



REPUBLIC OF KENYA



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**Mwangome & another v Vipingo Development Limited also known
as Vipingo Development PLC & 6 others (Constitutional Petition
015 of 2020) [2023] KEELC 257 (KLR) (25 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 257 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

CONSTITUTIONAL PETITION 015 OF 2020

MAO ODENY, J

JANUARY 25, 2023

**IN THE MATTER OF: THE ALLOCATION OF THE PARCEL OF LAND KNOWN AS
CR. 75265 BEING LAND REFERENCE NO. KILIFI 24881 (ORIGINAL NO. 5025/97
AND 7334/5) MEASURING ABOUT 1,583 HECTARES AND IN THE MATTER OF:
CHAPTER FOUR OF THE CONSTITUTION OF KENYA AND IN THE MATTER OF:
ARTICLES 2(5), 10, 28, 40, 63 OF THE CONSTITUTION OF KENYA AND IN THE
MATTER OF: ARTICLE 17 OF THE UNIVERSAL DECLARATION OF HUMAN
RIGHTS ON THE RIGHT TO PROPERTY AND IN THE MATTER OF: ARTICLE
14 OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS AND IN
THE MATTER OF: DOCTRINE OF ANCESTRAL DOMAIN AND/OR INTER-
GENERATIONAL TRUST AND A PETITION CHALLENGING INFRINGEMENT OF THE
PETITIONERS' CONSTITUTIONAL RIGHTS BY THE 1ST RESPONDENT THROUGH
THE CREATION OF A FRAUDULENT CERTIFICATE OF TITLE FOR PURPOSES
OF DISENTITLING THE PETITIONERS TOGETHER WITH THEIR FAMILIES THE
PROPERTY KNOWN AS CR. 75265 BEING LAND REFERENCE NO. KILIFI 24881
(ORIGINAL NO. 5025/97 AND 7334/5) MEASURING ABOUT 1,583 HECTARES BETWEEN**

BETWEEN

WYCLIFFE TEMBO MWANGOME 1ST PETITIONER

BAMBANI COMMUNITY BASED ORGANISATION 2ND PETITIONER

AND

**VIPINGO DEVELOPMENT LIMITED ALSO KNOWN AS VIPINGO
DEVELOPMENT PLC 1ST RESPONDENT**

VIPINGO ENERGY LIMITED 2ND RESPONDENT

THE HON. ATTORNEY GENERAL 3RD RESPONDENT

NATIONAL LAND COMMISSION 4TH RESPONDENT



COUNTY GOVERNMENT OF KILIFI 5TH RESPONDENT
THE CHIEF LAND REGISTRAR 6TH RESPONDENT
OFFICER COMMANDING STATION, KIJIPWA POLICE STATION 7TH
RESPONDENT

JUDGMENT

1. By a Petition dated 16th December, 2020 and filed on 17th December, 2020, the Petitioners sought the following remedies; -
 - a. A declaration that the Petitioners are the registered owners of the property known as land reference No. Kilifi 24881(Original No. 5025/97 and 7334/5) measuring about 1,583 Hectares.
 - b. A declaration that the Petitioners' right to dignity as set out under Article 28 of the *Constitution* has been violated by the Respondents.
 - c. A declaration that the certificate of lease purportedly issued to the 1st Respondent and the subsequent lease to the 2nd Respondent of the property known as Plot No. 5025/97 situated in Kilifi County are null and void.
 - d. A declaration that the 1st, 2nd and 7th Respondents have violated Articles 10, 28 and 40 of the *Constitution*.
 - e. A permanent injunction restraining the Respondents from interfering with the Petitioners quiet and peaceful occupation of the property known as land reference No. Kilifi 24881 (Original No. 5025/97 and 7334/5) measuring about 1,583 Hectares.
 - f. A conservatory order restraining the 7th Respondent from intimidating, harassing, arresting and/or in any other way interfering with the Petitioners and their members' rights over the suit property and/or with matters dealing with the suit property.
 - g. The costs of the Petition.
 - h. Any other orders the court may deem fit.

Petitioners'case

2. The Petition was supported by the affidavit of Wycliffe Tembo Mwangome sworn on 16th December, 2020 where he deponed that sometime in post-colonial period, the families of the Bambani and Kikandale communities occupied the parcel of land known as Plot No. CR. 75265 being land reference No. Kilifi 24881 (Original No. 5025/97 and 7334/5) measuring about 1,583 Hectares situated in Kilifi County.
3. PW1 further stated that the 2nd Petitioner is a community based organization registered to champion the community land rights and address the historical land injustices arising from the pre-colonial and colonial government land evictions of the locals who have been rendered squatters and landless.
4. PW1 deponed that after the colonial period, the suit land was acquired by the then colonial Government in Kenya and later subdivided and leased out to Rea Vipingo Plantations Limited for a period of 999 years. That Rea Vipingo was granted a lease for the parcels of land known as LR Nos.



- 5025/94, 5025/95, 7334/1, 7334/6, 8724/2 and 8724/4 whereby some portions were used for sisal farming.
5. It was the Petitioners' evidence that before the lapse of the lease, the Petitioners agitated for the suit property to revert back to them as they ought to have been given priority with the allocation of the property and according to the Petitioners, vide a Surrender Deed dated 20th September, 2001 Rea Vipingo Plantations Limited surrendered the parcels of land known as LR Nos. 5025/94, 5025/95, 7334/1, 7334/6, 8724/2 and 8724/4 back to the Government of Kenya.
 6. PW 1 stated that upon surrender of the suit property, the Government issued directives through the Municipal Council of Kilifi (now County Government of Kilifi); the Commissioner of Lands (the National Land Commission) to amalgamate LR No. 5025/97 with LR No. 7334/5 and a deed plan issued to that effect and the suit land was then allocated to the trustees of the clans and/or communities. LR No. 5025/97 was amalgamated with LR No. 7334/5 to form CR. 75265 being land reference No. Kilifi 24881 (Original No. 5025/97 and 7334/5) measuring about 1,583 Hectares.
 7. The Petitioners stated that vide a Surrender Deed dated 20th September, 2001 Rea Vipingo Plantations Limited surrendered the parcels of land known as LR Nos. 5025/94, 5025/95, 5025/97, 7334/5) 7334/1, 7334/6, 8724/2 and 8724/4 back to the Government of Kenya.
 8. PW 1 testified that the Petitioners were then issued with a letter of allotment dated 9th May, 2002 and later paid the stand premiums of Ksh 6,88022 /= which they stated that they paid late due to the colossal amount and further that they had frequently sought extension of time from the government in order to raise funds to pay the required stand premiums.
 9. PW1 further stated that on 24th June, 2020 they were issued with the lease document and further that on 27th July, 2020 the Petitioners were issued with a Certificate of Title for the suit property and were in the process of mobilizing funds to sub-divide the suit property to individual members of the said clan and/or family when on 9th December, 2020 PW1 was arrested by officers from Kijipwa Police Station for the alleged conspiracy to defraud the 1st Respondent the suit property but was later released on a police bond of Kshs. 30,000/= but to date has not been arraigned in court.
 10. PW1 made reference to a letter dated 21st October, 2020 and an official search issued on the same day where the 6th Respondent confirmed that the Petitioners were the registered proprietors of the suit property.
 11. PW1 also deponed that the Certificate of Title being held by the 1st Respondent and the subsequent lease to the 2nd Respondent is illegal since the suit property had been allotted to the Petitioners and that land Reference No. Kilifi 24881 (Original No. 5025/97 and 7334/5 was formed as a result of amalgamation of Plot No. 5025/97 and 7334/5.
 12. PW1 told the court that he was not aware that the 1st Respondent had a title deed and he only came to know when he filed the present Petition.
 13. On cross examination by Mr. Musangi for the 1st Respondent, PW1 informed the court that he had misplaced the application for allocation of LR No. 24881 measuring 1583 Hectares to the Ministry of Land and that a Mr Opiyo a Licensed Surveyor identified the specific parcels for them but did not produce any report or a survey map. That the said Mr. Opiyo relied on government survey and gave them a deed plan which was signed by P.A Zimerlin confirming that the deed plan is an amalgamation of 5025/97 and LR No. 7334/5.
 14. It was PW1's testimony that the two parcels were surrendered to create a new title and was referred to the deed of surrender dated 20th September 2001 at page 56 of the 2nd Respondent's bundle of



- documents where the titles were listed in the schedule as 5025/94, 5025/95, 7334/1, 8724/2 and 8724/4 and subdivision Nos. 1117/2,120/2 and 119/1. He was also referred to paragraph 10 and 11 of the supporting affidavit which he admitted to be correct.
15. PW1 also confirmed that in the deed of surrender LR No. 5025/97 and LR No. 7334/5 were not mentioned in the deed and further that he had not produced the deed of surrender for LR No. 5025/97 and 7334/5 because he did not have them. He also stated that he did not have evidence that Rea Vipingo surrendered these titles for reallocation. He further said that Zimerlin Surveyors were acting on behalf of the government and he did not know that they were acting on instructions of Rea Vipingo Limited.
 16. It was PW1's evidence that he neither had an acceptance letter nor any correspondence from the Ministry to show extension of the offer letter period which lapsed after 30 days for failure to pay stand premium. He confirmed that they did not pay land rent and rates during the 18 years. According to him, the Respondents paid the land rates but they did not give them the authority to do so and told the court that they have not exhibited any photographs of the activities on the land and that the shopping mall is on their land.
 17. It was also his testimony that he was neither aware that Mr. Zimerlin had cancelled the amalgamation nor that the Director of Survey of Kenya wrote a letter for cancellation of the amalgamation. PW1 stated that they signed the lease before the Registrar in Mombasa which was received on 27th July 2020 and that the title was issued on the same day by Mr. Wanjohi the Land Registrar. He stated that the 1st Respondent had encroached on their land by putting up a wall but he did not have a survey report to show the encroachment.
 18. On cross examination by Kahora for the 2nd Respondent, PW1 told the court that they applied for consent for subdivision of 24 portions and a Certificate of lease resulted in a certificate of title and further that the trustees were appointed in a CBO meeting held on 11th April 2020 for purposes of processing the title. He further confirmed that they did not write to Vipingo asking for copies of the surrender.
 19. Upon cross examination by Mr. Munga for the 3rd 6th & 7th Respondents PW1 stated that there were no written directions on amalgamation of the parcels and they did not have any written correspondences on the extension of time to pay the stand premium. That they made the application for allocation as Bambani but were advised that it could not be given land as it was not a registered entity.
 20. On cross examination by Mbutia for the 4th Respondent, PW1 testified that they used the County Council of Kilifi to find out whether the land was available for allocation and that they also consulted Mr. Opiyo a surveyor who told them that the land was available for allocation. He told the court that they have been in occupation of the land and were advised that the land had been amalgamated by the Ministry of Lands.
 21. On re-examination by Mr. Nderitu, PW1 told the court that he made an application for allocation in 2002 and they hired Mr. Opiyo as a consultant to do a survey and that he relied on the letter in relation to subdivision of plot No. 5025 which was the original number before sub division. He also told the court that what they were claiming is a division of block LR No. 5025 and 7334 which was amalgamated to form LR 24881 but he has never seen the titles.
 22. PW1 further told the court that at the time of amalgamation, the two plots were next to each other and were to be consolidated. That the subdivision was for 24 blocks/portions so that it could be easier for them to allocate to their members from various villages. He stated that Bambani had been in existence from 2000 as a self-help group and later became a community-based organization. He further stated



- that the stamp and signature on the rates clearance certificate is for Kilifi North Sub County but the property is in Kilifi South.
23. PW2 Sylvia Lewa Wanjiku Mwangi a trustee of Bambani Community which owns LR 24881 in Vipingo area adopted her affidavit dated 9th April 2021 as her evidence in chief and stated that she neither knew Mr. Kithi Advocate nor gave him any instructions to act on her behalf.
 24. On cross examination by Mr. Musangi, she told the court that she has been a trustee of Bambani Community based organization for four to five years and that did not participate in the allotment exercise but was involved in the processing of title to the suit land and fundraising for payment of the stand premium. Further that at one point she was called to sign a lease in Mombasa. She also stated that she has seen sisal plantation and a construction which is on their property.
 25. It was PW2's testimony that they did not pay the stand premium within the 30days but they wrote a letter to the Ministry of Lands who gave them authority to pay. She further told the court that there was a surrender which relates to LR 5025/94, LR 5025/95 to LR 8724/4 and subdivision No. 117/2, 120/2, 119/1 and that LR 5025/97 and 7334/5 are not mentioned in that surrender.
 26. PW3 Patrick Opiyo Adero Land Surveyor License No. 174 adopted the contents of his affidavit sworn on 28th October 2021 as his evidence in chief and told the court that he was engaged by Trustees of Bambani Community by the chairman Wycliffe Tembo to assist them identify LR No. 24881. He testified that he showed them the parcels and told them that they arose from amalgamation of two parcels namely 5025/97 and 7334/5 to create LR. 24881 as per the deed plan No. 231920 which was signed by the Director of survey on 10th October 2001.
 27. It was also his testimony that the government allocated the land to Bambani Community vide a letter of allotment on 9th May 2002 for a 99-year lease from 1st May 2002. He contended that the Petitioners paid Kshs. 6 Million on 7th May 2020 and subsequently a lease was granted to the Petitioners on 24th June.2020. Further, that the parcels were amalgamated and the initial survey map ceased to exist and that this was confirmed by Mr. Wilson Kibicho and according to him, as per the government records the lease is valid.
 28. On cross examination by Mr. Musangi, he told the court that he brought a map from Survey of Kenya which has coordinates and went to the ground using survey equipment and at the time, there were sisal plantations on the suit land. He also told the court that the beacons were in line but he did not inquire under what circumstances the land was surrendered. In addition, he stated that after the identification of the land he did not do anything else, he gave them the map that he brought from survey of Kenya Deed Plan No. 231920.
 29. PW3 further stated that he did not have any evidence to contradict the affidavit of Zimmerlin and that he had requested for cancellation of his deed plan and Mr. Kibicho confirmed that it had been done. He also confirmed that one cannot get a new title before the titles are surrendered.
 30. He further informed the court that did not have the deed of surrender for LR 5025/97 and 7334/5 which were comprised in the deed plan drawn by Zimmerlin and that he was not aware whether there was any other deed of surrender. That a letter of allotment cannot be issued for privately owned lands.
 31. Upon cross examination by Kahora, he told the court that he was consulted to identify and verify where the land was and that surrender was done by Rea Vipingo who had not instructed him on the surrender.



