REPUBLIC OF KENYA

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Wambega & 733 others v Attorney General & 9 others (Civil Appeal E028 of 2020) [2024] KECA 445 (KLR) (12 April 2024) (Judgment)

Neutral citation: [2024] KECA 445 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E028 OF 2020

P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA

APRIL 12, 2024

BETWEEN

HENRY WAMBEGA & 733 OTHERS & 733 OTHERS & 733 OTHERS & 733 OTHERS & 733 OTHERS & 733 OTHERS & 733 OTHERS & 733 OTHERS & 733 OTHERS & 733 OTHERS & 733 OTHERS .... APPELLANT

AND

THE HON ATTORNEY GENERAL .... 1ST RESPONDENT

KATHINI SPRING WATER LTD .... 2ND RESPONDENT

COOPERATIVE BANKING HOUSING SOCIETY LTD .... 3RD RESPONDENT

CANON ASSURANCE COMPANY LTD .... 4TH RESPONDENT

HEDGE FARM LTD .... 5TH RESPONDENT

MOHAMED BIN ALI MOHAMED .... 6TH RESPONDENT

NAAMAN BIN ALI MUSESS .... 7TH RESPONDENT

NATIONAL LAND COMMISSION .... 8TH RESPONDENT

SAFEPARK LIMITED .... 9TH RESPONDENT

THE CHIEF LAND REGISTRAR .... 10TH RESPONDENT

(Being an appeal against the judgement of the Environment and Land Court delivered by Munyao Sila. J. on 22nd October 2020 In Mombasa ELC Petition 2 of 2018)

Standard of proof required in claims of historical land injustices

The appellants claimed that they had a right to be settled on the suit lands by virtue of fact their forefathers lived on the land before they were violently evicted. The court held that when the title of a party was under scrutiny, the concerned party ought to travel beyond and show that he validly acquired title. The court noted that section

15 of the National Land Commission Act required a claimant of historical injustice to adduce evidence that was verifiable, that the act(s) complained of be demonstrated to have resulted in displacement of the claimant or other form of historical land injustice.

Reported by Kakai Toili

Evidence Law *– burden and standard of proof - burden and standard of proof in claims of historical land injustices - who bore the burden of proof and what was the standard of proof required in claims of historical land injustices – National Land Commission Act (cap28), sections 15(2) and (3).*

Constitutional Law *– constitutional petitions – form of constitutional petitions - whether it was sufficient to simply refer to various articles of the Constitution in a constitutional petition without linking those articles to the issues for determination.*

Brief facts

The appellants claimed that between 1960 to 1962 right through to the year 1970 there were forced evictions of the occupants in the suit lands, that those evictions were executed violently without regard to human life and with destruction of property. The appellants averred that attempts to address the issues through political means failed when in 2012 the court declared the process unconstitutional for failure to provide an avenue for compensation of the current land owners. That, they averred had led to infringement of their right to the suit land due to the Government's failure to declare the suit land ancestral land or trust land. The appellants thus filed a petition at the trial court.

The appellants claimed they had a right to be settled on the suit lands by virtue of fact their forefathers lived on the land before they were violently evicted, which, they claim caused them to lose their ancestral land. They claimed that their loss was a historical injustice. They thus sought for among other prayers; declarations that the appellants' rights to property and dignity had been violated; and a declaration that the suit properties were ancestral lands. The trial court dismissed the petition. Aggrieved, the appellant's filed the instant application.

Issues

i. Who bore the burden of proof and what was the standard of proof required in claims of historical land injustices

ii. Whether it was sufficient to simply refer to various articles of the Constitution in a constitutional petition without linking those articles to the issues for determination.

Held

1. Being a first appeal, it behooved the court to re-evaluate, re-assess and re-analyze the evidence on record and then determine whether the conclusions reached by the trial court should hold.
2. The National Land Commission Act, at section 15(2) and (3) provided a description of historical injustices and the threshold for such a claim to be admitted, registered and processed. Section 15(3)(a) specified that a claim based on historical injustices must be verifiable, and specifically, that the act(s) complained of be shown to have resulted in displacement of the claimants or other form of historical land injustice.
3. The evidence presented was problematic. First of all, the statement of all the witnesses except the Assistant Chief were generic to the extent that the statement were similar word for word. Secondly, there was no specifications of relevant issues in the statements, just generalized lyrics that were mere speculation, impersonal in terms of ownership of the information given and hypothetical in nature. The third problem with the statements, was the lack of supportive evidence in substantiation of the generalized allegations made.
4. It was not sufficient for a petitioner to simply refer to various articles of the Constitution without linking those articles to the issues for determination. A petition must therefore set out the articles alleged to have been violated or threatened with violation and state the relevance of those articles to the issues for determination. The appellants fell short of making linkages between the acts of

violations complained of, with the articles of the Constitution invoked, and the issues presented for the determination of the court.

5. When the title of a party was under scrutiny, the concerned party ought to travel beyond and show that he validly acquired title. There was no allegation that the respondents obtained their titles through fraud or misrepresentation, or illegally, unprocedurally or through corrupt scheme.
6. From the trial court's judgment, there was nothing to justify the accusation that it applied a stricter standard of proof above that set under section 15 of the National Land Commission Act. That section required a claimant of historical injustice adduced evidence that was verifiable, that the act(s) complained of be demonstrated to have resulted in displacement of the claimant or other form of historical land injustice. The trial court applied the correct test to the appellants claims and correctly found it undiscernible and unverifiable.
7. The trial court made certain observations; however, they were general observations arising from the circumstances of the petition. They were really not directed at the appellants, but were an appeal to Kenyans of all ethnic groups to embrace people from other ethnic groups.
8. The generic statements of the appellants' five witnesses, and the statement of the retired Assistant Chef in support of claims to the suit lands on behalf of 734 appellants, did not establish their claims to the suit lands, nor did they substantiate the alleged violations of their constitutional rights. There was no evidence of any of the allegations of violation of the appellants constitutional rights by any of the respondents. The trial court was right to arrive at the findings he did. The appellants provided little or no particulars as and the manner of the alleged infringements.

Appeal dismissed; each party to bear their own costs.

Citations

Cases

Kenya

1. *Anarita Karimi Njeru v Republic* Miscellaneous Criminal Application 4 of 1979; [1979] KEHC 30 (KLR) - (Applied)
2. *Cyprian Awiti & another v Independent Electoral and Boundaries Commission & 2 others* Election Appeal 5 of 2018; [2018] KECA 536 (KLR) - (Applied)
3. *Kiiku, Geofrey v Francis Njuguna* Civil Appeal 7 of 2011; [2018] KEHC 4082 (KLR) - (Applied)
4. *Maina, Munyu v Hiram Gathiha Maina* Civil Appeal 239 of 2009; [2013] KECA 94 (KLR) - (Explained)
5. *Matemu, Mumo v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal 290 of 2012; [2013] KECA 445 (KLR) - (Explained)
6. *Njoya, Timothy v Attorney General & another* Petition 479 of 2013; [2014] KEHC 8340 (KLR) - (Explained)
7. *Odera, Abok James t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* Civil Appeal 161 of 1999; [2000] KECA 431 (KLR) - (Applied)
8. *Sheikh t/a Hasa Hauliers v Highway Carriers Ltd* Civil Appeal 46 of 1986; [1988] KECA 139 (KLR) - (Explained)
9. *Wamwere, Monica Wangu v Attorney General* Civil Appeal 188 of 2017; [2019] KECA 579 (KLR) - (Applied)

Regional Court

1. *Kenya Ports Authority v Kustrom (Kenya) Ltd* [2009] 2 EA 212 - (Explained)
2. *Selle v Associated Motor Boat Company Ltd* [1968] EA 123 - (Applied)

Statutes

Kenya

1. Constitution of Kenya articles 2(5); 10; 28; 40; 63; 67(2)(e) - (Interpreted)

2. Land Registration Act (cap 300) section 26(1)- (Interpreted)
3. National Land Commission Act (cap 281)section 15(2) - (Interpreted)

Instruments

1. African Charter on Human and Peoples' Rights (Banjul Charter), 1981 article 14
2. Universal Declaration of Human Rights (UDHR), 1948 article 17

Advocates

Mr Kenga for the appellants

Ms Opio h/b for *Ms Kithi* for the 1st and 10th respondents

Mr Billy Kongere for the 3rd respondent

Ms Colletta Akwara for the 4th respondent

Ms Luisa Nafula for the 5th respondent

Ms Priscilla Onesmas for the 9th respondent

JUDGMENT

1. This appeal arises from the judgment of the Environment and Land Court sitting in Mombasa, (Munyao Sila, J) in which a petition filed by Henry Wambega and 733 others, the appellants' herein was dismissed. The Petition was brought pursuant to articles 2(5), 10, 28, 40, 63 of the *Constitution 2010*. Article 17 of the *Universal Declaration of Human Rights* on the Right to Property and article 14 of the *African Charter on Human and Peoples Rights*.

2. The appellants had filed the Petition before the Environment and Land Court on January 23, 2018, against 10 respondents, with the 2nd to 7th and 9th respondents being the registered owners of the suit properties, namely Plot Nos 8 Sec 111 MN; 9 Sec 111 MN; CR 14107; CR 5606/14 and 7120/15 Sub-division 513 (originally No 286/4 SEC 111 MN) Plan No 88144 of August 5, 1970; Sub-division 437 (Originally 15/12/286) 1 Sec 111 MN) CR 5692 Plot No 1589/13 SEC MN, Plot No 20800, Sub-division No 470 (Originally No. 5/3) SEC 111 Mainland North; CR No 13026/1 transfer registered AS No 5770/19; Land Survey Plan No 80138; Sub-division 4399 originally No 15/45 & 286/3 SEC 11/MN, Plan No 75772 CR 5692/4 and Plot No 4781/111/MN CR No 44069 which measure approximately 800 acres.

3. The 1st respondent is the Hon Attorney General, the 8th respondent is the National Land Commission and the 10th respondent the Chief Lands Registrar.

4. The appellants' claim and respondents' responses in the Environment and Land Court are summarized in the following sections.

Appellants' Claim

5. The appellants claimed that their forefathers were the original inhabitants of the suit properties now owned by the 2nd to 7th and 9th respondents which they owned communally without any demarcation. They asserted that the first titles to the land were issued in 1908, and that at the time their forefathers did not have the knowledge to assert their land rights. They contend that their forefathers continued living on the land and utilized it for farming, as graveyards and for religious shrines. One of the shrines on the land was called Kilimanjaro.

6. The appellants asserted that between 1960 to 1962 right through to the year 1970 there were forced evictions of the occupants in the suit lands, that these evictions were executed violently with the use

of General Service Unit Officers, without regard to human life and with destruction of property, cash crops, fruit trees and houses.

7. The appellants averred that the *Constitution 2010* heralded new dawn of hope that historical injustices will be dealt with. However, attempts to address the issues through political means failed when in 2012 the court declared the process unconstitutional for failure to provide an avenue for compensation of the current land owners. These, they aver has led to infringement of their right to the suit land due to the government's failure to declare the suit land ancestral land or trust land. They blamed the 1st, 8th and 10th respondents of failing to pass legislation to solve the land problem in the suit properties or to have the 2nd to 6th and 9th respondents compensated and the land adjudicated in their favour under the *Land Adjudication Act*.

8. The appellants annexed a list of the appellants and particulars of the parcel of land they each claim. They claimed they had a right to be settled on the suit lands by virtue of fact their forefathers lived on the land before they were violently evicted, which, they claim caused them to lose their ancestral land. They claimed that their loss was a historical injustice. They sought 8 prayers namely:

   a. A declaration that the appellants' right to property as set out under article 40 of the *Constitution* has been violated by the respondents;

   b. A declaration that the appellants' rights to dignity set out under article 28 of the *Constitution* has been violated by the respondents;

   c. A declaration that the suit properties are ancestral lands;

   d. A declaration that the appellants are entitled to have the suit properties declared trust land by virtue of the history of the lands;

   e. A declaration that the 2nd, 3rd, 4th, 5th and 6th respondents be compensated and the land be declared trust land and be adjudicated as per the *Land Adjudication Act* to ascertain the original occupiers descendants' interest in the land;

   f. The costs of the petition; and,

   g. Any other orders the Court may deem fit.

