



Gacanja v Ethics and Anti-Corruption Commission & another; National Land Commission (Interested Party) (Petition E655 of 2024) [2025] KEHC 8918 (KLR) (Constitutional and Human Rights) (19 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8918 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E655 OF 2024

AB MWAMUYE, J

JUNE 19, 2025

**IN THE MATTER OF ARTICLES 20, 22(1), 23, 258
AND 259 OF THE CONSTITUTION OF KENYA**

**AND IN THE MATTER OF ALLEGED CONTRAVENTION OF THE PETITIONER'S
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27(1),
28, 29 (F), 40, 47, 48, 50, AND 236 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF SECTIONS 4 AND 6 OF THE
FAIR ADMINISTRATIVE ACTION ACT, 2015**

BETWEEN

WILSON GACANJA PETITIONER

AND

ETHICS AND ANTI-CORRUPTION COMMISSION 1ST RESPONDENT

THE HON. ATTORNEY GENERAL 2ND RESPONDENT

AND

NATIONAL LAND COMMISSION INTERESTED PARTY



JUDGMENT

INTRODUCTION AND BACKGROUND

1. The Petitioner through his petition dated 19th November, 2024 seeks redress for what he characterizes as systemic and unconstitutional conduct by the 1st Respondent in persistently enjoining him as a defendant in over 200 land recovery suits instituted in various courts across the country. He asserts that such actions have gravely impaired his fundamental rights, including the right to fair administrative action, dignity, and access to justice. He thus seeks the following redress:
 - a)
 - b) A Declaration that the Petitioner's Rights under Articles 27(1), 28, 29(f), 40, 47, 48, 50 and 236 (a) of *the Constitution* stand violated, and/or are in danger of being Violated
 - c) An order of certiorari do issue to bring to this Honourable court and strike cut the name of the Petitioner in all the proceedings instituted against him by the 1st Respondent for any acts done by him in his capacity as Commissioner for Lands.
 - d) An-order of prohibition do issue against the Respondents herein jointly and severally, their agents, servants, employees and or any person whomsoever acting under their instructions, from enjoining the Petitioner as a Defendant in any proceedings by reason of acts performed by him as a holder of the office of the Commissioner of Lands
 - e) An order of Prohibition do issue against the Respondents herein jointly and severally, their agents, servants, employees and or any person whomsoever acting under thew instructions. from visiting the Petitioner home for reason of acts performed by him ava holder of the office of the Commissioner of Lands.
 - f) General Damages,
 - g) Costs of the Petition
 - h) Any other relief or further orders, writs and directions the court considers appropriate and just to grant for the purpose of the enforcement of the Petitioner's fundamental rights and freedoms
2. The Petitioner served as the Commissioner of Lands from 1989 until his retirement in 1999. His appointment and tenure were governed by the Government Lands Act (now repealed) and Gazette Notice No. 14 of 1965, acting under the authority of the President or relevant County Councils. Following the promulgation of *the Constitution* of Kenya, 2010, the office of Commissioner of Lands was abolished and its functions assumed by the Interested Party herein.
3. Since his retirement, the Petitioner has been named as a defendant in over 200 suits filed by the 1st Respondent, the Ethics and Anti-Corruption Commission (EACC), all concerning the recovery of public land allegedly irregularly alienated during his tenure. The Petitioner asserts that he has not been found personally liable in any of these suits and, in some instances, has not been served or made aware of their existence.
4. The Petitioner avers that the land allocation processes during his tenure were complex and involved multiple layers of approvals by government officials, including the President and the Minister for



Lands. He contends that the decisions were institutional, not personal, and that his inclusion in the suits is arbitrary and discriminatory.

5. The cumulative effect of these suits has allegedly caused the Petitioner emotional trauma, reputational harm, and financial ruin, with legal fees amounting to over Kshs.178 million. The Petitioner further avers that the Interested Party, which holds the relevant records, is rarely enjoined in these suits, thereby denying him access to crucial documentation necessary for his defence.
6. The Petitioner, now aged 81 years, laments the psychological toll of persistent litigation and physical limitations that inhibit his ability to effectively participate in court proceedings.

