



REPUBLIC OF KENYA



**Mwandori & 7 others v Weda & 7 others (Environment & Land Petition
19 of 2021) [2025] KEELC 3098 (KLR) (3 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3098 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND PETITION 19 OF 2021**

FM NJOROGE, J

APRIL 3, 2025

BETWEEN

KILLIAN MWAJANJI MWANDORI & 7 OTHERS PETITIONER

AND

ALI NDOROR WEDA & 7 OTHERS RESPONDENT

JUDGMENT

1. The petition subject of this judgment is dated 23rd August 2021. The petitioners pray for the following orders in the petition:
 - a. That a declaration be and is hereby issued that:
 - i) The 1st to 5th respondents are conflicted and a cannot discharge their mandate effectively; and
 - ii) The appointment of the 1st to 5th the respondents violates Article 10, 47, and 73 of the Constitution;
 - b. An order of certiorari bringing to this court for purposes of quashing and to quash the appointment of the 1st to 5th respondents to the Mtwapa-Kidutani Land Settlement Committee;
 - c. Costs of the petition.
2. The petition is supported by the sworn affidavit of the 1st petitioner, duly authorized by the other petitioners, dated 23/8/2021 which reiterates and elaborates on the matters in the petition.
3. The petitioners describe themselves as residents of Kidutani while they describe the 1st - 5th respondents as members of Mtwapa-Kidutani Land Settlement Committee appointed under the provisions of the Land Act 2022. The 6th respondent is the Land Adjudication Officer while the 7th respondent is the



County Government of Kilifi. The 8th respondent is the National Land Commission a Constitutional commission established under Article 67 of the Constitution.

4. By way of a historical background to the petition as narrated by the petitioners, they aver that sometime in 1987 the Government of the Republic of Kenya initiated the process of settling people on Mtwapa Kidutani G L15A (hereinafter referred to as “the suit property”.) That was to be done through the Kilifi District Land Adjudication Office. In 1988 the suit property was surveyed and a head count of the occupants conducted on what they call a “jembe-jembe” basis. It was found that a total of 174 families including the petitioners were resident on the land as squatters. In the next exercise conducted by the Kilifi Land Adjudication Office, the occupants were allocated land, with the petitioners being allocated plots number 2, 8, 30, 31, 43, and 49 respectively. Other portions were hived off and reserved for public use including a primary school and a market. The petitioners have been in occupation of the allotted land until recently when the 1st to 5th respondents allegedly with the help of government officers allegedly planned to dispossess the petitioners of their land. The 1st - 5th respondents allegedly invaded the petitioners’ land. This was reported to the 7th respondent; however, no action was taken by the 7th respondent. The petitioners lodged a court case, Kilifi Principal Magistrate’s Land Case Number 52 Of 2020 Alfeit Mumbo Gunda & Another versus Faraj Mwangome and 4 others as well as Kilifi Principal Magistrates Court Land Case Number E16 of 2020 Rajab Nyale Mwanyae End Another Versus Faraj Mwangome and Others. Orders of injunction restraining the 1st -5th respondents from trespassing or in any other manner interfering with the petitioners’ peaceful use and occupation of the suit property were issued in those cases. However, thereafter, allegedly with the aid of land officers and the local administration, the 1st to 5th respondents were appointed as members of the Mtwapa-Kidutani Settlement Committee, allegedly with a special mandate to deprive the petitioners of their land and regularize allocation to the invaders, and they instructed goons to invade the petitioners’ land. Reports were made to the police on various dates regarding these invasions. The petitioners have followed up with visits to the Mtwapa Police Station but the police redirected the petitioners to the court for redress, hence the present petition.
5. It is alleged that the appointment of the 1st - 5th responding violates Article 10 of the Constitution. The 1st - 5th respondents have appealing favor and criminal cases before the Kilifi Principal Magistrate’s Court for invading the petitioners plots and there are orders in force barring them from trespassing or visiting the suit property. Their appointment is faulted as being against the rule of law since it was done despite the existence of those court orders. It is stated that since they have pending issues relating to the suit land that they have been appointed to oversee the allocation of, their appointment fails in the integrity transparency and accountability aspects required by Article 10 of the Constitution
6. It is also alleged that their appointment violates the provisions of Article 73(2) of the Constitution which provides for the guiding principles of leadership and integrity, which includes selection on the basis of personal integrity, competence and suitability, objectivity, impartiality, in decision-making and ensuring that decisions are not influenced by nepotism, favoritism, other improper motives or corrupt practices, selfless service based solely on the public interest demonstrated by honesty in the execution of public duties, the declaration of any personal interest that may conflict with public duties, and accountability to the public for decisions and actions and discipline and commitment in service to the people.
7. The decision of the 6th 7th and 8th respondents to appoint the 1st to 5th respondents is alleged to have violated the principles of leadership and integrity because of the following: the 1st - 5th respondents allegedly have integrity issues including active criminal complaints of invasion of land; the 1st - 5th respondents are allegedly, by virtue of the active court orders barring them from trespassing the suit



property, not suitable for appointment; the 1st - 5th respondents are conflicted and cannot perform their roles as members of the Land Committee impartially and transparently.

8. It is also alleged that the appointment of the 1st - 5th respondents violates Article 47 of the Constitution.
9. Lastly it is alleged that the appointment of the 1st - 5th respondents violates Article 27 of the Constitution in that considering the land disputes between the petitioners and the 1st - 5th respondents, the 6th 7th and 8th respondents have treated the petitioners unfairly by appointing the 1st - 5th to a Committee that will identify beneficiaries of land that both the petitioners and the 1st - 5th the respondents are fighting for. It is therefore averred that the actions of the 6th to 8th respondents therefore violate the petitioners' rights to equal protection and equal benefit of the law hence the prayers sought.
10. At some point during the pendency of these proceedings, it was indicated by Mr. Lugo for the 6th and 7th respondents that the parties were exploring and out of court settlement but none ever materialized.
11. During the pendency of this proceedings also, it emerged that this matter is related to Petition Number 13 Of 2022. The two petitions were ordered to be disposed of by way of written submissions on 26th September 2024. It was also ordered that petitioners do file separate submissions for each file. However, no consolidation was sought and no order of consolidation was made and therefore each file has to be dealt with separately.
12. It would also appear that no substantive response was ever filed by the respondents to the present substantive petition. However, the 1st -4th respondents filed a notice of appointment of advocates through Bunde Mangaro and Company Advocates on 21st September 2021. They later filed a replying affidavit sworn by the 2nd respondent. That affidavit was also said to have been sworn on behalf of the 5th respondent. The 2nd respondent avers that he is the same person as the 5th respondent.
13. As things stand right now, the substantive petition is unopposed and the facts set out by the petitioners are deemed to be not controverted at all. Nevertheless, what this court must do is to investigate whether the petitioners have established that their rights under the Constitution have been violated or threatened with violation.

ANALYSIS AND DETERMINATION

14. The petition challenges the Constitutionality and legality of the appointment of the 1st -5th respondents as members of the Mtwapa-Kidutani Land Settlement Committee.
15. The issues that arise for determination in the petition are the following:
 - a. Whether the 1st -5th respondents were appointed as Committee members of the Mtwapa-Kidutani Land Settlement Committee?
 - b. Whether the appointment of the 1st -5th respondents violates the provisions of Articles 10, 27, 47 and 73of the Constitution;
 - c. What orders should issue.

The issues are addressed as hereunder.

a. Whether the 1st -5th respondents where appointed as Committee members of the Mtwapa Kidutani Land Settlement Committee appointed under the provisions of the Land Act 2012;

16. Is there any evidence that the 1st -5th respondents have been appointed as members of the said Committee?



17. This Court has perused the supporting affidavit to the petition and its attachments. There is no document attached to the affidavit showing that the 1st to 5th respondents were appointed as members of what the petitioners refer to as the Mtwapa Kidutani Land Settlement Committee.
18. However, the Court has also not seen any express denial from the 1st -5th respondents to the effect that they have been so appointed to the Committee.
19. Section 12 of the [Land Act](#) provides as follows:

“ 12. Allocation of public land

- (1) Whenever the national or county government is satisfied that it may be necessary to allocate the whole or part of a specific public land, the Cabinet Secretary or the County Executive Committee member responsible for matters relating to land shall submit a request to the Commission for the necessary action by way of—
 - (a) public auction to the highest bidder at prevailing market value subject to and not less than the reserved price;
 - (b) application confined to a targeted group of persons or groups in order to ameliorate their disadvantaged position;
 - (c) public notice of tenders as it may prescribe;
 - (d) public drawing of lots as may be prescribed;
 - (e) public request for proposals as may be prescribed;
or
 - (f) public exchanges of equal value as may be prescribed.
- (2) The Commission shall ensure that any public land that has been identified for allocation does not fall within any of the following categories—
 - (a) public land that is subject to erosion, floods, earth slips or water logging;
 - (b) public land that falls within forest and wild life reserves, mangroves, and wetlands or fall within the buffer zones of such reserves or within environmentally sensitive areas;
 - (c) public land that is along watersheds, river and stream catchments, public water reservoirs, lakes, beaches, fish landing areas riparian and the territorial sea as may be prescribed;



- (d) public land that has been reserved for security, education, research and other strategic public uses as may be prescribed; and
 - (e) natural, cultural, and historical features of exceptional national value falling within public lands;
 - (f) reserved land; or
 - (g) any other land categorized as such, by the Commission, by an order published in the Gazette.
- (3) Subject to Article 65 of the *Constitution*, the Commission shall upon the request of the national or a county government set aside land for investment purposes.
- (4) In fulfilling the requirements of subsection (3), the Commission shall ensure that the investments in the land benefit local communities and their economies.
- (5) Subject to the *Constitution* and any other law, the Commission may, in consultation with the National and county governments, allocate land to foreign governments on a reciprocal basis in accordance with the Vienna Convention on Diplomatic Relations.
- (6) At the expiry, termination or extinction of a lease granted to a non-citizen, reversion of interests or rights in and over the land shall vest in the national or county government as the case may be.
- (7) Public land shall not be allocated unless it has been planned, surveyed and serviced and guidelines for its development prepared in accordance with section 17 of this Act.
- (8) Public land allocated under this section shall not be sold, disposed off, subleased, or subdivided unless it is developed for the purpose for which it was allocated.
- (9) Where the land allocated under subsection (8) is not developed in accordance with the terms and conditions stipulated in the lease, that land shall automatically revert back to the national or county government, as the case may be and the Commission shall include in its annual report the status of implementation of this subsection.
- (10) In an allocation of public land under this section, the Commission may impose any terms, covenants, stipulations and reservations that the Commission considers advisable, including —



- (a) that the applicant shall personally occupy and reside on the land for a period set by the Commission;
 - (b) the applicant shall do such work and spend such money for permanent improvement of the public land within the period specified by the Commission; or
 - (c) the consideration that must be paid for a disposition of public land.
- (11) The Commission shall make regulations prescribing the criteria for allocation and for connected matters.
- (12) The Commission shall make regulations prescribing the criteria for allocation of public land and without prejudice to the generality of the foregoing, such regulations may prescribe—
- (a) forms of ownership and access to land under all tenure systems;
 - (b) the procedure and manner of setting aside land for investments;
 - (c) procedures to be followed with respect to auction and disposition of land;
 - (d) appropriate mechanisms for repossession of land given to citizens at the expiry of a lease; and
 - (e) mechanisms of benefit sharing with local communities whose land have been set aside for investment.”

20. It is under that Section that the purported recently appointed Committee is said to have been appointed while all along the petitioners insist that adjudication of the said land was conducted decades ago.
21. This Court has had opportunity to peruse the replying affidavit of Henry Mwangome Tsuma dated 8th October 2021. Henry, it is to be believed, is both the 2nd and 5th respondents. He admits to both names. Henry has attempted to give an account of the suit land in his affidavit. In his attempt to give the proper history of the suit land, he has exhibited proceedings of the Kaloleni Land Disputes Tribunal Case Number 10 Of 2008 in which the first respondent in this case was poised against one Donald Mwanyae, who, in this courts’ view maybe a predecessor or kin to the 7th and 8th petitioners.
22. The Tribunal proceedings reveal that as long ago as the year 2008 there was a conflict over the suit land. This conflict was between persons who considered themselves to be the proper members of the Ribe community and persons considered to be outside the Ribe community who in this case include the ancestors of the petitions. At page 3 of those proceedings the 1st respondent herein is seen as testifying that Donald Mwanyae who has no relationship with the first respondent has taken the 1st respondent’s land. Issues of ethnic origin took a centre stage, where the 1st respondent here in accused Donald of being of the Kamba ethnic group while the 1st respondent was a Mribe.



23. The 1st respondent admits that he saw the land being surveyed in the year 1986. He also admits that there are persons who started coming into the land as long ago as then, and who began taking action such as planting boundaries on the land. He therefore sought the intervention of the Chief of Kisauni one Alfred Nodoro and he was assured that the invaders should not grab the land.
24. Even as he testified before the Tribunal on that day, 13th November 2008, the 1st respondent herein admitted that he owns certain plots: Plots Numbers 16, 32, 33, and 18. He admitted that the land had been demarcated and surveyed and plots had been allocated numbers just as the petitioners are asserting. That is an admission on his part that will be relevant later in the present proceedings.
25. At page 2 of those proceedings, he averred that surveyors came to the land again in the year 1988 and surveyed it. However, he said that there was no Committee that had been appointed during the surveying. He complained to the DC Kilifi, one Harry Wamubei and the survey was stopped. The DC then visited the suit land and a Committee for the survey was appointed and the deponent was one of the members, where he acted as the Chairman. However, he maintains that the surveying never proceeded and only public utility areas were identified.
26. When the 1st respondent was cross-examined in those proceedings at page 4 his answers were as follows:
 - a. The demarcation took place in 1988;
 - b. That objections were raised but they were dealt with by the DC since there was no Committee;
 - c. That the complaints raised were to the effect that the people given the lands were not the owners of the land but they came from other areas;
 - d. That they were told to await a resolution but none came.
27. The decision of that Tribunal in that case is relevant to the present proceedings. First, it must be noted that the Tribunal visited Kilifi and saw the disputed land first hand in its attempt to resolve the case. They got the full description of the boundaries of the Kinung'una Adjudication Section. They found that all the land involved in that section is in Ribe Location, Kinung'una area. However, what the Tribunal found in the final analysis was that the area in dispute in the case, though claimed by the first respondent and his witnesses, was not private or community land but government land. In conclusion the Tribunal found that the information obtained could not have assisted in arriving at a clear decision as to why some other tribes outside Ribe were allocated land in Kinung'una. The Tribunal made the recommendation that the Land and Adjudication Department should examine the case and rectify the situation. It is noteworthy that it was the claimant, rather than the respondents, who was given 30 days to appeal from the decision of the Tribunal.
28. The 2nd respondent at paragraph 13 of his replying affidavit dated 5th October 2021 in the present petition maintains that the Land Dispute Tribunal Award was endorsed as a judgment of the court in Kaloleni Case Number 22 Of 2009 on 30th July 2009. However, this court notes that if there is any such endorsement by a court of law, then it was not exhibited in his affidavit as claimed in the body of the affidavit.
29. It is the 2nd respondent's opinion in his said affidavit that the award and the judgment (the judgment has not been exhibited) that the owners of the Nyika Reserve are the 5 Clans within the Ribe community. He maintains that the court should ask the petitioners which clans they belong to because they are not mentioned in the judgment and proceedings of the Land Disputes Tribunal case. He also emphasizes the fact that there was no appeal against the award of the Tribunal. In addition, he on the advice of his advocate which he believes to be true, maintains that the allotments to the petitioners were set aside and



are therefore null and void. He refers to copies of letters dated 16th October 2020 and 23rd September 2020 respectively which he exhibits in the affidavit. It is important to examine those documents. The letter dated 16th October 2020 is addressed to the Chairman, Ribe Council of Elders by the Chief Officer Lands and Energy the Department of Lands, Energy, Housing, Physical Planning, and Urban Development in the County Government of Kilifi. That letter reads as follows in part:

“Kindly be advised that land portion number GL15A was planned surveyed and awaiting allocation by the Sub County Selection Committee. It measures approximately 100 acres.

Further, Nyika Reserve has been approved for settlement purposes and awaiting (sic) reservation from National Land Commission and will be planned surveyed and allocated within this financial year 2020/2021.”

30. On its part the letter dated 23rd September 2020 is addressed to the 5th respondent (who also claims to be the 2nd respondent). It reads as follows in part:

“Re: Status of Government Land GL15A and Nyika Reserve.

Please refer to your letter of 18th September 2020.

GL15A

This is a public land surveyed and demarcated awaiting reservation for settlement purposes from the National Land Commission.

Nyika reserve

It is a government land. Once we get reservation from the National Land Commission we shall commence the process of regularization of the squatters living in the land.

Francis Obiria

Land Adjudication and Settlement Officer

Kilifi. ”

31. Throughout the affidavit of the 2nd respondent the issue of ethnic origin reigns supreme. He seems to have forgotten that the two letters that he has produced as exhibits in the case identify both GLA15A and the Nyika Reserve as Government Land. His main challenge to the petitioners is that they should prove that they were members of the Ribe community. He also asserts that the petitioners have not been in occupation and or residence as alleged in their supporting affidavit, and states that they have failed to establish by way of evidence that they have been in occupation. However, in paragraph 19 he admits that they are some structures on the land, but he alleges that they are of recent construction, and that they do not belong to the petitioners. In the same breath, he has stated that the land is community land which the petitioners have invaded and they should be evicted therefrom. He admits that the petitioners lodged claims against the respondents at Mtwapa Police Station but alleges that there was no evidence to prosecute the respondents. He also admits that there are a number of suits that have been filed against him and other persons including the 1st respondent by the petitioners at the Kaloleni Resident Magistrates Court but avers that the same are subject to Award Number 22 Of 2009 at the Kaloleni Resident Magistrates’ Court.
32. In the same affidavit the 2nd respondent exhibits a plaint in Civil Suit 228 of 2014 - Rajab Nyale and another versus Nodoro Weda. In that plaint it is evident that the plaintiffs therein claim to be the children of one Donald Japhet Mwanyae, deceased, who was the lawful or registered owner of Plot Number 30 Kibutani GLA and Plot Number 31 GLA situate at Kidutani in Kilifi County and they



being the personal representative to his estate, they have brought that suit against the defendant therein because he had threatened invasion and trespass onto the suit premises and/or carried out such threats and invasion starting as early as the year 2014. Their prayers are that a declaration be issued that they as personal representatives of the deceased are the lawful owners of the two properties as well as a permanent injunction restraining the defendant through himself or his agents from in any manner from interfering with the suit property therein. A copy of the 1st defendant's defense in that case is also exhibited, raising the same defense that has been raised in the present affidavit that I am now analyzing: that plots numbers 30 and 31 are government land; that their adjudication carried out in 1989 was fraudulent; that the adjudication of 1989 was declared null and void by the Kaloleni District Land Tribunal in an award that was adopted by the Kaloleni Court on 30th June 2009, whose adoption order I have already said is not attached to the present affidavit under review.

33. In paragraph 26 of the affidavit the deponent states that the Nyika Reserve Committee was formed on 24th November 2020. He attaches the Committee minutes of a meeting held on the 24th November 2020 chaired by the area Deputy County Commissioner, Rabai.
34. Minute number 2/11/2020 of that record of the Committee meeting identified the Nyika Reserve as Government Land and emphasized that it is not community land. It was evident from those minutes that most of the members of the public had believed that land to be community land, which opinion was erroneous. In the same minutes it was intimated that some funds had been set aside for an adjudication process in respect of that land.
35. Minute number 6/11/2020 of that record of the Committee meeting appointed the 1st – 5th respondents as the Nyika Reserve Land Committee members. Other members were added as follows:
 - i. Constance Chivatsi
 - ii. Sylvester Sadaka
 - iii. Mwanjole Chai
 - iv. Stella Inthambi
 - v. Mapenzi Muhammad
36. Whereas it is clear that the present petition never revealed the means by which the 1st – 5th respondents had been appointed Committee members, the affidavit of the second respondent has clarified the issue completely. Therefore, the allegations of the petitioners have been proved to be correct and a Committee in place as alleged by the petitioners.

b. Whether the appointment of the 1st -5th respondents violates the provisions of Articles 10, 73, 47, and 27 of the Constitution;

37. The next question is whether the appointment of a 1st – 5th respondents as members of the Committee is in violation of the law and the Constitution.
38. It is clear that the petitioners herein emphasize on the violation or the threatened violation of their Constitutional rights under Articles 10, (that the appointment of the 1st- 5th respondents fails in terms of its lack of integrity, transparency, and accountability) Article 73(2) (the appointment of the 1st -5th respondents fails the test of principles of leadership and integrity for having criminal complaints on invasion of the petitioners' land against them, active court orders injuncting them against trespass on the petitioners' land; being conflicted to the point of being incapable of being impartial or transparent in the discharge of their functions as members of the Committee;) Article 27



and Article 47 (unfairness and unreasonableness of the appointment owing to the 1st – 5th respondents being parties to proceedings over the suit land whose allocation they are to preside over.) The issue arising is whether the petitioners have by evidence established their claims of violation or threatened violation of rights.

39. It is categorical that the primary apprehension and is the intertwining thread that binds together all the alleged violations under the above Articles, and which has driven the petitioners to come before this court, is the serious apprehension of the possibility of injustice being meted out to them by virtue of the conflict of interest or bias on the part of the respondents and especially the 1st – 5th respondents who hold membership positions in the impugned Committee. It is alleged that the appointment of the 1st- 5th respondents was done by the 6th, 7th and 8th respondents.
40. In *Judicial Service Commission v Shollei & another* (Civil Appeal 50 of 2014) [2014] KECA 334 (KLR) (19 September 2014) (Judgment) the court, after reviewing the English decision in *R v Gough* [1993] AC 646, the Australian case of *Webb v the Queen* (1994) 181 CAR 41 and the House of Lords case of *Magill v Porter* *Magill v Weeks* [2001] UKHL 67, held as follows:
- “77. Nearer home in *Attorney-General v. Anyang’ Nyong’o & Others* [2007]1E.A. 12, the court identified the test for bias as follows:
- The objective test of ‘reasonable apprehension of bias’ is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the view of a reasonable, fair-minded and informed member of the public that a Judge did not (will not) apply his mind to the case impartially[?] Needless to say, a litigant who seeks [the] disqualification of a Judge comes to Court because of his own perception that there is appearance of bias on the part of the Judge. The Court, however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair-minded and informed about all the circumstances of the case...”
78. Thus it is crucial in determining real or apparent bias, that the first step be the ascertainment of the circumstances upon which the allegation of bias is anchored. The second step is to use the ascertained circumstances to determine objectively the likely conclusion of a fair minded and informed observer, on the presence or absence of reasonable apprehension of bias.” (emphasis mine.)
41. One common example of the implementation of the rule against conflict of interest is Rule 9 of the Advocates (Practice) Rules which provides that no advocate may appear as such before any court or Tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit, and that if, while appearing in any matter, it becomes apparent that he will be required as a witness to give whether verbally or by declaration of affidavit, he shall not continue to appear. Notably, if an advocate is not an adjudicator in a matter, but simply an agent of his principal the litigant, and is required by this rule to cease appearing, how much more undeserving to act is a person appointed as an adjudicator, where his competitor, or others in the generic category as his competitor, may end up before him for a determination of the same dispute? That is where the rule against conflict of interest comes in.
42. In *British-American Investments Company (K) Limited v Njomaitha Investments Limited & another* [2014] KEHC 4627 (KLR) Kamau J, analyzing *Supasave Retail Ltd vs. Coward Chance* (a firm) and



