



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MALINDI**  
**CONSTITUTION PETITION NO. 4 of 2012**

**IN THE MATTER OF CHAPTER FIVE OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ARTICLE 62, 47, 32, 22 AND 23 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF PETITION BY THE TRUSTEES/OFFICIALS OF DELIVERANCE CHURCH OF KENYA, CHALLENGING INFRINGEMENT OF THEIR CONSTITUTIONAL RIGHTS BY FORCIBLE ALIENATION OF A PORTION OF LAND BY JAPHET NOTI CHARO BEING THE UNSURVEYED PLOT NO. 4, 5, 7, 8, 10 AND 11 SABAKI SQUATTERS UPGRADING SCHEMES WITHOUT REGARD TO THE CONSTITUTION AND THE LAW IN THE STATUTES**

**BETWEEN**

**1. BISHOP MARK KUBAI KARIUKI**

**2. BISHOP J. B. MASINDE**

**3. BISHOP WILLIAM K. TUIMISING**

**4. RVEREND SAMUEL GAKUO**

**5. REVEREND GEORGE MULINGE MWAULA**

**6. REVEREND PAU MUTUNGA (suing on behalf of**

**DELIVERANCE CHURCH OF KENYA.....PETITIONERS**

**=VERSUS=**

# 1. JAPHET NOTI CHARO

## 2. MUNICIPAL COUNCIL OF MALINDI

### 3. THE ATTORNEY GENERAL.....RESPONDENTS

#### JUDGMENT

1. The Petitioner moved this court by way of a Petition dated 26th January 2012 and filed on the same date. The petition seeks for the following orders;
  - a. **A declaration that a citizen of Kenya has a right to apply for allocation of any vacant public plot for consideration by the Government**
  - b. **A declaration that a person devoid of a formal authority from the Government of Kenya over a public plot cannot evict, or demolish the structures of an earlier occupant of the same public plot.**
  - c. **A mandatory order compelling the 2nd Respondent to enforce its by-laws and demolish all the structures erected by the 1st Respondent since 2010 for being constructed without the approval plan.**
  - d. **An order of prohibition prohibiting the Respondents by themselves, their servants, agents, or assignees from interfering with the peaceful occupation of the UNSURVEYED PLOT NO. 4, 5, 7, 8, 10 and 11 SABAKI SQUATTERS UPGRADING SCHEME until the government and/or the National Land Commission determine who is to be allocated that plot.**
  - e. **Costs.**
2. According to the Petition, the Petitioners applied to the Malindi Agricultural Committee to be allowed to occupy a temporary hall for religious worship within Malindi Municipality. The temporary hall had been erected by Agricultural Society of Kenya.
3. The Petitioners have averred that the Agricultural Society of Kenya, Malindi, acceded to the Petitioners Application and allocated to the Petitioners unsurveyed plot numbers 4, 5, 7, 8, 10 and 11.
4. While occupying the suit property, Pius Maitha Lалу, Damaris Njoki Sibulu and Philip Ayub Chai sued the Petitioners herein in Malindi HCCC No. 40 of 2004 claiming ownership of the suit property. The suit was dismissed by the Court on 17th May 2006.
5. According to the Petitioners, the suit plot is a public property which should be held by the county in trust for the benefit of the people of Malindi; that in recognition of the rights of the Government of Kenya over public land, the Petitioners made an application to the Ministry of Lands for formal allocation of the suit plot. The Petitioners obtained all the necessary consents from the Municipal Council.
6. The Petitioners have averred in their Petition that sometimes in the year 2010, the 1st Respondent constructed a residential house on part of the suit property; that the development of part of the suit property by the 1st Respondent was done without the 2nd Respondent's approval.
7. The Petitioners finally averred that the government should allocate the Petitioners the suit property since they are the ones in occupation and that it is their constitutional right to worship God in the suit plot awaiting the decision of the Government through the 3rd Respondent.
8. The Respondent filed his Replying Affidavit and Further Affidavit on 6th January 2012 and 19th September 2012 respectively.
9. The Respondent deponed that the Petitioners have not disclosed that the suit property is a surveyed plot with a title in his name; that this matter does not fall within the jurisdiction of a constitutional petition.
10. The Respondent finally deponed that the suit premises is his family's ancestral land; that the show ground committee is not the registered owners of the suit property and that he is the bona fide registered owner of land portion number 14034.
11. The Petition was filed pursuant to the provisions of Article 22, 23, 32, 47 and 62 of the

- Constitution. In a nutshell, the Petitioners are alleging that their rights to own the suit property have been infringed by the threats of the Respondent to demolish the church.
12. The Petitioners have conceded that the suit property is public property which should be held in trust by Kilifi County in trust for the people of Kilifi pursuant to Article 62 of the Constitution. In the same breath, the Petitioners want this court to declare that they have a right to apply for the allocation of any vacant plot and be allocated the plot.
  13. The Constitution, the Land Act and the National Land Commission Act have elaborate procedures that should be followed before public land can be allocated to private entities like the Petitioners' Church.
  14. This court cannot abrogate itself with the responsibility of making declaratory orders on who should be allocated public land. That is a function to be performed by the agencies which have been established by the Constitution and the statutes.
  15. The Constitution, at Article 22, has identified "a right holder" as every person, including the Residents of Kilifi County on whose behalf unalienated government is held by the county government. Such land is supposed to be administered by the National Land Commission on behalf of the County.
  16. Having admitted in their own Petition that the land in question is public land, the Petitioners' right to the suit property has not crystallized to warrant protection pursuant to the provisions of Article 40 (1) of the Constitution or any other provision.
  17. It may be true that it is the Petitioners who are entitled to the suit property and not the 1st Respondent. It may also be true that the 1st Respondent's title is either not a genuine document or the requisite procedures were not followed when the same was issued to him.
  18. However what is before the court is not the legality or otherwise of the 1st Respondent's title. What is before the court is whether the Petitioners' rights to be allocated the suit property should issue.
  19. The Petitioners are further seeking for a mandatory injunction compelling the 2nd Respondent to demolish all the structures erected by the 1st Respondent and to prohibit the Respondent from interfering with the Petitioners' peaceful occupation of the suit property.
  20. The Petitioners have not sought for the cancellation of the 1st Respondent's title. The court can only make an order for the demolition of the 1st Respondent's house upon being satisfied on a balance of probability that the 1st Respondent's acquisition of the suit property was unlawful. This finding can only be made upon filing of a Complaint and after trial. In the absence of a prayer for cancellation of the title in the name of the 1st Respondent, the mandatory order as prayed for in the Petition cannot issue.
  21. For the reasons I have given above, I dismiss the Petitioners' Petition dated 26<sup>th</sup> January, 2012 with costs.
  22. However, this Judgment does not in any way prohibit any person or agency from inquiring into the propriety or otherwise of the title in respect to L.R. No. Portion No.14024 in the name of the 1<sup>st</sup> Respondent

Dated and delivered in Malindi this 12<sup>th</sup> day of July, 2013.

**O. A. Angote**

**JUDGE**