Respondents' Responses

The 1st & 10th respondents

9. The 1st and 10th respondents, both represented by the State Law office filed statement of grounds of opposition in which they raised eight grounds as follows:

   a. That the petition is frivolous vexatious and an abuse of the court process;

   b. That the petition is an abuse of the court process as the petitioners have disclosed that there are still several suits pending between the petitioners and some of the respondents;

   c. That the documents availed by the petitioners reveal that the disputed land is private property;

   d. That the petitioners have not satisfied the principles of granting any of the orders;

   e. That the prayer(s) of the petition seeks the establishment of an adjudication section which is not legally permissible on private registered land;

f. That the prayers in the petition if allowed will open a floodgate of litigation with the potential of causing huge economic consequences;

g. That the petitioners are inviting this court to engage in a purely academic exercise in that the issue was already dealt with by the 8th respondent; and,

h. That the petitioners have not set out with precision the specific rights that were violated.

The 2Nd Respondent

10. The petition was opposed. The 2nd respondent filed a reply to the petition and also a replying affidavit through its director one Elizabeth Wairimu Waiyaki. She deposed that in 1978 the deceased Fredrick Lawrence Munyua Waiyaki purchased the land title CR No 14107 which is Sub-Division No 437 (originally No 15/1-2 and 286/10) Sec 111 Mainland North, Sub-Division No 513 (original No 284) of Section 111 Mainland North and Sub-Division No 514 (original No 15/7) of section 111 Mainland North. That in 2014 the land was transferred to the 2nd respondent Company in compliance with the process of allocation transfer and registration. She denied that the appellants or their forefathers ever lived or occupied the suit land. The 2nd respondent also averred that allegations of forced evictions amounted to hearsay.

3rd Respondent

11. The 3rd respondent filed a response to petition through John Kimutai Ng'eno, the Company's Manager. The response challenged the authenticity of the appellants claim asserting that they did not annex anything to demonstrate that the parcels of land they claim existed. He averred that the 3rd respondent was the registered owner of two parcels of land bordering each other, being Sub-Division No 438 (original No 15/5 and 286/3) Section 111 Mainland North and Sub-Division No 439 (original No 15/4, 15/5 and 286/3) section 111 Mainland North. Titles were annexed.

12. The 3rd respondent averred that the appellants did not claim the two suit lands in the filed petition. However, it responded that it purchased Sub-Division No 438 from Mohamed Hyder Matano. Regarding Sub-Division No 439 it purchased it from Mohamed Hyder Matano and Samira Mohamed Hyder Matano by agreement dated October 7, 2010. It is averred that neither the appellants nor their forefathers ever lived on the suit lands, and that when the court visited the land no graveyard(s) were seen. It denied it could have violated the rights of the appellants as claimed since they purchased the land in 2010.

4th Respondent

13. The 4th respondent filed a replying affidavit through Lucrezia Midega a Principal Officer of the 4th respondent. She deposed that the 4th respondent was registered owner of the parcel of land CR No 5692 Plot No 1589/13/111/MN through purchase from Kijipwa Estates Limited on December 10, 1999. The Title was annexed. It averred that it was a legitimate bona fide purchaser and had sanctity of title. It averred that the appellants had brought a multiplicity of suits claiming suit lands through adverse possession, all which were struck out with costs, among them on April 26, 2013 and another on March 20, 2014. The 4th respondent denied appellants' claim contending lack of proof that the parcels of land listed in the petition exist, neither did the appellants demonstrate any historical injustice, neither did the suit land qualify to be termed as community land.

5th Respondent

14. The 5th respondent filed a replying affidavit by Harin Amirali Alarakhin, a director of the 5th respondent. He deposed that the 5th respondent acquired parcel Sub-Division No 470 (original No 5/3) section 111 Mainland North through a transfer from Donald Graham Gebbett and Ilfra Norma Gebbet dated 26th May 1980. The title was annexed. He averred that the land was utilized for farming, occupying the whole land which measures 124 acres. He averred that there has never been any encroachment on the suit land, and termed the appellants' claims as frivolous without any evidence or basis to support.

6th & 7th Respondents

15. The 6th and 7th respondents filed one replying affidavit sworn by Mohamed Naaman Aly. He deposed that the person sued as the 6th respondent is deceased. He averred that land parcel No 9 section 111 Mainland North was registered in the name of Ali Bin Mohamed alias Musa Mohamed also deceased. He averred that the deceased (latter) donated the land to Wakf which is registered against the title. He annexed a copy of a Wakf. He averred that by virtue of the Wakf, the property is trust land and cannot be purported to be a Jeuri Village; that neither the appellants nor their forefathers ever possessed or occupied the suit land; and that the appellants had no ancestral or customary rights that required protection of the court.

8th Respondent

16. The 8th respondent is the National Land Commission which opposed the petition through grounds of opposition in which five grounds are raised as follows:

    a. The appellants omitted to frame their case with precision as required under the pronouncement in the case of *Anarita Karimi Njeru vs The Republic* (1976- 1980) KLR 1272. The Petition fails the requirement (sic) as it does not state the alleged constitutional provisions were violated by the 8th respondent and the acts or omissions complained of with reasonable precision.

    b. That the issues raised in the Petition herein are of the nature of historical land injustice as defined under section 15(2) of the *National Land Commission Act 2012*.

    c. That the appropriate avenue for settling redress arising out of a historical land injustice is by lodging a claim of historical injustice with the National Land Commission for admission and subsequent investigation.

    d. That the issues raised in the Petition herein are therefore prematurely before this court.

    e. That the Petition as against the respondents has no merit and should therefore be dismissed.

