



Mwalambe (Suing as legal representative of the Estate of Lwambi Mwalambe Beponda) v Titles & 4 others; Rashid & 6 others (Interested Parties) (Civil Appeal E092 of 2021) [2024] KECA 751 (KLR) (21 June 2024) (Judgment)

Neutral citation: [2024] KECA 751 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E092 OF 2021
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA
JUNE 21, 2024**

BETWEEN

CHAI LWAMBI MWALAMBE (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF LWAMBI MWALAMBE BEPONDA) APPELLANT

AND

**THE SENIOR REGISTRAR OF TITLES 1ST RESPONDENT
DISTRICT LAND REGISTRAR 2ND RESPONDENT
THE COMMISSIONER OF LANDS 3RD RESPONDENT
THE PROVINCIAL ADMINISTRATION 4TH RESPONDENT
THE HON ATTORNEY GENERAL 5TH RESPONDENT**

AND

**SAUMU RASHID INTERESTED PARTY
ALI ABDALLAH SAID INTERESTED PARTY
FATUMA SAID OMAR INTERESTED PARTY
HANTER AHMED ADAM INTERESTED PARTY
NUSRA ABBAS INTERESTED PARTY
JAFFAR ABDULRAHMAN DOKA INTERESTED PARTY
ABDULRAHAMAN ALI INTERESTED PARTY**

(An Appeal against the Judgment of the Environment and Land Court at Mombasa (S. Munyao, J.) delivered on 30th September 2020 in ELC Constitutional Petition No 5 of 2010)



JUDGMENT

1. The appellant, Chai Lwambi Mwalambe (suing as legal representative of the estate of Lwambi Mwalambe Beponda) filed a Petition on his own behalf and on behalf of the household being the family of Lwambi Mwalambe Beponda (the deceased) against the respondents and the interested parties seeking:
 - a. A declaration that he, as the legal representative of, and the dependants of, the Estate of Lwambi Mwalambe Beponda are the lawful and rightful owners of the suit land and are entitled to repossession thereof to the exclusion of all others, who should be declared trespassers.
 - b. Orders compelling the 3rd Respondent to forthwith allot and issue letters of allotment for Plot No. 1043/111/1 – 26 Mazeras Kaloleni District in favour of the Appellant and the Estate of Lwambi Mwalambe Beponda.
 - c. Orders compelling the 1st respondent, through the 2nd respondent, to forthwith issue him with a certificate of ownership of title for the suit land.
 - d. A permanent injunction restraining the 3rd respondent from allotting or issuing letters of allotment in respect of the suit land to any other person other than himself.
 - e. A permanent injunction restraining the 1st and 2nd respondents from issuing a Certificate of ownership and title documents in respect of the suit land to any other person other than himself.
 - f. Eviction orders against any occupants other than his family, thereby granting vacant possession of the suit land to the petitioner.
 - g. Order of assistance of the officer in charge, Kaloleni/Mariakani Police Station, and the Provincial Administration Kaloleni, to supervise and provide security during the eviction process.
 - h. A declaration that he is entitled to compensation and/or restitution from the Kenyan Government for the endorsement of the wrongful dispossession of the suit land by the British Government, the deprivation of personal property for the period not less than 99 years and for the refusal to allot and grant him a certificate of ownership.
 - i. A declaration that the Kenyan Government has breached their fiduciary duty owed to him by failing to provide effective mechanisms and redress for the wrongful alienation of the suit property.
 - j. Order mandating the Kenyan Government to repossess the parcels of land that have been registered to other persons, other than him, through any means at its discretion and in turn make the property available for the use by the petitioner and the certificates issued irregularly to other third parties be revoked and fresh certificates of title be issued in favour of the petitioner.
 - k. Orders declaring the summons by the 4th respondent and consequent detainment by its agents as unlawful and the court do issue protection orders restraining the 4th respondent by itself, its agents/servant, from arresting or interfering with the petitioner's quiet and peaceful occupation of the suit land.



2. According to the appellant, the deceased was the beneficial owner of the land described as Plot Nos. 1043/111/1 – 26 Mazeras, Kaloleni District (the subject plots) which his family occupied and was currently occupying. They claimed to be the rightful owners by virtue of having obtained a confirmed grant of letters of administration through Mombasa HCCC Succession Cause No. 385 of 2005; that, despite confirmation to them by the 2nd respondent that the land was available for allotment, his efforts to have the subject plots allocated and registered in his name were thwarted by the 3rd respondent despite several requests; that, with the knowledge of the 1st respondent, the 2nd respondent was demarcating and allocating the subject plots to third parties, and that there was a real risk of the certificate of ownership being issued to persons who are not the rightful owners in breach of their fundamental rights and freedoms as guaranteed by section 70 of the repealed Constitution and Article 7 of the Universal Declaration of Human Rights to which Kenya is a signatory.
3. The appellant further claimed that, since time immemorial, his family and forefathers were in occupation of the subject plots; that, during the colonial government era, the inhabitants were driven to the outskirts, and the land was allocated to one Mr. Osborne for a leasehold period of 99 years to their exclusion; that Mr. Osborne’s leasehold title expired in the year 2005 whereupon the land reverted to the Government in trust for the local inhabitants; that the 4th respondent has, with the knowledge of the 1st and 2nd respondents, and without his consent, in blatant disregard to their forefathers subsisting title, subdivided the land into several parcels and settled people without considering the interests of his family; that the demarcation and allocation of the subject plots to their exclusion was erroneous and ultra vires the powers of the respondents and should be cancelled forthwith; and that the 4th respondent has been threatened and detained by the Administration Police in an effort to derail him from pursuing the allotment of the subject plots in his favour.
4. The appellant therefore claimed that the refusal by the British Colonial government and the Kenyan post-independence government to acknowledge and give effect to their land claims despite demands for their rights in the title and the resettlement of other people on the subject plots was wrongful, fraudulent, unconstitutional and an abrogation of their rights.
5. In response, the respondents filed Grounds of opposition in which they claimed that the subject plots did not devolve to the deceased and that, therefore, the appellant did not inherit the property from the deceased’s estate; that the court lacked jurisdiction to allocate the land in issue or register titles to the appellants; that the deceased had no registrable interest in the subject plot, and no evidence was adduced to support the deceased’s claim; that the orders of eviction sought against unknown and unnamed occupants of the subject plots were unconstitutional and incapable of being granted as they would violate the occupants’ fundamental rights granted under Chapter Four of *the Constitution* 2010; and that the court should not issue orders in vain or without legal basis.
6. On 23rd March 2012, the trial court (Kasango, J.), issued orders for the appellants to advertise the Petition in the Daily Nation newspaper for those who may be interested in the matter to file their appearances and affidavits, if any. That advertisement was placed on 25th June 2012 upon which the interested parties sought to be joined as parties in this suit.
7. In reply, the interested parties opposed the Petition and claimed that the letters of administration issued in Mombasa HCCC Succession Cause No. 385 of 2005 did not accord any right of ownership to the appellant in the subject property; that the interested parties are the lawful owners having acquired it in 1926 under the provisions of the then Crown Lands Ordinance; that they have occupied it since the colonial era and were issued with letters of allotment by the Government of Kenya in 1996 for 99 years, which period has not lapsed; that the subject plots were not compulsorily acquired by the Government, and that the appellant cannot lodge a constitutional claim on a property which has been