Others; David Lee & Co (Lincoln) Ltd vs. Coward Chance (a firm) and Others (1991) 1 ALL ER observed as follows, albeit in respect of an advocate client conflict of interest situation:

“It is therefore clear that where a party asserts that conflict of interest exists, he must provide sufficient evidence to demonstrate that such conflict of interest indeed exists. It is incumbent upon such party wishing to disqualify an advocate or a firm of advocates from acting for a particular party to show that it has suffered or will suffer prejudice if such an advocate or firm of advocates continues to so act for that party. Mere suspicion, apprehension of a possible conflict of interest or fear of prejudice cannot be a basis to stop an advocate from acting on behalf of a party.” (emphasis mine.)

43. In *Judicial Service Commission v Shollei & another* (Civil Appeal 50 of 2014) [2014] KECA 334 (KLR) (19 September 2014) (Judgment) it was held as follows:

“69. As a Commission established under the Constitution, the appellant is under Article 249(2) firstly, subject only to the Constitution and the law, and secondly is an independent body not subject to the control or direction of any person. The concept of impartiality is deeply engrained in the Constitution. Some of the Constitutional provisions that apply the concept of impartiality include:

- a) Article 10(2)(b) of the Constitution that reflects impartiality as one of the national values and principles of governance adopted in the Constitution as “human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, and protection of the marginalized” (Underlining added);
- b) Article 20(4) of the Constitution makes it mandatory for the Court to promote amongst other things “human dignity, equality and equity” in the interpretation of the Constitution;
- c) Article 159 enjoins the court in the exercise of judicial authority to be guided by amongst other principles, the principle that “justice shall be done to all, irrespective of status;”
- d) Article 50(1) of the Constitution which has already been referred to reflects impartiality as a key attribute in the administration of justice by providing for hearing before an “independent and impartial Tribunal or body” as a fundamental right in the resolution of legal disputes.

70. Bias is the nemesis to impartiality. Black’s law Dictionary 9th Edition has the following definitions in regard to bias.

Bias-Inclination; prejudice; predilection;

Actual bias - genuine prejudice that a judge, Juror, witness, or other person has against some person or relevant subject;

Implied bias – prejudice that is inferred from the experiences or relationship of a judge, juror, or other person.”

44. Impartiality is a common denominator in the provisions of 10(2)(b), Article 20(4) and Article 50(1), Article 73(2)(b). Appointment to leadership is subject to suitability as provided for in Article 73(2)



- (a). Article 27(1) and (27(2) provide for equality before the law, right to equal protection and equal benefit of the law.
45. I have read the contents of paragraph 6 of the 2nd respondent's replying affidavit dated 8th October 2021. That paragraph reads as follows:
- “That to the best of my own knowledge the property in dispute covers and/or extend (sic) to other properties and include (sic) Nyika Reserve and private properties and the name Mtwapa Kidutani GL15A was created to mislead the court to conclude that the entire property in question covers only GL 15A and it is within Mtwapa Kidutani which is not true.”
46. By that statement, the second respondent appears to confirm that the disputed land includes not only GL15A but also the Nyika reserve.
47. Paragraph 7 of the same affidavit reads as follows:
- “7. That the 1st, 2nd, 3rd and 4th defendants avers and maintains that the government intention was to settle Ribe community and/ or the Ribe the clans who were the owners and or occupiers of Nyika Reserve and include Wavitsa but not petitioners and particularly the 9th petitioner who recently invaded the land and forcefully constructed structures on suit property after 24th of November 2020 meeting.”
48. Paragraph 8 of the affidavit reads as follows:
- “8. That to the best of my own knowledge the GL15A is at Lutsanga Kidutani area and Nyika reserve is at the Bisitara village Kinunguna Sub-Location of Ribe.”
49. Paragraph 9 states as follows:
- “9. That the present dispute here in is over portion of land in the Nyika reserve which is defer (sic) from Mtwapa Kidutani GL15A and that of private property herein above and next is a copy of Map Sheet HMD-2.”
50. What the 2nd respondent is saying in his affidavit is that the petitioners' interest is only in plot GL15A situated at Lutsanga Kidutani and not at Mtwapa Kidutani. However, the certificates of confirmation exhibited by the petitioners read “Kidutani GL15A Mtwapa.” That raises doubt as to whether the demarcation conducted in the 1980s covered only G L15A, or both G L15A and the Nyika reserve. This issue will be conclusively addressed in the latter part of this judgment.
51. It is noteworthy that in an application dated 12th February 2024 the 1st -5th respondents sought to set aside the orders of this court dated 15th January 2024. Those orders were issued by my sister Hon Justice Odeny, granting conservatory orders restraining the 1st - 5th respondents from sitting in the Mtwapa Kidutani Settlement Committee and specifically restraining the 1st -5th respondents from identifying or selecting beneficiaries, sitting or hearing disputes relating to settlement of persons on Land Reference Number GL15A (the suit property here in); in that application it is clearly stated by the respondents herein that they are occupants of the Nyika Reserve; it is also the clear position of the 1st -5th respondent is that the petitioners should not obtain land in the Nyika Reserve.
52. This court has already stated that from the contents of the affidavit of the 2nd respondent dated 8th October 2021 analyzed above, it is uncertain as to whether the adjudication of 1988 covered the Nyika



