



Nyaga & 2 others v Attorney General & another (Constitutional Petition E025 of 2021) [2022] KEELC 15157 (KLR) (8 November 2022) (Judgment)

Neutral citation: [2022] KEELC 15157 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

CONSTITUTIONAL PETITION E025 OF 2021

JA MOGENI, J

NOVEMBER 8, 2022

IN THE MATTER OF ENFORCEMENT OF THE APPLICANT'S
RIGHTS UNDER ARTICLES 40 AND 50 OF THE
CONSTITUTION

AND

IN THE MATTER OF SECTIONS 24, 25 AND 26 (1) OF THE LAND REGISTRATION ACT

AND

IN THE MATTER OF SECTIONS 5 (2) (B) & (C), 7 (1) (A)
& (2) & 11 OF FAIR ADMINISTRATIVE ACTION ACT

IN THE MATTER OF ARTICLES 10, 22, 25, 27, 40, 47, 48,
50, 67, 165 (6) & (7) & 258 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE REPORT OF THE COMMISSION OF INQUIRY INTO THE
ILLEGAL/IRREGULAR ALLOCATION OF PUBLIC LAND (THE NDUNGU REPORT

BETWEEN

JOHN NJERU NYAGA 1ST PETITIONER

MARTIN MUGAMBI NJERU 2ND PETITIONER

NKUGWE INVESTMENTS LIMITED 3RD PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

NATIONAL LAND COMMISSION 2ND RESPONDENT



JUDGMENT

Introduction

1. The Petition for hearing and determination before me is dated 7/07/2021. It was filed on the even date. It sought the following reliefs:-
 - i. A declaration that the Petitioners' right to fair administrative action was violated by the Commission by failing to give the Petitioners an opportunity to be heard;
 - ii. A declaration that the Commission did not properly investigate or interrogate the complaints filed before it which adversely mentioned the Petitioners' property.
 - iii. A declaration that the Petitioners' right to peacefully own, use and enjoy the property has been and continues to be violated by its continued being part of the Report;
 - iv. An order of permanent injunction stopping and/or restraining the Respondents and/or any government institution from implementing the adverse mentions and/or recommendations contained in and or taking any adverse action on the basis of The Report of the Commission of Inquiry into the illegal/irregular Allocation of Public Land, particularly in Annexes Volume II, page 718 of the Report or any part thereof in reference to the Petitioners' Property LR No. 209/10722/88 South C;
 - v. An order of permanent injunction stopping the Respondents and or any government institution from implementing the adverse recommendations contained and/or taking any adverse action on the basis of The Report of the Commission of Inquiry into the illegal/irregular Allocation of Public Land, particularly in Annexes Volume II, page 718 of the Report or any part thereof in reference to the Petitioners' Property LR No. 209/10722/88 South C;
 - vi. An order of judicial review in the nature of certiorari to bring to this Honorable Court and quash the findings and recommendations and/or any mention and /or reference to the Petitioners' Property LR No. 209/10722/88 South C contained in The Report of the Commission of Inquiry into the illegal/irregular Allocation of Public Land (the Ndung'u Report and expunge from all records all references and/or mention of the Petitioners' Property known as LR No. 209/10722/88 South C;
 - vii. Costs consequent upon this petition be borne by the Respondents.

Plaintiff's Case

2. According to the Petitioner, sometime in March 2006, the 1st and 2nd Petitioners acquired the ownership of the 3rd Petitioner after purchasing all the shares from the initial owners of the Company. The 1st and 2nd Petitioners acquired the Company together with all its assets and liabilities at the time.
3. One of the assets that the Company owned at the time is the property known as L.R No. 209/10722/88 South C.
4. The Petitioners aver that when they acquired the Company, they, by extension, also acquired the Property, which was without any encumbrances.



5. It is their case that at that time the change of user of the Property from nursery school to residential had been effected by the previous Directors of the Company. Immediately upon acquiring the Company, the Petitioners embarked on developing the property by putting up residential buildings.
6. The Petitioners further aver that when they were developing the property, they were not aware that there had been any mention of the property in the Ndungu Report that would later come to affect their peaceful ownership and enjoyment of the property.
7. The Petitioners contend that they only learnt that the property was mentioned in the Report when some of the potential buyers and financiers pointed out that the property was adversely mentioned and threatened to pull out of the deal to purchase part of the property.
8. They aver that the Commission of inquiry into the illegal/irregular allocation of public land was established by former President Mwai Kibaki *vide* Gazette Notice No. 4559 of 30/06/2003. The Commission which was led by Mr. P. N. Ndung'u was mandated to *inter alia*: a. inquire generally into the allocation of lands, and in particular; "to inquire into the allocation, to private individuals or corporations, of public lands or lands dedicated or reserved for a public purpose."
9. It is the Petitioners' contention that the Commission, after conducting inquiries, submitted a report known as The Report of the Commission of Inquiry into the illegal/irregular Allocation of Public Land ("the Ndung'u Report" or "the Report") to the President for implementation.
10. The Petitioners aver that the recommendations contained in the Report have never been implemented up to date, neither have they been debated in Parliament to give them any force of law.
11. They added that the Petitioners' Property is adversely mentioned specifically on the section designated as "Complaints from the Public" where it is stated that the Property is public land allocated to an individual who sought to change user to residential.
12. After the above complaint was made, the Petitioners contend that they were never given notice of such a complaint and invited to appear before the Commission to give their side of the story before any recommendations were made.
13. They aver that the adverse reports made by members of the public to the Commission were never interrogated and remain un-interrogated up to date and yet the mere mention of the property in the Report has such great negative impact on the property and on the Petitioner's businesses.
14. It is their case that the paragraph associating the Petitioners with irregular acquisition of land is inaccurate and is deliberately designed to wrongfully implicate the Petitioners and destroy their standing in society and eventually destroy their business which is mainly in the real estate.
15. Lastly, they contend that the adverse mention of the Petitioners' property in the Report has made the property unattractive to potential buyers, some of whom are already threatening to back down from the already concluded sale agreements.

Constitutional violations

Failure to give the Petitioners and opportunity to be heard

16. In regard to their allegation of infringement of their constitutional rights, they cited Article 47 of the [Constitution](#) of Kenya; They contend that the said Article guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. They also



- cited Article 48 of the Constitution wherein they added that the said article further guarantees every person the right to access to justice that is not unreasonably impeded.
17. The Petitioners cited Section 3 of the Fair Administrative Act which provides that the Act applies to all state and non-state Application agencies, including any person exercising administrative authority; performing a judicial or quasi-judicial function under the Constitution or any written law; or whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.
 18. The Act further enjoins administrative action to be taken expeditiously, efficiently, lawfully and reasonably and procedurally fair as guarantee in the Constitution. This includes giving reason for any administrative action taken, giving any person likely to be adversely affected by the decision prior and adequate notice of the nature and reasons for the proposed administrative action and an opportunity to be heard and to make representations in that regard.
 19. The Petitioners aver that they were not given any notice of the complaints lodged before the Commission against them neither were, they given an opportunity to be heard before the Commission could release the Report.
 20. The Petitioners further aver that the Commission acted arbitrarily in coming up with the findings which were prejudicial to them in breach of the rules of natural justice hence the findings, recommendations of the Commission and/or any mention of the Petitioners' property in the Report are illegal, irrational, actuated with malice and bad faith and ought to be expunged from the Report.
 21. The Commission's action breached the rules of natural justice, violated the Petitioners' constitutional right to fair administrative action under Article 47 of the Constitution.

Violation of the Petitioners' right to peacefully own and enjoy property

22. The Petitioners propositioned that Article 40 of the Constitution was infringed. He asserted that the said Article guarantees every person the right to, individually or in association with others, acquire and own property of any description and in any part of Kenya.
23. It is their case that this right cannot be arbitrarily denied without according the individual the right to be heard and without giving proper and sound reason for the denial.
24. The effect of the actions of the commission have however completely denied the Petitioners the ability to peacefully own and enjoy their property in violation of their right to own property as guaranteed under Article 40 of the Constitution.
25. The Petitioners filed a further Affidavit wherein they stated that they were aware that the suit property was adversely mentioned, specifically in the section designated as "Complaints from the Public" contained in the Report of the Commission of inquiry into the Illegal/Irregular Allocation of Public Land (the "Ndung'u Report").
26. They contend that the mere mention of the Property in the Ndung'u Report has negatively impacted on the Petitioners' business as the Paragraph associating them with the illegal and/or irregular acquisition of the Property is inaccurate, has never been interrogated by Parliament and remains un-interrogated to date.
27. They aver that the 3rd Petitioner herein has developed the Property and put up residential buildings which it has offered for sale. The buyers and financiers have totally refused to purchase the residential properties erected on the Property and offered for sale on the ground that the Property is negatively and adversely mentioned in the Ndung'u Report. Because of the same, they contend that it is therefore



imperative for this Honourable Court to issue the Orders sought in order to enjoy the use of the Property as guaranteed under Article 40 of the Constitution of Kenya 2010.

The Response

28. The Petition was opposed. On 7/03/2022, the 1st Respondent filed its Grounds of Opposition dated 10/02/2022 and on 10/05/2022, the 2nd Respondent filed its Grounds of Opposition dated 10/04/2022. The 1st Respondent contended as follows: -
- a. The Petitioner has no claim against the 1st Respondent.
 - b. The Petition does not disclose any cause of action as against the 1st Respondent
 - c. The suit is frivolous, vexatious and a waste of judicial time
29. The 1st Respondent therefore prays that the application be dismissed with costs.
30. The 2nd Respondent contended as follows: -
- a. The Petition is incompetent, lacks precision of facts and cause of action as against the 2nd Respondent.
 - b. The Commission of Inquiry commonly known as Ndung'u Commission was an executive exercise.
 - c. The 2nd Respondent is an independent body whose mandate are clearly spelt out in the Constitution.
 - d. The 2nd Respondent does not work under the directives of either arms of government but independently in accordance with the functions bestowed upon it.
 - e. The 2nd Respondent has nothing to do with the executive order that gave birth to the Ndung'u Commission Report.
 - f. The Petition is frivolous, misinterpretation of the 2nd Respondent's mandate and is otherwise intended to embarrass and harass the 2nd Respondent.
31. The 2nd Respondent therefore asked the Court to find that they are wrongly enjoined to the present proceedings and without cause and dismiss/strike out the Petition as against the 2nd Respondent with costs.

Written submissions

32. Pursuant to the Court's directions issued on 7/02/2022, the parties were directed to canvass with the Petition by way of written submissions. The Petitioners and both the Respondents have filed submissions that I have considered. The Petitioners' submissions are dated 8/03/2022 and filed on the even date. The 1st Respondent's submissions are dated 26/05/2022 and filed on 6/10/2022. The 2nd Respondent's submissions are dated 18/05/2022 and filed on the even date.

Analysis and Determination

33. I have considered the Petition and the respective responses. I have also considered the respective rival submissions by parties. I postulate that the issue for determination is Whether the Petition raises any constitutional violations.



34. The Petitioners herein are challenging the recommendations that were made by the *Commission of Inquiry into the illegal/irregular allocation of Public Land (the Ndung'u Commission Report)*.
35. In the case of *Anarita Karimi Njeru v R* [1976 - 80] KLR 1272 which was also affirmed in *Mumo Matemu v Trusted Society of Human Rights Alliance & others* [2013] eKLR the Court held that a party seeking redress by way of Constitutional Petition must set out with a reasonable degree of precision the constitutional provisions which he alleges to have been infringed and the manner of the alleged infringement.
36. The petitioners cited Article 40, 47, 48 of the *Constitution* of Kenya for the proposition that his right to fair administrative action and protection of his property were violated. In order to establish whether that happened, it is important to analyze the content and import of each of the Articles.
37. Article 48 of the *Constitution* is under access to justice. It provides that the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.
38. Article 47 of the *Constitution* provides for the right to fair administrative action to which everybody is entitled to when one's right or fundamental freedom has been or is likely to be adversely affected by such action. In such a case he or she is supposed to be given a fair hearing. This upholds the principles of the administrative action which is supposed to be expeditious, efficient, lawful, reasonable and procedurally fair.
39. In the instant case, the Petitioners stated that they were not given any notice of the complaints lodged before the Commission against them neither were, they given an opportunity to be heard before the Commission could release the Report. Further, that the Commission acted arbitrarily in coming up with the findings which were prejudicial to them in breach of the rules of natural justice hence the findings, recommendations of the Commission and/or any mention of the Petitioners' property in the Report are illegal, irrational, actuated with malice and bad faith and ought to be expunged from the Report.
40. The Petitioners' counsel submitted that they have demonstrated that they were not notified of the complaints allegedly filed by members of the public and that they were not given an opportunity to be heard and that this averment has not been controverted by the Respondents.
41. Regarding Article 40, the Petitioners submitted that they have demonstrated that indeed they own the property known as L.R No. 209/10722/ 88 South C. However, by adversely mentioning the property in the *Ndung'u Land Report*, the Petitioners' right to peaceful enjoyment of property has been violated. It was their claim that the 3rd Petitioner herein has developed the Property and put up residential buildings which it has offered for sale. The buyers and financiers have totally refused to purchase the residential properties erected on the Property and offered for sale on the ground that the Property is negatively and adversely mentioned in the Ndung'u Report.
42. Additionally, the Petitioners claim to have demonstrated that they only came to know that the Property was mentioned in the *Ndung'u Land Report* in April, 2018 when a bank with which they had taken a facility, secured by the Property, threatened to cancel the security for the reason that the Property was adversely mentioned in the Report.
43. Furthermore, the Petitioners allege that they have been unable to sell portions of the property which have been developed since most buyers especially those being financed by banks are unable to get financing as a result of the adverse mention of the property in the Report.



44. The 1st Respondent's submitted that the contents of the report represent the opinions and aspirations of Kenyans and cannot just be wished away. These are weighty matters of public interest that the court needs to apply itself properly in order to protect public property as well as the public interest. They claim that the property had been set apart for a nursery school. The members of the public therefore had all the rights to raise this fact in the Report as it did and therefore, they urge the court to find that the Petition is without merit.
45. They 2nd Respondent submitted that the Commission of Inquiry was an executive exercise established by the late President Mwai Kibaki vide Gazette Notice No. 4559 of 20/06/2003 according to the power set out in Section 3 of the *Commissions of Inquiry Act*. That they had nothing to do with the executive order that gave birth to the Ndung'u Report. That the 2nd Respondent's mandate are clearly spelt out in Article 67 of the *Constitution*. That it does not work under the directives of either arms of government but independently in accordance with the functions bestowed upon it. They claimed that it has no powers to implement the recommendations in the *Ndung'u Report* which remains the province of the President and the Parliament. That the *Ndung'u Report* has not yet assumed any statutory form. Therefore, the 2nd Respondent has no statutory role concerning the Ndung'u Report and the orders sought against it cannot in law lie against it. It is their case that they were wrongly joined in the petition.
46. It is not in dispute that on 30/06/2003, via Gazette Notice No. 4559, the President, in exercise of the powers conferred to him by Section 3 of the *Commissions of Inquiry Act* 1962, appointed a Commission to inquire into the allocation of Public land, prepare a list of all land unlawfully or irregularly allocated and to make relevant recommendations. The Commission completed its inquiry and presented its Report to the President in June, 2004.
47. Section 3(1) of the *Commissions of Inquiry Act* provides that, the President, whenever he considers it advisable so to do, may issue a Commission under the Act appointing a commissioner or commissioners and authorizing him or them, or any specified quorum of them, to inquire into the conduct of any public officer or the conduct or management of any public body, or into any matter into which an inquiry would, in the opinion of the President, be in the public interest.
48. Section 3(3) of the *Commissions of Inquiry Act* provides how a Commission of Inquiry should conduct its affairs as follows: -

“Without prejudice to any regulations made under section 18 of this Act, every commission shall direct how the commission shall be executed and, in particular, shall in a suitable case contain the following directions to be observed by the commissioner—

- (a) that the commissioner shall conform with the following instructions—
- i. that evidence adversely affecting the reputation of any person, or tending to reflect in any way upon the character or conduct of any person, shall not be received unless the commissioner is satisfied it is relevant to the inquiry, and that all reasonable efforts have been made to give such person prior warning of the general nature of the evidence, and that where no such warning has been given, the general nature of the evidence has been communicated to such person.
 - ii. that that person shall be given such opportunity as is reasonable and practicable to be present, either in person or by his advocate, at the hearing of such evidence, to cross-examine any witness



testifying thereto, and to adduce without unreasonable delay material evidence in his behalf in refutation of or otherwise in relation to such evidence; (emphasis added)

iii. that hearsay evidence which adversely affects the reputation of any person, or tends to reflect in any way upon the character or conduct of any person, shall not be received.”

a. Section 7 of the *Commissions of Inquiry Act* goes further to state as follows:

“(1) It shall be the duty of a commissioner, after making and subscribing the prescribed oath, to make a full, faithful and impartial inquiry into the matter into which he is commissioned to inquire, to conduct the inquiry in accordance with the directions contained in the commission and on completion of the inquiry, to report to the President and to the National Assembly, in writing, the result of the inquiry and the reasons for the conclusions arrived at.”

49. The Petitioners have deponed that it is the registered owner of L.R No. 209/10722/88 South C by virtue of having purchased all the shares from the initial owners of the 3rd Petitioner Company. The said suit property was allegedly listed under the “complaints from the public” section of the impugned Report. They also explained that at that time the change of user of the Property from nursery school to residential had been effected by the previous Directors of the Company. Immediately upon acquiring the Company, the Petitioners embarked on developing the property by putting up residential buildings.

50. According to the Petitioners, they were not notified of the complaints allegedly filed by members of the public and that they were not given an opportunity to be heard and that by adversely mentioning the suit property in the *Ndung’u Land Report*, the Petitioners’ right to peaceful enjoyment of property has been violated.

51. The Petitioners are seeking various orders among them an order of permanent injunction be issued restraining the Respondents and/or any government institution from implementing the adverse mentions and/or recommendations contained in and or taking any adverse action on the basis of the impugned Report on the premise that the Commission did not adversely investigate or interrogate the complaints filed before it which adversely mentioned the petitioners’ property as well as their claim that they are the registered owners of the suit property. This Court is of the view that the Petitioners have not tabled sufficient evidence before this Court to demonstrate the root of title. They have not provided supporting documents to show the process that was followed before the title and change of user was issued to the Petitioners. In the case of *Munyu Maina..Vs..Hiram Gathiba Maina*, Civil Appeal No.239 of 2009, the Appeal Court held that:-

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.” [Emphasis added]

52. Having not annexed a letter of allotment which the complaints from the public on the *Ndung’u Commission Report* found as “public land allocated to individual who sought change of user to



residential” as seen on the evidence adduced by the Petitioners, this Court cannot state with certainty that indeed the suit property was regularly allocated and subsequently issued with a change of user as alleged by the Petitioners.

53. Furthermore, the issue of whether the suit property was regularly allocated to the Petitioners or not is a matter that was supposed to be investigated further. The impugned Report contained only recommendations. This is the position that the court observed in the case of *Geoffrey Kirimi Itania vs. Chief Land Registrar & 3 others* [2018] eKLR;

“Firstly, the Ndung’u report contained only recommendations and not binding resolutions. The raft of recommendations contained in the report were primarily on revocation and repossession of titles, investigations as well as policy developments. A restriction falls under investigations. The onus was upon the defendant to commence investigations as to whether the land in question indeed was public land or not. Defendants have not availed even the slightest evidence to show that they did any investigations... It follows that the Ndung’u Report was to be implemented within the existing legal structures.”

54. This court is in agreement with above pronouncement. The *Ndung’u report* contained only recommendations and not binding resolutions. The raft of recommendations contained in the report were primarily on revocation and repossession of titles, investigations as well as policy developments.
55. This Court is of the view that the *Ndung’u Commission Report* gave recommendations which were not geared towards making a final determination on the issue of proprietorship of land. I am aware that after the said Report was published, several institutions, including the EACC, launched investigations on the proprietary of the impugned titles and where evidence was available, filed suits in court to have the titles revoked.
56. That being the case, the Petitioners cannot claim that its right to own property pursuant to the provisions of Article 40 of the *Constitution* have been infringed upon considering that their title has not been revoked on the basis of the said Report.
57. Although the Petitioners have averred that they were not heard before the Commission made its recommendations, the Petitioners did not produce the full report of the *Ndung’u Commission Report* and its proceedings. Having not shown that they requested for the full Report and the proceedings, which request was declined, it will be reckless for this court to state that indeed the Petitioners were not invited to make representations to the Commission in respect to the suit property without reading the entire Report.
58. Although constitutional Petitions do have a specific timeline within which they should be filed, the Court of Appeal had this to say about the issue of inordinate delay in filing such Petitions in the case of *Wellington Nzioka Kioko vs. Attorney General* [2018] eKLR;

“On the issue of delay, the learned Judge found that the petitioner was filing his claim 33 years after the cause of action relied on, she considered several persuasive decisions of the High Court for instance *Wamabiu Kiboro Wambugu v Attorney General*, Petition No. 468 of 2014; *Mugo Theuri v Attorney General*, *Ochieng’ Kenneth Kogutu v Kenyatta University and 2 others*, High Court Petition No. 306 of 2012, and several others. The common thread running through those decisions is that whereas there is no time limitation in respect of constitutional petitions, the delay must not be inordinate and there must be plausible explanation for the delay. The learned Judge found that no justification for the delay of over 3 decades had been given in this matter. Can the Judge be faulted for that? We need to



look at the logic behind limitation of actions generally in order to place this issue in proper perspective. When a person suffers a wrong at the hands of another and feels the need to redress the wrong, it is reasonable to expect that redress will be sought before the claim gets stale. This enables a person to preserve and adduce the evidence that is necessary to support the claim. It also accords the purported wrong doer an opportunity to address the grievance and if possible remedy it. That way both parties are spared the agony of losing important evidence, or even witnesses. Memory is sometimes transient and it is important that a person adduces evidence when the memory of the incident complained of is still intact. There is also this idea of people moving on in life. If somebody wrongs you, you need to seek redress when the offending act still has an impact on your life, and when the evidence necessary to prove the wrong is still available. There is also the converse situation where the alleged wrongdoer should know that there is a claim against him which he needs to remedy. If a wrong is committed and then the person wronged waits for time on end before even notifying the other party, then a travesty of justice occurs because the claim might be made at a time when the offending party has forgotten about the incident and is no longer in a position to defend himself. There is of course a rebuttable presumption that if you don't seek redress within a reasonable time, there is a possibility that you have not suffered any loss from the act complained of. That would explain the maxim that equity does not aid the indolent.”

59. It is common knowledge that the [Ndung'u Commission Report](#) has been in the public domain since the year 2004. It is also common knowledge that some of the recommendations in the Ndung'u Commission Report have been acted upon by several state and non-state organs. I agree with the 1st Respondent's submissions that the Petitioners have not given this Court sufficient reasons why, despite the Report having been released to the public in the year 2004, which is 18 years ago, the same was never challenged within a reasonable time. They also submitted that they only came to know that the Property was mentioned in the [Ndung'u Land Report](#) in April, 2018 when a bank with which they had taken a facility, secured by the Property, threatened to cancel the security for the reason that the Property was adversely mentioned in the Report.
60. Considering that the Petitioners have not given any sufficient reasons as to why it took 17 years to challenge the recommendations made in the [Ndung'u Commission Report](#) in respect to the suit property, it is my finding that the delay in filing the Petition is inordinate.
61. Karnataka High Court of India in *Karnataka Power Corpn. Ltd Through its Chairman & Managing Director & Anr Vs. K. Thangappan and Anr* AIR 2006 SCW 1828 had this to say about delay:

“Delay or laches is one of the factors which is to be borne in mind by the High Court when they exercise their discretionary powers under Article 226 of the [Constitution](#). In an appropriate case the High Court may refuse to invoke its extraordinary powers if there is such negligence or omission on the part of the applicant to assert his right as taken in conjunction with the lapse of time and other circumstances, causes prejudice to the opposite party”.
62. After so stating the Court after referring to the authority in State of [M.P. v. Nandalal Jaiswal](#) (1986) 4 SCC 566 restated the principle articulated in earlier pronouncements, which is to the following effect: -

“the High Court in exercise of its discretion does not ordinarily assist the tardy and the indolent or the acquiescent and the lethargic. If there is inordinate delay on the part of the petitioner and such delay is not satisfactorily explained, the High Court may decline



to intervene and grant relief in exercise of its writ jurisdiction. It was stated that this rule is premised on a number of factors. The High Court does not ordinarily permit a belated resort to the extraordinary 6 remedy because it is likely to cause confusion and public inconvenience and bring, in its train new injustices, and if writ jurisdiction is exercised after unreasonable delay, it may have the effect of inflicting not only hardship and inconvenience but also injustice on third parties. It was pointed out that when writ jurisdiction is invoked, unexplained delay coupled with the creation of third-party rights in the meantime is an important factor which also weighs with the High Court in deciding whether or not to exercise such jurisdiction”.

63. As already stated, some of the recommendations in the Ndung’u Commission Report have been acted upon by several state and non-state organs and since the petitioner has not presented specific information on the alleged infringement of his rights under Articles 40, 47 and 48 of the Constitution of Kenya 2010 the court is constrained to exercise its discretion regarding the fact that there was any violation. From the evidence presented I did not see the violation since the allegations were not supported with any documentary evidence to show the allocation of the suit property to the petitioner. It was not pointed out with precision. I therefore point out to the petitioners that the right course of action would be to prove to the Court that their property was lawfully acquired and hence should be expunged from the Ndung’u land report.
64. In view of the foregoing, I find that the Petition dated 07/07/2021 lacks merit. Resultantly, it fails and is hereby dismissed with no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8th DAY OF NOVEMBER, 2022.

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MOGENI J

JUDGE

Judgment read in virtual court in the presence of:

Ms. Marube holding brief for Ms. Omiti for Petitioners

Ms Wanini for the 2nd Respondent

Ms Adomeyua for the 1st Respondent

Ms. Caroline Sagina - Court Assistant

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MOGENI J

JUDGE

