



**Mayama v National Assembly & 2 others (Petition E035 of 2023) [2024] KEHC 16496 (KLR)
(Constitutional and Human Rights) (31 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16496 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E035 OF 2023
LN MUGAMBI, J
DECEMBER 31, 2024**

**REPUBLIC OF KENYA IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION PETITION NO. E035 OF 2023**

BETWEEN

MEMBA MAYAMA PETITIONER

AND

NATIONAL ASSEMBLY 1ST RESPONDENT

SENATE 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

Introduction

1. The Petitioner filed an undated Petition supported by an affidavit sworn on 8th February 2023.
2. The gravamen of this Petition is the allegation that Parliament has failed to enact a Statute giving effect to Article 68(c)(i) of *the Constitution* which relates to minimum and maximum land holding acreage in respect of private land.
3. The Petitioner thus instituted this Petition against the Respondents seeking the following reliefs:
 - i. A declaratory order that the failure, refusal and/or neglect by the 1st and 2nd Respondent to enact legislation prescribing minimum and maximum land holding acreages in respect to private land is a violation of Article 68(c)(i) and the Fifth Schedule of *the Constitution*.
 - ii. An order of mandamus be issued directed at the 3rd Respondent, directing it to prepare the relevant bill prescribing the minimum and maximum land holding acreages in respect to



private land within the next 30 days from the date of Judgment for tabling before Parliament for purposes of implementation of Article 68(c)(i) of *the Constitution*.

- iii. An order of mandamus be issued at the 1st and 2nd Respondent to enact the relevant bill prescribing minimum and maximum land holding acreages in respect to private land furnished to it by the 3rd Respondent within 30 days of receipt of the bill(s).
- iv. Costs of the Petition.
- v. Any other orders that the court may deem fit to grant in the circumstances.

Petitioner's Case

4. The Petitioner avers that Article 68 (c) (i) of *the Constitution* provides that Parliament shall enact legislation to prescribe minimum and maximum land holding acreages in respect of private land. Particularly, Schedule 5 of *the Constitution* provides that this legislation ought to have been enacted within 18 months from the effective date of promulgation of *the Constitution*.
5. Furthermore, it is noted that Article 261 of *the Constitution* provides that the National Assembly may by resolution supported by at least two-thirds of the members of the National Assembly, extend the period of any particular matter under clause (1) by a period not exceeding one year. The Petitioner asserts that the Respondents have never complied with the said provisions 10 years later.
6. It is stated that an attempt to give effect to Article 68(c) (i) of *the Constitution* in 2015 vide the Minimum and Maximum Land Holding Acreages Bill, 2015 failed as it did not get parliamentary approval. Similarly, another attempt through the Land Laws (Amendment) Bill in 2015 also flopped. Further, another attempt to accomplish this provision through the Land Laws Amendment Act, 2016 also came to a cropper.
7. According to the Petitioner, the Parliament's supposed actualization of the said provision through Section 101 of the Land Laws Amendment Act is inept. This is because, the provision which amended Section 159 of the *Land Act* deals with regulation of the use of any land generally while Article 68 (c) (i) of *the Constitution* exclusively deals is particularly meant for minimum and maximum acreage of private land.
8. Consequently, the purported amendment is said to fall short of the constitutional obligation required of Parliament under Article 68 (c) (i).
9. The Petitioner is aggrieved therefore as there is no law enacted by Parliament that prescribes the maximum and minimum land holding acreages in respect to private land. For this reason, it is argued that the Parliament has violated *the Constitution* in this respect.

1st Respondent's Case

10. In reply, the 1st Respondent through its Clerk, Samuel Njoroge filed its Replying Affidavit sworn on 13th March 2023.
11. He affirms that the 1st Respondent enacted legislation to give effect to Article 68(c)(i) of *the Constitution* in accordance with its legislative mandate. Thus, the orders sought are in violation of Article 109 of *the Constitution*.
12. He informs that the Land Laws (Amendment) Bill (National Assembly Bill No.55 of 2015) that gave effect to this provision underwent the requisite legislative procedure before being enacted into law as detailed in his affidavit.



13. He further asserts that Article 186(4) of *the Constitution* mandates the 1st Respondent to legislate for the Country in any matter and that such laws so enacted are presumed constitutional unless declared otherwise by the Court.
14. According to him, the Petitioner has failed to prove violation of *the Constitution* in this case. For this reason, he asserts that the Petition lacks merit, is frivolous and an abuse of the Court process. As such, it should be dismissed.

2nd Respondent's Case

15. In reply to the Petition, the 2nd Respondent filed grounds of opposition dated 20th July 2023 on the basis that:
 - i. Article 94 of *the Constitution* vests in Parliament the exclusive authority of making laws.
 - ii. Article 96 of *the Constitution* inter alia provides that the Senate participates in the law-making function of Parliament by considering, debating and approving Bills concerning counties, as provided in Articles 109 to 113.
 - iii. Article 109(1) of *the Constitution* further stipulates that Parliament shall exercise its legislative power through Bills passed by Parliament and assented to by the President.
 - iv. Pursuant to Articles 94, 96 and 109(1) of *the Constitution*, the 1st and 2nd Respondents enacted the *Land Act* No. 6 of 2012 which provided for land acreages under Section 159.
 - v. In order to give effect to Article 68(c)(i) of *the Constitution*, Parliament further enacted the Land Laws (Amendment) Act, 2016 which amended Section 159 of the *Land Act* to prescribe for the minimum and maximum land holding acreages in respect to private land.
 - vi. Parliament having enacted the Land Laws (Amendment) Act 2016 which prescribes for the minimum and maximum land holding acreages, the duty now falls upon the Cabinet Secretary for Lands, Public Works, Housing and Urban Development to publish guidelines in respect to minimum and maximum land holding acreages.
 - vii. The Petitioner has thus not demonstrated to this Court how the 2nd Respondent has violated *the Constitution* as the legislation on minimum and maximum acreage has since been enacted.
 - viii. *The Constitution* under Article 119 provides for a mechanism for members of the public to petition Parliament.
 - ix. Parliament has further enacted the *Petition to Parliament (Procedure) Act*, 2012 which sets out the manner for consideration of Petitions to Parliament. Standing Order 235 of the Senate Standing Orders also provide for the manner of consideration for Petitions to Parliament.
 - x. The Petitioner ought to have first submitted a Petition to Parliament before instituting proceedings before this Court if indeed there is no legislation that prescribes for the minimum and maximum land holding acreages as alleged.
 - xi. The Petition as such violates the doctrine of Constitutional Avoidance which dictates that a case should not be resolved by deciding a constitutional question if it can be resolved in some other mechanism.
 - xii. The Petition further violates the principle of separation of powers that requires that each arm of Government carries out their roles independently and without interference from either arm of Government.



- xiii. The High Court has severally held that the Judiciary may not direct Parliament which laws to enact as this is within the mandate of Parliament.
- xiv. The jurisdiction of this Court can only be invoked where there is breach of *the Constitution* and the 2nd Respondent has complied with *the Constitution* through the enactment of the *Land Act* and Land Laws (Amendment) Act.
- xv. The Petition herein thus lacks merit, is frivolous, vexatious and an abuse of the court process.

3rd Respondent's Case

16. In like manner the 3rd Respondent filed its grounds of opposition dated 8th June 2023 on the premise that:
 - i. The Petition is filed following a misinterpretation of Article 94(1) of *the Constitution*. The legislative authority is vested in and exercised by the 1st and 2nd Respondents.
 - ii. The 3rd Respondent has no legislative authority or mandate and therefore cannot be compelled to institute the same.
 - iii. The Petitioner has not established any claim against the 3rd Respondent as there has been no claim for violation of rights by the said Respondent.
 - iv. The Petition seeks passage of legislation on minimum and maximum land holding acreage pursuant to Article 68(c) of *the Constitution*. Article 159 of the *Land Act*, 2012 makes provisions for the said minimum and maximum land acreage.
 - v. There is no claim by the Petitioner of the unconstitutionality of Section 159 of the *Land Act*, 2012. As such, the same remains constitutional and ought to be treated as such.
 - vi. Due to the fact that the said provision remains constitutional, there is no lacuna in law.
 - vii. The Petition is therefore unmerited and brought in bad faith.
 - viii. It is in the public interest and in the interest of justice that the current Petition be dismissed with costs as the same is an abuse of court process.

Parties' Submissions

Petitioner's Submissions

17. The Petitioner through Kaaya and Memba Law Chambers, filed two sets of submissions dated 13th September 2023 and 27th November 2023. Counsel outlined the issues for discussion as: whether Parliament has enacted legislation prescribing minimum and maximum landholding acreages concerning private land; whether Section 159 of the *Land Act* prescribes the minimum and maximum landholding acreages concerning private land; the consequences of Parliament's failure to enact legislation prescribing maximum and minimum land holding acreages concerning private land; whether the Petition offends the doctrine of separation of powers, and whether the Petitioner exhausted available remedies.
18. On the issue of whether Parliament has enacted legislation prescribing minimum and maximum landholding acreages, Counsel submitted that the 1st and 2nd Respondents have failed to perform their constitutional mandate and must thus be called to account. Reliance was placed in Centre for Rights Education and Awareness & 2 others v Speaker the National Assembly & 6 others [2017] eKLR which concerned Parliament's failure to implement the two thirds gender rule.



19. In this case, it was argued that Article 68(c)(i) of *the Constitution* stipulates that Parliament shall enact legislation to prescribe minimum and maximum landholding acreages concerning private land. It is submitted that this has not been done.
20. According to Counsel, Section 159 of the *Land Act* which purports to do so, is ambiguous, uncertain and poorly drafted. This is because it does not prescribe the minimum and maximum landholding acreages concerning private land and even purports to delegate constitutional power to a body other than Parliament which is not what *the Constitution* requires.
21. Reliance was placed in *Council of County Governors v Attorney General & another* [2017] eKLR where the Court applying the principles of interpretation held that:

“...Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to the language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation recognition of the character and origin of the instrument and to be guided by the principle of giving full recognition and effect to the fundamental rights and freedoms...”
22. Expounding on its argument in the second issue, Counsel argued that Section 159 of the *Land Act* provides that the maximum and minimum land holding acreages in respect to private land are to subject to Article 40 of *the Constitution*. It is argued that such a directive ought to have first been subjected to voting in a referendum. Be that as it may, it is contended that Article 40 of *the Constitution* addresses a variety of issues which are unrelated to private land hence Section 159 does not meet the constitutional requirement of providing for maximum and minimum land holding acreages concerning private land.
23. This provision is further impugned as it states that the maximum and minimum land holding acreages in respect to private land are to be subject to Article 66 of *the Constitution* which provides that the State may regulate the use of any land. It is contended that in effect shows it is not meant to prescribe the minimum and maximum land holding acreages in respect of private land but is a general provision pertaining any land. It is asserted therefore that there is no Statute giving effect to Article 68(c)(1) of *the Constitution*.
24. As a consequence, Counsel submitted that *the Constitution* provides remedies where the Parliament fails to enact legislation within the specified period. These are provided under Article 269 of *the Constitution* which is the basis for filing the instant suit.
25. Counsel rebutting the assertion of violation of the doctrine of separation of powers submitted that, on the contrary, it is *the Constitution* that reigns supreme not the Parliament. Reliance was placed in *Speaker of National Assembly -vs-Attorney General and 3 Others* (2013) eKLR where it was held that:

“Parliament must operate under *the Constitution* which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours...”
26. Like dependence was placed in *Asif Hameed & Ors. Etc. vs State of Jammu & Kashmir & Ors.* AIR 1989 Supreme Court 1899.



27. Moreover, that Article 261(5) of *the Constitution* empowers the Court to intervene where Parliament fails to enact legislation within the stipulated timeframe. For this reason, it was argued that the doctrine is not applicable as the matter concerns exercise of the constitutional duty by the Court.
28. Counsel in the next issue also argued that the doctrine of exhaustion is not applicable as recourse to this Court is provided for in Article 261(5) of *the Constitution*.

1st Respondent's Submissions

29. Counsel, Henry Atingo, filed submissions dated 2nd October 2023 for the 1st Respondent. Counsel submitted that the Petitioner's case lacks merit as the requisite legislation to give effect to Article 68 (c) (i) of *the Constitution* has already been enacted. Reiterating the procedure that took place before its enactment, Counsel submitted that the Land Laws (Amendment) Act was passed in accordance with *the Constitution* and the Standing orders.
30. He argued that the Petitioner has not demonstrated the unconstitutionality of this Act and therefore the Court should not intervene. Reliance was placed in Council of County Governors v Attorney General & another [2017] eKLR where it was held that:

“There is the general presumption that every Act of Parliament is constitutional and the burden of proof lies on every person who alleges otherwise. (The court should start by assuming that the Act in question is constitutional).”
31. Nonetheless Counsel submitted that Courts have severally, in interpreting statutes, determined that the statute itself should be interpreted in a manner that considers the object, purpose and effect of implementation of that legislation. Thus, the legislation should only be considered to be unconstitutional if its effect is to violate constitutional rights.
32. Counsel further submitted that the Petitioner's prayers seeking to compel the 1st Respondent to perform its mandate is a threat to the legislative authority of the Parliament under Articles 1(1), 94 and 95 of *the Constitution* and contravenes the doctrine of separation of powers. This is because it seeks to direct the 1st Respondent on how to carry out its constitutional mandate.
33. He placed reliance was placed on the following cases: Pevans East Africa Limited & another v. Chairman, Betting Control and Licensing Board and 7 Others (2013) eKLR placed in Mumo Matemu v Trusted Society of Human Rights Alliance, Attorney General, Minister of Justice & Constitutional Affairs, Director of Public Prosecutions, Kenyan Section of the International Commission of Jurists & Kenya Human Rights Commission [2013] KECA 445 (KLR).
34. Counsel in closing asserted that the Petitioner ought to have petitioned the 1st Respondent under Article 119 of *the Constitution* before approaching the Court. As a result, he submitted that the Petitioner failed to exhaust the available mechanisms.

2nd Respondent's Submissions

35. On 23rd November 2023, Wangeci Thanji on the 2nd Respondent's behalf filed submissions dated 23rd November 2023. Counsel discussed: whether the Petition offends the doctrine of exhaustion, whether Parliament can delegate its legislative power, whether this Court can compel the 2nd Respondent to enact legislation and whether the Petitioner is entitled to the relief sought.
36. Counsel submitted that the Petitioner failed to utilize the available mechanism set out under Article 119 of *the Constitution*. This right is further supported under Article 37 of *the Constitution*.



- Furthermore, the *Petition to Parliament (Procedure) Act*, 2012 and Standing Order 231 to 240 of the Senate Standing Orders provide for guidelines on how members of the public can petition Parliament. As a result, Counsel argued that the Petition offends the doctrine of exhaustion.
37. Reliance was placed in *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* (2020) eKLR where it was observed that:
- “The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of *the Constitution*.”
38. Comparable reliance was placed in *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others* (2015) eKLR and *Mutanga Tea & Coffee Company Ltd v Shikara Limited & another* (2015) eKLR.
39. On the second issue, Counsel in view of the Petitioner’s challenge to the Parliament under Section 159 of the *Land Act*, stipulating that the Cabinet Secretary shall publish guidelines in respect to minimum and maximum land acreages, submitted that this delegation is lawful and provided for under Article 94(5) and (6) of *the Constitution*. Reliance was placed in *Okiya Omtatah Okoiti v Commissioner General, Kenya Revenue Authority & 2 others* (2018) eKLR where it was held that:
89. Article 94 (5) of *the Constitution* precludes all other persons or bodies, other than Parliament from making provisions having the force of law in Kenya except under authority conferred by *the Constitution* or delegated by the legislature through a statute. The National Assembly may, therefore delegate to any person or body the power to make subsidiary legislation, which require approval of the House before having the force of law. Subsidiary legislation made by persons or bodies other than Parliament are commonly known as Statutory Instruments.
91. Statutory Instruments are prepared by the Cabinet Secretary or a body with powers to make them, e.g. a Commission, authority or a Board. Statutory Instruments must conform to *the Constitution, Interpretation and General Provisions Act*.”
40. Like dependence was placed in *Trusted Society of Human Rights Alliance v Cabinet Secretary Devolution and Planning & 3 others* (2016) eKLR.
41. On the third issue, Counsel submitted that the Petitioner’s prayer for the Court to compel the 2nd Respondent to enact laws is unsustainable as *the Constitution* exclusively vests this, mandate in the Parliament with the participation of the 2nd Respondent as provided for under Article 96 of *the Constitution*.
42. Furthermore, it was reasoned that the jurisdiction of this Court under Article 261(5) of *the Constitution* in relation to enactment of laws can only be invoked where the Parliament fails to enact a particular legislation within the specified time set out in the fifth schedule.
43. Reliance was placed in *Ripples International v Attorney General & another; FIDA (Interested Party)* (2022/KEHC 13210 (KLR) where it was held that:
- “Most significantly, the court cannot compel promulgation of a law or an amendment thereof. The Commonwealth (Latimer House) Principles on The Three Branches of Government, 2003 as regards Judiciary and Parliament provides as follows:



II) Parliament and the Judiciary

- a. Relations between parliament and the judiciary should be governed by respect for parliament's primary responsibility for law making on the one hand and for the judiciary's responsibility for the interpretation and application of the law on the other hand.
 - b. Judiciaries and parliaments should fulfill their respective but critical roles in the promotion of the rule of law in a complementary and constructive manner."
44. Comparable dependence was placed in *Pevans East Africa Limited (supra)* and *Commission for the Implementation of [the Constitution](#) v National Assembly of Kenya & 2 others (2013) eKLR* and *Justus Kariuki Mate & another v Martin Nyaga Wambora & another (2017) eKLR*.
45. In conclusion, Counsel submitted that in view of the foregoing the Petitioner is not entitled to the relief sought.

3rd Respondent's Submissions

46. State Counsel, Jackline Kiramana filed submissions dated 14th September 2024 and set out the issues to consider as follows: whether the petition is in violation of the principle of separation of powers and whether the Petitioner should be granted the reliefs sought.
47. Counsel in the first issue submitted that the instant Petition touches on the legislative mandate of the Parliament in that the Petitioner is seeking to have the Court compel the legislature to enact a law. Counsel asserts that this is offensive to the doctrine of separation of powers. Counsel for this reason, urged the Court to decline the Petitioner's invitation as affirmed in *Mumo Matemu (supra)* and *Pevans East Africa Limited & Another (supra)* which were also cited in support.
48. Counsel further added that the proper procedure which ought to have been followed by the Petitioner is to petition the Parliament while highlighting the inadequacy of Section 159 of the [Land Act](#) instead of filing this suit. Owing to this conclusion, Counsel asserted that the Petition is unmerited and further that the sought prayers cannot be granted by this Court in view of their nature.

Analysis and Determination

49. It is my considered view that the issues that arise for determination are as follows:
- i. Whether this Court has jurisdiction to entertain this suit in view of the principle of Separation of Powers.
 - ii. Whether or not Parliament failed to enact an Act of Parliament to give effect to Article 68(c) (i) of Constitution notwithstanding the provisions of Section 159 of the [Land Act](#).
 - iii. Whether the Petitioner is entitled to the relief sought.

Whether this Court has jurisdiction to entertain this suit in view of the principle of Separation of Powers.



50. Jurisdiction is the foundation of a Court’s exercise of judicial authority. The Court of Appeal in the locus classicus case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR explained the essence of jurisdiction as follows:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

51. This Court’s jurisdiction to entertain constitutional matters is founded in Article 165 (3) (d) of *the Constitution* which provides as follows:

Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

- a. the question whether any law is inconsistent with or in contravention of this Constitution;
- b. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
- c. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
- d. a question relating to conflict of laws under Article 191.

52. The Supreme Court explained how a Court acquires jurisdiction in the case of Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & others (2012) eKLR by guiding as follows:

“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. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

53. Under the principle of separation of powers, Courts are required to accord deference to other Constitutional bodies or organs by allowing them to execute their constitutional mandates unless there



is proven violation of *the Constitution* that necessitates Court's intervention. Judicial precedents are abound with this jurisprudential approach.

54. The Constitutional Court of South Africa while addressing the issue of separation of powers in *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11 stated as follows:

“The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle ‘has important consequences for the way in which and the institutions by which power can be exercised’.. ..”

But under our constitutional democracy, *the Constitution* is the supreme law. It is binding on all branches of government and no less on Parliament. When it exercises its legislative authority, Parliament ‘must act in accordance with, and within the limits of, *the Constitution*’, and the supremacy of *the Constitution* requires that ‘the obligations imposed by it must be fulfilled’. Courts are required by *the Constitution* ‘to ensure that all branches of government act within the law’ and fulfil their constitutional obligations. This Court ‘has been given the responsibility of being the ultimate guardian of *the Constitution* and its values.”

55. Correspondingly, the Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance, Attorney General, Minister of Justice & Constitutional Affairs, Director of Public Prosecutions, Kenyan Section of the International Commission of Jurists & Kenya Human Rights Commission* [2013] KECA 445 (KLR) held that:

“(49) It is not in doubt that the doctrine of separation of powers is a feature of our constitutional design and a pre-commitment in our constitutional edifice. However, separation of powers does not only proscribe organs of government from interfering with the other's functions. It also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government. Such powers are, however, not a license to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the function. We therefore agree with the High Court's dicta in the petition the subject of this appeal that:

“[Separation of powers] must mean that the courts must show deference to the independence of the Legislature as an important institution in the maintenance of our constitutional democracy as well as accord the executive sufficient latitude to implement legislative intent. Yet, as the Respondents also concede, the Courts have an interpretive role - including the last word in determining the constitutionality of all governmental actions...”

56. Be that as it may, the South African Constitutional Court in *Minister of Health and Others vs. Treatment Action Campaign and Others* (2002) 5 LRC 216, underscored the Court's role to protect the integrity of *the Constitution* as follows:

“The primary duty of courts is to *the Constitution* and the law, which they must apply impartially and without fear, favour or prejudice. *The Constitution* requires the State to



respect, protect, promote, and fulfil the rights in the Bill of Rights. Where state policy is challenged as inconsistent with *the Constitution*, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by *the Constitution* to say so. In so far as that constitutes an intrusion into the domain of the executive that is an intrusion mandated by *the Constitution* itself.”

57. In the instant Petition, the Petitioner prays for an order interalia that:

- a. An order of mandamus be issued at the 1st and 2nd Respondent (the Senate & National Assembly) to enact the relevant bill prescribing minimum and maximum land holding acreages in respect to private land furnished to it by the 3rd Respondent within 30 days of receipt of the bill(s).

58. Under Article 94 (1) of *the Constitution*, legislative mandate is vested on Parliament. The Article provides:

Article 94. Role of Parliament

1. The legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament.

59. This Court cannot direct Parliament on the manner of execution of its Constitutional mandate. However, it can make a declaration against actions of Parliament that are contravention of *the Constitution*. As was stated in *Pevans East Africa Limited & another v. Chairman, Betting Control and Licensing Board and 7 Others* (2013) eKLR:

“Where *the Constitution* has reposed specific functions in an institution or organs of state, the court must give those organs sufficient leeway to discharge their mandate and only accept an invitation to intervene when those bodies are demonstrably shown to have acted in contravention of *the Constitution*, the law or that their decisions are so perverse, so manifestly irrational that they cannot be allowed to stand under the principles and values of our Constitution. Courts must decline to intervene at will in the Constitutional spheres of other organs, particularly when they are invited to substitute their judgment over that of other of the organs in which constitutional power reposes, because those organs have expertise in their area of mandate, which the court do not normally have.”

60. Consequently, I find that in so far as the Petitioner seeks an order of mandamus to compel Parliament to enact ‘the specific Bill prescribing minimum and land holding acreages’, that runs afoul the principle of separation of powers and this Court must firmly decline that invitation.

Whether or not Parliament has failed to enact an Act of Parliament to give effect to Article 68(c)(i) of Constitution notwithstanding the provisions of Section 159 of the *Land Act*.

61. The Constitutional provision upon which this Petition is founded is, Article 68 (c) (i) of *the Constitution* provides as follows:

Parliament shall--

- c. enact legislation—
 - i. to prescribe minimum and maximum land holding acreages in respect of private land;

62. Parliament enacted the *Land Act* in which under Section 159 is contained which provides as follows:



Minimum and maximum land holding acreages

1. Subject to Article 40 of *the Constitution*-
 - a. the minimum land holding acreage shall be subject to the provisions of Article 66(1) of *the Constitution* and the legislation envisaged therein.
 - b. the maximum land holding acreage shall be subject to Article 60(1)(a) and (c) of *the Constitution*.
 2. The Cabinet Secretary shall publish guidelines on the penalties for noncompliance with the provisions of this section.
63. The Respondents contend that Section 159 of the *Land Act* statutorily operationalized Article 68(c) (i) of *the Constitution*.
64. The Petitioner in the reliefs sought in this Petition not seek to invalidation of Section 159 of the *Land Act* as unconstitutional. Instead, the Petitioner states in the submissions that Section 159 of the *Land Act* which the Respondents contends gives effect to Article 68 (c) (i) is ambiguous, uncertain and poorly drafted. Further that Parliament has by this legislative enactment delegated its Constitutional power to a body not contemplated by *the Constitution*.
65. One of the principles in Constitutional interpretation is presumption of constitutionality of Acts of Parliament. This principle was captured by the Court of Appeal of Tanzania in *Ndyanabo vs. Attorney General* [2001] EA 495 being a restatement of the law in the English case of *Pearlberg vs. Varty* [1972] 1 WLR 534 that:
- “Until the contrary is proved, legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, legislation should receive such a construction as will make it operative and not inoperative”
66. In the present case, the Petitioner does not seek any relief or prayer specifically questioning the constitutionality of Section 159 of the *Land Act* but in the submissions, the Petitioner faulted it for its ambiguity and poor draftsmanship, and further alleged that Parliament cannot delegate its legislative authority to another body not contemplated by *the Constitution*.
67. In my view, the cure for ambiguity or poorly drafted provision is not by declaring it unconstitutional, it is only when it is established to be in contravention of *the Constitution* that the matter becomes a subject of constitutional litigation. A badly drafted law is cured by amendment or repeal of the offending section. I say so because ambiguity or poor draftsmanship or even the inadequacy of a provision without pin-pointing its unconstitutionality is not what makes the provision unconstitutional. Indeed, considering that the Petitioner is not directly questioning the Constitutionality of Section 159 but complains about its ambiguity and poor drafting, I am of the view that is an issue which ought to have been raised directly with Parliament under Article 119 (1) of *the Constitution* which provides that “Every person has a right to petition Parliament to consider any matter within its authority, including to enact, amend or repeal any legislation.”
68. On the contention by the Petitioner that Parliament cannot lawfully delegate its mandate, it is necessary to consider Article 94 (5) and (6) of *the Constitution* which provide as follows:

Article 94. Role of Parliament

1. The legislative authority of the Republic is derived from the people and, at the national level, is vested in and exercised by Parliament.



2. Parliament manifests the diversity of the nation, represents the will of the people, and exercises their sovereignty.
 3. Parliament may consider and pass amendments to this Constitution, and alter county boundaries as provided for in this Constitution.
 4. Parliament shall protect this Constitution and promote the democratic governance of the Republic.
 5. No person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation.
 6. An Act of Parliament, or legislation of a county, that confers on any State organ, State officer or person the authority to make provision having the force of law in Kenya, as contemplated in clause (5), shall expressly specify the purpose and objectives for which that authority is conferred, the limits of the authority, the nature 43 Const2010 [Constitution of Kenya, 2010](#) and scope of the law that may be made, and the principles and standards applicable to the law made under the authority.
69. It is crystal clear from the reading of the above Constitutional provision that although Parliament is empowered by [the Constitution](#) to make law; it can also by legislation confer or delegate the authority to any State Organ or person, to make a provision having the force of law. There is thus no illegality or unconstitutionality when Parliament, in its wisdom, gives the relevant Cabinet Secretary, subject to the conditions specified in the enabling law, the responsibility to publish guidelines on the penalties for noncompliance with section 159 of the [Land Act](#).
70. The wisdom of Parliament to delegate to the Cabinet Secretary the power to publish guidelines for implementation of Section 159 of the [Land Act](#) instead of Parliament expressly or directly legislating on the same cannot be faulted without proof that such delegation is unconstitutional. As was held in *Mark Obuya, Tom Gitogo & Thomas Maara Gichuhi Acting for or on Behalf of Association of Kenya Insurers & 5 others vs. Commissioner of Domestic Taxes & 2 others* [2014] eKLR
- “ 32. The legislature is the law-making organ and it enacts the laws to serve a particular object and need. In the absence of a specific violation of [the Constitution](#), the court cannot question the wisdom of legislation or its policy object. The fact that the particular provision of the statute merely may be difficult to implement or inconvenient does not give the court license to declare it unconstitutional.”
71. In view of the forgoing reasons, I find no merit in this Petition which is hereby dismissed.
72. Each Party shall bear its own costs.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 31ST DAY OF DECEMBER, 2024.

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L N MUGAMBI
JUDGE