Reserve too. However, in this court opinion it does not at this point matter for the purposes of this petition, and for Malindi Petition No 13 of 2022, whether it is clear or not from the material presented that the adjudication of 1988 extended to the reserve. What is relevant and most crucial is that the land comprised in the Nyika Reserve is not Community Land but Government Land and that the petitioners claim to be already settled on it, whether by the government or otherwise, and that they have structures on the land, though there are pointers that their settlement was by a government Department. The categorization as government land puts the GL15A and the Nyika Reserve far away from the reach of any claim that it is community land meant for the Ribe community alone. To this court, if the government's decision is that the government land comprised in the Nyika Reserve shall be allocated to persons who have been squatting thereon, then the petitioners, if they were settled thereon in the 1980s by the government, or if they are otherwise in possession of portions of that land, they are entitled to be considered for settlement thereon just as are the 1st -5th respondents. The rights of the petitioners to land that was allocated to them however should be respected.

53. The contents of the sworn affidavit of the 2nd respondent whose content he also swears on behalf of the 1st, the 3rd 4th and 5th respondents and which opinions all those respondents therefore share, emphasize the issue of ethnic origin above every other land allocation criterion, and it can not be expected to instil confidence in any reasonable person that as members of the Land Committee, the 1st -5th respondents would play an impartial role in the determination of whether the petitioners would or would not qualify to be allocated land; they have already explicitly exhibited their bias in matters allocation.
54. Regarding the 1st respondent it is certainly evident that he has been engaged in litigation with persons among the petitioners group who claim to have been settled on the land by way of an adjudication that occurred in the 1980s which adjudication he acknowledged happened as seen in his testimony before the Tribunal. Further, the proceedings of the Land Disputes Tribunal case also paint him in negative light as a person who opposed the settlement of the petitioners and their predecessors on government land merely on the basis of their ethnic origin. Having thus exposed his bias, this court finds that he is also automatically disqualified from holding a position in that Committee.
55. Attached to the petitioners' affidavit in support of the petition is a plaint in Chief Magistrates Court Kilifi Land Case Number E52 of 2020 Moses Gunda Munga and Another Verses Ngoro Weda Ngoro, Faraj Mwangome, Hamisi Katani, Ndune Ndzifueni, and Roselyd Wairimu. It is evident that in that case, a Notice of Motion dated 16th November 2020 was filed against the named defendants seeking an injunction to restrain them from demolition or further demolition of structures or houses or howsoever hindering the applicants' peaceful use and occupation of Plot Number 2 - Kidutani GL15A. In that application it is evident that the plaintiffs therein are claiming as the only surviving beneficiaries of the Estate of Benedict Fondo Gunda who was the sole legal and beneficial owner of Plot Number 2 Kidutani GL15A. It is stated that the 1st -4th defendants therein and their families were allocated plots number 11, 14 16 17 36 38 and 39 in the same settlement scheme, which they subsequently disposed of. The deceased however never parted with his plot. The applicants have constructed houses on the suit land they are settled on and cultivated crops, and even buried their relatives on the suit property. It is narrated that on one occasion, the defendants in that case visited the suit land and expressly asked a plaintiff to vacate the suit land therein. The defendants are reported to have gone to the extent of sending goons with machetes to evict the plaintiffs from the land. It is alleged that owing to the political influence and official power of the 5th defendant the said goons are yet to be apprehended and charged with any offense. However, the plaintiffs in that case have resolved to remain on the suit land and to defend their property despite the scaring experiences they have undergone. It is also alleged that when they sought the audience of the 5th defendant in the case with an administrator, she demanded to be given a portion of the suit property.



56. The same picture is depicted in Chief Magistrate's Court Case Number E76 at Kilifi whose pleadings have been annexed to the petition as Exhibit KMM 5 and in which the defendants are named as Ndoro Weda Ndoro, Faraj Mwangome, Hamisi Katani Ndune Dzifweni and Roselyd Wairimu.
57. A copy of the Record of the Parliamentary Hansard of the date 13th December 2001 has been availed by the petitioners. In that record one Member of Parliament by the name Mr. Maitha makes several inquiries about the suit land. The answer from the Minister for Land recorded is that he is not aware that the Land Number 15 is being sold by the local administration officers, that he is not aware that the settled persons are being threatened with eviction. He adds that the Ministry of Land is in the process of regularizing the squatters on GL Plot Number 15A Kidutani village as land owners. The Member of Parliament, Mr Maitha, further alleges that when the government gave notice of intention of demarcation the administration officers on the ground began selling the land to third parties, and therefore sent notices of eviction to the area residents. He appears to have tabled some documents as proof of his allegations before Parliament. Before the end of the Parliamentary Session however, the Minister confirmed that the land had been already been demarcated for 177 households who would be issued with title deeds to enable them occupy the land. (this rhymes with the 177 entries in the list exhibited by the petitioners in their petition as KMM-2.) At the end of the Parliamentary Session the Minister promised to investigate the allegations that the land is being allocated to other people despite it having been already been demarcated.
58. On the basis of the foregoing discourse, it therefore offends the interests of justice and the principle of legitimate expectation for the 1st to 5th respondents to insist that the petitioners are not entitled to be settled on the land they have been in occupation of. In view of their claims to the land, it is also contrary to the rule of *nemo iudex in causa sua* to have them be included in the Mtwapa Kidutani Land Settlement Committee appointed or established by virtue of the minutes of a public baraza, dated 24th November 2020.

Effect Of The Land Adjudication Departments' Response In Malindi Petition 13 of 2022 On The Present Petition.

59. This petition is being tried alongside Malindi ELC Petition Number 13 of 2022 which is related the suit land and the claims of the petitioners in both being the same the only difference being the prayers. In Malindi ELC Petition 13 Of 2022 the following prayers are sought:
- a. A declaration that the 2nd and 3rd respondents' failure to comply with a mandatory requirement of Section 25 of the *Land Adjudication Act* constitutes a violation of the petitioners' right to property;
 - b. A declaration that the 2nd and 3rd respondents' failure to comply with a mandatory requirement of Sections 25 27 and 28 of the *Land Adjudication Act* constitutes of violation of the petitioners' right to property;
 - c. A permanent injunction against the 2nd - 7th respondents from purporting to restart a fresh the process of adjudication which was concluded 34 years ago;
 - d. A permanent injunction against the 2nd - 7th respondents from purporting to appointing Committee whatever pursuant to Section 6 of the *Land Adjudication Act*;
 - e. A declaration that any Committee appointed after the preparation of the Adjudication Register and or after the petitioners received their confirmation letter is illegal null and void devoid of any legal foundation;



- f. An order compelling the 1st -4th respondents through the 4th respondent to comply with mandatory provision of Section 27(3)(c) of the [Land Adjudication Act](#);
 - g. Subsequently an order compelling 1st -4th respondents through the 4th respondent to comply with Section 28 of the [Land Adjudication Act](#) within a reasonable time frame fixed by this honorable court;
 - h. Costs of this petition;
 - i. Any other remedy or such other orders as this honorable court made him just and expedient in the circumstances to remedy the violations of the petitioners' fundamental Constitutional rights.
60. In Malindi ELC Petition 13 of 2022, Francis Obiria Oseko, the Land Adjudication and Settlement Officer Kilifi swore a replying affidavit regarding the suit land herein. The contents thereof are analyzed in that petition. I will reiterate them as herein under for ease of reference as follows: Kidutani Nyika measuring approximately 500.2 hectares is situated at the border of Kilifi South and Rabai Sub-counties; that GL 15A measuring 35.08 hectares is a separate parcel within the same area. Both parcels are government land. The National Land Commission who is the custodian of public land has reserved the two parcels for settlement purposes by the letters dated 16th April 2021. Consequently, the land adjudication process is not applicable to the two parcels since the suit land is not ancestral or community land. Without stating the dates, the deponent averred that the Department of Land Adjudication and Settlement had started the demarcation and survey of the two parcels, but the exercise was abandoned when it was discovered that the land is government land, and that the necessary reservation had not been done. Now that the reservation has been done by the National Land Commission, the Land Adjudication Department has to move in and finalize the regularization of squatters living on the land and other persons using the land. Several public meetings were held at which the beneficiaries and the local inhabitants were informed that the parcels were government land and that a resettlement program is to be undertaken to settle them. The meetings were held on diverse dates being 24th November 2020 and 18th May 2022. However, the exercise did not commence as an injunction restraining the office from undertaking any activity on the suit land was issued in ELC Number 26 2021. That case was however withdrawn by the plaintiffs on 15th February 2022. In April 2022, survey and demarcation commenced and the exercise is almost complete. The purpose of the exercise is to settle the people living on the land and others who are cultivating on the land even though they live elsewhere. Upon completion of survey and demarcation, stated the deponent, a map will be generated to be used for allocation and issuance of title deeds to the beneficiaries.
61. The deponent outlined the difference between “resettlement” and “adjudication”, saying that in resettlement, land is acquired by way of purchase by government from private individuals, by reservation by the National Land Commission, or by surrender by private individuals or institutions, to the government. Where land has been so acquired, it is planned, surveyed, demarcated and a map generated for allocation and the beneficiaries are identified by a set criterion, either or by virtue of their being resident on the land or cultivating on the same; further, public utility parcels are also earmarked and reserved.
62. On the other hand, the deponent stated, the land adjudication process entails ascertainment and recording of rights and interests in land as they already exist. It begins with a description of and declaration of the Adjudication Section as required by Section 5 of the [Land Adjudication Act](#) where a notice of establishment is issued and widely circulated. Each Adjudication Section must have an Adjudication Committee appointed under Section 6 of the [Land Adjudication Act](#). Demarcation and



survey are undertaken; thereafter, interests in land are recorded. Adjudication records are prepared. The Adjudication Register is published for inspection as per Section 25 and 26 of the [Land Adjudication Act](#). Disputes arising during adjudication are adjudicated through a four-tier hierarchical mechanism starting from a Land Committee, Appeal to The Arbitration Board, Objection to the Adjudication Register, and Appeal to the Minister. Upon completion of the adjudication process the Director of Land Adjudication and Settlement issues a letter of finality, which, together with the adjudication register comprising of the map and adjudication records, are forwarded to the Chief Land Registrar for processing of title deeds as per Section 27 and 28 of the Act. The deponent concludes by stating that the two parcels mentioned herein above have never been Adjudication Sections and therefore the [Land Adjudication Act](#) does not apply to them, and the respondents cannot be accused of failing to comply with Sections 25 27 and 28 of the [Land Adjudication Act](#) since the land is not ancestral land, and that only a resettlement of the squatters thereon can be done.

63. Francis Obiria Oseko in his affidavit in Malindi ELC Petition 13 of 22, without giving specific dates, states that the Department of Land Adjudication and Settlement had commenced demarcation and survey but upon realizing that it was government land to which the [Land Adjudication Act](#) could not apply, it stopped. Therefore, at this juncture, the uncertainty as to whether only GL15A, or both GL15A and the Nyika Reserve, were subjected to some form of survey and /or Adjudication in the 1980s has thus been resolved by the affidavit of Francis Obiria Oseko in Malindi ELC Petition 13/22. The probability that the two parcels were made subject of adjudication in the 1980s is lent more force by the statement the of the petitioners who state at paragraph 7 of the petition which intimates that focus at that time may have been the fact of actual squatter occupation and that a headcount established 174 families were on the land by then. The 1st respondent herein has also been seen in the tribunal proceedings earlier mentioned to state that he was allocated numbered plots during the earlier adjudication process.
64. When considered wholistically for their effect, the contents of Francis Obiria Oseko’s affidavit further reinforce this court’s finding herein above that perchance the petitioners are in occupation of land within either GL15A and the Nyika Reserve, they are rightfully in such occupation and they are entitled to allocation of land therefrom. The 1st -5th respondents oppose the settlement of the petitioners on the land they are said to occupy, be it in GL15A or in the Nyika Reserve and therefore the reinforced finding herein places the 1st – 5th respondents at a deserved disadvantage with regard to their participation in any Committee that would administer the affairs of identification or verification of beneficiaries to any process that would lead to eventual alienation of individual titles to any person.
65. It is elementary in our system that justice must not only be done but must be seen to be done. It is strict canon of the [Constitution](#) of Kenya 2010 that not only all citizens without exception deserve to be granted an opportunity to be heard in respect of any dispute they may have, but also be heard in an environment of absolute impartiality.
66. Article 50(1) provides as follows:
 - “ 50. Fair hearing
 1. Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial Tribunal or body.”
67. In the context of the present petition, a proper interpretation of Article 50(1) of the [Constitution](#) 2010 is that any membership in a decision making body of persons whose prior utterances or public



expressions have made it clear the manner in which they would determine the disputes that will be placed before them in future renders them unsuitable for the task of such determination. The unsuitability for the task is also exacerbated by the presence of a personal dispute between the proposed members of that Committee and any beneficiaries of the allocation who may be required to bring a dispute before him or her. The obvious question that arises is how he may decide alone or, if among others, vote in such a dispute and whether his or her personal interests are likely to influence such solo decision, or vote, as the case may be, and actualize the conflict.

68. In view of material before court, it is crystal clear that the suit land is government land and not community land. Membership of a certain community ought not to be the sole criterion in the allocation of such government land. Furthermore, if the land was allocated in the 1980s to persons who are now already settled on it, any dispossession of the petitioners, whatever their ethnic or other origin, and subsequent fresh allocation to other persons not only lacks logic but is also likely to amount to discrimination on the basis of ethnic or other origin which is expressly enjoined by Article 27(4) of the *Constitution*. I hold as such because it is clear that legitimate expectation was created in the petitioners that they would be given titles in respect of the land they were allocated. Title issuance is the last step in land allocation. Though the minutes produced by the respondents in these two cases show that some government officers have taken sides in the conflict, it should be plain to the land administration authorities and generally to the national government administration offices concerned that bringing in new allottees to the suit land may occasion unnecessary social friction. In this case it is only appropriate for the purposes of good governance that they should take all measures to ensure that it is not friction that would appear to be sanctioned or condoned by those very authorities, some of whom are expected to keep law and order. It is the opinion of this court that if there be other persons who are landless, the most appropriate solution would be for the government to seek alternative land on which to settle them.
69. By virtue of their character evinced by their statements in this proceedings and in the Kaloleni District Land Tribunal Case of 2009 respectively, it is clear that the 1st -5th respondents are not comfortable with the petitioner's settlement on the land in question. This court does not necessarily take the allegations therein to be correct, but it is a notable coincidence that a letter written in 2014 seems to corroborate the 1st and 2nd respondents' present day opinions to the effect that the petitioners are not entitled to the land they were settled on in the 1980s by government authorities. It is also a clear pointer to the possibility that there is trouble brewing on the suit land and that the 1st -5th respondents have been involved in it for a long time. In that letter it is expressed that the perpetrators of the criminal activities are led by one Mr Ndoro Weda, village elder from Bistara Kinunguna, and Faraj Mwangome, said to be a political activist from Rabai. It is this court's reasonable surmise that these two are the 1st and 2nd respondents in this petition respectively. Indeed, this court is convinced that given their concessions in this case and in the Tribunal case the 1st - 5th respondents are most likely involved in the "emerging trend of forceful evictions of bona fide allottees of plots" who settled on the land in the 1980s, and who were formally allocated numbered plots as seen in the letter dated 2nd May 2014 addressed by the residents to the County Executive Committee member for Lands Physical Planning Energy and Housing Kilifi. Their conduct in the matter requires serious investigation by the Director of Criminal Investigations.
70. With the blatant exhibition of partiality in favour of a section of the residents arising primarily by virtue of their shared kinship or ethnic origin with them, the 1st -5th respondents have in their own replying affidavit already provided this court with sufficient criteria for their disqualification from that Committee. Given the circumstances of this case, a reasonable, fair-minded and informed member of the public would not expect the 1st - 5th respondents to be impartial in their decisions regarding



the suit land in relation to the petitioners. This court needs look no further for any ground for their disqualification.

71. It is categorically clear that the circumstances of this case have left this court satisfied that real mischief and real prejudice will, in all human probability, result if the 1st -5th respondents were left to serve in the Committee appointed on 20th November 2020. I find that the rights of the petitioners under Articles 10, 73(2) and 27(1) & (2) of the Constitution of Kenya 2010 have been violated and are threatened with continued violation.
72. In the circumstances I find that there is merit in the petition dated 23rd August 2021 and the same is allowed in terms of prayers no (a) (i) and (ii), (b) and (c) thereof. The costs shall be borne by the respondents jointly and severally.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 3RD DAY OF APRIL 2025.

MWANGI NJOROGE

JUDGE, ELC, MALINDI.

