



**Kakuzi PLC v Attorney General & another; Kakuzi Division
Development Association (Interested Party) (Environment & Land
Petition 20 of 2022) [2023] KEELC 18885 (KLR) (12 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18885 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION 20 OF 2022**

LN MBUGUA, J

JULY 12, 2023

(FORMERLY MALINDI PET NO.11 OF 2020)

BETWEEN

KAKUZI PLC PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

NATIONAL LAND COMMISSION 2ND RESPONDENT

AND

KAKUZI DIVISION DEVELOPMENT ASSOCIATION INTERESTED PARTY

RULING

1. This ruling relates to two issues. The first one was raised on April 27, 2023 by counsel for the Interested Party who stated that the issues the Petitioner raises have been handled by a 3 judge bench in Malindi ELC petition 19 of 2016, thus this court cannot enter a contrary view. The second issue is the determination of the Interested Party's application dated January 30, 2023, seeking orders for the transfer of this suit from this court to the Environment and Land Court Murang'a for hearing and determination and that costs be provided for.

Whether this Petition is Moot

2. Counsel for the interested party addressed the court on this issue stating that there is no need to proceed with the Petition at hand in light of the Malindi decision in the case Malindi Petition no 19 of 2016. It was argued that the Malindi case which was consolidated with other cases concerned the Amendment of Section 38 of the [Land Law Amendment Act of 2016](#) which brought in Section 15 of the [NLC](#). That the Malindi court had found the aforementioned section of law to be Constitutional and these are



the prayers captured in the Amended Petition. Thus the issues the petitioner desires to be adjudicated upon have already been dealt with by a three judge bench, hence unless that position is changed, this court cannot come with a contrary decision.

3. It was further argued that in the event the court rules otherwise, then a bench should be empaneled to determine the petition as was done in the Malindi cases.
4. In opposition to the aforementioned oral application of the interested party, counsel for the Petitioner argues that their Amended Petition raises new issues not captured by the Malindi bench. That they hold the view that the Malindi 3 judge bench is merely persuasive and not binding as it is from a court of concurrent jurisdiction.
5. On whether a 3 judge bench should be empaneled, it was argued that it is not necessary, as even a single judge can deal with constitutional issues. To this end, reference was made to the decision of the Court of Appeal in *Mohammed Abushiri v Minister of Lands and Settlement and others* [2015] eKLR.

Determination

6. The instant petition was commenced in the High Court vide a Petition dated July 18, 2018 and amended on July 30, 2019, where the following orders were sought;
 - a) This Honourable Court be pleased to declare that Sections 15(3) (b) (i) and Section 15 (3) (b) (ii) of the *National Land Commission Act* are null and void for being contrary to Articles 24,27(1), 40, and 50(1) of the *Constitution*.
 - b) Any and all proceedings ongoing before the National Land Commission including but not limited to NLC/ HLI /006 /2017, NLC /HLI /069/ 2017, NLC /HLI /049 /2017, NLC/ HLI/ 052/ 2017, NLC /HLI /054 /2017, NLC /HLI /176 /2018, NLC /HLI /170 /2018, NLC /HLI /168 /2018, NLC /HLI /530 /2018 and NLC /HLI /063 /2017 with respect to alleged historical land injustices in so far as they are filed pursuant to Section 15(3) (b) (i) and Section 15 (3) (b) (ii) of the *National Land Commission Act* be and are hereby quashed.
 - c) Such other orders as this Honourable Court shall deem just.
 - d) Cost of this petition.
7. The litigation history of the dispute herein is captured in various decisions; ie, in *Malindi Law Society v Attorney General & 2 others* [2020] eKLR judgment of October 29, 2021 and in a ruling delivered in this particular file on October 31, 2022 when the file was in Malindi ELC. The summary of the litigation herein is that after this suit was filed in Nairobi High court, the petitioner then made an application to have the matter consolidated with Malindi Petition 19 of 2016 which bore no fruits as it was rejected by the 3 judge bench sitting in Malindi Petition 19 of 2016 (reported as *Malindi Law Society v Attorney General & 2 others* [2020] eKLR). On October 1, 2020, Justice Makau transferred the suit to Malindi Environment and Land Court. On 31. 10 2022, the Malindi ELC Court gave a ruling for the transfer of the suit to this Court.
8. In the judgement delivered on October 29, 2021, in the case of *Malindi Law Society & 12 Others (All Suing as Officers of the Mombasa Law Society on their behalf and on behalf of the membership of the society) v Attorney General & 2 others* (Petition 19 & 291 of 2016 (Consolidated)) [2021] KEELC 4748 (KLR) (29 October 2021) (Judgment) (Malindi Case) the 3 judge bench determined that Section 38, 48, 61 and 98 of the *Land Laws Amendment Act 2016* are valid and constitutional.



9. Section 38 of the [Land Laws Amendment Act](#) provides as follows;

"Section 15 of the National Land Commission Act is "deleted and substituted by the following new Section-15.

- (1) Pursuant to Article 67(3) of the Constitution, the Commission shall receive, admit and investigate all historical land injustice complaints and recommend appropriate redress.
- (2) For the purposes of this section, a historical land injustice means a grievance which-
 - a) Was occasioned by a violation of right in land on the basis of any law, policy, declaration, administrative practice, treaty or agreement;
 - b) Resulted in displacement from their habitual place of residence;
 - c) Occurred between June 15, 1895 when Kenya became a protectorate under the British East African Protectorate and August 27, 2010 when Constitution of Kenya was promulgated;
 - d) Has not been sufficiently resolved and subsists up to the period specified under paragraph (c); and
 - e) Meets the criteria set out under subsection 3
 - f) of this section.
- (3) A historical land claim may only be admitted, registered and processed by the Commission if it meets the following criteria-
 - (a) it is verifiable that the act complained of resulted in displacement of the claimant or other form of historical land injustice;
 - (b) the claim has not or is not capable of being addressed through the ordinary court system on the basis that-
 - (i) the claim contradicts a law that was in force at the time when the injustice began; or
 - (ii) the claim is debarred under section 7 of the Limitation of Actions Act or any other law".

10. The court has already declared Section 38 of the [Land Laws Amendment Act](#) as constitutional. Therefore as things stand, the effect of the Malindi case is that Section 15 of the [National Land Commission Act](#) is constitutional. The Petitioner herein is asking this court to find that Section 15 is inconsistent with Articles 24, 27(1, 40, and 50(1) of [the Constitution](#). The question is; Is the decision of the 3 judge bench binding before this court?.



11. In *Vadag Establishment v Y A Shretta & Another* Nairobi High Court (Commercial & Admiralty Division) Misc High Court Civil Suit No 559 of 2011 cited in *Wycliffe Ambetsa Oparanya & 2 others v Director Of Public Prosecutions & another* [2016] eKLR, it was held that;

“It is also my considered view that a High Court whether constituted by one judge or more than one judge exercise the same jurisdiction and neither decision can be said to be superior to the other. True, two heads are better than one, but in terms of the doctrine of stare decisis whether a decision is delivered by one High Court Judge or handed down by a Court comprised of more judges, their precedential value is the same.”

12. This court is alive to the fact that there are various matters which have been filed in relation to the interpretation Section 15 of the *NLC*, including a sister file namely Petition 21 of 2020 also before this court.

13. I find that parallel interpretation of constitutionality of a provision of the law would bring about confusion. Even in the decision relied on by the Petitioner, the Court of Appeal encouraged courts to follow decisions of equal jurisdiction even if they are not binding provided they were not wrong. In that case; *Mohamed Abushiri Mukullu v Minister for Lands and Settlement & 6 others* [2015] eKLR, the Court stated that;

“.. The principle of stare decisis requires that, although not bound to do so, the court should follow a decision of a judge of equal jurisdiction unless the decision appears to be clearly wrong. In its vertical application, a court is bound by the decisions of a court superior to it. Horizontally, while it may be desired for the sake of certainty and consistency that the court does not deviate from decisions of the courts of the same rank, decisions by courts of concurrent jurisdiction are only of persuasive nature and cannot bind the court.”

14. The petitioner appears to be in agreement that the issue relating to Section 15 of the *NLC* has been determined. Their argument is that their Amended Petition has brought forth other issues which were not determined in the Malindi case. I beg to differ. What was added in the amended petition is prayer b), but as seen in paragraph 6 (b) herein, the prayers sought still relate to the application of Section 15 of the *NLC*. I hold the view that any continued litigation in this suit would be but an academic exercise. In the circumstances, I find that the issues raised in the Petition are moot.

Transfer

15. In view of the analysis above, I find that the issue of transfer of this suit does not arise.

Final orders

1. The Application dated January 30, 2023 is hereby marked as Spent.
2. This Petition (ELC Petition 20 of 2022 NBI) is hereby marked as Spent.
3. The decision herein is to apply to the file ELC Petition 21 of 2022.
4. Any orders subsisting herein including orders of *status quo* are hereby discharged.
5. Each party is to bear their own costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF JULY 2023 THROUGH MICROSOFT TEAMS.



LUCY N. MBUGUA

JUDGE

In the presence of:-

Mrs. Opiyo for Petitioner

A.Kamau holding brief for Kerubo for the Attorney General

Ambani for the Interested Party

Mbuthia for National Land Commission

Court Assistant: Eddel