9th Respondent

17. The 9th respondent filed a replying affidavit through its director Tushar Shah. It avers that the 9th respondent is the registered owner of land parcel No MN/111/4781 acquired in 2016 through purchase from Pride Industries Limited, which bought it in 2009, and that thus the 9th respondent was a bona fide purchaser for value. The 9th respondent deposed that the land was vacant when it was purchased, and denied evicting anyone from it; he challenged the appellants claim saying it dated over 6 decades, consisted of bare assertions with no evidence in support. He also challenged the doctrine of ancestral domain the appellants used to claim the land as not being in existence in Kenya.

Issues Identified by the ELC Court

18. The learned Environment and Land Court Judge directed that the Petition be heard by way of written submissions. After considering the Petitions, the witness statements of appellants witnesses, the replying affidavits and annexures by respondents and submissions the identified the issues for determination as follows:

    a. Whether the Environment and Land Court had jurisdiction to hear land claims based on historical injustices or whether the claims should be addressed by the National Land Commission (8th respondent).

    b. Whether the appellants have a right to the suit properties on basis of:

        i. Dispossession of the suit lands during colonial period or soon thereafter;

        ii. Forefathers and indigenous residents having allocated the predecessors of the 6th and 7th respondents 4 acres out of the suit lands;

        iii. Generational tree to identify their ancestry and connection to suit land

        iv. Descendants of the original inhabitants of the suit lands

        v. Ancestral domain

    c. Whether the respondents violated the constitutional or other rights of the appellants.

19. The learned Environment and Land Court Judge, after considering the Petition found no merit in it and dismissed it.

The Appeal

20. The appellants were dissatisfied with the Judgment of the Environment and Land Court and therefore filed this appeal. In the Memorandum of Appeal dated December 17, 2020 twelve grounds of appeal are listed. They fault the learned ELC Judge of erring in fact and law for:

    i. Dismissing the petition yet there was cogent evidence that the appellants and their forefathers had stayed and occupied the suit premises prior to their forceful and/or inhumane evictions in the 1960's;

    ii. Failure to uphold the *Constitution* and the law relating to the land historical injustices when he ruled that the petitioners did not tender any evidence to prove that their forefathers and/or themselves did not (sic) occupy and/or live on the suit premises yet the witnesses who testified through written statements and affidavits were indeed living were indeed living on the suit premises at the time of the forceful and/or unlawful eviction an more so witnesses the torture and burning of the petitioners houses on the land;

    iii. Not appreciating the fact that there was evidence , including graves of the petitioners deceased relatives and whose connection or relationship with the petitioners was shown to exist;

    iv. For failing to appreciate that the historical features including shrines known as kayas in Mijikenda tribe indeed belonged to the appellants and their forefathers, and more so because none of the respondents claimed to have established such features;

    v. By failing to appreciate the fact that some of the respondents had recognized the appellants legitimate claim to the suit land and commenced processes of compensating them through alienation and transfer of portions of the land on the suit premises, which in essence means that the appellants claims were valid;

vi. By misdirecting himself in relation to applicability of article 67(2)(e) as read with section 15 of NLC which provided for investigation into land historical injustices regardless of any other provisions of law, including the*Constitution* itself and any alleging that if the appellants claim is allowed, other people like the Maasai may claim the whole of Nairobi;

vii. By making a finding to the effect that ancestral domain claim is alien to the *Constitution of Kenya 2010*;

viii. By placing a higher threshold requirement of strict proof of generational tree for the appellants than required by section 15 of the NLC, hence arriving at an erroneous finding of fact of the appellants claim;

ix. By making a finding to the effect that the appellants claim to their ancestral land is illusory, despite the same being recognized by the law, thus rendering article 67(2)(e) of the *Constitution* inoperable;

x. By placing article 40 of the *Constitution* over and above the appellants right to their ancestral claim under article 67(2)(e) of the *Constitution*, hence resulting in an inharmonious construction of the *Constitution*;

xi. By making extraneous on issues of tribalism when he commented that the appellants should wake up instead of agitating for pertaining land historical injustices accept their fate and work hard to purchase the land with their hard earned money, yet the appellants' claim is one that is based on the *Constitution* and therefore sanctioned by law;

xii. By generally dismissing the appellants' petition despite overwhelming evidence in its support.

21. The appellants sought for orders:

a. the appeal be allowed by setting aside the judgment of the trial Court in ELC Petition No 2 of 2018, (Mombasa) delivered on 22nd October 2020 and substituting it with an order, allowing the appellants' Amended Petition dated July 29, 2019, with costs;

b. That the costs of appeal be borne by the respondents.

22. When the appeal came up before us for virtual hearing on 6th July 2023, the appellants were represented by learned counsel Mr Kenga, learned counsel Ms Opio, holding brief for Ms Kithi, appeared for the 1st and 10th respondents; learned counsel Mr Billy Kongere appeared for the 3rd respondent; learned counsel Ms Colletta Akwara appeared for the 4th respondent; learned counsel Ms Luisa Nafula appeared for the 5th respondent; while learned counsel Ms Prscilla Onesmas appeared for the 9th respondent. There was no appearance for the 2nd, 6th, 7th, and 8th respondents despite service of the hearing notice on their advocates on June 13, 2023.

Submissions by Counsel on Appeal

23. Mr Kenga relied on the written submissions filed on May 8, 2023. He highlighted his submissions briefly. Counsel condensed the grounds of appeal and urged them as three grounds. Grounds 1, 3, 4, 5 and 12 were urged together as ground one; grounds 2, 6, 7, 8,9 and 10 as ground two and ground 11 as ground three. In regards to ground 1 the appellants urged that the learned Judge erred to find that there was no evidence of occupation of land by the appellants and/or their forefathers yet there was the direct evidence of the 1st and 3rd appellants, one Madzayo and one Serah called as witnesses for the appellants.

24. Counsel urged that these witnesses were born in late 1940's and were witnesses of the occupation. Counsel urged that the evidence of the retired Chief, Simeon, also a witness for the appellants who testified of the presence of records in his former office confirming that there were mass and forceful evictions of the appellants and their forefathers. The witness also spoke of a letter written by the then Member of Parliament of the affected area dated October 4, 1964speaking to land problems in the area.

25. Counsel sought to rely on affidavits sworn by the respondents witnesses, Khalfan Ali Khalfan, Maulidi Mohamed Ogona, Chuba Juma Ziro and Danson Mwagambo Mwadzayo. He urged that these witnesses confirmed the occupation of the land, in particular the witnesses for the 2nd and 4th respondents, urging that the two respondents agreed to compensate the appellants by sharing out ten acres of their suit land. He urged that the respondents did not deny that the graves found on the suit lands during a court visit on November 16, 2015 did not belong to the appellants forefathers.

26. In regards to the second ground it was submitted that the learned judge failed to interpret article 67(3) of the *Constitution* alongside section 15 of the NLC Act finding that giving full effect to the two provisions would create chaos in the country, thus faulting the *Constitution*. Counsel urged that the learned Judge failed to enforce the law regardless of any undesirable effects, as mandated under articles 22 and 23 of the *Constitution*.

27. On the third ground the appellants counsel urged that the learned judge was at fault for making extraneous finding on tribalism which were uncalled for to the effect that all the appellants were Mijikendas, which was not an issue raised by any party in the Petition. Counsel decried the sentiments of the learned judge castigating the appellants and urging them to embrace people from other backgrounds and move away from the shackles of tribalism. Counsel referred us to the appellants submissions before the ELC. We have considered them. They dealt with the issue of jurisdiction, sanctity of title except if it was obtained through fraud or misrepresentation, illegally or unprocedurally and assertion that the titles to the suit land be returned to the appellants to cure the violations they have and continue to suffer. These submissions do not add value as they dwell on arguments that are not in issue in this appeal.

28. Ms Opio relied on her written submissions filed on May 4, 2023and proceeded to highlight them briefly. Counsel urged that the appellants Petition did not meet the threshold for claiming breaches under the *Constitution*, as set under the *Constitution*, in the *Anarita Kirimi Njeru* case and I the case of *Mumo Matemo vs The Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR. Counsel summarized the threshold as being the need to state the constitutional breaches alleged to have been violated; the actual act or omission complained of.

Counsel urged that the appellants needed to provide particulars of alleged complaints the manner of alleged infringements or the jurisdictional basis of the action before Court.

29. It was urged that what the appellants did was to cite omnibus provisions of the *Constitution*. Reliance was placed on *Timothy Njoya vs Attorney General & another* High Court Constitutional and Human Rights Division Petition No 479 of 2013 for the proposition that a petitioner cannot come to Court to seek evidence with which to support his case; but must plead his case with some degree of precision, specify which acts were violations, by whom and the manner of the violations. Counsel urged that in the entire petition, no violations were attributed to the 1st and 10th respondents. It was urged that the appeal should be dismissed as no claim to land can lie under article 40 of the *Constitution* as the suit land was neither public nor communal land.

30. Mr Kongere for the 3rd respondent relied on their filed submissions and list of authorities both dated 6th May 2023. He did not wish to highlight. In regards to ground 1 of appeal (as set by the appellants),

counsel urged that the appellants adduced no evidence to substantiate their claims, yet the burden of proof lay on them to prove their case. For that proposition counsel relied on the case of *Monica Wangu Wamwere vs AG* [2019] eKLR, *Geofrey Kiiku vs Francis Njuguna*[2018] eKLR. He urged that the Judge was right to expect the appellants to adduce evidence to prove they had resided at the suit lands, prove that they were dispossessed of the land and present documentation to prove arrests complained of. Counsel urged that on the site visit, Omollo J did not find any graves or shrines on the land. Counsel cited the case of *Cyprian Awiti & another vs IEBC & 2 others* [2018] eKLR for the proposition that once a court orders scrutiny, the resulting findings are as good as the finding of the Court.

31. Regarding the second issue, it was urged that the learned Judge did not apply a restrictive burden of proof, but applied the requisite standard of proof of balance of probabilities.

32. Ms Akwana for the 4th respondent relied on the written submissions and list of authorities both filed on May 5, 2023, which she briefly highlighted. The salient features in the submissions answers to the appellants claims that the learned Judge applied a stricter burden of proof to deny them justice. Counsel urged that section 15(3)(a) of the NLC Act provided the threshold of admission, registration and processing of historical land claims to be effected. The provision gave the criteria that it must be verifiable that the act complained of resulted in displacement of claimant or other forms of historical injustice.

33. Relying on the case of *Anarita Karimi Njeru*, *supra*, counsel agreed with the learned judge's finding that the criteria was not met for lack of evidence to enable the court determine which appellants or their forefathers were in occupation and of which land. She urged that the 4th respondent admitted settling 125 families who had invaded part of its land, but that these families were not the appellants. Citing *Monica Wangu Wamwere vs AG* [2019] eKLR counsel urged that what was required to prove arrests and torture was evidence of injuries suffered as a result, which was not availed.

34. Ms Nafula for the 5th respondent relied on their submissions filed on May 5, 2023. Much of the submissions are similar to the submissions made on behalf of the 3rd and 4th respondents on the inadequacy of evidence to support the appellants claims. We need not rehash them except to mention that counsel specified that Esther Tenzi, Danson Mwadzayo or Mwadzayo Ngala, who were witnesses for the appellants and who claimed that they and others, a total of 32 families were living on the 5th respondent's land adduced no evidence to substantiate the allegation. That the 5th respondent's witness statement was clear that there were no persons living on nor was evidence adduced to show that they or their forefathers ever lived on the land.

35. Ms Onesmus for the 9th respondent relied on her written submissions and list of authorities filed on May 5, 2023. She also highlighted them briefly. Her submissions echo the submissions of the other counsels for the respondents, dwelling on the need to meet the criteria set under section 15 of the NLC Act, and that the appellants failed to adduce verifiable proof to establish their claims to the suit lands or to establish any acts complained of ever took place or resulted in their displacement from the suit lands. Counsel urged that the appellants claims consisted of generic allegations without any specificity.

Analysis and Determination

36. This being a first appeal, it behooves this court to re-evaluate, re-assess and re-analyze the evidence on record and then determine whether the conclusions reached by the learned trial judge should hold. In

the case of *Kenya Ports Authority v Kuston (Kenya) Limited* [2009] 2EA 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." (See *Selle v Associated Motor Boat Company Ltd* [1968] EA 123 and also *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR.)

37. We have carefully and painstakingly considered this appeal together with the submissions of counsel. Based on that consideration, what falls for our determination are three issues namely;

    1. Whether the learned judge erred in law and facts for finding that the appellants did not prove that they or their forefathers occupied the suit lands, were forcefully evicted from the suit lands resulting in their displacements and that their constitutional rights were violated;

    2. Whether the learned judge failed to interpret article 67(3) of the *Constitution* and section 15 of the NLC Act to give the full effect to the law; and,

    3. Whether the learned judge delved into extraneous findings that were not issues before him.

38. The first issue is whether the learned judge erred in law and facts for finding that the appellants did not prove that they or their forefathers occupied the suit lands, or were forcefully evicted from the suit lands resulting in their displacements and violations of their constitutional rights. The appellants claim over the suit lands was hinged on articles 40 and 63 of the *Constitution* of Act. It was the appellants' case that they and their fore-fathers before them lived and owned the land as ancestral lands and/or communal land, and as land for their shrines, graveyards and subsistence before independence. They claimed a right to the suit lands by virtue of intergenerational trust and ancestral domain. Their case was that they were violently evicted from the suit lands, that some of their fore- fathers were arrested and that this resulted in infringement of their rights to property, displacements, which is historical injustice and violation of their constitutional rights. That the suit lands were, after the evictions registered in the names of the 2nd to 7th and 9th respondents.

39. The learned judge concluded as follows in regard to the claims of occupation and dispossession:

> " I am afraid that there is absolutely no evidence that any of the forefathers of the petitioners ever resided on the suit lands and I say this after having carefully gone through the evidence tendered by the petitioners. One cannot tell with precision and finality, which forefather of which petitioner resided in which land, and what sort of occupation such person had... There is a claim of disposition, but absolutely no evidence of who was dispossessed, by whom, and when exactly this occurred....

The petitioners have not given this court any generational tree to identify their ancestry and demonstrate that it is actually their fore fathers who were occupying the suit lands."

40. Regarding the claims that there were arrests and unfair imprisonment, the learned judge found:

> " ... it was claimed that some people were imprisoned unfairly and that there was a raid at Kijipwa Police Station. Specifically, it was pleaded that one Kiti Marera was arrested in the year 1966 and placed at Kijipwa Police Station. There is also claim of others being locked

up at Nyali Police Station. As pointed out by the counsel for the respondents, there is always documentation when a person is booked in a police station or imprisoned…There is no evidence that any of the claims of torture occurred. Neither is there any evidence of imprisonment. ”

41. Regarding presence of graves on the suit lands, the learned judge found:

> “ They have claimed that there were graves on the land, which is contested, but even if assuming there are graves on the land, there is no evidence that such and such grave is for the father or grandfather of any of the petitioners. ..I have looked at the site notes of Justice Omollo who visited the disputed land and her conclusion was that none of the claimants who constitute the petitioners herein were on the land. What she observed were developments by the current owners of the land.”

42. The appellants counsel in submissions in support of the appeal contends that there was evidence of persons who were alive in the late 40’s who were eye witnesses of possession of the land by the appellants and forefathers, witnessed the violent evictions and dispossession and their evidence was not considered. These were identified as 1st, 3rd and 4th appellants, one Madzayo and one Serah. Also cited was the evidence of the retired Assistant Chief Simeon Allington Jefwa Ngome.

43. We have considered the statements of each of these witnesses. Their statements are generic in that each of these statements are the same, except for that of the retired Assistant Chief. Taking each statement the deponent is not specific about the date of his birth, mentioning that it was before independence or in the 40’s. The salient features of the statements is the claim that their families gave land to the 6th respondent by virtue of being an in- law, but that he was later to evict them from the whole land claiming ownership. It was also stated that the 2nd respondent was allocated part of the suit lands by the late Dr, Munyua Waiyaki after he allocated himself the land. That there were graves of their relatives, shrines and homes belonging to them. He made similar claims in regard to land owned by the 2nd, 4th, 5th and 8th respondents.

44. As for the Assistant Chief, he was clear he was not born during the period of the relevant events in this case. His statement was that while in his former office of Chief, he came across records as well as information and/or investigations regarding the forceful evictions of residents of Jeuri village. He then gave details of the information he saw in those records.

45. Bearing the fact this was a constitutional petition and that the claim was based on historical injustices, the NLC, at section 15(2)(3) provides s 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

e. 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."

46. The learned judge expressed difficulty with the nature of the evidence that was presented by the appellants, finding it as lacking critical substantial and connective evidence as to make it impossible for the judge to determine the issues with precision and finality. Section 15(3)(a) specifies that a claim based on historical injustices must be verifiable, and specifically, that the act(s) complained of be shown to have resulted in displacement of the claimants or other form of historical land injustice. Having reanalyzed and reexamined the evidence presented before the court, we agree with the Judge that the evidence presented was problematic. First of all, the statement of all the witnesses except the Assistant Chief were generic to the extent that the statement were similar word for word. Secondly, there was no specifications of relevant issues in the statements, just generalized lyrics that were mere speculation, impersonal in terms of ownership of the information given and hypothetical in nature.

47. The third problem with the statements, is the lack of supportive evidence in substantiation of the generalized allegations made. The statement of the Assistant Chief for instance, spoke of existence

of records of information and investigations in which certain reports were made regarding evictions and arrests. He also stated that he saw certain correspondence to the Head of State of the time, and certain Member of the National Assembly. Quite apart from being devoid of time frames, the Chief's statement was inadmissible, as no oral evidence can be adduced in lieu of documentary evidence, where documentary evidence exists. He should have availed the alleged document. See sections 67 and 68 of the *Evidence Act*.

48. On the issue whether the learned judge erred for finding that the appellants did not prove constitutional rights violations, the learned judge found a lack of specificity in the constitutional rights alleged to have been violated. In the case of *Mumo Matemu versus Trusted Society of Human Rights Alliance* [2013] eKLR, although this court appreciated the importance of substantive justice under article 159 of the *Constitution*, it stated:

> "The principle in *Anarita Karimi Njeru* (*supra*) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to article 159 of the *Constitution* and the overriding objective. Principle under section 1A and 1B of the *civil procedure Act* (cap 21) and section 3A and 3B of the *appellate Jurisdiction Act* cap 9. Procedure is also a hand maiden 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 extract of this principle".

49. We did examine the amended petition filed in the ELC from which this appeal arises. On the title to the petition, articles 2 (5), 10, 28, 40, and 63 of the *Constitution* are cited as the constitutional provisions relied on. In the Petition itself, particulars of the infringement are particularized only in respect of articles 28 and 40. Under infringement of article 28, the appellants pleaded seven grounds in support of same. The gist of these particulars is the complaint that as a result of the 2nd to 6th and 9th respondents ownership of the suit lands, the respondents were guilty of failing to recognize the appellants right to the suit land as ancestral land; preventing the appellants exercise their right to bury their kin on the suit lands and to place headstones on their graves; preventing the appellants from carrying out sacrifices and libation ceremonies, prayers and sacrifices at their shrines; and denial to access the 800 acres that comprises the suit lands.

50. Under article 40 three particulars of infringement of the appellants rights are pleaded against the 1st, 8th and 10th respondents. The gist of these are that the three named respondents failed to declare the suit lands ancestral lands, or trust land by virtue of the history of the land; failure to remedy the situation through legislation among other mean; and by failure to ensure the 2nd to 6th respondents are compensated and to have the land adjudicated.

46. The learned judge found that the appellants "have not given this court generational tree to identify their ancestry and demonstrate that it is actually their forefathers who were occupying the suit lands…The ancestral domain (…) has some support in some jurisdictions…We cannot impose what has been held in one jurisdiction into our country for our circumstances could be different. The situation in Kenya is different.."

51. In regard to alleged violation of appellants rights under article 40, the learned judge, quoting articles 67(e) and 64 of the *Constitution* and section 15 of the NLC stated that the *Constitution* categorized land into private, public and community land, then found that:

> " I am not convinced that in Kenya there is a law that gives an individual a right to own land that was previously owned by his/her forefather. Kenyans did not deem it fit to introduce such a law... I have not been shown that there was any illegality in the manner in which all the land parcels herein were acquired. I have not been shown any right the

Respondents violated. I have not been shown any right that the entitles the appellants to settle or to be settled on the suit lands. I am unable to order the respondents to surrender these lands to the appellants. Neither can I order the Government to purchase these lands and settle the appellants"

52. The right to own and acquire property in Kenya is a Constitutional right to be enjoyed by all persons. It is hinged on article 40 of the *Constitution of Kenya, 2010* which provides as follows:

> " (1) Subject to article 65, every person has the right, either individually or in association with others, to acquire and own property—
>
> a. of any description; and
>
> b. in any part of Kenya.
>
> 2. The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—
>
> a. results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
>
> c. is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—
>
> i. requires prompt payment in full, of just compensation to the person; and

53. The purpose of article 40 is to prevent the State from depriving any person of their property, including land, without due process and without prompt payment and just compensation. The suit lands are private property of the 2nd to 7th and 9th respondents. This article does not apply to this case since the appellants' claim does not hinge on un-procedural acquisition of their property without due process or without just compensation. The appellants have not claimed that the government took away the land from them. That leaves the claims of violation of rights under article 28 of the *Constitution*.

54. Article 28 deals with right to dignity. As shared hereinabove the particulars of infringement or violation pleaded under article 28 were denial of the respondents to recognize the suit lands as ancestral land; prevention of the appellants right to bury their kin on the suit lands and to place headstones on their graves; preventing the appellants carry out sacrifices and libation ceremonies, prayers and sacrifices at their shrines; and denial to access to the suit lands. The appellants gave no particulars of how the acts complained of constituted the violation of their right to dignity, nor did they specify in which manner the acts constituted violation of their right to dignity.

55. As this court held in *Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others*, (*supra*), it is not sufficient for a petitioner to simply refer to various articles of the *Constitution* without linking the said articles to the issues for determination. A petition must therefore set out the articles alleged to have been violated or threatened with violation and state the relevance of these articles to the issues for determination. In this case, the appellants fell short of making linkages between the acts of violations complained of, with the articles of the *Constitution* invoked, and the issues presented for the determination of the court.

56. We have not lost sight of the fact that the appellants were challenging the legality of the respondents' titles to the suit lands. It cannot be gainsaid, when the title of a party is under scrutiny, the concerned party ought to travel beyond and show that he validly acquired title. This was well captured in the case of *Munyu Maina vs Hiram Gathiha Maina*, Civil Appeal No 239 of 2009. The Court of Appeal held that: -

> " We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register."

57. The learned judge considered the evidence of the 2nd to 7th and 9th respondents detailing how they acquired their respective suit lands. We do not need to rehash them. A consideration of their explanations shows that they all purchased their respective suit lands from registered owners, some dating way before the appellants were born, and way before independence. Regarding the predecessor of the 6th and 7th respondents, the court found that the predecessor had an agreement for sale of the respective portion of the suit lands to him dated 1938, way before the period the appellants claimed they gave him land. On behalf of the 2nd respondent, it was shown that its predecessor purchased the respective portion of the suit land in 1978 and had it registered in his name. The land was transferred to the 2nd respondent in 2014. On behalf of the 3rd respondent it was shown that it purchased two parcels of land bordering each other, its respective portion of the suit lands, on October 7, 2010. The 4th respondent purchased the suit land on December 10, 1999. The 5th respondent stated that he acquired the respective portion of his suit land through a transfer dated May 26, 1980. On behalf of the 9th respondent, it was averred that it purchased the respective portion of the suit land in 2016. All respondents denied the appellants claim to the suits.

58. The appellants sought to rely on the statement evidence of the respondents. They sought to rely on the statement of the 2nd respondent's witness, one Elizabeth, to the effect that the deceased predecessor of the 2nd respondent hived off 4 acres of the land during his lifetime to settle invaders to the land, to urge that the 2nd respondent had recognized the legality of the appellants claim. Elizabeth was clear in her evidence that the persons settled on the said land did not include any of the appellants. Secondly, that the appellants have never lived on the 2nd respondent's land. The other evidence they sought to rely on was the one given by a witness of the 4th respondent to urge that they too recognized the appellants' right to claim the suit land. Lucresia, the 4th respondent's witness stated that the 4th respondent settled 125 families on 32 acres of its land. She identified the 125 families to include appellants numbers 307 and 325, and none of the rest of the appellants. She averred that the second claim of the suit lands by the 307 and 325 appellants was fraudulent. The appellants sought to rely on statements that are not part of the record in this of appeal.

59. We agree with the learned judge that the appellants did not successfully challenge the respondents' titles to their respective suit land. The attempt to use the respondents witness statement as proof of acknowledgment of occupation cannot succeed as it was clear that, apart from appellants Nos 307 and 325, the respondents denied that the appellants were ever on their respective suit lands. They also denied engaging with them in order to settle them on their respective suit lands or at all. That evidence was not controverted. On the other hand, as the respondents proprietary interest was registered, it could only be challenged under section 26(2) of the *Land Registration Act*. Conversely, as title holders they enjoy statutory protection by dint of section 26(1)(b) of the same Act which provides:

> "The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer … shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner … and the title of that proprietor shall not be subject to challenge, except –
>
> a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
>
> b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."

60. There was no allegation that the respondents obtained their titles through fraud or misrepresentation, or illegally, unprocedurally or through corrupt scheme.

61. As to whether the learned judge failed to interpret article 67 (3) of the *Constitution* and section 15 of the NLC Act to give the full effect to the law, we think that in light of the findings on the first issue, there is no need to go into this second issue. Nevertheless, we shall consider it. The appellants complaint was that why the learned judge dismissed their petition was as a result of failure to up hold the *Constitution* and the law relating to historical injustices. Their complaint was that the learned Judge misled himself by applying a restrictive standard of proof of the generational tree than that required under section 15 of the NLC. It was their submission that the learned judge placed article 40 of the *Constitution* above the appellants right to their ancestral land.

62. The learned judge found the evidence adduced lacking in precision and therefore insufficient to enable him identify with finality which forefather of which appellant resided on which land. That the appellants did not demonstrate any historical connection to the suit land, did not prove forceful and violent evictions or torture; neither did they demonstrate that they were descendants of the original inhabitants of the suit land.

63. We have considered the learned judge's judgment. We do not see in it anything to justify the accusation that he applied a stricter standard of proof above that set under section 15 of the NLC. That section requires a claimant of historical injustice adduce evidence that is verifiable, that the act(s) complained of be demonstrated to have resulted in displacement of the claimant or other form of historical land injustice. The learned judge applied the correct test to the appellants claims and correctly found it undiscernible and unverifiable. Nothing turns on this ground.

64. As to whether the learned judge delved into extraneous findings that were not issues before him, the appellants' complaint narrowed down to paragraph 58 of the judgment. The complaint is that the learned judge castigated the appellants over matters that were not in issue before the court. In particular, they are aggrieved by the learned judge's observation that the appellants were all Mijikenda and called on them to accept people from other ethnic groups.

65. We have read the 'offensive' paragraph. The learned judge made certain observations. However, these are general observations he made, arising from the circumstances of this petition. They were really not directed at the appellants, but were an appeal to Kenyans of all ethnic groups to embrace people from other ethnic groups. For instance he uses such phrases as 'we' and states: 'it is time that we learnt to embrace people of different background……We must move away from the shackles of tribalism. If we do not , we can very well tear the very fabric that holds this country together.' This is just to demonstrate but a few.

66. The learned judge made observations of a general nature, not directed at the appellants, but generally. The observations are in line with the case and the issues before the judge. As was held by Apaloo, JA (as he then was) in *Haji Mohammed Sheikh t/a Hasa Hauliers vs Highway Carriers Ltd* [1988] KLR 806; Vol 1 KAR 1184; [1986-1989] EA 524:

> " If the judge introduced into his consideration of the application extraneous matters and founded his decision either partly or wholly on them, then the exercise of his discretion can properly be faulted. But if there is evidence on record to justify the judge's feeling that the genuineness of the defence was open to suspicion, there is nothing extraneous in the observation...One's experience teaches one that charges of bias or ill-will against a judge or adjudicator are usually made by defeated litigants often motivated by disappointment at adverse verdicts. Where a party or his advocate's conduct is deserving of judicial censure, strong language by the judge in condemnation of that conduct cannot properly be stigmatised as bias or judicial hatred. Nor does it justify an appellate court in substituting its discretion for that of the trial court regardless of the facts, or provide such court a warrant for exercising that discretion in favour of a party, who, on the facts, is entirely undeserving of it."

We leave it at that.

67. As we have already stated, we have carefully considered the entire evidence adduced in the ELC, together with the arguments of counsel and cases cited. We are in agreement with the learned judge. The generic statements of the appellants' five witnesses, and the statement of the retired Assistant Chef in support of claims to the suit lands on behalf of 734 appellants, did not establish their claims to the suit lands, nor did they substantiate the alleged violations of their constitutional rights. There was no evidence of any of the allegations of violation of the appellants constitutional rights by any of the Respondents. The learned judge was right to arrive at the findings he did. The appellants provided little or no particulars as and the manner of the alleged infringements.

68. We have come to the conclusion that the appellants' appeal has no merit whatsoever. Accordingly, we dismiss it in its entirety.

69. As this case is a public interest matter, we order each party to bear their own costs of this appeal.

DATED AND DELIVERED AT MOMBASA THIS 12TH DAY OF APRIL, 2024

P. NYAMWEYA

JUDGE OF APPEAL

J. LESIIT

JUDGE OF APPEAL

G. V. ODUNGA

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR