



**Said & 2 others v OCS Bamburi Police Station & 6 others (Environment & Land
Petition 82 of 2015) [2022] KEELC 3275 (KLR) (20 July 2022) (Judgment)**

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REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND PETITION 82 OF 2015

M SILA, J

JULY 20, 2022

(FORMERLY MOMBASA HIGH COURT CONSTITUTIONAL PETITION NO. 28 OF 2015)

BETWEEN

AWADH SALEH SAID & 2 OTHERS PETITIONER

AND

OCS BAMBURI POLICE STATION 1ST RESPONDENT

OCPD KISAUNI SUB-COUNTY/DIVISION 2ND RESPONDENT

COUNTY COMMISSIONER MOMBASA COUNTY 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

JOHN NAHOZA 5TH RESPONDENT

KATANA KIBWANA 6TH RESPONDENT

SUDI MBAGA 7TH RESPONDENT

JUDGMENT

1. On 30 April 2015, this petition was filed by one person, Awadh Saleh Said. The petition was filed as Constitutional Petition No. 28 of 2015 in the High Court. This being a matter on the use and occupation of, and title to, land, the file was transferred from the High Court to this court on 12 May 2015 and was registered as Mombasa ELC Constitutional Petition No. 28 of 2015. The petition describes the land in dispute as Subdivision No. 398, at Utange, Mombasa, Mainland North, registered as CR No. 7805/1. In the petition, the petitioner averred that he is the eldest son and beneficiary of the estate of the registered proprietor of the suit property, the late Saleh Said Sherman (the deceased). He sued 7 persons. The 1st respondent is the Officer Commanding Station (OCS) of Bamburi Police Station. The 2nd respondent is the Officer Commanding Police Division (OCPD) of Kisauni sub-



county/division. They are all officers of the Kenya Police Service. The 3rd respondent is the County Commissioner Mombasa County, and the 4th respondent is the Attorney General, the principal legal adviser to the Government of Kenya. The 5th, 6th and 7th respondents were said to have entered the suit property without the permission of the petitioner together with a group of unknown people.

2. There was a site visit conducted by the court (Omollo J) on 20 January 2017 after which the court directed counsel to revisit the site and do a house count and come up with a list of the occupants thereof. A list of 280 persons was subsequently presented, and on 21 February 2017, the court (Omollo J) directed that these persons be joined as interested parties with liberty to file a response to the petition. Although in some documents filed, and even within the proceedings, they are described as 5th to 277th respondents, the record shows that these occupants were joined as interested parties and not respondents.
3. On 23 July 2018, it was stated in court that there are persons appointed to be the administrators of the Estate of the registered proprietor. They were said to be Omar Saleh Sherman and Ahmed Kasam. The court ordered that they be joined as the 2nd and 3rd petitioners. I have not however seen an amended petition though the case has proceeded on the basis that there are now three petitioners. My reference to the petitioners is therefore reference to the three persons.
4. In the petition, it is pleaded that despite numerous complaints lodged with the 1st to 4th respondents, they have refused, neglected, or otherwise failed to accord the petitioners the necessary and/or required assistance as provided for under [the Constitution](#) and Police Act in investigating and arresting the 4th, 5th and 6th respondents, their agents and the group of unknown people who have trespassed on the suit land.
5. It is pleaded that the 1st, 2nd and 3rd respondents refused to evict the trespassers, or provide security to the petitioner on the ground that there is no court order compelling them to do so. It is pleaded that the respondents' unilateral decision to allow trespassers to take possession of the suit property is unreasonable, arbitrary, unconstitutional, illegal, null, and void. It is contended that the 1st, 2nd and 3rd respondents have completely disregarded the provisions of Part VII of the [National Police Service Act](#), Act No. 11A of 2011, which expressly lays down the procedure and powers that the respondents should follow when a citizen of the Republic of Kenya lodges a complaint of trespass to his property and have instead supported and incited the trespassers. It is pleaded that the petitioners are entitled to protection from deprivation of the suit land under Article 22, 40 and 64 of [the Constitution](#), 2010. It is contended that the fundamental rights to ownership of property as set out in [the Constitution](#) are being infringed by the respondents.
6. The petitioners ask for the following orders :-
 - a. A declaration that the petitioners' rights and the rights of the beneficiaries of the estate of the late Saleh Bin Said to acquire and own property guaranteed under Article 40 of [the Constitution](#) of Kenya is threatened and will be contravened if the respondents and the group of unknowns who have invaded the suit property are allowed to continue carrying out the intended unlawful and illegal excavation and construction on the suit property;
 - b. A declaration that the decision by the 1st, 2nd and 3rd respondents to arbitrarily allow the 5th, 6th and 7th respondents together with their agents and the group of unknown people to acquire the suit properties and commence the developments thereon and to refuse to grant security to the Petitioner and the other beneficiaries and/or lodge investigations into the complaints lodged by the petitioner is null and void to the extent that it violates the



fundamental rights and freedoms of the petitioner as set out under Articles 29, 31, 35, 40, 47, 48, and 64 of *the Constitution*;

- c. A declaration that the 1st, 2nd and 3rd respondents have acted ultra vires the powers conferred upon them under *the Constitution* of Kenya, 2010 and the Police Act and the *National Police Service Act*;
 - d. A declaration that the 1st, 2nd, and 3rd respondents have power to investigate and arrest any person who trespasses on a person's private property and the power to provide security to the citizens of Kenya whose lives are threatened by trespassers of private property;
 - e. A declaration that the unilateral decision by the 1st, 2nd and 3rd respondents to allow the 5th, 6th and 7th respondents to enter the suit property commence construction thereon, acquire the same was reached in breach of the rules of natural justice;
 - f. An order of judicial review in the nature of mandamus compelling the 1st, 2nd, and 3rd respondents to evict the 5th, 6th and 7th respondents, their agents and or group of the unknown persons on the suit property from the suit property and provide the necessary security required to the petitioner and the beneficiaries of the estate of Saleh Bin Said to enable them enjoy the suit property;
 - g. A permanent injunction restraining the 5th, 6th and 7th respondents, their employees, servants, agents, assigns, representatives, contractors, or howsoever from putting any further or other developments on, entering into, demolishing or destroying the fences of or any portion or part of the buildings or developments on the suit property and from interfering in any other way whatsoever with the petitioner's possession and enjoyment of the suit property;
 - h. A permanent injunction restraining the 5th, 6th and 7th respondents, their employees, servants, agents, assigns, representatives, contractors, or howsoever from hindering or blocking the petitioner's access to and exit from the suit property;
 - i. A declaration that the suit property belongs to the estate of the late Saleh Bin Said.
 - j. Such other or further orders or directions as the court may deem fit to grant so as to meet the interest of justice;
 - k. The cost of this Petition be awarded to the petitioner.
7. The 5th-7th respondents opposed the petition jointly vide the Replying Affidavit of John Nahoza Mwangapheu, the 5th respondent. He denied that they have unlawfully invaded, or commenced excavation and construction of buildings on the suit land. He deposed that they have been staying on the suit property uninterrupted for several years. He deposed that the petition was filed without disclosing that there are two pending cases, being Mombasa CMCC No. 474 of 2015, where the 5th and 7th respondents are plaintiffs and seek a permanent injunction against Saleh Said Sharman from evicting them from the suit land, and Mombasa Civil Application No. 58 of 2015 (OS) being a case for adverse possession. He deposed that the land has many squatters who have been on the land for several years and have built permanent structures. He denied that the 1st, 2nd and 3rd respondents have never assisted the petitioner/s as they filed an application to have the 1st respondent explain why he is disobeying a lawful court order which he annexed (the order is from the suit Mombasa CMCC No. 474 of 2015 and is dated 2 April 2015). He has raised issue that the petitioner (meaning the original 1st petitioner) has no capacity to sue (as he is not administrator of the estate of the deceased). He further deposed that on 10th May 2015, police officers from Bamburi Police Station invaded the suit property with the aid of the petitioner (meaning original 1st petitioner) and shot a young boy as they were trying



to evict squatters. He deposed that the petitioner has been colluding with the 1st respondent to arrest and charge the 5th-7th respondents and others without considering the pending suits. He pleaded that the suit has been caught up by Section 7 of the *Limitation of Actions Act*, Cap 22, Laws of Kenya and asked that it be dismissed with costs.

