



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CONSTITUTIONAL PETITION NO. 16 OF 2017

1. ALI ARUMI OBO

2. MUHSIN MOHAMED

3. JELANI A. OMAR

4. MOHAMED D. RAJAB & OTHERS.....PETITIONERS

VERSUS

1. THE NATIONAL LAND COMMISSION

2. MINISTRY OF LANDS HOUSING & URBAN DEVELOPMENT

3. LAPSSET CORRIDOR DEVELOPMENT AUTHORITY

4. MINISTRY OF TRANSPORT & INFRASTRUCTURE

5. THE COUNTY GOVERNMENT OF LAMU

6. THE ATTORNEY GENERAL.....RESPONDENTS

JUDGMENT

BACKGROUND

1. By this Petition dated and filed herein on 7th August 2017, the Petitioners pray for the following: -

a) A declaration that the omission by the Respondents to survey, demarcate and issue the Petitioners with Title Deeds to their ancestral land despite repeated assurances and recommendations by the Respondents is against the just and legitimate expectation of the Petitioners and amounts to a denial of the Petitioners' right to property, individually or in association with members of Kililana Farmers Organization as enshrined in Articles 40 and 60 of the Constitution of Kenya;

b) A declaration that the issuance of Title Deeds to the 3rd Respondent for the 1.3 km² parcel of land excised from the Petitioners' ancestral land and creation of freehold titles within the suit property to other people other than the Petitioners and members of Kililana Farmers Organization and issuance of Title Deeds to residents of Hindi/Magogoni and Siyu in Lamu County without similar treatment being accorded to the Petitioners amounts to discrimination of the Petitioners and members of Kililana Farmers Organization and is an infringement of the Petitioners rights not to be discriminated upon and is also a violation to the Petitioners' right to fair administrative of action as enshrined under Articles 10, 27 and 47 of the Constitution of Kenya;

c) A declaration that the intended annexation of the Petitioners ancestral land by the Respondents to the 1.3km² parcel of land already allocated to the 3rd Respondent without first surveying, and demarcating the Petitioners' remaining ancestral land and issuing them with title documents and without just and prompt compensation will amount to arbitrarily depriving the Petitioners of their land and is a threat to the Petitioners' right to property, individually or in association with the others as enshrined in Article 40 of the Constitution of Kenya;

d) An order of mandamus compelling the Respondents to survey and demarcate the land owned and occupied by the Petitioners and members of Kililana Farmers Organization, the suit property herein and the allocation and registration of each individual member and issuance of Title Deeds for their respective parcels of land and also compelling the Respondents to survey and demarcate the 1.3km² parcel of land already acquired and allocated to the 3rd Respondent so as to clearly delineate and separate it from that of the Petitioners and members of Kililana Farmers Organization;

e) An order that the said survey and demarcation be undertaken by the Respondents in conjunction with the Petitioners and Kililana Farmers Organization and that there be no annexation of the Petitioners land without just and prompt compensation and only after the survey and demarcation is carried out;

f) Costs of this Petition; and

g) Any other relief that this Honourable Court may deem just to grant so as to meet the ends of justice and the protection of the Petitioners' Constitutional rights.

2. The prayers arise from the Petitioners' contention that at all times material they are the beneficial owners entitled to possession of identifiable individual parcels of land which they have owned and occupied individually within the suit property as their ancestral land from time immemorial. It is their case that prior to the commencement of the LAPSET Project, the Respondents herein acquired 1.3km² parcel of land then comprised within the Petitioners' ancestral land and duly compensated the individual owners thereof albeit after protracted litigation.

3. The Petitioners aver through the Supporting Affidavit of the 4th Respondent Mohamed Rajab that before the acquisition of the said 1.3km² parcel of land, the Petitioners had applied to the Respondents for their said community land to be surveyed so that each parcel of land is demarcated and allocated to individual owners to facilitate the issuance of Title Documents. The Petitioners and other members of the Kililana Farmers Organization were assured by the Respondents that the suit property shall be surveyed and that each member would have the parcels allocated and registered in their names.

4. Despite all the assurances by the 1st, 2nd, 3rd and 4th Respondents and by the 5th Respondents, the suit property has not been surveyed or demarcated in order to pave way for their registration and issuance of title deeds. The Petitioners have now learnt that some freehold titles have been created within the suit property by the 1st Respondent and that the 2nd Respondent has since registered and issued Title Deeds to people who are not members of the Kililana Farmers Organization and who do not reside therein and hence the prayers made herein.

5. The Petition is opposed. In a Replying Affidavit sworn by its Acting Director Legal Affairs and Enforcement Brian Ikol, the National Land Commission (the 1st Respondent) avers that it is an Independent Commission established under Article 67(1) of the Constitution and that its fundamental functions include the management of public land on behalf of the National and County Governments.

6. The 1st Respondent asserts that all that area of land situate within Kililani, Lamu County as claimed by the Petitioners is public land as defined under Article 62 (1) (a) of the Constitution. The land is therefore neither community nor ancestral land as stated by the Petitioners. The 1st Respondent further avers that even if the suit property were community land as stated, the Petitioners do not have the locus to commence the proceedings as they are not a registered community as set out under Section 7 of the Community Land Act.

7. The 1st Respondent avers that despite the area being public land, it was agreed after extensive consultations that the occupants if the area in question, where the Lamu Port Project is being undertaken, would be compensated for any dislodgment that would be carried out by the Government to pave way for the Project. A majority of the affected persons have since been compensated save for a small number who have pending disputes.

8. The 1st Respondent further avers that owing to the nature, magnitude and costs involved in the construction of the Project, it was deemed necessary to secure a title document for which reason it was agreed that title for the project would issue in the name of the LAPSET Corridor Development Authority (the 3rd Respondent herein).

9. The 1st Respondent denies that it has at any particular time made any representations or assurances to the Petitioners or members of Kililana Farmers Organization to the effect that the suit property would be surveyed and that each member would be issued with title deeds. The 1st Respondent avers that under Section 12 of the Land Act, it can only commence the process of allocation of public land upon a request from the National or County Government. It has not received any such request.

10. The LAPSET Corridor Development Authority (the 3rd Respondent) is equally opposed to the Petition. In a Replying Affidavit sworn and filed herein on 28th November 2018 through its Director General Silvester Kasuku, the 3rd Respondent states that it is a State Corporation established through the LAPSET Corridor Development Authority Order, 2014 with the principal mandate to plan, coordinate, sequence and provide effective leadership in the implementation of the LAPSET Corridor programme

11. The 3rd Respondent avers that there is currently under the programme an ongoing construction of the first three Lamu Port berths. To facilitate the Project, the Ministry of Lands (the 2nd Respondent) was required to reserve an initial 28, 139 Ha of land for purposes of the Lamu Port and its ancillary activities. Prior to the reservation of the land, a consultant was engaged to undertake the Environment and Social Impact Assessment (EISA) study in order to identify the Project Affected Persons within the concerned area.

12. The 3rd Respondent further avers that all persons who had been identified in the EISA study as Project Affected Persons whose land fell within the area earmarked for the project were identified for compensation purposes. All those persons have since been compensated through

a consultative forum with all relevant stakeholders including the Petitioners herein.

13. The 3rd Respondent asserts that all the land that had been earmarked for use of the LAPSET Project was for the construction of the berths and ancillary project components which included access roads, rails, administrative blocks, terminals, boreholes and storage tanks. The 3rd Respondent is not aware of any agreement between itself and the Petitioners in regard to the remaining land.

The Petitioners' Case

14. In support of their case, the Petitioners called one witness who testified in support of their case at the trial.

15. PW1- Mohamed Rajab is the 4th Petitioner herein and the deponent of both the Affidavit in support of the Petition filed on 7th August 2017 and a Supplementary one filed on 1st July 2019. Relying on the two affidavits as filed, PW1 told the Court that he is a member of Kililana Farmers Organization and that they had filed the Petition on behalf of and on the authority of all their members whom he told the Court are about 500 in number.

