



**Mtana v Munga & 8 others (Environment & Land Petition  
13 of 2021) [2023] KEELC 278 (KLR) (25 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 278 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MALINDI**  
**ENVIRONMENT & LAND PETITION 13 OF 2021**  
**MAO ODENY, J**  
**JANUARY 25, 2023**  
**IN THE MATTER OF: ARTICLE 22 (1) OF THE CONSTITUTION OF KENYA**  
**AND**  
**CONTRAVENTION OF: FUNDAMENTAL RIGHTS AND FREEDOM PURSUANT**  
**TO ARTICLE 28, 40, 43, 47, 64 OF THE CONSTITUTION OF KENYA, 2010**  
**AND**  
**SECTIONS 43 & 44 OF THE LAND ACT, 2012, LAWS OF KENYA**  
**AND**  
**SECTIONS 24, 25, 26, 29, 30, 34, 37, 42, 76, 77 &**  
**78 OF THE LAND REGISTRATION ACT, 2012**  
**THE CONSTITUTION OF: KENYA (PROTECTION OF RIGHTS**  
**AND FUNDAMENTAL FREEDOMS AND ENFORCEMENT OF THE**  
**CONSTITUTION) PRACTICE AND PROCEDURE RULES, 2012**  
**BETWEEN**  
**JOHNSON ROBERT MTANA ..... PETITIONER**  
**AND**  
**KATANA MWAMUNDA MUNGA ..... 1<sup>ST</sup> RESPONDENT**  
**MATHIAS HAMISI MWAMUNDA ..... 2<sup>ND</sup> RESPONDENT**  
**CHARO MWAMUNDA MUNGA ..... 3<sup>RD</sup> RESPONDENT**  
**JACKSON KASIWA MWAMUNDA ..... 4<sup>TH</sup> RESPONDENT**  
**MWAMUNDA CULTURAL CENTRE ..... 5<sup>TH</sup> RESPONDENT**  
**MWAMUNDA C. B. O ..... 6<sup>TH</sup> RESPONDENT**



THE NATIONAL LAND COMMISSION ..... 7<sup>TH</sup> RESPONDENT

THE LAND REGISTRAR, KILIFI DISTRICT LAND REGISTRY .... 8<sup>TH</sup>  
RESPONDENT

THE HONOURABLE ATTORNEY GENERAL ..... 9<sup>TH</sup> RESPONDENT

## JUDGMENT

1. By a petition dated June 21, 2021, the petitioner/applicant sought the following orders; -
  - a. A declaration do issue that the petitioner is the legal and rightful registered owner of the original suit property which was known as Chembe/ Kibabamshe/152 measuring approximately 34.5 Ha situate in Kilifi;
  - b. A declaration do issue that the petitioner's fundamental rights and freedoms as enshrined under articles 40 (1), 40 (2) (a), 40 (3) (b) (1), 47 (1) and 47 (2) of the *Constitution of Kenya 2010* have been contravened and infringed upon by the 1<sup>st</sup> to 8<sup>th</sup> Respondent herein jointly and/or severally.
  - c. A declaration that the action by the 7<sup>th</sup> and 8<sup>th</sup> respondents in cancelling the petitioner's title known as Chembe/ Kibabamshe/ 152 was illegal and the same cannot stand.
  - d. A declaration that any title(s) issued by the 8<sup>th</sup> respondent to the 1<sup>st</sup> to 6<sup>th</sup> respondents over the petitioner's parcel of land originally known as Chembe/ Kibabamshe/ 152 are invalid titles, null and void ab initio and the same be ordered cancelled.
  - e. A permanent injunction do issue restraining all the respondents herein whether by themselves, their agents and servants and/or whomsoever is acting upon their instructions or on their behalf from entering upon or remaining thereon, selling, allocating or alienating, constructing thereon any structure be it permanent or temporary, or in any way denying the petitioner access to it or in any way whatsoever interfering with the petitioner's quiet, peaceful and actual possession, enjoyment and ownership of the suit property originally known as Chembe/ Kibabamshe 152 measuring approximately 34.5 Ha.
  - f. This honourable court do issue an order for payment of damages against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> respondents jointly and/ or severally in the form of both exemplary and punitive for violating the petitioner's rights.
  - g. This honourable court do issue an order of eviction from the suit premises against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents.
  - h. This honourable court be pleased to order that the officer commanding police division malindi, the officer commanding police station malindi or their officers acting under their instructions do supervise implementation of this court's orders to ensure compliance and maintenance of peace.
  - i. That costs of this suit be provided for.
  - j. Any other order or relief that this honourable court is pleased to issue in the circumstances.



## Petitioner's Case

2. The petition was supported by the affidavit of Johnson Robert Mtana who deponed that he was the registered owner of the parcel of land known as Chembe/ Kibabamshe/ 152 measuring approximately 34.5 Ha, Registry Sheet No 13 at the Kilifi District Land Registry registered on the July 5, 1990. He stated that on February 8, 1962 he applied to the Chairman, Gede Chembe Kibabamshe – Gede settlement scheme for allocation of a parcel of land in the said area and on February 20, 1962, the chairman allocated him the parcel of land.
3. He further stated that by a letter of August 5, 1976, the land adjudication department, Kilifi district invited him to appear before the recording officer gede land office adjudication section on the August 11, 1976 for purposes of registration of the land. That in the year 1990 different portions were allocated to people and handed title deeds upon completion of payment of all the requisite fees.
4. It was the petitioner's case that in the year 2017, the National Land Commission held a meeting to inquire into disputes with regard to Chembe/ Kibabamshe parcels of land during which meeting the National Land Commission gave a determination vide Gazette Notice Number 6862 where it stated in its determination that "the land (34Ha) be repossessed from Johnson Kalama and reallocated to the community where there are a shrine (3 acres) a school (10acres) and a portion given to Mwamunda family (21 acres); Johnson Mtana owns parcel No 18".
5. He contends that the 8<sup>th</sup> respondent has to date declined to supply him with the proceedings, findings and reasons for the outcome of the hearing dispossessing him of his entire land and handing it over to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents and that the land registrar, *suo moto* alienated his whole parcel of land Chembe Kibabamshe/ 152 and distributed it to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents. According to him, the action of the 8<sup>th</sup> respondent in purporting to enforce the 7<sup>th</sup> respondent's findings was perpetuating an illegality. He also contended that the 8<sup>th</sup> respondent had no power to cancel his title deed which had been regularly issued to him without obtaining an order of this honourable court.

## 1<sup>st</sup> to 6<sup>th</sup> and 8<sup>th</sup> respondents'cases

6. The 1<sup>st</sup> to 6<sup>th</sup> respondents filed a replying affidavit to the petition sworn by the 4<sup>th</sup> respondent Jackson Kasiwa Mwamunda who deponed that they were born and raised on the suit property together with his brothers and that they got aware that the property had been registered in the names of the petitioner during the historical injustices hearing of parcels of land in Chembe/ Kibabamshe area of Kilifi County.
7. That after the hearings by the National Land Commission, the Commission made its findings via gazette dated July 17, 2017 where the Commission directed that the land be repossessed to the community where there is a shrine, a school and a portion given to the Mwamunda family.
8. He further deponed that the Commission also clarified that Parcel No Chembe/ Kibabamshe/18 is the one that is owned by the petitioner and that the 8<sup>th</sup> respondent issued a title in favour of the 1<sup>st</sup>-6<sup>th</sup> respondents in complying with the recommendations of the National Land Commission.
9. The 8<sup>th</sup> respondent in response filed a replying affidavit sworn by Juma Boaz Oketch sworn on February 22, 2022 where he deponed that the parcel Number Chembe/ Kibabamshe/ 152 which is the subject of this petition was first registered to Johnson Robert Mtana in the year 1978 and that he was duly issued with a title deed in the year 1990.
10. That the National Land Commission after conducting hearings made the determination that the petitioner had been wrongly registered as he did not stay on the land and that they further



recommended that the parcel be registered to the name of the community and Katana Mwamunda Munga and his family who stayed on the parcel of land.

11. He further deponed that the Chief Land Registration Office implemented the decision of the Commission on February 12, 2020 and issued a title deed in the names of Mwamunda Cultural Center, Mwamunda CBO, Katana Mwamunda Munga and Jackson Kasiwa Mwamunda.

#### **Petitioners' Submissions.**

12. Counsel for the petitioner submitted that the respondents have violated the petitioner's right to property as provided for under article 40 of the *Constitution* and further stated that at no time did the 7<sup>th</sup> respondent indicate to the petitioner that it was acquiring the petitioner's private property through compulsory acquisition.
13. Counsel further submitted that the 7<sup>th</sup> respondent dispossessed the petitioner of his private property without any compensation in total contravention of the *Land Act* and urged the court to find that the action amounted to an illegality.
14. Mr Kaingu submitted that 8<sup>th</sup> respondent by a letter to the petitioner dated April 26, 2019; which never reached the petitioner purported to carry out the recommendations of the National Land Commission and demanded of the petitioner to surrender the title failure to which it would be cancelled was an illegality.
15. Counsel submitted that whereas the National Land Commission recommended that the land be reallocated to the 1<sup>st</sup> to 6<sup>th</sup> respondents as follows; the community where there is a shrine (3 acres), a school (10 acres), a portion given Mwamunda family (21 acres), the 8<sup>th</sup> respondent instead reallocated the petitioner's land as follows; Mwamunda cultural centre (3 Ha), Mwamunda CBO (10 Ha), Katana Mwamunda Munga, Mathias Hamisi Mwamunda, Charo Mwamunda Munga, Jackson Kasiwa Mwamunda (21 Ha) and stated that this was a clear manifestation of bad faith on the part of the 7<sup>th</sup> and 8<sup>th</sup> respondents.
16. Counsel relied on the case of *Registered Trustee of Arya Pratinidhi Sabha, Eastern Africa v National Land Commission & another* [2016] eKLR and submitted that the 7<sup>th</sup> respondent acted ultra vires its mandate when it irregularly repossessed the petitioner's private property which title the petitioner never acquired by fraud and urged the court to grant the prayers in the petition as sought.

#### **8<sup>th</sup> & 9<sup>th</sup> Respondents' Submissions**

17. Counsel submitted that the allegation of ultra vires on the part of the National Land Commission is an issue that ought to have been brought through Judicial Review proceedings and not through a petition.
18. Counsel further cited the provisions of section 5 (1) of the *National Land Commission Act* which gives the 7<sup>th</sup> respondent the powers to initiate investigations on its own initiative or on a complaint, into present or historical land injustices and recommend appropriate redress and submitted that the petitioner who was a surveyor at the time used his position to allocate himself the 1<sup>st</sup> -6<sup>th</sup> respondent's land.
19. It was counsel's further submission that the 7<sup>th</sup> respondent in accordance with section 15 (9)(g) ordered that the suit land be repossessed and reallocated to the community where the 1<sup>st</sup> -6<sup>th</sup> respondents have been staying.
20. Mr Ojwang submitted that the decision of the 7<sup>th</sup> respondent was communicated to the 8<sup>th</sup> respondent who acted upon it and by a letter dated March 5, 2019 the 8<sup>th</sup> respondent was asked to implement the



recommendations of the 7<sup>th</sup> respondent and relied on section 26 (1) (b) of the *Land Registration Act* which provides that a certificate of title can be revoked where the certificate has been acquired illegally, unprocedurally or through a corrupt scheme.

21. It was counsel's further submission that the 8<sup>th</sup> respondent issued a letter to the petitioner through the area chief requesting for surrender of title whereby the area chief replied through a letter dated February 7, 2020 indicating that the letter above had been served upon the petitioner.
22. Mr. Ojwang submitted that even though the petitioner deny having received a letter on the same, he has however attached the letter at page 65 of his bundle confirming that indeed he received the letter.

### **Analysis And Determination.**

23. The issues for determination in this petition are: -
  - a. Whether the court has jurisdiction to hear and determine this petition.
  - b. Whether the National Land Commission had the mandate to hear complaints of historical injustices under the act.
  - c. Whether the orders sought in the petition are merited.
24. The petitioner in the present case is aggrieved by the decision of the National Land Commission vide gazette notice number 6862 which decision he contends is illegal and a violation of his constitutional rights. It is trite that where the law provides for procedure to be followed, the parties are bound to follow the procedure provided by the law before the parties can resort to a court of law as the court would have no jurisdiction to entertain the dispute.
25. It is on record that the petitioner participated in proceedings before the 7<sup>th</sup> respondent where he participated to air his grievances. A decision was reached and duly gazetted as per the law governing the 7<sup>th</sup> respondent's operations. Rule 29 of the *National Land Commission (Historical Land Injustices) Rules, 2016* provides that a party aggrieved by a decision of the National Land Commission ought to appeal against the decision within 28 days.
26. It is further on record that the petitioner did not pursue an appeal as laid down within the rules but instead instituted the present petition citing violation of his constitutional rights.
27. In the Court of Appeal case of *Almer Farm Limited v National Land Commission & 2 others* [2021] eKLR the court held as follows: -

“We have at the beginning of this ruling summarized the facts that were before the ELC at Kitale. The Judge found, rightly, we think, that the applicant had submitted to the jurisdiction of the 1st respondent. Proceedings were conducted and a decision reached which was duly gazetted pursuant to the laws creating the 1<sup>st</sup> respondent. The applicant, if dissatisfied with the said decision was required to follow the procedure laid out in the said law if it desired to file an appeal. There is considerable authority for the statement that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an act of parliament, that procedure should be strictly followed – speaker of the National Assembly v James Njenga Karume [1992] eKLR.

The applicant who was aggrieved was required to file an appeal within the timeline prescribed in law. It did not do so but instead, contrary to procedure, it applied for



judicial review. That was not the procedure prescribed by the National Land Commission (Investigation of Historical Injustices) Regulations.

28. I notice that when the petitioner filed this case together with a notice of motion dated June 21, 2021 seeking for injunction against the respondents where the court observed that; -

“I note that the 1st to 6th respondents had laid a claim to the land more than 3 years ago and that the 7th respondent did make a determination in their favour way back in 2017. I am therefore not satisfied that there is any urgency in the application. The same to be fixed for hearing in the usual manner.”

29. Why did it take the petitioner 3 years to notice that his rights had been violated yet he participated in the proceedings that gave rise to the recommendations by the National Land Commission? He should have filed an appeal within 28 days as prescribed by the law and rules.

30. In the case of *Republic v National Land Commission; Katana Karisa Saro & another (Interested Parties) Ex Parte; John Kamande Mwaniki* [2022] eKLR, the court made a similar find that it does not have jurisdiction to hear and determine a matter where laid down procedures are in place for redress. The court stated that:

“The applicant is aggrieved by the decision of NLC gazetted on July 17, 2017 revoking his title. This challenge comes after the applicant participated in proceedings before the respondent ably represented by counsel. A decision was reached and duly gazetted as per the law governing the 1<sup>st</sup> respondent’s operations. Rule 29 of the National Land Commission (Historical Land Injustices) Rules, 2016 provides that a party aggrieved by a decision of the NLC ought to appeal against the decision in 28 days. The applicant did not pursue this very clearly provided procedure but instead instituted these judicial review proceedings. His application is thus contrary to the law and it is an invite to this court to assume a jurisdiction that it does not have.”

31. I have considered the petition, the responses and submissions by counsel and find that the petitioner did not follow the laid down procedures for appeal which is provided for hence this court does not have jurisdiction to hear and determine this petition. The same is therefore dismissed with costs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 25<sup>TH</sup> DAY OF JANUARY, 2023.**

**M.A. ODENY**

**JUDGE**

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

MALINDI PETITION No 13 OF 2021 JUDGMENT Page 7

