



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILINMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 479 OF 2017

**IN THE MATTER OF ARTICLES 1, 2, 3 (10,10, 35, 40, 61 (2), 62, 67, 68, 165 (3) (D), 232 (10 (B),
233, 234, 248, 249, 252**

AND 259 OF THE CONSTITUTION OF KENYA, 2010;

AND

**IN THE MATTER OF CONTRAVENTION OR BREACH OF THE CONSTITUTION OF
KENYA, 2010, TO WIT ARTICLE 67;**

AND

IN THE MATTER OF THE NATIONAL LAND ACT (NO. 5 OF 2012);

**SECTIONS 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 25, 28, 29, 30, 34 OF THE LAND
ACT (NO. 6 OF 2012);**

**SECTIONS 6, 17, 54, 55, 105 (3), 110, THE LAND REGISTRATION ACT (NO. 3 OF 2012); AND
THE SURVEY ACT (CAP 299).**

ABDULKADIR A. KHALIF.....PETITIONER

VERSUS

**THE PRINCIPAL SECRETARY, MINISTRY OF LANDS AND
PHYSICAL PLANNING.....1STRESPONDENT**

THE CHIEF LAND REGISTRAR.....2NDRESPONDENT

DIRECTOR OF SURVEYS.....3RDRESPONDENT

PUBLIC SERVICE COMMISSION.....4THRESPONDENT

THE HON. ATTORNEY GENERAL.....5THRESPONDENT

AND

THE NATIONAL LAND COMMISSION.....1STINTERESTED PARTY

DAVID KIBIWOTT ACHIKWA.....2NDINTERESTED PARTY

JUDGMENT

Introduction

1. At the outset, I find it appropriate to state that this Petition raises three fundamental issues which are dispositive in nature and warrant an early determination. This is because, two of them can, if upheld determine this Petition *in limine* while one of them if upheld, can be a valid ground to stay any further proceedings in this Petition.

2. The issues are:- **(a) first**, whether this court has jurisdiction to hear and determine this Petition. Tied to this issue, is the plea by **Mr. Langat**, counsel for the second interested party inviting this court to review its orders of 8th November 2017 and hold that this court lacks jurisdiction to hear this matter; **(b) second**, whether this Petition is *res judicata*, **(c) third**, whether the issues raised in this Petition are wholly or substantially similar to issues raised in a pending suit, that is JR. No. 8 of 2017, Eldoret, filed pursuant to leave granted in J.R. 19 of 2017.

3. By their nature, the above issues demand that they be addressed at the earliest possible opportunity. However, in order to appreciate the issues properly and the context within which they arise, I will first summarize the facts of this case as presented by the parties.

The Parties

4. The Petitioner, a Commissioner at the National Land Commission (NLC), brings this Petition on his own behalf and in the interest of Kenyans. The first Respondent is the Principal Secretary, Ministry of Lands and Planning, a public office established under Article 155 of the Constitution and the Chief Accounting officer of the Ministry. The second Respondent is the Chief Land Registrar, a public office established under Section 12 of the Land Registration Act,^[1]the holder is the Chief Administrator of all land registries in Kenya.

5. The third Respondent is the Director of Surveys, a public office established under Section 3 of the Land Survey Act.^[2] The holder is responsible for the Survey of Land and preparation and maintenance of Registry Index Maps and Deed Plans for every registration unit.

6. The fourth Respondent is a Public Service Commission established under Article 233 of the Constitution mandated to *inter alia* establish and abolish offices in the public Service and appoint persons to hold or act in those offices, while the fifth Respondent is the Honorable Attorney General, the Principal Legal Advisor to the government of Kenya vested with authority to represent the Government in judicial proceedings.

7. The first interested party is the **NLC**, established under Article 67 of the Constitution of Kenya, its mandate is to *inter alia* manage public land on behalf of the national and county governments. The second Interested Party, a male adult Kenyan residing in Eldoret was enjoined in these proceedings pursuant to this court's order made on 29th November 2017 following his application dated 23rd November 2017.

Petitioners case

8. The Petitioner avers that following the establishment of the N.L.C., the office of the Commissioner of

Lands became defunct. The NLC was mandated to manage and administer public land, a function that includes valuation and taxation. The Ministry of Lands and Physical Planning (the Ministry) retained the function of registration of leases relating to public land executed by the N.L.C. while the functions of Survey and Mapping were devolved to the Counties.[3]

9. He also avers that by virtue of Section 31 of the National Land Commission Act,[4](the Act), every staff, who, immediately before the commencement of the Act[5] was an employee of the Government in the Ministry whose functions had been transferred to the Commission was, deemed by operation of the law, to be employed or appointed as a member of staff of the Commission. Further, by virtue of Section 32 of the Act,[6] the NLC inherited all property, assets, rights, liabilities, obligations, agreements and other arrangements existing at the commencement of the Act and vested in, acquired, incurred or entered into by or on behalf of the Ministry of Lands with respect to the departments whose functions were transferred to NLC.

10. The Petitioner further avers that the Ministry and the NLC never came to a consensus on the appropriate body to execute the various functions in the land management and administration which stalled the land reforms. As a consequence, the NLC filed a Reference at the Supreme Court[7] seeking an Advisory Opinion on their respective functions and powers.

11. The Petitioner avers that the Supreme Court framed and addressed only one issue, namely:- *"What is the proper relationship between the mandate of the National Land Commission, on the one hand, and the Ministry of Lands, Housing and Urban Development, on the other hand in the context of Chapter Five of the Constitution; the principles of governance (Chapter 10 of the Constitution); and the relevant legislation?"* As a consequence, the Petitioner avers that the following issues raised in this Petition are yet to be addressed with finality:-

i. Whether there is need for the existence of a department dealing with land administration in the Ministry; and if the answer is in the affirmative why should the said department be the one executing leases for public land yet NLC is constitutionally and statutorily tasked with management and administration of all public land in the following sense:-

a. Upon expiry of leases, the land reverts to the government a public land and NLC has domain over the land by virtue of Article 67 of the Constitution and Sections 4 and 6 of the NLC Act.

b. If and when a lessee fails to perform the obligations outlined in the conditions of lease which conditions are actually prepared by NLC, it is the body mandated, on behalf of both the national and county governments, to take appropriate action against the lessee.

ii. Whether the maintenance of the status quo post establishment of the NLC under Article 67 of the constitution and the coming into effect of the NLC Act can be construed as a violation of the Constitution.

iii. Whether the existence of infrastructure in both the Ministry and the NLC post establishment of NLC under Article 67 of the Constitution and the coming into effect of the NLC Act in 2012 can be construed as unnecessary duplication of functions with negative financial consequence to the public.

iv. Whether the maintenance of status quo post the Supreme Court Advisory opinion in 2015 can be construed as contempt of court.

12. The Petitioner also avers that constitutional Petition number 54 of 2015 was filed in the High Court of Kenya[8]in which two core issues were raised, namely, the promulgation of regulations and forms by the Cabinet Secretary in charge of Housing, land and Urban Development for the purpose of effecting Section 110 of the Land Registration Act [9]in which the court found that the promulgation was not

preceded by consultation with the NLC or even Parliaments' Approval despite the provisions of Article **67 (2) (c)** of the Constitution. Hence, the Court declared the registration forms unconstitutional, null and void but suspended the declaration for **12** months from the date of the judgment so as to enable the Ministry to initiate meaningful engagement with the public, seek and take into account the advice of the NLC pursuant to the provisions of Section **110**; failure to which the regulations and forms shall stand null and void for all intents and purposes on the **366** day following the court's order.

13. The Petitioner avers that following the said cases, the Ministry and the NLC have had various meetings and sought expert opinion(s) on the interpretation of the Advisory Opinion in relation to the functions that are exclusive to each of them and those that require the spirit of collaboration and consultation. This yielded the gazette by the Cabinet Secretary of Guidelines for Extension and Renewal of Leases vide Gazette Notice No. **75** Vol. **CXIX**.

14. The Petitioner states that there are still operational challenges caused by the Ministry to the detriment of the NLC among them the Ministry benefits from funds in the account of the defunct office of the Commissioner of Lands which funds are supposed to be used by NLC in the management and administration of public land; the Ministry signs and registers leases relating to public land without the approval of the NLC; the Ministry maintains a department that deals in the administration of public land thus duplicating the constitutional and statutory mandate of the NLC and the Ministry maintaining custody and control of correspondence files which contain documents necessary for the administration of public land and denying NLC's requests to gain access to the files arbitrarily.

15. The Petitioner also avers that on **5th** September 2017, the Ministry, through its Head, ICT circulated an internal memo making reference to a meeting of Registrars, Land Administration Officers and the ICT Unit in the Ministry in which a dry test of a lease printing system was done without consulting the NLC.

16. The Petitioner also avers that to the extent there exists two departments, one in the Ministry and the other at the NLC both of which deal with administration of public land, that is a violation of Article **67** of the Constitution. Further, the Ministry still retains personal and office infrastructure, including all correspondence files relating to public land rather than transferring them to the NLC by virtue of Sections **31** and **32** of the Act, a violation of Article **67** of the Constitution. Also, the second Respondent has refused, neglected and or failed to register any and or all instruments relating to public land delivered by the NLC in accordance with Sections **13** and **23 (2)** of the Land Act^[10] in violation of Articles **40**, **67** and **252 (1) (d)** of the Constitution. Further, the Ministry continues to use instruments and forms and backdating them contrary to Section **110** of the L.R.A. Act^[11] and Article **67** of the Constitution. Further, the Ministry operationalized a lease printing system without consulting the NLC contrary to Section **110** of the LRA and Article **67** of the Constitution. Also, the Ministry benefits financially from the funds in the account of the defunct Commissioner of Lands, funds meant for the administration of public land, a function of the NLC in violation of Article **67** of the Constitution. Lastly the NLC is not allowed to assess and collect land based revenues in accordance with Section **28** of the Land Act,^[12] in violation of Article **67 (2)** and **209** of the constitution and the Public Service Commission continues to appoint persons to hold or act in the abolished land administration department in the Ministry, a violation of Articles **232 (1) (b)**, **233**, **234** and **249**.

First, third and fifth Respondents Replying Affidavit

17. Edward K. Kosgey, the Director, Land Administration Department, in his Replying affidavit filed on **27th** November 2017 avers that the office of the Commissioner of Lands was abolished upon the repealing of the Government Lands Act^[13] soon after the enactment of the Constitution of Kenya, 2010 which created the NLC.^[14] Its functions are stipulated in sub-Article **(2)** and that all the other functions which were previously performed by the Commissioner of Lands were retained by the Ministry, except those touching on public land.

18. He also averred:- **(a)** NLC is only to administer public land, **(b)** private and community land remained with the Ministry, **(c)** public land may be converted to private land by allocation; **(d)** land previously allocated by the Commissioner of Lands under the previous legal regime does not fall under

the mandate of the NLC, **(e)** any land that has been allocated by the NLC after enacted of the Constitution of Kenya 2010 constitutes private land under Article **64** of the Constitution, **(f)** under Article **66 (1)**, the State has authority to regulate the use of any land, or any interest in or right over any land as provided therein.

19. He cited executive order number **1** of 2016 which assigned both the Ministry and the NLC specific functions as follows:-i.e. **the Ministry** was allocated National Lands Policy and Management, Physical Planning, Land Transactions, Survey and Mapping, Land Adjudication, Settlement Matters, Rural Settlement Planning i.e. eco-village, Land Reclamation, Land Registration, National Spatial Infrastructure, Land and Property Valuation Services Administration, Administration of Public Land as Designated by the Constitution, Land Information Systems. The **NLC** was allocated Management of Public Land, Advice of Public Land Policy and Registration, Research on Land, Policy and Management of Historical Land Injustices, Monitoring and Oversight Over Land Use Planning, assessment of Land Taxes Authorized by Law and Traditional Dispute Resolution.

20. He defined Land Administration Directorate functions to include processing of leases, sub-divisions and amalgamations, changes and extension of land use, issuance of consents to transfer, charge, lease and sub-lease, co-ordination of activities of respective Land Control Boards, Collection of Land Rent and Maintenance of Plan Records and Land Records. He denied that the Ministry prepares leases relating to public land and stated that the Supreme Court in the Advisory Opinion[15] was categorical that the NLC had no role in the registration of titles to land (Public, Community or private) and that the task of registering lies with the National Government and that the Supreme Court stated that the functions of the NLC are consultative, advisory, oversight and safeguard oriented.[16]

21. He also stated that the NLC's mandate is limited to public land, that the Ministry does not charge for services rendered to public institutions, and that collection of land based revenue have been transferred to the e-payment platform. On the question of employees he stated that some officers were seconded to the NLC for a limited period, others joined NLC, while others remained with the Ministry and the Ministry and NCL have their respective individual properties, assets, rights and obligations and that the NLC has been allowed access to files and that all monies collected by the Ministry are forwarded to the consolidated fund. He denied that the Ministry is signing leases relating to public land.

22. Lastly, he averred that this Petition is *res judicata*, the issues raised having been determined by the Supreme Court in the Advisory Opinion[17]and that solution is to operationalize the Regulations which are awaiting publication and approval of Parliament.

Second Respondents Replying Affidavit

23. Pauline Muriithi, the Acting Chief Land Registrar in her Replying Affidavit avers that her functions are stipulated under Section **14 (2)** of the Land Registration Act.[18] She stated that this Petition is *res judicata* and denied usurping the functions of the NLC. She stated that registration of titles is a function of the National Government, and, public land may be converted to public land by allocation. Also, land allocated prior to the 2010 constitution remains private land. Lastly, the Chief Land Registrar is mandated to register leases and the existing regulations remain in force until others are enacted under the current legislation.

First Interested Party

24. The NCL fully supports the Petition, hence it did not file any papers.

Second Interested Party

On 29th November 2017, by consent, the second Interested party was enjoined in this Petition, and prayers **4 & 5** of his application dated 23rd November 2017 were to be argued as grounds in opposition to the Petition. Prayer **4** seeks to set aside this courts directions granted on 8th November 2017 discussed below while prayer **5** seeks dismissal of this Petition.

Further Affidavits

25. Both the Petitioner and the second respondent filed further affidavits on 24th November 2017 and 29th November 2017 respectively. In his further affidavit, the Petitioner highlighted the functions of both the Ministry and the NLC while the second interested party stated that the NCL was served with court documents in J.R. No. 19 of 2017, Eldoret.

26. He averred that the Petitioner is a Commissioner at the NCL, by virtue of his position, he was aware of the said case which raises substantially the same issues, hence this case is an abuse of court process. Therefore, the orders of on 8th November 2017 were procured by material non-disclosure. He also filed a supplementary affidavit on 6th December 2017 stating that the substantive suit in the Judicial Review application being J.R. No. 8 of 2017 was filed within the time allowed by the court while granting leave. He annexed copies of the substantive application duly filed in court.

27. I now proceed to examine the issues identified above.

Whether this court should review its orders of 8th November 2017 on jurisdiction

28. The relevant background to this issue is that on 27th September 2017, at the *ex parte*, stage I directed that the parties herein will be required to address the court on the question of the jurisdiction of this court in the matters raised in this Petition. I listed the matter for mention on 11th October 2017 but it was adjourned to 29th September 2018 on grounds that the Respondents had not been served. However, counsel for the Petitioner filed a certificate of urgency seeking an early date and upon consideration I directed that the question of jurisdiction be addressed on 24th October 2017, but on 16th October 2017, the Petitioners' Counsel wrote asking for an early date and upon consideration I directed that the parties appear before me on 31st October 2017. On the said date, the Petitioners counsel was unavailable, hence the matter did not proceed. A fresh certificate of urgency, and upon appreciating the urgency, I fixed the matter was for 8th November 2017 for the parties to address the question of jurisdiction.

29. On the said date, counsels for the Petitioner, the Respondents and the first interested party addressed the court on the question of jurisdiction. They were all unanimous that this court has jurisdiction to hear this matter. I agreed with them and gave directions for hearing and granted conservatory orders pending full hearing.

30. In the meantime, the second interested party successfully applied to be enjoined in this Petition.

31. **Mr. Langat**, Counsel for the second interested party in his submissions citing Articles **162,165** of the Constitution and Section **13** of the Environment and Land Court Act[[19](#)] argued that this court lacks jurisdiction. He invited the court to review its orders made on 8th November 2017. In his view, this Petition involves land administration and management, a function of the Environment and Land Court under Section **13 (2) (c)** of the Environment and Land Court Act. To buttress his argument, he cited a decision of this court rendered in *David Ramogi & 4 Others vs The Cabinet Secretary, Ministry of Energy & Petroleum & 7 Others*.[\[20\]](#)

32. He invited this court to invoke the provisions of Rule **3 (8)** of *The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*[\[21\]](#)and review its orders of 8th November 2017 and find that this court has no jurisdiction.

33. Whereas a court can review its decision, the law and scope of the jurisdiction to exercise this power is limited to three grounds, namely:- (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.

34. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it or for any other sufficient reason. It may be pointed out that the expression “any other sufficient reason” means a reason sufficiently analogous to those specified in the rule.[22]Any attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out would amount to an abuse of the liberty given to the court under the Act to review its judgment.[23]

35. **Review** proceedings are not an appeal. The **review** must be confined to **error apparent** on the **face** of the **record** and re-appraisal of the entire evidence or how the judge applied or interpreted the law would amount to exercise of Appellate Jurisdiction, which is not permissible.[24] It is my view, that the question of jurisdiction is a point of law, which, even if I were to find that I was wrong, it can only be corrected by way of an appeal. In other words, counsel is inviting this court to sit as an appellate court on its own decision, which I can't do. Therefore, the plea for review fails.

Whether the issues raised in this Petition are *res judicata*

36. **Mr. Kuria**, for the Respondents submitted that this Petition is *res judicata* on grounds that the issues raised herein were substantively determined by various courts including the Supreme Court in Advisory Opinion referred to earlier in which the functional overlaps between the NLC and the Respondents was settled with finality. Hence, he argued, by dint of Article **167 (7)** of the Constitution, he argued, this court is barred from determining the same issues. He also argued that the issues raised in this court is "*what is the proper relationship between the mandate of the NCL on one hand and the Ministry in the context of Chapter five of the Constitution, the Principles of governance (Chapter 10 of the Constitution) and the relevant legislation*" which was settled with finality by the Supreme Court.

37. Mr. Kuria also argued that similar issues were determined in *Anthony Otiende vs Public Service Commission & 2 Others*,[25] hence, the same issues cannot be reopened in this case.

38. To ascertain whether the Supreme Court addressed the issues herein, it is necessary to closely examine the issues raised in the advisory opinion and the issues presented in this case. Paragraph one of the Advisory Opinion reads in part:-

"The Reference relates to the NLC's functions and powers, on the one hand, and the functions and powers of the Ministry... on the other hand. The issues raised by the applicant were as follows:-

a. On land administration and management functions

i. what meaning is to be assigned to the words “to manage”, and “to administer” public land, unregistered trust land, and unregistered community land by virtue of Articles 62(2), 62(3), 67(2)(a) and 67(3) of the Constitution of Kenya; and Sections 5(1)(a) and 5(2)(e) of the National Land Commission Act No. 5 of 2012 [NLC Act]?

ii. are Land Registrars (recorders of titles) and Land Surveyors answerable to the NLC, or to the Cabinet Secretary of the Ministry?

iii. which functions that were previously performed by the Ministry, before the creation of the NLC, have now been transferred to the NLC?

iv. when Article 62(2) and (3) of the Constitution, and Section 5(2)(b) of the NLC Act provide that the NLC is to administer public land "on behalf of" the National and County Governments do these provisions envisage an agency relationship between the National and County Governments, the latter being the principals?

v. are the provisions of Executive Order No. 2 of 2013 consistent with the terms of the Constitution?

b. On land taxation and revenues

- i. should the Ministry relinquish the land-tax function, roles, records and powers to the NLC; and if so, by what date?*
- ii. should the Ministry account for, and remit to the NLC the rent (annual ground rent and stand premium), royalty and payments under any lease or licence that the Ministry has collected, as well as the records for such collection since the 27th February, 2013 and if so, by what date?*
- iii. are the monies received, earned, or accruing to the NLC, and the balances at the close of each financial year, in the nature of monies excluded from payment into the Consolidated Fund under Article 206(1)(a) of the Constitution?*
- iv. is the NLC entitled under Article 206(1)(b) of the Constitution to retain monies received, earned, or accruing to the NLC, and the balances at the close of each financial year, for the purpose of defraying the expenses of the Commission?*
- v. has the Ministry, in failing to account for and to remit to the NLC the funds due to the Commission under Section 26(1)(a) of the NLC Act, been in breach of the terms of the Constitution?*

c. On human resources and staff issues

- i. are officers who perform functions that were previously performed by the Ministry before the creation of the NLC, and which have now been transferred to the NLC, answerable to the NLC, or to the Cabinet Secretary of the Ministry?*
- ii. should the Ministry transfer to the NLC part of the staff that previously worked in departments of the Ministry, whose functions have been transferred to NLC, or transfer the entire staff in such departments?*
- iii. can the Ministry rescind the appointment of the members of staff deployed to the NLC?*
- iv. is the Ministry obliged to remit to the NLC money for the payment of salaries of the members of staff that the Ministry deploys to the NLC, and if so, by what date?*
- v. is the NLC entitled to recover from the Ministry monies that the Commission has so far used to pay salaries of the Members of Staff that the Ministry deployed to the NLC?*

d. On land registration and issuance of titles

- i. what does the phrase “to monitor the registration of all rights and interests in land provided for in Section 5(2)(b) of the NLC Act”, entail?*
- ii. are Land Registrars accountable to the NLC, or to the Ministry?*
- iii. is land registration a function of the NLC, or the Ministry?*
- iv. is it practical that the NLC be charged with the task of creating registration units, registration sections, or registration blocks; of prescribing nomenclature for land titling; of regulating rectification of land registers by Registrars; and of annually reporting to the President and Parliament as regards the progress made in the registration of title in land^¾when the NLC is not the agency mandated to control the process of registration of land?*

e. On the National Land /Information Management System (NLIMS)

i. upon which agency does the development of NLIMS fall?

f. On transfer of assets

i. is the Ministry obliged to transfer to the NLC all property and assets of the departments whose functions have now, by law, been transferred to the NLC; and if so, by what date?

g. On private land

i. which agency has the mandate to administer and manage dealings in private land?

h. On land settlement

i. is the Ministry obliged to transfer to the NLC the Land Settlement Fund; and if so, by what date?

39. Mr. Kanjama for the Petitioner, correctly stated that the Supreme court scaled down the above issues to only one issue, namely:-

"What is the proper relationship between the mandate of the National Land Commission, on the one hand, and the Ministry of Lands, Housing and Urban Development, on the other hand in the context of Chapter Five of the Constitution; the principles of governance (Chapter 10 of the Constitution); and the relevant legislation?"

40. The Petitioner avers that whereas the above issue was addressed by the Supreme Court, the following issues raised in this court are yet to be addressed with finality:-

i. *Whether there is need for the existence of a department dealing with land administration in the Ministry; and if the answer is in the affirmative why should the said department be the one executing leases for public land yet NLC is constitutionally and statutorily tasked with management and administration of all public land in the following sense:-*

a. *Upon expiry of leases, the land reverts to the government a public land and NLC has domain over the land by virtue of Article 67 of the Constitution and Sections 4 and 6 of the NLC Act.*

b. *If and when a lessee fails to perform the obligations outlined in the conditions of lease which conditions are actually prepared by NLC, it is the body mandated, on behalf of both the national and county governments, to take appropriate action against the lessee.*

ii. *Whether the maintenance of the status quo post establishment of the NLC under Article 67 of the constitution and the coming into effect of the NLC Act can be construed as a violation of the Constitution.*

iii. *Whether the existence of infrastructure in both the Ministry and the NLC post establishment of NLC under Article 67 of the Constitution and the coming into effect of the NLC Act in 2012 can be construed as unnecessary duplication of functions with negative financial consequence to the public.*

v. *Whether the maintenance of status quo post the Supreme Court Advisory opinion in 2015 can be construed as contempt of court.*

41. Mr. Kanjama submitted that Despite the Supreme Court Advisory Opinion and the High Court Decision, constitutional violations still persist, such as, the Ministry runs the Land Administration

Directorate which duplicates constitutional functions of the NLC, that it still retains personnel and office infrastructure including correspondence files relating to public land instead of transferring them to the NLC is conformity with Sections 31 and 32 of the NLC Act,^[26] that the Ministry's failure to register all instruments relating to public land delivered by the NLC in accordance with Sections 13 and 23 (2) of the Land Act,^[27] and instead it prepares, executes and registers leases relating to public land undermining the role of the NLC, using invalid instruments and forms to register land and backdating them contrary to section 110 of the Land Registration Act,^[28] operationalization of a lease printing system without consulting the NLC, benefiting from funds in account of the defunct commissioner of lands, which funds were meant to the management and administration of public land, hence inhibiting the NLC from assessing and collecting land based revenues, that the Director of Survey forwards Registry Index Maps and Deed Plans relating to public land to the Chief Land Registrar instead of the NLC. Lastly, the Public Service Commission despite knowledge of a constitutional commission mandated to manage and administer public land continues to appoint persons to hold and or act in the abolished land Administration Directorate, a department of the Ministry, as a consequence, there is a backlog of over 7,000 leases pending registration. **Mr. Kanjama** cited violation of articles 67, 40, 232 (1) (b), 233, 234 and 249, 252 (1) (d).

42. Mr. Mbutia, advocate for the NLC supported the Petition entirely and added that whereas the Supreme Court Advisory opinion laid out the theoretical framework within which the NLC were to operate, the parties have operated differently, and that this court has powers to enforce the Supreme Court Decision, thus determining fidelity to the law and the constitution. In his view, what is before his court is a question of which party has the mandate to generate the forms for preparation of leases and which body registers the same. He also submitted that the Ministry's actions are in violation of Articles 62 and 67, 68 of the constitution and the independence of the NLC as a Constitutional body. **Mr. Mbutia** also stated that the question of generating leases was dealt by the Otiende case and urged the court to arrive at a determination that upholds the independence of the NLC.

43. It is also necessary to list here below the reliefs sought in this Petition. These are:-

*A. A declaration that **Article 67** of the Constitution has been gravely violated on account of the Ministry of Lands having a fully functional department dealing in the management and administration of public land despite that being the reserved Constitutional and Statutory mandate of the National Land Commission.*

*B. A declaration that **Articles 40, 67 and 252(1) (d)** of the Constitution have been gravely violated on account of the Ministry's refusal to register instruments prepared, executed and presented by the NLC for registration as well as its continuous use of invalid and forms and backdating them.*

*C. A declaration that **Articles 67(2) (g) and 209** of the Constitution have been gravely violated on account of the Ministry's continual use of the account of the defunct Office of the Commissioner of Lands.*

*D. A declaration that **Articles 232(1) (b), 233, 234 and 249** of the Constitution have been gravely violated on account of the Public Service Commission's continual appointment of persons to hold or act in the abolished land administration department in the Ministry.*

*E. An Order of Mandamus compelling the Ministry of Lands and Physical Planning and/or its employees, authorized agents, assigns or any other authorized persons to register any and/or all instruments relating to public land prepared, executed and delivered to them by the National Land Commission in accordance with **Section 13** of the Land Act and **Articles 67 and 252(1) (d)** of the Constitution of Kenya.*

F. An Order of Mandamus be issued compelling the Ministry of Lands and Physical Planning and/or its employees, authorized agents, assigns or any other authorized persons to shut down the account of the Commissioner of Lands with immediate effect, account for the funds therein and the funds be and are hereby transferred to the National Land Commission for its use in the functions of

management and administration of public land collection of land based revenues as per the law on the functions and powers of the National and County governments and to account for those funds in line with the provisions of **Articles 67(2) (g) and 209** of the Constitution of Kenya and **Section 28** of the Land Act.

G. An Order of Mandamus compelling the Public Service Commission and/or its employees, authorized agents, assigns or any other authorized persons to disband the Land Administration Directorate in the Ministry which is currently duplicating the Constitutional and Statutory roles of managing and administering public land which is of the National Land Commission.

H. An Order to be issued that the parallel structure between the Land Administration Department in the Ministry of Land and Physical Planning and the National Land Commission be and is hereby dissolved and the function of administration of public land together with all personnel and office infrastructure in respect of the departments whose functions have been transferred to the National Land Commission by virtue of **Article 67** of the Constitution and **Section 31 and 32** of the NLC Act be vested exclusively in the National Land Commission.

I. An Order of Mandamus compelling the Director of Surveys to avail to the National Land Commission all the Registry Index Maps and Deed Plans relating to public land that has been surveyed so as to enable the National Land Commission prepare leases relating to public land effectively.

J. An Order of Mandamus be issued compelling the Ministry of Lands and Physical Planning to transfer the full control, custody and management of all the correspondence files relating to public land under **Article 62** of the Constitution of Kenya, 2010 to the National Land Commission so as to enable the National Land Commission prepare leases relating to public land effectively.

K. An Order of Mandamus be issued prohibiting the Ministry of Lands and Physical Planning and/or its employees, authorized agents, assigns or any other authorized persons from undertaking any dealings in relation to public land without the express approval of the National Land Commission.

L. An Order of Prohibition be issued prohibiting the Ministry of Lands and Physical Planning and/or its employees, authorized agents, assigns or any other authorized persons from registering leases in relation to public land without the same having been prepared and executed by the National Land Commission.

M. An Order of Prohibition be issued the Ministry of Lands and Physical Planning and/or its employees, authorized agents, assigns or any other authorized persons from utilizing the already operationalized Lease Printing System and/or using a Lease document that has not been prepared and/or executed by the National Land Commission; which is the body authorized to execute leases relating to public land; to register leases relating to public land.

44. On what constitutes *res judicata*, I adopt the following passage in the dictum of Wigram V-C, in *Henderson vs Henderson*^[29] as it summarizes *res judicata*:-

" ... where a given matter becomes the subject of litigation in, and adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

45. Unless it is abundantly clear, when *res judicata* is raised, a court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case and the instant case- to ascertain; **(i)** what issues were really determined in the previous case; and **(ii)** whether they are the same in the subsequent case and were covered by the decision of the earlier case. One more thing; the court should ascertain whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction.

46. The test of determining whether a matter is *res judicata* was also summarized in *Bernard Mugo Ndegwa -vs- James Nderitu Githae and 2 Others*,^[30] as follows:- **(a)** The matter in issue is identical in both suits; **(b)** the parties in the suit are the same; **(c)** sameness of the title/claim; **(d)** concurrence of jurisdiction; and **(e)** finality of the previous decision.

47. Its trite law that if any judicial tribunal in the exercise of its jurisdiction delivers a judgment or a ruling which is in its nature final and conclusive, the judgment or ruling is *res judicata*. If in any subsequent proceedings (unless they be of an appellate nature) in the same or any other judicial tribunal, any fact or right which was determined by the earlier judgment is called in question, the defence of *res judicata* can be raised. This means in effect that the judgment can be pleaded by way of estoppel in the subsequent case.

48. As **Somervell L.J.** stated ^[31] *res judicata* covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.

49. Paragraphs **42** and **43** above captures what Mr.Kanjama and Mr.Mbuthia presented as the issues raised in this case. These can be summarized as follows; Whether there is need for the existence of a department dealing with land administration in the Ministry; Why should the department be the one executing leases for public land yet NLC is constitutionally and statutorily tasked with management and administration of all public land; Whether the maintenance of the status quo post establishment of the NLC under Article 67 of the constitution and the coming into effect of the NLC Act can be construed as a violation of the Constitution; Whether the existence of infrastructure in both the Ministry and the NLC post establishment of NLC under Article 67 of the Constitution and the coming into effect of the NLC Act in 2012 can be construed as unnecessary duplication of functions with negative financial consequence to the public; and Whether the maintenance of status quo post the Supreme Court Advisory opinion in 2015 can be construed as contempt of court.

50. The broad issues presented to the Supreme Court before the Court condensed them to one issue were, land administration and management functions under which several issues were posed among them the meaning to be assigned to the words “to manage”, and “to administer” public land, unregistered trust land, and unregistered community land within the context of Articles 62(2), 62(3), 67(2)(a) and 67(3) of the Constitution of Kenya; and Sections 5(1)(a) and 5(2)(e) of the National Land Commission Act.

51. Also raised presented to the Supreme Court were questions whether Land Registrars and Land Surveyors answerable to the NLC, or to the Cabinet Secretary of the Ministry, which functions previously performed by the Ministry have now been transferred to the NLC, the relationship between the Ministry and the NCL, and the constitutionality of the Executive Order No. 2 of 2013 consistent with the terms of the Constitution.

52. Other issues presented to the Supreme Court related to land taxation and revenues, human resource and staff issues and land registration and issuance of titles. Other issues related to the National Land /Information Management System, transfer of assets, private land and land settlement.

53. Upon analyzing the issues presented to the Supreme Court as summarized above, and upon careful consideration of the Supreme Court Opinion and the issues raised in this Petition and applying the above tests, the conclusion becomes irresistible that the issues raised herein are substantially similar to the issues determined in the said opinion.

54. The fact that the Supreme Court condensed the issues raised into only one broad issue, does not mean that all the issues presented to it were not addressed. In fact, my reading of the opinion is that it is much wider and covers all the questions presented before it. The Supreme Court at paragraph 317 acknowledged this fact when they said:-

317. The purpose of an Advisory Opinion is not only to settle the specific issues raised, but also to present a pragmatic course for problematic aspects of the operation of State organs in the instant case, the NLC and the Ministry.

55. Also relevant is paragraph 309 and 288 which reads:-

309. From the foregoing assessment, it is clear that the applicant's specific request, that this Court delineate the respective functions of the NLC and of the Ministry of Land, is already answered with sufficient clarity: the allocation of discrete functions to the one or the other is not possible, or indeed necessary. The essence of the Supreme Court's Advisory Opinion is that the vital subject of land-asset governance runs in functional chains, that incorporate different State agencies; and each of them is required to work in co-operation with the others, within the framework of a scheme of checks-and-balances—the ultimate goal being to deliver certain essentials to the people of Kenya.

*288. By the relevant provisions under Part II of the Land Registration Act, the process of registration is undertaken by various agencies, starting with the NLC, establishing the registration units; and culminating with the Registrar, registering the title documents. Of interest is Section 6(6), which stipulates that, “the land registration units shall be established at County level and at such other levels to ensure reasonable access to **land administration and registration services**” [emphasis supplied].*

56. Article 163 (7) of the Constitution explicitly provides that all courts, other than the Supreme court, are bound by the decisions of the Supreme court. Clearly, since the Supreme Court addressed the issues raised in this Petition, then, the Supreme Court's decision is binding on this court by dint of Article 163 (7) of the constitution.^[32] The binding nature of the Supreme Court decision under Article 167 (7) of the Constitution is absolute. Article 163 (7) is an edict firmly addressed to all courts in Kenya that they are bound by the authoritative pronouncements of the Supreme Court^[33] and that where the issues before the court were determined by the Supreme Court, it is not open to this court to examine the same with a view to arriving at a different decision.^[34]

57. Similarly, the issue of registration forms as well as forms of titles including leases, Title Deeds, Grants and Certificates of Title or of Lease made or promulgated by the Ministry without the advise or input of the NLC was determined in *Anthony Otiende Otiende vs Public Service Commission & 2 others.* ^[35] This court cannot revisit it.

58. The inevitable conclusion is that this court by dint of Article 167 (7) cannot entertain this case. Further, the question of registration forms, as well as of titles including leases, title deeds, Grants and Certificates of Title or Leases was determined in the *otiende* case. The plea of *res judicata* succeeds.

Whether the issues raised in this Petition are substantially similar to issues pending in Eldoret High Court Judicial Review No. 8 of 2017

59. **Mr. Langat** submitted that the cardinal prayers in the Petition are mirrored in prayers **A, B, L and M** reproduced above and also in the application for conservatory orders. He submitted that the prayers sought in this Petition are not different from the orders the second interested party seeks in Eldoret JR No. 8 2017 being the substantive application filed pursuant to the leave of the court.

60. The J.R. seeks an order to quash the guidelines for extension and renewal of leases, the cabinet memorandum guidelines for extension and renewal of leases and any decision taken pursuant to the challenged gazette notice. It also seeks a declaration that the Ministry is the sole agency mandated to

issue and execute letters of allotment, leases and certificates of title in relation to private land and further a declaration that the obligations of the NCL to alienate public land is extinguished once it approves allocation of public land to a person and communicates such a decision to the Cabinet Secretary, Lands.

61. Clearly, the reliefs sought in the JR case in Eldoret are substantially similar to the issues raised in this case. They touch on the functions of the Ministry and the NLC, processing titles deeds for public land. Above all, they all touch on the interpretation of the same provisions of the Constitution and applicable statutory provisions. The NCL is a Respondent in the said case. The Petitioner herein can present his case in the said proceedings and all the issues raised can be effectively resolved in the said case. In my view, the issues raised herein are substantially similar to the issues raised in the pending judicial Review case.

62. It was also argued that the NCL had been served with orders issued in the said case and since the Petitioner herein is a Commissioner in the NLC, he was aware of the existence of the case. On his part, the Petitioner states that he has filed this case in his personal capacity. There is nothing to show that the Petitioner was not aware of the Eldoret case, and in any event, even if he was not aware, he can apply to be enjoined in the said case.

63. The law as I understand is that *no court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.*

64. *Black's Law Dictionary*^[36] defines "lis pendens", as a Latin expression which simply refers to a "pending suit or action". The *Oxford Dictionary of Law*^[37] also defines the expression in similar terms. In the context of **Section 6** of the *Civil Procedure Act*^[38] which encapsulates the principles that underpin the rule, it simply means that no court ought to proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previous instituted suit or proceeding; and or the previously instituted suit or proceedings is between the same parties; and or the suit or proceeding is pending in the same or any other court having jurisdiction to grant the reliefs claimed.

65. The basic purpose and the underlying object of **Section 6** of the Code is to prevent the Courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject matter and the same relief. This is to pin down the parties to one litigation so as to avoid the possibility of contradictory verdicts by two courts in respect of the same relief and is aimed to prevent multiplicity of proceedings.^[39]

66. The words "directly and substantially in issue" are used in contradistinction to the words "incidentally or collaterally in issue". Therefore, **Section 6** would apply only if there is identity of the matter in issue in both the suits, meaning thereby, that the whole of the subject-matter in both the proceedings is identical. In the present case, the NCL and the Ministry are parties in the two suits.

67. The question which follows is as to whether "the matter in issue is also directly and substantially in issue in the previously instituted suit. The key words in **Section 6** are "the matter in issue is directly and substantially in issue in the previously instituted suit". The test for applicability of **Section 6** of the Code is whether on a final decision being reached in the previously instituted suit, such decision would operate as *res-judicata* in the subsequent suit. To put it differently one may ask, can the plaintiff get the same relief in the subsequent suit, if the earlier suit has been dismissed? In my opinion, if the answer is in affirmative, the subsequent suit is not fit to be stayed. However, I hasten to add then when the matter in controversy is the same, it is immaterial what further relief is claimed in the subsequent suit.

68. As observed earlier, for application of **Section 6** of the Code, the matter in issue in both the suits have to be directly and substantially in issue in the previous suit. In my view, the entire subject-matter of the two suits is the same. Accordingly the Court may in proper cases invoke its inherent jurisdiction to make

such orders as may be necessary for the ends of justice or to prevent abuse of its process and this may be done where the principles of *sub judice* would be applicable. As was held by the High Court of Uganda in *Nyanza Garage vs. Attorney General*:-[\[40\]](#)

“In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits.”

69. This then leads me to the issue whether the said principles apply to this case. For the doctrine to apply the following principles ought to be present:- **(a)** There must exist two or more suits filed consecutively; **(b)** The matter in issue in the suits or proceedings must be directly and substantially the same, **(c)** The parties in the suits or proceedings must be the same or must be parties under whom they or any of them claim and they must be litigating under the same title, **(d)**The suits must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

70. There is no doubt that the above conditions are present in this case. A cursory look at the prayers would on their face show that they relate to the same subject. However, the principle of *sub judice* does not talk about the “prayers sought” but rather “the matter in issue.” It is my view that the matters in issue in the two suits are substantially the same. In *Re the Matter of The Interim Independent Electoral Commission*[\[41\]](#)the Supreme Court cited with approval the an Australian decision where it was held:-[\[42\]](#)

“...we do not think that the word ‘matter’...means a legal proceeding, but rather the subject matter for determination in a legal proceeding... ..”

71. In determining whether or not *sub judice* applies, it is the substance of the claim that ought to be looked at rather than the prayers sought. In both proceedings, the following issues are discernible, dispute on the functions of the NLC and the Ministry, Administration and Management of Public Land, allocation of public land and preparation and registration of titles for public land, whether public land converted into private by allocation upon expiry of the term of the lease reverts again to public, alleged violation of constitutional and statutory provisions and generally disputes on mandate, powers and duties of the Ministry and the NLC.

72. Its trite that the law allows the court to stay a subsequent suit, but having found that this suit is *res judicata*, the question of staying does not apply. Further, having found and determined that this Petition is *res judicata*, I find no reason to consider the merits or otherwise of the Petition.

Summary of findings

73. In view of my findings as herein above enumerated, I conclude as follows:-

a. The facts and arguments presented in this Petition raise three fundamental issues which by their nature are dispositive. First is the question of this courts' jurisdiction and whether or not this court can review its orders of 8th November 2017.

*b. On the invitation to this Court to review its orders of 8 November 2017, the law and scope of the jurisdiction to exercise the power to review a decision or order is limited to three grounds, namely:- **(a)** discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; **(b)** on account of some mistake or error apparent on the face of the record, or **(c)** for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.*

c. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction

of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it or for any other sufficient reason. Any attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out would amount to an abuse of the liberty given to the court under the Act to review its judgment. [43]

d. The **review** must be confined to **error apparent** on the **face** of the **record** and re-appraisal of the entire evidence or how the judge applied or interpreted the law would amount to exercise of Appellate Jurisdiction, which is not permissible. [44] The question of jurisdiction is a point of law, which, even if I were to find that I was wrong, it can only be corrected by way of an appeal.

e. On the issue of *res judicata*, when *res judicata* is raised, a court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case and the instant case- to ascertain; (i) what issues were really determined in the previous case; and (ii) whether they are the same in the subsequent case and were covered by the decision of the earlier case. One more thing; the court should ascertain whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent. Perhaps I should add that the test is determining, [45] as follows:- (a) The matter in issue is identical in both suits; (b) the parties in the suit are the same; (c) sameness of the title/claim; (d) concurrence of jurisdiction; and (e) finality of the previous decision.

f. Upon analyzing the issues presented to the Supreme Court, and upon careful consideration of the Supreme Court Opinion and the issues raised in this Petition and applying the above tests, the conclusion becomes irresistible that the issues raised herein are substantially similar to the issues determined by the Supreme Court in the Advisory opinion.

g. Article 163 (7) of the Constitution explicitly provides that all courts, other than the Supreme court, are bound by the decisions of the Supreme court. The binding nature of the Supreme Court decision under Article 167 (7) of the Constitution is absolute. Article 163 (7) is an edict firmly addressed to all courts in Kenya that they are bound by the authoritative pronouncements of the Supreme Court [46] and that where the issues before the court were determined by the Supreme Court, it is not open to this court to examine the same with a view to arriving at a different decision. [47]

h. Further, the issue of registration forms as well as forms of titles including leases, Title Deeds, Grants and Certificates of Title or of Lease made or promulgated by the Ministry without the advise or input of the NLC was determined in *Anthony Otiende Otiende vs Public Service Commission & 2 others*. [48] This court cannot revisit it.

i. Third, the law is that no court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

j. The issues raised in this suit are substantially the same as the issues presented in the Judicial Review case at Eldoret. However, whereas, the court is required to stay the subsequent suit, having found that this suit is *res judicata*, staying it will serve no purpose.

k. By dint of Article 163 (7), the conclusion becomes irresistible that this Court lacks jurisdiction to entertain these Petitions. On this ground alone, I find and hold that this Petitions must fail.

l. Having found that I have no jurisdiction by dint of Article 167 (7) of the Constitution, I find no reason to address the merits or otherwise of the Petition

74. In view of my herein above analysis of the findings and conclusions on the above three issues, which

as stated earlier, are dispositive in nature, I find no reason to delve in the merits of the Petition. Accordingly, I find and hold that this Petition must fail. Consequently I dismiss this Petition with no orders as to costs.

Orders accordingly.

Signed, Delivered, Dated at Nairobi this **19th** day of **February** 2018

John M. Mativo

Judge

[1] Act No. 6 of 2012

[2] Cap 299, Laws of Kenya

[3] By virtue of Section 8 of Part two of the Fourth Schedule of the Constitution.

[4] Act No. 5 of 2012

[5] Ibid

[6] Ibid

[7] In the Matter of the National Land Commission {2015}eKLR

[8] Anthony Otiende vs PSC & 2 Others

[9] Act No. 3 OF 2012

[10] Act No. 6 OF 2012

[11] Supra

[12] Supra

[13] Cap 280, Laws of Kenya-Repealed

[14] Under Article **67 (1)**

[15] Supra, Paragraphs 289, 29, 293 and 310

[16] Ibid paragraphs 314 and 359

[17] The National Land Commission vs the Ministry of Lands, Housing & Urban Development & 7 Others, Pet No. 54 of 2015 Anthony Otiende vs PSC & 2 Others, Pet No. 250 OF 2016, Okoiti Omtatah Okoiti vs Ministry of Lands, Housing & Urban Dev & 2 Others Consolidated with JR Case No. 261 of 2016, Eldoret ELC Misc App No. 8 of 2017, David Kibiwot Achikwa vs CS for Lands & Physical Planing & Another

[18] Supra

[19] Act No. 19 of 2011

- [20] {2017}eKLR
- [21] Legal Notice No. 117 of 28 June 2013
- [22] Ajit Kumar Rath vs State of Orisa & Others, 9 Supreme Court Cases 596 at Page 608
- [23] Ibid
- [24] See [Meera Bhanja v. Nirmala Kumari Choudhury](#), (1995) 1 SCC 170
- [25] Pet No 54 of 2015
- [26] Act No. 5 of 2012
- [27] Act No. 6 of 2012
- [28] Act No. 3 of 2012
- [29] {1843} 67 ER 313
- [30] {2010} e KLR
- [31] In *Greenhalgh v Mallard* (1) (1947) 2 All ER 257
- [32] See *Woods Manufacturing Co. vs The King* {1951} S.C.R. 504 at page 515 and *Youngsam R (On the Application of) vs The Parole Board* {2017}EWHC 729
- [33] *Fredrick Otieno Outa vs Jared Odoyo Okello & 3 Others* {2017}eKLR
- [34] See *Justice Jeane W Gacheche & 5 Others vs Judges and Magistrates Vetting Board & 2 Others* {2015}eKLR citing *Sir Charles Newbold, P in Dodhia vs National & Grindlays Bank Ltd & Another* {1970} E.A. 195
- [35] {2016}eKLR
- [36] 8th Ed
- [37] 5th Ed
- [38] Cap 21, Laws of Kenya
- [39] *National Institute of Mental Health & Neuro Sciences vrs. C. Parameshwara*, (2005) 2 SCC 256
- [40] HCCS No. 450 of 1993
- [41] Constitutional Application No. 2 of 2011 {2011} eKLR
- [42] *In Re Judiciary Act 1903-1920 & In re Navigation Act 1912-1920* {1921} 29 CLR 257
- [43] Ibid
- [44] See [Meera Bhanja v. Nirmala Kumari Choudhury](#), (1995) 1 SCC 170
- [45] *In Bernard Mugo Ndegwa -VS- James Nderitu Githae and 2 Others* {2010} e KLR

[46] Fredrick Otieno Outa vs Jared Odoyo Okello & 3 Others {2017}eKLR

[47] See Justice Jeane W Gacheche & 5 Others vs Judges and Magistrates Vetting Board & 2 Others {2015}eKLR citing Sir Charles Newbold, P in *Dodhia vs National & Grindlays Bank Ltd & Another* {1970} E.A. 195

[48] {2016}eKLR