8. I have not seen a replying affidavit, which I can say is an actual response to the petition, filed by the 1st – 4th respondents. They however filed a list of documents and an affidavit sworn by Samwel K. Mwangi, the Chief Land Registrar Mombasa. His affidavit gives a history of the ownership of the suit land as noted in the title and register thereof. It is demonstrated that the original land was identified as Subdivision No. 398 of Section I, of Meridinal District South B. 37 comprising of 73.16 acres and title was issued on 4 November 1924 to Msellam bin Kassim. He died, and the share of the property was given to three persons each holding 1/3rd share, being Rashid bin Kassim Bin Rashid (Rashid), Said Rashid Bin Kassim (Said), and Mohamed Rashid Bin Kassim El-Manthry (Mohamed). In September 1963, 2 of the 1/3rd shares were transferred to Saleh Said Sherman (the deceased herein). On 3 May 1985, a grant of probate was registered in favour of the Public Trustee for the 1/3rd share of Said. On 3 May 1985, approval was given by the Municipal Council of Mombasa, to have the property subdivided into two, being Numbers 2473 and 2474 (Original Number 398)/I/Mainland North. On 3 May 1985, the Subdivision No. 2474 (Original Number 398/3) Mainland North measuring 9.299 hectares was transferred to one Danson S. Maingi and a certificate of title issued. What he acquired was 1/3 share of what was owned by the estate of Said and which was held by the Public Trustee. Mr. Mwangi deposed that upon surrender of the original title to Plot No. 398/Section I/MN, Saleh Said Sherman will be issued with a new title in respect of the Subdivision No. 2473 (which comprises of 2/3rd of the original land).
9. The petition was heard by way of viva voce evidence.
10. During the hearing, the petitioner called as PW-1, one Samuel Kinuthia, who was the Deputy OCS Bamburi Police Station, when the events in the petition took place. At the time that he testified, he was the Deputy OCPD, Machakos. He testified that in the year 2015, Swaleh Sherman (either 1st or 2nd petitioner) came to Bamburi Police Station and complained that the land was being invaded. On 18 March 2015, a report was made that a gang had attacked him, destroyed his property, and chased him away. The police took his statement. He (PW-1) visited the suit land. What he saw were crops and coconut trees. There was a homestead and some structures and nobody on the land apart from the workers of the petitioners. At a later visit, they found temporary structures which they managed to remove. The locals demonstrated, complaining of harassment, and they would re-build the structures at night. They made more than 20 arrests and charged the accused persons in Shanzu Law Courts. Mr. Kinuthia continued to testify that after the demonstrations, the County Government of Mombasa through the CEC of Lands, accused the police of bias and harassment. He testified that after the accusations, the police were laid back from carrying out the demolitions and they advised the petitioners to file a matter in court. After they stopped, the structures multiplied on the land. He expressed surprise at the number of structures which were on the land during the site visit by the court as there were now many structures. A scene of crimes photographer, one Antony Kinyanjui took photographs of the suit and prepared a report which he referred to. He testified that he was aware that there was criminal trespass and he attempted to remove the illegal structures on the land before they were stopped.
11. Cross-examined by Mr. Makuto, learned counsel for the 1st-4th respondent. He testified that once the report was made, they (the police) tried to assist the complainant by removing the structures, and also advised him to seek court intervention to enable him get a court order to remove the trespassers. He asserted that they did not refuse to assist.