16. PW1 testified that the land in dispute is about 5000 acres in size and that it is situated in Mokowe, Lamu. He told the Court that the LAPSET Project took about 390 acres and that they now also want to take the portion the Petitioners are claiming in this Petition. PW1 told the Court the Petitioners want the land to be surveyed and that the individuals be given their parcels of land with the title deeds

17. PW1 further told the Court that the County Government of Lamu had passed a resolution to have their portions of land surveyed. No survey has however taken place to-date. While they had initially been told that the Government required 1.3km² of the land for the LAPSET Project, they have since learnt in Court that the Project was given a Lease of 28,134 acres.

18. On cross-examination by Ms Lutta, Learned State Counsel representing the 2nd, 3rd, 4th and 6th Respondents, PW1 insisted that they had been given a promise that they would be issued with titles for the land by one Cyrus Njiru who was a Government Official, the President of the Republic of Kenya and the then Prime Minister among other Government officials.

19. PW1 told the Court that the 3rd Defendant had taken their land and that despite their complaint to the 1st and 5th Defendants in the year 2017, no action had been taken. While the County Government took their plea into consideration and even passed a Resolution on 25th January 2017, nothing much had been done. PW1 told the Court he was aware the Government compensated some people for their land but his name was not on their list and he was therefore not compensated.

20. PW1 further testified that the disputed parcel of land was their community land. While conceding he was not aware of the process of subdividing community land, he told the Court they had an interest in the 28,500 acres taken by the LAPSET Project. He told the Court that while they did not have any documentation showing they were residing on the land, the County Government was aware they occupied the land.

The Defence case

21. The six (6) Defendants equally called a single witness who testified in support of their case at the trial.

22. DW1 – Silvester Kasuku is the Director General of the 3rd Respondent and the deponent of the 3rd Defendant's Replying Affidavit filed herein on 28th November 2018. Relying on the said Affidavit, DW1 told the Court that the Government had issued a title deed in the name of the 3rd Defendant on 1st January 2016- for a parcel of land measuring 28,139 Ha.

23. DW1 further told the Court that compensation for those affected had been undertaken and that any further claim that the Petitioners have ought to be pursued with the 1st Defendant Commission. He further told the Court the 3rd Defendant had only surveyed the land that was to be covered by the Project and did not take a survey of any other parcels of land.

24. On cross-examination, DW1 conceded that the Lease for their parcels of land LR No. 29636 was issued by the 2nd Defendant and that part of the area covered therein is actually inside the Indian Ocean Waters. He further conceded that the 3rd Respondent may be interested in the area outside the lease depending on a Master Plan that they had developed for the area. If that were to happen, the 1st Defendant would survey the area and identify the land needed.

Analysis and Determination

25. I have given full consideration to the Petition, the responses thereto by the 1st and 3rd Respondents as well as the oral testimonies and the evidence adduced by the two witnesses who testified at the trial herein following directions that the deponents of the Affidavit be cross-examined. I have equally taken into consideration the rival submissions and authorities placed before me by the Learned Counsels acting for the parties herein.

26. Ali Arumi Obo, Muhsin Mohamed, Jalan A. Omar and Mohamed Rajab listed herein as the 1st to 4th Petitioners are respectively the Chairman, Secretary, Treasurer and Member respectively of a Community Based Organization (CBO) registered under the Ministry of Gender, Children & Social Development going by the name Kililana Farmers Organization.

27. The four Petitioners told the Court that they had presented this Petition on their own behalf and on behalf of the 500 members of their

organization which comprises of farmers and other residents of Kililana Village situated in Mokowe Location of Lamu County. A schedule of the listed members of the organization was filed together with the Petition.

28. The Petition is brought against various departments of the National Government as well as the County Government of Lamu which is named herein as the 5th Respondent. The National Land Commission (the 1st Respondent) is an independent Commission established under Article 67 of the Constitution with the critical mandate of inter alia managing public land on behalf of both the National and County Governments. Its mandate also extends to monitoring the registration of all rights and interests in land as well as to initiate investigations into present or historical land injustices and to recommend appropriate redresses thereto.

29. The 2nd and 4th Respondents are respectively Ministries responsible for Lands, Housing and Urban Development and Infrastructure development within the National Government. The 3rd Respondent –the LAPSSET Corridor Development Authority- is the body mandated to plan, coordinate and manage the implementation of the Lamu Port South Sudan Ethiopia Transport (LAPSSET) Corridor Project in collaboration with the other implementing Ministries in the National Government while the Honourable the Attorney General (the 6th Respondent) is sued in its capacity as the Principal Legal Advisor to the Government.

30. The Petition is in respect of an apparently unregistered parcel of land situated at the said Kililana Village in Mokowe and said to be measuring some 5000 acres. The Petitioners' case is that the suit property is their ancestral land and that they have owned and occupied the same since time immemorial. They told the Court that during their occupation of the suitland, they have used it to plant various crops and to rear livestock. They have also built their residential houses, nursery schools and mosques on the land.

31. It was the Petitioners' case that prior to the commencement of the LAPSSET Corridor Project within Lamu County, the Respondents herein acquired 1.3km² of their said ancestral land and proceeded to duly compensate the individual owners thereof in recognition of the fact that the said individuals owned their various pieces of land notwithstanding the fact that those individuals had no title documents for the concerned parcels of land.

32. The Petitioners told the Court that before the acquisition of the said 1.3 km² parcel of land for the development of the Lamu Port, they had applied to the Respondents to have their land surveyed, demarcated and allocated so as to facilitate the issuance of Title documents to each one of them. They told the Court that following their application, the 1st to 4th Respondents had answered them that the suit property shall be surveyed and that each one of them would subsequently be issued with title documents.

33. The Petitioners further told the court that following the assurances, they subsequently petitioned the 5th Respondent whose County Assembly then passed a resolution that the Petitioners' ancestral land be surveyed and that they be issued with title deeds therefor.

34. Despite all these assurances and recommendations, the Petitioners are aggrieved that their ancestral land was not surveyed and no title documents have been issued to them. Instead, the Respondents proceeded to issue title deeds to the 3rd Respondent and to other inhabitants of Lamu County residents in the Hindi/Magogoni and Siyu Settlement Schemes which are situated near the suit property.

35. Through their Learned Counsel Mr. Shujaa, the Petitioners submit that the issuance of the lease to the 3rd Respondent and to those other residents of Hindi/Magogoni and Siyu Settlement Schemes without according the Petitioners similar treatment amounts to discrimination of the Petitioners contrary to Article 27 of the Constitution which provides that every person is equal before the law and has the right to equal protection and benefit of the law and which Article prohibits the State from discriminating directly or indirectly against any person on any ground.

36. The Petitioners further submit that under Articles 40 and 60 of the Constitution, they have a right to acquire and own land of any description including the suit property herein like any other person without discrimination and that the tenure and security of their land can only be safeguarded when each of the Petitioners' land is surveyed, demarcated and registered in their names and title deeds issued to them and that the continued omission by the Respondents to survey and demarcate the Petitioners ancestral land is a denial of the Petitioners' right to acquire and own land as stipulated and further that it amounts to a failure of the Respondents to secure the Petitioners' right to land in violation of their mandates as provided in Articles 10 (2) (b), 20, 21 and 27 of the Constitution.

37. The Petitioners further told the Court that they have established proprietary rights or interests in the suitland and that there was a clear and unambiguous representation to them that they will be allocated the suit property. It is therefore their case that by the said representations, the Petitioners had a legitimate expectation that the Respondents who had authority to allocate the suit property would do so and the actions by the Respondents have violated the legal principle of legitimate expectation by renegeing on their promise to demarcate and allocate the land without any due process and or consultation with themselves.

38. The Respondents however denied making any such promises, assurances, and/or recommendations. In particular, the 2nd, 3rd, 4th and 6th Respondents whose representative testified herein as DW1 told the Court that the National Government had initiated a Project running through parts of Lamu County and known as the Lamu Port South Sudan Ethiopia Transport (LAPSSET) Corridor Project which called for the construction of several shipping berths at the Lamu Port.

39. The Respondents told the Court that before the commencement of the construction of the first three berths at the Lamu Port, the Government had carried out a thorough feasibility study to establish the viability of the Project, the location conducive therefor and its impact. It was further the Respondents case that subsequently, the 2nd Respondent was required to reserve an initial 28,139 Ha of land for purposes of the Lamu Port and its ancillary activities which would include the construction of access roads, rails, administrative blocks, terminals, boreholes as well as storage tanks.

40. The Respondents further told the Court that prior to reservation of the land the Government engaged a consultant who undertook an Environment and Social Impact Assessment (EISA) study in consultation with the people in the affected region as well as their leaders.

Upon completion of the exercise all the persons whose parcels of land fell within the land earmarked for the Project and who had been identified in the EISA study as the Project Affected Persons were compensated and the 3rd Respondent was issued with a Certificate of Lease on 1st February 2016 for the 28,139 Ha so acquired.

41. In regard to the doctrine of legitimate expectation which is the cornerstone of the Petition herein, this Court need not re-invent the wheel as the same has been the subject of various Judicial pronouncements. In *Kalpana H. Rawal –vs- Judicial Service Commission & 4 Others (2015) eKLR*, the five Judge bench exhaustively discussed the doctrine in a decision that was subsequently affirmed by the Court of Appeal. That bench tried to trace the origins of the doctrine and rightfully observed as follows: -

“207. The doctrine of legitimate expectation was developed by English Courts to hold rulers to their promises. In the 4th Edition, 2001 Reissue of Halsbury’s Laws of England, the authors at page 212, paragraph 92 explain the concept behind the development of the principle as follows: -

“A person may have legitimate expectation of being treated in a certain way by an administrative authority even though there is no other legal basis upon which he could claim such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past practice. In all instances the expectation arises by reason of the conduct of the decision maker and is protected by the Courts on the basis that principles of fairness, predictability and certainty should not be disregarded.

The existence of a legitimate expectation may have a number of different consequences; it may give standing to seek permission to apply for Judicial review, it may mean that the authority ought not to act so as to defeat the consequence of the expectation without some overriding reason of public policy to justify its doing so, or it may mean that, if the authority proposes to act contrary to the legitimate expectation, it must afford the person either an opportunity to make representations on the matter, or the benefit of some other requirement of procedural fairness. A legitimate expectation may cease to exist either because its significance has come to a natural end or because of action on the part of the decision maker.”

42. In *Communication Commission of Kenya & 5 Others –vs- Royal Media Services Ltd & 5 Others (2014) eKLR*, the Supreme Court explained the principle as follows: -

“(264). In proceedings for Judicial review, legitimate expectation applies the principles of fairness and reasonableness, to the situation in which a person has an expectation, or interest in a public body retaining a long-standing practice, or keeping a promise.

(265). An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. A party that seeks to rely on the doctrine of legitimate expectation has to show that it has locus standi to make a claim on the basis of legitimate expectation.”

43. The Supreme Court went on in the same case to lay down the principles governing the successful invocation of the doctrine as follows: -

“(269). The emerging principles may be succinctly set out as follows: -

- a. There must be an express, clear and unambiguous promise given by a public authority;**
- b. The expectation itself must be reasonable;**
- c. The representation must be one which was competent and lawful for the decision-maker to make; and**
- d. There must be a legitimate expectation against clear provisions of the law or the Constitution.**

44. In the matter before me, the Petitioners assert that the suitland is their ancestral and/or community land and that they have owned and occupied the same from time immemorial. It is their case that before the Respondents acquired part of the land for the development of the LAPSET Project, they had applied to the Respondents for their land to be surveyed, demarcated and allocated to each and everyone of them in order to facilitate their being issued with title deeds. It is further their case that the Respondents assured and promised them verbally and in writing that the property would be surveyed, demarcated and allocated to each one of them and that they would be issued with title deeds for their respective parcels of land.

45. In support of their case, the Petitioners have annexed some correspondence between them and a number of agencies. In a letter dated 26th November 2008 and copied to various agencies, they addressed the District Commissioner, Lamu through their Chairman as follows: -

“RE: PLEAS OF KILILANA RESIDENTS

On behalf of Kililana farmers, I wish to present the attached mentioned subject for your immediate and necessary action. We hope you will treat this matter with high consideration.

Sir, attached please find background information about this land and our plea to the Government of Kenya to protect this land which we believe is under threat of individuals interested in the land and consider allocating it to the families already living and practicing agriculture as a strategy living towards ensuring food security in our district.”

46. The said letter had attached to it a 5-page document dated the same day and titled "Plea for Kililana Residents of Mokowe Sub-location, Mokowe Location, Hindi Division in Lamu District." At page 1 of the document on the Section marked "Introduction", the Petitioners express their concerns as follows:

"Introduction

Following the recent land related incidences on Manda Island, we the residents and farmers of Kililana wish to present to your noble office our fears on the tenure of our agricultural plots among others problems which are responsible for the regressive development of (the) area and subsequently of our livelihoods.

To be honest our fears have been aggravated by the recent reports on the possibility of title deeds having been issued to speculators who are hoping to benefit illicitly from the development of the planned Lamu Port.

For centuries, the residents of the settlements located on the islands within the Lamu archipelago have held farms on the Lamu District mainland; today the same farms are still in existence and under cultivation. Kililana is one such area where residents of Lamu town have held agricultural activities for centuries, other farms in the area belonged to the residents of the Kililana an 8th century Swahili Settlement before its abandonment. (Existence of this settlement is evidenced by the ruins of Abderehaman Tuwili and a number of traditional wells).

Should the future of this farms which are our only source of livelihood be threatened by land grabbers so many families shall be affected both economically and socially."

47. The Petitioners have also annexed another letter addressed to the Lamu District Officer dated 30th August 2010 and an undated one addressed to the Lamu District Land Adjudication Officer in the same lines. On 4th March 2015, they wrote a 2-page letter to the 1st Respondent Commission's then Chair Mohamed Swazuri stating as follows in the relevant part: -

"Re: Land

Ownership Documentation for the Remaining on Site Kililana Farmers-Lamu County

We the above named organization and on behalf of all the entire farmers of Kililana do hereby express our heartfelt regards, for the ability and the frequency of the logical decision and manner the Government took in handling the compensating issue of the farmers, whose land was lost in LAPSET Project even without disregarding of land ownership documents, the Government through your office carried the land compensation diligently.

The lost land at the site where the headquarters, staff houses shall or are being built, and where other Port amenities shall stand, have had their payment of compensation settled. It(is) however noted that the logical action of compensation taken by the Government, has quickly changed the mind of briefcase investors who are underway to grab land from poor unsuspecting rightful landowners. The remaining Kililana farmers are being engulfed by fear that their parcels of land might be taken by this (sic) con investors and have therefore decided to ask through your office for the issuance of land Title Deeds for documentation ownership, as the long custom tenure settlement system has been phased out.

We therefore Sir, do kindly beg, request your good office and bearing the land ownership rights at hand to CONSIDER US the right of documentation ownership, of our parcels of lands, by having the remaining land demarcated, surveyed by professional surveyors from National and Country Governments engaged in this exercise, conducted together with community leaders and owners (farmers) on the ground to determine the rightful ownership and who owns which part of the land. This shall avoid any further conflict that may be unforeseen.

....."

48. That letter was followed by another one dated 3rd February 2016 addressed to the 5th Respondent County Government, as well as another one dated 4th February 2016 addressed to the Principal Secretary in the 2nd Respondent Ministry.

49. Despite this sustained pressure, there was very little evidence of any documented response from the Respondents herein. All that is annexed by way of response as Exhibit 5 to the Petition is a Letter dated 25th October 2012 from the Lamu District Land Officer addressed to the then office of the Commissioner of Lands stating as follows: -

"RE: LAND

OWNERSHIP DOCUMENTS FOR KILILANA FARMERS- LAMU COUNTY

The subject above refers.

I have received complaints by farmers of Kililana Lamu County who are requesting to be issued with ownership documents for their ancestral land.

The above residents have occupied Kililana area for many years without ownership documents from the Government.

The farmers have already been affected by the Lamu Port Project and a number of them have been displaced by the ongoing Port construction. Further no compensation has been done to date. A list of those who have been displaced was forwarded by the DLMC to Nairobi for action.

The DLMC also provided a way forward on how the current situation can be handled. This was to be done by: -

- i. Immediately settling those displaced by the ongoing construction on the land reserved for extension of Hindi Magononi Settlement Scheme.***
- ii. Regularizing the existing settlements of Kililana, Mashindwani and Mokowe through the Swahili Settlement Scheme.***
- iii. Through fast tracking the commencement and completion of the proposed extension of Hindi Magogoni Settlement Scheme to cater for the needs of the landless people within the Country.***

In this regard, I kindly request you to:

- i. Ensure that no new leases or grants are processed within the said area since this will displace the farmers who are currently on the ground.***
- ii. Liase with the other heads of department in Nairobi with a view of fast tracking the above issues as a matter of priority.”***

50. While the Petitioners told the Court that they had been assured by the 2nd Respondents Permanent Secretary, the then Prime Minister and the President of the Republic of Kenya that they would be issued with title deeds after survey, demarcation and allocation of the land, nothing was exhibited on the meetings and what was stated by the said individuals.

51. As it were, the Petitioners based their claim herein on the contention that the same was either their ancestral or community land. They did not however place any evidence before this Court as to their ownership thereof either individually by way of their ancestry or as a registered community with the locus to institute the Petition as required under Section 7 of the Community Land Act. From the material placed before me, it was evident that the land claimed by the Petitioners comprised of unalienated public land as defined under Article 62 (1) (a) of the Constitution.

52. While it was indeed true from the Petitioners exhibits that the 5th Respondent County Government had by a resolution of its County Assembly on 24th January 2017 resolved to have the suitland surveyed and demarcated for purposes of allocation, there was no evidence, again, that the County Government of Lamu had progressed that resolution and approached the 1st Respondent Commission as required under Section 12 of Land Act to commence the process of allocation of the land to the Petitioners. While the said County Government was enjoined as a party in these proceedings, it neither appeared nor responded to the Petition.

53. As it were, the right to ownership of property as enshrined under Article 40 of the Constitution only extends to proprietary interests acquired through an existing legal framework. The Petitioners before me acknowledge that they have sought to be allocated the land through the 1st Respondent and that they have made a similar request which appears to have proceeded partially before the 5th Respondent. I think they should have been a little bit more patient to give the relevant bodies time to consider their Petitions. Otherwise as the Court of Appeal stated in ***Mumo Matemu –vs- Trusted Society of Human Rights, Alliance & 5 Others (2013) e KLR: -***

“A body or organ performing statutory duties has discretion when handling matters falling within its mandate. There is a margin of discretion conferred by the Constitution and the law upon those who make decisions and the test of rationality ensures that any legislation or official act is confined within the purposes set by the law...”

54. While the Petitioners told the Court that the Respondents had discriminated against them by issuing title Deeds to other residents of Hindi/Magogoni and Siyu areas, they did not provide any proof that those residents were in similar circumstances as themselves and/or that the Respondents had despite the similarity of their situations proceeded to issue those other residents with title deeds while denying the Petitioners similar rights.

55. All that was placed before me was evidence which was admitted by the Respondents that the 3rd Respondent Authority had been granted a lease of the 28,139 Ha that was acquired for the Project. It was however clear to me that the said parcel of land was lawfully acquired by the Government for lawful purposes and that the same was not available for alienation and/or allocation to other persons other than as provided by law. Indeed, while it was apparent that the Petition herein was actuated by the act on the Government to compensate certain individuals that had hitherto been the Petitioners’ neighbours, I did not think the Respondents could be compelled to acquire more land than the Government needed for its purposes at the time. It was also clear to me that the Compensation may have been made out of other factors as determined by the EISA Study on the affected persons.

56. As Mativo J., observed in ***Shamsher Kenya Ltd –vs- Director of Public Prosecutions & 2 Others (2018) eKLR 80: -***

“Section 107(1) of the Evidence Act provides that “whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Decisions on violation of Constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize the Constitution and inevitably result in ill-considered opinions. The presentation of clear evidence in support of violation of Constitutional rights, is not,

a mere technicality; rather, it is essential to a proper consideration of Constitutional issues. Decisions on violation of Constitutional rights cannot be based on the unsupported hypothesis.”

57. In the premises, I find and hold that the Petition before me is premature and without any basis. The Respondents herein have not been shown to have violated any of the Petitioners’ Constitutional rights as alleged or at all. Accordingly, I dismiss the Petition but with an order that each party bears their own costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 28TH DAY OF MAY, 2021.

J.O. OLOLA

JUDGE