



REPUBLIC OF KENYA



**Jara & another v Wanje & 9 others (Petition 25 of 2021)
[2025] KEELC 1122 (KLR) (5 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1122 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
PETITION 25 OF 2021
EK MAKORI, J
MARCH 5, 2025**

BETWEEN

JOSHUA KOFA JARA 1ST PETITIONER

KATHLEEN AMUMA JARA 2ND PETITIONER

AND

NYANJE ZIRO WANJE 1ST RESPONDENT

MRAMBA MRABU TUNE 2ND RESPONDENT

ELIJAH MZUNGU MURABU 3RD RESPONDENT

GUYO MAJEMBI 4TH RESPONDENT

GRACE DAMA CHARO 5TH RESPONDENT

VINCENT MUNYAO WAMBUA 6TH RESPONDENT

DANIEL JENNOH MURABU 7TH RESPONDENT

CHIEF LAND REGISTRAR 8TH RESPONDENT

KILIFI COUNTY LAND REGISTRAR 9TH RESPONDENT

HON ATTORNEY GENERAL 10TH RESPONDENT

JUDGMENT

1. By their Petition dated 6th October 2021, the Petitioners seek the following reliefs:
 - a. A declaration that plot No. 410 Malindi has overlapped the 1st & 7th Respondents' pieces or parcels of land by approximately 4.35 Ha. and the Respondents' pieces of land be hived off and the acreage of 4.35 Ha. be included in the total area of Plot No. 410 Malindi.



- b. A prerogative order of mandamus be issued directing the 9th Respondent to resurvey Plot Nos. 19, 20, 21, 22, 1296, 1297 and 1298 Chembe/Kibabamshe and Plot No.410 Malindi, their registry index map, and rectify the area to tally with the title deeds and the measurement on the ground.
 - c. A prerogative order of certiorari be issued directing the 8th Respondent to quash the current registry index map and the title deeds of plots No. 19, 20, 21, 22, 1296, 1297, 1298 Chembe/ Kibabamshe and 410 Malindi.
 - d. A prerogative order of mandamus be issued directing the 9th Respondent to rectify the registers of Plot No. 19, 20, 21, 22, 1296, 1297, 1298 Chembe/Kibabamshe and Plot No. 410 Malindi and re-issue the title deeds indicating correct measurements to tally with the measurements on the ground.
 - e. Costs of this Petition.
 - f. Any other relief this Honorable Court may grant to meet the ends of justice and protect the Petitioners' constitutional rights.
2. The Petitioners relied on the Supporting Affidavit dated 6th October 2021, its annexures, and the Supplementary List of Documents, dated 28th April 2023, filed on the same day.
 3. The Firm of Katsoleh and Company advocates filed a Notice of Appointment of Advocates for the 1st to the 7th Respondents on 2nd February, 2022 but did not file any response to the Petition.
 4. The Office of the Attorney General entered appearance for the 8th, 9th, and 10th Respondents on 25th January, 2023 and filed Grounds of Opposition dated 7th July 2023 as follows:
 - i. The Petitioners' land Plot No 410 was established in 1936.
 - ii. That the Petitioners were not made party to the alleged settlement of squatters in the area and no evidence has been tendered to prove that the area including the Petitioners' land was identified for settlement of squatters.
 - iii. The previous owner who sold Plot No. 410 Malindi to the Petitioners in 1991 had already had possession of the plot for nearly 40 years, and there was no such settlement of squatters on plot No. 410 Malindi.
 - iv. The Petitioners have possessed their land since buying it on 11th July 1991.
 5. The court directed that the Petition be disposed of via the affidavits, documents and written submissions filed. The Petitioners filed their submissions; the other parties did not.
 6. Having reviewed the materials and submissions placed before me, I frame the issues for determination by this court as being significant in determining whether the reliefs sought can be granted in a constitutional Petition and who should bear costs.
 7. The Petitioners aver that property, Plot No. 410 Malindi, was established in 1936. The Petitioners bought this plot in 1991, as evidenced in the agreement for sale dated 11th July 1991 and transfer dated 2nd August 1996, and thereby became the registered owners thereof.



8. The Petitioners contend that on 1st August 2014, the District Surveyor Malindi conducted boundary verification within plot No. 410 Malindi and the adjacent plots. The Surveyor recommended that:
- The line that marks the end of Chembe/Kibabamshe and separates the registration section from private lands including Plot No. 410 Malindi should be surveyed.
 - The Plots on Chembe/Kibabamshe registration section along the said boundary including plot No. 19, 20, 21, 22, and 23 be resurveyed and their area corrected on the respective title deeds.
9. The Petitioners contend that the District surveyor also made the following recommendations:
- i. It should be noted that the survey plan showing plot number 410 Malindi was registered on 17th December 1936. In contrast, the registry index map showing the plot for Chembe/Kibabamshe was registered in May 1978.
 - ii. Also, surveys under fixed boundaries are superior to general boundaries surveys, and they must be respected.
 - iii. Therefore, the chief lands registrar needs to be liaised with so that the plots under Chembe/Kibabamshe can be re-surveyed, the registry index map corrected, and the areas corrected so that the title deeds tally with what is on the ground.
10. Petitioners state that their land was registered under the Registration of Titles Act (RTA), a fixed survey determined its boundaries. Plot No. 410 Malindi was determined by cadastral survey, which is superior to a general survey, which created the adjacent plots on Chembe/Kibabamshe under the Registered Land Act (RLA).
11. Petitioners proceed to state that under the invitation by the District Surveyor on 3rd October, 2013, and boundary verification on 1st August 2014 in the presence of all concerned parties, land bordering Plot No. 410 Malindi were invited to fix and ascertain the boundaries therein whereby the beacon placing and/or fixing exercise was done in the presence of all parties mentioned and the following findings were recorded: It was found that part of plot 410 Malindi, which is registered under RTA cap 281, is overlapped by plots Chembe/Kibabamshe 19, 20, 21, 22, and 23. The overlap covers an area of 4.35 Ha (approximately 10.75 acres. Note the total area of plot 410 is 7.70 Ha (approx. 19 acres) There is a road which marked the cut line during the adjudication exercise and it cuts through Plot 410.
12. According to the Petitioners, the above findings show that the Petitioners' rights over their land Plot 410 Malindi have significantly been infringed. The overlapping area has been robbed of part of the Petitioner's land by 10.75 acres. The 9th Respondent having conducted the survey and taking part of the Petitioner's land and included it to the bordering plots was not only illegal but unconstitutional as enshrined in Section 18(1)(2)(3) and 19(1)(2) of the Land Registration Act 2012 and Article 40 (3) (a), (b) (6) and 60(1) (d) of the Constitution of Kenya 2010.
13. Petitioners assert that, pursuant to the invitation extended by the District Surveyor on October 3, 2013, and the subsequent boundary verification conducted on August 1, 2014, in the presence of all relevant parties, those with land adjacent to Plot No. 410 in Malindi were called upon to establish and confirm the boundaries. As mentioned above, placing and/or fixing beacons was carried out in the presence of all parties.
14. The Petition seeks to fix a survey of plot No.410 and the adjacent plots. The survey plan shows plot No. 410 Malindi, which was registered on 17th December 1936, whereas the registry index map shows



the plot for Chembe/Kibabamshe, which was registered in May 1978. The Petitioners bought this land in its present form sometime in 1991; 40 years had lapsed since its establishment.

15. The idea of altering titles and boundary fixing came much later in 2013 and 2014. In my mind, the Petitioners' demand is stale. At the core, then, is whether this Petition can be used to cancel titles and fix boundaries, which have roots 85 years ago – before filing this Petition - going by the initial establishment of plot No. 410 Malindi in 1936 under RTA and the 43 years in 1978 when the Chembe Kibabamshe was established under RLA. Whether a constitutional claim of violation of property rights under Article 40 of *the Constitution* is subject to limitation under Article 24 thereof and Section 7 of the *Limitation of Actions Act*. The Supreme Court in Janmohammed (SC) (Suing as the Executrix of the Estate of the Late H.E. Daniel Toroitich Arap Moi) & another v District Land Registrar Uasin Gishu & 4 others (Petition 17 (E021) of 2023 & 24 (E027) of 2022 (Consolidated)) [2024] KESC 39 (KLR) (2 August 2024) (Judgment), had this to say on limitation of action when it comes to constitutional violations:

“In view of our decision in Monica Wangu [supra], we do reiterate that as a general principle, petitions founded on claims of violation of fundamental rights and freedoms are not subject to limitation of actions. However, having so affirmed, it is to be noted that this principle is not absolute. It is to be applied by a court of law on a case by case basis taking into account factors such as the nature of the right, the time taken to ventilate the alleged violation, and whether the claimant may be riding on a mischief.

94. Applying the foregoing principle to the appeal before us, we take note of the following facts on record. Firstly, the original cause of action that culminated in the appeal before us is founded on a claim to a right or title to land. This being the case, Section 7 of the *Limitation of Actions Act* is applicable to the suit unless ousted by the principle in Monica Wangu as contended by the 2nd respondents herein. Secondly, it is undisputed that the property L.R. 10492 was purchased in 1965 by the five proprietors, namely, Nathaniel Kiptalam arap Lagat, Thomas Kipkosgei arap Yator, Noah Kipngeny arap Chelugui, Cherwon arap Maritim and William Kimngeny arap Leting. Thereafter, the five proprietors resolved to subdivide it, which efforts are documented in the applications to the Uasin Gishu Land Control Board in 1976. On 21st September 1983, Eldoret Municipality/Block 15/10, which was carved from L.R 10492, was closed on subdivision and Noah Chelugui, Stanley Metto and President Moi issued with and registered as proprietors of leases of the resultant parcel nos. 237, 238 and 239 respectively.

95. It can therefore be concluded that the cause of action arose on 21st September 1983, when Eldoret Municipality/Block 15/10 was closed on subdivision and President Moi registered as the proprietor of the suit property. From the record, there is no proof that the 2nd respondent or his estate pursued any form of redress for the enforcement of the claim of deprivation of his right to the suit property. It was not until 2014 when the 2nd respondent sent a demand letter dated 3rd April 2014, addressed to both President Moi and Stanley Metto seeking restitution of both parcel nos. 238 and 239. Thereafter, they filed suit before the ELC on 10th June 2014 against the appellant to the exclusion of Stanley Metto, over 30 years from the date on which the cause of action arose.....



100. Turning to the pronouncement by the Court of Appeal, in determining the question as to whether the claim was time barred under the *Limitation of Actions Act*, the court held that unless expressly stated in *the Constitution*, the limitation period under the said Act does not apply to the violation of rights and freedoms guaranteed in *the Constitution*. It is therefore clear to us that the appellate court did not consider the fact of delay as being relevant in determining whether the limitation period was applicable or not. However, in so doing, the court made no reference to Article 24 of *the Constitution*, which provides for the circumstances under which a right or fundamental freedom may be limited. In this regard, *the Constitution* provides that a right or fundamental freedom, unless it is non-derogable, can be limited only by law, and to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity and freedom.
101. We think with all due respect, that it was a fundamental omission by the appellate court, not to consider the provisions of Article 24 of *the Constitution* in determining whether Section 7 of the *Limitation of Actions Act* was applicable to the original proceedings before the ELC. At this stage of the proceedings, the fundamental right or freedom in question was not the right to property per se, under Article 40, but the right to institute court proceedings claiming that a right or fundamental freedom has been denied under Article 22 of *the Constitution*. As such, given the fact that this right was being exercised, thirty-one (31) years after the cause of action arose, and long after the promulgation of the 2010 Constitution, it was incumbent upon the Court of Appeal to interrogate such inordinate delay and on what basis it would be justifiable. The *Limitation of Actions Act* seeks to limit the time within which a right under Article 22 may be exercised. In this regard we agree with the appellants and the Attorney General that the said Act is precisely such law as is envisaged under Article 24 of *the Constitution*.
102. We are also of the firm opinion that had the appellate court addressed itself to the principles weighed against the chronology of events that we have flagged in the foregoing paragraphs, it would have arrived at a different conclusion. The argument that a constitutional petition such as this one, automatically ousts the provisions of the *Limitation of Actions Act*, is not legally tenable. There is nothing on record to show that the 2nd respondents provided any explanation for the delay beyond stating that theirs was a constitutional petition and not a claim based on statute.”
16. It should also be noted that the Petition hinges on claims under the *Land Adjudication Act* in the Chembe/Kibabamshe Adjudication Section, which Act provides an elaborate procedure for questioning titles created under that regime.
17. No explanation has been put forward why the original owner – who had occupied it for over 40 years since its creation or the Petitioners never filed a claim in 1991 when they purchased this land and have been in occupation in its current form since then. I think this claim will not succeed. It is time-barred. The other rigmaroles of drafting Constitutional Petitions need not be addressed.
18. The upshot is that the current Petition is dismissed with costs.



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

E. K. MAKORI

JUDGE

In the Presence of:

Ms. Otieno, for the Petitioners

M.Ekiru for the 8th, 9th & 10th, Respondent

Happy: Court Assistant

In the Absence of:

Mr. Katsoleh for 1st – 7th Respondents