12. Cross-examined by Mr. Kenga, learned counsel for the 5th – 7th respondents and the interested parties, he testified that the person who made the report was Swaleh Sherman (also known as Swaleh Nguru, a name similar to that of the registered proprietor) and he tendered a copy of the title to the land. They (the Police) proceeded to demolish the structures on the land. He denied that in the process they injured a boy, though he did claim that a boy was injured with a stick and the squatters exaggerated so as to get some mileage. The incident report was dated 18 March 2015. He stated that he assisted in demolitions before this date as there were other similar reports. He denied that they did not take action because they failed to remove the invaders. He testified that he did not have evidence of the persons charged though he could recall that the case against 5th respondent was discharged under Section 87(a) of the *Criminal Procedure Code*. He testified that he was not paid to demolish the respondents' houses and it was being done as a Bamburi Police Station operation and not on a personal basis.
13. PW-2 was one Swaleh Hussein Sharman. He testified that the 1st petitioner is 84 years old and is his cousin, and that he had donated to him a Power of Attorney. He testified that the title deed is in the name of Said Saleh Sharman (deceased also known as Swaleh Nguru), his grandfather, who bought the land in 1964. He testified that he had been utilizing the land for poultry farming from 2001, and that he was on the land everyday. There was a caretaker, and besides him and the caretaker, there was no one else on the land. He testified that in 2015, he received a call from his caretaker about the invasion of the suit property and cutting down of trees. He rushed to the police station and made a report. They went to the suit property, and three persons, who were drawing lines on the land and allocating it to people, were arrested. The rest of the people ran away. He testified that the police guarded the suit property only during the day, and at night the invaders would build their structures. He testified that he tried to put a wall, but he did not get approval as there were invasions of land in that area. He produced some photographs to demonstrate that he was doing poultry farming on the land and to show that there was a mosque built by his grandfather. He stated that the mosque was demolished by the invaders and what remains is an orphanage they had built, and further, that the invaders have rented out the caretaker's house.
14. He testified that he sued the National Police Service because he was not getting assistance from them. He further alleged that the OCPD was siding with the leaders of the invaders. He testified that the invaders were not in the land since 1997 because in 1997 the land was occupied by Somali refugees under a contract between the UNHCR and the deceased. He testified that the respondents have continued to sell the land to third parties and he has been unable to access the suit property since 2015. He testified that the deceased had eight sons but the suit property could not be distributed because of this dispute.
15. Cross-examined by Mr. Makuto, he testified that he reported the invasion to the police and initially the police assisted. He also referred to a letter dated 25 March 2015 written by the Deputy County Commissioner to the County Director of Physical Planning and Architecture, where the writer mentioned that they have had several cases of invasion of land and they had advised the property owners to fence their land to make their work easier. He testified that he was advised by police to file a case for eviction. He denied that the respondents and interested parties got into the land in 1998 or 1999. He added that as per the letter from the Deputy Commissioner, there were no invaders as at March 2015.
16. Cross examined by Mr. Kenga, he testified that their land is 72 acres and the mother title is No. 398. He stated that part of the land was sold to one Maingi. He was questioned on some entries in the register of the land. He denied that the land does not belong to them for reason that it is not registered in the Municipal Council system. He testified that the children's home was built by his father around 1991. He further testified that refugees came in 1992. He testified that the coconut trees on the land were planted by his grandfather and himself. He stated that they demolished the structures built in the year



- 2015 and not any other house. He testified that he received assistance from the police for 3 weeks only. He stated that the police did not demolish any house. He denied that the 5th – 7th and the interested parties moved into the land in the year 1997 after the refugees moved out.
17. PW-2 was recalled twice as issues had arisen on some entries in the title and he was to attend with the original certificate of title. On the first recall, he testified that the original title could not be traced and that the administrator of the estate has applied for a new title. He affirmed that there is subdivision into Plots No. 2473 and 2474. He stated that what they own is the Plot No. 2473 and the Plot No. 2474 belongs to one Maingi. He clarified that this suit has been filed in relation to the Plot No. 2473. He was nevertheless cross-examined by Mr. Makuto on other issues and he testified that the initial suit was against the 5th – 7th respondents who went to court and obtained a court order to stop their eviction. He affirmed that the police came, which resulted in a scuffle, and a child was shot. It is after this that the police told them that it is better they proceed to court and obtain a court order. Cross-examined by Mr. Kenga, he stated that the petition is in relation to the Plot No. 398. He stated that he came to know of the subdivision of the land after this case was filed. Pressed, he stated that he cannot testify much on the entries in the title as he was not there at the time. He however insisted that they still own 72 acres of the land and affirmed that the suit is filed to remove the occupants out of 72 acres. He testified that before 2014/2015, there were 6 squatters in the 1980s who were given money to vacate but did not leave the land. The 6 died and their descendants are on the land. He however clarified that they are not the persons sued in this suit and that they have a separate suit. He stated that their occupation is of about 7 acres and that as at 2013, there were about 11 houses. On further cross-examination, he agreed with a report which put the figure at 15 houses. He stated that the original squatters and their descendants never left the land and that they are on the land to date. He testified that the 5th respondent came into the land in the year 2014 and sold the land to the interested parties. He stated that he does not live on the land but only sells. So too the 6th and 7th respondents. He mentioned that he is in court owing to a power of attorney he holds from Awadh and Said Saleh who are the administrators of the estate of the deceased. He referred to the said Power of Attorney. He affirmed that when the case was filed they held no grant of letters of administration and no one had been appointed administrator.
18. On the second recall, he now had the original title deed, which he stated was found with one of his uncles after a family meeting was held. It is title to the Plot No. 398.
19. With the above evidence, the case of the petitioners was closed.
20. The 1st-4th respondents called as RW-1, one Anthony Kinyanjui an officer from the Department of Criminal Investigations, Special Service Unit, Scene of Crime section. Between May 2011 and February 2018, he worked in Mombasa. He testified that he visited the suit property on several occasions, the first time being on 17 April 2015. He had been called by the OCS, Bamburi and requested to proceed to the Plot No. 2473/I/MN owned by Swaleh Sherman. At the scene, he was shown illegal subdivisions and illegal structures. He took 137 photographs of the site and prepared a report. He had the 137 photographs in a booklet which he produced in evidence. On arrival, he saw illegal subdivisions and structures under construction. He testified that he visited the suit property again on 8 June 2015 and there was farming and new subdivisions with barbed wire and construction still ongoing. He took 30 photographs and made a report. His third visit was on 20 January 2017. This was during the court site visit. He testified that he again visited the suit property on 10 February 2017 when the physical counting of the houses took place. He thought that most of the structures were newly built while some were under construction. He took photos of these.
21. The second witness was Samwel Kariuki Mwangi, the Land Registrar. His evidence centered on the ownership of the land and the entries in the titles. He more or less elaborated on the affidavit that he had earlier filed which I see no need of repeating. What is significant is the entry No. 15 which is



subdivision of the Plot No. 398 into Subdivisions Nos. 2473 and 2474. A transfer has been effected for Plot No. 2474 but the Plot No. 2473 still remains unregistered and is the remainder in the mother title. No separate title has been issued yet.

22. The 5th respondent testified on his own behalf and on behalf of the 6th and 7th respondents and the interested parties. He denied that they invaded the land in the year 2015. He testified that his grandmother used to occupy this land for a long time. His mother and himself also occupied the land until 1992 when refugees from Somalia were settled on the land. He claimed that upon their arrival, they (the occupants) were told to stay at the periphery of the land by the Administration who told them that this was Government land. They thus lived on the periphery of the land and leased their houses to the refugees, until the refugees left in the year 1996. They then went back to their original occupation. He testified that when this petition was filed, they had lived on the land for more than 12 years. He stated that it is them who built the mosque and that he has never seen a caretaker on the land. He denied that PW-2 has ever lived on the land. On the photographs produced by Mr. Kinuthia, he stated that what he recognizes are those taken during the court visit and claimed that Mr. Kinuthia took photographs to help the petitioners and that he was involved in the demolition of houses. He testified that the houses that were destroyed were rebuilt. Cross-examined, he acknowledged filing the suit Mombasa CMCC No. 474 of 2015 over the same land. He denied filing other suits that were put to him. He acknowledged selling and leasing part of the suit land in the year 2018 to third parties. He was also cross-examined on his identity and origin as shown in his identity card which revealed that he was born in Kinango, Kwale County. He testified that he lives on the land with two of his three wives. He stated that he was arrested in the year 2015 after the petitioners complained. He was also cross-examined at length on the photographs taken and of their occupants.
23. With the above evidence, the 5th – 7th respondents and the interested parties closed their case.
24. I invited counsel to file written submissions which they did.
25. Ms. Oluoch Wambi, learned counsel for the petitioners inter alia submitted that the state through its security agencies, including the police, has a positive obligation and duty to facilitate and create a peaceful environment in which rights enshrined in *the Constitution*, including the right to property, are freely and fully enjoyed by persons within its jurisdiction. She referred me to the decision of the Inter-American Court of Human Rights in the case of *Velaoquez Rodriguez vs Honduras*, judgment of 27 July 1998. She also referred me to the local decisions in *Gullid Mohamed Abadi vs OCPD Isiolo Police Station & 2 Others* (2006) eKLR and *Charles Murigi Muriithi & 2 Others vs Attorney General* (2015) eKLR. Counsel submitted that the suit is straight forward and was precipitated by a dereliction of duty by the 1st – 3rd respondents. She clarified that this is not a suit for adverse possession, nor one for determination of ownership of the Plot No. 398, nor a recognition of the purported status of the 5th – 7th respondent and interested parties. She submitted that despite lodging a complaint, the 1st – 3rd respondents failed to discharge their duties under Section 24 of the *National Police Service Act*. She submitted that there is no law which requires the police to only act through a court order so that they can exercise their functions. She submitted that the failure to act resulted in a violation of the rights of the petitioners under Articles 22, 40 and 64 of *the Constitution*. She submitted that the petitioners have demonstrated ownership of the land and that there is evidence of illegal entry by the 5th – 7th respondents and interested parties. She referred to the various reports and photographs taken by the police and produced in evidence, and to the evidence of the 5th respondent. Counsel referred to various letters on the request to build a boundary wall. She submitted that the petitioners have demonstrated that their constitutional rights have been violated as the 1st – 3rd respondents failed to discharge their duties. She cited the case of *Kariithi & Another vs Attorney General & Another* (2021) KEHC 308 and *Florence Amunga Omukanda & Another vs Attorney General & 2 Others* (2016) eKLR. She submitted



that the inaction of the 1st – 3rd respondents caused the illegal occupation, trespass and wastage of the suit property by the 5th – 7th and the interested parties and a group of unknown persons. She submitted that an order of mandamus should issue to the 1st – 3rd respondents compelling them to ensure the protection of the rights of the petitioners under Articles 22, 40 and 64 of *the Constitution*. She referred me to the case of *Republic vs Kenya National Examinations Council ex parte Geoffrey Gathenji Njoroge*, Civil Appeal No. 266 of 1996 on the nature of the order of mandamus. She also raised issue that the 5th respondent has not filed any authority that he was so authorized by the other parties to act on their behalf and asked court to take cognizance that none of the other respondents filed a response to the petition.

26. For the 1st to 4th respondent, it was submitted by Mr. Makuto, learned State Counsel, that the 1st – 4th respondent are not opposed to granting security and assistance to the petitioners in removing the respondents from the land. He particularly referred me to the evidence of Mr. Kinuthia. Counsel submitted that the police are ready and willing to assist the petitioners but there was need for a court order. Counsel submitted that the 1st – 4th respondents provided security to the petitioners and pointed out that trespassers were arrested and presented at Shanzu Law Courts for prosecution. He refuted the claim that they neglected their duties. Counsel submitted that the request made to the petitioners for them to avail a court order was reasonable.
27. On the part of the 5th – 7th respondents and the interested parties, Mr. Kenga, learned counsel, inter alia submitted that the petitioner seeks to enforce private land rights against the 5th – 7th respondents using the assistance of the 1st – 4th respondents by having them evicted from the suit land. He submitted that the 5th – 7th respondents have invoked the doctrine of adverse possession as a shield. Counsel submitted that no orders are being sought against the interested parties as the petition was not amended. He also pointed out that the petition was also not amended to have the 2nd and 3rd petitioners on board. He submitted that filing this petition without letters of administration was fatal to the suit. He referred me to various authorities regarding filing suit for or against a deceased person all of which affirm that such suit is a nullity. He submitted that the petitioner (meaning 1st petitioner) should not have filed this petition without first obtaining letters of administration as this petition is being filed on behalf of the estate of the deceased. Counsel also raised issue on the capacity of the witness who testified on behalf of the petitioners. He submitted that the initiator of the petition was Awadh Saleh Said who gave no evidence in court. He submitted that the evidence came from Swaleh Hussein Saleh Sherman who alleged to have a general power of attorney donated to him by the petitioner on 11 June 2007. He did not think that this power of attorney qualified to allow him to be a competent witness. He relied on the case of *Kenneth Omollo Simbiri & Another vs Daniel Ongor*, Kisumu ELCA No. 23 of 2019, that the legality of a power of attorney can be raised at any time before the determination of the suit. He pointed out that the witness had to be recalled twice to clarify issues and submitted that it was only the petitioner or the donor of the power of attorney who could give direct evidence on the matter. He relied on the decision of *Brigitte Korn vs Kahindi Mtsanzu*, Mombasa ELC No. 110 of 2009 on this point. He submitted that the failure to amend the petition was fatal and added that the co-petitioners and interested parties are strangers to this suit. Counsel further submitted that this petition seeks a determination of private land ownership rights against the individuals named as the 5th – 7th respondents and interested parties. He submitted that the petitioners ought to have filed an ordinary suit through a plaint. He relied on the case of *KALRO vs Edison Sonje Taura & Others*, Mombasa ELC, Petition No. 29 of 2019; *Beatrice Mutoya & Another vs Henry Manyange Matoya*, Kisii ELC No. 272 of 2013; and the Court of Appeal decision in the case of *Gabriel Mutava & 2 Others vs The Managing Director, Kenya Ports Authority & Another*, Civil Appeal No. 67 of 2015 (Mombasa). Counsel added that what the petition seeks are simple reliefs of eviction and permanent injunction and should have been commenced through a plaint. He submitted that the intention of the petitioners was to escape



any defence of limitation and the claim for adverse possession. He asked that the petition be dismissed with costs.

28. I have considered all the above. It will be seen that Mr. Kenga raised quite a number of issues which are procedural in nature. He also raised an important issue concerning the registration of the land and pointed out that the petitioners cannot purport to assert rights over the whole of the Plot No. 398 as it has already been subdivided and title to a portion of it issued to a third party. He may also have a point in asserting that the petition is incompetent for having been instituted by a person who had no capacity to represent the estate of the deceased at the time that the petition was filed. I however opt not to go into assessing all these technical procedural issues, but instead deal with the merits of the case once and for all. I will therefore be quite brief in my disposition, and this is no disrespect to the submissions filed, and I acknowledge the industry that counsel have put in, only that I am of opinion that the matter before me is straight forward and can be determined based on the evidence presented.
29. In a nutshell, the case of the petitioners is that despite lodging numerous complaints, the 1st – 3rd respondents refused to accord them the necessary assistance under *the Constitution* and Police Act, in failing to investigate and arrest the 4th – 6th respondents. It is also mentioned that the 1st – 3rd respondents have refused to evict the trespassers on the suit property and refused to provide security to the petitioners on the basis that there is no court order compelling them to act.
30. I have no issue with the assertion that the police need to act upon a complaint when presented. Indeed that is why we have a police service. Without the police, and without security being guaranteed to every person within the Kenyan territory, then anarchy would prevail. It is indeed therefore necessary for the police to take action once a complaint is presented. The complaint of the petitioners is that despite having this obligation, the police failed to take action.
31. Are these claims really true ? I am not persuaded.
32. I think given the fact that there were already squatters on the land, the request by the police for a court order before they could proceed any further was reasonable. One can as well argue that if the police proceeded to demolish houses and evict the persons therein, then the police would have gone on a frolic of their own, and would be infringing on the rights of the persons in occupation. You see, it is not always the case that a person in occupation of land without having a title has no rights in it. That is why it is necessary for the police to proceed with caution. It is one thing arresting a person who is undertaking a cognizable offence, in our instance a person being seen to be making an active entry to land, but it is another matter arresting a person who you find is already in occupation of the land.
33. From the evidence presented, the police did in fact move in and proceeded to arrest a number of persons, who were said to have recently invaded the land. The police even appear to have proceeded to destroy their houses but at some point they stopped. They needed to stop because the persons in occupation had now filed suit and had obtained orders in their favour.
34. I have looked at the crime and incident report. It shows that a report of malicious damage to property was made on 18 March 2015. The report states that the scene was visited and one person arrested and charged with the offence complained of. The person arrested was the 5th respondent and he was put in custody. On 24 March 2015, the 5th and 7th respondents moved to court to assert rights to the land, by filing the suit Mombasa CMCC No. 474 of 2015. On the same day, they obtained an interim order restraining Mr. Sherman from evicting, demolishing, harassing, or interfering with their occupation of the land, identified as Plot No. 398. I am not sure if the police were aware of this order, for it seems as if the police still continued to act. I have seen evidence of a charge sheet showing that ten persons, including the 5th respondent, were arrested on 28 March 2015, and charged with the offence



