



**Muthungu v Chiguzo & 4 others; Apollo Insurance Company Limited (Interested Party)  
(Environment & Land Petition 2 of 2021) [2025] KEELC 4881 (KLR) (27 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4881 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND PETITION 2 OF 2021**

**AE DENA, J  
JUNE 27, 2025**

**BETWEEN**

**EPHRAIM NDEGWA MUTHUNGU ..... PETITIONER**

**AND**

**MOHAMED HASSAN CHIGUZO ..... 1<sup>ST</sup> RESPONDENT**

**FATUMA MOHAMED MBONGI ..... 2<sup>ND</sup> RESPONDENT**

**THE KADHI, KADHIS COURT KWALE ..... 3<sup>RD</sup> RESPONDENT**

**THE LAND REGISTRAR KWALE ..... 4<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT**

**AND**

**APOLLO INSURANCE COMPANY LIMITED ..... INTERESTED PARTY**

**JUDGMENT**

**Background**

1. The subject of this judgement is the petition dated 23<sup>rd</sup> November 2021 in respect of parcel known as Kwale/Galu/Kinondo/577 (herein suit property). The petition was initially filed in Mombasa Environment and Land Court Registry as Number 40 of 2020 and was subsequently assigned a new number, 2 of 2021 upon transfer to Kwale ELC.
2. The petitioner prays for the following orders; -
  - a. A declaration do issue that the petitioners rights to a fair administration process under article 47 of the constitution has been violated



- b. A declaration do issue that the petitioners rights to a fair hearing under article 50 of the constitution has been violated
  - c. An order of certiorari to bring into this court for purposes of being quashed the order dated 27<sup>th</sup> July 2014 from Kwale Kadhis Court Succession Cause Number 99 of 2014 in the Matter of the Estate of Hassan Juma Mwangome
  - d. A declaration that the Petitioner is the owner of the Land Kwale/Galu/Kinondo/577 and the Interested party is the charge and the 4<sup>th</sup> Respondent to restore the parcel file and the green card accordingly
  - e. An order for damages for trespass to Land
  - f. Costs and interest of this suit
  - g. Or such other orders as this Honourable court shall deem just.
3. The petition was based on the facts on its face and the affidavit of Ephraim Ndegwa Muthungu the petitioner sworn on 20/11/2020. The petitioner claims to be the registered owner of the suit property since 1980. Through his estate agent he discovered that the same has been vested in the 1<sup>st</sup> and 2<sup>nd</sup> respondents in the above succession cause. That he was condemned unheard. The petitioner terms the succession proceedings were intended to steal the suit property. The petitioner also averred that there was no fair hearing as the Kadhis court lacked jurisdiction over the petitioner who is not of the Muslim religion at the same time want of jurisdiction of the said court in a land case.

### **Responses to the Petition**

4. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents responded to the petition by an affidavit sworn on 13/02/2021 by Fatuma Mohamed Mbongi the 2<sup>nd</sup> Respondent with authority of the 1<sup>st</sup> defendant. The deponent states that she inherited Kwale/Galu/Kinondo/577 & 576 from the estate of their grandfathers Athuman Juma Kombako & Hassan Juma Mwangome and who were siblings. That as per the Land adjudication records which reflected the two as original allottees it was practically impossible for the petitioner to have owned the suit property in 1980. It is further deponed that a portion of the suit property was allocated to the 2<sup>nd</sup> respondents' father who was mentally ill. That the deponent's grandfather has been in possession of the suit property upto 1990 when he died without any interruptions from the petitioner. That it is upon the said death that the respondents embarked on the succession proceedings.
5. The 3<sup>rd</sup> to 5<sup>th</sup> Respondents responded vide a response dated 20/04/2022 filed on 12/5/2022 through Mr. Mwandeje Senior Litigation Counsel in the office of the Attorney General. It is averred that the respondents did not take part in any theft to defraud the petitioner of the suit property. That the fraud allegations as against the 3<sup>rd</sup> – 5<sup>th</sup> defendants have not been substantiated. That the 4<sup>th</sup> respondent was not a party to the proceedings in the Kadhis court and upon service with the order had to comply. That article 40 of the Constitution of Kenya 2010 is not absolute. That the proper forum to challenge the administrative actions of the 3<sup>rd</sup> respondent was judicial review and not a petition. They prayed that the petition is dismissed.
6. The Interested Party responded vide a Replying Affidavit in support of the petition sworn by one Shah Shah confirming that the petitioner had secured a facility with the Interested Party resting with a charge of Kshs. 100,000/= registered on 2<sup>nd</sup> May 1984 which was still in force. That the original title to the suit property was in the custody of the Interested Party.



## HEARING & EVIDENCE OF THE PARTIES

### Petitioners Case

7. The petition was heard viva voce. The responses were converted appropriately during pretrial directions. Parties also filed witness statements and list of documents. During the hearing the petitioner was represented by Mr. Muchiri of Prime Lawyers LLP who also held the brief for counsel for the Interested Party, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents by Ms. Ogotti from the firm of Chimera Kamotho & Company Advocates and the 3<sup>rd</sup> to 5<sup>th</sup> respondents by Mr. Mwanjeje.
8. The petitioner EPHRAIM NDEGWA MUTHUNGU testified virtually as PW1 from Indiana USA where he resides and carries on the business of selling curios. He adopted his witness statement dated 18/11/20 and the supporting affidavit to the petition as his evidence in chief. He told the court that he bought the land from one Grant Kariuki Muturi with the intention of building a hotel but he had to flee to America for political reasons. That the original title was in the custody of the Interested Party who had lent him money in 1984 for his business of supplying food to the armed forces. The business collapsed and he was unable to fully repay the money. He further testified that in the year 2014 some people encroached into the suit property erected structures which were removed after he dealt with them but they never left the land.
9. Cross examined by Ms. Ogotti PW1 testified that he had not presented to court a sale agreement, transfer. Stamp duty payment and Land Control Board Consent in support of the purchase arrangement with the vendor Grant Kariuki Muturi. That he knew before purchase that the land was in Galu Kinondo adjudication section though he did not visit the land adjudication offices since the vendor held a title which was confirmed by the land registrar.
10. Cross examined by Mr. Mwanjeje the witness stated he bought the land for Kshs. 35,000/- but had not presented the receipt. That he did not construct any structures on the property.
11. PW2 was Charles Muraya Ndegwa a businessman who lived in Indiana USA. He adopted his witness statement dated 14/04/2022. The witness was not cross examined.
12. PW3 was Julius Mutwiri Mutunga a resident of Kiembeni Mombasa. The witness adopted his witness statement dated 23/11/2020. Cross examined by Mr. Mwanjeje PW3 confirmed he had been an estate agent for the petitioner for over 12 years and had visited the suit property in the years 2010,2015 and 2020.
13. With the above the petitioner's case was closed.

### The 1<sup>st</sup> & 2<sup>nd</sup> Respondents Evidence

14. DW1 was Mohamed Hassan Chiguzo. He adopted his witness statement dated 26/10/2021 as part of his evidence in chief. Upon cross examination by Mr. Muchiri DW1 confirmed that Hassan Juma Mwangome was his biological father who died in the year 1990 and also owned adjudication plots 58 and 59 which they did not list in the succession cause. Upon being shown order No. 2 of the Kadhis Order he could not explain it vis a vis his testimony that they did not know the suit property had issues. That his father never told him the land had issues. DW1 admitted he was 1 year old in 1980. Though he had done a search at the land's registry in 2012 and 2014 the same were not before court. Further that he did not know the process that follows land adjudication.
15. Cross examined by Mr. Mwanjeje DW1 stated that other than the documents they have presented in court they had no other documents in proof of ownership.



16. DW2 was fatuma mohamed mbongi. The witness adopted her witness statement dated 26/10/2021 and replying affidavit dated 13/2/2021 as part of her evidence in chief. Cross examined by Mr. Muchiri DW2 confirmed that Mohamed Ibrahim was her biological father and was buried in his land in Mwabungo Tangila village. Though they had done his succession the witness could not remember the cause number. Though she was aware that after adjudication one should collect title at the land registrar she did not make this follow up. That she never undertook a search at the land registry because she did not have title. She had no structure on the suit property. That she used to visit the suit property with Mwangome her grandfather around 1980/4 when she was about 9/10years old and she was sure it was the same suit property. She admitted she had not brought any elderly person to confirm this.
17. Cross examined by Mr. Mwandeje DW1 confirmed she did not have title to the suit property. They undertook succession to enable them use it to obtain title at the land registry.

### **3<sup>rd</sup> – 5<sup>th</sup> Respondents Evidence**

18. DW3 was Susan Mueni Mwanzawa Land registrar Kwale. DW3 testified that the current registered owner of the suit property was Ephraim Ndegwa Muthungu. That the title was issued on 3/12/1980. The green card got lost from the parcel file after tampering necessitating reconstruction. That the parcel file also had subdivisions 2190 and 2196 in the names of Obadiah Kioko, James Nyoike Kinuthia and Rachel Masinde. The green card for plot 577 had not been closed because there was no corresponding mutation for the subdivision. There was no transfer from the petitioner to Obadiah Kioko, James Nyoike Kinuthia. The registrar allowed the reconstruction because the petitioner was still in possession of his original title.
19. Cross examined by Mr. Kipkoech holding brief for Ms. Ogotti . on being shown the adjudication record, DW3 clarified that the same indicates the 1<sup>st</sup> allottee but not the current registered proprietor and it never changes.
20. On cross examination by Mr. Muchiri DW3 confirmed the search dated 12/6/2015 as authentic. That no subdivision can occur during the pendency of a charge. The witness confirmed there was no discharge of the charge. According to the witness the Kadhi does not have jurisdiction to determine issues of land ownership and nullify title. The matter was before the Kadhi for succession. Ephraim was a not a party in the Kadhis proceedings and was also a Christian. That adjudication was a once off process and it could not have still been ongoing in the year 2021. According to the witness the adjudication search is issued as a confirmation of the record held as a matter of practice and not as a matter of law. It does not stop subsequent transactions from happening.
21. With the above evidence the 3-5<sup>th</sup> respondents' case was closed.

### **Submissions**

Parties filed and exchanged submissions. The petitioners submissions are dated 10/08/2024 the 1<sup>st</sup> and 2<sup>nd</sup> respondents 22/07/2024 and the 4<sup>th</sup> and 5<sup>th</sup> respondents 26/07/2024.

### **Petitioners Submissions**

22. The petitioner submitted that they were the lawful owners of the suit property having presented a copy of the original certificate of title in the name of Ephraim Muthungu and which title has never been transferred to anybody else. Citing the provisions of section 26 of the Land Registration Act it is submitted the law confers upon the holder of title absolute and indefeasible ownership. That the respondents did not raise any allegations that the land was acquired fraudulently or unprocedurally.



That the same can only be lawfully occupied by the petitioner or with his permission. The respondents are therefore termed as trespassers.

23. The petitioner further submits that the actions of the Kadhi violated the petitioners right to property enshrined under article 40 of the Constitution and also contravened the provisions of section 2 and 4(4) of the Fair Administrative Action as it relates to fair administrative action. Referring to article 23 of the constitution the court is invited to issue the reliefs sought.

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

24. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that based on the copy of the letter from the Land Adjudication & Settlement Office dated 17/4/2014 it is confirmed the suit property was first recorded in the names of Hassan Juma Mwangome and Mohamed Ibrahim who were the 1<sup>st</sup> and 2<sup>nd</sup> respondents father and grandfathers. That the same was never recorded in the name of Grant Kariuki the vendor who allegedly sold the property to the petitioner. The respondents further relied on DW3 testimony that when the adjudication records are presented, the name of the first allottee would appear as entry No.1 in the green card.
25. It is further submitted that the petitioner has failed to prove the root cause of his title, has never been in possession and can never be in possession thereof. That he has also failed to produce sale agreement , proof of payment, registered transfer in his favor and failed to undertake due diligence at the land adjudication office before the said purchase. It is contended that the 1<sup>st</sup> and 2<sup>nd</sup> respondents have explained their entitlement to the suit property from the adjudication to the vesting pursuant to the succession proceedings.
26. It is contended that the petitioner having failed to establish the root of his title, being not the legal owner cannot claim damages for trespass or the reliefs sought in the petition.

#### **4<sup>th</sup> and 5<sup>th</sup> Respondents Submissions**

27. It is submitted by the state counsel that according to records at the land office the suit property is still registered in the name of the Petitioner. Rehashing the provisions of section 26(1) of the Land Registration Act and the circumstances under which title may be impeached, the evidence adduced by both parties in proof of ownership of their titles the court was invited to review the same and come up a determination on which of the two equities should be upheld while also considering the respondents only produced an adjudication search.

#### **Analysis And Determination**

28. The genesis of this petition substantively lies in the orders issued by the Kadhis court in Succession Cause Number 99 of 2014 in the Matter of the Estate of Hassan Juma Mwangome in relation to the suit property herein. The petitioner claims to be the lawfully registered owner of the same yet the orders made by the Kadhi declared him to have acquired the same fraudulently and vested it to the 1<sup>st</sup> and 2<sup>nd</sup> respondents as beneficiaries without jurisdiction, without according him a hearing thus violating the petitioners rights to fair administrative action and a right to hearing. The petitioners craves interlia a declaration the said rights were violated the said orders to be quashed and to be declared the lawful owner of the suit property.
29. The main issue for determination therefore is whether the petitioner is entitled to the reliefs sought in this petition. For the petitioner to claim a breach of his rights in so far as they relate to the suit property he must establish the right of ownership over the suit property. Consequently the questions that must be resolved in order of priority is Whether the petitioner is the lawful registered proprietor



of the property known as Kwale/Galu/Kinondo/577 and then whether his rights were violated and in what ways which will encompass the question of the jurisdiction of the Kadhis court to make a determination on land ownership.

**Whether the petitioner is the lawful registered proprietor of the property known as Kwale/Galu/Kinondo/577**

30. The petitioner testified as PW1 and told the court he bought the suit property from Grant Kariuki in the year 1980 and later used the title to secure a loan from Apollo Insurance Co. Ltd, the Interested Party to support his business. He produced as part of his evidence a copy of Land Certificate for Kwale/Galu Kinondo/577, Copy of Green Card for Kwale/Galu Kinondo/577, OB No.16/18/11/20, Letter to Kadhis Court dated 21/10/2020 together with attachments, Letter to the Registrar dated 09/11/2020, Official Search dated 12/06/2015 and a Photograph showing some fencing posts.
31. The copy of the land certificate is dated 3/12/1980 and indicates Ephraim Ndegwa Muthungu as the registered absolute proprietor. Part C the Encumbrances Section confirmed that the property was charged to the Interested Party two times, in the year 1982 and 1984. A letter dated 5<sup>th</sup> June 2015 confirmed that the Interested Party held the original title pursuant to the facility obtained from them by the Petitioner. It was also the petitioners testimony that while trying to undertake a routine search he was informed through his agent that the green card was lost. That during the process of reconstruction of the card the impugned order of the Kadhis court was discovered. PW3 was the said agent and corroborated this evidence.
32. DW3 the Land Registrar corroborated the petitioners evidence when she informed the court that according to the parcel file records which she had carried to court, the suit property was registered in the name of the petitioner who was issued with a title on 3/12/1980. That the green card was reconstructed following the loss of the original green card. DW3 confirmed in cross examination that the official search dated 12/06/2015 produced by the petitioner was an authentic search and that it confirmed the petitioner as the registered proprietor.
33. The 1<sup>st</sup> respondent (DW1) stated in his adopted witness statement that he was the son of the original owner of the suit property Hassan Juma Mwangome (deceased) which they used for agricultural activities but lived on a separate suit property. That Mwangome was his grandfather. That it is the said Mwangome who informed him that part of the suit property was allocated to Mohamed Ibrahim who was mentally challenged. DW2 evidence was that Mwangome died in 1990 in physical occupation of the suit property.
34. What did the 1<sup>st</sup> and 2<sup>nd</sup> respondent produce in proof of the above facts and their alleged ownership of the suit property. DW1 evidence was that his deceased mother had given him some documents which showed ownership of land in respect of Hassan Juma Mwangome and Athuman Juma Kombaiko who are brothers as well as land ownership documents by Hassan Juma Mwangombe and Mohamed Ibrahim Mbongi (the 2<sup>nd</sup> respondent's father.) My concern with this evidence is that the particulars of these documents were not given in the witness statement neither were they attached. On cross examination by Mr. Mwandeje DW1 stated the documents were defaced yet they were said to be the ones they used at Kwale to get the status of the property. This was information that the court could not rely on.
35. That notwithstanding DW2 produced a Copy of adjudication search of plot 577 dated 13/02/2021 (FMM1) and copy of Kwale Kadhis Court Succession Cause No.99/2014. Asked by Mr. Mwandeje if they had any other documents in proof of ownership both DW1 and DW2 confirmed that what they



had presented in court was all they had as proof. They therefore did not have any title in the names of Mwangome and Mohamed Ibrahim.

36. The court had occasion to interact with the Adjudication record. Indeed, it showed Mohamed Ibrahim and Hasan Juma Mwangome as the persons recorded at the time of adjudication. As noted there was no corresponding title produced as confirmed by both DW1 and DW2. DW1 at paragraph 14 of his witness statement stated that together with his niece the 2<sup>nd</sup> respondent they visited the land registry to inquire on the status of the suit property and learnt that it had no title deed. The court notes that this visit is not confirmed in DW2 witness statement and therefore not corroborated. DW2 only refers to a visit accompanied by DW1 to the land adjudication and settlement office (see paragraph 8 ). DW1 also admitted in cross examination that though they undertook searches in 2012 and 2014 he did not present the searches in court. It is also not clear to me what they presented to any of these offices for identification of their land in return to the feedback they got since the particulars of the documents they were shown by DW1 mother are not disclosed in addition to my observation in paragraph 34 above.
37. DW1 and DW2 could not explain why their patriarchs did not pursue the title to the suit property after adjudication. DW1 stated clearly that he did not know why his father and Ibrahim did not follow up on their title. Ibrahim appears to have died much latter than Mwangome yet he did not pursue his title to the property and no evidence was led to show he was mentally ill which may have made him not pursue his title.
38. DW1 admitted that he was aware that after adjudication one must obtain title from the land registry yet they did not follow up the deceased title through the entire process of adjudication to the issue of title. DW2 testified she was young when she visited the suit property yet she did not call any elderly person to corroborate her evidence nor did she avail the Galu Kinondo Map she referred to during cross examination to identify the land she used to visit.
39. Moreover it did not make sense at all why it took DW1 and DW2 over 5 years to apply for registration for the vesting of the property in 2020 and at the same time without the corresponding grant of administration in respect of the 2<sup>nd</sup> respondents father estate who was already deceased as his daughter was said to hold his share on his behalf. While DW2 stated he undertook the said succession proceedings she could not remember when she did it.
40. All the above did not bolster confidence in the court that the suit properties indeed physically and legally passed to the 1<sup>st</sup> and 2<sup>nd</sup> respondents as beneficiaries and more specifically when the petitioners registration seem to have been predated by other transactions since it was entry no. 6 & 7 in the green card coupled with DW3 evidence in cross examination that the entry in the adjudication register does not stop subsequent transactions. Infact it became clearer during cross examination that DW1 could not explain the contradictions in how he and DW2 were related to Mwangome and Ibrahim.
41. But having stated all the above, the pertinent question to ask is whether the Land Adjudication document produced was proof of ownership? DW3 stated and to me rightly so that it only showed the 1<sup>st</sup> allottee but not the current registered proprietor. An adjudication record clearly therefore is not evidence of ownership, it is not a title. Only a certificate of title or lease held by a person is stated in law to be prima facie evidence that the person noted therein is its owner as will be seen shortly. It is thus misleading to submit there are competing titles in this dispute.
42. Having come to the above conclusion I must then discuss the import of title. It is trite that the Certificate of Title issued to a person is prima facie evidence, that the said person holds title to the land



as noted therein. The suit property is registered under the Registered Land Act (repealed). Section 27 of the Registered Land Act provided as follows

RLA S.27. Subject to this Act -

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.

43. The current law is in Section 26 of the Land Registration Act, 2012, which provides as follows :-

26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

44. Arising from the above it follows that when a person has been issued with a Certificate of Title, that title, prima facie, demonstrates that the individual named therein is the proper owner of the freehold or leasehold title noted in the said certificate. The law presumes the title to be a good title and therefore if another person claims that the said title is not genuine, then the burden of proof is upon the person claiming as much. It was incumbent upon the 1<sup>st</sup> and 2<sup>nd</sup> respondents to discharge the evidentiary burden, which they have failed to do. It is not enough to state that the petitioner has not proved the root of his title.

45. The court noted DW3 evidence of the existence of records depicting alleged subdivisions of the suit property. The court was satisfied with DW3 testimony that as long as there was an encumbrance registered against the suit property a subdivision cannot have occurred. Further the subdivisions were not supported by the attendant mutations and closure of the green card for Kwale/Galu Kinondo/577. Moreover the reconstruction of the files with regard to the subdivision was not supported with the corresponding documents thereto. The petitioners evidence of the application for reconstruction of the land register and indemnity were presented and confirmed by DW3.

46. Based on the foregoing it is the finding of this court that the petitioner is the lawful registered proprietor of the suit property.

47. The above finding then paves way for the petitioner to pursue the reliefs sought which all revolve around the orders issued by the Kadhis court herein.

48. The court has been invited by the petitioner to declare that the petitioners right to fair hearing and fair administration process have been violated by the 3<sup>rd</sup> respondent in arriving at the orders dated



27/07/2014 in Kwale Kadhis Court Succession Cause Number 99 of 2014 in the Matter of the Estate of Hassan Juma Mwangome. That consequently the said orders should be called into this court and be quashed.

49. PW1 adopted his witness statement as part of his evidence in chief that the decision above purported to take away the suit property from him without his knowledge and without having been made a party to the succession proceedings and therefore being condemned unheard.
50. The order in Kadhis Succession Cause No. 99 of 2014 dated 27/07/2014 was produced as evidence by both the petitioner, the 1<sup>st</sup> and 2<sup>nd</sup> respondents as well as the 4<sup>th</sup> and 5<sup>th</sup> Respondent. It was not in dispute that the proceedings took place in respect of the estate of Hassan Juma Mwangome (deceased) and orders issued. Before I get into a discussion of the orders, I must look at the jurisdiction of the Kadhis court as provided under article 170 of the Constitution as read together with section 5 of the Kadhis Court Act.
51. Section 5 thereof stipulates the jurisdiction of Kadhis' Courts as follows:-
- “ A Kadhi's court shall have and exercise the following jurisdiction, namely the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion; but nothing in this section shall limit the jurisdiction of the High Court or of any subordinate court in any proceeding which comes before it.”
52. Therefore, pursuant to the above, the jurisdiction of the Kadhis court is therefore limited to the determination of questions of Muslim Law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim Religion and submit to the jurisdiction of the Kadhis' courts. DW1 and DW2 both testified that they had approached the Kadhis court for purposes of succession to enable them pursue title with the Land Registry and were fully aware that titles are issued by the land registrar.
53. However the content of the orders issued by the Kadhis court seem to represent a different intention (and which seem to confirm my earlier reservations) as seen in order No. 2 and 3 thereof as follows; -
2. ‘THAT the registered proprietor was fraudulently registered and the same be nullified’
  3. THAT the original proprietors as per the record of District Land adjudication and Settlement officer be reinstated.’
54. Clearly the Kadhi entered an arena he did not have powers to adjudicate upon by nullifying title of a registered proprietor and pronouncing himself on the ownership of Kwale/Galu/Kinondo/577 as constituting the estate of Hassan Juma Mwangome. Jurisdiction is everything and without it a court cannot do anything see Owners of the Motor Vessel “Lilian S” vs. Caltex Oil (Kenya) Limited [1989] KLR 1.
55. Indeed the “Supreme Court case of Samuel Kamau Macharia and Another – Versus - Kenya Commercial Bank Limited & 2 others (2012)eKLR authoritatively dealt with jurisdiction, where it was held that:-
- “ A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second Respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of



mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings....’

56. The Honourable Kadhi should have upon realising there was a registered owner over the suit property, downed his tools and refer the matter to the appropriate forum which was the Environment and Land Court. Instead he conferred upon himself jurisdiction outside the law and the constitution and thus the orders made were in vain.
57. DW1 was fully aware of the existence of another owner of the land other than his father but failed to inform them of the proceedings. I say so because while he stated in evidence in chief that he did not know the title had issues the witness could not explain this assertion when he was shown the content in order No.2 above. I found it difficult to believe that the defendants meant the proceedings purely for succession.
58. Let me state that the right to be heard is a Constitutional right enshrined in Article 47 and 50 of the Constitution and Section 4 of the Fair Administrative Action Act. Article 47(1) and (2) of the Constitution provides as follows;
- I. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
  - II. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action
59. Section 4(3)(b) of the Fair Administrative Action Act, 2015 imports the rules of natural justice and provides that where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision an opportunity to be heard and to make representations in that regard. Equally the Kadhi should have directed the matter to be filed before the right court and the alleged registered proprietor enjoined. This would have presented an opportunity to the petitioner to defend his title to the suit property. The result was that pursuant to the proceedings in the Kadhis court the suit property was vested in the 1<sup>st</sup> and 2<sup>nd</sup> respondents unilaterally and against the right to property as envisaged in article 40 of the Constitution.

#### **Whether the petitioner is entitled to the reliefs sought?**

60. This court has made a finding that the Kadhis Court had no jurisdiction to nullify title and or make a determination on the ownership of land. A decision made in the absence of jurisdiction and outside the principles of natural justice is a nullity and nothing can come out of a nullity see Republic Vs. Registrar Non Governmental Organizations Coordination Board exparte Evans Kidero Foundation (2017) eKLR. and The Court of Appeal in Evans Thiga Gaturu & another vs Naiposha Company Ltd & 13 Others [2017] eKLR,
61. The reliefs the petitioner seeks have already been highlighted earlier in this petition. Based on the foregoing analysis I see no bar to granting the orders sought in the petition except for the damages for trespass.
62. The power to grant general damages is discretionary. The Court has not been led to any figure to guide it on quantum in this regard and I will leave it at that. With regard to orders for rectification of the register any registration made pursuant to the Kadhis orders herein cannot be sustained for the reasons already highlighted hereinbefore.



63. The upshot of the foregoing is that I find the petitioner has proved his claim to the required standard against the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. The following orders therefore hereby issue to dispose of this petition; -

1. That a declaration do issue that the petitioners rights to a fair administration process under article 47 of the constitution has been violated
2. That a declaration do issue that the petitioners rights to a fair hearing under article 50 of the constitution has been violated
3. That an order of certiorari do issue to bring into this court for purposes of being quashed the order dated 27<sup>th</sup> July 2014 from Kwale Kadhis Court Succession Cause Number 99 of 2014 in the Matter of the Estate of Hassan Juma Mwangome
4. That a declaration hereby issues that the Petitioner is the owner of the Land Kwale/Galu/Kinondo/577 and the Interested party is the chargee.
5. The Land Registrar Kwale to restore the parcel file and the green card in terms of 3 and 4 above.
6. That each party shall bear its costs of the petition.

Orders accordingly.

**JUDGEMENT DATED SIGNED AND DELIVERED THIS 27<sup>TH</sup> OF JUNE 2025.**

**HON. LADY JUSTICE A.E DENA**

**JUDGE**

**27.6.2025**

**JUDGEMENT DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO  
CONFERENCING PLATFORM IN THE PRESENCE OF: -**

In the presence of:

No attendance for the Petitioner

Ms. Kimani for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent

Ms Mwanazumba for 3<sup>rd</sup> – 5<sup>th</sup> Respondent

No attendance for the Interested Party

