



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL PETITION NO. 2 OF 2018

HENRY WAMBEGA & 733 OTHERS PETITIONERS

AND

THE HONOURABLE ATTORNEY GENERAL 1ST RESPONDENT

KATHINI SRPING WATER LIMITED 2ND RESPONDENT

COOPERATIVE BANK HOUSING SOCIETY..... 3RD RESPONDENT

CANNON ASSURANCE COMPANY LIMITED 4TH RESPONDENT

EDGE FARM LIMITED 5TH RESPONDENT

MOHAMED BIN ALI MOHAMED (GANDI) 6TH RESPONDENT

NAAMAN BIN ALI BIN MUSES 7TH RESPONDENT

NATIONAL LAND COMMISSION 8TH RESPONDENT

SAFEPAK LIMITED 9TH RESPONDENT

THE CHIEF LAND REGISTRAR 10TH RESPONDENT

JUDGMENT

(Petition by various persons claiming that they, or their forefathers, are the original inhabitants of the suit properties owned by the 2nd – 7th & 9th respondents and asserting a right to be settled in the same; petitioners claiming that they, or their forefathers, were violently evicted from the subject properties; petitioners claiming a right of native title to the land; historical injustices and the jurisdiction of the court and the National Land Commission; court also vested with jurisdiction though not always that in each case the court would take up jurisdiction depending on the nature of the case; no evidence that the petitioners or their forefathers were ever on the land; even if the petitioners or their forefathers were on the land, no right to the subject properties, merely by virtue of such historical occupation; constitution protecting private rights of ownership of land; petition dismissed)

A. INTRODUCTION AND PLEADINGS

1. This petition was filed on 23 January 2018 and amended on 30 July 2019. It is said to be brought pursuant to the provisions of Articles 2 (5), 10, 28, 40, and 63 of the Constitution of Kenya, 2010, and Article 17 of the Universal Declaration of Human Rights on the Right to Property, and Article 14 of the African Charter on Human and People's Rights. It is further said to be based on the doctrine of ancestral domain and/or inter-generational trust and contends a breach of constitutional rights by the refusal of the Government of Kenya to recognise and address the plight of the original occupiers, and/or descendants of the occupiers, and cumulatively the community, in relation to the following parcels of land being :- Plot No. 8 Section III MN, 9 Section III MN, CR 14107, CR 5606/14, and 7120/15 Subdivision 514 (Original No. 286/4/Section III MN) Plan No. 88144 of 5th August 1970, Sub-Division 437 (Original 15/1.2 & 286) 1 Sec III MN, CR 5692 Plot No. 1589/13 Section III MN, Plan No. 20800, Subdivision NO. 470 (Original NO. 5/3) Section III Mainland North, CR No. 13026/1, Transfer Registered as NO. 5770/19, Land Survey Plan No. 80138, Subdivision 4399 Original No. 15/4.5 & 286/3 Sec II/MN Plan No. 75772 CR 5692/4 and Plot No. 3781/III/MN CR No. 44069 which measure over 800 acres in total formerly said to be known as Jeuri Village

(hereinafter referred to as “the suit properties”).

2. The 1st respondent is the Government of Kenya, sued through the Attorney General. The 2nd respondent is a limited liability company. The 3rd respondent is a cooperative society. The 4th respondent is a limited liability company carrying out insurance business. The 5th respondent is also a limited liability company. The 6th and 7th respondents are individuals. The 8th respondent is the Commission established by the Constitution at Article 67 and among its functions is “to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress.” The 9th respondent is a limited liability company. The 10th respondent is an office in charge of the land registry. The 2nd, 3rd, 4th, 5th, 6th, 7th and 9th respondents are cumulatively the registered proprietors of the suit properties. In the petition, the petitioners have given the following history, which according to them, constitutes the factual background.

3. That on or about the year 1908, during the colonial period, the first titles to the suit properties were issued. They aver, although speculatively through stories passed through generation to generation, that only persons professing the Islamic religion, or coastal arabs, because of their advanced social network, exposure to education or announcements through mosques, were aware of the land registration process and thus became registered as owners of the suit properties, despite the indigenous community being in occupation of the properties. They claim that their forefathers did not have the knowledge that would have catapulted them to enforce their rights. It is said that several families existed in the suit properties being the following families :- Mwadzoya, Deche Kai, Mbega, Nyule, Dau Kombo, Gona Rua, Bechirume, Chief Khalfan, Salim Mwachabwe, Nzagu, Rajab, Shuli, Khamisi Rajab, Jamvi, Sudi Juma, Mwambui, Mungoma Ngala, Kea Sudi, Khamisi Mshipi, Mwagomba, Omar Ngaramiza, Mramba Mweni, Kitsao Madaro, Kavue, Mwalukumi, Mwadzombo, Bekifupi Maluka, Kiti Marera, Yusuf Juma, Shariff Said and other families. It is averred that the several families that existed in the suit properties utilized them for farming, residence, and graveyards, and had a shrine known as Kilimanjaro, with the ownership of the land being communal with no demarcation, save that the land was divided into residential areas, farming/grazing areas, and graveyards. It is averred that the graveyards and shrines were revered grounds for a link to the petitioners’ ancestors and forefathers.

4. It is pleaded that about the year 1960 to the year 1962, right through the year 1970, there were forced evictions of the occupants in the properties. It is averred that the evictions were forceful, violent, and with no basic regard to human rights, and that the property and crops of the occupants, including cash crops, mango and coconut trees, and houses, were utterly destroyed, with some community members being imprisoned in Malindi Prison. It is stated that in the year 1966, one Mzee Kiti Marera was arrested and the villagers stormed Kijipwa Police Station and that there were General Service Unit (GSU) officers who meted violence on the locals whereby others were arrested and locked at Nyali Police Station, notably Mazia Mwachote, Mungoma Ngala, Julius Mwandege among others.

5. It is said that to date, there has been no notable structural investment in some of the suit properties and that some are being rented out at a fee. It is averred that to date, there are trees planted by the forefathers of the petitioners, wells that were built for the community by the Portuguese which are still utilised by the locals, such as “Kisima Cha Mgombani”, which is said to be utilized by the 5th respondent for irrigation, and also “Kisima Cha Migandini” and Shrines, which are located in the property of the 4th respondent, and also remains of a mosque.

6. It is averred that the passing of the Constitution of Kenya, 2010, heralded a new dawn for the petitioners and that there was a general goodwill that historical injustices will be dealt with. It is further averred that Article 2(5) of the Constitution provides for general rules of international law to form part of the law of Kenya. The petitioners have pleaded that Article 17 of the Universal Declaration of Human Rights provides that everyone has a right to own property and that no one shall arbitrarily be deprived of property. They have also pointed at Article 14 of the African Charter on Human and People’s Rights that also safeguards the right to property. They have referred to the National Values at Article 10 of the Constitution, the right to human dignity under Article 28, and the recognition of community land under Article 63. They have also pleaded what they refer to as “ancestral domain rights.” They contend that being descendants of the original occupiers of the land their right to property has crystallised through the “doctrine of ancestral domain” or alternatively, through an “implied inter-generational trust.”