of Trespass contrary to Section 3 (1), as read with Section 11, of the Trespass Act, Cap 294, Laws of Kenya. This led the 5th and 7th respondents to file an application dated 1 April 2015 to have the OCS, Bamburi, summoned to explain why he was still sending police officers to demolish and interfere with their possession. I do not think that given the order of 24 March 2015, the police could proceed to act at the behest of the petitioners, for if they proceeded to do so, then they would have been in violation of the court order.

35. In addition to the suit Mombasa CMCC No. 474 of 2015, there was also the suit Mombasa High Court Civil Application No. 58 of 2015 (OS), a suit for adverse possession, which was filed on 2 April 2015 by other persons who claimed to be in occupation of the land. It is apparent therefore that the occupants were asserting that they have rights over the land. Given that position, the police could not now take the law into their hands and proceed to evict the 5th – 7th respondents and the interested parties. There was already a court order stopping them from acting. This was a situation which now called for the petitioners to also move to court to assert their rights and obtain orders for the eviction of the occupants of the land. I have seen no suit filed by the petitioners seeking the eviction of the persons said to be in illegal occupation of the land. Instead, the petitioners filed this suit complaining that the police have failed to act. Can the petitioners really claim that the police failed to act? I do not see how, given the evidence that I have demonstrated above.
36. With the above in mind, I do not see the place of this petition. Turning to the prayers in the petition, prayers (a), (b) (c) and (e) are untenable for I find that the police did not in any way violate the rights of the petitioner. They acted to the extent that they could until the court issued orders stopping them from proceeding any further. I need not give prayer (d) for you cannot issue declarations in a vacuum. One first needs to demonstrate a violation of rights before the court can issue a declaration. Prayer (f) seeks an order of mandamus to compel the 1st – 3rd respondents to evict the 5th – 7th respondents and the other occupants from the land. This cannot issue without a determination of the rights of the parties having been made. The rights of the parties will be determined in the pending civil suits that have been filed or in any other suit that may be filed by the petitioners or other persons claiming rights to the land. To issue an order of mandamus here would be to render otiose the said suits and that would be completely untenable. I say the same on prayers (g) and (h) of the petition. This court cannot issue an order of permanent injunction in a petition such as this. If the petitioners want that order, then they need to file a civil suit before a competent court, which court will then assess whether or not the petitioners are entitled to such an order. Prayer (i) seeks a declaration that the suit property belongs to the estate of the late Saleh Bin Said. I reiterate again that a court only issues declarations when there is a dispute. In this instance, I have no dispute of ownership of the land upon which I can make a declaration of ownership. In any event, this court wouldn't issue such an order given that there is a third party who has a stake in the Plot No. 398 and whose stake is within the Subdivision No. 2474. It is apparent from the above that I am not persuaded to issue the orders sought in the petition and this petition fails.
37. The only issue is costs. I think the petition was ill advised. I have already demonstrated that on receipt of the complaint, the police proceeded to act and arrest the persons who had allegedly invaded the land. They were presented in court and charged. The occupants subsequently got orders restraining the police from acting any further. Why would the petitioners now sue the police claiming that they have refused to act and remove the occupants on the land? I fail to understand. I also do not see why the petitioners sought orders of eviction and permanent injunction against the 5th – 7th respondents in this petition. They have already shown that they have filed suits against the petitioner/s asserting rights over the land. Why wouldn't the petitioners proceed and defend those suits or file a suit of their own seeking to have the occupants evicted and permanently restrained from the land but proceed to



file this petition ? I also fail to understand. The costs herein will thus follow the event. The petition is dismissed with costs to the respondents.

38. Judgment accordingly.

DATED AND DELIVERED THIS 20 DAY OF JULY 2022.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA.

Delivered in the presence of:

Ms. Oluoch Wambi for the Petitioners

Mr Makuto, State Counsel, for the 1st – 4th respondents

Mrs. Chengo holding brief for Mr. Kenga for the 1st – 7th respondents and the interested parties

Court Assistant – Wilson Rabong'o

