



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MALINDI

PETITION NO. 11 OF 2013

**THE CONSTITUTION OF KENYA PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL
PRACTICE AND PROCEDURE RULES 2013**

AND

IN THE MATTER OF: ARTICLES 20 (1) AND ARTICLES 22 OF THE CONSTITUTION

AND

IN THE MATTER OF: ARTICLE 40(1), (2), 48 AND ARTICLE 23(1) (3)

AND

IN THE MATTER OF: LAND TITLES ACT CAP 282

AND

IN THE MATTER OF: LANDS ACT OF 2012

AND

IN THE MATTER OF: LAND TITLES NO. 641 AND 642 MAMBRUI, KILIFI COUNTY

AND

IN THE MATTER OF: THE NATIONAL LAND COMMISSION ACT NO. 5 OF 2012

BETWEEN

JOSEPH KASENA YERI.....PETITIONER

VERSUS

- 1. THE REGISTRAR OF TITLES MOMBASA**
- 2. THE NATIONAL LAND COMMISSION**
- 3. THE HONOURABLE THE ATTORNEY GENERAL.....RESPONDENTS**

AND

GAO INTERNATIONAL COMPANY LIMITED.....1ST INTERESTED PARTY

GOLDEN SEA MAMBRUI LTD.....2ND INTERESTED PARTY

GOLDEN BEACH MAMBRUI LTD.....3RD INTERESTED PARTY

AMINA SAID ABDALLA.....4TH INTERESTED PARTY

SWALEH SAID.....5TH INTERESTED PARTY

JUDGMENT

BACKGROUND

1. By this Petition dated and filed herein on 23rd September 2013, Joseph Kasena Yeri (the Petitioner) prays for:

- a) A declaration that his rights to property especially concerning the ownership of Plot No. 641 and 642 Mambrui were grossly violated by the 1st, 2nd and 3rd Respondents in ignoring his submissions to be allocated the land which he was occupying;*
- b) Revocation of Titles for Plots Nos. 641 and 642 Mambrui respectively which are in the names of the 2nd and 3rd Interested Parties who are in the process of transferring or have transferred the same to the 1st Interested Party;*
- c) Restoration of the suit property to the Petitioner having been the rightful Claimant thereto and/or reasonable compensation for the loss incurred and the suffering he has gone through as a result of the deprivation of the suit property;*
- d) Any other relief this Honourable Court may deem just and fit to grant.*

2. Those prayers arise from the Petitioner's contention that since the 1950s, he and his family have been residents of the said Plot Nos 641 and 642 Mambrui and that he is dissatisfied with the decision of the Recorder of Titles Mombasa in allocating the same to the 4th and 5th Interested Parties.

3. The Petitioner avers that the allocation of the suit properties was arbitrary and biased and that the same violated his rights to property as guaranteed under Article 40 of the Constitution. He accuses the 4th and 5th Interested Parties of proceeding soon after the allocation to alienate and sell the suit properties to the 2nd and 3rd Interested Parties who have since destroyed the family's graveyard and wells to which he was emotionally attached thereby subjecting his family to stress and trauma.

4. The Petitioner accuses the Registrar of Titles Mombasa of acting outside his powers as the claim was not investigated and or authenticated to ascertain the true claimant as by law required.

5. In response to the Petition, the Honourable the Attorney General, the Commissioner of Lands and the Registrar of Titles Mombasa (the 1st, 2nd and 3rd Respondents) have filed Grounds of Opposition herein dated 4th August 2016 wherein they oppose the Petition on the grounds:

