Church Commissioners for Kenya (Suing for and on behalf of ACK St Marks Church, Chang'ombe as the Trustee of the properties of the Anglican Church of Kenya) v Adjudication Officer, Kilifi & 10 others (Environment & Land Petition 08 of 2018) [2025] KEELC 1109 (KLR) (5 March 2025) (Judgment)

Neutral citation: [2025] KEELC 1109 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND PETITION 08 OF 2018

FM NJOROGE, J

MARCH 5, 2025

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLE 27(1), 40 AND 47

BETWEEN

THE CHURCH COMMISSIONERS FOR KENYA (SUING FOR AND ON BEHALF OF ACK ST MARKS CHURCH, CHANG'OMBE AS THE TRUSTEE OF THE PROPERTIES OF THE ANGLICAN CHURCH OF KENYA) ..... PETITIONER

AND

ADJUDICATION OFFICER, KILIFI ..... 1ST RESPONDENT

DIRECTOR OF LAND ADJUDICATION ..... 2ND RESPONDENT

REGISTRAR OF LANDS, KILIFI ..... 3RD RESPONDENT

THE COMMISSIONER OF LANDS ..... 4TH RESPONDENT

THE NATIONAL LAND COMMISSION ..... 5TH RESPONDENT

THE COUNTY GOVERNMENT OF KILIFI ..... 6TH RESPONDENT

GOHU BAYA GOHU ..... 7TH RESPONDENT

SIDI MUNGA KOMBE ..... 8TH RESPONDENT

PATRICK KOMBE MUNGA ..... 9TH RESPONDENT

MWAMBAJI MUNGA ..... 10TH RESPONDENT

SAMSON MUNGA KOMBE ..... 11TH RESPONDENT

JUDGMENT

The Petition

1. By a Petition filed 23rd March 2018 and filed on 27th April 2018 the petitioner lodged its claim in this court and alleged that the Respondents have violated its rights or fundamental freedoms under Articles 27, 40 and 47 of *the Constitution*. The Petitioner seeks the following reliefs:

    a. A declaration that the Respondents have violated the Petitioner's rights under Articles 40 and 47 of *the Constitution*;

    b. An order of injunction to compel the 6th to 11th Respondents to vacate and deliver vacant possession of L.R Nos. Kilifi/Changómbe/87, 98 & 99 to the Petitioner;

    c. A permanent injunction restraining the Respondents, whether by themselves, servants, employees, agents, personal representatives, or administrators, from occupying, cultivating, constructing, fencing, selling, leasing, charging or in any other way interfering with the Petitioner's quiet possession and enjoyment of Chang'ombe plots A, B and C, now known as L.R Nos. Kilifi/Changómbe/27, 87, 98 & 99 (hereinafter "the suit property");

    d. An order of injunction to compel the 3rd Respondent to cancel the titles registered as L.R Nos. Kilifi/Changómbe/27, 87, 98 & 99.

2. In its petition the Petitioner's claim is that it is the beneficial and/or bona fide owner of three parcels of land known as Plots A, B and C, located in Chang'ombe, Kilifi, which were allegedly acquired from the elders of the Rabai community on 7th March 1898 and 7th May 1903. The Petitioner states that on 7/5/1903 it was issued a 99-year lease for these properties by the then-Commissioner for the East African Protectorate. That lease was to expire on 6th May 2002. The Petitioner avers that it applied for an extension of the lease for a further 99 years on 13th June 1995 and again on 24th October 2017. It desired that the lease be extended with effect from 6/5/2002. It is stated that the 4th and 5th respondents failed, neglected and/or refused to acknowledge respond or consider the said letters seeking extension and the extension was thus not granted. The petitioner states that the said respondents never gave it a hearing or written reasons. The Petitioner is aggrieved by the actions of the 4th and 5th Respondents, who allegedly failed to renew the lease and subsequently issued purported documents of title to the suit property to the 6th to 11th Respondents as follows:

    a. Plot A was registered on 8/8/2013 as LR NO Kilifi Changómbe /87 under the name of Munga Kunya Kombe;

    b. Plot B was registered on 19/10/1982 as LR NO Kilifi Changómbe /27 in the name of Kilifi county council (reserved for Changómbe primary school);

    c. Plot no C was subdivided into two as follows|:

        i. LR NO Kilifi Changómbe /98 registered on 8/8/13 in the name of the 7th respondent;

        ii. LR NO Kilifi Changómbe /87 registered on 8/8/13 ion the name of Kilifi County Council.;

3. The Petitioner alleges that it has occupied the properties since the 1800s and has established the Anglican Church of Kenya Mission at Changómbe comprising of a primary and a secondary school, a church, a youth polytechnic, residential houses for the Church missionaries and a Church cemetery.

The 4th and 5th Respondents also breached the petitioner's legitimate expectation in failing, neglecting and/ or refusing to acknowledge respond and or consider the petitioner's applications for extension of the lease and issuing third parties titles without granting it a hearing. In particular, it alleges that its legitimate expectation to:

a. Acknowledgment of letters dated 13/6/1995 and 24/10/2017;

b. Reply of letters dated 13/6/1995 and 24/10/2017 indicating willingness to renew or not to renew the lease dated 7th May 1903;

c. That Respondents will notify the petitioner of their intention to confer land rights over the suit properties to any other persons;

d. That the respondents will give an opportunity to the petitioner to be heard on when the lease should be renewed before deciding not to renew the same;

e. That the respondents will give the petitioner opportunity to be heard before purporting to give the land rights to any other person(s);

f. That the respondent will give the petitioner the right of first refusal before purporting to give the land rights to any other person(s);

g. That the lease dated 7th May 1903 will be renewed on suitable terms;

h. That the respondent will observe and follow the public procurement regulations then in force before purporting to give the land rights to any other persons.

4. It is averred that the 1st to 3rd respondent further abused their offices and breached the petitioner's legitimate expectation by colluding with the 6th to 11th respondents and fraudulently illegally and unprocedurally and/or through a corrupt scheme issuing the purported documents of title to them in:

(a) Adjudicating the suit land while it was registered as private land contrary to section 3(1) of the *Land Adjudication Act*;

(b) Adjudicating the suit property while it was occupied by the petitioner without physically visiting it for demarcation;

(c) Failing to inform, notify, invite, or warn the petitioner of the intended adjudication contrary to section 14 of the *Land Adjudication Act*;

(d) The 6th -11th respondent knowingly misrepresented to the 1st to 3rd respondents that they owned interest in the suit property

(e) The 1st to 3rd respondent acted without jurisdiction in adjudicating registered land;

(f) Adjudicating the suit properties without hearing the petitioner who was occupying the land at the time;

(g) Violating and depriving the petitioner of its preemptive rights and legitimate expectation to the extension of the lease as provided for under Section 13(10) of the *Land Act*;

(h) Failure to hear the petitioner before the purported documents of title were issued contrary to Section 4 (2) (b) of the *Fair Administrative Action Act*;

(i) Issuing the titles contrary to Section 4(2) and 3A of the Fair Administrative Actions Act.

5. It is alleged that the petitioner's rights under Article 40 of *the Constitution* were violated in that it was deprived of properties it had occupied since 1800 contrary to Article 40(2)(a) of *the Constitution*; that the petitioner's enjoyment of the properties was discriminated by their alienation to the 6th to 11th respondent contrary to Article 27(4) and 40(2b) of *the Constitution* and that the petitioner was deprived of his preemptive rights and legitimate expectation to the extension of the lease despite its occupation of the land.

6. It is claimed that Article 47 of *the Constitution* and Section 4 to 6 of the *Fair Administrative Action Act* were violated by the issuance of titles over the suit land to third parties and the refusal to acknowledge the petitioner's application for extension in that those acts were not reasonable, procedural, fair or expeditious; they were without jurisdiction or materially influenced by an error of law; they were carried out without knowledge or notice to the petitioner; they defeated the petitioner's legitimate expectation to have it application acknowledged, responded to and considered; it defeated the petitioner's preemptive right and legitimate expectation to have the lease renewed and it was done without hearing him and without giving the petitioner valid or written reasons for the decisions.

7. It is urged that unless the orders sought are granted, the petitioner will suffer irreparable damage arising from destruction of infrastructure on the suit premises and denial of rights to use and enjoy occupation of the premises. In particular, it is urged that the church congregation will be denied access to the church thereby violating their freedom of conscious under Article 32 of *the Constitution*; that the church missioners will be denied their access and use of their residence thereby violating their rights to housing provided for under Article 43(1d) of *the Constitution*, while the pupils and students will be denied access to the school and polytechnic thereby violating their rights to education under Article 43 (1f) and 53(1b) of *the Constitution* among other things.

