



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

PETITION NO. 3 OF 2016

WILLIAM ABOK..... PETITIONER

VERSUS

NATIONAL LAND COMMISSION.....1ST RESPONDENT

TURKANA COUNTY LAND MANAGEMENT BOARD.....2ND RESPONDENT

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

JOHN EGIELAN.....4TH RESPONDENT

AND

REDEEMED GOSPEL CHURCH.....INTERESTED PARTY

JUDGMENT

The Plaintiff's Case

1. By a petition dated 15/8/2016 and filed in court on the same date, the petitioner sought the following orders against the respondents:-

a. A declaration that the National Land Commission and/or the County Land Management Board has no mandate to investigate, question or make recommendations on the title to private land/community land under Article 67 of the Constitution, the National Land Commission Act and/or under any other law whatsoever.

b. A declaration that the National Land Commission and/or the County Land Management Board has no jurisdiction on all disputes touching on the environment, the use and occupation of and title to private land or community land under Article 67 of the Constitution, the National Land Commission Act and/or under any other law whatsoever.

c. A declaration that proceedings and decision made on 10th August, 2016 by the Turkana County Land Management Board on the land dispute between Egielan's Family represented by John Egielan and Abok Family represented by William Abok are *ultra vires* the powers of the said County Management Board and unconstitutional.

d. A declaration that Section 18 of the National Land Commission Act 2012 (No. 5 of 2012), does not donate jurisdiction to investigate title to private land or community land to County Land Management Boards.

e. An order of certiorari quashing the proceedings and decision made on 10th August, 2016 by the Turkana County Land Management Board on the land dispute between Egielan's Family represented by John Egielan and Abok Family represented by William Abok.

f. An order of prohibition barring the National Land Commission and/or the Turkana County Land Management Board from investigating, challenging and/or in any manner whatsoever questioning the ownership of the land referenced herein.

g. That costs of this petition be provided for.

h. That such order may be made in the premises as shall be just.

The Petition

2. From the contents of documents filed, it is apparent that the genesis of this petition is the dispute between the family of the petitioner and that of the 4th respondent which went before a Council of Elders of Nawoirotong Sub-location and was decided in favour of the petitioner's family.
3. An appeal was then made by the 4th respondent's family to the Ministry of Lands Physical Planning Housing and Urban Areas Management in the County Government of Turkana on **9/8/2015** and a decision in favour of the 4th respondent issued on **24/8/15**.
4. Subsequently the dispute was brought before the 2nd respondent who determined it on **10/8/2016**, also in favour of the 4th respondent. It is a contention of the petitioner that the last decision herein purports to make a determination on the issue of ownership of the disputed land which is community land and thus unconstitutional.
5. The petitioner avers that the mandate of the National Land Commission under the Constitution is only restricted to the administration and management of public land.
6. He further avers that the Turkana County Land Management Board, the 2nd respondent herein, violated the express constitutional provisions in **Articles 67(2)**, as read with **Section 18** of the **National Land Commission Act** by purporting to determine the issue of ownership of the suit land.
7. It is also alleged that the provisions in **Article 40** were violated in that land that the petitioner's family has utilized for generations stands to be lost hence this petition. The petitioner's affidavit in support of the above facts has been filed with the petition.

The Response

8. The petition is opposed by the 4th respondent who filed his response on **20/9/2016**. He depones upon the advice of his advocate that he believes this court to be devoid of jurisdiction to hear and determine this petition; that jurisdiction is vested in the High Court under **Article 165(6) and (7)** to exercise supervisory jurisdiction over such authorities as the 1st and 2nd respondents; that; that also under the provisions of **Article 67(2)(e) (g) and (h)** the National Land Commission can address historical injustices monitor and oversee the land use planning throughout the country and offer redress to all land issues; that the NLC can review grants under **Section 14** of the **NLC Act**; that under **Section 18 (8)** of the Act, the 2nd respondent has mandate to allocate and subdivide public land; that the petitioner is blowing both hot and cold with the same mouth by terming the suit land alternately as "*private land*" and then "*community land*;" that the petitioner has not invoked the appropriate provisions on land tenure; that judicial review proceedings are the appropriate vehicle for the instant dispute; that only the community through its elders can determine who owns what land; that facts available show that the land belongs to the 4th respondent's family and the petitioner's family entered therein by force and against the advice of community leaders; that the authorities decided the matter correctly; that the court does not have jurisdiction to prohibit public authorities from carrying out their constitutional/statutory mandates save where their action is outside the law; that in any event no demarcation documents are exhibited to show in whose favour the land was demarcated; that no injunctive orders should issue as the decision the petitioner impugns has already been implemented by the Ministry of Lands and that in any event the petitioner delayed in approaching this court for **9** months and any such orders if issued would be quite "*disruptive*" and would legitimize the illegal invasion of the 4th respondent's family's land.
9. The 3rd respondent filed grounds of opposition to the petition on **28/9/16**, stating that the same does not raise any constitutional question; that no constitutional rights have been demonstrated to have been violated with regard to the petitioner; that no act or omission is attributable to the 3rd respondent and that the petition is premature.
10. The **interested party** was belatedly enjoined to this case at its instance. Its case is that it bought **5** acres out of the suit land from the petitioner after a due diligence process which involved confirmation from the area chief that the land belonged to the petitioner and before the 4th respondent obtained a decision in his favour from the Turkana County Land Management Board.
11. The petitioner filed his submissions on **1/2/2018**, the 4th respondent on **15/12/17** and the interested party on **19/11/2018**. The 3rd respondent filed submissions on **25/3/2019**.

Determination

Issues for Determination.

12. In this court's view the issues for determination are as follows:

- a. **Whether this court has jurisdiction to determine the matter.**
- b. **Whether the National Land Commission and the County Land Management Board have jurisdiction to inquire into title use and occupation of the suit land;**
- c. **What orders should issue?**

(a) Whether this court has jurisdiction to hear and determine the matter.

13. The faintest whiff of discontent with the jurisdiction of a court should galvanize the court into an inquiry as to whether it has jurisdiction in the first place before it delves into any other matter arising, for it was stated in the **Republic v Commissioner of Lands, Kenya Agricultural Research Institute Ex-parte Renege Project Ltd [2018] eKLR** while quoting the celebrated case of **Motor Vessel M. V. "Lilians" -vs- Caltex Oil (Kenya) Ltd (1989) LLR 1653**, as follows:

"15. It is not contested that jurisdiction is everything and where lacking, a court must down its tools. In the oft cited case of Owners of the Motor Vessel „Lillian S? v Caltex Oil (Kenya) Ltd [1989] KLR 1 referred to by counsel for the 1st respondent it was held that:

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for continuation of proceedings pending other 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."

14. The jurisdiction of this court is challenged by the 4th respondent. In his view, the High court is the court that has exclusive jurisdiction to hear and determine such a matter under **Article 165 (6) and (7)** and it has supervisory jurisdiction over anybody or authority exercising judicial or quasi-judicial functions such as the 1st and 2nd respondents. However, I have not found any strong submission on this point in the 4th respondent's documents.

15. Nevertheless it is necessary to inquire into the same.

16. It is correct that **Article 23** of the constitution grants the High Court has jurisdiction, in accordance with **Article 165**, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

17. The jurisdiction of the Environment and land court is first and foremost created by **Article 162(2)(b)** which provides as follows:

"Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to:-

(b) the environment and the use of and occupation of and title to Land."

18. It is out of this provision that the environment and land court act emanated. Its pre-ambule shows that it is an "Act of Parliament to give effect to **Article 162(2)(b)** of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes.

19. Section 13 of the Act provides as follows:

"13. Jurisdiction of the Court

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes-

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

(5) Deleted by Act No. 12 of 2012, Sch.

(6) Deleted by Act No. 12 of 2012, Sch.

(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—

(a) interim or permanent preservation orders including injunctions;

(b) prerogative orders;

(c) award of damages;

(d) compensation;

(e) specific performance;

(g) restitution;

(h) declaration; or

(i) costs.

20. This is a petition for redress following what the applicant terms as the violation of certain provisions of the constitution.

21. In the petition he avers that the Turkana County Land Management Board violated the express terms of articles of the constitution. Those articles relate to land. **Article 62(2)** provides as follows:

“(2) Public land shall vest in and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission, if it is classified under-

(a) clause (1)(a), (c), (d) or (e); and

(b) clause (1)(b), other than land held, used or occupied by a national State organ.

22. **Article 40** of the constitution prohibits the arbitrary deprivation of a citizen of his right to of any description, or of any interest in, or right over, property of any description, unless the deprivation meets certain conditions set out thereunder.

23. **Section 13(3)** of the Act provide that *“...nothing in [the] Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.”*

24. In the case of **Joseph A Oremo v Commissioner of Lands & 3 others [2019] eKLR** it was submitted in a preliminary objection that the Environment and Land Court’s jurisdiction is settled in terms of **Article 162(2) (b)** and **Section 13** of the **Environment and Land Court Act No. 19 of 2011** to handle the matters for redress of denial, violation and infringement of, threat to, rights or fundamental freedom relating to clean and healthy environment **under Article 42, 60 and 70** of the Constitution. It was submitted that matters under other articles, to wit, **Article 3, 10, 22, 23(3) and 40(1)** of the Constitution can only be addressed by the High court and those under **Article 13 and 24** of the African Charter on Human and Peoples Rights by the African court on Human and Peoples Rights established by virtue of **Article 1** of the protocol to the African Charter on Human and Peoples’ Rights. Kibunja, J dismissed the objection as lacking in merit, stating as follows:

“That it is apparent from the paragraphs of the petition set out above that the petitioner is staking his claim to the title or entitlement of the property described therein. That contrary to the 4th Respondent’s learned counsel’s submissions, this court is the one with jurisdiction to hear and determine claims, howsoever commenced, including constitutional petitions, touching on title to land. That being the main claim or subject matter in the petition, the other issues of whether the 1st Respondents action of allocating the said plot to the 4th Respondent contravened or infringed his right to fair administrative action, and fair hearing under Articles 40 and 50 of the Constitution are also matters to be decided by this court.”

25. I am persuaded that in this case too the matters of violation of the constitution should not be confined to the interpretation of the provisions of under **Articles 42, 60 and 70**, and that the specific violations alleged herein being related to land issues, this petition is envisaged by the constitution and the provisions of **Section 13** of the Act and that it is properly before this court.

(b) Whether the petition meets the threshold established by the court in the Anarita Karimi Njeru decision

26. The respondents’ claim that the petition does not meet the threshold established by the legal decision in **Anarita Karimi Njeru vs the Republic KLR 1 1979** must be examined first. That decision emphasizes the need for precision in pleading while a petitioner is drafting his

petition.

27. In earlier decisions courts have, following the decision in Anarita, stressed the need for a petitioner to show the right alleged to be violated, the provision of the constitution which are said to be violated and how the same have been violated.

28. In the Anarita case (supra) case the applicant moved the Court for a declaration that during her trial before the Resident Magistrate Meru upon two charges of stealing by a person employed in the public service the provisions of section 77 of the Constitution of Kenya were contravened. The court examined the manner in which the affidavit outlined the elements of alleged contravention of rights of the petitioner. At the hearing the court also sought to be enlightened as to which of the paragraphs of **Section 77** of the Constitution were thereby alleged to have been infringed and Mr. Mwirichia, counsel for the applicant and Mr. Mwirichia referred to his list of authorities, which were said to have been filed on the day preceding the hearing, which mentioned both **paragraphs (c) and (e) of subsection (2)** of that Section. The court observed that that was a rather curious manner of bringing a statutory provision to the notice of a court of law but nevertheless allowed counsel to attempt to persuade it, but later gave this now famous dictum with regard to such a situation:

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

29. The petition before me cites numerous articles of the constitution in its heading and many others in its body. I am concerned more with those in the body for that is where conclusions may come from to the effect whether the same has met the threshold in the **Anarita Karimi Njeru** case supra.

30. In his petition (and submissions) the petitioner stresses that, contrary to his expectations, the 2nd respondent made a determination regarding ownership of the land in question, a decision he terms as unconstitutional, and a threat to the to his family’s private rights to the land. It is evident from the petition that his assertion is that the 1st respondent’s mandate is only limited to the administration and management of public land, that the functions of the 2nd respondent are limited to processing of land allocation, change and extension of user, conducting subdivision of land and renewal of leases. His further assertion in his pleading is that the function of the 2nd respondent would ordinarily be the preparatory step in the acquisition of ownership to land and which ends up in issuance of title to individuals. The petition further states that the Turkana County Land Management Board violated the express provisions of **Article 67(2) 62(2)** of the Constitution of Kenya as read with **Section 18** of the National Land Commission Act **No. 5 of 2012** by then purporting to make a determination on ownership of land in the dispute between the Egielan Family and his family. It is further pleaded that the decision by the 2nd respondent violates the express provision of **Article 40 (1)** of the Constitution as it threatens to unlawfully deprive the Abok family land which they have utilized for generations. In his written submissions the 3rd respondent cites the **Anarita Karimi Njeru Case (supra)** and the case of **Augustine Gakure Monyo -vs- County government of Murang’a [2016] eKLR** and submits that the petitioners has not identified which Constitutional bridge that he have suffered.

31. In his submission the 4th defendant has omitted this issue completely.

32. In view of the above observations of the contents of the petition would the petitioner be properly deemed to have failed to meet the threshold set out in the **Anarita Karimi Njeru** case? It must be recalled that the Court of Appeal, while revisiting this issue in the case of **Mumo Matemo -vs- Trusted Society of Human Rights Alliance & 5 Others Civil Appeal No. 290 of 2012 [2012] eKLR** observed precision is not to be equated with exactitude. The Court observed as follows:

“(41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude *ex ante* is to miss the point.”

33. The principal question to be addressed in this matter is whether the petition before court has brought to the fore the complaint that requires to be addressed, whether on a wholistic reading this court can decipher that complaint, and whether the respondents and the interested party have, without any prejudice being occasioned to them, had adequate notice of that complaint, for the purpose of its just determination. In brief, have the petitioner’s documents before court brought to the parties adequate notice of what his complaint is and what he seeks?

34. The pleading before court is a far cry from what was described as Mr. Mwirichia’s affidavit in the **Anarita Karimi Njeru** case (supra). It is evident that the petitioner clearly expresses his idea that the challenge to private rights to land is a preserve of this court pursuant to **Article 162** of the constitution. It is evident that the dispute regarding the suit land went before other forums before it was taken to the county land management board. Apparently the dispute was “*was referred*” to the 2nd respondent by reason of absence of an environment and land court in Lodwar and the 2nd respondent heard and determined the same.

35. In my view the instant petition has not fallen short of threshold set out in the **Anarita Karimi** case (supra) for the reason that he has set out with reason of precision his complaint, the provisions of the Constitution said to be infringed and the manner in which he thinks that they have been infringed on.

b. Whether the National Land Commission and the County Land Management Board have jurisdiction to inquire

into title use and occupation of the suit land;

36. It is evident that the dispute regarding the suit land went before other forums before it was taken to the County Land Management Board. Apparently the dispute was “*was referred*” to the 2nd respondent by reason of absence of an environment and land court in Lodwar. The question that arises is what was the nature of the dispute before the 2nd respondent? In the decision of the 2nd respondent, it stated as follows:

“The board keenly considered the case from all facets including documents of hearings by the Ministry of Lands Physical Planning and Urban Areas Management of Turkana County Government and rules that the disputed parcel of land belongs to the Egielan’s family on the following grounds.....”

37. Later on the Board finalised as follows:

The board therefore authorizes the representative of Egielan’s family one John Egielan to proceed with the development of the parcel of land which has been found to be their bona fide property.”

38. It is evident that the dispute was in relation to the ownership of the land in question. The main question that rises therefore is whether the board was possessed of jurisdiction to hear and determine the dispute in relation to land ownership.

39. The petitioner’s submissions is that the Turkana County land Management board’s decision is a direct interference and challenge to the private rights legally vested in the petitioner and his family pursuant to **Article 40, 61 and 63** of the Constitution of Kenya 2010; that the challenge to either private or community rights vested in private or community hands is the preserve of the Environment and Land Court and that therefore the proceedings before the Board are unconstitutional for lack of jurisdiction and ultra vires the functions and powers of the National Land Commission and the Board as set out **Article 67** of the Constitution and **Section 5,6, and 18** of the **National Land Commission Act No. 5 of 2012**. He refers to the celebrated case of **Motor Vessel Lillian “S” -vs- Caltex Kenya Ltd [1989p KLR 1**. He submits that jurisdiction cannot be conferred by the parties and that that principle also applies to tribunals commissions and administrative boards which he states have no jurisdiction other than what is conferred by statutes. He maintains that the jurisdiction of the National Land Commission under **Article 67** of the Constitution is to manage public land on behalf of the National and County government therefore neither the 1st nor the 2nd respondent had jurisdiction to hear or determine the right of ownership of the disputed land. It is also submitted that the land was not public land but community land which has been subdivided amongst the heirs and that issues of ownership can only be determined by a court of law and not any other unauthorized body or persons; the determination of the 2nd respondent is therefore illegal and void *ab initio*. He submits that the challenge to private rights to land is a preserve of this court pursuant to **Article 162** of the constitution.

40. Regarding this issue the 3rd respondent submits that as the land was unregistered community land it fell within the jurisdiction of the 1st and 2nd respondents for administration and management and they are mandated to undertake those tasks by the constitution and statute therefore the 1st and 2nd respondents may call party to a dispute record their evidence and render a decision without relying on strict rules and procedure. It is submitted that under **Section 6(2)** of the **National Land Commission Act 2012** the 1st and 2nd respondents may institute hearings for the purpose of determination of any dispute brought before them as in this case and that **Section 5 (2) (a)** granted them the power to manage and administer all unregistered trust land and unregistered community land. It is submitted the petitioner has not demonstrated how the 1st and 2nd respondents overstepped their jurisdiction.

41. The 4th respondent’s preliminary submission is on two limbs: first that the 1st and 2nd respondents have become *functus officio* and cannot be prohibited from doing what they have already done, and secondly, that the petition does not reveal any basis other than that the petitioner failed to obtain the decision that he expected from the 2nd respondent.

42. The first preliminary issue can be easily disposed of in that it is evident from the prayers in the petition that orders of declaration that the 1st and 2nd respondents had no mandate to hear and determine the dispute, and also orders of certiorari of their decision, have been sought. I say no more on that issue.

43. However, on the second issue that is, that when both parties agreed to take their dispute before the Ministry of land Turkana County Government, they both willingly participated and the petitioner only came to this court when the decision of the 2nd respondent went contrary to his expectations, this court returns to the issue of jurisdiction. Jurisdiction can neither be granted by the consent of the parties. Jurisdiction must be that which is granted by the law and the constitution. In the case of Lillian S it was stated as follows:

44. The court must therefore investigate whether the 1st and 2nd respondents had jurisdiction to hear and determine the dispute.

45. The substantive argument that the 4th respondent later on raises is that **Article 67(2) (a)** of the constitution grants the national land commission power to initiate investigation on its own in initiative or upon a complaint into present or historical land injustices and recommend appropriate redress. He also relies on **Article 252(1) (b)** of the Constitution for the proposition that commissions including the 1st respondent may conduct investigations on their own initiative or on the complaint of a member of the public, have the powers necessary for reconciliation mediation and negotiation, and may perform any function and exercise any powers prescribed by legislation in addition to the functions and powers conferred by the constitution. It is therefore submitted that **Section 6(3) (a)** of the National Land Commission Act gives the Commission power to inform itself in such manner as it may consider necessary and that **Section 18(1)** enables the 1st respondent to establish County Land Management Boards which shall perform any other functions assigned by the Commission or by any other written law. By reason of those provisions it is submitted on behalf of the 4th respondent that nothing prohibited the 1st respondent or the 2nd respondent from hearing and determining the dispute. The case of republic vs the national land commission *ex parte* crystalline salt is cited in support of that proposition. It is also averred that the land in question is in any event unregistered land. The 4th defendant appears to be of the opinion that since the petitioner has not demonstrated that he has instituted an ordinary suit in relation to the suit land to enable the final

determination as to ownership to be made, these proceedings serve no purpose save the frustration of the 4th respondent.

46. This court is of the view that though the land is stated to be unregistered community land, there are private interests surrounding it hence the dispute between the parties. Are the 1st and 2nd respondents mandated to hear and determine such a dispute?

47. In creating and conferring mandate upon the 1st respondent, **Article 67** of the constitution provides as follows:

(1) There is established the National Land Commission.

(2) The functions of the National Land Commission are-

(a) to manage public land on behalf of the national and county governments;

(b) to recommend a national land policy to the national government;

(c) to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya;

(d) to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities;

(e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;

(f) to encourage the application of traditional dispute resolution mechanisms in land conflicts;

(g) to assess tax on land and premiums on immovable property in any area designated by law; and

(h) to monitor and have oversight responsibilities over land use planning throughout the country.

(3) The National Land Commission may perform any other functions prescribed by national legislation.

48. Sections 5 and 6 of the National Land Commission Act state as follows:

5. (1) Pursuant to Article 67(2) of the Constitution, the functions of the Commission shall be-

(a) to manage public land on behalf of the national and county governments;

(b) to recommend a national land policy to the national government;

(c) to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya;

(d) to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities;

(e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;

(f) to encourage the application of traditional dispute resolution mechanisms in land conflicts;

(g) to assess tax on land and premiums on immovable property in any area designated by law; and

(h) to monitor and have oversight responsibilities over land use planning throughout the country.

(2) In addition to the functions set out in subsection (1), the Commission shall, in accordance with Article 67(3) of the Constitution-

(a) on behalf of, and with the consent of the national and county governments, alienate public land;

(b) monitor the registration of all rights and interests in land;

(c) ensure that public land under the management of the designated state agencies is sustainably managed for the intended purposes;

- (d) may develop and maintain an effective land information system for the management of public land;
 - (e) deleted by Act No. 28 of 2016, s. 37 (a)(iii);
 - (f) deleted by Act No. 28 of 2016, s. 37 (a)(iv);
- (3) Deleted by Act No. 28 of 2016, s. 37(b).
- (4) Deleted by Act No. 28 of 2016, s. 37(c).

Powers of the Commission

6. (1) **The Commission, shall have all the powers necessary for the execution of its functions under the Constitution, this Act and any other written law.**
- (2) **Without prejudice to the generality of subsection (1), the Commission shall have powers to-**
- (a) **gather, by such means as it considers appropriate, any relevant information including requisition of reports, records, documents or any information from any source, including any State organ, and to compel the production of such information where it considers necessary;**
 - (b) **hold inquiries for the purposes of performing its functions under this Act;**
 - (c) **take any measures it considers necessary to ensure compliance with the principles of land policy set out in Article 60(1) of the Constitution.**
- (3) **In the exercise of its powers and the discharge of its functions, the Commission-**
- (a) **may inform itself in such manner as it may consider necessary;**
 - (b) **may receive written or oral statements; and**
 - (c) **is not bound by the strict rules of evidence.**

49. The 2nd respondent was constituted by the 1st respondent under the provisions of **Section 18** (now repealed) of the National Land Commission Act for the purpose of performing functions on behalf of the 1st respondent as conferred by law, and it needs not be gainsaid that whatever the 1st respondent was not mandated to do under the law and the constitution could not become the mandate of the 2nd respondent.

50. I do not find any provisions in the above cited law that would enable the 1st and the 2nd respondent to determine any dispute between two private parties over any parcel of land whether registered or unregistered.

51. In the case of **Republic -vs- National Land Commission Ex-parte, Cecilia Chepkoech Leting and 3 Others [2016] eKLR** the court observed as follows:

“53. To permit the Commission to investigate all types of lands no matter their status would amount to clothing the Commission with jurisdiction it does not have, yet it is trite that a judicial or quasi-judicial tribunal, such as the Commission herein has no inherent powers. In *Choitram vs. Mystery Model Hair Salon* [1972] EA 525, Madan, J (as he then was) was of the view that powers must be expressly conferred; they cannot be a matter of implication. Similarly, in *Gullamhussein Sunderji Virji vs. Punja Lila and Another* HCMCA No. 9 of 1959 [1959] EA 734, it was held that Rent Restriction Board is the creation of statute and neither the Board nor its chairman has any inherent powers but only those expressly conferred on them.”

52. The resolution of all kinds of disputes relating to ownership of land is addressed by **Section 13** of the Environment and Land Court Act. **Section 13** of the Environment And Land Act, an Act of Parliament to give effect to **Article 162(2)(b)** of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes provides as follows:

13.(1)The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2) (b) of the Constitution, the Court shall have power to hear and determine disputes-

- (a) **relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries,**

rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

(5)

(6)

(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including-

(a) interim or permanent preservation orders including injunctions;

(b) prerogative orders;

(c) award of damages;

(d) compensation;

(e) specific performance;

(g) restitution;

(h) declaration; or

(i) costs. (Emphasis mine)

53. From a plain reading of the provisions of **Article 162** of the Constitution and **Section 13** of the **Environment and Land Act**, it is clear that the determination of disputes relating use and occupation of land is within the mandate of this court. This court is therefore not confined to handling disputes concerning title.

54. In my view the 2nd respondent erred in entertaining and determining the dispute between the families of the petitioner and the 4th respondent in respect of the suit land.

55. The upshot of the above is that this petition has merit. I therefore enter judgment for the petitioner against the respondents jointly and severally and I issue the following final orders:

a. A declaration that the National Land Commission and/or the County Land Management Board had no mandate to investigate, question or make recommendations on the title to the suit land under Article 67 of the Constitution and the National Land Commission Act.

b. A declaration that the National Land Commission and/or the County Land Management Board had no jurisdiction on all disputes touching on the environment, the use and occupation of and title to private land or community land under Article 67 of the Constitution and the National Land Commission Act.

c. A declaration that proceedings and decision made on 10th August, 2016 by the Turkana County Land Management Board on the land dispute between Egielan's Family represented by John Egielan and Abok Family represented by William Abok are *ultra vires* the powers of the said County Land Management Board and unconstitutional.

d. An order of certiorari quashing the proceedings and decision made on 10th August, 2016 by the Turkana County Land Management Board on the land dispute between Egielan's Family represented by John Egielan and Abok Family represented by William Abok.

e. An order of prohibition barring the National Land Commission and/or the Turkana County Land Management Board from investigating, challenging and/or in any manner whatsoever questioning the ownership of the suit land.

f. The respondents shall bear the costs of this petition.

It is so ordered.

Dated, signed and delivered at Kitale on this 4th day of November, 2019.

MWANGI NJOROGE

JUDGE

4/11/2019

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Ingosi for 4th respondent

Mr. Teti holding brief for Khisa for petitioner

Ms. Tigoi for 3rd respondent

Mr. Wanyonyi holding brief for Kidiavai for plaintiff

COURT

Judgment delivered in open court.

MWANGI NJOROGE

JUDGE

4/11/2019.