Buya & 2 others (Suing on behalf of Ndera Community, Tana River County and themselves) v National Land Commission & 5 others; County Government of Tana River (Interested Party) (Petition 10 of 2021) [2023] KEELC 20325 (KLR) (28 September 2023) (Ruling)

Neutral citation: [2023] KEELC 20325 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

PETITION 10 OF 2021

EK MAKORI, J

SEPTEMBER 28, 2023

BETWEEN

ALI HERO BUYA ..... 1ST PETITIONER

ALI MOHAMED SAID ..... 2ND PETITIONER

JAMAEL ADE SHEKU ..... 3RD PETITIONER

SUING ON BEHALF OF NDERA COMMUNITY, TANA RIVER COUNTY AND THEMSELVES

AND

THE NATIONAL LAND COMMISSION ..... 1ST RESPONDENT

THE CHIEF LANDS REGISTRAR ..... 2ND RESPONDENT

IDA-SA GODANA RANCH COOPERATIVE SOCIETY LIMITED .... 3RD RESPONDENT

KENYA ELECTRICITY TRANSMISSION COMPANY LIMITED (KETRACO) ..... 4TH RESPONDENT

KURWITU VENTURES LIMITED ..... 5TH RESPONDENT

THE ATTORNEY GENERAL ..... 6TH RESPONDENT

AND

THE COUNTY GOVERNMENT OF TANA RIVER ..... INTERESTED PARTY

RULING

1. The 3rd respondent herein raised a Preliminary Objection to the Petitioners' Application dated 21st May 2021, for the reason that the suit is time-barred and the Court lacks the requisite jurisdiction to hear this matter given the doctrine of exhaustion of alternative dispute resolution mechanisms.

2. Parties were directed to file written submissions. On the 8th of May 2023, they did highlight the same orally.

   The 3rd respondent averred that the petitioners' claim through the amended petition dated 8th December 2022 is largely that the 1st Respondent violated their right to property under Article 40 of *the Constitution* by leasing the property known as L.R No. 13597/1 (the suit property) to the 3rd respondent, a private entity, in 1970, which act prompted historical injustices to the petitioners. The petitioners are further aggrieved that despite the said lease expiring in 2015, the 1st respondent went ahead and extended and or issued a new lease to the 3rd Party without their participation and any compensation to them. The 3rd respondent has now entered into third-party contracts with the 4th and 5th respondents, resulting in mining activities being undertaken on the suit property without any environmental impact mitigation.

3. Upon hearing the petitioners' application dated 21st May 2022, which sought interlocutory injunctive reliefs against the respondents, the Court issued interim orders on 28th May 2021 pending the hearing of the application inter partes as follows:

   a. A conservatory order against the 3rd to 5th Respondents, restraining them or their agents from leasing, transferring, or developing the suit property;

   b. A temporary injunction restraining the 4th and 5th Respondents or their agents from paying out any compensation money to the 3rd Respondent or anyone else concerning the acquisition of a wayleave for the construction of the transmission line on the suit property; and

   c. A stop order stopping all mining and/or extraction activities in the suit property.

4. The Preliminary Objection raised in this matter is to the effect that the amended petition dated 8th December 2022 together with the instant application dated 21st May 2022, is in the first instance, time-barred, and in the second instance, prematurely and improperly before this Court for failure to exhaust alternative dispute resolution mechanisms.

   The 3rd respondent submitted that the petitioners are aggrieved that the 1st Respondent granted a 45-year lease to the 3rd Respondent in 1970. In fact, the petitioners allude to an alleged meeting that was held between the 3rd Respondent's committee and the members of the Nderu Community on 17th April 1973. From the petitioners' case, it is clear that the cause of action, if any, arose over 50 years ago. No explanation, whatsoever, has been given to this Court as to why it took 5 decades for the petitioners to pursue their alleged claim. It is also surprising that despite being aggrieved by the 3rd Respondent's Lease, the petitioners held back even when the same was renewed in 2015, only to spring into action 6 years later.

5. Section 7 of the *Limitation of Actions Act* limits the time within which an action to recover land may be brought by any person to twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

6. On that basis alone, the Court is invited to find that the petitioners' inordinate delay is inexcusable and that they are inevitably guilty of laches.

7. Without prejudice to the foregoing, it is not lost on the 3rd Respondent that the Courts have recently settled the issue as to whether constitutional petitions, on of historical injustices over land matters, have time limitations. In particular, the Court of Appeal has held that Section 7 of the *Limitation of Actions Act* does not apply to these kinds of claims.

8. The 3rd Respondent submitted that even then, the Courts have been very deliberate in not entertaining claims brought before it after inordinate delays that cannot be justified by the claimants. For instance, in the case of John Peter Mureithi & 2 Others V Attorney General & 4 others [2006] eKLR the claimants sought judicial review orders of mandamus against the respondents, claiming that the respondents had unlawfully and fraudulently conspired and connived to have the 5th respondent in that case registered as proprietor of an extra 2577 Acres from the land that the applicants claimed belonged to them. As such, they sought orders of mandamus to compel the Minister of Lands and the Chief Land Registrar to revoke the titles issued to the respondents and thereafter, register the parcels in the name of the applicants' clan. The respondents opposed the application on grounds, among others, that the applicants' claim was time-barred for there was an undue delay of up to 40 years. The Court, in dismissing the application, agreed that the delay was inordinate.

9. Closer to the issue at hand herein, the 3rd respondent contended that in the case of Safepak Limited v Henry Wambega & 11 others [2019] eKLR, the appellant appealed, at the Court of Appeal, against the Environment and Land Court's decision that had disallowed the appellant's application which sought to dismiss the petition therein on grounds that it was time-barred and that the ELC Court lacked jurisdiction. Despite the Court of Appeal finding that the petition was not time-barred, the Court addressed itself to the issue of time limitation when it comes to constitutional petitions.

10. The Court agreed with the ELC Judge that indeed Article 67 of *the Constitution*, which gives the National Land Commission powers to investigate complaints over current or historical land injustices and recommend appropriate redress, does not place a time limit on seeking such redress. More importantly, the Appellate Court queried whether the lack of limitation meant that the time for seeking redress for constitutional violations was forever at large. The Court found this was not the case.

11. The 3rd Respondent submitted that 50 years is beyond inordinate delay. At best, the filing of the instant petition and application is an afterthought camouflaged in a constitutional petition to avoid the statutorily imposed time limitation of 12 years for land claims. At worst, it is motivated by other reasons other than the alleged violation of the petitioners' constitutional rights.

12. The 3rd Respondent stated that the dispute before this Court concerns the alleged historical injustices committed by the 1st to 5th respondents against the petitioners in the suit property through:

    a. Clearing and altering boundaries and subsequently causing registration of the suit property in the name of the 3rd Respondent to the exclusion of the petitioners;

    b. Encroaching on the existing village farms of the petitioners and altering the farming system;

    c. Demolishing the petitioners' houses and buildings;

    d. Destroying permanent trees and forests; and

    e. Initiating mining activities without any mitigation of the environmental repercussions.

13. The 3rd respondent submitted that the nature of the dispute as highlighted in Paragraph 12 is squarely within the National Land Commission's mandate to receive, admit, and investigate all historical land injustice complaints and recommend appropriate redress as provided for under section 15 of the *National Land Commission Act*, 2012. Given that no complaint has been lodged before the NLC over the dispute herein, the 3rd respondent submitted that this Court's jurisdiction has been invoked prematurely and improperly for lack of exhaustion of the already available dispute resolution mechanism.

14. A three-judge bench of the High Court reaffirmed this position in the case of Ledidi Ole Tauta & Others v Attorney General & 2 others [2015] eKLR where the petitioner's claim bordered on historical injustices. The Court upheld the NLCS's mandate as provided for under Article 67 (2) (e) and Section 15 of the *National Land Commission Act*, 2012.

15. Additionally, in the cited case of Safepak Limited v Henry Wambega & 11 others [2019] eKLR the appellant questioned the Environment and Land Court's jurisdiction over the petition that touched on historical injustices in the face of the NLC's mandate to investigate or inquire into such complaints and make recommendations for the appropriate reliefs. The Court of Appeal agreed that the petitioners had a responsibility first to exhaust all the available dispute resolution mechanisms.

16. The 3rd respondent averred that the Supreme Court has also had a chance to comment on the role of the National Land Commission as far as claims for historical injustices are concerned. In the Matter of the National Land Commission [2015] eKLR the National Land Commission approached the Court for an Advisory Opinion on its functions and powers, on the one hand, and the functions and powers of the Ministry of Land, Housing and Urban Development (the Ministry), on the other hand. The Court went into an exhaustive discourse on the separate roles of the two but also clarified on their interdependency in operations. Particularly, the Court restated the primary role that the Commission plays when it comes to claims of historical land injustices under Article 67 (2) (e).

17. The 3rd respondent concluded in the submissions by stating that should the Court be inclined to agree with the 3rd Respondent, the Court upholds the primary mandate of the NLC, as far as historical land injustices are concerned, by affirming that the doctrine of exhaustion is a critical component of the justice system and must be upheld as such.

18. The other respondents in this matter supported the Preliminary Objection.

19. On the other hand, the petitioners submitted that on the issue as to whether this matter is time-barred, from the pleadings, the grievances raised permeate from the extension of the subsisting lease for the next 45 years, which act was undertaken in the year 2015 and therefore the Court should start reckoning time from 2015 and not 1970.

20. On the doctrine of exhaustion, the petitioners submitted that this mechanism has been tried and failed. A case in point is the several memos and meetings with the NLC for action Annexures JM7, JM9, and JM10 on the illegalities of the extension of the lease in 2015. These interventions did not yield anything hence this petition.

21. The Preliminary Objection raises two issues worthy of discussion. Whether the petition is time-barred. Moreover, whether it offends the doctrine of exhaustion.

22. On the first question of whether the petition is statutorily barred from the petition itself, the petitioners approached this Court questioning the legality of the extension of a lease, which was created in the year 1970. The extension was done in 2015. So the question should be are we dealing with the 1970 lease or the renewal in 2015?

23. The law on the extension of leases is as held by Osiemo J. in the case of Charles Mwangi Kagonia v Dhraj D. Popat & Another [2006] eKLR as follows:

> " The obvious rights which the defendant has as a leasehold owner had ceased. The issue of extension of an expired lease is barred by statute which provides that the term of a registered lease may be extended by an instrument executed by the lessor and the lessee for the time being and registered before the expiry of the then-current term of the lease. The insurmountable hurdle which faces the lessee is that he cannot establish lawful occupation. A party cannot be allowed to benefit from an illegality. Once the 99-year lease between the Government and the defendant expired and he did not apply for an extension which must be granted and executed by the lessee and the lessor and registered before the expiry of the then-current term the interest of the lessee ceases and once the interest of the lessee ceases the land becomes available for allocation by the Commissioner of Land who is at liberty to allocate the same to any deserving applicant following the laid down procedures."

24. The lease is said to have expired in 2015. A renewal applied for. An extension was extended in 2018. The new lease then triggered a new cause of action reviving the 1970 lease. This Court and the other Superior Courts have severally held that historical injustice issues touching on Constitutional violations cannot be hinged on the Statute of Limitations however where there is an inordinate delay, the Court will have to consider each case on its unique circumstances rather than limiting the right complained of. See for instances in the case of Safepak Limited v Henry Wambega & 11 others [2019] eKLR where the Court of Appeal held as follows:

> " Whether a constitutional petition has been instituted within a reasonable time is a question for determination based on the particular circumstances of each case having regard to such considerations as the length of delay; explanation for such delay; availability of witnesses; and considerations as to whether justice will be done. In present case, the Judge determined, correctly in our view, that Section 7 of the *Limitation of Actions Act* does not apply to this matter. The Judge was also satisfied that the claim was not defeated under the doctrine of laches. We do not have a basis for interfering with that decision."

25. On the doctrine of exhaustion, this Court and other Superior Courts have discoursed this doctrine for quite a while. There are lots of authorities in this realm including the one quoted by the 3rd respondent on the role of NLC in historical injustice cases that is the Supreme Court holding In the Matter of the National Land Commission [2015] eKLR, where the apex Court held as follows on the role of NLC in historical injustice cases Article 67 (2) (e):

> " (313) In the course of rendering this Advisory Opinion, we have considered the mandates of the NLC as set out in *the Constitution* [Article 67(2) (d), (e) and (f)]. These are conducting research on land issues and on natural resources—with appropriate recommendations to certain agencies; initiating inquiries into historical land grievances—and recommending courses of redress; promoting traditional methods of resolving land conflict.
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> (314) From those provisions, it is clear to us that the NLC bears a brains-trust mandate in relation to land grievances, with functions that are in nature consultative, advisory, and safeguard-oriented. As regards such functions, the NLC, on the basis of clearly-formulated statutes, should be able to design a

clearly-structured agenda for regular operations and inter alia, should seek to devise a well-focused safeguard-mandate in relation to land issues."

26. On the same, subject in the case of Ledidi Ole Tauta & Others v Attorney General & 2 others [2015] eKLR where the petitioner's claim bordered on historical injustices. In upholding the NLCS's mandate as provided for under Article 67 (2)(e) and Section 15 of the *National Land Commission Act*, 2012, the Court stated as follows:

> " In our view, it is the National Land Commission that has the mandate to investigate into historical land injustices and make appropriate recommendations for redress. The Court is not the appropriate organ to carry out the investigation and/or inquiry and where the law has made provision for a state organ or institution to carry out a specific function that institution should be allowed to carry out its mandate. The Court should not usurp the roles of other state institutions. We therefore are of the view, it was premature on the part of the petitioners to come to Court without either exhausting the process of obtaining a degazettment of Ngong Hills Forest as a state forest under the provisions of the Forest Act and/or having the National Land Commission exercise its mandate under Article 67(2) (e) of *the Constitution*."

27. Further in Safepak Limited v Henry Wambega & 11 others [2019] eKLR on a similar topic the Court held as follows:

> " There is however the additional complaint in the present case that the petitioners' first port of call before approaching the ELC, should have been the National Land Commission on which the specific function of carrying out investigations into historical land injustices is vested. The advisory opinion of the Supreme Court in In the Matter of the National Land Commission (above), the High Court decision in Leidi Ole Tuta & others vs. Attorney General & 2 others (above), and decision of this Court in Speaker of the National Assembly vs. James Njenga Karume (above) were cited in support. Those authorities stand for the proposition, with which we agree, that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be followed provided that the remedy thereunder is effectual."

28. The doctrine of exhaustion or abstention has also been discussed in the following other cases (not cited by the parties) by this Court and the Superior Courts. In Benson Ambuti Adega & 2 others v Kibos Distillers Limited & 5 Others [2020] eKLR, Petition 3 of 2020, Maraga, CJ & P, Mwilu, DCJ & VP, Ibrahim, Wanjala, Njoki & Lenaola SCJJ. held as follows:

> " ...It would seem that the ELC had failed to appreciate that there were properly constituted institutions that were mandated to hear and determine the issues but instead chose to arrogate to itself the jurisdiction to hear and determine all the issues raised in the Petition. The Petitioners stated that the Superior Court correctly relied on the doctrine of judicial abstention, and exercised it discretion to hear and determine the Petition.
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> (51) Judicial abstention, as with judicial restraint, is a doctrine not founded in constitutional or statutory provisions, but one that has been established through common law practice. It provides that a Court, though it may be vested with the requisite and sweeping jurisdiction to hear and determine certain issues as may be presented before it for adjudication, should nonetheless exercise restraint or refrain itself from making such determination,

if there would be other appropriate legislatively mandated institutions and mechanism.

(52) The abstention doctrine, also known as the Pullman doctrine, was deliberately first reviewed by the U.S. Supreme Court in Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 61 S. Ct. 643, 85 L. Ed. 971 (1941). The doctrine, and as applied within the context of the US legal system, allows federal Courts to decline to hear cases concerning federal issues where the case can also be resolved with reference to a state-based legal principle. The Supreme Court, in an opinion by Justice Brennan in England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964) also noted that a State Court determination would indeed bind the federal Court. The proper procedure, the Court determined, is to give notice that the federal issue is contended, but to expressly reserve the claim on the federal issue for the federal Court. If such a reservation is made, the parties can return to the Federal Court, even if the State Court makes a ruling on the issue.

(53) Applying these principles to the instant Petition, the more favorable relief that the Superior Court should have issued was to reserve the constitutional issues on the rights to a clean and healthy environment, pending the determination of the issue with regards to the issuance of EIA licenses by the 4th Respondent to the 1st, 2nd and 3rd Respondents. The Court should have reserved the issues pending the outcome of the decision of the Tribunal, thereby affording any aggrieved party the opportunity to appeal to the Court. It would then have determined the reserved issues, alongside any of the appealed matter, if at all, thus ensuring the parties right to a fair hearing under Article 50 of *the Constitution* was protected. [54] The Court of Appeal, in our view, gave quite an elaborate and definitive definition pertaining to the jurisdiction of the trial Court in hearing and determining the Petition. However, once it had established that the ELC did not have the jurisdiction to hear and determine the Petition, the appellate Court should at that juncture issued appropriate remedies, which could have included, but not limited to, remitting back the matter to the appropriate institutions for deliberation and determination. Also, once it had determined that the ELC did not have the jurisdiction to hear and determine the issues before it, it should have held that any determination made was void ab initio and that the appellate Court therefore and with respect failed to properly exercise its discretion and supervisory mandate in this instance..."

29. The position taken by the Supreme Court in the Kibos Case is also replicated by the Apex Court in United Millers Limited v Kenya Bureau of Standards and 5 Others [2021] eKLR, as follows:

"(25) Considering all the above, it is clear to us that the judicial review application before the trial Court and the subsequent appeal to the Court of Appeal were determined on a preliminary jurisdictional issue. We have previously in Peter Odour Ngoge v Francis Ole Kaparo & others; SC Petition No. 2 of 2012, [2012] eKLR, emphasized the significance of respecting the hierarchy of the judicial system, as one of the principles guiding the exercise of our jurisdiction under Article 163 (4) (a) of *the Constitution*. From the foregoing, we find no difficulty in concluding that the issues before the High Court, as well as the

Court of Appeal, did not either involve the interpretation and application of *the Constitution* or take a trajectory of Constitutional interpretation or application. While issues of constitutional interpretation and application had been raised in the substantive application for Judicial Review, they were nipped in the bud when the preliminary objection was upheld for failure to exhaust the statutory alternative dispute resolution mechanisms.

(26) We also take judicial notice that the superior Courts' findings on jurisdiction is in harmony with our finding in Albert Chaurembo Mumbo & 7 others v Maurice Munyao & 148 others; SC Petition No 3 of 2016, [2019] eKLR, wherein we stated that, even where superior Courts had jurisdiction to determine profound questions of law, the first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute. We emphasized that where there exists an alternative method of dispute resolution established by legislation, the Courts must exercise restraint in exercising their Jurisdiction conferred by *the constitution* and must give deference to the dispute resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance.

(27) In view of the reasons tendered, we find that this Court has no jurisdiction to hear and determine Petition No. 4 of 2021 or the instant application for conservatory or stay orders."

30. In this petition, what the Court needs to determine is whether, given the provisions of the law, NLC is vested with the power to hear and determine historical injustice cases in the form of a complaint. As alluded by the authorities cited – whenever there is a first port of call – the Court ought to await the outcome of the primary organ before proceeding further.

31. In this action, the petitioners contended that they have tried that avenue through various Memorandums and meetings with NLC which have yielded no fruits hence recourse to this Court. Besides, NLC already approved the extension of the lease in this petition and is opposed to the current petition. It has already taken sides that the lease was properly extended after due process. The conclusion will be that even if the matter is referred to it, there is already a decision.

32. Munyao J. had an opportunity to distill the issue of jurisdiction between the NLC and this Court on historical injustice grievance in the case of Henry Wambega & 733 others v Attorney General & 9 others [2020] eKLR as follows:

" Let me first start with the question of jurisdiction.

28. The petitioners have brought this petition partly on the claim of historical injustices. There is of course contention from the respondents on whether this Court has jurisdiction to hear claims of historical injustice related to land or whether the claims should be addressed by the National Land Commission (NLC). The petitioners have argued that this Court has jurisdiction. They have referred me to my own decision in the case of Kipsiwo Community Self Help Group vs. Attorney General & 6 Others (2013) eKLR and the Court of Appeal decision in the case of Chief Land Registrar & 4 Others vs Nathan Tirop Koech & 4 Others (2018) eKLR.

29. In the Kipsiwo case, a Self-Help Group filed suit claiming that their forefathers had historically been in occupation of some specified land and that they were forcefully evicted and they now wished to have title to the land. A preliminary objection was raised, firstly, that the case was improperly filed by an entity with no capacity to sue, and secondly, that the Court had no jurisdiction as the right forum to address historical injustices would be the NLC. On the first objection, I held that the case was actually not properly filed because the Group had no capacity to sue or to be sued and I struck out the suit on that ground. On the question of whether the Court had jurisdiction, I held that though one could approach the NLC for redress, there was nothing to bar the jurisdiction of the Court. My dictum was as follows:-

"... I have not seen anywhere in *the Constitution*, or in the NLC Act, which provides that a person cannot initiate a constitutional petition based on a perceived historical injustice and that the NLC has a monopoly on such mandate. I think, so long as one can cite a violation of a Constitutional provision or Constitutional right, then such a person may initiate a Constitutional petition and seek redress. I don't think that the basis of such a complaint is important. Such complaints could be based on any foundation. It could be, as in our case, a historical injustice, or even a continuing land injustice.

Thus, in as much as I agree that the NLC has a mandate to look into historical injustices; I do not agree that an individual cannot commence a Constitutional petition, on the foundation of historical land injustice. In so far as the jurisdiction of ELC, is concerned, the ELC will have jurisdiction, if the basis of the case is land and environment, including a matter founded on claims of historical land injustices."

30. In the case of Chief Land Registrar & 4 Others vs Nathan Tirop Koech & 4 Others, the petitioners filed suit claiming that they had been deprived of ownership of certain land without compensation. They averred that they were registered as owners of the land but the Government acquired it without paying compensation. The Court after hearing the dispute made an order for compensation which the State appealed. Within the appeal, counsel for the NLC submitted inter alia that it is the NLC which is mandated to deal with historical land injustices under Article 67(2) (e) of *the Constitution*. In addressing this point, the learned Judges of the Court of Appeal stated as follows:-

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

76. Further, there is nothing in the 2010 Constitution or in the *National Land Commission Act* ousting the jurisdiction of the High Court or barring a person from presenting a petition before a Court in relation to a claim founded on historical injustice..."

31. Counsel for the respondents, on the other hand, referred me to the cases of Ledidi Ole Tauta vs. Attorney General & Others (2015) eKLR and Kenya National Chamber of Commerce & Industry – KNCCI (Muranga Chapter) & 2 Others vs. Del Monte Kenya Limited & 3 Others. In the case of Ledidi Ole Tauta the petitioners, of Maasai decscent, claimed that their forefathers owned some certain land falling within Ngong Hills, before the colonial period, and that they should thus be declared to be entitled to the same. A preliminary objection was raised and in addressing the same, the Court made the following dictum:-

"We also note that the petitioners (sic) claim to the land is predicated on what the petitioners claim were historical injustices visited on the community by the colonial masters who required that they move out of what they claim were ancestral lands to pave way for white settlement. We do not think the Court would be the right forum for the petitioners to ventilate their claim which is founded on historical injustices.

The Constitution acknowledged there could have been historical injustices in the manner land issued were handled by past regimes and hence among the functions and mandate of the National Land Commission established under Article 67 (1) of *the Constitution* is to investigate historical injustices and to make recommendations for redress... In our view, it's the National Land Commission that has the mandate to investigate into historical land injustices and make appropriate recommendations for redress. The Court is not the appropriate organ to carry out the investigation and/or inquiry and where the law has made provision for a state organ or institution to carry out a specific function that institution should be allowed to carry out its mandate. The Court should not usurp the roles of other state institutions. We therefore are of the view, it was premature on the part of the petitioners to come to Court without either exhausting the process of obtaining a degazzetement of Ngong Hills Forest as a state forest under the provisions of the Forest Act and/or having the National Land Commission exercise its mandate under Article 67 (2) (e) of *the Constitution*."

32. In the Kenya Chamber of Commerce v Del Monte case, the plaintiffs filed suit claiming that their forefathers lived on land owned by the 1st defendant and that they were deprived of the land during colonialism. They asked the Court to redeem their historical rights by making an order for 1,500 acres to be excised from the land of the 1st respondent and be allotted to them. A preliminary objection was filed that the Court has no jurisdiction to determine the claim which was based on historical injustices. In determining the question, Kemei J referred to the decision in the case of Nathan Tirop Koech case and found that the jurisdiction of the ELC is wide and can encompass historical land injustices.

33. I think the issue of jurisdiction is settled. This Court has jurisdiction to hear claims even those based on historical injustices. What we need to have in mind here is that just because a Court is vested with jurisdiction, does not mean that

in all cases the Court will proceed to exercise that jurisdiction, especially where there is another body that also has capacity to hear that dispute. In other words, depending on the facts and circumstances surrounding the case, the Court can defer jurisdiction to another body, or decline to take up the matter altogether, and this would not be because it has no jurisdiction, but because given the surrounding circumstances, it would be best for the Court not to exercise its jurisdiction."

33. What we have in this matter is a Constitutional Petition stating that a lease was wrongfully extended without following the law and proper procedures adopted hence perpetuating a historical injustice that started way back in 1970 and needs to be corrected. NLC supports the extension and hence cannot have a second bite on it. The predominant feature in this petition – albeit multifaceted is the extension of the lease and its effect on the ownership rights of the petitioners. This Court will proceed to hear the petition. At the end, the preliminary objection is hereby dismissed with costs.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF SEPTEMBER, 2023

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E. K. MAKORI

JUDGE

In the presence of:

Mr. Muga for the petitioners

M/s Omwamba for 3rd respondent

Court Clerk: Happy

In the absence of:

The AG

1st ,4th ,5th, 6th and the interested party