



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC PETITION NO. E020 OF 2023

**IN THE MATTER OF: ARTICLES 19, 20, 21, AND 22 OF THE CONSTITUTION OF
KENYA, 2010 - ENFORCEMENT OF THE BILL OF RIGHTS**

-AND-

IN THE MATTER OF: ARTICLE 26 OF THE CONSTITUTION - THE RIGHT TO LIFE

-AND-

**IN THE MATTER OF: ARTICLE 40 OF THE CONSTITUTION - PROTECTION OF
THE RIGHT TO PROPERTY**

=BETWEEN=

- 1. STEPHEN KAHINDI NGUMBAO**
- 2. GLADYS RIZIKI NYAMAWI**
- 3. HASSAN MZEE KHAMIS**
- 4. GEORGE WANJE CHONJO**

5. MWARUA TSONGO
6. SABINA MUTUA
7. JULIUS DZOMBO NGUMA
8. FAITH MUTHEU
9. THOMAS SAFARI
10. IREY ABDI.....PETITIONERS

-VERSUS-

1. MINISTRY OF LANDS AND PHYSICAL PLANNING
2. NATIONAL LAND COMMISSION
3. KILIFI COUNTY LANDS AND SETTLEMENT OFFICER
4. LAND REGISTRAR, KILIFI
5. COUNTY GOVERNMENT OF KILIFI
6. LEWIS MUCHAI
7. JOHN NJOROGE KUNGU
8. IBRAHIM MUTHAMA
9. OMAR CHENGO
10. MARGARET LUVUNO
11. HUSSEIN KITS AO CHENGO (wrongly sued as HUSSEIN SARBITI)
12. ISSA OMAR NGUMA (wrongly sued as ISSA OMAR CHENGO)
13. JANE MUCHE
14. JUMA NGUMA
15. KENYATTA MAITHA MWAWASHE

16. DAVID MWAMBIRE

17. JUMA NIMASUMBI (wrongly sued as JUMA BALONGO)

18. JUNE RUTH

19. SULEIMAN MAKARANI

20. SILAS NDORA

21. DANIEL SAFARI

22. AGRICULTURAL HANDLING SERVICES LTD.....RESPONDENTS

JUDGMENT

1. Before the court for determination is the petitioners' amended petition dated June 24, 2023, filed on June 26, 2023, which seeks:

- a) **A declaration that the Petitioners are the rightful allottees of the land formerly known as MN/III/324 and MN/III/334, Mtwapa, Kilifi County;**
- b) **A declaration that the issuance of titles, excluding the petitioners, violates their constitutional right to own property;**
- c) **Cancellation of all titles that have been irregularly and improperly issued to non-residents;**
- d) **An order for proper resurvey and process of land allocation for parcels formerly known as MN/III/324 and**

MN/III/334, Mtwapa, Kilifi County, involving residents and in accordance with the law;

- e) An order for the issuance of title deeds to the residents;**
- f) An order from this court directing the OCS, Mtwapa, DCC Kikambala Division, and County Commissioner, Kilifi County, to ensure compliance;**
- g) Costs of the petition;**
- h) Any other just orders this court may deem appropriate to grant.**

2. In response to the petition, the 22nd respondents filed a cross-petition dated March 13, 2025, seeking the following reliefs:

- a) a declaration that the 22nd respondent's constitutional right to acquire and own the property known as MN/III/5533, which is a subdivision of MN/III/515, has been violated by the issuance of parallel titles to the petitioners, respondents, and other persons who may not be before the court;**
- b) A declaration that, since this honorable court has severally upheld the 22nd respondent's title to the said property, the subsequent**

issuance of titles to the petitioners and respondents is in blatant disobedience of this honorable court's binding judgments and therefore null and void;

c) A mandatory injunction compelling the petitioners, the respondents, and any other persons who may, by reason of the aforementioned unconstitutional actions, come into possession of the 22nd respondent's property, to vacate the property; eviction of the petitioners and respondents from the 22nd respondent's property known as MN/III/5533 and all other subdivisions derived therefrom; and costs of the suit.

3. From the outset, I will state that this court variously gave directions for the parties to file their responses to the main petition and cross-petition, and also directed the parties to file written submissions. The court had reserved judgment for June 25, 2025, but the 7th petitioner filed an application on the 23rd of June 2025 seeking to file further evidence.

- 4.** Noticing the convoluted nature of the matter and that some parties were not adhering to the court's direction on October 8, 2025, it was ordered that all parties involved in this petition appear in court on 30th October 2025 and submit all the averments filed in the case in a bundled manner.
- 5.** On October 30th, 2025, I received the bundled averments, statements, and filed documentations from the parties, except for the 1st and 2nd respondents, despite them being represented by the Honorable AG throughout the entire hearing of this matter. I also did not receive any documentation or averments from the 3rd respondent in the matter.
- 6.** The petitioners relied on the affidavit supporting the petition, sworn by Stephen Kahindi Ngumbao on May 15, 2025, along with written statements from Irey Abdi, Gladys Riziki Felistus Mbitha, and Omar Salim, as well as a list provided for the Mtwapa Maweni Settlement cheme, photographs depicting the settlement, and submissions filed on April 7, 2025.
- 7.** The 7th petitioner relied on the supporting affidavit sworn by Julius Dzombo Nguma, dated July 10, 2025, which shows encroachment on the suit property and a list believed to

include those who genuinely need to be settled on the suit properties. I also received a submission dated October 6, 2025.

- 8.** As alluded to, I did not receive any response from the 1st to 5th respondents in the matter, despite the fact that all the transactions alluded to in this petition must have been undertaken by the officers from those government departments.
- 9.** The 6th respondent relied on his statement and bundle filed on October 1, 2025, with attached submissions.
- 10.** The 7th, 8th, 10th, 12th, 13th, 14th, 16th, 19th, and 20th respondents, through the authority granted to Kenyatta Maitha Mwawashe, swore the replying affidavit dated November 14, 2025, with their submissions dated 28th November 2025.
- 11.** The 9th respondent, Omar Chengo, filed submissions dated 26th September 2025.
- 12.** At one point, the firm of Mwakireti and Asige advocates appeared for the 6th to the 21st respondents, but that firm filed nothing on record. In this respect, I did not see responses from the 11th, 15th, 17th, 18th, and 21st respondents, presumably represented by Mr. Mwakireti.

13. The petitioner in the main petition stated that the petitioners are bringing this case on their own behalf and on behalf of members of the Maweni Self Help Group regarding land parcels formerly known as MN/III/324 and MN/III/334 (the suit property), which have always been public land at all material times. In 2017, the 1st and 2nd respondents began a joint process to allocate these properties to residents of Maweni through the Maweni Settlement Scheme initiative. A ground survey was conducted as part of this process, involving officials from the 1st respondent's Kilifi County and the 2nd respondent's County Coordinator; however, this process was marred by irregularities.

14. As a direct result of these irregularities in the allocation process, the residents of Maweni have faced issues with titles, as the 4th respondent has issued and continues to issue homestead deeds to strangers and non-residents who have appeared, claiming to be registered owners of the petitioners' land parcels. All residents of Maweni have written several letters to the respondents regarding this matter; however,

these letters have not elicited any response, necessitating the filing of this petition.

- 15.** The respondents have provided what they believe to be the genuine list of individuals who need to be settled. Through this petition, the exercise should be repeated with officers of integrity.
- 16.** As for the cross-petition by the 22nd respondent, the petitioners aver that this petition is not *res judicata* as claimed by the 22nd respondent.
- 17.** In response, the 6th respondent contends that the petitioners are beneficiaries with titles to their respective parcels, hence the petition is misconceived.
- 18.** Furthermore, although the petitioners claim they are also suing on behalf of others, they have not provided any evidence to prove the identity or actual physical occupation of the land by other alleged squatters, such as copies of national identification cards, including the authority to sue on their behalf as per Order 1, Rule 13 of the Civil Procedure Rules.
- 19.** The 6th respondent argues that the petitioners have also failed to submit photos of the houses or land they occupy

individually, utility bills, details of the land size each claims, an approved survey map showing the exact location of each petitioner's house or structure, or a registered surveyor's report confirming actual physical occupation of the property. Concerning the allegation in paragraph (6) that the process was marred by irregularities, in which the 1st respondent did not provide the petitioners with the scheme survey map, this is untrue, and there is no evidence that efforts to locate the survey map failed.

20. Furthermore, it should be noted that a consent court order of **ELC No. 166 of 2015** for planning and surveying was publicly granted, along with a prior notice letter issued by Kilifi County Government to residents. Additionally, the map was publicly available for inspection, verification, and correction at Maweni Village by Respondents (1), (2), (3), (4), and (5).

21. Furthermore, in the matter of **Miscellaneous Application No. 560 of 2004 (OS), Omar Salim Chengo and Others v Land Registrar and others**, the trial judge decreed that: the parcels of land be held by the Government upon trust for the

applicant and other residents in possession thereof in accordance with Article 62 of the Constitution.

22. Furthermore, contrary to the petitioners' allegations in the petition, beacons were indeed properly placed by the Director of Surveys at each boundary of the 1,401 plots, and a survey map was produced in accordance with the court's directive in an *inter partes* consent judgment in the case of **ELC Case No. 166 of 2015**, where no appeal was filed. Additionally, contrary to the petitioners' allegations in the petition, beacons were properly placed by the Director of Surveys at each boundary of the 1,401 plots, and a survey map was produced as directed by the court in the *inter partes* consent judgment in **ELC Case No. 166 of 2015**, where no appeal was entered.

23. Regarding the cross-appeal, the 6th respondent argues that at no point did the Court of Appeal declare that plot number MN/III/5533, supposedly registered in the name of respondent No. 22, is a better title originating from plot MN/III/515. He claims that MN/III/515 is a subdivision of MN/III/324 and MN/III/334. There is enough evidence before this court and from other sources to show that no subdivision was ever made on

the property before 2012. In the case of **Mwinyi Hamisi Ali (Appellant) v the Attorney General and Philemon Mwaisaka (Civil Appeal No. 125 of 1997)**, The Appellate Judges found and stated that the undivided three-quarters of plot No. 334 was not for the Government to allocate to anyone until it was properly surrendered to the Government and the appropriate surrender documents were registered. The 6th respondent contends that there were many other matters filed in court concerning the same property, plot No. MN/III/324 and plot No. MN/III/334.

24. The 9th respondent states that the allocation of the land to the community was marred by irregularities and that, instead of benefiting the locals, government officials allocated the land to themselves. Therefore, there is a need to review the process again.

25. The 7th, 8th, 10th, 12th, 13th, 14th, 16th, 19th, and 20th respondents aver that the main petition is an ill-conceived petition but to defend the integrity of long-established judicial decisions, to protect constitutionally guaranteed property rights, and to resist an attempt, thinly disguised as a

constitutional grievance, to reopen, unsettle, and undo matters that the law considers final, closed, and beyond dispute. On the cross petition, the 6th respondent claims that, contrary to the petitioners' allegations in paragraph (6), bullet (5) of the petition, beacons were indeed correctly placed by the Director of Surveys at each boundary of the 1,401 plots, and a survey map was produced in accordance with the court's directives in an *inter-parties* consent judgment in the matter of **ELC Case No. 166 of 2015**, where no appeal was filed.

