



**Abdalla & 601 others (All being members of Boni/Sanye CBO - BOSACO)  
v National Land Commission & 11 others (Environment & Land Petition  
8 of 2021) [2025] KEELC 131 (KLR) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 131 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND PETITION 8 OF 2021  
FM NJOROGE, J  
JANUARY 23, 2025**

**BETWEEN**

**HUSSEIN ABDALLA ..... 1<sup>ST</sup> PETITIONER  
ARAFI LACHO & 600 OTHERS ..... 2<sup>ND</sup> PETITIONER  
ALL BEING MEMBERS OF BONI/SANYE CBO - BOSACO**

**AND**

**NATIONAL LAND COMMISSION ..... 1<sup>ST</sup> RESPONDENT  
CHIEF LAND REGISTRAR ..... 2<sup>ND</sup> RESPONDENT  
NATIONAL POLICE SERVICE ..... 3<sup>RD</sup> RESPONDENT  
ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT  
ABDINOOR OMARA FARAH ..... 5<sup>TH</sup> RESPONDENT  
ISAAC JAMAL IBRAHIM ..... 6<sup>TH</sup> RESPONDENT  
ISSA SHEIKH MOHAMED ..... 7<sup>TH</sup> RESPONDENT  
AHMED ABDULLAHI MOHAMED ..... 8<sup>TH</sup> RESPONDENT  
AHMED MAHMUD HUSSEIN ..... 9<sup>TH</sup> RESPONDENT  
ALPERTON HOLDINGS LTD ..... 10<sup>TH</sup> RESPONDENT  
KASSIM SHARE ..... 11<sup>TH</sup> RESPONDENT  
ABDI REHMAN ..... 12<sup>TH</sup> RESPONDENT**



## JUDGMENT

1. By a Petition dated 7/5/2021 the Petitioners herein moved the Court seeking orders as follows:
  - i. A declaration that the Petitioners are the rightful owners of the land comprising Magogoni village and its environs as their ancestral land and no adjudication has been done thereon and any alienation and acquisition of the same to the 5<sup>th</sup> to 12<sup>th</sup> Respondents is illegal, null and void ab initio;
  - ii. A declaration that the issuance of grants to the 5<sup>th</sup> to 12<sup>th</sup> Respondents by the 2<sup>nd</sup> Respondent amounts to an illegal and unprocedural alienation and acquisition of land thus null and void and the same should be cancelled and or deregistered;
  - iii. An order of permanent injunction restraining the Respondents by themselves their servants and or agents and employees from selling, transferring, charging and or dealing with it in any manner and or evicting the Petitioners therefrom, demolishing their houses and or carrying any development of whatsoever nature;
  - iv. The Petitioners be awarded costs.
2. Briefly, the facts leading to this dispute as averred in the Petition, are that the Petitioners enjoyed peaceful occupation of the land comprising Magogoni Village, Hindi within Lamu County (hereinafter “the suit property”) until sometime in the year 2020 when the 5<sup>th</sup> to 12<sup>th</sup> Respondents invaded the same and commenced demolition of the Petitioners’ houses; that the Respondents did so claiming to be the registered owners of the suit property. The Petitioners were aggrieved by the said actions thus filed the present petition claiming ancestral rights to the suit property and infringement of their rights guaranteed under Article 1, 2, 3, 10, 23, 40, 67, 159 and 250 of the *constitution* of Kenya. According to the Petitioners, the Respondents wrongly and illegally acquired the suit property which ought to have been allocated to the Petitioners.
3. The Petition is opposed. The Attorney General entered appearance and filed grounds of opposition dated 24/5/2021 on behalf of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents, as follows:
  1. The Petitioners do not have any demonstrable legal or beneficial title to the said property known as Magogoni village and accordingly the petitioners have no locus standi to institute any suit seeking any relief in connection with it;
  2. That there is no property on Kenya’s cadastral map described and identified in the land register as Magogoni village as to be capable of being made the object of enforceable legal rights and duties;
  3. The constitutional rights alleged to have been breached are not absolute but limited and that the Petitioners have not demonstrated that they are deserving of the remedies they are seeking;
  4. That a lawful eviction cannot amount to a violation of the rights of an individual and that proof of ownership is cardinal when determining violation of the right to property;
  5. That by dint of Section 24 of the *National Police Service Act*, the 3<sup>rd</sup> Respondent had the mandate to inter alia apprehend offenders, investigate crimes and enforcement of all laws and regulations thus the act of arresting and investigating unless proven to be done arbitrarily does not amount to a violation of the Petitioners’ rights.



4. The 5<sup>th</sup> -11<sup>th</sup> Respondents filed a joint response dated 24/6/2021 through the firm of Aboubakar Mwanakitina & Company Advocates. These Respondents contested that the Petitioners ought to have challenged their titles by way of a plaint on the grounds laid down in Section 26 of the [Land Registration Act](#). They averred that the petition does not disclose any violation of the Petitioners' rights. They added that sometime in the year 2012, they were allocated a long-term lease for 99 years of the suit property, for agricultural purposes. The Respondents thus employed a contractor to clear the reserved roads adjacent to the suit property to facilitate easy access and clear the suit property to commence the intended agricultural projects. According to these Respondents, the suit property and the road reserves are unoccupied therefor the Petitioners allegations are not true.
5. Through the firm of Ms. Kitoo & Associates, the 12<sup>th</sup> Respondent filed grounds of opposition dated 17/4/2024 as follows: -
  1. The Petitioners have not demonstrated whether they own any identifiable property in common and/or jointly. The Petition does not disclose any joint facts or material issues in commonality to the petitioners.
  2. The petitioners have not identified any particular property against which their property rights have been violated as per Article 40 of the [constitution](#).
  3. The Petition discloses a purely civil dispute which is disguised as a constitutional petition.
  4. The Petitioners have not demonstrated how the 12<sup>th</sup> Respondent has contravened the [constitution](#) and or their constitutional rights.

## Submissions

### 2<sup>nd</sup>,3<sup>rd</sup> and 4<sup>th</sup> Respondents' Submissions Dated 3/6/2024

6. Mr. Munga, State Counsel, identified three issues for determination, namely- whether the Petitioners have locus standi; whether the petitioners are the owners of the suit land; and whether the petitioners are entitled to the reliefs sought.
7. On the issue of locus standi, Mr. Munga submitted that the petitioners have no right to bring the petition for the reason that they do not have any demonstrable legal or beneficial interest over the suit property, which measurement thereof is undisclosed. Counsel relied on the cases of Khelef Khalifa El-Busaidy v Commissioner of Lands & 2 others [2002] eKLR and LSK v Commissioner of Lands & Others, Nakuru High Court Civil Case No. 464 of 2000.
8. Submitting on the second issue, Mr. Munga asserted that the constitutional protection of the right to property only arises when a petitioner can prove ownership of the property in dispute; that this must begin with identification of the property and the persons who are laying claim as was held in the case of Ledidi Ole Tauta & Others v AG & 2 Others [2015] eKLR. According to Mr. Munga, the petitioners failed to identify and prove ownership thus they cannot be protected by Article 40 of the [constitution](#) in this case.
9. Lastly, relying on the case of Beekay Supplies Limited & another v AG & another [2017] eKLR, Mr. Munga submitted that the reliefs sought are not available to the petitioners for the reason that the matter before court is not of violation of rights but a claim of ownership; that in any case, the Respondents have not been demonstrated to have breached the [constitution](#) to warrant issuance of the reliefs sought. Counsel urged the court to dismiss the petition with costs.



## 12<sup>th</sup> Respondent's Submissions Dated 17/4/2024

10. Mr. Mugambi, counsel for the 12<sup>th</sup> Respondent, submitted that constitutional protection of the right to property only arises when the Petitioner can prove ownership and that this must begin with identification of the property and the persons laying claim to it, as was discussed in *Ledidi Ole Tauta & Others v AG & 2 Others* [supra]. According to counsel, the Petitioners have not specified any particular property in respect of which the 12<sup>th</sup> Respondent has violated their rights under Article 40, and have not disclosed to the court the size of the suit property; as such the court is not able to tell the specific land in Magogoni village that the Petitioners are laying claim to. Without such information, it would be impractical to enforce any orders granted in this case.
11. Counsel further submitted that the Petition suffers a serious lack of precision in substance and drafting that the petitioners have not pleaded the particulars of the alleged violations and the manner of the alleged infringements as is required in constitutional petitions. To this end, counsel was guided by the case of *Anarita Karimi Njeru v Republic* [1979] eKLR.
12. According to Mr. Mugambi, the suit ought to have been filed as an ordinary civil suit since the issues fall squarely in the realm of private law. He asserted that private law claims should not form the basis of constitutional petitions and should be resolved through the usual process of litigation. Counsel was guided by the case of *Mutiri alias Remus Banu Muturi alias Remus Banu Muthuuri v Itirikia* (Pet 15 of 2013) [2023] KEELC 19866 (KLR).

## Determination

13. Having perused the petition, the responses and the submissions of the parties, this court finds that the issues that arise for determination in the present petition are as follows:
  - a. Do the petitioners have locus standi to bring this action?
  - b. Has the jurisdiction of the court been properly invoked?
  - c. Have the petitioners established that their rights under the constitution have been or are about to be infringed?
  - d. What orders should issue?
14. Regarding the first issue which is raised by the Attorney General, he claims that the basis for raising it is that the petitioners do not have any demonstrable legal or beneficial title/interest to the suit property, and they have not informed the court the full physical extent of the suit land, and so they lack right to file the present petition.
15. It is the case that a person must have sufficiency of interest to sustain his standing to sue in a court of law as held in the *Law Society of Kenya* case (supra). But it must also be remembered that locus in the present constitutional dispensation has been expanded by Article 22 to unprecedented lengths. That article states as follows:
  22. Enforcement of Bill of Rights
    - (1) Every person has the 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.
    - (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—



- (a) a person acting on behalf of another person who cannot act in their own name;
- (b) a person acting as a member of, or in the interest of, a group or class of persons;
- (c) a person acting in the public interest; or
- (d) an association acting in the interest of one or more of its members.”

16. The court when approached by a litigant in a constitutional petition is enjoined to consider the constitution as a living document which encourages the growth and development of law rather than the stymying of the same. Consequently, it ought to give a broad definition of locus standi within the outline given in Article 22. In Republic Vs County Government of Mombasa, Ex Parte Outdoor Advertising Association of Kenya [2014] eKLR the court held as follows: -

On locus standi, as a constitutional principle of public law and for promotion of access to justice, the law makes generous provisions on standing over and above personal standing interest in interest of enforcement of public law duties. That is clear from Articles 22 and 258 of the constitution of Kenya. the constitution thus recognizes the right of association to litigate questions of fundamental human rights, and interpretation of the constitution on behalf of its members.”

17. In Mumo Matemu Vs Trusted Society of Human Rights Alliance & Others [2013] eKLR the Court of Appeal held as follows:

Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of the constitution by necessity and logic broadens access to the courts. In this broader context, this court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hurdles on access to the courts, except only when such litigation is hypothetical, abstract or is an abuse of the judicial process....

It may therefore now be taken as well established that where a legal wrong or injury is caused or threatened to a person or to a determinate class of persons by reason of violation of any constitutional or legal right, or any burden is imposed in contravention of any constitutional or legal provision, or without authority of law, and such person or determinate class of persons is, by reason of poverty helplessness, disability or social-economic disadvantage, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Articles 22 and 258 of the constitution”.

18. I have perused the petition and the supporting documentation. This is not a hypothetical case. The petitioners claim that the suit property is their ancestral land. They are on the ground. Whether or not they will be able to prove that claim as we progress with the petition is another issue. What matters is that the 1<sup>st</sup> 2<sup>nd</sup> and 4<sup>th</sup> respondents are said to have enabled a section of the other respondents obtain titles to the suit property on the basis of which ownership documents those other respondents have attempted to evict the petitioners from land they believe is ancestrally theirs. The allocated respondents hold onto the alleged authenticity of their titles to oppose the claim and also raise the issue of their own rights under Article 40 of the constitution; for now, their claim seems protected by the provisions of section 25 of the Land Registration Act which provides 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.

19. However, while those allocated respondents alleged that the land is vacant and bushy the petitioners have attached photographic evidence of houses allegedly built on the same land. Ancestral claims are unregistered interests, just as many other interests in land are. It is for the respondents to demonstrate that their registered title defeats any claimed interests of the petitioners. In the circumstances this court is unable to find that the present litigation is hypothetical, abstract or is an abuse of the judicial process or that the petitioners have no capacity to institute it, and the Attorney General's objection on lack locus standi is hereby dismissed.

20. As to the second issue, Article 40 of the *constitution* of Kenya, 2010 which is the basis of the present petition provides as follows:

Protection of right to property

- (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.”
21. I have perused the pleadings and submissions on record and find the main issue that arises for determination is whether the Petitioners’ rights under Article 40 above have been violated. It is quite evident that the grants issued in respect of the suit property are recent, having been issued in 2012. A perusal of the bundle of documents annexed to the Petition, reveals that there are three properties being Grant No. CR 56619 in favour of the 5<sup>th</sup> and 6<sup>th</sup> Respondents; Grant No. 56614 in favour of the 7<sup>th</sup> and 8<sup>th</sup> Respondents; and Grant No. 56611 in favour of the 9<sup>th</sup> Respondent. According to the Petitioners, these three titles form part of the suit property, Magogoni village. The Petitioners’ claim is that the suit property is their ancestral land and that the same was illegally allocated to the Respondents.
  22. Land is categorized into public, private and community land in the *constitution*. What the court hears the petitioners to say in their petition is that there has been no process either of land adjudication or land acquisition undertaken in the area and the acquisition of the grants held by the respondents, upon the strength of which the right to eviction is claimed, is therefore illegal.
  23. Any finding by the court either of violation or non-violation of the petitioners’ rights shall be predicated on whether or not the petitioners have established that the suit land is their ancestral land and that as such they own it, and/or whether it could be alienated, and further, whether the right process was applied in alienating it, in which case the court would be able to decide whether the grants issued to the 5<sup>th</sup> -12<sup>th</sup> respondents should be cancelled. These issues are evident in the body of the petition and the prayers sought at its end. In all this, establishing the proper category that the suit land fell into before allocation to the 5<sup>th</sup> -12<sup>th</sup> respondents, and the process employed in such acquisition, is of paramount importance in resolving the issue as to whether or not the rights of the petitioners have been violated.
  24. Further, the matters in the petition are those that require evidence. The rules of evidence are very clear, that he who alleges must prove. Section 107 – 109 provide thus: -

107. Burden of proof.

- (1) 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. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden.

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact.



The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

25. It is a well settled principle that the petitioners in any constitutional petition ought to demonstrate with some degree of precision, the right they allege has been violated, the manner it has been violated and the relief they seek for that violation (See Anarita Karimi Njeru vs Republic (supra) and Trusted Society of Human Rights Alliance vs Attorney General and Others Petition No.229 of 2012).

26. This being a claim of violation of constitutional rights, it is also a matter of principle that one cannot claim to be deprived of that which he does not have rights over. In Veronica Njeri Waweru & 4 others v City Council of Nairobi & 2 others [2012] eKLR the Court observed:

The petitioners have readily conceded that they have been occupying public property, a road reserve, for the last ten years. They have licenses to operate businesses, but have no proprietary interest in the land. Clearly, therefore, their claim that their rights under Article 40 have been violated has no basis. They do not own the land, and they therefore cannot be deprived of that which they have no rights over. I therefore find and hold that there has been no violation of the petitioner’s right to property under Article 40.”

27. The pertinent question therefore would be whether or not the Petitioners are able to establish in a constitutional petition that they have rights and interests over the suit land, or whether the court is able to do justice in such a petition.

28. Section 26 of the *Land Registration Act* is categorical that a certificate of title is prima facie evidence that the person named therein is the proprietor of the land but the same can be challenged where the certificate of title has been acquired fraudulently, unprocedurally or through corrupt practice.

29. Challenge to title to land on grounds of mistake, fraud, irregularity or illegality, corrupt scheme needs evidence to establish those grounds on a balance of probabilities in a civil suit. Challenge to title to land on grounds of mistake, fraud, irregularity or illegality, corrupt scheme is therefore usually done through an ordinary civil suit. That is the forum in which oral evidence can be taken and all evidence including documentary evidence regarding the process of alienation be tested by way of physical examination of documents and cross-examination.

30. In Malindi ELC Petition No. 19 Of 2017- Likizo Ltd V Nasib Kashuru Mumbo & others this court held as follows:

Usually the facts in a petition are straightforward and undisputed and the court is required to apply the constitutional provisions to the facts to come up with a determination. Petitions have been struck out in the past when the court realized that they sought to litigate over contentious issues such as ownership of the land or validity of a disputed title, which issues by their very nature would be favoured by an ordinary trial by way of plaint.”

31. In the case of Petro Oil Kenya Limited v Kenya Urban Roads Authority [2018] eKLR:

A constitutional petition is not an ideal forum for investigating and determining contentious issues of fact as oral evidence is rarely called like in this case. Whether or not the suit property was hived from a road truncation is not an issue which I can determine on the affidavit evidence before me. If it is true that the suit property was hived from a road truncation, the title held by the Petitioner would not be valid since the property was not available for allocation to Wangs from whom the Petitioner purchased the suit property.



Article 40 (6) of the constitution provides that the protection accorded to property does not extend to the property which has been acquired unlawfully. Whether or not the Petitioner acquired the suit property lawfully is an issue that can only be determined in a civil suit and not in a Constitutional Petition. The courts have said over and over again that the mere fact that constitutional rights are alleged to have been violated or are threatened does not make the dispute a constitutional one calling for the filing of a petition under Article 22 of the constitution. The court can still uphold constitutional rights in a normal civil suit...

In the case before me, I am of the view that due to the nature of the dispute which turned on whether the Petitioner holds a valid title, the ideal forum should have been a civil suit. In a civil suit, the court would have been better placed to determine all the issues raised by the parties. The court would also have been in a position to grant all the reliefs sought in the petition herein if merited. It is my finding therefore that although the Petitioner had a right to invoke the jurisdiction of the court under Article 22(1) of the constitution, that jurisdiction was not ideal for the determination of the issues at hand. As aptly put by the Respondent in its replying affidavit, this court in exercise of that jurisdiction is not possessed of the necessary tools to determine the validity or otherwise of the Petitioner's title to the suit property."

32. In the case of *Kibos Distillers Ltd & 4 Others V Benson Ambuti Adegga & Others* 2020 eKLR it was held as follows:

In the Lesotho case of *Zwelakhe Mda v Minister of Home Affairs and Others* (Constitutional Case No.4 of 2014) [2014] LSHC 30 (24 September 2014); it was expressed that where there is no real, substantial and material dispute of fact which makes it impossible to dispose of a matter without resort to viva voce evidence, the factual differences can be decided on the papers by affidavit evidence."

33. As things stand now, the challenge to the validity of the respondent's title through the present petition is futile in that there is no prior civil judgment declaring the titles illegal and also that there are no means in this petition by which to test the authenticity of the claims of illegality, including whether the titles have been superimposed on the ancestral land of the petitioners.
34. I have already stated that a petition is not the appropriate suit for investigation as to authenticity or otherwise of title. In that case also, there is no basis upon which to investigate a claim of violation or threat of violation of constitutional rights of the petitioners.
35. In this court's view an ordinary suit would be the best manner of establishing whether the suit land is the petitioners' ancestral land and whether or not the alienation thereof to a section of the respondents was legally done. On the basis of that finding this court concludes that the jurisdiction of this court has been improperly invoked and that the petition herein is for striking out. I therefore issue the following final orders:
- a. The petition dated 7/5/2021 is hereby struck out;
  - b. Leave is granted to the petitioners herein to lodge their claim over the suit land by way of an ordinary suit within 3 (three) months from the date of this judgment;
  - c. The status quo regarding the suit land shall be maintained both on the land title register as well as on the ground during the 3 (three) month period provided for in (b) herein above;
  - d. Each party shall bear its own costs.



**JUDGMENT DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON  
THIS 23<sup>RD</sup> DAY OF JANUARY 2025.**

**MWANGI NJOROGE**

**JUDGE, ELC, MALINDI**