- allocated to private individuals; and that the appellant's claim was bad in law, and the end result will lead to denial of the right to own property now vested in the interested parties.
8. During the hearing, the appellant testified as PW1 and stated that he was born in 1955, and that the deceased had resided in the subject plot since the 1900s until his death in 1999. He stated that the land was under leasehold which had not expired. He produced a map sheet of the land and the alleged proceedings before the Magistrate in 1926. He testified that, by that time, the land had no title and that the original lease expired in 2005; that, thereafter, the land was allocated to other people who are now in occupation; and that the respondents were brought in by Mr. Osborne and that land adjudication officers failed or neglected to allocate it to them.
 9. He stated that, when his father died in 1999, the lease to Mr. Osborne was still subsisting; and that his father and grandfather did not hold any title deed to the land. He claimed to be living on the land with his family, although he did state that the interested parties (Nubians) lived on the land as squatters. He was questioned on the lease that he claimed Mr. Osborne held, but did not produce the lease. He claimed to have three houses on the plot No. 15 within the disputed parcels of land.
 10. PW2 Thomas Lwambi Mwalumbi, a younger brother to the appellant, testified that the subject plot belonged to his grandfather, and that the deceased left a lease with his father who later handed it to the appellant. He claimed to be one of the beneficiaries of the land. During cross examination, he conceded that he does not have a copy of the lease agreement, and did not live there as the persons residing on it were of Nubian origin settled by the Government. He affirmed that among those who reside on the land were the 1st Interested party who resides at Kisimani.
 11. The 1st to 5th respondents did not call any witness, but counsel informed the trial court that they would rely on their Grounds of opposition.
 12. The 1st to 7th Interested Parties relied on the replying affidavit filed in answer to the Petition and also gave oral evidence. The 1st Interested party, Ali Abdallah Said, testified that their parents were Nubian fighters in the 1st and 2nd World Wars who were given the subject plot in 1926; and that they are the children and grandchildren of the original allottees (now deceased) who were issued with allotment letters. He also asserted that they were born on the subject plot.
 13. On cross-examination, he stated that they are yet to be issued with title documents because not all allottees had paid the stand premium stipulated in the allotment letters; that the subject plot is referred to as the Nubian Settlement Scheme; and that the appellant's land is situated across from their land. On his part, the 7th Interested party testified that he bought Plot No. 15 where he resides from one of the Nubian owners. He claimed to have known the appellant's father, whose land was across the river from the subject plot.
 14. The trial Judge dismissed the petition after concluding: that the appellant's evidence that the subject plot was previously owned by the deceased or his forefathers was speculative and unresponsive of his claim that the land in dispute was owned by his forefathers; that on the contrary, it was held by the forefathers of the interested parties and other persons of Nubian origin since the year 1926; that there was no basis in his complaint that he has been discriminated against or deprived of the right to property; and that if the Government allocated the subject property to the appellant, the appellant's family or to other people, it would mean displacing the very persons who are in occupation of the land, which would be unfair.
 15. The Judge further held that there was no proof that the subject property was ever under the ownership of the deceased, and that it was an act of fraud for the appellant to have inserted the subject plot into the succession proceedings and claim that it was part of the deceased's estate. The court concluded that



- the appellant's claim for ownership of the land could not succeed merely because of the inclusion of the subject plot in the confirmed grant of letters of administration of the deceased's estate.
16. On compensation, the learned Judge concluded that, since there was no evidence of the appellant having been detained, the issue of compensation did not arise.
 17. The appellant was aggrieved by the judgment and filed an appeal to this Court on grounds that the Judge was wrong: to dismiss the appellant's case without having undertaken a proper and thorough analysis of what constitutes a historical injustice thereby perpetuating the injustice against the appellant; in disregarding the appellant's exhibits on technical grounds that does not constitute historical evidence; in over reliance on a lease agreement dated 13th July 1926 between the land officer of the colony and the Protectorate of Kenya, one Mr. Hassan Musa, which was merely a one year lease agreement; in failing to appreciate the entire documentary evidence that linked the appellant's case to the subject plot; in failing to appreciate that the appellant's case was based on proof of extant ancestral land that was not compulsorily acquired by the government; in failing to appreciate that the interested parties are not of Sudanese descent; in holding that the appellant's constitutional rights were not infringed, and that the subject plot was given to the persons of Nubian origin by the colonial government, yet there is no documentary evidence adduced to support that conclusion; in holding that the appellant had no valid claim simply because the law provides that every person can settle anywhere in the country, thereby depriving the appellant of the subject plot in disregard of the provisions of sections 70 and 82(2) of the retired constitution and Article 7 and 17 of the Universal Declaration of Human Rights.
 18. When the appeal came up for hearing on a virtual platform, learned counsel Mr. M. Tindi, appeared for the appellant while learned counsel Mr. Makuto appeared for the respondent, and Mr A. Abdullah was on record for the Interested Parties. Counsel filed written submissions, which were highlighted orally. On behalf of the appellant, it was submitted that the Judge generalized the Petition by concluding that unscrupulous persons were approaching the Succession court to defraud land owners, which, in the appellant's case, was unsubstantiated; that the Judge misunderstood the appellant's claim as it was not against a particular community, in this case, the Nubians, but that it concerned the allocation of their land to 34 parties without following the laid down procedures; and that under Article 60 (1) of *the Constitution*, the appellant should have security of land rights since they were deprived of their land.
 19. It was further submitted that if at all the appellant's land was compulsorily acquired to settle the Nubians, then the proper procedure was not followed to the detriment of the appellant and his family, which was unconstitutional.
 20. In their submissions, learned counsel for the State submitted that, at the time of his death, the deceased did not have an allotment letter or title to the subject plot; that, as at 14th April, 2010 all 26 plots, the subjects of the Petition had been allotted to members of the Nubian Community; that the deceased was not in occupation of the subject plot, and that the appellant had not discharged the burden of proof that the deceased owned and occupied it at any one time; that, although the appellant claimed that the subject plot was leased to one Mr. Osborne for a period of 99 years and that the lease expired in the year 2005, no evidence of the existence of such lease was provided; that, in any event, if there was a 99 year lease from the government to Mr. Osborne, the title reverted to the government upon expiry of the lease period.
 21. On compensation, counsel submitted that the appellant failed to prove that his grandfather owned the land, and that he misrepresented to the High Court family division that the parcel of land belonged to his father, contrary to the evidence in his possession at the time; that the subject plot had been subdivided and allocated to third parties, and that he failed to establish that there was compulsory



- acquisition from his great grandfather to warrant compensation under section 75 of the retired Constitution.
22. On his part, counsel for the Interested Parties supported the respondent’s submissions.
 23. This is a first appeal where this Court is required to conduct an independent appraisal and analysis of the facts and arrive at its own independent conclusion, and thus the court is at liberty to consider both the issues of fact and law as prescribed under rule 31(1) (a) of the Court of Appeal Rules, 2022. In so doing, the Court is required to take into consideration that unlike the trial court, it did not have the advantage of seeing and hearing the witnesses testify so as to be in a position to gauge their demeanour. See *Kenya Ports Authority vs. Kuston (Kenya) Limited* [2009] 2 EA 212 as reiterated in *James Odera T/A A. J. Odera & Associates vs. John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR; and *Mugwe vs Waititu Babayao & another; Speaker, Kiambu County Assembly & 2 others (Interested Parties)* (Civil Appeal 245 of 2018) [2023] KECA 1422 (KLR)
 24. Bearing the forgoing principles in mind, the issues that are for our consideration are:
 - a. whether the appellant’s rights were violated;
 - b. whether the appellant and his family were subjected to historical injustices as alleged;
 - c. whether the Confirmation of Grant conferred any proprietary rights to the appellant’s family; and
 - d. whether the appellant was entitled to the reliefs sought.
 25. Where a violation of constitutional rights is alleged, it is trite that the specificity test established in the case of *Anarita Karimi Njeru vs. Republic* (No. 1.) [1979] 1 KLR 154 ought to be satisfied, that:

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”
 26. This Court in *Uasin Gishu Memorial Hospital Limited vs. Moi Teaching and Referral Hospital Board & 2 Others* [2017] eKLR emphasized that, where a person had alleged a contravention or a threat of contravention of a constitutional right under the retired constitution, he or she must set out the specific right infringed and the particulars of such infringement or threat.
 27. The appellant’s Petition is brought under the provisions of sections 70 and 82(2) of the repealed constitution, which provide that:

“

 - “70. Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely-
 - a. life, liberty, security of the person and the protection of the law;



- b. freedom of conscience, of expression and of assembly and association; and (c) protection for the privacy of his home and other property and from deprivation of property without compensation, the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

And Section 82(2) provides that:

Subject to subsections (6), (8) and (9), no person shall be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of the functions of a public office or a public authority.

28. The appellant also relied on Articles 7 and 17 of the Universal Declaration of Human Rights which provide that:

“ Article 7.

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination”.

And

“ Article 17.

- a. Everyone has the right to own property alone as well as in association with others.
- b. No one shall be arbitrarily deprived of his property.”

29. The appellant’s complaints are that his forefathers being the historical owners of the subject plot meant that they were entitled to allocation of the parcel as descendants, and that their rights to ownership of the subject plot were violated by allocation of the land to third parties by both the British Colonial government and the post-independence Kenya Government. When the appellant’s complaints are considered against the provisions set out above, we are satisfied that the infringements alleged were adequately defined, and therefore the Petition was competent.
30. As to whether the appellant’s constitutional rights were indeed violated, the High Court observed that the appellant’s case was hinged on the claim that the subject plot was owned by his forefathers, and that the land was then leased for 99 years to one Mr. Osborne. The question that begs at this juncture was whether the material before the court below was sufficient to demonstrate that the appellant’s forefathers owned the subject plot.
31. Addressing this issue, the learned judge concluded thus:

“From the evidence tabled, I have nothing to demonstrate that the land in dispute was ever leased to one Mr. Osborne. I have not seen any lease. If the lease was from the colonial Government to Mr. Osborne, then certainly, there would have been a leasehold title issued



to the said Mr. Osborne. The land would have been surveyed and mapped and a grant of title issued. I have no evidence of such. Certainly, no leasehold title was presented before me and it does actually appear that no grant has ever been made over the suit land. If the position of the petitioner is that it is his grandfather or forefather who issued to Mr. Osborne a lease, again, I have no lease agreement between Mr. Osborne and any of the predecessors of the petitioner. What the petitioner has presented are some documents said to be proceedings before a Magistrate of the year 1925. They comprise of two pages. If they are court proceedings, one cannot tell what sort of case was being tried, for there is no indication of the case number or parties in the suit. Neither are there any pleadings. The said documents are also not certified and nobody can tell their authenticity. But even if I am to assume that they are authentic, nowhere is there any reference in the said document of any lease from any of the forefathers of the petitioner to the said Mr. Osborne. Those two pages do not in any way demonstrate that there was any lease issued to Mr. Osborne by the forefathers of the petitioner. Even assuming that Mr. Osborne had a lease with the petitioner's grandfather, I have no evidence that the land leased was the suit land. The evidence of the petitioner, that the suit land was previously owned by the deceased or his forefathers, is in my view, all speculative and cannot support any claim that the land in dispute was ever owned by the forefathers of the petitioner.”

32. The foregoing finding is clear that the learned Judge considered the materials that were before him and, having taken into account the appellant's, the respondent's and Interested parties' evidence, came to the conclusion that there was nothing that proved that the subject plot belonged to the appellant's forefathers at any time.
33. As stated above, it is the duty of this Court as an appellate court sitting on a first appeal to reanalyse the evidence, and reach our own independent conclusion.
34. It is trite that he or she who alleges must prove. Section 107 of the *Evidence Act* provides that he or she who asserts must prove that the facts alleged exist. Under section 109 of the same Act, the burden of proof lay with the appellant to establish his right to the subject plot. See Swaleh Mohamed Waziri & 3 others vs. Houd Mohmoud Athman & another [2020] eKLR; and Monica Wangu Wamwere vs Attorney General [2019] eKLR.
35. In the case of Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & another [2004] eKLR, this Court held:

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (1) of the *Evidence Act* Cap 80...

There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in sections 109 and 112 of the Act...

The two sections carry forward the often repeated evidential adage: ‘he who asserts must prove’”.



36. In the case of the Chief Land Registrar & 4 others vs. Nathan Tirop Koech & 4 others [2018] eKLR, this Court observed that:
- “...in a claim for declaration of title, the onus is on the Petitioner to satisfy the Court on the evidence produced by them that they are entitled to the declaratory orders sought.”
37. The Court further noted that:
- “...We are fortified in our view by provisions of Section 97(1) of the *Evidence Act* which inter alia stipulates that when the terms of a grant or any other disposition of property has been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of such grant or other disposition except the document itself or secondary evidence of its contents in cases in which secondary evidence is admissible.”
38. As is clear from the record, it was the appellant’s claim that the subject plot was owned by his forefathers and that the land was then leased for 99 years to one Mr. Osborne and that, upon expiry of the lease, which he claimed occurred in the year 2005, the land ought to have reverted to the descendants of the original occupants who comprise the appellant and his family. Save for letters of correspondence between his counsel and the Land Office, the appellant did not adduce any documents or evidence to prove that the land belonged to his forefathers, or to prove that a lease agreement existed between Mr. Osborn and the appellant’s forefathers. There was also no evidence to prove the challenge of the letters of allotment issued to the interested parties.
39. On the other hand, in an affidavit sworn by Saum Rashid on behalf of the interested parties, it was contended that the subject plot was given to persons of Sudanese origin (the Nubians) who fought for the British in the 1st and 2nd World Wars. Their claim in respect of the suit parcel is that, by their lineage of consanguinity, they obtained ownership and possession thereof vide an agreement made between the land officer of the colony and the Protectorate of Kenya and Hassan Mussan on behalf of the Sudanese on 1st July 1926; that the agreement was subject to the Crown Land Ordinance of 1915, and that the interested parties families’ lineage of consanguinity have occupied the subject plot since 1926; that, on 18th October 1991 through one H. M. Khamis, they raised their concerns about threats from the appellant with regard to the subject plot with the government and applied for registration of the land in their name; that, sometimes in 1996, the interested parties deceased’s parents were allocated several parcels; that, on 24th July 1995, and while acknowledging the grant in respect to plot No. 12 Mazaras, one Hassan Musa paid the Ministry of Lands and Settlement Kshs. 71,795 vide cheque No. 009156; and that on 29th October, 1996 the District Officer confirmed to the interested parties that the government surveyor was slated to survey the subject plot sometimes in April 2010. He stated that a survey was conducted by the Coast surveyor, and that it was thereafter confirmed that all the 26 plots in the subject plot were allotted to the Nubian community.
40. The interested parties produced an agreement dated 1st July 1926 and letters of allotment to their forefathers as deponed in the affidavit. This evidence was reiterated by the 1st and 7th Interested parties in their testimony.
41. Without any evidence that demonstrated ownership of the subject plot by the appellant’s forefathers, the appellant failed to discharge the burden of proof that his forefathers owned the subject plot. On the contrary, the evidence adduced by the Interested parties, including the agreement dated 1st July 1926, together with the chronology of events coupled with the letters of allotment, explained how they came to be in ownership of the subject plot. As was the learned Judge, we too are satisfied that the interested



parties' evidence sufficiently proved their ownership of the subject plot, which rebutted the appellant's claims that the land belonged to their forefathers. The appellant having failed to furnish the trial court with any title documents or any proof of ownership was unable to demonstrate that they owned the subject plot, with the result that there was nothing on which to base the claim that their rights under the retired constitution were violated.

42. We are therefore satisfied that, the appellant having failed to establish that he and his family held proprietary rights to the subject plot that were capable of being violated, they were also not entitled to such finding.
43. This then brings us to the issue as to the confirmed grant from the High Court, which sought to distribute the subject plot to the appellant and his relatives, section 3 of the [Law of Succession Act](#) defines an "estate" to mean the free property of a deceased person while "free property" in relation to a deceased person is defined to mean the property of which that person was legally competent freely to dispose during his lifetime and in respect of which his interest has not been terminated by his death.
44. The foregoing provisions are clear that, for the subject plot to have formed a part of the deceased's estate, it had to be established that it was free property. The appellant testified that the deceased died in November 1999. He also testified that, at that point in time, it had been leased to Mr. Osborn whose lease lapsed in 2005, approximately 6 years after his father's death. The appellant also testified that both his father and his grandfather had no title to the land as they waited for the lease to expire. It therefore goes without saying that neither his grandfather nor his father had any proprietary rights over the subject plot capable of being inherited by the appellant and his siblings.
45. Consequently, as rightly concluded by the trial Judge, and with which conclusion we agree, the letter of Confirmation of Grant issued by the Probate Court to the appellant was incapable of conferring any proprietary rights to him or his family.
46. Turning to the claim that a historical land injustice was committed against them, "historical land injustice" is defined under section 15(2) of the [National Land Commission Act](#) as a grievance which was occasioned by a violation of right in land on the basis of any law, policy, declaration, administrative practice, treaty or agreement; resulted in displacement from their habitual place of residence; occurred between 15th June 1895 when Kenya became a protectorate under the British East African Protectorate and 27th August, 2010 when [the Constitution](#) was promulgated; has not been sufficiently resolved and subsists up to the period specified under the paragraph; and meets the criteria set out under subsection 3 of this section.
47. Under section 15(3) it is provided that:
 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. 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 renunciation of the right to the land in question; and
 - e. it is brought within five years from the date of commencement of this Act.
4. A claim alleging historical land injustice shall be permissible if it was occasioned by—
- a. colonial occupation; -
 - b. independence struggle;
 - c. pre-independence treaty or agreement between a community and the Government;
 - d. development-induced displacement for which no adequate compensation or other form of remedy was provided, including conversion of non-public land into public land;
 - e. other form of remedy was provided, including conversion of non- public land into public land;
 - f. inequitable land adjudication process or resettlement scheme;
 - g. politically motivated or conflict-based eviction;
 - h. corruption or other form of illegality;
 - i. natural disaster; or
 - j. other cause approved by the Commission.
48. In effect, for a claim of historical justice to succeed, the claimant must prove that he had a right to the land, but that due to colonial occupation, independence struggle, pre-independence treaty or agreement between a community and the Government, development-induced displacement, including conversion of non-public land into public land, inequitable land adjudication process or resettlement scheme, politically motivated or conflict- based eviction that right resulted in displacement of the claimant from their habitual residence.
49. The appellant claimed that the government ought to have allocated the subject plot to them to the exclusion of the interested parties as they were in occupation of the land before the colonial period. Our interrogation of the evidence before the trial court does not disclose that the deceased and his family were at any time in occupation of the subject plot, or that they were relocated by the colonial government from the land during the colonial period, or that they were subsequently dispossessed to give way to resettlement of the interested parties. To the contrary, it is the interested parties who produced evidence of a sale agreement showing that their forefathers had been on the subject plot since 1926, following which it was allocated to them as evidence by the letters of allotment. Therefore, there being nothing that demonstrated that the appellant’s family was subjected to historical injustices in the terms enlisted under section 15(3), we are satisfied that the appellant’s family did not prove that they were subjected to historical injustices.
50. Regarding the appellant’s claims that the deceased’s family were discriminated against by the settlement of the interested parties because they were Nubians, based on our foregoing conclusions, as did the learned Judge, we find no basis for these unproven allegations. Having failed to show that they had at



any time occupied the subject plot, or that they were displaced to resettle the interested parties, we find that the claims that they were discriminated against were not founded in law or in fact.

51. Finally, in view of the foregoing conclusions, since the appellant has not made out a case for payment of compensation under section 75 of the Retired Constitution or other reliefs, their claim for compensation is hereby dismissed.
52. In our considered view, the appellant has failed to establish his case, or prove the alleged violations to the required standards and, accordingly, we find that the trial Judge was correct in dismissing the Petition. Consequently, we have no reason to interfere with the trial judge's decision.
53. In conclusion, the appeal is without merit and is hereby dismissed. The appeal having been brought in public interest on behalf of the descendants of the late Lwambi Mwalambe Beponda, we make no orders as to costs.

It is so ordered.

DATED AND DELIVERED AT MALINDI THIS 21ST DAY OF JUNE, 2024

A. K. MURGOR

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA C.Arb, FCI Arb.

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR

