



Mikaal Limited v Land Registrar Kilifi County & 2 others (Petition 38 of 2021) [2025] KEELC 445 (KLR) (5 February 2025) (Judgment)

Neutral citation: [2025] KEELC 445 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
PETITION 38 OF 2021**

EK MAKORI, J

FEBRUARY 5, 2025

**IN THE MATTER OF: ARTICLES 10, 22, 23, 40,
AND 47 OF THE CONSTITUTION OF KENYA, 2010**

-AND-

**IN THE MATTER OF VIOLATION OF SECTIONS 79, 80,
87 OF THE LAND REGISTRATION ACT NO. 3 OF 2010**

BETWEEN

MIKAAL LIMITED PETITIONER

AND

LAND REGISTRAR KILIFI COUNTY 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

DAWAGI INVESTMENTS LIMITED 3RD RESPONDENT

JUDGMENT

1. By a petition dated 22nd December 2021, the petitioner seeks the following reliefs:
 - a. An order directing the Registrar of Lands to expunge from the lands records the entries made on 10th March 2015 with regard to the registration of Dawagi Investments Limited as the owner of Plot No.Chembe/Kibabamche/376.
 - b. An order be made to cancel the title held by Dawagi Investments Limited with respect to the property, namely Plot No.Chembe/Kibabamche/376.
 - c. An order should be made directing the Land Registrar Kilifi to issue a new Title deed to the petitioner and register Mikaal Limited as the owner of Plot No.Chembe/Kibabamche/376.



- d. Any other relief the Court may find fair and reasonable to give when all the circumstances are considered.
 - e. The costs of the petition.
2. The petition is supported by an affidavit sworn by the petitioner's director, Michael John Karanja, on 22nd December 2021. The 3rd respondent opposed the petition. It filed an answer to the petition dated 7th February 2022 and a replying affidavit sworn on 7th February 2022 by its director, Antony Safari Kitsao.
 3. The court directed that the petition be canvassed through written submissions. Parties have cited various constitutional and statutory provisions relevant to this petition and several judicial authorities to guide this court in the delivery of its judgment—I will revert to the same if need be.
 4. From the materials and submissions placed before me, the issues for determination in this petition are whether this court should direct the Land Register Kilifi to expunge or cancel the title of Plot No.Chembe/Kibabamche/376, held by Dawangi Investment Limited, the 3rd respondent, and issue a new title to Mikaal Limited, the petitioner herein, who should bear the costs of this petition.
 5. The petitioner's gravamen is that on 6th March 2015, the 1st respondent cancelled and expunged its leasehold title to the suit land, Title No.Chembe/Kibabamche /376, registered in its name on 30th December 1996 for a term of 99 years from 1st June 1992 without its involvement or knowledge and registered the 3rd respondent as the owner of the suit land on 10th March 2015.
 6. The petitioner has averred that it was neither informed of the 1st respondent's action nor accorded an opportunity to be heard by the 1st respondent before the cancellation of its title to the suit land.
 7. The petitioner contends that the cancellation was made without due process or notification to itself and urges this court to determine that the 1st respondent's actions were irregular and illegal and violated their land rights and proceed to order the 3rd respondent's title cancellation.
 8. The petitioner has pleaded that it is the registered owner as lessee of the suit land from the Government of Kenya, and in support of this, it has exhibited a copy of the certificate of lease dated 30th December 1996.
 9. The petitioner contends that it acquired the suit land from Pekiwa Investments Company Limited. The company was the original allottee and registered owner of the suit land. The petitioner has also averred that the 1st respondent had in the early 1990s placed an embargo on all titles to land in the Chembe/Kibabamche registration section and that due to the blockade, it was not able to develop the suit land and had all along been waiting for the removal of the embargo.
 10. To support this averment, the petitioner has exhibited a public notice showing that the Ministry of Lands had once lifted an embargo on certain titles within the Chembe/Kibabamche registration section in its supporting affidavit. In the notice, the suit land is not listed. It is also the petitioner's case that it instituted Malindi ELC. Petition No.17 of 2015 (formerly) Mombasa HCC Petition No.12, 13 & 14 of 2011 challenging the embargo, but the same was not successful. That when the 3rd respondent entered the suit land the petitioner instituted Malindi ELC No.42 of 2021 against the 3rd respondent to seek restraining orders amongst other reliefs.
 11. 3rd respondent contends that this petition is an abuse of the court process and amounts to forum shopping in that the petitioner had, before the institution of this petition, filed Malindi ELC Case No. 42 of 2021 between the petitioner and the 3rd respondent and obtained interim orders of an injunction



pending delivery of a ruling in an application for an injunction. The application for injunction was later dismissed. Besides, the petitioner had filed Malindi ELC Petition No.17 of 2015, formerly Mombasa HCC Petition No; 12, 13 & 14 of 2011, to challenge the failure to lift an embargo placed over the suit property by the 1st respondent and for payment of compensation due to its inability to use the suit property on account of the existence of the embargo. The petition was dismissed, prompting it to appeal to the Court of Appeal.

12. The 3rd Respondent avers that had Petition No. 17 of 2015 succeeded, the petitioner would not have instituted the present petition or even Malindi ELC Case No. 42 of 2021. The 3rd respondent states that this is a clear case of forum shopping, an attempt by the petitioner to look for a favorable outcome by instituting several suits over the same suit property in different fora and, in each suit, choosing one cause of action and reserve another cause of action for subsequent litigation. The petitioner has now come to this court to seek more or less the same reliefs. The 3rd respondent asserts that this amounts to abuse of the court process.
13. In the present case, the petitioner has pleaded that it is the registered owner as lessee of the suit property from the Government of Kenya. In support thereof, a copy of the lease certificate dated 30th December 1996 has been made available. The 3rd respondent believes that the petitioner must show by material evidence that the Certificate of Lease was issued to it either upon registration or upon a transfer or transmission before the court can receive the same as prima facie evidence of ownership of the suit property. The 3rd respondent contends that the petitioner has not discharged this burden. Although the certificate of lease indicates that the petitioner was registered as a lessee on 30th December 1996, no evidence of the fact of registration by either the production of a certificate of official search or a white card to show it is a lease or any other documentary evidence showing the fact of registration from the Land Registry has been availed.
14. The 3rd respondent avers that the petitioner has not shown how it acquired the suit property from Pekiwa Investments Company Limited, whom it claims was the original allottee and owner of the suit land. If the petitioner's registration as lessee of the suit property was upon a transfer from Pekiwa Investments Company Limited, then the petitioner ought to have furnished evidence of the transfer registration from the said company.
15. The 3rd respondent contends that the petitioner has not availed any evidence of the registration of the lease transfer to itself. Accordingly, the certificate of lease should not be taken by the court as prima facie evidence of ownership because it has not been shown by material evidence that it was issued to it as a purchaser upon a transfer from Pekiwa Investments Company Limited as provided in Section 26 (1) of the *Land Registration Act*. The petitioner's mere act of waving some certificate of Lease whose origin is unknown does not qualify it as the genuine owner of the suit property.
16. The 3rd respondent further asserts that in ELC Petition No.14 of 2011, ELC Petition No. 12 of 2011 & ELC Petition No.13 of 2011, the gravamen of the petitioner was that the 1st respondent had imposed an embargo over the suit property prohibiting the registration of any party as owner of the suit property pending investigation on the propriety of any prior registration. It sought payment of compensation from the Government of Kenya on that account. In the premise, it is not open for the petitioner to now plead that it is legally registered as the absolute owner of a lease of the suit property when, even after the dismissal of its petitions, it lodged an appeal, which is yet to be determined.
17. Further to the foregoing, if the petitioner's averment is factual, then the petitioner appears to have irregularly obtained the certificate of lease of the suit property during an ongoing investigation concerning the allocation of land in an area affected by an embargo, Article 40(6) of *the Constitution* does not extend to property that is found to have been unlawfully acquired.



18. The 3rd respondent avow that it has not only availed a copy of a Title Deed dated 10th March 2015 but has also availed a copy of the Transfer of Land in a Settlement Scheme, copies of receipts for payment of requisite fees, copy of discharge of charge of the Settlement Fund Trustee charge. A copy of the letter of offer, a copy of the agreement for sale, a copy of the application for consent of the Land Control Board, and a copy of the Letter of Consent of the Land Control Board as required. The foregoing is prima facie evidence of the transfer and the registration of the 3rd respondent as owner of the suit property.
19. The 3rd respondent contends that having availed evidence of its registration and transfer, under the provisions of Section 26(1) of the *Land Registration Act*, its title deed should be taken as prima facie evidence that it is the absolute and indefeasible owner of the suit property and not the petitioner.
20. 3rd respondent contends that it is in actual possession of the suit property contrary to the allegations by the petitioner that it's the one in occupation as it contradicts its pleadings filed in ELC Petition No. 12 of 2011, ELC Petition 13 of 2011 and also amounts to prevaricating in that in the said petitions, the petitioner had sought recovery orders to be availed the suit property on the ground that it had been unable to take possession and carry out developments because of an alleged embargo placed against the suit property by the government of Kenya. In the alternative, the petitioner sought compensation for the loss of use of the suit property. The petitioner has now changed the tack and contends that it is in possession of the suit property.
21. On the 3rd of May 2023, this court gave an elaborate ruling on a Preliminary Objection that the 3rd respondent had raised. There were suits similar to this one, significantly Malindi ELC Petition No. 17 of 2015, formerly Mombasa HCC Petition No. 12, 13, and 14 of 2011, challenging an embargo placed on the Chembe/Kibabamshe registration Section (where the suit property falls) and ELC No. 42 of 2021, seeking injunctive orders against the 3rd respondent.
22. In paragraph 45 of the court's ruling, it stated:

“I have perused the ruling attached in Malindi ELC No.42 of 2021; the parties and the subject matter are the same. In the current suit, the petitioner has joined the Registrar of Lands Mombasa and the Attorney General. In the former suit, the petitioner had sought injunctive reliefs citing similar reasons as in this case—the Olola J's. ruling, which I have quoted above, declined to grant the orders sought, traced the root of the titles held by parties, and quoted other matters between the parties. The former suit is still pending and active. I have not been told why it has been abandoned, and the current one filed over the same subject matter and involving the same parties.
23. I stated that the above scenario offends the sub judice, and I add - constitutional avoidance doctrines. In his ruling in *Mikaal Limited v Dawagi Investments Limited (Environment & Land Case 42 of 2021)* [2022] KEELC 3385 (KLR) (28 July 2022) (Ruling) by Olola J., captured the chronology of the acquisition of each of the party's titles documents in this manner:

“In the matter before me both the Plaintiff and the Defendant lay claim to the suit property – Chembe/Kibabamshe/376 said to be measuring some 2.5 acres. Both Parties have produced copies of Certificates of Lease pursuant to which they lay claim to the land. I note however that while the Plaintiff has produced a Certificate of Lease indicating the date of registration as 30th December 1996, there was no evidence of registration of the same at the Lands Registry. I say so because the Plaintiff has neither produced a Certificate of Official Search or a White Card or any other documentary evidence indicating the registration of the Lease in any official record.



16. On its part, the Defendant has produced a copy of a Title Deed dated 10th March, 2015. The Defendant has also produced several copies of Certificates of Official Searches issued over the years by the Land Registrar as proof of its registration as the proprietor of the land. The Defendant has equally availed the history of the land indicating how the same was transferred and discharged from the Settlement Fund Trustees to its successors in title before it acquired the same through a Sale Agreement.
17. While the Plaintiff contends that its ownership of the suit property was validated by the National Land Commission through a Gazette Notice published by the Commission on 17th July 2017, it was clear to me that the Commission had since reviewed its position and that by another Gazette Notice dated 25th May 2018, the Commission did recommend that the suit property “be regularized” in favour of the Defendant.
18. Again, while the Plaintiff contended that it had been in occupation and possession of the suit property since the 1990s, I was not persuaded that the Plaintiff was being candid with the Court. From the Defendant’s Replying Affidavit, it was apparent that the Plaintiff had filed ELC Petition Nos 12 of 2011; 13 of 2011; 14 of 2011 as well as ELC Petition No. 17 of 2015 which Petitions were later consolidated. A perusal of the pleadings in the said Petitions reveal that the Plaintiff had sought recovery orders against the Government to be availed the suit property on the ground that it had been unable to take possession and carry out development thereon because of an embargo placed against the property by the Government. In the alternative the Plaintiff had sought recovery for compensation for the loss of use of the suit property.
19. In its Supporting Affidavit sworn by its director Richard Karanja in Petition No 17 of 2015, the Plaintiff states at Paragraph 5 and 7 thereof as follows: “5. That it is apparent that the Interested party (one Daniel Runya Gamba) has apparently sold his interest in Plot No. Chembe/Kibabamshe/376 to Changawa Mranai Mulila and Rollingstone Jefa Mrandzi who had apparently also sold their interest for a consideration of Kenya Shillings Fourteen Million Two Hundred Fifty Thousand (Kshs.14,250,000/-) to Dawagi Investments Limited. The said Parties’ transactions thereon is evidenced in an Agreement of Sale dated 30th June, 2014 between the said parties. I annex a copy of the said Agreement for Sale as annexure “MJK-2”. 7. That following the dismissal of the Petition herein, the Interested Party and his aforesaid agents have moved on to the suit property and have threatened that they will physically and forcefully remove the Petitioners therefrom with regard to Plot No. Chembe/Kibabamshe/376.”
20. Arising from the foregoing, it was apparent that the Plaintiff was aware that the Defendant had acquired an interest in the suit property as far back as the year 2014 and that it did not take any steps to restrain the Defendant from dealing with the suit property.
21. As the Court of Appeal stated in *Nguruman Limited v Jan Bonde Nielsen & 2 Others* (2014) eKLR: “The party on whom the burden of proving a prima



facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.”

22. In the circumstances herein I was not persuaded that the Plaintiff had established a prima facie case and/or that it stood to suffer any loss irreparable or otherwise as a result of the Defendant’s alleged actions. It follows that I did not find any merit in the Motion dated 11th May, 2021. It is dismissed with costs to the Defendants.”
24. The scenario captured by my brother judge is the same here. The petition filed will not change the course of events. The parties had instead stuck to the pending civil suit, which the petitioner abandoned midstream to bring up this petition.
25. This petition, in my view, ought to have been avoided. A constitutional petition is not the proper forum to determine contested ownership disputes of properties if there is another manner provided by law or Statute. This is what is called the doctrine of constitutional avoidance. The rationale behind the doctrine is that in a constitutional petition like this case, the court is usually asked to determine violations to or threats to fundamental rights or constitutional violations rather than the rival parties claiming validity and legality of the title of the suit property. See *Yaa v District Land Registrar Kilifi County (Petition 23 of 2022) [2023] KEELC 21694 (KLR) (16 November 2023)*, where this court declined to determine the legality of a title in a constitutional petition due to the doctrine of constitutional avoidance the court held as follows:

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- “12. Besides, the issues raised in this petition could easily have been crusaded in our civil courts to decide if the title issued to Thabiti Said Swaleh was obtained through fraud or corruptly gotten as to render it fit for cancellation as envisaged under Article 40(6) of *the Constitution...*

I am persuaded that the correct approach to take is to have the two parties holding or claiming equal rights as owners of the suit property or claiming title to it approach the Court and prove that one has a better title than the other...The Court will need to hear the two parties claiming ownership of the suit property – to check the root of the title. That journey cannot be achieved in this petition.

14. This is what the doctrine of constitutional avoidance envisages. This petition should have been heard as a normal civil suit for the court to decide who between the named parties should be the rightful owner of the land in question...
15. The petitioner, as I have said, ought to have invoked the civil jurisdiction of the ELC to cancel the title on the grounds as set under Article 40(6) of *the Constitution* and Section 26(1) (a) (b) of the *Land Registration Act*.
16. The upshot is that the current petition fails with costs.”



26. Okongo J. used a similar approach in the case of *Joseph Musikali Mutemi v National Land Commission & 2 others* [2021] eKLR, where he pronounced himself thus:

“What I have before me is affidavit evidence on contested facts as to the validity or legality of the petitioner’s title to the suit property. I am unable to determine on affidavit evidence whether the suit property was created from a road and a railway reserve or not. If the property was created from land that was reserved for the Nairobi Southern Bypass road, as claimed by the respondents, then its title would be invalid. On the other hand, if the property was not created from a road reserve as claimed by the petitioner, the title would be valid. This is an issue that requires viva voce evidence to determine. The parties will have to move the court appropriately should they wish to have the issue determined now that this court has found the proceedings before the 1st respondent to have been unprocedural. Due to the foregoing, I will not grant prayer(a) of the petition.”

27. Similarly, in *Valentine Odhiambo & 2 others v HF Development & Investment Ltd & another* [2021] eKLR, Mwangi J. struck out a petition because it attempted to constitutionalize an ordinary civil matter, offending the doctrine of constitutional avoidance.
28. Since another suit is pending over the same issue, touching on the validity and titles held by the parties, this petition represents an abuse of the judicial process.
29. The upshot is that this petition is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 5TH DAY OF FEBRUARY 2025.

E. K. MAKORI

JUDGE

In the Absence of:

Mr. Otieno, for the Petitioners

Mr. Ojwang, for the 1st and 2nd Respondents

Mr. Shujaa, for the 3rd Respondents

Happy: Court Assistant