7. They state that their problems stem from the issuance of titles to the then registered owners without due regard to their occupation. They aver that there was attempt to explore a political solution, and one was through the passage of the Mazrui Lands Trust Act 1989, but this was declared unconstitutional by the High Court in the year 2012, because the process did not provide for compensation to the registered land owners. They plead that successive Governments have failed to remedy the situation and solve the land problem in the Coast region with particular emphasis on the subject parcels of land. They contend that their right to dignity has been infringed or denied, or is threatened, because inter alia, they cannot access the land to perform memorial services or the practice of placing headstones on the graves, carrying out sacrifices and libation. They aver that their right to property is infringed by failing to have the suit properties declared ancestral lands and/or trust land and that the 1st, 8th and 10th respondents have failed to pass legislation to solve the land problem in the suit lands, or to have the 2nd, 3rd, 4th, 5th, and 6th respondents compensated and the land adjudicated under the Land Adjudication Act.

8. The petitioners seek the following prayers :-

- a. A declaration that the Petitioners’ right to property as set out under Article 40 of the Kenyan Constitution has been violated by the respondents.
- b. A declaration that the Petitioners’ right to dignity as set out under Article 28 of the Kenyan Constitution has been violated by the respondents.
- c. A declaration that the suit properties are ancestral lands.
- d. A declaration that the petitioners are entitled to have the suit properties declared trust land by virtue of the history of the land.
- e. A declaration that the 2nd, 3rd, 4th, 5th, and 6th respondents be compensated and the land be declared trust land and be adjudicated

as per the Land Adjudication Act to ascertain the original occupiers descendants' interest in the land.

f. The costs of the petition.

g. Any other orders the court may deem fit.

9. There is annexed to the petition a list of the petitioners and the particular parcels of land that they claim.

10. I have not seen a response from the 1st and 10th respondents represented by the State Law Office.

11. The 2nd respondent filed a replying affidavit sworn by Elizabeth Wairimu Waiyaki, its director. She has deposed inter alia that in the year 1978, one Fredrick Lawrence Munyua Waiyaki (now deceased) purchased the land title CR No. 14107 which is Subdivision No. 437 (Original No. 15/1-2 and 286/10) of Section III Mainland North, Subdivision No. 513 (Original No. 286/4) of Section III Mainland North and Subdivision No. 514 (Original No. 15/7) of Section III Mainland North. The deceased charged the land to National Bank of Kenya to secure a loan facility. In the year 2014, the land was transferred to the 2nd respondent company. She has averred that title is conferred through the process of allocation, transfer and registration, which the 2nd respondent complied with. She has deposed that neither the petitioners nor their forefathers ever occupied the land of the 2nd respondent and that the allegations of forceful evictions amount to hearsay. In her view, the entire petition is generally speculative and not factual, and is based on stories which cannot be verified, or proved, in a court of law. She deposed that their land has never been declared community land. She has further stated that the alleged violations took place in 1908 or thereabout when the current constitution was not in force and it cannot be applied retrospectively. She is of opinion that the petitioners are out to unjustly enrich themselves and she wonders where they have been all these years.

12. The 3rd respondent filed an affidavit sworn by John Kimutai Ng'eno, its manager. He deposed that the petitioners have not annexed anything to demonstrate that the parcels of land that they claim actually exist. He has deposed that the 3rd respondent is the registered owner of two parcels of land bordering each other being Subdivision No. 438 (Original No. 15/3 and 286/2) Section III Mainland North and Subdivision No. 439 (Original No. 15/4, 15/5 and 286/3) Section III Mainland North and he annexed the titles thereof. He stated that the 3rd respondent purchased Subdivision No. 438 from Mohamed Hyder Matano and Subdivision No. 439 from Samira Mohamed Hyder through an agreement for sale dated 7 October 2010. He has averred that the petitioners have not laid claim to Subdivision No. 438, and in so far as Subdivision No. 439 is concerned, it is only mentioned in generic allegations that it was occupied by over 183 families who were brutally evicted and that there are graves therein. He deposed that the court (Omollo J) visited the site and there was not a single grave seen nor was there any evidence of occupation by the petitioners. He has deposed that there is no way that the 3rd respondent would have violated the rights of the petitioners as it acquired the properties in the year 2010. He further averred that there is no reason why the petitioners side stepped the mechanism in Section 15 of the National Land Commission Act.

13. The 4th respondent filed a replying affidavit sworn by Lucrezia Midega, a principal officer of the 4th respondent. She has deposed that the 4th respondent is the lawful registered proprietor of the land parcel CR No. 5692 Plot No. 1589/13/III/MN having purchased it from Kijipwa Estates Limited on 10 December 1999. A copy of the title is annexed. It is averred that the 4th respondent is a bona fide purchaser and has sanctity of title. It is deposed that various suits have been filed by the petitioners including *Malindi HCCC No. 102 of 2012 (OS)*, *Jeuri Community Based Organisation through Kahindi Katana Mwango & Others vs Cannon Assurance K Ltd* claiming ownership of the land through adverse possession which suit was struck out with costs in a ruling dated 26 April 2013; *Mombasa HC Misc. Application No. 26 of 2013 (OS) Omar Kuto & Others vs Cannon Assurance K Ltd*, another claim for adverse possession which was struck out with costs on 20 March 2014; *Mombasa ELC No. 142 of 2014, Salim Bakari Mwinyi vs Cannon Assurance K Ltd & Others*, a pending suit seeking the land by way of adverse possession. She has averred that these multiple suits have caused the 4th respondent not to peacefully possess and quietly deal with its land. She has deposed that there is no proof that the several families listed in the petition exist or existed in the 4th respondent's property at any one time and that the petitioners have failed to provide past or present evidence of ownership of the 4th respondent's land. She has averred that the petitioners have not demonstrated any historical injustices meted out to them by the 4th respondent, nor demonstrated what right they may have over the property of the 4th respondent, or how those rights have been violated. It is averred that the allegation of historical injustices cannot be used to deny a party such as the 4th respondent its lawful title to land. She has further deposed that the land of the 4th respondent does not qualify to be termed as community land as defined by Article 63 of the Constitution, and that neither have the petitioners identified themselves as a community on the basis of ethnicity, culture, or similar community interests. She has averred that the petitioners have failed to demonstrate with any degree of precision what provisions of the Constitution have been violated by the 4th respondent.

14. In a further replying affidavit she has deposed inter alia that there are some persons comprising of 125 families who have invaded the land of the 4th respondent and occupy about 32 acres of it. It is deposed that in a meeting held on 16 December 2015 a settlement was reached, with the involvement of the 8th respondent (the National Land Commission), and the 125 families were settled on approximately ¼ acre per family, with the exception of two families who laid claim over a mosque and graves, and who were to be given 5 acres, or be compensated with the money equivalent, so that they can relocate to another area. It is deposed that Petitioner 307 and 328 were among those settled and allotted subdivisions Nos. 42 and 85 respectively. It is deposed that in the suit *Mombasa ELC No. 142 of 2014 (OS)* the court visited the land and made a finding that none of the plaintiffs (now the petitioners herein) were in occupation of the property.

15. The 5th respondent filed a replying affidavit sworn by Karim Amirali Alarakhia its director. He has deposed inter alia the 5th respondent is the registered proprietor of the land parcel Sub-Division No. 470 (Original No. 5/3) Section III Mainland North. The company acquired the land through a transfer dated 26 May 1980 from one Donald Graham Gebbett and Ilfra Norma Gebbett after a purchase. The sellers on their part acquired the land in the year 1962. He has deposed that the 5th respondent utilises the land for farming and they occupy the whole of the land measuring about 124 acres. He has deposed that there has never been any encroachment on the land whatsoever even by the petitioners. He believes that the petition is not backed by any evidence, is frivolous, unmeritorious, and without any basis in law, and should be dismissed.

16. On behalf of the 6th and 7th respondents, a replying affidavit was filed by Mohamed Naaman Aly. He has deposed that the person sued as the 6th respondent is deceased. He has deposed that the registered owner of the land parcel No. 9 Section III Mainland North was Ali Bin Mohamed alias Muses Mohamed (now deceased). He has stated that he consecrated this property to a Wakf created by him which Wakf was registered as against the title. A copy of the Wakf is annexed. He has deposed that this property is therefore trust property and cannot be purported to be Jeuri Village. He has deposed that neither the petitioners nor their forefathers or ancestors have ever occupied or possessed this property. He has deposed that the petitioners have failed to point out when the alleged eviction from Jeuri Village took place nor when the said families lived/existed on the subject property. It is stated that the petitioners do not have any ancestral or customary rights which require protection of the court as the subject property has always been private property. He has deposed that the purpose of the Wakf was to run a mosque and other affiliated religious purposes and that there is a mosque, namely Masjid Naima, and a fully fledged and functioning Madrassa. He has stated that the right to privately own property is protected in the Constitution. He is of the view that the claims of the petitioners are vague, illogical and ambiguous, and he wonders why the petitioners have sat on their alleged rights for over 60 years.

17. The National Land Commission filed Grounds of Opposition as follows :-

- a. That the petitioner has (sic) omitted to frame its (sic) case with precision as required under the High Court's pronouncement in the case of Anarita Karimi Njeru vs The Republic (1976-1980) KLR 1272. The petition fails the requirement as it does not state the alleged constitutional provisions violated by the 7th Respondent (now 8th respondent after the amendment of the petition) and the acts or omissions complained of with reasonable precision.
- b. That the issues raised in the petition herein are of the nature of historical land injustice as defined under Section 15 (2) of The National Land Commission Act, 2012.
- c. That the appropriate avenue for seeking redress arising out of a historical land injustice is by lodging a claim of historical injustice with the National Land Commission for admission and subsequent investigation.
- d. That the issues raised in the petition herein are therefore prematurely before this court.
- e. That the petition as against the Respondents has no merit and should therefore be dismissed.

18. The 9th respondent replied to the petition through an affidavit sworn by Tushar Shah, its director. It is deposed inter alia that it is the registered proprietor of the land parcel MN/III/4781 having acquired it from Pride Industries Limited in the year 2016. The said property was initially leased under Grant CR 44069 to Gharib Mohamed Ali and Abdalla Mohamed Ali, with the property being transferred to Pride Industries Limited in the year 2009. It is deposed that the 9th interested party is a bona fide purchaser for value. It is further deposed that the property was bought vacant and the 9th respondent has not evicted anyone from the property. Mr. Shah has deposed that the petitioners' generalised claims date back more than 6 decades and consist of bare assertions bereft of evidence. He has deposed that none of the allegations in the petition are aimed at the 9th respondent and no fraud has been alleged against the 9th respondent. He has deposed that the alleged doctrine of "ancestral domain" does not exist in Kenya. He has deposed that the 9th respondent has constructed warehouses on its property after taking a KShs. 250 million loan. He has deposed that there are no graveyards, wells, or shrines, on the property of the 9th respondent. He has deposed that if the petitioners were evicted 6 decades ago, they have not given any explanation for their silence and have thus slept on their rights. He urged that the petition be dismissed.

19. I directed that the petition be disposed of by way of written submissions.

B. SUBMISSIONS OF COUNSEL

20. Mr. William Kenga, learned counsel for the petitioners, inter alia submitted that the petitioners, including their forefathers, were in occupation of the suit lands since 1920s but were never issued with title documents, and upon Kenya becoming an independent State, they were forcefully evicted. He submitted that in regard to prayer (e) the same should be amended to reflect that compensation is sought from all the respondents. Counsel submitted that Article 22 (2)(b) and (c), and Article 258 (2)(b) and (c), of the Constitution, allow the petitioners, in addition to their own interest, to act in the interest of a group, class of persons or public interest in enforcing the Bill of Rights. He submitted that the petitioners represent themselves and the general community and descendants of the original occupiers of the suit properties. Counsel reiterated the historical background given in the petition. He also referred me to some various statements written by some of the petitioners. In reference to the Grounds of Opposition filed by the NLC, counsel submitted that the court is mandated to deal with historical land injustices. He submitted that the reply of the 2nd respondent shows that when the land was purchased by Mr. Waiyaki, the petitioners were on the land. He also referred to the 32 acres given to 125 families by the 4th respondent as proof that the petitioners have been on the suit lands. He submitted that the piecemeal attempts, to give back land to the people in occupation, is an admission that the petitioners and others were forcefully evicted from the suit lands. He submitted that lack of current actual occupation of the suit lands is irrelevant as what matters is the evidence of occupation and possession at the time of displacement and forcible eviction.

21. He submitted that the displacement and eviction took place between 1960 and 1979 which period is recognised by the Constitution. He submitted that any acquisition of land through displacement remains questionable, more so, under the Bill of Rights. He submitted that the evidence of the petitioners shows that the 6th and 7th respondents were welcomed into the suit lands but after a short stay processed ownership documents behind the petitioners' back and subsequently tortured and/or burnt the petitioners' houses, displacing and forcefully evicting them. He referred to the report of the Truth Justice and Reconciliation Commission in respect of historical land injustices as including those of Jeuri Village. He submitted that there is ample evidence that the petitioners were the persons previously occupying the suit lands and that now that they cannot access them and exercise their cultural rites, and thus their constitutional rights under Article 11 have been violated. He submitted that there is enough evidence that the petitioners and their forefathers were tortured and their houses burnt and that they were forcefully evicted. He submitted that the suit lands are ancestral land by virtue of their history. He submitted that Article 27 provides the right to equality and freedom from discrimination and similarly Article 30 prevents acts of slavery. He submitted that the

petitioners have been rendered slaves and subjected to servitude and are being treated as lesser human beings by the respondents. He submitted that their dignity has been prejudiced thus a violation of the right to dignity under Article 28 of the Constitution. He further submitted that their right to property under Article 40 has been violated and that the 1st respondent has failed to remedy the situation, say by legislation, to solve the land problem. He relied on various Human Rights reports and authorities including the South African case of *The Salem Community*.

22. Ms. E. M. Omulama also for the petitioners, in her submissions, inter alia submitted that this court has jurisdiction to entertain claims based on historical injustices. Counsel referred to Section 26 (1) of the Land Registration Act on the protection of title and pointed out the vitiating factors. She submitted that the respondents do not hold good title as the foundation of acquisition of their property was marred with violations of human rights and dignity of the petitioners and their families. She submitted that violations of human rights cannot be sanctified even with time. She submitted that the suit properties should be returned to the petitioners as their original owners.

23. For the 2nd respondent, Ms. Farida Jadi, learned counsel, submitted inter alia that the entire petition is generally speculative and not factual. She submitted that it is based on hearsays, beliefs and stories, which cannot be verified. Counsel submitted that the petitioners have failed to name the purported forefathers who were allegedly living on the suit lands and have not pointed out which generation they belong to. She submitted that the petitioners are on a fishing expedition and that none of the petitioners' family members ever lived on the land of the 2nd respondent. She submitted that a closer look at their identity cards shows that most of the petitioners were not even born in Kilifi and she referred me to a few of them who were born in Kwale, Matuga and Mombasa. She submitted that the petitioners have failed to state which property was used for farming, which for residential purpose, and which for graveyards. Counsel submitted that there are no graveyards in the land of the 2nd respondent, and that if any exist, they do not automatically belong to the alleged petitioner's forefathers, and could belong to the coastal Arabs. She submitted that the petitioners have failed to provide any evidence of forceful evictions done in the 1960s through 1970, and she pointed out that matters such as imprisonment have documentation. Counsel submitted that the petitioners have failed to show how the 2nd respondent has violated their constitutional rights. She contended that the petitioners are notorious for invading land, claiming ancestral ownership, with the aim of selling to third parties. She averred that the petitioners have permanent places of abode and ancestral homes. She referred to a letter by Hon. Ronald Ngala, relied upon by the petitioners, and submitted that it does not help the petitioners as it is not signed. On the evidence of the Assistant Chief of Kidutani Mawamba, she submitted that the said officer was in office in 1992 – 2007 whereas the alleged violations occurred before independence. She further pointed out that the witness has not annexed any records. She submitted that all documents annexed by the respondents do not show the land of the 2nd respondent. She further submitted that Mr. Waiyaki, the predecessor in title of the 2nd respondent, had every right to purchase land in any part of the country and that there were no people on the land when it was purchased. She submitted that an attempt to allocate land to people in occupation is not an admission that such people were displaced or evicted. She submitted that her client allocated 4 acres to squatters on humanitarian grounds.

24. Counsel submitted that Section 26 of the Land Registration Act protects title. She averred that the issues herein were settled by the National Land Commission in a letter dated 16 December 2015 and the petitioners could only approach court by way of Judicial Review. She submitted that the court does not have jurisdiction to determine historical land injustices pertaining to private land as the court's jurisdiction is not for fact-finding but enforcement and establishment of rights. It was submitted that the NLC has mandate to address historical injustices. Counsel referred to Section 15 of the National Land Commission Act (NLC Act) and the National Land Commission (Investigation of Historical Land Injustices) Regulations, 2017. It was submitted that the first port of call for historical injustice claims should be the NLC and a person aggrieved by the decision of the NLC can appeal to the ELC pursuant to Regulation 29. Counsel submitted that it was resolved that the petitioners be settled on 32 acres and thus wondered how the petitioners can claim that the issue is unaddressed. Counsel referred to the threshold to be met by S. 15(2) of the NLC Act.

25. The submissions of Mr. Billy K'Ongere, learned counsel for the 3rd respondent, Mr. Kevin Kinuthia, learned counsel for the 4th respondent, Mr. Khalid Salim, learned counsel for the 5th respondent, Ms. N.A. Ali learned counsel for the 7th respondent, and Mr. Abbas Esmail, learned counsel for the 9th respondent, more or less echoed what Ms. Jadi submitted above. I have not seen the need of rehashing their submissions, for as I have mentioned, they are more or less along the lines pronounced by Ms. Jadi. There was addition that the petitioners have filed various suits in the past which have either been dismissed or struck out. I was also referred to the court site visit in the suit Mombasa ELC No. 142 of 2014 (a claim for adverse possession over the suit properties which suit was withdrawn) where the court made a finding that the claimants were not in possession. It was further submitted that the delay in filing this petition is inordinate and that there has been no good reason given why the petitioners waited for so long to file this petition. There was submitted that there was no single document to demonstrate that there was ever a Jeuri Village covering over 800 acres. Jurisdiction of this court was also raised with arguments being that the petitioners ought to have presented their claim to the National Land Commission. I was referred to various authorities to support these submissions. I have taken note of all of these

C. ANALYSIS AND DECISION

26. Before I delve deeply into the matters raised, let me first address Mr. Kenga's submissions where he submitted that prayer (e) of the amended petition should be deemed amended. I will be very brief on this. I am afraid that counsel, while making submissions, is not at liberty to unilaterally amend pleadings. The simple reason for this is that the respondents would not have a chance to respond to the amendment. If the petitioners were of the view that there is an issue with one of the prayers in their petition, then they ought to have sought leave to amend, before parties made their final submissions. That amendment cannot be allowed and the amended petition will be decided on the basis of its current pleading. Let me also address one other preliminary issue raised by Ms. N.A. Ali, learned counsel, for the 6th and 7th respondents. She did point out that the 6th respondent had died long before this petition was presented and that this petition cannot be maintained against a deceased person. I agree. The suit against the named 6th respondent is a non-starter.

27. Having put that aside, I will now address the petition. Let me first start with the question of jurisdiction.

28. The petitioners have 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). The petitioners have argued that this court has jurisdiction. They have referred me to my own decision in

the case of *Kipsiwo Community Self Help Group vs Attorney General & 6 Others (2013)eKLR* and the Court of Appeal decision in the case of *Chief Land Registrar & 4 Others vs Nathan Tirop Koech & 4 Others (2018)eKLR*.

29. In the *Kipsiwo case*, a Self-Help Group filed suit claiming that their forefathers had historically been in occupation of some specified land and that they were forcefully evicted and they now wished to have title to the land. A preliminary objection was raised, firstly, that the case was improperly filed by an entity with no capacity to sue, and secondly, that the Court had no jurisdiction as the right forum to address historical injustices would be the NLC. On the first objection, I held that the case was actually not properly filed because the Group had no capacity to sue or to be sued and I struck out the suit on that ground. On the question of whether the Court had jurisdiction, I held that though one could approach the NLC for redress, there was nothing to bar the jurisdiction of the Court. My dictum was 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. I think, so long as one can cite a violation of a Constitutional provision or Constitutional right, then such person may initiate a Constitutional petition and seek redress. I don't think that the basis of such complaint is important. Such complaint could be based on any foundation. It could be, as in our case, a historical injustice, or even a continuing land injustice..

Thus, in as much as I agree that the NLC has a mandate to look into historical injustices, I do not agree that an individual cannot commence a Constitutional petition, on the foundation of historical land injustice. In so far as the jurisdiction of ELC, is concerned, the ELC will have jurisdiction, if the basis of the case is land and environment, including a matter founded on claims of historical land injustices.”

30. In the case of *Chief Land Registrar & 4 Others vs Nathan Tirop Koech & 4 Others*, the petitioners filed suit claiming that they had been deprived of ownership of certain land without compensation. They averred that they were registered as owners of the land but the Government acquired it without paying compensation. The Court after hearing the dispute made an order for compensation which the State appealed. Within the appeal, counsel for the NLC submitted inter alia that it is the NLC which is mandated to deal with historical land injustices under Article 67(2) (e) of the Constitution. In addressing this point, the learned Judges of the Court of Appeal stated as follows :-

“75. On the question whether a court should await investigations 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. Our conviction stems from a reading of Article 67(2) (e) of the Constitution. The Article provides that the NLC can investigate “present or historical” land injustices. We lay emphasis on the word “present.” If the NLC had an initial and exclusive mandate, it would mean that all present cases on land injustices can only be handled by the NLC and not courts of law. This would prima facie render the *Environment and Land Court* redundant. We do not think this was intended to be so. Our view is fortified by Section 15(3)(b) of the *National Land Commission Act* which permit the *Environment and Land Court* to deal with historical injustice claims capable of being addressed through the ordinary court system.

76. Further, there is nothing in the 2010 Constitution or in the *National Land Commission Act* ousting the jurisdiction of the High Court or barring a person from presenting a petition before a court in relation to a claim founded on historical injustice...”

31. Counsel for the respondents, on the other hand, referred me to the cases of *Ledidi Ole Tauta vs Attorney General & Others (2015) eKLR* and *Kenya National Chamber of Commerce & Industry – KNCCI (Muranga Chapter) & 2 Others vs Del Monte Kenya Limited & 3 Others*. In the case of *Ledidi Ole Tauta* the petitioners, of Maasai descent, claimed that their forefathers owned some certain land falling within Ngong Hills, before the colonial period, and that they should thus be declared to be entitled to the same. A preliminary objection was raised and in addressing the same, the court made the following dictum :-

“We also note that the petitioners (sic) claim to the land is predicated on what the petitioners claim were historical injustices visited on the community by the colonial masters who required that they move out of what they claim were ancestral lands to pave way for white settlement. We do not think the court would be the right forum for the petitioners to ventilate their claim which is founded on historical injustices.

The Constitution acknowledged there could have been historical injustices in the manner land issued were handled by past regimes and hence among the functions and mandate of the National Land Commission established under Article 67 (1) of the Constitution is to investigate historical injustices and to make recommendations for redress... In our view it's the National Land Commission that has the mandate to investigate into historical land injustices and make appropriate recommendations for redress. The court is not the appropriate organ to carry out the investigation and/or inquiry and where the law has made provision for a state organ or institution to carry out a specific function that institution should be allowed to carry out its mandate. The court should not usurp the roles of other state institutions. We therefore are of the view, it was premature on the part of the petitioners to come to court without either exhausting the process of obtaining a degazetement of Ngong Hills Forest as a state forest under the provisions of the Forest Act and/or having the National Land Commission exercise its mandate under Article 67 (2) (e) of the Constitution.”

32. In the *Kenya Chamber of Commerce v Del Monte* case, the plaintiffs filed suit claiming that their forefathers lived on land owned by the 1st defendant and that they were deprived of the land during colonialism. They asked the court to redeem their historical rights by making an order for 1,500 acres to be excised from the land of the 1st respondent and be allotted to them. A preliminary objection was filed that the court has no jurisdiction to determine the claim which was based on historical injustices. In determining the question, Kemei J, referred to the decision in the case of *Nathan Tirop Koech* case, and found that the jurisdiction of the ELC is wide and can encompass historical land injustices.

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.

34. With regard to historical injustices and the National Land Commission, the Constitution at Article 67 (2) (e) does provide 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.” The function was embodied in Section 15 of the NLC Act. The original Section 15 of the NLC Act, Act No. 5 of 2012, (before amendment in the year 2016) provided as follows :-

The Commission shall, within two years of its appointment, recommend to Parliament appropriate legislation to provide for investigation and adjudication of claims arising out of historical land injustices for the purposes of Article 67 (2)(e) of the Constitution.

Thus, whereas the function to attend to historical injustices was noted, the process of doing so was not elaborated. This was done in 2016 through The Land Laws (Amendment) Act, 2016, which commenced on 21 September 2016. The purpose of this Amendment Act, as noted in its preamble, was to inter alia give effect to Article 67 (2)(e) of the Constitution, which, as we have seen, relates to the function of the NLC on historical injustices. The Amendment Act deleted the old Section 15 and replaced it with a new Section 15 drawn as follows :-

15. Historical land injustices

1. Pursuant to Article 67 (3) of the Constitution, the Commission shall receive, admit and investigate all historical land injustice complaints and recommend appropriate redress.

2. For the purposes of this section, a historical land injustice means a grievance which—

- a. was occasioned by a violation of right in land on the basis of any law, policy, declaration, administrative practice, treaty or agreement;
- b. resulted in displacement from their habitual place of residence;
- c. occurred between 15th June 1895 when Kenya became a protectorate under the British East African Protectorate and 27th August, 2010 when the Constitution of Kenya was promulgated;
- d. has not been sufficiently resolved and subsists up to the period specified under paragraph (c); and
- e. meets the criteria set out under subsection 3 of this section.

3. A historical land claim may only be admitted, registered and processed by the Commission if it meets the following criteria—

- a. it is verifiable that the act complained of resulted in displacement of the claimant or other form of historical land injustice;
- b. the claim has not or is not capable of being addressed through the ordinary court system on the basis that—
 - i. the claim contradicts a law that was in force at the time when the injustice began; or
 - ii. the claim is debarred under section 7 of the Limitation of Actions Act, (Cap. 22) or any other law;
- c. the claimant was either a proprietor or occupant of the land upon which the claim is based;
- d. no action or omission on the part of the claimant amounts to surrender or renouncement of the right to the land in question; and
- e. it is brought within five years from the date of commencement of this Act.

(4) A claim alleging historical land injustice shall be permissible if it was occasioned by—

- a. colonial occupation;
- b. independence struggle;
- c. pre-independence treaty or agreement between a community and the government;
- d. development-induced displacement for which no adequate compensation or other form of remedy was provided, including conversion of non-public land into public land;
- e. inequitable land adjudication process or resettlement scheme;

- f. politically motivated or conflict based eviction;
- g. corruption or other form of illegality;
- h. natural disaster; or
- i. other cause approved by the Commission.

(5) When conducting investigations under subsection (1) into historical land injustices the Commission may—

- a. request from any person including any government department such particulars, documents and information regarding any investigation, as may be necessary; or
- b. by notice in writing, addressed and delivered by a staff of the Commission to any person, direct such person, in relation to any investigation, to appear before the Commission at such time and place as may be specified in the notice, and to produce such documents or objects in the possession, custody or under the control of such person and which are relevant to that investigation.

(6) Where a complainant is unable to provide all the information necessary for the adequate submission or investigation of a complaint, the Commission shall take reasonable steps to have this information made available.

(7) If at any stage during the course of an investigation, the Commission is of the opinion that the resources of the Commission may be more effectively utilized if all claims within a given area or township were to be investigated at the same time, the Commission shall cause to be published in the Gazette or in such other manner as the Commission may deem appropriate, a notice advising potential complainants of the decision and inviting them to lodge claims within a period specified in such notice.

(8) A claim in respect of a matter contemplated in subsection (7) shall not be lodged after the expiry of the period specified in the said notice.

(9) The Commission, after investigating any case of historical land injustice referred to it, shall recommend any of the following remedies—

- a. restitution;
- b. compensation, if it is impossible to restore the land;
- c. resettlement on an alternative land;
- d. rehabilitation through provision of social infrastructure;
- e. affirmative action programmes for marginalized groups and communities;
- f. creation of wayleaves and easements;
- g. order for revocation and reallocation of the land;
- h. order for revocation of an official declaration in respect of any public land and reallocation;
- i. sale and sharing of the proceeds;
- j. refund to bona fide third party purchasers after valuation; or
- k. declaratory and preservation orders including injunctions.

(10) Upon determination of a historical land injustice claim by the Commission, any authority mandated to act under the redress recommended shall be required to do so within three years.

(11) The provisions of this section shall stand repealed within ten years.

35. It will be seen from the above, that the NLC has wide jurisdiction on historical injustices. I would say that when it comes to the choice of filing a claim before the NLC or before the Court, one needs to make an assessment of what task is required. If the facts are contested, the number of persons elaborate and not easy to verify them, and where a thorough investigative process is going to be needed, then probably the court would not be the best forum and it would be best that the NLC handles the matter. If a person files such suit in court, the court, on being moved, or on its own volition, can refer the matter to the NLC for determination, rather than dismissing it outright. However where facts are clear, the issues uncontested, and what is needed is for the court to determine the rights violated and the nature of redress, or the legal rights of the parties, then a court is at liberty to entertain the suit and determine it on its merits.

36. In the case at hand, the petitioners have opted to come to court and I have admitted the petition. I will thus proceed to determine it on merits.

37. The argument of the petitioners is that because their forefathers lived on the suit lands, and were dispossessed during the colonial period, or shortly thereafter, then they have a right to these parcels of land. Straight from the blocks, the respondents have attacked this claim, asserting that there is no evidence to prove such allegations. On this point, I must agree with the respondents. I am afraid that there is absolutely no evidence that any of the forefathers of the petitioners ever resided on the suit lands and I say this after having carefully gone through the evidence tendered by the petitioners. One cannot tell with precision and finality, which forefather of which petitioner resided in which land, and what sort of occupation such person had. Indeed, as pointed out by the respondents, some of the petitioners appear to have roots in Kwale and not within the site of the disputed land. There is a claim of dispossession, but absolutely no evidence of who was dispossessed, by whom, and when exactly this occurred.

38. Among the allegations of the petitioners is that the predecessor in title of the 6th and 7th respondent, one Mohamed Muses, was given 4 acres by the indigenous residents, but that he later carved out a large title for himself, and proceeded to torture the locals, by drawing their blood and selling it, and also selling them to slavery. It will be recalled that Mohamed Muses is the predecessor in title of the 6th and 7th respondents. First, other than merely stating that Mohamed Muses was allotted 4 acres by the locals, there is absolutely no evidence to back up this allegation. I have in fact taken the trouble of looking up at the title relating to Mohamed Muses which is the Plot 9 and No. 10 Section III Mainland North. I have seen that the first registered proprietor was not even Mohamed Muses. What I can see is that Mohamed Muses purchased the land in the year 1938. This completely obliterates the allegation that Mohamed Muses was given 4 acres which he later expanded illegally. I am pointing this out to demonstrate that the allegations of the petitioners are completely unfounded.

39. Apart from the above, it will be recalled that in the petition, it was claimed that some people were imprisoned unfairly and that there was a raid at Kijipwa Police Station. Specifically, it was pleaded that one Kiti Marera was arrested in the year 1966 and placed at Kijipwa Police Station. There is also claim of others being locked up in Nyali Police Station. As pointed out by counsel for the respondents, there is always documentation when a person is booked in a police station or imprisoned. There is no such evidence presented.

40. The fact of the matter is that the petitioners have not demonstrated any historical connection to the suit lands. It has been held in various decisions that when one is presenting a constitutional petition, then he must back it up with cogent evidence. Mr. K'Ongere, learned counsel for the 3rd respondent, and Mr. Kinuthia, learned counsel for the 4th respondent, specifically referred me to Court of Appeal decision in the case of *Monica Wangu Wamwere vs The Attorney General (2019)eKLR* to emphasise this point and I think the case is apt in our circumstances. In that case, the petitioner claimed to have suffered torture during the Moi era. This was refuted by the respondent. The court was not persuaded that there was any evidence of torture provided. On appeal, the court of appeal had this to say :-

“We respectfully agree and reiterate the finding of the learned Judge that for there to be torture certain aspects of the claims need to be proven in court and from the record which we have carefully and anxiously considered, it is clear that the appellant failed to prove that she was severely injured. She did not produce an iota of evidence to convince the court of her untold suffering as the mother to two political activists. The learned Judge correctly expected the appellant to produce medical records to corroborate the claims.”

41. I am in full agreement with the above dictum. The petitioners in this case needed to do more than just state that their forefathers were displaced and tortured. They ought to have provided cogent evidence of this, and there is none in this case, save for hearsays which cannot be proved. In fact some of the claims of the petitioners, such as those against the forefather of the 6th and 7th respondents, sound to me like folklore. The slave trade was not there in the 1940s or 1950s in Kenya, and if there was any drawing and selling of blood, that would be criminal, even under the colonial laws.

42. The petitioners have not given this court any generational tree to identify their ancestry and demonstrate that it is actually their forefathers who were occupying the suit lands. There is no evidence that any of the claims of torture occurred. Neither is there any evidence of imprisonment. It is indeed impossible to hold that any of the events that are claimed by the petitioners actually occurred. It is also impossible to connect the petitioners in any way to the suit lands. They have of course claimed that there are graves on the land, which is contested, but even assuming that there are graves on the land, there is no evidence that such and such grave is for the father or grandfather of any of the petitioners. Those could be graves of any person. I have looked at the site notes of Justice Omollo who visited the disputed parcels of land and her conclusion was that none of the claimants who constitute the petitioners herein were on the land. What she observed were developments made by the current proprietors of the land.

43. I appreciate that there is a strong probability that some persons were indeed displaced by the colonialists on the suit lands but I have nothing before me that the persons so displaced were the forefathers of the petitioners.

44. At the outset, I am afraid that the petitioners have hopelessly failed to tender to this court any evidence of displacement, or any evidence of torture, either upon themselves or upon their forefathers. With this finding, there is no substratum in this petition and the same must thus be dismissed.

45. Assuming that I am wrong in my finding above, and assuming that there was displacement of the forefathers of the petitioners from the land, I will delve into the issue of “ancestral domain” that the petitioners hinge their petition on.

46. In a nutshell, the argument of the petitioners is that because their forefathers lived on the suit lands and were displaced from them, then it follows that the petitioners, as descendants of the original inhabitants, have a right to be settled on these parcels of land. Counsel for the petitioners referred me to the South African case of *The Salem Community*. What counsel presented before me was a decision of the South African Land Claims Court (LCC 217 of 2019), a decision on leave to appeal, and the decision on appeal rendered by the Supreme Court of Appeal of South Africa, Case No. 20626/14, *The Salem Party Club & 16 Others and The Salem Community & 8 others*. I have read the decisions. At the outset, I must say that we must be careful when citing decisions from other jurisdictions, because our laws may be very different. I am no expert in South African law, and I pray to be forgiven for any shortcomings in my understanding of the South African law.

What I have gathered is that *The Salem Community* case was based on Section 25 (7) of the South African Constitution. Section 25 deals with the right to property and Section 25 (7) provides for historical redress. It is drawn as follows :-

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

47. South Africa also has the Restitution of Land Rights Act 22 of 1994 (later amended) to implement the provision of Section 25 (7) of its constitution. *The Salem Community* case was based on the right in Section 25 (7) of the South African constitution and the Restitution of Land Rights Act 22 of 1994. It is thus a case that was decided within the framework of a distinct constitution and a distinct law. What we have in Kenya is the National Land Commission Act for purposes of redress of historical injustices and it is important that we restrict ourselves to what is provided in our constitution and our laws. We must appreciate that different countries, given their varied backgrounds, will address their land issues differently and we cannot superimpose what is decided in one jurisdiction to suit the circumstances that prevail in our country.

48. The “ancestral domain” claim (as defined by the petitioners to mean that a present generation has a historical right to own land that was previously in the hands of their forefathers) has some support in some jurisdictions, especially those with a minority population that was marginalised owing to colonialism or occupation by foreigners. Australia is a prime example, as it has enacted the Native Title Act, 1993, so as to inter alia appreciate that Australia was not *terra nullius* at the advent of European occupation and to make amends to the native population that was dispossessed of land. The statute followed the decision in *Mabo vs Queensland (No. 2) (1992) HCA 23, (1992) 175 CLR 1*, where the Australian High Court pronounced itself on the native title, which in a nutshell was a recognition that there existed “native title” to land, the foundation of which was the traditional connection by the natives.

49. Land issues are complex and are unique to each country. It follows that each country enacts laws that suits its circumstances. We cannot impose what has been held in one jurisdiction into our country for our circumstances could be different. Taking the example of Australia, Australia has a large population of European origin with the native Aboriginals and Torres Strait Islander people representing only 3.3% of the population (Source www.aihw.gov.au). It will follow therefore that there would be reason in ensuring the protection of this minority group. The situation in Kenya is radically different, with the native inhabitants being the overwhelming majority.

50. I do not think that the petitioners are correct in stating that the Government has not done its bit in enacting legislation to address historical land injustices. I have already set out the provisions of the Constitution at Article 67 (e) and Section 15 of the NLC Act. They are the response of the Government in addressing historical land injustices. In making these provisions, the people of Kenya had to balance the interests of those who are adversely affected by historical land injustices, and the interests of those that have title to land and expect the same to be protected. Thus, Article 40 of the Constitution protects the right to property, and among the rights noted therein is that the State is not to deprive a person of property without prompt payment in full, of just compensation. The Constitution also categorises land into private, public, and community land. Article 64 defines private land as follows :-

Private land consists of –

- a. Registered land held by any person under any freehold tenure;
- b. Land held by any person under leasehold tenure; and
- c. Any other land declared private land under an Act of Parliament.

51. The right to own property in a private capacity is thus protected. Such property cannot be taken away without good reason and without just compensation.

52. I have seen no backing in our Constitution or in any law that would entitle the petitioners to the land that is now privately held by the 2nd - 7th and 9th respondents, even assuming that the said land was originally settled by the forefathers of the petitioners. I have seen no law that says that a person must be settled in land that was previously owned by his/her forefather, irrespective of whether that land is now privately owned, and counsel for the petitioners have not provided me with any. There is of course power to recommend restitution or compensation, if deemed appropriate, when dealing with historical injustices, but that should not be construed to mean that a person has a right to be settled in land that belonged to his/her forefather who was dispossessed from it.

53. I am not saying anything new here. In the case of *Federation of Women Lawyers (FIDA Kenya) & 4 Others vs The Attorney General & 2 Others, 2016 eKLR*, cited by Mr. Khalid, learned counsel for the 5th respondent, a petition was filed in the Environment and Land Court at Malindi, on behalf of members of the Giriama ethnic community and the Midzichenda people generally. That petition sought various orders over a certain identified piece of land whose title was awarded to Sheikh El Mazrui. The petitioners wished to have orders declaring the said title to be unconstitutional as it is their ancestral land. The evidence showed that the land was first registered in the year 1911 pursuant to the provisions of the Land Titles Ordinance, 1908. The Land Titles Ordinance (later the Land Titles Act) (now repealed) did provide for the recording of interest in land by the Recorder of Titles. Angote J was of opinion that the petitioners could not now claim, after 105 years, that their rights were breached by the allocation of the land to El Mazrui. The court has this to say :-

“In any event without evidence to show that indeed their ancestors rights were breached, the 2nd – 5th petitioners cannot purport to be in a better position to speak on behalf of their ancestors who were alive, and even worked on those farms, as at the time the initial registered owner of the suit land made his claim.”

The judge went further to state as follows :-

“...considering that the whole of this country was colonized, and in view of the fact that with that colonization, the country borrowed its laws heavily from England and India, which laws were enacted pursuant to the Constitution of the county, we cannot afford to go back to the situation that was existing before the era of the enactment of the laws by the then legislators in conformity with the Constitution... It is with the above observations in mind that I agree with the 2nd respondent’s submissions that the Petitioners are inviting the court on a flight of fancy by asking it to find that their ancestors were discriminated against and that the enforcement of the alleged infringed rights should be enforced now. If that were to happen, then almost all Kenyans will be entitled to that order considering that the whole country was colonised and a new legal system of land ownership was put in place.”

54. It will be seen that court was not moved by the claims of the petitioners that they are entitled to the land because there was some unfairness in the manner in which titles were recorded pursuant to the 1908 statute.

55. A more or less similar issue arose in the case of *Charo Kazungu Matsere & 273 Others vs Kencent Holdings Limited & Another (2012)eKLR*. In that case, the petitioners who occupied land that was sold by the 2nd respondent to the 1st respondent, inter alia claimed that they had a first right to purchase the land because of their indigenous roots. This was dismissed by Tuiyott J. The same result ensued in the case of *Parkire Stephen Munkasio & Others vs Kedong Ranch (2015)eKLR*. This was a case by persons of Maasai descent claiming historical rights to land owned by the 1st respondent. I happened to hear the case and I dismissed it. I found that it was immaterial that the land was previously owned by the Maasai as it had now become private land and the title needed to be protected. It is the same finding I will make in this case.

56. There is clearly agitation for land from people who claim to have faced historical injustices. The agitation is in fact most intense in the coastal region. There was certainly injustice caused by colonialism and people were displaced and their lives destabilized. But this did not just occur in the coastal region, it was countrywide. Persons were displaced in Central Kenya and Rift Valley, where the colonialists established the so called “White Highlands.” The Maasai were also displaced from a huge swathe of what would otherwise comprise their native land. So too the Nandi in Uasin Gishu, the Kipsigis in Kericho, and even the Taita at the Coast. Almost every community that had “good land” (in the eyes of the colonial settlers) was dispossessed to pave way for colonial occupation. We in fact had native reserves dotted all over the country where displaced indigenous persons were concentrated while the colonialists hogged all the prime land. Was it unjust? Yes. Was it fair? No. The fact of the matter is that almost every other person in Kenya has been affected by the historical accident of colonial occupation. If we all asserted that we have a right to be settled in the land that was originally occupied by our forefathers, we will only be opening a Pandora’s Box, and creating an even bigger problem, for there will be a massive displacement of persons which will be catastrophic. Even Nairobi itself, with its Maasai origin, would be overrun. How to move on from the dark colonial past does not lie, in the circumstances of this country, by making an order for people to cede their land so that the original native occupants, or their descendants, are settled in it. Neither does the solution lie in invading land that one believes belonged to his ancestor, for this would be a total negation of the constitutional right to property.

57. It is indeed time to recognise that the solution to the land problem in Kenya, considering our unique history and current prevailing circumstances, does not lie in land invasion, or in asserting that land belonging to one’s forefather be given, as of right, to a descendant. If you proceed to do so, you will be bearing your brunt on very innocent people, and this would lead to even more unfairness. Let us take the example of the respondents herein. You will see that most of them purchased, through their hard earned money, or loans, the lands in question. They are investors and they have made sacrifices in order to invest. They are also Kenyans and they have a right to own land in any part of this country.

58. There is a spirit in some sections of our country that look with an evil eye at people who do not bear the stamp of being native descendants. It is time we learnt to embrace people of different backgrounds and not look at them as outsiders. We must move away from the shackles of tribalism. If we do not, we can very well tear the very fabric that holds this country together. We must appreciate that people moved on after independence and proceeded to buy land based on the prevailing laws of the land. Some people moved away from their original native lands and settled elsewhere, in the spirit of us being one country and they were protected by the Constitution. You cannot be heard to argue that such person was not entitled to buy such land. You cannot now tell that person, or his/her descendants, to go back to where they came from, because even where they came from, people have moved on. There will be chaos in this country if we do so. Even for the petitioners, somebody can argue and say that they, and their forefathers, are not originally from Mombasa or Kilifi, and that they should go back to Congo or wherever Bantus came from, which I am sure the petitioners will declare preposterous.

59. I do not think that we got it right at independence, which would have been the perfect point to address the plight of those who were displaced by colonialism. The population was small and the memory of where persons, or their predecessors, had come from, was still there. Probably the right approach, at that time, would have been to resettle everybody in the place that they originally were, with the settlers outrightly leaving the country and being compensated, not by the independence Government, but by the Government that settled them there in the first place, or by the settlers now buying from the locals the land that they occupied, so that the locals could establish themselves elsewhere. But this did not happen, and the independence Constitution protected all privately owned land, even that owned by the colonial settlers.

60. The Constitution of Kenya, 2010 was alive to the fact that there were historical injustices. With a good case being presented, either before this forum or before the NLC, there could be avenue for redress, but that avenue may not necessarily be an order for resettlement in the very land that was owned by the forefathers of such claimant/s. Redress certainly does not include the invasion of privately owned land and does not involve harassing persons who innocently purchased land. We must respect title even as we look at the historical injustices. We have already seen that the Constitution does respect title to private land. If one has title to land, the Constitution protects that title. The petitioners cannot therefore claim that their rights are any superior to the constitutionally protected rights of the title holders. You cannot solve the problem by digging one hole to fill another or by robbing Peter to pay Paul. Indeed, the solution to the land problem may not necessarily lie in giving out land. We need to look at other avenues of mitigating the effects, say, by investing in education and empowering people on the ground to be self reliant. We need to think out of the box.

61. Getting back to the law, I am not persuaded that in Kenya, there is any law that gives an individual a right to own land that was previously owned by his/her forefather. Kenyans did not deem it fit to introduce such a law and that must have been after considering the circumstances prevailing in the country. I have not been shown that there was any illegality in the manner in which all the land parcels herein

were acquired. I have not been shown any right that the respondents violated. I have not been shown any right that entitles the petitioners to settle or to be settled on the suit lands. I am unable to order the respondents to surrender these parcels of land to the petitioners. Neither can I order the Government to purchase this land and settle the petitioners in it.

62. The petitioners have gripe against the NLC, but that bile is misplaced. It does indeed appear that the petitioners did lodge a complaint before the NLC. With regard to the land of Cannon Assurance, the 4th respondent, which is MN/III/13, there was indeed a resolution, vide which the squatters on the land were settled. It was established that there were 125 families and each were settled on land measuring ¼ acre, and a total of 32 acres was ceded by the 4th respondent. There was an additional 5 acres given to some two families claiming a mosque and some graves. In relation to land owned by the 2nd respondent, I have seen a letter dated 7 December 2016, from the NLC stating that it has received a complaint by members of Buguluni community. I have also seen a letter dated 21 September 2017 in relation to the land parcel Kilifi/Kijipwa/31 owned by Safepark Limited, the 9th respondent. I have not been told that the Commission has failed to act. Just because the NLC has not found it fit to order a resettlement of the petitioners in the land of the 2nd – 7th and 9th respondents does not mean that they have failed to act.

63. There has not been a violation of the petitioners' constitutional rights or any violation of the international instruments that the petitioners have mentioned.

64. I do not think that it is necessary for me to say more. I find no merit in this petition and it is hereby dismissed with costs payable jointly and/or severally by the petitioners.

65. Judgment accordingly.

DATED AND DELIVERED THIS 22 DAY OF OCTOBER 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA