



Mirigo & 550 others v Minister for Lands & 4 others (Civil Appeal 277 of 2011) [2014] KECA 881 (KLR) (22 January 2014) (Judgment)

Lucy Mirigo & 550 others v Minister for Lands & 4 others [2014] eKLR

Neutral citation: [2014] KECA 881 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 277 OF 2011
MK KOOME, PM MWILU & JO ODEK, JJA
JANUARY 22, 2014**

BETWEEN

LUCY MIRIGO & 550 OTHERS APPELLANT

AND

MINISTER FOR LANDS 1ST RESPONDENT

PERMANENT SECRETARY MINISTRY FOR LANDS 2ND RESPONDENT

THE COMMISSIONER FOR LANDS 3RD RESPONDENT

HOME GROWN KENYA LIMITED 4TH RESPONDENT

J. H ANGAINE & CO. LTD 5TH RESPONDENT

(Appeal against the Judgment and Decree of the High Court of Kenya at Meru (Kasango, J.) dated 30th June 2011 in Meru HC Misc. App No.218 of 2004 consolidated with Meru HC Misc. App. No. 71 of 2003)

A promise by the President to alienate or allocate land is not enforceable in law.

Reported by Nelson Tunoi & Riziki Emukule

Law of Contract- privity of contract doctrine - whether Appellants had any registrable interest or beneficial trusteeship in the suit property - whether a non - vested and promissory interest in land is enforceable in law - whether the doctrine of rights in alieno solo was applicable in the circumstances of the case - Law of Contract Act, section 3(3).

Judicial Review - mandamus - appeal - whether order of mandamus could be issued against private persons - when is time deemed to begin running for purposes of limitation in respect to an order of mandamus - whether a prayer for equivalent land compensation is available in judicial review proceedings - whether the Appeal had merit.



Constitutional Law - fundamental rights and freedoms - bill of rights - right to human dignity - whether the Appellants were by definition squatters in the circumstances of the case - whether the provisions under the bill of rights were meant to impose a constitutional duty on the government to allocate land to any squatter or person - whether the Appellants had any interest in the suit property capable of being enforced - Constitution of Kenya, 2010 article 28.

Jurisdiction - jurisdiction of the Court on land matters - mandate of the National Land Commission - whether a promise by the President to alienate or allocate land is enforceable in law - Constitution of Kenya, 2010, article 67.

Words and Phrases - "Rights in alieno solo" - rights that a party has over another person's land.

Brief facts

The Applicants (Lucy Mirigo & 550 others) brought a judicial review appeal for an order of *mandamus* to issue against the Respondents and in the alternative compensation for land. The facts of the case were that while in the employment of the Forest department of Ontulili forest within Mt Kenya forest in Meru in the 1970s, they had petitioned the then president (Jomo Kenyatta) to allot them land from this forest since they were squatters.

Following their visit to the President, the then Ministers for Natural Resources and for Lands and Settlements respectively were instructed to earmark suitable land to be excised from Ontulili forest for these squatters. The Appellants were thereafter allocated a total of 973 hectares through Legal Notices No 68 of 1975 and No 107 of 1977.

This land was later taken over by a company associated with the 5th Appellant hence the present suit.

Issues

- i. Whether the Appellants had any interest in the suit property capable of being enforced
- ii. Whether a non-vested and promissory interest in land was enforceable in law
- iii. Whether a promise by the President to alienate or allocate land was enforceable in law
- iv. Whether the Appellants were squatters in the circumstances and what rights, if any, did they have as squatters
- v. Whether the doctrine of rights in *alieno solo* was applicable in this case
- vi. Whether an order of *mandamus* could be issued against private citizens
- vii. When is time deemed to begin running for purposes of limitation in respect to an order of *mandamus*
- viii. Whether a prayer for compensation for equivalent land was available in judicial review proceedings

Held

1. The order of *mandamus* compels a public body to exercise a duty bestowed upon it by law or to judiciously exercise a discretionary power. Given that the 4th and 5th Respondents were not public bodies but private citizens, then the order of *mandamus* could not issue against them. Moreover, such an order of *mandamus* could not be issued against a person if it would not be within his power to comply with it and such it would of necessity fail.

2. With regard to the 1st, 2nd and 3rd Respondents, who were a public body, the order of *mandamus* could issue against them since such order would compel them to perform a specific act where statute imposed a clear and qualified duty to that act. However, where an individual was challenging a decision that he had no entitlement to, the appropriate remedy would be an order of *certiorari* to quash the decision and not an order compelling the authority to provide the benefit sought.

3. The Appellant had not demonstrated or pointed out any specific statutory obligation vested in the 1st, 2nd and 3rd Respondents which had been violated. Given that *mandamus* compels performance of a statutory public duty, it was up to the Appellants to adduce evidence showing the constitutional or statutory duty on the part of the Respondents that was owed to them and that was breached. Failure to do this was fatal and an order of *mandamus* could not issue since there was an absence of a specific statutory obligation to be enforced.