8. Albert Zoka Kombe swore an affidavit dated 8th September, 2023 through Ndegwa Katisya & Sitonik Advocates in support of the Petitioner's case. He stated that he was born and brought up on the suit land by his parents who were among the first people to be invited into the suit land by the missionaries in charge of the church in time and he even schooled at Changómbe primary school. He has built a house on the suit property on a portion allocated to his parents by the church and his occupation is pegged on the good will of the church who are the rightful owner of the land. He worships at ACK Changómbe Church and so do all other persons allowed to live on the land by the church; that the land parcel is very huge and he was surprised to see an eviction notice issued by the 7th to 11th respondents advocates claiming ownership thereof. The persons claiming the suit land have now interfered with his occupation of the suit land. To him the land belongs to the church.

9. Dickson Dzungovu and Eric Mwakwanje swore different affidavit dated 8th September reiterating the contents of the affidavit filed by Albert Zoka.

Respondents' Responses

6th Respondent's Response.

10. The 6th respondent filed a replying affidavit of Maurice Tsuma, an officer in its Survey Department. He deponed that the suit land is under the national government and thus under the administration of the National Land Commission; that the 6th respondent was not in any manner involved in the lease renewal process; that the petition is time barred by statute; that the lease term expired in the year 2002; that the petitioner has not demonstrated that it ever followed up on the issue of renewal until 2017; that the required threshold for impeachment of the suit titles has not been attained by the petitioner;

that allegations of fraud have not been proved; that the since lease had expired prior to issuance of the impugned titles, then the issue of fraud does not arise.

8th, 9th, 10th And 11th Respondents

11. The 8th, 9th, 10th and 11th respondents filed an affidavit in opposition to the petition dated 3rd November, 2023 sworn by Mwambaji Munga, the 10th Respondent, in which he deponed as follows: that they are administrators of the estate of the late Munga Kombe Kunya appointed in Kaloleni SRM Succession Cause No. 3 Of 2007. Munga Kombe was the husband of the 8th respondent while the other respondents are brothers and is the registered proprietor of Kilifi/Changómbe 87 to which a title deed has been issued in his name; that even before demarcation by the government, the family was in possession of the said land from time immemorial as it is their ancestral land which their father inherited from their grandfather Kombe Kunya Munga who had also inherited it from their great grandfathers. They live on the land with their families. They cultivate the land for subsistence and for sale of products; that they were not privy to the alleged agreement between the Church Missionary Society and some elders of the Rabai and they have always believed that the land they till is their ancestral land. They accuse the church of having grabbed their ancestral land through the alleged agreement; that their late father was constantly in dispute with the church and the church declined to participate in attempt to end the land dispute; that on 10th July 2006 following the church's threatened eviction of the respondents their late father lodged a complaint at the Kilifi Land Offices; on the 14th July 2006 the land officials conducted a ground visit, confirmed there is no church on the suit land and pointed out plot 27,88 and 98 as belonging to Changómbe Primary School and two other persons respectively and the eviction threats by the church subsided; there after the church constructed Changómbe Secondary School in 2009 and the respondents father made a complaint of trespass to the lands office in Kilifi and the church was invited to the lands office for a resolution of the problem; that on 13th October 2010, the deponent and his father went to the land offices where the church and the secondary school were represented; in August 2013, the deponent collected a title from the land office on behalf of his father. The deponent further stated that the church has been attempting to obtain identification boundaries in vain because the land was demarcated by the government. In 2017 threats of eviction emerged once again. The deponent gave a history of the land of having subdivided between his father and his uncle Chonya Chibindo Kunya, who got Plot No 86. The deponent deposed that his family is not comprised of squatters or trespassers on the suit land and that the church does not have any right over it. He also urged that the missionaries have land in other places which they are currently utilizing and so the family's title should be upheld.

12. Tindi Mwakamuvya Dzengo opposed the petition through his affidavit dated 3rd November, 2023. He averred that Kilifi Changómbe/88 is still registered in the name of his father one Samuel Tindi; that he was born on that land which is ancestral land and it was allocated to the family of Munga Kombe who has been in occupation ever since. She does not recall seeing any missionary in the suit property as a young girl and she concludes that they only occupied the suit property recently; that they have not encroached on Kilifi/ Changómbe /87 and the missionaries have their own land elsewhere. She stated that Albert Zoka had his ancestral land in Huruma Location and that Dickson Dzungovu's and Eric Mwakwanje's father came from Mwaweza location in Rabai Subcounty where those families still have their ancestral land.

13. Nyakondo Mvuko Nzaka who stated that he is a first cousin to the late Munga Kombe Kunya, swore an affidavit dated 3rd November 2023 reiterating what Tindi Mwakamuvya has stated in her affidavit analyzed herein before.

14. By consent of the parties the conservatory orders application dated 23/3/18 was withdrawn and an order of status quo was issued pending trial. In the early days of the petition the parties were of the view that it could be disposed of by way of viva voce evidence but later that position was abandoned when Mr. Ndegwa for the petitioner on 18/07/2023 applied without any opposition being raised that the same be disposed of by way of written submissions and affidavit evidence, and that the witness statements be adopted without calling their maker. The court ordered that the petition be disposed of by way of written submissions and affidavit evidence.

Submissions

15. Submissions were filed by the petitioner, the 6th respondent, the 8th -11th respondents.

Petitioner's Submissions

16. The petitioner filed submissions on 19th September 2023. It reiterated that it was at all material time the registered material owner of Plot A, B and C situate in Changómbe Kilifi having been issued with a 99 years lease on 7th May, 1903. Its application to the 4th and 5th Respondents for extension of lease on 13th June, 1995 and 24th October 2017 were not effective. In 2013 contrary to the provisions of Article 40, 47 and 50 the Respondents unlawfully registered the 6th to 11th respondents as proprietors of the suit property without acknowledging, responding to or considering the petitioner's application to the extension of lease. That action is also said to be in contravention of Article 40 and 47. It is stated that the Land Adjudication Officer Kilifi and the Director of Land Adjudication had acknowledged the two letters sent by the petitioner and by their letters dated 8th May 2017 and 15th June 2017 they had acknowledged that the registration of the petitioner dated 7th March 1898 was still valid and that the adjudication of the land to the 6th to 11th respondents was irregular, and they recommended the offending title be recalled or restricted.

17. In terms of chronology of events, it was stated that vide an agreement dated 7th March 1898 the Church Missionery Society, the predecessor to the petitioner, acquired Plots No A, B and C at Changómbe Kilifi from the elders of the Rabai Community and the suit properties were to be utilized internally for the purpose of the Church Missionary Society (CMS); on 7th March 1898, the Church Missionary Trust Association registered the agreement with the registration office of the East African Protectorate as No. 138 of 1898; on 7th May 1903 the Commissioner Of The East African Protectorate granted the CMS a 99 year lease over the property and it was registered in the name of the Church Missionary Trust Association the then trustee of the properties of the CMS; on 7th April 1915 R.M Byron & Company Advocates acknowledged receipt of the indenture and deed; thereafter the CMS established the Anglican Church of Kenya Changómbe Mission. Over 120 years, the petitioner has heavily developed the suit property and has established a church, a primary and a secondary school, a village polytechnic and residential houses; on 31st May 1962 the Church Trust changed its name to Church Commissioners for Kenya which is the current name of the Petitioner; on 13th June 1995, the petitioner wrote to the 4th and 5th respondent seeking extension of the lease which was set to expire on 6th May 2002; that the failed to acknowledge or respond to the letter seeking extension; on 6th May 2002 the 99 year lease expired but the petitioner remained in possession and occupation of the properties during the pendency of the hearing and determination of the extension application; however on an unknown date, purporting to be 8th August 2013, the Land Registrar registered the 6th to 11th respondents; on 24th October, 2017, the petitioner wrote again seeking extension of the lease and complained of the double allocation and demanded nullification thereof but no action was taken; many subsequent reminders and follow ups have been sent to no avail; in 2017 the petitioner discovered that the 1st to 5th respondent had subdivided the suit properties and registered them under new numbers.

18. The petitioner frames the following issues for determination:

    (a) Whether the 1st to 5th respondent violated its rights under Article 47 and acted ultra vires by failing, neglecting, or refusing to acknowledge, respond to or consider the petitioner's application for extension of lease;

    (b) Whether the 1st to 5th respondent violated its rights under article 47 again and acted ultra vires by failing to extend the petitioners lease;

    (c) Whether the 1st to 5th respondent breached their statutory duty under Section 13(1) and 1(A) of the *Land Act* 2012 to give the petitioner its preemptive rights to be allocated the said property;

    (d) Whether the 1st to 5th respondent violated the Constitutional rights of the petitioners under Article 40 and 47 by registering the 6th to 11th respondents as proprietors of the suit property;

    (e) Whether the 1st to 5th respondent violated the *Land Adjudication Act* and *the Constitution* by purporting to undertake an adjudication on land that was already alienated;

    (f) Whether the Petitioner is entitled to the reliefs sought in the petition.

19. Regarding the first issue, No (a) above, the petitioner, relying on Joseph Karanja Mwangi (suing as the legal representative of estate of Amos Mwangi Githigia vs Stephen Ndung'u Gichuhi eKLR, urged that the respondent breached the petitioners' legitimate expectation by neglecting, failing, or refusing to acknowledge and/or consider the application for extension of lease since they had a legal duty to do so and to thereafter make decision and communicate it to the petitioner.

20. The petitioner, relying on Section 4 (2) of the *Fair Administrative Action Act*, the Republic vs National Land Commission and 2 Others Ex parte Ravindra Ratilal Taylor & 3 others CEC Lands, Housing, Physical Planning Uasin Gishu County & Another 2022 e KLR, submitted that the 4th and 5th respondents have contravened the *Fair Administrative Action Act* in their exercise of their administrative functions of dealing with application for extension by failing to consider or respond to the petitioner's application.

21. Citing Sarah Mweru Muhu vs Commissioner of Lands and 2 Others 2014 eKLR, the petitioner also urged that the failure to acknowledge, respond to and/or consider the application for extension expeditiously and/or efficiently by the 4th and 5th respondent and the failure to give the petitioner any written reasons for failing to acknowledge, respond to and/or consider the petitioner's application for extension was in violation of Article 47.

22. On issue No. 2 the petitioner, citing Kenya Industrial Estate Limited vs Ann Chepsiror & 5 Others 2015 eKLR, Republic vs National Land Commission and 2 Others Ex parte Ravindra Ratilal Taylor & 3 others CEC Lands, Housing, Physical Planning Uasin Gishu County & Another 2022 eKLR and Sarah Mweru Muhu (supra) urged that since the petitioner had a legitimate expectation that the 4th respondent would renew the lease by reason of the fact that extensive development had been conducted on the property by the petitioner, that legitimate expectation was violated; also the right to fair administrative action was violated under Article 47 due to failure to give any or any written reasons for failing to renew the lease.

23. On issue No. 3, it was stated that the 1st to 5th respondents breached their statutory duty under Section 13(1) and 1(A) of the *Land Act* 2012 to give the Petitioner its preemptive rights to be allocated the suit property, see the case of Joseph Karanja Mwangi (Suing as The Legal Representative of Estate of Amos Mwangi Githigia v Stephen Ndung'u Gichuhi eKLR and Remtone Holdings Company

Ltd v Mashukur Enterprises Ltd 2017 eKLR. It was urged that where a lease is not granted after an application for renewal by the lessee, Section 13(1) (a) requires the Commission to give the Lessee the reasons for not granting the lease in writing, yet no reason was given. Additionally, the 5th respondent failed to notify the petitioner of its preemptive rights to apply for renew of the lease and/or publish such a notice which was contrary to Rule 3(1), 2, and 3(3) of the Land (Extension and Renewal of Leases) Rules 2017.

24. The registration of and issuance of title document to the 6th to 11th respondent is said to be in violation of their petitioner's right to property under Article 40(1), and to fair administrative action under Article 47 since the petitioner remained the legal owner of the property unless and until communication of a decision on the application for extension of lease was given.

25. Regarding issue No 4, it was stated that adjudication of the suit property under the *Land Adjudication Act* while it was still registered as private land and was thus unavailable for alienation was contrary to Section 3(1) of the *Land Adjudication Act* which limits the application of the said Act to community land. The case of Ben O. Okwendu & 7 others vs Kenya Prison Services & 2 Others 2022 eKLR was cited in this regard. In any event, the petitioner stated, the 1st to 3rd respondent failed to apply the provisions of Section 14 to such purported adjudication by giving a minimum of seven clear days before adjudication.

26. On the last issue, the petitioner's averred that he was entitled to the reliefs sought.

The 6th Respondent's Submissions**

27. In its submissions dated 18th April 2024, the 6th respondent framed the following issues for determination:

    a. Whether the court has jurisdiction to hear this matter;

    b. Whether the petitioner has established fraud.

28. On the 1st issue, the 6th respondent submitted that the petitioner's suit is statute barred by provisions of Section 7 of the *Limitation of Actions Act*. The case of Nassra Ibrahim Ibren vs Independent Electoral & Boundary Commission & 2 others 2018 eKLR, and Francisca Wanza Nthenge & Another vs Mwana Wikio Cooperative Society 2020 eKLR were cited in this regard. The arguments raised by the 6th Respondent is that the request was made for extension in 1995 and thereafter there was no renewal/ extension and the lease expired in 2002 and there is no evidence of any follow up by the petitioners for 15 years up to 2017, a period of 22 years from the date of the cause of action in 1995 when the application failed to secure extension.

29. It is submitted that perchance the above arguments of limitation fail and that the cause of action is found to have occurred in 2002, that is still outside the limitation period given in Section 7 of the *Limitation of Actions Act* and no declaration of violation of Constitutional rights can issue. In addition, it is averred that upon the expiry of the lease term in year 2002, the proprietary rights accruing to the petitioner were terminated with the lease.

30. On the 2nd issue regarding fraud, the 6th respondent citing Section 26 of the *Land Registration Act* urged that fraud must be specifically pleaded and proved. Citing John Mbugua Getau vs Simon Parkoyiet Mokare & 4 others 2017 eKLR for the proposition that fraud is a matter of fact and that the standard or burden of proof in civil matters where fraud is alleged is higher than the ordinary standard of balance of probabilities. It was urged that the petition has pleaded and particularized the allegations of fraud but it has failed to proof that fraud. The 6th respondent asserts that the petitioner would in any event,

be unable to prove fraud for the reasons that its lease expired prior to the issuance of title to the 6th and 7th respondents. The case of Dina Management Limited vs *County Government of Mombasa & 5 Others Petition 8 of 2021*, 2023 eKLR was cited in that regard. The 6th respondent asked the court to dismiss the petition.

8th To 11th Respondents' Submissions

31. The 8th to 11th Respondents are the legal administrators of the estate of the late Munga Kombe Kunya, the registered proprietor of parcel Kilifi/Chang'ombe/87. They are in possession of the said land and they assert that the Munga clan has held this land since time immemorial as ancestral land, having inherited it through generations from their forefathers. The Respondents argue that they have provided documentation showing the adjudication process followed to register their late father as the legal owner of the land. They argue that the adjudication was legal as the due process was followed. They framed the following as the issues for determination in this petition:

    a. Whether the Court has jurisdiction to hear and determine the present Petition;

    b. Whether the Petitioner can rely on Article 47 of *the Constitution*, 2010 and Section 13(1) and 1(a) of the *Land Act*, 2012 to retrospectively apply them in relation to the alleged infringements of its rights;

    c. Whether there existed legitimate expectation for the indenture to be acknowledged, responded and renewed;

    d. Whether the Petitioner's pre-emptive rights to have the lease renewed have been violated;

    e. Whether the Petitioner has proved its case to warrant cancellation of the Title issued to the 8-11th Respondents.

32. Regarding the first issue, it was submitted that this Petition is time-barred under Section 7 of the *Limitation of Actions Act* and consequently, the Court lacks jurisdiction to entertain it; that it is undisputed that the Petitioner's lease expired on 6th May 2002; that the cause of action, if any, arose on that date; that the respondents dispute the Petitioner's claims to have applied for a lease renewal through a letter dated 13th June 1995, noting that the letter did not bear any stamps or signature evidencing the letter was ever presented to the Commissioner of Lands; that the Petitioner never demonstrated any actions or follow-up actions it took to pursue this application for renewal of the said lease from that date it allegedly lodged the application; no explanation to this Honourable Court why the petitioner did not take any action against the alleged refusal of the Commissioner to renew the lease for more than 16 years after the lease expired; that it only acted upon the matter on 24th October 2017, after receiving an eviction notice dated 16th May 2017 from the 8th to 11th Respondents; that the Petitioner could have brought an action to protect its interests in the expired lease within a statutory limit of twelve years, as prescribed by the *Limitation of Actions Act* and this claim brought after 6th May 2014 is statutorily time-barred.

33. The respondents further submit that this is an ordinary land matter but the Petitioner has camouflaged it as a Constitutional petition raising an alleged violation of Constitutional rights in an attempt to circumvent the statutory time limitations. They rely on James Kanyiita Nderitu v Attorney General & another [2019] eKLR the Court of Appeal cited with approval the case of Lt. Col. Peter Ngari Karume & Others vs. Attorney General, Nairobi Constitutional Application No. 128 of 2006 [2009] eKLR.

34. Citing Attorney General & 2 others v Okiya Omtatah Okoiti & 14 others [2020] eKLR, the respondents further submitted that where a suit is statutorily time-barred, the Court lacks jurisdiction to entertain it. They rely on the following passage in that case:

> " There are many decisions of our Courts that emphasize that due to its importance, an issue of jurisdiction may be taken at any time and stage of proceedings... In my view, jurisdiction is primordial and must exist right from the filing of a case to determination. The issue of jurisdiction need not be raised by the parties to a suit for the court to address its mind to it. It is incumbent upon every judicial or quasi-judicial tribunal or court to satisfy itself that it has jurisdiction to entertain a matter before settling down to hear it. In essence, therefore, a court or tribunal should not wait for a party to move it on the issue of jurisdiction for it to determine the issue. The Court can suo motu determine the issue even without being prompted by a party."

35. It was also submitted that the Petition should be struck out for non-compliance with Section 26 of the *Land Adjudication Act* on the basis that the Petitioner challenges the adjudication process that resulted in the Respondents' registration as proprietors of the suit property; that the adjudication process was duly conducted and concluded; that following adjudication, the Land Adjudication Officer issued a notice inviting any objections from individuals who believed the register to be incorrect or incomplete; however, the Petitioner failed to raise any objections within the stipulated 60-day period, as required by Section 26 of the *Land Adjudication Act*; the Petitioner neither filed an appeal to the Minister nor initiated any other action within the statutory period to challenge the adjudication outcome; consequently, it is stated, the Petitioner's failure to observe these statutory procedures and timelines renders the petition incompetent and should be struck out.

36. The second issue is whether the Petitioner can rely on Article 47 of *the Constitution*, 2010, and Section 13(1) and 1(a) of the *Land Act*, 2012 to retrospectively apply them in relation to the alleged infringements of its rights.

37. It is urged that the Petitioner filed this Petition on the basis and allegations that the Respondents have violated its rights or fundamental freedoms under Articles 27 (on equality and freedom from discrimination), 40 (on protection to right to property), and 47 (on fair administrative action) of *the Constitution*; that the Petitioner further lays the basis of the Petition as Section 13(1) and 13(1)(a) of the *Land Act*, 2012 which provides for lessee's pre-emptive rights to allocation. However, the respondents argue that the Petitioner cannot rely on Article 27,40 and 47 of *the Constitution*, 2010 or Section 13(1) and 13(1)(a) of the *Land Act*, 2012, to address alleged infringements that occurred prior to their enactment; that it is a well-established principle that laws do not apply retroactively unless explicitly stated; that the Petitioner's lease expired on 6th May 2002 and so the alleged infringements and the expiry of the Petitioner's lease occurred before the promulgation of the 2010 Constitution and enactment of the *Land Act*, 2012; that at the time of the expiration of lease, the applicable laws were the Crown Lands Ordinance and the Government Lands Act, which did not provide the protections now enshrined in *the Constitution* and the *Land Act*; that Article 47 of *the Constitution*, which guarantees the right to fair administrative action and Section 13(1) of the *Land Act*, which grants pre-emptive rights to lessees, were not in effect and cannot govern claims arising from events that happened before their enactment; that the Petitioner's claims must be evaluated under the laws and rights existing at the time of the lease's expiration; that since the Petitioner failed to renew the lease within the applicable legal framework, they cannot invoke provisions from laws enacted long afterwards to claim rights that

did not exist at the material time. The respondents cite the case of P N N v Z W N [2017] eKLR where the Court of Appeal held that:

> " The foregoing provisions are in consonance with Section 23 (3) of the *Interpretation and General Provisions Act* which safeguards all rights, obligations, liabilities and privileges where legislation is repealed. It states thus: -
>
> "Where any written Law repeals in whole in part another written Law, then unless a contrary intention appears, the repeal shall not;
>
> a. Revive anything not in force or existing at the time at which the repeal takes effect; or
>
> b. Affects the previous operation of a written Law so repealed or anything duly done or suffered under a written law so repealed; or
>
> c. Affect a right, privilege, obligation or liability acquired, accrued or incurred under a written Law so repealed; or
>
> d. Affect a penalty for forfeiture or punishment incurred in respect of an offence committed against a written Law so repealed."

It is common ground in this matter that the properties in dispute were registered under the Registered *Land Act*, Cap 300 (now repealed). That is therefore the relevant and applicable law, and I so find".

38. Thus, the Petitioner's reliance on *the Constitution* of Kenya,2010 and the *Land Act*,2012 to argue for rights or entitlements concerning their expired lease is legally untenable since both legal instruments were enacted after the lease expired, they cannot be invoked to challenge the validity of the actions taken regarding the lease or the issuance of titles to the Respondents.

39. Regarding the third issue as to whether there existed legitimate expectation for the lease extension application to be acknowledged, responded and renewed it is submitted that legal principles governing legitimate expectation as well as the facts surrounding the Petitioner's lease renewal process must be considered. The respondents rely on the Supreme Court case of *Kenya Revenue Authority v Export Trading Company Limited (Petition 20 of 2020)* [2022] KESC 31 (KLR) (Civ) (17 June 2022) (Judgment) for their argument.

40. It was urged that the Petitioner must show that the Commissioner of Lands either explicitly or implicitly led it to reasonably expect that the lease would be renewed upon request. It is argued that the purported letter to the Commissioner dated 13th June 1995 presented in Court as evidence is unsigned and lacks any stamp or other proof of receipt; that consequently, doubt is cast whether the application was formally submitted and acknowledged by the Commissioner of Lands; that it is just a draft letter pulled from the Petitioner's files; that for a legitimate expectation to arise, there should ideally be some form of acknowledgment or response from the Commissioner of Lands, indicating that the application was received and would be considered; that the absence of acknowledgment suggests that the Petitioner did not take adequate steps to ensure that the unsigned letter dated 13th June 1995 serving as its renewal application was properly lodged with the Commissioner of Lands; that without evidence of proper application and acknowledgment of the application by the Commissioner of Lands, the Petitioner cannot be heard to argue that the Commissioner was even aware of its intention to renew the lease, let alone that any expectation for renewal could arise.

41. It is submitted that at the time the Petitioner's lease expired in 2002, the renewal of government leases was not automatic but subject to the discretionary approval of the Commissioner of Lands, contingent

on the lessee's compliance with required application procedures. Since no explicit law guaranteed lease renewal, the Petitioner cannot claim a legitimate expectation of renewal or assert that such an expectation was breached. It is also argued that the extended delay in pursuing renewal undermines the Petitioner's claim of legitimate expectation. In support of that proposition the respondents cite Ndambuki (Suing as an administrator of the Estate of the Late Gregory Ndambuki) & another v National Land Commission & 2 others (Environment & Land Petition E022 of 2023) [2024] KEELC 928 (KLR) (22 February 2024) (Judgment) where the Court stated as follows:

> " It is the considered view of this court that in addition to complying with terms of the lease, a lessee who applies for renewal even before the lease lapses or one who applies for the same immediately after the lease lapses would have the legitimate expectation as opposed to a lessee who does not actively follow up renewal. The Petitioners admit that they only applied for renewal in 2023, 19 years after the lease had lapsed. This kind of indolence is inexcusable and does not aid a case for legitimate expectation."

42. The respondents argue that the assertion that the Petitioner's legitimate expectation for lease renewal by the Commissioner of Lands arose from its extensive development of the suit property is misplaced, as the Petitioner was bound by the terms of the lease, which are expressed as follows:

> " It is hereby agreed and declared that at the expiration or sooner determination of the said term, the Lessees shall be entitled, if they so desire, to remove any buildings now or hereafter erected by the Lessees upon the said pieces or parcels of land. However, should they not remove such buildings within one year of the expiration or sooner determination of the said term, such buildings shall become the property of the Commissioner, who shall not be liable to pay any compensation."(See annexure marked COK-4(a)). This clause clearly negates any assumption of automatic lease renewal based on the developments done on the suit property."

43. As to whether the Petitioner's pre-emptive rights to have the lease renewed have been violated it is urged that though the Petitioner claims pre-emptive rights to lease renewal, arguing that existing lessees should be given priority upon lease expiry, its indenture dated 7th May 1903 expired on 6th May 2002, long before the enactment of the *Land Act*, 2012, which introduced pre-emptive rights for lessees under Section 13(1). As the applicable laws did not then explicitly recognize pre-emptive rights for lessees. The reliance on Section 13(1) of the *Land Act* 2012 is faulted as misplaced as the statute cannot be applied retrospectively to leases that had already expired. It is submitted that before the 2010 Constitution and the *Land Act*, 2012, the primary laws governing public land were the Government Lands Act (Cap 280) and the Crown Lands Ordinance under which the Petitioner's indenture was issued and that these statutes did not provide for pre-emptive rights upon lease expiry; that under the earlier laws, once a lease expired, the land reverted to the government, which had the discretion to allocate it without any obligation to prioritize the former lessee. Ndambuki (Suing as an administrator of the Estate of the Late Gregory Ndambuki) & another v National Land Commission & 2 others(supra) was relied on for this proposition where it was held that:

> " It is not disputed that the lease to the contested parcel of land expired on 1.1. 2004. It follows that neither the *Land Act* of 2012 nor the (Extension and renewal of leases) Rules, 2017 are applicable. Having found that the lease herein had expired by 1.1.2004, it was necessary for the petitioners to commence the process of extension of the lease herein within the legal regime appertaining at that particular time (Year 2004)."

44. It is submitted that no violation of the Petitioner's pre-emptive rights has occurred, as such rights were neither recognized nor applicable when the Petitioner's lease expired and also because the Petitioner did not make an application for renewal of the lease.

45. Regarding whether the Petitioner has proved its case to warrant cancellation of the Title issued to the 8th-11th Respondents the respondents submit that the Petitioner seeks the cancellation of titles issued to the 6th –11th Respondents, claiming violations of its pre-emptive rights and legitimate expectation to the extension of a lease that expired on 6th May 2002. Additionally, the Petitioner alleges that the titles were issued fraudulently, illegally, unprocedurally or through a corrupt scheme. This argument is faulted on the grounds that the Petitioner's claim for breach of pre-emptive rights is untenable because such rights did not exist in law at the time the lease expired. Pre-emptive rights arose from *the Constitution*, 2010 and the *Land Act*, 2012, which cannot apply retrospectively to events occurring in 2002. Furthermore, the Petitioner failed to take any steps to renew the lease until 24th October 2017, long after the Respondents' titles were issued on 8th August 2013. It is stated that upon the expiry of the petitioner's lease, the Petitioner's proprietary interest in the suit property ceased and the land reverted to the Government and the 1st Respondent was therefore within its mandate to adjudicate the land and allocate it to the rightful native occupants, among them the 8th to 11th Respondents.

46. On the claims that the issuance of titles violated its legitimate expectation for a lease renewal the respondents' answer is that legitimate expectation could not have arisen because the Petitioner did not submit a valid and timely application for lease renewal and for that reason, the suit property was lawfully adjudicated to the Respondents, who are in occupation. Thus, the Petitioner has failed to establish any grounds for the cancellation of the titles.

47. The Petitioner's assertion that there is double registration of the suit property following the adjudication and subsequent issuance of title deeds to the 6th to 11th Respondents is faulted as incorrect on the ground that at the time of the Respondents' registration as absolute proprietors in 2013, the Petitioner's lease had already expired; that expiry having occurred, the Petitioner has not produced any valid certificate of title or indenture registered in its favour or evidence, such as a current search of the suit property, to substantiate its claim of double registration. Therefore, it is argued, the Petitioner lacks not only valid proprietary interest in the suit property but also standing to challenge the issuance of titles to the Respondents and the title deed issued to the Respondents is protected Section 26 of the *Land Registration Act* the respondents having obtained indefeasible rights under Section 25 of the *Land Registration Act* and Article 40 of *the Constitution*. The certificates of titles can only be challenged on grounds of fraud, misrepresentation, illegality, or procedural impropriety, and the burden of proof lies with the party alleging such grounds which, in this case, is the Petitioner. The respondents cited Joseph Kiprotich Bor v Tabutany Chepkoech Chebusit [2021] eKLR, where the Court held as follows:

> " As may be observed, the law is extremely protective of title and provides only two instances for the challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme."

48. The allegation that the 1st–3rd Respondents abused their offices by colluding with the 6th–11th Respondents to issue fraudulent titles is refuted by the respondents who point out that the petitioner has not tendered any evidence to prove the alleged fraud, illegality or procedural impropriety of the issuance of the titles to the 6th -11th Respondents. They cite Kuria Kiarie & 2 Others v Sammy Magera [2018] eKLR, for the proposition that allegations of fraud or illegality must be specifically pleaded and

strictly proved to a standard higher than a balance of probabilities. The following passage in that case is relied on by the respondents:

> " As regards the standard of proof, this Court in the case of Kinyanjui Kamau v George Kamau [2015] eKLR expressed itself as follows; -
>
> "...It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs Ndolo (2008) 1 KLR (G & F) 742 wherein the Court stated that: "...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases..." ...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."

49. The 8th to 11th respondents pray that the Petition be dismissed with costs.

Analysis And Determination

50. It is undisputed by all parties that the petitioner had a lease over the suit property, that the property that is covered by that lease was adjudicated to the 6th -11th respondents;

51. To this court, the issues that arise for determination are as follows:

    1. Whether the petition is time barred by statute and thus the Court lacks jurisdiction to hear and determine the present Petition;

    2. Whether the petitioner applied for an extension of lease;

    3. Whether the handling of the adjudication of Changómbe Adjudication Section and the registration of and issuance of title to the land in the names of persons other than the petitioner, and the handling of the letter seeking extension of the petitioner's lease, were done in a manner that violated the petitioner's rights under:

        a. Article 27(4);

        b. Article 32;

        c. Article 40(2)(a);

        d. Article 40(2)(b);

        e. Article 40(3)(b);

        f. Article 43(1)(b);

        g. Article 43(1)(f);

        h. Article 47 as read with Sections 4-6 of the *Fair Administrative Action Act*, and

        i. Article 53(1)(b).

    4. Who ought to bear the costs of the petition.

    Whether the petition is time barred by statute;

52. The claim that the petition is barred by statute is raised by the 6th respondent and the 8th -11th respondents. In summary, the basis for the claim that the petition is time barred by provisions of Section 7 of the *Limitation of Actions Act* is that:

a. request was made for extension in 1995;

b. request was by letter dated 13th June 1995, which has no any stamps or signature evidencing the letter was ever presented to the Commissioner of Lands;

c. thereafter there was no renewal/extension and the lease expired in 2002;

d. there is no evidence of any follow up by the petitioners for 15 years up to 2017;

e. The Petitioner could have brought an action to protect its interests in the expired lease within a statutory limit of twelve years, as prescribed by the *Limitation of Actions Act*;

f. The delay is a period of 22 years from the date of the cause of action in 1995;

g. perchance the cause of action is found to have occurred in 2002 that is still outside the limitation period given in Section 7 of the *Limitation of Actions Act*;

h. upon the expiry of the lease term in year 2002, the proprietary rights accruing to the petitioner were terminated with the lease.

53. The provisions of the *Limitation of Actions Act* are as follows:

> "7. Actions to recover land
>
> An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."

54. First and foremost, this is a Constitutional petition for determination whether Constitutional rights of the petitioner have been violated. In John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment) the court held that in hearing and determining a Constitutional petition exercises a jurisdiction much broader than it does in ordinary litigation or in judicial review applications. It is trite that *the Constitution* does not set timelines for the filing of any claims for violation of rights. *The Constitution* is the supreme law of the land and all statutes are below it in terms of power and effect. In fact, it is all statutes and subsidiary legislation that have to be interpreted in accordance with the letter and spirit of the supreme law and not vice versa. This petition was filed within the dispensation of *the Constitution* of Kenya 2010. Article 159(2) (d) emphasizes that justice shall be administered without undue regard to technicalities. An objection based on limitation by statute is a technicality. I agree with the 8th -11th respondents that Constitutional claims can be declared stale, but not as a mere technicality under a provision of a statute such as the *Limitation of Actions Act*. Usually, Constitutional petitions involve matters of public law, administration and governance save where horizontal application of the bill of rights is applied, and it is the case that a determination therein normally has ramifications beyond the rights in rem or in persona of the immediate parties to the petition. Perchance the court is faced with the issue of limitation in a Constitutional petition, it may make circumspect assessment of the facts of the case to establish if the delay in lodging the claim is extremely inordinate to the extent that it would render a just trial of the issues on the merits impossible. Besides, the explanation for the delay is vital in a court's determination on the objection of limitation. In Lt. Col. Peter Ngari Kagume & Others (supra), the delay was said to be 24 years and

the court commented that no explanation was given by the petitioners therefor. In that case, Nyamu J stated as follows:

> " The petitioners had all the time to file their claim under the ordinary law and the jurisdiction of the court but they never did and are now counting on *the Constitution*. None of the petitioners has given any explanation as to the delay for 24 years. In my view, the petitioners are guilty of inordinate delay and in the absence of any explanation on the delay, this instant petition is a gross abuse of the court process...In view of the specified time limitation in other jurisdictions, the court is in a position to determine what a reasonable period would be for an applicant to file a Constitutional application to enforce his or her violated fundamental rights. I do not wish to give a specific time frame, but in my mind, there can be no justification for the petitioner's delay for 24 years...."

55. However, Lt. Col. Peter Ngari Kagume & Others is distinguishable in that it was not a claim about violation of Constitutional rights connected with land or extension of lease as in the present petition. It was a case in which the petitioners knew exactly what had happened to them during and immediately after the abortive 1982 coup; no issue of waiting for a response from the authorities arose as in the present case where the petitioner is still awaiting a response to a letter seeking extension of its lease since 1995.

56. In the case of Guyo v Kenya Electricity Generating Company PLC (KENGEN); National Assembly (Interested Party) [2025] KEELC 3 (KLR) the court held as follows:

> " In the end it is clear that entire petition arises from a constitutional tort with regard to which no limitation should apply unless the delay in lodging the claim is so inordinate that it would not be possible to do justice in the case between the parties. In the present case the delay by the petitioner overshot the usual limitation period of three years by only one year which does not amount to inordinate delay that would obstruct a just determination in the matter. For the foregoing reasons, the Respondent's objection on limitation must, and hereby does, fail."

57. In contrast, though the present petition is neither a claim for recovery of land nor a tort and Section 7 of the LAA is thus inapplicable, it is a claim for redress for violation of Constitutional rights with regard to the handling of the process of renewal of a lease after the petitioner allegedly made an application for such renewal and the act of illegal adjudication of the petitioner's land. A wholistic assessment of the petition and the responses thereto is needed in order not to drive away a claimant unjustly on ground of limitation. Therefore, although the 1st -5th respondents have not filed any submissions to the petition, on the particular issue of limitation, this court cannot shut its eye to the replying affidavit of Mary Muteti, Land Adjudication and Settlement Officer, Kilifi County, dated 16th November 2018 filed and on 28/11/2018 by the Attorney General on behalf of the 2nd respondent.

58. Her deposition is that the Changómbe Adjudication Section was established in 1977; that during the prescribed adjudication period the recording officer recorded claims of rights and interests over Plots Nos 27,87,98 and 99 situate within the boundaries of that Section; that a Notice of Completion of the Adjudication Register was issued by the Land Adjudication Officer Kilifi vide a noticed dated 16th December 1982; three plots were later registered in the names of individuals and one, No 27, in the name of a Primary School; that Gohu Baya Gohu and Munga Kombe Kunya were registered as proprietors of Plots Nos 98 and 87 respectively;

59. What is apparent is that the process of adjudication began long before date of expiry of the lease and by 1982, in fact 20 years earlier than the expiry date, the petitioner's land had already been demarcated and allocated to various persons. It is obvious that between 1985 and 2006, the petitioner may not have known that its land had been illegally adjudicated upon by the 1st - 3rd respondents, out of that blissful ignorance, may not have been able to lodge a claim and limitation should not apply to its claim based on any period computed from any date in between. The foregoing notwithstanding, to this court, adjudication is one process comprised of series of interwoven acts of the 1st - 6th respondents that culminates in issuance of title to the entitled persons. The last date of issuance of title is thus the last date that ought to be taken as the last date in the computation of the limitation period suggested by the respondents, if at all limitation is applicable. Titles in this case issued as follows:

    a. To Kilifi County Council On 19/10/82 –Plot No 27 (Reserved for a Primary School, according to a certificate of official search)

    b. To Munga Kombe Kunya On 8/8/2013 - Plot No 87

    c. To Gohu Baya Gohu On 8/8/2013; - Plot No 98

    d. To Kilifi County Council On 8/8/2013 - Plot No 99 (No reserved Purpose, according to the certificate of official search, but according to Mary Muteti's affidavit, reserved for a Primary School.)

60. Save for parcel No 27 which got title in 1982, the process ended in 2013 for 3 of the parcels with the definitive action of title issuance by the 1st -5th respondents. This is just 5 years before the present petition was commenced. This court thus finds it proper to deem 2013 as the date on which the process ended with the issuance of the last of the documents of title which defined the purported rights of the new title holders with clarity so as to inform the petitioner what had actually transpired regarding its land to enable it take action.

61. On any of the dates between 1985 and 2006, the petitioner, if it was aware, could have initiated legal action. After the last of the suit titles issued over the petitioner's land to some of the Respondents in 8/8/2013 time started running. If a limitation period were to be computed, it should be from that date. The petitioner lodged this petition on 24/7/2018, long before the 12-year statutory limitation period expired. The objection to the petition based on limitation under Section 7 of the *Limitation of Actions Act* therefore lacks merit on the above grounds.

Whether the petitioner applied for extension of lease.

62. The petitioner avers that before the lease ended, it had made an application to the Commissioner of Lands for extension of lease on 13th June 1995. The dispute raised by the 8th - 11th respondents about that letter is that it does not bear any stamps or signature evidencing that it was ever presented to the Commissioner of Lands and that the Petitioner never demonstrated any actions or follow-up actions it took to pursue this application for renewal of the said lease from that date it allegedly lodged the application.

63. Before I proceed to analyze this objection further, it noteworthy that the next correspondence attached to the petition is a letter from the petitioner dated 24/10/2017 in which the complaint is as follows:

> "One Munga Kobe has come forth to lay claim to (apportion of) the (suit) land and was irregularly issued with a title deed on the 8th august 2013... the (Petitioner) applied for

renewal of lease vide a letter to the Commissioner of Lands, dated 13th June 1995 (see attached letter for ease of reference). To date we have not received any response."

The second letter then proceeded reiterate the request for renewal contained in the first letter.

64. Failure to respond to correspondence is not uncommon in various public offices in this republic. In Rita Vallentini Vs Shadia Munini Farid Malindi ELC Petition No. E005 OF 2024 this court, having encountered such a situation stated as follows:

> "64. In this court's view also, the consequences of the unwarranted reticence of the 2nd and 3rd respondents outlined herein above are a vital indicator that it is time public bodies and officers ingrained in themselves an intrinsic sense of responsibility that by constant gnaws at their conscience, elicits basic courtesies such as simple acknowledgement and dispatch of informative letters on matters of their concern which a citizen had demonstrated, especially in writing, serious interest in! In the present dispute it can not be understood why no informative letters were addressed to the petitioner by the 2nd and 3rd respondents informing her that licences had been issued, which would have obviated the need for the filing of a petition on the assumption that they had not been issued. As long as the luxury of such lackadaisical mien persists in those offices, needless litigation against them and the risk of its concomitant overheads is likely to increase and impact adversely on the public purse."

65. It is true that the petitioner's copy of the letter seeking extension of lease lacks any acknowledgment of receipt on its face. The 8th – 11th respondents accuse the petitioner of simply pulling the letter from its filed and presenting it to court. That in itself is an acknowledgment that the letter was written and only its delivery is in doubt. However, the 6th and 8th -11th respondents lack any other material besides that lack of any acknowledgment to support their claim that the letter was not so delivered. This court has no grounds upon which to believe that the letter dated 13/6/1995 was not delivered to the Commissioner of Lands. I find that in the social milieu the petitioner and the respondents live in, failure to acknowledge a letter does not necessarily mean that its original was not delivered to the addressee. Besides, extension of lease is not a one-day matter and the petitioner would be entitled to patiently wait for not just an acknowledgment but also a substantive response. If both could be delivered in the same response, that would be an added advantage. The respondent's objection is clearly a shot in the dark and, having Article 159(2) (d) in mind, the possibility of denying the petitioner justice on the basis of such a speculative objection would lead to probability of violation of Article 50(1) of *the Constitution* of Kenya 2010. For the foregoing reasons, this court finds no merit in any of the respondents' arguments premised on the allegation that the letter dated 13th June 1995 does not have acknowledgment of receipt, and the objection must be dismissed.

66. The respondents also blame the petitioner saying that, there is no evidence that the petitioner consequently followed up letter dated 13/6/1995. This court is of the view that it is obvious that in some cases, the senders of letters have to visit the offices they addressed their letters, sometimes travelling a few kilometres and sometimes hundreds of kilometres to establish the fate of their requests when they fail to receive responses; it is not lost on the court that it is also possible that owing to their informal nature, most of such physical follow ups to public offices are undocumented. It is already the expressed view of this court herein above that the letter dated 13th June 1995 was sent to the Commissioner of Lands and all that he required to do was to answer the petitioner's request in writing which he does not appear to have done; the office of the petitioner not being a personal office, this court finds it quite onerous to foist on it the burden of establishing that the personnel who manned it over the

years, who may not be in its employ any more, kept up a follow up on the application for extension of lease after 13th June 1995. Besides, lack of such follow up cannot be deemed to have dissolved the Commissioner of Lands', or, after the new Constitution was implemented, the National Land Commissions' responsibility to act appropriately on the said letter.

Whether the handling of the adjudication of Changómbe Adjudication Section and the registration of and issuance of title to the land in the names of persons other than the petitioner, and the handling of the letter seeking extension of lease, were done in a manner that violated the petitioner's rights.

67. The next issue is whether the 1st to 5th respondents, either by themselves or in collusion with the other respondents, handled the application for extension and the adjudication and title issuance in breach of the petitioner's legitimate expectation.

68. First, on the letter seeking extension of lease, it is alleged that the respondents failed to acknowledge, respond, and consider the application for extension and whether that conduct violated the petitioner's rights under *the Constitution* of Kenya 2010.

69. This court has already found that the letter dated 13th June 1995 is good evidence to that has proved that the petitioner applied for extension of lease. On their part, the respondents have not demonstrated that the letter was responded to. It is not an obvious conclusion that the government's failure to answer that letter meant that the application for extension of lease had been rejected. The letter contained a serious request for extension. In so far as the petitioner had written the letter it had a legitimate expectation of a response. This legitimate expectation for a response must be distinguished from a legitimate expectation of renewal. They are two different things.

70 A legitimate expectation of a response arose automatically upon dispatch of the letter to the Commissioner of Lands. Such legitimate expectation is natural and is not predicated on any promissory or other conduct on the part of the Commissioner of Lands. In the case of Supreme Court case of *Kenya Revenue Authority v Export Trading Company Limited (Petition 20 of 2020)* [2022] KESC 31 (KLR) (Civ) (17 June 2022) (Judgment) it was held as follows:

> " A legitimate expectation arose where a person responsible for taking a decision had induced in someone a reasonable expectation that he would receive or retain a benefit of advantage. Legitimate expectation could take many forms. It could take the form of an expectation to succeed in a request placed before the decision maker or it could take the objective form that a party may legitimately expect that, before a decision that could be prejudicial was taken, one was to be afforded a hearing. The question of whether a legitimate expectation arose was more than a factual question. It was not merely confined to whether an expectation existed in the mind of an aggrieved party, but whether viewed objectively, such expectation was in a legal sense, legitimate. Legitimate expectation would arise when a body, by representation or by past practice, had aroused an expectation that was within its power to fulfill. For an expectation to be legitimate therefore, it had to be founded upon a promise or practice by a public authority that was expected to fulfill the expectation. We then went on to find the emerging principles on legitimate expectation to be that: there had to be an express, clear and unambiguous promise given by a public authority; the expectation itself had to be reasonable; the representation had to be one which it was competent and lawful for the decision-maker to make and there cannot be a legitimate expectation against clear provisions of the law or *the Constitution*."

71. Another legitimate expectation arose upon the sending of the letter, that the Commissioner of Lands would not only acknowledge the letter, but would also hear the Petitioner out on the issue of the renewal of the lease in accordance with the principles of natural justice. This expectation could have occurred in two ways: first, it can be a naturally occurring expectation not based on anything the Commissioner would or would not do once he received the letter seeking extension; secondly, it could be an expectation created by something that the Commissioner of Lands has done after receiving the letter, such as responding and requesting the petitioner to avail itself for an examination on the issue.

72. Another expectation, whether or not the other two expectations herein above were fulfilled, is the expectation that the Commissioner of Lands would consider the application for extension of lease, apply his mind to it with a view to determining the same.

73. The next expectation would have been that the Commissioner of Lands would have made a determination on the application and that he would have communicated his decision to the petitioner after he arrived at it.

74. Therefore, contrary to the 8th -11th respondent's submissions, the arising of a legitimate expectation in the respondent was not solely predicated on action on the part of the Commissioner, but also arose despite his lack of response.

75. Failure to acknowledge the application underlined all the other failures on the part of the Commissioner- failure to respond in any way, failure to consider and failure to communicate his decision his decision to the petition. Consequently, the Commissioner of lands, and naturally the National Land Commission when it succeeded him, breached the petitioner's rights to legitimate expectation in all the aforementioned ways.

76. It is the case, as argued by the 8th -11th respondents, that preemptive rights were not applicable before *the Constitution* of Kenya 2010 and the *Land Act* 2012 came into force and so the petitioner can not lay claim to legitimate expectation of renewal of the lease. Does that mean that the petitioner should not host any legitimate expectation? In so far as principles of equity did not originate with *the Constitution* of Kenya 2010 but existed earlier, the fact remains that the Commissioner of Lands and the NLC ought to have made it clear in writing to the petitioner upon receipt of its letter dated 13th June 1995 as to whether or not the lease would be renewed. The fact that the then existing legal regime and Constitutional dispensation never provided for pre-emption rights never absolved the Commissioner from acknowledging, responding to, considering, and determining the application and communicating the determination to the petitioner. This court must import the doctrine of legitimate expectation in favour of the petitioner into that scenario for there was no other way of knowing if the lease would be considered or extended or not save by way of receiving communication from the Commissioner. Instead of responding or determining the application, the Commissioner kept silent. Consequently, by failing to answer the petitioner's said letter seeking lease extension, the respondents violated the right to legitimate expectation that its letter would be responded to. The violation of that legitimate expectation continued all the way to the year 2013 when titles were issued to a section of the respondents over the suit land. It is not disputed that upon the coming in force of *the Constitution* of Kenya 2010, the 5th respondent assumed the responsibilities and mandate formerly vested in the 4th respondent. It has also not been demonstrated by the 5th respondent that the letter dated 24/10/2017, which renewed the request for renewal of the petitioner's lease, was responded to. Failure to respond to the two letters is therefore a violation of the petitioner's legitimate expectation to a response.

77. In this case, I have found that the petitioner's rights were violated as follows:

a. The 1st, and 2nd respondents adjudicated the suit property was while it was still registered in the name of and occupied by the petitioner. The 1st to 3rd respondent also acted without jurisdiction in adjudicating registered land as it was privately registered as at the time of adjudication. That was tantamount to appropriating the petitioner's land and without compensation. The former Constitution of Kenya provided that no land could be appropriated without compensation further the appropriation was to be for a public purpose. Section 75 of the repealed Constitution of Kenya provided as follows:

> "(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied –
>
> (a) the taking of possession or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property so as to promote the public benefit; and
>
> (b) the necessity therefor is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property; and
>
> (c) provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.
>
> (2) Every person having an interest or right in or over property which is compulsorily taken possession of or whose interest in or right over any property is compulsorily acquired shall have a right of direct access to the High Court for –
>
> (a) the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled; and
>
> (b) the purpose of obtaining prompt payment of that compensation:"
>
> This court is of the view that under the former Constitution, the petitioner's rights to property under section 75(1) were violated in so far as it later transpired in 2013 that titles over the petitioner's land so appropriated were registered to the 6th respondent and some private individuals. There is no hiatus or vacuum between the two Constitutional dispensations and they form a continuum in so far as guarantees in respect of property rights continues in both. The continuation of the adjudication process culminating

into concrete acts of title issuance to persons other than the petitioner under the dispensation of *the Constitution* of Kenya 2010 deprived the petitioner of its property notwithstanding that no compulsory acquisition process with compensation was employed and the appropriation was not for a public purpose. In so far as the registration of the suit land in the 8th – 11th respondents' names, and/or threatened demolition of the church the primary school, the secondary school, the polytechnic and residences of church missioners may occur while the application for extension of the lease has not been appropriately attended to by the 5th respondent under the law, it is the view of this court that the petitioner has established threatened violation of its right to enjoyment of its properties under Article 40(3)(a). The said demolition would if carried out, deprive the church missioners access and use of their housing thus violating their right to housing under Article 43(1)(b) and it would deprive the pupils and students in the Petitioner's schools access to education and thus is a threat to the violation of their right to education under Articles 43(1)(f); hence, the provisions of Article 40(3)(a) and Article 40(3)(b) of the new Constitution were violated and are threatened with violation with regard to the petitioner.

c. The Adjudication of the suit properties and the issuance of titles was conducted without hearing the petitioner who was occupying the land at the time. In so far as the repealed Constitution then provided that no property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where under the conditions in its Section 75(a), (b) and (c) which in any event were not satisfied with respect to the petitioner. That was not only in violation of Constitutional rights to property but also contrary to the principles of natural justice which are also embodied in Articles 47 and 50 of *the Constitution* of Kenya 2010. In so far as the final definitive acts of the 1st -5th respondents in the process of adjudication and title issuance happened after *the Constitution* of Kenya 2010 came into force, both Article 47(1) and (2) and 50(1). I have considered that the Fair Administrative Actions Act having come into force after the titles over the petitioner's land were issued in 2013, its provisions are not applicable retrospectively to the petitioner's case. It is thus the case that the respondents failed to inform, notify, invite, or warn the petitioner of the

intended adjudication contrary to Section 14 of the *Land Adjudication Act* which provided as follows:

> "14. Warning of demarcation and recording
>
> Not less than seven clear days before the demarcation of an adjudication section is begun, the demarcation officer shall give warning of the intended demarcation and recording of claims, and of the time and place at which it will begin, in such manner as the adjudication officer considers most likely to bring the matter to the knowledge of the persons who will be affected by the demarcation and recording."

d. This court considers the petitioner's application to be still pending. The petitioner's suffering under the weight of an unjust adjudication process, and its wait for a response by the government to its request for renewal of lease straddled two Constitutional eras. In so far as the actions and omissions of the respondents crossed into the era of *the Constitution* of Kenya 2010 and the *Land Act* 2012, other violations under the said Constitution and the said statute also followed. As long as the application is still pending even now, it should be acted on and not in accordance with the old legal position but in accordance with the present legal and Constitutional dispensation. The existing law in Section 13(1) and 1A of the *Land Act* provides as follows:

> "13. Lessee pre-emptive rights to allocation
>
> (1) Before the expiry of the leasehold tenure, the Commission shall—
>
> (a)within five years, notify the lessee, by registered mail, of the date of expiry of the lease and inform the lessee of his or her pre-emptive right to allocation of the land upon application, provided that such lessee is a Kenyan citizen and that the land

is not required by the national or county government for public purposes; and

(b)if within one year the lessee shall not have responded to the notification, publish the notification in one newspaper of nationwide circulation.

(1A) Where a lease is not granted after an application under subsection (1), the Commission shall give the lessee the reasons for granting the lease, in writing."

e. The 8th -11th respondents acknowledge that preemptive rights did not exist under the repealed Constitution and statutes. However, for as long as it is still pending, and I have held herein that it still is, law has to be applied to the lease extension application. The question would be: under which other law can the 5th respondent undertake its duties in respect of the lease extension process? It would be absurd to hold that the existing law can not be applied to the application for extension of the lease and that existing law is in Section 13(1) and 1A of the *Land Act* as read with Article 47(1) and (2) of *the Constitution*. The question raised by the 8th-11th respondents as to whether Article 47 of *the Constitution*, 2010 as read with Section 13(1) and 1(a) of the *Land Act*, 2012 can apply retrospectively for the benefit of the petitioner in relation to the alleged infringements of its rights does not arise at all since the rights of the petitioner to renewal under the new law are still alive. Those rights under Article 47(1) and (2) and Section 13(1) and 1A are still being violated by the 5th respondent to date.

f. The process that the 1st -5th respondents followed in adjudicating the petitioner's land as analyzed while determining the issue of limitation herein above is relevant. Changómbe Adjudication Section was established in 1977. The year 1977 was 25 years before the expiry date of the lease held by the petitioner over the suit land. A notice of completion of the Adjudication Register was issued by the Land Adjudication Officer Kilifi vide a noticed dated 16th December 1982. From its inception till its conclusion therefore, the adjudication process, in so far as it covered the land whose title was in the name of the petitioner was illegal null and void

since there is no law that permits the government to conduct adjudication over private land. On this court's part, the petitioner had legitimate expectation that an adjudication would be conducted on its land which was titled since such process was normally reserved for land that then fell under the category of trust land. Community land includes what was under the former Constitution of Kenya known as Trust Land. It is undisputed that the land claimed by the petitioner herein is was in the category of alienated land that neither fell under government land nor trust land at the time the adjudication was conducted over it.

g. It is the 1st and 2nd respondent's case that the Demarcation Officer was not notified of the existence of indenture Title No 361A during demarcation, hence the same was not excluded from the map by the surveyor. However, with the petitioner's legitimate expectation that its land can not be adjudicated under Cap 284 in place, it was incumbent upon the 1st, 2nd and 6th respondents, who were advantaged in their official positions to have maps and other documentation of the area, to ensure that the declaration of Changómbe Adjudication Section did not include the petitioner's land which was already titled, and that such land was not adjudicated. That the Demarcation Officer was not notified of the existence of indenture Deed No 361A during demarcation was a matter of negligence on the part of officers working with the 1st, 2nd and 6th respondents. In the 2nd respondent's replying affidavit analyzed partially herein above, it was stated that no objections were raised in respect of the suit land herein. The 8th -11th respondents add their support to that while arguing their objection based on Section 7 of the *Limitation of Actions Act*. However, I have already stated that the adjudication was illegal ab initio as the land was not trust land and was registered private land. The 1st and the 2nd respondents lacked jurisdiction to adjudicate the petitioner's land under the law. It thus matters not whether or not any objections under Section 26 of the LAA, or appeal under Section 30 LAA, were lodged because of the illegality of the adjudication. In the case of Macfoy v United Africa Co LTD [1961] 3 All ER, 1169 the court held as follows:

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without

more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse..."

h. The 2nd respondent's replying affidavit states that the process was undertaken in good faith by the Adjudication Officer; and the 1st , 2nd and 3rd respondents have conducted themselves with transparency at all times; that several years later it was brought to the attention of the Settlement Office that Plots Nos 27,87, 98 and 99 overlapped the indenture area; that if the court were to find that the indenture title valid then the County Surveyor should map out the boundaries of the Title No 361A to clearly ascertain the registered plot numbers affected so as to resolve the issues raised by the petitioner. The deponent states that there was no intent to undermine the fundamental rights of the petitioner and there was no fraud abuse of office and or any illegalities on the part of the 1st -5th respondents. It is noteworthy that after this affidavit was filed the 1st -5th respondents never filed any substantive response to the main petition. Therefore, save that they deny that there was any intention to deny the rights of the petitioner, they are deemed to admit all the effects of their action of adjudication of the suit land undertaken under the mistaken view that the land was supposed to be included in the Changómbe Land Adjudication Section. They therefore do not oppose this petition at all. This court thus, views that sworn affidavit as an admission of the impropriety of the 1st and 2nd respondents' application of the adjudication process for the Changómbe Adjudication Section over land that was privately owned by the petitioner. Notwithstanding the 6th and the 8th -11th respondent's vehement opposition to the petition, that admission, in addition to the analysis of this court as hereinabove contained, concludes the issue as to whether the adjudication was legal or not; it was illegal ab initio. There was no compulsory acquisition. There was no surrender of lease to the government by the petitioner; between 1985-1988 when the demarcation was done and the land interests registered in the name of a section of the respondents herein, the petitioner's lease had not expired. Consequently, as the land adjudication process was concluded with the issuance of title to a section of the respondents in 2013 without consulting

the petitioner and the petitioner was thus deprived of its preemptive rights and legitimate expectation to the extension of the lease as provided for under Section 13(1) of the *Land Act*.

78. As seen above, the threatened destruction of the properties is merely physical and this court has not found any material to support the petitioner's claim of violation of their rights to freedom of worship and conscience under Article 32 are threatened with violation.

Who Should Bear the Costs of These Proceedings?

79. As the 6th -11th respondents' opposition to the present petition necessitated its hearing, they shall bear the costs of these proceedings jointly and severally.

Conclusion.

80. In the final analysis, this court finds that the petitioner has established its claim against all the respondents and it enters judgment in its favour against the respondents and issues the following orders:

    a. A declaration is hereby made declaring that the 4th respondent breached the petitioner's legitimate expectation when he failed, refused or neglected to acknowledge, respond to or consider the petitioner's application dated 13/6/1995 for extension of its lease in respect of land held under indenture Deed No 361A of 1903;

    b. A declaration is hereby made declaring that the petitioner's rights under Article 40(3)(a), Article 40(3)(b)(1), Article 47(1) and (2), Article 43(1)(f) of *the Constitution*, Section 13(1) and 1A of the *Land Act* 2012 have been violated by the actions and omissions of the respondents acting singly or jointly;

    c. A declaration is hereby issued declaring that the inclusion of the petitioner's land held under indenture Deed No 361A of 1903 in the Changómbe Land Adjudication Section by the 1st and 2nd Respondents is illegal null and void;

    d. An order of mandatory injunction is hereby issued to compel the 6th to 11th Respondents to vacate and deliver vacant possession of L.R Nos. L.R Nos. Kilifi/Changómbe/27, Kilifi/Changómbe/87, Kilifi/Changómbe/98 and Kilifi/Changómbe/99 to the Petitioner;

    e. An order of permanent injunction is hereby issued restraining the Respondents, whether by themselves, servants, employees, agents, personal representatives, or administrators, from occupying, cultivating, constructing, fencing, selling, leasing, charging or in any other way interfering with the Petitioner's quiet possession and enjoyment of Chang'ombe plots A, B and C, held under indenture Deed No 361A, now known as L.R Nos. L.R Nos. Kilifi/Changómbe/27, Kilifi/Changómbe/87, Kilifi/Changómbe/98 and Kilifi/Changómbe/99;

    f. All the titles registered as L.R Nos. Kilifi/Changómbe/27, Kilifi/Changómbe/87, Kilifi/Changómbe/98 and Kilifi/Changómbe/99 are hereby hereby cancelled;

    g. An order of mandatory injunction is hereby issued to compel the 5th respondent to consider and make a determination on the petitioner's application for renewal of lease dated 13th June 1995;

    h. The 6th-11th respondents in this petition shall jointly and severally bear the costs of this petition.

JUDGMENT DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 5TH DAY OF MARCH 2025.

MWANGI NJOROGE

JUDGE, ELC, MALINDI