1st Respondent's Case

32. The 1st Respondent filed a Replying Affidavit sworn by Kenneth Mbae the Managing Director of the 1st Respondent Company on the 4th January, 2021.
33. DW1 stated that Centum, acting through the 1st Respondent purchased 10, 254 acres of land from Rea Vipingo Plantations Ltd on or about 27th March, 2015 which land comprised in 18 separate Titles which included LR Number 5025/97 and LR Number 7334/5 which have never been amalgamated as alleged by the Petitioners. He also asserted that according to the Deed Plan Number 231920, the Petitioners are seeking to superimpose a new Title issued in 2020 on top of LR Number 5025/97 and LR Number 7334/5 being the two pre-existing lawful titles registered in the name of the 1st Respondent.
34. It was DW1's evidence that the 1st Respondent has initiated various developments on the purchased land including construction of affordable housing, supporting local educational infrastructure development, construction of a large-scale water desalination plant to supply water to local residents and investors. That pursuant to change of User, Title LR Number 5025/97 (CR 8367/1) was surrendered by a Deed dated 12th February, 2020 a new Certificate of Title was consequently issued to the 1st Respondent on 27th March, 2020 being CR 74909, LR Number 5025/1591 and that the 1st Respondent is in the process of Change of User over Title LR Number 7334/5 and is in possession of all approvals.
35. According to DW1 the Surrender of lease defines the Trust Lands being surrendered in the "Schedule" and the portions were delineated on the respective Deed Plans. That from the Surrender Deed, there is no correlation to the land being claimed by the Petitioners since the various amendments by sub division, Consolidation, Change of User and Surrender to the Rea Vipingo Plantations Limited Titles were duly and lawfully processed in 2001. He also asserted that it is not possible that the Petitioners to have made payments in their names or on their behalf on a title that is non- existent.
36. DW1 testified that upon investigations, it was established that the Kilifi South Land Control Board had granted Consent to sub divide the land, the consent issued disregarded the fact that there already existed a title C.R 74909 being LR. No. 5025/1591 and a Change of User for the property had been approved in favour of the 1st Respondent.
37. It was DW1's further evidence that the 1st Respondent charged the title with the Bank of South Africa for a loan of 45Million dollars for purposes of obtaining funds for its development plans.
38. He informed the court that he met the Petitioner who signed a MOU KM13 within Vipingo Development on 13th June 2015 which MOU was to find a way the community could benefit from the Vipingo Development. It was his testimony that when they discovered another title in respect of the suit land, they made reports to the DCI, the Chief Land Registrar and the Kilifi County Government. Subsequently, there was a response from the Lands office and the Kilifi County Government cancelling consent for subdivision of CR 75262 being No. LR 24881 which is the title being claimed by the Petitioners.
39. On cross examination by Mr. Nderitu, he confirmed that there is no parcel No. 5025/97 and that there has never been surrender of the two portions of land. He told the court that a new title was issued on 28th February 2021 and the change of user was approved on 26th May,2016.
40. On re-examination by Mr. Musangi, he told the court that entry No. 26 was transfer to Vipingo Development Limited and there was no entry transferring the title to anyone else. Entry No. 29 was the



change of user mentioned as CR. No. 74909 issued on 27th March, 2020 which is the current Vipingo Development Limited, the land registry record corresponds to what was exhibited in court. He further stated that the land was not available for allocation in 2002 as it belonged to Rea Vipingo.

2nd Respondent's Case

41. The 2nd Respondent in response to the Petition filed a Replying affidavit sworn by Stephen Waruhiu sworn on the 10th March, 2021 where he deponed that LR 5025 (CR 8367) was originally granted to Heinz August Treviranus by the Government of Kenya as a 999-year lease from 1st January 1930 to 1st January 2929 on 4th February, 1931. That on 27th March, 1946 according to the abstract of title, the property was transferred to Vipingo Estate Limited and by a transfer date 3rd May, 1995, Vipingo Estate Limited transferred several properties to the Rea Vipingo Plantations Limited including LR 5025 (CR 8367) and LR 7334 (CR 8818) and subsequently, Rea Vipingo Plantations Limited sold the property to the 1st Respondent on 27th March, 2015.
42. According to him, by the Surrender dated 20th September, 2001, Vipingo Estates Limited surrendered 9 properties and that neither LR 5025/97 nor LR 7334/5 were surrendered as both properties have their own individual Certificate of Titles. He also deponed that in 2001, there was a proposed amalgamation of deed plan for LR 24881 of LR 5025/97 and 7334/5 but the amalgamation was not done and the deed plan is therefore not attached to any document registered against the title. It was his contention that the letter of allotment and the Certificate of title issued to the 1st Petitioner are attempts at fraudulently obtaining the 1st Respondent's land.
43. DW2 Samuel Kariuki Mwangi the 6th Respondent, the Land Registrar Mombasa relied on his affidavit dated 5th May 2021 which he adopted as his evidence in chief and stated that they received a letter dated 24th June 2020 from the office of the Cabinet Secretary forwarding a lease document LR 24881 which letter specified that the Registrar should register the lease since the requisite payment had been done.
44. That the lease was registered on 27th July 2020 and a certificate of title No. CR 75265 was issued and according to the lease document the registered owners were Wycliffe Mwangome, Sylvia Wanjiku Mwangi, Daniel Charo and Masha Kagomba. That after the registration they received a letter dated 3rd March, 2021 from the Director of Land Administration which confirmed that the lease document was erroneously issued due misrepresentation of facts and further confirmed that the land on which that lease was issued had a previous registered title and the land was therefore not available for allocation and consequently requested the office to expunge all entries in respect of that lease.
45. He further told the court that pursuant to that letter, he did another letter dated 3rd March 2021 addressed to the Registrar requesting for surrender of the title and the registered lease issued to them. Reference was made to the letter dated 4th March 2021 from the firm of Steve Kithi & Company Advocates on behalf of three of the registered owners communicating that they had finally and unconditionally surrendered the right to the title and interest but they did not surrender the physical original title since it was not in their custody. It was his testimony that the office was subsequently served with an order of injunction dated 21st December 2020 restraining any action from the Registrar's office. That pursuant to the order, they could not proceed to expunge from the records LR. 75265 pending the hearing and determination of this case.
46. On cross examination by Mr. Musangi, he stated that the active titles were 74909 and 7334/5 which were not part of active title by then CR. 8818. That the original Nos were LR No. 5025/97 and 7334/5 and that the owner of the active title was Vipingo Development Limited. He also stated that there was an alteration on the numbering from No. 15 to No. 19 which was an error on the face of the title



- and that the Registrar is allowed to make the necessary amendments. Further that typographical or numbering errors do not change the ownership of the title.
47. On cross examination by Mr. Nderitu, he stated that the letter was written after complaints by Vipingo Development PLC and that he wrote to the title owners and one letter from the Director of Land Adjudication was copied to EACC and Vipingo Development. That the land in question had a correspondence file referred to the letter as LR No 5025/159 title No 74909 with a parcel file and deed file. DW2 stated that he followed due process in summoning the title holders
 48. DW3 Andrew Aseri Kisungu adopted his affidavit dated 12th March 2021 and told the court that he forwarded a letter dated 24th April 2020 in relation to a lease document LR No. 24881 to Mombasa Lands office. That he sent another letter dated 3rd March 2021 informing the Land Registrar that the lease was erroneously issued as there was an active title upholding LR 24881 which is amalgamation of two titles. He further told the court that they got information that the beneficiary had agreed to surrender their interest over the land and that the Director of Surveys had cancelled the survey.
 49. On cross examination by Mr. Musangi he stated that a new title cannot be issued if there is an existing title. On cross examination by Mr. Nderitu he stated that they received a letter from Kithi Advocate that the beneficiaries had surrendered their interest in the land. That the deed plan had been cancelled and had not been served with a court order.
 50. DW4 Wilson Kibicho a Principal Cartographer also adopted his affidavit dated 22nd June 2021 and told the court that he was aware that the suit parcels of land were amalgamated and resulted into LR. No. 24881 and deed plan No. 231920 which was prepared by their office.
 51. On cross examination by Mr. Musangi, he told the court that a deed plan number was allocated by the Director of Survey and upon amalgamation, one surrenders the title and is issued with a new deed plan and title to the owner who requested for amalgamation. That if a deed plan was cancelled it cannot be used for any other purpose.
 52. DW5 Fowler Director and shareholder of Vipingo Energy Limited adopted his statement dated 8th November 2021 as his evidence and stated that he was aware of LR. No. 7334/5 and 5025/97 which land belonged to Rea Vipingo before it was transferred to Vipingo Development and that the two parcels were never surrendered to the government.
 53. On cross examination by Mr. Ondeng, he stated that there was a survey which was done later and changed the original status of the land and that a private surveyor cannot request for cancellation of a deed plan on government land.
 54. DW6 Phillipe Zimerlin a Licenced Surveyor adopted his statement dated 28th July 2021 and stated that the two parcels of land were not part of the surrendered parcels. That he was instructed to carry out an amalgamation but the same did not proceed. He testified that he received instructions to cancel the amalgamation which he did vide a letter dated 21st September 2018 to the Director of Surveys.
 55. DW6 also stated that he called the Director of Surveys to cancel the deed plans which included Deed Plan No. 231920 and the Director cancelled the deed plans. Further that if the amalgamation had proceeded then the rightful owners would be Rea Vipingo and similarly, an amalgamation cannot result in change of ownership.
 56. On cross examination by Mr. Nderitu and Mr. Musangi he stated that he did not proceed with the amalgamation and that he was not summoned by DCI in respect of the titles but they came to his office and gave them the information that they needed although they did not ask him about the abandonment of the amalgamation.



Petitioners' submissions

57. Counsel filed submissions and identified the following issues for determination; -
- a. Who is the legitimate proprietor of the suit property?
 - b. Whether the Petitioners are entitled to the prayers sought in the Petition.
 - c. Who should bear the costs of the suit.
58. Counsel submitted on the Articles upon which the Petition is anchored namely: Articles 2(5), 10, 28, 40 and 63(1), 259(1) of the Constitution of Kenya 2010, Article 17 of the Universal Declaration of Human Rights on the right to property, Article 14 of the African Charter on Human and Peoples' Rights.
59. Mr. Nderitu submitted that based on the above edict on constitutional interpretation, the question of historical land injustices is a serious issue to be determined within the context of promoting constitutional purposes, values and principles and advancing the rule of law, human rights, and fundamental freedoms in the Bill of Rights. Further that under Article 67(2)(e) the National Land Commission the 4th Respondent is mandated, inter alia, "to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress".
60. In this respect counsel urged the court to take judicial notice that the Commission is yet to conclude investigations on historical land injustices and that has not made any recommendations for appropriate redress.
61. It was counsel's submission that the Petitioners' claim satisfies the criteria laid out in Section 15(2) of the National Land Commission Act. However, Section 15(3)(e) of the Act provided that historical land claims had to be "brought within five years from the date of commencement" of the Act. The date of commencement of the Act is stated to be 2nd May 2012, but it is a matter of general notoriety that the Commission invited the general public to lodge historical land claims until 21st September 2021 notwithstanding the fact that the period provided for in the Act had lapsed. That a Bill of Parliament to amend the Act in order to allow the Commission to continue admitting and processing historical land injustice claims sponsored by the Hon. Owen Yaa Baya, M.P., and published as Kenya Gazette Supplement No. 42 (National Assembly Bills No. 12) in the Kenya Gazette on 15th March 2022 which is still pending.
62. Counsel therefore stated that the Petitioners, despite having a claim based on clear and veritable historical land injustices, do not have an accessible, adequate and effective remedy except through this Honourable Court. Counsel gave a detailed background and chronology of the historical perspective of how the colonial government acquired land and dispossessed the indigenous peoples in the coastal region and submitted that the Court cannot give effect whatsoever to the manner in which the lands previously occupied by the native Mijikenda peoples under their own customary land tenure system.
63. Further that the court is duty bound to recognize the historical land injustices occasioned to such peoples, like the Petitioners and cited Section 3(1) the Judicature Act.
64. Counsel also relied on several books and thesis to explain colonial dispossession of indigenous peoples and submitted that the question of the existence of land rights in favour of previous (native) occupiers of land vis-à-vis subsequent (settler or other) occupiers of the land has been addressed and recognized in other Commonwealth countries apart from Australia.



65. Counsel cited a South African case of *Richtersveld Community and others v Alexkor Ltd and another* [2004] 3 All SA 244 (LCC), where the Plaintiffs first brought suit against the Defendants claiming dispossession of a narrow strip of land containing diamonds alongside the Western Coast of the Northern Cape, comprising the area known as the Richtersveld. The dispossession occurred after diamonds were discovered, where after mining rights were granted to Alexkor Ltd, a state-owned diamond-mining company. The restitution claim was dismissed in the first instance. The Supreme Court of Appeal however overturned the ruling, and this position was confirmed on further appeal by the Constitutional Court, which ordered that the community was entitled to restitution of ownership of the land, including its minerals and precious stones, and to the exclusive beneficial use and occupation thereof.
66. Mr. Nderitu further submitted that the other countries which have recognized and given effect to native land rights include Malaysia in , *Adong bin Kuwau & 51 Ors v The Government of Johore* [1997] 1 MLJ 418¹, *Nor Nyawai & 3 Ors v Borneo Pulp Plantation Sdn Bhd & 2 Ors* [2002] Indig Law B 8, and Canada in *R. v. Sparrow* (1990), 70 D.L.R. (4th) 385 (S.C.C.), amongst other cases and that Kenya has also recognized the Ogiek right through the African Court on Human and Peoples' Rights.
67. Counsel submitted that in the Nor Nyawai case, the Plaintiffs were residents of two villages. They claimed that the Defendant timber company had trespassed and damaged their ancestral land. The Plaintiffs, however, did not hold documentary title to the land. The title to the disputed land was held by the Defendant, Borneo Pulp Plantation Sdn Bhd, which had hired contractors to clear the land for commercial timber development. The Plaintiffs' action rested exclusively on their claim that under their local Iban custom they had acquired native customary rights to the property. Under Iban custom, each village community had a territory over which it exercised control which included not only the land surrounding the village but also land that was under cultivation and the rivers and forests within half-a-day's walking distance, which they used for hunting, fishing and gathering forest produce. The Malaysian High Court followed the Mabo case and held that the common law respects pre-existing rights under native law or custom though such rights may be taken away by clear and unambiguous words in legislation.
68. On the first issue as to who is the legitimate proprietor of the suit property, counsel submitted that it is not in dispute that the Petitioners are the registered owners having been registered as such on 27th July 2020. But it is also on record that the 1st Respondent has a title to the suit property having been registered on 28th March 2020 hence there are two competing titles.
69. Counsel relied on the case of *Hubert L. Martin & 2 others v. Margaret J. Kamar & 5 others* [2016] eKLR, where Munyao J held that when faced with two or more titles, the court must make an investigation so that it can be discovered which of the two titles should be upheld. That the investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain.
70. Mr. Nderitu submitted that the 1st Respondent's title was registered at a time when all Lands Registries countrywide had been closed following the Covid-19 pandemic and that no evidence was adduced to show how the title was registered while the offices were closed and that the Petitioners has given a chronology of how they got their title.
71. Counsel submitted that the 1st Respondent's title acquisition had many irregularities namely that: -



- a. the 1st Respondent purchased the suit property from Rea Vipingo Plantations Limited hence they would only have obtained an interest for the remainder of the lease issued to Rea Vipingo Plantations Limited, that is, a period of 14 years. Further that it is not possible for the 1st Respondent to be holding a lease for a term of 99 years from 1st August, 2018.
 - b. Secondly that the 1st Respondent did not produce the transfer documents between itself and Rea Vipingo Plantations Limited, the receipts for payment of the transfer fees and stamp duty, evidence of payment of the consideration, and the title which was issued after the transfer and before the issues of change of user.
 - c. Thirdly that the entries purporting to transfer the suit property to the 1st Respondent are on the face of it fraudulent as it is captured as entries numbers 15 and 16 yet the record was already at entry number 18 when the 1st Respondent alleges to have purchased the suit property.
 - d. Fourthly that the Ministry of Lands closed the land registries on 15th March, 2020 due to Covid-19 pandemic. However, the 1st Respondent's Certificate of Title appears to have been signed on 27th March, 2020 and issued on 28th March, 2020 which was on a Saturday.
 - e. Fifthly that the issuance of the Certificate of Title to the 1st Respondent is not captured in the register entries produced in court. That the alleged Deed of Surrender dated 12th February, 2020 returning the Certificates of Title does not feature in the entries.
72. Counsel therefore submitted that the 1st Respondent's title is fraudulent and the Petitioners' title is the legitimate title. Counsel urged the court to grant the reliefs sought by the petitioners with costs.

1st Respondent's Submissions

73. Counsel filed submissions where he gave a brief summary of the Petition and submitted that the 1st Petitioner is the sole claimant to the suit land as the other alleged "owners" named on the Title document issued in 2020, including PW2 who testified, declined to participate as parties in this suit. Further that two of the persons named on the 1st Petitioner's title has formally withdrawn from any claim on the suit properties as these parcels of land had and still have pre-existing lawful titles.
74. Mr. Musangi submitted that it is neither legally possible nor tenable under any Land Registration regime in Kenya, for a title to be issued and superimposed on another pre-existing Title and that it is self-evident that the 1st Petitioner's alleged title document is null and void ab initio and it certainly cannot form the basis for the issuance of the Orders/reliefs sought by the Petitioners from this Court.
75. It was counsel submission that the declaration of the invalidity of the title held by the 1st Petitioner has been formally made by the official custodian of the Titles being the Land Registrar – Mombasa (DW2) as well as the very same Land Administration Officer (DW3) who signed the Lease.
76. According to counsel, the Petitioners' entire claim is founded on the allegation that the suit land was surrendered to the Government of Kenya in its entirety in the year 2001 and in the absence of strict proof of the surrender allegation, the Petitioners' entire case should be dismissed as they have not established their case for grant of the orders sought.
77. Counsel submitted that the deed of Surrender discloses that certain portions of land were surrendered by Rea Vipingo to the Government of Kenya in 2001., and that the deed as per its Schedule, effected the Surrender of various pieces of land measuring a cumulative total of 601.7424 hectares which were excised from various Rea Vipingo Plantations Limited Titles and not the suit properties. Further that this fact was disclosed in detail in the Schedules to the Deed of Surrender and Deed Plans and



- each surrendered parcels were shown. Counsel submitted that it is inconceivable how a surrender of 601.7424 Hectares in a variety of locations gave birth to a single consolidated Title for 1,583 hectares (3,911.7 acres) in the 1st Petitioner's name.
78. Mr. Musangi also submitted that none of the Petitioners' witnesses pointed out any part of the Schedules that made reference to the suit properties being surrendered to the Government. That they made reference to the existence of another Deed of Surrender which none of them produced before the Court hence there was no evidence on record of the existence of such a Surrender instrument for the Court to consider. Further that PW1 expressly admitted on page 11 of the proceedings that "Once you surrender, the old titles must be cancelled." And he further states that "I do not have evidence that Rea Vipingo surrendered these titles for allocation."
79. Counsel relied on the case of *Daudi Kiptugen v Commissioner of Lands & 4 Others* [2015] eKLR where the Court held that the acquisition of title cannot be construed only in the end result; the process of acquisition is material.
80. Mr. Musangi further submitted that the 1st Petitioner and three others received a Letter of Allotment dated 9th May 2002 granting them 1,583 hectares of land subject to payment of the Stand Premium of KShs.6,100,000/= and Land Rent of KShs 1,200,000/= per year for a lease Term of 99 years from the Government commencing from 1st May 2002 and that the Stand Premium was to be paid within 30 days otherwise the Letter of Allotment would lapse and it is on record that the premium was paid on 27th April 2020, 18 years after the letter of allotment had lapsed. That the Petitioners admitted that they did not pay land rent for 18 years which was paid by the 1st and 2nd respondents.
81. Counsel submitted that the letter of offer was a nullity and relied on the case of *Bubaki Investment Company Ltd v National Land Commission & 2 Others* [2015] eKLR where the court held that where the petitioner did not comply with the terms and conditions of the letter of allotment dated 30th May 1997 and that as at the time the petitioner made payment of the charges stipulated under the letter of allotment the offer had lapsed and was therefore ineffectual and that the offer extended through the letter of allotment having lapsed by effluxion of time, there was no offer to accept at the time the petitioner made the payment.
82. Counsel further cited the case of *Gitwany Investment Limited -v- Tajmal Limited & 2 others*, (2006) eKLR and submitted that the 1st Respondent's title which was first in time should prevail in the circumstances.
83. According to counsel DW3 Land Adjudication Officer had impugned the lease that was issued to the Petitioners and stated that the same was issued erroneously as they were not aware of the existence of other titles to the suit properties hence without a valid lease no title can be issued.
84. Mr. Musangi submitted that a land title derives its validity from the process of its acquisition and if the acquisition process is irregular then the title ought to be impeached and relied on the case of *Teresia Wangari Mbugua v Jane Njeri Nduati & Anor* [2020] eKLR
85. It was counsel's submission that the Petitioners made extensive submissions on the lack of a Sale Agreement to advance the argument that the 1st Respondent's Titles are flawed but the 1st Respondent exhibited its purchase documents together with the registered Transfers of the suit properties - Exhibits KM15, KM16 and KM17 which documents were not disputed by the Petitioners further that the purchase of the land by the 1st Respondent is not in issue in this suit.
86. Counsel submitted that the matter of validity of the 1st Respondent's Titles to the suit properties was resolved conclusively by the evidence of an independent witness DW2 the Mombasa Land Registrar.



- That the 1st Respondent has demonstrated with a full history that its Titles indeed pre-existed the 1st Petitioner's Title and has always been in lawful ownership, occupation and use of the suit properties with a legal charge of the property to secure financing
87. On the issue that the Registries were closed due to Covid 19 Counsel submitted that there was no factual information to back this up and that nothing has been tendered in Court to suggest that ALL functions of the Ministry were suspended or frozen in their entirety. Similarly, no illegality has been pointed out relating to the issuance of the revised-user Title to the 1st Respondent dated 28th March 2020.
88. Counsel relied on the case of *Kenleb Cons Ltd v New Gatitu Service Station Ltd & another*, (1990) eKLR, as upheld by the court in *Robert Mugo Wa Karanja v Ecobank (Kenya) Limited & another* [2019] eKLR, where it was held that a party seeking an injunction must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right legal or equitable, which requires protection by injunction, and counsel therefore submitted that the Petitioners have not met this requirements.
89. Mr. Musangi therefore urged the court to dismiss the Petitioners case on the grounds that the Petitioners have never been the lawful owners of the suit properties; have never been in possession of the suit properties and have no colour of right over the same; that the 1st Respondent's titles to the suit properties were never surrendered to the Government of Kenya; the suit properties were thus never available for allocation or alienation to the Petitioners; the 1st Petitioner therefore did not acquire a valid, legal title for the suit properties in 2002 when his Letter of Allotment was issued.; the Petitioners did not acquire legal title for the suit properties in 2020 when they paid the stand premium on the illegal, null and expired Letter of Allotment.; the 1st Respondent's titles were the first in time and therefore are indefeasible in law and finally that the 1st Respondent's titles were the product of a purchase for value from the then registered owner of the suit properties and are therefore protected in law.

2nd Respondent's Submissions

90. Counsel submitted that the issue for determination is whether the Petitioner's ownership can be upheld and aligned himself with the 1st Respondent's submissions dated 23rd May 2022 which is in tandem with the 2nd Respondent's case. The submissions largely reiterate the 1st and 2nd Respondent's case and urges the court to dismiss the petitioners' with costs.
91. Counsel relied on the case of *Nelson Kazungu Chai and 9 others v Pwani University College* [2017] eKLR where the Court of Appeal held that once land has been allocated under Section 2 of the *Government Lands Act*, it ceased to be Government Land and the Commissioner of Lands had no power to re-allocate the land.
92. Mr. Kahora also cited the case of *Funzi Island Development Limited & 2 others v County Council of Kwale & 2* [2014] eKLR where the Court of Appeal held that a registered proprietor acquires an absolute and indefeasible title if and only if the acquisition was legal, proper and regular. That a court of law cannot, on the basis of indefeasibility of title, sanction an illegality or give its seal of approval to an illegal or irregularly obtained title.
93. Counsel further relied on the cases of *Cherney Investment Limited v Attorney General & 2 others* [2018] eKLR, *Moses Okatch Owuor and another v Attorney General and another* [2017] eKLR, *Kenya Anti-Corruption Commission v Online Enterprises Limited and 4 others*, [2019] eKLR, *Republic v Minister For Transport & Communication & 5 Others Ex Parte Waa Ship Garbage Collector & 15*



Others Mombasa HCMCA No. 617of2003 [2006]1KLR(E&L) 563 on fraudulently acquired titles which court should not uphold as the root of their acquisition is tainted with illegality.

94. Mr. Kahora submitted that it is not true that the suit properties were communal land and compulsorily acquired by the government, as alleged at paragraphs 3, 4, and 5 of the Supporting Affidavit as the properties have been privately owned since the colonial period and down to the present day.
95. Further that the Petitioners based part of their claim on alleged historical land injustices, however they did not provide any evidence that their ancestors were in historical occupation of the land. The requirement to provide cogent evidence in a claim for historical land injustices was discussed by the Court in *Henry Wambega & 733 others v Attorney General & 9 others* [2020] eKLR where the court dismissed claim, for lack of proof.
96. It was counsel's submission that it is on record that the Vipingo Estate did not acquire land from the government but purchased it from the original owners hence the claim for ancestral domain should be dismissed.
97. It was Mr. Kahora's submissions that in Constitutional violations, the law requires that allegations of constitutional violation be properly pleaded and particularized as was held in the Supreme Court case in *Communications Commission of Kenya & 5 Others v. Royal Media Services Limited & 5 Others* (2014) eKLR and stated that the allegations at paragraphs 3 I and 34 of the Petition do not meet the threshold as against the 2nd Respondent. There was no evidence that the 2nd Respondent was involved in the alleged constitutional violation against the Petitioners and that the 2nd Respondent's witness was not cross examined on the issue. Counsel urged the court to dismiss the petition with costs.

3rd, 6th & 7th Respondents' Submissions

98. Counsel filed submissions and identified three issues for determination as follows:
 - a. Whether the Petitioners acquired lawful and legitimate rights over the suit property
 - b. Whether the Petitioner's rights to property under Article 40 have been violated by the Respondents
 - c. Whether the Petitioners are entitled to the reliefs sought
99. On the issue whether the Petitioners acquired lawful and legitimate rights over the suit property, counsel submitted that the Petitioners have alleged that the suit property, LR 5025/97 and LR 7334/5 which was amalgamated to form LR No. 24881 was surrendered to the Government by Rea Vipingo Plantations Limited however from a simple perusal of the deed of surrender it is evident that the plot numbers LR 5025/97 and 7334/5 were never surrendered to the Government and that even an attempt by PW3 to amend his affidavit to suggest that there were other parcels surrendered does not prove that the same were ever surrendered.
100. Mr Munga further submitted that the deed plan number 231920 that emanated from the survey carried out on the suit property was cancelled by the Director of Survey following a request from the surveyor who was engaged to do the amalgamation as per annexure of DW3 marked "AA-3".
101. Counsel stated that it is on record that the 1st Respondent acquired the suit property by way of purchase from Rea Vipingo, who was the registered proprietor on 27th March, 2015 which means that there are two titles over the suit property and thus it is important to ascertain which of the two is valid.
102. It was counsel's submission that the suit property is governed by The *Land Act*, 2012 and The *Land Registration Act*, 2012 which provides under Section 26(1) of the *Land Registration Act* that a



Certificate of Title issued by the Registrar upon registration, to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of the proprietor shall not be subject to challenge, except –

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party
 - b. Where the Certificate of Title has been acquired illegally un-procedurally or through a corrupt scheme
103. Counsel relied on the Court of Appeal case of *Munyu Maina v. Hiram Gathiba Maina* [2013] eKLR, and submitted that the Petitioners have failed to prove that the process of acquiring their title was valid and lawful since the same is tainted with illegality and fraud. In addition, that the suit property was never available for allocation in the first place either through surrender or otherwise and that the suit property was owned by Rea Vipingo Properties until it was transferred to the 1st Respondent by way of sale.
104. On the issue whether the Petitioners' rights to property under Article 40 have been violated by the Respondents, counsel relied on Article 40 of the *Constitution*, 2010 and submitted that the thrust of Article 40 is to protect proprietary rights under the law. However, Article 40 which protects the right to property must be read to exclude property found to have been unlawfully acquired under Article 40(6). This requirement is an extension of the fact that the *Constitution* protects higher values which are to be found in preamble to the Constitution and Article 10. Values such as human rights and social justice cannot countenance a situation where the Constitution is used to rubberstamp what is in effect unlawful.
105. Counsel cited the case of *Evelyn College of Design Ltd v Director of Children's Department & another* [2013] eKLR, where the Court held that under Article 40(6) rights acquired do not extend to properties unlawfully.
106. Mr Munga submitted that it is trite law that he who alleges must prove and that the Respondents have tendered both oral and documentary evidence to prove that the Petitioners title was fraudulently acquired.
107. Counsel submitted that the 2nd Respondent's affidavit deponed by Mr. Oliver Fowler detailed chronologically how the suit property has been transferred over the years and its proprietorship hence evident that the suit property was neither surrendered to the Government nor transferred to the Petitioners at any one time.
108. Further that the Land Registrar had vide the letter dated 3rd March, 2021 summoned the Petitioners requiring them to surrender their certificate of title but the court intervened and issued orders of status quo. This court therefore has powers to make the said finding that the suit property was unlawfully acquired by the Petitioners. Counsel therefore submitted that the Respondents have not violated the Petitioner's rights to property protected under Article 40 and hence should be dismissed with costs.

Analysis And Determination.

109. The issues for determination in this petition are as follows; -
- a. Whether the two parcels of land i.e LR 5025/97 and LR 7334/5 were part of the surrendered parcels.
 - b. Whether the LR Nos 5025/97 and LR No. 7334/5 were amalgamated



- a. Whether the parcel claimed by the Petitions was available for allocation.
 - b. Whether the right to property under Article 40 has been violated
 - c. Whether the petitioners are entitled to the land on account of historical injustices
 - d. Who is the legitimate proprietor of the suit property?
 - e. Whether the Petitioners ought to be granted the orders sought in the Petition.
110. The Petitioners' claim is founded on the allegation that the suit parcels of land LR No. 5025/97 and LR NO. 7334/5 were amalgamated and surrendered to the Government of Kenya by a deed of Surrender dated 20th September 2001 by Rea Vipingo Plantations Ltd.
 111. It is important to look at the Deed of Surrender dated 20th September 2001 by Rea Vipingo Plantations to Government of Kenya. The specific parcels in the Schedule as annexed by the Petitioners as exhibit WTM3 are LR Nos 5025/94, 5020/95, 7334/1 7334/6, 8724/2, 8724/2 8724/4, CR NO. 7314/1, deed plan No,229569, CR No. 7314/1 deed plan No. 229534 and CR No, 9732 measuring 601.7424 hectares.
 112. DW1 testified that the surrender of lease defines the Trust Lands being surrendered in the "Schedule" and that the portions were delineated on the respective Deed Plans. It is on record from DW1's evidence that from the Surrender Deed, there is no correlation to the land being claimed by the Petitioners since the various amendments by sub division, consolidation, Change of User and Surrender to the Rea Vipingo Plantations Limited titles were duly and lawfully processed in 2001.
 113. From the oral and documentary evidence LR Nos. 5025/97 and 7334/5 do not feature in the schedule of the deed of surrender dated 20th September 2001. PW1 and PW2 also confirmed during cross examination that LR Nos 5025/97 and 7334/5 were not mentioned in deed of surrender schedule dated 20th September 2001.
 114. The second issue is whether the parcels of land were amalgamated and surrendered to the Government of Kenya. The genesis of the issue of amalgamation is captured in the evidence of Zimmerlin the Surveyor who had been given instruction to carry out an amalgamation by Rea Vipingo and confirmed by PW3 Mr. Opiyo who told the court that he relied on survey map from the government and a deed plan signed by Mr. Zimmerlin
 115. PW3 admitted that his work was on consultancy basis and his task was to identify the parcels of land that the Petitioners as claiming and confirmed that he showed the Petitioners the parcels which he stated were as a result of an amalgamation of two parcels namely 5025/97 and 7334/5 to create LR No. 24881 as per deed plan No 231920. It shows that it is DW3 who confirmed to the Petitioners that the said parcels had been amalgamated
 116. PW3 told the court that he did not inquire under what circumstances the land was surrendered and did not do anything else after the identification of the parcels of land to the Petitioners. This means that he was not well versed with the issue whether the land was amalgamated or not as his task was to show the Petitioners where the parcels of land were including the boundaries.
 117. It is also on record that PW3 being a licensed Surveyor admitted that he did not have any evidence to contradict the evidence of Mr Zimmerlin that he requested for the cancellation of the deed plan which was confirmed by Mr. Kibicho DW4 a Principal Cartographer that the same was done. DW4 also stated that upon amalgamation one surrenders the title and is issued with a new deed plan and



another title is issued to the person who requested for amalgamation and a cancelled deed plan cannot be used for any other purpose.

118. The evidence of Mr. Zimmerlin DW6 was crucial as he was the person tasked with the amalgamation of the suit parcels. Mr. Zimmerlin stated that he was instructed by Rea Vipingo Plantations Ltd to carry out an amalgamation of the two parcels of land but the same did not proceed as he later received instructions to cancel the amalgamation which he did vide a letter dated 21st September 2018 to the Director of Surveys which was effected and deed plan No. 231920 cancelled. He also told the court that an amalgamation does not result in change of ownership as was also stated by PW3 Mr. Opiyo.
119. It was also PW1's testimony that he was neither aware that Mr. Zimerlin had cancelled the amalgamation nor that the Director of Survey of Kenya wrote a letter for cancellation of the amalgamation.
120. From the evidence it follows that the answer to the question as to whether the suit parcels were amalgamated is in the negative.
121. On the third issue as to whether the parcels of land claimed by the Petitioners were available for allocation, the Petitioners stated that after the alleged deed of surrender of the parcels and upon confirmation by DW3 Mr. Opiyo that the same were amalgamated and available for allocation they agitated for allocation of the suit parcels of land which was allocated to them vide an allotment letter dated 9th May 2002. The Petitioners stated that they were supposed to pay a stand premium of Kshs 6,88022/- within 30 days but they did not have the money therefore they sought to extension of the period within which to pay and paid after 18 years as they had to raise funds. The Petitioners stated that on 24th June 2020 they were issued with a lease document and subsequently on 27th July 2020 with a certificate of title.
122. The Petitioners admitted that they paid the stand premium after 18 years, that they did not pay any rates during that period and that the 1st and 2nd Respondents paid the rates in their name.
123. It should be noted that the Petitioners did not produce any letter from the Ministry of Lands showing that they had sought and were granted an extension of time within which to pay the stand premium after 18 years. They did not also produce the letter of acceptance, and there was no evidence that such a letter exists in the land registry in respect of the parcels in question.
124. The Petitioners admitted that they were not aware that there existed active titles in respect of the suit parcels of land as was confirmed by the Land Registrar who stated that they realized that the lease document was issued erroneously due to misrepresentation on the surrender and amalgamation of the two parcels of land.
125. It is also trite that a letter of offer cannot be issued on privately owned land and a title cannot be superimposed on an existing title. It should be noted that consent to subdivide issued to the Petitioners by the Land Control Board were cancelled upon complaint to the Chief Land Registrar, DCI and Kilifi County government.
126. In the case of *Kenya Anti-Corruption Commission v Online Enterprises Limited and 4 others*, [2019] eKLR (*supra*) this court found that the Commissioner of Lands did not have authority to allocate land that had already been alienated. This is similar to this case where a lease document was issued to the Petitioners while there were existing active titles as was confirmed by the Land Registrar who wanted to rectify the erroneous lease document and certificate of title



127. Similarly, in the case of *James Joram Nyaga & Another –v- Attorney General & another* [2007] eKLR the court referring to section 3 and 7 of the GLA observed thus: -

“The above section clearly limits the power of the Commissioner to executing leases or, conveyances on behalf of the President and the proviso to the section specifically limits the power to alienate unalienated land to the President. We find and hold that the Commissioner of Lands had no authority to alienate the disputed plot to the Applicants as he purported to do vide the letter of 18th December, 1997. That was the preserve of the president. It follows that the Commissioner of Lands could not have made any grant under the Government Lands Act Cap. 280 Laws of Kenya nor could he pass any registerable title under the *Registration of Titles Act* Cap. 281 of the Laws of Kenya.”

128. Having found that the suit parcels of land were not part of the parcels that were surrendered vide the deed of surrender dated 20th September 2001 and further that the parcels were not amalgamated, that there existed active titles on the suit land in favour of the 1st Respondent, it follows that the suit parcels were private land and were not available for allocation to the Petitioners. Private land cannot be allocated through a letter of allotment.

129. In the Court of Appeal case of *Benja Properties Limited v Syedna Mohammed Burbannudin Sabed & 4 others* [2015] eKLR the court held as follows:

“The legal effect of the registrations made in 1907 and 1911 was to convert the suit property at that time from un-alienated government land to alienated government land with the consequence that the suit land became private property and moved out of the ambit and confines of the GLA. This made the suit property unavailable for subsequent allotment and alienation by the Commissioner of Lands or the President of Kenya. The appellant’s title to the suit property was thus anchored on land that was not unalienated government land. We concur with the trial judge’s finding that “the suit land having been owned privately was not GLA land, and was not available for alienation. Its alienation was illegal and void ab initio”

130. According to the 2nd Respondent the suit parcels of land were also offered as security to secure 45 Million dollars from a South African Bank for development. This could have not been done if the land belonged to the Petitioners.

131. Similarly, in the case of *Babati Properties Limited v Attorney General & 7 others* [2019] eKLR the court held that: -

“It is not in dispute that in 2001 when the Letter of Allotment was issued to the 2nd – 6th Defendants, Kwale Diani Beach/Block/59 was already leased out to a private person for a term of 99 years with effect from 1st January 1914 and a Certificate of Title duly issued. The lease was due to expire in 2013. That means that in 2001, the land was already allocated to a private person and was therefore not available for allocation or alienation to the 2nd – 6th Defendants. Put differently, there was no unalienated government land capable of being allotted to the 2nd – 6th Defendants. Brother.”

132. By the time the letter of allotment, lease document and certificate of title were issued to the Petitioners the land had already been alienated and was not available for allocation.



133. On the issue of historical injustices, counsel for the Petitioners submitted elaborately on the issue of historical injustices against the Mijikenda communities. With due respect to counsel, this Petition is not about historical injustices but about whether the Petitioners' title was issued regularly.

134. I wish to refer to the case of *Henry Wambega & 733 others v Attorney General & 9 others* [2020] eKLR and in dismissing such a claim, the Court stated that:

“I am afraid that there is absolutely no evidence that any of the forefathers of the petitioners ever resided on the suit lands and I say this after having carefully gone through the evidence tendered by the petitioners. One cannot tell with precision and finality, which forefather of which petitioner resided in which land, and what sort of occupation such person had. Indeed, as pointed out by the respondents, some of the petitioners appear to have roots in Kwale and not within the site of the disputed land. There is a claim of dispossession, but absolutely no evidence of who was dispossessed, by whom, and when exactly this occurred.”

135. The court further stated that: -

“Getting back to the law, I am not persuaded that in Kenya, there is any law that gives an individual a right to own land that was previously owned by his/her forefather. Kenyans did not deem it fit to introduce such a law and that must have, been after considering the circumstances prevailing in the country. I have not been shown that there was any illegality in the manner in which all the land parcels herein were acquired. I have not been shown any right that the respondents violated. I have not been shown any right that entitles the petitioners to settle or to be settled on the suit lands. I am unable to order the respondents to surrender these parcels of land to the petitioners. Neither can I order the Government to purchase this land and settle the petitioners in it.”

136. I concur with the above finding that the Petitioners did not prove that their forefathers resided on the suit parcels of land and which parcels of land in particular. Counsel also rightly stated that the National Land Commission had the mandate investigate and inquire into the historical injustices within a specified period which has since lapsed and a Bill for extension of the mandate is still pending before the National Assembly.

137. Does the court have jurisdiction to hear cases of historical injustices? In the Court of Appeal case of *Chief Land Registrar & 4 others v Nathan Tirop Koeh & 4 others* [2018] eKLR the court had this to say: -

“On the question whether a court should await investigation and recommendation by the NLC before it can entertain a claim founded on historical injustice, it is our considered view that a court has jurisdiction to hear and determine any claim relating to historical injustice whether or not the NLC is seised of the matter. Our conviction stems from our reading of Article 67(2) (e) of the *Constitution*. The Article provides that the NLC can investigate “present or historical” land injustices. We lay emphasis on the word “present.” If the NLC had an initial and exclusive mandate, it would mean that all present cases on land injustices can only be handled by the NLC and not courts of law. This would prima facie render the Environment and Land Courts redundant. We do not think this was intended to be so. Our view is fortified by Section 15 (3) (b) of the *National Land Commission Act* which permit the Environment and Land Court to deal with historical injustice claims capable of being addressed through the ordinary court system.”



138. The court has jurisdiction to hear and determine historical injustices but the Petitioners are duty bound to prove the same. The 2010 *Constitution* and the *National Land Commission Act* neither oust the jurisdiction of the court nor bar a person from presenting a Petition before a court in relation to a claim founded on historical injustice. I find that the Petitioners have not proved historical injustice. The main issue in this Petition was to determine whether titles were acquired regularly. The evidence on record confirms that since the parcels of land were not available for allocation, then any title or lease documents that resulted from the allocation were illegal, null and void as there were existing titles. The Respondents gave a chronology on how they acquired the titles which is confirmed by the issuing authority the Land Registrar. The Petitioners title was said to have been issued erroneously through misrepresentation hence not valid.
139. The next issue is whether the Petitioners' rights under Article 40 of the Constitution have been violated. The Petitioners were under a duty to establish that they had rights over the suit parcels of land which are capable of being violated.
140. In the case of *Evelyn College of Design Ltd v Director of Children's Department & another* [2013] eKLR, (supra) the court held that; -
- “it is clear that rights acquired under this Article do not extend to any property that is found to have been unlawfully acquired. Such “finding” cannot be by any other means other than due process”.
141. The analysis of the evidence in this case shows that the foundation within which this Petition was anchored had already collapsed namely surrender and amalgamation of the suit parcels of land, therefore proof of violation became an uphill task. The title which they were waving did not benefit from a procedural process hence can be impeached as provided for under Section 26 of the Land Registration Act.
142. Section 24 of the *Land Registration Act* provides that the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.
143. Section 25 of the *Land Registration Act* states that rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an Order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever but the same is qualified by Section 26 states that the title of that proprietor shall not be subject to challenge, except — on the ground of fraud or misrepresentation to which the person is proved to be a party; or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
144. In this petition we are faced with 2 titles, one issued to the petitioners on 27th July 2020 and another had been issued to the respondents in 2015. The court is guided by the case of *Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others* [2016] eKLR (*supra*), where Munyao J held as follows;
- ‘A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it



for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.'

145. Both the Petitioners and the Respondents gave a history how they acquired their titles. The root and the processes of acquisition laid bare where there were missteps which even led to involving the DCI and EACC in investigating the root of the title. The court had already enumerated the anomalies by the Petitioners acquisition of title, starting from the allotment of private which was not available for alienation. Secondly assuming that the land was available for alienation, the Petitioner did not comply with the terms and condition of the allotment letter that required that the stand premium be paid within 30 days. The same was paid after 18 years and there was no proof whether they sought for extension of that period and if so was it granted. The crucial one is that even the issuing authorities of the title disowned it that it was erroneously issued as there were existing active titles.
146. Having said so, it follows that the title issued to the Respondents meets the procedural compliance for acquisition of titles and impeach the Petitioners title which fell short of the glory of procedural requirements of a good title. Courts cannot be used to sanitize irregularities in the land sector which has gone rogue. The Petitioners are therefore not entitled to the orders sought in the Petition.
147. Section 80 (1) of the [Land Registration Act](#) provides that: -
- “Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”
148. The above section empowers the court to make an order of rectification of a register directing that any registration be cancelled if it is satisfied that the registration was obtained, made or omitted by fraud or mistake. In this case the same was done by mistake which the Land Registrar and the Director Land Administration tried to rectify but they needed a court order to effect the rectification. The court therefore finds that the Petitioners title was superimposed on the Respondents' title hence it has no legal effect and therefore the Land Registrar is directed to cancel the Petitioners' Certificate of title dated 27th July 2020 and rectify the register to expunge such title.
149. I have considered the Petition, the responses, the submissions by counsel and the relevant judicial authorities and find that the Petition lacks merit and is dismissed with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 25TH 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.

