



REPUBLIC OF KENYA



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**Obo & 3 others v National Land Commission & 5 others (Civil Appeal
E054 of 2021) [2024] KECA 232 (KLR) (8 March 2024) (Judgment)**

Neutral citation: [2024] KECA 232 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL E054 OF 2021
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA
MARCH 8, 2024**

BETWEEN

**ALI ARUMI OBO 1ST APPELLANT
MUHSIN MOHAMED 2ND APPELLANT
JELANI A. OMAR 3RD APPELLANT
MOHAMED RAJAB 4TH APPELLANT**

AND

**NATIONAL LAND COMMISSION 1ST RESPONDENT
MINISTRY OF LAND HOUSING & URBAN DEVELOPMENT 2ND
RESPONDENT
LAPSSET CORRIDOR DEVELOPMENT AUTHORITY 3RD RESPONDENT
MINISTRY OF TRANSPORT & INFRASTRUCTURE 4TH RESPONDENT
COUNTY GOVERNMENT OF LAMU 5TH RESPONDENT
ATTORNEY GENERAL 6TH RESPONDENT**

*(An appeal against the Judgment and Decree of the Environment and Land Court
at Malindi (Olola, J.) delivered on 28th May 2021 in ELC Petition No. 16 of 2017)*

JUDGMENT

1. The genesis of this appeal was a petition dated and filed in the Environment and Land Court at Malindi on 7th August 2017 by the appellants against the respondents in Petition No. 16 of 2017.



2. The appellants' case, as pleaded and supported by an affidavit sworn on 9th August 2017 by the 4th respondent, Mohamed Rajab, was that, as beneficial owners, they were entitled to possession of identifiable individual parcels of land, which they have owned and occupied individually within the suit property as their ancestral land from time immemorial; that, prior to the commencement of the Lamu Port South Sudan Ethiopia Transport (LAPSSET) Corridor Project, the respondents acquired 1.3² Kms parcel of land then comprising part of the appellants' ancestral land (the suit property) and duly compensated the individual owners thereof albeit after a protracted litigation; that, before the acquisition of the said
32. Kms parcel of land, the appellants had applied to the respondents for the suit property to be surveyed so that each occupied portion is demarcated and allocated to individual owners to facilitate the issuance of Title Documents; and that the appellants and other members of the organisation to which they belong, namely Kililana Farmers Organization, were assured by the respondents that their remaining ancestral land (the suit property) would be surveyed, and that each member would have the parcels allocated and registered in their names; that despite that assurance, survey has not been carried out and no titles have been issued to the appellants; that the appellants learnt that some freehold titles were created within the suit property by the 1st respondent; and that the 2nd respondent registered and issued Title Deeds to people who are not members of the Kililana Farmers Organization, and who did not reside therein. The appellants therefore sought:
- a. a declaration that the omission by the respondents to survey, demarcate and issue the Petitioners with Title Deeds to their ancestral land despite repeated assurances and recommendations by the respondents is against the just and legitimate expectation of the Petitioners, and amounts to a denial of the Petitioners' right to property, individually or in association with members of Kililana Farmers Organization as enshrined in Articles 40 and 60 of *the Constitution*;
 - b. a declaration that the issuance of Title Deeds to the 3rd respondent for the 1.3² Kms parcel of land excised from the Petitioners' ancestral land and creation of freehold titles within the suit property to people other than the Petitioners and members of Kililana Farmers Organization and issuance of Title Deeds to residents of Hindi/Magogoni and Siyu in Lamu County without similar treatment being accorded to the Petitioners amounts to discrimination of the Petitioners and members of Kililana Farmers Organization, and is an infringement of the Petitioners rights not to be discriminated upon, and that it is also a violation of the Petitioners' right to fair administrative action as enshrined in Articles 10, 27 and 47 of *the Constitution*;
 - c. a declaration that the intended annexation of the Petitioners ancestral land by the respondents to the 1.3² Kms parcel of land already allocated to the 3rd respondent without first surveying and demarcating the Petitioners' remaining ancestral land and issuing them with title documents without just and prompt compensation will amount to arbitrarily depriving the Petitioners of their land, and that it is a threat to the
Petitioners' right to property, individually or in association with the others as enshrined in Article 40 of *the Constitution*;
 - d. an order of mandamus compelling the respondents to survey and demarcate the land owned and occupied by the Petitioners and members of Kililana Farmers Organization, and the allocation and registration of each individual member and issuance of Title Deeds for their respective parcels of land, and further compelling the respondents to survey and demarcate the



suit property already acquired and allocated to the 3rd respondent so as to clearly delineate and separate it from that of the Petitioners and members of Kililana Farmers Organization;

- e. an order that the survey and demarcation be undertaken by the respondents in conjunction with the Petitioners and Kililana Farmers Organization, and that there be no annexation of the Petitioners land without just and prompt compensation, and only after the survey and demarcation is carried out;
 - f. costs of this Petition; and
 - g. any other relief that this Honourable Court may deem just to grant so as to meet the ends of justice and the protection of the Petitioners' Constitutional rights.
3. The 1st respondent, the National Land Commission, opposed the petition by way of a replying affidavit sworn by its Acting Director Legal Affairs and Enforcement, Brian Ikol, on 17th September 2019 in which it set out its legal status and functions, and averred that all that area of land situate within Kililani, Lamu County claimed by the appellants was public land as defined under Article 62(1) (a) of *the Constitution*; that the said land was neither community nor ancestral land as claimed by the petitioners; that, even if the suit property was community land, the appellants did not have the locus standi to commence the proceedings as they were not a registered community as set out under section 7 of the *Community Land Act*; that, despite the disputed area being public land, it was agreed after extensive consultations that the occupants of the area in question, where the Lamu Port Project was being undertaken, would be compensated for any dislodgment that would be carried out by the Government to pave way for the Project; and that a majority of the affected persons were compensated save for a small number who had pending disputes.
4. According to the 1st respondent, owing to the nature, magnitude and costs involved in the construction of the Project, it was deemed necessary to secure a title document for which reason it was agreed that title for the project would issue in the name of the LAPSSET Corridor Development Authority (the 3rd respondent herein). However, it denied that it made representations or assurances to the appellants or members of Kililana Farmers Organization to the effect that the suit property would be surveyed, and that each member would be issued with title deeds. According to the 1st respondent, under section 12 of the *Land Act*, it can only commence the process of allocation of public land upon a request from the National or County Government, which it had not received.
5. The 3rd respondent, the LAPSSET Corridor Development Authority, equally opposed the petition through a replying affidavit sworn and filed on 28th November 2018 by its Director General, Silvester Kasuku. In that affidavit, it was deposed that, for the 3rd respondent to facilitate the Project, the Ministry of Lands (the 2nd respondent) was required to reserve an initial 28,139 Ha of land for purposes of the Lamu Port and its ancillary activities; that, prior to the reservation of the land, a consultant was engaged to undertake the Environment and Social Impact Assessment (EISA) study in order to identify the Project Affected Persons within the concerned area; that all persons who had been identified in the EISA study as Project Affected Persons whose land fell within the area earmarked for the project were identified for compensation, and were compensated through a consultative forum with all relevant stakeholders, including the appellants; that all the land that had been earmarked for use of the LAPSSET Project was for the construction of the berths and ancillary project components, which included access roads, rails, administrative blocks, terminals, boreholes and storage tanks; and that the 3rd respondent was not aware of any agreement between itself and the appellants in regard to the remaining land.



6. When the hearing commenced, the petitioners called PW1, Mohamed Rajab, the 4th appellant herein. The witness relied on his affidavit in support of the petition filed on 7th August 2017 and a supplementary affidavit filed on 1st July 2019. According to him, the petition was in respect of an apparently unregistered parcel of land at Kililana Village in Mokowe measuring some 5000 acres, which the appellants claimed was their ancestral land which they had owned and occupied since time immemorial. During their alleged occupation, they used it to plant various crops and to rear livestock, and had constructed their residential houses, nursery schools and mosques thereon. It was his evidence that, prior to the commencement of the Project, the respondents acquired 1.3² Kms of their said ancestral land and proceeded to duly compensate the individual owners thereof in recognition of the fact that those individuals owned their various pieces of land notwithstanding the fact that they had no title documents for the respective parcels of land. However, before the acquisition of the suit property, the appellants had applied to the respondents to have their land surveyed, demarcated and allocated so as to facilitate the issuance of Title documents to each of them; that the 1st to 4th respondents indicated that the suit property would be surveyed, and that each one would be issued with title documents.
7. Consequently, the appellants petitioned the 5th respondent, whose County Assembly passed a resolution that the petitioners' ancestral land be surveyed and that they be issued with title deeds therefor. According to the witness, despite all these assurances and recommendations, the appellants' ancestral land was not surveyed, and no title documents were issued to them. Instead, the respondents proceeded to issue title deeds to the 3rd respondent and to other inhabitants of Lamu County residents in the Hindi/Magogoni and Siyu Settlement Schemes, which are situated near the suit property.
8. On behalf of the respondents, Silvester Kasuku, the Director General of the 3rd respondent, denied that any promises, assurances, and/or recommendations were made to the appellants by the respondents. According to him, before the commencement of the construction of the first three berths at the Lamu Port, the Government carried out a thorough feasibility study to establish the viability of the Project, whether the location was conducive therefor, and its impact; that, subsequently, the 2nd respondent was required to reserve an initial 28,139 Ha of land for purposes of the Port and its ancillary activities, which would include the construction of access roads, rails, administrative blocks, terminals, boreholes as well as storage tanks; that, prior to reservation of the land, the Government engaged a consultant who undertook an Environment and Social Impact Assessment (EISA) study in consultation with the people in the affected region as well as their leaders; that, upon completion of the exercise, all the persons whose parcels of land fell within the land earmarked for the Project and who had been identified in the EISA study as the Project Affected Persons were compensated whereupon the 3rd respondent was issued with a Certificate of Lease for their parcels of land LR No. 29636 by the 2nd respondent on 1st February 2016 for the 28,139 Ha so acquired; that any further claim that the appellants have ought to have been pursued with the 1st respondent Commission; and that, in the event that the 3rd respondent was interested in the area outside the lease depending on a Master Plan that they had developed for the area, the 1st respondent would survey the area and identify the land needed.
9. After hearing the petition, the learned Judge (Olola, J.), in his judgment dated 23rd November 2020, found that there was no evidence documented regarding the alleged assurances by the 2nd respondent's Permanent Secretary, the then Prime Minister and the President of the Republic of Kenya, that the appellants would be issued with title deeds after survey, demarcation and allocation of the land; that, although the appellants based their claim on the contention that the suit land was either their ancestral or community land, they did not place any evidence before the court as to their ownership thereof either individually by way of their ancestry or as a registered community with the locus to institute the petition as required under Section 7 of the [Community Land Act](#); that, from the material placed before



the court, it was evident that the land claimed by the appellants comprised of unalienated public land as defined under Article 62(1) (a) of *the Constitution*.

10. While appreciating that the 5th respondent County Government had by a resolution of its County Assembly on 24th January 2017 resolved to have the suit land surveyed and demarcated for purposes of allocation, the learned Judge found that there was no evidence that the County Government of Lamu had progressed that resolution and approached the 1st respondent Commission as required under section 12 of the *Land Act* to commence the process of allocation of the land to the appellants.
11. It was held by the learned Judge that the right to ownership of property as enshrined under Article 40 of *the Constitution* only extends to proprietary interests acquired through an existing legal framework; that, since the appellants had sought to be allocated the land through the 1st respondent, and that a similar request appeared to have proceeded partially before the 5th respondent, the appellants should have been a little bit more patient to give the relevant bodies time to consider their petitions. As held by this Court of Appeal in *Mumo Matemba vs. Trusted Society of Human Rights, Alliance & 5 Others* (2013) e KLR, a body or organ performing statutory duties has discretion when handling matters falling within its mandate.
12. Regarding the allegation of discrimination of the appellants by the issuing title deeds to other residents of Hindi/Magogoni and Siyu areas, the learned Judge found that the appellants did not provide any proof that those residents were in similar circumstances, and/or that the respondents had proceeded to issue other residents with title deeds while denying the appellants similar rights despite the similarity of their situations. To the learned Judge, all that was placed before him was evidence which was admitted by the respondents that the 3rd respondent had been granted a lease of the 28,139 Ha that was acquired for the Project. In his view, the said parcel of land was lawfully acquired by the Government for lawful purposes, and was not available for alienation and/or allocation to other persons otherwise than is provided by law.
13. The learned Judge's view was that, while it was apparent that the petition was actuated by the act of the Government to compensate certain individuals that had hitherto been the appellants' neighbours, the respondents could not be compelled to acquire more land than the Government needed for its purposes at the time, and that the compensation may have been made out of other factors as determined by the EISA Study on the affected persons. In arriving at his decision, the learned Judge relied on the decision of *Matavo, J* (as he then was) in *Shamsher Kenya Ltd vs. Director of Public Prosecutions & 2 Others* (2018) eKLR 80, highlighting the principle that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim; and that decisions on violation of Constitutional rights should not and must not be made in a factual vacuum.
14. Accordingly, the learned Judge held that the petition was premature and without any basis since, according to the appellants, it was not shown that the respondents violated any of the petitioners' constitutional rights. He dismissed the same with orders that each party bears their own costs.
15. Dissatisfied with the decision, the appellants are before us challenging the foregoing findings on the grounds that the learned judge erred in law and in fact: in finding and holding that the appellants had not proved that they had been assured by the respondents that they would be issued with title deeds after the survey, demarcation and allocation of the land; in failing to find and hold that the respondents had acted against the just and legitimate expectation of the appellants in failing to issue the appellants with title deeds after the survey, demarcation and allocation of the land; in finding and holding that the appellants had not shown that the land was their ancestral land; in finding and holding that land claimed by the appellants was unalienated public land as defined in Article 62(1) (a) of *the Constitution*; in holding that the 3rd respondent had lawfully acquired 28,139 hectares of land for the



- LAPSET project; in failing to find and hold that the appellants had been discriminated against by the respondents; in finding and holding that the petition was premature and without basis; and in finding and holding that the appellants had not proved that their constitutional rights had been violated by the respondents.
16. The appellants prayed that the appeal be allowed; and that the judgement delivered on 28th May 2021 be set aside and substituted for judgement allowing the appeal. They also prayed for the costs of the appeal.
 17. We heard this appeal on the Court's GoTo Meeting virtual platform on 9th October 2023 when learned counsel Mr. Shujaa appeared for the appellant while learned counsel Mr. Lutta, appeared for the 2nd, 3rd, 4th and 6th respondent. There was no appearance for the 1st and 5th respondents despite having been duly notified of the hearing date.
 18. It was submitted on behalf of the appellant that there was uncontroverted evidence on record both orally and documentary establishing that the respondents assured the appellants that the suit land would be surveyed, demarcated and allocated so as to facilitate the issuance a certificate of title documents to each of them; that the County Assembly of the 5th respondent passed a resolution that the appellants ancestral land be surveyed after they petitioned the Assembly; and that the learned Judge was wrong to find that the 5th respondent ought to have sent the resolution to the 1st respondent when it was sufficient to show that the 5th respondent had made a resolution, and that the appellants had legitimate expectation. In this regard, the appellants cited the case of Oindi Zaippeline & 39 Others vs. Karatina University & Another [2015] eKLR in support of their contention that the doctrine of legitimate expectation applied in those circumstances.
 19. It was submitted further that, from the survey map, the suit land was unregistered land situated at Kililana village in Mokowe Sub-location, Mokowe Location, Hindi Ward in Lamu West Subcounty within Lamu County, and was outside the boundaries of the 13 Km square of land acquired by the 3rd respondent. It was also contended that the photographs produced showed some of the developments on the suit land carried out by the appellants for a long time, and hence proof that it was their ancestral land. They faulted the learned Judge for failing to rely on the report dated 26th November 2008 laying the foundation of an ancestral claim. According to the appellants, the existence of Abdereham Tuwili ruins and the appellants' old settlements is proof of the existence of their ancestral land; that their recognition as occupants of the ancestral land in the ESIA report outlining the stakeholders meeting held on 31st January 2013 was not considered; that the issuance of a lease to the 3rd respondent and title document to the residents of Hindi/Magogoni and Siyu Settlements in Lamu was discriminatory contrary to Article 27 of the Constitution, and that the respondents failed to discharge their mandates as provided under Article 10(2) (b) of *the Constitution*; that it was wrong for the learned Judge to find their petition to be premature since they presented numerous correspondences requesting for title documents and received written responses of assurance which gave rise to their legitimate expectation, and that no justification was given for the respondents' inaction.
 20. It was submitted on behalf of the 2nd, 3rd, 4th and 6th respondents that no evidence was tendered to demonstrate how they breached the appellants' rights under Article 40 and 60 of *the Constitution*; that the petition was not drafted with precision as to the area or portion they claimed in accord with the principle expressed in Anarita Karimi Njeru vs. Republic (1976-1980) KLR 1272, and as underscored in Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR; that the appellants' cannot claim land No. CR 68910 given to the LAPSET Authority for the ongoing port project after a proper process of verification and acquisition process by the National Land Commission and the respondents; that there was no agreement that the suit land would be surveyed and allocated to



the appellants by the respondents, and hence the suit land vested in the allocated authority pursuant to section 120(4) of the *Land Act* and Article 62 of *the Constitution*.

21. Reliance was placed on *Erastus Njonjo Mote & 3 Others vs. the AG & 2 Others* [2017] eKLR, submitting that, if the appellants were laying claim on unsurveyed and unregistered land, they ought to petition to the National Land Commission and/or County Government for the process of registration as provided for under the *Community Land Act* and the *Land Registration Act*; that, pursuant to Article 67 of *the Constitution* and the *National Land Commission Act* No.5 of 2012, the National Land Commission is the custodian of such land. It was submitted further that the appellants were aware of the Gazette Notice No. Vol. CXXI Notice No.1553 published on 15th February 2019 notifying the public of the intention to acquire additional land in several counties, including Lamu, on behalf of the 3rd respondent and that, therefore, the doctrine of legitimate expectation did not apply. In view of the foregoing, we were urged to dismiss the appeal with costs.
22. We have carefully considered the parties' rival submissions and the cited authorities, as well as the proceedings before the ELC. This being a first appeal, we are enjoined to re-evaluate, re-assess and reanalyse the evidence on record and determine whether the conclusions reached by the learned trial Judge should hold. In the case of *Kenya Ports Authority vs. Kuston (Kenya) Limited* [2009] 2 EA 212, this Court espoused that mandate or duty as follows:

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”
23. We are conscious, as cautioned by the predecessor of this Court in *Peters vs. Sunday Post Ltd* [1958] E.A 424 that:

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion.”
24. The main question for consideration in this appeal is whether the suit land was the appellants' ancestral land; whether representations were made by the respondents that the appellants would be compensated in the event that the same was to be acquired for the purposes of the project; whether the appellants were discriminated against in the process of compensation; and whether the appellants are entitled to the reliefs sought.
25. Article 61(2) of *the Constitution* classifies land into three categories, namely: Public, Community or Private. From the arguments put forward by the appellants that the suit land is their ancestral land, it is clear that their claim to the suit land falls under Article 63(2) (d) (ii) of *the Constitution* which, inter alia, describes “community land” as land that is “ancestral lands and lands traditionally occupied by hunter-gatherer communities”. According to the appellants, before the acquisition of the said 1.3² Kms parcel of land for the development of the Lamu Port, they had applied to the respondents to have their land surveyed, demarcated and allocated so as to facilitate the issuance of Title Documents to each one of them. It was their case that, pursuant to that request, the 1st to 4th respondents assured them that the suit property would be surveyed, and that each one of them would subsequently be issued with



title documents. Consequently, the appellants petitioned the 5th respondent whose County Assembly then passed a resolution that the petitioners' ancestral land be surveyed, and that they be issued with title deeds therefor. According to the witness, despite all these assurances and recommendations, the appellants' ancestral land was not surveyed, and no title documents were issued to them. Instead, the respondents proceeded to issue title deeds to the 3rd respondent and other inhabitants of Lamu County residents in the Hindi/Magogoni and Siyu Settlement Schemes, which are situated near the suit property.

26. Under section 6(1) of the [Community Land Act](#), all unregistered community land is to be held by county governments on behalf of the communities for which it is held. However, section 7(1) of the same Act provides that:

A community claiming an interest in or right over community land shall be registered in accordance with the provisions of this section.

27. The appellants' contention, if we understood them correctly, was that they intended that their community land be converted to private lands. In this regard, section 23 of the [Community Land Act](#) provides that:

Registered community land may, subject to the approval of the registered community, be converted to private land through-

- a. transfer; or
- b. allocation by the registered community, subject to ratification of the assembly as provided in section 21(2).

28. Section 21(2) of the said Act provides that:

A registered community shall, before the conversion of registered community land into any other category of land seek and obtain approval from two thirds of the assembly in a special meeting convened for that purpose.

29. From the foregoing, it is clear that what gives a community the standing to claim land in that capacity is registration under the Act. In this case, the learned Judge found that there was no evidence of registration by the appellants. In their submissions, the appellants have not addressed this particular finding. We agree with the learned Judge that in the absence of registration, the appellants had no locus to make a claim for the suit land.

30. In the absence of any evidence of registration, the question that arises is whether the appellants could make out a claim for ancestral land. In our view, it was not possible for the claim for ancestral land to be made out in those circumstances. From the evidence on record presented only by PW1, we find that there was no sufficient evidence to arrive at such a finding. In our considered view, a claim for land based on ancestry requires more than just mere allegations. While it may not be possible to adduce documentary evidence to support such a claim, one is expected to adduce evidence that goes further than mere occupation of the land in question since, in our view, mere occupation of land without more does not necessarily convert the land in question to ancestral land. Evidence ought to be adduced by the person who expects the court to find in his favour, for example, showing actions taken by a particular community which, if considered cumulatively, satisfies the tribunal that, as a fact, the occupation was based on a claim based on ancestry. Unfortunately, no such evidence was adduced in this case. The report referred to by the appellants was purportedly made by their members and, in particular, by a person who was not called to testify. Hence, the trial court was denied the opportunity to interrogate



the same in order to establish if it could pass the evidential threshold so as justify a finding on a claim based on ancestry.

31. With respect to the survey of the suit property, it was further contended that since the 1st to 4th respondents assured the appellants that the suit property would be surveyed, and that each one of them would subsequently be issued with title documents, the appellants had a legitimate expectation that the respondents would not backtrack from the said assurance or promise. It was therefore submitted that the learned Judge erred in law and in fact in finding and holding that the appellants had not proved that they had been assured by the respondents that they would be issued with title deeds after the survey, demarcation and allocation of the land; and that the learned Judge erred in law and fact when he failed to find that the respondents had acted against the just and legitimate expectation of the appellants by failing to issue the appellants with title deeds after the survey, demarcation and allocation of the land. In support of this submission, the appellants relied on the documents appearing from pages 22 to 35 of the Record of Appeal.
32. In order to appreciate the appellant's case in so far as it is hinged on legitimate expectation, it is important to review the principles that underlie legitimate expectation. According to De Smith, Woolf & Jowell, "Judicial Review of Administrative Action" 6thEdn. Sweet & Maxwell page 609:

"A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government's dealings with the public."

33. Apart from the letters written by the appellants, one of the letters relied upon is from the District Land Officer, Lamu, dated 25th October 2012 and addressed to the Commissioner of Lands, and whose contents were as follows:

"Re: Land Ownership Documents for Kililana Farmers- Lamu County

The subject above refers.

I have received complaints by farmers of Kililana Lamu County who are requesting to be issued with ownership documents for their ancestral land.

The above residents have occupied Kililana area for many years without ownership documents from the Government.

The farmers have already been affected by the Lamu Port Project and a number of them have been displaced by the ongoing Port construction. Further no compensation has been done to date. A list of those who have been displaced was forwarded by the DLMC to Nairobi for action.

The DLMC also provided a way forward on how the current situation can be handled. This was to be done by:-

- i. Immediately settling those displaced by the ongoing construction on the land reserved for extension of Hindi Magononi Settlement Scheme.
- ii. Regularizing the existing settlements of Kililana, Mashindwani and Mokowe through the Swahili Settlement Scheme.



iii. Through fast tracking the commencement and completion of the proposed extension of Hindi Magogoni Settlement Scheme to cater for the needs of the landless people within the Country. In this regard, I kindly request you to:

- i. Ensure that no new leases or grants are processed within the said area since this will displace the farmers who are currently on the ground.
- ii. Liaise with the other heads of department in Nairobi with a view of fast tracking the above issues as a matter of priority.”

34. It is not clear in what capacity that letter was written since an expectation to acquire the legitimacy must arise from a promise made by a person with authority to make such a promise. As was held in *South Bucks District Council vs. Flanagan* [2002] EWCA Civ. 690 [2002] WLR 2601 at [18]:

“Legitimate expectation involves notions of fairness and unless the person making the representation has actual or ostensible authority to speak on behalf of the public body, there is no reason why the recipient of the representation should be allowed to hold the public body to the terms of the representation. He might subjectively have acquired the expectation, but it would not be a legitimate one, that is to say it would not be one to which he was entitled.”

35. It is clear to our mind that the said letter was being addressed to the relevant office in order for that office to consider the appellants’ request. That letter cannot give rise to legitimate expectation since it was seeking the exercise of a power by authority other than the one that authored the letter. It was not a promise by the author, the District Land Officer, Lamu, to the appellants that they would be issued with title deeds or that they would be compensated. While that letter might have given the appellants some expectation that an action might be taken, that expectation was not an actionable expectation. As appreciated in “The Doctrine of Legitimate Expectations and the Distinction between Reliance and Expectation Interests” by Daphne Barak Erez (*European Public Law* Vol. 11 Issue 4):

“As it turns out, only in a minority of cases does the doctrine of legitimate expectations protect expectations per se, while the focus is usually on the protection of reliance. Although the protection of ‘pure’ expectations sometimes prevails, its relative scope is narrow, given the public interest in avoiding restrictions on administrative discretion. The suggested understanding of the doctrine of legitimate expectations is based on an evaluation of the arguments justifying the protection of the reliance and expectation interests, in general as well as in the context of administrative law...The discussion of these arguments reveals reasons for protecting ‘pure’ expectations, but also shows that these justifications become particularly significant once reliance is also involved, thus highlighting the importance of assessing the involvement of a reliance factor in the case. Where reliance had occurred, the balance tilts against changes in official decisions. Moreover, even when the administration is allowed to change its decision (for important public reasons) the private party who had relied on the authorities should still be compensated.”

36. The other evidential document relied on was the minutes of the Stakeholders’ Consultative Meeting on the Environmental and Social Impact Assessment (ESIA) for Construction of the Lamu Port First Three Berths and Associated Infrastructure held on 31st January 2013. The meeting was chaired by the Lamu County Commissioner. Relevant to this matter was the recommendation that the



resettlement of Kililiana Community should be implemented immediately, and that the affected farmers be compensated. It was noted that:

The Assistant Commissioner of Lands, Peter Kahuho, assured the stakeholders that compensation will be paid promptly and the issuance of titles will be addressed.

37. Clearly, this assurance did not amount to a legitimate expectation that the appellants would be compensated and titles issued to them, because an assurance that the appellants' grievances would be addressed only means that the said grievances would be considered. It does not mean the same thing as the grievances being resolved in the appellant's favour. Similarly, an assurance that compensation would be paid promptly would be depended on the determination of ownership of the land and, hence, cannot amount to legitimate expectation that the appellants would be paid irrespective of the proprietorship of the lands.
38. Next is a letter dated 25th January 2017 from the Clerk to the County Assembly of Lamu to the Chief Officer, Lands, Lamu communicating the resolution of the Assembly of 24th January 2017 regarding the petition by Kililiana Community to the Assembly. That resolution was to the effect that the suit land be surveyed and demarcated for purposes of allocation. However, as rightly held by the learned Judge, there was no evidence that the County Government of Lamu progressed that resolution and approached the 1st respondent as required under section 12 of *Land Act* to commence the process of allocation of the land to the appellants. While the said County Government was joined as a party in these proceedings, it neither appeared nor responded to the Petition.
39. It is also noteworthy that no evidence was presented that the former Prime Minister and the President assured the appellants that they would be issued with titles to the suit land.
40. As regards the allegation of discrimination, the appellants' claim was based on the fact that title documents were issued to the residents of Hindi/Magogoni and Siyu Settlements in Lamu. We must emphasise that the mere fact that persons are subjected to different treatments does not necessarily amount to prohibited discrimination. The test to be employed in determining whether or not an action is discriminatory was laid down by the South African Constitutional Court in Jacques Charl Hoffmann vs. South African Airways, CCT 17 of 2000 in which the court stated:

“This court has previously dealt with challenges to statutory provisions and government conduct alleged to infringe the right to equality. Its approach to such matters involves three basic enquiries: first, whether the provision under attack makes a differentiation that bears a rational connection to a legitimate government purpose. If the differentiation bears no such rational connection, there is a violation of Section 9(1). If it bears such a rational connection, the second enquiry arises. That enquiry is whether the differentiation amounts to unfair discrimination. If the differentiation does not amount to unfair discrimination, the enquiry ends there and there is no violation of Section 9(3). If the discrimination is found to be unfair, this will trigger the third enquiry, namely, whether it can be justified under the limitations provision. Whether the third stage, however, arises will further be dependent on whether the measure complained of is contained in a law of general application.”

41. In the President of the Republic of South Africa & Another vs. John Phillip Hugo 1997 (4) SAICC Para 41, it was held as follows:

“We need to develop a concept of unfair discrimination which recognizes that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in



all circumstances before the goal is achieved. Each case, therefore will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in different context.”

42. In order to make a determination as to whether or not there is discrimination, it is important to appreciate the position in *Minister of Finance vs. Van Heerden* [2004] ZACC 3; 2004

(6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) (Van Heerden) para 27 that:

“It is . . . incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution. In the assessment of fairness or otherwise a flexible but ‘situation-sensitive’ approach is indispensable because of shifting patterns of hurtful discrimination and stereotypical response in our evolving democratic society.”

43. It is therefore important that the person claiming relief based on discrimination adduces evidence showing that persons in positions similar to his have been treated differently to his detriment without any rational basis. In this case, as we hereby find, there was no satisfactory evidence placed before the trial court that the appellants were entitled to be issued with title documents to the suit land. We find no evidence to show that the residents of Hindi/Magogoni and Siyu Settlements in Lamu were in similar position as the appellants, and yet they were issued with title documents. Consequently, there is no evidence on the basis of which we can find that the appellants were discriminated against.

44. Regarding payment of compensation, the 1st respondent’s position was that, despite the area being public land, it was agreed after extensive consultations that the occupants of the area in question, where the Lamu Port Project was being undertaken, would be compensated for any dislodgment that would be carried out by the Government to pave way for the Project; and that a majority of the affected persons were compensated save for a small number who had pending disputes. In light of this contention, we agree that the petition was prematurely filed.

45. Having considered the issues raised before us in this appeal, we find no basis for interfering with the findings of the learned Judge. We find no merit in this appeal which we hereby dismiss.

46. We make no order as to costs since the proceedings were brought on behalf of Kililiana Community.

47. Those shall be our orders.

DATED AND DELIVERED AT MOMBASA THIS 8TH DAY OF MARCH, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

G. V. ODUNGA



.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

