



**Mwangang’anzi & 12 others v Kenya Airports Authority & 4 others (Petition  
11 of 2021) [2023] KEELC 16684 (KLR) (31 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16684 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
PETITION 11 OF 2021  
AE DENA, J  
MARCH 31, 2023**

**BETWEEN**

**SWALEHE MWANGANG’ANZI & 12 OTHERS ..... PLAINTIFF**

**AND**

**KENYA AIRPORTS AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**THE CHIEF LAND REGISTRAR ..... 2<sup>ND</sup> RESPONDENT**

**THE CABINET SECRETARY, MINISTRY OF LANDS ..... 3<sup>RD</sup> RESPONDENT**

**THE NATIONAL LAND COMMISSION ..... 4<sup>TH</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**The Petition**

- 1 The petitioners refer to themselves as adults residing and/or working for gain in Ukunda Kwale County. It is the petitioners case that they have been residing around the Diani International Airport, formerly Ukunda Airstrip since pre- independence as their ancestral home. That sometimes in 1958, their forefathers led by one Mwaraoone welcomed a European man by the name Trench French to the area and allocated him 2 acres of Plot Number Kwale/Diani Beach Block /675 (hereinafter referred to as the suit property) for purposes of landing his aircraft.
- 2 The petitioners state that the said Mr Trench would land his aircraft and it would be parked near a mango tree which exists to date. According to the petitioners, Mr Trench was only invited and the portion of land was never sold to him as it was a grazing and farming.
- 3 The petitioners state that around 1982 the adjacent parcels to the suit property were demarcated and title deeds issued but to their knowledge the area occupied by the airport was not demarcated



- having been reserved for grazing. That however without the petitioners knowledge or compensation the 1<sup>st</sup> respondent acquired a title deed to the area in 1988. The petitioners claimed further that the 1<sup>st</sup> respondent had also encroached on land registered under the petitioners whose titles were subsequently revoked by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents for the benefit of the 1<sup>st</sup> respondent.
- 4 Additionally the petitioners alleged that the 1<sup>st</sup> respondent demolished Mkwakwani school built on Plot Number Kwale/Ukunda/3634 without compensating the petitioners.
- 5 The petitioners state that the parcel of the land occupied by the 1<sup>st</sup> respondent was illegally obtained without their consent and/or permission and devoid of compensation. The petitioners state that there is need for proper survey to be conducted to establish the area occupied and encroached upon by the 1<sup>st</sup> respondent for purposes of compensation as their earlier efforts to undertake the same were frustrated by the respondents. The petitioners want to be compensated for the entire land measuring 98.3 acres at market rate among other reliefs as shall be seen later this judgement.
- 6 The petitioners highlight a breach of their constitutional rights under articles 10, 20, 21,22, 23(1) and (3), 27,28, 29 ,35, 40, 47 and 48 of the constitution. The petition is supported by the affidavit of Ali Swalehe Mwang'ang'azi sworn with authority of the other petitioners.

## **Responses To The Petition.**

### **The response of the 1<sup>st</sup> respondent**

- 7 In response to the petition, the 1<sup>st</sup> respondent filed a replying affidavit dated 26/4/2021 sworn by Margaret Munene its acting corporation secretary. It is averred that the 1<sup>st</sup> respondent is the legal and registered owner of the suit property in which they have developed the Ukunda airstrip as mandated by law. It is deponed that the airstrip is a sensitive national asset that serves the local and international travellers going to the South Coast and the facility therefore requires to be secured to ensure safety of the flights and passengers using the Ukunda airstrip.
- 8 The deponent states that the petitioners reside on the properties neighbouring and or adjacent to the Ukunda airstrip and the issue between the petitioners and the 1<sup>st</sup> respondent is the boundary between the properties and which does not amount to a constitutional issue. That mandate to fix boundaries to registered land is vested in the Land Registrar under section 19 of the Land Registration Act 2012 and who may visit the site and fix boundaries. That consequently the court lacked jurisdiction.
- 9 According to the 1<sup>st</sup> respondent the petitioners among others were trespassers and which was confirmed by the 4<sup>th</sup> respondent the National Land Commission. That the Commission had *vide* a letter dated 16/8/2017 directed the eviction of the petitioners. That despite an eviction notice issuing the petitioners had refused to vacate.
- 10 Additionally it was deponed that the Directorate of Survey visited the area and established that the petitioners have trespassed on the 1<sup>st</sup> respondent's property. That pursuant to section 154E of the Land Act 2012 a notice was issued to people who had encroached on the airstrip land but they had to date refused to vacate.
- 11 This court was urged to dismiss the petition for failure to raise any constitutional issues.
- 12 From the proceedings in the court file it is noteworthy that state counsel from the office of the Attorney has been appearing for the 2<sup>nd</sup> 3<sup>rd</sup> and 5<sup>th</sup> respondents. On 17/02/22 Mr Mwandeje sought for 21 days to respond to the petition which the court granted but this was never complied with. The 4<sup>th</sup> respondent did not participate in the proceedings.



## Submissions

13 The petition was disposed of by way of written submissions.

## Petitioner's submissions

- 14 The petitioners' identified two issues for determination, whether this court has jurisdiction to entertain this petition and whether the petitioners are entitled to compensation.
- 15 Mr Matende learned counsel for the petitioners submitted that the jurisdiction of the court was broad as donated by article 162 of the Constitution and section 13 of the Environment and Land Act. Article 23 was also cited in this regard. It was contended that the main issue as per the prayers in the petition was compensation from the respondents for encroaching and trespassing and wrongfully acquiring the petitioner's ancestral land. That the petitioners were deprived of their property for a public purpose without compensation contrary to article 40 of the Constitution.
- 16 On whether the petitioners are entitled to compensation, it was submitted that the recommendation of the National Land Commission was meant to aid the 1<sup>st</sup> respondent illegally acquire the suit property. That the petitioners held valid certificates of title and were therefore not squatters. That the said recommendations were made without carrying out survey exercise and according the petitioners a chance to be heard.
- 17 Counsel urged that the petitioners had duly demonstrated through maps from the regional surveyor coast that the respondents encroached upon the various titles exhibited by the petitioners. That the titles held by the petitioners ought to be protected under the provisions of section 25[1] of the Land Registration Act on indefeasibility of title as well as article 40 of the Constitution unless they were challenged under the provisions of section 26 (1) (a)(b) as to fraud or misrepresentation or corrupt scheme.
- 18 The petitioners allege that the respondents have engaged in fraudulent acquisition of the suit property in that the survey exercise done by the District Surveyor Kwale H Ndolo dated 30/1/2020 was carried out without the petitioners participation nor their surveyor which was admitted in the said report; That the 1<sup>st</sup> respondent had unlawfully obtained titles in their name for plot 3634 where Mkakwani school was initially built which did not belong to the 1<sup>st</sup> respondent and had also obtained title to the land where it was relocated to. That the 1<sup>st</sup> respondent had engaged the petitioners on compensation since 2009 and it was therefore strange that they never evicted the petitioners since then if the 1<sup>st</sup> respondents title was acquired legally.
- 19 The petitioners pray that the court exercises its jurisdiction by rectifying the records held by the respondents as per section 80 of the Land Registration Act 2012 and referred to the case of Samuel Odhiambo Oludhe & 2 Others Vs Jubilee Jumbo Hardware Limited & Another (2018) eKLR.

## The submissions of the 1<sup>st</sup> respondent

- 20 The 1<sup>st</sup> respondent submitted through the firm of Cootow & Associates that this court does not have jurisdiction to handle this petition on two points. Firstly, that the courts have in numerous authorities which were cited including the Court of Appeal in Anarita Karimi Njeru Versus Republic [1979] KLR 154. opined that reliance on constitutional provisions does not always automatically mean that the claim is a constitutional matter. Secondly that the fixing of boundaries did not amount to a constitutional issue but was vested in the Land Registrar under section 19 of the Land Registration Act and further ousted the jurisdiction of this court.



- 21 Referring to the provisions of sections 107(1), 109 and 112 of the Evidence Act it was submitted that the burden that is cast upon any party is the burden of proving any particular fact which he desires the court to believe in its existence, yet the petitioners had failed to tender any evidence to support their claim of the airstrip being their ancestral home. That the suit property was government land.
- 22 It was submitted that the 1<sup>st</sup> respondent right to ownership of the suit property as evidenced by a certificate of title thereof was protected under article 40 of the Constitution as read together with sections 24, 25 and 26 of the Land Registration Act No 3 of 2012. That there was no evidence tendered to show that the suit property was acquired illegally. Reliance was placed in the Court of Appeal decision of Charles Karatbe Kiarie & 2 Others Versus Administrators of the Estate of John Wallace Mathare [Deceased And 5 Others] [2013] eKLR.
- 23 It was urged that the petitioners being squatters have no protected rights over the airstrip land. The 1<sup>st</sup> respondent further submitted that the National Land Commission dealt with the issue before court as evidenced by the letter dated 16/8/2017. The court was invited to dismiss the petition with costs to the 1<sup>st</sup> respondent.

### **Analysis And Determination**

- 24 Having considered all the foregoing, I have carved out the following issues for determination;
1. Whether the court has jurisdiction to hear this petition
  2. Whether the allocation of the suit property to the 1<sup>st</sup> respondent was illegal and infringed on the petitioners rights.
  3. Whether the petitioners should be compensated.
  4. Who bears the costs of this petition.
- 25 The jurisdiction of this court was called to question on the basis that petitioners claim was a boundary issue and yet determination of boundaries was the preserve of the Land Registrar. Further that the claim did not meet the threshold for a constitutional issue. In my understanding the petitioners desire to be compensated forms the key incentive of this petition. It is their case that depriving any person the use and occupation of their land was unconstitutional as per the provisions of article 40 of the constitution. I hear the petitioners saying that the suit property which was their ancestral land was transferred and/or acquired for the purposes of the Ukunda airstrip which is a public purpose on behalf of Kenya Airports Authority the 1<sup>st</sup> respondent without compensation contrary to the Constitution. To me this is not a boundary issue in entirety to disqualify it from the ambit of a constitutional issue. In fact the petitioners state in their submission that they have no opposition to the expansion of the Ukunda Airstrip and all they want is compensation. Based on this alone I uphold this court has jurisdiction to determine this petition.
- 26 The Court of Appeal in the case of Randu Nzai Ruwa & 2 Others Vs Secretary, the Independent Electoral and Boundaries Commission & 9 Others (2016) eKLR held the view that the intention of the framers of the Constitution from which the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 are derived, was to allow any person who genuinely believed that there was a violation of fundamental freedoms and constitutional rights to approach the court for redress as envisaged under article 22 of the Constitution 2010.
- 27 In a ruling to strike out a petition, Mativo J in Disney Insurance Brokers Ltd v Jobo & 4 others (Petition 37 of 2020) [2021] KEHC 353 (KLR) (17 December 2021) persuasively stated as follows:-



8. It is also important to mention that Constitutional Petitions are governed by the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (the Rules) which provide for the form of petitions and the informality rule. In addressing the two hurdles erected in front of this petition, the overriding objective of the rules as provided under rule 3 which is to facilitate access to justice for all persons as required under article 48 of the *Constitution* must be kept in mind. In addition, rule 3(3) provides that the rules must be interpreted in accordance with article 259 (1) of the *Constitution* and shall be applied with a view to advancing and realizing the- (a) rights and fundamental freedoms enshrined in the bill of rights; and (b) values and principles in the *Constitution*. Also relevant is sub-rule 4 which provides that in exercise of its jurisdiction under the Rules, the court shall facilitate the just, expeditious, proportionate and affordable resolution of all cases.<sup>18</sup>Legal Notice No 117 of 2013.

28 Persuaded and guided by the above including my analysis based on article 40 , I will proceed to adjudicate upon this petition.

**Whether the allocation of the suit property to the 1<sup>st</sup> respondent was illegal and infringed on the petitioners rights.**

29 In undertaking an analysis of the above issue it is important to look into whether petitioners had any interest in the suit property be it proprietary or beneficial. In the petitioners statement sworn by Ali Swaleh the petitioners state that they are members of the Mwaraoone family clan, which clan had been residing in and around the Diani International airport formerly Ukunda airstrip since pre-independence and continue to stay thereon to date. That sometime in 1958 their forefathers without consideration allocated one Mr French 2Ha for purposes of landing his aircraft. It is stated that when adjudication of the area was undertaken, to the petitioners knowledge the said area used by Mr French was never adjudicated upon since the same had been reserved by the clan for grazing yet the 1<sup>st</sup> respondent had obtained title to the same.

30 Of course, to the petitioners the suit property is ancestral land. What then did the petitioners present before court to support the claim that the suit property was their ancestral land? Copies of titles were presented but which to me do not prove ancestry. An article extracted from europeansineastafrika.co.uk was presented at the point of submissions giving a narration of how the said Mr Trench took a very active part in the laying out and sitting of the airstrip at Ukunda. I state at the point of submission because it was not part of the petitioners list of documents and neither was it attached to any of the affidavits that were already on record. Assuming it was duly produced how does the article prove ancestry? There is no information in the report about the ownership of the land other than the alleged active part played by Mr Trench in laying out and setting the Ukunda airstrip. And there is nothing wrong with this. But was this the best the petitioners could present in terms of ancestry? It was submitted by Mr Matende that the article placed Mr Trench on the suit property then. For me the person the petitioners required to place in the suit property then is mzee Mwaraoone. To me no cogent evidence was tendered with regard to the petitioners including the occupation of the petitioner's forefathers.

31 In the case of *Leonard Otieno Versus Airtel Kenya Limited* [2018] eKLR Justice Mativo persuasively observed that a litigant bears the burden of proof in asserting his claim and more so in violation of constitutional rights. The petitioners claim a breach of fundamental rights and it was incumbent upon them to prove their claim of right of ownership over the suit property. In the present case they did not.



- 32 Assuming that the petitioners proved that their forefathers dwelt in the suit property, it would still have not granted them proprietary interest in the suit property. I agree with Justice Sila Munyao dictum in *Henry Wambega & 733 Others V Attorney General & 9 Others* [2020]eKLR where he stated as follows;-  
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.’
- 33 The 1<sup>st</sup> respondent exhibited a title deed for Kwale/Diani Beach Block/675 issued under the Registered Land Act (now repealed) in the name of Kenya Airports Authority issued on January 11, 1996. The history of the title is given in the report on survey of Parcel: Kwale/Diani Beach Block/675- Ukunda airstrip dated January 30, 2020 exhibited by the 1<sup>st</sup> respondent.
- 34 The report is by the Ministry of Lands & Physical Planning District Surveyor Kwale and gives the following findings/ analysis; -  
Analysis of Data
- a. The Diani area was first surveyed on March 31, 1920
  - b. The Diani Area was first surveyed on March 31, 1920 which set apart Ukunda Reserve, Diani Reserve and the remainder being Crown Land (later Government Land). See Plan F/R No 7/183.
  - c. The Government Land in (a) was later subdivided beginning on May 29, 1961 and in 1972 was registered as Diani Beach Block. See plan F/R No 96/61.
  - d. The Airstrip was first was first surveyed on 4<sup>th</sup> January, 1970 as parcel as parcel No 13 of Diani Beach Block (See Plan F/R No 118/28). It was later re-surveyed as parcel No 675 on 31<sup>st</sup> March, 1988 (see Plan F/R No 199/21).
  - e. The Native Reserve in (a) were adjudicated starting in 1973 and in 1982 were registered as Ukunda Registration Section. The area along the boundary with the airstrip appears in PID number 14 of the Registration Section. See Ukunda Registration Section PID No 14
- 35 It is therefore very clear that even before the alleged allocation by Mr Mwaraone to the said Mr Trench in 1958, the land was government land set apart for the purpose of the airstrip. It cannot have been private land or even trust land to have belonged to the mwaraone clan herein. Based on the report this court is in agreement with counsel for the 1<sup>st</sup> respondent submission that the airstrip land was formerly government land. Infact this settled my curiosity as to why the suit property was not adjudicated to the petitioners if the land was under adjudication in 1982. For me there would be no reason for it to be left out. Either there was no one who laid a claim/interest on the suit property or it may not have been available for adjudication. Indeed, it was not part of the native reserves that were later adjudicated in 1973 and subsequently registered as Ukunda registration area.
- 36 This survey report is impugned by Mr. Matende learned counsel for the petitioners on the basis that the report states that there was going to be a joint survey involving a private surveyor appointed by the local community. My understanding of this background is that this affected the area near the former Kakwami primary school. I will deal with the issue of the land belonging to the School later in this judgement. Assuming this court is wrong, even if this involved the other areas under dispute, it would not in my view form a valid basis to impugn the report whose objectives, methodologies and reference maps were clearly set out. I have no reasons to doubt the veracity of this report having been presented



- by the government as the keeper of the master record of all land. I also do not see the need for conduct of another survey it would not change much.
- 37 It was incumbent upon the petitioners to present evidence that would demonstrate that 1<sup>st</sup> respondent title has been acquired illegally, unprocedurally, or through a corrupt scheme pursuant to the provisions of section 26 (1) (a)(b) of the Land Registration Act. There was no evidence produced in this regard except for hypothetical questions raised by learned counsel for the petitions. Let me state that it is trite that fraud has to be specifically pleaded, particularised and proved at a slightly higher standard of proof than that of a balance of probabilities see *Ratil Patel Vs Lalji Makanji* EA 1957. No fraud has been pleaded, no particulars have been given. I noted an attempt to introduce the particulars through the submissions filed. Submissions do not replace pleadings neither can they be used as a platform to introduce new evidence. Parties are bound by their pleadings. In any event as observed earlier the 1<sup>st</sup> respondent was able through the report by the Ministry of Lands & Physical Planning District Surveyor Kwale to demonstrate how they came to be the proprietors of the suit property. Based on the pleadings and the evidence this court is unable to make a finding that the 1<sup>st</sup> respondents obtained the title to the suit property fraudulently. No evidence has been placed before this court showing that the 1<sup>st</sup> respondent was unlawfully occupying the suit property as a state agency.
- 38 In view of the foregoing this court finds no reason to impeach the 1<sup>st</sup> respondent title in respect of Kwale/Diani Beach Block/675.
- 39 Are the petitioners entitled to the reliefs they seek? Firstly, the petitioners seek a declaration that the allocation and acquisition of Plot Number Kwale/Diani Beach Block/675 by the 1<sup>st</sup> respondent was illegal and in contravention of the petitioner's rights and the Constitution. I have already made a finding that the acquisition was not illegal. Additionally, the petitioners having failed to prove on a balance of probabilities their interest in the suit property there was nothing capable of being infringed upon or protected under article 40 of the Constitution.
- 40 In view of the above finding the order seeking a declaration that the petitioners have the right to be compensated for the illegal acquisition of the Plot Number Kwale/Diani Beach Block/675 cannot issue for the reason that the allocation was not illegal.
- 41 The petitioners also crave for an order for compensation for the Plot Number Kwale/Diani Beach Block 3634 at the current market price. The petitioners claimed that the 1<sup>st</sup> respondent had unlawfully obtained titles in their name for plot 3634 where Mkwakwani school was initially built which did not belong to the 1<sup>st</sup> respondent and had also obtained title to the land where the school was relocated to. While a Title for Mkwakwani PEXH 4 measuring 0.63HA issued on February 10, 2005 to Suzane Mehmet as trustees and which was corroborated by the official search dated March 28, 2018 was exhibited by the petitioners, the subsequent alleged title to the new location or an official search was not produced to prove the claims that it was in the name of the 1<sup>st</sup> respondent. The said alleged allegation was said to be the fraud. This court cannot speculate; fraud must be proved.
- 42 Additionally, I observed from the minutes exhibited by the plaintiff that the school was relocated to 5 acres as compared to the initial 0.63Ha which is way over and above in terms of size. How can this be termed as a fraud? The school is a public school and I also wondered as a court in what capacity the petitioners claim for compensation on behalf of the School. Reference has been made to a meeting held on November 20, 2009 whose minutes were availed as 'PEXH 5.' Min.01/1/2009 thereof discussed Mkwakwani Primary School. The petitioners are using the minutes to state the issue of compensation was not new. I keenly studied the minutes of the meeting and I did not find any discussions on compensation for the school land except generally compensation for land owners. Not even the school chairman who attended the meeting and who is listed in this petition as petitioner No 33 asked for



compensation for the School. All I saw in the minutes in response to compensation for land owners, the Deputy Managing Director of the 1<sup>st</sup> respondent stated the issues of land compensation would be addressed later. There was no express commitment that there would be compensation. In any event the school has been stated to have encroached into the suit property at the old site. I see no reason to grant the orders sought. In my view the school got exceedingly abundantly what they ought to have received for purposes of the land.

43 The upshot of the foregoing is that the petition is lacking in merit and is hereby dismissed. Due to the nature of the petition i will make no orders as to costs.

44 Orders accordingly.

45 The judgment is delivered electronically through email with approval of the parties.

**DELIVERED AND DATED AT KWALE THIS 31<sup>ST</sup> DAY OF MARCH, 2023**

**A.E. DENA**

**JUDGE**

