



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL PETITION NO. 5 OF 2010

CHAI LWAMBI MWALAMBE (Suing as the Legal

Representative of the Estate

of LWAMBI MWALAMBE BEPONDA).....PETITIONER

AND

DISTRICT LAND REGISTRAR.....1ST RESPONDENT

THE SENIOR REGISTRAR OF TITLES.....2ND RESPONDENT

THE COMMISSIONER OF LANDS.....3RD RESPONDENT

THE PROVINCIAL ADMINISTRATION.....4TH RESPONDENT

THE HON. ATTORNEY GENERAL.....5TH RESPONDENT

JUDGMENT

(Suit by the petitioner claiming an infringement of the constitutional right against discrimination and to property; petitioner claiming that his forefathers owned the disputed land and that it was thus wrong for the Government to allocate it to other people; evidence showing that the land was given to persons of Nubian origin by the colonial Government to settle them after the 1st World War; the descendants of the persons of Nubian origin continuing to occupy and possess the land or selling it to other people; no discrimination or deprivation of property by the Government issuing allotment letters to the occupants; no right to claim land that was owned by a person's forefathers and no right to claim native land that was owned by one's forefathers before colonialism; right to every person to settle or to be settled anywhere in the country; petitioner also claiming that he owns the land because he holds a confirmed grant bearing the suit land; court noting that this has become an avenue to defraud people of land; waving a confirmed grant which has no foundation and which fraudulently indicates land not owned by the deceased does not mean that the grant is inviolable; petition dismissed)

1. This suit was commenced through a Constitutional Petition that was filed in the High Court of Mombasa on 1 July 2010 on the basis of the pre-2010 constitution (the repealed constitution). The 2010 Constitution created the Environment and Land Court that became operational in the year 2012, upon which, this petition was transferred to the Environment and Land Court at Mombasa for disposal. The petitioner is the legal representative of the estate of Lwambi Mwalambe Beponda (the deceased) and he has filed this petition on his own behalf and on behalf of the household heads of the late family of the deceased.

2. It is alleged that the deceased was the beneficial owner of the land described as Plot No. 1043/111/1 – 26 Mazeras, Kaloleni District (hereinafter referred to as the suit land) and that his family has been occupying and is currently occupying the said land. It is further averred that the petitioner has the rightful ownership of the suit land by virtue of obtaining a confirmed grant of letters of administration through the case Mombasa HCCC Succession Cause No. 385 of 2005. It is pleaded that the efforts of the advocate of the petitioner to have the suit land allocated and registered in the petitioner's name has been thwarted by the 3rd respondent (the Commissioner of Lands) despite several requests. It is pleaded that this is despite the confirmation by the 2nd respondent (the Senior Registrar of Titles) that the suit land has not been allotted to anyone and is thus open for allotment. The petitioner avers that several letters have been written to the 2nd respondent without any reply. It is pleaded that the 4th respondent (the Provincial Administration) has been, with the knowledge of the 1st respondent (District Land Registrar) and 2nd respondent (the Senior Registrar of Titles), been demarcating and allocating the suit land to third parties and that there is a real risk of the certificate of ownership being issued to persons who are not the rightful owners of the suit land. It is pleaded that if this is done, it will be in breach of the fundamental rights and freedoms of the petitioner as guaranteed by Section 70 of the repealed constitution for

the following reasons : that the petitioner's family and forefathers were in occupation of the suit land since time immemorial; that during the era of the colonial government, the inhabitants were forced to the outskirts and the land was allocated to one Mr. Osborne for a leasehold period of 99 years at the exclusion of the natives; that the leasehold title of Mr. Osborne expired in the year 2005 and the land has reverted to the Government in trust for the natives; that the 4th respondent has with the knowledge of the 1st and 2nd respondents, and without the consent of the petitioner, in blatant disregard to the subsisting native title of the petitioner's forefathers, subdivided the suit land into several parcels and is settling people on the same without considering the interests of the petitioner's family; that the demarcation and allocation of the suit premises to third parties to the exclusion of the petitioner is erroneous and ultra vires the powers of the respondents and should forthwith be cancelled; that the 4th respondent has gone as far as having the petitioner threatened and detained by the Administration Police in an effort to derail the petitioner from pursuing the allotment of the suit land in his favour.

3. The petitioner has further contended that as descendants of the indigenous inhabitants of the suit property, the native title to the suit land survived the entire colonial period and currently vests in them, and as such, the petitioner's family is entitled to be registered as owners of the suit property. The petitioner avers that the conduct of the respondents is unreasonable and discriminatory and is a denial of the petitioner's right to natural justice and due process unconditionally guaranteed by Section 70 of the repealed constitution and Article 7 of the Universal Declaration of Human Rights of which Kenya is a signatory. The petitioner avers that the refusal by the British Colonial Government and the Kenyan independence Government to acknowledge and give effect to the natives' land claims, despite great and relentless vigilance by their representatives in agitating for their rights, did not extinguish or diminish their native title subsisting in the suit land and which holds valid to date, and is vested upon them (the petitioner and his family) as descendants of the original inhabitants of the suit land. The petitioner avers that the resettlement of other people on the suit land is wrongful and amounts to fraud and that it is unconstitutional and an abrogation of the native people's just entitlement, and against Section 82 (2) of the repealed constitution, since the native descendants are able and willing to take over those lands. It is pleaded that the acquisition of the suit land by other persons as against the petitioner's family, who it is said are the historical indigenous inhabitants of the suit land, is in total breach of Article 17 of the Universal Declaration of Human Rights. It is averred that the State has to provide effective mechanisms to redress the effects of dispossession but is instead perpetuating the same.

4. It is pleaded that the failure by the successive independent Kenya Government to redress them for the alienation of their land has denied them equal opportunity for development as other Kenyan communities. The petitioner has stressed that the violations above can only be redressed by repossession of the suit land and resettlement of the petitioner and his kinsmen in the suit land.

5. In the petition, the petitioner has asked for the following orders (slightly paraphrased for clarity and brevity) :-

(a) A declaration do issue that the Petitioner as the legal representative and the dependants of the Estate of Lwambi Mwalambe Beponda are the lawful and rightful owners of the suit land and are entitled to repossession thereof to the exclusion of all others who should be declared trespassers.

(b) Orders compelling the 3rd respondent to forthwith allot and issue letters of allotment for Plot No. 1043/111/1 – 26 Mazeras Kaloleni District in favour of the Petitioner and the Estate of Lwambi Mwalambe Beponda.

(c) Orders compelling the 1st respondent, through the 2nd respondent, to forthwith issue the Petitioner with a certificate of ownership of title for the suit land.

(d) A permanent injunction restraining the 3rd respondent from allotting or issuing letters of allotment in respect of the suit land to any other person other than the petitioner.

(e) A permanent injunction restraining the 1st and 2nd respondents from issuing a Certificate of ownership and title documents in respect of the suit land to any other person other than the petitioner.

(f) Eviction orders against any occupants other than the petitioner's family thereby granting vacant possession of the suit land to the petitioner.

(g) Order of assistance of the officer in charge, Kaloleni/Mariakani Police Station, and the Provincial Administration Kaloleni, to supervise and provide security during the eviction process.

(h) A declaration that the petitioner is entitled to compensation and/or restitution from the Kenyan Government for the endorsement of the wrongful dispossession of the suit land by the British Government, the deprivation of personal property for the period not less than 99 years and for the refusal to allot and grant the petitioner a certificate of ownership.

(i) A declaration that the Kenyan Government has breached their fiduciary duty owed to the petitioner by failing to provide effective mechanisms and redress for the wrongful alienation of the suit property.

(j) Order mandating the Kenyan Government to repossess the parcels of land that have been registered to other persons, other than the petitioner, through any means at its discretion and in turn make the property available for the use by the petitioner and the certificates issued irregularly to other third parties be revoked and fresh certificates of title be issued in favour of the petitioner.

(k) Orders declaring the summons by the 4th respondent and consequent detainment by its agents as unlawful and the court do issue protection orders restraining the 4th respondent by itself, its agents/servant, from arresting or interfering with the petitioner's quiet and peaceful occupation of the suit land.

(l) In any event, the costs of and incidental to this petition be awarded to the petitioner.

(m) Interest on (h) and (l) above at court rates.

(n) Such other or further orders as this Honourable Court may deem fit and just.

6. The petition is supported by the affidavit of the petitioner. In the affidavit, he stated that he is conversant with the history of the suit land. He deposed that his family/forefathers have been in occupation of the suit land since time immemorial, and that this can be proven by recorded witness statements made in the Magistrate's Court back in the year 1925 and photos of burial sites of his forefathers and derelict buildings, as evidence of occupation. He annexed what he described to be copies of statements made in court and some photographs. He deposed that during the colonial era, the suit land was allocated to one Mr. Osborne for a leasehold title of 99 years which title expired in the year 2005. No title was however annexed. He annexed several letters written asking to be allotted the suit land which he said he has not received any response to. He annexed "summons" by the 4th respondent to support the claim that he has been threatened and detained. He asserted that the demarcation of the land and allocation to third parties to the exclusion of his family is erroneous.

7. On 28 February 2011, the court (Odero J) issued orders restraining the respondents from allocating or issuing letters of allotment in respect of the suit land pending hearing of this petition. On 23 March 2012, the court (Kasango J), issued orders for the petitioner to advertise the petition in the Daily Nation newspaper for those who may be interested in this matter to file their appearances and affidavits if any. An advertisement was duly placed on 25 June 2012 upon which six persons filed to be enjoined as interested parties in this suit. I have seen the name of Ali Abdalla Said, Saumu Rashid, Fatuma Said Omar, Hanter Ahmed Adam, Nusra Abbas, Jaffer Abdulrahman Doka, and Abdulrahman Ali, as interested parties who filed appearance through the law firm of M/s Kilonzo & Aziz Advocates. Saumu Rashid, later appointed the law firm of M/s J.S Chidzipha & Company Advocates to represent him. On 12 September 2012, the interested parties filed an answer to the petition and inter alia pleaded as follows :- that the letters of administration issued in Mombasa HCCC Succession Cause No. 385 of 2005 does not accord any right of ownership to the petitioner in regard to the suit land; that the interested parties are the lawful owners of the suit land having acquired it in 1926 vide the provisions of the then Crown Lands Ordinance; that the interested parties have occupied the suit land since the colonial era and have been issued with letters of allotment thereto; that the letters of allotment were issued by the Government of Kenya in 1996 for 99 years, which 99 years have not lapsed; that the suit land has not been compulsorily acquired by the Government; the petitioner cannot lodge a constitutional claim on a property which has been allocated to private individuals; that the petitioner's claim is bad in law and the end result will lead to denial of the right to own property now vested in the interested parties. The interested parties asked that the petition be dismissed and they be issued with registration documents for the suit land.

8. In addition, Saumu Rashid, the 2nd interested party, filed a replying affidavit on his own behalf and on behalf of the 1st, 3rd – 6th interested parties. He deposed inter alia that the 1st – 6th interested parties claim the land, as their lineage obtained ownership and possession of the land vide an agreement entered into between the Land Officer of the Colony and Protectorate of Kenya and one Hassan Mussan. He annexed a copy of an agreement dated 1 July 1926. He deposed that following this agreement, the lineage of the family of the interested parties occupied the land in 1926. On 18 October 1991, they raised concern of threats from the petitioner and applied for registration. In 1996, their parents applied for and were allocated several parcels of land. He annexed a bundle of allotment letters to the Plots No. 22, 12, 18 24 , 11 and 9. He deposed that on 24 July 1995, one Hassan Musa paid a sum of KShs. 71,795/= in respect of the grant for the Plot No. 12. On 29 October 1996, the District Officer confirmed to the interested parties that the Government Surveyor was slated to survey the suit land. He deposed that in April 2010, a survey was conducted and it was confirmed that all the 26 plots comprising the disputed land were allotted to the Nubian community. He annexed a survey report dated 14 April 2012. He deposed that Kenya Pipeline Company sought to acquire part of the suit land and directly paid compensation to the interested parties. He annexed copies of documents in respect of the acquisition. He deposed that the interested parties, given their occupation since time immemorial, have acquired a constitutional right to the suit land. He deposed that the petitioner does not even dwell on the suit land and that there are no burial sites on it.

9. The State Law Office on 12 November 2012, on behalf of the respondents, filed Grounds of Opposition as follows :-

(i) That the petitioner did not inherit anything from the estate of the late Lwambi Mwalambe Beponda as the said deceased had no property to devolve.

(ii) That this Honourable Court lacks jurisdiction to allocate the land in issue or register titles thereto.

(iii) That the deceased had no registrable interest in the Plot No. 1043/III.

(iv) That no evidence has been adduced to support the petitioner's or the deceased's claim over the suit property.

(v) That orders of eviction sought against unknown and unnamed occupants of the suit property cannot be granted as prayed such orders would be unconstitutional for being in violation of the said persons' fundamental rights granted in Chapter four to the Constitution of Kenya 2010.

(vi) That this Honourable Court cannot be expected to issue orders in vain, without a proper legal basis.

(vii) That since the petitioner does not own the suit land in the first place they are not entitled to any compensation whatsoever.

10. On 4 October 2012, parties agreed that the matter be disposed of by way of viva voce evidence. Parties were thus granted leave to file statements of their witnesses. The hearing commenced on 1 November 2017 before Komingoi J, and subsequently by Anne Omollo J who was the Presiding Environment and Land Court Judge at the time. She was transferred in the year 2019 after which I took over the matter. By then the petitioners and the respondent had given their evidence.

11. PW-1 was Chai Lwambe Mwalambe, the petitioner. He was born in the year 1955. He testified inter alia that the land in issue measures 73 acres. He testified that Lwambi Mwalambe Beponda (the deceased) resided in the land since the 1900s. He died in the year 1999. He stated that the land was on leasehold and the lease had not expired. He had a map sheet for the land which he produced as an exhibit and he

also produced the alleged proceedings before the Magistrate in the year 1926. He testified that the land has no title yet and that the original lease expired in the year 2005. He testified that after the lease expired, the land was allocated to other people who are now on the land. He testified that they (he and the others he represents) were born on the land. He stated that they (interested parties) were issued with the letters of allotment illegally. He testified that when they (interested parties) entered the land, the original lease had not yet expired. He stated that Mr. Osborne lived on the land before and that his father showed him the boundaries. He stated that the interested parties were brought in by Mr. Osborne. He claimed that he (petitioner) lives on the land with his family and that the land adjudication officers have never come to the land to allocate it to other people.

12. Cross-examined, he stated that when his father died in the year 1999, the lease to Mr. Osborne was still subsisting. He never showed the court that handled the succession matter of the Estate of the deceased any lease or copy of title deed. He affirmed that his father and grandfather held no title deed to the land. He contended that the interested parties were issued with allotment letters while Mr. Osborne's lease was still subsisting. He testified that there are now many people residing on the suit land. He asserted that when Mr. Osborne's lease expired, the land ought to have reverted to the natives. He was recalled to adduce additional evidence and he inter alia stated that the interested parties were given the suit land on the basis of the lease held by Mr. Osborne. He claimed to be living on the land with his family although he did state that the interested parties (Nubians) live on the land as squatters. He was questioned on the lease that he claimed Mr. Osborne held but he did not avail any lease. He claimed to have three houses on the plot No. 15 within the disputed parcels of land.

13. PW-2 was Thomas Lwambi Mwalumbi. He is a younger brother to the petitioner. He testified that the disputed land belonged to his grandfather. He stated that his grandfather left a lease with his father who later handed it to the petitioner. He claimed to be one of the beneficiaries of the land. Cross-examined, he testified that his grandfather had died by the time he was born. He conceded that he does not have a copy of the lease agreement. He testified that they do not live on the land as the persons who reside on it are of Nubian origin who were brought by the Government. He affirmed that among those who reside on the land is the 1st interested party. He himself lives in a place called Kisimani.

14. With the above evidence, the petitioner closed his case.

15. The 1st – 5th respondents did not call any witness and counsel submitted that they would rely on the Grounds of Opposition.

16. The 1st to 7th interested parties relied on the replying affidavit filed in answer to the petition and also gave oral evidence. The 1st interested party testified that their parents were fighters in the 1st and 2nd World Wars. In 1926, they were given the suit land. They are children and grandchildren of the original allottees who are now deceased. He stated that they now reside on the suit land. He stated that they have been issued with allotment letters. He stated that the land was given to the Nubians. He himself was born on the suit land. Cross-examined, he inter alia stated that they are yet to be issued with title because not all persons have made payment as stipulated in the allotment letters. He testified that the suit land is known as the Nubian Settlement Scheme. He mentioned that the land of the petitioner is across the suit land. The 7th interested party on his part testified that he bought the Plot No. 15 from one of the Nubian owners and he now resides in it. He testified that he knew the father of the petitioner and his land was across the river from the suit land.

17. With the above evidence, the interested parties closed their case.

18. I invited the parties to file written submissions. I have take note of the written submissions of Mr. Gekonde, learned counsel for the petitioners, Mr. Makuto learned State Counsel for the respondents, and the submissions filed by the interested parties now acting in person. I have considered all of these before arriving at my decision.

19. In a nutshell, what the petitioner wants in this petition is to be allocated the land in which the interested parties reside.

20. The legal basis for this Petition is said to be Section 70 and 82 (2) of the repealed (pre-2010) Constitution, which were drawn as follows :-

70. Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely-

(a) life, liberty, security of the person and the protection of the law;

(b) freedom of conscience, of expression and of assembly and association; and (c) protection for the privacy of his home and other property and from deprivation of property without compensation,

the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

82 (2) Subject to subsections (6), (8) and (9), no person shall be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of the functions of a public office or a public authority.

21. Apart from the repealed Constitution, the petitioner has also based his petition on Articles 7 and 17 of the Universal Declaration on Human Rights. These two Articles are drawn as follows :-

Article 7.

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 17.

(a) Everyone has the right to own property alone as well as in association with others.

(b) No one shall be arbitrarily deprived of his property.

22. I do not think one can argue that these rights are not important, or that they do not exist in our country. Indeed, Article 7 of the UDHR was domesticated through Section 82 (2) of the pre-2010 Constitution and is also contained in the 2010 Constitution within Article 27. There is certainly freedom from discrimination, and a person has every right to approach court, if he is of opinion that he is being discriminated. The right to own property was also recognised in the repealed Constitution under Section 75 and is contained in the current Constitution at Article 40. I therefore have no problem with the legal basis for this petition. The right against discrimination and the right to property, as I have said, were enshrined in the previous Constitution and even in the current dispensation, and if a person is of the view that these rights are being curtailed, he/she has every reason to approach the court for redress.

23. I will now turn to the facts presented, so that I can determine whether or not there has indeed been an infringement of the rights of the petitioner and the other descendants of the deceased.

24. A key plank of the case of the petitioner is the claim that the petitioner and his family, and I believe the descendants of the deceased, are resident on the suit land. I am not however so persuaded. PW-2 himself stated that *“we do not reside on the suit land. There are people from the Nubian community.”* I further note that in prayer (f) of the petition, the petitioner seeks orders of eviction, and in prayer (g) an order of assistance from the police to supervise the eviction. This implies that there are other persons on the ground who are in occupation of the suit land and these persons certainly do not comprise the petitioner nor his family or the family of the deceased. What this means is that the suit land is currently in occupation of other persons, and I believe that these comprise the interested parties and their families, or other persons of Nubian origin.

25. The case of the petitioner is further hinged on the claim that the suit land was owned by his forefathers and that the land was then leased for 99 years to one Mr. Osborne. The petitioner thus asserts that upon expiry of the lease, which he says occurred in the year 2005, the land ought to revert back to the descendants of the original native occupants who comprise the petitioner and his family. From the evidence tabled, I have nothing to demonstrate that the land in dispute was ever leased to one Mr. Osborne. I have not seen any lease. If the lease was from the colonial Government to Mr. Osborne, then certainly, there would have been a leasehold title issued to the said Mr. Osborne. The land would have been surveyed and mapped and a grant of title issued. I have no evidence of such. Certainly, no leasehold title was presented before me and it does actually appear that no grant has ever been made over the suit land. If the position of the petitioner is that it is his grandfather or forefather who issued to Mr. Osborne a lease, again, I have no lease agreement between Mr. Osborne and any of the predecessors of the petitioner. What the petitioner has presented are some documents said to be proceedings before a Magistrate of the year 1925. They comprise of two pages. If they are court proceedings, one cannot tell what sort of case was being tried, for there is no indication of the case number or parties in the suit. Neither are there any pleadings. The said documents are also not certified and nobody can tell their authenticity. But even if I am to assume that they are authentic, nowhere is there any reference in the said document of any lease from any of the forefathers of the petitioner to the said Mr. Osborne. Those two pages do not in any way demonstrate that there was any lease issued to Mr. Osborne by the forefathers of the petitioner. Even assuming that Mr. Osborne had a lease with the petitioner's grandfather, I have no evidence that the land leased was the suit land. The evidence of the petitioner, that the suit land was previously owned by the deceased or his forefathers, is in my view, all speculative and cannot support any claim that the land in dispute was ever owned by the forefathers of the petitioner.

26. What I can see from the affidavit of Mr. Saumu, is that the subject land was given to persons of Sudanese origin (the Nubians) who fought for the British in the 1st World War. I have an agreement dated 13 July 1926 between the Land Officer of the Colony and Protectorate of Kenya and one Hassan Mussa, from Yonte, Sudan, which is a lease to Mr. Mussa. That document states that Mr. Mussa is from Jubaland, and that upon cessation of Jubaland to the Italian Government, Mr. Mussa was given the option of remaining at Yonte under conditions which had been arranged with the Italian Authorities, or of moving into Kenya, and that he has opted to move to Kenya. The Land Officer then proceeded to grant Mr. Mussa a lease of a Plot No.22 for a term of one year to be renewed. I have further evidence that Mr. Mussa was a Private in the King's African Rifles and was discharged on 31 December 2018. It does appear to me that the British colonialists were settling some persons who served as soldiers after the 1st World War and they were settled on the suit land. There is certainly clear written evidence of a lease to a person of Nubian origin. The suit land is indeed variously described in the documents presented before me as *“Sudanese Pensioners Plots”*. The very surveyor who was instructed by the petitioners to survey the land, after the petitioner obtained a confirmed grant, in his letter dated 14 April 2010, did state that his investigations showed that the land was allocated to the Nubian Community and there is hardly any vacant parcel as claimed by the representative of the Estate of the late Lwambi Mwalambe Beponda. It is thus apparent to me that this land has actually been in the hands of the forefathers of the interested parties and other persons of Nubian origin since at least the year 1926. Given that position, can it be said that the Government was wrong in allocating this land to the occupants thereof? Can it be said that in allocating the suit land to persons of Nubian origin, the Government discriminated the petitioner and his family? Certainly not. If the Government proceeded to allocate the land to the petitioner, or the petitioner's family, or to other people, then it would mean displacing the very persons who are in occupation of the suit land, which would on the face of it be unfair. I therefore do not see the basis of the complaint by the petitioner that he has been discriminated or deprived of the right to property. It will be observed that Section 70 of the repealed Constitution, cited by the petitioners, does provide that the enjoyment of one's fundamental rights and freedoms *“does not prejudice the rights and freedoms of others or the public interest.”* In my opinion, if the Government acted to withdraw the interested parties, or other persons of Nubian origin from the suit land, then that would be prejudicing their fundamental rights and freedoms and would be contrary to public interest. In fact, it is now them who would have come to court to argue that their fundamental rights and freedoms have been curtailed, principally the right to own property.

27. But even assuming that the land was of the forefathers of the petitioner, that alone, does not mean that when the Government is allocating land, then the land must be allocated to the descendants of the original native occupants. It is a fact of life that land ownership changes.

Tenure of land also changes. The persons who originally owned land may no longer be in occupation of it because of various reasons. In Kenya, we faced colonialism at some point in our history, which resulted not only in the displacement of persons, but also in new regimes of land tenure that were never known before. Historical incidences have a way of creating new ways of life, new forms of land tenure, and even new States. After the 1st and 2nd World Wars, countries that were one got separated and others that were separate merged. People found themselves in States that were not there before. It is the same situation that our country faced during colonialism. There was displacement of communities from tranches of land that they previously owned. Some of these parcels of land are now settled by people from other communities. New occupants of land took over and have moved on with life. The reality is that it is not possible to revert back to the land tenure that was there in the pre-colonial period without causing extreme instability. Neither is it possible to say that there is “native land” that must be settled by people of a particular community. It is certainly not feasible to drum the theory that every person needs to go back to his “native” land, or land that his forefather held before the colonial period. That is not possible and would defeat public order and public interest. We are one Kenya and every person is at liberty to settle in any part of the country irrespective of his origin. The petitioner cannot expect that this court is going to tell the Nubians who have settled in Mazeras, where the land is situated, to go back to Sudan. That will be ridiculous. The Nubians have every right to settle in Mazeras, where the suit land is located, just in the same way the petitioner can buy land and settle in any part of this country. Thus, even assuming that the suit land was indeed owned by the forefathers of the petitioner, that fact alone, would not give the petitioner or the people he represents, the right to have that land. There is no law that says that land must be allocated to persons of the same lineage as the pre-colonial owners. Just because one’s forefather owned certain land, does not now mean that the current owners of it should be uprooted, so that a descendant of the pre-colonial owner is settled on it. It is not a deprivation of the right to property, for land not to be allocated to persons of the same lineage as the pre-colonial owners. It is indeed dangerous, and a threat to the very fabric of this nation, if we entertain such thoughts. We must be able to embrace all communities and must come to terms that we are one Kenya, though comprised of different communities, and any person, regardless of his origins, is at liberty to settle, or to be settled by the Government in any part of this country.

28. There is a claim in this case for the Government to compensate the petitioner for wrongful dispossession of land. The reality of the matter is that almost all communities were displaced from their native lands or suffered a deprivation of property in one way or another during the colonial period. I know of no obligation that this Government has to compensate persons for the deprivation of land caused by the British colonisers. If that were available, then almost every citizen of Kenya would be seeking compensation because we were all marginalised during the colonial period in one way or another. We are all victims of colonialism, but whether we, as citizens of this county have avenue for redress against the British, is not something that is within the scope of this case. I cannot, within the context of this petition, hold this Government responsible, assuming that the petitioner and his family were displaced and lost land during the colonial period.

29. I have not forgotten that the petitioner also anchored his petition on the claim that he has a confirmed grant from the High Court, which distributed this land to him and to his relatives. I am afraid that unscrupulous persons have now resorted to the succession court to defraud people of their land. It is not the first time that I am seeing a person waving a certificate of confirmed grant, and alleging that because the court has distributed the land to him, then it belongs to him. It is now one of the issues this court faces almost on a daily basis; people fraudulently inserting a land title and alleging to be part of the estate, when it never was, and then claiming that land by virtue of the said grant. That cannot hold. It is the same as a person waving a title deed in his/her name, without there being any basis for the ownership of the land described in that title. Waving a certificate of confirmation of grant without one having demonstrated the basis upon which the land contained in the grant was ever owned by the deceased and could thus be distributed as noted therein is not inviolable proof of ownership of land. In our instance, I have already demonstrated that there was no proof that the suit land was ever under the ownership of the deceased. It was an act of fraud for the petitioner to insert the suit land and claim it to be part of the estate of the deceased. The petitioner cannot thus succeed to have ownership of the land, merely because the confirmed grant listed the suit land as part of the estate of the deceased, when I can see for myself that it never was.

30. Before I close, I will address the issue that the petitioner was detained and thus deserves to be compensated. I have no evidence of detainment. The letter dated 10 February 2004 which the petitioner claims was a “summon” though titled as such, is nothing more than a letter asking the petitioner to report to the District Officer’s office. I see nothing wrong in that letter.

31. I really do not see the need of saying more. I think I have demonstrated that I am not persuaded that this petition is merited. It is hereby dismissed with costs to the respondents and to the interested parties.

32. Judgment accordingly.

DATED AND DELIVERED THIS 30TH DAY OF SEPTEMBER 2020.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

Delivered in presence of:

Mr Hezron Gekonde for the Petitioners

Mrs Winnie Waswa holding brief for Mr Makuto for the Respondent.

The interested parties acting in person.