26. The proceedings before this Court concern the land historically known as MN/III/324 and MN/III/334, now subdivided, under the direct supervision of the High Court, with the involvement of the National Land Commission and the Ministry of Lands, into 1,401 individual plots forming the Maweni Settlement Scheme. The respondents are beneficiaries of this lawful, court-driven settlement process, which descended from the decree in **Misc. Application No. 560 of 2004**, the **Consent Judgment in ELC No. 166 of 2015**, and subsequent administrative implementation. Their rights are

vested, their titles are issued, their possession is settled, and their legal position is anchored in judicial authority.

27. The petitioners now invite this Honorable Court to declare this entire judicial history a nullity; to displace more than 1,401 titleholders; to impugn a legally supervised settlement program; and to elevate bare allegations over binding appellate authority. Their case rests on an audacious misconception, that the suit properties *“have always been public land”*, a position directly contradicted by the Court of Appeal, which held that the alleged surrender of the suit land was legally defective, incomplete, and incapable of vesting the land in the Government. The petitioners, therefore, seek, through constitutional litigation, to achieve what no party has ever achieved through law: the resurrection of a surrender that the Court of Appeal condemned as ineffectual.

28. The amended petition suffers from a fatal and incurable vice: the deliberate omission of more than 1,401 indispensable parties, being registered proprietors whose titles the petitioners seek to cancel, nullify, or displace. The law is unequivocal: no order adverse to a proprietorship may be issued without notice

or joinder. The petitioners purport to invalidate an entire settlement scheme without naming even a fraction of the persons who stand to lose their homes, their titles, and their rights. This is not litigation; it is an ambush of the highest order, and it strikes at the heart of Articles 25(c), 47, 48, and 50 of the Constitution.

29. Similarly, the petitioners fail the constitutional pleading test established in **Anarita Karimi Njeru v The Republic (1976-1980) KLR 1272** and reaffirmed in **Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] KECA 445 (KLR)**. They do not identify the constitutional provisions they allege were violated, explain how the violation occurred, or show the connection between the respondents' actions and the claimed infringement. What the petitioners have submitted is not a constitutional petition but an ordinary land dispute disguised as a constitutional matter to avoid statutory procedures under the Land Act, Land Registration Act, and the Fair Administrative Action Act. Under the doctrine of constitutional avoidance, this Court is obliged to

decline to hear matters properly within the scope of alternative dispute resolution mechanisms.

30. On the cross petition, the 7th, 8th, 10th, 12th, 13th, 14th, 16th, 19th, and 20th respondents, aver that the 22nd respondent's cross-petition, fare no better. It is based on an illegal title, namely MN/III/515, which the Court of Appeal clearly condemned as having been created through an unlawful, incompetent, and premature subdivision. At the same time, the land was still private property, and before any lawful surrender. Article 40(6) removes constitutional protection from such tainted titles. Therefore, the Cross-Petition is structurally flawed, substantively unjustifiable, and constitutionally invalid.

31. At its core, both the amended petition and the cross-petition represent an impermissible secondary attack on the judicial process itself. The law does not allow litigants to revisit the court, invoking constitutional language, to overturn final judgments, relitigate settled issues, or seek remedies that conflict with previous rulings. Allowing such actions would violate principles like *res judicata*, finality of litigation, issue

estoppel, *lis pendens*, and the fundamental idea that judicial decisions should ultimately be final.

32. The 7th, 8th, 10th, 12th, 13th, 14th, 16th, 19th, and 20th respondents accordingly request the Court to strike out both the Amended Petition and the cross-petition *in limine*, dismiss them with costs, and confirm the legality and finality of the Maweni Settlement Scheme.

33. The 22nd respondent and cross-petitioner argue that the subject land previously belonged to Captain Townsend, Mrs. Bradley, and Mr. Taylor. Captain Townsend owned MN/III/324, while MN/III/334 was co-owned by the three of them. In a letter dated January 26, 1956, Captain Townsend relinquished his title to the government in exchange for a promise to grant him a smaller residential plot. On March 21, 1961, the Commissioner of Lands informed Captain Townsend that, upon surrendering both Plot Nos. 324 and 334, the government would offer him two residential beach properties and one additional property for each of the three co-owners of Plot No. 334. In 1996, Captain Townsend surrendered Plot No. 324 to the government. Mr. Taylor also surrendered his share in Plot

No. 334 on January 19, 1970, with registration completed on January 13, 1971. Mrs. Bradley surrendered her one-quarter share to the government, and the surrender was registered on May 23, 1989. Only a one-quarter share was registered, leaving half of the surrendered land unregistered. In 1971, the Government of Kenya unified and subdivided the two plots (MN/III/324 and MN/III/334) into MN/III/515 and MN/III/527. Plot No. MN/III/324 and 18 acres from MN/III/334 were combined to create MN/III/515. MN/III/515 was allocated to Mr. Philemon Mwaisaka. Consequently, MN/III/324 and MN/III/334 ceased to exist following the consolidation and subdivision described above. The validity of Mr. Mwaisaka's title has been the subject of several proceedings, including:

- a) **High Court Civil Case No. 732 of 1991 Mwinyi Hamisi Ali vs. Attorney General and Philemon Mwaisaka.**
- b) **Civil Appeal No. 125 of 1997 Mwinyi Hamisi Ali vs. Attorney General and Philemon Mwaisaka.**
- c) **High Court Civil Case No. 64 of 2004 Mwinyi Hamisi Ali Kombo & Others vs. Dairus Mbela and Others.**

34. The 22nd respondent cross-petitioner asserts that the above cases validated Mr. Philemon Mwaisaka's title. These decisions

have not been overturned and are therefore binding on the parties regarding the validity of the title held by Philemon Mwaisaka.

35. Furthermore, another case, namely **High Court Miscellaneous Application No. 560 of 2004 (OS)**, was filed. The order for reconstructing the parcel files of Plot No. MN/III/324 and MN/III/334 were issued by the late Mukunya J. on November 26, 2013. By that time, Mr. Philemon Mwaisaka had already subdivided and sold a significant portion, namely MN/III/5533, to the 22nd respondent. When issuing the order on November 26, 2013, the Court was unaware of the various decisions. The 22nd respondent was not joined to the proceedings despite its interest in the property. Therefore, the 22nd respondent moved the court to strike out the suit in **Miscellaneous Application No. 560 of 2004**. The suit was subsequently dismissed by a ruling on February 6, 2020. In 2017, pursuant to the order issued in **High Court Miscellaneous No. 560 of 2004**, the 1st respondent began allocating land to Maweni residents through the Maweni Settlement Scheme Initiative, a process that has led to this

case. This was despite the 1st respondent knowing that the orders in **Civil Miscellaneous Case 560 of 2004** had been vacated, as mentioned above. The 22nd respondent denies the petitioners' claims and states that the properties known as MN/III/324 and MN/III/334 were consolidated and subdivided and therefore no longer exist. The 22nd respondent argues that the initial allotment was lawful, as the suit property has been the subject of various court cases, including **Civil Appeal No. 125 of 1997**, in which the court found that the title to MN/III/334 was factually surrendered to the government. The court also held that the Commissioner of Lands had *de facto* powers to allocate the land to other persons, and resulting titles could not be challenged except as provided in Section 24 of the Act. This appeal validated Mr. Philemon Mwaisaka's title, which he subsequently passed to the 22nd respondent. There is no connection between Philemon Mwaisaka's status as a civil servant and his being allocated land. Therefore, the petitioners cannot claim to be the rightful allottees without submitting any document to support such a claim, especially in deliberate disregard of the binding decision of the Court of Appeal in **Civil**

Appeal No. 125 of 1997. The 22nd respondent maintains that the petitioners' actions have adversely affected its property rights by denying it peaceful possession of the suit property and, consequently, infringing on its right to own property under article 40(1), (3), and (6) of the Constitution of Kenya 2010.

36. Arising from the averments by the parties, the issues I frame for the determination of this petition are whether the petition meets the threshold for a constitutional petition and whether the petitioners are entitled to the reliefs sought. Whether the issues in the petition are *res judicata*. Whether the 22nd respondent is entitled to the reliefs sought in the cross - petition. Costs of the petition and cross-petition.

37. As alluded to above, as I work to resolve the issues raised herein, it seems to me that the parties in this litigation were trying to steal a march or gain an advantage over each other, judging by how they filed their pleadings, averments, and statements in support of their respective cases. As previously mentioned, it is quite telling that the Government Departments responsible for the matters referred to by the parties did not

show up for this case, which means the Court will be operating without vital documents held by the Government regarding the Mtwapa Maweni Settlement Scheme, how it started, and whether the parties' allegations are substantiated. I will note that, in all the mess depicted in this matter, the persons entrusted with the allotment of the land in question jumbled the whole process and failed to follow the law governing the allocation of public land and to distinguish between public and private land, leading to the current mix-up. As I see it, it will take a while to achieve an equilibrium in this matter, given the competing interests of the parties in the subject property.

38. And as already stated, the court will go by the materials and submissions placed before it.

39. Regarding whether the main petition qualifies as a constitutional petition, the petitioners argue that the scheme was meant to benefit locals, but government officials interfered and allocated the land to themselves, excluding the true beneficiaries. The truth of this claim is not usually something a petition can resolve. I agree with the respondents that, since over 1401 titles have already been issued, this court cannot

assume to determine how the process was conducted, especially given that the government officials involved played a significant role. Moreover, as alleged, the titles were issued pursuant to court orders based on directives emanating from **Mombasa Misc. Application No. 560 of 2004 and ELC No. 166 of 2015**. (I will review the tenor of these suits while discussing the cross-petition.) I also reckon many of those parties holding those titles are not parties to this petition.

40. Besides, it has been shown that the main petition violates and offends the doctrine of *res judicata*, as the issues raised here have been handled in various cases disclosed as:

- i. Misc. Application No. 560 of 2004 (O.S.) - Jumaa Chengo Kashasha & another v Registrar of Titles Mombasa & 5 others [2018] eKLR.**
- ii. Civil Case 64 of 2004 - Mwinyi Hamisi Ali Kombo, Mohamed Karisa Mwisho, Chengo Nguma Benguma, Bardale Tapata, Partson Jkahindi Nyundo, Ngala Chigunda Jira, Gladys Riziki Nyamawi & Bodze Jilani V Darius M. Mbela, Philemon Mwaisaka, Julius Kariuki Gecao, Mike Maina, SI [2009] KEHC 3582 (KLR).**

iii. ELC No. 166 of 2015 (Consolidated)- Gladys Riziki Nyamawi & 8 others v Registrar of Titles, Mombasa & 10 others [2021] eKLR

iv. Civil Case No. 284 of 2012 - Joshua M. Wambua & 12 Others v Philemon Mwaisaka & 5 Others [2013] eKLR

v. ELC No. 60 of 2020 - Omar Salim Chengo & 5 others v Philemon Mwaisaka & 13 others [2022] eKLR.

b) ELC No. 108 of 2022 - Agricultural Handling Services Limited v Chengo & 10 others [2023] KEELC 787 (KLR).

41. I will also revert to those matters when discussing the cross-petition.

42. A look at the main petition, the nature of the reliefs sought in the petition does not conform to the provisions of Article 23 of the Constitution of Kenya. Reliefs sought in a petition pursuant to articles 22 and 23 of the Constitution of Kenya should aim to protect and enforce the fundamental rights and freedoms that are allegedly infringed or threatened. The prayers in the amended petition do not explicitly seek to protect or enforce any fundamental rights and freedoms in the Bill of Rights. The jurisdiction of this court has not been sufficiently invoked to enable it to sit as a constitutional court. As stated in the case of

Fose v Minister of Safety and Security 1997(3) S.A 786(Sasely) at page 19, the Constitutional Court of South Africa held that;

"appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case, the relief may be a declaration of Rights, an interdict, a mandamus or such other as may be required to ensure that rights enshrined in the Constitution are protected and enforced.If it's necessary to do so the courts will even have to fashion new remedies to secure the protection or enforcement of these rights."

43. As noted earlier, there is no disclosure of the rights the petitioners seek to protect and enforce, nor are the reliefs requested aimed at safeguarding any rights. The overall conclusion is that, based on the nature of the complaint and the relief sought, it is clear that the main petition does not meet the threshold for a constitutional petition. The petitioners' allegations, including claims of irregular survey, faulty beaconing, alleged unfair vetting, disputes over allocation, and dissatisfaction with administrative steps taken during the

planning and survey process, are solely land administration issues, fully governed by non-constitutional legislation. These laws explicitly provide procedures for filing complaints, objections, and appeals; rectifying the register; identifying boundaries; updating survey records; and conducting administrative reviews.

44. Further, the petitioners have not shown that they have exhausted, attempted to exhaust, or were prevented from exhausting any of these statutory procedures. Instead, they have escalated a routine administrative disagreement into a constitutional issue, contrary to the ruling in **Speaker of the National Assembly v Karume (Civil Application 92 of 1992) [1992] KECA 42 (KLR) (29 May 1992)**, which holds that when a statute establishes a process for redress, that process must be followed precisely.

45. Due to the foregoing, the main petition is hereby dismissed with costs.

46. Coming to the cross-petition by the 22nd respondent, the main complaint is that, despite numerous court decisions recognizing its title to the suit property—decisions that have

been confirmed and upheld by precedent—some of the petitioners in the main petition and respondents have forcibly entered the property under an allocation that contradicts still-in-effect orders recognizing its right to the property. The cross-petitioner avers that the amended petition relies on the alleged existence of parcels Number MN/III/324 and MN/III/334. It is not in dispute that these two parcels of land have been the subject of various court proceedings, including **High Court Civil Case No. 732 of 1991, Mwinyi Hamisi Ali v. Attorney General, and Civil Appeal No. 125 of 1997**, where the court held that Mr. Philemon Mwaisaka Mawaka was the registered owner of plot No. MN/III/515, and **High Court Civil Case No. 64 of 2004 Mwinyi Hamisi Ali Kombo & Others v. Darius Mbela and others**, where the court was satisfied that Mr. Philemon Mwaisaka Mawaka was the registered owner of plot No. MN/III/515 and ordered the eviction of the trespassing plaintiffs. It is submitted that the validity of Philemon Mwaisaka's title was an issue in these cases, and the Court of Appeal's decision has neither been appealed nor varied. In fact, the matter

concerning the reconstruction of MN/III/324 and MN/III/334 was subsequently struck out.

47. The 22nd respondent averred that, based on the Court of Appeal decision validating Philemon Mwaisaka's title, the decision also guaranteed him the right to pass the title by sale to the 22nd respondent. This, therefore, dismisses the petitioners' claim that Mr. Philemon Mwaisaka did not pass a good title. The Supreme Court, in the case of **Independent Electoral and Boundaries Commission v Kiai & 5 others [2017] KECA 477 (KLR)**, while considering section 7 of the Civil Procedure Rules, held that for the doctrine of *res judicata* to apply, the issue must have been directly and substantially in dispute in the previous case and must have been finally heard and decided by a court of competent jurisdiction. It was also held in the case of **John Florence Maritime Services Ltd & Ano vs Cabinet Secretary for Transport and Infrastructure and 3 others [2013] eKLR** that the rationale behind *res judicata* is to bring litigation to an end and to protect a party from facing repetitive lawsuits over the same matter.

48. On the other hand, respondents significantly disagree with the 22nd respondent cross-petitioner, more so the 7th, 8th, 10th, 12th, 13th, 14th, 16th, 19th, and 20th respondents, contending that the core foundation of the 22nd respondent's cross-petition is fatally defective. They argue it rests on an alleged chain of title derived from the purported subdivision and amalgamation of Plots MN/III/324 and MN/III/334, culminating in Plot MN/III/515 and subsequently MN/III/5533. That chain of title is legally nonexistent, historically invalid, and has been judicially repudiated by the highest authority governing this matter—the Court of Appeal in **Mwinyi Hamisi Ali v Attorney General & Philemon Mwaisaka [1997] KECA 210 (KLR)**.

49. The respondents in the cross-petition aver that the 22nd respondent/petitioner bases his claim on a title whose root is alleged to have arisen from a subdivision undertaken around 1971. The Court of Appeal has decisively rejected the legality of that subdivision, holding that the Government had no capacity to alienate or subdivide Plots MN/III/324 or MN/III/334 until a lawful surrender had been effected and registered, as

required under section 44 of the (repealed) Registration of Titles Act (RTA), Cap 281. Without a lawful surrender, the Government could not pass good title, and any purported subdivision or allocation was ultra vires, void, and incapable of creating rights in anyone.

50. This then brings me to the question of whether the 22nd respondent's cross-petitioners' rights to own property have been infringed in view of the decisions of the courts, and whether his title is valid vis-à-vis the other titles held by the parties.

51. This will be achieved by going back in time to examine how parcels Number MN/III/324 and MN/III/334 were created, and how the subsequent subdivisions were created.

52. The issue traces back to the litigation in **High Court Civil Case No. 732 of 1991, Mwinyi Hamisi Ali vs. Attorney General and Philemon Mwaisaka**, with an appeal in **Civil Appeal No. 125 of 1997, Mwinyi Hamisi Ali vs. Attorney General and Philemon Mwaisaka**. The latter is reported as **Mwinyi Hamisi Ali, The Attorney General & Another [1997] KECA 210 (KLR)**. Regarding the title held by Mr.

Mwaisaka, the Court of Appeal will comment on his title as follows:

“The land in question was held under the Registration of Titles Act, Cap 281, Laws of Kenya (the Act). Section 44 of the Act requires that surrender of land leased by the Government to persons be registered in order to terminate the interest of the lessees. Registration of such surrender is evidence of surrender. But section 44 does not envisage a situation whereby lack of such registration would make null and void de facto surrenders. From the evidence before the superior court there can be no doubt that Captain Townsend and his three co-owners had factually surrendered plot No. 334 to the Government and that all of them had in exchange been promised allotment of residential beach plots. Moreover, such lack of registration of surrender does not give Mr. Hamisi Ali any title to the suit land. He must claim only as the law allows him to. If, as he says, he was in possession of the suit land, by permission of Captain Townsend and others, he only had mere possession, but no title, or entitlement to title.

There is no doubt in our minds that the Commissioner acted unfairly in not considering Mr. Hamisi Ali as an

allottee. To that extent the Commissioner may have been callous, or even partisan, but Mr. Hamisi Ali could not, on that basis alone, claim title. Section 44 of the Act could only be invoked in aid by a registered proprietor and not a person who is there by permission of the registered proprietor. The Commissioner had de facto control of plot No. 334 and if he proceeded, as he did, to allot the land to other persons, who were not aware of the claim by Mr. Hamisi Ali their titles cannot be impugned except as provided for in section 24 of the Act which section has no relevance in this suit.

It is on these observations that, in our view, Mr. Hamisi Ali's claim to title to the suit land fails. The Commissioner or his agents acted irregularly in allotting the plots when they were not de jure surrendered to the Government but such actions were not illegal, or null and void, as we think the surrenders may have been subsequently regularised and as de facto the Government had a right to the suit land. At least Mr. Hamisi Ali had no better right than the Government.

It must be borne in mind that Mr. Hamisi Ali went into occupation of the suit land by permission of Captain Townsend, who had wanted to sell the plots (324 and

334) to him. He paid nothing. He was even told not to pay until such time someone called upon him to pay. He developed the suit lands and has had, presumably, benefits derived from such developments. Mr. Hamisi Ali, in our view, acquired no better rights to claim title to the suit land, as Captain Townsend having surrendered the title of plot No. 324 to the Government was in no position to sell the suit land to Mr. Hamisi Ali who was then on plot 324 at his own sufferance.”

53. From that passage from the Superior Court, there is no indication that it illegitimized any allotment to any person, including Mr. Mwaisaka’s allotment to the suit property, even though it commented that the procedure was flawed due to a lack of proper surrender.

This issue was further discussed in another case, reported as **Ali Mwinyi Hamisi v Mike Maina & 2 Others [2012] KEHC 935 (KLR)**. The High Court held as follows:

“Let me say something about Civil Suit No. 64 of 2004. As pointed out by the Defence that suit was filed after the Court of Appeal decision and was in my view an attempt by the Plaintiff to rectify the errors committed in Civil

Suit No. 732 of 1991. Those proceedings did not go as planned (from the Plaintiffs point of view) because in the Ruling of 3rd November 2006 Judge Sergon ordered the Plaintiffs to vacate parcel of land known as MN/II/515. It is the view of the 2nd and 3rd Defendants that the current suit is an abuse of Court process as it is intended to defeat the result in Suit No. 64 of 2001. The Plaintiffs answer to this is that the Deceased withdrew from those proceedings. Shown to the Court is a Notice of Discontinuation of suit by the first Plaintiff dated 4th August 2005 and filed on 10th August 2005. I have to agree with the Plaintiff herein that the Ruling delivered on 3rd November 2006 did not affect him. Infact these Originating Summons were commenced on the very same day the Plaintiff withdrew from the 64 of 2004. I am unable to find that these proceedings were intended to circumvent Judge Sergon's decision as they were filed about 16 months before that decision."

54. There followed High Court Miscellaneous Application No. 560 of 2004 (OS). This is the origin of the convolusion we have in subsequent litigation. It was a matter directly filed to defeat the holding of the Superior Court in the **Mwinyi Hamisi Ali**

Case (supra). The order for the reconstruction of the parcel file for Plot Nos. MN/III/324 and MN/III/334 was given by Mukunya J. on November 26, 2013. By the time the order was issued, Mr. Philemon Mwaisaka had already subdivided and sold a significant portion thereof, to wit, MN/III/5533, to the 22nd respondent. The Court, while giving the orders of November 26, 2013, was not made aware of the various decisions. The 22nd respondent had not been joined to the proceedings, despite its interest in the property to protect its proprietary interest.

55. The 22nd respondent moved the Court to be joined, along with others, to review the adverse orders issued despite its interest in **Misc. Application No. 560 of 2004**. The ruling for joinder is reported as **Jumaa Chengo Kashasha & another v Registrar of Titles Mombasa & 5 others [2018] KEELC 2498 (KLR)**. In its ruling dated 5th day of July 2018, the court held as follows:

“The Rules however give the Court discretion to allow review for any sufficient cause. The applicants have demonstrated the sufficient cause to include the suit being filed against parties who were deceased (2nd -

6th defendants). Further the Applicants also stated that the consent was entered in respect of titles numbers 324 &334 which had ceased to exist following the amalgamation and the same having left the hand of the persons sued. In par 12 of the judgement, Mureithi J. observed that it was unclear what happened to the two titles after they were surrendered to the government- whether the same were re-issued to the original owners or to 3rd parties.

54. The trial Judge went further to state that the onus was on the Respondents to establish the titles remained in the names of persons sued as 2nd- 6th Defendants. He found in par 15 of the judgement that the claimant before him failed to discharge this burden. He therefore dismissed the suit for want of proof. The respondents to the present applications did not appeal this judgment and they have neither denied that the titles had ceased to exist nor whether at the time the suit was filed the named 2nd -6th defendants had passed on. If this was the true position, then there is sufficient cause that requires the orders of review to be granted as the proceedings before the judge were a nullity. Further; it is clear that the orders if executed will result into issuance of double

titles over the same parcels of land to different persons (i.e the 3rd -204th Respondents and the current holders of the titles some of whom have brought these applications).

55. Mr Oduor for the co-plaintiffs submitted that the applications were time barred because they were filed after six months. Both sections 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules do not impose timelines within which applications should be made. It only requires a party to move the court without unreasonable delay. Consequently the submission that the applications were filed outside the six months thus filed out of time is not grounded in the law.

56. In conclusion, I find the applications have merit because of the inconsistencies outlined above. It is in the interest of justice that the persons holding the titles to the suit land be accorded an opportunity to present their case. Accordingly, I grant the following orders;

i) The judgement of the court delivered on 30th March 2012 be and is hereby set aside together with all consequential orders flowing therefrom more

particularly the orders given on the 26th Nov 2013 & 11th April 2017 in ELC Case no 166 of 2015.

ii) The applicants herein are joined as defendants with leave to defend the suit.

iii) Each party shall meet its costs of the respective applications”

56. Upon joinder, the Court, in its ruling dated 5th February 2020, after being moved to strike out the entire suit. After discussing the history of the matter, the court held as follows in striking out the OS:

“The judgement in the Ali Hamisi Case supra was rendered on 19 September 1997. It is the 1st and 2nd plaintiff who annexed it and they referred to it in opposing the application when they stated that the Court of Appeal noted that the suit titles was grabbed and fraudulently sub divided. The inference drawn is that at the time the 1st plaintiff or his predecessor in title filed this suit in the year 2004, it was within the plaintiff's knowledge that;

- (i) Captain Townsend, Mrs. Brandy, Mr. Taylor, and Mr. Torr (2nd, 3rd - 6th defendants) were already deceased as at 1997.**
- (ii) The suit title numbers 324 and 334 was already surrendered to the government and sub divided (whether fraudulently or otherwise).**

The suits as against the 2nd - 6th deceased defendants cannot therefore stand unless their personal representatives were sued. Once served with the application dated 1/10/2018 to strike out the suit, the plaintiffs defended themselves that their suit is valid and that the defendants and the general public were duly served through registered mail and an advertisement placed in the standard newspaper. A suit against a deceased person cannot be validated merely by service being effected through advertisement in the newspaper. In the Case of Viktar Maina Ngunjuri & 4 others vs A.G. & 6 others (2018) eKLR, where Mbogholi Msagha stated thus;

"The estate of a deceased person may take over proceedings against him if that person were alive at the time the suit was filed. That

notwithstanding, the estate must be made a party and authorized by the court through an executor or a personal representative. A formal application has to be filed to facilitate this. No grant of representation has been presented to court. In the instant case this cannot happen because the deceased died before the suit was filed and the representative of the estate has not been identified. Even if the representative were identified it is not possible to take over a nullity."

The 1st plaintiff also urged this Court to nullify the amalgamation and subsequent subdivisions which was done by people who were not the registered owners as was found by the Court of Appeal. This confirms the second point that the title numbers given in the Originating Summons (MN/111/324 & 334) had ceased to exist at the time this suit was filed in the year 2004. Although the plaintiffs contended that they were the custodian of the suit land, registration on paper had indeed changed pursuant to the sub divisions. Current title numbers can be changed by amendment of pleadings. However the fact that the suit was commenced

against dead defendants cannot be changed as the suit was fatally defective ab initio. Consequently there is no valid suit that can be cured by way of amendment. The plaintiffs still have options open to them as against the legal representatives of the 2nd - 6th Respondents and or any parties claiming title to the suit land which option does not include a null and void claim. To this extent, I find that the merit in the motion dated 1/10/2018. The consequence is that Originating Summons filed as No. 560 of 2004 be and is struck out for being void with an order that each party to meet respective costs."

57. In yet another matter, the County Government of Kilifi filed a constitutional petition, **Case No. 48 of 2019, County Government of Kilifi and others v. the Registrar of Titles and others**. It is reported as **County Government of Kilifi & another v. Registrar of Titles & Others [2021] KEELC 2810 (KLR)**. In upholding a preliminary objection raised (by the 22nd respondent, cross-petitioner in this matter) on the doctrine of *res judicata* in that matter, the Court considered and perused the judgment dated September 19, 1997, in **Civil Appeal No. 125 of 1997**. That was an

appeal from the judgment and decree of the High Court of Kenya at Mombasa dated 18th September, 1995, in **HCCC No. 732 of 1991**. The judge found that, no doubt, the subject matter of the appeal was Plot Nos. 324 and 334. The same plots were also referred to in the rulings dated 3rd November, 2006, and 18th February, 2008, in **HCCC No. 64 of 2004**. He found that, in the petition before him, the petitioners' claim was based on the fact that the 2nd petitioner and several other individuals were in occupation of the said parcel, Plot Nos. 324 and 334. From the documents filed, and in particular the judgments and rulings annexed thereto, he found that it was clear that the former suits and the suit before him were based on the same claim and the same cause. The suit properties in all the suits were Plot Nos. 324 and 334, Section III, mainland north. In the former suit, judgment was entered on the merits after the parties had presented their evidence. Indeed, the matter was appealed to the Court of Appeal, where judgment was also delivered on 19th September, 1997. At the end, the Court ruled as follows:

“When this court applies the law into the facts before it, it is with no shadow of doubt that the petitioners in this present case have camouflaged the issues that were litigated and adjudicated upon previously before courts of competent jurisdiction. From the pleadings, it is clear that the petition has been brought on behalf of other parties who have not clearly been named. These could as well include the parties in the former suits. What is, however, clear is that the same issues that were litigated upon in the former suits and the ones being raised in the current suit are the same. From the decision cited hereinabove, it is clear that parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit. The statutory provisions under Section 7 of the Civil Procedure Act are also clear and bars a court from hearing a suit or other issue if the same was substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim. In the Amended Petition, the Petitioners have pleaded that the petition is purely brought on the basis of public interest. The petitioners aver that there are several individuals and families in occupation of the subject parcel of land whose

interest is represented by the 1st Petitioner herein. In my view, the named individuals may as well be the parties in the former suits. By virtue of Section 7 of the civil Procedure Act, the Petitioner herein is barred by the doctrine of res judicata.

21. In the result, I find that the Notice of Motion dated 15th February, 2021 and the Notice of Preliminary objection are merited and the same are allowed. The Amended Petition dated 14th July, 2020 is hereby struck out with costs."

58. Examining the chronology and litigation history, the 22nd Respondent's title has been confirmed through various judicial pronouncements based on the history of the two parcels in question. This has been consistent. High Court Miscellaneous Application No. 560 of 2004 was struck out, and all subsequent orders previously issued therein were set aside; the invalidated orders have been used by Government officials to process titles that are now the subject of this petition.

59. By reason of the foregoing, any person holding title over the title held by the 22nd respondent, cross-petitioner, holds an illegal title derived from a process marred by fraud and deceit.

Clearly, the issues raised in the main petition are res judicata if the judicial pronouncements alluded to are anything to go by.

60. The process leading to the issuance of duplicate titles over the 22nd respondent's title: Disregards the fact that the property in question is private land. Disregards this court's decree on the status of the subject titles. Is premised on orders that the court has set aside and therefore do not exist. Has led to the issuance of rival titles from 2 different Land Registries. Has infringed on the 22nd respondent's cross-petitioner's right to own property and on the rights of all those persons who claim under his title.

61. Consequently, the cross-petition will succeed, and I will proceed to make the following final orders:

a) A declaration is hereby made that the 22nd respondent's cross-petitioner's constitutional right to acquire and own all that property known as MN/III/5533, which is a subdivision of MN/III/515, has been violated by the issuance of parallel titles by the 1st, 2nd, 3rd, 4th, and 5th respondents.

b) A declaration is hereby issued that, in view of the several court decisions upholding the 22nd respondent's cross-petitioners' title to the said property, the subsequent issuance of parallel titles by

the 1st, 2nd, 3rd, 4th, and 5th respondents is a glaring disobedience of this court's binding judgments and therefore titles accruing from that exercise concerning the suit property known as MN/III/5533, which is a subdivision of MN/III/515 are null and void ab initio.

- c)** *A mandatory injunction is hereby issued, compelling the petitioners and the respondents herein, who may be holding parallel titles by reason of the aforesaid unconstitutional actions, to give vacant possession of the 22nd respondent's cross-petitioner's property, described as MN/III/5533, which is a subdivision of MN/III/515, within 3 months of this judgment after due issuance of notice in accordance with the law.*
- d)** *In the alternative, and in accordance with Article 40(3)(b)(i), because the parallel titles were issued by the 1st, 2nd, 3rd, 4th, and 5th respondents, the Government shall make prompt payment in full of just compensation, to the 22nd respondent cross - petitioner equal to the market value of the suit property described as MN/III/5533, a subdivision of MN/III/515, within 3 months of this judgment.*
- e)** *Costs of the cross-petition to the 22nd respondent cross-petitioner.*

Dated, signed, and electronically delivered in Nyeri on this 9th day of April, 2026.

E. K. MAKORI

JUDGE

In the presence of:

Mr. Magolo and Mr. Adika for the Petitioners.

Mr. Gathu for the 3rd Respondent

Mr. Nyanje for the 7th, 8th, 10th, 12th, 13th, 14th, 16th, 19th, and 20th respondents

Mr. Wameyo for the 22nd respondent.

Mr. Muchai, 6th respondent

Mr. Omar, 12th respondent

Kendi: Court Assistant