- 1. That the application is misconceived as an indefeasible title to the suit property has already been issued;*
- 2. That the subject matter of the Petition was directly and substantially in issue between the same parties in Case No. 59 of 1994 at Mombasa High Court whereby the issue of ownership was determined hence the matter is Res Judicata;*
- 3. That the Petition herein is incompetent as the Petitioner disregarded the lawful procedure for determining squatters' entitlement to allocation of land within a settlement scheme set out under Section 167 and 168 of the Agriculture Act, Cap 318;*
- 4. That the Petition is an afterthought and the Petitioner is not entitled to the equitable reliefs sought due to his indolence as he failed to challenge the Judgment delivered in Case No. 59 of 1994 (which he should have done) if he was genuinely aggrieved;*
- 5. That the suit land was lawfully and procedurally allocated and the Petition is therefore overtaken by events; and*
- 6. That the Petition lacks merit, is frivolous and vexatious, or is otherwise an abuse of the process of this Honourable Court.*

6. Similarly opposed to the Petition are Messrs Gao International Company Ltd, Golden Sea Mambrui Ltd and Golden Beach Mambrui Ltd (the 1st, 2nd and 3rd Interested Parties). In a Replying Affidavit sworn on 4th October 2013 and filed herein on 7th October 2013 by one Yang Jie who describes himself as a director of the 1st Interested Party and a shareholder in the 2nd and 3rd Interested parties, they aver that the Petitioner herein is a perennial litigant who will not let the Interested Parties or any other party for that matter to enjoy the benefits of the suitland.

7. The 1st, 2nd and 3rd Defendants aver that they did enter into a sale agreement in which the 1st Interested Party purchased the shares of the 2nd and 3rd Interested Parties who were the registered owners of Plot Nos. 641 and 642 Mambrui. As at the time of the purchase, the previous directors of the 2nd and 3rd Interested Parties had mentioned to the 1st Interested Party that they had filed against the Petitioner *Mombasa High Court Civil Suit No. 59 of 1994; Golden Sea Mambrui Ltd & Golden Beach Mambrui –vs- Joseph Kasena Yeri* wherein the issue of ownership of the suit property was determined.

8. The 1st, 2nd and 3rd Interested Parties further aver that the Petitioner has filed another suit being **Malindi ELC No 115 of 2013** and that he is clearly abusing the Court process by bringing this suit during the pendency of the said **Malindi ELC No. 115 of 2013**.

9. The Interested Parties state that the Petitioner has had time to challenge the ownership of the two suit properties since 1994 but has failed to do so. They assert that they intend to invest in the said properties and that their efforts to do so have been frustrated by the Petitioner who has not demonstrated any infringement of his rights in the Petition.

10. Amina Said Abdalla (the 4th Interested Party) is similarly opposed to the Petition. In a Replying Affidavit sworn on 2nd September 2015 and filed herein on 3rd September 2015, she asserts that she was married to the late Said Swaleh and that Swaleh Said (named herein as the 5th Interested Party) is her step son who passed away on 29th September 2011.

11. The 4th Interested Party denies that the process preceding the issuance of the Certificate of Title to the suit properties was illegal and contra-statute and or that the same were in contravention of any Constitutional provisions in 1985 or thereafter. She avers that she is aware that a claim before the Land Registration Court was heard and determined in 1985 and that the said determination was by dint of Section 7 of the Land Titles Act conclusive and not subject to challenge in the manner sought herein.

12. The 4th Interested Party further avers that the Petitioner did not appeal the decision and cannot therefore be allowed to marshal a parallel assault on her title 30 years down the road without occasioning grave miscarriage of justice as a result of passage of title, death of prospective witnesses and destruction of records. She avers that by the time the Petitioner is alleged to have applied for Plots Nos. 641 and 642 Mambui in 1992, those parcels had already been surveyed and deed plans issued.

13. The 4th Interested Party further contends that the present Petition is sub-judice as the Petitioner discloses that there was another **Case No. 135 of 1993** in his pleadings and urges the Court to stay it permanently or to strike it out altogether as the same does not in any event raise any Constitutional issues.

The Petitioner's Case

14. The Petition proceeded to hearing viva voce and the Petitioner called three witnesses who testified in support of his case after the parties failed to settle the matter through Alternative Dispute Resolution.

15. PW1 Joseph Kasena Yeri is the Petitioner and a resident of Mambui. He told the Court that he is the proprietor of Plots A and B Mambui. He used to cultivate maize, cotton and other crops with his family since 1967. PW1 told the Court that land adjudication was done in the area in 1994. Plot A was accordingly adjudicated while Plot B was only partially adjudicated.

16. PW1 told the Court he applied for the suit properties in 1992 and the Commissioner of lands instructed the District Lands Officer to do a report. In his letter dated 8th April 1993, the District Lands Officer stated that he had already allocated the parcels of land. The Area Assistant Chief however did another letter indicating that PW1 should be the one to be allocated the land.

17. PW1 testified that he came to see a Certificate of Ownership of the land in the name of the 4th Interested Party and that he had complained about the allocation of his land vide his letter dated 28th July 1993. Subsequently, he filed **High Court Civil Suit No. 135 of 1993** for the cancellation of the title. He told the Court that his then Advocates then colluded with the Defendants and that case was never concluded. He further told the Court that the Defendants sued him in **High Court Civil Case No. 59 of 1994** and obtained an injunction restraining him from using the land.

18. On cross examination, PW1 told the Court he had only applied for the land to legalize his occupation. He had been using the land and felt he should have been allocated the same. He told the Court the Lands Officer allocated the land illegally and that he was only given a title for Plot No. 1379 which is a sub-division.

19. On further cross examination, PW1 testified that he applied for and was allocated Plot A which is now known as Plot No. 1407 Ngomeni Settlement Scheme. It measures 18 acres in size. He told the Court plots 641 and 642 which are in dispute fall within what was earlier Plot B which he had applied for and measured 37 acres. He was only given a Portion of Plot No. 642 which upon sub-division became Plot No. 1379.

20. He further told the Court that all residents of the area were involved in the adjudication process in 1994 and that he was allocated plots Nos. 72, 1379 and 1407. Plot Nos 641 and 642 had not been surveyed then and were still part of Government land. He admitted that he had gone to Court to challenge the same and that he sued the 4th Interested Party and others in **JR No. 135 of 2013**. He however told the Court the said case was never heard.

21. PW2- David Karisa Kitsao is a retired Assistant Chief and a resident of Mambui. He told the Court he was the Assistant Chief of the area between 1993 and 2006. He told the Court he knew the Petitioner since the year 1966 and that the Petitioner and his brother occupied Plot No. 641 and a portion of Plot No. 642. In 1993, the Petitioner had coconuts, cotton, maize, cow peas and melons on the land.

22. PW2 further testified that the Petitioner had applied for the land through a former Assistant Chief who then recommended that the land be allocated to the Petitioner. Later on however, PW2 learnt that the land had been allocated to the 5th Interested Party and he did not understand how that came to be.

23. On cross examination, PW2 testified that when he was appointed the Assistant Chief of the area, the Petitioner lived on Plot No. 622

which is a different one from the suit properties herein. He was not aware that by then the two plots were already registered. He conceded that the 4th Interested Party was a resident of Mambui and that he was aware she had been sued by the Petitioner herein in a suit filed in Mombasa. PW2 did not however know what became of the Mombasa case. He however conceded that the dispute related to the same property.

24. PW3- Mwalimu Harrison Garama Kombe is a former member of Parliament for Magarini Constituency and a nephew of the Petitioner. He told the Court the Petitioner and his family have lived on the land since 1950 and were there until 1994 when a Court injunction was issued that dispossessed them of the land. PW3 told the Court that before then, his uncle had been cultivating the land and had dug two wells from which water would be drawn to irrigate the crops.

25. On cross examination, PW3 conceded that the land in question previously belonged to the Government and that his uncle had applied to the Commissioner of Lands for allocation. PW3 told the Court that during adjudication, the Petitioner was only given the lower part of what he was holding near the sea. While he did not know the measurement of the land, PW3 told the Court it was a very small piece.

26. PW3 further told the Court that during adjudication, the Petitioner had staked a claim on about 35000 to 40000 acres of land and had applied for the same through the Provincial Administration. He however conceded that in the 1990s he was still in school and was unaware the Plots had been surveyed in the 1980s and that titles therefor came out in 1993.

The Respondents' Case

27. The 1st and 3rd Respondents called one witness who testified in support of their case. The National Land Commission initially sued as the Commissioner of Lands (the 2nd Respondent) did not however participate in these proceedings.

28. DW1- John Wanjui Gichuki is the Land Registrar, Mombasa. He testified that from their records, the original proprietor of Plot No. 641 was Amina Said Abdalla Basadik (the 4th Interested Party) while Plot No. 642 was registered in the name of Swaleh Said (the 5th Interested Party). The two were issued with titles under the Land Titles Act, Cap 282 (now repealed) on 29th January 1993.

29. DW1 further testified that the process of acquiring title was for the owner to make a claim to the Recorder of Titles who would then process the same. In this respect the claim had been made and was registered in 1983. From the records, the 2nd Interested Party had since purchased Plot No. 641 from the 4th Interested Party while the 3rd Interested Party was registered as the owner of Plot No. 642.

30. On cross examination, DW1 told the Court that the Mambui Area was the subject of the Land Titles Act and that upon one making a claim and a determination being made by the Recorder of Title, the successful party would be issued with a Certificate of Ownership upon expiry of the period allowed for appeal. From their records he could not see any appeal by the Petitioner against that decision. He told the Court, those parcels could not be acquired through the Commissioner of Lands as the Petitioner had purported to do.

31. On cross examination, DW1 conceded that the position of Recorder of Titles is no longer in existence and that the position ceased to exist in the 1980s. He was unsure if the position was still there in 1985.

The Interested Parties Case.

32. On their part, the Interested Parties called a total of three (3) witnesses.

33. IPW1- Cheng Dahai is the 1st Interested Party's Sales Manager. He told the Court that the 1st Interested Party is a registered multinational company and a shareholder of the 2nd and 3rd Interested Parties who are the proprietors of Plots Nos 641 and 642 Mambui. He told the Court that prior to the purchase of shares in the 2nd and 3rd Interested Parties, the 1st Interested Party had done due diligence and established that the two were the registered owners and further that they were bonafide purchasers for value of the suit properties.

34. IPW1 further testified that prior to the acquisition of the shares, the directors of the 2nd and 3rd Interested Parties had disclosed to the 1st Interested Party the fact that they had instituted ***Mombasa HCCC No. 59 of 1994*** against the Petitioner in which they sought an injunction to restrain him from interfering with the suit properties which they had acquired from the 4th and 5th Interested Parties for value. The suit was determined in favour of the 2nd and 3rd Interested Parties and no appeal was preferred against the same.

35. IPW1 further testified that on or about August 2013, the Petitioner instituted a subsequent suit being ***Malindi ELC No. 115 of 2013*** against the 2nd and 3rd Interested Parties raising the same issues as those in ***Mombasa HCCC No. 59 of 1994***. The Petitioner thereafter abandoned the prosecution of the said case.

36. IPW1 testified that the 1st Interested Party had taken the initiative to develop the suit properties by constructing hotels and villas but their efforts have been frustrated by the Petitioner.

37. On cross-Examination IPW1 conceded that they had not produced anything to demonstrate that the 1st Interested Party had purchased shares from the 2nd and 3rd Interested Parties.

38. IPW2- Amina Abdalla is the 4th Interested Party. He testified that the suit properties belonged to her mother Sultan Basadik and her husband Said Swaleh Bahamed. Some of the neighbours sold their pieces of land to them and they then applied to be allocated the same. IPW2 testified that after they were registered as the owners thereof they sold the same together with her husband who passed away shortly

thereafter.

39. IPW2 told the Court the case was first heard by the Recorder of Titles before whom she appeared with her husband. No one else claimed the land at that time and it is now some 23 years after her husband passed away. Her eldest step-son Swaleh Said Barmende (the 5th Interested Party) with whom they are sued had also since died and they had no claim on the land as they had long sold the same to the 2nd and 3rd Interested Parties.

40. On cross examination, IPW2 told the Court the suit properties were initially Government land. They had gone with the 5th Interested Party to the Recorder of Titles after the land was surveyed. While her parents had initially used the land, IPW2 told the Court she is the one who applied for the land and the titles came out in her name and that of the 5th Interested Party. She further told the Court it is her husband who did the application and that the Petitioner's parcel of land was separate from their own.

41. IPW3- Kazungu Baya Msanzu is a retired Police driver and a resident of Kagombani, Mambui. He told the Court that the Petitioner is his uncle, being a younger brother to his mother. He had also known the 4th Interested Party and had worked for her parents. He told the Court the suit property belonged to the 4th Interested Party's parents and that the Petitioner did not have any land around that area.

42. On cross examination, IPW3 testified that the 4th Interested Party's parents had at one time employed him to take care of their livestock. The land was over 300 acres and only had cashew nut and coconut trees as no one lived there.

Analysis and Determination

43. I have perused and considered the pleadings filed herein, the oral testimonies of the witnesses and the evidence adduced at the trial. I have equally perused and considered the written submissions and authorities placed before me by the Learned Advocates for the parties.

44. By his Petition dated and filed herein on 23rd September 2013 the Petitioner instituted this Constitutional Petition seeking a declaration that his rights to property concerning the ownership of the parcels of land known as Plot Nos. 641 and 642 Mambui were grossly violated by the 1st, 2nd and 3rd Respondents in ignoring his submissions to be allocated the same. As a result, he urges this Court to revoke the titles for the suit properties which are respectively in the names of the 2nd and 3rd Interested Parties and to restore the ownership of the said properties to himself.

45. The Petition proceeded by way of *viva voce* evidence and the Petitioner told the Court that he was in occupation and usage of the suitland since the year 1967. The Petitioner told the Court that in the year 1992, he applied to be allocated the two parcels of land and that the District Commissioner did not have any objection to the allocation of the same to the Petitioner. Accordingly, he accused the Respondents herein of irregularly and illegally allocating the suit properties to the 4th and 5th Interested Parties and thereby violating his Constitutional rights.

46. The 5th Interested Party did not file any response to the Petitioner's claim. He could not do so because as his step-mother, the 4th Interested Party told the Court, he had passed away on 29th September 2011, some two years before the Petitioner would institute this Petition.

47. Testifying on her own behalf and on behalf of her deceased step-son, the 4th Interested Party however denied that the process through which they acquired title to the suit properties were illegal and or contra-statute. She further denied that the process or proceedings taken before the Land Registration Court was in contravention of any Constitutional provisions as at the time they were so registered in 1985 or at any time thereafter.

48. The 4th Interested Party told the Court that the suit properties belonged to her family and that they applied together with her deceased step-son to be registered as the owners of the suit properties under the Land Titles Act and that the Recorder of Titles Mombasa who was then clothed with the exclusive jurisdiction to entertain such claims determined that the properties belonged to them. She asserted that the Petitioner herein did not appeal the determination by the Recorder of Titles as by law required and asserted that his claim is time-barred and an abuse of the Court process.

49. It was further the 4th Interested Party's case that by the time the Petitioner is alleged to have applied for Plot Nos. 641 and 642 Mambui in 1992, the same had already been surveyed and deed plans issued. She further told the Court that this Petition was sub-judice as the Petitioner had filed Judicial Review Application No. 35 of 1993 at the High Court at Mombasa in regard to the same parcel of land.

50. The 4th Interested Party told the Court that they sold the suit properties a long time back to the 2nd and 3rd Interested Parties and urged the Court to dismiss the Petition on account that the same does not raise any Constitutional issues.

51. That is the same position taken by the related companies enjoined herein as the 1st, 2nd and 3rd Interested Parties. In their testimony as given by the 1st Interested Party, they accuse the Petitioner of being a perennial litigant who would stop at nothing to deny the Interested Parties the enjoyment of quiet possession of the suit properties.

52. The 1st, 2nd and 3rd Interested Parties assert that following their acquisition of the suit properties from the 4th and 5th Interested parties in 1993, and due to similar claims by the Petitioner over the suit property, they did file **Mombasa HCCC No. 59 of 1994** whereby the Plaintiff was ejected from the suit property and restrained from any further interference therewith on 26th April 1994.

53. The 1st, 2nd and 3rd Interested Parties further aver that other than this suit the Petitioner also instituted **Malindi ELC No. 115 of 2013** which remains pending and unresolved. It is therefore their case that bringing this suit as a Constitutional Petition is an outright abuse of the Court process and urge the Court to so-find.

54. The Petitioner did not deny that he had filed the said **Mombasa Judicial Review Application No. 135 of 1993; Republic –vs- Registrar of Titles and 3 Others Ex parte Joseph Kasena Yeri**. Neither did he deny that he had filed **Malindi ELC No. 115 of 2013; Joseph Kasena Yeri –vs- Amina Said Abdalla and 9 others**.

55. Asked about the said cases during his cross examination herein, the Petitioner told the Court that none of those cases had proceeded as he had never testified in the same. In addition, he blamed his previous Advocates for colluding with the Defendant in **Malindi ELC No. 115 of 2013** and thereby stalling the same.

56. From the material placed before me, it was apparent the said suits were clearly related to the subject matter herein. In the substantive Motion dated 5th July 1993 in the said JR Application No. 135 of 1993, the Ex parte Applicant sought orders against the Recorder of Titles Lillian Mary Mutimos, the 4th and 5th Interested Parties as well as the Commissioner of Lands as follows:

1. **That the Certificate of Ownership in respect of Plot No. 641 Mambrui issued in favour of Amina Said Abdalla Bassadiq the 3rd Respondent and dated 29th January 1993 be declared invalid null and void for all purposes and that the same be delivered upto Court for the purpose of quashing the same.**
2. **That the Certificate of Ownership in respect of plot number 642 Mambrui issued in favour of Swaleh Said the 4th Respondent be declared invalid null and void for all purposes and that the same be delivered upto Court for purposes of quashing the same.**
3. **That proceedings held by the Recorder of Titles-the 2nd Respondent in respect of the said Plot Nos. 641 and 642 be delivered upto this Court for the purposes of quashing the same.**
4. **That the Commissioner of Lands the 5th Respondent be directed to issue title to the 1st Respondent Joseph Kasena Yeri; and**
5. **That the costs of the application be paid by the 2nd, 3rd, 4th and 5th Respondent.**

57. In his Supporting Affidavit to this Petition, the Petitioner at Paragraph 7 thereof blames his then Advocates Messrs Khaminwa and Khaminwa of abandoning and failing to pursue that matter to its logical conclusion. He does not explain why he did not himself pursue the matter and it was unclear to me what became of the same.

58. Perhaps of greater significance was the fact that the 2nd and 3rd Interested Parties herein filed their own **Mombasa High Court Civil Suit No. 59 of 1994; Golden Sea Mambrui Ltd and Golden Beach Mambrui Ltd –vs- Joseph Kasena Yeri**. While it would appear that the said suit was also not pursued to conclusion, the Honourable Justice ICC Wambiliyangah on 24th April 1994 granted a mandatory injunction against the Petitioner thereby ejecting him from the suit premises.

59. Arising from the foregoing, it was evident that the Petitioner has since 1993 been aware that the suit properties were allocated to the 4th and 5th Respondents (sued herein Post humously) by the Recorder of Titles. In this respect Section 15 of the Land Titles Act (now repealed) provided as follows on presentation of a claim for land along the then Coastal Strip.

15(1) All persons being or claiming to be proprietors of or having or claiming to have any interest or whatsoever in immovable property situated in any district, area or place to which this Act has been applied shall, before the expiration of six clear months from the date of the application of this Act, make a claim in respect thereof to the District Commissioner of the district wherein the immovable property is situated or to such officer as he may appoint.....

Provided that-

(i) If a Claimant satisfies the Recorder of Titles that he has failed or neglected through ignorance or other sufficient cause to make his claim before the expiration of the period of six months, and if no other claim has been made in respect of the same land or any other part of it, the Recorder of Titles may hear and determine the claim out of time in all respects as if the Claimant had made his claim within the period of six months;

(ii) No such claim shall be heard and determined out of time unless it is made within one year of the expiration of the period of six months.

(2) Every such claim shall as regards a claim in respect of –

a) Estates in fee in land, be in form A1 in the First Schedule;

b) All interests in immovable property other than estates in fee in land, be in form A2 in the First Schedule and shall be forwarded by the District Commissioner or other officer appointed by him within one month of the receipt thereof to the Recorder of Titles, Mombasa.

(3) Any person may for the purposes of a claim under this Section obtain the forms free of charge from the Office of a District Commissioner or from the Office of the Recorder of Titles Mombasa.”

60. It was not lost on this Court that while the Petitioner purported to have applied for allocation of the suit properties to the Commissioner of Lands in 1992, the official records produced at the trial herein by the Land Registrar Mombasa (DW1) in regard to the suit property revealed that as far back as 1985, the Recorder of Titles Mombasa had approved the allocation of the suit properties to the 4th and 5th Interested Parties.

61. As it were Section 20 (1) of the repealed Land Titles Act provided as follows:

“20(1) After six months from the date of the application of this Act, or as soon thereafter as is possible, the Recorder of Titles shall give a certificate of title to those persons whose rights to any immovable property or any interest therein has been determined.”

62. The 4th Interested Party testified herein that no one objected to the determination by the Recorder of Titles. That position was indeed corroborated by the Land Registrar Mombasa (DW1) who told the Court that from their records, there were no objections to the claims dealt with by the Land Registration Court.

63. Again in that respect, Section 7(1) of the Land Titles Act provided thus:

“7(1) The determination or Judgment of the Recorder of Titles upon each claim shall, save as otherwise expressly provided for in this Act, be final and conclusive upon the Claimants, and upon those claiming under any of them by any title acquired subsequent to the claim being made.”

64. Under Sections 34 and 35 of the repealed Act, an aggrieved party who claims to have been deprived of property by the issuance of a certificate of title through fraud, error omission or mis-description was allowed to bring an action against the person to whom the certificate of title had been issued or any person who has acquired an interest in that property with knowledge of the fraud, error, omission or mis-description within 12 years from the grant of the certificate.

65. The Certificate of title issued for the two suit properties before me were issued in the names of the 4th and 5th Interested Parties on 29th January 1993 and this Petition having been filed on 23rd September 2013 arrived some 20 years after the certificates were issued and was therefore seven years late.

66. Accordingly, it was clear to me that this claim was statute barred and no amount of camouflage as a Constitutional Petition purporting to raise fundamental violations of the Petitioner’s rights could change its intrinsic character. This was clearly a claim which ought to have been brought under Section 34 of the Land Titles Act for it alleges that the issuance of the certificates to the 4th and 5th Interested Parties was unprocedural.

67. The law as it existed clearly provided mechanisms for ventilation of such grievance. The Petitioner was aware of the issuance of the Certificate as far back as 1993 and he has not told this Court of any difficulties and/or obstacles that were placed on his way by either the Respondents and/or the Interested Parties that led to the inordinate delay in ventilating his grievances. Having instituted other cases which he abandoned unprosecuted, it was clear to me that the claim that his rights were violated and hence this Petition was nothing but a misguided attempt to circumvent the statutory time limits provided in law.

68. Otherwise it was evident to me that the Respondents had rightly acted on a claim for land by the 4th and 5th Interested Parties. It was further evident that the 2nd and 3rd Interested Parties were bonafide purchasers for value without notice of any defects in the titles held by the 4th and 5th Interested Parties. Indeed, a reading of the entire Petition does not reveal any complaint against the 2nd and 3rd Interested Parties and it was unclear why they had been enjoined in the Petition.

69. The Petitioner cannot claim to have been deprived of any property as the land previously belonged to the Government. He is a former Area Member of Parliament for Magharini Constituency within which lies the suit property. During his cross-examination, he conceded that during the land adjudication process leading to this dispute, he was allocated four parcels of land within the Mambui area with a total acreage of about 20 acres. Evidently he wanted more than that.

70. While it may well be that the Petitioner resided on a portion of the vast land prior to the alienation thereof, it was also clear that there were other people residing there too. His own witness a former Area Assistant Chief David Karisa Kitsao(PW2) confirmed that he knew the 4th and 5th Interested Parties as residents of the Mambui area. They had a legitimate right as did the Petitioner to apply to be allocated parts of what was then Government property. There was nothing placed before me to demonstrate that the Petitioner had a higher right to the suit properties over and above other residents and that he was entitled to and had a sole right to the properties whether or not the heavens fall.

71. In conclusion, I can only but quote the erudite assessment of the Petitioner’s character as demonstrated in these proceedings by the Honourable Justice Wambiliyangah some two and a half decades ago in the said ***Mombasa HCC No. 59 of 1994***. In his Ruling granting a mandatory injunction against the Petitioner dated 28th April 1994, the Learned Judge observed as follows:

“... It is also relevant to notice that the documents filed by the defendant reveal that he was once a Member of Parliament for the area where the plots are situated. It should thus be assumed that his level of understanding the procedure to be followed in this matter was superior to that of most of the other squatters. One therefore expected him to invoke the right procedure to

which his advocate has referred in his bid to acquire the plots. But in paragraph 8 of his Replying Affidavits in this application he deponed:

“I have always occupied these plots when I was a Member of Parliament in this Constituency and have carried out development over the period.”

It is difficult to understand why a man of his high caliber would embark on developing a piece of land over which he had not yet acquired any proprietary rights.

His documents reveal a further point namely, that in 1992 he initiated a process of acquiring the plots by obtaining a recommendation in his favour from the Chief Magarini Location.

He proceeds on to show in the Statement filed in the Case No. 641 of 1992 paragraph (g) that he applied to the Commissioner of Lands to be issued with titles in respect of the plots “on which he occupied”. He says that he made this application by his letter dated 25th of February 1992. So it is clear that even he himself did not channel his application to a recorder contemplated by the Lands Titles Act, Cap 282. He clearly also addressed his application to the Commissioner of Lands. I am certain that if his application to the Commissioner of Lands had been successful, he would not have turned round and contended that after all his own application had been defective. That would have been a bizarre situation. The question is whether he is now entitled to challenge the allotment in favour of the original owners on the ground of want of improper procedure in acquiring the titles. It is clear that he has attacked the alleged non-compliance of the provisions of the Land Titles Act, which he himself had deliberately also ignored, solely because his similar application to the Commissioner of Lands was unsuccessful. Therefore, this is not a bona fide application. It is actuated by evident malice: the defendant’s reasoning is that since he failed to get the land allocated to him then nobody else should get it.....”

72. I say no more. It must be clear from the foregoing that I did not find any merit in the Petition. The same is dismissed with costs.

Dated, signed and delivered at Malindi this 5th day of November, 2020.

J.O. OLOLA

JUDGE