



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT KWALE**

**ELC PETITION NO 10 OF 2021**

**(FORMERLY ELC PETITION NO. 36 OF 2020)**

THE COUNTY GOVERNMENT OF KWALE.....1<sup>ST</sup> PETITIONER

JUMAA ABDALLA MWAZUZU.....2<sup>ND</sup> PETITIONER

JUMA SULEIMAN MZARI.....3<sup>RD</sup> PETITIONER

VERSUS

PATRIA PROPERTIES LIMITED.....1<sup>ST</sup> RESPONDENT

TEESIDE TRADING LIMITED.....2<sup>ND</sup> RESPONDENT

GAMI PROPERTIES LIMITED.....3<sup>RD</sup> RESPONDENT

THE CABINET SECRETARY MINISTRY OF LANDS &

PHYSICAL PLANNING.....4<sup>TH</sup> RESPONDENT

THE CHIEF LAND REGISTRAR.....5<sup>TH</sup> RESPONDENT

THE CHIEF LAND REGISTRAR MOMBASA.....6<sup>TH</sup> RESPONDENT

THE ATTORNEY GENERAL.....7<sup>TH</sup> RESPONDENT

AND

THE NATIONAL LAND COMMISSION.....1<sup>ST</sup> INTERESTED PARTY

THE CABINET SECRETARY MINISTRY OF

SPORTS CULTURE & HERITAGE.....2<sup>ND</sup> INTERESTED PARTY

NATIONAL MUSEUMS OF KENYA.....3<sup>RD</sup> INTERESTED PARTY

NATIONAL ENVIRONMENTAL MANAGEMENT

AUTHORITY.....4<sup>TH</sup> INTERESTED PARTY

ETHICS & ANTI CORRUPTION COMMISSION.....5<sup>TH</sup> INTERESTED PARTY

**RULING**

## THE PETITION

1 The Petition herein was filed on 23/10/2020. It is supported by the affidavit of **Kevin Dzumo**, Director of Legal Services Kwale County as well as the grounds on the face of the petition. The subject of the petition is a site measuring approximately 10 hectares situated in Tiwi area within Kwale County (Kaya Tiwi Forest).

2 The Petitioners case is that, the subject parcel is the ancestral home of the Digo subtribe of the Mijikenda. That to the Digo it is sacred and for over 300 years has been the abode of their ancestors and a repository of their spiritual beliefs. It is averred that each of the Mijikenda sub tribes has a sacred forest used for prayers (Kaya) and the same have been recognised as UNESCO World Heritage Sites.

3 It is contended that at the instance of the Digo community the site was recognised as a national monument vide Gazette Notice No. 200 of 17/1/1992 Vol XCIV-No. 3, and a boundary was set upon the said 10 hectares, was also a riparian area. The area due to interests to grab the land was maliciously degazetted vide Gazette Notice No. 1552 of 1998. Following public outcry, the same was revoked vide Gazette Notice No 1759 of 1998. Consequently the status quo returned to the initial gazette notice. That for over the 300 years there has not been any interference with the usage and character of the suit property until recently when the Respondents commenced illegal activities on the suit property.

4 It is further stated that sometime in July 2020 the 1<sup>st</sup> and 2<sup>nd</sup> Respondents laid claim on the land purporting ownership over plot No's 14885/2, 14885/3, 14885/4, 14885/5, 14885/6, 14885/7, and 14885/8 within the Kaya Tiwi Forest. They proceeded to cut down indigenous trees, chased indigenous fauna, commenced construction of a wall, destroying the biodiversity and threatened cultural and spiritual integrity thereof. The Respondents presented to the County Government of Kwale application to construct a wall over the suit property. The Council demanded for documentation to support the application. Following due diligence, it emerged that the subject plots were within the Kaya Tiwi Forest. As a result of the occupation and alleged destruction tension and an impending conflict between the community and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents ensued.

5 It was deposed that taking advantage of the above tension some individuals illegally and or irregularly allocated to themselves the entire Kaya Tiwi. They subdivided it into LR No **12962, 12963 & 12964** and their descendant and procured titles.

6 The Petitioners/Applicants seek reliefs under articles 2,3,10,11,19,20,22,42,44,258,63,67,910 of the Constitution of Kenya 2010 as hereunder; -

- a) A declaration that LR No 12962, 12963 & 12964 and their descendants fall within the Kaya Tiwi forest a gazetted monument under gazette notice 200 of 17<sup>th</sup> January 1992.
- b) A declaration that titles to LR No 12962, 12963 & 12964 and their descendants are null and void ab initio
- c) An order that all entries in relation to the registration of the alienation, allocation and subsequent transfer of the suit property in favour of the respondents and/or any other party be cancelled and the ownership of the suit premises to revert to the rightful owners being the Digo subtribe of Kaya Tiwi.
- d) An order of mandatory injunction do issue compelling the 5<sup>th</sup> & 6<sup>th</sup> respondents to cancel/revoke all the proprietary rights created and titles issued for LR No 12962, 12963 & 12964 and their descendants
- e) Any other orders as this honourable court shall deem fit.
- f) Costs

7 Together with the Petition was filed a Notice of Motion application dated 23/10/2020 under certificate of urgency for a temporary injunction against the Respondents restraining them from among others alienating and interfering with the suit property LR No 12962, 12963 & 12964.

## 1<sup>ST</sup> AND 2<sup>ND</sup> RESPONDENTS REPLY TO THE PETITION

8 The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed Response to the Petition on 9/2/21 dated 8/02/2021, Replying Affidavit in response to both the Petition and Notice of Motion application sworn by Ashok Labshanker Doshi their director on 8/02/2021 as well as Notice of Preliminary Objection dated 5/2/2021 on both the Petition and Notice of Motion application. The Preliminary objection is the subject of this ruling.

9 It is their case that the suit properties were registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents by virtue of a lease from the Government of Kenya from for a period of 99 years. That the suit properties were created in 2010 as a result of subdivision of land parcel No. 14885 (the original property). According to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents the title to the original property was first issued on 7/7/1989 to a company known as **Toloch Enterprises Limited**. The same was later transferred to **Dock Sides Estates Limited** and subsequently to the 1<sup>st</sup> Respondent on 13/3/2006. The 1<sup>st</sup> Respondent then subdivided the property to create the 1<sup>st</sup> and 2<sup>nd</sup> respondents suit properties.

10 The 1<sup>st</sup> and 2<sup>nd</sup> Respondents opposed the Petition on grounds of failure to meet legal threshold for filing petitions, lack of locus standi on the part of the Petitioner, limitation, laches, lack of jurisdiction, illegality of the gazettements among others. Most of these grounds are reiterated in the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submissions herein.

## SUBMISSIONS

11 The Preliminary objection was canvassed by way of written submissions by consent of the parties.

### 1<sup>st</sup> and 2<sup>nd</sup> Respondents Submissions

12 The 1<sup>st</sup> and 2<sup>nd</sup> Respondent filed submissions on 5/3/2021. Citing Sections 40,41 and 42 of the Community Land Act 2016, Counsel submitted that this court lacks jurisdiction to hear and determine the petition. That according to the Petitioners pleadings herein, the suit properties are viewed as land belonging to the Digo community. That the cited provisions require disputes arising from such land are subjected to mediation and arbitration before being brought to court. However, no mediation or arbitration was undertaken or even exhausted and therefore the Petition was premature before the court. The case of **Charles Apudo Obare & Another V Clerk, County Assembly of Siaya & Another [2020] eKLR** was relied upon to buttress this point.

13 Further on jurisdiction, it was pointed that the prayers seeking nullification of the title of the suit properties can only be sought in an ordinary civil suit. In an ordinary civil suit viva voce evidence can be adduced. Counsel cited **Bandari Investment Company Limited Versus National Police Service & Another [2021] eKLR** where Munyao J observed; -

*‘Eviction from land and permanent injunction to bar a person from certain land are matters that are routinely heard through ordinary civil suits commenced by way of plaint. If the person sued wishes to resist the suit, say because he claims the land, then he will file a defence and probably a counterclaim...’*

Counsel also cited **Justice and Peace Centre Kitale Versus National Land Commission & 3 Others [2020] eKLR** where the court observed that;-

*‘...Documents exhibited in the bundle marked ‘IW2’ by the petitioner could only be verified by way of evidence..’*

14 Counsel pointed that although in the instant case there was no prayer for eviction, were the orders sought to be granted it would be tantamount to an eviction.

15 Having pointed that the case herein ought to have been brought as an ordinary suit, Counsel further urged that under Section 7 of the Limitation of Actions Act, the case would be barred by limitation since such actions to recover land ought to be brought after expiry of 12 years. The prayers sought in this petition had been brought 36 years after creation of title for the suit properties and were therefore statute barred. That even assuming the Petitioners were not aware of the creation of the titles in 1980, they became aware of the private titles in 1998 when the gazette notice was revoked 22 years ago. The case of **Johnstone Ogechi Mose V National Police Service [2017] eKLR** was cited.

16 It was further submitted that even though there is no limitation in respect of constitutional petitions, inordinate delay without plausible reason was not to be entertained by the court. To emphasise the need for a plausible explanation on the delay, that a party was not to circumvent limitation of time by filing a constitutional petition and that moving the court by way of a constitutional petition will not suddenly render the statutory provisions on limitation inapplicable, Counsel relied on **Wellington Nzioka Kioko V Attorney General [2018] eKLR**, **James Kanyiita Nderitu V Attorney General & Another [2019] eKLR** and **Peter Ngari Kagume & 7 Others v The AG [2009] eKLR**.

17 The 1<sup>st</sup> and 2<sup>nd</sup> Respondents also contended that the Petitioners are guilty of acquiescence and barred by estoppel. The defunct Kwale Municipal Council had approved the construction of the boundary wall on the suit properties. Therefore the 1<sup>st</sup> petitioner acquiesced in the ownership and proprietorship of the subject properties. Furthermore, vide an agreement dated 13/2/2015 the Kaya elders had agreed to the construction of the wall. Consequently, the Petitioners are estopped from challenging the same.

18 Furthermore, it was argued that the Petitioners have no locus standi to file the petition as the land is registered and cannot be perceived as being held in trust for the community. Only unregistered community land can be held by the County governments on behalf of the communities. Moreover, the Digo community is not registered and have no capacity to claim rights over the suit property.

19 Lastly Counsel submitted that the petition as drafted did not meet the legal threshold for Constitutional petitions as it did not plead with reasonable precision and specify how the Petitioners’ constitutional rights were breached as was stated in **Anarita Karimi Njeru v AG [1979]** and in **Mumo Matemu V Trusted Society of Human Rights Alliance and Others Nairobi Civil Appeal No 290 Of 2012**.

### The Petitioners submissions

20 The Petitioners submissions were filed on 25/11/2021 and stated that the preliminary objection did not meet the threshold laid down in the case of **Mukisa Biscuits Manufacturing Co Ltd V West End Distributors [1969] EA 696**. It did not raise pure points of law which ought to be argued on the assumption that all facts pleaded by the other side are correct. Not all facts had been ascertained and that whatever was being sought was an issue of judicial discretion.

21 The Petitioners deny that the petition is statute barred by limitation. That the new Constitution of Kenya 2010 was to address past atrocities, current infringement of constitutional rights and provide for a society where the rule of law and constitutionalism would prevail. It would be rendered toothless if limitation of time were to apply on past infringements. Moreover, both the ELC and the Court of Appeal had severally held and declared that there can never be limitation as against constitutional provisions. All that was required in the event of long passage of time was to give reasonable explanation for the delay. Counsel implored that prayers sought in the current petition were not time barred in any form or character. Reliance was placed on the cases of **Kiluwa Limited & Another V Commission Of Lands & 3 Others**

[2015] eKLR and **James Kanyita Nderitu V AG & Another**[2019] eKLR .

22 Counsel further pointed that it was not in dispute that the 1<sup>st</sup> Respondent was the unlawful registered owner of leasehold property in part of the suit properties. That documents presented by the Petitioner indicated that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents properties were as a result of the sub division of Plot No. 14885 which in itself emanated from the subdivision of LR No 12964. That the same was evident in the survey report by the Ministry of Land and Physical Planning dated 18/8/2020 and which showed that the breach of the Petitioners constitutional rights was a continuous process which began in the year 1984 to 2010. That the last infringement having taken place in 2010 meant that there was still one more year before limitation of actions set in.

23 Counsel also submitted that where an illegality has been committed the defence of acquiescence was not available as was held in **Macfoy V United Africa Co Ltd [1961]**. Further that in order to establish estoppel the court will have to interrogate the facts as raised by the parties, contrary to the fundamental principles laid down by the case of **Mukhisa Biscuits Ltd**.

24 On locus standi, it was submitted that the respondents had manifestly misapprehended the Petitioners petition and the correct position of law as the suit parcels of land were unregistered land under the old Constitution and were held in trust by the county government of Kwale on behalf of the community. It was urged that the parcels were illegally registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> respondents and there is no law which bars a challenge of the illegality. It was the Petitioners submission that the land ought to be returned to its original position as unregistered community land by having the 1<sup>st</sup> and 2<sup>nd</sup> respondents title quashed as under the law it is the 1<sup>st</sup> petitioner who had the responsibility of being a custodian of unregistered community land on behalf of the local community. That where unregistered community land is unlawfully registered in the names of private individuals then the party with locus standi to sue will be the one who the law intends to be the legal custodian. Reliance was placed on the provisions of article 22 and 258[1] of the Constitution and the supreme court decision in **Mumo Matemu V Trusted Society Of Human Rights Alliance & 5 Others (2014)** and **Mohamed Hussein Yakub & 5 Others V County Government Of Mandera & 5 Others (2020) eKLR**.

26 On jurisdiction it was submitted that this court has jurisdiction to hear and determine the petition herein. That the primary mechanism for resolution of disputes was the court and the rest were just alternatives. Reliance was placed on **Karen Blixen Company Limited V Kenya Hotels and Allied Workers Union [2018] eKLR** and further that sections 39,40,41,42 of the Community Land Act were only permissive in nature when it comes to resolution of disputes involving community land. The Petitioners prayed for the preliminary objection raised by the respondents to be dismissed with costs.

#### ANALYSIS AND DETERMINATION

26 I have considered the Notice of Preliminary Objection the grounds thereto, the affidavits and submissions. I have also seen the rival submissions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents inclusive of all authorities cited therein. I find it necessary to first deal with the question whether the objections raised are pure points of law under the principles in **Mukisa Biscuit Manufacturing Company Limited Vs West End Distributor Limited** supra. The Petitioners have pointed that the Preliminary Objection has not met the test set out in the said case. **Law J. A had this to say in the case;-**

***“A preliminary objection raises a pure point to law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.***

26 *The Supreme Court in **Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others**, Petition No. 10 of 2013, [2014] eKLR [paragraph 31]: restated the principle set in the above case as hereunder; -*

***“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ..... It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”*** **(The emphasis is mine).**

27 *Indeed jurisdiction, limitation and failure to subject the dispute herein to the mediation mechanism under the Community Land Act have been raised and fit within the examples given above. However, guided by the above case of **Ali Hassan Joho & Another v. Suleiman Said Shahbal & 2 Others** it is not enough to raise the grounds of law. The Preliminary Objection must be argued on the assumption that all the facts pleaded by the other side are correct. Further a preliminary objection cannot be raised if any fact has to be ascertained for then it loses its character of a pure point of law. Upon consideration of the objections as picked from the Petitioners pleadings and averments by the Respondent some facts cannot in my view be safely assumed to be correct. Looking at the objection on limitation it is not clear when the suit properties were first registered under private ownership. Both sides of the divide have given its own time on the same. The Petitioners allege the year 1998 as well as year 2000 and the Respondents proceeded into presenting some assumptions on the same. From the facts it is not clear when the original alienation/allocation was done and the subsequent subdivisions undertaken. All these are fundamental in computation of time for purposes of determining whether the Petition is time barred and this court will have to ascertain the date after hearing the parties in evidence. Other issues that are not clearly admitted from the pleadings the issue of registration of the Digo Community which registration cannot be inferred when the Petitioners have not pleaded the said registration. Furthermore, the classification of the suit property is also highly contested and specifically whether the same should be classified under un-registered community land or not.*

28 *From the foregoing it is clear that certain facts require further canvassing and interrogation. This can only be ascertained at full hearing of this petition. The preliminary objection must therefore fail on this basis.*

29 *The other point necessary to be addressed by this court is whether or not the petition is properly filed before this court. The*

Petitioners/Applicants seek reliefs among others under articles 2,3,10,11,19,10,22,42,44,258,63, of the Constitution of Kenya 2010 and the reliefs have been set out verbatim in paragraph 6 of this ruling. The Respondent submitted that the petition did not plead with reasonable precision and specify how the Petitioners' constitutional rights were breached. In this courts view this is an issue which should be canvassed fully and tested for this court to be able to make an informed determination on this point. The *Respondent has further urged that the Petition is barred by limitation. Guided by the wordings in Chief Land Registrar & 4 others vs. Nathan Tirop Koech & 4 others* where it was stated;

*'Guided and convinced of the sound jurisprudence that there is no time limit for filing a constitutional petition, we find the ground that the trial judge erred in failing to dismiss the Petition on account of delay, acquiescence and laches has no merit. Unless expressly stated in the Constitution, the period of limitation in the Limitation of Actions Act do not apply to violation of rights and freedoms guaranteed in the Constitution. The law concerning limitation of actions cannot be used to shield the State or any person from claims of enforcement of fundamental rights and freedoms protected under the Bill of Rights. (See Dominic Arony Amolo vs. Attorney General Nairobi HC Misc. Civil Case No. 1184 of 2003 (O.S) (2010) eKLR; Otieno Mak'Onyango vs. Attorney General & another Nairobi HCCC No. 845 of 2003).*

***In our view, subject to the limitations of Article 24 of the 2010 Constitution, fundamental rights and freedoms cannot be tied to the shackles of Limitation of Actions Act. However, each case is to be decided on its own merits...."***

**30 It is clear from the foregoing therefore, that a constitutional petition can be brought before court for determination at any particular time and the issue of limitation of time has not been regarded as a factor impeding filing of actions that highlight violation of rights. Several authorities have been pronounced in defence of dismissing petitions on grounds of limitation of time, the cure has however been the circumstances under which the delay occurred. Indeed, this cure denotes discretion since the court is called upon to consider the circumstances for the delay then it ceases being a pure point of law as provided under the Mukisa Biscuits case as further restated by the Court of Appeal in the *Ali Hassan Joho & Another v. Suleiman Said Shahbal & 2 Others* case supra. In the instant case it has been pleaded by the Petitioners that the violations did take place across certain periods of time and not at a specified period of time. It was pleaded that from the year 1984 to the year 2010 several persons had been encroaching on the land leading to causes of action arising at different times. This court is of the opinion that the petition has rightfully been placed before it.**

31 Submissions have also been made in favour of an ordinary civil suit as against a Petition on the basis among others that in the former viva voce evidence can be adduced. I have read the case of **Bandari Investment Company Limited Versus National Police Service & Another [2021] eKLR** and the observations of my brother Munyao J. This is a persuasive opinion rather than a binding one. I'm aware that a court of law may be called upon to allow viva voce evidence to be tendered in a petition such as in the case of **Kibos Distillers Limited & 4 Others - Vs- Benson Ambuti Atega & 3 Others [2020] eKLR**. Moreover, there is nothing that stops the other party from filing a cross petition to advance their case or defence. **I am further guided by the provisions of Rule 20(3) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** which provides as here below on hearings;

### **PART III —HEARING AND DETERMINATION OF COURT PROCEEDINGS Hearing of the petition.**

**20. (1) The hearing of the petition shall, unless the Court otherwise directs, be by way of—**

**(a) affidavits;**

**(b) written submissions; or**

**(c) oral evidence.**

**(2) The Court may limit the time for oral submissions by the parties.**

**(3) The Court may upon application or on its own motion direct that the petition or part thereof be heard by oral evidence.**

32 I have also considered the submissions on the alternative dispute resolution mechanisms based on Sections 40,41 and 42 of the Community Land Act 2016, and by dint thereof the court lacks jurisdiction to hear and determine the petition. In my view whether the land is community land has to be determined after considering the evidence by both parties. It is not an issue that can be plainly determined from the pleadings as having been admitted. I have keenly looked at the provisions of Section 40 – 42 of the Community Land Act and the same do not oust the jurisdiction. Section 40 gives a discretion to the parties to agree on referring the dispute to mediation. Even Section 41 on arbitration gives the option to the parties by the use of the words 'may'

33 The upshot of the foregoing is that the Preliminary objection is dismissed. Costs shall follow the event.

Delivered and Dated at Kwale this 7<sup>th</sup> Day of February, 2022.

**A.E. DENA**

**JUDGE**

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Mutugi Holding Brief for Mr. Olwande.....for the Petitioners

Ms. Kinuva Holding Brief for Mr. Oluga .....for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents

N /A.....for the Interested Party.

Mr.Denis Mwakina.....Court Assistant.