4. The suit property the Appellants claimed was excised from Mt Kenya for their benefit comprising of two pieces of land (Land Reference Nos 13269 and 12234) respectively were registered in the name of the 5th Respondent who later transferred it to the 4th Respondent. The Appellants never took physical possession of the land and this failure to take possession and occupy the land meant that they were not squatters as they claimed to be.
5. The doctrine of rights in *alieno solo* recognized various categories of rights that a third party could have over another person's land such as easements, licenses, profits, restrictive covenants, overriding interests and mortgages. The Appellants did not have such registerable interest or beneficial trusteeship in the suit property and as such the doctrine of rights in *alieno solo* was inapplicable to their case and they had no enforceable third party rights over the suit property.
6. With regard to the issue of the promise for land made by the former President (Jomo Kenyatta) to the alleged squatters, the order of mandamus could not issue to enforce a promise to do anything in the future and neither could mandamus issue to enforce a promise not underpinned by a statutory provision and moreover a promise could not create nor convey an interest in land.
7. The Law of Contract Act clearly spelt out the requirements for a valid instrument to convey an interest in land with a key requirement being a memorandum or note in writing and signed by the party to be charged. There was no privity of contract between the Appellants and Respondents in this case in relation to the suit property and a squatter could have no privity of estate that runs with the estate. Given the absence of such privity of contract between the Appellants and the Respondents, lack of a letter of allotment from the government to the Appellants in relation to the suit property and also an absence of part performance by the Appellants to occupy the land, the averred promise by the former President to give them land was unenforceable by an order of mandamus. It is trite law that a promise to enter into a contract was not enforceable.
8. On whether the Appellants had a vested interest in the suit property, the rule of thumb was for the interest to vest, it had to do so within 21 years. In the instant case, when the legal gazette notices were issued and land excised from the forest, the parcels of land created vested in the 4th Respondents and not the upon the Appellants.
9. The promise by the former President to allot land was a future promise which did not vest any interest in the suit property on the Appellants. Moreover, it is trite law that a future interest in land is void if it is not vest within the stipulated time frame.
10. With regard to the issue of limitation period, two aspects were considered namely, the limitation period for instituting judicial review proceedings under order 53 of the Civil Procedure Rules and the limitation period for recovery of land under the Limitation of Actions Act (cap 22 of the Laws of Kenya). There was a six month limitation period for an order of certiorari but none for institution of the order of mandamus. Limitation for such orders was to be determined by the reasonableness and length of time between the cause of action and time for filing suit.
11. The order of *mandamus* is not an appropriate remedy to issue under the new constitutional dispensation and the Appellants had no registered, possessory or future enforceable right over the suit property. The Appellants also did not show any statutory obligation owed to them that had been breached. On the issue of limitation period for the issuance of an order of mandamus, the trial court erred in arriving at the figure of 50 years without indicating as to how they had arrived at that figure.
12. Although article 28 of the Constitution of Kenya, 2010 was to the effect that every person had the inherent dignity and the right to have that dignity respected and protected, the article was not meant to impose a constitutional duty on the government to allocate land to any squatter or person. Likewise, the provisions on social justice, equality, equity and prevention of inhuman, cruel and degrading treatment were not meant to be used to demand land allocation from the government.



13. It was the mandate of the National Land Commission to investigate issues of historical land injustices and to recommend appropriate redress as per article 67(1)(e) of the Constitution of Kenya, 2010. It was not the duty of the courts to allocate land and more so the judicial remedy of *mandamus* was not created to settle ownership disputes or to confer title to land.

14. The order of *mandamus* did not lie as a matter of course against a public officer and was a matter of court discretion. However, if such issuance of the order would lead to judicial interference with the executive arm of government, then the Court would decline to issue it. If the order of *mandamus* was granted it would be contrary to the spirit of Chapter Five of the Constitution relating to management of land as a resource in the country as well as interfere with the executive arm of government in resource allocation.

Appeal dismissed.

Orders

Appeal dismissed with costs.

Citations

East Africa

1. *Commissioner of Lands v Kunste Hotel Limited* Civil Appeal No 234 of 1995 - (Explained)
2. *District Commissioner, Kiambu v Republic and others ex parte Ethan Njau* [1960] EA 109 - (Explained)
3. *Jabane v Olenja* [1986] KLR 661 - (Explained)
4. *Kabiru, Francis v Minister for Lands & another* Petition No 66 of 2010 - (Mentioned)
5. *Manyasi v Gicheru & 3 others* [2009] KLR 687 - (Applied)
6. *Morgan v Stubenitiky* [1977] KLR 188 - (Mentioned)
7. *Mungai, Douglas Mbugua v Harrison Munyi* Civil Application No 167 of 2010 - (Explained)
8. *Mureithi & 2 others v Attorney General & 4 others* [2006] 1 KLR (E&L) 707 - (Applied)
9. *Republic v Director-General of East African Railways Corporation ex parte Kaggwa* [1977] KLR 194 - (Explained)
10. *Selle & another v Associated Motor Boat Co Ltd* [1968] EA 123 - (Explained)
11. *Shah v Attorney General (No 3)* [1970] EA 543 - (Explained)
12. *Transouth Conveyors Ltd & another v Kenya Revenue Authority & 3 others* [2008] KLR 216 - (Mentioned)
13. *Wagichiengo v Gerald* [1988] KLR 406 - (Explained)

South Africa

1. *Modderklip Boerdery v President Van Die RSA en Endere* 2003 (6) BCLR 638 - (Mentioned)

United Kingdom

2. *R v Barnet London Borough Council ex parte Shah* [1983] 2 AC 309 - (Explained)
3. *R v Dunsbeath, ex parte Meredith* [1950] 2 All ER 741 - (Explained)
4. *R v Lancashire County Council ex parte Gayer* [1980] 1 WLR 1024 - (Explained)
5. *Re Bristol and North Somerset Railway Co* (1877) 3 QBD 10 - (Explained)
6. *Re Stern* (1962) Ch D 732 - (Mentioned)

United States

1. *Tichborne v Weir* (1892) 67 LT 735 - (Mentioned)

Statutes

East Africa

2. Appellate Jurisdiction Act (cap 9) sections 3A, 3B - (Interpreted)
3. Civil Procedure Act (cap 21) sections 1A, 1B - (Interpreted)
4. Civil Procedure Rules (cap 21 Sub Leg) order 53 rule 2 - (Interpreted)



5. Constitution of Kenya, 2010 articles 1, 10, 28, 40(b); 61; 67(1) (e); 76; 159(1) - (Interpreted)
6. Law of Contract Act (cap 23) section 3(3) - (Interpreted)

JUDGMENT

1. This is a judicial review appeal for an order of mandamus to issue and in the alternative an order for compensation for land. The Appeal has a historical perspective. By Notice of Motion dated 18th November 2004, the Appellants describe themselves as public servants in the Ministry of Lands and Settlement. The pertinent facts are that on or about August/September 1970, six individuals namely Gichohi Gikaandi, Gitahiga Kabuya, Williet Mwangi, John Kahuthu and Mawi Kanja being forest officers at Ontulili within Mt Kenya Forest in Meru County visited the then First President of Kenya HE Mzee Jomo Kenyatta at his Gatundu Home. The Appellants petitioned the then President stating that they were squatters and landless persons working in the Forest Department and about to retire. They requested the President to hear their cries and have mercy upon them and excise part of Ontulili Forest within Mt Kenya Forest in Meru and allot them land for settlement. It is the Appellants' contention that the late President Kenyatta promised to consult the Ministers responsible and to look into the request. The Appellants state that they gave their request to the late President by way of a written memorandum and the President upon reading the same directed the then Minister for Natural Resources the late Hon William Odongo Omamo to liaise with the then Minister for Lands and Settlements the late Hon Jackson Harvester Angaine with a view to identifying and earmarking a suitable part of Ontulili Forest for excision and allocation to the landless employees of Ontulili Forest.
2. The Appellants state that pursuant to the Presidential directive, on 9th September 1970, the then Minister for Lands and Settlement, the late Hon Jackson Harvester Angaine accompanied by the Minister for Natural Resources the late William Odongo Omamo visited Ontulili Forest with a view to identifying suitable land for excision. That the ministerial visit was reported in the Daily Nation Newspaper of 10th September, 1970.
3. The Appellants state that to their positive surprise, Legal Notice No 68 of 1975 was published in the Kenya Gazette dated 16th May, 1975 altering the boundaries of Mt Kenya Forest. In addition, a further Legal Notice No 107 of 1977 was published altering the boundaries of Mt Kenya Forest. These two legal notices excised and curved out parcels of land from Ontulili Forest which was part of the Mt Kenya Forest. The Appellants contend that the parcels of land excised from Mt Kenya Forest were meant to settle them pursuant to the promise by the late President Jomo Kenyatta. The size of parcels of land excised from Mt Kenya Forest pursuant to the Legal Notices is 384 Hectares and 546. 2 Hectares respectively measuring in total about 973 Hectares of land. The land which was excised through the Legal Notices were surveyed and given Land Reference Nos 13269 and 12234 respectively.
4. The Appellants contend that upon the land parcels being demarcated and excised from the forest, they were instructed by the late Hon Angaine to cut trees and clear the site on the understanding and assurance from Minister Angaine that the clearing of site would pave way for further demarcation and sub-division of the land to be allocated to individual squatters. That on completion of the site clearance, the Appellants were dismayed that the late Hon Angaine started to cultivate the land for his personal use. The Appellants inquired of the late Minister what was happening and he responded that the land at Ontulili belonged to people of the Meru tribe and the squatters who were of Kikuyu tribe should seek land in the Rift Valley Province where other Kikuyu were being settled.
5. The Appellants grievance is that the land excised from Mt Kenya Forest was not used to settle them but instead, the land was allocated and title issued in the name of a company formed by the then Minister



- for Lands and Settlement Hon Jackson Harvester Angaine. That the late Minister incorporated a company known as JH Angaine & Sons, the 5th Respondent, which company was allocated the land and title issued to it. That the 5th Respondent then sold the land to the 4th Respondent, Home Grown Kenya Limited.
6. The Appellants claim is that the Government of Kenya through the 1st, 2nd and 3rd Respondents' excised land from Mt Kenya Forest vides Legal Notices No 68/75 and 107/77 for purposes of settling the Appellants. That the land meant for the Appellants was diverted and the 1st, 2nd and 3rd Respondents instead of settling the Appellants gave the land to Hon Jackson Angaine, a non-needy person who by all definitions was not a squatter and who was then Minister for Lands and Settlement.
 7. In line with their grievance, the Appellants by Notice of Motion dated 18th November 2004 moved the High Court for the following orders and relief:-
 - (i) An Order of Mandamus to compel the Respondents to settle the Appellants on land excised from Mt Kenya Forest vide Legal Notices Nos 68 of 1975 and 107 of 1977 being Land Reference Nos 13269 and 12234.
 - (ii) That in the alternative, the Respondents be compelled to settle the Appellants in land of equivalent size and quality.
 8. The Appellants claim that failure by the Respondents to allot and allocate them the degazetted land as earlier intended was illegal and unconstitutional. That the Appellants had been promised land by the late HE Mzee Jomo Kenyatta, the late Minister CMG Argwings Kodhek, the late Minister Hon William Odongo Omamo and other Senior Government Officials. In support of their claim, the Appellants tendered in evidence a letter dated 18th May 1977 from the Chief Conservator of Forest addressed to the Forester Ontulili. The letter is captioned Mount Kenya Forest Excision and it states that the excision was to allocate land to the squatters. The Appellants contend that the Government of Kenya through the Commissioner of Lands has not implemented its own decision and promise to demarcate and settle the Appellants and other squatters at Ontulili Forest in individual portions of Land Reference No 13269 and 12234 excised from the said forest specifically for that purposes. That the Commissioner of Lands subverted the government's intention by failing to carry out the intention and instead allowed one Jackson Harvester Angaine to use the land contrary to the purpose for which it was intended.
 9. Upon hearing the parties to this suit, Kasango, J by a judgment dated 30th June, 2011 dismissed the Notice of Motion seeking an Order for Mandamus. The Judge held that there had been inordinate delay in bringing the action. The Honourable Judge observed that the claim had been brought 50 years after the land was allocated to a company associated with JH Angaine. That some of the land had also changed hands to third parties and part had been sold to Home Grown Kenya Limited. The Honourable Judge stated that the suit was allegedly brought by 550 people but the heading of the suit only reveals the name of Lucy Mirigo Munyi. The other 549 people had their names in a hand written paper attached to the application and there was no clarity that these other persons had authorized Lucy Mirigo Munyi to represent them in the action. The Judge observed that only Six persons visited the late President Kenyatta at Gatundu and wondered whether it can be said that the Six persons are the 550 persons who were now before the Court. The Honourable Judge stated that the application for Mandamus failed the more so because there was no document indicating that the Appellants were entitled to the land that was excised out of Mt Kenya Forest.
 10. Aggrieved by the decision of the Honourable Judge, the Appellant lodged this Appeal citing six grounds to wit: The learned Judge erred in law and fact in dismissing the matter without giving due



consideration to the materials supporting the motion. The learned Judge failed to analyze the material before her to find that the same was sufficient for the grant of the orders sought. The learned Judge failed to appreciate the previous proceedings and the historical background of the matter in holding that there was inordinate delay in instituting the matter. The learned Judge failed to appreciate that the identifying parties was valid and unchallenged by the Respondents and therefore went into error in rejecting the matter on the issue of uncertainty of the parties. The learned Judge erred in law and fact in holding that there were no documents entitling the Appellants to the suit land yet there were legal notices and correspondences from the Respondent's office indicating the purposes of the degazettement of the forest land. The entire ruling is unfair and against the spirit of sections 1A and 1B of the *Civil Procedure Act* and Articles 1 and 10 of the Bill of Rights and article 159 of the *Constitution* of Kenya.

11. At the hearing of the appeal, the Appellants were represented by learned counsel Mr Charles Kariuki while the 1st, 2nd and 3rd Respondents were represented by the learned State Counsel M/s Teresia Gathagu. The 4th Respondent was represented by learned counsel Mr AG Riungu while learned counsel Kiogora Arithi is on record for the 5th Respondent.
12. Counsel for the Appellant elaborated on the grounds of appeal. He pointed out that the appeal arose from a decree issued by the High Court in two consolidated Miscellaneous Civil Applications being Meru HCC Misc App No 71 of 2003 and Meru HCC Misc App No 218 of 2004. Counsel pointed out that during the hearing of the cases before the High Court, it was agreed that the judgment delivered shall apply to both cases. Counsel submitted that although there was no formal record consolidating the two cases, the judgment and decree is one and the learned Judge erred in stating that there was a pending suit before the High Court. It was submitted that the correct position is that the two miscellaneous applications should be consolidated and the appeals be likewise consolidated.
13. On the substantive grounds of appeal, counsel for the Appellant submitted that the Appellants' case is premised on the fact that the government failed to implement its own directive to settle the squatters on the land parcels that had been excised from Ontulili Forest. That the government allowed the then Minister for Lands and Settlement Hon Angaine to dispose the Appellants off the land. It was submitted that the land was excised for the benefit of the squatters and this position was confirmed by the letter dated 18th May 1977 from the Chief Conservator of Forests. Counsel submitted that the learned Judge erred in finding that only six people visited the late President Kenyatta at Gatundu; that the Judge erred in failing to appreciate that the six people who visited the late President were representatives of other squatters. The said six people were the 1st to 6th Appellants. Counsel submitted that even if the Judge was correct in finding that only six people visited the late President, the Judge erred in failing to find that the land was to be allocated to the six people who were squatters to hold the same as representatives of other squatters whom they represented. Counsel submitted that the Judge erred in invoking the limitation period and stating that the Appellants claim was filed 50 years after the land was allocated to a company associated with the late Minister Angaine. It was submitted that the 50 years came out of the blues and it is not clear how the Judge computed the 50 years. Counsel submitted that there was no way the government could have excised 3,000 acres of land for one individual. Counsel submitted that the land was meant for squatters and by no imagination or definition was the late Hon Jackson Angaine a squatter.
14. Counsel for the Appellants cited the case of *Mureithi & 2 others v Attorney General & 4 others* KLR (E & L) 1 to support the submission on limitation of time. The Appellant submitted that it was the legal and statutory duty of the Respondents to allocate/settle the Appellants on the land available. That the Respondents are in breach and continue to breach the statutory obligation. It was submitted that it is a constitutional duty and a right of the Appellants to be allocated land set aside for purposes



of their settlement and to be provided with proper housing. The Appellants contend that they live as squatters and are internally displaced persons in their own country. In support of this submission, learned counsel cited the case of *Modderklip Boerdery v President Van Die RSA en Endero* 2003 (6) BC LR 638 (T) cited in Nai Petition No 66/10 *Francis Kabiru v Minister for Lands & another*.

15. Counsel for the Appellant submitted that the Kenya Constitution must be upheld in relation to human rights, equality, freedom, democracy, social justice and the rule of law which provides the Appellants with a right to provision of housing and land. The Appellant cited article 28 of the *Constitution* wherein it is provided that every person has the inherent dignity and the right to have that dignity respected and protected. The Appellants invoked article 259(1) of the *Constitution* and urged this Court to interpret the *Constitution* in a manner that promotes its purposes, values and principles and advances the Rule of Law and Human Rights. It was submitted that although the Appellants were not registered proprietors of the suit property, they had a claim against the Respondents. Counsel cited the case of *Commissioner of Lands v Kunste Hotel Limited* Civil Appeal No 234 of 1995 where this Court stated that:

“The Appellant was exercising his statutory powers under the Government Lands Act, when he decided to allot the subject plot to the interested party. The exercise of that discretion clearly affected the legal rights of Kunste Hotel Ltd. The exercise of that power was therefore judicial in nature and he was therefore obliged to hear all those who were likely to be affected by his decision. It does not lie in the Appellant’s or anybody else’s mouth to argue that in absence of registration the interest Kunste Hotel seeks to protect was non-existent.”

16. Counsel for the Appellant submitted that the Respondents acquired title to the suit property illegally and pursuant to article 40(B) of the *Constitution*, the right to protection of private property does not extend to any property that has been acquired unlawfully. It was submitted that to grab land set aside for squatters/Appellants was unlawful and unconstitutional and the acquisition by the 4th and 5th Respondents was null and void. Counsel submitted in the alternative that if an order for mandamus cannot issue, then the Appellants should be allocated or compensated with land of equivalent size and quality.
17. The Respondents vehemently opposed the Appeal. Mr AG Riungu learned counsel for the 4th and 5th Respondents urged this Court to find that the appeal had no merit. He submitted that the 5th Respondent JH Angaine & Sons have never been parties to the suit before the High Court in both Miscellaneous Application Nos 218 of 2004 and 71 of 2004. He urged this court to find that there can be no claim and no order can be enforced against the 5th Respondent who was not a party before the High Court. He further submitted that there was no evidence on record to show that JH Angaine & Co Limited was incorporated as a legal entity. We have considered this submission and it is appropriate to dispose of it at this stage. The suit property is registered in the name of the 5th Respondent and the name on the title reads JH Angaine & Sons Ltd. Under the court rules, a party who is likely to be affected by any court order or judgment is entitled to be heard. The record reveals that the 5th Respondent participated in the trial before the High Court and even filed a replying affidavit. We are satisfied that the submission by the 5th Respondent has no merit and fails.
18. Counsel for the 5th Respondent supported the judgment by the High Court in finding that the 550 Appellants did not have any locus to claim interest in the suit property. He submitted that there is no mention of Lucy Mirigo and 550 others in any correspondence pertaining to the excision of the Ontulili Forest; that there is no tangible evidence that the said Lucy Mirigo and 550 others were supposed to benefit from excision of the forest. Counsel further submitted that in the Misc Application No 218 of 2004, the number of applicants/squatters is given as 550 while in Misc App No



- 71 of 2004; the number of applicants/squatters is given as 138 people. He posed the question that in the two cases as consolidated in this appeal is the number of Appellants 550 plus 138 or what number”
19. In relation to the finding by the Judge that the Appellants had inordinately delayed for 50 years in bringing the suit, Counsel for the 5th Respondent submitted that the in the *Mureithi case* (supra) cited by the Appellants, the delay was for 40 years which was found to be inordinate. In the present case, learned counsel submitted that the gazette notices were published in 1975 and 1977 and as at 2011 when the case was heard before the learned Judge of the High Court there was inordinate delay.
 20. Counsel for the Respondent further submitted that the 4th and 5th Respondents were private persons and not public bodies. He submitted that the order of mandamus sought by the Appellants was not available and enforceable against private individuals. That the 4th and 5th Respondents do not owe the Appellants any statutory duty and as such, the remedy sought against them cannot issue. Counsel submitted that the 4th and 5th Respondents have no power to allocate any land to any person and consequently the alternative prayer to be compensated land of equivalent size and quality cannot issue against the 4th and 5th Respondents. In any event, counsel urged this court to find that an order for compensation cannot issue or be made in a judicial review application.
 21. Counsel for the 4th and 5th Respondents further submitted that the Notice of Motion that moved this Court did not disclose the provisions of law upon which it is founded. That the Appellants have not cited any Act of Parliament that has been violated nor do they cite any land related legislation that gives them the right to claim any interest in the suit property. No specific statutory provision which is alleged to have been breached has been cited.
 22. Learned State Counsel, Ms Teresia Gathagu for the 1st, 2nd and 3rd Respondents in opposing the appeal submitted that the Appellants should have filed an ordinary suit by way of plaint seeking compensation for loss, if any, that they can prove to have suffered. While associating with the submissions of the 4th and 5th Respondents, Counsel observed that the Appellants are seeking an order of mandamus but have not demonstrated that any specific legal right to land had been violated. Counsel submitted that the 550 persons making the appeal are not known as some of the names on the list attached to the supporting affidavit have been canceled while others have no signatures. Referring to the Appellant’s reference of the letter dated 18th May 1977 from the Chief Conservator of Forests, Counsel submitted that the letter does not indicate the names of the alleged squatters. It was further submitted that there has been inordinate delay in bringing the suit which is caught up not only with limitation period for judicial review orders but any other suit for recovery of land. Counsel urged this court to note that the suit property had changed hands and the remedy, if any, for the Appellants is to institute an ordinary civil action and not judicial review. Counsels submitted that the legal authorities cited by the Appellants were distinguishable and in support the Respondents’ case.
 23. As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. It was put more appropriately in *Selle v Associated Motor Boat Co* [1968] EA 123, thus:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must 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 this respect. In particular this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence



or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v Ali Mohamed Sholan* (1955), 22 EACA 270).”

24. This Court further stated in *Jabane v Olenja*, [1986] KLR 661, 664 thus:

“More recently, however, this Court has held that it will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did - see in particular *Ephantus Mwangi v Duncan Mwangi Wambugu* (1982-88) 1 KAR 278 and *Mwanasokoni v Kenya Bus Services* (1982-88) 1 KAR 870.”

25. In evaluating the evidence on record, this Court is mandated not to give undue regard to technicalities through the overriding objectives as enshrined in Sections 3A and 3B of the *Appellate Jurisdiction Act* and as stated in *Douglas Mbugua Mungai v Harrison Munyi* Civil Application No Nai 167 of 2010

“We are as a matter of statute law required to take a broad view of justice and take into account all the necessary circumstances, factors, and principles and be satisfied at the end of the exercise that we have acted justly” As was stated in *Stephen Boro Gititha v Family Finance Building Society & 3 others* Civil Application No Nai 263 of 2009. “The overriding objective overshadows all technicalities, precedents, rules and actions .. and whatever is in conflict with it must give way.”

26. We have evaluated the evidence on record and analyzed the judgment of the High Court. It is our considered view that the following questions are pertinent to the determination of this Appeal. Do the Appellants have any interest in the suit property capable of being enforced? Is the letter dated 18th May 1977 from the Chief Conservator of Forest addressed to the Forester Ontulili capable of conveying or conferring an interest in land to the Appellants? Is a non-vested and promissory interest in land enforceable? Is a promise by the President to alienate or allocate land enforceable? The Appellants describe themselves as squatters, on which land are they squatters and what are the rights of squatters? Is the doctrine of rights in alieno solo applicable in this case? Can an order of mandamus be issued against the 4th and 5th Respondents who are private citizens and not public persons or body? Is any cause of action disclosed by the Appellants against the 4th and 5th Respondents? When does time for purposes of limitation begin to run in respect to an order for mandamus. Is the alternative prayer for compensation for equivalent land available in judicial review proceedings? Is tracing of land a remedy available under judicial review proceedings? What statutory duty has been breached by the 1st, 2nd and 3rd Respondents as against the Appellants? Have the Appellants disclosed any contingent, executory or future interest recognizable in law over the suit property?

27. The Appellants are seeking an order of mandamus against the 1st to 5th Respondents. The 4th and 5th Respondents are not public bodies but are private citizens. An order for mandamus compels a public body to exercise a duty bestowed upon it by law or to judiciously exercise a discretionary power. (See *Transouth Conveyors Ltd & another v Kenya Revenue Authority & 3219 others* (2008) KLR 216). In the present case, the 4th and 5th Respondents are not public bodies and it is our considered view that an order of mandamus cannot issue against them. In the case of *District Commissioner, Kiambu v R and others ex parte Ethan Njau*, 1960 EA 109, it was held that an order of mandamus could not be issued against a person if it would not be within his power to comply with it. To this extent, the order sought by the Appellant for mandamus against the 4th and 5th Respondents must of necessity fail as they are incapable of complying with it and they are not a public entity.



28. The 1st, 2nd and 3rd Respondents are a public body. Mandamus can issue against a public body to perform a specific act where statute imposes a clear and qualified duty to do that act. (See *Manyasi v Gicheru & 3 others*, (2009) KLR 687). In the case of *R v Barnet London Borough Council ex parte Shab* (1983) 2 AC 309, it was held that if an individual is challenging a decision that he has no entitlement, the appropriate remedy will be a quashing order to quash the decision and not an order compelling the authority to provide the benefit sought. We have analyzed the evidence on record and the submissions by counsel for the Appellant. The Appellant has not demonstrated or pointed out any specific statutory obligation that is vested upon the 1st, 2nd and 3rd Respondents that has been violated. Mandamus compels performance of a statutory public duty. The evidence does not disclose any statutory public duty owed to the Appellants by the 1st, 2nd and 3rd Respondents. No constitutional or statutory provision has been cited that impose an obligation to be exercised in favour of the Appellants. The failure by the Appellants to point at any statutory duty on the part of the Respondents is fatal and an order of mandamus cannot issue in the absence of a specific statutory obligation that can be enforced.
29. The suit property that the Appellants claim was excised from Mt Kenya Forest vide Legal Notice No 68/75 and 107/77. The land was surveyed and given Land Reference Nos 13269 and 12234 respectively. These two parcels of land were registered in the name of the 5th Respondent who transferred the same to the 4th Respondent. The evidence on record shows that the Appellants never took physical possession of the land. They have never occupied the land. The failure to take possession and occupy the land means that the Appellants are not squatters on this land. We find that it is misleading for the Appellants to create an impression that they are squatters on the suit property. The defacto position is that the Appellants are not squatters on the disputed parcels of land. The legal issue is what right does a third party (Appellants) have over land belonging to another (4th & 5th Respondents) when the said third party has never occupied that other's" The doctrine of rights in alieno solo recognizes various categories of rights or interests that a third party may have over the land of another. These are easements, licenses, profits, restrictive covenants, overriding interests and mortgages. These are interests conferring rights enforceable against the land of another. The evidence on record shows that the Appellants do not have any easement, licenses, profit, restrictive covenants, overriding interests or mortgage over the suit property which is registered in the names of the 4th & 5th Respondents. The Appellants also do not have any registerable interest or beneficial trusteeship in the suit property. To this end, we are satisfied that the doctrine of rights alieno solo is inapplicable to this case and the Appellants have no enforceable third party rights over the suit property.
30. The Appellants allege that the late President Jomo Kenyatta promised to allocate them land from the excised forest. This was a promise to allocate land in the future. Can a promise to allocate land create any interest in land and is such a promise enforceable" The Appellants in the prayer for mandamus are seeking a court order to enforce a promise. Can mandamus issue to enforce a promise" It is our considered view that mandamus cannot issue to enforce a promise to do something in future; neither can mandamus issue to enforce a promise not underpinned by a statutory provision. A promise can neither create nor convey an interest in land.
31. The *Law of Contract Act* clearly stipulates the requirements for a valid instrument to convey an interest in land. Section 3(3) of the *Law of Contract Act* (cap 23 of the Laws of Kenya) stipulates that no suit shall be brought upon a contract for the disposition of an interest in land unless some memorandum or note thereof is in writing and signed by the party to be charged. (See *Morgan v Stubenitisky* 1977 KLR 188; *Wagichiengo v Gerald* (1988) KLR 406). In the present case, all that is on record is an averment by the Appellants that the late President Kenya promised to allocate them land. There is no privity of contract and no privity of estate between the Appellants and all the Respondents in relation to the suit



property. A squatter has no privity of estate that runs with the land (See *Tichborne v Weir* (1892) 67 LT 735). There is no government instrument such as a letter of allotment that expresses the intention to allot any land to the Appellants. We are of the considered view that in the absence of privity of contract between the Appellant and all the Respondents and the absence of a letter of allotment from the government to the Appellants in relation to the suit property, and the absence of part performance by way of possession or occupation of the suit property by the Appellants, the averred promise to give land by the late President is unenforceable by way of mandamus. It is trite law that a promise to enter into a contract is not enforceable; in other words a contract to enter into a contract is not enforceable.

32. A further issue for our consideration is whether the Appellants have a vested interest in the suit property. John Chipman Gray, stated “No interest is good unless it must vest, if at all, not later than twenty one years after some life in being at the creation of the interest” (See *Re Stern* (1962) Ch 732). To comply with this rule, the interest created must be of such a nature that if it does vest, it must do so within 21 years. This rule is concerned with contingent interests and such an interest may never vest at all. In the present case, when the legal gazette notices were issued and land excised from the forest, the parcels of land that were created were vested in the 4th Respondent and not upon the Appellants. The promise by the late President to allot land to the Appellants was a future or contingent promise which did not vest any interest in the suit property to the Appellants. It is our considered view that if the government had the intention to allot or allocate any land to the Appellants, such intention was to create a future interest in land that has never vested upon the Appellants. It is trite law that a future interest in land is void if it does not vest within the stipulated time frame.
33. The next issue for our consideration relates to limitation period. There are two aspects of the Limitation Period that we have to consider. The first is limitation period for instituting judicial review proceedings under order 53 of the *Civil Procedure Act* and the second is the limitation period for recovery of land under the *Limitation of Actions Act* (cap 22 of the Laws of Kenya).
34. Under Section 9 as read with section 7 of the *Limitation of Actions Act*, a suit for recovery of land has a limitation period of twelve years. In the instant case, the Appellants seek an order for mandamus which ipso jure is an application for an order to recover the land parcels excised from Mt Kenya Forest through Legal Notice No 68 of 1975 and Legal Notice No 107 of 1977 being Land Reference Nos 13269 and 12234 respectively. The evidence shows that the land parcels were excised in 1975 and 1977 and the grant of title to the 4th Respondent was made in 1995. Whatever the year from which computation is done, the twelve year period under the *Limitation of Actions Act* is a factor to be considered. The Judge did not consider the limitation period under the *Limitation of Actions Act* and we decline to address the issue beyond this point.
35. We now consider the limitation period for initiating action on judicial review. The Appellants are seeking a judicial review order for mandamus. The learned judge on the issue of limitation expressed herself as follows:

“ This claim is made more than 50 years after the land was allocated to a company associated with JH Angaine.... In considering the period of time it has taken the applicants to come before the Court, I am persuaded by the cases relied upon by the advocate representing the company Homegrown (K) Limited. This is the case of *Mureithi & 2 others v Attorney General & 4 others* (KLR) (E&L) 1 at page 707 where the Court held “judicial review matters have to be filed promptly and heard with the expedition and a delay of 40 years was hopelessly outside any reasonable limit for mandamus and prohibition”. I echo those words in respect of this case. There has been inordinate delay in bringing this action. The land has also changed hands. ”



36. During the hearing of this Appeal, learned counsel for the Appellant submitted that the Judge erred in finding that the Appellant's claim had been caught up by limitation. It was submitted that the 50 years that the Judge referred to is not supported by evidence on record. Counsel for the Respondent in support of the findings by the Judge submitted that if in the *Mureithi & 2 others v Attorney General & 4 others* (KLR) (E & L) 1 40 years was deemed to be a hopelessly inordinate delay, then 50 years is a much more hopeless inordinate delay for an order of mandamus.
37. On our part, we have examined the provisions of order 53 of the *Civil Procedure Act* which is the juridical basis for an application for mandamus. Rule 2 of order 53 provides a six month limitation period for an order of Certiorari. There is no limitation period to institute an action for mandamus. Limitation for purposes of mandamus is to be determined by the reasonableness and length of time between the cause of action and time for filing suit. From the facts of the present appeal, it is arguable when the cause of action alleged by the Appellants did arise for purposes of computation of time. Did the cause of action arise in 1970 when the late President Kenyatta made the promise, or did it arise in 1975 and 1977 when the legal gazette notices were issued, or did it arise in 1995 when a grant of title was made to the 4th Respondent? Whatever the time when the cause of action arose, we have stated that an order for mandamus is not an appropriate remedy to issue under the new constitutional dispensation. We have also found that the Appellants have no registered, possessory or future enforceable interest in relation to the suit property. The Appellants have also not pointed out any statutory obligation owed to them that has been breached. Consequently, we decline to pronounce ourselves on the issue of limitation period for purposes of an order for mandamus. It suffices to state that the learned judge erred in arriving at 50 years without indicating the event or facts from which the 50 years was computed.
38. The Appellants' further contention is that the Respondents are under a constitutional obligation to provide them land. The Appellants cited article 28 which stipulates that every person has inherent dignity and the right to have that dignity respected and protected. It is our considered view that the purpose of article 28 of the *Constitution* is not to impose a constitutional duty on the Government to allocate land to any squatter or person. Likewise, the provisions on social justice, equality, equity and prevention of inhuman, cruel and degrading treatment are not meant to be used to demand land allocation from the government. The Appellants also referred to article 40(B) of the *Constitution* wherein the protection of private property does not extend to any property that has been acquired unlawfully. It is our considered view that the issue before the High Court and before this Court is not whether the suit property was acquired unlawfully by the 4th and 5th Respondents but whether an order for mandamus can issue in favour of the Appellants based on the facts disclosed in the case. In any event, under article 67(1)(e) of the *Constitution*, it is the mandate of the National Land Commission to investigate issues of historical land injustices and to recommend appropriate redress.
39. An issue for our consideration is what is the legal effect of the promise made by the late President Kenyatta to the Appellants noting that a visit by the then Minister for Lands & Settlement thereafter ensued and subsequently excision of forest land was made.
- Is there any principle of law that can give legal effect to the promise and excision of forest that ensued? The 1st, 2nd and 3rd Respondents are part of the government; are they bound by the promise and ensuing excision to allocate land to the Appellants or provide them with an alternative land in size and quality? Is the doctrine of estoppel applicable against the 1st, 2nd and 3rd Respondent's to the effect that they cannot refuse or renege from the promise by the late President to allot land to the Appellants? Can the concept of legitimate expectation be used to confer an interest in land? Can mandamus issue to enforce legitimate expectations? Neither the Appellants nor the Respondents addressed the High Court or this Court on these issues and we offer no determination on the same. The Appellant asked for an alternative remedy namely a claim to be compensated with land of equivalent size and quality. In the



case of *R v Lancashire County Council ex parte Gayer* (1980) 1 WLR 1024 it was stated that courts should be acutely conscious that they do not usurp the role of the administrator by assuming the task of deciding how resources are to be allocated as between competing claims. We adopt the above dicta in *R v Lancashire County Council ex parte Gayer* (supra) and observe that it is not the duty of the courts to allocate land and decide how national resources are to be allocated between competing claims. The Appellants by seeking an order for mandamus are in fact asserting a claim to ownership or interest in the suit property. The judicial remedy of mandamus was neither created nor established to settle ownership disputes nor to create nor confer title to land.

40. The final issue for our consideration is the case of The *Commissioner of Lands v Kunste Hotel Limited* (Nai Civil Appeal No 234 of 1995). The pertinent facts of this case are that in 1976, upon application by one Stephen Kungu Kagiri, a majority shareholder in Kunste Hotel Ltd, the Hotel was allotted an unsurveyed plot of land known as Nakuru Municipality Plot No 451, which plot was later renumbered as Block 16/3 by the Appellant. The said Stephen Kungu Kagiri had indicated in his application for a plot that if allotted one he intended to put up a tourist hotel thereon. The plot which had been allocated to him abutted the Nakuru-Solai road but not the Nakuru-Nairobi Highway road although the road was nearby. The subject plot was between his plot and that highway. After viewing the general area, Mr Kagiri thought that it would be desirable that his intended hotel should be clearly visible from the Nakuru-Nairobi highway.

To obviate the plot between his and the highway being allotted to somebody else and fearing that whoever would be allocated the same would develop it so as to obstruct the view of the hotel from the highway, he addressed a letter to the Appellant dated 26th August 1976, which in pertinent part read as follows:

I would like to request you that site "C" be left a road reserve and not for any future alienation or if that is not possible then "A", "B" and "C" be amalgamated into one plot and if it is felt very necessary the hotel boundary may leave out "B" so that, the hotel covers "A" and "C" only.

A revised letter of allotment was issued by the Appellant to Mr Kagiri which showed an enhanced acreage of the plot allotted. Mr Kagiri built the hotel and the plot between the hotel and the Nakuru-Nairobi Highway remained unalienated until 3rd May 1993 when the Appellant allotted the plot to the interested party. Kunste Hotel moved to the High Court seeking an order of Certiorari to quash the allotment to the interested party. The gist of Kunste's complaint was that the Appellant decided to allot the subject plot to the interested party without giving it a hearing and in flagrant disregard of an earlier assurance that the plot would be a road reserve. This Court in confirming an order for Certiorari quashing the decision of the Appellant to allot the plot to the interested party held that the Commissioner of Lands was under duty to give a hearing to Kunste Hotel.

41. We have considered the facts and reasoning in The *Commissioner of Lands v Kunste Hotel Limited* (supra). It is our considered view that the present appeal is distinguishable from the Kunste Hotel case. First, Kunste Hotel had sought an order for certiorari and not mandamus. Second, the issue in the Kunste Hotel case related to a right to be heard and not whether Kunste Hotel had a proprietary interest in the disputed plot; third, there was no issue of limitation or inordinate delay. In the present appeal, the order sought is for mandamus, there is no letter of allotment in favour of the Appellants and the Appellants are claiming a proprietary interest in the suit property and not a right to be heard; then there is the issue of inordinate delay.
42. The overall re-evaluation of the facts of this case leads us to examine the extent to which mandamus can issue against a public officer. Lord Goddard CJ in *R v Dunsbeath, ex parte Meredith* (1950) 2



All ER 741, 743 stated that mandamus is neither a writ of course nor a writ of right. *In Re Bristol and North Somerset Railway Co* (1877) 3 QBD 10, 13, the court refused to enforce by mandamus an order imposed on a virtually defunct company, a duty that was impossible for the company to discharge. Besides in the instant case, the 2010 Constitution in Chapter 5 has come into force with new values and provisions relating to land. Article 61 classifies all land in Kenya into public, private or community land. Article 76 establishes the National Land Commission with distinct functions. The 1st to 3rd Respondents no longer have the discretion to allocate land to individuals under the new Constitution and this Court should consider whether an order for mandamus is an appropriate remedy in this present case in view of the new constitutional dispensation. It is trite law that if circumstances have rendered performance of something impossible, mandamus will not issue.

43. In the case of *Republic v Director-General of East African Railways Corporation ex parte Kaggwa*, 1977 KLR 194, it was correctly stated that an order for mandamus did not lie as a matter of course against a public officer and the court's discretion would be exercised before such an order can issue and if the exercise of discretion to grant mandamus would constitute judicial interference with the executive arm of government, the same cannot issue. It is our considered view that in the present case, an order for mandamus if granted would be contrary to the spirit of Chapter Five of the Constitution relating to management of land as a resource in this country and will also interfere with the executive arm of government in resource allocation. In the case of *Shah v Attorney General (No 3)* (1970) EA 543, 549, it was stated:

“Mandamus does not lie against a public officer as a matter of course. The Courts are reluctant to direct a writ of mandamus against executive officers of a government unless some specific act or thing which the law requires to be done has been omitted. Courts will proceed with extreme caution for the granting of the writ which would result in interference by the judicial department with the management of the executive department of government.”

44. From the analysis conducted here above, we are of the considered view that for reasons entirely different from the Honourable Judge, the Judge did not err in refusing to grant the order of mandamus. The totality of our re-evaluation of the evidence on record and application of law to the facts of the case while taking into account submissions by all learned counsel leads us to the conclusion that this Appeal has no merit and is hereby dismissed with costs. For avoidance of doubt, we hereby state that this Judgment in Appeal applies to the two consolidated Miscellaneous Civil Applications being Meru HCC Misc App No 71 of 2003 and Meru HCC Misc App No 218 of 2004.

DATED AND DELIVERED AT NYERI THIS 22ND DAY OF JANUARY, 2014

MARTHA KOOME

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JUDGE OF APPEAL

P. MWILU

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL



I certify that this is a true copy of the original.

DEPUTY REGISTRAR

