



Amu Beach Management Unit v County Land Registrar Lamu & 8 others (Environment & Land Petition 4 of 2023) [2025] KEELC 295 (KLR) (29 January 2025) (Judgment)

Neutral citation: [2025] KEELC 295 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND PETITION 4 OF 2023**

EK MAKORI, J

JANUARY 29, 2025

**IN THE MATTER OF ARTICLES 10, 19, 20, 21, 28, 40, 44,
47, 63(2), 69, 70 AND 260 OF THE CONSTITUTION OF**

KENYA

IN THE MATTER OF FAIR ADMINISTRATIVE ACTIONS ACT, NO 4 OF 2015

AND

IN THE MATTER OF THE LAND REGISTRATION ACT 2012

AND

IN THE MATTER OF THE GOVERNMENT LAND ACT (NOW REPEALED)

AND

IN THE MATTER OF THE PHYSICAL PLANNING ACT (NOW REPEALED)

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF
RIGHTS AND FUNDAMENTAL FREEDOMS) AND PROCEDURE RULES 2013**

BETWEEN

AMU BEACH MANAGEMENT UNIT PETITIONER

AND

COUNTY LAND REGISTRAR LAMU 1ST RESPONDENT

DIRECTOR OF PHYSICAL PLANNING 2ND RESPONDENT

DIRECTOR OF SURVEYS 3RD RESPONDENT

MOHIDIN MOHAMMED SHEIKH NUREIN 4TH RESPONDENT

HASSAN MOHIDIN SHEIKH NUREIN 5TH RESPONDENT



COUNTY GOVERNMENT OF LAMU	6 TH RESPONDENT
NATIONAL LAND COMMISSION	7 TH RESPONDENT
CHIEF LAND REGISTRAR	8 TH RESPONDENT
THE ATTORNEY GENERAL	9 TH RESPONDENT

JUDGMENT

1. By a petition dated 7th August 2023, the petitioner herein moved this Court seeking orders inter alia:
 - i. A declaration that the initial allocation of title to all that parcel of land known as Lamu/Block 1/1193 contravened the Physical Planning Act (now repealed) and Government *Land Act* (now repealed), rendering the allocation null and void ab initio.
 - ii. A declaration that the District Physical Planning officer (now Director of Physical Planning, Lamu) refusal and/or failure to exercise his statutory authority to control the use and development of the site in the interest of maintaining the historical public use of all that parcel of land known as Lamu /Block 1/1193 as a traditional fish landing site contravened section 9 of the Physical Planning Act (now repealed).
 - iii. A declaration that the 4th and 5th respondents, their agents, and/or officers in allowing and/or approving the transfer of title to Lamu/Block 1/1993 in total disregard for the National Land Commission’s recommendations for the revocation of the said title and in total disregard of the Petitioner’s caution against the said title is a violation of the National Values and principles under Article 10(2) of transparency, accountability, good governance, human rights, Article 47 of the *Constitution*, their obligations under Article 73(1) and 75(1) of the *Constitution* and section 72(2) of the *Land Registration Act*.
 - iv. A declaration that the respondents violated Article 2(6) of the *Constitution* by allocation of private title over all that parcel of land known as Lamu/Block 1/1993 without the free, prior, and informed consent of the traditional fishers of Lamu as enshrined under Articles 11 and 15 of the International Covenant on Economic, Social and Cultural Rights under Articles 14 and 22 of the African Charter on Human and Peoples’ Right.
 - v. An order of mandamus compelling the Chief Land Registrar to revoke title No. Lamu/Block 1/1993 and expunge it from the registry of titles. A Certificate of Title register be issued to the Petitioner herein on behalf of the traditional fishers of Lamu Island as a community identified by their community interest in fishing.
 - vi. Any other orders the court deems fit.
 - vii. Costs of the petition.
2. The petition is supported by Abubakar Twalibu's supporting affidavits sworn on 7th August 2023 and 21st August 2023. The petition is further supported by the Petitioner's List and Bundle of Documents dated 7th August 2023 and the Supplementary List and Bundle of Documents dated 29th September 2023.



3. The petitioner alleges that the property known as Lamu/Block I/1193 (hereinafter “the suit property”) is a fish landing site that was illegally and irregularly allocated to the 4th and 5th respondents. The petitioner alleges a breach of Kenya’s Constitution and the relevant Land Statutes.
4. The 1st, 2nd, 3rd, and 8th respondents filed their replying affidavit deposited by the Land Registrar Lamu—Sego Manyarikiy, filed on 17th October 2023, and an affidavit from the Director of Survey sworn by Timothy W. Mwangi, dated 6th November 2024, filed on the same date.
5. The 4th and 5th respondents opposed the petition through the following documents: a response to the petition dated 26th September 2023 and a replying affidavit sworn by the 4th respondent, Mohidin Mohammed Nurein, on 26th September 2023; a further affidavit sworn by the 4th respondent, Mohidin Mohammed Nurein, on 15th April 2024, replying affidavit sworn by Ali Bin Suo Bakari on 10th March 2024, replying affidavit sworn by Mohamed Sadiki Mahadhi on 10th March 2024.
6. The 6th respondent’s response is anchored in the replying affidavit of John Athens Onyango, the Principal Fisheries Officer—Lamu, sworn on 28th September 2023.
7. The 7th respondent filed a replying affidavit deposited by Benard Opa, the Deputy Director and Head of the Natural Resources Management Department at NLC, on 21st November 2024.
8. The court directed that the petition be canvassed through affidavits, filed documents, and written submissions.
9. From the materials and submissions placed before me, the issues that fall for this court’s determination, which I frame, are whether the petition offends the doctrine of constitutional avoidance by attempting to constitutionalize an ordinary civil matter, whether the petition as presented before the court is competent, whether the court lacks jurisdiction to hear and determine the petition, whether the orders sought in the petition should be granted and who should bear costs of these proceedings. The doctrine of constitutional avoidance is relevant in this case as it guides the court in interpreting the Constitution to avoid constitutional issues when the same can be ventilated in an ordinary civil suit. Put this way - the single cognomen in the petition is the legality of the title held by the 4th and 5th respondents.
10. The petitioner – whose stance was wholly adopted by the County Government of Lamu (the 6th Respondent) and the National Land Commission (the 7th respondent), avers that Amu Beach Management Unit was first registered as Beach Management Unit (BMU) on 21st November 2008 pursuant to Regulation 3(1) of the Fisheries (Beach Management Unit) Regulations, 2007. It sues on its own behalf and on behalf of its members – the collective of fishers, fish traders, boat owners, fish processors, and other stakeholders who traditionally and critically depend on fisheries for their livelihoods. The petition is instituted in the public interest under Articles 22 and 258 of the Constitution.
11. Under Regulation 5(1) of the Fisheries (Beach Management Unit) Regulations, each BMU has jurisdiction over the area for which it is established. Due to this, Amu Beach, Amu Location, Amu Division in Lamu District was designated as a fish landing station under the Fourth Schedule of the Fisheries (General) Regulations (now repealed). According to the petitioner, Amu BMU’s jurisdiction over the said fish landing site is confirmed in its first Certificate of Registration, which lists Amu, Langoni, and Mokowe as its areas of jurisdiction - Annexure AT-01 and Annexure JAO 1.
12. The petitioner contends that Lamu District was designated a fish landing station under the Fourth Schedule of the Fisheries (General) Regulations (now repealed). Under paragraph 1(e) of Part 2 of the Fourth Schedule of the Constitution, fisheries is a devolved function of the County Government. In



performing this function, Amu BMU was re-issued with a Certificate of Registration on 3rd August 2020, designating both Amu and Wuyoni as its areas of jurisdiction - Annexure AT-01.

13. The petitioner contends that Joseph Athens Onyango, the Principal Fisheries Officer of the County Government of Lamu, identifies Lamu/Block 1/1193 as the landing site referred to in the repealed Fisheries Regulations and confirmed under the terms of the Certificates of Registration issued to Amu BMU in 2008 and 2020.
14. The petitioner asserts that on the disputed land are features indicative of its longstanding use by traditional fishers for boat making, repair, and other uses. There are old, abandoned boats, rails emerging from a damaged jetty in the ocean onto the landing site, and an abandoned winch and building used to pull boats up a slipway, as demonstrated by Joseph Athens Onyango's affidavit and the Petitioner's Bundle of Documents.

The petitioner avers that the location of the landing site in contention - Lamu Old Town - enjoys the distinction of being the oldest and best-preserved Swahili settlement in East Africa. Traditional small-scale fishing has been the main livelihood of Lamu for centuries. Traditional small-scale fishing also forms a part of the cultural identity and heritage of Lamu and its residents, among the factors contributing to its Outstanding Universal Value, which has earned Lamu Old Town international recognition and protection as a UNESCO World Heritage Centre. The status of Lamu Old Town as a UNESCO World Heritage Centre and the consequent obligations on the State for its protection and preservation were acknowledged in the decision of a five-judge High Court bench in *Mohamed Ali Baadi & others v the Hon. Attorney General & others* Petition No. 22 of 2012. This historical use should be respected and upheld.

15. The petitioner proceeds to state that in the State Department of Fisheries and National Land Commission's 'Report on Securing Fish Landing Sites within Kenya (Coastal Counties), March 2019,' the disputed land's use as a public utility for boat repair is confirmed in the National Museums of Kenya's letter dated 1st February 2023. This letter confirms that the District Commissioner granted the museum two-year use of the land as a boat-building school under its Swahili cultural centre. Notably, this use by the museum was only temporary. After two years, the facilities reverted to the custody of the District Commissioner in 1996, which was an injustice to the traditional fishers.
16. The petitioner asserts that traditional fishers' access and use of the disputed land as a fish landing site has been hampered by individuals who claim private ownership over the land and have fenced it, barring access. Joseph Athens Onyango confirms that he has heard complaints from local fishermen regarding their dispossession of the disputed land by individual land grabbers claiming ownership. The issue is also addressed in a letter from the County Director of Fisheries and Blue Economy dated 23rd February 2023, in which he confirms that fishers have traditionally used the disputed land as a landing site to construct, repair, and mend their fishing boats and nets. In the same letter, the County Director refers to disputes concerning this landing site, which prompted the District Commissioner (as custodian of the public utility) to write to the District Physical Planning officer to confirm its status in a letter dated 14th April 2004.
17. The petitioners contend that former President His Excellency Uhuru Kenyatta recognized the scourge of land grabbing facing fish landing sites and the importance of small-scale fishers to developing, managing, and conserving Kenyan fisheries. He consequently issued a directive on 19th November 2018 to repossess all illegally acquired fish landing sites. This directive was reduced into a written communication from the Head of Public Service dated 24th November 2018 titled 'Repossession of All Illegally Acquired Fish Landing Sites.' According to that directive, the State Department of Fisheries, Aquaculture, and the Blue Economy and National Land Commission formed a team of technical



- officers from both agencies to undertake a ground survey of landing sites to identify those irregularly and unlawfully allocated and make appropriate recommendations for their recovery.
18. The petitioner proceeds to state that the Joint Agency Team undertook a ground survey of landing sites in coastal communities (including Lamu) to identify those parcels of land irregularly and unlawfully allocated. This exercise culminated in a report with its findings and recommendations. An excerpt of the Joint Agency Team's March 2019 'Report on Securing Fish Landing Sites within Kenya (Coastal Counties)' the Amu Landing Site is addressed on page 13 of the Joint Agency Team's Report – I will revert to the findings later in the judgment.
 19. The Joint Agency Team makes two critical recommendations: that the boundaries to the landing site be reestablished through a survey and that the title held by the private developer be revoked.
 20. The Presidential directive, the Joint Agency Team's exercise, and its outcome recommending repossession of grabbed fish landing sites were matters of wide notoriety that gathered national attention and will have been known within the coastal region and the tight-knight community in Lamu. The petitioner has provided instances where the media covered the exercise with national coverage - See Documents 4 and 10 of the Petitioner's Bundle of Documents.
 21. The petitioner states that building on this effort, the County Government of Lamu made assurances and started repossessing all grabbed fish landing sites, as was widely reported in 2021. It bears note at this point that the private developer(s) referred to in the Joint Agency Team's report were, in fact, three individuals – Mohamed Salim Mbarak, Jaffer Ahmed Mohamed, and Zahra Salim Islam who purport to have held a valid title over the disputed land at the time.
 22. The results of an Official Search by the petitioner on 9th June 2021 confirmed this. In support of the petition, Abubakar Twalibu addresses the petitioner's efforts to follow up on implementing the Joint Agency Team's Report, which was unsuccessful. Furthermore, wind was gotten off a potential sale of the disputed land. This prompted another Official Search on 16th December 2022, which indicated that Mohamed Salim Mbarak, Jaffer Ahmed Mohamed, and Zahra Salim Islam still held the title to the disputed land. Concerned about the lack of protective measures from the State, the petitioners lodged a caution against the disputed land on 20th December 2022 to stop any further dealings concerning the disputed land. In the caution, the petitioner claims an interest in the disputed land as "Public Land used as a Fish Landing Site by Members of Amu BMU."
 23. The 1st, 2nd, 3rd, and 8th respondents, through the Office of the Attorney General, filed their replying affidavit sworn by the Land Registrar Lamu—Sego Manyarikiy, filed on 17th October 2023, and an affidavit from the Director of Survey sworn by Timothy W. Mwangi, dated 6th November 2024, filed on the same date.
 24. The respondents' case is that though the suit land is registered in the names of the 4th and 5th respondents, the land is public land and had been illegally registered in favor of the 5th respondent. The suit property – has, all along, been utilized for docking and boat repair under the supervision of the Fisheries Department and was therefore reserved for public use. Hence, no PDP could have been prepared for a private person. In addition, under section 11(3) of The Land Planning Act Cap 303, the suit property was reserved for public purposes under the Fisheries Department and was already alienated for Government purposes.
 25. The replying affidavit by the 2nd respondent demonstrates that the suit property belonged to the Government of Kenya and was allocated to Mohamed Salim Badamana - who attached a copy of the title registered on 30th March 1988. The applicable PDP preparation law was the Government Lands



Act 288 (repealed), as read with the Land Planning Act Cap 303 (repealed). The affidavit states that an authentic PDP must:

- a. Be approved by the Commissioner of Lands.
 - b. Be assigned an approved development plan number by the Director and entered in the Register as an approved plan.
26. The affidavit states that, under paragraph 3.5.1 of The Land Use Planning, Administration, and Development Procedures Handbook, the Director of Physical Planning could not prepare a PDP on land reserved for Government Ministries and Departments, Local Authorities, or Parastatals. Once reserved, such land is allocated and is not available for use or occupation by another person/body without the surrender of that land by the original allottee. This position was supported by the 7th Defendant (the NLC) via the affidavit deposed by one Benard Opa, dated 21st of November 2024. The title deed registered in 2008 is not anchored on the above process. The Land Use Planning, Administration, and Development Procedures Handbook guided all land planning, administration, and development procedures before enacting the Physical Planning Act 1998.
27. The 4th and 5th respondents contend that they are the registered owners of the suit property. They purchased it from Mohamed Salim Mbarak, Jaffer Ahmed Mohamed, and Zahra Salim Islam for valuable consideration on or about 25th March 2022.
28. The register for the suit property was first opened on 24th January 1975, when the suit property was created. Accordingly, it has been in existence for 48 years. First, it belonged to the Government of Kenya until 1988, when it was allocated to Mohamed Salim Badamana, who sold it to Shaikh Khamis Al-Hasher in 2006. Upon the aforementioned allocation, the suit property ceased to be Government land and became private property. Later, the Administrator of the Estate of Shaikh Khamis Al-Hasher, one Faisal Khamis Ali Al-Hashar, sold it to three people - Mohamed Salim Mbarak, Jaffer Ahmed Mohamed, and Zahra Salim Islam, who sold it to the 4th and 5th respondents. In totality, it has existed for 48 years (since 1975) and has been a private property for 35 years (since 1988). For all that period, neither the petitioner nor any other person has challenged the regularity or legality of the title of the suit property.
29. The 4th and 5th respondents aver they plan to develop a private hospital on the suit property, which the County Government of Lamu (6th respondent) has approved. The hospital, though private, is intended to serve the Lamu people and help the Government of Kenya achieve its objective of Universal Health Care. Despite being a well-intentioned project, the petitioner and its officials deliberately frustrated the 4th and 5th respondents' efforts to undertake the development. This court ordered that the status quo be maintained, meaning that the 4th and 5th respondents had to stop any development on the suit property until this petition was determined.
30. To determine the questions raised in the petition, we must start with the preliminaries. The 4th and 5th respondents have raised jurisdictional questions that the petition does not raise constitutional issues, is incompetent, the petitioners lack the capacity to bring up the petition on behalf of the other fishers within Amu, and that the petition is time or statutorily barred having been brought 35 years after the land was converted from public to private land.
31. I will resolve the issues simultaneously as they are intertwined since, as I said, we are checking the regularity and legality of the title held by the 4th and 5th respondents vis-a-vis the petitioner's claim on the issue of their traditional landing rights.



32. On the constitutionality of the petition, Mr. Oluga learned counsel for the 4th and 5th respondents submitted that the 1st respondent, the Lamu Land Registrar, gave an elaborate registration status of the suit property through a replying affidavit sworn by Sego Manyariky on 12th October 2023, complete with supporting documents obtained from the Land Registry. The registration details given by the Lamu County Land Registrar agree with the position taken by the 4th and 5th respondents. Also, contrary to the petitioner's allegation that there is a restriction on the suit property, Sego Manyariky categorically states in his replying affidavit that there is no such restriction. Therefore, there is no doubt that ownership and legality of the title of the suit property is at the center of this petition and is hotly contested. The court is called upon to determine whether the title currently held by the 4th and 5th respondents was obtained irregularly or illegally to render it fit for cancellation. It is now well settled that a constitutional petition is not the proper forum to determine contested ownership disputes of properties. This is what is called the doctrine of constitutional avoidance. The rationale behind the doctrine is that in a constitutional petition, the court does not hear the evidence of the rival parties claiming ownership of the suit property and does not get an opportunity to interrogate the evidence before the court. Reliance was placed on the decision of this court in the case of *Yaa v District Land Registrar Kilifi County (Petition 23 of 2022) [2023] KEELC 21694 (KLR) (16 November 2023)* where this court declined to determine the legality of a title in a constitutional petition due to the doctrine of constitutional avoidance the court held as follows:

“ 12. Besides, the issues raised in this petition could easily have been crusaded in our civil courts to decide if the title issued to Thabiti Said Swaleh was obtained through fraud or corruptly gotten as to render it fit for cancellation as envisaged under Article 40(6) of the Constitution...

I am persuaded that the correct approach to take is to have the two parties holding or claiming equal rights as owners of the suit property or claiming title to it, approach the Court and prove that one has a better title than the other... The Court will need to hear the two parties claiming ownership of the suit property – to check the root of the title. That journey cannot be achieved in this petition.

14. This is what the doctrine of constitutional avoidance envisages. This petition should have been heard as a normal civil suit for the court to decide who between the named parties should be the rightful owner of the land in question...

15. The petitioner as I have said ought to have invoked the civil jurisdiction of the ELC to cancel the title on the grounds as set under Article 40(6) of the Constitution and Section 26(1) (a) (b) of the Land Registration Act.

16. The upshot is that the current petition fails with costs.”

33. Mr. Oluga asserts that Okongo J. used a similar approach in the case of *Joseph Musikali Mutemi v National Land Commission & 2 others [2021] eKLR*, where he pronounced himself thus:

“What I have before me is affidavit evidence on contested facts as to the validity or legality of the petitioner's title to the suit property. I am unable to determine on affidavit evidence whether the suit property was created from a road and a railway reserve or not. If the property was created from land that was reserved for the Nairobi Southern Bypass road as claimed by the respondents, then its title would be invalid. On the other hand, if the



property was not created from a road reserve as claimed by the petitioner, the title would be valid. This is an issue that requires viva voce evidence to determine. The parties will have to move the court appropriately should they wish to have the issue determined now that this court has found the proceedings before the 1st respondent to have been unprocedural. Due to the foregoing, I will not grant prayer(a) of the petition.”

34. Mr Oluga contends that in the case of Valentine Odhiambo & 2 others v HF Development & Investment Ltd & another [2021] eKLR, Mwangi J. struck out a petition because it attempted to constitutionalize an ordinary civil matter, offending the doctrine of constitutional avoidance.
35. He concludes that from the above authorities, it is clear that the Petitioner’s allegation that the suit property is public land reserved for use by fishermen and that the initial allocation of the suit property was irregular cannot be determined through this constitutional petition. A contested ownership dispute cannot be determined in a constitutional petition because viva voce evidence is required. To determine whether the root of the title is irregular, this court is called upon to conduct an inquiry requiring the hearing of witnesses through oral evidence. The same cannot be achieved in this petition but in an ordinary civil suit. He avers that the Petitioner has challenged the very root of the title at the initial allocation. The person initially allocated the suit property, Mohamed Salim Badamana, has not been sued. The initial allottee is the right person to explain the process that was followed. In his absence, the process of initial allocation cannot be impugned.
36. Mr. Odaga learned counsel for the petitioners, supported by Ms. Lutta, learned state counsel for the 1st, 2nd, 3rd and 8th respondents, Ms. Swaleh learned counsel for the 6th respondent, and Mr. Kiilu learned counsel for the 7th respondent are of the contrary view; it is submitted that the 4th and 5th respondents have presented to this court copies of title to the property and related documents as to the transfer of ownership from one private owner to another or others. The 4th and 5th respondents failed to demonstrate how the land passed from public utility land into private ownership.
37. In *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR, the Court of Appeal noted the following concerning circumstances where the root title is the subject of challenge:

“...when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”
38. Mr. Odaga contends that, in *Funzi Development Limited & others v County Council of Kwale* [2014] eKLR, the Court of Appeal stated as follows:

“...a registered proprietor 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 gives its seal of approval to an illegal or irregularly obtained title.”
39. In his view, Mr. Odaga states that the starting point must, therefore, be an evaluation as to whether there was procedural and substantive compliance with the applicable law in the alleged allocation of the disputed land to private ownership in 1988 or otherwise. This process was set out in the case of *Nelson Kazungu Chai & 9 others v Pwani University* [2014] eKLR, which was cited with approval



by the Supreme Court in *Dina Management Limited v County Government of Mombasa & 5 others* [2023] KESC 30 (KLR):

“...It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister for lands before any un-alienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved PDP is then issued to the allottees.

131. It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a certificate of lease. This procedural requirement was confirmed by the surveyor, PW3. The process was also reinstated in the case of *African Line Transport Co. Ltd vs. The Hon. Attorney General, Mombasa HCCC No. 276 of 2013* where Njagi J. held as follows: “Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the department of survey, who undertake the surveying. Once the surveying is complete, it is then referred to the Director of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot.132. A part development plan (PDP) can only be prepared in respect to Government land that has not been alienated or surveyed...”

40. I agree with Mr. Oluga that the sum total of this petition is the regularity, and the legality of the title held by the 4th and 5th respondents is contested. I will also agree with Mr. Odaga and all counsels representing the respondents on the procedure of allocating public land as elaborately enunciated by the authorities cited. Whether a constitutional petition was the most appropriate way to commence the current suit and not plaint will depend on how the other issues are resolved.
41. On the issue of limitation of actions, Mr. Oluga submits that the petition is statute-barred as it challenges an initial allocation of the suit property made in 1988, over 35 years ago. Under the *Limitation of Actions Act*, the time limit to challenge the allocation of land and title and ownership of suit property is 12 years.
42. I did not see submissions from learned counsel for the respondents on this point. Suffice it to say that the crafted petition has two facets, as highlighted by Mr. Oluga for the petitioner: the implications of traditional fishing rights on the rights of traditional fishers to ownership, use, and access to the Amu landing site. Second, the revocation of the respondent's purported title to the Amu landing site, its restoration, and reversion to the fishing community under the stewardship of the petitioner.
43. All the parties admit that the title documents for the suit property and the rights over the same inhere in the 4th and 5th respondents for now. The petitioners plead the historical use of the Amu landing site. Evidence was led to show how historically this was a landing site and that the title to private individuals is irregular and should be declared null and void.
44. At the core, then, is whether this petition can be used as a basis to cancel a title, which has roots 35 years ago. Whether a constitutional claim of violation of property rights under Article 40 of the *Constitution* is subject to limitation under Article 24 thereof and Section 7 of the *Limitation of Actions Act*. The Supreme Court in *Janmohammed (SC) (Suing as the Executrix of the Estate of the Late H.E. Daniel Toroitich Arap Moi) & another v District Land Registrar Uasin Gishu & 4 others* (Petition 17 (E021)



of 2023 & 24 (E027) of 2022 (Consolidated)) [2024] KESC 39 (KLR) (2 August 2024) (Judgment), had this to say on limitation of action when it comes to constitutional violations:

“In view of our decision in *Monica Wangu* [supra], we do reiterate that as a general principle, petitions founded on claims of violation of fundamental rights and freedoms are not subject to limitation of actions. However, having so affirmed, it is to be noted that this principle is not absolute. It is to be applied by a court of law on a case by case basis taking into account factors such as the nature of the right, the time taken to ventilate the alleged violation, and whether the claimant may be riding on a mischief.

94. Applying the foregoing principle to the appeal before us, we take note of the following facts on record. Firstly, the original cause of action that culminated in the appeal before us is founded on a claim to a right or title to land. This being the case, Section 7 of the *Limitation of Actions Act* is applicable to the suit unless ousted by the principle in *Monica Wangu* as contended by the 2nd respondents herein. Secondly, it is undisputed that the property L.R. 10492 was purchased in 1965 by the five proprietors, namely, Nathaniel Kiptalam arap Lagat, Thomas Kipkosgei arap Yator, Noah Kipngeny arap Chelugui, Cherwon arap Maritim and William Kimngeny arap Leting. Thereafter, the five proprietors resolved to subdivide it, which efforts are documented in the applications to the Uasin Gishu Land Control Board in 1976. On 21st September 1983, Eldoret Municipality/Block 15/10, which was carved from L.R 10492, was closed on subdivision and Noah Chelugui, Stanley Metto and President Moi issued with and registered as proprietors of leases of the resultant parcel nos. 237, 238 and 239 respectively.
95. It can therefore be concluded that the cause of action arose on 21st September 1983, when Eldoret Municipality/Block 15/10 was closed on subdivision and President Moi registered as the proprietor of the suit property. From the record, there is no proof that the 2nd respondent or his estate pursued any form of redress for the enforcement of the claim of deprivation of his right to the suit property. It was not until 2014 when the 2nd respondent sent a demand letter dated 3rd April 2014, addressed to both President Moi and Stanley Metto seeking restitution of both parcel nos. 238 and 239. Thereafter, they filed suit before the ELC on 10th June 2014 against the appellant to the exclusion of Stanley Metto, over 30 years from the date on which the cause of action arose.....
100. Turning to the pronouncement by the Court of Appeal, in determining the question as to whether the claim was time barred under the *Limitation of Actions Act*, the court held that unless expressly stated in the *Constitution*, the limitation period under the said Act does not apply to the violation of rights and freedoms guaranteed in the *Constitution*. It is therefore clear to us that the appellate court did not consider the fact of delay as being relevant in determining whether the limitation period was applicable or not. However, in so doing, the court made no reference to Article 24 of the *Constitution*, which provides for the circumstances under which a right or fundamental freedom may be limited. In this regard, the *Constitution* provides that a right or fundamental freedom, unless it is non-derogable, can be limited only by law,



and to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity and freedom.

101. We think with all due respect, that it was a fundamental omission by the appellate court, not to consider the provisions of Article 24 of the *Constitution* in determining whether Section 7 of the *Limitation of Actions Act* was applicable to the original proceedings before the ELC. At this stage of the proceedings, the fundamental right or freedom in question was not the right to property per se, under Article 40, but the right to institute court proceedings claiming that a right or fundamental freedom has been denied under Article 22 of the *Constitution*. As such, given the fact that this right was being exercised, thirty-one (31) years after the cause of action arose, and long after the promulgation of the 2010 Constitution, it was incumbent upon the Court of Appeal to interrogate such inordinate delay and on what basis it would be justifiable. The *Limitation of Actions Act* seeks to limit the time within which a right under Article 22 may be exercised. In this regard we agree with the appellants and the Attorney General that the said Act is precisely such law as is envisaged under Article 24 of the *Constitution*.

102. We are also of the firm opinion that had the appellate court addressed itself to the principles weighed against the chronology of events that we have flagged in the foregoing paragraphs, it would have arrived at a different conclusion. The argument that a constitutional petition such as this one, automatically ousts the provisions of the *Limitation of Actions Act*, is not legally tenable. There is nothing on record to show that the 2nd respondents provided any explanation for the delay beyond stating that theirs was a constitutional petition and not a claim based on statute.”

45. The suit property was converted from public to private land in 1988 - 35 years ago when the cause of action arose. It has changed hands several times from its original allottee Mohamed Salim Badamana, who sold it to Shaikh Khamis Al-Hasher in 2006. Upon the aforementioned allocation, the suit property ceased to be Government land and became private property. Later, the Administrator of the Estate of Shaikh Khamis Al-Hasher, one Faisal Khamis Ali Al-Hashar, sold it to - Mohamed Salim Mbarak, Jaffer Ahmed Mohamed, and Zahra Salim Islam, who sold it to the 4th and 5th respondents.
46. No explanation has been given for why it took the petitioners or anyone else such a long time to question such an allocation. Perhaps the answer lies with the Presidential directive that all landing sites in the coast region be regularised and a Taskforce formed to examine their status. Besides, the 6th respondent had promised the petitioners that it would restore all grabbed landing sites, including Amu, and have the same revert to the Fishers. The report by the Taskforce, which was issued in March 2019, among other recommendations, particularly on the Amu landing site, found that:

It falls within Lamu Island, the Lamu West sub-county.

The landing site seems abandoned and unoccupied.

Historically, the site was used as a boat-making and repair facility.

The landing site is approximately 0.2 Ha.

The landing site is fenced all around.



A private developer claims ownership, and the fishermen must secure permission from the private developer to store their boats on the land.

The developer claims to be having a title to the land.

An abandoned winch building previously used to pull boats from the ocean through the slipway is within the site.

The site has rails emerging from a damaged jetty into the sea and onto the landing site, indicating that boats used to be docked on the site.

On the site also are old damaged boats. Kengen's Lamu power station borders to the north, and Langoni cemetery borders to the south. Kengen's station is currently not utilized. Currently, BMU has offices at a rented house a few metres from the landing site.

47. The Taskforce recommended on the Amu landing site that: Boundaries to the landing site are to be re-established through the survey. The title held by the private developer is to be revoked. The adjacent Kengen property is to be considered for amalgamation with the landing site to create more space for landing facility developments.
48. The Taskforce concluded that: Most of the fish landing sites have partially or wholly been encroached into. However, a few are undisputed. In many cases, private ownership of fish landing site areas is claimed. Some Government agencies also claim ownership to whole or sections of some of the fish landing sites. The extent of most of the landing sites is not known. Many landing sites have Part Development Plans (PDP) but are yet to be surveyed.
49. The Taskforce, among other recommendations on all the landing sites are as follows: NLC will conduct a survey and demarcate the fish landing sites and associated riparian lands to establish the boundaries of the landing sites. Where there are disputes, KeFS, in collaboration with NLC and other relevant government agencies/departments, conducts further investigations to ascertain the following:
SUBPARA a.
The authenticity of the titles in question,
SUBPARA b.
If proper procedures were followed when registering the titles, illegal titles should be revoked where necessary, and a resurvey and demarcation should be carried out.
50. The 6th and 7th respondents who bear the most significant responsibility did not comment on to what extent that report has been implemented—I will revert to that shortly.
51. On the merits of the petition, and as to whether the suit property constitutes a landing site and whether the petitioners have proved the same, evidence was led by the petitioners that in his supporting affidavit, Abubakar Twalibu deposes that the disputed land has been used for boat repair and other related uses by various stakeholders who depend on fisheries for their livelihood. This averment is supported by the findings of the Joint Agency Team, which found as part of its report that historically, the site was used for boat making and repair facility. The averments further support its use as such in paragraph 22 of the Lamu Principal Fisheries Officer's affidavit sworn on behalf of the County Government of Lamu. This is further buttressed by the County Director of Fisheries and Blue Economy, who is categorical in his written letter dated 24th February 2023 to the petitioners under the reference "Old Lamu County Commissioner Landing Jetty Plot Block 1/1193" In the letter, the County Director of Fisheries and Blue Economy is categorical that the plot is and has been traditionally used by fishers as a landing site where they have been constructing, repairing and mending their fishing boats and nets respectively.



The public utility of the property is further supported by the averments of Ali Bin Suo Bakari, the affidavit sworn on behalf of the 4th and 5th respondents, to wit:

“The suit property was previously Government Land which was used by the Provincial Administration and more specifically the then Lamu District Commissioner (DC) as a boat making and repair site.”

52. The 4th and 5th respondents, on the other hand, avow that Ali Bin Suo Bakari, who filed a replying affidavit and stated on oath that the petition is driven by malice as follows:

“29. Abubakar Moahmed Twalibu, the current Chairman of Amu Beach Management Unit who has sworn the affidavit in support of this petition clearly does not have the benefit of history and is not conversant with the facts herein. I suspect that Abubakar Moahmed Twalibu is being used by some person(s) with ulterior motive to grab the suit property from the 4th and 5th Respondents or just to frustrate their project which is to build a hospital that will help the people of Lamu.

30. I say so because as one of the founding members of Amu Beach Management Unit, I am not aware of any meeting called and resolution passed to file this suit.”

53. The 4th and 5th Respondents further filed the replying affidavit of Mohamed Sadiki Mahadhi in which the said deponent averred as follows:

“17. Sometime in 2003, the Petitioner’s chairman, Abubakar Moahmed Twalibu came to me and informed me that he wanted to apply to the Government for the allocation of the suit property to the Amu Beach Management Unit. He wanted me to join and assist him in the process since I had a good history of the plot and had used it at some point. To convince me, Abubakar Moahmed Twalibu told me that the plot had been grabbed by undisclosed individuals and he wanted me to step in so that he could recover the plot from the grabbers and give it to Amu Beach Management Unit.

18. Since I knew that the suit property was a private one and had not been grabbed by anyone, I politely declined the overtures of Abubakar Moahmed Twalibu. I was therefore shocked when I learnt that Abubakar Moahmed Twalibu had actualized his plans by coming to court.”

54. According to the 4th and 5th respondents, the petitioner did not challenge or controvert the above assertions, which remain true. The averments show that the petition is driven by malice and an ulterior motive to remove the suit property from the 4th and 5th respondents.

55. The 4th and 5th respondents contend that the 6th Respondent, through its Principal Fisheries Officer, Joseph Athens Onyango, joined hands with the petitioner in the quest to take away land legally owned by the 4th and 5th respondents using this court process. The replying affidavit sworn by the 4th respondent on 26th September 2023 is an application dated 3rd October 2022 for change of user of the suit property from agricultural to public purpose (private level 4 hospital) by Spatial Milestone (K) Limited on behalf of the 4th and 5th respondents. The same was submitted to the Lamu County Government on 18th November 2022, as shown by the official stamp of the said replying affidavit. The County Government of Lamu granted the application for the change of user via Approval No.



CGL/DPP/2022/CUO2 dated 23rd November 2022. Earlier, in 2006, the Lamu County Council, the predecessor of the County Government of Lamu, approved building the perimeter wall on the suit property.

56. The 4th and 5th respondents conclude that if the suit property was a public land held in trust for the fishermen by the County Government of Lamu, as the petitioner and Joseph Athens Onyango want the court to believe, why did the same County Government of Lamu and its predecessor (Lamu County Council) grant approvals for the development of the suit property by the private owners? The 4th and 5th respondents believe that the 6th respondents are doing so with mala fides and intention to deprive the 4th and 5th respondents of the suit property.
57. Based on the averments by the warring parties in this petition, it is clear that it is difficult to determine whether the suit property constituted a landing site before its ownership changed to private property in 1988.
58. That brings me back to whether this petition will resolve the issues raised regarding whether the suit property constituted a landing site or private property. The petitioners filed this petition depending on the 1st, 2nd, 3rd, 6th, and 7th respondents to supply necessary background documentation of the suit property. It took the respondents a while—Mr. Odaga states the court adjourned seven times before replies were forthcoming; having reserved the matter for judgment, this Court had to allow the respondents to file further replies.
59. From what I have and as correctly submitted by Mr. Oluga, is a scenario where the suit property, which changed to private property in 1988, the process of its acquisition is being questioned 35 years later in a constitutional petition. Whereas the manner of acquisition of public land is as elaborately laid by the authorities cited, the allocation process happened 35 years ago; the same allocating authorities are questioning the 4th and 5th respondents – purchasers for value without notice given the lapse of time on how the allocation could have been done – back in time. The burden of proof on allocation rested with the 1st, 2nd, 3rd, 6th, and 7th respondents. The 4th and 5th respondents were never the initial allottees. An elaborate manner of how they acquired the land has been provided, and they could not have possibly been expected to know how the allocation was done back then. The initial allottee is not a party to this suit. That is why the authorities cited by Mr. Oluga are relevant that this Court will have difficulties in cancelling the titles held by the 4th and 5th respondent via this petition – all the materials on the history of the suit property have not been placed on the table and questioned, the trial by instalments in this petition leading to the piecemeal filing of documents did not assist the parties and this court to reach an informed decision.
60. This brings me to the Taskforce report, which, as placed above, does not exhaustively determine whether the suit property was a landing site. If it was, the several measures proposed have to be undertaken, including revoking the title held by the 4th and 5th respondents. In the said process leading to revocation, the 4th and 5th respondents must be heard because, as I gather from what I have, had it not been for the Presidential directives, the Taskforce would not have been formed, nor could we have the current petition.
61. The Taskforce recommended that the line Ministries and NLC take the lead in recovering the landing sites at the Coast, including the Amu landing site. In this matter, it was expected that the State Department for Fisheries Aquaculture and Blue Economy should have taken the lead in implementing the report in corroboration with the 6th and 7th respondents who did not tender evidence of how far the implementation of that report is. This petition cannot be the most adequate and efficacious forum to achieve that, given the controversy persists regarding the allocation of the suit property from public to private land in 1988 and the several changes of ownership since then.



62. It brings me further to whether the 7th Respondent, the NLC, is mandated to implement that report. I attempted to answer that in *Ali Hero Buya & 200 others (Suing on Behalf of Ndera Community, Tana River County, and Themselves) v National Land Commission & 5 others; County Government of Tana River (Interested Party)* [2024] KEELC 13497 (KLR):

“The National Land Commission's (NLC) authority to address claims related to historical land injustices concluded on May 1st, 2022. According to the NLC Act of 2012, the commission was required to propose legislation for investigating and resolving claims within two years of its establishment. The five-year timeframe for the commission to handle issues related to public land concluded on May 1st, 2017. The National Land Commission (Amendment) Bill, 2022, also known as the Owen Baya “Bill,” aims to modify Sections 14 and 15 of the *National Land Commission Act*. Section 14 of the Act provided the Commission the responsibility to examine grants or transfers of public land to determine their validity or legality within five years from the Act's commencement. It also permitted the Commission to request Parliament to extend these five years. Section 15(3) of the Act outlined the conditions for the Commission to accept a claim of historical injustice, one of which requires that the claim be submitted within five years from the Act's commencement date. The Commission's ability to address historical land injustices was restricted to a decade from the Act's effective date.

75. The Bill aims to eliminate these time restrictions. It is crucial to highlight that although the Act became effective in 2012, the National Land Commission (Review of Grants and Dispositions of Public Land) Regulations were published in May 2017. Furthermore, the National Land Commission (Investigation of Historical Land Injustices) Regulations were implemented in October 2017 after the deadline for claim submissions expired. The Commission was tasked with an investigative and resolution role concerning the legitimacy and legality of titles, which was anticipated to facilitate the resolution of matters addressed in the Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (the “Ndungu Report”) and any other relevant report. (underlined for emphasis in this matter).

76. Sources from the NLC indicate that by the end of 2020, the Commission had received 15,513 complaints, investigated 5,773, and officially determined and published 4,088. The Commission collected 693 claims regarding historical land injustices and resolved 126. Given that the Commission no longer has the authority to handle these claims, there will be no means of redress for the unresolved claims that remain to be investigated and processed – I will revert to this issue in my conclusion.”

63. If I understand correctly, the Taskforce's assignment, under the guidance of the NLC, was to examine grants or transfers of public land to determine their validity or legality. This mandate ended in 2017, and the Taskforce Report was published in 2019, two years after the NLC's mandate ended. The further implementation of that report will hit a whirlwind if the ‘Owen Baya Bill’ is not passed in parliament.

64. Before I conclude, Mr. Oluga raised a further issue that the NLC cannot revoke the title held by the 4th and 5th respondents—private individuals—of the suit property and reallocate it to the petitioners—another private entity. I agree with him that perhaps what would have happened if the suit property had been found to have been irregularly acquired is that the land should revert to the line ministry,



the Fisheries Department. In this petition, the Department took a back seat. No instrument that designated the suit property as a landing site was produced, whether a Gazette Notice et al. Abubakraa Twalibu and Joseph Athens Onyango did not substantiate on this. Had the same been designated as a fish landing site, the County Government of Lamu and/or the National Land Commission would have the instrument of such designation, which they would have tabled in court. Further, the County Government of Lamu and its predecessor, the County Council of Lamu, would not have granted development approvals concerning the suit property. Besides, the report by the Agency Team would have expressly stated that the Amu Beach landing site is situated on Lamu/Block I/1193.

65. Based on the foregoing, the current petition will not succeed on the following fronts: it offends Section 7 of the *Limitation of Actions Act* as it purports to bring a claim of recovery of land that accrued 35 years ago. The circumstances of this case do not show why it took that long to originate the petition, as the petitioners have given no explanation. The evidence adduced does not prove that the suit property is a landing site since the same is subject to further investigations by the 7th respondent and lead agencies, which will go hand in hand with the 4th and 5th respondents' claim that they are innocent purchasers for value without notice – they cannot be called upon to shed light on the conversion of the same to private property 35 years ago. I need not delve further.

66. Consequently, the current petition is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 29TH DAY OF JANUARY 2025.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Odaga, for the Petitioners

Mr. Munga for the 1st, 2nd, 3rd, 8th Respondents

Mr. Kilonzo, for the 4th and 5th Respondents

Mr. Kiilu for the 7th Respondents and H/B for Ms. Swaleh for the 6th Respondents

Happy: Court Assistant

