



**Chairman, Secretary and Treasurer School Management Committee of Sir Ali Bin Salim Primary School v Rabai Mining Limited; Muslim for Human Rights & 2 others (Interested Parties) (Environment & Land Petition 16 of 2021) [2025] KEELC 3544 (KLR) (30 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3544 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MALINDI**

**ENVIRONMENT & LAND PETITION 16 OF 2021**

**FM NJOROGE, J**

**APRIL 30, 2025**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 10,  
11, 22, 40, 48 AND 62 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE PROTECTION OF PUBLIC LAND UNDER  
ARTICLES 40 AND 62 OF THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**CHAIRMAN, SECRETARY AND TREASURER SCHOOL MANAGEMENT  
COMMITTEE OF SIR ALI BIN SALIM PRIMARY SCHOOL ..... PETITIONER**

**AND**

**RABAI MINING LIMITED ..... RESPONDENT**

**AND**

**MUSLIM FOR HUMAN RIGHTS ..... INTERESTED PARTY**

**NATIONAL MUSEUMS OF KENYA ..... INTERESTED PARTY**

**THE ATTORNEY GENERAL ..... INTERESTED PARTY**

**JUDGMENT**

1. By a Petition dated and filed on 17/8/2021, the Petitioner sought the following reliefs:
  - a. The honourable court be pleased to declare that the petitioner's fundamental rights and freedoms under Article 10, 11, 22, 40 and 62 of the Constitution have been violated and or infringed by the Respondent;



- b. The honourable court be pleased to find and declare that the subject parcel of land, title number 9279 Malindi was public land and was therefore unavailable for alienation and or allocation to a private individual;
  - c. The honourable court be pleased to revoke title for plot number 9279 Malindi and restore the land to Sir Ali Bin Salim Primary School and order the registration of the same in the name of the school;
  - d. Permanent injunction restraining the Respondent by itself, its employees, workers, servants and or agents from demolishing any building or constructing any building, or structure on plot number 9279 Malindi or any other development thereon or from encroaching thereon or selling or disposing of or in any other manner dealing with the said land in any manner injurious to the Petitioner and the public interest therein;
  - e. Costs and interest.
2. The petition is anchored on a seventeen (17) paragraphed supporting affidavit sworn on 17/8/2021 by Abubakar Jeylan Abubakar, said to be the elected chairman of the Petitioner School Management Committee. Briefly, the Petitioner claimed that Sir Ali Bin Salim Primary School (the school) being the first school constructed in Malindi in 1914 was allocated over 16 acres of land by the late Sir Ali Bin Salim; that much of the school's land has since been illegally allocated to private developers, the Respondent being of the most recent beneficiary; that pursuant to a transfer dated 3/11/2018, the portion of land identified as Title Number LR 9279 Malindi (hereinafter also referred to as "the suit property"), which was at all material times owned by the school, and the buildings thereon utilized and maintained by the government Department of Housing, and serialized as government buildings with serial number MAL/HOU/HG2 CAT A, was illegally and unlawfully transferred to the Respondent; that in total disregard to the rule of law, rich history and social and cultural heritage, the Respondent proceeded to demolish the historical buildings on the suit property without any consultation with the National Museums of Kenya. The Petitioner added that from the relevant records in the District Physical Planning Office, the 1980 PDP reveals that the suit property was reserved for school purposes only.
  3. The Petitioner averred that the purported allocation and transfer of the suit property to the Respondent is contrary to Articles 40 and 62 of the Constitution of Kenya, and the development thereon is wrongful and unlawful for reasons that the Respondent failed to follow the laid down procedure relating to allocation and disposal of public land; the school, community and relevant stake holders were never informed of the said transfer; the buildings on the suit property are declared national monuments by the 2<sup>nd</sup> Interested Party thus could not be allocated to a private individual contrary to the Museums and Heritage Act, and the 2<sup>nd</sup> Interested Party was never asked to conduct an impact assessment of planned development projects that are likely to affect the survival of heritage resources within the area.
  4. In a replying affidavit sworn on 25/10/2022 by Absalam Hassan Ismail, the Respondent opposed the Petition. He did deny all the allegations raised in the petition. He averred that sometime in the year 2018, he became aware that the suit property was on sale. He instructed his advocates to act for him in the purchase of the suit property when he learnt that the same was allocated to one Francis Bahati Diwani for a term of 99 years from 1/8/1994. He also learnt the said Diwani transferred his interests to one Ernest Kahiro Kimani who charged it to Equity Bank until 24/6/2015. On the same date, the property was transferred to one Isaac Muriithi Mwitari who also charged the same to Equity Bank. The Respondent thus acquired the suit property from Isaac Muriithi, as a bona fide purchaser for value without notice. The deponent explained that as part of his due diligence, he was shown by the



said Issac, letters dated 3/8/2015 and 5/8/2015 from the OCS Malindi and a report by the District Surveyor dated 5/8/2015 showing that the suit property does not form part of the gazetted monument (all exhibited as AHI 2). He exhibited as AHI 3, copies of the sale agreement, provisional certificate and all relevant transfer documents. The deponent further deposed that sometime in June 2021, he was served with a letter from the Deputy County Commissioner (AHI 4), to which an order of injunction dated 11/9/2012 issued in HCCC 28 of 2012 and Gazette Notice No. 13561 were attached; that the suit HCCC 28 of 2012 was later dismissed as per the ruling he exhibited as AHI 5. To the deponent, the suit property has never formed part of the school property, and does not appear in the said gazette notice as a national monument.

5. The petition was canvassed by way of written submissions. Notably, Mr. Ojwang, State Counsel, was on record for the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties. He opted to not file a response and submissions.

### **Petitioner's Submissions**

6. Counsel for the Petitioner listed three issues for determination - whether the Petitioner's fundamental rights have been violated; whether public land is available for alienation to private individuals; and whether the petitioner has satisfied the grounds for grant of a permanent injunction.
7. Counsel submitted that the Petitioner has articulated and pleaded its case with utmost detail and precision as is required and as was established in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & another & 5 others* [2013] eKLR and *Anarita Karimi Njeru v Republic* [1980] eKLR. Counsel argued that the Petitioner's right to property guaranteed under Article 40 was violated when it was unlawfully dispossessed of the suit property by the Respondent. To counsel, the Petitioner has adequately demonstrated the said violations.
8. Counsel further submitted that the suit property was not available for alienation as it already had a purpose and the same was being held in trust by the school for the community. He added that the buildings on the suit property were to conserve the historical culture, therefore allocation to private individuals was irregular and illegal. To support this argument, counsel relied on the cases of *Republic v Commissioner of Lands & 4 Others, ex-parte Associated Steel Mill* [2014] eKLR; *Kenya National Highway Authority v Shalien Masood Mughal & 5 Others* [2017] eKLR and *Kenya Industrial Estates Limited v Anne Chepsiror & 5 Others* E&L No. 71 of 2013.
9. Further relying on the cases of *Niaz Mohamed Jan Mohamed v Commissioner of Lands & 4 Others* HCCC 423 of 1996 and *Chemey Investment Limited v AG & 2 Others* [2018] eKLR, counsel submitted that the process leading to the transfer and issuance of title of the suit property was both irregular and illegal since the suit property was alienated for public use. As such, so counsel urged, the same should be revoked and cancelled.
10. On whether the Petitioner is entitled to a grant of permanent injunction, counsel relied on the case of *Kenya Power & Lighting Co. Limited v Sheriff Molana Habib* [2018] eKLR and *Bandari Investment & Co. Limited v Martin Chiponda & 139 Others* [2022] eKLR where the court defined the meaning and purpose of a permanent injunction. Counsel submitted that the Petitioner has provided sufficient proof with regard to violation of its rights and fundamental freedoms by the Respondent, therefore it will be highly prejudiced as a public interest right will be infringed if the injunction is not granted.

### **Respondent's Submissions Dated 4/3/2025**

11. The Respondent numbered four issues for determination. First, whether the petitioner has capacity to institute the petition or whether they have demonstrated their capacity before this court? To demonstrate the importance of capacity to bring action, counsel cited the case of *Kipsiwo Community*



Self Help Group v AG & 6 others [2013] KEELC 63 KLR. Counsel submitted that the Petition as filed should be dismissed as the Petitioner has failed to demonstrate the capacity to lodge the petition. It was counsel's argument that under Order 8 Rule 1 of the Civil Procedure Rules, the deponent of the supporting affidavit ought to have filed an authority to plead. He added that there was no evidence to support the deponent's position as chairperson or that the school resolved to file the present petition. He further submitted that there is no evidence that the school is a validly registered school since the certificate exhibited as AJA 1 was only valid for 18 months. To counsel, the issue of capacity is not a technical but a fundamental element in every suit and failure to demonstrate capacity, a suit would collapse. To support this argument, counsel relied on the cases of Kituo cha Sheria v John Ndirangu Kariuki & another [2013] eKLR; and Peter Taracha & another v International Pentecostal Holiness Church & another [2016] KEHC 6482 KLR.

12. The second issue was that the Petitioners have claimed the suit property as public land allocated to the school; if the suit property is indeed public land, have they followed the due process of recovery of the same? Counsel submitted that Section 14 of the *National Land Commission Act* highlights that the NLC has jurisdiction to review all grants or disposition of public land, and that jurisdiction is extended only to public land or land that was previously public but subsequently converted to private land. He added that Section 8 of the *Land Act* stipulates that due process ought to be followed if at all the suit process is public land. It was counsel's argument that the Petitioner ought to have fully ventilated their options provided by statute and only move the court if unsatisfied with the outcome thereof.
13. Counsel pointed out that the suit property has been the subject of two different suits filed by different persons claiming to be the representatives of the Petitioner, yet nowhere have they involved the NLC.
14. The third issue as framed by counsel is whether the Petitioners have met the threshold stipulated for constitutional matters, or whether have they abused the doctrine of avoidance. Quoting the case of Anarita Karimi Njeru v Republic [supra] counsel submitted that constitutional violations must be pleaded with a reasonable degree of precision. To counsel, the Petitioner has failed to plead with precision the alleged violations in that on one instance, the Petitioner alleges that the suit property is public land, in another it was allotted to them and in a different occasion that the suit property is a national monument to be preserved.
15. Counsel added that as per Rule 10 (2) of the Mutunga Rules, the articles of the *Constitution* which accord rights to the petitioners must be precisely enumerated and the claim pleaded to demonstrate such violation and the violations be particularized in a precise manner, the manner in which they alleged violations were committed and to what extent be shown by way of evidence. According to counsel, the Petition is based on generalized allegations and that the Petitioner has failed to provide particulars of the alleged violation. He added that the Petitioner has equally failed to table any evidence at all to demonstrate any violation occasioned by the Respondent. To this end, counsel relied on the case of Meru Cultural Center & 17 Others v Kisima Farm Limited & 24 others (Constitutional Petition E006 of 2022).
16. The final issue counsel submitted on was whether the petition proved that the Respondent obtained the title to the suit property through fraudulent means and is not a bona fide purchaser for value. Counsel submitted that it is trite law that he who alleges must prove, yet the Petitioner did not table any evidence to demonstrate that the Respondent engaged in fraudulent practices in obtaining the suit property. Counsel added that the Respondent, in compliance with the principles outlined in Munyu Maina V Hiram Gathitha Maina [2013] eKLR, demonstrated how he conducted due diligence and the chain of ownership of the suit property. It was counsel's argument that the Respondent has a good and indefeasible title by dint of Section 26 of the *Land Registration Act*, and nothing in the Petition has proved otherwise. Counsel urged the court to dismiss the Petition.



## Analysis and Determination

17. I have carefully considered the Petition, supporting affidavit, replying affidavit, submissions filed by both sides and authorities relied upon, I hold the view that the following issues are for determination: -
- i. Whether the jurisdiction of this court has been properly invoked and whether the petition meets the threshold of a constitutional petition;
  - ii. Whether the Respondent has violated the Petitioner's rights guaranteed under Article 10, 11, 22, 40 and 62 of the Constitution of Kenya.
  - iii. Whether the Petitioner is entitled to the reliefs sought.
18. Before I delve into the merits of this petition, I must mention the issue of capacity raised by the Respondent in their submissions. The Respondent contended that there were no resolutions exhibited to demonstrate that the officials were allowed to file the present petition by the school; and that the deponent of the supporting affidavit did not present an authority to plead on behalf of the other officials and the school in general.
19. It is trite that submissions are not an avenue for raising new issues, and especially in situations like the present one where the Petitioner had closed its case by filing final submissions. This is because, as per the Court of Appeal in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR, submissions are generally a marketing language for parties to convince the court that their case is better than the other. Submissions highlight the parties' cases as pleaded, and a party should not be allowed to introduce new issues at that stage. The explained the purpose of submissions as follows: -
- “Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented. In any event all the 1st respondent would claim and prove as loss could only relate to the shares in the companies and not the properties of the companies. And even that he did not do. Regarding the punitive damages sum of shs.50 million awarded, the learned judge again found and lifted the proposal in the submissions of the 1st respondent. We were unable to come by any pleading or evidence to warrant this award and therefore it cannot be sustained.” (emphasis mine)
20. Given that the issue of capacity as raised by the Respondent was not pleaded to enable the petitioner respond thereto, countenancing its agitation herein by the defendant is tantamount to condoning an ambush and owing to the foregoing, this Court cannot venture into a determination of the same.
21. Regarding the first issue, this court notes that the present case is not merely about whether the petitioner's fundamental rights and freedoms under Article 10, 11, 22, 40 and 62 of the Constitution have been violated and or infringed by the Respondent, but also about whether the Title Number 9279 Malindi was public land and was therefore unavailable for alienation and or allocation to a private individual, and whether the title for the suit plot now registered in the name of the respondent ought to be revoked and reverted to the name of the petitioner.
22. In brief, the court is being asked to determine whether the proper process was followed in the registration of the suit land in the name of the respondent and to cancel the title issued in the name of the respondent if it finds that there was fraud and illegality in the registration in its favour. The provisions of Sections 25 and 26 of the Land Registration Act are as follows:

“ 25.



- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
  - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
  - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

26.

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
  - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
  - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

23. In the process of making determinations on ownership and whether the proper processes were followed in the registration of the suit land in the name of the respondent this court needs evidence. It has been held before that disputes brought before court for determination of ownership of land ought to be presented in the form of an ordinary suit and by way of plaint so as to enable discovery and the adducing of evidence in the manner that is recognizably suitable for verification of both the process and authenticity of title. The process in civil suits involves calling of viva voce evidence and that aspect allows for cross-examination and re-examination of witnesses and the examination of documents. Petitions are suitable for matters in which there is no dispute about the facts said to constitute violations of the constitutional right of a citizen. The usual processes that is not usually available in petitions which are normally disposed of by way of affidavit evidence and submissions.



24. In the present case the petition having been filed the same was heard by way of affidavit evidence and submissions of the parties. There was no room to interrogate the evidence by way of cross-examination, scrutiny and verification of documents and re-examination. In *Petro Oil Kenya Limited v Kenya Urban Roads Authority* [2018] eKLR the court stated that a constitutional petition is not an ideal forum for investigating and determining contentious issues of fact as oral evidence is rarely called and added that whether or not the suit property subject matter of that case was hived from a road truncation is not an issue which the court could determine on the basis of the affidavit evidence before it. In *Francis Oyagi Vs Samwel Motari Mangare and 2 Others* (2018) eKLR it was stated that “...the court must guard against improper transmission of normal disputes or ordinary issues of litigation being clothed in Constitutional petitions.”
25. In *Nyongesa v County Government of Nakuru & another (Land Case Petition E9 of 2021)* [2022] KEELC 14454 (KLR) (28 October 2022) (Judgment) the court stated that:
- “...there must be ability to read conclusivity of facts put forward by the parties so that the only issue that remains for the court is to interpret the factual matrix within the fabric of the Constitution to determine if any constitutional violations have been proved...
- In the instant case there would be infinitesimal chance of the petitioner establishing violation of his constitutional rights while the truth regarding basic facts regarding whether the petitioner’s building was capable of being salvaged, and the veracity of each sides’ factual claims on whether or not the petitioner complied with regulatory bodies’ directions (including the respondents’) remains uncertain. The evidence attached to an Affidavit by the claimant is simply insufficient for the purpose. It is clear to this court that the allegations as raised would only be determined if the case is heard on merit in the ordinary fashion under a plaint where each party’s allegations would be tested by way of tendering documents, oral evidence and cross-examination.”
26. The claim herein, in this court’s view, is just like the claims in the three cases cited herein above. It ought to have been lodged by way of an ordinary plaint. The jurisdiction of this court has not been properly invoked and this court therefore finds it unnecessary to proceed to the rest of the issues framed for determination herein before. Consequently, I find that the petition dated 17/8/2021 is for striking out.
27. It is however noted that the petitioner has attempted to raise what would have turned out to be serious issues of administration and governance and which are of public importance in the land sector. The Petitioner has claimed that the respondent violated its rights guaranteed under Articles 10, 11, 22, 40 and 62 of the Constitution of Kenya.
28. Article 40 protects the right to property, and it reads: -
- Protection of right to property.
40. (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
- (a) of any description; and
  - (b) in any part of Kenya.
- (2) Parliament shall not enact a law that permits the State or any person—
- (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or



- (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).
- (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—
    - (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
    - (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—
      - (i) requires prompt payment in full, of just compensation to the person; and
      - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.
  - (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.
  - (5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.
  - (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.
29. Article 62 defines public land as follows: -
- (a) land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date;
  - (b) land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease;
  - (c) land transferred to the State by way of sale, reversion or surrender;
  - (d) land in respect of which no individual or community ownership can be established by any legal process;
  - (e) land in respect of which no heir can be identified by any legal process;
  - (f) all minerals and mineral oils as defined by law;
  - (g) government forests other than forests to which Article 63(2)(d)(i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas;
  - (h) all roads and thoroughfares provided for by an Act of Parliament;
  - (i) all rivers, lakes and other water bodies as defined by an Act of Parliament;
  - (j) the territorial sea, the exclusive economic zone and the sea bed;
  - (k) the continental shelf;
  - (l) all land between the high and low water marks;



- (m) any land not classified as private or community land under this Constitution; and (n) any other land declared to be public land by an Act of Parliament—
    - (i) in force at the effective date; or
    - (ii) enacted after the effective date.
  - (2) Public land shall vest in and be held by a county government 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.
30. Article 10 lists the national values and principles of governance and states that those values and principles shall bind all State organs, State officers, public officers and all persons whenever any of them interprets the *Constitution* or any law and or enact any law or implement public policy. Article 11 recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation and provides that the state shall promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage.
31. The Petitioner alleged that the suit property was at all material times public land held by the school, hosting government buildings serialized at the government estate department with serial number MAL/HOU/GG2 CAT A. The Petitioner’s grievance was that the Respondent failed to follow the laid down procedure relating to the allocation and disposal of public land; that the school and other stake holders were never consulted or informed of the disposition of the suit property. The petitioner’s claim for declaration of constitutional violations has foundered only on the basis of the propriety of process it employed in presenting its case before court; indeed, Article 22 gives any person the power and right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. In the proper forum, this court would have been able to determine the petitioner’s claims of violations on their merits, but first it the alleged illegalities regarding registration of the suit land must be established in a normal suit. There is also in my view no reason why the petitioner would not rely on constitutional provisions, where applicable, in the ordinary suit to establish its claim.
32. In view of the pertinent matters of public importance outlined above, I hereby strike out the petition dated 17/8/2021 with no orders as to costs, but I also grant leave to the petitioner to lodge a claim over the suit land herein within the next 90 days by way of an ordinary suit by plaint, if it so desires, for the purpose of its determination on the merits.

**DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 30<sup>TH</sup> DAY OF APRIL 2025.**

**MWANGI NJOROGE**



**JUDGE, ELC, MALINDI.**

