this appeal and those of the court below.

DATED and delivered at Nairobi this 27th day of February, 2014

D.K. MARAGA

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JUDGE OF APPEAL