



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC PETITION NO. 28 OF 2019

KENYA CIVIL AVIATION AUTHORITY.....PETITIONER

VERSUS

NATIONAL LAND COMMISSION.....1ST RESPONDENT

WESTON HOTEL LIMITED.....2ND RESPONDENT

PRIORITY LIMITED.....3RD RESPONDENT

MONENE INVESTMENTS LIMITED.....4TH RESPONDENT

AND

KENYA COMMERCIAL BANK LIMITED...INTERESTED PARTY

RULING

Background

1. This suit was initiated as a petition under the constitutional framework on enforcement of the Bill of Rights, among other cited provisions of the law. The petition was provoked by a report of findings and recommendations by the National Land Commission (hereinafter referred to as “the Commission”) dated 21/1/2019 (*the copy exhibited by the petitioner is dated 21/1/2019 while the copy exhibited by the 2nd respondent is dated 22/1/2019*). The report was titled: “**NATIONAL LAND COMMISSION REVIEW OF GRANTS OR DISPOSITIONS OF PUBLIC LAND – WESTON HOTEL LIMITED – LR. 209/14372**”

2. At the centre of the petition are the observations and findings contained in the report, and particularly on the last page of the said report. They read as follows:

“Points that were observed by the Commission were:

Ø That it is not disputed that the subject parcel belonged to Kenya Civil Aviation Authority

Ø The letter of allotment issued to Priority Limited and Monene Investment Limited was irregular

Ø That Weston Hotel are bona-fide purchasers without a notice of any defect in the title

Ø That the land at the time of valuation was undervalued

Ø That the Kenya Civil Aviation Authority lost an important asset in this case.

Ø That the then Commissioner and Minister of Lands are to be blamed for occurrence as they failed to act on the irregular allocation of the parcel.

Ø The Management of Kenya Civil Aviation Authority then is also to be blamed for vacating the subject parcel without establishing if the alternative land was available for allocation.

The Commission therefore, after considering and analyzing the issues at hand made a finding that:

The current market value of the land to be determined by the Commission after which Weston Hotel is required to pay the current market price of land of Kenya Civil Aviation Authority so as to enable it purchase land of equal value Kenya Civil Aviation Authority having been restituted to its initial position only then can the Commission regularize the title to Weston Hotel”

3. It is noteworthy that the Commission indicated that it prepared the report under **Section 6** of the **National Land Commission Act** pursuant to a complaint by Kenya Civil Aviation Authority. The Commission further noted in the report that it no longer had the mandate to review grants under **Section 14** and that it was only exercising its mandate under **Section 6** of the **Act**.

4. It is also noteworthy that the document was conveyed through a forwarding letter dated 1/2/2019 and signed by the Commission Vice Chairperson and Head of Review of Grants & Dispositions on behalf of the Chairman. The forwarding letter reads thus:

“NATIONAL LAND COMMISSION

OFFICE OF THE VICE-CHAIRPERSON

Ref: NLC/GEN.CORR.VOL.VIII(V3)

Managing Director

Kenya Civil Aviation Authority (KCAA)

P O BOX 30163-00100

NAIROBI

Ahmendnasir, Abdikadir & Co Advocates

CBA, Building, 2nd Floor, Standard Street

Nairobi.

The Chief Land Registrar

Ministry of Lands & Physical Planning

Ardhi House

Nairobi.

Dear Sirs,

**RE; DETERMINATION IN RESPECT OF LR NO 209/14372 – KENYA CIVIL AVIATION AUTHORITY (KCAA) VS
WESTON HOTEL LIMITED**

“I refer to the above subject matter.

The Commission received a complaint in respect of the above stated property. The Commission exercised its mandate under Section 6 of the National Land Commission Act, 2012.

The Commission has concluded the process. Kindly find enclosed the report and recommendations of the Commission for your further action.

Yours faithfully

ABIGAEL MBAGAYA MUKOLWE (MRS)

VICE CHAIRPERSON & HEAD OF REVIEW OF

GRANTS & DISPOSTIONS

For: CHAIRMAN, NATIONAL LAND COMMISSION

5. Subsequent to that, on 13/6/2019, the petitioner brought this petition contending, *inter alia*, that: (i) the Commission had violated its constitutional and statutory rights and the right to natural justice because it purported to adjudicate the dispute long after its constitutional mandate to review grants and dispositions relating to public land had lapsed; the Commission had no jurisdiction to order compensation to the petitioner because its powers were limited to making a determination on whether the grant was acquired lawfully, regularly or unlawfully, or to order revocation of title; and the Commission had acted *ultra vires* by ordering that it would determine the current market value of the suit property and thereby arrogating to itself powers contrary to the Constitution and statute; (ii) the Commission had acted illegally in issuing the impugned determination because the impugned determination was signed for the Chairman by the Vice Chairman despite there being no vacancy in the Office of the Chairperson; the determination was signed by only one member of the Commission; the Commission had purported to grant a relief which was not sought; and the Commission had acted unlawfully by ordering that compensation be paid to the petitioner for public land; and (ii) the Commission had violated its rights under **Section 7(2) of the Fair Administrative Action Act**

6. As against the 2nd respondent, the petitioner contended that it violated its rights by irregularly acquiring its land and fraudulently registering an undervalued transfer; and engaging in illegal conduct after registration of the transfer.

7. As against the 3rd and 4th respondents, the petitioner contended that they had violated its rights by procuring illegal and fraudulent allotment of alienated public land; illegally and forcefully evicting the Directorate of Civil Aviation in questionable circumstances; and illegally selling irregularly acquired public land to the 2nd respondent.

8. The Petitioner sought the following verbatim reliefs in the petition:

a) The honourable court be pleased to issue the order of certiorari to remove into this honourable court and quash the decision of the National Land Commission dated 25 January 2019(sic) together with all orders, actions and decisions consequent thereto: made in respect of all that piece of land known as L R No 209/14372 and the developments thereon, for having been made without jurisdiction, and for being illegal, irrational and procedurally irregular.

b) The honourable court be pleased to issue a declaration that the petitioner is the lawful owner of all that piece of land known as LR 209/14372 situated along Langata Road in Nairobi opposite Wilson Airport as the successor in title to the defunct Directorate of Civil Aviation.

c) The honourable court be pleased to issue a declaration that the 3rd and 4th respondent did not acquire good title to all that piece of land known as LR 209/14372 situated along Langata Road in Nairobi opposite Wilson Airport

d) The honourable court be pleased to issue a declaration that the 2nd respondents did not acquire good title to the all that piece of land known as LR 209/14372 situated along Langata Road in Nairobi opposite Wilson Airport.

e) The honourable court be pleased to issue an order for rectification of the Land Register by cancellation of the fraudulent registration of a Grant and Certificate of title issued to the 3rd and 4th Respondents over ALL that piece of land known as LR 209/14372 situated along Langata Road in Nairobi opposite Wilson Airport, and all conveyances, transfers, sub-divisions, assignments, leases or any other dealings of whatever nature subsequent thereto.

f) The honourable court be pleased to issue an order for rectification of the Land Register by cancellation of the fraudulent registration of transfer made on 13 June 2007 in favour of the 2nd respondent over all that piece of land known as LR 209/14372 situated along Langata Road in Nairobi opposite Wilson Airport, and all conveyances, transfers, sub-divisions, assignments, leases or any other dealings of whatever nature subsequent thereto.

g) The honourable court be pleased to issue the order of mandamus to compel the Chief Land Registrar to register the petitioner as the lawful owner and proprietor of all that piece of land known as LR 209/14372 situated along Langata Road in Nairobi opposite Wilson Airport, and subsequently issue to the petitioner the requisite complete land ownership documents within thirty (30) days of issuance of this order.

h) The honourable court be pleased to issue a mandatory injunction to order the 2nd respondent whether acting by itself, its servants, agents or howsoever otherwise to deliver to the petitioner vacant possession of all that piece of land known as LR 209/14372 situated along Langata Road in Nairobi opposite Wilson Airport, within thirty (30) days of issuance of this order, and in default the petitioner be at liberty to evict the 2nd respondent and further that the Inspector General of Police be ordered to provide adequate security personnel for the entire period of eviction.

i) The honourable court be pleased to order the 2nd, 3rd and 4th respondents to jointly and severally pay to the petitioner general damages for unlawful eviction and forced relocation.

j) The honourable court be pleased to order the 2nd, 3rd and 4th respondents to jointly and severally pay to the petitioner general damages for loss of user of land.

k) The honourable court be pleased to order the 2nd, 3rd and 4th respondents to jointly and severally pay to the petitioner mesne profits

l) The petitioner be awarded costs of the suit

m) Interest on (i), (j), (k) and (i) at court rates from the date of entry of judgment until payment in full

n) Such further relief as the court deems just and fit to grant in the circumstances

Responses to the Petition

9. The Commission opposed the petition through a replying affidavit sworn on 2/6/2020 by its Director of Legal Affairs and Enforcement, Mr Brian Ikol. The Commission, *inter alia*, contended that it had acted in strict conformity with the provisions of **Article 50** of the **Constitution**, the **Fair Administrative Action Act**, and **Section 14** of the **National Land Commission Act**. It added that although its mandate to review grants and dispositions of public land was limited by statute and effectively terminated in May 2017, **Section 26** as read together with **Section 23** of the **Interpretation and General Provisions Act (Cap 2)** gave it the mandate to continue with investigations and proceedings which were ongoing and to render review determinations thereon. Further, the Commission took the position that the impugned determination was rendered in exercise of its mandate under both **Section 6** and **Section 14** of the **Act**. Lastly, the Commission contended that it did not in its determination, vest any title to the 2nd, 3rd and 4th respondents.

10. The 2nd respondent opposed the petition through a replying affidavit sworn on 31/10/2019 by its Director, Michael Nzile. Firstly, at Paragraph 4 of the replying affidavit, Mr Nzile deposed that indeed this court had jurisdiction to entertain this petition. He denied the allegations of fraud and illegality as pleaded in the petition, and contended that if the allegations were true, the petitioner would have instituted appropriate legal proceedings against the 3rd and 4th respondents or would have enforced its rights. The 2nd respondent added that it was an innocent purchaser for value. Mr Nzile contended that at the time the 2nd respondent purchased the suit property from the 3rd and 4th respondents, the said vendors were the duly registered proprietors of the suit property and there was no adverse claim on the title relating to the suit property. He added that the 2nd respondent carried out due diligence and confirmed the sanctity of the title held by the 3rd and 4th respondents before purchasing it. He deposed that it was surprising that the petitioner was claiming interest in the suit property in the absence of a rival title or even an allotment letter.

11. The 2nd respondent outlined the sequence of events culminating into its registration as proprietor of the suit property, starting with the allotment to the 3rd and 4th respondents dated 5/1/1998; payment of the requisite monies by the 3rd and 4th respondents; survey of the suit property; booking and registration of Grant Number IR 89671 as a title; change of user; transfer of the suit property to the 2nd respondent; and approval of developments by the petitioner's predecessor on 29/4/2008;

12. The 2nd respondent added that it was equally aggrieved by the 1st respondent's determination requiring it to compensate the petitioner yet the 1st respondent had found, as a matter of fact, that they were innocent purchasers for value. The 2nd respondent added that the petitioner having submitted its complaint to the 1st respondent and having attended its hearings and actively prosecuted its complaint leading to the impugned determination; they were estopped from claiming that the 1st respondent lacked jurisdiction to entertain the dispute. Further, the 2nd respondent contended that the impugned determination was properly signed by the Vice Chair because the relevant regulations did not prescribe how a determination was to be signed. The 2nd respondent added that the petitioner's objection to the determination on the ground of expiry of the mandate of the 1st respondent was an afterthought. The 2nd respondent urged the court to dismiss the petition.

13. The 3rd respondent opposed the petition through an affidavit sworn on 15/11/2019 by Paul Chirchir. The case of the 3rd respondent was that they were at all material times the legitimate registered proprietors of the suit property, having been legitimately allocated the suit property. Upon allotment, they duly paid the requisite monies. The suit property was duly surveyed and a proper title was processed, signed, registered, and issued to them. They denied the allegations of improprieties, illegality and/or fraud. They contended that there was no basis for the petitioner's claim for restitution.

14. The 4th respondent opposed the petition through a replying affidavit sworn on 7/4/2019 by Mr Melchisedec Nyamima Siambe. They denied the allegations of illegality and fraud in the registration of the title to the suit property and contended that they were procedurally allocated the suit property; they paid all the requisite monies; and their title was procedurally processed.

15. The interested party opposed the petition through a replying affidavit sworn on 17/12/2019 by its Director of Legal Services & Company Secretary, Mr Bonnie Okumu. Their case was that they held a first charge against the suit property dated 9/10/2014 and registered on 27/10/2014 securing a loan facility of Kshs 350,000,000 and USD 1,500,000, advanced to the 2nd respondent. They held a further charge dated 8/7/2015 and registered on 27/7/2015, securing an additional loan facility of Kshs 70,000,000 advanced to the 2nd respondent.

16. It was the case of the interested party that at the time of registering the charge and the further charge, the interested party exercised due diligence and fulfilled all prerequisites of registering a chargee's interest in land as required by the law and it was upon obtaining an official search that it agreed to advance the loan facilities to the 2nd respondent. The interested party contended that the orders sought in the petition would severely prejudice the interested party's equitable interest in the suit property as the loan was still outstanding.

17. Parties to the petition agreed to dispose the petition through affidavit evidence, written submissions, and brief oral highlights of the written submissions.

The Application

18. It was while the petition was at the stage of submissions that the 2nd respondent brought a notice of motion dated 16/6/2020 seeking orders dismissing the petition in the following *verbatim* terms:

1) The court do certify this application as urgent

2) This honourable court do dismiss the suit herein with costs for want of jurisdiction

3) This honourable court do find that this suit offends the doctrine of exhaustion of remedies

4) The petitioner do pay the costs of the application and the suit to the 2nd respondent/applicant

19. The said application was premised on the following *verbatim* grounds:

1) The petitioner on 29th October 2018(sic) voluntarily filed with the 1st respondent a claim seeking to recover the suit property herein under the provisions of the National Land Commission Act, No 5 of 2012 in line with the constitutional and statutory mandate of the 1st respondent

2) The 2nd respondent/applicant filed its response to the claim

3) After hearing all the parties, the 1st respondent on 1st February 2019 served all the parties with a judicial determination dated 21st January 2019.

4) The law expressly prescribes a statutory procedure for pursuit by persons aggrieved with determinations issued by the 1st respondent, being an appeal to the Environment and Land Court

5) The petitioner has not filed an appeal as provided for by law, and has instead filed a fresh petition

6) The instant petition offends the doctrine of exhaustion of remedies. It is also an abuse of the court process

7) The Environment and Land Court lacks the requisite jurisdiction to hear and entertain the instant petition. It can only hear an appeal as expressly provided by the National Land Commission Act, No 5 of 2012.

8) The petition herein is an abuse of the court process and the petitioner is obligated to adhere to the law and not lodge multiple claims in different fora

9) It is in the interest of justice that the petition be dismissed with costs to the petitioner.

20. The application was supported by an affidavit sworn on 11/6/2020 by Michael Nzile, a director of the 2nd respondent. The application was canvassed through written submissions.

21. The gist of the application was that the redress mechanism available to the petitioner against the 1st respondent's determination dated 21/1/2019 was an appeal to this court under Regulation 30 of the **National Land Commission (Review of Grants and Dispositions of Public Land Regulations) 2017** and not an original suit such as the present petition.

Applicant's Submissions

22. The applicant filed written submissions dated 29/9/20 through the firm Ahmendnasir, Abdikadir & Company Advocates. Mr Ahmendnasir, counsel for the applicant, identified the following as the three key issues falling for determination in the application: (i) what is the procedure of challenging the determination by the 1st respondent as prescribed by the National Land Commission Act and the National Land Commission (Review of Grants and Dispositions of Public Land) Regulations 2017; (ii) whether this court has the jurisdiction to handle this suit as filed; and (iii) why this suit is a classic case of abuse of court process.

23. On the first issue, counsel outlined the constitutional functions of the Commission under the Constitution, the relevant statutory and subsidiary legislations on review of grants and dispositions of public land. Counsel argued that it was clear from the relevant framework that the law prescribed the procedure to be pursued by a party aggrieved by a report or recommendations of the Commission. citing the decision in **Compar Investments Ltd v National Land Commission & 3 others (2016) eKLR**, counsel submitted that once the Commission rendered its findings on the legality of one's title, the court could only review the exercise of powers by the Commission. Counsel added that the process and procedure available to an aggrieved party was prescribed by **Articles 67 and 68 (c) (v) of the Constitution, Section 14 of the National Land Commission Act and Regulation 30 of the National Land Commission (Review of Grants and Dispositions of Public Land Regulations) 2017** (hereinafter referred to as "**the Regulations**"). Counsel argued that the law empowered the Commission to exclusively determine disputes such as this petition. Counsel contended that the only reason why the petitioner elected not to file on appeal was that they wanted to generate publicity and media coverage.

24. On the second issue, counsel cited various judicial decisions focusing on the centrality of jurisdiction of a court to underscore the principle that a court is a creature of the law and only exercises powers conferred to it by the law. Counsel submitted that jurisdiction was a matter of law and not merely a technicality. He added that Kenya's legal system was founded on principles, procedures and rules that must be adhered to, lest the foundation of the justice system is broken. Counsel contended that the law gave this court appellate jurisdiction as opposed to original jurisdiction in relation to challenges against the decisions of the Commission on review of grants and dispositions of public land. It was the applicant's position that this court lacked the requisite jurisdiction to entertain a fresh suit relating to a determination by the Commission; and that the remedy available to the petitioner was an appeal under Regulation 30.

25. Counsel further argued that where the Constitution clearly provided for an appeal, it would be unconstitutional for a trial court to continue to entertain the dispute. Mr Ahmendnasir added that there were no exceptional circumstances in the present petition to warrant a departure from the general principle that where an appeal mechanism is provided, it should be exhausted. Counsel further argued that judicial review was a last resort and should not be invoked where an appeal mechanism is provided.

26. On the last issue, counsel for the applicant submitted that the petitioner was obligated to follow the due process by filing an appeal.

1st Respondent's Submissions

27. The 1st respondent in the petition (the Commission) filed written submissions dated 10/12/2020 through the firm of Irungu Kangata & Co Advocates in which they made contradictory arguments. They identified the following as the two key issues in the application: (i) the procedure to be used by a person aggrieved by a decision of the National Land Commission; and (ii) whether this honourable court had jurisdiction to hear and entertain the instant petition. Counsel outlined the constitutional, statutory, and procedural frameworks governing the Commission's review mandate and contended that the remedy available to the petitioner after the 1st respondent rendered its decision was an appeal and not a fresh suit. Counsel submitted that, on that basis, this court lacked jurisdiction to entertain this petition.

28. In an about turn, counsel for the Commission submitted that Regulation 30 was a subsidiary legislation prescribing procedure; was not a jurisdictional rule; and could not confer or limit the jurisdiction of the Environment and Land Court to hear and determine this petition. Counsel for the Commission added that the issues raised in the petition concerned fundamental rights guaranteed by the Constitution and the National Land Commission Act, hence the petition herein fell within the jurisdiction of this honourable court. Counsel added that the issues raised in the petition predominantly and substantially touched on the decision-making process relating to title to land and the said decision making process was subject to review by this court hence the petition herein was properly before this court. Citing Articles 22 and 23 of the Constitution, counsel submitted that the petitioner was entitled to bring this petition to this court and the court was empowered by the Constitution to grant any of the reliefs set out under **Article 23(3) of the Constitution**. Citing the Court of Appeal decision in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 6 others [2013] eKLR**, counsel submitted that **Article 159 of the Constitution** abhorred the sacrifice of substantive justice at the altar of procedural technicalities.

29. On the second issue, counsel cited the framework in **Article 162 (2) (b) of the Constitution** and **Section 13** of the Environment and Land Court Act and submitted that a dispute relating to land may be brought to this court through a plaint, an originating summons, a constitutional petition, or a judicial review motion. Counsel for the 1st respondent urged the court to dismiss the application.

30. The third respondent in the petition identified the following as the key issues falling for determination in the application: (i) whether the Commission had jurisdiction to entertain and determine this case considering the provisions of, *inter alia*, **Section 6 and 14 of the Act** and **Articles 67 and 68 of the Constitution**; (ii) whether the petitioner can present two similar cases before two competent legal fora for determination without abusing the court process; (iii) whether the rules of res-judicata applied to environment and land disputes and petitions; (iv) whether or not this cause ought to be judicial review or appeal; and (v) whether this court had jurisdiction to entertain this matter.

31. Counsel for the 3rd respondent submitted that the Commission had jurisdiction to entertain and determine the dispute in this petition pursuant to the provisions of **Sections 6 and 14 of the National Land Commission Act** and **Articles 67 and 68** of the Constitution. Noting that the effect of the repeal of **Section 14 of the Act** was to divest the Commission of powers to direct the Registrar to cancel any title, counsel argued that **Section 6(2) of the Act** gave the Commission powers to gather relevant information and compel the production of such information, hence it had the power and jurisdiction to make the impugned determination under **Section 6 of the Act**. Citing various authorities, counsel submitted that the Court could not usurp the powers and jurisdiction given to other bodies.

32. Counsel for the 3rd respondent further submitted that the issues raised by the petitioner were raised before the Commission and were resolved by the Commission, hence this petition was *res judicata*. Citing various decisions, counsel argued that access to justice and the right to be heard were not an opportunity for a vexatious litigant to file and maintain multiple suits in different fora against the same respondents over the same subject matter. Lastly, counsel submitted that if the petitioner was aggrieved by the decision of the Commission, their remedy lay in an appeal under **Regulation 30**.

33. The 4th respondent did not file written submissions on the application dated 16/6/2020.

Interested Party's Submissions

34. The interested party filed written submissions through the Firm of Mohammed Muigai LLP. Counsel for the interested party submitted that the central issue in the application dated 16/6/2020 was whether this court had jurisdiction to hear the petition herein. Citing **Supreme Court of Kenya Advisory Opinion No 2 of 2011** and the decision in the **Owners of Motor Vessel Lillian "S" v Caltex Oil (Kenya Ltd (1989) KLRI**, counsel submitted that jurisdiction is everything and without it, the court must down its tools. Counsel added that **Article 68(c) (v) of the Constitution** and **Section 14 of the National Land Commission Act, No 5 of 2012** empowered the Commission to within 5 years of commencement of the Act review all grants and dispositions of public land to establish their propriety or legality. He added that the Commission carefully considered the facts in issue in the present petition under the petitioner's complaint, considered all the evidence, and delivered its determination dated 21/1/2019.

35. Counsel further submitted that Regulation 30 of the National Land Commission (Review of Grants & Dispositions of Public Land) Regulations 2017, provided for appeals to this court hence this court was precluded from considering the issues that were before the Commission except in its appellate capacity. It was counsel's view that filing this petition in this court instead of bringing an appeal was an abuse of the process of the court.

36. Lastly, counsel for the interested party invoked the principle of constitutional avoidance. Citing the Supreme Court of Kenya decision in **Communications Commission of Kenya v Royal Media Services and Others**, counsel argued that a court of law is obliged not to determine an issue as a constitutional matter when a matter may properly be decided on another basis. In conclusion, counsel argued that the clothing of the dispute as a constitutional petition was designed to circumvent the lawful process of its determination. Counsel urged the court to allow the application.

Petitioner's Submissions

37. The petitioner filed written submissions through the firm of Rachier & Amollo Advocates LLP. Counsel for the petitioner identified the following as the three issues falling for determination in the application: (i) whether the petition was barred by *res judicata*; (ii) whether the doctrine of exhaustion of remedies applied to the petition; and (iii) whether this court had jurisdiction to intervene and determine this petition on merits.

38. On the first issue, counsel submitted that all the essential elements of *res judicata* must be present before a suit is deemed *res judicata* on account of a former suit. Counsel contended that *res judicata* did not apply in the present circumstances because the Commission was not a competent forum because it lacked jurisdiction to render the determination dated 21/1/2019 as it purported to do, its mandate having expired on 3/5/2017. Citing the decision in **Republic v National Land Commission & 3 Others ex parte Samuel Githegi Mbugua & 5 Others [2018] eKLR**, counsel submitted that the Commission acted incompletely and without jurisdiction. Counsel argued that since the Commission issued its determination *sans jurisdiction*, the determination could not apply as *res judicata* to debar this petition. Citing the decisions in **Macfoy v Limited Africa Co Ltd (1961) 3 ALL LR 1169** and **Desai v Warsam (1967) I EA 35**, counsel argued that the Commission's determination was made without jurisdiction and was therefore null and void and there was nothing to be reversed or altered through an appeal.

39. On the 2nd issue, counsel cited the above two decisions and submitted that no appeal would lie from a void decision issued without jurisdiction. Counsel further submitted that Regulation 30 was permissive because the word used was "May", meaning that the legislative intent was to not to oust other avenues of redress or this court's original jurisdiction. Citing the High Court decision in **Republic v Firearms Licencing Board and another ex-parte Boniface Mwaura [2019] eKLR**, counsel urged the court to interpret the use of the word "May" in **Regulation 30** strictly so as not to oust the original jurisdiction of this court. Counsel argued that the use of permissive language showed that an appeal under **Regulation 30** was not obligatory.

40. Counsel for the petitioner added that the doctrine of exhaustion of remedies did not apply to this petition because the petition raises issues of constitutional and statutory interpretation and application which were beyond the remit or statutory mandate of the Commission. Citing the decision of **Republic v Firearms Licencing Board & another ex-parte Boniface Mwaura [2019] eKLR**, counsel submitted that issues of constitutional interpretation were a direct exception to the doctrine of exhaustion of statutory remedies. Counsel added that the petition herein raised many issues of constitutional interpretation falling for determination including the right to fair administrative action; and the right of action to access to justice under **Articles 47 and 48** of the Constitution; protection from illegal alienation of public land and public resources entrusted to state agencies under **Article 62** of the Constitution; property rights under **Article 40**; and jurisdiction of the Commission under **Article 67(3)** and under the Act when discharging its review mandate. It was the position of counsel for the petitioner that these were weighty issues which made the petition fall squarely within the exception to the doctrine of exhaustion of remedies.

41. On the last identified issue, counsel submitted that the 2nd respondent had through Mr Nzile's replying affidavit submitted to the original jurisdiction of this court. Counsel added that this court had jurisdiction because the petition herein directly impugned the illegality and statutory violations of the 2nd, 3rd and 4th respondents in their acquisition of the suit property. Counsel added that this court had jurisdiction because the petition herein raised "independent issues" of constitutional and statutory violations by the 2nd, 3rd and 4th respondents. Counsel cited **Articles 165 (6)** as read together with **Article 162(2) (b)** and contended that this court had jurisdiction to entertain this petition.

Analysis and Determination

42. I have considered the prayers and grounds set out in the application; the parties' respective affidavits and submissions; the relevant constitutional and legal frameworks; and the applicable jurisprudence on the issues that fall for determination in the application. In my view, two key issues fall for determination in this application. The first issue is whether the petitioner, as an aggrieved party, was bound by law to challenge the 1st respondent's report of findings and recommendations dated 21/1/2019 (or 22/1/2019) through an appeal under **Regulation 30** of the **National Land Commission (Review of Grants and Dispositions of Public Land) Regulations 2017**? The second issue is whether Regulation 30 of the **National Land Commission (Review of Grants and Dispositions of Public Land) Regulations 2017** completely ousted the original jurisdiction of this court under **Articles 22, 23 and 162(2) (b)** of the Constitution and **Section 13** of the **Environment and Land Court Act** in relation to decisions made by the Commission under **Section 14** of the **National Land Commission Act**. I will make brief sequential pronouncements on the two issues in the above order. At this point, the court is obliged to caution itself against making definitive or conclusive pronouncements which may prejudice any of the parties to this petition in the event the petition herein proceeds to full hearing.

43. There is no gainsaying that jurisdiction is what gives courts and other adjudicatory bodies the mandate to determine disputes presented before them. Without jurisdiction, they labour in vain. The **Supreme Court of Kenya** underscored the centrality of jurisdiction in dispute resolution in the case of **Samuel Kamau Macharia v Kenya Kenya Bank Ltd [2012] eKLR** in the following words:

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court 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."

44. Prior to the above pronouncement by the Supreme Court of Kenya, the Court of Appeal [Nyarangi JA] stated the following on jurisdiction in **Owners of Motor Vessel Lillian "S" v Caltex Oil (Kenya) Limited**:

"Jurisdiction is everything. Without it, a court has no power to take one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending the evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

45. The applicant in the application under consideration contends that, at the behest of the petitioner, the 1st respondent exercised its review jurisdiction under **Articles 67(2)(e) and 68 (c)(v)** of the Constitution, **Section 14** of the **National Land Commission Act**, and the **National Land Commission (Review of Grants and Dispositions of Public Land) Regulations 2017**, and rendered a "judicial

determination dated 21st January 2019". The petitioner did not lodge an appeal against the said "judicial determination" in accordance with the requirements of Regulation 30. The applicant contends that this petition therefore offends the doctrine of exhaustion of remedies and is an abuse of the process of the court because the petitioner ignored the appeal platform provided in **Regulation 30** and brought this petition as a fresh suit.

46. I have looked at the entire legal framework in the National Land Commission Act and the Regulations made thereunder. Section 14 of the Act provided the framework for review of grants and dispositions of public land while Section 15 provided a framework on exercise of the Commission's mandate in relation to historical land injustices. For avoidance of doubt, Section **14** provided as follows:

"14. Review of Grants and Dispositions.

1) Subject to Article 68 (c)(v) of the Constitution, the Commission shall, within five years of the commencement of this Act, on its own motion or upon a complaint by the national or a county government, a community or an individual, review all grants or dispositions of public land to establish their propriety or legality.

2) Subject to Articles 40, 47 and 60 of the Constitution, the Commission shall make rules for the better carrying out of its functions under Subsection (1).

3) In the exercise of the powers under subsection (1), the Commission shall give every person who appears to the Commission to have an interest in the grant or disposition concerned, a notice of such review and an opportunity to appear before it and to inspect any relevant documents.

4) After hearing the parties in accordance with subsection (3), the Commission shall make a determination. [This subsection was declared unconstitutional in High Court Petition No 100 of 2017]

5) Where the Commission finds that the title was acquired in an unlawful manner, the Commission shall, direct the Registrar to revoke the title.

6) Where the Commission finds that the title was irregularly acquired, the Commission shall take appropriate steps to correct the irregularity and may also make consequential orders.

7) No revocation of title shall be effected against a bona fide purchaser for value without notice of a defect in the title.

8) In the exercise of its power under this section, the Commission shall be guided by the principles set out under Article 47 of the Constitution.

9) The Commission may, where it considers it necessary, petition Parliament to extend the period for undertaking the review specified in subsection (1)

47. The National Land Commission (Review of Grants and Dispositions of Public Land) Regulations 2017 is a subsidiary legislation made under **Section 14(2)** of the **National Land Commission Act** to regulate the review exercise contemplated under **Section 14** of the Act. **Regulations 30** upon which the present application is anchored provides thus:

"30 A person aggrieved by the decision of the Commission may, within fourteen days of the Commission's decision, appeal to the court"

48. The "court" is defined in **Section 2** of the **Act** as the Environment and Land Court.

49. It is clear from the above legal framework that the appeal contemplated under **Regulation 30** is one against a decision made by the Commission in exercise of its review mandate under **Section 14** of the **Act**. Was the impugned report of findings and recommendations made under **Section 14** of the **Act**?

50. I have examined the impugned report in its entirety to understand the legal framework under which it was made. It does emerge from the report itself that the Commission was aware that its mandate under **Section 14** of the **Act** had lapsed and it had no jurisdiction to make review findings under Section 14 of the Act. The Commission rendered itself on this issue at **Paragraph (vi)**, at **Page 22** of the impugned report, as follows:

"Can NLC investigate the grant of this property pursuant to any Section of the NLC Act, 2012?"

Yes, NLC can carry out inquiries under Section 6 of the NLC Act, 2012, but has lost the mandate to revoke titles under Section 14 of the NLC Act. NLC can only give recommendations and advisories for alternative dispute resolutions (mediation) or to the courts for arbitration"

51. Secondly, the letter forwarding the report was clear that what was being forwarded was a report compiled in exercise of the Commission's powers under **Section 6** of the **National Land Commission Act**. The letter read thus:

"RE: DETERMINATION IN RESPECT OF LR NO 209/14372 – KENYA CIVIL AVIATION AUTHORITY (KCAA) VS

I refer to the above subject matter

The Commission received a complaint in respect of the above stated property. The Commission exercised its mandate under Section 6 of the National Land Commission Act, 2012.

The Commission has concluded the process. Kindly find enclosed the report and recommendations of the Commission for your further action

Yours faithfully”

52. The question as to whether **Section 6** of the **National Land Commission Act** granted the Commission specific powers to prepare and present a report of any kind after its review mandate expired is for a different forum. I would exercise caution and avoid commenting on that question at this stage. What is clear from the impugned report and from the forwarding letter is that the Commission was aware its mandate under Section 14 of the Act had lapsed and made it clear that it was not exercising jurisdiction under **Section 14** but under **Section 6** of the **Act**.

53. Is a decision by the Commission made in purported exercise of mandate under **Section 6** subject to the appeal mechanism stipulated under **Regulation 30**? My answer to this question is in the negative. The appeal mechanism provided under **Regulation 30** only relates to decisions made in exercise of review mandate under **Section 14** of the **Act**.

54. In the above circumstances, it is my finding that the impugned report was not subject to the appeal mechanism stipulated under **Regulation 30**. This is because **Regulation 30** applied only to decisions made by the Commission in exercise of its review mandate under **Section 14** of the **Act**. I now turn to the second issue in this application.

55. Assuming that the Court is wrong on the above view, did the legal framework in **Regulation 30** completely divest from this court its judicial review jurisdiction under **Articles 22 and 23** of the **Constitution** in relation to the Commission's decisions under Section 14 of the Act? I do not think so. Firstly, this petition is anchored on the Bill of Rights and was brought under **Articles 22 and 23** of the **Constitution**. Among the reliefs sought are judicial review orders of *certiorari* and *mandamus*. **Article 23 (3) (f)** as read together with **Article 162(2)(b)** of the **Constitution** and **Section 13** of the **Environment and Land Court Act** empower this court to grant judicial review orders when exercising jurisdiction under **Article 23** of the **Constitution**. That jurisdiction is limited to petitions relating to enforcement of constitutional rights falling within the scope of disputes defined under **Article 162(2) (b)**. The platform provided for enforcing a right under the Bill of Rights is a petition within the framework of **Rules 4 and 10** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**. Similarly, **Section 13** of the **Environment and Land Court Act** grants this court both original and appellate jurisdiction to hear and determine disputes relating to the environment and the use and occupation of and title to land. The jurisdiction includes grant of prerogative orders.

56. Secondly, the word used in Regulation 30 is “may”, meaning that the legislative intent was not to completely oust this court's constitutional jurisdiction under **Articles 22 and 23** (enforcement of the Bill of Rights) and the jurisdiction to issue judicial review orders under the **Fair Administrative Action Act**. In my view, the legislating authority deliberately used the word “may” with the intent of allowing any aggrieved party the leeway to pursue the most efficacious redress mechanism in the unique circumstances of each case. A key consideration in this regard would be the question as to which redress mechanism permitted by the law offers a most efficacious or conclusive resolution of the dispute at hand.

57. In the present dispute, the petitioner sought redress under **Articles 67 (2)(e)** and **68(c)(v)** of the **Constitution** and **Section 14** of the **National Land Commission Act**. The Commission acknowledged in its report that its mandate under the said framework had lapsed by the time it was rendering its report. The Commission was categorical that the dispute could only be resolved through mediation or by courts. Therefore, effectively, the Commission did not render any or any binding decision under **Section 14** of the **Act** because its mandate had expired. This means the dispute remained unresolved and an appeal would at best serve an academic exercise. At the end of the appeal, the dispute would remain unresolved. It is, in my view, not far-fetched to conclude that the legislating authority contemplated a scenario such as this and deliberately used the word “may” as opposed to “shall” or “must”.

58. In this regard, I entirely agree with the High Court in its observation in **Republic v Firearms Licensing Board & Another ex-parte Boniface Mwaura [2019] eKLR** relating to use of the permissive word “may” as follows:

“55. The operative words in Section 23 of the Act are “... may appeal to the Minister whose decision is final.” When used in a statute, the word “may” is permissive as opposed to the words “must” and “shall” which are mandatory. A provision in a statute is mandatory if the omission to follow it renders the proceeding to which it relates illegal and void, while a provision is directory if its observance is not necessary to the validity of the proceeding, and a statute may be mandatory in some respects and directory in others. [54] One of the important tests that must always be employed in order to determine whether a provision is mandatory or directory in character is to consider whether the non-compliance of a particular provision causes inconvenience or injustice and, if it does, then the court would say that, the provision must be complied with and that it is obligatory in its character. [55]

59. For the above reasons, I find that **Regulation 30** of the **National Land Commission (Review of Grants and Dispositions of Public Land) Regulations 2017** did not completely oust this court's jurisdiction to entertain a rights enforcement petition for judicial review orders under **Articles 22 and 23** of the **Constitution** or this court's judicial review jurisdiction under the **Fair Administrative Action Act**.

60. In light of the above findings, the application dated 16/6/2020 brought by the 2nd respondent is declined for lack of merit. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 3RD DAY OF MARCH 2021.

B M EBOSO

JUDGE

In the Presence of: -

Mr Gitonga holding brief for Mr Irungu Kang'ata for the 1st Respondent

Mr Khadijah holding brief for Mr Ahmednasir for the 2nd Respondent

Ms Kaunda holding brief for Mr Wetangula for the Interested Party

Ms Waweru holding brief for Mr Katwa for the 3rd Respondent

Mr Ochieng for the Petitioner

Court Assistant: June Nafula