



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

PETITION NO. 5 OF 2020

ALI ABDALLA MWAKUPIGWA (Suing as Administrator

Of the Estate of the late Abdul Mwakupigwa Juba

Aka Abdalla Juma Mwakupigwa)..... PETITIONER

-AND-

THE ATTORNEY GENERAL..... 1ST RESPONDENT

CHIEF LAND REGISTRAR..... 2ND RESPONDENT

THE NATIONAL LAND COMMISSION..... 3RD RESPONDENT

JACARANDA HOTELS (MSA) LIMITED..... 4TH RESPONDENT

JUDGMENT

(Petitioner alleging that his late father was dispossessed of property without compensation; petitioner claiming that when Diani Complex was created, his late father was evicted but was not allowed back to his land despite the complex not being implemented and was not compensated; suit more or less related to historical injustices; jurisdiction of the court in determining a suit for historical injustices; proof required when a party approaches the court; no evidence presented by the petitioner of all the allegations in the petition; petition dismissed)

A. Introduction and Pleadings

1. This suit was commenced on 4 February 2020 through a Constitutional Petition. The petitioner is suing in his capacity as the Administrator of the Estate of Abdul Mwakupigwa Juba aka Juma Mwakupigwa. The 1st respondent is the Attorney General, sued in this matter on behalf of the Ministry of Lands, Housing and Urban Development. The 2nd respondent is the Chief Land Registrar. The 3rd respondent is the National Land Commission established under Article 67 of the Constitution with the mandate inter alia of managing and administering unregistered trust land and unregistered community land. The 4th respondent, Jacaranda Hotels (Msa) Limited, is a limited liability company.

2. It is the petitioner's case that he (or probably the estate he represents) was the legitimate owner and occupant of Plot LR No. 13448 measuring approximately 18 acres being part of all that piece of land known as Tiwi Trust Land cumulatively measuring 960 acres (hereinafter, 'the suit land'). The petitioner's alleged interest in the suit land is that it is ancestral land and he claims beneficial ownership which dates back to the year 1944 when he commenced occupation which interests, he avers, are anchored under the provisions of Articles 40, 63, 69 and 71 of the Constitution, 2010. He pleads that he has not ceded his rights and interest to a third party under any legal process. The petitioner states that being the lawful occupant of the suit land, he is entitled to protection accorded under Section 75 of the repealed Constitution. He further avers that the suit land was, until its purported acquisition and allocation and subsequent registration in favor of the 4th respondent, Trust Land, within the meaning of Section 117 of the repealed Constitution and the Trust Land Act (repealed).

3. He contends that the suit land being Trust Land was illegally and unprocedurally compulsorily acquired by the Government in favor of the 4th respondent in breach and disregard of Section 13 of the Trust Land Act (repealed) and Section 117 and Section 75 of the repealed Constitution.

4. The petitioner claims that through a presidential directive in 1974, by "the then President of Kenya, Daniel Toroitich Arap Moi" (sic) the entire 960 acres of the land was unlawfully alienated on the basis that it was to be turned into a tourist complex to be known as Diani

Complex. He claims that the said directive was however reversed by the president on 12 January 1979 at a public meeting and the then District Commissioner directed that the land, being trust land, does revert to its original.

5. According to the petitioner, on 3 January 1989, the 3rd respondent (it will be recalled that the 3rd respondent is the National Land Commission) acting through persons on its instructions invaded the petitioner's land and violently evicted him and demolished his developments therein, and cut down his crops and trees, which acts greatly injured the petitioner, and thus unlawfully deprived the estate of its land. The petitioner avers to have established that the Commissioner of Lands (succeeded by the 3rd respondent) had allocated the suit land to the 4th respondent, while at the same time unlawfully allocating the entire 960 acres to other persons and entities. He claims that these acts were unlawful, illegal, null and void, as it amounted to the compulsory acquisition of the suit land in complete disregard of the provisions of the law, and in particular, was a violation of Section 13 of the Trust Land Act (repealed), Section 75 and Section 117 of the former Constitution of Kenya, and now Article 40 and Article 60 of the Constitution 2010. He contends that the procedure stipulated in Section 13 (2) of the Trust Land Act, CAP 288 (repealed) for setting apart Trust Land were not adhered to at all. He contends that there were procedural lapses in the manner in which the suit land was allocated and subsequently registered in the name of the 4th respondent. He claims that there was no public consultation and no notice of the proposal to set apart given, no objections by the occupants recorded, no compensation or alternative settlement offered, and no Divisional Board constituted as required Section 13 (2) of the Trust Land Act. He pleads that no proposal to set apart the suit land was ever presented to the petitioner by the County Council of Kwale, nor was the petitioner invited to any meeting of the Divisional Board, at which the proposal was discussed.

6. The petitioner avers that the suit land has been converted into private land owned by the 4th respondent and the process leading to the conversion of the suit land from trust land to privately owned land was undisclosed and undeclared by the respondents to the petitioner.

7. The petitioner claims violations of Section 75 of the repealed Constitution. He avers that his right to hold and own property, guaranteed under the Constitution was violated, as the 1st-3rd respondents forcefully removed, evicted, dispossessed, and deprived the petitioner off the suit land unlawfully. The petitioner states that the respondents violated his rights by depriving him his land in contravention of the Constitution and the applicable laws as the land was illegally allocated to the 4th respondent without following statutory procedures. He states that there was no reasonable justification for causing hardship that has resulted from depriving him of his land, and there was also no compensation nor was the petitioner recognized as legitimate owners of the suit land.

8. The petitioner further claims that Article 60 of the Constitution, 2010 was violated. He contends that the respondents violated the constitutional concept of security of land rights by violating the rights of the petitioner to hold the suit land. It is stated that the illegal deprivation by the 1st-3rd respondent, and subsequent acquisition by the 4th respondent, of the suit land, has occasioned and continues to occasion economic and social challenges and hardship to him.

9. The petitioner prays for the following orders:-

a) A declaratory order do issue declaring that there was no lawful acquisition of the land and the actions by the respondents in forceful removal of the petitioner from possession and occupation of 18 acres of the suit property hived from LR No. 13448 was illegal, null and void.

b) A declaratory order do issue declaring that the acts by the 1st, 2nd and 3rd respondents being unlawful and illegal did not confer any proprietary interests in the suit property to the 4th respondent whatsoever.

c) An order do issue declaring that the purported registration of the suit land in favor of the 4th respondent is unlawful, null and void.

d) A declaratory order do issue declaring that the subdivision made on the land and the issuance of the title to the 4th respondent was illegal, null and void.

e) A declaratory order do issue that the petitioner is the bona fide and lawful owner of all that parcel number original title LR No. 13448.

f) An order do issue to rectify the land register so as to show that the petitioner is the bona fide owner of all that parcel reference LR No. 13448.

g) An order of restraint do issue to restrain the respondents and any other person whosoever, whatsoever restraining them from further entering and or transferring and or dealing in any manner whatsoever with parcel number original title number LR No. 13448.

h) An order do issue that the 1st, 2nd and 3rd respondent do effect and the 4th respondent does give vacant possession of all that parcel being original title LR No. 13448 to the petitioner.

i) An order to restrain do issue restrain (sic) the said 1st and 4th to 36th interested parties and the registrar of lands Kwale County, and whatsoever else whatsoever, jointly and severally from further trespassing into and or interfering with the use of all that parcel known original title LR No. 13448.

j) Damages for loss of user, injury, and damages for unlawful deprivation of the use of the suit land for the said period with interest at court rates.

k) Any other or further order that the court may deem just and fit to grant.

l) Costs and interest of this suit.

10. The petition is supported by the affidavit of the petitioner where he more or less reiterated the contents on the petition. He annexed copies of a limited grant issued to him on 19 February 2004, an excerpt from the *Weekly Review* magazine dated 12 January 1979, an excerpt from the *Sunday Standard* dated 29 January 1989, a copy of letter of complaint dated 25 November 2018, and a certificate of title and a map sheet indicating the 4th respondent as the registered owner. He contended that the Commissioner of Lands allocated the suit property to the 4th respondent while at the same time unlawfully allocating the entire 960 acres to other persons and entities. He claimed at all material times to have been the lawful occupant of LR No. 13448.

11. The 1st and 2nd respondent opposed the Petition through Grounds of Opposition and a replying affidavit sworn by Samuel Mwangi, the Land Registrar, Mombasa. In the Grounds of Opposition, they pleaded that the petition is frivolous, vexatious and an abuse of the court process, as the petitioner has not placed any evidence before the court linking any of their ancestors or themselves as ever having ownership of, occupation, or residence in the suit land. They added that the petitioner is guilty of laches in that he slept on his rights and has not given explanation of his silence decades after, and now comes to court almost eight years after the 2010 Constitution introduced the 3rd respondent to investigate historical land injustices. They pleaded that the petitioner has not satisfied the principles meriting the granting of any orders, and that the petitioner has failed to state or demonstrate to a reasonable degree of precision, which of his alleged constitutional rights have been infringed, if at all, and how the infringement is attributed to the 1st and 2nd respondent.

12. In the replying affidavit, Mr. Mwangi deposed that LR No. 13448 measuring 4.434 ha (the suit land) was registered as a new grant in the year 1989 and assigned title no. 19878. He annexed the said grant. He deposed that the 1st registered owner is the 4th respondent, and the same title to the land has been transacted several times, with encumbrances in the title, mainly charges, being noted. He deposed that the allocation of former government land was done by the office of the Commissioner of Lands who exercised delegated power from the President; that the Registrar of Titles had no power to allocate Government land and had no input in the allocation of the suit land. He deposed that the records of the allocation file do include the allotment letters, payment thereof and processing of the deed plan in respect of the suit land and is under the custody of the 3rd respondent, the successor office of the Commissioner of Lands. He deposed that the petitioner has failed to state, or demonstrate to a reasonable degree of precision, which of his alleged constitutional right have been infringed, if at all, and how the infringement is attributed to the 1st and 2nd respondent. Lastly, he deposed that the petitioner is guilty of laches.

13. The 4th respondent opposed the petition vide a replying affidavit of Joseph Gichuki, a director of the 4th respondent. He deposed that 4th respondent is the registered owner of the suit land and he annexed the copy of the grant. He deposed that the grant was lawfully obtained for a consideration of Kshs. 310,000/= by way of a stand premium and a lease issued for a term of 99 years from 1 March 1982. He contended that this court does not have the jurisdiction to hear and determine the dispute. He was of opinion that the suit does not raise any constitutional questions and the cause of action is an ordinary claim of ownership and possession to land which ought to be filed, adjudicated and determined under the Land Act, Environment and Land Court Act, Civil Procedure Act and the other applicable statutes. He added that this court does not have original jurisdiction to hear or determine this dispute to the extent that it is challenging compulsory acquisition by the Government or historical land injustices of 1989. He stated that the petitioner has not shown that the remedies provided by the National Land Commission Act, Environment and Land Court Act, Civil Procedure Act and the other applicable statutes framework is insufficient or that the statutes are unconstitutional. He deposed that the petitioner should not be allowed to ignore the statutory framework for resolving disputes and resort to the general provisions of the constitution. He was also of opinion that the cause of action is time barred under Section 7 of the Limitations of Actions Act because the said provision bars action to recover land after the end of 12 years from the date on which the right of action accrued. He deposed that according to the petition, the petitioner admits that the cause of action accrued on 30 January 1989 when the petitioner and his predecessors were allegedly evicted by the 2nd and 3rd respondent. He stated that the legal right to file a valid action to recover the land or any interest over the suit land expired on 3 January 2001 when the 12 years lapsed. He deposed that in view of the foregoing, the petition should be dismissed.

14. The 4th respondent also filed a preliminary objection contesting the jurisdiction of this court and limitation. I directed that the preliminary objection be deemed as part of the pleadings of the 4th respondent opposing this petition. I gave further directions that the petition be canvassed through written submissions.

B. Submissions of Counsel

15. Ms. Onyango, learned counsel for the petitioner, submitted on three issues. The first issue was on whether the court has jurisdiction to hear and determine the case; secondly, whether the suit is time barred; and finally whether the allocation and registration of the suit land to the 4th respondent was lawful. On jurisdiction, counsel submitted that Section 13 of the Environment and Land Court Act, Act No. 19 of 2011, gives this court jurisdiction to hear and determine disputes relating to environment and land, including disputes relating to breach of fundamental rights and freedoms over environment and land. She submitted that the petition raises a constitutional issue under Article 40 of the Constitution, the right to property. She submitted that the court would have jurisdiction even on a suit claiming historical land injustices and referred me to the cases of *Kenya National Chamber of Commerce & Industry (Muranga Chapter) & 2 Others vs. Delmonte Kenya Limited & 3 Others*; *County Government of Kiambu (Interested Party) (2020) eKLR*; *Safepak Limited vs. Henry Wambega & 11 Others (2019) eKLR*; and *Kipsiwo Community Self Group vs. Attorney General and 6 others (2013) eKLR*.

16. On whether the suit is time barred, counsel submitted, that the petitioner's claim is based on the claim of right to ownership and possession of land that is founded under Article 40 of the Constitution. She submitted that there is no provision in the repealed constitution, or the 2010 Constitution, that provides for limitation of time in instituting a constitutional petition. She submitted that a constitutional petition can be brought to court any time, though she acknowledged that public policy requires that the same be filed expeditiously depending on the circumstances of the case. Counsel relied on the case of *David Gitau Njau and 9 Others vs. Attorney General (2013) eKLR*; *Wachira Weheire & Attorney General (2010)*; *Pius Kibet Tott vs. Uasin Gishu County Government & 9 Others (2018) eKLR*; *Dominic Aroyo Amolo vs. Attorney General HC Misc. 494 of 2003*; and *Gerald Gichochi & 9 Others vs. Attorney General, Petition No. 487*

of 2012. She submitted that though there is no limitation, the courts have required that there be reasonable explanation for the delay. She submitted that the delay in filing this suit was because there have been follow ups and that this petition is another added attempt at recovering the land. She submitted that the petitioner's father, the late Abdalla Juma Mwokovu, had filed *Mombasa High Court Civil Suit No. 593 of 1992*, which the petitioner followed up after the demise of his late father, but the case did not bear fruit and its outcome is unknown to date. Counsel submitted that despite the fact that the actions of the respondents happened 30 years ago, the cause of action is still alive in this case, as the breach of the petitioner's right is still ongoing.

17. On whether the acquisition, allocation and registration of the suit property in favor of the 4th respondent was lawful and procedural, counsel submitted that a perusal of the proceedings and ruling in the *Criminal Case No. 22 of 1989* where the petitioner's father was charged with trespass and creating disturbance, shows that the 4th respondent failed to demonstrate ownership of the suit property and the case thus failed. Counsel also submitted that on 29 January 1989, there was an article in the Standard Newspaper which featured 500 families who were evicted from Diani beach plots and the petitioner's late father was listed on the front page as one of the victims of the illegal evictions done by the respondents. She submitted that in 1974, a directive was issued by the then President Moi to the effect that the suit land was to be alienated on the basis that it was to be turned into a tourist complex known as Diani Complex, but the said directive was reversed and a new directive issued in 1979 directing the District Commissioner of Land, that the land, being trust land, do revert back to its original owners, that is the petitioner's late father and others. Counsel submitted that in 1989 the 3rd respondent acting through persons on its instructions and in total disregard of the President's directive, invaded the petitioner's suit land and violently evicted the petitioner's late father and demolished the developments thereon, thereby unlawfully and forcefully acquiring the suit land. Counsel submitted that consequent to this, the office of the Commissioner of Lands which has since been succeeded by the 3rd respondent, had allocated the suit land to the 4th respondent though the 4th respondent claims that the suit land was issued as a grant by the President on 1 March 1982. She submitted that the respondents did not dispute the facts as pleaded by the petitioner and they also did not dispute the petitioner's claim of legitimate ownership, and the fact that the suit land was a trust land that was illegally acquired and irregularly converted to private land. Counsel submitted that the law for compulsory acquisition at that time was Section 75 of the repealed Constitution, and Article 40 of the Constitution 2010 has the same intention of protecting the inalienable right to own land and to access the court if the right is violated, for prompt payment of compensation. Counsel submitted that from the provisions of the Constitution, the requirement that the Government needed to meet to acquire the suit land were that the land to be acquired was required by a public body; that the acquisition was primarily for public need or benefit; that necessity was justifiable in causing hardship to the petitioner; and that there had to be compensation for the acquisition. She submitted that none of these requirements were met by the Government. On this point, counsel referred me to the cases of *James Joram Nyaga & Another vs. Attorney General & Another (2007) eKLR*; *Kenya National Highway Authority vs. Shalien Masood Mughal & 5 others (2017) eKLR* and *Niaz Mohammed Jan Mohammed vs. Commissioner of Lands & 4 others (1996) eKLR*.

