

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KWALE
CONSTITUTIONAL PETITION NO. 24 OF 2021
(FORMERLY CONSTITUTIONAL PETITION NO. 341 OF
2015)
CONSOLIDATED WITH PETITION NO. 66 OF 2015

KILLIAN MWANJANI MWANDORI.....1ST
PLAINTIFF

MWATELA CHUPHI CHABOGO.....2ND
PLAINTIFF

MWARUWA DZEHA MWAMBIRE3RD
PLAINTIFF

JUMA BORA.....4TH
PLAINTIFF

MBEYU MWATENGA5TH
PLAINTIFF

=VERSUS=

KWALE INTERNATIONAL

SUGAR COMPANY LTD.....1ST
RESPONDENT

WHITESTONES FARMS LTD.....2ND
RESPONDENT

ABDALLA SAID KIZELE.....3RD
RESPONDENT

ZAINAB JUMA SALIMINI.....4TH
RESPONDENT

THE REGISTRAR OF LANDS KWALE5TH
RESPONDENT

**THE NATIONAL LAND COMMISSION.....6TH
RESPONDENT**

**THE HON. ATTORNEY GENERAL7TH
RESPONDENT**

**MUSLIMS FOR HUMAN RIGHTS (MUHURI).....
INTERESTED PARTY**

JUDGEMENT

- 1 This judgement is the subject of the petition dated 9th December 2015. The petition was brought by the petitioners on their own behalf and behalf of other residents/owners of land used for sugar growing at Kwale/Majoreni and Kidimu areas.
- 2 Vide a Notice of Motion dated 9/12/2015 the petitioners sought leave to file the petition as a representative suit which was granted. An order of consolidation was sought but the record does not bear a record of the same. However, I note the substance appears to be the same including allegations of quiet possession of the suit property and this will become apparent later in this judgement.
- 3 The petitioner's case is that they were at all material times the owners and occupiers of some parcels of land located at Kwale Majoreni area now LR Numbers Kwale/Kidimu/15 and Kwale/Majoreni 869,906,1019, Majoreni /1271, 1279, 1283, 1284, 1285, 1286, 1287, 1288, and Kwale /Majoreni /1319, 1331, 1336) (hereinafter referred to as the suit premises) where the 1s Respondent

has been developing a Sugar Growing Project in recent times. The Petitioners contend that the 1st respondent has been making further subdivisions to the said suit premises without the consent or knowledge of the petitioners.

- 4 The Petitioners contend that their occupancy of the suit premises occurred long before the establishment of the Sugar Project and the land in question is ancestral and occupied by the Petitioners forefathers a long time ago when the land used to be government land.
- 5 At paragraph 11 of the petition the particulars of occupancy are gives as follows.
 - a) The 1st Petitioner has been in occupation of 35 acres of Kwale/Kidimu/15 for long before 1983 and has hence been in the suit premises for about 32 years
 - b) The 2nd Petitioner has had an uninterrupted occupation of 37acres of Kwale/Majoreni/1283 for over 35 years
 - c) The 3rd and 4th petitioners had been occupying 14 acres and 28 ceres respectively of Kwale/Majoreni/1283 both having entered the same in 1983 hitherto without any interruption.
 - d) The 5 Petitioner has occupied some 25acres of Kwale/Majoreni/1283 for 39 years way back since his childhood.
- 6 The Petitioners contend that there is a total of Ninety-Four (93) (sic) households in actual occupation of the suit

properties, each having occupied for over twelve years in all the three-suit premises.

- 7 That Kwale/Majoreni/1284 has 28 homesteads; Kwale/Majoreni/1283 has 33 homesteads and Kwale/Kidimu/15 has 32 homesteads making a total 93 households.
- 8 The Petitioners contend that on or about the 13th day of February 1984 the then Ministry of Lands and Settlement alienated the portions of lands occupied by the Petitioners (Vide LR Number Kwale/Majoreni 1283 measuring 10.88 Hectares) and unlawfully allocated the same to the 3rd Respondent Abdalla Said Kizete without the knowledge, consent or consultation of the Petitioners who were occupying and developing the same at that time.
- 9 The Petitioners contend that on or about the 6th day of June 2008, the 3rd respondent Abdalla Said Kizere unlawfully transferred LR Number Kwale/Majoreni 1283 to the 4 Respondent Zainabu Juma Suleiman without the knowledge, consent or consultation of the Petitioners whatsoever who were occupying and the developing the same at that time.
- 10 The Petitioners contend that on or about the 31st day of July 2008, only two months after the property was transferred to her from the 3rd Respondent, the 4th respondent Zainabu Juma Suleiman unlawfully transferred LR Number Kwale/Majoreni/1283 to the 1st respondent

Kwale International Sugar Company without the knowledge, consent or consultation of the Petitioners whatsoever who were occupying and the developing the same at that time.

- 11 The petitioners contend that on or about the 13th day of February 1984 the then Ministry of Lands and Settlement alienated the portion of lands owned and occupied by the Petitioners Kwale/Majoreni/1283 measuring 4.60Ha and unlawfully allocated the same to the 3rd respondent Abdalla Said Kizere without the knowledge, consent or consultation of the Petitioners.
- 12 The Petitioners contend that on or about the 6th day of June 2008, the 3rd Respondent Abdalla Said Kizere unlawfully transferred LR Number Kwale/Majoreni 1284 to the 4th Respondent Zainabu Juma Seleiman without the knowledge, consent or consultation of the Petitioners whatsoever who were occupying and the developing the same al that time.
- 13 The Petitioners contend that on or about the 31st day of July 2008, only two months after the property was transferred to her from the 3rd Respondent, the 4th Respondent Zainaba Juma Suleiman unlawfully transferred LR Number Kwale/Majoreni 1284 to the 1st Respondent Kwale International Sugar Company Ltd without the knowledge, consent or consultation of the Petitioners whatsoever who were occupying and the developing the same at that time.

- 14 The Petitioners contend that on or about the 26th day of August 1993, the then Ministry of Lands and Settlement alienated the portions of lands owned and occupied by the Petitioners (Vide I.R Number KWALE/KIDIMU/15 measuring 123.00 Hectares and unlawfully allocated the same to the 2nd Respondent Whitestone Farmers Lid without the knowledge, consent or consultation whatsoever of the Petitioners who were occupying and developing the same at that time
- 15 The Petitioners contend that on or about the 31st day of July 2008, the 2nd respondent Whitestone Farmers Ltd unlawfully transferred LR Number Kwale/Kidimu/15 to the 1st Respondent Kwale International Sugar Company Ltd without the knowledge, consent or consultation of the Petitioners who were occupying and the developing the same at that time whatsoever.
- 16 The Petitioners contend the alienation of LR Number Kwale/Kidimu/15 and unlawfully and allocation of the same to Whitestone Farmers Ltd and also the alienation of LR Numbers Kwale/Majoreni/1283 and Kwale/Majoreni 1284 and allocation of the same to the 3rd Respondent Abdalla Said Kizere were unlawful, and unconstitutional on the grounds that;
- 17 The same was done in total disregard of the fact that the Petitioners were already occupying the land and had already developed and therefore an overriding interest

- a) The Petitioners had lived on the suit premises for more than 12 years and they therefore had acquired rights of ownership by way of prescription and adverse possession
- b) The Petitioners ought to have been informed that their land was being taken away for some reason or other
- c) The Petitioners ought to have been given priority when alienating and allocating land which they had lived on long before.
- d) They Petitioners ought to have been compensated for the land taken together with the development they had made as at the time the land was taken.

18 According to the petitioners the transfer on 6/06/2008 by the 3rd respondent of LR Numbers Kwale/Majoreni/1283 and Kwale/Majoreni 1284 to the 4th respondent was unlawful in that, the 3rd respondent did not have a good title capable of being transferred. That the beneficiaries thereof should have been the petitioners and not the 4th respondent.

19 The petitioners add that the simultaneous transfer on 31/07/2008 by the 2nd respondent of LR Numbers Kwale/Kidimu/15 and by the 4th respondent of Kwale/Majoreni 1284 LR Numbers Kwale/Majoreni/1283 to the 1st respondent was unlawful since neither the 2nd nor 4th respondents had any good title to transfer to the 1st respondent. The exercise was done without the consent, knowledge or consultation of the petitioners whatsoever

although they had already acquired a right of ownership or at least had an overriding interest in the suit preemies prior to the transfers.

- 20 The Petitioners contend that the alienation and allocation of their land to the 2nd and 3rd respondents and the subsequent transfer to the 1st respondent by the 2nd and 4th respondents were the illegal act of the officials of the then Ministry of Lands and the Registrar of Lands (Kwale) and the same amounts to denying them of their right to a fair administrative action in contravention of Article 47 of the Kenya Constitution (2010).
- 21 It is further averred that the Petitioners learnt the land which they have always considered theirs was alienated, registered, was subdivided and transferred to the current registered owner, the Respondents herein after the Petitioners conducted official searches in preparation for filing a suit for issuance of title to their said land.
- 22 That the unconstitutional and unlawful alienation, allocation, issuance of tile, subdivision and transfers was facilitated by the Registrar of Lands, Kwale District, and / or the Ministry of Lands and it amounts to a historical injustice which the National Land Commission ought to have addressed and to cure by either compensating the Petitioners or settling them in alternative settlements.
- 23 The Petitioners contend that it is in the interest of justice that this Court issues appropriate orders to avert a

situation where the Petitioners will be deprived of their properties without compensation and have their fundamental humans' rights being infringed with impunity. The Petitioners contend that failure to compensate the Petitioners in monetary terms or in the form of alternative land amounts to denying them of their right to property in contravention of Article 40 of the Kenya Constitution (2010) which guarantees them of the right to protection of property.

24 The Petitioners contend that as members of the public and residents of Kwale County, they have inalienable rights of access to information involving the following issues,

a) The policy document by the Government Kwale Land Policy and in particular how the government intends to displace, resettle and compensate people who will be affected by the Sugar Cane Growing Project in their county,

b) How The National Land Commission intends to cure the Historical Injustice, which was occasioned upon the Petitioners when their land was taken without their consent, knowledge and consultation.

25 The Petitioners contend that failure to inform the Petitioners of the activities leading to loss of their land amounts to denying them of their right to information in contravention of Article 35 of the Kenya Constitution (2010).

- 26 The Petitioners contend that the 1st Respondent had recently begun threatening them with eviction and has unlawfully been destroying their crops and structures thereby causing irreparable damage to them and their structures in breach of Articles 29, 31, and 47 of the Kenya Constitution (2010) which guarantees them of their security, privacy and fair administrative action respectively
- 27 The Petitioners contend that in breach of Articles 29, 31, and 47 of the Kenya Constitution (2010) which guarantees them of their freedom, security, privacy and fair administrative action respectively, the 1st Respondent has made recent to forcefully occupy the land by harassing and intimidating the Petitioners by pressing for criminal Petitioners Shs. 600/- for the land which is not true.
- 28 The Petitioners urge that the entire exercise of alienating and transferring their land, withholding of information, harassment and false accusations by the 1st respondent and the failure of the National Land Commission to cure the historical injustice is in contravention of the National Principles of governance and Principles of land policy set out under Articles 10 and 60 of the Kenya Constitution (2010) respectively. They are apprehensive that their inalienable rights of access to information, security, privacy and property have been and shall continue to be transgressed should this Honourable court hesitate to intervene.

- 29 The Petitioners contend that the petition has been filed before court to enforce their rights under Article 20, 21, 22 and 23 of the Kenya Constitution (2010)
- 30 It is disclosed that Some of the Petitioners filed suit Vide Misc. Civil Case Number 133 of 2012 (Originating Summons) at the Mombasa, which is now being heard in the Environment and Land Court in Mombasa. The Petitioners shall crave for leave to consolidate this case and Misc. Civil Case Number 133 of 2012 so that the ends of justice may be met.
- 31 That the 1st Respondent eventually filed a suit against some of the Petitioners to evict the said Petitioners from the suit property Vide ELC Number 249 of 2014 at the Environment and Land Court in Mombasa. The Petitioners shall crave for leave to consolidate these cases that all the issues involved in the suit may be determined by one court so that the ends of justice may be met. This Honourable court has in itself power to grant such orders *ex debito Justitiae*.
- 32 Arising from the foregoing the petitioners crave the following reliefs;-
- 1) A Declaration that the petitioners constitutional right under article 40 of the Kenya Constitution (2010) which protects acquisition and ownership of land, freedom from arbitrary deprivation and freedom from discrimination has been infringed

and was not been conducted in line with Part VIII of the Land Act (2012) with the involvement of the National Land Commission in line with the guiding constitutional principles on land policy in Kenya.

2) An Order directed to the National Land Commission to issue a policy document on the Government Kwale Land Policy addressing the issue of how the government intends to displace, resettle and compensate people who will be affected by the Sugar Cane Growing Project in their county and how the National Land Commission intends to Cure the Historical Injustice caused to the Petitioners.

3) Compensation for Damages suffered for trespass, invasion and intrusion of privacy, loss of security and arbitrary deprivation of property, and the violation of other constitutional rights and values cited in this petition to be paid by the 1st Respondent.

4) An Order for costs to be provided

33 The petition was supported by the affidavit of Kilian Mwanjanji Mwandori whose depositions rehash the contents of the petition.

RESPONSES TO THE PETITION

The 1st Respondents Response to the Petitions

- 34 The 1st respondent opposed the petition through the affidavit sworn on 7/3/2022 by Amos Suge its legal officer. It is averred that the petition is generally speculative based on hearsays which cannot be verified.
- 35 The 1st respondent contends that it is the registered owners and bonafide purchasers for value of parcel numbers Kwale/Kidimu/15, Kwale/Majoreni 869,906, 1019, 3271, 1279, 1283, 1284, 1285, 1286, 1287, 1288, 1319, 1331 and 1336 totalling 310.3Hactares. That it is entitled to protection of its right to property guaranteed under article 40 of the Constitution of Kenya including section 26 of the Land Registration Act
- 36 That the above suit lands have since the year 2008 been under intensive sugar cane cultivation by the Company and the Company has incurred substantial expenses in bush clearing, tilling and planting of sugar cane as well as erection of irrigation pipes and attendant systems.
- 37 That the said parcels of land are charged to various financial institutions as security for the total sum of USD 271.400,000/= US dollars. That it is not true that the Petitioners are the owners and/ or occupiers of the said parcels of land since the same were barren and unoccupied when the 1st Respondent purchased them and took possession thereof. The petitioners have not produced evidence of their purported ownership.

- 38 The 1st respondent state that the land cannot be the petitioners ancestral land when whereas most of the petitioners do not hail from Majoreni. No evidence has been led to support the petitioners ancestral claim over the suit properties nor their occupation of the suit lands since 1983. That it was strange that the petition has taken so long to be filed and including the adverse possession claim which was never filed after 12 years of their occupation. Further why they never made a complaint to the National Land Commission for investigation and inquiry under article 67(2) of the Constitution.
- 39 Responding to the averments in paragraphs 12 and 13 of the petition it is stated that the purported households, their composition, the identity card & birth certificates numbers of the alleged household members areas under occupation date of occupation, nature of activities on the land, evidence of structures erected were not disclosed. That this was meant to disadvantage the respondents in responding thereto.
- 40 The 1st respondent states that the registration and subsequent transfers of the suit land to the 1st respondent were procedural, regular, lawful and above board. That if the petitioners were wronged during allotment of the land in 1984 it was not clear why they never challenged the same to the 1st registered owners to date.
- 41 It is deponed that the petitioners were notorious for invading the 1st respondents land and then file suits and

petitions claiming ancestral ownership with the aim to selling to 3rd parties and or unjustly enriching themselves through an award of compensation.

- 42 That the petition was premature for the reason that the petitioners had not lodged any complaint on historical land injustices for investigation and action under article 67(2) (e) of the Constitution, section 15 of the NLC Act and attendant regulations.

The 6th Respondents Response

- 43 The National Land Commission entered appearance vide a Memorandum of Appearance dated 21st April 2016 and responded to the petition by way of grounds of opposition dated 2016 filed on 26/04/2016 contending that they have been wrongfully enjoined in the proceedings as there were no allegations made against it. That parliament was yet to enact legislation that set out a framework for investigation and adjudication of claims arising out of historical injustices and therefore the order sought for it to issue a policy document was not based on any laws. That the 6th respondent could not compulsorily acquire land on its own motion unless it receives a request from either the national and county government to acquire land on their behalf. The suit against it was termed frivolous and an abuse of the court process and the court was invited to disjoin them from the proceedings.

The 5th and 7th Respondents Response

- 44 The 5th and 7th respondent reply to the petition is dated 20/09/2023. It is averred that the petition is a civil suit disguised as a petition and raises no constitutional issues as its core is adverse possession, That the petition contravenes the principles set out in **Anarita Karimi Njeru Vs. Republic (No.1)(1979)KLR 154.** The allegations in the petition are denied.
- 45 It is also averred that the petition contravenes the doctrine of exhaustion to the extent that the petitioners have not sought for information under section 8 of the Access to Information Act No. 31 of 2016
- 46 It is averred that 22nd May, 1975 Notice of establishment of Majoreni Adjudication Section in Kwale District was issued and all person daiming any right or interest was requested to present his claim to the recording officer not later than 22nd September 1975. That on 9 October, 1978 Notice of establishment of the Kidimu Adjudication Section in Kwale District was issued and persons claiming any right or interest was requested to present his claim to the recording officer within 4 months of issuance of the notice.
- 47 It is averred that the Petitioners had the opportunity to use and or file any complaint or dispute with the Adjudication Committee appointed under Section 6 of the Land Adjudication Act, the Land Arbitration board

appointed pursuant to section 7 of the Act. That on completion of the adjudication exercise an Adjudication register was prepared and the petitioners had 60 days to write to the land adjudication officer on what they considered incorrect. The Kidimu Adjudication section was declared complete on 23/4/1993 and all persons had 60 days to inspect the records and raise any complaints as provided under sections 25(c) and 26(1) of the Act.

- 48 It is averred that the suit parcels were not the subject of any adjudication tribunal Committee hearing, arbitral proceedings and or appeal to the Minister during demarcation, publication of the register and registration of the section. That on 14/9/1982 the Director Land Adjudication forwarded the final adjudication register for Majoreni adjudication section per section 27(3) (c) and the Land registrar caused registration in accordance to the adjudication register.
- 49 The 5th and 7th respondents urge that the petition contravenes the doctrine of constitutional avoidance and ought to be struck out.
- 50 The 2nd Respondent did not enter appearance.

The suit against 3rd and 4th Respondents

- 51 Vide a ruling delivered by this court on 16/02/2023 the suit against the 3rd respondent Abdalla Said Kizere was dismissed and the suit against the 4th respondent Zainab

Juma Salimini was deemed as abated by operation of the law.

HEARING OF THE PETITION

52 The petition was heard viva voce on 20/09/2023, 16/12/2024 and 17/12/2024.

Petitioners Evidence

53 PW1 was the 1st Petitioner Kilian Majanja Mwandori. He adopted his witness statement dated 21/12/2015 as his evidence in chief. The same rehashes the averments in the petition. Additionally the witness told the court that he knew the 3rd respondent who was his neighbour. He stated that in terms of the history of Ramisi it is their forefathers who came to work in Ramisi for an Asian by the name Madvani and this is how he later entered the suit property in 1983 and lived therein. He was not aware that there was adjudication. They came to court in 2008 after surveyors came to the land in the guise of making roads and water wells for the benefit of the community. Other surveyors came later undertook the survey but on inquiry about the purpose of the same they were told they would be informed later.

54 PW1 testified that one Chief Rashid Kassim informed them that the land was privately owned and they would be removed therefrom. That they followed up with the Member of Parliament (MP) and administration had meetings on our fate but at the same time continued with

occupation. Later they were issued with notice by the subchief and thereafter the 1st respondents bulldozers moved in and started demolishing houses in Kidimu and Pongwe which is also known as Majoreni.

- 55 It was the witness further evidence that they obtained court orders and were told to go back to the land. The he was beaten, tortured and arrested by the GSU. After this many of the residents left but he remained in the suit land and they would till and plant sugar cane at the same time. Denying the allegation in the defence he told the court that he was never paid for his shamba.
- 56 Cross examined by Mr. Njuru for the 1st respondent PW1 confirmed that as per his ID card he was born in Kilifi Mamba Kikambala which was his home together with his parents. That when he came to majoreni in 1984 he was already an adult with a family for farming. Those employed were his parents not him. While he to took 35 acres of land he did not confirm the acreage through survey. He did not inquire about the ownership of the land. He reiterated he did not know about adjudication and wasn't on the land when the government surveyor came for adjudication.
- 57 The witness indicated he left the shamba when the bulldozers came though he could not remember the year. He had no evidence of his occupation such as photos, letter from the chief and burial permits for the people they

buried on the land. He conceded he had nothing to show he was evicted

- 58 That though he was aware of the NLC he never went to NLC to complain. While he knew Abdalla Kizele used to work with government he did not have proof thereof. While he reiterated, he wanted compensation he conceded he had not described to the court the nature of the houses that were demolished. He told the court the case filed in Mombasa after the shooting was still pending though he could not remember the case number. He confirmed he had no medical report or charge sheet to prove he was arrested and brought to court.
- 59 On being referred to page 8 of this court's ruling dated 16/2/2023 PW1 testified he knew Chari Chimambo and that she sued KISCOL but stated he never gave evidence and was not aware of the suits dismissal. He denied being given money by sponsors to file the cases and share the land upon getting the land.
- 60 On further cross examination by Mr. Kulecho for the 1st defendant PW1 testified that Omar was the one who was shot was still alive but he did not write a statement. That Abdalla Kizele was a very good inlaw and he had many shambas he held legally and he could sell his shambas as he liked. That he did not have valuation because only household items were salvaged during the eviction.

- 61 PW1 was cross examined by Mr. Makuto State Counsel for the 5th and 7th. The witness confirmed existence of Malindi High Court Malindi Petition No. 4/2015. That he sued Coast Hauliers and OCS Mtwapa in HCC Malindi Petition No. 25 of 2015 which was ongoing and conceded they claimed land being residents of Kilifi. That in the present case he claims he lives in Kwale. The witness stated he didn't know the title deed number of the shamba he was evicted from.
- 62 On being shown the application dated 30/5/22 and supplementary affidavit thereto of Amos Suge and Annexure AKS1 PW1 confirmed that his name appeared in the list of people in Kwale Majoreni 1224 as number 25. On the acreage of the same as seen in the green card annexed as MBC3 he confirmed it measures 4.6 Ha. PW1 confirmed he lived in Kidimu and not Majoreni.
- 63 PW1 conceded though they have sued NLC and Attorney General they were not not evicted by Government of Kenya. He was not aware if the 1st Respondent was affiliated to the Government of Kenya. He had no documents to show his father worked at Ramisi and when he started working there. He conceded he had filed suit on land in Kisauni, (ELC 28 of 2018) Ali Nassoro and myself against Mbilo and Another which he stated was ongoing but was shown was struck out by the court on 29/1/2019.
- 64 PW2 was Mwanasiti Bakari Chombo who adopted her witness statement dated 21/12/2015 as her evidence in

chief. She testified that she came to Majoreni because of her grandparents. It was a forest, which they cleared and started farming. That they were not aware of land adjudication where their grandfathers were. The witness rehashed the entry by 1st defendant as given by PW1 and the demolishing and their interaction with Kituo cha Sheria and orders obtained from court. The witness further testified that she knew Abdalla as a neighbour and used to work at Kilindini port. That they found that Kizeles land was 1285 and 1286 and not 1284.

65 The witness testified that she too together with her father Bakari Alawi Chombo Noor and Bakari Alawi were arrested in March 2013 and taken to Msambweni police station on allegations they were cultivating on someone's else land but were never charged. That Our houses were demolished in March 2015. Graves on the land were destroyed by the bulldozers. The witnesses noted that the titles produced bore no signatures but didn't know the implication thereof. PW2 testified that they want back the titles.

66 Cross examined by Mr. Njuru the witness testified that she was born in Kwale Matuga. That her clan is in Msambweni and that they came to Majoreni in 1990. She didn't have evidence to prove his grandfather lived in Majoreni. That her family was not in Majoreni in 1975-77 during adjudication and her grandfather had already died in 1950. She was not aware that they were challenging the

process of adjudication. She confirmed she never lodged complaint about the land to NLC, Land registrar and Land Adjudication.

- 67 On further cross examination by Mr. Kulecho PW2 testified that she did not have hospital record on Omar's shooting. That after the death of her grandfather in 1960 the place became a bush. Her grandfather was buried in Msambweni. They did not write any formal complaint about the demolition. They did not go to Area MP but just called him. By the time I came in 1990 the roads were already there. Abdalla Kizele 2nd defendant had other two plots in Majoreni. By the time this suit was filed they knew Abdalla was dead but they joined him because Kiscol said he sold to them. Kizele worked at the port and not lands office.
- 68 The witness was also cross examined by Mr. Makuto. She testified that she was not sure if the land belongs to Government of Kenya or private. She had nothing to show the government of Kenya is shareholder in Kiscol. She conceded that while in accordance to paragraph 10 of petition they were claiming 15 plots there is no detail as to the owner of each. She was not yet born when Majoreni adjudication was established. Claims were to be raised by 22/9/1975 and she would not raise claim. That for Kidimu claims were to be raised with 4 months of 9/10/1978 at expiry she was 2 years old and could not lay interest.

- 67 The witness testified that his father came back to Majoreni in 1990. She didn't live in Majoreni but only cultivated. While she did find out that the names in the green card followed adjudication, she did not go to the adjudication office to complain.
- 68 On the prayers sought by the petitioners PW2 confirmed there was no prayer directed to the land registrar. The witness confirmed she has never written to registrar to inquire for information about the ownership of the plots. That she was evicted and it is not the government of Kenya who took the land. The witness conceded she did not know to date the particulars of the land she lived in. That Kiscol gave all of them land to live in after they removed them.
- 69 PW3 was Mwatela Chuphi Chibogo. The witness adopted his witness statement dated 21/12/2015 as his evidence in chief. He asked the court to give them back their land as they did not have any land. -
- 70 Cross examined by Mr. Kulecho the witness confirmed he was not born in Majoreni. He was born in 1935 when KISCOL did not exist but came in 2008. Their grandfathers used to tell them about the land but were buried where PW3 was born. While he and his family took 35 acres, he had not undertaken survey to confirm the acreage. That his measurement were taken by feet. He denied the acreage as given by titles produced by KISCOL. He agreed KISCOL came in the land the witness was staying and

made roads. While they went to the chief to complain about the demolition the chief did not write for them a letter. He stated Kizele was a Tanzanian and not a Kenyan though they did not include the information in the papers though he conceded he had stated he was a government official who got the title through forgery. The witness testified he did not know the government office Kizele worked with. That he gave Mr. Nyange their evidence of occupation but he failed to present the same before court.

71 The witness confirmed there were areas where locals had planted their own sugarcane. He stated he did not know the 1st petitioners' grandfather but it was possible they came from Kilifi.

72 Upon cross examination by Mr. Makuto the witness. He confirmed that by the time of adjudication for Majoreni he had not come to the land. He was not aware of adjudication. He noted from the record Julo and Baya were found on the land then but stated he didn't know them and never found them on the land was empty. He stated he did not know Kizele as a government officer. That he was 30 years old during adjudication but he did not go to the adjudication office to tell them the land was theirs because it was their ancestral land who only moved out because of the world war between the British and Germans. That they reported to the police about demolition but were never given any OB. The witness

stated that they gave all their documents to their 1st lawyer but he hid the same.

- 73 The witness confirmed he had no photos or a report from the department of agriculture on the crops that were destroyed. He had no chiefs letter to confirm he used to previously live on the land. Though he stated Mwaruwa Dheha could confirm this the witness on being shown the statement confirmed that there was no reference to his name. he did not have pictures to show he built a house.
- 74 PW4 was Dorothy Kadzo Dena. She adopted her witness statement dated 21/12/2015 as her evidence in chief. The witness statement rehashes what is stated in the petition and the 1st petitioners.
- 75 Upon cross examination by Mr. Kulecho PW4 stated she was born in Kinango and came to Majoreni in 1990. She confirmed she was not one of the petitioners but had come my own behalf as took an estimated 25 acres, according to the witness here is in both parcel 1283 and 1284. It was her parents who went there first and cleared the land. On being shown her witness statement 11/7/2012 and pleadings in case no. 133/2012 (OS) she confirmed it stated she was from Lukore and came into the land in 1992 and agreed the witness statement refers to the year 1990.
- 76 About the 4 acres and 25 acres mentioned in her statements. She stated the 25 acres was the correct one.

The witness could not vouch for acreages claimed in paragraph 11 of the petition as she only knew about her portion. While she noted Mbeyu Mwatenge claimed 25 acres in 1284 she pointed there could a mistake. She did not know who occupied the plots listed in paragraph 10 of the petition. While she was aware that Kiscol came to do a road around 2008 she is not the one who asked them about it. They let the KISCOL do their work as they had no issues. This took about 2 months

77 PW4 told the court her house and crops was destroyed in 2012. They were about 50 people; they went to the chief Kidimu and didn't write anything for them. She did not do a valuation of her house and crops but we went to Kituo cha Sheria. While she had heard of Abdalla Kizere she had not seen him physically. She could not tell which government office Kizere worked. She knew from her brain that Abdalla Kizere sold land to Kiscol though she didn't know the extent of Kizera's land. Her people never told her about Ramisi and the extent of the Sugar farming. She could not tell the extend of Kiscol occupation.

78 Cross examined by Mr. Makuto PW4 testified that she came into the land together with her parents in 1990 when she was 28 years in 1990. She was not aware the government had undertaken adjudication. On being shown the adjudication register for parcels 1283 and 1284 she confirmed her parents' names were not in the list. That his father and mother were not among the

petitioners. Though both deceased she had no letters of administration to come on behalf of the estate. The witness emphasised she had approached court for her children and herself though none of the children are on the list of parcels 1284. That she has never complained to land adjudication. She has not gone to the land tribunal or appealed to the minister. She had no map from surveyor to show the occupation of everyone on the land. She did not report the demolition to the police neither she has any report from department of Agriculture. She had not produced any photos before court.

79 With the above the petitioner's case was closed.

80 DW1 was Nicholas Sanya Representative Land Adjudication & Settlement Offices Kwale P/NO. 2006045090. DW1 testified that he has worked with the Ministry of lands for over 22 years and had brought with him the original file for Majoreni and Kidimu . The witness produced the documents as listed in the list of documents dated 20/9/23 as DW1 EX "1-5".

81 The witness testified on the entries in the adjudication records. He told the court that the Notice of Majoreni adjudication section was issued on 22/5/1975. Notice for Kidimu was issued on 9/10/1978. That the entries for 1283 were made on 9/9/1976 and the final record indicates Abdalla Saidi Kizare. Reading from the last column of the extract he pointed Julo accepted transfer to Abdalla. That entries in 1284 were made on 9/9/1976 and final entry

was Abdalla Said Kizare after Baya's name was cancelled. At the remarks Baya accepted cancellation of his name in favor of Abdalla Kizare. That the office did not have details of anyone else claiming ownership of the two parcels. There was no record of any dispute for the parcel. It was his evidence that if a dispute arose under the Land Adjudication Act the dispute could be heard at Committee level and thereafter appeal to the adjudication board and thereafter appeal is to the minister. He did not have a record of any dispute under this property.

82 Cross examined by Ms. Mukoya for the petitioners the witness conceded that the register did not bear the reasons why Julo was accepting the cancellation of his name. There was no record reflecting there was a dispute between Julo and Kizare. He conceded most of the plots 1283 -1288, 1319, 1333, 1336, have cancellations and Abdalla Kizere entered but the reason for the owners accepting the cancellation is not stated. The witness noted it was possible for Abdalla Kizere, to hold several parcels. That ordinarily the change of name and the reason should be recorded. That it was also possible to have squatters.

83 Cross examined by Mr Kulecho DW1 confirmed that with regard to Majoreni 906, 1019, 1271, 1279, 1283, 1284, 1285, 1286, 1287, 1288 and 1336 were all as a result of an adjudication process and were not subdivisions from any other parcel witness. There was no piece of land that was alienated in February 1984 by the ministry of land.

He denied the contents of paragraph 14 and 17 of the petitions. Further on being referred to Paragraph 20 referring to plot 15 he pointed the content was not true since based on notice of declaration of Kidimu adjudication on 9/10/1978 and notice of finality of the settlement dated 23/4/1993 the purported alienation of August 1993 would not apply. That based on his experience even where they find squatters their interests are usually verified and recorded depending on the nature of their interests unless there are objections by other claimants and these will be heard as per the Act (Cap 284). He reiterated if there were squatters in 1978 their interests would have been captured.

84 With the above the 5th and 7th respondents' case was closed

85 DW2 was Otieno Maurice, the 1st respondents Company Surveyor employed for 14 years. He adopted his witness statement dated 2/09/24 as his evidence in chief. He also produced copies of searches, copies of titles for the suit properties, judgment and ruling attached to Amos Sugas replying affidavit sworn on 7/3/22 as evidence in court (DW searches page 9-28, titles page 29-83 DW2 EX 2, copies of judgment page 84 - 99 DW 2 EX 3.)

86 DW2 testified that the current status of the suit property is that it has been developed. That there was trespass by Kwale Sugar since the property belongs to Kwale Sugar as per the search and titles. That he was not aware of any

demolitions. In the pleadings filed and the documents filed there was no evidence proving demolition by Kwale Sugar such as photos, machines are identified by registration number and attribute it to Kwale Sugar. The structures and their type could also have been seen. As for compensation there was no valuation of the structures or agricultural valuation report.

87 Commenting on the witness statements filed and paragraph 11(a) - (d) particulars of occupancy DW2 pointed that as a surveyor the acreage from the search for parcel Kwale Majoreni 1283 is 10.8 HA (pg 017 of 1st defendant bundle) translating to approximately 27 acres, parcel 1284 is 4.6 Ha (pg 025) translating to approximate 11.5 acres making a total of 38.5 acres. On paragraph 11 (b) he noted that Mwatele claims 37 acres out of 38.5 acres, at paragraph 11 (c) claims 28 acres of the same property Mbeyu at paragraph 11 (d) the claims amount to close to 90 acres way beyond the total of 38.5 acres. That others were Mwanasiti Bakari claiming 25 acres, Juma Bora Majoreni 1283/1284 ,28 acres totalling to close to 179 acres yet the two plots are 38.5 acres. According to the witness the totals did not tally with what is on the ground neither does it tally with the official records.

88 Commenting on paragraph 10 of the petition and the several parcels of land except 1283/1284 the witness noted that the parcels are just listed with no corresponding claims against the parcels. These are

properties that have cane grown thereon and did not understand why they are listed other than to justify compensation. The witness told the court there have been similar claims for compensations (page 084 Pet 8 of 2019) a claim listing over 600 claimants claiming ancestry. The case was dismissed.

- 89 DW2 testified that he had not seen a medical report on anyone injured/shot in relation to the land. On paragraph 11(a) of the petition where the 1st petitioner, claims 35 claims in parcel Kidimu 15 he pointed that the 1st petitioners witness statement states he occupies Kwale Majoreni 1283/1284. It was not clear which property he occupies. The witness added that there is a case in ELC Malindi where Kilian claims ancestral ownership That he was also aware of the existence of several cases as has emerged in cross examination by Makuto by the 1st petitioner being Mtwapa Kidutani where he stated he is one of the identified owners of the land.
- 90 Upon cross examination by Ms. Mukoya the witness confirmed that the properties in paragraph 2 of his witness statement are the same as listed in paragraph 2 of the petition. That the petitioners were acting on behalf of others and the order dated 29.3.2016 by Anne Omolo J. for representative suit.
- 91 That while the 1st respondent is a bonafide purchaser he had not produced a sale agreement and transfer, the sale which was done in the year 2008. On the green card for

Kwale Majoreni 1284 and entry number 5 and 6 for Kwale international he conceded the column for signature of registration had a mark which he could not tell if it was a signature or not.

92 Referring to HARSHIL KOTTECHA witness statement in the OS 133/2012 and paragraph 3 he pointed the property in the current suit were all purchased privately. He confirmed the respondent has not built anything in parcel 1283 and 1284 two parcels. That he was not aware if there were squatters, though at page 3 of Kottechas witness statement paragraph 3 refers to the petitioners therein as squatters.

93 The witness agreed that ordinarily people would not value their property if there is no reason for valuation. That values of constructions can be estimated. If the crops are just for use you don't go to Agriculture to value but for sugar the value could be estimated. He agreed the petitioners are not surveyors but a layman can estimate the size of their land. At paragraph 2 of my witness statement, I state the properties in the suit are 310.3 HA translating to about 775 acres comprising all the properties given in the petition.

94 Upon cross examination by Mr. Makuto the witness stated he had not produced notice of motion dated 30/5/22 as part of my documents. He confirmed that the land registrar and Attorney General were not parties as seen in annexed certificate of urgency to the notice of motion of

11/7/2012 filed in the OS. There was no evidence that the green card was filed by land registrar, it has no signature but "SGND". He had interacted as a surveyor with green cards and they normally have signatures and not SGND.

95 On orders of representative suit pursuant to application dated 9/12/2015 and issued in open court on 25/2/2016 the witness noted that it was filed under case 66/2015 supported by the Affidavit of Killian Mwanduri but no list of persons is attached thereto. That it attaches the petition in 66/2016 but the order of Anne Omollo J was in relation to constitutional petition 341 of 2015 and not 66/2016. He confirmed he had not been provided with list of persons served nor the list of persons affected.

96 He noted prayer no. 4 of the application was for consolidation but pointed he was not aware if the order for consolidation was issued. The witness reiterated the government didn't allocate them plots 15, 869,906,1019,1271,1279,1283,1284,1285,1286,1287,1288,1319,1311 and 136 but the same were purchased on willing buyer willing seller basis. That Kwale sugar conducted duly diligence at the time of purchase and to the best of his knowledge was not aware the properties were invaded by squatters. That none of the properties in paragraph 10 were allocated by Government of Kenya.

97 On the judgement in petition 8/2019 ELC MSA the witness stated the same suit was dismissed with costs. DW2 reiterated Kwale sugar didn't evict the petitioners, it didn't

engage the police to evict any of them from the suit properties and had not seen any evidence that the petitioners were shot at.

98 Upon re-examination the 1st respondents' case was marked as closed.

SUBMISSIONS

99 The court issued directions on filing of submissions and only the petitioners and the 1st respondent complied.

ANALYSIS AND DETERMINATION

100 Before I delve into identification of the issues for determination and analysis thereof I'm inclined to clarify the issue of consolidation of the petitions. The record bears a Notice of Motion application dated 9/12/2015. The application also sought the consolidation of the present petition with Misc. Civil Case Number 133 of 2012 (Originating Summons) and ELC Number 249 of 2014 both filed at Mombasa since all the three matters involve the same subject matter and should be heard together to meet the ends of justice. However, I have no record to show that the said orders were ever granted. This is confirmed by the Petitioners submissions dated 13th May 2025 which only refer to the Petition dated 9th December 2015.

101 Having considered the pleadings, the witness statements, oral testimonies, the documents produced as well as the submissions on record the main issue for determination is

whether the petitioners have proved their claim to the required standard to warrant the orders sought in the petition.

102 It has been submitted by counsel on record for the petitioners that the Petitioners' claim to the suit properties rests on legitimate and historically rooted rights of occupancy and possession that trace back to the original settlement of their forebears. That Petitioners are lineal descendants of the original occupants of the area who inhabited the property prior to, and during, the colonial period. Although their parents were temporarily displaced by colonial conflicts, they lawfully returned to and reoccupied the land maintaining continuous and peaceful possession thereafter.

103 The petitioner's claim is therefore grounded on ancestral claims to the suit property. At paragraph 11 of the petition the petitioners state the land in question is ancestral occupied by the Petitioners forefathers when the land was government land. This is further supported by the oral testimony of PW1 who told the court their forefathers came to work in Ramisi for an Asian by the name Madvani and this is how he later entered the suit property in 1983 and lived therein. PW2 testified that she came to Majoreni because of her grandparents. PW3 alluded in cross examination to their grandfathers telling them about the land.

104 The burden of proof in civil cases does not change. In the case of **Leonard Otieno Versus Airtel Kenya Limited [2018] eKLR** Justice Mativo persuasively observed thus;-

47. 'The general principle governing the determination of cases is that the party who alleges or, as it is sometimes stated, the party who makes the positive allegation, must prove. Moreover, the onus on the Petitioner to establish violation of alleged consumer rights is not a mere formality; it is important. Differently put, the onus lies on the Petitioner to prove every element constituting his cause of action. This includes sufficient facts to justify a finding that his consumer rights were violated.'

105 It was incumbent upon the petitioners to prove their ancestral claim to the suit properties outlined in paragraph 10 of the petition to the required standard of proof that of a balance of probabilities.

106 As to the nature of evidence required to prove ancestral claims the court is guided by the case of **Henry Wambega & 733 Others Vs. Attorney General & 9 Others (2020) eKLR** where the court dismissed the suit on the basis that there was nothing significant or any cogent evidence to demonstrate the connection of the land in dispute with their ancestors or forefathers. The court found there was no specificity as to enable the court

identify with finality which forefather and of which claimant resided on the land. Neither did they demonstrate that they were descendants of the original inhabitants of the suit land. Failure to produce a generational tree to identify their ancestry and demonstrate that it is actually their forefathers who were occupying the suit lands was also considered by the judge. It is noteworthy that the court of appeal upheld the decision of the **ELC court in Wambega & 733 others v Attorney General & 9 others [2024] KECA 445 (KLR)**

107 My review of the evidence led before court shows that most of the witnesses testified that they came to the suit properties as farmers and that they were born elsewhere. PW1 confirmed his Identity card shows that he was born in Kilifi Mamba Kikambala which was his home together with his parents. That he came to majoreni in 1984 as an adult with a family for farming. He also conceded in cross examination that there was a pending suit in HCC Malindi Petition No. 25 of 2015 where he claims land as a resident of Kilifi. PW3 who was the eldest of the witnesses did not know the 1st petitioners' grandfather though he stated it was possible they came from Kilifi.

108 PW1 conceded he had no documents to show his father worked at Ramisi and when he started working there. Further PW2 confirmed she came to Majoreni in 1990 and that she did not have evidence to prove his grandfather lived in Majoreni. PW3 told the court their grandfathers

used to tell them about the land but were buried where PW3 was born which was not in Majoreni. In my view this is hearsay.

109 In the present case none of the witnesses led evidence that traced their ancestral origins in the Majoreni or even Ramisi area. It is the finding of this court that the petitioners did not establish their ancestral claims to the required standard of proof of a balance of probabilities.

110 The court notes that the petition is a representative suit on behalf of others whose particulars were not provided in full in terms of when their families and ancestors came into the suit property. However even assuming the same was adduced, according to the pleadings their claims are also anchored on the ancestral claims raised and I have already made a finding that the same has not been proved.

111 In Constitutional **Petition No. 8 of 2019 which was formerly Mombasa High Court Constitutional Petition No. 65 of 2011 Said Omar Mwituu & 5 Others (Suing on their own behalf and on behalf of 610 residents of Mabatani, Nyumba Sita, Vidziani, Gonjora, Fahamuni, and Kigwede area - Msambweni - Kwale County) Vs. Kwale International Sugar & 8 Others** the court stated thus; -

'The other reason why the petitioners appear to suggest that they deserve the land is because historically the land

was of their forefathers. That may be so, but the mere fact that land was previously settled by one's forefathers, does not by itself give a right to a descendant to have title to that land.

112 On the other hand, the 5th respondent through DW1 produced before court evidence showing that the area was subject to land adjudication. These were Notice of Establishment of Majoreni Adjudication Section Kwale District; Notice of establishment of Kidimu Adjudication Section in Kwale District, Certificates of Completion of Adjudication Section, Extract of Kidimu Adjudication Section Adjudication register and Extract of Majoreni Adjudication Section Adjudication register.

113 I have perused the Notice of establishment of an adjudication section for both Majoreni and Kidimu. The question that arises is what does this indicate as the status of the land? The applicable law is the Land Adjudication Act Cap 284.

114 The preamble to the Land Adjudication Act states that it is;-

“An Act of Parliament to provide for the ascertainment and recording of rights and interests in community land... and for purposes connected therewith and purposes incidental thereto.”

115 The land was therefore treated as community land. Sections 13 through 29 of the Act lay out the procedural roadmap. During adjudication, claimants present their interests to the Recording Officer, who records and maps them. If a dispute arises, the Recording Officer refers it to the Adjudication Committee as provided under Section 19(2) and (3). Thereafter, dissatisfied parties may escalate the matter to the Arbitration Board pursuant to Section 21(3). Upon conclusion, the adjudication register is compiled and published. Section 26 then grants any aggrieved person sixty days to file an objection with the Adjudication Officer, stating how and why the register is incorrect. The final stage, under Section 29(3), is the closure and certification of the adjudication register.

116 All the witnesses who gave evidence on behalf of the petitioners stated they were not aware that the land was declared an adjudication area. They all state in their witness statement that they only came to know of the titling when they obtained the official searches and found that titles were issued to individuals who then sold to the 1st respondent. DW1 stated that during adjudication the land is recorded in accordance to those who are on the ground and that even squatters found on the land would be recorded based on their claim and subject to any objection raised on their claim.

117 The evidence shows that most of the petitioners came post the land adjudication .PW2 confirmed in cross

examination that her family was not in Majoreni during the period 1975-77. PW3 in cross examination by Mr. Makuto confirmed that by the time of adjudication for Majoreni he had not come to the land. In my view had the petitioners' forefathers been there including their grandfathers then they would have been found on the ground and their occupation recorded whereupon the claimants would seamlessly occupy the portions adjudicated to their forefathers/grandfathers as beneficiaries.

118 Moreover, no evidence was placed before court to show that they or their predecessors lodged objections within the adjudication process. PW1 conceded in cross examination that they did not lodge any complaint about the adjudication so did PW2. In my view the petitioners cannot impeach the adjudication process and the titles that were issued pursuant to the process they cannot as well hide under the guise that they were not aware of the adjudication.

119 Was there a historical land injustices.

120 I must now address the claim of historical injustices. This is pleaded at paragraph 27 of the petition dated 9/12/2015 thus;-

'The Plaintiffs further content that the unconstitutional and unlawful alienation, allocation, issuance of title, subdivision and transfers was facilitated by the Registrar of Lands.....and it amounts to a historical injustice and which the

National Land Commission...ought to have addressed and to cure by either compensating the petitioners or settling them in alternative settlements.'

121 The National Land Commission Act at section 15(2)(3) provides description of historical injustices and the threshold for such a claim to be admitted, registered and processed (by NLC) as follows:

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

a.was occasioned by a violation of right in land on the basis of any law, policy, declaration, administrative practice, treaty or agreement;

b.resulted in displacement from their habitual place of residence;

c.occurred between June 15, 1895 when Kenya became a protectorate under the British East African Protectorate and August 27, 2010 when the Constitution of Kenya was promulgated;

d.has not been sufficiently resolved and subsists up to the period specified under paragraph

(c); and meets the criteria set out under subsection 3 of this section.

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

a.it is verifiable that the act complained of resulted in displacement of the claimant or other form of historical land injustice;

b.the claim has not or is not capable of being addressed through the ordinary court system on the basis that—

i.the claim contradicts a law that was in force at the time when the injustice began; or

ii.the claim is debarred under section 7 of the Limitation of Actions Act, (cap 22) or any other law;

c.the claimant was either a proprietor or occupant of the land upon which the claim is based;

d.no action or omission on the part of the claimant amounts to surrender or renouncement of the right to the land in question; and

e.it is brought within five years from the date of commencement of this Act.”

122 Firstly, it is my view that as long as the petitioners have not proved their ancestral claim to the land then a claim for historical injustice against them cannot be properly raised and succeed under these proceedings. There was

no evidence upon which the claim for historical injustices could be verified as required under section 15(3)(a) above.

123 It is also noteworthy that at the time of filing these proceedings some of the petitioners had moved the court in Misc. Civil Case No. 133 of 2012 (OS) as pleaded in 12. I have seen the pleadings thereof where they claim under adverse possession. They did not choose to approach the NLC. PW2 who was a party in the said proceedings conceded in cross examination she never lodged a complaint about the land to NLC.

124 Additionally, PW1 testified that while he was aware of the existence of NLC he never went to NLC to complain. The question that I posed to myself is how the NLC was supposed to act when no one complained to them. In any case some of the petitioners had already moved a court of law with respect to the same subject matter.

125 I would be hesitant to make a finding of historical land injustice based on the entirety of the evidence that has been placed before me.

126 The claimants claim damages for trespass, invasion and intrusion of privacy, loss of security and arbitrary deprivation of property to be paid by the 1st respondent. The land being claimed as belonging to the petitioners is pleaded as situate in Kwale Majoreni area. Paragraph 10 of the Petition dated 9/12/2015 lists them as LR Numbers Kwale/Kidimu/15 and Kwale/Majoreni 869,906,1019,

Majoreni /1271, 1279, 1283, 1284, 1285, 1286, 1287, 1288, and Kwale /Majoreni /1319, 1331, 1336). According to the petitioners the 1st respondent had been developing Sugar Growing Project and making further subdivisions without the consent or knowledge of the petitioners.

127 I find it pertinent at this point to define who is a trespasser. The legal framework on the law on trespass is the Trespass Act Cap 34 of the Laws of Kenya. Section 3 provides;-

Trespass upon private land

(1) Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.

128 According to the **10th Edition of Black's Law Dictionary** trespass is defined as follows;

“an unlawful act committed against the person or property of another; especially wrongful entry on another's real property. Clark & Lindsell on Torts, 18th Edition on page 923 defines trespass as any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the Plaintiff to proof that the Defendant invaded his land without any justifiable reason”.

129 The Court of Appeal in **Charles Ogejo Ochieng v Geoffrey Okumu [1995] eKLR**, the learned judges took a view that;-

“Trespass is an injury to the possessory right, and therefore the proper Plaintiff in an action for trespass to land is the person who has title to it, or a person who is deemed to have possession at the time of the trespass.”

130 According to the prayer sought for damages for trespass, the petitioners term the 1st respondents entry into their land as trespass and intrusion. It is important to note that the petitioners did not hold any title to the suit property. They have also not demonstrated that they were lawfully in occupation of the suit properties having failed to prove their ancestral claims. The history of titles parcels Kwale/Kidimu/15 and Kwale Majoreni 1283, 1284 is that the same were issued pursuant to the process of Land adjudication abinitio. Said Kizele and the said Zainabu Juma Suleiman prominently features in the adjudication register. This was supported by the evidence of DW1 from the Ministry of Lands who produced the adjudication register. None of the petitioners or their grandparents’ names if at all feature in the adjudication records. The witnesses were shown the register and indeed confirmed their names or that of their patriarchs were not in the register.

- 131 Based on the above I do not see how they can legally claim that the 1st respondent was a trespasser upon land that was not owned and occupied lawfully by the petitioners. On this basis alone the claim for trespass against the 1st respondents would not be sustainable.
- 132 I will also review the claim for compensation for eviction. The particulars of occupation were highlighted at paragraph 11 of the petition wherein the 1st Petitioner Kilian Mwanjani Mwandori (PW1) is pleased to be in occupation of 35 acres in Kwale/Kidimu/15 since 1983; 2nd Petitioner Mwatela Chuphi Chabogo 37 acres of Kwale Majoreni 1283 for 35 years; the 3rd and 4th petitioners 14 and 28 acres respectively in Kwale Majoreni 1283 since 1983 and the 5th petitioner Mbeyu Mwatenga 25 acres of Kwale Majoreni 1284. Moreover, it is stated at paragraph 12 there was a total of 93 households in actual occupation.
- 133 I think based on the evidence in court what is clear is that the petitioners claim under Kwale/Kidimu/15 and Kwale Majoreni 1283, 1284. There was no specific person disclosed as having been in occupation of the rest of the parcels or asserting a claim thereon. I will therefore concentrate on these specific titles. The petitioners case is that the 1st Respondent later evicted them, demolished their houses, destroyed their trees & crops, prevented them from cultivating their farms and subsequently developed the parcels for sugar cane farming.

134 The burden of proof still lay on the petitioners to prove that they were evicted and their assets demolished. All the witnesses that testified in support of the petitioner's case alluded to demolition of their houses, destruction of crops and graves. No specific particulars were given as to who lost what and the value thereof. No reports from agriculture office in the area on the damage to trees and crops was tendered. A blame was placed on the petitioner's initial counsel at the Kituo Sheria for not handing over the documents. There was also an attempt by Ms. Mukoya during cross examination that only a commercial farmer would be able to estimate the value of their produce.

135 But I also note most of the petitioners indicated to the court that they allegedly came to the suit properties do farming yet they did not see the importance of getting an opinion from the agriculture department on the same even for the mangoe trees and Kasorina mentioned by PW4 and PW2 in her witness statement. No values for the houses that were said to have been demolished were given. The witnesses for the petitioners spoke in generalities. The total number of households were gives as 93 thereabout but with no further particulars as to their nature interalia.

136 In view of the above even assuming there was demolition there was no basis or evidence upon which the court would award compensation for the same.

137 Further based on the particulars of occupation there seems to have been a lot of guess work to use a more polite term. The particulars of occupation as pleaded are already mentioned herein. DW 2 testified on behalf of the 1st Respondent and produced copies of official searches from the land registry and a bundle of copies of title deeds. Based on the titles produced Kwale/Majoreni 1283 measures 10.8 Ha which translates to 27 acres and Kwale/Majoreni 1284 measures 4.6 Ha translating to 11.5 acres and therefore bringing the total acreage is 38.5 acres. This translation was given by DW2 during his oral testimony. I have already alluded to the petitioners claims in terms of acreage. For the parcels 1283 and 1284 alone the claim totals 100 acres. Adding PW1 claim the figure 135 acres. If we add PW4 claim of 25 acres the total comes to about 160 acres.

138 The above casts a doubt as to the area allegedly occupied by the petitioners and if they were genuine with their occupation. Moreover, PW4 confirmed that to date she does not know the title of the property she is claiming. The witness had no explanation on the disparity of acreage claimed by her in the adverse possession (4 acres) claim and the present petition (25 acres). When asked about Mbeyu Mwatenge claim of 25 acres in 1284 she pointed there could be mistake. PW3 who alleged to have 35 acres had no cogent explanation but to deny the acreage as

given by titles produced by the 1st Respondent as against their estimate based on their feet.

139 None of the alleged acreage was confirmed by actual survey reports through survey. While there was indication during re-examination that the petitioners were not surveyors the glaring disparity which seems exaggerated can only be construed against them to have been given for the sake of compensation.

140 The court must also pronounce itself on the attempt by the petitioners to impeach the titles issued to the 1st respondent and their predecessors in title. I have already made a finding the petitioners never complained about the adjudication process within the framework provided and cannot purport to do so within these proceedings. Moreover, a look at the final prayers sought in the petition dated 9th December 2015 there is no order seeking a cancellation of the titles held by the 1st respondent and its predecessors.

141 It is trite law that parties are bound by their pleadings and the issues for the court's determination flow from the pleadings. See **Mwinyihaji -vs- Mwebeyu & Another 2025 KECA 858 [KLR]; David Sironga Ole Tukai Vs Francis Arap Muge and Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR** if the intention was to have the titles cancelled then they ought to have made a specific prayer. Consequently, I will not delve into a discussion geared towards the

legality of otherwise of the titles issued to the 1st respondents and its predecessors.

142 The petitioners want a declaration that their constitutional right under article 40 of the Kenya Constitution (2010) which protects acquisition and ownership of land, freedom from arbitrary deprivation and freedom from discrimination has been infringed and was not been conducted in line with Part VIII of the Land Act (2012) with the involvement of the National Land Commission in line with the guiding constitutional principles on land policy in Kenya.

143 My view is that the petitioners never took the option to approach the NLC but instead opted for the court judicial process.

144 I must also speak to the claims for adverse possession. This has not been specifically pleaded in the petition dated 9/12/2015. However, it is alluded in the originating summons filed in the year 2012. As long as the petitioners claim under ancestral claim then the plea of adverse possession cannot be sustained. As long as the petitioners do not recognise the ownership of the 1st respondent and its predecessors the plea of adverse possession cannot as well be sustained. The land alleged to be the subject of adverse possession proceedings must be definitely identifiable. This was not met as seen earlier on. From the analysis on the particulars of occupation the claim of adverse possession

would fail - see the case of **Gatimu Kinguru vs Muya Gathangi (1976) KLR 253**

145The court is also guided by the holding in the case of **Haro Yonda Juaje -vs- Sadaka Dzenzo Mbauro & Kenya Commercial Bank (2014) eKLR** where the court stated thus;

“One cannot claim to have acquired land by adverse possession if he claims that the land, he is occupying is his ancestral land having been born and brought up on the land and the registered owner has never been in possession of that land....one cannot succeed in a claim for adverse possession before conceding that indeed the registered proprietor of the land is the true owner of the said land. It does not lie in the mouth of a claimant to aver that the title held by the registered proprietor was fraudulently acquired and then claim the same parcel of land under the doctrine of adverse possession.”

146I think I have said enough to show that the petitioners have not proved their case to the required standard of a balance of probabilities to warrant the grant of the orders sought.

147The petition is hereby dismissed. Due to the public interest nature of this petition, I will make an order that each party shall bear its own costs of the proceedings.

Orders accordingly.

Judgement dated and delivered virtually this **30th day of April 2026**

HON. LADY JUSTICE A.E DENA

JUDGE

30.04.2026

No appearance for the Petitioners

Mr Muinde for the 6th Respondent

No appearance for the rest of the Respondents

Asmaa Muftah – Court Assistant