REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

PETITION NO. 250 OF 2016

IN THE MATTER OF ARTICLES 1, 2, 3, 4(2), 10, 19, 20, 21, 22, 23, 24, 27, 41(1), 47, 48, 50(1), 73, 75, 62(2) & (3), 67, 156, 159, 165, 258, AND 259 (1) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: THE ALLEGED VIOLATION OF RIGHTS AND FUNDAMENTAL FREEDOMS IN ARTICLES 41 (1) AND 47 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF: THE ALLEGED VIOLATION OF ARTICLES 1, 2, 3, 10, 62(2) & (3), 67, 209, AND 259 (1) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT 2015; THE LAND REGISTRATION ACT, 2012; THE LAND ACT 2012; AND THE NATIONAL LAND COMMISSION ACT

IN THE MATTER OF: TH CONSTITUTIONAL VALIDITY OF THE PURPOTED TRANSFER OF THE ADMINISTRATION AND MANAGEMENT FUNCTIONS FROM THE LAND ADMINISTRATION DEPARTMENT TO THE NATIONAL LAND COMMISSION

BETWEEN

OKIYA OMTATAH OKOITI.....PETITIONER

VERSUS

MINISTRY OF LAND,

HOUSING AND URBAN DEVELOPMENT.....1ST RESPONDENT

NATIONAL LAND COMMISSION.....2ND RESPONDENT

HON. ATTORNEY GENERAL.....3RD RESPONDENT

CONSOLIDATED WITH

JUDICIAL REVIEW CASE NUMBER 261 OF 2016

(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

ORDERS OF PROHIBITION & CERTIORARI

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA, ARTICLE 10 (2); ARTICLE 67 & ARTICLE 249

AND

IN THE MATTER OF THE LAND REGISTRATION ACT, 2012

AND

IN THE MATTER OF THE NATIONAL LAND COMMISSION

AND

IN THE MATTER OF AN APPLICATION

BETWEEN

REPUBLIC

VERSUS

THE HON. ATTORNEY GENERAL……...1ST RESPONDENT

THE NATIONAL LAND COMMISSION.....2ND RESPONDENT

THE CABINET SECRETARY, MINISTRY OF LANDS

& PHYSICAL PLANNING.....3RD RESPONDENT

AND

JACKSON MUTWIRI NJUE.....1ST APPLICANT

JOHN NJOROGE MUINAMI.....2ND APPLICANT

RULING

1. For the purposes of this ruling Petition 250 of 2016 between **Okiya Omtatah Okoiti vs. Ministry of Land, Housing and Physical Planning, the National Land Commission and the Attorney General** was consolidated with Judicial Review No. 261 of 2016 between **Republic vs The Attorney General, The National Land Commission, the Cabinet Secretary, Ministry of Lands and Physical Panning ex parte Jackson Mutwiri Njue and John Njoroge Muinani** for the purposes of the disposal of the Notice of Motion dated 12th August, 2016. For the purposes of this ruling both the Petitioner and the ex parte applicant will be referred to jointly as "the Petitioners." The Ministry of Lands, Housing and Physical Planning and/or the Cabinet Secretary therein will be referred to as the 1st Respondent or the Ministry while the National Land Commission will be referred to as the 2nd Respondent, the NLC or the Commission.

2. The parties herein concur that the genesis of this dispute was the decision was the decision of the Supreme Court in **In the Matter of the National Land Commission [2015] eKLR** being advisory opinion no. 2 of 2014 wherein the said Court expressed itself inter alia as hereunder:

"…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…Falling within that broad opinion are more limited sub-sets—an important one being this: The NLC has a mandate in respect of various processes leading to the registration of land, but neither the Constitution nor statute law confers upon it the power to register titles in land. The task of registering land title lies with the National Government, and the Ministry has the authority to issue land title on behalf of the said Government…That the Ministry of Land is the special entity with authority to register and issue land title, in this Court's opinion, bears restating…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…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-focussed safeguard mandate in relation to land issues…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…Apart from considering the main issue raised in this Reference, we have taken a side glace at the other constitutional mandates reposed in the NLC: recommending a national land policy to the National Government; advising the National Government on a comprehensive programme for the registration of title to land, throughout Kenya; conducting research related to land, and to the use of national resources and making recommendations to the appropriate authorities; initiating investigations (on its own initiative or upon a complaint) into present or historical land injustices, and recommending appropriate redress; encouraging the application of traditional dispute-resolution mechanisms in land conflicts; assessing tax on land and premiums on immovable property in any area designated by law; and monitoring, and asserting oversight responsibilities on land-use planning, throughout the country. *It is our Opinion that the NLC should, upon priority, and with the essential consultations and coordinations, formulate a structured scheme of operations which provides not only for the broadly-defined mandate of "managing public land" [The Constitution, Article 67(2)], but also for the specific national interest mandate, as well as the charges herein specified*. [Emphasis added].

3. In these proceedings, it is clearly appreciated that on 2nd December 2015, ***In the Matter of the National Land Commission [2015] eKLR*** (Advisory Opinion Reference No. 2 of 2014), the Supreme Court of Kenya clarified the functions and powers of the Ministry of Land Housing and Physical Planning, the 1st Respondent herein (hereinafter referred to as "the Ministry") vis-à-vis those of the 2nd Respondent herein, the National Land Commission (hereinafter referred to as "the Commission"). Subsequently, the two institutions appointed a special joint committee to interpret and implement the Supreme Court advisory opinion and on 25th April 2016, the committee submitted its report, and on 20th May 2016 the report was adopted.

4. It was pleaded that on 20th May, 2016, at a meeting on respective roles of the 1st and 2nd Respondents it was resolved that:-

a. All the functions of the Land Administration Department, including processing of leasehold titles both for public and private land be transferred to the Commission which according to the Petitioners is contrary to the express provision of Article 67 (2) (a) which specifically restricts the

commission to the management of public land as defined by Article 62 of the Constitution.

b. The Commission was also allocated the function of processing all the development applications including, subdivision of Private Land, Extension of lease and change of user on leasehold private land, issuance of consents including transfers on private land.

c. The Commission was given the authority to collect land rent, stand premium and other land taxes contrary to the provision of the Supreme Court's Advisory Opinion at paragraphs 361, 362, and 363. It was however averred that in the meantime, the Commission has delegated the function of collecting land rent to the Ministry and that this is contrary to the management principle that provides that delegation must come from a higher Authority -to a Lower Authority yet the Commission is not superior to the Ministry (the National Government).

5. What seems to have provoked these proceedings, according to the Petitioners was the decision by the 1st and 2nd Respondents, acting jointly and unlawfully to transfer the functions of the Land Administration Department to the National Land Commission. According to the Petitioners the transfer of functions will adversely affect Land Administrators employed by the Land Administration Department of the Ministry yet, in violation of Article 47 of the Constitution and the ***Fair Administrative Action Act***, they have not been involved in the process.

6. It was pleaded that the separate and relative functions of the 1st and 2nd Respondents must stay as provided for in the Constitution and in statutes, and as pronounced by the Supreme Court and cannot be determined or changed by an inter-agency report.

7. The Petitioners therefore urge this Court to annul the report and its itemized list of functions to be transferred from the 1st Respondent to the 2nd Respondent, for being haphazard, irregular, unreasonable, illegal, unlawful, capricious and, therefore, unconstitutional, null and void.

8. Before the Petition could be heard, the 2nd Respondent filed a Notice of Motion dated 12th August, 2016 in which the Commission seeks that these proceedings be precluded from any further hearing or consideration under the doctrine of collateral estoppel (issue preclusion) since the consideration or hearing thereof is a re-litigation of issues raised and pronounced by the Supreme Court in the said Advisory Opinion No. 2 of 2014.

9. According to the Commission, the Supreme Court in the said Advisory Opinion sought to answer the following question as put down in paragraph 4 of the Advisory:

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

10. It was contended that this is the very question the litigants will essentially be putting forth for this Court to pronounce itself on yet as all parties agree, this question has already been answered conclusively. If perhaps, the litigants seek a different answer to this question, or a simple interpretation of the Advisory Opinion, again, the proper forum to seek that assistance is the Supreme Court, and not, this Court.

11. It was submitted that the subsequent chronology of events is that after the Advisory Opinion was rendered, in the spirit of the Supreme Court's directive 'to engage one another in good faith, and to seek mutual understanding', the Commission and the Ministry formed a **Special Joint Committee** ('the Joint Committee') on the 1st March, 2016 to advice on the implementation of the Advisory Opinion which Committee comprised of members from the Law Society of Kenya, the Commission on Administrative Justice, Kenya Law Reform Commission and the Institution of Surveyors of Kenya and it was tasked with providing an objective and non-partisan interpretation of the Advisory Opinion and report to both the Principal Secretary Ministry of Lands and the Chief Executive Officer of the Commission.

12. It was averred that the Joint Committee presented its Report to the Cabinet Secretary of the Ministry and the Chairman of the Commission together with senior officials of both institutions on 12th April, 2016. On 27th May, 2016, the Joint Committee's Report was unanimously adopted as being reflective of the Advisory Opinion and the law which report contained a division of functions matrix identifying key land policies whose implementation was required by the law; and the primary responsible body for their implementation as defined by the Constitution and supporting legislation. The matrix also specified whether, for each of the policies, the implementing body was agreed upon by both the NLC and the Ministry, or should be referred to the Attorney General for further guidance.

13. It was clarified that this Matrix of functions was not an invention of the Commission, or the Ministry. Rather, it was based on paragraph 185 of the ***Advisory Opinion***, which called for both parties to, within the fabric of laws governing them, engage each other in good faith and mutually co-ordinate in management of Land in Kenya. On the basis of the adopted Report, and the agreed functions in the matrix, the Cabinet Secretary circulated an internal memo dated 9th June, 2016 ***Re: Implementation of the Supreme Court Advisory Opinion on the Function of the Ministry and the National Land Commission***. It was contended that the internal memo and the matrix of functions was not a unilateral decision of the Cabinet Secretary intent on directing the NLC as the litigants claim but was a communication of an agreed position on the functions of the NLC between two mutually cooperating state agencies.

14. It was however contended that the functions in this impugned communication, which the applicants seek to re-litigate, falls squarely within the legal mandate of the Commission under the Constitution and the Land Laws. The Court was therefore urged not even proceed to the merits of the case because the issues in these two matters have already been previously determined in a binding decision of the Supreme Court which stated thus in paragraph 316:

> **'The Opinion must guide the conduct of not just the organ(s) that sought it, but all governmental or public action thereafter. To hold otherwise, would be to reduce Article 163(6) of the Constitution to an 'idle provision', of little juridical value. The binding nature of Advisory Opinions is consistent with the values of the Constitution, particularly the rule of law.'**

15. To the Commission, this is purely why it approached this court with an Application based on collateral estoppel, because needlessly, the litigants in pursuing the Judicial Review Application and the Petition are essentially seeking to open for re-litigation matters that have already been finally decided by the Supreme Court. To the Commission, the issue for resolution in this Application is therefore only one, and that is whether, the doctrine of collateral estoppel bars the main proceedings from any further consideration.

16. It was submitted that to guard against needless duplicative litigation, courts have over time developed certain finality doctrines such as *res judicata*, and for cases such as the instant one, collateral estoppel which was defined by **Dixon, J** in **Blair vs. Curran (1939) 62 CLR 464, 531-2** as:

> **'A judicial determination directly involving an issue of fact or of law disposes once [and] for all of the issue, so that it cannot afterwards be raised between the same parties or their privies.'**

17. The Commission also relied on ***Halsbury's Laws of England*** **(4th Ed.) at p. 861** where it is stated that:

> ***An Estoppel which has come to be known as an issue estoppel may arise where a plea of res judicata could not be established because the causes of action are not the same. A party is precluded from contending the contrary of any precise point which having once already been distinctly put in issue, has been solemnly and with certainty determined against him. Even if the objects of the first and second actions are different, the finding on a matter which came directly (not collaterally or incidentally) in issue on the first action, provided it is embodied in a judicial***

decision is final, is conclusive in a second action between the same parties and their privies. This principle applies whether the point involved in the earlier decision, and as to which the parties are estopped, is one of fact or one of law, or one of mixed fact and law.

18. Further reference was made to the observation of **Coke** in ***Ferrer's Case*** **(1599) 6 Co Rep 7a, 9a; 77 ER 263, 266** that:

> **'Great oppression might be done under colour and pretence of law; for if there should be an end of suits, then a rich and malicious man would infinitely vex him who hath rights by the suits and actions; and in the end (because he cannot come to an end compel him (to redeem his charge and vexation) to leave and relinquish his right.'**

19. The Commission also relied on **Tuiyott, J's** decision in **Fatuma A. Chamkono & 40 Others vs. District Commissioner, Msambweni District & Another [2013] eKLR** in which the learned Judge applied the doctrine and summarized the elements that are pre-requisite for the application of collateral estoppel as follows:

> ***a) There has been prior litigation in which an issue identical to the subsequent litigation has been brought before the Court.***
>
> ***b) The issue has been actually litigated in the prior proceedings and the party against whom the estoppel is being asserted has had a full and fair opportunity to litigate the issue in that litigation.***
>
> ***c) The issue must have been decided and rendered as a necessary party of the Court's final determination.***

20. It was submitted that the learned Judge relied on the decision in **Hunter vs. Chief Constable of West Midlands and another [1981]3 All ER** to show the difference between res judicata and issue estoppel despite both being used to stop re-litigation of a suit and stated that persons who were not parties to the prior litigation can assert the doctrine of issue estoppel provided a particular issue has been decided and expressed by a Court in a final judgment.

21. It was submitted that besides the notion of judicial economy, the judicial system risks the embarrassment of a later decision contradicting an earlier one especially one of a higher court. According to the Commission, in the ***Advisory Opinion***, the parties asked the Court to decide on the issue of demarcation of functions as between the Ministry and the National Land Commission. At the heart of the application, as framed in paragraph 1 (a) (3) of the ***Advisory Opinion*** was inter alia:

> ***'Which functions that were previously performed by the Ministry, before the creation of the NLC, have now been transferred to the NLC?'***

22. Upon presentation of all the questions, the Supreme Court scaled down the main the main issue for determination in paragraph 4 thus:

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

23. It was the Commission's case that the substance of the controversy raised by the Judicial Review Application and the Petition is the proper constitutional and statutory boundaries between the powers and functions of the NLC on the one hand, and the Ministry on the other. By attacking the internal memo and the matrix of functions, they are essentially asking this Court, to reopen and decide on the issue of demarcation of functions between the NLC and that of the Ministry. However, since these very questions were already raised and answered in the ***Advisory Opinion***, the invocation of this court's jurisdiction over

them amounts to a collateral attack on the final decision of the Supreme Court and this is in itself an abuse of the court process.

24. It was submitted that for collateral estoppel to apply, it was held in **McIlkenny vs. Chief Constable of West Midlands Police Force and an-other and related appeals 1980 QB 283, [1980] 2 All ER 227, [1980] 2 WLR 872, 144 JP 291** that there must be a binding judgment of the Court of competent jurisdiction. The Commission's contention was that the traditional rubrics of the legal system command preclusion if a competent court has already made a valid judgement over an issue and that a second court faced with the same legal issue may not contradict it. Collateral estoppel with regards to issue of law preclusion focuses on the structure of the legal system, and the binding nature of its judgments, not necessarily on the equities of the parties.

25. It was submitted that the issues in the instant cases are issues of law, whose determination has been made finally by the Supreme Court in the paragraph 309 of the ***Advisory Opinion*** as follows:

> **'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 as set 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.'**

26. According to the Commission, the Court did answer the question of the mandate of the NLC with regards to management of public land when it stated in paragraph 310 that:

> **"Falling within that broad opinion are more limited sub-sets—an important one being this: The NLC has a mandate in respect of various processes leading to the registration of land, but neither the Constitution nor statute law confers upon it the power to register titles in land. The task of registering land title lies with the National Government, and the Ministry has the authority to issue land title on behalf of the said Government."**

27. Accordingly the Commission asserted that this position, is the exact position communicated by the internal memo and the matrix of functions the issues put forth by the Petitioners in these matters have already been subject of a final court determination and therefore ought not be re-litigated.

28. According to the Commission, mutuality of parties and their privies was traditionally a prerequisite of the application of the doctrine of collateral estoppel. This general rule has however adopted the necessary exceptions in instances of public law litigation in order to avoid what would be an obviously undesirable consequence of endless re-litigation of similar issues by different parties, simply because they were not part to the previous litigation. This exception, is the exception from the requirement of mutuality of parties or their privies in application of collateral estoppel in public law litigation. This comprises of instances where the issues being litigated are issues of law such as: constitutionality of statutes; suits for injunction in respect of enforcement of legislation; and validity of or lack thereof of legislation among others. To the Commission, a judgement in this regards, has been held to be a judgement in rem, and the requirement of mutuality of parties or their privies is not a necessity and relied on **Lord Says Case (1639) Cro Car 524; 79 ER 1053, Ship Money Case-R v Hampden 3 St Tr 825. 1089, Dilworth v Town of Bala [I955] 2 DLR 353, 357**, **Emms v The Queen (1979) 102 DLR (3d) 19** and submitted that the Supreme Court as if having read the minds of future litigants as in this case, specifically pronounced its judgement as a judgement in rem, applicable as to all.

29. In the Commission's view, it is not a pre-requisite that the Respondents in this Application have been parties or have had privies in the Supreme Court Advisory Opinion matter for them to be barred from re-litigating the issues at hand. In this respect reliance was placed on **Pigeon, J's** reasoning in **Emms vs. The Queen (1979) 102 DLR (3d) 193** that:

> **"If a formal declaration of invalidity of an administrative regulation is not considered effective towards all those who are subject thereto, it may mean that all other persons concerned with the application of the regulation, including subordinate administrative agencies, have to keep on giving effect to what has been declared a nullity. It is obviously for the purpose of avoiding this undesirable consequence that, in municipal law, the quashing of a by-law is held to be effective in rem."**

30. Dealing with the issue whether there any circumstance in this case, to warrant an exception to the otherwise applicable rules of issue preclusion, it was submitted that even if for some reason unknown in law, the principles of estoppel were not to be applied in this case, this Court should still preclude re-litigation in this case by invoking its inherent jurisdiction to prevent abuse of its processes and reliance was placed on **R v Balfour; Ex parte Parkes Rural Distributions Pty Ltd (1987) 76 ALR 256** where the Court invoked its inherent jurisdiction to prevent re-litigation of an issue of validity which had been determined in prior litigation in the Supreme Court of New South Wales and the New South Wales Court of Appeal and held that a proceeding which, if successful, would result in a judgment inconsistent with that of the Supreme Court which was held to be abuse of process.

31. In the Commission's view, once an advisory opinion is rendered, the residual powers of revision and interpretation lie in Rule 20(4) of the ***Supreme Court Rules of 2012*** stating that:

> ***The Court may, in circumstances it considers exceptional, on an application by any party or on its own motion, review any of its decisions.***

32. In the Commission's view, if an interpretation of the Advisory Opinion is needed, the parties are invited to approach the Supreme Court on the same but should not re-litigate the same in this Court

33. Consequently this Court was urged to allow the Motion dated and filed on the 12th August 2016 on behalf of the Second Respondent.

The Petitioners' Case

34. The Application was opposed by the Petitioners. However only the Petitioner in Petition 250 of 2016 participated at the hearing of the instant application as the other Petitioners neither filed their responses nor were they represented at the hearing.

35. According to the Petitioners, the instant petition is an invitation to this Honourable Court to invoke its jurisdiction to intervene and determine whether the 1st and 2nd respondents' purported interpretation and application of the Supreme Court's advisory opinion is correct, and whether or not other violations of the law have resulted as pleaded in the instant petition and in the JR application. It was averred that ppursuant to section 27 of the ***Supreme Court Act, 2011*** (No. 7 of 2011), the High Court is vested with jurisdiction to enforce decisions of the Supreme Court as if they had been given or made by the High Court. To the Petitioners, they are urging the High Court to enforce the decision of the Supreme Court clarifying the 1st respondent's functions and powers *vis-à-vis* those of the 2nd respondent.

36. It was averred that the instant petition challenges the 1st and 2nd respondents' interpretation and implementation of the Advisory Opinion Reference No. 2 of 2014 of the Supreme Court and Articles 22, 23, 165(3)(b),(d)(i)&(ii),(6)&(7) and 258(1)&(2)(c)&(d) of the Constitution of Kenya, 2010 read with section 5(a) of the ***High Court (Organization and Administration) Act, 2015*** vests the High Court with original and exclusive jurisdiction to determine whether the 1st and 2nd respondents violated the law by their purported transfer of the functions of the Land Administration Department to the National Land Commission. Accordingly, the impugned purported transfer of the functions of the Land Administration Department to the National Land Commission was contrary to the Supreme Court's clarification in its Advisory Opinion Reference No. 2 of 2014 of the 1st Respondent's functions and powers *vis-à-vis* those of the 2nd Respondent. Further, the impugned transfer of functions is contrary to the national values and the principles of governance, including the rule of law, participation of the people, good governance, fair

administrative action, and fair labour practices.

37. It was therefore contended that the High Court has jurisdiction to hear and determine petitions under Article 22(1)&(2)(c)&(d) and 258(1)&(2)(c)&(d) of the Constitution and reference was made to **Timothy Otuya Afubwa & Another vs. County Government of Trans Nzoia & 3 others [2016] eKLR** where it was held that:

> ***13. That their petition is on behalf of the public and they have invoked the provisions of Article 258(2)(c) and 22(1) of the Constitution. Article 22 deals with the Enforcement of Bill of Rights and provides that every person can bring court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed and the same can be brought by a person acting on behalf of the public. This Article in my view is so wide and the drafters of the constitution intended that nobody would be locked out of the mercy sit of justice when his interest or those of the public are threatened.***
>
> ***14. Article 258 of the constitution buttresses the provision of Article 22 above. I do find that the petitioners have locus standi. They fall within the class of persons anticipated under Article 258 of the constitution. They have not in my view brought this petition with ulterior motive or bad faith. What they are saying simply is that the hospital to be build or expanded would be public. The funds used to purchase would be public. If the process is flawed then the public would obviously suffer. The tax payer eventually would foot the bill.***

38. The Petitioners also relied on **Erick Okeyo vs. County Government of Kisumu & 2 Others [2014] eKLR** where the High Court assumed jurisdiction in a petition filed by a member of the public in public interest to challenge a public procurement process that was inconsistent with Article 10 and 227(1) of the Constitution. It was held that:

> **"Article 258 of the constitution buttresses the provision of Article 22 above. I do find that the petitioners have locus standi. They fall within the class of persons anticipated under Article 258 of the constitution. They have not in my view brought this petition with ulterior motive or bad faith…"**

39. It was therefore contended that the High Court has original jurisdiction to hear the instant petition relating to the 1st and 2nd respondents' purported interpretation and implementation of the Supreme Court Advisory Opinion Reference No. 2 of 2014.

40. To the Petitioners, the gravamen of the instant petition is that the 1st and 2nd respondents, acting jointly and unlawfully, purported to transfer the functions of the Land Administration Department to the National Land Commission, in blatant contravention of the Constitution, the ***Fair Administrative Action Act 20***15, the ***Land Registration Act 2012***, the ***Land Act 2012***, the ***National Land Commission Act 2012***, and the **Advisory Opinion Reference No. 2 of 2014** of the Supreme Court of Kenya. In their view, the contention that the 1st and 2nd respondents have acted contrary or outside the law is a dispute to be resolved by the application of law in a fair and public hearing before this Honourable Court as provided for in Article 50(1) of the Constitution.

41. It was their case that the 1st and 2nd respondents' purported transfer of functions of the Land Administration Department to the National Land Commission was not lawful, procedural, participatory, fair, equitable, transparent, and was tainted with glaring conflict of interest and if left undisturbed by this Honourable Court, the impugned administrative decision will orchestrate chaos in the land sector. Accordingly, the amended petition raises a reasonable cause of action and ought to be heard in the merits.

42. In support of this position that the petition should not be struck out, the Petitioners relied on ***Blacks' Law Dictionary*, 9th Edition at page 1644 and Elijah Sikona & George Pariken Narok on Behalf of Trusted Society of Human Rights Alliance vs. Mara Conservancy & 5 others [2014] eKLR**, **Transcend Media Group Limited v Independent Electoral & Boundaries Commission (IEBC)**

[2015] eKLR Rashid Odhiambo Aloggoh & 245 others vs Haco Industries Limited, Kenya Commercial Bank vs. Suntra Investment Bank Ltd, Milimani Commercial Court Commercial and Admiralty Division Civil Suit No. 380 of 2013, **Blue Shield Insurance Company Ltd vs. Joseph Mboya Oguttu [2009] eKLR.**

43. With respect to the application of the doctrine of collateral estoppel, it was submitted that section 27 of the ***Supreme Court Act, 2011*** (No. 7 of 2011), states that decisions of the court may be enforced by the High Court. The petitioner submits that whatever the case, this court is the right forum for enforcing decisions of the Supreme Court, and petitioner and the JR applicants cannot therefore be barred herein by the doctrine collateral estoppel or of issue preclusion since they are not asking the Court to review the Supreme Court's decision, but simply to enforce it. To the Petitioners, the Supreme Court in its Advisory Opinion Reference No. 2 of 2014 did not with finality consider and determine the 1st and 2nd respondents' purported **interpretation** and **implementation** of the said advisory opinion. Neither did the Supreme Court consider the fate of those adversely affected by the impugned interpretation and implementation. Hence, the issues which are raised in the instant petition and in the JR application are new disputes for determination. If anything, the conclusion that the disputes were determined by the Supreme Court can only be arrived at by this Court after a full hearing of the application on the merits, and not at the threshold stage.

44. It was submitted that collateral estoppel, which is also referred to as "estoppel by record," was considered and rejected in United ***States v. Lane, 75 U.S. 185, 200-01, 19L.Ed. 445, 449 (1868),*** on grounds that the record of the prior proceeding was not offered in evidence and the Court could not determine whether the issue had been litigated and determined. Similarly, the 2nd respondent's plea to collateral estoppel must fail herein. It was therefore submitted that it is premature for the 2nd respondent to contend that the instant petition and the JR application are violative of the doctrine of collateral estoppel or of issue preclusion which would prevent the petitioner and the *ex-parte* applicants from litigating the issues raised in their causes, the same having with finality been considered and determined on the merits by the Supreme Court.

45. The Court was therefore urged to reject the prayer to dismiss the instant petition *in limine*, and proceed to hear and determine the matter on its merits. Accordingly, the Petitioners prayed that the motion to strike out the petition lacks merit and ought to be dismissed with costs and the petition be heard in the merits.

Determinations

46. I have considered the issues raised and which are the subject of this ruling.

47. Before delving into the merits of the issues, it is important to appreciate the status of advisory opinion of the Supreme Court. In the said ***Advisory Opinion No. 2*** the Supreme Court expressed itself in paragraph 315 as hereunder:

> **"While an Advisory Opinion may not be capable of enforcement in the same way as ordinary decisions of the Courts (in the shape of Rulings, Judgments, Decrees or Orders), it must be treated as an authoritative statement of the law. The Opinion must guide the conduct of not just the organ(s) that sought it, but all governmental or public action thereafter. To hold otherwise, would be to reduce Article 163(6) of the Constitution to an 'idle provision', of little juridical value. The binding nature of Advisory Opinions is consistent with the values of the Constitution, particularly the rule of law."**

48. It is therefore my view and I hold the decisions of the Supreme Court arising from advisory opinion are decisions in rem as opposed to decisions in personam. It is important to make a distinction between the two. The general rule is that orders which are personal in nature, or orders *in personam* in legal parlance, do not affect third parties to the cause. See **Ernest Orwa Mwai vs. Abdul S Hashid & Another Civil Appeal No. 39 of 1995, Kotis Sandis vs. Ignacio Jose Macario Pedro De Silva Civil Appeal No. 38 of 1950 [1950] 1 EACA 95, The Town Council of Ol'kalou vs. Ng'ang'a General**

Store Civil Appeal No. 269 of 1997 and **Sakina Sote Kaitany and Anor. vs. Mary Wamaitha Civil Appeal No. 108 of 1995.**

49. Similarly, in **Gitau & 2 Others vs. Wandai & 5 Others [1989] KLR 231, Tanui, J** held that:

> **"The plaintiffs in this suit were not party to the suit in which the consent judgement was entered and consequently they are not bound by a compromise made between the advocate who acted for the second, third, fourth, fifth and sixth defendants on one part and the advocates for the first defendant on the other."**

50. However, there are other orders or judgements which bind the whole world as they determine the state of affairs rather than the rights of the parties before the Court. In ***Conflict of Laws*** (7th Edn. 1974) at page 98 by **R H Graveson** it is stated:

> **"An action is said to be *in personam* when its object is to determine the rights and interests of the parties themselves in the subject-matter of the action, however the action may arise, and the effect of a judgement in such an action is merely to bind the parties to it. A normal action brought by one person against another for breach of contract is a common example of an action *in personam*."** See ***Black's Law Dictionary,*** 9th Edn. Page 862.

51. With respect to a decision *in rem* it was held in **Kamunyu And Others vs. Attorney General & Others [2007] 1 EA 116:**

> **"In a suit seeking judgement *in rem,* that is a judgement applicable to the whole world, an individual does not sue on behalf of the whole world, but sues for judgement which is effective against the whole world. In other words, in the present case, the appellants when successful in the suit obtain judgement, which is effective against the whole world but does not confer benefits upon the whole world."**

52. Therefore the mere fact that the parties in the subsequent proceedings were not parties to the earlier proceedings does not deprive them of the benefit of the said order as long as the same was a decision *in rem*. Nor can such parties escape the consequences of the earlier determination and seek to re-open the issues by instituting fresh proceedings. I further associate myself with the decision in **George William Kateregga vs. Commissioner for Land Registration & Others Kampala High Court Misc. Appl. No. 347 of 2013** in which the Court while citing the South African case of **Nicholas Francois Marteemns & Others vs. South African National Parks, Case No. 0117**, expressed itself as follows:

> **"Therefore, in the instant case even if the parties other than the Applicant crafted a consent judgement over the suit land which was sanctioned by the court, it necessarily became a judgement of the court. The effect was that the Applicant would be bound by it notwithstanding that he was not privy to the consent agreement or suit; which renders the judgement in that case a judgement *in rem*. A judgement *in rem* invariably denotes the status or condition of the property and operates directly on the property itself. It is judgement that affects not only the thing but all persons interested in the thing; as opposed to judgement *in personam* which only imposes personal liability on the defendant**."

53. Similarly in **Japheth Nzila Muangi vs. Kenya Safari Lodges & Hotels Ltd [2008] eKLR** it was held:

> **"It is trite law that ordinarily a judgement binds only the parties to it. This is known as Judgement *in personam*. A judgement may also be conclusive not only against the parties to it but also against all the world. This is known as a judgement *in rem*. This is a judgement which declares, defines or otherwise determines the status of a person or of a thing i.e. the jural relation of the person or thing to the world generally."**

54. I am also alive to the decision in **Pattni vs. Ali & Anor (Isle of Mann (Staff of Government**

Division) [2006] UKPC 51 in which reliance was sought from ***Jowitt's Dictionary of English Law*** (2nd Edn.) p. 1025-6 to the effect that:

> **"A judgement *in rem* is an adjudication pronounced upon the status of some particular subject-matter by a tribunal having competent authority for that purpose. Such an adjudication being a solemn declaration from the proper and accredited quarter that the status of the thing adjudicated upon is also declared by the adjudication...So a declaration of legitimacy is in effect a judgement *in rem*."**

55. In my considered view, the decision determining the respective functions of two state organs, as was the matter before the Supreme Court, cannot be said to be restricted to the parties before that Court. Such a decision is a decision *in rem* which are defined as final judgements or orders or decrees of competent courts which confer or take away from any person any legal character, or to be entitled to any specific thing, not as against any specific person but absolutely. See **Koech vs. African Highlands and Produce Limited and Another [2006] 2 EA 148**.

56. I therefore associate myself with the reasoning of **Pigeon, J** in **Emms vs. The Queen (1979) 102 DLR (3d) 193** that:

> **"If a formal declaration of invalidity of an administrative regulation is not considered effective towards all those who are subject thereto, it may mean that all other persons concerned with the application of the regulation, including subordinate administrative agencies, have to keep on giving effect to what has been declared a nullity. It is obviously for the purpose of avoiding this undesirable consequence that, in municipal law, the quashing of a by-law is held to be effective in rem."**

57. It is true that pursuant to section 27 of the ***Supreme Court Act, 2011*** (No. 7 of 2011), the High Court is vested with jurisdiction to enforce decisions of the Supreme Court as if they had been given or made by the High Court. However one must distinguish between the enforcement of a decision that has not been implemented and the challenge to the manner of the implementation of a decision of a Court.

58. In the Petitioners' own words, the instant petition is an invitation to this Court to invoke its jurisdiction to intervene and determine whether the 1st and 2nd respondents' purported interpretation and application of the Supreme Court's advisory opinion is correct, and whether or not other violations of the law have resulted as pleaded in the instant petition and in the JR application. In effect the Petitioners intend to urge this Court to interpret the opinion of the Supreme Court in order for this Court to determine whether or not the said decision is being implemented according to the said Court's intention. This fact clearly comes from the Petitioners' averment that they are "*urging the High Court to enforce the decision of the Supreme Court clarifying the 1st respondent's functions and powers vis-à-vis those of the 2nd respondent*." In this case it is clear that the parties hereto are not agreed on the manner in which the said decision was to be implemented.

59. In my view, it would be disastrous if this Court was to arrive at a decision which the Supreme Court never intended under the guise of interpreting the Supreme Court's decision. In effect this Court by its decision would have varied the decision of the Supreme Court notwithstanding the binding effect of the decision of the Supreme Court as enunciated in Article 163(7) of the Constitution.

60. That the Court, even after handing down its decision retains a certain measure of residual power in the implementation thereof is nolonger in dispute. In **The Matter of The Estate of George M'mboroki Meru HCSC No. 357 of 2004, Ouko, J** (as he then was) expressed himself inter alia as follows:

> **"The Law of Succession Act, like section 3A of the Civil Procedure Act has a saving provision as to the court's jurisdiction under section 47 which is affirmed by rule 73 of the Probate and Administration Rules. It is therefore accepted that the court retains certain intrinsic authority in the absence of specific or alternative remedy, a residual source of power, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular**

to ensure the observance of the due process of law, to prevent abuse of its process, to do justice between the parties and to secure a fair trial between them."

61. Similarly **Kimaru, J** in **Rev. Madara Evans Okanga Dondo vs. Housing Finance Company of Kenya Nakuru Hccc No. 262 Of 2005** held:

"The court will always invoke its inherent jurisdiction to prevent the abuse of the due process of the court. The jurisdiction of the court, which is comprised within the term "inherent", is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of the substantive law; it is exercisable by summary process, without plenary trial, it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of the court. The inherent jurisdiction of the court enables the court to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process. In sum, it may be said that the inherent jurisdiction of the court is virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."

62. In **Meshallum Wanguhu vs. Kamau Kania Civil Appeal No. 101 of 1984 1 KAR 780 [1987] KLR 51; [1986-1989] EA 593, Hancox, JA** (as he then was) emphasised that it is a residual jurisdiction, which should only be used, in special circumstances in order to put right that which would otherwise be a clear injustice.

63. One of the instances in which the court exercises this residual power is in the fulfilment of its obligation to ensure that the orders it issues are not issued in vain. This was recognised by the Court of Appeal in **Nicholas Mahihu vs. Ndima Tea Factory Ltd & Another Civil Application No. Nai. 101 of 2009** where it was held that the Court has the duty to ensure that its orders are at all times effective.

64. Accordingly, the rules of procedure for example provide for the correction of typographical errors in its decision without which the decision may either be un-implementable or otherwise be ridiculous. Where therefore a party is challenging the manner in which a decision is being implemented as opposed to enforcing its implementation, it is my view that any clarification if required ought to be sought from the Court that gave its decision.

65. In **Nyamodi Ochieng Nyamogo vs. Telkom Kenya Limited Nairobi HC (Civil Division) Civil Suit No. 1736 of 1993**, this Court expressed itself as hereunder:

"What is however clear is that there is a divergence of opinion between the Plaintiff and the Defendant as to the effect of the decision issued by the Court of Appeal. This Court, it is my respectful view, is not competent to interpret the decision of the Court of Appeal where the parties are not clear on the same and where the decision itself may be subject of more than one interpretation. Such a matter can only be dealt with by the Court and preferably the bench that dealt with the matter, if the members of that bench are still in that Court. See Bearing House (1985) Ltd. & 4 Others vs. Reliance Bank Ltd. Civil Application No. Nai. 245 of 2000."

66. As indicated above Article 163(7) of the Constitution provides:

All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court.

67. This provision is a Constitutional codification of the common law doctrine of stare decisis. As was held by **Emukule, J** in **Koinange vs. Commission of Inquiry Into The Goldenberg Affair Nairobi HCMCA No. 372 of 2006 [2006] 2 KLR 529**.

> **"The doctrine of *stare decisis* is predicated upon the principle of precedent under which it is necessary for a court to follow earlier judicial decisions when the same facts arise again in litigation. The phrase *stare decisis* literally means, "stand by things decided". This doctrine is simply that when a point or principles of law has been once officially decided or settled by the Ruling of a competent court in a case in which it is directly and necessarily invoked, it will no longer be considered as open to examination or to a new ruling by the same tribunal or by those which are bound to follow its adjudications, unless it be for urgent reasons and exceptional cases."**

68. Therefore if the issues in this application were necessarily determined by the Supreme Court, it will nolonger be open to this Court to examine the same with a view to arriving at a different decision. The said doctrine is so sacrosanct in our jurisprudence that even the highest court in the land will not lightly ignore the same and was recognised by **Sir Charles Newbold, P** in where he pronounced himself as follows:

> **"A system of law requires considerable degree of certainty and uniformity and such certainty and uniformity would not exist if the courts were free to arrive at a decision without regard to any previous decision of its own. But there is a great difference between a final court of appeal and a subordinate court of appeal. If it is considered that a decision of a subordinate court of appeal was wrong it would always be open to have it tested and if necessary rectified in the final court of appeal. Thus, on the face of it, there is a need for greater flexibility in a final court of appeal than there is any other court in the judicial hierarchy. Further, the need for such flexibility is the greater and not the less in a developing country, as there is a greater likelihood of rapid changes in the customs, habits and needs of its people, which changes should be reflected in the decisions of the final court of appeal. It should, moreover, be borne in mind that too strict an adherence to the principle of *stare decisis* would, in fact, defeat the object of creating certainty, as a final court of appeal faced by a decision which was unsuited to the present needs of the community would seek to distinguish it. The result of distinguishing a decision when there was no real difference results in uncertainty, an uncertainty which would not exist if it were clearly stated that the old decision was nolonger the law. It must also be remembered that the Privy Council, when it was the final court of appeal for Kenya, Tanzania and Uganda, never considered itself bound by its previous decisions. It would seem a retrograde step for the court, now that it has taken over the functions of a final court of appeal for these countries, to discard the flexibility previously possessed by the final court of appeal and instead adopt a position of rigidity."**

69. **Duffus, VP** on his part held:

> **"The adherence to the principle of judicial precedent or *stare decisis* is of utmost importance in the administration of justice in the Courts in East Africa and thus to the conduct of the everyday affairs of its inhabitants, it provides a degree of certainty as to what is the law of the country and is a basis on which individuals can regulate their behaviour and transactions as between themselves and also with the State. There can be no doubt that the principle of judicial precedent must be strictly adhered to by the High Courts of each of the States and that these courts must regard themselves as bound by the decision of the Court of Appeal on any question of law, just as in the former days the Court of Appeal was bound by a decision of the Privy Council, or in England as the Court of Appeal or the High Courts are bound by the decisions of the House of Lords, and of course, similarly the magistrates courts or any other inferior court in each State are bound on questions of law by the decisions of the Court of Appeal and subject to these decisions also to the decisions of the High Court in the particular State."**

70. As was appreciated by **Musinga, J** as he then was in **Rift Valley Sports Club vs. Patrick James Ocholla Nakuru HCCA NO. 172 of 2002 [2005] eKLR**:

> **"A judicial decision must be based on proper legal grounds but never on feelings alone, no matter how strong such feelings may be. The doctrine of stare *decisis* is very important in our judicial system and must be respected as much as possible otherwise judicial decisions would be chaotic and unpredictable."**

71. A similar position was taken by the Supreme Court in **Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others Petition No. 4 of 2012 [2013] eKLR** when it held that:

> **"Adherence to precedent should be the rule and not the exception....the labour of judges would be increased almost to breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."**

72. **Benjamin Cardozo's,** in ***'The Nature of the Judicial Process',*** **New Haven; Yale University Press (1921) p. 149** opines:

> **"In these days, there is a good deal of discussion whether the rule of adherence to precedent ought to be abandoned altogether. I would not go so far myself. I think adherence to precedent should be the rule and not the exception. I have already had occasion to dwell upon some of the considerations that sustain it. To these I may add that the labour of judges would be increased almost to breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."**

73. The House of Lords similarly held in **R vs Knuller (Publishing, Printing and Promotions) Ltd (1973) A.C 435** :

> **"It was decided by this House in Shaw vs Director of Public Prosecution [1962] A.C 220 that conspiracy to corrupt public morals is a crime known to the law of England…I dissented in Shaw's case. On reconsideration I still think that the decision was wrong and I see no reason to alter anything which I said in my speech. But it does not follow that I should now support a motion to reconsider the decision. I have said more than once in recent cases that our change of practice is no longer regarding previous decision of this House as absolutely binding does not mean that whenever we think that a previous decision was wrong we should reverse it. In the general interest of certainty in the law we must be sure that there is some very good reason before we so act… I think that however wrong or anomalous the decision may be it must stand and apply to cases reasonably analogous unless or until it is altered by Parliament."**

74. I also associate myself with the decision of **Lord Wilberforce** in **Fitzleet Estates vs Cherry (1971) 1 WLR 1345**, where he expressed himself as follows;

> **"Nothing could be more undesirable, in fact, than to permit litigants, after a decision has been given by this House with all appearance of finality, to return to this House in the hope that a differently constituted committee might be persuaded to take the view which its predecessors rejected …[D]oubtful issues have to be resolved and the law knows no better way of resolving them than by the considered majority opinion of the ultimate tribunal. It requires much more than doubts as to the correctness of such opinion to justify departing from it."**

75. I therefore find nothing wrong in a Court or a Tribunal entertaining the proceedings whose effect was to ensure that its earlier decision was given effect since it had the power to give effect to its decision. No provision of the rules should be so construed as to preclude a court from giving effect to its decision. To the contrary, any court must have the power to give effect to its decisions. See **Peter Mburu Echaria vs.**

Priscilla Njeri Echaria Civil Appeal No. 75 of 2001 [2007] 2 EA 139; Mawji vs. Arusha General Store Civil Appeal No. 19 of *1969* [1970] EA 137**.**

76. It is therefore my view that the proper forum to ventilate the issue whether the 1st and 2nd respondents' purported interpretation and application of the Supreme Court's advisory opinion is correct must of necessity be the Supreme Court. This determination ought not to be construed as sanitising the decision challenged as being proper. What I am simply saying is that this dispute ought to have gone back before the Supreme Court where it all started. It is worth noting that the substance of the issue was commenced by invoking the original jurisdiction of the Supreme Court under Article 163(6) of the Constitution. It would therefore be improper in my view to subject the interpretation of the decision of the Supreme Court in the exercise of its original jurisdiction to a determination by the High Court.

77. In the result I agree with the 2nd Respondent herein, the National Land Commission, that the proceedings in Petition 250 of 2016 and Judicial Review No. 261 of 2016 are caught up by the doctrine of collateral estoppel.

Order

78. What then is the option available to the Court in such circumstances? The Petitioners alluded to the fact that these being matters revolving around constitutional issues the same ought not to be summarily terminated. In **Ngoge vs.Kaparo & 4 Others Nairobi HCMA No. 22 of 2004 [2007] 2 KLR 193**, a three judge bench of this Court expressed itself as hereunder:

> **"In our view, it cannot be correct to suggest that a constitutional matter cannot be dealt with in a summary manner in deserving cases. There are in fact many instances where the court must for example move first to prevent abuse of its process and to safeguard the dignity of the court."**

79. Consequently the application dated 12th August, 2016 succeeds and Petition 250 of 2016 and Judicial Review No. 261 of 2016 are hereby struck out but with no order as to costs as the substance of the dispute remains unresolved.

80. Orders Accordingly.

Dated at Nairobi this 22nd day of May, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Clapton for the National Land Commission

CA Gitonga