

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ELC PETITION NO 29 OF 2021

DR FRANK KAMUNDE MWONGERA
PETITIONER

VERSUS

AGRICULTURAL DEVELOPMENT CORPORATION LTD1ST
RESPONDENT
THE ATTORNEY GENERAL2ND
RESPONDENT
THE ETHICS AND ANTI CORRUPTION COMMISSION INTERESTED
PARTY

JUDGMENT

1. In the petition dated 25th October 2021, the petition seeks the following prayers:

- a. A declaration that the petitioner is the lawful owner of all those parcels of land known as title number CR 31274 and title number CR29096;
- b. A declaration that under Article 40 of the Constitution the petitioner has the right to own and enjoy property of any description in any part of Kenya and is a search and titled to enjoy the proprietary rights of enjoyment use and possession of title numbers CR 31274 and title numbers CR29096;
- c. An order of *Mandamus* compelling the first respondent to give to the petitioner actual and physical possession and occupation of all those properties known as Title number CR 31274 and title number CR 29096;
- d. An order of injunction prohibiting the 1st respondent from transferring charging mortgage or in any manner dealing with title numbers CR 31274 and title numbers CR 29096;
- e. An order for compensation for violation or the petitioner's Constitution al rights by way of an award of exemplary and punitive damages.

2. The petition is supported by the affidavit of the petitioner.

3. Briefly, the facts of his case are as follows: on 13th October 1994 the petitioner made a written application to the 1st respondent to purchase a plot from an ADC farm in Malindi, which application was approved in writing in a letter dated 13th March 1995 written by the 1st respondent. The approval was for purchase of 2 plots of 5 acres each and the petitioner was asked to make payment of the purchase price and the legal costs for the transfer of the properties to the petitioner. The full payment of **Kenya Shillings 244,400/-** requested by ADC on 23rd March 1995 was paid. The deed plans were prepared. The petitioner provided the details to be reflected on the two titles and titles were during issued to him. Those are the 2 titles subject of the present case.
4. Sometime in the year **2018** the petitioner wrote to the respondent and notified it that he intended to take possession of the above properties with a view to fencing the same but he did not get a response to his letter, and in November of the same year he went to the suit properties and fenced them with a stone wall. However, in 2019 a Mr Mulupi, an employee of the 1st respondent mobilized staff of the 1st respondent to, in violation of **Articles 10, 40 and 64** of the Constitution of Kenya, to vandalize and destroy the fence and later they stole all the fencing materials, which matters reported to the Malindi Police Station and an OB Number secured OB Number 37/17/1/ 2019. After that, he has not been able to take actual physical possession and occupation of the property because of the hostility on the part of the 1st respondent, and he believes

his Constitution rights to own and enjoy the property have been fragrantly breached. He referred to **Section 132** of the Agricultural Development Corporation Act which states that the corporation may sell movable or immovable property.

5. Martin Munga Senior Litigation Counsel, filed grounds of opposition dated 14th January 2022 on behalf of the Attorney General, the 2nd respondent as follows:

- a. That whereas the petitioner is seeking several orders against the 1st respondent he has not alleged any procedural or substantive irregularity occasioned by the 2nd respondent herein as to support the issuance of the same as against him;
- b. That no allegation of irregularity *ultra vires* or irrationality has been made or can be construed from the pleadings and evidence adduced against the 2nd respondent;
- c. That the petition has not met the threshold for granting of orders of compensation sought against the respondents;
- d. That the petition is devoid of merit as no Constitutional rights alleged to have been breached are attributable to the 2nd respondent and the petition has not demonstrated that he has a reasonable cause of action as against the 2nd respondent.
- e. That the petition is imprecise regarding the rights violated by the 2nd respondent as it makes general references to omnibus provisions of the law thus violating the criteria set out in **Anarita Karimi Njeru versus Republic (1979)**.

6. The 1st respondent filed a replying affidavit through its Corporation Secretary **Rogers Karumpu**, dated 20th January 2022. The gist of that response is as follows: that there is an active investigation by the Ethics and Anti-Corruption Commission on the irregular allocation and transfer of the suit properties; that investigations and the inquiry are yet to be concluded, thus the petition is premature; that the petition has not disclosed the said fact of investigations to the court. The petition does not

raise issues for determination as envisage under **Article 40** of the Constitution. The petition has raised issues that are criminal in nature, of trespass and malicious damage which has not been reported and which will not be canvassed in this court; that the petition does not meet the threshold of a Constitutional petition as it does not disclose any fundamental breach; that the EACC should be allowed conclude its investigations before the matter is heard and determined; the petitioner's claim for compensation is baseless and ought to be dismissed; that **Article 40** of the Constitution does not protect the petitioner's title; that the balance of convenience is in favor of the striking out of the petition with costs. Alongside that replying affidavit was filed a notice of preliminary objection the grounds that:

- a. The petition is premature due to the active investigations by the EACC;
 - b. The Petition does not raise any Constitutional issues for deliberation;
 - c. The petition has three star issues that are criminal in nature which can be adequately canvassed in the environment and land Court;
 - d. The petition as drawn does not meet the threshold of a Constitutional petition as it does not disclose any fundamental breach,
 - e. The petition is an abuse of the court process it should be dismissed with cost to the respondent.
7. The interested party was joined to these proceedings in that capacity at the instance of the 1st respondent in an application dated 4th March 2024.
8. The 1st respondent also filed a second replying affidavit dated 28th August 2025 in answer to the petition. That affidavit has been sworn by the **Nicholas Ayugi**, administrator of Lands Limited, a wholly owned

subsidiary of the 1st respondent. The gist of that affidavit is that the deponent denies the legality of the titles issued to the petitioner. He avers that the suit titles were hived off the 1st respondent's farm land without consent of the 1st respondent's board and puts the petitioner to strict proof of the violation of his Constitutional rights. He attached a report by the National Assembly Departmental Committee on Lands dated July 2019 as having concluded that the 1st respondent's land was irregularly subdivided and allocated to 125 individuals between 1994 and 2008 without any formal resolutions being made by the 1st respondents which undermined the 1st respondent's institutional mandate. He stated that the committee expressed its recommendation for the revocation of the disposals of the land as irregularly allocated or recovery of public assets by the EACC among other things. The petitioner's title was among those earmarked for revocation. That the EACC has placed restrictions on the suit properties pending conclusion of investigations. He denied that the petitioner is a *bona fide* purchaser for value. That the suit lands being vested in a state organ, Article 62(1)(b) applied to them and any transfer of such land to a private individual is null and void *ab initio* and the 1st respondent ought not be compelled to surrender them and the reliefs sought in the present petition are untenable; that the petitioner has not demonstrated any lawful entitlement to the suit properties.

SUBMISSIONS

9. The petition was disposed of by way of written submissions.
10. The petitioner addressed three issues in his submissions as follows:
- a. Who is the lawful proprietor of the suit premises;
 - b. What are the rights of a proprietor;
 - c. What relief should the court grant.
11. Regarding the first issue the potential now submitted that the evidence before Court demonstrates beyond a shadow of doubt that he is the role of proprietor of the suit premises and under **Section 24(a)** of the Land Registration Act he has the absolute ownership of that land together with the all rights and privileges which are protected by **Section 26(1)** of the Land Registration Act as indefeasible.
12. In respect of the second issue on the rights of the proprietor he referred to **Article 40** of the Constitution and **Section 25** of the Land Registration Act and submitted that a party has right to own an acquire property in any part of Kenya and enjoy or rights and privileges and the petitioner is also entitled to have and enjoy the suit property. He relied on the case of **Paul Ngishema and Halima Said 2020 eKLR**.
13. On the last issue he referred to **Article 23(3)** of the Constitution with regard to (e) an order of compensation (f) and order of judicial review and (b) an order of injunction as well as **Section 13(7)** of the Environment and Land Court Act 2011 which provides for an interim or permanent preservation order, prerogative orders, award of damages, and compensation. He relied on *Kellico Limited Versus National Land Commission and Three Others 2016 eKLR*. The petitioner also relied on

Republic Versus Chief Land Registrar Kisii County Land Registrar and Yosabio Kerubo Manyura *Ex Parte* Applicant 2018 eKLR and prayed that the petition be allowed as prayed with costs to the petitioner.

14. The 1st respondent's counsel identified **3** issues for determination as follows: whether the petition meets the threshold for a Constitution al petition; who is the lawful owner of the suit properties; and whether the petitioner is entitled to the reliefs sought.

15. On the first issue he referred to Anarita Karimi Njeru [1979] eKLR and Mumo Matemu V Trusted Society of Human Rights Alliance & 5 others [2013] eKLR and submitted that the petitioner has made references to articles of the Constitution without demonstrating with particularity how they have been violated by the 1st petitioner. He submitted that instead the petition seeks a declaration of ownership and possession, remedies that properly lie in an ordinary suit; that Communications Commission of Kenya & 5 Others V Royal Media Services Limited & 5 Others 2014 eKLR. Regarding the second issue as to who is the lawful proprietor of the suit properties the 1st respondent relied on Article 40(6) and Dina Management Ltd Vs County Government Of Mombasa 2023 eKLR for the proposition that courts can not sanitize titles obtained illegally, and Arthi Highway Developers Ltd Vs West End Butchery Ltd and 6 others 2015 eKLR for the proposition that while title is *prima facie* evidence of proprietorship it can be defeated where illegality or fraud are established; as well as Munyu Maina V Hiram Gathiha Maina 2013 eKLR for the

proposition that a proprietor when the root of their title is challenged, must demonstrate the legality of the process of acquisition thereof. Regarding the present suit titled he averred that doubts have been raised about the legality of the suit titles. Citing the cases of Funzi Island Development Ltd and 2 Others V County Council of Kwale & 2 Others 2014 eKLR and Kenya revenue Authority Vs Menginya Salim Murgani 2010 eKLR, counsel for the 1st respondent submitted that the petitioner has failed to prove that he is entitled to the prayers sought in the petition.

ANALYSIS AND DETERMINATION.

16. It is proper to state that the constitutional rights of a person with regard to a certain property can only be violated if his legal rights to ownership and use of that property have crystallized, if there is no doubt that the property is his. Where there is doubt as to whether the proper process that could give legality to his ownership was followed, and thus there is need to investigate whether that title is legally valid, then his rights have not yet crystallized, and there is a serious risk that the court may thus declare a violation where there is indeed none.
17. Usually, proceedings for the determination of title to land are commenced by way of plaint. It is that method of litigation that brings the title documents and the process of acquisition thereof under minute scrutiny by way of allowing for evidence or forensic reports of examination of documents used to authorize the issuance of title and

challenge to the authenticity of those documents or process. That is the test that declares a title valid or otherwise. Without having undergone that test, and while an objection has been raised to their validity, the title documents remain under suspicion for their illegality.

18. The present proceedings were commenced by way of a petition which time and again has been ruled out as the proper forum for the determination of land ownership disputes. In Attorney General & another v Uasin Gishu Memorial Hospital Limited & another (Petition 20 of 2019) [2021] KESC 57 (KLR) (24 March 2021) (Judgment) the court stated as follows:

“56. Having found that the High Court failed to execute its constitutional mandate, the learned Judges of Appeal proceeded to address the substantive issues before them. In doing so, the appellate court relied on affidavit evidence, without giving parties the opportunity to present and examine evidence. We are aware that the learned judges of Appeal may have invoked section 3(2) of the Appellate Jurisdiction Act. Ordinarily, this would have been proper had all the facts and law been well presented at the trial court. It is not contested in the superior courts and even before this Court that the question of ownership of the suit premises, the legal status of the 1st respondent and compensation (if any) upon acquisition of the suit premises by the appellants and vesting the same upon the 2nd respondent are highly contested. We do agree with the High Court on its finding only to the extent that the matter could not be determined by affidavit evidence in the manner in which the suit was presented before it.”

19. It is crystal clear from the documents filed in the present petition that there is a dispute as to whether the properties were transferred to the petitioner in a process that could pass the test of legality. The EACC, the interested party herein, points out that investigations are going on

regarding all disposals of land with regard to the mother parcel from which the two parcels claimed by the petitioner were carved. By extension the two portions the petitioner is claiming are also entangled in that dispute as to propriety of title. From the time the dispute erupted, there has been no determination of a court of competent jurisdiction as to whether the petitioner legally owns the said property or not; observably, the petitioner has not insisted that the issue of legality of his claim to ownership of the suit lands is *res judicata* and in his favour. This court thus concludes that the petitioner has never been declared the legal owner of the suit premises.

20. In the process of determination of legality of title there are allegations and counter allegations, assertions and denials. Facts are put forth and other facts are brought up to counter them. Arguments are presented and controverted. At the end of the litigation facts and arguments are verified by the Judge either for or against the validity of the impugned title. It is sometimes a very messy process, filled with ups and downs, twists and turns, as each party tries to maintain their ground that the title is either valid or invalid; it is quite a far cry from the process of determining in a petition whether the rights of a person whose title is not in doubt, have been contravened by way of trespass or deprivation by a public authority. But it is only after that process has been undergone that the court can determine whether any action adverse to the interests of the property holder has contravened or threatened contravention of a subject's rights

under the constitution. This process can not take place within a constitutional petition but only in a suit commenced by way of plaint.

21. **Petro Oil Kenya Limited v Kenya Urban Roads Authority [2018]**

eKLR held as follows:

“A constitutional petition is not an ideal forum for investigating and determining contentious issues of fact as oral evidence is rarely called like in this case. Whether or not the suit property was hived from a road truncation is not an issue which I can determine on the affidavit evidence before me. If it is true that the suit property was hived from a road truncation, the title held by the Petitioner would not be valid since the property was not available for allocation to Wangs from whom the Petitioner purchased the suit property. Article 40 (6) of the Constitution provides that the protection accorded to property does not extend to the property which has been acquired unlawfully. Whether or not the Petitioner acquired the suit property lawfully is an issue that can only be determined in a civil suit and not in a Constitutional Petition. The courts have said over and over again that the mere fact that constitutional rights are alleged to have been violated or are threatened does not make the dispute a constitutional one calling for the filing of a petition under Article 22 of the Constitution. The court can still uphold constitutional rights in a normal civil suit.”

22. In **Francis Oyagi Vs Samwel Motari Mangare and 2 Others (2018) eKLR** the court held as follows:

“The court must guard against improper transmission of normal disputes or ordinary issues of litigation being clothed in Constitutional petitions. I am aware that the existence of an alternative remedy or procedure may not oust the jurisdiction of the court. But the court in deciding whether to entertain a suit must take into account the existence of such a remedy and its application to the issues at hand.”

23. The only recourse that is available is for this court to strike out the present petition. However, petitions can at times be disposed of by way of *viva voce* evidence, and one may ask the question whether anything can

turn on the fact that the petitioner had earlier on sought to have the petition heard and disposed of by way of *viva voce* evidence. I do not think so because firstly, the application to have the petition heard in that manner was not prosecuted and it was dismissed by this court. Secondly, it has been a rule in our justice system, espoused much in Speaker of the National Assembly v James Njenga Karume [1992] eKLR that the specific procedure prescribed for the resolution of a certain dispute has been provided for by the Constitution or by an Act of Parliament, that is the procedure that ought to be followed. The precise words used in the relevant dicta that case are as follows:

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.”

24. The 1st respondent is a state corporation and therefore an organ of government. However, any wrongful actions with regard to private property of a citizen are not protected by the constitution. **Article 40(3) (a) and (b)** of the Constitution specifically provides that:

“(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that-

**(i) requires prompt payment in full, of just compensation to the person; and
(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law."**

25. The right of recourse to a court of law has been available to the petitioner but he must follow the proper process. In this case had the petitioner followed the procedure in the Civil Procedure Act and Rules and brought his claim under the relevant causes of action, he may have obtained appropriate relief. I must reject the present petition for the reason that the jurisdiction of this court has not been properly invoked by way of the proper process. I therefore strike out the petition dated 25th October 2021 with no orders as to costs.

Dated, signed and delivered at Malindi on this 15th day of December, 2025.



**MWANGI NJOROGE
JUDGE, ELC, MALINDI.**