



**Karama & 13 others v National Land Commission & 21 others (Environment & Land  
Petition 13 of 2021) [2022] KEELC 13521 (KLR) (28 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 13521 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**ENVIRONMENT & LAND PETITION 13 OF 2021**

**LL NAIKUNI, J**

**SEPTEMBER 28, 2022**

**IN THE MATTER OF: PROTECTION OF FUNDAMENTAL RIGHTS  
AND FREEDOMS UNDER CHAPTER V OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF: ARTICLE 67 OF THE CONSTITUTION ON  
PROSECUTION OF CLAIMS ON HISTORICAL LAND INJUSTICE**

**AND**

**IN THE MATTER OF: KENYA GAZETTE OF 1ST  
MARCH 2019 TABLE 3 S/NO4 NLC/HLI/124/2017**

**AND**

**IN THE MATTER OF: AN APPLICATION FOR ENVIRONMENT OF FUNDAMENTAL  
RIGHTS UNDER ARTICLES 22, 23, 40, 50,67 AND 165 OF THE CONSTITUTION**

**BETWEEN**

**KARAMA YAHYA KARAMA & 13 OTHERS ..... PETITIONER**

**AND**

**NATIONAL LAND COMMISSION & 21 OTHERS ..... RESPONDENT**

**JUDGMENT**

**I.Preliminaries**

1. This judgment pertains to a constitutional petition filed by the 1<sup>st</sup> and 2<sup>nd</sup> petitioners herein on March 8, 2020 dated the even date. The petition was brought under the dint of chapter v articles 67, (2) (e), 22, 23, 40, 50, 67 and 165 of the Constitution of Kenya, sections 6 and 15 of the National Land Commission Act No 5 of 2012 respectively.



## II. The Petitioners Case.

2. The petitioners herein have sought for the following remedies:-
  - a. A declaration that plot Nos Mombasa/block Xii/320-356 constituting the assets of the estates of Yahya Karama Laabdi (deceased) and Hassan Karama Al - beid (deceased) are private land within the definition of article 64 of the Constitution.
  - b. A declaration that under article 67 2(e) of the Constitution and sections 6 and 15 of the National Land Commission Act No 5 of 2012 or otherwise, the National Land Commission has no jurisdiction to adjudicate claim of historical injustice over private land.
  - c. A declaration that the decision of the National Land Commission delivered on February 7, 2019 and published in the Kenya gazette of March 1, 2019, table 3 item 4 breached the rights of the petitioners under articles 40 and 50 of the Constitution.
  - d. A declaration that the decision of the National Land Commission delivered on February 7, 2019, and published in the Kenya gazette of March 1, 2019, table 3 items 4 is against police and breached article 165 of the Constitution by attempting to override orders of the High Court in HCC succession cause No 142 of 2009 and HC succession cause No 174 of 2016.
  - e. A declaration that the decision of the National Land Commission delivered on February 7, 2019 and published in the Kenya gazette of March 1, 2019 table 3 item 4 in a nullity and incapable of implementation.
  - f. A declaration that the proceedings leading to decision of the National Land Commission delivered on February 7, 2019 and published in the Kenya gazette of March 1, 2019 table 3 item 4 did not qualify as a historical claim contemplated under article 67 (2) (e) of the Constitution and section 6 and 15 of the National Land Commission Act No 5 of 2012.
3. The petition is premised by the fundamental grounds testimonial facts and averments made out under the 33 paragraphed affidavit in support of the petition sworn by Karama Yahya Karama dated March 8, 2021. He as the 1<sup>st</sup> petitioner in the matter avers that he is one of the administration of the estate of his late father Yahya Karama Laabdi (“hereinafter referred to as “the deceased -1”) together with his brother Nasib Yahya Karama. He has annexed a copy of the certificate of grant issued on December 20, 2018 rectified on February 18, 2020 and November 24, 2020 in HC succession cause No 142 of 2009 Mombasa.
4. From the grant the other beneficiaries of Yahya Karama Laabdi and Hassan Karama Al - Beid are the 2<sup>nd</sup> to 13<sup>th</sup> petitioners based on the letter of consent by these other beneficiaries in simple terms – the beneficiaries of the estate of Yahya Karama Laabdi are (a) Nasib Yahya Karama (b) Karama Yahya Karama (c) Habshi Yahya Karama (d) Asya Yahya Karama. To that effect the assets for the estate of Yahya Karama Laabdi – the deceased – 1 are:-
  - i. ½ Share Mombasa/Block Xii 351;
  - ii. ½ Share Mombasa/Block XII 336;
  - iii. ½ Share Mombasa/Block XII 350;
  - iv. ½ Share Mombasa/Block XII 355;
  - v. ½ Share Mombasa/Block XII 347;



- vi. ½ Share Mombasa/Block XII 348;
  - vii. ½ Share Mombasa/Block XII 349;
  - viii. ½ Share Mombasa/Block XII 354;
  - ix. ½ Share Mombasa/Block XII 345;
  - x. ½ Share Mombasa/Block XII 354;
  - xi. ½ Share Mombasa/Block XII 325;
  - xii. ½ Share Mombasa/Block XII 328;
  - xiii. ½ Share Mombasa/Block XII 330;
  - xiv. ½ Share Mombasa/Block XII 332;
  - xv. ½ Share Mombasa/Block XII 337;
  - xvi. ½ Share Mombasa/Block XII 338;
  - xvii. ½ Share Mombasa/Block XII 339;
  - xviii. ½ Share Mombasa/Block XII 340;
  - xix. ½ Share Mombasa/Block XII 344;
5. He held that the beneficiaries of the estate of Hassan Karama Al-Beid (hereinafter referred to the deceased -2) were – (a) Faiza Hassan Karama, (b) Masad Hassan Karama (c) Amal Hassan Karama (d) Khaifa Hassan Karama (e) Karama Hassan Karama (f) Saida Hassan Karama (g) Aisha Hassan Karama (h) Suleiman Hassan Karama (i) Suhaila Hassan Karama as contained in the copy of the certificate of confirmation of grant issued on February 18, 2019 in HC succession cause No 174 of 2016. As shown from the grant the asset of the estate of Hassan Karama Al-Beid are
- a. ½ Share Mombasa/Block XII 351;
  - b. ½ Share Mombasa/Block XII 332;
  - c. ½ Share Mombasa/Block XII 325;
  - d. ½ Share Mombasa/Block XII 337;
  - e. ½ Share Mombasa/Block XII 339;
  - f. ½ Share Mombasa/Block XII 344;
  - g. ½ Share Mombasa/Block XII 338;
  - h. ½ Share Mombasa/Block XII 330;
  - i. ½ Share Mombasa/Block XII 354;
  - j. ½ Share Mombasa/Block XII 328;
  - k. ½ Share Mombasa/Block XII 340;
  - l. ½ Share Mombasa/Block XII 345;
  - m. ½ Share Mombasa/Block XII 341;



- n. ½ Share Mombasa/Block XII 356;
- o. ½ Share Mombasa/Block XII 355;
- p. ½ Share Mombasa/Block XII 352;
- q. ½ Share Mombasa/Block XII 349;
- r. ½ Share Mombasa/Block XII 348;
- s. ½ Share Mombasa/Block XII 336;
- t. ½ Share Mombasa/Block XII 335;
- u. ½ Share Mombasa/Block XII 334;
- v. ½ Share Mombasa/Block XII 323;
- w. ½ Share Mombasa/Block XII 320;

He confirmed that Yahya Karama Laabdi died on April 8, 2008 while Hassan Karama Al-Beid died on August 15, 2010 and prior to their death, some of the 2<sup>nd</sup> to 20<sup>th</sup> respondents were tenants in the properties above named. He averred that it was within his knowledge that as at September 4, 2015, none of the estates of the deceased-1 and 2 respectively had an administration. In this regard for the deceased -1 the administration was appointed by the court in HCC succession cause No 142 of 2009. For the of the deceased 0 2, the administration was appointed on February 18, 2019 in HCC succession cause No 174 of 2016.

6. He deposed that on February 8, 2016 the sole administrator of the estate of the deceased – 1 were Saumu Hassan Mbwana (widow of the deceased) died leaving the estate un-administrated. He next administrator was appointed on December 20, 2019. For the period between February 9, 2016 and December 19, 2018 the estate of the deceased -1 had no administrator for the estate of the deceased -2 the grant of letters of administration were issued on February 18, 2019.
7. He stated that on September 4, 2015, the 1<sup>st</sup> respondent issued a letter addressed to the estate of the deceased -1 and 2 which related to parcel No MN/Block XII 163 Ziواني Mombasa sub-divided into MN/Block XII/320 to 356 and taking that there was no legal administrator the letter was never acted on. He further deposed that on August 28, 2018 the 1<sup>st</sup> respondent convened a meeting at the Kenya School of Government (former GTI- Mombasa). He stated that some of the beneficiaries of the estate of the deceased -1. Learnt about the sessions scheduled to be heard and he personally attended the session where he disclosed to the 1<sup>st</sup> respondent that:-
  - a. With regard to the estate of deceased – 1 there was no administrator to respond to the issues raised. It was failed all claims from the estate to be raised in court.
  - b. Several of the 2<sup>nd</sup> to the 20<sup>th</sup> respondent had pending cases in court against the estate of the late deceased -1
  - c. The 1<sup>st</sup> respondent had no jurisdiction over private land.
  - d. The issues raised by some of the 2<sup>nd</sup> to the 20<sup>th</sup> respondents never qualified to historical injustices.

He confirmed that there was no representation of the 5<sup>th</sup> to 13<sup>th</sup> petitioners as they were not aware of the session by complainant lodged by the 2<sup>nd</sup> to 20<sup>th</sup> respondents. He informed court that there was no



formal proceedings that took place on August 28, 2018 and they never heard anything else later neither from the 1<sup>st</sup> respondent not anyone.

8. He deposed that in December, 2020 they received pleadings dated November 19, 2020 in ELC (Misc) application No 87 of 2020 (OS) Abdulkader Mohamed Awadh Salim and others v Karama Yahya Karama & 5 others. In these pleadings he came to know for the first time that the 1<sup>st</sup> respondent treated the brief meeting held on August 28, 2018 as proceedings for purposes of article 67 (2) of the Constitution of Kenya and sections 6 and 15 of the National Land Commission Act. He held that for the rest of the petitioners this was the first time they learnt about the claim by the 2<sup>nd</sup> to 20<sup>th</sup> respondents and the proceedings before the 1<sup>st</sup> respondent on August 28, 2018.
9. He deposed that the proceedings of August 28, 2018, were out rightfully and unlawful unconstitutional for the following reasons:-
  - a. None of the two estates had a legal administrator making the proceedings a nullity one having died on February 8, 2016 while the other got to be appointed later on – December 20, 2018.
  - b. The 1<sup>st</sup> respondent had no jurisdiction to deal with these properties belonging to the deceased 1 and 2 respectively.
  - c. The proceedings of August 28, 2018, was against the provision article 165 of Constitution of Kenya where a tribunal got to overturn the findings of the High Court. Such proceedings were a nullity *ab initio* and against public policy.
  - d. In relation to the two estates, the matters raised by some of the 2<sup>nd</sup> to the 20<sup>th</sup> respondents were not matters contemplated by the provision of articles 67 (2) (e) of the Constitution and sections 6 and 15 of the National Land Commission Act in:-
    - i. They were not verifiable as the complaints did not result in displacement of the claimant or other form of historical land injustice.
    - ii. The claim touched on matters actively in court as at August 28, 2018 in High Court succession cause No 142 of 2009 Mombasa.
    - iii. The claims contradicted the Law of Succession Act cap 160 in dealing with the property of a deceased persons.
    - iv. The claim was debarred by the provisions of section 7 of law Limitation of Actions cap 22.
    - v. Some of the claimants had matters pending in court.
    - vi. The affected properties for the estate of deceased 1 and 2 were private properties under article 64 of Constitution of Kenya and hence not the 21<sup>st</sup> respondent had no jurisdiction to adjudicate on a claim of historical injustice over private land.
    - vii. The time was barred under section 15 (3) of the National Land Commission Act.
    - viii. The claims were not occasioned by colonial occupation.
    - ix. The claims were not occasioned by the pre-independence treaty or agreement between a community and the government.



- x. The claims were not occasioned by development induced displacement for which no adequate compensation or other form of remedy was provided, including conversion of non public land into public land.
  - xi. The claim were not occasioned by inequitable had adjudication process or resettlement scheme.
  - xii. The claims were no occasioned by politically motivated or conflict based eviction.
  - xiii. The claims were not occasioned by corruption or other form of illegality.
  - xiv. The claims were not occasioned by other cause approved by the commission.
  - xv. Some of the claimants were not occupants of the land upon which the claim was based.
  - xvi. Some of the claimants had lawful contracts with the two (2) deceased proprietors as tenants and were authorized to construct a house without land.
  - xvii. The estate of deceased - 2 not notified of the proceedings condemned unheard.
  - xviii. The estate of the deceased – 1 had no admission.
10. He reiterated that on December 20, 2018 and February 18, 2019 and HCCC succession cause No 174 of 2016 the court issued a confirmation of grant vesting the properties to the beneficiaries of the estate of deceased - 1 and 2 respectively as per the annexed copy of the said certificate of confirmation grants and they were granted proprietary rights as per the provision articles 40 of *Constitution*. He held that they had now noted through the gazette notice published on March 1, 2019, the 1<sup>st</sup> respondent communicated that it allowed the claim pursuant to the proceedings of August 28, 2018 to vest all the assets of the estates of the deceased 1 and 2 to the 2<sup>nd</sup> to 20<sup>th</sup> respondents herein.
11. He averred that the decision by the 1<sup>st</sup> respondent was delivered on February 7, 2019 in this decision: -
- a. The family of the estate of deceased - 1 and siblings were directed to transfer the said land as sub-divided to the claimants.
  - b. The claimants were advised to apply to court for the deputy registrar to facilitate the transfer of the land to them.
  - c. As at February 7, 2019 all the properties of the two estates had been lawfully vested to the beneficiaries pursuant to the letters of administration.
  - d. The 1<sup>st</sup> respondent was aware that Karama Yahya Laabdi was deceased.
  - e. The 1<sup>st</sup> respondent was ware that there probate proceedings in court and it affected the beneficiaries who never appeared before the constituted by the 1<sup>st</sup> respondent on August 28, 2018.
  - f. The 1<sup>st</sup> respondent never considered the relevance of the pending probate cases before arriving or making its decisions. It's only the deponent who was present representing the estate of the deceased - 1. None of the beneficiaries of deceased - 2 were present.
12. Indeed the whole process leading to the decision of the 1<sup>st</sup> respondent dated February 7, 2019 was unlawful, unconstitutional oppressive and fraudulent. The proceedings adjudicated on issues touching lands of a deceased persons without ascertaining the presence of representation of the estate.



13. He contended that the 1<sup>st</sup> and 2<sup>nd</sup> petitioners had met the threshold set out in the now famous case of “*Anarita Karimi Njeru v Republic* (1976-80) 1KLR 1283” and emphasized in the case of “*Trusted Alliance Society of Human Rights v Attorney General and others* (2015) eKLR on the manner of pleadings in constitutional petitions and where a party was required to plead with precision the rights alleged to have been violated the manner of the alleged to have been violated and the jurisdiction basis for it.

## II.The Replying Affidavit by 2<sup>nd</sup> to 20<sup>th</sup> Respondents

14. On July 21, 2021, the 2<sup>nd</sup> to 20<sup>th</sup> respondents herein filed a 41 paragraphed replying affidavit sworn by Abdulkader Mohmaed Awadh Salim dated July 19, 2021. He deponed that this petition was directly related to the suit known as ELC (OS) No 87 of 2020 at Mombasa in which he was the 1<sup>st</sup> applicant together with the 18 others while the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> petitioners herein were the 1<sup>st</sup> to 4<sup>th</sup> respondents in that matter respectively, he held that he had authority of the 2<sup>nd</sup> to the 20<sup>th</sup> respondents and that the petition was brought in bad faith frivolous, vexatious, without cause of action meant to halt the wheels of justice and also a scheme by the petitioners to abuse the court process and deny the 2<sup>nd</sup> to the 20<sup>th</sup> respondents justice. He averred that the petition was an afterthought by the petitioner and had been brought about in a well-orchestrated move to circumvent the suit filed by the 2<sup>nd</sup> to 20<sup>th</sup> respondents before this court known as “ELC (OS (Mombasa) Misc Appl No 87 of 2020 Abdulkader Mohamed Awadh Salim & others v Karama Yahya Karama & 4 others”. He informed court that on February 3, 2021 they filed a replying affidavit in above suit and raised the same issues as stated here. He stated that the petitioners herein sought to contest the findings by the 1<sup>st</sup> respondent in its determination made on the February 7, 2019 but they were guilty under the doctrine of laches.
15. He argued that the petitioner had a right to appeal the determination made by the 1<sup>st</sup> respondent within 28 days but unfortunately they ignored or neglected to do so. Instead it took them two (2) years to realize that they were not contented with the findings of the 1<sup>st</sup> respondent and hence filed the instant petition. He averred that it is the 2<sup>nd</sup> to 20<sup>th</sup> respondents herein who moved the court in a bid to execute the determination of the 1<sup>st</sup> respondent delivered on the February 7, 2019 *vide* their application dated November 19, 2020 in Mombasa ELC Appl No 87 of 2020 which was filed 22 months after delivery of the subject matter determination. He stated that the petitioners herein realized that they were guilty of inordinate delay and had now mischievously attempted to hood whisk this court into re-opening the case between the petitioners and the 2<sup>nd</sup> to 20<sup>th</sup> respondents which was fully heard and determined by the 1<sup>st</sup> respondent herein. He held that the petitioners had willingly mislead this court by alleging that they were not party to the proceedings before the 1<sup>st</sup> respondent herein.
16. He opined that the 2<sup>nd</sup> to 20<sup>th</sup> respondents were not making this claim for the first time as they had done so *vide* a letter on February 23, 2015 where the petitioners and the respondents were summoned by the 1<sup>st</sup> respondent and a hearing was conducted on August 6, 2015. The 1<sup>st</sup> respondent sent out hearing notices to the individual petitioners and the same was advertisement in the Standard Newspapers dated July 27, 2015. Indeed, after hearing both parties, the 1<sup>st</sup> respondent addressed the petitioners through a letter dated September 4, 2015 in which the 1<sup>st</sup> respondent directed the petitioners to complete the pending transactions with the 2<sup>nd</sup> to 20<sup>th</sup> respondents directed the petitioners to complete the pending transactions with the 2<sup>nd</sup> to 20<sup>th</sup> respondents over the subject matter land.
17. He referred to the various sale agreements which the 1<sup>st</sup> respondent made reference to and which persuaded them in making the findings made but the petitioners refused and ignored to comply with the directions by the 1<sup>st</sup> respondent which created more tension with the 2<sup>nd</sup> and 20<sup>th</sup> respondents some of whom had been in occupation of the said land since the year 1960s. it was as a result of this tension



that the 2<sup>nd</sup> to 20<sup>th</sup> respondents approached the 1<sup>st</sup> respondent in the year 2018 for a remedy under the historical injustices claims which culminated to the determination made on the February 7, 2019.

18. He deponed that the 1<sup>st</sup> and 2<sup>nd</sup> petitioners herein were parties to the proceedings before the 1<sup>st</sup> respondent sometimes in the year 2018 and not only had legal representation but also had representation from the 1<sup>st</sup> petitioner Karama Yhaya Karama who indicated that he represented the interests of both the estates of the deceased 1 and 2. He argued that the petitioners have now sought to import succession issues in this matter in an attempt to mislead this honorable court to believe that they were never represented during the proceedings before the 1<sup>st</sup> respondents herein and consequently burred the court[’s vision from focusing on the main and relevant issues relating to the subject matter land.
19. He held that the petitioners had conveniently failed to disclose that upon the demise of the deceased – 1 his wife Saumu Hassan Mbwana was appointed as the administrator of the said estate as per the confirmation of grant dated August 12, 2014 before her demise on February 8, 2016. He further informed court that the 2<sup>nd</sup> to 20<sup>th</sup> respondents and their parents had been in occupation of the subject matter property since the year 1960s when the property was previously owned by one – Mr Peter Oliver Periera husband to Mrs Perpetua Angelina Periera. Upon the demise of Mrs Peter Oliver Periera, his wife Mrs Periera was registered as the owner of the suit property sometime in the year 1974 and subsequently sold it to Karama Al - Abeid Abud Timimi sometimes in the year 1981. He further informed court that his late father Mr Mohamed Awadh was in occupation of the suit property since the year 1960s having purchased a house without land from the late Mr Oliver Periera husband to Mrs Periera. He held having grown on the suit land where he still resided when Mrs Periera sold it to the grandfather to the petitioners – the late Karama Al - Abeid Timimi, in the year 1980s.
20. He averred that upon the demise of the late Karama Al - Abeid Timimi, both the deceased -1 to 2 took up ownership of the suit property and later sold it to the 2<sup>nd</sup> to 20<sup>th</sup> respondents on diverse dates as evidence in their respective agreements. He argued that they legally acquired the suit property from the deceased- 1 and 2 as evidenced in the agreements. They had been and continued paying land rates in respect of the suit property and in accordance to their respect plots occupied.
21. He informed court that sometimes in the year 1970s, the numerous land transactions that were taking place at the coast and particularly in Majengo area within Mombasa caught the attention of the then commissioner of lands J.A O’Loughlin prompting him to write a letter addressed to the registrar of titles instructing him on how to handle relating to the subject matter properties whereby parcel No 163/XII was one of them.

He deposed that sometimes in the year 1987, the then municipal council of Mombasa came up with a lay out plan on sub-division of various parcels of land including but not limited to parcel No 163/ XII which was sub-divided into sub division plots Nos 320 to 356 and subsequently approved by the municipal council of Mombasa. He held that sometimes in the year 1988 the then President the Late Daniel Torotich Arap Moi issued a presidential directive directing that the tenants who were in occupation of the sub-divided suit property among others to pay Kenya shillings thirty thousand (Kshs 30,000/=) and Kenya shillings fifteen thousand (Kshs 15,000/=) for those occupying front row plots and other rows respectively to their landlords after which the government would issue title documents.

22. He deponed that thereafter the then district land officer , D.T.A Owino approved the lay out plans earlier tendered by the Mombasa municipal council *vide* a letter addressed to the director of surveys and dated January 9, 1989. He alleged that the late deceased 1 and 2 entered into legal sale agreements with the 2<sup>nd</sup> to 20<sup>th</sup> respondents. Although they received the full purchase price but when the time came



to transfer the ownership to the 2<sup>nd</sup> to 20<sup>th</sup> respondents, they declined on ground that the purchase price was too low thereby resulting to the current state of affairs.

He held that the dispute and evidence were presented to the 1<sup>st</sup> respondent before the historical land injustice committee which heard it and on February 7, 2019 made its determination. He urged that this matter did not fall under the jurisdiction of the succession court. He contended that the matter qualified as a historical injustices claim and was properly heard and determined by the 1<sup>st</sup> respondent who was legally mandated to handle such claims. In conclusion, he asserted that the petitioner was an abuse of the due process as no cause of action was raised. It was only brought to frustrate the 2<sup>nd</sup> to 20<sup>th</sup> respondents efforts to execute the decision of the 1<sup>st</sup> respondents and as such ought to be dismissed with costs.

#### **IV. The Replying Affidavit by the 21<sup>st</sup> Respondents**

23. On December 9, 2021, the 21<sup>st</sup> respondent the honorable Attorney General filed a 22 paragraphed replying affidavit of Samuel Mwangi the duly appointed county land registrar, at Mombasa, Sworn and dated December 9, 2021. He averred that he was duly appointed as such with ancillary powers as stipulated in sections 14 of The [Land Registration Act](#), 2012. He undertook to respond to the issue as to whether the 1<sup>st</sup> respondents decision directing transfer of suit property from the estate of Karama Yahya to the respondents was unconstitutional. He informed court that the proceedings conducted by the 1<sup>st</sup> respondent emanated from their mandate under the [Constitution](#) of Kenya, 2010, under the provision of article 67(2) (e) and section 15 of the [National Land Commission Act](#) No 5 of 2012 and the regulations thereof.
24. While responding onto the allegations as to whether the 1<sup>st</sup> respondent had jurisdiction to adjudicate a claim of historical injustice over private land, he averred as follows:-
- a. The functions of the NLC dealt with land tenure in all forms and it was not restricted to private or public land and based on the interpretation of section 5 of the NLC Act No 5 of 2012.
  - b. The mandate addressed the holistic issue of land when exercising powers under sections 15 of the [National Land Commission Act](#). No 5 of 2012 and the admissibility. The criteria used to asserts all historical land injustices claims was categorized under regulations 7(3) was the Historical Land Injustices Rules 2016.
    - i. Colonial occupations
    - ii. Independence struggle
    - iii. Treaty or agreement
    - iv. Development induced
25. He further held that the petitioners admitted participating during the hearing proceedings conducted on August 28, 2018 by the 1<sup>st</sup> respondent herein. Thus the 1<sup>st</sup> respondent discharged their constitutional principles of fair hearing under article 50 and sections 8 of the [National Land Commission Act](#).

Based on the claim by the petitioners that there existed a succession dispute and which proceedings canvassed the distribution of the estate of the deceased, he argued that the said distribution did not invalidate the existence of the agreement between the deceased 1 and 2 and the 2<sup>nd</sup> to 20<sup>th</sup> respondents – he relied on the following reasons: -



- a. This process directed the administration as to the liabilities accruing to the estate due to the respondents herein.
  - b. The petitioners willingly and knowingly failed to avail the pleadings of the succession dispute to the 1<sup>st</sup> respondent and hence estopped from doing so now.
  - c. The jurisprudence on the principles of disclosure of material facts where the petitioners avail facts after conclusion of judgments courts held that such suits were pegged on falsehoods and if permitted litigation would never end.
26. Therefore, he urged court to dismiss the petition based on the non-disclosure of material facts. He further argued that based on the provisions of section 83 of the *Evidence Act*, cap 80, the petitioners relied on photocopies of the court pleadings which were not certified without calling for the production of the court file in the succession cause No PMXCC No 4022 of 2004 and hence they should be expunged from record. He further stated that the petition was anchored in bad faith as the petitioners admitted proceedings of August 28, 2018 yet denied outcome of the proceedings held on August 28, 2018 which led to the issuance of the gazette notice of March 1, 2019.
27. He deponed that the petitioners had failed to exhaust the mandatory internal dispute resolution mechanism available under regulations 29 of the National Land Commission (Investigations of Historical Injustice) Regulations and it was trite law that where a certain course of action or procedure of seeking redress had been specifically provided for then that procedure ought to be followed before any other recourse to the court for relief. For that reason therefore this court had no jurisdiction to determine this suit under the provision of section 9 (2) (3) of the *Fair Administrative Action Act* 2015 and article 159 (2) (c) of the *Constitution* of Kenya, *National Land Commission Act* and the regulations 29 of the National Land Commission (Investigations of Historical Injustices) Regulations.
28. He contended that the petition was time barred and a nullity in law, which disclosed no constitutional issued for determination by this honorable court and court should exercise doctrine of constitutional avoidance. He stated that the suit properties had not been transferred to the respondents as ordered by the 1<sup>st</sup> respondent as evidenced in the green cards. In conclusion he urged court to dismiss the petition with costs.

#### **V.The Supplementary Affidavit by the Petitioners**

29. On August 17, 2021, the 2<sup>nd</sup> to 20<sup>th</sup> respondents filed a six (6) paragraphed supplementary affidavit of Karama Yahya Karama the 1<sup>st</sup> petitioner herein while responding to the issues raised in the replying affidavit by Abdulkader Mohamed Awadh Salim filed in court on July 21, 2021. He averred that the letter of authority marked “Amas -1”) was not signed by Jemmima Najama Asati and Khadija Salim Abdalla respectively.

He further attacked the authenticity of the agreement between one Saleh Nassir Said. It was done on March 10, 1988. He held that the said Saleh Nassir Said was not a party in the proceedings before the ELC. That also applied to the Agreement for Rehema Athmani, Ali Mohamed Bakari, Maamini Ali Mohamed and Mohamed Ali Mohamed, Miss Zafaran Rizik, Miss Siada Rizik and Mr Tesir Riziki and Mr Saadalia Riziki as all these alleged purchasers were not parties to the case. He deposed that the agreement of 1994 by the time their fathers died in the years 2008 to 2010 more than 12 years had expired – why wait up to the year 2015 to raise the first claim.

He disapproves the alleged to have served Hahya Yahya Karama had no authority to represent any of the estates. What the replying affidavit has been relying on the respondents who were all tenants of their fathers. They disputed the authenticity of all receipts purporting to be for payment of land. He



averred that *vide* a letter dated February 22, 1974 addressed to the Registrar of Titles Mombasa. He held that the property in contest was land whose title was issued under the [Registration of Land Act](#) cap 300 (now repealed). For this reason, that the Registrar of Titles had no jurisdiction to deal with land registered under that act.

30. In conclusion, he averred that there were many owners of land from this sub-division who acquired their pieces of land legally, Hence, it was those who never purchased land from their late father who were the ones now ganging up together to acquire prime land for free.

## VI. Submissions

31. On June 23, 2021 while in the presence of all parties, this court and by the consent of all the parties herein to have this petition and a civil suit ELC (OS) Misc No 87 of 2020 be heard and disposed off together by way of written submissions.

Pursuant to this, all the parties herein fully complied with the said directions accordingly by filing their written submissions. On March 7, 2022, each of the parties were accorded a brief opportunity to highlight their submissions orally. Thereafter, the honorable court reserved that it would be rendering its judgement in due course.

### A. The 1<sup>st</sup> to 20<sup>th</sup> Petitioners Written Submissions to the Petition:

32. On November 9, 2021, the learned counsel for the 1<sup>st</sup> to 21<sup>st</sup> petitioners herein the law firm of Messrs Munyithia Mutugi, Umara and Muzna & Company Advocates filed their written submissions dated November 8, 2021. Mr Munyithia Advocate submitted that the 1<sup>st</sup> respondent was aware that these were probate proceedings in court affecting the beneficiaries who never appeared before the parcel constituted by the 1<sup>st</sup> respondent on August 28, 2018, whereby the 1<sup>st</sup> respondent never considered the relevance of the pending probate cases before making its decisions. The learned counsel averred that the 1<sup>st</sup> petitioner attended the proceedings appeared as a potential beneficiary but had no legal authority to represent the estate or the other beneficiaries. The estate of the deceased – 2 was never notified of the proceedings and the complaint by the 1<sup>st</sup> respondents – hence they were condemned unheard contrary to the rules of natural justices. The fact that both estates had no administration thus the proceedings were a nullity and constitutional an act of meddling of the estate of the deceased – 1 and 2. To buttress on this point they relied on the decision of “[Ali Noor Abdi Elmi Ali & 2 others v Wilson Kipyegon Chelule & 2 others](#) (2021) eKLR.

33. The learned counsel has further submitted under the following four (4) issues. These are:-

Firstly, the 1<sup>st</sup> respondent excised jurisdiction of a private land yet it had no such jurisdiction to do. He held that the suit property were private property as per the provisions of article 63 of [Constitution](#) of Kenya. Following the death of the deceased – 1 and 2 the petitioner filed probate proceedings and were issued with the certificate of grants hence acquiring proprietary rights over the suit property under article 40 of the [Constitution](#) of Kenya, 2010.

To juxtapose this point, he held that the 1<sup>st</sup> respondent’s jurisdiction is set out in the provision of article 67 of [Constitution](#) of Kenya and under [National Land Commission Act](#) No 5 of 2012 and which does not provide the National Land Commission legal mandate to deal with private property. On this point he relied on the authorities of “[The Registered Trustee of the Arya Pratinidhi Sabla, Eastern Africa v The National Land Commission and another](#) (2016) eKLR and “[In the Matter of the National Land Commission](#) advisory reference No 2 of 2014 (2015) eKLR with the holding that the role and mandate of the 1<sup>st</sup> respondent had “to be construed as narrowly as possible and not extended unreasonably to avoid role conflicts” with other state organs.



Secondly, the 1<sup>st</sup> respondent had no jurisdiction to deal with land subject matter to probate proceedings pending in High Court. He argued that by the time the 1<sup>st</sup> respondent was convened the meeting on August 28, 2018, the estate of the deceased – 1 and 2 were subject to proceedings for letters of administration. Further, the proceedings were against the article 165 of *Constitution* of Kenya where a tribunal sat to overrun the findings of the High Court, such proceedings were a nullity ab-initio and were proceedings against public policy. The court should strike out the findings by the 1<sup>st</sup> respondent of February 7, 2019.

Thirdly, there was no service of hearing notice upon the petitioners of the hearing of August 28, 2018 according to the provisions of article 50 of *Constitution* of Kenya as the estate of deceased – 1 and 2 were never notified of the proceedings and the complainant by the 1<sup>st</sup> respondent. For that reason, they were condemned unheard contrary to rules of natural justice; He reiterated that the estate of deceased -1 had no administrator. Such proceedings constitute an act of meddling with the estate of a deceased person. Karama Yhaya Karama who attended appeared as a potential beneficiary but had no legal authority to represent the estate or the other beneficiaries. These other beneficiaries were equally condemned unheard.

Fourthly and lastly the learned counsel argued that the issues raised by the 2<sup>nd</sup> to 20<sup>th</sup> respondents never qualified as historical injustice – as contemplated by article 67(2) (e) of the *Constitution* of Kenya and sections 6 and 15 of the *National Land Commission Act*. He provided the particulars of fraud leading to the decision of the 1<sup>st</sup> respondent dated February 7, 2019 – being adjudicating on matter of a deceased persons without ascertaining the presence of representation of the estate and also knowing too well that the matter was pending in court. He added the estate of deceased – 2 was not present and no evidence of their service, the 1<sup>st</sup> respondent proceeded to conduct proceedings. He added, the 1<sup>st</sup> respondent alienating private land without jurisdiction.

34. The learned counsel submitted that the respondents had raised jurisdictional points under section 9(2) (3) of the *Fair Administration Act 2015* and article 159 (2) (c) of *Constitution* of Kenya, National Land Commission, to wit: -

- a. Section 2 of the *Fair Administration Act 2015* provides for instances in which the court may intervene over the decision of tribunal, the court can intervene if the person who made the decision denied the persons to who the administrative action or decision relates, a reasonable opportunity to state the person's case.

The contention by the learned counsel was that under the regulations 29 of the National Land Commission (Investigations of Historical Injustice) it provides for an aggrieved person by the decision of National Land Commission to file an appeal to court within 28 days of publication.

He submitted that for the publication targeting the Petitioners the ideal newspaper should have been a newspaper in the Kiswahili language – in particular “The Taifa Leo” – otherwise, he argued it would be unreasonable and oppressive against the petitioners to access either the Kenya gazette or website of the 1<sup>st</sup> respondent.

He further submits that there was no personal service of the decision upon the affected persons as contemplated under regulations 27.

Additionally, the learned counsel contention was that the regulation was silent on what happened on the aggrieved person who had not been served with the decision of the National Land Commission. Further, the regulation was also silent on what happened if an aggrieved person by the decision by the National Land Commission did not file an appeal within 28 days of publication of the decision of the National Land Commission.



35. In conclusion, the learned counsel held that this honorable court had jurisdiction to hear and grant the prayers sought within the legal framework set out on the body of the petition

### **B.The Written Submissions by 1<sup>st</sup> Respondents**

36. On December 17, 2021, the learned counsel for the 1<sup>st</sup> respondent, filed their written submissions dated December 14, 2021, Mr S. Mbuthia Advocate submission that they opposed the petition dated on March 8, 2021. They relied on the replying affidavit of Brian Ikol. The learned counsel argued from the outset that the orders sought by the petitioner could not issue for lack of merit. Under the following grounds:-

Firstly, the constitutional petition by the petitioners never raised pure constitutional issues and mere quoting of the *Constitution* and constitutional provisions does not make it a petition that disclose pure constitutional issues as founded in the South African cases of “*Fredricks & others v MEC for Education and Training, Eastern Cape & others* (2002) 23 ILJ 81 (CC)

37. He further argued that the constitutional litigation was not open for every claim which may properly be dealt with under that the alternative existing mechanism for redress in civil or criminal law as founded in the case of “*Speaker of the National Assembly* (supra). The learned counsel held that the principle of constitutional avoidance as enunciated in the South African case of “*S v Mbulungu* and the Court of Appeal – *Communications Commission of Kenya & 5 others Royal Media Services Limited & 5 others* (2014) eKLR.

Secondly, the learned counsel contention while relying on the case of “*Samuel Kamau Macharia & another v Kenya Commercial Bank & 2 others* that this honorable court lacked the original jurisdiction to entertain the dispute as framed in the petition herein. He held the petitioned herein being aggrieved by the decision of 1<sup>st</sup> respondent dated February 7, 2019 requiring them to transfer the suit land to the 2<sup>nd</sup> to 20<sup>th</sup> respondents instead of preferring an appeal against the decision of February 7, 2019 as provided for bylaw they filed this petition under rule 29 of the National Land Commission (Investigation of Historical Land Injustice) Regulations, 2017. He further held that the decision having been rendered on February 7, 2019 while the petition was filed two (2) years later in 2021 way outside the statutory prescribed period.

Thirdly, the learned counsel averred that the 1<sup>st</sup> respondent had jurisdiction to entertain the claim lodged by the 2<sup>nd</sup> to 20<sup>th</sup> respondents as per the provisions of article 67 of *Constitution* of Kenya and section 15 of National Land Commission.

To support its argument, the learned counsel relied on the international instructions of *United Nations Declarations on the right of indigenous peoples and International Labour Organization* (ILO) No 169 which defined Historical Land Injustices in terms of safeguarding the rights of indigenous people over their ancestral land.

38. The learned counsel argued the claim by the historical land injustices claim was subjected to and the 1<sup>st</sup> respondent founded the claim admissible for the following reasons: -

- a. The claim by the 2<sup>nd</sup> to 20<sup>th</sup> respondent occasioned by an agreement and more specifically a sale agreement.
- b. The cause of action arose between June 15, 1895 and August 27, 2010.
- c. The claim had not sufficiently been resolved to date and it was still subsisting as of 2010.
- d. It was verifiable that the claim resulted in other form historical land injustice.



- e. The cause of action arose on or about the year 1998 and the claim was not capable of being resolved by the court since it is debarred under section 7 of the [Limitation and Actions Act](#).
- f. The claimant occupied and continued to occupy the suit land.
- g. Some of the claimants were displaced from their land.
- h. No evidence was presented that the claimant ever renounced their rights to the suit land.

According to him therefore the claim was admissible and the same was duly admitted for processing. Hence, all the parties were invited and participated in the hearing held on August 28, 2018. He held that undoubtedly clear the historical land injustices proceedings over the suit property were lawful, reasonable fair and within the dictates of article 47 of the [Constitution](#) of Kenya. He held that the right to fair administrative action and to be heard should not be interpreted to mean a full adversarial hearing. Through the petitioner appeared the hearing but never raised any issues on any dispute that was pending before court –vis –a- vis the succession cause PM CCC No 4022 of 2004. They never any preliminary objection on the jurisdiction of the 1<sup>st</sup> respondent to entertain the claim and they were now estopped from raising that issue. He averred that the only issue was that the estate had no legal administrator and upon perusal of the pleadings in PMCC No 4022 of 2004 and the following issues came to fore:-

- a. The said suit was a probate matter only concerned with the distribution of the estate of the deceased.
- b. The ownership dispute of the suit land as between the petitioners and 2<sup>nd</sup> to 20<sup>th</sup> respondent was not before court for determination had been rendered by the court on that issue. In any event the family court was bereft of jurisdiction to entertain such disputes.
- c. The 1<sup>st</sup> respondent and the 2<sup>nd</sup> to 20<sup>th</sup> respondents were not to the said succession cause.
- d. There was no decision on merits or proceedings before any court where the issues raised in the complaint had been subject of judicial proceedings or had been adjudicated upon by any court of law.
- e. The claims were time barred and they could not be litigated upon in a court of law due to the statute on limitation of time. Therefore, he argued that there was no succession cause had no nexus to the claim before the 1<sup>st</sup> respondent and the suit was only relevant for purposes of distributing the estate that was not contested. The succession cause would also be relevant during the implementation of the decision of the 1<sup>st</sup> respondent herein

39. In conclusion, the learned counsel held that the legal mandate of the 1<sup>st</sup> respondent and held the petitioners had failed to substantiate with specificity which rights had been violated and how they had been violated clearly failing the test in *Anarita Karimi v Republic* (supra) and prayed that the petition be dismissed in totality.

### **C.The 2<sup>nd</sup> to 20<sup>th</sup> respondents written submissions**

40. On December 1, 2021, the learned counsel of the 2<sup>nd</sup> to 20<sup>th</sup> respondents, the law firm of Messrs Gitahi Gathu & Company Advocates filed their written submission. Mr Gitahi Advocates submitted mainly on three (3) issues as follows:-



Firstly, that the National Land Commission's Historical Land Injustices Committee had jurisdiction to hear and determine the claim. The National Land Commission derived its authority from article 67 (3) of Constitution of Kenya the National Land Commission Act No 5 of 2012 which established under section 16 for the better carrying out of the functions mandated to the National Land Commission. Further, section 15 gave the National Land Commission the original jurisdiction to receive admit, investigate historical injustices complaints and recommend appropriate redress. He argued that a judicial or quasi-judicial institution derives its authority from either the Constitution or the statute or both. He held that this position was alluded and rightfully so, to by Supreme Court the case of "Samuel Kamau Macharia & another v Kenya Commercial Bank & 2 others" SC (Appl)No 2 of 2001" held thus:-

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of Law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law" and also cited the now famous case of "Owners of Motor Vessel "Lillian "S" v Caltex Oil (Kenya) Limited 1989 eKLR" Where court has state without jurisdiction a court or tribunal/quasi – judicial body could not purport to handle a matter with which it has no jurisdiction over as such conduct was a nullity and could not be upheld under the law.

41. He relied on the decision of "Henry Wambega & 4 others v Attorney General & 6 others" where court held. This court enjoyed the appellate jurisdiction in matters relating to historical injustices claim as provided for by law. He further relied on the Supreme Court decision of "Benson Ambuti Adeja & 2 others v Kibos Distillers Limited & 5 others" (2020) eKLR which held: - "..... A court does not have jurisdiction to hear and determined issues that could be determined by other properly constituted institutions/tribunals even when some of the issues therein form elements that are within such courts jurisdiction"

It was the learned counsel submissions that the instant petition sought to have this honorable court re-open proceedings which had already been concluded by the 1<sup>st</sup> respondent. Under the impressions that this honorable court had original jurisdiction to hear historical injustices claims contrary to the holding of the above Supreme Court case. He emphasized that the petitioners who had brought a multi faceted suit on grounds they were never accorded an opportunity to be heard, but all just being a gimmick to oust the jurisdiction of National Land Commission. He wondered why the petitioners never lodged an appeal instead of re-inventing the wheel by filing this petition. To him the petition never raised any constitutional issue but merely forum shopping in disregard of the existing law. They persuaded court to apply the legal maxim of "equity aids the vigilant, not the indolent".

Secondly, the learned counsel submitted that the National Land Commission's historical Land Injustices Committee complied with the law in executing its mandate – as encapsulated under article 67 (2) (e) of the Constitution of Kenya, 2010 and sections 6 and 15 of the National land Commission Act of 2012. The National Land Commission was empowered to conduct investigations of such a claim as provided under rules 12, 12, 14, 15, 18, 20, 22 and 27 of National Land Commission Regulations.

42. In the instant case the National Land Commission complied with all the legal requirements to receive, investigate hear and determine the subject claim. According to him the petitioners were duly served with the hearing notices, attended the hearing on the August 28, 2018 and after according all parties an opportunity to be heard, the 1<sup>st</sup> respondent proceeded to deliver a determination on the February 7, 2019. He held that the said determination was thereafter published on the Kenya gazette on the March 1, 2019 after which the petitioner had an opportunity to file an appeal within 28 days as provided for by law.



43. According to the learned counsel, the petitioners took almost two (2) years to realize that they were dissatisfied with the determination by the National Land Commission's Committees and proceeded to file this petition after having been served and responded to the respondents' Misc application (OS). He argued that this was a means to delay justice bearing in mind they had already filed their responses to the OS application.

He averred that there was no fraud committed by the 1<sup>st</sup> respondent by proceeding with the hearing as the dispute had been long standing between the parties. There had been a complaint by the respondent in the year 2015 but which the petitioners failed to participate on ground that they had not appointed a legal administration to the estate. Be that as it may the learned counsel still wondered why they never sought for a limited grant for that purpose.

Thirdly, the learned counsel submitted that from the given circumstances, the legal remedy available to the petitioners would have been to prefer an appeal from the decision made by the National Land Commission Committee on August 28, 2018. He urged that this court enjoyed appellate jurisdiction from determination made by the National Land Commissions' historical injustices committee.

He cited the provisions of the National Land Commission (Investigation of Historical Land Injustices) Regulations, 2017 rule 29 which provided:-

“A person aggrieved by the decision of the commission may, within twenty eight (28) days of the publication of the decision appeal to the court”. In this case the court is the ELC established under the [Environmental and Land Court Act](#) No 19 of 2011.

He further cited section 13(4) of the [Environment and Land Court](#) which gives court the appellate jurisdiction.

However, he argued that instead of preferring an appeal, the petitioners filed a constitution petition as an effort to challenge the National Land Commission's Committee decision. They never gave a solid reason why they never did this for two (2) years.

On the other hand, the respondents approached court to have the same adopted and executed as a judgment of this court which was within this court's jurisdiction.

44. In the final point, the learned counsel urged court to have two reliefs. (a) have the determination dated February 7, 2019 adopted and executed as prayed in the applicants (OS) application dated November 19, 2020 and (b) that have the petition dated March 8, 2021 be dismissed with costs.

#### **D. Written submissions by the 21<sup>st</sup> respondent**

45. On January 31, 2022, the state law officer for the 21<sup>st</sup> respondents herein filed their written submissions dated January 28, 2022 M/s Njau Advocate commenced her submission by recounting though briefly on the fact of the case by the petitioners she submitted on the following five (5) issues namely.

46. Firstly the petitioner failed to exhaust the mandatory internal dispute resolutions mechanism available under regulations 29 of the NLC investigations of Historical Injustices Regulations to wit:-

“A person aggrieved by the decision of the commission may within twenty-eight (28) days of the publication of the decision appeal to the court”

She argued and by citing the decisions of “[Speaker of the National Assembly v James Njenga Karume](#) (1992) eKLR Nbi civil application No 92 of 1992. Court of Appeal – [Republic v the](#)



47. The learned counsel averred that right way for the petitioners would have been by preferring an appeal against the decision by the 1<sup>st</sup> respondent as provided for under section 9 (2) of the Fair Administration Action Act and not instituting a constitutional petition. She argued the petition was a nullity in law and a waste of the courts time because a court or tribunal without jurisdiction was like an animal without blood, which meant it was dead. Citing the case of “William Mutuara Kairiba v Samuel Nkari & 2 others (2018).

Secondly, the learned counsel contention was that the petition was a gross abuse of the court’s process on the following grounds:-

- a. The court process is settling disputes related to the 1<sup>st</sup> respondent was explicitly clear. The petitioners had failed to adhere to it.
- b. The petitioners ought to have appeal against the decision by the 1<sup>st</sup> respondent.
- c. The petitioners only filed the petition at the time the respondents filed an application for the enforcement of these orders by the 1<sup>st</sup> respondent hence frustrating that process.
- d. The petitioners were seeking to consent the findings of the 1<sup>st</sup> respondent issued on February 7, 2019 *vide* this suit.

Thirdly, the learned counsel submitted that the National Land Commission had jurisdiction to investigate disputes pertaining to private properties. On the basis that the function of National Land Commission was to deal with land tenure in all forms. She relied on the interpretation of section 5 of the National Land Commission Act No 5 of 2012 and article 67 (2) (e) of the Constitution to wit:- “to initiate investigations, on its own initiative or on a complaint into present and historical land injustices and recommend appropriate redress”.

She further argued that the mandate for the 1<sup>st</sup> respondent addressed the holistic issue of land when exercising powers under section 15 of the National Land Act No 5 of 2012 and the admissibility criteria used to assess all historical land injustices claims categorized under regulation 7(3) was the Historical Land Injustices Rules 2016. She argued that the petitioners admitted participating during the hearing proceedings conducted on August 28, 2018 by the 1<sup>st</sup> respondent herein thus the 1<sup>st</sup> respondent discharged their constitutional principle of fair hearing under article 50 of Constitution of Kenya and section 8 of the National Land Act. While relying on the decision of “Court of Appeal Tom Dola & 2 others v Chairman, National Land Commission & 5 others (2010) eKLR and Republic v National Land Commission & another (2018) eKLR she stressed that there was nothing stopping the 1<sup>st</sup> respondent while carrying out its legal mandate that prohibited it from dealing with inquiring over privately owned land – that the 1<sup>st</sup> respondent had the constitutional powers and mandate to investigate claim related to land whether public or private land.

48. Fourthly, she submitted that the petitioners were guilty of material non-disclosure of facts. They failed to avail to the 1<sup>st</sup> respondents the pleadings and proceedings of the High Court succession dispute No 4022 of 2004 on the distribution of the assets for the estates of deceased – 1 and 2 respectively. Thus they were estopped by law and equity from relying on the same in the suit. To buttress her argument, she relied on several decision being “Paul Koinange v Donald Kipkorir HCCC No 2040 of 2000, civil appeal No 80 of 1988 Pop-in (K) Ltd & 30 others v Habib Bank, AG, Zurich, and Aviation & Airport Services Workers Union (K) v Kenya Airport Authority & another (2014) eKLR where petition availed facts after conclusion of judgment court held that such suits were pegged on falsehoods and



if permitted litigations would never end. For this reason, she prayed that the documents annexed as pleadings be expunged from the record since they were inadmissible and their authenticity could not be confirmed by this court.

In conclusion, she prayed for the petition to be dismissed taking that it was anchored in bad faith whereby the petitioners admitted proceedings of August 28, 2018 yet denied its outcome which led to the issuance of the gazette notice of March 1, 2019,

## **VI. The Issues for Analysis & Determination**

49. I have keenly assessed all the filed pleadings – the supporting affidavits, replies, the written submissions, authorities in this petition and the relevant provisions of the Constitution of Kenya, 2010 and the statutes. In order to arrive at an informed, reasonable, fair, just and equitable decision, I have condensed all the issues raised herein by the parties into the following six (6) salient sub – headings for its determination. These are:-
- a. Whether the Constitution petition filed by the petitioners met the laid down principles on constitutional set up.
  - b. Whether this court has jurisdiction to hear and determine the issues raised in this petition.
  - c. Whether the subject matter of suit property being private property and dispute of historical injustice falls within the jurisdiction of the National Land Commission under the provisions of article 67(e) of the Constitution of Kenya and sections 6 and 15 of the National Land Commission Act, No 5 of 2012.
  - d. Whether the parties herein are entitled to the relief sought, to wit:-
    - i. The petitioner never filed an appeal within 28 days.
    - ii. The petitioner filed the petition after 2 years from the date of the NLC decision.
  - e. Whether the principles of natural justice was applied in relation to the proceedings conducted before the National Land Commission on August 28, 2018 and its decision rendered on February 7, 2019.
  - f. Who will bear the costs of the petition?

SUBDIVISION - Issue No (a) Whether this honorable court has jurisdiction to hear and determine the issues before it.

### **Brief Facts: -**

50. Prior to embarking on the analysis of this issue under this sub-heading the court finds it imperative to extrapolate on the facts of the case through briefly. From the filed petition, the 1<sup>st</sup> to the 4<sup>th</sup> petitioners were the legal administrators/beneficiaries of the estate of the deceased – 1 pursuant to the certificate of confirmation of grant issued on December 20, 2018 rectified on February 18, 2020 and November 24, 2020 in HCC succession cause No 142 of 2019 Mombasa prior to the death of deceased – 1 and 2 some of the 2<sup>nd</sup> to the 20<sup>th</sup> respondents were tenants in the properties from the two (2) estates.
51. The 5<sup>th</sup> to the 13<sup>th</sup> petitioners were legal administrators/ beneficiaries on the estate of the deceased -2 pursuant to a grant issued February 18, 2019 in HC succession No 174 of 2016 Mombasa in relation to the estate.



52. According to the 2<sup>nd</sup> to the 20<sup>th</sup> respondents they were residents of Ziwani Majengo in Mombasa who had been occupying the suit land and houses at Majengo on land they claim to have bought from the estates of the deceased 1 and 2 respectively. They claim to have been living on the land as tenants at will paying ground rent to the Land-lord who was Mr P.A Pereia. However, Mr Pareia sold it to Karama Abed Abudja but the tenants continued to pay ground rent until there was a presidential directive that such arrangement ceases forthwith and that the tenants be sold the property to enable them to be paying rent directly to the county government of Mombasa. They claimed this directive was issued in 1998. The 2<sup>nd</sup> to 20<sup>th</sup> respondents claimed they entered into a sale agreement with Yahya Karama to purchase the land on which they already had houses at a sale price of Kenya shillings thirty thousand (Kshs 30,000/=). However, as fate would have it the deceased 1 and 2 died before the transfer had been executed, from there the sons of the deceased -1 and 2 refused to cause the transfer of the suit property by executing the necessary documents to have enabled the transfer of the land. They produced copies of the duly executed sale agreements.

53. As result of this state of affairs the 2<sup>nd</sup> to 20<sup>th</sup> respondents decided to lodge a complaint with the 1<sup>st</sup> respondent. On August 28, 2018 the 1<sup>st</sup> respondent convened a session at the Kenya School of Government (former GTI Mombasa). Some relations of the beneficiaries of the estate of the deceased – 1 learnt about it and attended. However, there was no representation of the 5<sup>th</sup> to 13<sup>th</sup> petitioners – estate of the deceased – 2 as they were not aware of the session or complainant by the 2<sup>nd</sup> to 20<sup>th</sup> respondents. According to the petitioner no formal proceedings took place on that day and they never heard anything else later on either from the 1<sup>st</sup> respondents or otherwise.

The petitioner averred that it was in the month of December, 2020 that they received pleadings dated November 19, 2020 in ELC Misc Appl No 87 of 2020 (OS) Abdulkader Mohamed Awadh Salim & others v Karama Yahya Karama & 5 others. From these pleadings they came to know for the first time that the 1<sup>st</sup> respondents treated the brief meeting on August 28, 2018 as proceedings for purposes of articles 67 (2) of the [Constitution](#) of Kenya and sections 6 and 15 of the [National Land Commission Act](#). To them, for the rest of the petitioners this was the first time they learnt about the claim by the 2<sup>nd</sup> to 20<sup>th</sup> respondents and proceedings before the 1<sup>st</sup> respondents on August 28, 2018.

On February 7, 2019, the 1<sup>st</sup> respondent delivered its decision directing *inter alia* that the family of the deceased – 1 and siblings to transfer the suit land sub-divided to the 2<sup>nd</sup> to 20<sup>th</sup> respondents. Further, they were advised to apply to court for the deputy registrar to facilitate the transfer of the land to them. On March 1, 2019 the 1<sup>st</sup> respondent through a gazette notice published communicated that it allowed the claim pursuant to the proceedings of August 28, 2018 to vest all the assets of the estates of the deceased 1 and 2 to the 2<sup>nd</sup> to 20<sup>th</sup> respondents from the pleadings, the petitioners alleged that they were not aware of all these development – hence alleged breach of the principles of natural justice – of being condemned unheard. Hence being aggrieved by the foregoing, the petitioners filed this constitutional petition and an affidavit in support of it. That is adequate of the facts of this case.

54. Now turning to the issue under this sub-heading. My view is that thus court has jurisdiction to deal all present and historical related matters as provided for under article 162 (2) (b) of [Constitution](#) of Kenya and section 3 and 13 of the ELC Act No 19 of 2011. It's for this reason this court will critically deal with both the matters before it emanating from the originating summons Misc No 87/2020 dated November 19, 2020 and the [Constitution](#) petition No 13 of 2021 in this judgment.



**Issue No. (b) Whether the national land commission had the legal mandate to deal with the matters before it – on the basis of historical injustice**

55. Under this sub – heading, this court holds that a factor which is now well established that the Constitution is the supreme law. It is a living tissue and like all such tissues it has to be fed and watered. It breathes and without oxygen and freshness it will die. These issues are not mere metaphorical but real. Hence, as court we must at all times provide the direct interpretation of the Constitution as it is required by law. Unconditionally, in the instant petition, from the provisions of the law under the provision of article 62 (7) (e) of the Constitution of Kenya sections 5, 6 and 15 of the NLC Act, the 1<sup>st</sup> respondent has the legal mandate to deal with matters of present and historical injustices of this country. These provisions make elaborate provisions on historical land injustices including but not limited to defining what a historical land injustices is causes of such an injustice and recommended remedies. Therefore, I find the question on whether this court has jurisdiction in this matter therefore stands answered in affirmative.

56. However, having said all this, the only misgiving the honorable court has are broadly held. Firstly, as stated the function of the National Land Commission which is a creature of the Constitution are clearly provided under article 67 (2) (e) of the Constitution of Kenya, stipulates that these power include:-

“(e) to initiate investigations, on its own initiatives or on a complaint, into present or historical land injustices, and recommend appropriate redress”.

The major legal question to deal with here under what regime or classification of land did the legislatures intended that the NLC deals with. Under article 61(2) of the Constitution of Kenya classifies land in Kenya as public, community or private. This issue is expressly responded to under the object and purpose of the NLC Act whose date of assent was April 27, 2012 its commencement date was May 2, 2012 states:-

“An Act of Parliament to make further provision as to the functions and powers of the National Land Commission, qualifications and procedure for appointments to the commission; to give effect to the objects and principles of devolved government in land management and administration and for connected purposes”.

Additionally, the provisions of section 14 of National Land Commission Act is explicit and which provides:-

(1) Subject to article 68 (c), (i) of Constitution of Kenya, the commission. Shall, within five years of the commencement of this Act or its own motion or upon a complainant by the national or county government a community or an individual, review all grants or disposition of public land to establish their proprietor or legality. (emphasis is mine).

If the legislatures intended that this covers private land what would have been easier to do than state the same. Strictly speaking, the legal mandate for the National Land Commission is on the public land and not private land. The only except to this rule, is whereby the commission may only deal on private land whereupon its state or public land under private lease or transferred to state by way of sale or reversion or surrender thereof.

57. Under the provision of article 62 (1), (2), (3) & (4) of the Constitution of Kenya defines public land which is:-

62 (1) :-



- a. Land which at the effective date was unalienated government land as defined by an Act of Parliament;
  - b. Land lawfully held, used or occupied by any state organ, except any such land that is occupied by the state organ as lessee under a private lease.
  - c. Land transferred to the state by way of sale, reversion or surrender.
  - d. Land in respect of which no individual or community ownership can be established by any legal process.
  - e. Land in respect of which no heir can be identified by any legal process.
  - f. All minerals and mineral oils as defined by law.
  - g. Government forests other than forests to which article 63 (2) ( d ) ( i ) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas.
  - h. All roads and thoroughfares, provided for by an Act of Parliament.
  - i. All rivers, lakes and other water bodies as defined by an Act of Parliament.
  - j. The territorial sea, the exclusive economic zones and the sea bed.
  - k. The continental shelf.
  - l. All land between the high and low water marks.
  - m. All land not classified as private or community land under this *Constitution*; and
  - n. Any other land declared to be public land by an Act of Parliament.
- 2). Public land shall vest in and be held by a county government in trust for the people resident in the county and shall be administered on their behalf by the National Land Commission.
  - 3). Public land classified under clause ( 1 ) ( f ) to ( m ) shall vest in and be held by the national government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission.
  - 4). Public land shall not be disposed of or otherwise used except in terms of an Act of parliament specifying the nature and terms of that disposal or use.

58. Under the provisions of article 64 of *Constitution* of Kenya defines private land in the following terms.

Article 64. Private land consists of:-

- a. Registered land held by any person under any freehold tenure;
- b. Land held by any person under leasehold tenure; and
- c. Any other land declared private land under an Act of Parliament.

Guided by the provisions of articles 67 and 68 (c) (v) of *Constitution* of Kenya and section 14 of Act, I hold on a legal preposition the 1<sup>st</sup> respondent has jurisdiction to review all grants or disposition of public land. The critical point however, is that the jurisdiction in this context extends only to matters of public land as outlined above or land that was previous public but was subsequently converted to private land – saying so I fully rely on the decision of “*Mwangi Stephen Murithi v NLC & 3 others*”



(2018) eKLR and *Nicholas Mwatika Mulei v National Land Commission and 3 others* 2018 eKLR, and *Republic v NLC Ex- P Krystalline Salt Ltd.* (2015) eKLR and *Republic v NLC & 4 others ex-parte P Futson Company Limited* 2015 eKLR.

I need not stress more that the NLC need to confine themselves to this jurisdiction.

Secondly, based on the above legal proposition this court question are the matter before the 1<sup>st</sup> respondent in the instant case full within this purview.

Arising from the facts of this case it is a matter of breach of agreement – for a sale of land from the estate of the deceased 1 and 2 to the 2<sup>nd</sup> to the 20<sup>th</sup> respondents terms and conditions stipulated thereof. Unfortunately, the alleged seller cited before they could transfer the land to the intended purchasers – the 2<sup>nd</sup> to 20<sup>th</sup> respondents. It has been alleged that the beneficiaries of the estates had been reluctant, and in cooperative to transferring the land to them. Therefore, being aggrieved they decided to lodge a complaint before the 1<sup>st</sup> respondent and a session was held on August 28, 2018 and a decision made on March 7, 2019.

Clearly, this suit is private land. It's not a case of public land or private land which was legally converted to private land. In my view, the 2<sup>nd</sup> and 20<sup>th</sup> respondents ought to have instituted their case in an ordinary court of law and not before the 1<sup>st</sup> respondent. Further, there is no historical injustices about this matter.

I dare say the NLC had lacked the procedural jurisdiction to hear and determine the issue herein.

#### **Issue no. (c) Whether the parties are entitled to the relief sought.**

59. Under this sub-heading this court has already made a pronouncement on the pertinent issues of the jurisdiction of this court and the NLC. On the jurisdiction of NLC, this court strongly holds this is a matter the parties would have been advised to have instituted an ordinary suit in any court of law and certainly not lodging it before the NLC as it was tolerated. In so doing, the NLC acted *ultra vires* its legal mandate for the reasons already adduced herein.
60. Additionally, the honorable court the strongly feels that this notwithstanding, there were several shortcomings in the manner in which the 1<sup>st</sup> respondent conducted the proceedings with regard to this dispute on August 28, 2018 and its subsequent decision of February 7, 2019 for the following reasons:-
- Firstly, was there really any proceedings carried out on the dispute at hand. The 1<sup>st</sup> petitioner has termed it a brief session and not proceedings as such. Although the NLC have attached a copy of the proceedings but clearly it is evident that the principles of natural justice already deliberated herein in depth was not applicable at all to warrant a proper proceeding betting what is envisaged in law.
61. Secondly, at all costs, matters involving estates of deceased persons are extremely delicate. It was erroneous, for the 1<sup>st</sup> respondent to have continued dealing with this matter yet it was a suit of the deceased persons and the succession cases were pending hearing and final determination by court. Under the provision of section 45 (1) of the *Succession Act*, cap 160 – holds that:-

“No intermeddling with the property of the deceased person:- except so far expressly authorized by the Act or by any other written law or by a grant of representation under the Act, no person shall for any purpose take possession or dispose of or otherwise intermeddle with any free property of a deceased person”

Thus, despite being aware that there existed no duly appointed legal administrators for these estates, the 1<sup>st</sup> respondent still persisted on proceeding with the matter on the pretext that there was non-



disclosure of material facts by the petitioner and that some of the beneficiaries for the deceased – 1 were presented and participated. It's not clear why the estate of the deceased -2 were not invited and hence never participated at all in these proceedings. I need to state that, like all other established state legal entities or organs, the NLC must at all times not only observe the rule of natural justice but also the provisions of the *Fair Administration of Action Act* 2015 as to due process and fair procedures to be adopted refer to "*Judicial Service Commission v Mbali Mutara & another* (2012) eKLR circumstances count for the simple reasons that the right to fair administration action is not absolute.

Thirdly, this court has also taken cognisance to the fact that there was no evidence of the service of its decision of February 7, 2018. The regulations 29 of the NLC (Investigation of Historical Injustices) dictates that the decision ought to be published in two local dailies of Kiswahili and English language and an announcement carried out over the radio. No such evidence was adduced by the NLC. Ideally, the NLC carried the decision through its website. How was were the 1<sup>st</sup> and 2<sup>nd</sup> petitioners expected to have accessed this electronic internal systems for the NLC is the major question here to ponder.

Thirdly, the regulations provide extremely stringent timelines upon which an appeal of its decision is to be challenged. This should be after 28 days from the publication of the said decision. Once again the court ponders the question and poses an answer that to have expected the 1<sup>st</sup> and 2<sup>nd</sup> petitioners to have preferred an appeal within 28 days of the publication of the said decision was far fetched. Besides I concur with learned counsel for petitioner the provision of rules 3 and regulations 29 is silent on what happens after the lapse of the such as enlargement of time as envisaged under the provisions of order 50 rule 7 of the *Civil Procedure Rules*, 2010.

For these reasons, therefore this court finds that the petitioners are entitled to all the relief sought from the petition.

#### **Issue No. (d) Who will bear the costs of the suit**

62. The issue of costs is the discretion of court. The Black Law Dictionary defines "cost" to mean, "the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other".
63. The proviso under the provisions of section 27 (1) of the *Civil Procedure Act*, cap 21 holds that costs follow events. it is trite law that the issue of costs is the discretion of courts. In the case of "*Reids Heweeet & Company v Joseph* AIR 1918 cal 717 & *Myres v Defries* (1880) 5 Ex D 180, the House of the Lords noted:-

"The expression "costs shall follow the events" means that the party who, on the whole succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word 'event' should be read distributive and the costs of any particular issue should go to the party who succeeds upon it....."

From this provisions of the law, it means the whole circumstances and the results of the case where a party has won the case. The events in the instant case is the petitioners from the filed constitution petition and the originating summons dated November 19, 2020 in "ELC Misc Appl No 87 of 2020 (OS) Abdulkader Mohamed Awadh Salim & others v Karama Yahya Karama & 5 others" by the respondents herein for purposes of enforcement of the aforestated NLC award rendered on February 7, 2019 has succeeded in their cases. Nonetheless, the matter being of public interest, the court out of the principles of natural justice, equity and conscience it feels the costs of these suit should be borne by each party.



## VII. Conclusion and disposition

64. In the long run, as I have indicated above the petitioners elaborately established their case on a balance and preponderance of probability. They have satisfied this court that the National Land Commission acted *ultra vires* their jurisdictional legal mandate as stipulated under the relevant provision of the law. Having stated that, for avoidance of doubt, I now proceed to make the following orders:-
- a. That the petition filed by the petitioners herein dated March 8, 2021 be and is hereby allowed.
  - b. That a declaration be and is hereby made that all plot Nos Mombasa/Block XII/320-356 constituting the assets of the estates of Yahya Karama Laabdi (deceased) and Hassan Karama Al - beid (deceased) are private land within the definition of article 64 of the Constitution.
  - c. That a declaration be and is hereby made that under article 67 2(e) of the Constitution and sections 6 and 15 of the National Land Commission Act No 5 of 2012 or otherwise, the National Land Commission has no jurisdiction to adjudicate claim of historical injustice over private land.
  - d. That a declaration be and is hereby made that the proceedings conducted on August 28, 2018 and the decision and/or award of the National Land Commission delivered on February 7, 2019 and published in the Kenya gazette of March 1, 2019, table 3 item 4 breached the rights of the petitioners under articles 40 and 50 of the Constitution.
  - e. That a declaration be and is hereby made that the decision of the National Land Commission delivered on February 7, 2019, and published in the Kenya gazette of March 1, 2019, table 3 items 4 is against police and breached article 165 of the Constitution by attempting to override orders of the High Court in HCC succession cause No 142 of 2009 and HC succession cause No 174 of 2016.
  - f. That a declaration be and is hereby made that the decision of the National Land Commission delivered on February 7, 2019 and published in the Kenya gazette of March 1, 2019 table 3 item 4 in a nullity and incapable of implementation.
  - g. That a declaration be and is hereby made that the proceedings leading to decision of the National Land Commission delivered on February 7, 2019 and published in the Kenya gazette of March 1, 2019 table 3 item 4 did not qualify as a historical claim contemplated under article 67 (2) (e) of the Constitution and section 6 and 15 of the National Land Commission Act No 5 of 2012.
  - h. That an order be and is hereby made that the filed originating summons No 87 of 2021 Abdulkader Mohamed Awadh Salim & 19 others v Karama Yahya Karama & filed before this court be and is hereby dismissed with no orders to costs.
  - i. That each party to bear their own costs of the petition.

**JUDGEMENT DELIVERED, SIGNED AND DATED AT MOMBASA ON THIS 28<sup>TH</sup> DAY OF SEPTEMBER, 2022.**

**HON. JUSTICE MR. L.L NAIKUNI (JUDGE),**

**ENVIRONMENT & LAND COURT AT**

**MOMBASA** In the presence of:

- a. Mr. Boko & Mr. Omar, the Court Assistants.



- b. Mr. Munyithya Advocate for the 1<sup>st</sup> & 2<sup>nd</sup> Petitioners.
- c. Mr. Gitahi Advocate for the 2<sup>nd</sup> to the 20<sup>th</sup> Respondents.
- d. Mr. S Mbutia for the 1<sup>st</sup> Respondent.

