



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 175 OF 2009

KENYA ANTI-CORRUPTION COMMISSION.....PLAINTIFF/ RESPONDENT

VERSUS

SARAH MARIA LOBO & MYRTE MARY DESA.....1ST DEFENDANT/ RESPONDENT

(Sued as the legal representatives of the estate of the late PAUL LOBO)

BERNARD ATATI.....2ND DEFENDANT/RESPONDENT

SAMMY SILAS KOMEN MWAITA.....3RD DEFENDANT/APPLICANT

RULING

I. PRELIMINARIES

1. Before this Honorable Court for determination is a Notice of Preliminary Objection (hereinafter referred to as “The Objection”) filed by the 3rd Defendant/Applicant herein on 9th March 2021 and dated the 2nd March, 2021. From the records, upon filing and effecting service of the said Objection, the Plaintiff/Respondent, 1st Defendant/Respondent and 2nd Defendant/Respondent respectively, filed their replies in its opposition accordingly. May I state from the very onset that, the outcome from this ruling, will have direct and some effect to other related six (6) matters pending before this court over the same parties but different properties. These are ELC No. 170 of 2009; 177 of 2009; 178 of 2009; 179 of 2009; 181 of 2009 and 270 of 2009 respectively and therefore the decision herein will be replicated onto the said cases.

2. On 9th March, 2021, in the presence of all the parties in court, directions were taken, to have the said objection be canvassed by way of written submissions. On 29th September, 2021 having fully complied with the said direction by all parties, a ruling date was reserved. The said Objection on points of law sought the following orders:-

(a) That the suit offended the clear provisions of Articles 2, 67 and 68 (c), (v) and 259 (3) of the Constitution of Kenya, 2010 as read with sections 14 and 30 of the National Land Commission Act No. 5 of 2012 and Sections 4 of the Environment Land Court Act No. 19 of 2011 for reasons that:-

i) The NLC established under Article 67(1) of the Constitution of Kenya, 2010 is vested with jurisdiction in the first instance to review of all grants or dispositions of public land to establish their property or legality under Article 68 (c) (v) as read with Sections 14 of the NLC Act No. 5 of 2012

ii) On the other hand, the ELC is established under Article 162 (2) (b) of the Constitution of Kenya, 2010 as read with Section 4 of the Environment and Land Court Act No. 19 of 2011 with original and appellate jurisdiction and more particularly Appellate jurisdiction in relations to matters arising from the determination of disposition of public land by the NLC under Section 30 of the National Land Commission Act No. 5 of 2012.

iii) On the effective date when the Constitution of Kenya 2010 came into force, all matters relating to questions of disposition of Public Land and their property and/or legality were to be referred to the NLC for determination in light of the enactment of the Constitution of Kenya 2010 and the NLC as the body of first instance to adjudicate on the same.

iv) In that regard, this Honorable Court does not have original jurisdiction with regard to inquiry into disposition of Public Land unless and until the NLC has made an inquiry and determination as provided for under Section 30 of the NLC Act No. 5 of 2012 and

v) *The Jurisdiction of this Honorable Court is thus prematurely invoked by the Plaintiffs and the Honorable Court has to down its tools/decline to assume jurisdiction until the NLC has been moved or on its own motion and has initiated an inquiry and made a determination on the subject matter herein.*

(b) That the present suit was on the effective date that the Constitution of Kenya 2010, came into force and the NLC Act No. 5 of 2012 came into force, deemed ripe for adjudication by the NLC and thus its transfer to this Honorable Court was non-starter for being moot and unripe for non-exhaustion of other statutory remedies hence rendered it moot, incompetent and dead on arrival.

II. THE BRIEF FACTS

3. Before extrapolating on the legal trajectory pertaining to the objection beforehand, it's imperative that the honorable court indulges on the brief facts on the court case which will be beneficial in arriving at the final decision in this objection. From the filed pleadings, on 9th June 2009, the Plaintiff/Respondent a body corporate established under the provisions of the Anti-Corruption & Economic Crimes Act. No. 3 of 2003, upon conducting intensive investigation instituted this suit. It was brought pursuant to the provisions of the aforesaid Act for the recovery of a public property by dint of the provisions of Section 11 (1) (j) of the Ethics & Anti-Corruption Commission Act No. 22 of 2011. On 29th April, 2019, the Plaintiff/Respondent was granted the leave of court to file an amended Plaintiff. The Defendants also filed their Defence and Counter Claim. The Plaintiff/Respondent averred that, at all material times the Government of Kenya through the then East African Community, reserved Land reference numbers MN/1/2408 (hereinafter referred to as "The Suit Land") situated at Bamburi/Nyali estate within the Mombasa Municipal for the purposes of the construction of a house for the members of staff of the then Directorate of Civil Aviation (now Kenya Civil Aviation Authority) by way of a Survey Plan folio Reference No. 131/31 dated 22/10/1975.

6. The Plaintiff/Respondent further stated that on or about 18.8.1976, upon the completion of the Survey, the Government of Kenya through the then East African Community, caused to be prepared and registered a Deed Plan for the suit property. The said property was registered with Directorate of Survey. Further, in the year 1977, the Government of Kenya through the then East African Community completed the construction of a four (4) bedroomed bungalow with a servant quarter on the suit property and as stated above allocated it to the Directorate of Civil Aviation to house its staff members. Sometimes in the year 2000, it is pleaded that the Defendants allegedly through fraudulent, corrupt and illegal means used the Survey Plan and Deed Plan to prepare and register a Grant in the name of one Paul Lobo, (Hereinafter referred to as "The Deceased"). This was done without the consent or approval of the Board of Directors of the Director of the Civil Aviation. Later on, the suit property was transferred from the deceased to the 2nd Defendant/Respondent with the assistance of the 3rd Defendant/Respondent, by then as the Commissioner of Lands duly appointed.

7. For all these, the Plaintiff/Respondent sought for several reliefs from court. These included for:- (a) A declaration that (i) the allocation of the suit land to the deceased (ii) the transfer to the 2nd Defendant by the 3rd Defendant; (iii) the issuance of the lease to the Deceased be found to be illegal, irregular and fraudulent. (b). An order for the rectification of the register by cancellation of the title deed in favour of the deceased and the 2nd Defendant in respect of the suit land and also (c) An order of preservation of the suit land. (d) Costs and interest.

8. Thereafter, on 14th July 2020, the 1st Defendant filed their amended Defence while on 25th October, 2018, the 3rd Defendant/Applicants filed an amended Defence. The 1st, 2nd and 3rd Defendants respectively, profusely denied and held to be strangers to the allegation of irregularity, illegality, fraud and corruption meted out against them by the Plaintiff/Respondents. They emphasized that the processing of the acquisition of the Grant to the 1st Defendant and the subsequent transfers and registration to the other parties had followed the due process and procedures as stipulated by law. They averred that the suit instituted by the Plaintiff/ Respondent had been incompetent, incurably and fatally defective and that they would be raising an objection on a pure points of law at the earliest opportunity. Now it is that objection that is before this honorable court hereby.

III. THE SUBMISSIONS

As indicated above, on 9th March, 2021, while in the presence of all the parties herein, court directed that the said objection by the 3rd Defendant be disposed by way of written submission.

C. THE SUBMISSIONS BY THE 3RD DEFENDANT/APPLICANT

9. On 19th October, 2021, the Learned Counsels for the 3rd Defendant/Applicant the law firm of Messrs. T.K. Rutto and Company Advocates filed their written submissions dated 10th June, 2021. The Learned Counsel, maintained that the said Objection raised pure points of law being the issue of the jurisdiction of this court to hear and determine the suit in the first instance. They stressed that it was not in dispute that the substratum of the Plaintiff's case was an inquiry into the propriety of dispositions of the public land which to them was a legal mandate and function of the National Land Commission.

10. The Learned Counsel, additionally argued that while they were not disputing the discretion of this court in dealing with the matter but rather appealed to it court to invoke the doctrine of exhaustion of statutory remedies and respect for judicial hierarchy. To buttress on this point of their submission, they relied on the decision of *Alexander Mugo Mtetu & 5 Others Versus Kenya Breweries & 4 Others (2021) eKLR* whose holding was in particular affording parties an additional layer of a forum where they could air their grievances. Further, the Advocates for the 3rd Defendant submitted that the said objection was raised in the interest of justice and meant to facilitate access to justice, respect for the rule of Law. To them the objection would in no way prejudice any of the parties as indeed the Plaintiff would not be left without any remedy as alleged. On the contrary, they contended that, the Plaintiff/Respondent would be directed to an alternative forum – being NLC - in the interest of justice where all their concerns raised would be effectively adjudicated. They strongly held and reiterated the proposition that it was not in dispute that the substratum of the Plaintiff/Respondent's case was the review of grants and dispossession of public land under the provisions of Sections 14 and 30 of the NLC Act. In the long run they urged court to uphold the Objection and refer the matter to the NLC for hearing in the first instance in compliance with the doctrine of exhaustion of statutory remedies with costs.

B. THE SUBMISSIONS OF THE 2nd DEFENDANT/RESPONDENT

12. On 8th June, 2021, the 2nd Defendant/Respondent's Advocates the firm of Messrs. Oloo & Chatur Advocates filed their written Submissions dated 7th June, 2021. Firstly, from the onset, they expressed themselves as fully being associated with the sentiments expressed in the filed Objection by the 3rd Defendant/Applicant. In supporting the objection, the Learned Counsel stated it met the threshold and test set out under the law for what constituted a proper Preliminary Objection held in the now famous case of **Mukisa Biscuits Manufacturing Co. Ltd – VS - West End Distributors Ltd. [1969] E.A. 696**. They emphasized that the court had only one main subject matter to deal with the Objection in determining whether it had the jurisdiction to hear and determine this case before it in the first instance. In so doing, they argued, it needed not to be called upon to ascertain any facts independent of the text of the objection itself. They stressed that it was not an issue of the discretion of the court but law. They asserted that upon making that establishment to the effect that it had no jurisdiction, it had no choice but to down its tools immediately and take no further steps in the case. They submitted that the issue of jurisdiction – power of court to ascertain, hear and determine a dispute before it went to the root of any dispute before it and this court should proceed to state so on the objection's merit.

13. Secondly, they submitted on the applicability of the Doctrine of Judicial Exhaustion and whether the instant case was an exception to the rule. On this point, the 2nd Defendant's Advocates argued that this Doctrine was applicable as it affected this instant case. They explained that this is where court had the responsibility of postponing, for the time being, its role and allowing other Judicial bodies with quasi judicial mandate to adjudicate on matters as a first instance and granting remedies. To them, this case was not in the category of those actions which would be exempted from the rule in certain circumstances – to allow certain suits to proceed before it. For this limb of its argument, the Learned Counsel relied on the decisions of **William Odhimabo Ramogi & 3 Others – VS - The Attorney General & 4 Others [2020] eKLR & Geoffrey Muthinja & Another –VS- Samuel Muguna Henry & 1756 Others [2015]eKLR**

where the court held *inter alia*:-

“The doctrine of exhaustion serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanism in place for resolution outside the court. This encourages alternative dispute resolution outside mechanism in line with Article 159 of the Constitution of Kenya”

The Learned Advocates contended that, it was only in exceptional circumstances where high court would determine that the doctrine requirement would not serve that value and allow the suit to proceed before it. Otherwise, under this doctrine, court should consider the suitability of the particular case and determine the issues raised itself. It was the 2nd Defendant's Advocate submission that the cause of action and this suit did not qualify to be exempted from the Doctrine of exhaustion of administrative remedies. Explicitly, they pressed, the Plaintiff/Respondent's case ought to be and should be heard and resolved by the National Land Commission for these reasons that:-

a). The filed suit by the Plaintiff/Respondent was for the recovery of the Government (Public) land allegedly illegally alienated by the Defendants; b). The prayers, orders sought and the cause of action by the Plaintiffs/ Respondents were not premised on any complex legal and/or Constitutional issues whose interpretation would be solely the preserve of the High Court but the National Land Commission would handle as the suitable statutory body with the legal mandate to deal with the dispute. They held that should the NLC be unable to successfully resolve the dispute any party dissatisfied with its findings could thereafter invoke this court through its appellate Jurisdiction to address the grievances and the dispute.

C. THE SUBMISSIONS BY THE PLAINTIFF/RESPONDENT

14. On 31st May, 2021, the Advocates for the Plaintiff/Respondent, Mr. Francis O. Makori Advocate, filed their written submissions on the Objection dated the same date. The Learned Advocate summarized the gist of the Objection by stating that the 3rd Defendant had sought to strike out the Plaint dated 9th June, 2009 and amended Plaint dated 15th April, 2019, by holding that the import of the suit had been rendered moot upon the promulgation of the Constitution of Kenya 2010 and that this court lacked the jurisdiction to hear and determine it as its jurisdiction had not crystalized whereby the EACC filed a complaint for the recovery of the Suit property being a public property allegedly obtained by the Defendants through corrupt and illegal means.

15. The Learned Plaintiff/Respondent's Advocates submitted that this court had original and unlimited jurisdiction to hear and determine the Plaintiff's suit being one where the suit property had been initially alienated in a corrupt manner in favour of the deceased and subsequently transferred to the 2nd Defendant/Respondent who was assisted by the 3rd Defendant/Respondent while acting in his official capacity as a duly appointed public officer. He held that pursuant to the provisions of Section 11(i) (j) of “The Ethics and Anti Corruptions Commissions Act” the Plaintiff/Respondent had the legal mandate to investigate and institute Civil Proceedings with respect to corruptly alienated public land. Based on this legal mandate, they conducted investigations which established that the Defendants were civilly liable under the provisions of Section 51 of the Anti-Corruption and Economic Crimes Act. Therefore, the present suit was properly instituted before a court of competent jurisdiction.

The Learned Counsel, further juxtaposed that under the provisions of National Land Commission Act. 2012, the National Land Commission, as a quasi-judicial body, lacked the legal mandate to investigate corruption issues touching on alienation of public land. It was his submission that the provisions of the National Land Commission Act 2012 at no instance did limit the Ethics and Anti-Corruption Commission on any aspect, section or operation particularly under the provision of Section 11(i) (i) of the said Act.

The Advocate reiterated, if anything it is the NLC that lacked jurisdiction at all to adjudicate or consider over factual & legal corruption related issues touching on alienation of public land such as the suit property. It was his submission that, the remedies sought by the Plaintiff/Respondent in its suit fell outside the scope and purview of the provisions of both Sections 14 and/or 30 of the NLC Act. 2012 as the 3rd Defendant had wanted the court to believe.

16. To buttress its argument on this point the Plaintiff/Respondent's Advocate, specifically contrasted and relied on the following provisions of the Law:-

(a) The long title of Sections 14(1) and 30 of the NLC Act, 2012.

(b) The long title of Sections 11(i)(j), 28 and 33 of the Ethics and Anti-Corruption Act 2011.

(c) The long title of Section 2 (Definition of Corruption) 23, and 51 of the Anti - Corruption Crimes Act; and

(d) Order 2 Rule 6 of the Civil Procedure Rules, 2010 where one was bound by their own pleadings.

17. The Learned Counsel argued that the objection was raised in bad faith, lacked merit and failed to meet the threshold of a preliminary objection as according to them there existed several and material facts in dispute that would require production of both oral and documentary evidence. To support it on this issue they relied on the decision of ***“Attorney General and another –VS- Andrew Maina Githinji & another [2016] eKLR.***

18. The Learned Counsel vehemently submitted with great concern that should the preliminary objection be upheld a number of relevant and factual issues from the filed suit would be subsumed, left out and un tackled, which included in the long run to establish whether:- i). the suit had been filed by or on behalf of the Ministry of Lands; NLC had the mandate to investigate and adjudicate corruption issues in alienation, allocation or disposition of public property; ii). the Defendants in the year 1998 were liable for corruption, by corruptly, fraudulently and illegally being issued the Survey Plan and Deed Plan to prepare a Grant in the name of the deceased; iii). the suit property had been registered by the 3rd Defendant without the consent or approval of the then Directorate of Civil Aviation (Now Kenya Civil Aviation Authority) or the then Ministries of Land, Transport or Finance; iv). at the time of the allocation of the suit property and the house the said parcel had already been reserved, set aside for the use and/or was being used by the then Directorate of Civil Aviation to house its staff members who provided air navigation services to the public; v). The suit property remained and reflected in the Government Building Register as an institutional house and that it was not available for allocation to the 1st Defendant; and vi). it was one of the Properties mentioned in the report of the Ndungu Commission of Inquiry into illegal allocations of Public Land in which the cancellation of the title issued to the 1st Defendant had been recommended thereof.

19. The Learned Counsel contended that the suit consisted of material triable issues in dispute including the establishment of whether the 3rd Defendant abused his office and breached his fiduciary duties. Arising from 3rd Defendant's conduct, the suit property was irregularly, fraudulently and unlawfully alienated to the deceased and subsequently to the 2nd Defendant contrary to the law. To support his argument the Learned Counsel relied on the decision of ***Ethics and Ant-Corruption Commission –VS- Judith Marilyn Okungu & Another [2017] eKLR*** for the proposition that a preliminary objection should be dismissed where matters raised in the Plaintiff/Respondent's suit could not be handled by way of preliminary objection since in so doing mis justice would be occasioned.

20. The Advocate further submitted that the issues raised in the objection were materially inconsistent with the averments made out under Paragraph 25 by the 3rd Defendant of his filed Amended Defence dated 24.10.2018 where he emphatically and unequivocally admitted the jurisdiction of this court. In the given circumstances, therefore they held that the provisions of Order 2 Rule 6 of the CPR which estops parties from departing from the averments of their filed pleadings came to play.

He further opined that the objection was an afterthought all intended to derail the expeditious disposal of the suit as by the time of filing his Amended Defence was within his knowledge and information that the National Land Commission was already in existence having been established in the year 2012 and ought to have raised the objection immediately. The Advocate opined that it had not have to wait for a period of 12 years to lapse in order to object as clearly this was done in bad faith, ulterior motive and as an afterthought intended to delay the determination of the Plaintiff's suit. To buttress his point on this issue, the Learned Counsel relied on the decision of ***“Kinyetti –VS- Attorney General [1988] eKLR”*** where court upheld that under the provision of Order 2 Rule 6 of the Civil Procedure Rules and upon invoking the doctrine of estoppel parties are strictly bound by their own pleadings.

21. The Learned Counsel submitted that the Plaintiff/Respondent's suit fell outside the provisions of Sections 12 (1), 14 and 30 of the National Land Commission Act 2012, which could not be applicable retrospectively in respect to the Plaintiff/Respondent's suit file in the year 2009. He held that EACC was a body corporate established under the provisions of Article 79 of the Constitution of Kenya and Section 3 of Ethics and Anti-Corruption Commission Act 2011 within the mandate under Article 259 (1) (a) (d) and Section 11(i) (j) to undertake investigations into comply alienated public property and related issues and where appropriate to institute and conduct proceedings in court for the recovery or protection of public property or for the freezing or confiscation of proceeds of corruption or related to corruption or the payment of compensation or other punitive and disciplinary measures.

The Advocates averred that pursuant to the provisions of Sections 11 & 33 of the EACC Act the corruption issues over the alienation were properly investigated and upon conclusion the Plaintiff filed the suit and was ready to prosecute it.

22. The Learned Counsel asserted that under the provision of Section 28 of the EACC Act the commission could not be a subject of control or direction of any other person except as provided for under the Constitution and which the 3rd Defendant now wanted to do by making suggestions that the EACC to be placed under the ambit, control or direction of the National Land Commission which according to the Advocates was unlawful to say the least. Additionally, the Learned Counsel submitted that, there was no provisions in neither the Land Act nor EACC which held that after the conclusion of its investigations they should lodge a complaint with the NLC in the first instance before filing a suit before the Environment and Land Court. Furthermore, pursuant to the provisions of Section 13 of the ELC, the court has exclusive and original jurisdiction to hear and determine all suits under Sections 51 of the Ant Corruption and Economic Crimes Act and Section 11(i) (j) of the EACC Act of 2011.

He asserted that the Plaintiff's suit never sought for the review of grant or disposition over the suit property as envisaged by the 2nd and 3rd Defendants. Hence, the suit and its relief fell outside the scope of contemplated under Sections 14 and 30 of the NLC Act.

23. Lastly, the Learned Advocate strongly submitted that all the cases cited and relied upon by the 3rd Defendant/Applicant were materially distinct, different and distinguishable on factual issues and the circumstances from the instant Plaintiff/ Respondent's case whereby:- i). the Plaintiff/Respondent had filed the case under the provision of Section 23 of the ACC Act and Section 11 (1) (j) of the EACC Act; ii). The 3rd Defendant in the instant case had not admitted that all facts pleaded were correct; iii). in the current case it's the EACC itself which was a party as a Plaintiff and with a clear cause of action against the Defendants on alienation of public land through corrupt and illegal means and nor for the review nor disposition of a grant; iv). in the current case EACC had conducted thorough investigation and had established that the Defendants were civilly liable unlike in the substratum depicted in those cited cases. In conclusion, and based on the foregoing legal arguments and submissions the Learned Counsel urged court to dismiss the Preliminary Objection with costs.

V. ANALYSIS AND DETERMINATION

24. The Honorable Court has keenly read through and perused all the filed pleadings, articulated and comprehensive written submissions by all parties, all the plethora authorities relied on and cited by the parties, other relevant provisions of the law as pertains to the preliminary Objection filed by the 3rd Defendant/Applicant and supported by the 2nd Defendant herein. In order to arrive at an informed decision on the said Objection the honorable court has framed the following fundamental issues as a guide. These are as follows:-

- a) Whether the raised preliminary objection by the 3rd Defendant/Applicant meets well established threshold of a preliminary objection as set out by law and precedents.***
- b) Whether this Honorable Court has jurisdiction to hear and determine the Plaintiff's case as a court of first instance or if there exists other statutory bodies namely the NLC to do so on matters pertaining to alienation, acquisition and disposition of public land.***
- c) Whether the Preliminary Objection by the 3rd Defendant is sustainable – entitling the 3rd Defendant the relief sought.***
- d) Who will bear the costs of the filed preliminary objection?***

Issue No. 1 - Whether the raised preliminary objection by the 3rd Defendant/Applicant meets the well established threshold of a preliminary objection as set out by law and precedents.

25. According to the Black Law Dictionary a Preliminary Objection is defined as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”

The above legal preposition has been made graphically clear in the now famous case of *Mukisa Biscuits Manufacturing Co. Ltd –VS- West End Distributors Ltd. [1969] E.A. 696*. Where Lord *Charles Newbold P.* held ***that a proper preliminary objection constitutes a pure points of law***. The Learned Judge then held that:-

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary objection. A preliminary Objection is in the nature of what used to be a demurer it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought in the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”

26. Verbatim, I lifted up the decision cited by the Plaintiff/Respondent's Advocate in the case of *Attorney General & Another –VS- Andrew Mwaura Githinji & another [2016] eKLR:-* as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection *inter alia:-*

- (i) A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.***
- (ii) A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and***
- (iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.***

It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. The 3rd Defendant/Respondent has not provided any plausible reason as to the reason of filing the objection close to 12 years from the time when the Plaintiff/Respondent filed their case. Although the Plaintiff/Respondent imputed perhaps in so doing, the 3rd Defendant might have been harboring ill motive, bad intentions and faith to derail the proceedings and cause

more delay in the expeditious determination of its case. But based on the above legal position, this court holds that filing a Preliminary objection is not time bound. Therefore, it is unfortunate as this honorable court does not see any nexus to these allegations.

27. Be that as it may, the 3rd Defendant and as it is mutually supported by the 2nd Defendant essentially has raised the following fundamental pertinent issues of pure law:- These are:-

(a) The suit offends the Provisions of Articles 2, 67 and 68 (c) (v), 259 (3) of the Constitution of Kenya 2010 as read with Sections 14 and 30 of the NLC Act No. 5 of 2012 and Section 4 of the ELC Court Act No.19 of 2011

(b) It's the NLC and not the ELC which has an appellate jurisdiction, which is vested with the Jurisdiction under Section 30 of NLC Act in the first instance to review of all grants or disposition of public land to establish their propriety or legality under Article 68 (c) (v) of the Constitution of Kenya as read with Section 14 of the NLC Act.

28. Certainly, these are serious and pure issues of law which this court is duty bound to critically venture to be heard and determined prior to them being set down the case for full trial on its own merit. The issues are not fanciful nor remote. Indeed, under this sub-heading on the one hand, while the court fully concurs with the common position adopted by 2nd and 3rd Defendants/Applicants to raise and defend the objection on law, on the other hand, notwithstanding the issue of the timing of filing, the court vehemently disagrees with the Plaintiff/Respondent's assertion that the said objection in its entirety is grossly misconceived, misplaced and utter bad faith as it fails for failing to meet the threshold of a Preliminary Objection. For these reasons, therefore, I find that the objection raised was properly filed hereof. It constitutes matters akin to be determined at the preliminary level before embarking on the hearing of the case on its own merit in conformity to *Mukisa Biscuits Manufacturing Co. Ltd (Supra)*.

Issue No. 2:- Whether this Honorable Court has jurisdiction to hear and determine the Plaintiff's case as a court of first instance or if there exists other statutory bodies namely the NLC to do so on matters pertaining to alienation, acquisition and disposition of public land.

29. In all fairness, I presume that this sub - heading constitutes what is the cracks of the matter and the basic substratum to the said objection. It is the elephant in the room as it were! Let us begin by assessing the areas of consensus by the parties. It is not contested at all by any party hereof whether the ELC has jurisdiction or not to hear and determine this case. Nay. Far from it. My appreciation of the strong legal contestation, is one anchored on the Doctrine of Judicial Exhaustion advanced by the 2nd and 3rd Defendants herein this being not an exempted rule to postpone the trial herein and juxtapose permit another judicial body – NLC with a legal mandate to explore and exercise its judicial powers in handling the case in the first instance. In that legal arrangement, it is strongly advanced that the Defendants would have been accorded more leverage on their rights of fair hearing and a golden opportunity on hierarchy basis to prefer an appeal before this court which retains an appellate jurisdiction. While mounting a strong opposition, the Plaintiff/Respondent advanced an argument that the NLC ostensibly being the preferred statutory quasi judicial body, lacked such legal mandate any more to deal with such matters by virtual of the expiration of time under Section 14 (1) of the NLC Act, operation of law and effluxion of time. Besides, the case at hand, being one of acquisition of public land through corrupt and illegal means was rather unique and distinct outside its legal scope. That is the pith and substance of the matter.

30. It is trite law that matters of jurisdiction is everything. While the Supreme Court in **Civil Appeal No. 2 of 2011 – “Samwuel Kamau Macharia – Vs _ Kenya Commercial Bank & 2 others”** with regard to jurisdiction held that:-

“A court's jurisdiction flows from either the Constitution or legislation. 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. We agree with the Counsel for the first and second Respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings.....where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the Constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation”.

It is imperative to keenly look at the three (3) statutory bodies referred to in this case and which are of significant importance. These are namely, a). the Environment & Land Court, b). the National Land Commission and c). the Kenya Anti Corruption Commission. The ELC was established under the provisions of Article 162 (2)(b) of the Constitution of Kenya 2010, as read with Section 4 of the Environment and Land Act No. 19 of 2013. It is court with original and appellate jurisdiction. The NLC is established under Article 67 (i) of the Constitution of Kenya 2010 as read with Section 30 of NLC which is vested with jurisdiction in **the first instance** to review of all grants or disposition of public land to establish their propriety or legality under Article 68 (c) (v) as read with Section 14 of the NLC No. 5 of 2012. The Kenya Anti - Corruption Authority - the Plaintiff/Respondent attained its legal mandate as vested from the provisions of Article 252 (1) (a) (d) of the Constitution of Kenya 2010. Its a body corporate established under the Provisions of Article 79 of the Constitution of Kenya 2010 as read with section 3 of the Ethics and Anti-Corruption Commission Act, 2011as read with Section 11(i)(j) and 23 of the EACC Act.

31. Additionally, in order to fully tackle these legal aspects of the Preliminary Objection raised herein there is need to critically assess the fundamental principles of Law cited and referred to by the 3rd Defendant as follows:-

Section 14 (1) of the National Land Commission Act 2012 provides **“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 of a County Government, a Community or an individual, review all grants or disposition of Public Land to establish their propriety or legality”**

While the provisions of Section 30 of NLC being a transitional chance provides:-

“Notwithstanding the provisions of this Act:-

(a) Any orders or notices relating to public land administration made or issued by the Ministry of Lands before the commencement of the Act shall be deemed to have been made or issued under this Act; and

(b) Any function or transactions Civil Proceedings or any other legal or other process in respect of any matter carried out in relation to the administration of public land administration, by or on behalf of the Ministry of Land s before the commencement of this Act, shall be deemed to have been carried out under this Act”.

32. To begin with, the preliminary objection and above statutory provisions have been analyzed as herein below. Firstly, the commencement date for the NLC Act No. 5 of 2012 was 2nd May, 2012. The power by the NLC for grants review and disposition of public land was time bound by law. It already expired and lapsed after 5 years of its establishment. To be exact, the five (5) years envisaged by law was the year 2nd May, 2017. My understanding here is that the said legal mandate bestowed onto the National Land Commission expired then by operation of law and effluxion of time. I have not seen anywhere in law or otherwise where Parliament has extended this mandate as we shall see later on hereinbelow. In the *ELC (Nbi) Misc. (Nbi) No. 582 of 2016 (JR) the matter of “Republic –VS- NLC & 3 Others Ex - parte, Samuel Githegi Mbugua & 4 Others [2018] eKLR court held:-*

“There is no dispute that the NLC had the power under Section 14 of the NLC Act on its own motion or upon a complaint to review all grants or dispositions of public land to establish their Proprietary or legality. However, this mandate has since come to an end. It is arguable whether the Respondent (NLC) can continue with the review of grants or disposition of Public Land in respect of the Complaints that were pending before it when it’s mandate under that section expired. I am of the view that the Respondent cannot purport to review any grant or disposition of public land after the Expiry of its mandate under Section 14 of the Act Whether such review is pursuant to a new complaint or a complaint that was pending as at the time its mandate expired unless Parliament extended its mandated under that section of the Act”.

33. Arising from the ratio of the above court decision, I hold the view that, if it was the intention of Parliament to empower the NLC to continue processing complaints pending before it after the expiry of its mandate nothing would have been easier to do than to have provided for such eventuality in the Act. In the absence of such provisions in the Act, the NLC would be exercising powers it does not have if it purports to continue with the review of Grants and dispositions of public land after the expiry of its mandate. Thus, until the extension is granted by Parliament, the NLC must lay down its tools with regard to the exercise of the powers that were granted to it under the said Section 14(1) of the NLC Act. Automatically, this defeats the contention advanced by the 3rd Defendant onto the application of the doctrine of Judicial exhaustion of statutory remedies and respect for judicial hierarchy. I emphasize that this mandate expired and Parliament refused to extend it.

34. Secondly, as stated above, the cause of action in the Plaintiff/Respondent’s suit against the 1st, 2nd and 3rd Defendants is for the recovery of public land alienated allegedly from corrupt and illegal means. For the sake of appreciation, public land is as defined under Article 67 (1), (2), (3) and (4) of the Constitution. The relief sought is for the cancellation of the said title deed and rectification of the land registries. Accordingly, the Plaintiff/Respondent undertook investigations into the alleged Corruptly alienated public property the suit land and hence decided to institute this case in this court for the recovery or protection of the said property. Critically speaking, this mandate is not founded under the provisions of Sections 14 and/or 30 of NLC Act, but only this court has the said legal mandate to deal with corruption related issues touching on alienation of public land and grant the remedies sought here. As such, the matter before this court falls squarely outside the legal scope and purview of the provisions of Sections 14 and 30 of NLC Act.

35. As stated the umpteenth times, the reliefs sought by the Plaintiff/Respondents herein being one for the cancellation of the title deed to the suit property and rectification of the registries by the registrar. In the *Judicial Review cases nos. 298 and 363 of 2014 – “Robert Mutiso Lelli and Cabin Crew Investments Limited – Versus – The National Land Commission” eKLR (2017) court held that there is no legal provision for the NLC to revoke titles where upon inquiry it establishes that such titles were unlawfully or irregularly acquired. The power to revoke title is vested in the Registrar and not the Commission which can only recommend. Articles 69 of the Constitution of Kenya and Section 14 of the National Land Commission Act limits the Commission’s power to carrying out an inquiry and determining the legality or propriety of a title or disposition in public land after which it can recommend to the Registrar for revocation and acting contrary to this would acting exceedingly and excessively ultra vires the law”.*

36. On the contrary, under the provisions of Section 80 (1) and (2) of the Land Registration Act, No. 2012 the ELC has the power to order for the rectification of the Register by directing that any registration be cancelled or amended where it is satisfied that the registration was obtained, made or omitted by fraud or mistake.

37. In the *ELC (Nbi) Misc. (Nbi) No. 582 of 2016 (JR) the matter of “Republic –VS- NLC & 3 Others Ex - parte, Samuel Githegi Mbugua & 4 Others [2018] eKLR court held:-*

“There is no dispute that the NLC had the power under Section 14 of the NLC Act on its own motion or upon a complaint to review all grants or dispositions of public land to establish their Proprietary or legality. However, this mandate has since come to an end. It is arguable whether the Respondent (NLC) can continue with the review of grants or disposition of Public Land in respect of the Complaints that were pending before it when it’s mandate under that section expired. I am of the view that the Respondent cannot purport to review any grant or disposition of public land after the Expiry of its mandate under Section 14 of the Act Whether such review is pursuant to a new complaint or a complaint that was pending as at the time its mandate expired unless Parliament extended its mandated under that section of the Act”.

38. Arising from the ratio of the above court decision, I hold the view if it was the intention of Parliament to empower the NLC to continue processing complaints pending before it after the expiry of its mandate nothing would have been easier to do than to have provided for such eventuality in the Act. In the absence of such provisions in the Act, the NLC would be exercising powers it does not have if it purports to

continue with the review of Grants and dispositions of public land after the expiry of its mandate. Thus, until the extension is granted by Parliament, the NLC must lay down its tools with regard to the exercise of the powers that were granted to it under the said Section 14(1) of the NLC Act. Automatically, this defeats the contention advanced by the 3rd Defendant onto the application of the doctrine of exhaustion of statutory remedies and respect for judicial hierarchy. I emphasize that this mandate expired and Parliament refused to extend it.

39. Thirdly, on the Contrary, the provisions of Section 13 of ELC Act, of 2012 grants the ELC the exclusive and original jurisdiction to hear and determined all suits filed under Section 51 of the Anti - Corruption Economic Crimes Act and section 11(i) (j) of the Ethics and Anti-Corruption Commissions Act 2011. The Appellate mechanism under (The Review of Grants and Disposition of Public Land (Regulations 2017 (Legal Notice No. 71 of 2017) would only be available in instances where review decisions were made and the aggrieved parties participated in the review proceedings by NLC. The ELC is vested with jurisdiction over unresolved disputes on titles/grants relating to past dispositions of public land. This becomes an exemption case for the application of the Doctrine of Judicial Exhaustion as propelled by the 2nd and 3rd Defendants. My understanding and from the filed pleadings, the Plaintiff/Respondent have not at all sought for the review of Grant or disposition over the suit land as contemplated under Sections 14 & 30 of the Act and “The Grants Review Regulations” but for recovery of public land ostensibly alienated by corrupt and illegal means which falls within the powers of this court.

40. Fourthly, the provisions of Section 28 of the Ethics & Anti Act 2011, provides that except as provided in the Constitution and the Act the EACC shall in the performance of the Function’s not be subjected to the direction or control of any person or authority. Thus, this contrasts the preposition meted out by the 3rd Defendant in the Preliminary Objection of unduly subjecting the operations of the Plaintiff/Respondent to the control of NLC on matters of investigations onto allegedly comply acquired public land and property as is the case here and suit property.

41 The upshot of this is that the Environment & Land Court has original jurisdiction to hear and determine the Plaintiff/Respondents suit before it from the cause of action where there are allegations that the property was corruptly alienated in favour of the deceased in the first instance and subsequently transferred to the 2nd Defendant/Respondent and the National Land Commission lacks the jurisdiction and mandate to conduct investigations of corruptions issues touching on alienation of public land and the reliefs and remedies sought from the suit and the NLC legal mandate has expired altogether. Moreover, the authorities cited are distinguishable and distinct as the circumstances there are very different from the one here.

For these reasons, the Preliminary Objection by 3rd Defendant/Applicant and supported by the 2nd Defendant herein is disallowed and for avoidance of any doubts, I proceed to provide the following directions:-

- a) **That the Doctrine of Judicial Exhaustion is not applicable and it is not suitable to this instant case being a clear exemption to the rule and therefore the case will be heard and determined by this Honorable court.**
- b) **That taking that all the parties had fully complied with the provisions of Order 11 of Civil Procedure Rules on case management the matter is ready. It should be set down for full trial within the next 90 days from todate without failure.**
- c) **That this order shall apply “Mutatis Mutandis” to all the other related five cases pending before this court being ELC No. 170 of 2009; 177 of 2009; 178 of 2009; 179 of 2009; 181 of 2009 and 270 of 2009 respectively.**
- d) **That the costs to be in cause.**

IT IS SO ORDERED.

Ruling **Delivered, Dated** and **Signed** in Open Court This 2nd Day of **November 2021.**

HON. JUSTICE L.L. NAIKUNI

JUDGE

(ELC - MOMBASA)

In the presence of:-

(a) *M/s. Yumna – the Court Assistant*

(b) *Mr. Francis Makori Advocate for the Plaintiff/Respondent.*

(c) *Mr. Busieka for the 1st Defendant/Respondent*

(d) *Mr. T. K Rutto holding brief for Mr. Magut Advocate for the 2nd Defendant/Respondent*

(e) *Mr. T. K Rutto for the 3rd Defendant/Respondent*