18. For the 1st and 2nd respondents, Ms. Kiti, learned State Counsel, inter alia submitted that the petitioner has failed to state or demonstrate to a reasonable degree of precision which of his alleged constitutional right have been infringed, if at all, and how the infringement is attributed to the 1st and 2nd respondent. Counsel further submitted that the petitioner is guilty of laches and thus has not satisfied the principles meriting the granting of any orders. She referred me to the case of *Anarita Karimi Njeru v. Republic (No. 1) (1979) KLR 154* and *Mumo Matemo vs. Trust Society of Human Rights Alliance (2014) eKLR* on the need to be precise in demonstrating what constitutional right has been violated. Counsel submitted that the petitioner's claim that he is entitled to the suit land by virtue of ancestral land is unfounded as the petitioner has not tendered proof to show that they were, or are, in occupation of the said suit land or that they made any attempt to have the property registered to them. She submitted that the suit land is being occupied by the 4th respondent. Counsel cited Section 24 (a) and Section 26 (1) of the Land Registration Act on who is entitled to rights over land, which provisions generally affirm that it is the registered owner who is entitled to proprietary rights. On the criminal case referred to by the petitioner, counsel submitted that it was not clear who the accused persons were and that the evidence tendered therein shows that people were compensated. She submitted that the petitioner is guilty of laches and that equity only aids the vigilant. She closed her submissions by submitting that though this court has jurisdiction, the petitioner has alternative remedy in statute and referred to the case of *Kagia Ole Kamoiro & 8 others vs. Agricultural Development Corporation & 3 others (2020) eKLR*. Counsel submitted that where there is an alternative remedy provided by statute, this court cannot venture into the realm of investigation.

19. For the 4th respondent, Mr. Karina, learned counsel, submitted that the petition does not raise any constitutional question, and as such, is incompetent. Counsel submitted that this suit calls for the interpretation of statute rather than the Constitution and that the petitioner's case is an ordinary claim for ownership and possession of land. Counsel referred me to the case of *Republic vs. Paul Kihara Kariuki, Attorney General & 3 others ex parte Law Society of Kenya (2020)* and *Commission for Human Rights and Justice vs. Land Settlement Board of Trustees & 5 others (2021) eKLR*. He submitted that the petitioner invites the court to elevate his civil claim into a constitutional issue and added that this is an ordinary civil claim for ownership of land disguised as a constitutional petition. He referred to the case of *Four Farms Limited vs Agricultural Finance Corporation (2014) eKLR* where it was held that where there is a parallel remedy, constitutional relief should not be sought. He further submitted that the Environment and Land Court lacks original jurisdiction in the first instance to hear and determine historical land injustices and that the petitioner ought first to have referred his claim to the National Land Commission. He relied on dictum from the Court of Appeal decision in *Safepark Limited vs Henry Wambega & 11 Others (2019)eKLR*. He submitted that a party should not be allowed to ignore the statutory framework and resort to provisions in the Constitution. On this point, he relied on *Baobab Beach Resort and Spa Limited vs Duncan Muriuki Kaguru & Another (2017) eKLR* and *Geoffrey Muthiga Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others (2015) eKLR*. He submitted that the petitioner has failed to show that the remedies available under the National Land Commission Act are insufficient or unconstitutional. Counsel submitted that the action is time barred or has been filed after inordinate delay. He referred me to Section 7 of the Limitation of Actions Act, which gives a 12 year period for an action for recovery of land. On the argument that there is no limitation in a constitutional petition, counsel submitted that the petition herein does not qualify to be a constitutional petition as it does not raise constitutional issues, and is therefore time barred. He submitted in any event, that there has been inordinate delay. He referred me to the decision in *Wellington Nzioka Kioko vs Attorney General (2018) eKLR*, where the Court of Appeal held that a constitutional petition instituted over 30 years from the cause of action constituted inordinate delay. He submitted that in this case, the delay is of 40 years and there is no good explanation offered for it. He submitted that the reason that the petitioner's father had filed the suit *Mombasa HCCC No. 593 of 1992* is not a good reason, and in fact demonstrates an abuse of the court process, as the petitioner in effect admits filing a multiplicity of suits. He submitted that this petition therefore offends the *sub judice* and relied on the case of *Republic vs Paul Kihara Kariuki & Others (2020) eKLR* on the applicability of the *sub judice* rule in constitutional petitions. He submitted that the petition should therefore be struck out as an abuse of the court process. He submitted that apart from citing Articles of the Constitution, the petitioner has not demonstrated how they have been violated thus offending the rule in *Anarita Karimi Njeru vs Republic (1979)eKLR*. Counsel submitted that the 4th respondent is the registered owner of the property with title and that her title cannot be defeated by any of the reasons

given in the petition. He referred me to Section 26 of the Land Registration Act on when title may be vacated and submitted that the petitioner has not proved any valid competing claim.

C. Analysis and determination

20. I have considered the petition, pleadings, and the rival submissions of the parties.

21. First, I will address the issue of jurisdiction, because without jurisdiction I am barred from taking any further step. The petitioner has brought this petition partly on the claim of historical injustices. There is of course contention from the respondents on whether this court has jurisdiction to hear claims of historical injustice related to land or whether the claims should be addressed by the National Land Commission (NLC).

22. I think the issue of jurisdiction of this court regarding historical claims is more or less settled. Indeed the Court of Appeal in the case of *Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others [2018] eKLR*, did affirm that this court is not divested of jurisdiction to hear claims based on historical injustices. The Court of Appeal stated inter alia as follows :- “75. *On the question whether a court should await investigation and recommendation by the NLC before it can entertain a claim founded on historical injustice, it is our considered view that a court has jurisdiction to hear and determine any claim relating to historical injustice whether or not the NLC is seised of the matter.*” I have been in agreement with this dictum of the Court of Appeal. I had occasion to pronounce myself in the now rather old case of *Kipsiwo Community Self Help Group vs Attorney General & 6 Others (2013) eKLR* where I stated as follows, “... *I have not seen anywhere in the Constitution, or in the NLC Act, which provides that a person cannot initiate a constitutional petition based on a perceived historical injustice and that the NLC has a monopoly on such mandate.*”

23. I agree that the National Land Commission also has jurisdiction to hear claims of historical injustices under Article 67 (2) (e) which provides that one of the functions of the NLC is “*to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress.*” This function is embodied in Section 15 of the NLC Act, which provides at Section 15 (1) that “*Pursuant to Article 67 (3) of the Constitution, the Commission shall receive, admit and investigate all historical land injustice complaints and recommend appropriate redress.*”

24. Of course, the court has discretion to defer jurisdiction to the NLC if it is of opinion that the matter is best handled by the NLC rather than by the Court. I did address this point when I handled the case of *Henry Wambega & 733 others v Attorney General & 9 others [2020] eKLR* where I stated as follows :-

33. I think the issue of jurisdiction is settled. This court has jurisdiction to hear claims even those based on historical injustices. What we need to have in mind here is that just because a court is vested with jurisdiction, does not mean that in all cases the court will proceed to exercise that jurisdiction, especially where there is another body that also has capacity to hear that dispute. In other words, depending on the facts and circumstances surrounding the case, the court can defer jurisdiction to another body, or decline to take up the matter altogether, and this would not be because it has no jurisdiction, but because given the surrounding circumstances, it would be best for the court not to exercise its jurisdiction.

25. I still hold the same view even as I handle this petition. I in fact think that a party needs to carefully assess his case, and make a determination whether it is best suited to be heard by the NLC or by the Court. The risk of coming to court is that the claimant is tied to rigours of procedure which may not be applicable before the NLC. Also in court, parties are tied by their pleadings and the evidence that they have filed and/or presented. They also face an adversarial system of litigation, and the court has limited leeway to enter into the arena of litigation, say, for purposes of investigating an issue. In court, it is for the party to tailor his case, present appropriate pleadings and evidence to support it, and then square out in battle with the person/s that he has sued, who will certainly throw all brickbats at the case of the claimant, as it is indeed their right to do so. Those are the risks of coming to court. The petitioner took upon those risks when he filed this case before court. He is tied by the pleadings that he has filed and by the evidence he has presented. I need to assess what he has brought before me in light of the response filed by the respondents and nothing else. It is from this that I will determine whether or not the petitioner has proved his case.

26. I will start with the petition itself. The petitioner pleads that he is suing in his capacity as the administrator of the Estate of Abdul Mwakupigwa Juba aka Abdalla Juma Mwakupigwa. From this, it is apparent that this case has been brought on behalf of the estate of a deceased person. I however see some sentences in the petition which seem to assert that the petitioner is owner of the land LR No. 13448 which is the suit land herein. When I see such pleading, I get confused as to whether the petitioner is suing on his own behalf or on behalf of the estate of the deceased. For example, in paragraph 7 of the petition, the petitioner claims to have commenced occupation of the suit land in the year 1944. Putting aside for a moment that the petition is not brought on his own behalf but on behalf of the deceased, the comment that he commenced occupation in 1944 cannot be correct, because the petitioner was born in 1959, according to the details of his identity card which he has annexed to the petition. However, given the introduction in paragraph 1 of the petition, that the petitioner is suing in his capacity as administrator of the estate of the late Mwakupigwa, I will proceed on this assumption, and take it that the other references to the claim being directly that of the petitioner is nothing but inelegance in drafting, and there is certainly a lot of it in this petition. He must indeed be claiming on behalf of the estate of the deceased for he has taken some trouble to annex a limited grant of letters *ad litem* issued to him on 19 February 2004 in respect of the estate of the late Mwakupigwa, who it is noted died in the year 1997.

27. Now, if it is the case of the petitioner that the suit land was that of the late Mwakupigwa, and that the deceased was illegally dispossessed of this land, then I expect the petitioner to have that evidence presented before me, so that I can at least have a factual determination of prior ownership or occupation by the late Mwakupigwa as a basis to start from. Has the petitioner adduced evidence on a balance of probabilities that the deceased owned and/or possessed the suit land ?

28. The first evidence that the petitioner has exhibited is a barely legible page claimed to be of *The Weekly Review* magazine of 12 January (year cannot be read). Much of what is exhibited cannot in fact be read owing to poor photocopy but I can at least see the title of the article as “*Diani Beach Complex Scrapped.*” I have mentioned that what is annexed is a single barely legible page and it is certainly not the complete

article. I don't know what the petitioner wants me to decipher from an article that is not complete putting aside for a moment that I can hardly read it. But let us just assume that the petitioner is trying to tell this court that the tourism project that was intended to be the Diani Beach complex was scrapped. Even if I am to accept this, how does it help the petitioner? It certainly doesn't help him prove that the suit land was land belonging to the estate of his late father and that his late father was dispossessed from it without compensation.

29. The second piece of evidence is another single page of the *Sunday Standard* but out of which one cannot tell the day of the publication. The article therein is titled "*Moi gives up prime beach plot.*" I have read the article which basically states that former President Daniel arap Moi has given up a 15 acre beach plot in Tiwi for it to be turned into a recreational park by the Kwale County Council. The same article states that this is a second beach plot to be surrendered by the former President, the other being a 16 acre plot that was the Kongo mosque. Ok, so former President Daniel arap Moi gave up a couple of beach plots in Tiwi. How does that help the petitioner? The two beach plots that President Moi gave up are not being claimed by the petitioner and neither do they constitute the suit land herein. I even wonder why the petitioner introduced the article to his case. This article has absolutely no evidential value in helping the petitioner.

30. The other evidence that the petitioner has annexed to support his case is another barely legible copy of the *Sunday Standard* of 29 January 1989. Despite its poor legibility, I can at least read the heading which is "*Diani beach plots : 500 families evicted.*" I can also read the first paragraph of that article which states that "*About 500 families in Diani on the South Coast are being evicted from their beach plots despite an earlier cancellation by the government of a proposed Diani complex.*" The article more or less states that with the cancellation of the Diani complex the people whose land was taken away should have been given back their plots. Yet again, this article is not complete for it continues into another page which is not annexed. I wonder what the petitioner wants this court to do with an incomplete article. There is a photograph in that article of some two people said to be victims and that they are the family of Abdala Juma Mwakubigwa "outside their hut by the beach." Well, if they are outside their hut by the beach, then it cannot be said that they have been evicted. I do not see how this single barely legible incomplete article and a photograph can support, to the required standard, the allegations of the petitioner.

31. The last piece of evidence is the criminal case where it is said that the late Mwakupigwa was charged, with the offence of creating disturbance on the suit land and resisting arrest, but was acquitted. I have gone through what is annexed. First, I cannot even tell from what is annexed what criminal case it is as it has no reference number. Secondly, what is annexed does not even show who the accused persons are. All I can see is that four persons were charged with two counts, that of creating disturbance in a manner likely to cause a breach of peace contrary to Section 95 (1) (b) of the Penal Code and the other count of resisting arrest contrary to Section 253 (b) of the Penal Code. Who these four accused persons are, is not known, as nowhere have I seen their names being mentioned. I have certainly not seen the name of the late Mwakupigwa in whatever is annexed as being part of the criminal proceedings. How do these proceedings, which cannot be traced to the late Mwakupigwa assist the petitioner? I don't see how. But let me assume that one of the accused was the late Mwakupigwa. So he was charged with creating disturbance and resisting arrest. The persons were acquitted under Section 210 of the Criminal Procedure Act, and were not put to their defence. There is therefore no statement of the late Mwakupigwa that elaborates his position on the offence. I have read the ruling of the Magistrate while making the decision to acquit under Section 210 and nowhere does he mention the late Mwakupigwa as having any right over the land in dispute. All the Magistrate says is that the evidence presented was not sufficient to place the accused persons on their defence. I fail to see how this assists the case of the petitioner.

32. The petition is also anchored on the claim that the suit land was trust land and that the procedures of allocation of trust land were not followed. Where is the evidence that this was trust land? I have none. I would have expected the petitioner to present cogent evidence that this was trust land so that this court can proceed to determine whether or not its allocation was proper. But I have nothing before me to tell me that the suit land was indeed trust land, and without evidence, I am unable to speculate. I am afraid that I cannot rely on an incomplete newspaper article as demonstrating proof of an area being trust land. I would have expected the petitioner to demonstrate through survey maps that the area was indeed trust land and that the suit land fell within this trust land area. I have no such evidence.

33. Apart from not demonstrating that the suit land fell within the 960 acres Diani complex, the petitioner has also failed to provide any evidence of how this 960 acres was distributed, if at all. Who was allocated land and in which place? That is the only way the petitioner could have shown that the 4th respondent was allocated land which was hitherto occupied by the deceased. I have no such evidence.

34. There are also some facts which are completely distorted. For example, in paragraph 10 of the petition, the petitioner alleges that through a Presidential directive, the then President of Kenya, Daniel Toroitich arap Moi, unlawfully alienated the 960 acres forming Diani complex. Well, if this is the basis of the petitioner's claim, then it fails, for in 1974 the president of Kenya was the late Jomo Kenyatta, and not Daniel Toroitich arap Moi.

35. I have not forgotten that in her submissions, Ms. Onyango mentioned that this petition is another attempt by the petitioner to press for his cause and that there was a previous pending suit. I think it behoved the petitioner to disclose to this court what sort of previous suit this was, and what its outcome was. In her submissions, Ms. Onyango stated that its outcome "is unknown." That cannot be true. The petitioner must have knowledge of the outcome of his case and why he has concealed it from this court can only mean that whatever decision was reached was not favourable to him and does not help him support this petition. Filing suit such as this, after one has had previous litigation, certainly smacks of an abuse of the court process, which ought not to be encouraged.

36. From my analysis above, the petitioner has failed to present to this court any evidence that connects the late Mwakupigwa, and/or even the petitioner himself, to the suit land. In other words, there is no evidence before me which would lead me to the conclusion, on a balance of probabilities, that the late Mwakupigwa occupied the suit land and that he was forcefully evicted therefrom without any compensation. With this finding, this petition must collapse and must be dismissed.

37. Need I really go into any of the other issues including the fine technical legal points that have been raised complete with authorities? I don't see the need. I would have, if the petitioner had crossed the threshold point of connecting the deceased, or himself, to the suit land. This is a factual test that he has failed. There is no need of going into the nitty gritty of the legal points raised, as the petition has no factual foundation. Even if I am to proceed to analyse them, I will only be speculating. I do not see the need of spending precious judicial time on an exercise in futility.

38. Before I close, I feel the need of emphasizing that when a party comes to court, he must come properly armed with material that is not

only legible, but also complete, so that context can be taken into account. A litigant cannot throw bits and pieces at the court and hope that the court is going to put together the jigsaw puzzle thrown at it. In my case, I even doubt if the pieces thrown at me are of the same puzzle. I wonder how the petitioner hopes me to put all this together. It is upon a litigant to gather and present good solid evidence that the court can appreciate. The petitioner hopelessly failed in doing so in this case. As I have mentioned before, most if not all, of what was provided was barely legible, and even then, certainly not complete. The evidential value of newspaper articles by themselves is also not very strong. If ever the petitioner had a good case, then what he presented before me has not helped his cause one little bit.

39. The upshot of the above is I find no merit in this petition and it is hereby dismissed with costs.

40. Judgment accordingly.

DATED AND DELIVERED THIS 14TH DAY OF OCTOBER 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA