



Kalama & 2 others (Chairman, Secretary and Treasurer respectively of Bahari Community Development CBO) v Ministry of Lands and Physical Planning & 3 others; National Land Commission (Interested Party) (Environment & Land Petition 17 of 2019) [2023] KEELC 237 (KLR) (24 January 2023) (Judgment)

Neutral citation: [2023] KEELC 237 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND PETITION 17 OF 2019**

MAO ODENY, J

JANUARY 24, 2023

IN THE MATTER OF: THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS AS ENSHRINED UNDER ARTICLES 19, 20, 21, 22, 23, 24, 40 & 47 OF THE CONSTITUTION OF KENYA, 2010 AND IN THE MATTER OF: THE IMPLEMENTATION OF THE PARLIAMENTARY REPORT OF 2ND MARCH ON LR NOS MN/III/289 & 3545/4 IN KILIFI COUNTY AND IN THE MATTER OF: THE SETTLEMENT OF MEMBERS OF BAHARI COMMUNITY DEVELOPMENT ON L.R NOS MN/III/289. THIS LAND COMBINED WITH MN/III/273, 281 AND PARTS OF CROWN LANDS FROM MN/III/107 AND WAS ALLOCATED A NEW SUBDIVISION NUMBER MN/III/528 & MN/III/3545/4 (CR30669 IN KILIFI COUNTY BETWEEN

BETWEEN

**JUSTUS NDORO KALAMA 1ST PETITIONER
STEPHEN KAREMU MUKETHA 2ND PETITIONER
ANNA NDORI MWOLOLO 3RD PETITIONER
CHAIRMAN, SECRETARY AND TREASURER RESPECTIVELY OF BAHARI
COMMUNITY DEVELOPMENT CBO**

AND

**MINISTRY OF LANDS AND PHYSICAL PLANNING 1ST RESPONDENT
KENYA PORTS AUTHORITY 2ND RESPONDENT
MOMBASA CEMENT LIMITED 3RD RESPONDENT
ATTORNEY GENERAL 4TH RESPONDENT**

AND

NATIONAL LAND COMMISSION INTERESTED PARTY



JUDGMENT

1. By an Amended Petition dated 22nd October 2019 and lodged in court on the even date, the Petitioner has sought the following reliefs: -
 - a. A declaration that the Petitioner's fundamental rights and freedoms as enshrined under Articles 40 (1), 40 (2), (a), 40 (3) (b) (i), 47 (1) and 47 (2) of *the Constitution* of Kenya 2010 have been contravened and infringed upon by the Respondents herein.
 - b. An order that the 1st Respondent immediately take possession of Plot L.R No. MN/III/289. This land was combined with MN/III/273, 281 and parts of crown lands to form MN/III/107 and was allocated a new subdivision number MN/III/528 currently registered in the name of the 2nd Respondent and MN/III/3545/4 (CR30669) located in Kilifi County from the 2nd and 3rd Respondents respectively.
 - c. An order that the Interested Party facilitates and administers possession of Plot L.R No. MN/III/289. This land was combined with MN/III/273, 281 and parts of crown lands to form MN/III/107 and was allocated a new subdivision number MN/III/528 currently registered in the name of the 2nd Respondent and MN/III/3545/4 (CR30669) from the 2nd and 3rd Respondents to the 1st Respondent.
 - d. An order directing the 1st and Interested Party to reserve Plot L.R No. MN/III/289. This land was combined with MN/III/273, 281 and parts of crown lands to form MN/III/107 and was allocated a new subdivision number MN/III/528 currently registered in the name of the 2nd Respondent and MN/III/3545/4 (CR30669) immediately for settlement of the Petitioner.
 - e. An order that the 3rd Respondent vacates L.R NO. MN/III/3545/4 (CR30669) in Kilifi County.
 - f. An order that the 1st Respondent conducts a re- survey on L.R No. MN/III/289. This land was combined with MN/III/273, 281 and parts of crown lands to form MN/III/107 and was allocated a new subdivision number MN/III/528 currently registered in the name of the 2nd Respondent and MN/III/3545/4 (CR30669) and issue its title deed to the squatters herein.
 - g. A declaration that the Petitioner herein is entitled to prompt, just and adequate settlement of its proprietary interests in Plot No. L.R MN/III/289. This land was combined with MN/III/273, 281 and parts of crown lands to form MN/III/107 and was allocated a new subdivision number MN/III/528 currently registered in the name of the 2nd Respondent and MN/III/3545/4 (CR30669) in Kilifi County.
 - h. That the Honourable Court be pleased to grant a permanent injunction order restraining the 2nd and 3rd Respondents by themselves, their agents, servants and/or personal assigns from further dealings, engagements and carrying out quarrying activities and planting of trees on the subject properties pending the hearing and determination of this Petition.
 - i. That all titles unlawfully sold and transferred by the squatters to third parties be and are hereby cancelled.



- j. That the Honourable Court be pleased to order the 3rd Respondent to compensate the Petitioners by way of both general damages and mesne profits earned by the 3rd Respondent for the unlawful use and/occupation of the Petitioners parcel no. MN/III/3545 Kilifi.
- k. Any other orders and directions as this Honourable Court may consider appropriate.
- l. Costs of the Petition.

THE PETITIONER'S CASE

2. The gist of the Petitioners' case is that they presented a claim in their capacity as squatters in 2015 to the National Assembly Committee on Lands regarding the parcels of land identified in their reliefs above and that the Committee forwarded its recommendations in 2016 to the then Cabinet Secretary Ministry of Lands and Physical Planning for implementation. That the same could not be effected since the Petitioner's then officials failed to pursue the settlement course. That one of the recommendations therein was to investigate the then Chairman who allegedly had the allotment letters and sold the suit property to the 3rd Respondent.
3. The Petitioners stated that this prompted them as squatters to register Bahari Community Development CBO. Further that there was a fact finding team which was commissioned by the then Cabinet Secretary, which came up with a report dated 12th February 2018. According to that report, the suit property set aside for squatters had been invaded by the 3rd Respondent by carrying out quarry business and tree planting.
4. The Petitioners' complaint was that the Respondents have refused to comply with the recommendations of the Committee thereby violating their fundamental rights and freedoms.
5. The Petition is anchored on a verifying affidavit sworn on 22nd October 2019 by Stephen Karemu Mutheka and documents annexed thereto as listed on the list of documents of the same date.

THE RESPONDENTS' CASE

6. The 1st and 4th Respondent opposed the Petition and filed grounds of opposition dated 13th August 2019 stating that the Petition did not raise any constitutional issues hence did not meet the threshold of a Constitutional Petition. Further that the matter could be dealt with in a normal civil suit.
7. The 2nd Respondent filed a Replying Affidavit sworn on 25th November 2019 by Ephantus Waweru, its Estate and Rating Officer who deponed that the 2nd Respondent is the absolute owner of all that parcel of land measuring approximately 173.6Ha identified as L.R. MN/III/528 (formerly MN/III/307) having acquired the same in the year 1993 from Winworld Limited. That vide a letter dated 12th February 2014, the Interested Party requested the 2nd Respondent to consider hiving off part of the said land for the benefit of the squatters, which request was declined.
8. Mr. Waweru further deponed that as per the survey reports FR No. 122/33 and FR 99/17 the parcels MN/III/528, MN/III/3544, and MN/III/3545 were separate titles bordering each other and added that the Committee's report do not at any point allege that the land MN/III/528 was obtained fraudulently or illegally.
9. The 3rd Respondent filed a Replying Affidavit sworn on 1st November 2019 by Hasmukh Patel, its director who deponed that the Committee's report dated 24th November 2015 and relied upon by the Petitioner was at that time the subject in another dispute Mombasa ELC Petition 17 of 2018 which found that the Committee acted on non-existent powers.



10. Mr. Patel further deponed that the 3rd Respondent purchased from Vipingo Estates Limited, land and buildings comprised in subdivision number 4391 (Original No. 3545/2/1) Section III/MN measuring approximately 499.0 Ha. He annexed a copy of transfer of lease dated 1st March 2005 together with a consents from the Land Control Board, Commissioner of Lands, stamp duty payment receipt and Rates and Rent Clearance Certificate (HP7 and HP8); and a copy of approval for change of user as HP10.
11. Mr. Patel explained that LR No. MN/III/289 was subdivided into two portions in 1920 with one of the portions allocated by the then Crown government to a private individual; and the remainder portion together with LR No. MN/III/290 allocated to Vipingo Estates Limited. The latter was subsequently subdivided resulting to MN/III/3545, which was further subdivided into three portions namely MN/III/4391, 4392 and 4393.
12. Mr. Patel further deponed that the Interested Party conducted its investigations which concluded that the transfer of MN/III/4391 was lawful and by letters dated 22nd September 2014 and 8th January 2015, the Interested Party confirmed the 3rd Respondent's ownership (Annexure HP 13 and HP14). He also annexed as HP15, letters from the Director of survey and Department of Lands dated 6th August 2014.
13. In relation to the investigations and report of the Parliamentary Committee, Mr. Patel stated that the same was conducted after the investigations by the Interested Party which is the body mandated to review grants and dispositions of public land and investigate on land injustices.
14. That on 28th July 2017, the CS Ministry of Lands, wrote to the 3rd Respondent informing them of the Committee's report and demanding that the 3rd Respondent vacate the land MN/III/4391. The CS issued a further directive on 15th February 2018 that a committee be instituted to oversee restitution of the land in question which Committee subsequently reported vide a letter dated 28th March 2016 confirming the 3rd Respondent's ownership of MN/III/289 and MN/III/290.
15. The director also attached a copy of a report from the Director of Criminal Investigation as HP20 and a letter from the area Member of Parliament as HP21, confirming that the parcels MN/III/291/2 and MN/III/4391 belong to the 3rd Respondent.
16. Mr. Patel urged the Court to quash the directive of the CS Ministry of Lands directing the 3rd Respondent to vacate the suit property; examine the actions by the National Assembly Committee; and dismiss the petition.
17. On 22nd June 2022, this court directed parties to file written submissions. As at the time of writing this Judgment only the 2nd Respondent had filed written submissions. The other submissions on record are in respect of the Notice of Motion dated 22nd October 2019 by the Applicant for injunction which was dismissed vide a ruling dated 30th April 2021.

THE 2ND RESPONDENT'S SUBMISSIONS

18. Counsel for the 2nd Respondent submitted that this court lacks jurisdiction to allocate land whether alienated or otherwise but it can only enforce existing rights. That the Petition does not demonstrate the existence of any right that is capable of being enforced and protected by this Court, hence the Petition is not justiciable.
19. On the issue of jurisdiction counsel relied on the cases of Owners of Motor Vessel "Lillian S" Vs. Caltex Kenya Civil Appeal No. 50 of 198, Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & 2 Others (2013) eKLR, Supreme Court of Kenya in Samuel Kamau Macharia & Another vs. Kenya Commercial Bank



- Limited & others (2012) eKLR and submitted on the centrality of jurisdiction in determination of a matter and if a court lacks the same, then it should down its tools.
20. Counsel submitted that the Honourable Court is neither vested with power to allocate land whether alienated or otherwise nor create rights and further that it can only enforce existing rights.
 21. It was counsel's submission that it should be noted that even the National Land Commission has no power to allocate alienated or privately owned land as the land must be compulsorily acquired first as provided under Article 40 of *the Constitution*.
 22. Counsel submitted on justiciability of the petition and stated that the power to determine disputes through the exercise of judicial authority and the capacity to commence action for such determination is based on the universal concept of principle of justifiability.
 23. Counsel submitted on the definition of justiciability which means that a matter is "proper to be examined in courts of justice" or "a question as may properly come before a tribunal for decision, and stated that courts should only decide matters that require to be decided.
 24. On this issue counsel relied on the cases of *Ashwander v Tennessee Valley Authority* [1936] 297 US 288; *John Harun Mwau & 3 others -v- AG & 2 Others* HCCP No. 65 of 2011; *Hon. Martin Nyaga Wambora -v- Speaker of County Assembly of Embu & 5 others* HCCP No. 3 of 2014; and *Communications Commission of Kenya & 5 Others -v- Royal Media Services Limited & 5 Others* [2014] eKLR and submitted that the justiciability dogma prohibits the court from entertaining hypothetical, abstract arguments or academic interest cases as the court is not expected to engage in abstract arguments.
 25. It was counsel's further submission that the Petitioners having pleaded that they are squatters, therefore have no protected rights in the suit property capable of being enforced and that there was no evidence to the effect that the 2nd Respondent acquired the suit property illegally hence the registered owner, the 2nd Respondent was entitled to be protected under section 24, 25 and 26 of the *Land Registration Act*, 2012 and relied on the case of *Charles Karathe Kiarie & 2 other -v- Administrators of Estate of John Wallace Mathare and 5 other* [2013] eKLR on indefeasibility of title.
 26. Counsel also quoted the definition of a squatter as highlighted in the case of *Nelson Kazungu Chai & 9 Others v Pwani University College* [2017] eKLR, and submitted that the Petitioners having pleaded that they are squatters, their alleged rights remain an illusion thus not capable of protection.

ANALYSIS AND DETERMINATION

27. The issues for determination in this petition are as follows: -
 - a. Whether this court has jurisdiction to determine the Petition.
 - b. Whether the Petitioner's fundamental rights and freedoms as enshrined under Articles 40 (1), 40 (2), (a), 40 (3) (b) (i), 47 (1) and 47 (2) of *the Constitution* of Kenya 2010 have been infringed upon by the Respondents.
 - c. Whether the Petitioners are entitled to an order of injunction against the respondents and payment general damages and mesne profits by the 3rd Respondent.
28. The issue of this court's jurisdiction on constitutional Petitions has been a subject of many decisions. The Respondents' argument was that this court has no jurisdiction to hear to hear constitutional Petitions and that this matter should have been filed vide a normal civil suit as opposed to a Constitutional Petition.



29. The Supreme Court in the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR para 68, observed: -

“A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

30. Article 162 (2) (b) of *the Constitution* of Kenya, 2010 establishes the Environment and Land Court. It reads: -

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) ...

(b) The environment and the use and occupation of, and title to, land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

31. Section 13 of the *Environment and Land Court Act* provides for the jurisdiction of this court that is envisaged under Article 162(2) (b) above, as follows: -

13. Jurisdiction of the Court

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of *the Constitution*.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.



32. It is clear from the provisions of Section 13 above, that this Court has jurisdiction to hear and determine suits for redress of a violation or infringement of fundamental rights and freedoms. It also provides that the court shall have the jurisdiction to hear any other disputes relating to environment and land.
33. The Petitioners alleged the violation of their rights in relation to land as enshrined in *the Constitution*, it therefore follows that this court has jurisdiction to hear and determine this Petition.
34. On Constitutional Petitions generally, it is now settled that the same should be precise as it was held in the case of Anarita Karimi Njeru v Republic [1979] eKLR:-

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

35. The Petitioner stated that their rights under Articles 40 (1), 40 (2), (a), 40 (3) (b) (i), 47 (1) and 47 (2) of *the Constitution* of Kenya 2010 have been infringed by the Respondents. A perusal of the Petition, I see a paragraph titled “Particulars of the Infringement of the Petitioner’s rights by the Respondents.” Thereunder, they have set out the provisions that have allegedly been infringed, and further the Petitioners proceeded to aver:

“In view of the circumstances in the instant case, the Respondents are obliged by dint of law to implement the recommendations of the parliamentary committee on Lands and ensure that the squatters are settled.”

36. Having in mind the standard set out in the Anarita Karimi Case, I do not see how the Petitioner has demonstrated the manner in which their rights have been infringed by each of the Respondents. It is prudent upon a Petitioner must set out with a reasonable degree of precision what rights and how they have been infringed by the Respondents. I find that the Petitioners did not meet these requirements.
37. In any event, the said Articles said to have been infringed read as follows: -

40. Protection of right to property

- (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
- a. of any description; and
 - b. in any part of Kenya.
- (2) Parliament shall not enact a law that permits the State or any person—
- (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or ...
- (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—
- a. ...



- b. is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—
 - i. requires prompt payment in full, of just compensation to the person;

47. Fair administrative action;

1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

38. Article 40 provides that every person has a right either individually or in association with others, to acquire and own property. It does not say that this right should infringe on other people's right to enjoy their property which has been acquired lawfully.

39. It was therefore incumbent upon the Petitioners to demonstrate how the aforementioned rights have been infringed. Briefly, the Petitioner's case was that they were entitled to the suit property on the basis that they were squatters set to be settled on the suit properties. That they presented a claim in 2015 to the National Assembly Committee on Lands which forwarded its recommendations to the CS, Ministry of Lands who in turn wrote to the 3rd Respondent letter dated 28 July 2017, inter alia stating as follows:

1. That this Ministry hereby wishes to notify you of the existence of the said Parliamentary Report and Recommendations thereof (attached).
2. That you are hereby directed to immediately give vacant possession of the above captioned parcels of land and have the illegal titles, held by yourselves returned to the Land Registrar, Mombasa for cancellation.
3. That failure on your part to comply with (2) above and upon lapse of seven (7) (sic), this Ministry will without further notice to yourselves move to the ground with a view to mark out the said parcels and physically take possession of the same.

Prof. Jacob T. Kaimenyi

CABINET SECRETARY.

40. The parcels of land in the report of the Committee and in a letter by the Cabinet Secretary, are the parcels MN/III/290, MN/III/289 and MN/III/3545. The suit properties herein are MN/III/289 and MN/III/3545/4 (CR30669). Notably, prior to the Committee's recommendations, the Interested Party had conducted an investigation connected to the suit properties and in their report dated 17th September 2014, it is noted that the very original plot numbers were MN/III/289 and 290. MN/III/289 was subdivided into two portions.

41. One portion was allocated by the Crown to Khamis Bin Rashid Bin Sood, and the remainder portion together with MN/III/290 allocated to Vipingo Estates Limited. When an amalgamation was done for the MN/III/290 and the remainder of 289, the number changed to MN/III/3545. MN/III/3545 was subsequently subdivided into three portions being 4391, 4392 and 4393. It also appears that MN/III/528 was as a result of the original number MN/III/307 which included a portion of MN/III/289 allocated to Khamis Bin Rashid.



42. It follows therefore that the suit properties form part of the properties referred to in the recommendations by the Committee. The pertinent question therefore is whether the recommendations by the Committee are legal and enforceable. This question has been aptly addressed by this Court sitting in Mombasa in *Mombasa Cement Limited –v- The Ministry of Lands and Physical Planning & 3 Others, Vipingo Estate Limited (Interested Party) Petition No. 17 of 2018*.

43. Allow me to quote extensively what Munyao J stated in the case in respect of the roles of the National Assembly and the National Land Commission, as this decision has a bearing in this case as below:

“69. I have elaborated the applicable law in relation to land disputes and it will be observed that nowhere does *the Constitution*, or statute, give the National Assembly the power to handle a dispute over land, or make a decision on who should get title to certain land, or who has the right to occupy it. What can be seen is that for purposes of resolving land disputes, *the Constitution* has established the National Land Commission (to among other matters review grants and dispositions of public land subject to limitations) and the Courts. The National Assembly and its Committees cannot therefore purport to utilize their deliberative or oversight role to hear disputes over land. Neither does the National Assembly have the power to cancel title, or direct the Ministry or the National Land Commission to cancel a title, or make decisions on occupation of land. In short, land disputes do not fall within the jurisdiction of the National Assembly.

70. I have also not seen any law that empowers the National Assembly to declare that a certain title is illegal, or fraudulently acquired, or direct the rectification of a land register. That power rests with the Court pursuant to Section 80 of the *Land Registration Act*, Act No. 3 of 2012....

.....The above implies that title cannot be declared as fraudulent or illegal by fiat of the National Assembly. In my view, if the National Assembly, through its deliberations, is of opinion that a certain title may be tainted, it is not for the National Assembly to make any declaration that the title is bad. It can only make a note of its suspicions and let other bodies undertake their independent investigations and come up with the finding of illegality and corrective action. It would be improper for the National Assembly to purport to sit as a court would, and proceed to make final declarations over the authenticity of title to certain land...

79. The result of the deliberations and “recommendations” of the National Assembly, and the subsequent action taken by the Cabinet Secretary of the Ministry of Lands, directly and adversely affected the right of the petitioner to property enshrined by Article 40 of *the Constitution*. The pronouncement of the National Assembly went contrary to the provisions of Sections 24 and 25 of the *Land Registration Act* ...

80. The intention of the recommendations by the National Assembly and the subsequent action by the Cabinet Secretary was to have the petitioner denied the right to enjoy its property. It will in fact be noted that the National Assembly directed the Ministry of Lands and Physical Planning to immediately take possession of the land of the petitioner.....



.....The National Assembly could not thus pronounce that the title of the petitioner is illegal and fraudulently acquired. Its directive to the Ministry in charge of land was illegal and unconstitutional. The report of the National Assembly was thus unconstitutional, ultra vires, and null and void, and needs to be quashed. That report is hereby quashed. The letters of the Cabinet Secretary were written pursuant to a directive that I have held to be unconstitutional. Those letters also need to be quashed and they are hereby quashed.”

44. The reason I have quoted the above Mombasa case extensively is because it resonates well with the current case where the Petitioners are relying on recommendations of the Departmental Committee of Lands of the National Assembly and the letter by the Cabinet Secretary dated 28th July 2017 instructing the 3rd Respondent to vacate pursuant to the parliamentary recommendation.
45. The above decision by the Parliamentary Committee on land and the Cabinet Secretary’s letter were declared unconstitutional, null and void by the court as they did not have such authority to declare any title fraudulent as that is the mandate of the court.
46. The effect of such an act that has been declared null and void was aptly stated by Lord Denning in the case of *Macfoy vs. United Africa Co. Ltd* [1961] 3 All E.R. 1169, where he explained: -

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”
47. Counsel for the Petitioner submitted that the Mombasa case is distinguishable from this Petition on the grounds that the parliamentary report that was quashed was dated 24th November 2015 and that the present one that the Petitioners are relying on is dated 12th February 2018, that the parcels in the Mombasa case were totally different, that the land was registered in the name of Mombasa Cement and this one is registered in the 3rd Respondent’s name.
48. Counsel therefore submitted that the Mombasa Judgment is persuasive and not binding and urged the court not to rely on the Mombasa decision in dismissing the case but rely on the affidavits and submissions to allow the Petition as prayed.
49. With due respect to counsel, such an argument is not tenable as what we are concerned with is the principle on power and mandate, whether the Parliamentary Committee on Land of the National Assembly has the power to declare rights in land or that certain titles are fraudulent, whether the Cabinet Secretary had the mandate to act on the Parliamentary Report to order that the 3rd Respondent vacates the suit parcels of land. The answer is in the negative as it was declared in the Mombasa case. Those decisions by the 2 bodies were null and void whether they related to the current parcels of land or not. Whether the date came earlier or later it does not matter but whatever the report communicated to be done was ultra vires and that is why they were quashed by the court and if such is done again the court will not tire to quash such actions.
50. It should be noted that the Petitioners, claim was hinged on the same Parliamentary Report and the letter by the Cabinet Secretary as annexures to the amended Petition, judgment which was attached Mombasa ELC Petition No 17 of 2018 under “Pleading of the parties: refer under paragraph 1 subdivisions No 4391 (Original No. 3545/2(1) of Section III/MN. Further the parcels of land



mentioned at pages 44,68, 69 of the Amended Petition namely MN.III/289 MN/III/290, MN/III/3545 were all mentioned in the judgment in the quashed Parliamentary Report.

51. The Mombasa decision by Munyao J, declaring the Committee's recommendations unconstitutional and all other acts emanating therefrom, has not been overturned on appeal or review. The Petitioner admitted that the suit properties were registered in the names of the 2nd and 3rd Respondents respectively and there being no evidence to prove that they were fraudulently acquired, there would be no reason to deprive them of their rights as proprietors as per Sections 24, 25 and 26 of the [Land Registration Act](#) which provides for indefeasibility of title.
52. Having found that the titles in relation to the suit property were not challenged on any of the grounds envisaged under Section 26 of the [Land Registration Act](#), it follows that the Petitioners have no rights to be enforced against the Respondents, be it right over the suit property as squatters, damages, mesne profits or injunction against the Respondents.
53. The Petitioners have therefore not proved that they have any rights capable of being infringed by the Respondents. The Petitioners having described themselves as squatters know which door to knock and should not use trial and error tactics on private land.
54. The upshot is the Petition is dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 24TH 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.

