



**Athman v Kilifi Plantations Coastal Limited & 5 others (Petition E009 of 2020) [2024] KEELC 714 (KLR) (16 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 714 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MALINDI**  
**PETITION E009 OF 2020**  
**MAO ODENY, J**  
**FEBRUARY 16, 2024**  
**IN THE MATTER OF: ARTICLES 22, 23(3) & 258 OF THE CONSTITUTION**  
**OF KENYA (2010);**  
**AND**  
**IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF ARTICLES**  
**2(5) & (6), 10, 11, 20(5), 22, 40(3), 42, 47, 62, 69 & 70 OF THE CONSTITUTION OF**  
**KENYA (2010);**  
**AND**  
**IN THE MATTER OF: THE IMPLEMENTATION OF THE AFRICAN**  
**(BANJUL) CHARTER ON HUMAN AND PEOPLE’S RIGHTS ARTICLES 2, 3, 7,**  
**13, 14 & 24;**  
**AND**  
**IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT (NO. 4**  
**OF 2015), SECTIONS 4, 5, 6 & PART III THEREOF;**  
**AND**  
**IN THE MATTER OF: THE CIVIL PROCEDURE RULES (2010), ORDER 53**  
**AND**  
**IN THE MATTER OF: THE NATIONAL LAND COMMISSION ACT, NO. 5 OF**  
**2012**  
**BETWEEN**  
  
**BETWEEN**  
**NYASAIIDI FAMAU ATHMAN ..... PETITIONER**



**AND**

<b>KILIFI PLANTATIONS COASTAL LIMITED .....</b>	<b>1<sup>ST</sup> RESPONDENT</b>
<b>KIRIKIRI LIMITED .....</b>	<b>2<sup>ND</sup> RESPONDENT</b>
<b>REGISTRAR OF TITLES, MOMBASA .....</b>	<b>3<sup>RD</sup> RESPONDENT</b>
<b>NATIONAL LAND COMMISSION .....</b>	<b>4<sup>TH</sup> RESPONDENT</b>
<b>COUNTY GOVERNMENT OF KILIFI .....</b>	<b>5<sup>TH</sup> RESPONDENT</b>
<b>DIRECTOR OF SURVEYS .....</b>	<b>6<sup>TH</sup> RESPONDENT</b>

**JUDGMENT**

1. By a Petition dated 28<sup>th</sup> September 2020 the Petitioner herein sued the Respondents seeking the following orders:
  - a. A declaration that the creation and subsequent registration of LR V/278, currently LR V/1625 and LR V/279, currently LR V/1626 which were curved out of the beach access road and the sea frontage thereto was illegal, unconstitutional, null and void.
  - b. A declaration that the alienation of LR V/278, currently LR V/1625 and LR V/279, currently LR V/1626 to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents which were curved out of the beach access road and the sea frontage thereto was illegal and unconstitutional.
  - c. An order of judicial review in the nature of certiorari to bring into this Honourable Court for purposes of quashing the decision of the 3<sup>rd</sup> Respondent to alienate LR V/278, currently LR V/1625 and LR V/279, currently LR V/1626 to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein.
  - d. An order of judicial review in the nature of a writ of mandamus compelling the 3<sup>rd</sup> Respondent to cancel the registration of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as proprietors of LR V/278, currently LR V/1625 and LR V/279, currently LR V/1626.
  - e. A declaration that the initial LR Group V/39/R and its accompanying sea frontage as designated in Survey Plan FR 111/37 is public property and is held in trust for the use and enjoyment by the residents of Kilifi County and generally members of the public.
  - f. An order of judicial review in the nature of a writ of mandamus compelling the 6<sup>th</sup> Respondent to re-survey for purposes of restoration of the public property being the beach access road namely LR Group V/39/R in its initial dimensions and the sea frontage thereto as formerly captured in Survey Plan FR 111/37.
  - g. That this Honourable Court be pleased to make any such other orders as it may deem fit and just to give effect to the Petitioner's claim.
  - h. Costs of this petition.

**Petitioner's Case**

2. The Petitioner averred that the suit property was designated as a public utility vide Survey Plan FR 111/37, and that the same has been admitted by the Director of Surveys, in the Replying Affidavit of one Michael Kinyua sworn on 13<sup>th</sup> July 2022.



3. It was further the Petitioner's case that an irregular, unlawful and illegal survey was carried out and an unlawful allocation done, without public participation in total disregard for public interest. That the same was hived off access to sea from the road and introduced a 6 metre wide road as beach access road while converting the 150 metre wide sea frontage into plots LR V/278 and LR V/279 and this was captured in Survey Plans FR/237/6 and FR237/7 and the new narrower beach access road was marked by beacons V94, V95, V96, V97 and V98.
4. The Petitioner further stated that after the allocation, the new owners applied for change of user, causing a re-survey to be done on or about the 10<sup>th</sup> May 2012 upon the parcels LR V/278 and LR V/279 which was done as captured in Survey Plan FR 526/154 and that the two parcels of land were thereafter issued with new numbers and parcel LR V/278 was re-numbered LR V/1625 owned by the 1<sup>st</sup> Respondent herein while LR V/279 was re-numbered LR V/1626 owned by KILIFI PLANTATIONS PROPERTIES LIMITED, the 1<sup>st</sup> Respondent herein, until on or about the 11th April 2016 when parcel LR V/1626 was subsequently transferred to KIRIKIRI Limited.

### **Respondents' case**

5. The 1<sup>st</sup> Respondent opposed the Petition vide a Replying Affidavit filed on 18<sup>th</sup> January 2021 and averred that it was the legal owner, having complied with all legal requirements during acquisition.
6. It was the 1<sup>st</sup> Respondent's case that it obtained ownership of the suit property, following a change of user for the suit property and a subdivision that necessitated a re-survey subsequent to which title deeds were issued for the newly created parcels of land in 1994.
7. The 2<sup>nd</sup> Respondent similarly claimed ownership of the suit property having purchased it from the 1<sup>st</sup> Respondent and that it exercised proper due diligence before proceeding to purchase the suit property.
8. The 6<sup>th</sup> Respondent filed a Replying Affidavit as well on 28<sup>th</sup> July 2022 and opposed the Petition on the grounds that a re-survey was done in 2012 and access to the sea created.

### **Petitioner's Submissions**

9. Counsel identified the following issues for determination:
  - a. Whether the suit property is public or private property and whether the rights of the Respondents supersede those of the public.
  - b. Whether the orders sought by the Petitioner may be granted.
  - c. Who bears the costs of this Petition?
10. On the first issue whether the suit property is public or private land and whether the rights of the Respondents supersede those of the public; counsel relied on Article 258 (2) of *the Constitution* of Kenya, on proceedings alleging breach of *the constitution*, which states that ;

“In addition to any person acting in their own interest, court proceedings under Clause (1) may be instituted by ... (b) a person acting as a member of, or in the interest of, a group or class of persons.”
11. Mr. Adhoch therefore submitted that the Petitioner being a resident of Kilifi county has sued on his own behalf and on behalf of the residents of Kilifi in exercise of that constitutional right.
12. Counsel relied on the case of Kiluwa Limited & Another v Commissioner of Lands & 3 others (2015) eKLR where Articles 22(2) and 258(2) of *the Constitution* were applied.



13. It was counsel's submission that the Petitioner has demonstrated that the suit property herein was designated as a public utility vide Survey Plan FR 111/37, a fact that has been admitted by the Director of Surveys, vide a Repling Affidavit of one Michael Kinyua sworn on 13<sup>th</sup> July 2022.
14. Mr. Adhoch relied on the case of Kenya National Highway Authority v Shalien Masood Mughal & 5 others [2017] eKLR, where the Court of Appeal held that such a title is defeasible under article 40 of *the Constitution* of Kenya as long as the land designated for public use was in existence before the land to which a private individual claiming to have title came into existence, then the subsequent title is defeasible.
15. Counsel further cited the case of Hamid Abdalla Mbarak v Registrar of Titles & 3 others; Will W. M. Omido & another (Interested Parties) [2020] eKLR, where the court held that a designated public utility property cannot be converted to private property.
16. Mr. Adhoch also cited the case of Falcon Global Logistics Co. Limited v Management Committee of Eldama Ravine Boarding Primary School [2018] eKLR and submitted that the Respondents may or may not have been party to any fraud but there is evidence that the suit property had been allocated for public purpose and was not available for reallocation to private persons
17. Counsel further stated that in the case of Kenya National Highway Authority v Shalien Masood Mughal & 5 others [2017] eKLR (supra) the Court of Appeal held that persons who find themselves in situations such as the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have the recourse to sue for damages.
18. On the second issue as to whether the rights of the Respondents supersede those of the public; counsel urged the court to weigh the individual rights of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents against those of the general public, in particular the Kilifi residents who will be deprived of the natural resource in the nature of a public beach for the enjoyment of the general public community and relied on the case of Isaac Gathungu Wanjohi & another v Attorney General & 6 others [2012] eKLR(supra).
19. Counsel submitted that the court has powers to grant the orders sought by the Petitioner and relied on the case of Kiluwa Limited & Another v Commissioner of Lands & 3 others (2015) eKLR where the court declared that "the alienation by the First Respondent to the Third Respondent of L.R No. MN/I/5902 Mombasa which is the Petitioner's access to the Indian Ocean Beach is a violation of the Petitioner's right to own property and equal access to public property; granted orders of injunction against construction or development in any other form upon the beach access property; issued orders for demolition of construction that had already begun and orders of certiorari to quash the decision to alienate the said land ; and orders of mandamus to cancel the grant for the alienation of the said beach access property."
20. Counsel therefore urged the court to allow the Petition as prayed.

## **2<sup>nd</sup> Respondent's Submissions**

21. Counsel submitted that the 2<sup>nd</sup> Respondent prior to purchasing the suit property ascertained that it belonged to the 1<sup>st</sup> Respondent and subsequently the land was transferred to it on 5<sup>th</sup> April 2016.
22. Counsel further submitted that the Petitioner has failed to specify what fundamental rights the Respondents have infringed as the alleged concerns can be dealt with in a civil suit.
23. It was counsel's submission that the suit property is private and that the 2<sup>nd</sup> Respondent is an innocent purchaser for value and therefore protected under Article 40 of *the Constitution*.



24. Counsel submitted that no substantial question of law which is of general public importance has been raised to warrant the court to issue the orders sought and relied on the case of Chunilal V. Mehta Vs. Century Spinning and Manufacturing Co. AIR 1962 SC 1314 where the court stated that a substantial question of law is one which is of public importance or which directly and substantially affects the rights of the parties and which have not been finally settled by the Supreme Court.
25. Counsel therefore urged the court to dismiss the Petition with costs.

### **3<sup>rd</sup> to 6<sup>th</sup> Respondents' Submissions**

26. Counsel relied on the Replying Affidavit of Michael Kinyua the Kilifi Land District Surveyor who confirmed that a survey was done in 1968 which produced Survey Plan F/R NO. 111/37 where an access to the sea was created and a further survey in 1993 which produced 2 Survey Plans F/R NOS. 237/6 and 237/7 where an access to the sea was still created.
27. Mr. Munga therefore submitted that the Petitioner has failed to prove any infringement of rights under Article 40 of *the Constitution*. Further that the Petitioner has not adduced any evidence or demonstrated any hardship in accessing the beach to warrant the court's intervention.
28. On the issue whether the Petitioner is entitled to the reliefs sought, counsel submitted that the Petitioner seeks declaratory orders as well as judicial review orders of certiorari and mandamus. That the Petitioner seeks the said reliefs on the ground that the 3<sup>rd</sup> and 6<sup>th</sup> Respondents have violated constitutional provisions while discharging their mandate.
29. Mr. Munga submitted that the re-survey was done by the 6<sup>th</sup> Respondent in line with his mandate and still created an access to the beach after reestablishment of boundaries. Counsel therefore submitted that the 3<sup>rd</sup> and 6<sup>th</sup> Respondents acted within their mandates lawfully and procedurally surveyed and created an access to the beach.

### **Analysis And Determination**

30. The issues for determination are whether the petition meets the threshold of a constitutional petition, whether the Petitioner's constitutional right has been infringed upon and whether the Petitioner is entitled to the reliefs sought in the petition.
31. For a constitutional petition to be sustained it must meet the basic ingredients of a petition. It must have a reasonable degree of precision identify the constitutional provisions that are alleged to have been violated or threatened to be violated and the manner of the violation and/or threatened violation. It follows that Petitioner cannot just throw in a few constitutional provisions and expect the court to look for the violation if it is not precisely identified. The precision is to enable the Respondents to answer to the alleged infringements and violations. If this is not done then it would be difficult to engage with the petition.
32. In the case of Mumo Matemo v Trusted Society of Human Rights Alliance Civil APP.290/2012 (2013) e KLR the court held that:  

“if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”



33. The court further stated that:

“...the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court... Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle”

34. The Petitioner averred that he has brought the petition on his behalf and on behalf of the residents of Kilifi County. He has particularized with precision his complaint against the Respondents and given details on how the suit parcels of land were public land that were later surveyed and re surveyed to create the parcels, which were allocated to individuals for private use.

35. In the case of Sollo Nzuki v Salaries and Remuneration Commission & 2 others [2019] eKLR, a member of the public filed a petition on behalf of High Court judges and judges of courts of equal status where the court held that :

“It is therefore clear that over time the issue of standing, particularly in public law litigation has been greatly relaxed and in our case *the Constitution* has opened the doors of the courts very wide to welcome any person who has bona fide grounds that *the Constitution* has been or is threatened with contravention to approach the court for an appropriate relief. In fact, since article 3(1) of *the Constitution* places an obligation on every person to respect, uphold and defend *the Constitution*, the invitation to approach the court for redress as long as the person holds bona fide grounds for believing that *the Constitution* is under threat ought to be welcome....In this case the petitioner not only contends that there is not only a threat to the violation of *the Constitution* but that *the Constitution* has in fact been violated by the respondents. In light of such allegations I cannot fault the petitioner for instituting these proceedings and I hold that he was within his right to commence these proceedings. As to whether his case is merited is another matter. Locus standi is a totally different thing from the merits of the petitioner’s case.”

36. Similarly in the Mumo Matemu case (supra) the court held as follows:

“Public Interest Litigation plays a transformational role in society. It allows various issues affecting the various spheres of society to be presented for litigation. This was *the Constitution*’s aim in enlarging locus standi in human rights and constitutional litigation. Locus standi has a close nexus to the right of access to justice. In instances where claims in the interest of the public are threatened by administrative action to the detriment of constitutional interpretation and application, the court has discretion on a case by case basis, to evaluate the terms and public nature of the matter vis a vis the status of the parties before it. The discretion is drawn from the command of article 259(1) to interpret *the Constitution* in a manner that promotes its values and purposes, advances the rule of law, human rights and fundamental freedoms, permits the development of the law and contributes to good governance.”



37. Articles 22 and 258 of *the Constitution*.

“ 22(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by –

- (a) a person acting on behalf of another person who cannot act on their own name;
- (b) a person acting as a member of, or in the interest of, a group or class of persons;
- (c) a person acting in the public interest; or
- (d) an association acting in the interest of one or more of its members.

(3) The Chief Justice shall make rules providing for the court proceedings referred to in this Article which shall satisfy the criteria that –

- (a) the right of standing provided for in clause (2) are fully facilitated;
- (b) formalities relating to proceedings, including commencement of the proceedings, are kept to a minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;
- (c) no fee may be charged for commencing the proceedings;
- (d) the court while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and
- (e) an organization or an individual with particular expertise may with leave of the court, appear as a friend of the court;

(4) .....

258(1) Every person has the right to institute court proceedings claiming that this constitution has been breached, contravened, or is threatened with contravention;

(2) In addition to any person acting in their own Interest, court proceedings under Clause (1) may be instituted by – a person acting on behalf of another who cannot act in their own name;

a person acting as a member of, or in the interest of, a group or class of persons;

a person acting in the public interest or;



an association acting in the interests of one or more of its members;”

38. The Petitioner falls within the categories listed above as a person acting in the public interest or as a person acting as a member of, or in the interest of, a group or class of persons. I find that the Petitioner has locus standi to bring this petition further that the Petition meets the threshold for constitutional Petitions.
39. It was the Petitioner’s case that the suit property was designated as a public utility vide Survey Plan FR 111/37, which fact has been admitted by the Director of Surveys, in the Replying Affidavit of one Michael Kinyua sworn on 13<sup>th</sup> July 2022. The Petitioner further stated that the Director of Surveys carried out an irregular, unlawful and illegal survey and an unlawful allocation without public participation in total disregard for public interest.
40. It is on record which is confirmed by the Petitioner and the Respondents that a survey and re survey was carried out and captured in Survey Plans FR/237/6 and FR237/7 whereby a new beach access road was marked by beacons V94, V95, V96, V97 and V98. It is further not in dispute that the suit parcels of land were hived off access to sea from the road and introduced a 6 metre wide road as beach access road while converting the 150 metre wide sea frontage into plots LR V/278 and LR V/279.
41. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents argued that they were bona fide purchasers of the suit land and are duly registered as such with titles. The 3<sup>rd</sup> to 6<sup>th</sup> Respondents averred that they were carried out their legal mandate hence should not be faulted for any infringement or violation of the rights of the Petitioner. The Respondents did not go further to establish the process, which they followed to survey and resurvey the suit parcels of land and the subsequent allocation to private individuals. The root of a title and the process of acquisition is very important when the legality of a title is challenged.
42. In the Supreme Court Case of Dina Management Limited v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment) the court held as follows:

“The title or lease was an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title could not be held as indefeasible. The first allocation having been irregularly obtained, the former President had no valid legal interest, which he could pass to Bawazir & Co. (1993) Ltd, who in turn could pass to the appellant.

Article 40 of *the Constitution* entitled every person to the right to property, subject to the limitations set out therein. Article 40(6) limited the rights as not extending them to any property that had been found to have been unlawfully acquired. As the 1<sup>st</sup> registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter could not therefore be protected under article 40. The root of the title having been challenged; the appellant could not benefit from the doctrine of bona fide purchaser.

The appellant’s title was not protected under article 40 *the Constitution* and the land automatically vested to the 1st respondent pursuant to article 62(2) *the Constitution*. The suit property, by its very nature being a beach property, was always bound to be attractive and lucrative. The appellant ought to have been more cautious in undertaking its due diligence.



43. The Petitioners and the residents of Kilifi should have been consulted before such action of survey and resurvey of the land reserved for public use is alienated and allocated to the Respondents as was held in the Court of Appeal case of Commissioner Of Lands v Kunste Hotel Limited [1997]eKLR, where the court held that –

“where allocating land under the Government Lands Act, the Commissioner of Lands is exercising a statutory power and when the exercise of that power is likely to affect the rights of third parties, such parties as are likely to be affected ought to be heard. Failure to hear such parties before the allotment is made renders the allotment null and void.”

44. The Respondents cannot be heard to claim indefeasibility of title or bona fide purchasers as the process of survey, resurvey and subsequent allocation of public land was flawed. Article 40 does not protect any property that has been found to have been unlawfully acquired.

45. I have considered the Petition, the submissions by counsel and the relevant authorities and find that the Petition has merit. I therefore make the following specific orders.

- a. A declaration is hereby issued that the creation and subsequent registration of LR V/278, currently LR V/1625 and LR V/279, currently LR V/1626 which were curved out of the beach access road and the sea frontage thereto was illegal, unconstitutional, null and void.
- b. A declaration is hereby issued that the alienation of LR V/278, currently LR V/1625 and LR V/279, currently LR V/1626 to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents which were curved out of the beach access road and the sea frontage thereto was illegal and unconstitutional.
- c. An order of certiorari is hereby issued to bring into this Honourable Court for purposes of quashing the decision of the 3<sup>rd</sup> Respondent to alienate LR V/278, currently LR V/1625 and LR V/279, currently LR V/1626 to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein.
- d. An order of mandamus is hereby issued compelling the 3<sup>rd</sup> Respondent to cancel the registration of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as proprietors of LR V/278, currently LR V/1625 and LR V/279, currently LR V/1626.
- e. A declaration is hereby issued that the initial LR Group V/39/R and its accompanying sea frontage as designated in Survey Plan FR 111/37 is public property and is held in trust for the use and enjoyment by the residents of Kilifi County and generally members of the public.
- f. An order of mandamus is hereby issued compelling the 6<sup>th</sup> Respondent to re-survey for purposes of restoration of the public property being the beach access road namely LR Group V/39/R in its initial dimensions and the sea frontage thereto as formerly captured in Survey Plan FR 111/37.
- g. This being a public interest petition, each party to bear their own costs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 16<sup>TH</sup> DAY OF FEBRUARY 2024.**

**M.A. ODENY**

**JUDGE**

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

