



Mazera & 3 others (Suing on their own behalf and on behalf of their families and all the members and residents of the Rabai Community, living on plot Kilifi/ Kingung'una/15 situated in Ribe Location, Kingung'una Area) v Masinde & 7 others (Petition 4 of 2017) [2025] KEELC 1263 (KLR) (13 March 2025) (Judgment)

Neutral citation: [2025] KEELC 1263 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
PETITION 4 OF 2017
EK MAKORI, J
MARCH 13, 2025
IN THE MATTER OF: CHAPTER FOUR, THE BILL OF
RIGHTS,ARTICLES 19, 20, 21, 22,
23, 40 AND 159(2) OF THE
CONSTITUTION OF KENYA
AND
IN THE MATTER OF: AN ALLEGED VIOLATION OF THE
RIGHT TO OWN LAND BY THE
RABAI COMMUNITY UNDER
ARTICLE 40 OF THE
CONSTITUTION OF KENYA
AND
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IN THE MATTER OF: ARTICLE 63 OF THE
CONSTITUTION, 2010
AND
IN THE MATTER OF: THE COMMUNITY LAND ACT, NO.
27 OF 2016
AND
IN THE MATTER OF: A PETITION BY THE RESIDENTS
AND MEMBERS OF THE RABAI



**COMMUNITY FOR THE ILLEGAL
AND IMPROPER ACQUISITION OF
KILIFI/KINUNG'UNA/15 BY LEAH
MASINDE, HAMISI AMBALE BUGO
AND MUGO**

BETWEEN

MAZERA KATEMBO MAZERA 1ST PETITIONER
EMMANUEL MASUMBUKO CHIVATIS 2ND PETITIONER
GIBSON NDENGE CHAI 3RD PETITIONER
ELIUD MWANZISE CHENGO 4TH PETITIONER
**SUING ON THEIR OWN BEHALF AND ON BEHALF OF THEIR FAMILIES
AND ALL THE MEMBERS AND RESIDENTS OF THE RABAI COMMUNITY,
LIVING ON PLOT KILIFI/KINGUNG'UNA/15 SITUATED IN RIBE
LOCATION, KINGUNG'UNA AREA**

AND

LEAH MASINDE 1ST RESPONDENT
HAMISI AMBALE BUGO 2ND RESPONDENT
JOHN MUGO 3RD RESPONDENT
LAND REGISTRAR KILIFI 4TH RESPONDENT
CHIEF LAND REGISTRAR 5TH RESPONDENT
ATTORNEY GENERAL 6TH RESPONDENT
NATIONAL LAND COMMISSION 7TH RESPONDENT
COUNTY GOVERNMENT OF KILIFI 8TH RESPONDENT

JUDGMENT

1. The petitioners contend that they are residents of the Rabai Community, Ribe location, Kilifi County, suing on their own behalf and on behalf of their families and all members of the Rabai Community.
2. They aver that an unsurveyed, undemarcated, and unregistered parcel of land measuring approximately 52 acres existed initially in the Kinung'una area. - Ribe Location meant to develop public utilities, such as a Secondary School called Mbarani Secondary School, a Dispensary called Mbarani Dispensary, a Shopping Centre called Mbarani Shopping Centre, and a Police Station called Mbarani Police Station.
3. The petitioners claim that during adjudication, which was carried out in 2010, a portion measuring 52 acres was demarcated as plot No. Kilifi/Kinung'una/15 (hereinafter the suit property) for the said purpose.



4. In 2011, through their agents, they went to pick their title document from the District Land Officer. They were surprised to find that the land was registered in the name of the 1st respondent. They recently discovered that it had been transferred to one Hamisi Amale Bugo, the 2nd respondent, and another unknown person.
5. They aver that indeed during adjudication, the land was set aside for community development but not for the 1st, 2nd, 3rd respondents or any other individual
6. They further aver that they do not know of a person called Leah Masinde, the 3rd respondent
7. The petitioners contend that their right to own the suit property communally has been infringed or negated, causing them a profound sense of injustice.
8. They say the land had been identified as community land under Article 63(1) of the *Constitution* as land held and determined based on ethnicity, culture or similar community interest. They believe they are persons of an identical culture known as the Rabai Community.
9. They contend that any law that the 4th and 5th respondents used to confer ownership of the land to the 1st, 2nd, and 3rd respondents was unconstitutional, discriminatory, and illegal and in breach of Article 27 of the *Constitution*.
10. The current petition thus seeks the following reliefs:
 - a. A declaration under Article 23(3)(a) that title No. Kilifi/Kinung'una/15 is community land vested in the petitioners to benefit Kinung'una Community.
 - b. A declaration under Article 23(3)(a) that allocating the land to the respondents was discriminatory and unconstitutional.
 - c. An order of judicial review in the form of mandamus should be issued compelling the 4th and 5th respondents to issue title deeds in the petitioners' names or such other name as will protect and guarantee the community interest of Kinung'una, Ribe.
 - d. In the alternative, an order compelling the respondents to compensate the petitioners for the property's current market value.
 - e. Costs of the petition.
11. The petition was supported by the affidavit of one Gibson Ndege Chai. Replying affidavits deposed by one John Mugo Githaiga showing land title No, Kilifi/Kinung'una/377, a letter dated 3rd October 2023, the 1986 adjudication record from the Director of Land Adjudication, and an affidavit sworn by one Pamela Lisasa advocate for the 4th, 5th, and 6th respondents with an attachment showing the adjudication records and others annexures.
12. The petition was canvassed through written submissions.
13. As narrated above, the significant averments and submissions from the petitioners' side are that the land in question ought to have been adjudicated as community land meant for the Kinung'una Community. It had been promised that it would be registered in their favour and that the court should declare any process to the contrary unconstitutional, null and void.
14. The petitioners have cited various judicial authorities contending that this is community land and they are entitled to it. They cited the decision in County Government of Tana River v Mohamed Gore Bulale & 3 others [2021] KEELC 2549 (KLR) and County Government of Tana River v Dakane



- Shake Bocha & 10 others [2021] KEELC 3148 (KLR), which are relevant because they establish the principles of community land ownership.
15. Regarding noncompliance with the adjudication process, the petitioners have cited the decision in Solomon Meme Muthamia v Ntaari Kabutura & Land Adjudication Officer Meru [2001] KEHC 655 (KLR).
 16. Regarding the veracity of the titles held by the respondents, the petitioners believe that they were acquired fraudulently and should be nullified, citing the decisions in Dina Management Limited v County Government of Mombasa & 5 others [2021] KECA 503 (KLR) and Funzi Island Development Limited & 2 others v County Council of Kwale & 2 others [2014] KECA 882 (KLR).
 17. The petitioners strongly believe in the court's role and that it should not countenance the acquisition of titles through fraud or procedural and corrupt practices.
 18. The 1st, 2nd and 3rd respondents believe that the petitioners have failed to show that this is community land and that they are entitled to own it in the first place. However, the petitioners remain resolute in their pursuit of justice.
 19. The respondents opine that the petitioners failed to show that they participated in the adjudication process and laid claim on the suit property, and whether the land fell within the adjudication process they claim. The said respondents cite the following decisions to support the proposition that the petitioners ought first establish that they participated in the said process which they contend was a nullity – see Jimmy Parnyumbwe Luka & 3 others v Chairman Land Adjudication Committee Leshuta Land Adjudication Section & 6 others [2021] KEELC 637 (KLR) and that approaching the constitutional court should not have been the first port of call as held in Gabriel Mutava, Elizabeth Kwini & Mary Martha Masyuki v Managing Director Kenya Ports Authority & Kenya Ports Authority [2016] KECA 411 (KLR).
 20. The petitioners' grievances are that the land in question is community land and should have been adjudicated in their favour as Kinung'una community.
 21. Article 61(1) of the *Constitution* promulgates that:

“ All land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals.”
 22. Article 62(2) provides the classification of public land and its holding as follows:

“ Public land shall vest in and be held by a county in trust for the people resident in the county and shall be administered on their behalf by the National Land Commission, if it is classified under—

 - (a) clause (1) (a), (c), (d) or (e); and
 - (b) clause (1) (b), other than land held, used or occupied by a national State organ.
 - (3) Public land classified under clause (1) (f) to (m) shall vest in and be held by the national government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission.



- (4) Public land shall not be disposed of or otherwise used except in terms of an Act of Parliament specifying the nature and terms of that disposal or use.”

23. Article 63(2) of the *Constitution* defines Community land to include:

- (2) Community land consists of—
 - (a) land lawfully registered in the name of group representatives under the provisions of any law;
 - (b) land lawfully transferred to a specific community by any process of law;
 - (c) any other land declared to be community land by an Act of Parliament; and
 - (d) land that is—
 - (i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;
 - (ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities; or
 - (iii) lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under Article 62 (2).
- (3) Any unregistered community land shall be held in trust by county governments on behalf of the communities for which it is held.
- (4) Community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively.
- (5) Parliament shall enact legislation to give effect to this Article.

24. Parliament enacted the *Community Land Act* of 2016, which outlines an elaborate process for acquiring and registering community land.

25. Typically, the Principal title for community land is granted to communities upon registration, as outlined in Article 63 (1) of the *Constitution* and Section 4 of the *Community Land Act*. This title may take the form of customary, freehold, leasehold, or other legal entitlements. A Certificate of Title issued by the Registrar of Community Land serves as prima facie evidence of the community's status as the absolute and indefeasible owner unless the title was acquired through fraud, as stated in Section 18 of the Act. The process for obtaining freehold, customary, or leasehold titles is consistent; it begins with the registration of the applicant community, followed by their application for a formal survey and adjudication of the land, with the results being recorded as a collective title in a Community Land Register established for this purpose in each County. The Act also recognizes individuals, families, and various customary groups or newly formed groups by community members, such as cooperatives or associations, as rightful owners of specific portions of the community's land, as indicated in Section 14 of the Act.

26. The petitioners failed to demonstrate that they had organized themselves into a recognized group to acquire this land as community land. The term "community land" used in this petition is inappropriate, as no evidence was presented to substantiate the acquisition of those land rights; it remained an unproven claim by the petitioners. They should have provided proof of their attempts to have the land registered as community land in their favour.



27. The decisions then cited by the petitioners are inapplicable here because they dealt with unsurveyed and unregistered land due for adjudication.
28. Here, adjudication has already occurred, and the petitioners have not disclosed whether they participated in the process and were desirous of having the title they claim registered in their favour. The decisions then cited by the respondents become relevant, for example, in - Jimmy Parnyumbe Luka & 3 others v Chairman Land Adjudication Committee Leshuta Land Adjudication Section & 6 others [2021] KEELC 637 (KLR) - the court, for instance, questions whether petitioners participated in the adjudication process:

“I would agree with the 2nd to the 6th respondents that the petitioners have not shown that when the 7th respondent was allocated 210 acres, the act resulted in some people being displaced. In other words, the petition is full of allegations and speculations which the petitioners were duty bound to prove but did not. Besides, there is nothing to show that the allocation of the 210 acres of land to the 7th respondent was not for public good.

43. As earlier on observed in this judgement, the petitioners were not parties to the objection proceedings and the petitioners only ventured into the proceedings by way of an appeal to the Minister.
44. In my view, it is clear that the petitioners did not follow the procedure laid out by the [Land Adjudication Act](#). Whereas, the petitioners are entitled to institute these proceedings as is provided for under Article 22 of the [Constitution](#), I hold that the invocation of the court’s jurisdiction to question the procedural property or substantive merit of the Adjudication process is improper in that they ignored the laid out procedure that is provided for under the statute which in this case is the [Land Adjudication Act](#).
45. It is not lost on me that the petitioners have not disclosed to this court what became of the other petitions that they have alluded to. Although Articles 21,22,23,27(1),28,35,40,47,48 and 54 of the [Constitution](#) were cited by the petitioners, no direct particulars of the alleged contraventions thereof have been disclosed.
46. I have come to the conclusion that the petitioners resorted to an arbitrary decision to file a constitution petition when they had other avenues to have their grievances addressed. The petition herein has not been made out of necessity, merit and most importantly to the required legal threshold.
47. That said, in Gabriel Mutava & 2 others -vs- Managing Director Kenya Ports Authority & Anor (2016) eKLR the Court of Appeal held as follows: -

“In saying all these, we are not oblivious to the fact that a party is entitled to sue under the [Constitution](#) even if there is an alternative remedy, and or other mechanism for resolution of the dispute. However, it has since emerged on the authorities that constitutional litigation is a serious matter that should not be sacrificed on the altar of all manner of frivolous litigation christened constitutional when they are not and would otherwise be adequately handled in other legally constituted forums. Constitutional litigation is not a panacea for all manner of litigation, we reiterate that the first port



of call should always be suitable statutory underpinned forums for the resolution of such disputes.”

29. The *Land Adjudication Act* establishes an elaborate procedure for ascertaining and recording individuals' rights under an adjudication area. The process has an in-built mechanism of quasi-judicial processes that one must follow. Precedents from this court and the Superior Courts indicate that the manner provided in law to address grievances emanating from the adjudication process is via Judicial Review - see for example, the decision in *Amarnath (Suing on Behalf of the Estate of the Late Amarnath Gupta) v Kazungu & 2 others (Civil Appeal E033 of 2021) [2023] KECA 1280 (KLR) (27 October 2023) (Judgment)*, the Court of Appeal held:

“The prayers sought, among others, included the prayer for the setting aside of the Ministerial decision. Even though the Appellant denies that the suit was an appeal, we are convinced that it was one for all practical purposes.

20. Regarding whether the ELC had the requisite jurisdiction to entertain the suit, there is no dispute that the suit was challenging the decision of the Minister made pursuant to Section 29 of the Act. That Section, under Section 29(1) (b) provides:

“(b) and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.”

21. In addition to declaring that the decision of the Minister is final, Section 30 of the Act all together ousts the jurisdiction of the Courts, providing as follows:

“30. Staying of land suits

- (1) Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29(3) of this Act.”

22. The Act is clear that any person aggrieved by a decision made under Section 26 of the Act must follow the process under Section 29 and appeal to the Minister. Once the Minister, or the panel delegated to, makes a determination, his order is final. That means the Minister's decision cannot be appealed, whether under the Act or in Court. The option the Appellant had was to pursue the Judicial Review process provided under Article 47 of the *Constitution*, and the *Fair Administrative Action Act*, 2015, a statute enacted pursuant to Article 47 of the *Constitution*. He could not re-open the case and challenge it except through Judicial Review. The Appellant was attempting to undo the process he participated in using a process that is not provided for, and that is not allowed.



23. In *Julia Kaburia vs. Kabeera & 5 Others* [2007] eKLR, this Court commenting on Section 30 of the Act, held:

“The *Land Adjudication Act* provides an exclusive and exhaustive procedure for ascertaining and recording land rights in an adjudication section. By Section 30 (1) (2), the jurisdiction of the court is ousted once the process of land adjudication has started until the adjudication register has been made final ...In our respective view, the consent envisaged by Section 30 to institute or continue with civil proceedings is not a consent to file a suit challenging the decision of the Land Adjudication Officer himself on the merits of his decision. Rather, the consent is given to a person to file a suit or continue with a suit against persons who have a competing claim on the land under adjudication. This protection was availed to the parties herein by the appellate process which culminates with Section 29 of the Act;

- “(1) Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by-
- a. delivering to the Minister an appeal in writing specifying the grounds of appeal; and
 - b. sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.”

24. The ELC commenting on the role of the Court vis-a-vis that of the adjudicating bodies under the Act in the persuasive authority of *Tobias Achola Osindi & 13 Others vs. Cyprian Otieno Ogalo & 6 Others* [2013] eKLR by Okongo J., as follows:

“The whole process leading up to the registration of land as aforesaid is undertaken by the Adjudication Officer together with other officers appointed under the Act for that purpose. It follows from the foregoing that once an area has been declared an adjudication area under the Act, the ascertainment and determination of rights and interests in land within the area is reserved by the law for the officers and quasi-judicial bodies set up under the Act...The Act has given full power and authority to the Land Adjudication Officer



to ascertain and determine interests in land in an adjudication area prior to the registration of such interest. As I have mentioned above, the process is elaborate. It is also inclusive in that it involves the residents of the area concerned. I am fully in agreement with the submission by the advocates for the defendants that the Land Adjudication Officer cannot transfer the exercise of this power to the court. The court has no jurisdiction to ascertain and determine interests in land in an adjudication area. In my view, the role of the court is supposed to be supervisory only of the adjudication process. The court can come in to ensure that the process is being carried out in accordance with the law. The court can also interpret and determine any point or issue of law that may arise in the course of the adjudication process. The court cannot, however, usurp the functions and powers of the Land Adjudication Officer or other bodies set up under the Act to assist in the process of ascertainment of the said rights and interests in land...”

25. Having carefully considered this appeal, we find no fault with the finding and holding of the ELC Judge that it had no jurisdiction to entertain the Appellant’s suit. The process of land adjudication had effectively come to its logical conclusion and could not be re-opened otherwise than in the manner contemplated by the law. In the circumstances, the ELC properly struck out the Appellant’s suit. The Appellant did not have any separate cause of action against the 1st Respondent other than the matters which were adjudicated upon and determined by the Ministerial Appeals Committee during the appeal to the decision of the objection proceedings. That decision was final.”

30. Petitioners failed to demonstrate that they followed the procedures set under the *Community Land Act* and the *Land Adjudication Act* concerning their grievances. Their claim is bad in law as it failed to adhere to the procedures laid down in those Acts. Approaching this court as they did under the banner of a constitutional petition was abstract, and the rights they say were infringed had not crystallized.

31. The upshot is that the petition herein is dismissed with costs.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT MALINDI ON THIS 13TH DAY OF MARCH 2025.

E. K. MAKORI

JUDGE

In the Presence of:

Ms.Kibii for the Petitioners

Mr. Munga for the 4th, 5th and 6th Respondents

Mr. Kithi for the 8th Respondents

Happy: Court Assistant

In the Absence of:

Mr. Odiagga for the 1st 2nd and 3rd Respondents

