



Mugweru & 4 others (Being the administratrices of the Estate of Maaka Mukuhi Mugweru (Deceased))) v National Land Commission & 5 others; Estate of Samuel Mugweru Wathirwa & another (Interested Parties) (Petition 421 & 419 of 2018 (Consolidated)) [2022] KEHC 13252 (KLR) (Constitutional and Human Rights) (30 September 2022) (Judgment)

Neutral citation: [2022] KEHC 13252 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION 421 & 419 OF 2018 (CONSOLIDATED)
HI ONG'UDI, J
SEPTEMBER 30, 2022**

BETWEEN

**LOISE WAIRIMU MUGWERU 1ST PETITIONER
RUTH WANJIRU MUGWERU 2ND PETITIONER
WINNIE WANGU MUGWERU 3RD PETITIONER
BEING THE ADMINISTRATRICES OF THE ESTATE OF MAAKA MUKUHI
MUGWERU (DECEASED))**

AND

**NATIONAL LAND COMMISSION 1ST RESPONDENT
CHIEF LAND REGISTRAR 2ND RESPONDENT
DIRECTOR OF SURVEY 3RD RESPONDENT
ATTORNEY GENERAL 4TH RESPONDENT
LOISE WANJIRU GICHUHI 5TH RESPONDENT
GODWIN WACHIRA GICHUHI (SUED AS THE ADMINISTRATORS OF THE
ESTATE OF GICHUHI KIMIRA (DECEASED)) 6TH RESPONDENT**

**AS CONSOLIDATED WITH
PETITION 419 OF 2018**

BETWEEN



JOSEPH NGANGA NJUGUNA 1ST PETITIONER

FRANCIS WAMBUGU MIANO 2ND PETITIONER

AND

NATIONAL LAND COMMISSION 1ST RESPONDENT

CHIEF LAND REGISTRAR 2ND RESPONDENT

AND

ESTATE OF SAMUEL MUGWERU WATHIRWA INTERESTED PARTY

ESTATE OF GICHUHI KIMIRA INTERESTED PARTY

JUDGMENT

Background

1. The core of this issue finds its root in a suit filed in 1977 being High Court Civil Case No 880 of 1977 based on the farm known as LR 13041 which was a partnership property. The suit sought for dissolution of the partnership, taking of accounts inquiries thereof, appointment of a proper person to collect and receive the debts of the partnership.
2. The High Court in its judgment by Justice AM Akiwumi (retired) dated October 6, 1989 directed that the partnership between the parties be dissolved and wound up, and that a proper person be appointed to oversee the dissolution and winding up process.
3. Being aggrieved by the High Court's decision, Gichuhi Kimira (represented as the 2nd interested party in Consolidated Petition No 419 of 2018) filed an appeal in the Court of Appeal being Gichuhi Kimira v Samuel Ngunu Kimotho & Another, Civil Appeal No 186 of 1995. The appeal was heard and dismissed on April 24, 1998 save for an amendment on the effective date of the dissolution of the partnership. The effective date for the dissolution of the partnership was stated as April 20, 1977.
4. The parties in these suits have since died and so it is their estates that are represented in the two petitions with reference to land LR No 13041. The basis of the present suit is thus outlined below by the petitioners herein.

The 1st, 2nd & 3rd petitioners case

5. The 1st, 2nd & 3rd petitioners, through their Petition No 421 of 2018 dated November 27, 2018 filed under Articles 2(4), 10, 19, 22, 23, 25, 27, 40, 47, 50, 64, 67, 73 and 165 of the Constitution seek the following orders:
 - a. A declaration be issued to the effect that the 1st respondent lacked jurisdiction to hear, investigate and determine any complaint and/or claim with respect to LR No 13041/1-3(Originally LR No 13041) which is private land and which matter had been the subject matter of both the High Court and Court of Appeal decisions.
 - b. A declaration be issued that the 1st respondent has no jurisdiction to entertain, hear and/or determine any claim relating to the parcels of land to wit LR.No 13041/1-3 as the same has been heard and determined by both the High Court and Court of Appeal which courts are superior to the 1st respondent.



- c. An order of certiorari be issued to bring to this court and quash the decision of the 1st respondent made on March 8, 2018 and the directions given to the 2nd respondent on October 26, 2018 revoking the subdivisions to wit LR No 13041/1-3 (originally LR.No 13041) together with the special issue of the Kenya Gazette Notice published on November 9, 2018 to that effect.
 - d. An order of prohibition be issued directed to the 2nd respondent prohibiting it, its agents and/or servants from acting on all or any of the recommendations of the 1st respondent contained in Gazette Notice issued on November 9, 2018 in relation to LR No 13041/1-3(originally LR.No 13041) and/or the findings of the 1st respondent dated 8th March, 2018 touching on the parcel of land to wit LR No 13041/1-3 (Originally LR No 13041).
 - e. A declaration be issued to the effect that the purported investigations conducted by the 1st respondent with respect to review of the Grant IR No 24746, LR No 13041 and the determination made on March 8, 2018 and published in the special issue of the Kenya issue of 9th Novemeber,2018 were irregular, illegal, unlawful, null and void and of no legal effect.
 - f. The costs of this petition be borne by the respondents herein above in any event.
6. The petition is supported by the 1st petitioner's affidavit sworn on November 27, 2018 and a further affidavit dated November 20, 2019. The petitioners depose that the bona fide registered owner of the parcel of land LR No13041/2 is the 1st petitioner's mother, the late Maaka Mukuhi Mugweru. Accordingly it is deposed that on May 22, 2017 the petitioners herein were appointed as administratrices of the deceased's estate by the High Court at Nyeri in Succession Cause No 250 of 2007.
 7. It is stated that this appointment was protested to on September 1, 2017 by Julius Gichuki Gichuhi the representative of the Estate of Gichuhi Kimira who filed an affidavit of protest of confirmation of grant in the Succession Cause No 250 of 2007. This is since he claimed that the land was part of the late Gichuhi Kimira's estate in HCCC No 880 of 1977.
 8. The petitioners depose that upon perusal of the court file in HCCC No 880 of 1977, it was revealed that the judgement dated October 6, 1989 had been entered against Julius Gichuki Gichuhi. In the matter, he had proceeded to appeal the Court's decision in the High Court in Civil Appeal No 186 of 1995.This Appeal was subsequently dismissed.
 9. It is deposed soon after that the late Maaka Mukuhi Mugweru and the other plaintiffs in HCCC No 880 of 1977, sometime in the year 1995 sought to enforce the Court Orders issued in the judgement delivered on October 6, 1989.Pursuant to the decree, the original parcel of land LR No 13041 was subdivided into three parts being LR.No 13041/1,2 & 3.
 10. It is stated that Julius Gichuki Gichuhi on January 27, 2014 filed an application seeking a declaration that the suit against him in HCCC No 880 of 1977 had abated and sought costs of the suit. He was granted the orders on March 20, 2014. It is deposed that he went on to file a Bill of Costs where he was awarded Ksh 1, 977, 919/=.
 11. The petitioners herein aggrieved by the said decision filed an application for review to set aside the orders dated March 20, 2014. The application was allowed in the ruling dated May 4, 2018. Julius Gichuki Gichuhi opposed to the Court's ruling filed for an injunction at the Court of Appeal under Application No 277 of 2018 with an aim of restraining the petitioners from the contested parcel of land. In addition, he proceeded to file an appeal, Civil Appeal No 326 of 2018 which were still pending at the time of filing of this petition.



12. It is deposed that the petitioners discovered later on that Julius Gichuki Gichuhi had revoked title LR No 13041/2 vide Gazette Notice, Special Issue Vol. CXX-No 138. Additionally it is averred that the 3rd and 4th respondents lodged a complaint with the 1st respondent based on Grant IR No 24746, LR.No 13041. The 1st respondent in its decision dated March 8, 2018 revoked the titles to LR No 13041/1, 2 & 3 which had been subdivided pursuant to the High Court decision in HCCC No 880 of 1977 dated October 6, 1989.
13. The petitioners in view of this are aggrieved by the 1st respondent's decision since its mandate to review grants under Section 14 expired on May 1, 2017. Further that vide a letter dated October 26, 2018 the 1st respondent directed the 2nd respondent to revoke the sub divided titles in favour of the estate of Gichuhi Kimira. They depose that they were not informed of the review process and neither did they participate in it.
14. It is their contention owing to this that the 1st respondent did not have jurisdiction to make the challenged decision and more so over private land. As a result the petitioners depose that their constitutional rights under Articles 2(4), 25 (c), 40, 47, 50, 67 and 165(6) of the Constitution were violated. In addition the petitioners contend that the 1st respondent violated its mandate as spelt out under Section 5(1)(a) and Section 14(1)(3)(4) & (5) of the National Land Commission Act 2016.
15. The genesis of this suit is a friendship that existed between Simon Mugweru Wathirwa, Gichuhi Kimira and Ngunu Kimotho. The three friends formed a partnership mainly focusing on farming (livestock, poultry, dogs etc.) They agreed to purchase a farm (LR 13041) and all transactions concerning the purchase of the farm were carried out in the name of Gichuhi Kimira. He was therefore to be a trustee for all of them until such a time it would be convenient to have the farm registered in the names of all three. Gichuhi Kimira being the one with practical experience and knowledge would reside in the farm and run it on behalf of all three. However, some years after the sale of the farm to Gichuhi Kimira, he refused to acknowledge Wathirwa and Kimotho's beneficial interest in the farm and in the business carried thereon. Hence Civil Suit No 880 of 1977.
16. Therein they sought a declaration that the plaintiffs are beneficiaries of a third each of the farm and income, that the farm be registered in the names of the plaintiffs and defendant as tenants in common in equal shares, and that the defendant should account to the plaintiffs for all the income and moneys received by him in respect of the farm.
17. Through his judgment dated October 6, 1989 and while agreeing with the plaintiffs account of events, Justice A. M. Akiwumi (retired) found that indeed there existed a partnership between the three friends and that the farm (LR No 13041), registered in the name of Gichuhi Kimira belonged to the partnership and was being held by him in trust for himself and the other two. The rest of the background is as set out in petition No 421/2018.
18. The petitioners herein are the purchasers of LR 13041/1 from Ngunu Kimotho. The 1st interested party is the estate of Samuel Mugweru Wathirwa and the 2nd interested party is the estate of Gichuhi Kimira.

The petition

19. The petitioners filed a petition dated November 26, 2018 seeking the following reliefs in Petition No 419/2018: -



- i. A conservatory order to suspend implementation of the direction given by the 1st respondent to the second respondent namely to cancel the applicant's title or to give such title to the 2nd interested party pending the hearing of this petition.
- ii. A declaration that the 1st respondent's determination conveyed vide Gazette No 11714 of November 9, 2018 concerning parcel number 13041 or any parcel of land derived from it upon sub-division was made without jurisdiction was unconstitutional, invalid, null and void.
- iii. An order setting aside the said determination.
- iv. In the alternative, an order of judicial Review to quash the 1st respondent's determination conveyed through Gazette No 1714 of November 9, 2018 as it relates to LR Number 13041 or any sub-division thereof.
- v. An order that the 1st respondent and the 2nd interested party pay the cost of this petition.

Petitioner's case

20. A summary of their case as set out in his affidavit in support of the petition sworn by Joseph Nganga Njuguna on November 26, 2018 is that, sometime in October 2016, they were informed by some members of the 1st interested party that a complaint had been filed by Mrs Loise Wanjiru Gichuhi and Godwin Wachira Gichuhi with the 1st respondent in relation to LR Number 13041 in Ruaraka Nairobi and the same fixed for hearing on 1st November 2016.
21. Land title number 13041 ceased to exist in 2001 when the same was sub-divided into 3 parcels; 13041/1, 13041/2 and 21041/3. That although their land 13041/1 was not in issue, they asked their counsel to obtain a copy of the complaint from the 1st respondent. After studying the complaint, they discovered the complaint was alleging illegality in relation to the sub-divisions that gave rise to their title.
22. They had bought their parcel of land from the registered proprietor one Samuel Ngunu Kimotho (now deceased) in 2004 for Kshs 19,665,000/= and were given possession and transferable documents. Further, even though the complainants were well aware of their interest in the land they failed to enjoin them to the proceedings before the 1st respondent.
23. It was deponed that after purchasing their land in 2004, the complainants tried to invade or encroach on it which prompted them to make inquiries. They discovered that,
 - a. The late Gichuhi Kimira, Simon Mugweru Wathirwa and Samuel Ngunu Kimotho were partners who bought LR Number 13041 together but the same registered in the name of Gichuhi Kimira and who declined to transfer his erstwhile partners' shares to them.
 - b. To get their shares, Samuel Ngunu Kimotho and Simon Mugweru Waithirwa sued Gichuhi Kimira in Nairobi High Court Civil Case No s 880/77 and 908/77 which after consolidation and being heard together and judgment rendered on October 6, 1989 all three parties were awarded equal shares.
 - c. Gichuhi Kimira appealed to the Court of Appeal through Civil Appeal No 186 of 1995 which was dismissed on April 24, 1998. He however thereafter unsuccessfully made numerous applications for stay of execution, review and other orders in the High Court and the constitutional Court.



- d. To execute the decree the court, appointed a proper person one Ernest Kamau who sub-divided the land and the partition documents signed by the Deputy Registrar of the High Court resulting in closure of the original title 13041 and issuance of 3 titles in the names of the three parties to the case.
 - e. After the end of the litigation and sub-division, Samuel Ngunu Kimotho sold his parcel of land to them.
24. It was their case that on perusal of the documents they discovered that the complaint had set out the allegations and evidence that had previously been litigated upon in court and was basically alleging fraud and concealing the litigation history and the orders made by the High Court Constitutional court and the Court of Appeal.
 25. They prepared a replying presentation and filed it with the 1st respondent on October 28, 2016 giving the litigation and other history of the land in question. Subsequently, on November 1, 2016, they attended a 1st respondent's scheduled session wherein their advocates and those of the 1st interested party informed the commission of the past determination of the matter pointing out that at the commission would have no jurisdiction to re-litigate the matter. The session was adjourned and they were informed that they would be called.
 26. They later learnt of a determination vide Kenya Gazette Notice Number 11714 of November 9, 2018 directing illegal titles to be revoked and land be restored to the 2nd interested party. The said determination contravened Articles 19, 47, 27, 50, 159, 165, 40, 64 of the [Constitution](#) and section 15 of the [National Land Commission Act](#).

The Respondents' Case

The 1st Respondent's Case in Pet No 421/2018

27. The 1st respondent made its response through the sworn affidavit of its vice Chairperson, Abigael Mbagaya Mukolwe dated December 17, 2018.
28. She deposes that on January 28, 2015, the Commission received a complaint from Godwin Wachira Gichuhi the son of the late Gichuhi Kimira requesting it invokes its mandate of Review of grants and dispositions with reference to grant IR No 24746 LR No 13041.
29. Following this complaint, she deposes that the Commission notified all the interested parties of its intent to instigate, review of grants and dispositions proceedings before its Tribunal. The Commission accordingly invited all parties to attend and supply documentation in support of claims of ownership and consequently make submissions on the same. She informs that the petitioner is among the parties that appeared before the Tribunal from July 22, 2016 to November 1, 2016. At the end of the proceedings the Tribunal rendered its decision on March 8, 2017.
30. She deposes that contrary to the petitioners' allegation, its mandate lapsed in May 2017 while its decision in the matter was rendered earlier on a date as stated above. Moreover, she notes that according to Section 14(1) of the [National Land Commission Act](#), the Commission can receive a complaint from an individual. In this case, Godwin Wachira Gichuhi being an administrator of the Estate of Gichuhi Kimira had a meritorious complaint.
31. In the same way, she avers that although the Commission under Article 67 of the [Constitution](#) is required to review grants of public land, the Commission had an obligation to review the grant of the suit property to ascertain the claims raised on the legality of the title.



32. Additionally it is argued that Section 6 of the [%204%20of%202015/docs/FairAdministrativeActionAct4of2015.pdf](#) *Fair Administrative Actions Act* empowers the Commission to render its decision and issue its reasons later. In view of this she avers that the Commission's actions were within the law. As such the petition is an abuse of the Court process and so orders should not be granted.

The 3rd & 4th respondents' case

33. The 3rd & 4th respondents vide a replying affidavit sworn by the 4th respondent filed their response dated September 24, 2019, with a further affidavit dated March 17, 2020 in response to the petitioners further affidavit.
34. He deposes that the court decree issued on 6th October 1989 in NRB HCC No 880 of 1977 was a preliminary decree appealed against in Nairobi Court of Appeal Civil Appeal No 186 of 1995. He avers that as per the court order delivered in the matter dated July 3, 1996, Ernest Kamau was appointed as the proper person in their partnership that possessed the impugned parcel of land. He was to run the partnership from 1996 understanding that the accounts ran from August 23, 1974 when property LR No 13041 was bought until judgment was delivered.
35. It is deposed that upon conclusion of the matter by the Court of Appeal, the Court rendered its judgment dated April 24, 1998. He informs that owing to this pronouncement the date of dissolution of the partnership was revised to April 20, 1977 and amended the preliminary decree that the petitioners have relied on in their case. He deposes that the petitioners predecessors in bad faith sought to enforce the preliminary decree whilst the matter was pending at the Court of Appeal. However in view of the Court of Appeal in amendment of the preliminary decree, the late Gichuhi Kimira and other parties in the NRB HCC No 880 of 1977 were bound by the amended preliminary decree.
36. He deposes that one of the orders of the preliminary decree was that upon dissolution of the partnership a proper person was to be appointed to take account of all the dealings and wind up the partnership. He asserts that the proper person was not given the mandate to execute any documents of transfer of the land. As such the petitioners were not at liberty to deal with the contested parcel of land before conclusion of the matter by the Court of Appeal.
37. He avers that the petitioners in NRB Milimani Commercial Court Miscellaneous Application No 586 of 2018 purported to present a land search result for LR No 13041 which was not found in the land registry's database according to the Chief Land Registrar. It is deposed that the documents relied upon by the petitioners were forged. Moreover that a search conducted on July 22, 2016 revealed that the land had not been subdivided as claimed.
38. He deposes that owing to the illegalities orchestrated by the petitioners in the said parcel of land and grant issued, he lodged a complaint with the 1st respondent. This was for purposes of ascertaining how the petitioners had been able to acquire the documents of transfer, discharge of charge, deed of partition, sub-division certificates, deed plans and certificates of title. To that end, he avers that the matter before this Court can only be entertained by the Environmental and Land Court as the issue deals with property title. In addition he argues that the petition does not disclose how the petitioners' fundamental rights were infringed whilst the rights can nonetheless be limited. As such he argues that the petition is incompetent and misconceived.



The 2nd, 5th & 6th respondents' case

39. The 2nd, 5th & 6th respondents in response to the petition filed the following grounds of opposition dated February 17, 2022:
- i. This Court lacks jurisdiction to hear and determine this petition by virtue of the provisions of Article 165 (5) of the Constitution since the dispute relates to the environment and the use and occupation of, and title to, land.
 - ii. Section 13 of the Environment and Land Court Act provides that the Environment and Land Court is to have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of the Constitution.
 - iii. Section 13 (7) of the Environment and Land Court Act provides that the Environment and Land Court can issue prerogative orders, which provision if read together with the provisions of Article 162 (2) of the Constitution ousts the jurisdiction of this Court to hear and determine this case.
 - iv. The Environment and Land Court in the case of Joyce Mutindi Muthama & another v Josephat Kyololo Wambua & 2 other [2018] eKLR, held that the Environment and Land Court Act does not limit or preclude the Court from hearing applications for redress of a denial or violation of any other right, if that right is in furtherance of a dispute relating to land and the environment. This was similarly held in Mohammed Said v County Council of Nandi [2013] eKLR and Omar Tahir Said v Registrar of Titles & Another [2013] eKLR.
 - v. Without prejudice to the forgoing, the petition raises no constitutional issues and cause of action against the 2nd, 5th and 6th respondent to warrant the intervention of this Court.

1st Respondent's case in petition 419/2018

40. The 1st respondent filed its replying affidavit sworn by Abigail Mbagayya on December 17, 2018. She admitted to receiving the complaint and averred that all parties were notified of the complaint and invited for a hearing. The same is confirmed by the petitioners in their affidavit.
41. She deposed that the petitioners and interested parties appeared before the 1st respondent on July 22, 2016, August 19, 2016, September 16, 2016 and October 14, 2016 through their various counsel or legal representatives but the matter would be adjourned at the behest of the parties. She stated that the matter was finally heard on November 1, 2016 and all parties attended and made submissions on how they acquired the land.
42. She averred that the issue of the matter having been subject to litigation in Civil suit No 880 of 1977 as consolidated with civil suit No, 908 of 1977 was only brought up as a peripheral issue and the parties voluntarily submitted to the 1st respondent's jurisdiction and proceeded to make their submissions. She deposed that the 1st respondent was not re-opening the court cases but was only keen on examining the process used by the parties to implement the court orders made in the said suits and the legality and propriety of the resultant titles. Further, it was submitted during the hearing on March 20, 2014, that the said suits were dismissed after abating.
43. She averred that the parties made very extensive and several issues came to the fore on the legality and propriety of the said titles to the suit land. It was therefore absurd for the petitioners to concede having attended and participated in the hearings of 1st November 2018 and still insist that they were not given a hearing. She deposed that after the hearing on November 1, 2016, the 1st respondent rendered its



determination on March 8, 2017 and made findings that the subdivisions were done illegally, entries number 6-15 in the parallel title of Grant IR Number 24746, LR No 13041 were done fraudulently and the process extending the lease in 2004 was not procedural. The said determination was gazetted vide gazette notice number 11714 of November 9, 2018.

44. She averred that the suit land was leased public land and upon expiry of the lease in 2004 the land reverted back to the State and it remains public land. Further that these are issues that require a civil suit and a petition is not the best suited to address them. There is no response by the 2nd respondent in the file.

1st interested party's case

45. The 1st interested party filed an affidavit in support of the petition by Loise Wairimu Mugweru sworn on April 2, 2019. She is the administratrix of the estate of Maaka Mukuhi Mugweru and daughter and beneficiary of the estate of Samuel Mugweru Waithirwa. She deposed that on September 22, 2017, Ruth Wanjiru Mugweru, Winnie Wangui Mugweru and herself were duly appointed as administratrices of the estate of Maaka Mukuhi Mugweru (deceased) by the High Court at Nyeri Succession cause No 250 of 2007.
46. She deposed that on September 1, 2017 one Julius Gichuhi, a personal representative of the estate of Gichuki Kimira, the 2nd interested party filed an affidavit of protest of confirmation of grant in succession cause No 250 of 2007 claiming Kshs.1,977,919/= being costs in HCCC No 880 of 1997 and the parcel of land LR No 13041/2 as a share of the estate of Gichuhi Kimira.
47. Consequently, on September 11, 2017 they instructed their advocates to peruse the court file No 880 of 1977 wherein they discovered that several activities had taken place in respect of LR No 13041/2. The activities were spear headed by Julius Gichuki Gichuhi s/o Gichuhi Kimira (deceased). This involved a succession cause and High Court civil case. The matter had proceeded upto the Court of Appeal.
48. She averred that while the said state of affairs was still subsisting, they discovered sometimes in November, 2017 that the 1st respondent had revoked the Title to wit LR No 13041/2 vide Gazette Notice, Special Issue Vol CXX-No 138. They also discovered that the 2nd interested party had lodged a complaint with the 1st respondent to review of the Grant IR No 24746, LR No 13041 which was heard *ex parte* and determination made on March 8, 2018 revoking the titles initially sub divided.
49. She averred that the land and subject matter of the purported review by the 1st respondent was the subject of the suit in the High Court and Court of Appeal which were heard and determined hence the 1st respondent lacked jurisdiction to reopen, entertain the matter; and the proceedings were therefore a nullity; hence null and void as they fly in the face of the provisions of section 14(1) of the [National Land Commission Act](#) and therefore the 1st respondent had no jurisdiction to make the said determination; proceeding with the matter in the absence of their absence was a violation of Articles 25(c) and 50(1) of the [Constitution](#) and that the late Maaka Mukuhi Mugweru was and is still the bona fide registered owner of LR No 13041/2 with an indefeasible title against the 2nd interested party.
50. She averred that the varying dates on the ruling and the Gazette Notice is a clear indication that the decision made by the 1st respondent was an afterthought bent on infringing on their rights to own the property. They will stand to suffer irreparable loss if the determination by the 1st respondent is not quashed.



The 2nd interested party's case

51. The 2nd interested party filed a replying affidavit by Godwin Wachira Gichuhi sworn on September 24, 2019 and a further replying affidavit dated March 20, 2017 (which is nowhere in the record). He is an administrator of the estate of Gichuhi Kimira, the 2nd interested party herein. He deposed that the preliminary decree was issued on October 6, 1989 in HCCC No 880 of 1977 and the defendant therein being dissatisfied appealed vide Civil Appeal No 186 of 1995.
52. He averred that the proper person has never taken account of the partnership nor rendered any to the court as required by the revised decree following the judgment of the Court of Appeal issued on April 24, 1998 and extracted on June 28, 2007. He averred that as per the decree given, the proper person was not given the mandate to execute any documents of transfer of the land, which remained exclusively, the duty of the Deputy Registrar.
53. He deposed that the order of Hon. Justice Bosire in prayer No 2 for declaration that the judgment debtor, Gichuhi Kimira, held a sum Kshs. 2, 603,046.60 in trust for the plaintiffs/ judgment creditors was made with the presumption that the appeal preferred by Gichuhi Kimira will not change the status of the decree of Hon. Justice Akiwumi of October 6, 1989. That therefore, the Court of Appeal having resolved the matter partnership collapsed by the time of filing the suit HCCC No 880 of 1977 on April 20, 1977, as it therefore set aside the decree of High Court of October 6, 1989. To wit, the partnership was to be taken for the period from 1974 to April 20, 1977 and not after.
54. He deposed that upon the proper person making inquiry and taking account for the said period, failed to discharge his mandate to make inquiry on the share contribution and/ or take account, to date. All this, he claims was overtaken by the Court of Appeal Judgment. He maintained that the preliminary holding of 1/3 share interest could not be implemented separately and without first determining the partners contribution in the business as was provided in Order No 4.
55. According to him, the petitioners and their predecessors, Samuel Ngunu Kimotho unabatedly forged documents from Transfer, Discharge of Charge, Deed of Partition, Sub-Division Certificate, Deed Plans and Certificate of Titles merely because the Deputy Registrar, then sitting, declined to implement the preliminary decree before taking of account and issuance of a final decree. Further a search conducted by the 2nd respondent on LR No 13041 and issued on July 22, 2016 showed that the said title had not been closed for sub-division and subsequent entries or memorandums were not owned by the Registrar of title. The alleged sub-division of land LR 13041 into three portions was a fraud.
56. He deposed that the predecessors of the petitioners, Margaret Wandia Ngunu and the 2nd interested party were summoned by the Chief Land Registrar through summons dated November 25, 2014 to explain on the issue of Discharge of Charge and transfer of the LR 13041. Those summoned did not attend leading to the cancellation of LR No 13041/1. He averred that contrary to the petitioners allegations, they were duly invited by the National Land Commission vide letter dated 1st July 2016 to participate in the public hearing scheduled on 22nd July 2016 over the concerns on title IR 24746 (LR 13041). The general notice was also advertised in the print media. They also continued to participate in the public hearing of the National Land Commission and were represented as indicated in the proceedings from July 22, 2016, August 19, 2016, September 16, 2016, October 14, 2016 and November 1, 2016.
57. He deposed that he had the legitimacy to lodge a complaint with the National Land Commission for review of the grant following the illegal transactions perpetuated by the petitioners and or their predecessors in dealing with the title LR No 13041(IR 24746). He averred that it was mandatory that



the original title deed ought to have been submitted to the Registrar of titles to facilitate the registration of the discharge of charge which the petitioners misrepresented to the Registrar as the title/ grant as having been lost yet they knew that the original was still charged to Agricultural Finance corporation causing a publication of a gazette Notice No 7734 of December 1, 2000 and further without a court order dispensing the production of the original title/ grant.

58. He deponed that the 2nd respondent collected the original discharge of charge and the title/grant from Agricultural Finance Corporation and lodged the registration and that is when he discovered the fraudulent transfer by the petitioner's predecessors and thereby prompted him to lodge the complaint on the illegal dealing to the National Land Commission, as the original records kept had been manipulated.
59. He deposed that the petitioners misrepresented to the Registrar of Titles the fictitious Grant IR No 85809 as having been lost and caused to be published a Gazette Notice No 528401 of August 1, 2014 a notice to such effect. They further caused to be published a gazette Notice No 2018 of March 27, 2015 claiming that the land register in respect to the grant IR 85809 was lost therefore to be reconstructed with the concerted effort to clean the dirty title by opening a new register.
60. He supported the determination by the 1st respondent reiterating that it had the jurisdiction to entertain and hear the complaint and decision was made within their mandate as provided in the *Constitution* and the *National Land Commission Act* No 5 of 2012. He reiterated that the issues raised herein can only be addressed through the Environment and Land Court and urged that the application and petition be dismissed with costs.

The parties' submissions

1st, 2nd & 3rd Petitioners' Submissions (Petition No 421/2018)

61. The firm of Njuguna, Kahari & Kiai Advocates on behalf of the 1st, 2nd & 3rd petitioners filed written submissions and a list of authorities dated July 8, 2019 and further supplementary submissions dated March 23, 2022. Counsel raised the following issues for determination:
 - i. Whether this court has jurisdiction to hear and determine this petition.
 - ii. Whether the 1st respondent had jurisdiction to review the Grant to wit LR.No 24746, LR.No 13041 pursuant to the complaint lodged by the 3rd and 4th respondents.
 - iii. Whether the petitioners' fundamental rights were violated.
 - iv. Whether the petitioners are entitled to the orders sought.
62. On the first issue, Counsel submitted that the key assertion in the petition is violation of the petitioners fundamental rights under Articles 2(4), 25, 40, 47 and 50 of the *Constitution*. Counsel thus stated that the matter was well within this Court's jurisdiction under Articles 165(3)(d) and 23(1) of the *Constitution*. In support he cited the Supreme Court case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* (2012) eKLR which noted that a Court's jurisdiction flows from the *Constitution*.
63. Counsel with regard to the Environment and Land Court, contended that its jurisdiction flows from statute and not the Constitution as purported. It was argued that owing to its enabling statute the Court's jurisdiction is limited and as such cannot entertain petitions on infringement of fundamental freedoms other than those under Articles 42, 67 and 70 as stipulated in the *Environment and Land Court Act*.



64. He noted that this position was affirmed by the Supreme Court in the case of *Republic v Karisa Chengo & 2 others* (2017) eKLR where it was held that pursuant to Article 162(3) of the *Constitution*, Parliament enacted the *Environment and Land Court Act* and the *Employment and Labour Relations Act* and respectively outlined the separate jurisdictions of the ELC and the ELRC. From a reading of the *Constitution* and these Acts of Parliament, it is clear that a special cadre of Courts, with *suis generis* jurisdiction, is provided for. I therefore entirely concur with the Court of Appeal's decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa.
65. The three are different and autonomous Courts and exercise different and distinct jurisdictions. As Article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court.
66. Turning to the second issue, counsel submitted that the 1st respondent lacked jurisdiction to review the grant to wit LR.No 24746.LR.No 13041.To buttress this issue reliance was placed on the case of *Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited* (1989) KLR 1.This is because the issues raised in the complaint had been the subject of litigation at the High Court under HCCC 880 of 1977 and Court of Appeal under Civil Appeal No 186 of 1995.As such the complaint was offensive to the doctrine of *res judicata* under Section 7 of the *Civil Procedure Act*. The case of *Republic v Business Premises Rent Tribunal & another Ex parte Albert Kigera Karume* (2015) eKLR was cited in support of this point.
67. Secondly on the same point that the 1st respondent's mandate to review grants under Section 14 of the *National Land Commission Act* had expired as at May 1, 2017, counsel noted that the impugned decision had been taken out on March 8, 2018 hence null and unlawful. Further, that the parcels of land subdivided under LR. No 13041 were private land hence Article 67(2)(a) of the *Constitution* precluded the 1st respondent from exercising its mandate on such land as held in the case of *Republic v National Land Commission & another exparte Salim Gulambussein Gilani* (2016) eKLR, he further relied on *Republic v National Land Commission Ex parte Cecilia Chepkoech Leting & 3 others* (2016) eKLR.
68. On the third issue, counsel answered in the affirmative. It was submitted that the 1st respondent heard the 3rd and 4th respondents' complaint without according the petitioners an opportunity to defend their case hence violating their right to a fair trial which is a non-derogable right under Article 25(c) of the *Constitution*. Counsel noted that this position was affirmed by the Court in the case of *Standard Chartered Financial Services Limited & another v Manchester Outfitters Limited & 2 others* (2016) eKLR.
69. Similarly Counsel noted that the impugned decision that cancelled the titles under LR. No 13041/1-3 violated the petitioners rights to property under Article 40 of the *Constitution*. In addition, the 1st respondent by denying the petitioners an opportunity to participate in the review of grant proceedings and failing to furnish written reasons for its decision infringed on the petitioners rights under Articles 47 and 50 of the *Constitution*. He submitted that procedural fairness is a constitutional requirement in an administrative action as held in the case of *Republic v National Police Service Commission Expate Daniel Chacha* (2016) eKLR, and *Judicial Service Commission v Mbalu Mutava & another* (2015) eKLR and *John Peter Kiria & another v Pauline Kagwiria* (2013) eKLR.
70. Counsel on the final point submitted that since the petitioners had demonstrated that the 1st respondent's decision was *ultra vires* they were entitled to the reliefs sought. He submitted that in *Omega Enterprises (Kenya) Limited v Kenya Tourist Development Corporation Limited & 2 others*



(1998) eKLR it was held that if an act is void then it is in law a nullity. He further relied on [Kenya National Examination Council v Republic Exparte Geoffrey Gathenji Njoroge & others](#) (1997) eKLR, to buttress this point.

1st Respondent's submissions

71. The 1st respondent did not file submissions in this petition but filed them in the consolidated Petition No 419 of 2018 as summarized herein. They are dated February 21, 2022 and raise two issues:
 - i. Whether the honourable court has jurisdiction to entertain, hear and determine the petition as filed?
 - ii. Whether the orders sought in the petition should issue.
72. On the first issue, relying on [Black's Law Dictionary](#) 10th Edition; the writings of John Beecroft Saunders in treatise Vol 3:I-N, At page, 113; [Owners of the Motor Vessel "Lillian S" v Caltex Oli \(Kenya\) Ltd](#) [1989] KLR 1; and [Samuel Kamau Macharia & another v Kenya Commercial Bank & 2 others](#) Supreme Court Civil Appeal (Application) No 2 of 2011 they argued that this court lacks jurisdiction to determine the petition. They further relied on Articles 162(d), 162(3) of the Constitution and section 13(1) of the [ELC Act](#) and submitted that the ELC is the most suited to hear this case.
73. They relied on the case of [Republic v Karisa Chengo & 2 others](#) [2017]eKLR that spoke to the question of status and issue of the jurisdiction of the High Court vis-à-vis that of the specialized courts. They further relied on the case of [Mohammed Said v County Council of Nandi](#) [2013] eKLR; [Mutanga Tea & Coffee Company Limited v Shikara Limited & another](#) (2015) eKLR for the argument that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution, that procedure should be followed.
74. They argued that the specialized courts can exercise supervisory jurisdiction over the decision of quasi-judicial bodies and administrative bodies, interpret the Constitution and make declarations on violations of Fundamental rights and freedoms They relied on [Daniel Mugendi v Kenyatta University and 3 others](#) [2013] eKLR for that argument. They also relied on [Republic v Chief Land Registrar & another](#) [2019] eKLR on the jurisdiction of the High Court to entertain land disputes camouflaged as serious constitutional issues or judicial review applications or other matters falling under the jurisdiction of the High Court.
75. They relied on [Honey Creepers Investment Limited v Cab Investments Company Ltd & 4 others](#) [2020]eKLR which lay a criteria to determine what would otherwise be deemed to be a mixed grill petition. They urged this court to lay down its tools and dismiss the petition for want of jurisdiction. Further relying in the cases of [Equity Bank Ltd v Bruce Mutie Mutuku t/a Diani Tour & Travel](#) [2016] eKLR they argued that this court has no jurisdiction to transfer the suit to a court with jurisdiction.
76. They submitted that the effect of allowing the petition would be to affirm ownership of the suitland by the petitioner without a trial on merits where evidence would be called and tested to establish how they acquired title to the property. The petitioner would have used this court to sanitize what are otherwise titles without a trial in a court clothed with jurisdiction to hear and determine issues of title and ownership of land.
77. Regarding jurisdiction of the 1st respondent to entertain and determine the dispute herein, they affirmed that the 1st respondent had the jurisdiction under the [Constitution](#) and the [National Land Commission Act](#) to review all grants and disposition to the suit land herein and render a determination on its legality and propriety. They based their argument on Article 67(3) , 68(v) of the [Constitution](#), Sections 14, 14(5), (6) of the [NLC Act](#) and the cases of [Republic v Land Registrar Mombasa & 2 others](#)



Ex Parte Bhangha Limited [2012] eKLR; *Republic v National Land Commission & 2 others Ex Parte Airways Holdings Limited* [2015] eKLR; *Republic v National Land Commission & another Ex Parte Muktar Saman Olow* Miscellaneous Application No 376 of 2014 [2015] and *Republic v National Land Commission Ex Parte Holborn Properties Limited* [2016] eKLR.

78. Extensively defining the term grant and disposition, they argued that the 1st respondent has a wide mandate to look at various processes involved in the conversion of public land to private land and determine whether the conversion process leading to the issuance of a grant, lease or certificate of title was lawful. Relying on Article 62 they argued that it ought to be read putting in mind that there are other categories of public land recognised by the same Article 62 although not listed under the said Article.
79. They submitted that the mere registration of land that was once public land does not oust the jurisdiction of the 1st respondent to ascertain how the land was converted to private land. Under Articles 62 and 67 of the *Constitution*, the 2nd respondent manages and administers all public land on behalf of the county government and national government. When a lease to the property expires, the property reverts back to the county government which remains the head lessor. Under Article 62 (2) of the *Constitution*, the instant suit land is vested in the county government as public land and leased to the *ex parte* applicant for a definite period.
80. It is argued that 1st respondent has the jurisdiction to look at how the process of conversion was done it and rendered a verdict on March 8, 2017 when it found that the sub-division was done illegally and entries numbers 6-15 in the parallel title of grant IR Number 24746, LR Number 13041 was done fraudulently and the process of extending the lease in the year 2004 was not procedural. It therefore pursuant to section 13 of the *Land Act* directed that the extension of the lease to grant IR Number 24746 IR Number 13041 as approved by the county government be processed in the name of the administrator of the estate of the late Gichuhi Kimira.
81. They submitted that Article 40 guarantees the right to own property but Article 40(6) divests any property found to have been unlawfully acquired from any constitutional protection.
82. Regarding due process and fair administrative action, counsel submitted that all parties to the dispute herein were duly notified and served with the complaint. They were equally in strict compliance with the provisions of the Section 14 of the *NLC Act*. The parties attended the hearings as required and made representations either through their representatives or advocates.
83. They argued that the parties voluntarily submitted to the jurisdiction of the 1st respondent and made extensive oral and written representations. This has also been admitted by the petitioners in their pleadings. Being dissatisfied with the 1st respondent's decision, the only recourse available under Rule 30 of the *2012 National Land Commission (Review of grants and disposition of public Land) Regulations 2017* was to appeal to the ELC Court and not this court. They relied on *Gathigia v Kenyatta University* Nairobi HCMA No 1029 of 2007 [2008] KLR 587.
84. On the pendency of civil suit No 908 of 1977 as consolidated with Civil Suit No 908 of 1977, it was submitted that the suits had abated and had no bearing or effect on the proceedings before the 1st respondent. Further the issues raised were not similar to the issues raised therein. Accordingly, Section 14 of the *NLC Act* was enacted in 2014 way after the said cases were filed and the mandate of the 1st respondent was not to establish the ownership of the suit property but to examine the process used to acquire the titles and to further ascertain the legality and propriety of such titles. They relied on *Republic v National Land Commission & another Ex Parte Fidelity Commercial Bank* [2016]; *Elizabeth Nditi Njoroge v National Land Commission* [2013] eKLR in support.



85. On when the decision of the 1st respondent was rendered, it was submitted that the hearings were conducted within the set of five years period and a determination rendered on March 8, 2017 and not on November 9, 2018 as claimed by the petitioners. Further that the typographical error may have indicated the same was signed on March 8, 2018. This was duly corrected by way of amendment and an amended determination indicating the correct date as March 8, 2017 duly issued and was served on the parties herein.
86. They also admitted that the Gazette Notice was done on November 9, 2018 but argued that the Gazette Notice is not a decision or a determination but mere evidence of a decision that has already been made and its publication is just for public information. Further section 14 of the [NLC Act](#) does not require the publication of the decision in the Gazette Notice and its publication was for public information. The same is subject to the bureaucracy at the Government printer office and the availability of funds and it's not dependent on the wishes of the 1st respondent.
87. Finally it was argued that the complaint and investigations that had been commenced by the Commission under section 14 were left in limbo following the effluxion of the said mandate and could still be finalized pursuant to section 26 and 23(3) of the [Interpretation and General Provisions Act](#), (Cap 2).

The 2nd, 5th & 6th Respondents' submissions

88. The 2nd, 5th & 6th respondents' filed written submissions dated February 18, 2022 through State Counsel Betty Mwasao. Counsel identified the issues for determination as:
- i. Whether this Court has jurisdiction to hear and determine this petition.
 - ii. Whether the petitioner has established a case against the 2nd, 5th and 6th respondents.
89. Counsel submitted that this Court can only exercise jurisdiction as conferred by the Constitution or other written law as opined in the case of [Samuel Kamau Macharia](#) (supra). She submitted that the consolidated petition primarily challenges the 1st respondent's decision to revoke the sub-division of the property in question based on the underlying dispute between the petitioners and the 3rd and 4th respondents in relation to the ownership of the property. In view of this she contended that the issues herein are predominantly in relation to the subject of land administration which is a matter within the ambit of the Environment and Land Court. As such this Court does not have the requisite jurisdiction to entertain this petition as it is barred by virtue of Article 162 (2) (b) of the [Constitution](#).
90. In support she relied on the case of [Omar Tabir Said v Registrar of Titles & Another](#) [2013] eKLR where it was emphasized that the Environment and Land Court has juridical likeness or similarity with the High Court. In this juridical likeness, the ELC Court has authority to entertain applications for the redress of a denial, or violation, or threat to a right or fundamental freedom in the Bill of Rights in matters falling under its jurisdiction. Similar reliance was placed on the case of [United States International University \(USIU\) v Attorney General](#) [2012] eKLR.
91. On the second issue, Counsel submitted that the petition had not raised any constitutional issues nor cause of action against the respondents, noting that the petitioners had not sought any substantive prayers against the 2nd, 5th and 6th respondents. She underscored that the burden of proving violation of a right as enshrined in the Constitution rests on the person alleging the violation. As such she urged this Court to be guided by the cases of [Anarita Karimi Njeru -versus- Republic](#) [1979] eKLR, and [Ismael Mzee Ismael v Attorney General & another](#) [2021] eKLR.



92. Counsel pointed out that the petitioners' allegation that the 2nd respondent had violated its fundamental right and freedom for fair administrative action for its failure to furnish written reasons was not supported by any evidence. This is because the allegation implied that the petitioners had sought to be given the reasons yet no such request or application to the Commission was adduced as evidence. According to Counsel the petitioners' allegations were based on unverified information which is inconsequential. For the reasons stated above, Counsel submitted that the petition ought to be dismissed.

The 3rd & 4th respondents submissions

93. The firm of Gathara Mahinda & Company Advocates on behalf of the 3rd and 4th respondents filed written submissions dated 17th February 2021. On the first issue, it was submitted that the 1st respondent had jurisdiction to deal with the complaint raised by the 4th respondent in line with its functions as stipulated under Sections 5 and 14 (1) of the *National Land Commission Act* No 5 of 2012. Besides that the 1st respondent had jurisdiction, to review Grant IR No 24746, LR No 13041 since the title which was under leasehold had already expired in 2003 and thus the reversionary right went back to the State making it public land.
94. On the second issue, as to whether the decision of the 1st respondent determined issues which had already been pronounced by the High Court and the Court of Appeal, counsel answered in the negative. The reason being that the case in the High Court had abated. What is more is that the proceedings before the 1st respondent's Tribunal were not challenging the decision of the courts, but focussed on probing the legality of processing the registration of a discharge of charge purportedly issued by the Agricultural Finance Corporation and a transfer both entered in the register to title IR o. 24 746 (LR No I 3041) on October 5, 1993.
95. On whether the petitioners' rights were violated, Counsel submitted that the 1st respondent discharged its duty and acted within the ambit of Articles 40 (6) 67, and 68 (c) (v) of the *Constitution* and so it is not for this Court to stand in the way of a quasi-judicial body lawfully discharging its constitutional mandate as held in *Milan Kumarn Shah & others v City Council of Nairobi & others* Nairobi HCCC No 1024 of 2005 (unreported).
96. On the alleged violated rights, Counsel stated that Article 40 must be read as a whole so that the protection afforded by Article 40 which protects the right to property must be read to exclude property found to be unlawfully acquired under Article 40(6) as held in the case of *Isaac Gathungu Wanjohi & another v Attorney General & 6 Others* Petition 154 of 2011 [20121 eKLR. With regard to Articles 47 and 50 of the *Constitution*, counsel challenged the petitioners' allegations and submitted that they had been invited by the 1st respondent through a letter dated July 15, 2016 to participate in the public hearing, scheduled for July 22, 2016 over the concerns on the impugned property. In fact he submitted that the petitioners' counsel had acknowledged receipt of the communication in its response dated July 16, 2016.
97. On the fourth issue, as to whether the High Court has mandate to entertain constitutional issues touching on title to land, counsel submitted that the predominant issue was the recommendation for cancellation of all the illegal entries that were made on Grant IR 24746, LR No 13041 from entry No 6 to 15 and revocation of any illegal titles that may have been issued against the said property. These he argued were matters squarely falling within the jurisdiction of the Environment and Land Court and not the High Court.



98. Taking this into consideration, Counsel stressed that Article 165 (5) of the Constitution expressly prohibits the High Court from dealing with any matter reserved for the exclusive jurisdiction of the ELC Court as held in the case of Delmonte Kenya Limited v County Government of Muranga and another (2019) eKLR. He also referred to the cases of Ludia Nvambura Mbugua v Diamond Trust Bank Kenya Limited and another (2018) eKLR and Honey Creepers Investment Limited v Cab Investment Limited & 4 others (2020) eKLR.

Petitioners' submissions (Pet No 419/2018)

99. The petitioners filed two sets of submissions dated February 22, 2021 and March 23, 2022 respectively by Njuguna & Kahari advocates. In their initial submissions, counsel substantively reiterated the contents of the petition and affidavit. He argued that the purported inquiry by the 1st respondent to review the grant for title No LR 13041 and the determination to revoke subdivisions carried out in compliance of lawful court orders was unconstitutional. The same was carried out in a manner that offends the principles of natural justice and violated their rights guaranteed under Articles 40, 47, 50 and 159 of the Constitution.
100. The petitioners claimed that they were never served or formally notified of the inquiry by the 1st respondent contrary to the provisions of section 14(3) of the NLC Act. By doing so the 1st respondent violated the petitioner's right to fair hearing and fair administrative action. Counsel argued that for the notice to be sufficient and adequate, it ought to have complied with sections 4(3) of the Fair Administrative Actions Act. He urged that they were never informed of the particulars of facts constituting any alleged illegality, irregularity and / or fraud in the acquisition of the suit property. They were thus denied an opportunity to know the allegations and / or case they were required to answer to. Such denial amounted to breach of Article 47 of the Constitution.
101. Counsel relied on Republic v National Land Commission & Tropical Treasure Limited Ex Parte Krystalline Salt Limited (2015) eKLR; Republic v National Land Commission & 2 others Ex Parte Archdiocese of Nairobi Kenya Registered Trustees (St. Joseph Mukasa Catholic Church Kabawa West) [2018] eKLR in support of this argument. Also see
- i. Judicial Service Commission v Mbalu Mutava & Another [2015] eKLR,
 - ii. Republic v Registrar of titles & Another Ex Parte David Gachira & Another [2014] eKLR;
 - iii. Musk Deer Limited v Benjamin K. Kipkurui & another Mombasa CA No 54 of 2017,
102. He reiterated that owing to the history of litigation involving the original parcel namely LR 13041 and by extension the suit property, any inquiry conducted by the 1st respondent in respect of the said property was outside its constitutional mandate. Counsel relied on section 15(3) of the NLC Act, arguing that the respondent lacked the jurisdiction to entertain a dispute on the ownership of the suit property which had been determined by the highest court in the land. It also offends the hierarchy of courts envisaged by chapter 10 of the Constitution. It was therefore submitted that pursuant to Articles 23 and 165 (3) (b) of the Constitution, this court had jurisdiction to hear and grant the orders sought in the petition.
103. In the submissions dated March 23, 2022 and in response to the 1st respondents' submissions, counsel emphasized that this court has jurisdiction to hear the petition, considering its nature. He argued that the case of Karisa Chengo & 2 others disapproved those decisions that tend to claim that section 13(3) ELC gave that court the jurisdiction to deal with all kinds of infringement of constitutional rights. He further argued that the Honey Creepers Investment Ltd v Can Investment Ltd & 4 others [2020] case is different as the dominant issue identified was falling under the jurisdiction of the ELC.



104. Counsel submitted that this case is similar to the case of *Musk Deer Limited v Benjamin K. Kipkurui & another* [2018] eKLR wherein the High Court allowed the petition. The same was challenged at the Court of Appeal and a challenge on the jurisdiction of the High Court to entertain the petition raised. The Court held that it had jurisdiction because the issue fundamentally fell on breach of fundamental rights and freedom.
105. Counsel reiterated that the issue here is not on ownership or title but whether the denial of a fair hearing constitutes a violation of the petitioners' rights protected under the Constitution. Further relying on *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others* (2017) eKLR he submitted that the said case established that just because land is involved does not automatically invoke the jurisdiction of the Environment and Land Court. They argued that even if land was to be severed from this petition and disregarded, violations of the petitioners' right to a fair hearing and fair administrative action would still ensue.
106. He added that the petition was also seeking to challenge the jurisdiction of the National Land Commission in re-litigating matters which had been adjudicated before superior courts. It was submitted that the principles in *Republic v Karisa* (supra) apply to the impugned decision of the National Land Commission. It was given without jurisdiction and therefore amounted to nothing. He also dismissed the allegation that the petitioners submitted to the jurisdiction of the National Land Commission. Making reference to their bundle they submitted that they had in their written presentation to the National Land Commission informed it that it had no constitutional or statutory jurisdiction to set aside the decision of the High Court of Kenya.
107. Dismissing the 1st respondent's argument, counsel submitted that a section of the *National Land Commission Act* No 5 of 2021 related to review of grants of public land to establish their propriety or legality. There is no an allegation that the land subject matter before the National Land Commission was public land. It was at all material times private land as defined by Article 64 of the Constitution.

1st Interested party's submissions

108. The 1st interested party did not file submissions in petition 419 of 2018.

2nd interested party's submissions

109. The 2nd interested party filed submissions dated February 17, 2021 by Mr Mahinda Gathara advocates. Therein counsel reiterated the contents of their replying affidavit raising issues as hereunder:
- i. Whether the 1st respondent had the jurisdiction to hear, investigate and determine the complaint or claim raised by the 2nd interested party
 - ii. Whether the decision of the National Land Commission, in essence determined issues which had already been pronounced by the High Court and Court of Appeal.
 - iii. Whether the petitioners and/ or their predecessors had the mandate to effect the preliminary decree and more so through fraudulent means
 - iv. Whether there was a violation of the petitioners fundamental rights
 - v. Whether this Honourable Court can issue an order of certiorari to bring to this court and quash the decision of the 1st respondent on March 8, 2017 and the directions given to the 2nd respondent on March 8, 2017 revoking the subdivisions to wit LR No 13041/1-3 (originally LR No 13041)



- vi. Whether an order of prohibition be issued directed to the 2nd respondent prohibiting it, its agents / servants from acting on all or any of the recommendations of the 1st respondent contained in the Gazette Notice issued on November 9, 2018
 - vii. Whether the investigations conducted by the 1st respondent with respect to review of the Grant IR No 24746, LR No 13041 and the determination on March 8, 2017 and published in the special issue of the Kenya Gazette of 9th November 2018 were irregular, illegal, unlawful, null and void and of no legal effect.
 - viii. Whether the High Court has mandate to entertain constitutional issues touching on title to the subject land.
110. On the first issue, and relying on Article 67 of the Constitution, sections 3, 5(1) (2) (6), and 14(1) of the NLC Act, counsel affirmed that the 1st respondent had the jurisdiction to deal with the complaint raised by them. Further that the National Land Commission merely looked on whether the law and proper procedure was followed in effecting the registration on the entries made on the parallel title not how the grant was acquired.
 111. He submitted that pursuant to section 35 (1) of the Registration of Titles Act (repealed) that for any registration of instrument to be effected, the original grant ought to be submitted and endorsed thereon. This was not followed and there was no order produced by the petitioners before this court, dispensing with the production of the original title/ grant as ordinarily would be expected.
 112. On the second issue, counsel submitted in the negative. He urged that the cases in the High Court filed by the sellers to the petitioners had already been declared by the courts to have abated and there remained nothing further to arbitrate on. The 2nd interested party therefore held the legitimacy to make a complaint to the National Land Commission.
 113. It was submitted that it would have been prudent for the plaintiffs in HCCC No 880 of 1977 as consolidated with CCC No 908 of 1977 to await the outcome of the Court of Appeal case, than attempt to enforce the preliminary decree through illegal means. That the preliminary holding of 1/3 share interest could not be implemented separately and without first determining the partners contribution in the business as was provided for in Order No 4.
 114. Counsel submitted that the proceedings at the National Land Commission therefore were not challenging the decision of the courts, but merely probing the legality or propriety in processing the registration of a discharge of charge purportedly issued by the Agricultural Finance Corporation and a transfer both entered in the register to tile IR No 24746 (LR No 13041) on October 5, 1993.
 115. He argued that the petitioners while engaging in purchasing the land ought to have carried out due diligence. Again no explanation has been offered by the petitioners as to why they engaged in a spree of forgery of various documents and misrepresentation just to cause a registration. He submitted that the process that culminated in the registration of a forged discharge of charge and transfer was not in tandem and does not flow from the preliminary decree issued in 1989 and therefore are all a nullity
 116. Relying on *Yalwala v Indimuli* (1989) eKLR and in the case of *National Bank of Kenya v Wilson Ndolo Ayal* (2009) eKLR, counsel submitted that the 1st respondent in discharging its functions by investigating the manner in which the registration of the forged discharge of charge and transfer on the parallel Title in action acted well within the ambit of Articles 40 (6) 67, and 68(c) (v) of the Constitution.



117. They submitted that the grant to the suit land was issued pursuant to the *Registration of Titles Act (repealed)* by the then President of Kenya John Terence Twohey for a term of 31 years and 8 months from 1st May 1971. That the leasehold period expired by January 2013 and the nature of the title being a leasehold, the interest reverted to the government.
118. Regarding Article 40 of the *Constitution*, he submitted that the right does not extend to a title founded on an unlawful acquisition. He relied on Article 40(6) of the *Constitution* and the case of *Isaac Gathungu Wanjobi & another v Attorney General & 6 others* Petition 154 of 2011 [2012] eKLR and JR 376 of 2014- *Muktar Saman Olow v National Land Commission*.
119. It was submitted that no evidence had been tendered by the petitioners that discloses an arbitrary deprivation of the petitioners' interest over the land. No title had been displayed by the petitioners and no evidence by way of official search had been tendered by the petitioners to show that LR No 13041/1 exists. On the contrary a search conducted by the 2nd respondent on LR 13041 and subsequently issued on July 22, 2016 showed the title IR No 24746 had not been closed for subdivision and subsequent entries or memorandums were not owned or endorsed by the Registrar of Titles either. Hence the petitioners could not claim their right to Article 40 as the alleged property is not registered and does not legally exist on the Government records.
120. Relying on Articles 47 (1), 50 of the *Constitution* and Sections 14(3) , (5) of the *National Land Commission Act* (NLC Act) counsel submitted that the petitioners were duly invited by the National Land Commission and participated as demonstrated in the Hansard in the replying affidavit by the 1st respondent to participate in the public hearing , scheduled on July 22, 2016 and other subsequent hearings over the concerns on title IR No 24746 (LR No 13041). Hence the 1st respondent did comply with the said provisions of the Constitution and the *NLC Act*.
121. On the eighth issue, counsel submitted that the appropriate forum for arbitration of the petitioners' grievances herein, ought to have been through the ELC. Relying on *Milan Kumarn Shah & Others v City Council f Nairobi & Others* Nairobi HCCC No 1024 of 2005 he submitted that it is not for this court to stand in the way of a quasi-judicial body lawfully discharging its constitutional mandate.

Analysis and determination on the consolidated petitions.

122. Having carefully considered the parties' pleadings, submissions, cited authorities, and the law I find the issues raised to be twofold, the preliminary issues and substantive issues which are as follows:
- a) Preliminary issues:
 - i. Whether this Court has jurisdiction to hear the consolidated petitions.
 - ii. If the answer in (i) is in the negative, whether this Court can transfer this matter to the Environment and Land Court.
 - b) Substantive issues:
 - i. Whether the 1st respondent had jurisdiction to entertain the complaint with respect to LR No 13041 and render its decision dated March 8, 2017.
 - ii. Whether the petitioners are entitled to the reliefs sought.



Issue No (a)(i).

Whether this Court has jurisdiction to hear the consolidated petitions

123. The jurisdiction of this Court was challenged by the 2nd, 3rd, 4th, 5th & 6th respondents (Petition No 421/2018) in their replying affidavit dated September 24, 2019 and grounds of opposition dated February 17, 2022. It is their contention that by dint of Article 165(5) (b) as read together with Article 162(2) (a) of the *Constitution*, this Court lacks the requisite jurisdiction to deal with questions touching on property disputes in the nature of land. The 1st respondent additionally argued that any party aggrieved by the decision of its Tribunal ought to be appealed against in the Environment and Land Court and not the High Court. The 1st respondent and 2nd interested party in Petition No 419/2018 raised the same arguments.
124. The petitioners on the other hand argued that the substratum of the petition concerns breach of fundamental rights and freedoms and not ownership or title to land. That therefore by dint of Article 23 and 165 (3) (b) of the *Constitution*, this court is vested with the requisite jurisdiction to hear and determine this suit.
125. Jurisdiction is a legalistic concept as derives its force from the law. It is the law that donates jurisdiction to a court. Courts do not therefore enjoy absolute power but only that which is donated by the law. This means that Courts are prohibited from entertaining matters outside their ambit. Jurisdiction is thus defined by the law which sets the limits of the exercise of judicial power.
126. The Supreme Court has on a number of occasions addressed its mind in this respect. In the case of *in the Matter of Interim Independent Electoral Commission* [2011] eKLR the Court opined as follows;
- “ [29] Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent....
- [30] ...jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.”

Also see the Supreme Court decision in *Samuel Kamau Macharia* (supra)

127. Once the jurisdiction of a Court is challenged in a suit the Court of Appeal in the case of *Owners and Masters of Motor vessel “Joey” v Owners and Masters of Motor Tugs “Barbara” and Steve “B”* (2007) eKLR offers guidance on the steps to be taken thereafter as follows:

“ ..the underlying principle is contained in the two previous decisions of this Court in the cases of *The Owners Of The Motor Vessel “lilian S” v. Clatex Oil (kenya) Ltd* [1989] KLR 1, *And Roy Shipping Sa & All Other Persons Interested In The Ship “mama Otan” v Dodoma Fishing Company Ltd*, Civil Appeal No 238 of 1997 (unreported). In the *Lilian S*, the Court, consisting of the late Mr Justice Nyarangi, the late Mr Justice Masime, and Mr Justice Kwach, relying on previous decisions of the Courts of the United Kingdom, decisions such as *The River Rima* [1987] 3 ALL E.R 1, *The I Congreso del Partido* [1983] 1 AC 244 and such like cases, held that the question of jurisdiction, raised in the circumstances such as



those existing in the present appeal, is a thresh-hold issue and must be determined by a judge at the thresh-hold stage, using such evidence as may be placed before him by the parties.”

128. A reading of the facts in this matter reveals that the petitioners’ contention is the 1st respondent’s decision with reference to property LR No 13041 which they say violated their constitutional rights under Articles 2(4), 25 (c), 40, 47, 50 and 67 of the Constitution.
129. The 1st respondent on the other hand asserts that the pleaded issues are not constituted in the right forum. The question to be answered therefore is whether the petition falls within the meaning of Article 165 (3) (b) & (d) (ii) or Article 162 (2) (a) of the Constitution.
130. The High Court’s jurisdiction to entertain matters is found in Article 165(3)(d) of the Constitution which provides as follows:
- (3) Subject to clause (5), the High Court shall have--
- a. unlimited original jurisdiction in criminal and civil matters;
 - b. jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
 - c. jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
 - d. jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of--
 - i. the question whether any law is inconsistent with or in contravention of this Constitution;
 - ii. 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;
 - iii. 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
 - iv. a question relating to conflict of laws under Article 191; and
 - v. any other jurisdiction, original or appellate, conferred on it by legislation.
131. The Constitution in Article 162 establishes two more Courts of equal status with the High Court which exercise jurisdiction over environment and land matters and employment and labour relations. This Article provides as follows:
- (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to--
- a. Employment and labour relations; and
 - b. The environment and the use and occupation of, and title to, land.
132. As a result of Article 162 of the Constitution the High Court is barred in Article 165(5)(b) of the Constitution from exercising jurisdiction conferred to the special courts. This Article provides as follows:



The High Court shall not have jurisdiction in respect of matters-

b) falling within the jurisdiction of the courts contemplated in Article 162(2).

133. Parliament as empowered by Article 162 of the *Constitution* enacted the *Environment and Land Court Act* No 19 of 2011 which deals exclusively with matters falling within its ambit. The Jurisdiction of the Court is defined in Section 13 of the Act as follows:

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

- i. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
- ii. relating to compulsory acquisition of land;
- iii. relating to land administration and management;
- iv. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
- v. Any other dispute relating to environment and land.

134. My interpretation of the preceding Section is that the jurisdiction of the Environment and Land Court is founded on the existence of any dispute with relation to land or environment. In essence therefore where the substratum of a dispute is founded on such, the matter should be exclusively dealt with in the Environment and Land Court.

135. On the other hand, the 1st respondent a constitutional commission is established under Article 67 of the *Constitution* and mandated as follows:

- a. to manage public land on behalf of the national and county governments;
- b. to recommend a national land policy to the national government;
- c. to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya;
- d. to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities;
- e. to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;
- f. to encourage the application of traditional dispute resolution mechanisms in land conflicts;
- g. to assess tax on land and premiums on immovable property in any area designated by law; and
- h. to monitor and have oversight responsibilities over land use planning throughout the country.

136. Considering the matter before this Court, it is apparent that the foundation of the issue is ownership of property LR No 13041 which led to the 1st respondent's impugned decision. The issue principally relates to the land title and administration of the property which falls within the jurisdiction of the Environment and Land Court. The petitioners however contend that the issues raised herein deal with the violation of their constitutional rights which this Court has the jurisdiction to entertain.



137. To answer this question I am guided by the Court of Appeal who speaking to this matter in the case of *Chimweli Jangaa Mangale & 3 others v Hamisi Mohamed Mwawasaa & 15 others* [2016] eKLR opined as follows:

“This Court considered the issue in *Prof. Daniel N. Mugendi v. Kenyatta University & Others*, CA No 6 of 2012 and in *Judicial Service Commission v. Gladys Boss Shollei & Another*, CA No 50 of 2014, involving the Labour and Employment Court, which, like the ELC, is a court of equal status as the High Court under Article 162(2) of the Constitution. The Court concluded that the High Court did not have exclusive jurisdiction to enforce the Bill of Rights and that the Constitution contemplates enforcement and protection of fundamental rights and freedoms by other courts, other than the High Court. Accordingly, where issues involving the environment or land raise constitutional issues or issues of protection and enforcement of the right to land as property, the ELC will have jurisdiction to hear and determine the dispute. We are satisfied that the appellant’s claim that the ELC lacks jurisdiction to enforce constitutional rights is totally bereft of merit.”

138. Similarly, the Court in the case of *Joyce Mutindi Muthama & another v Josephat Kyololo Wambua & 2 others* [2019] eKLR held that:

“ 16. It is true, as submitted by the Respondents’ counsel, that under Section 13(3) of the *Environment and Land Court Act*, the court has the mandate to hear and determine applications for redress of a denial, violation or infringement of, or threat to rights or fundamental freedoms relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution. However, the Act does not limit or preclude the court from hearing applications for redress of a denial or violation of any other right, if that right is in furtherance of a dispute relating to land and the environment.

17. It is trite that the right to own land and the right to a clean and healthy environment cannot be dealt with in isolation from other rights like the right to a fair hearing, the right not to be discriminated against, the right to a fair administrative action, the right to equal protection and equal benefit of the law, the right to adequate housing, amongst other rights.

18. All these rights have to be interpreted in the context of the Petitioners’ right to own land and the right to a clean and healthy environment, and not in isolation as argued by the Respondents.”(Emphasis is mine).

Also see: *Honey Creepers Investment Limited v Cab Investments Company Ltd & 4 others* [2020] eKLR.

139. Guided by the above case law, I find the substratum of this case to be title to land. The Environment and Land Court has the jurisdiction to hear and determine matters concerning breach of fundamental rights if the heart of the issue stems from its jurisdiction pertaining to land and environment. That mandate is also not limited to Articles 42, 67 and 70 of the *Constitution*.



140. Having determined that the matter falls within the purview of the Environment and Land Court, I am guided by the case of *Delmonte Kenya Limited v County Government of Murang'a & another* [2019] eKLR where it was held that:-

“89. In the end we find and hold that the dominant issue in the petition is the right to renewal of leases over the suit land. We further find that the issue is intrinsically connected to the use and title to land. The dispute thus falls squarely within the purview of the ELC under Article 162(2) of the Constitution as read with Section 13 of the ELC Act. We also find that although the petitioner claims violation of various constitutional rights, those claims are intertwined with the dominant issue and that the ELC has jurisdiction to deal with the alleged violations.”

141. In the same way, with reference to the issue of grants as presented in this matter the *2012 National Land Commission (Review of Grants and Dispositions of Public Land) Regulations, 2017* under Regulation 30(1) provides as follows:

A person aggrieved by the decision of the Commission may, within fourteen days of the Commission's decision appeal to the Court.

142. Court is defined under Regulation 2 as meaning:

The Environment and Land Court established under the *Environment and Land Court Act, 2011* and any other courts that have jurisdiction to matters relating to land.

143. The 1st respondent in this matter made a decision dated March 8, 2017. This in and of itself was a decision taken out by the 1st respondent's Tribunal. The Regulations as spelt out above indicate that where such a decision exits an aggrieved party is required to file an appeal at the Environment and Land Court. The petitioners did not adduce any evidence to demonstrate whether they exhausted this mechanism before approaching this Court.

144. In essence this Court lacks the jurisdiction to hear and determine this matter in both legal aspects. As such this Court ought to down its tools at this juncture.

Whether this Court can transfer the matter to the ELC Court

145. Having established that this court lacks the jurisdiction to determine this petition, ordinarily, it will down its tools. However a question arises what next? Should the suit be left to die a natural death or can this court indeed out of its own volition transfer the matter to the right forum? The 1st respondent has submitted in the negative.

146. There have been conflicting decisions on the same. In *Equity bank Limited v Bruce Mutie Mutuku T/ A Diani Tour & Travel* (2016)eKLR, the Court of Appeal held: -

“In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under Section 18 of the *Civil Procedure Act* to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign. It is settled that parties cannot, even by their consent



confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks, parties cannot even seek refuge under the “O2” principle or the overriding objective under the *Civil Procedure Act*, the *Appellate Jurisdiction Act* or even Article 159 of the Constitution to remedy the situation. In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through a transfer. In *Abraham Mwangi Wamigwi v Simon Mbiriri Wanjiku & Another* [2012] eKLR, it was held as follows: -

“It is therefore trite that where a suit is instituted before a tribunal having no jurisdiction, such a suit cannot be transferred under section 18 aforesaid to a tribunal where it ought to have been properly instituted. The reason for this is that a suit filed in a court without jurisdiction is a nullity in law and whatever is a nullity in law is in the eyes of the law nothing and therefore the court cannot purport to transfer nothing and mould it into something through a procedure known as “transfer”. In other words, courts can only transfer a cause whose existence is recognised by law.”

147. I have equally considered other decided case son this issue such as
- i. *Daniel N. Mugendi v Kenyatta University & 3 others* (2013)eKLR
 - ii. *Ali Jarso Wako & another v Ministry of Interior & Coordination of National Government & 5 others; Public Service Commission & 5 others (Interested Parties)* [2020] eKLR
 - iii. *Honey Creepers Investment Limited v Cab Investments Company Ltd & 4 others* [2020] eKLR
148. I stand guided by the cited authorities in this matter and find no distinguishing circumstances before me to warrant my arrival at a different decision. Secondly the petitioners herein were dissatisfied with the decision of the 1st respondent. The procedure of challenging the said decision is clearly set out in the Review of Grants & Dispositions of Public Land) Regulations, 2017, under Regulation 30(1) as read with Regulation 2. The petitioners ought to have challenged the 1st respondent’s decision before the Environment & Land Court by way of Appeal or Review, and not file it here as a pure case of violation of constitutional rights. This Court therefore will not transfer the petition to the ELC since it’s neither an Appeal nor application for Review.
149. The upshot is that this Court lacks jurisdiction to hear and determine both petitions which are struck out with costs.

Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 30TH DAY OF SEPTEMBER, 2022 IN OPEN COURT AT MILIMANI NAIROBI.

H. I. Ong’udi

Judge of the High Court