Petitioner's Case

7. The Petitioner through his Petition and Supporting affidavit both dated 19th November, 2024 and further affidavit sworn on 2nd April, 2025 by the Petitioner contends that the EACC's conduct violates Articles 27(1), 28, 29(f), 40, 47, 48, 50, and 236(a) of *the Constitution*. He asserts that he is being targeted for acts performed in his official capacity and that the 1st Respondent has failed to demonstrate personal culpability in any instance.
8. He further relies on court decisions, including Nakuru ELC 54b of 2021; Ethics and Anti-corruption Commission v Shadrack Koske & 3 Others [2019] eKLR and Nairobi ELC 56 of 2019; EACC V Zablon Mabea & 4 Others, in which courts found no personal liability on his part and questioned the EACC's litigation strategy. He also cites his acquittal in Mombasa CMCC E003 of 2022; Republic v Jabu Salim, Wilson Gacanja & Zablon Mabea, where the prosecution failed to establish a prima facie case against him.
9. The Petitioner, in responding to the Respondents' affidavits and objections, asserts that they misrepresent the purpose of his Petition, which is not to usurp the jurisdiction of other courts or relitigate settled issues. He clarifies that the Petition is intended solely to protect his constitutional rights from the 1st Respondent's alleged procedural improprieties. He disputes the attempt to equate his case with other past matters, such as ELC Mombasa Const. Pet E011 of 2023, and insists his Petition is distinct in both substance and objective as he does not seek to halt lawful prosecutions but rather challenges the fairness and legality of the 1st Respondent's actions.
10. The Petitioner argues that this case is grounded in Articles 22 and 23 of *the Constitution*, along with the *Fair Administrative Action Act*, due to the administrative nature of the 1st Respondent's decisions. He denies attempting to overturn any precedent and instead seeks review of the repeated and allegedly arbitrary decisions to drag him into numerous litigations without fair process. He stresses the need for due process, including the opportunity to be heard before adverse action is taken, something he claims the 1st Respondent has largely ignored. This disregard, he argues, results in unjustified prosecutions even where his role was minimal or nonexistent.
11. The Petitioner further argues that fair administrative action under Article 47 and the *Fair Administrative Action Act* requires the 1st Respondent to act lawfully, reasonably, and procedurally. He avers that the arbitrary filing of suits without prior notice, proper investigations, or enjoining relevant parties violates this standard.
12. He also invokes foreign jurisprudence, including the Indian case of Ram Lal Patidar v State of Rajasthan (2024: RJ-jd:35519), to support the proposition that protracted litigation against elderly citizens lacking direct involvement in wrongdoing is inhumane and unjust. Additionally, the Petitioner contends that the independence granted to the 1st Respondent cannot be unchecked or exercised arbitrarily. He urges the Court to strike a balance between institutional independence and the



protection of individual rights. He prays that the Court hears the Petition on its merits to safeguard the values enshrined in *the Constitution*.

1st Respondent's Case

13. The 1st Respondent, through its replying affidavit sworn by Ben Murei, its Deputy Director of Legal Services and a Preliminary Objection dated 6th February 2025, argues that the Petition is fundamentally flawed for seeking to quash or stay legitimate proceedings pending in competent courts of law, particularly the Environment and Land Court. It contends that the High Court lacks jurisdiction under Article 165(5)(b) of *the Constitution* to supervise courts of equal status.
14. It is averred that the Petition violates the doctrines of sub judice and res judicata as codified under Sections 6 and 7 of the *Civil Procedure Act*. It asserts that the questions raised herein, particularly on the Petitioner's liability in land alienation are pending or have been conclusively determined in numerous other suits, including the binding decision of the Court of Appeal in EACC v Judith Marilyn Okungu & Another, Civil Appeal No. 183 of 2014.
15. Additionally, it is argued that its decision to enjoin the Petitioner in recovery suits is based on credible findings that he acted beyond his lawful mandate as Commissioner of Lands. Citing Frann Investments Limited v KACC, the Respondent emphasizes that government officers may be held personally liable for actions taken ultra vires or in bad faith, even if those actions were purportedly done under official capacity.
16. It is argued that the Petitioner's reliance on Article 236(a) and Section 126 of the repealed Government Lands Act is misguided, as such protections do not extend to acts done in excess of lawful authority or in breach of the public trust. It asserts that immunity under these provisions is qualified by the requirement of good faith. He further contends that the Petitioner's reliance on statutory protection is misplaced as it does not apply to acts done in bad faith. The EACC has established that Commissioners of Lands, including the Petitioner, acted beyond their lawful authority and are thus personally liable.
17. He further stresses that government officials, including civil servants, can be held personally liable for fraudulent acts done under the guise of official duty. He argues that the Petition seeks to unlawfully restrain the EACC from exercising its constitutional mandate under Articles 22, 252, and 258. Consequently, the Petition, if allowed, would undermine the principle of finality in litigation and prejudice ongoing cases that have been awaiting resolution for many years.
18. The 1st Respondent refutes claims of harassment or selective prosecution, arguing that its mandate under Articles 79, 252 and 258 of *the Constitution* as well as Section 11 (1) (d)- (j) of the *Ethics and Anti-corruption Commission Act* authorizes it to independently investigate and institute civil proceedings for the protection of public property. The Petitioner's inclusion in multiple suits is premised on evidence implicating him directly in land allocations found to have been irregular or unlawful.
19. Further, it is emphasized that the Petition does not meet the constitutional threshold under Rule 10 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. It asserts that the Petitioner has failed to show any specific violation of his rights and is merely seeking protection from legitimate proceedings. It is prayed that the Petition be dismissed with costs as its issues will be appropriately addressed during the hearing of the various suits already filed. Accordingly, the 1st Respondent urges the Court to uphold its Preliminary Objection and strike out the Petition in limine for want of jurisdiction, abuse of court process, and for lacking any demonstrable violation of the Petitioner's constitutional rights.



2nd Respondent's Case

20. The 2nd Respondent, the Attorney General, opposes the Petition through its grounds of opposition dated 16th January, 2025 on the basis that the High Court lacks jurisdiction to exercise supervisory authority over the Environment and Land Court, a court of equal status under *the Constitution*. It asserts that the reliefs sought, particularly orders of certiorari and prohibition cannot issue against proceedings actively pending before such courts.
21. The 2nd Respondent further contends that the Petition fails to disclose any specific constitutional or statutory violation attributable to it. It argues that the Petitioner has not alleged, nor provided evidence, that the Attorney General initiated, participated in, or instructed the proceedings complained of, thereby rendering the joinder of the 2nd Respondent unwarranted.
22. It emphasizes that the Petitioner has an effective legal remedy supported with well-established procedure to extricate himself in all legal proceedings where he has been wrongly joined as a party and claim legal costs in any proceedings where he is adjudged to have been unjustifiably joined. Thus, there exists no necessity for constitutional intervention where ordinary civil remedies suffice.
23. Accordingly, the 2nd Respondent prays that the Petition be dismissed in its entirety or, in the alternative, that its name be struck out from the proceedings for misjoinder.

Interested Party's Case

24. The Interested Party, filed its replying affidavit sworn on 12th March, 2025 by Brian Ikol, its Director of Legal Services, opposing the Petition and asserting that the office of the Commissioner of Lands under the repealed Government Lands Act had clearly delineated powers which excluded the authority to allocate unalienated land, powers exclusively reserved for the President under section 3(a) of the Government *Land Act* (now repealed). It is contended that the Petitioner, while serving as Commissioner of Lands, acted beyond his legal mandate and in contravention of statutory provisions, thus incurring personal liability.
25. It is contended that Upon review of the supporting documents annexed to the Petition, the Interested Party notes that different courts have ruled variably on the Petitioner's culpability, depending on the facts presented in each case. This, it argues, demonstrates that the Petitioner's role is a material issue for trial and not one that warrants shielding through a constitutional petition.
26. It is further contended that it holds no direct stake in the allegations made, nor has it dispatched any agents or servants to the Petitioner's home. Accordingly, it argues that its inclusion in the Petition is unwarranted. Furthermore, it emphasizes that previous judgments have been rendered without the Interested Party's participation, without prejudicing the outcome.
27. Furthermore, the Interested Party argues that under Article 10 and Article 79 of *the Constitution*, all public officers are expected to uphold national values and can be subjected to oversight and litigation by the EACC for misconduct. The Interested Party argues that the Petitioner's reliance on Article 236 for immunity is misplaced where abuse of office is alleged and substantiated.
28. The Interested Party maintains that the High Court cannot exercise supervisory jurisdiction over the Environment and Land Court, which is of concurrent status. It argues that the Petition offends the doctrines of res judicata and sub judice and constitutes an abuse of the court process. Consequently, it prays that the Petition be dismissed in its entirety or that the Interested Party be struck out for misjoinder.



29. The Petition was canvassed by way of written submissions and in compliance, all parties filed their respective submissions.

Petitioner's Submissions

30. The Petitioner through its written submissions dated 2nd April, 2025 and Supplementary written submissions dated 23rd May, 2025 submits that the Petition does not seek to challenge or overturn any judicial determination issued by a court of competent jurisdiction, nor does it attempt to re-litigate matters previously adjudicated. Rather, the gravamen of the Petition lies in challenging the continuous and systemic violation of his fundamental rights and freedoms under *the Constitution* through the arbitrary, repetitive, and procedurally irregular institution of civil and criminal proceedings by the 1st Respondent. The Petitioner contends that such conduct constitutes administrative action within the meaning of Article 47(1) of *the Constitution* and therefore must comply with the requirements of lawfulness, reasonableness, and procedural fairness. The Respondent's conduct, he avers, fails this constitutional threshold.
31. The Petitioner further submits that the preliminary objection raised by the 1st Respondent on the ground of lack of jurisdiction is misconceived. He invokes Article 165(3)(b) and (d)(ii) of *the Constitution* to argue that this Honourable Court is vested with jurisdiction to determine allegations of violations of constitutional rights and to supervise the conduct of constitutional bodies, including the 1st Respondent. The Petition, he emphasizes, is not an appeal or review of Environment and Land Court (ELC) matters, but a sui generis action grounded in the Bill of Rights and procedural fairness.
32. He asserts that contrary to the 1st Respondent's position, the Petition is not res judicata as it addresses a distinct constitutional grievance that has not been previously adjudicated. The Petitioner distinguishes this matter from EACC v Judith Marilyn Okungu (Supra) by asserting that the issue here concerns the fairness and legality of repeated prosecutions and enjoinders, not the underlying merits of specific allotments or fraud allegations. Reliance is placed in Kenya Commercial Bank Ltd v Benjoh Amalgamated Ltd [2017] eKLR where the Court of Appeal held that res judicata cannot bar a claim where new issues touching on constitutional violations arise. Therefore, he argues, this matter is not barred by Section 7 of the *Civil Procedure Act*.
33. On the doctrine of sub judice, the Petitioner submits that this doctrine does not apply to constitutional petitions unless it is demonstrably shown that the constitutional issues raised are directly and substantially in issue in other pending proceedings. The Petitioner maintains that the instant Petition raises overarching constitutional questions that cut across multiple pending suits, and such systemic issues cannot be addressed through piecemeal defences in individual proceedings.
34. The Petitioner further argues that the continuous enjoinder of his name in over 200 proceedings, most of which seek no personal reliefs against him, is oppressive and violates his rights under Articles 28, 29(f), 47, 48, and 50 of *the Constitution*. He relies on the Indian case of Ram Lal Patidar vs State of Rajasthan (2024:RJ-Id:35519), where the court quashed criminal charges against an elderly person on the basis of advanced age, lack of evidence, and humanitarian considerations. The Petitioner submits that this case is analogous, and that the principle of humane justice must inform prosecutorial and investigatory discretion. The petitioner placed reliance on several authorities to show how his constitutional rights have been violated.
35. The Petitioner maintains that the 1st Respondent, being a constitutional body, is bound by Article 47 of *the Constitution* and the *Fair Administrative Action Act*. He argues that the decision to prosecute is an administrative action that directly affects his rights and should be made in a manner that ensures fairness, notice, and an opportunity to be heard. The Petitioner references Robert Monda v EACC



- to underscore the duty to notify an affected party when recommending prosecution. He notes that while he was sporadically invited to respond to allegations, there has been no consistent or transparent process, reflecting arbitrariness on the part of the 1st Respondent.
36. The Petitioner contends that although the 1st Respondent claims not to make binding legal determinations, its decisions have significant adverse effects—including loss of property through legal fees and compromised access to justice due to numerous suits filed against him. He challenges the Respondent’s failure to enjoin the Interested Party (IP), the successor to his former office and the custodian of relevant documents. The suggestion that he should initiate joinder in over 200 cases, he argues, is impractical and demonstrates the 1st Respondent’s pursuit of personal rather than public accountability. This omission, in his view, undermines fairness and betrays a targeted campaign.
 37. The Petitioner insists that the 2nd Respondent, as the Government’s principal legal adviser under Article 156(6), must play a role in ensuring that all state organs act within constitutional limits. He argues that this court has jurisdiction to determine the Petition, as it concerns the legality of administrative decisions and not land disputes. The Petition, he clarifies, seeks a broader constitutional remedy to systemic and continuous violations rather than piecemeal responses like striking off his name from individual suits. He asserts that the nature and volume of cases filed—many without his knowledge—necessitate a judicial intervention that ensures finality and fairness.
 38. The Petitioner also invokes Article 236(a) of *the Constitution* and Section 8 of the repealed Government Lands Act to submit that as a public officer acting in good faith under delegated authority, he is entitled to protection from personal liability. He notes that in Nakuru ELC Case 54b of 2021, the court expressly held that no orders could be issued against the Commissioner of Lands where the decision was informed by ministerial and presidential approvals. Thus, the Petitioner’s prosecution is unlawful in the absence of a demonstrated personal benefit or ultra vires action, and he should not be made to bear the burden of such proceedings in perpetuity.
 39. It was submitted that the failure by the 1st Respondent to consistently enjoin the Interested Party, the institutional successor to his former office, while suing him personally, is procedurally irregular and undermines his right to a fair defence. He submits that most of the documentation relevant to his defence is in the custody of the Interested Party, thereby placing him at an evidentiary disadvantage. The 1st Respondent’s selective prosecution without consideration of institutional continuity or record custody, he argues, is irrational, unreasonable, and prejudicial, contrary to the test of rationality in *Pharmaceutical Manufacturers Association of SA and Another. In re: Ex Parte President of the Republic of South Africa and Others* 2000 (4) SA 674 (CC) at para 90.
 40. It was further submitted that the persistent litigation and publication of the petitioner’s name in the media as a defendant in corruption-related proceedings have violated his right to dignity and fair trial. The reputational damage, financial depletion, and emotional distress arising from these cases, he argues, constitute a constructive denial of access to justice under Article 48 of *the Constitution*. He urges the Court to find that the 1st Respondent has failed to exercise its powers with accountability, fairness, and restraint. He accordingly prays for the grant of declaratory, prohibitory, and compensatory reliefs to redress the violation of his rights.

1st Respondent’s Submissions

41. The 1st Respondent submitted that this Court lacks jurisdiction to entertain the present Petition to the extent that it seeks to challenge or interfere with matters pending before the Environment and Land Court, which is a court of equal status to the High Court as per Article 162(2)(b) of *the Constitution*. It cites the case of *Greenfield Investments Limited & Anor v State of the Republic of Kenya & 3 Others*



- [2013] eKLR to reinforce the principle that the High Court cannot exercise supervisory jurisdiction over another superior court of concurrent jurisdiction. As such, it is submitted that the Petition offends the constitutional scheme of judicial hierarchy and distribution of functions.
42. The 1st Respondent further invoked the doctrines of sub judice and res judicata, arguing that the questions raised by the Petitioner, particularly regarding his personal liability have either been conclusively determined or are pending before competent trial courts. Reliance was placed in Joseph Njuguna & 28 Others v George Gitau T/A the [2019] eKLR for the proposition that the court must safeguard against abuse of process by refusing to entertain duplicative or parallel litigation. The Respondent emphasizes that allowing this Petition would disrupt the finality of judicial proceedings and create procedural confusion in the administration of justice.
 43. With regard to the applicability of Article 47 of *the Constitution* and the *Fair Administrative Action Act*, it was submitted that its decision to institute suits is not an administrative act but an exercise of constitutional and statutory mandate. Relying on the Supreme Court decision in EACC & DPP v Tom Ojienda, SC t/a Prof. Tom Ojienda & Associates Advocates & 2 Others (Petition 30& 31 OF 2019) (consolidated) [2022] KESC 59 9KLR), it submits that the Commission's conduct constitutes investigative and quasi-judicial functions which are not subject to the procedural fairness requirements of Article 47. It is argued that the Petitioner's complaints are therefore mischaracterised and legally untenable.
 44. In addressing Articles 48 and 28 on access to justice and dignity, EACC maintains that court proceedings provide a platform for parties to be heard and cannot be construed as rights violations. The Commission highlights that some cases have absolved the Petitioner, while others, like Frann Investments Limited (Supra), resulted in liability and damages. It also rejects the argument that the Petitioner has been unfairly singled out, noting that his formal approvals as Commissioner bind him even if subordinate officers initiated earlier steps. The assertion that only he has been targeted does not negate his legal accountability.
 45. It was further submitted that the threshold for protection under Article 236(a) and Section 126 of the repealed Government Lands Act is not met in this case. It asserts that the immunity contemplated therein applies only to acts performed in good faith and within the scope of lawful authority. Where a public officer acts ultra vires or with intent to defraud, it is submitted that personal liability ensues. To support this proposition, the Commission relies on Frann Investments Limited v Kenya Anti-Corruption Commission & 6 Others [2024] where the Petitioner was found culpable for fraudulent alienation of land.
 46. On the Petitioner's claim that the Interested Party should bear institutional responsibility, it was contended that such arguments cannot shield a public officer from personal accountability for unlawful acts. It maintains that the Petitioner's role in each of the impugned transactions is a matter of evidence to be tested during trial and not a question to be determined in limine through constitutional litigation. The Respondent argues that the High Court should not be invited to make sweeping declarations insulating former officers from legitimate legal scrutiny.
 47. The 1st Respondent also challenges the Petitioner's claim to damages, asserting that no evidence has been presented of malice, bad faith, or illegality on the part of the Commission. It relies on the decision in Irene Wangari Gacheru v AG [2017] eKLR to argue that constitutional compensation is only available where actual harm has been demonstrated and cannot be presumed. The mere existence of multiple suits does not, according to the 1st Respondent, amount to a constitutional violation.
 48. In conclusion, the 1st Respondent urges this Court to dismiss the Petition in its entirety for want of jurisdiction and for constituting an abuse of the court process. It submits that the proper forum



for challenging the Petitioner's joinder is within each pending suit, and not through a blanket constitutional petition. The Commission prays that the Preliminary Objection be upheld and the Petition be struck out with costs.

2nd Respondent's Submissions

49. The 2nd Respondent, submitted that the High Court lacks jurisdiction to entertain the Petition, as it invites the Court to exercise supervisory authority over the Environment and Land Court, a court of equal status established under Article 162(2)(b) of *the Constitution*. Relying on the decisions of United States International University (USIU) v Attorney General [2012] eKLR and Bellevue Development Company Ltd v Gikonyo & 3 Others; Kenya Commercial Bank & 3 Others (Interested Parties) [2018] KECA 330 (KLR), the 2nd Respondent submits that constitutional questions incidental to specialized court matters must be resolved within those courts.
50. It was contended that the Petition fails to disclose any valid cause of action against it. It argues that the Petitioner has not demonstrated any involvement of the Attorney General in the impugned suits, nor has he shown that the AG played any role in instituting or sustaining them. Consequently, its inclusion in the Petition is unnecessary and procedurally improper.
51. The 2nd Respondent relies on the doctrine of constitutional avoidance as articulated in Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 Others [2014] eKLR, asserting that constitutional relief should only be sought where no adequate alternative remedy exists. The Petitioner, it argues, has several legal options, including seeking removal from suits under Order 1 Rule 10 of the Civil Procedure Rules or pursuing damages for malicious prosecution if warranted.
52. It is further submitted that the 2nd Respondent has not been shown to have breached any constitutional or statutory duty and that the Petition seeks to improperly saddle it with liability for proceedings initiated independently by the EACC, a constitutionally distinct body under Article 253. The legal threshold for joinder, as articulated in cases such as Amon v Raphael Tuck & Sons Ltd, has not been met.
53. In conclusion, the 2nd Respondent prays for dismissal of the entire Petition for want of jurisdiction or, in the alternative, that it be struck out from these proceedings for misjoinder. It urges the Court to uphold the principles of judicial economy and procedural fairness by avoiding unnecessary litigation against parties without demonstrable involvement or liability.

INTERESTED PARTY'S SUBMISSIONS

54. The Interested Party raised two issues for determination which are: whether it is a necessary party and whether the Petitioner is entitled to the reliefs sought. It defines a necessary party as one whose presence is essential for the court to effectually and completely adjudicate upon the issues. Relying on the case of Ojwang v Ghelani & 5 Others; Chaju Builders Limited (Interested Party); Agola (Applicant) [2025] KEELC 405 (KLR) and Zephir Holdings Ltd v Mimosa Plantations Ltd, Jeremiah Maztagaro & Ezekiel Misango Mutisya [2014] eKLR, the Interested Party argues that no identifiable legal interest or duty links it to the impugned proceedings, and no involvement has been demonstrated on its part.
55. It maintains that the Government Lands Act (repealed) conferred duties upon the Commissioner of Lands, and the actions forming the subject of the various suits were allegedly committed personally by the Petitioner during his tenure. Article 10 and 79 of *the Constitution* empower the EACC to investigate and prosecute public officers who act unlawfully or abuse public trust. It is therefore the Petitioner alone, not the Interested Party, who must answer to such claims.



56. The Interested Party opposes the Petition on jurisdictional grounds, arguing that the reliefs sought would require the High Court to exercise supervisory jurisdiction over the Environment and Land Court, in violation of Article 165(5)(b). It cites the Supreme Court’s decision in *Samuel Kamau Macharia v KCB & 2 Others*, which affirms that courts cannot arrogate to themselves powers not conferred by *the Constitution* or statute. The Petition, it asserts, is res judicata and constitutes an abuse of process.
57. Additionally, the Interested Party invokes Order 1 Rule 10 of the Civil Procedure Rules, contending that it has not been shown to be a necessary party and its continued presence in the proceedings serves no practical or legal purpose. The Court is urged to strike it out and allow the real controversy—whether the Petitioner is personally liable—to be resolved without unnecessary parties. It argues that constitutional petitions should not be used to clog the judicial system where standard procedures and remedies are available.
58. In conclusion, it was prayed that the Petition be dismissed or, in the alternative, that it be struck out as against the Interested Party. It submits that the Petitioner has failed to establish a basis for its joinder, and its continued inclusion undermines efficient adjudication. The Petition is characterized as an attempt to deflect personal accountability and improperly expand the scope of constitutional litigation.

Analysis And Issues For Determination

59. Upon careful consideration of the Pleadings, the parties’ responses, submissions, and authorities relied upon, the Court identifies the following as the key issues for determination:
- i. Whether the Petition is properly before this Court in light of the doctrines of jurisdiction, sub judice, and res judicata.
 - ii. Whether the Petitioner’s constitutional rights under Articles 27, 28, 29, 47, 48, 50, and 236 of *the Constitution* have been violated by the conduct of the 1st Respondent.
 - iii. Whether the Interested Party and the 2nd Respondent are necessary parties to the Petition, and whether any reliefs are available to the Petitioner.

Whether the Petition is properly before this Court in light of the doctrines of jurisdiction, sub judice, and res judicata

60. The Court is first called upon to determine whether it is clothed with jurisdiction to entertain this Petition. Jurisdiction is the foundational threshold in any judicial inquiry and must be determined at the outset. As emphasized by the Supreme Court in *Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] KESC 8 (KLR) underscored that “a court’s jurisdiction must be derived from *the Constitution* or legislation. A court cannot extend its authority beyond what was granted by law”. Thus, jurisdiction cannot be implied or inferred but must be expressly provided.
61. The 1st and 2nd Respondents averred that this Court lacks jurisdiction as the matters complained of fall within the purview of the Environment and Land Court (ELC), a court of equal status established under Article 162(2)(b) of *the Constitution*. They further argue that the Petition improperly seeks to supervise proceedings actively before other courts, contrary to Article 165(6) and (7) of *the Constitution*. These provisions bar the High Court from exercising supervisory jurisdiction over superior courts or courts of equal status.



62. The doctrine of sub judice is raised by the Respondents under Section 6 of the *Civil Procedure Act*, which bars a court from proceeding with a suit where the matter in issue is directly and substantially in issue in a previously instituted suit between the same parties. The principle is meant to prevent parallel proceedings and conflicting decisions. Sub judice applies where the subject matter and parties are substantially similar and there exists a risk of conflicting determinations.
63. Further, the 1st Respondent argues that the issues raised by the Petitioner have already been addressed in decisions such as *EACC v Judith Marilyn Okungu & Another* Civil Appeal No. 183 of 2014 and *KACC V Frann Investments Ltd, Francis Githui Wahome, Ann Gathoni, Victor Wahome, Edward Kagume, David Mwangi & Wilson Gacanja* [2020] KEELC 402 (KLR). The doctrine of res judicata under Section 7 of the *Civil Procedure Act* prevents re-litigation of matters conclusively determined. The Petitioner, while seeking broad constitutional remedies, is essentially inviting the Court to review settled judicial pronouncements and factual findings in these earlier matters.
64. On res judicata, the Supreme Court in *Communications Commission of Kenya & 5 others - v- Royal Media Services Limited & 5 others* [2014] eKLR expressed itself as follows on the issue of res judicata:
- (317) The concept of res judicata operates to prevent causes of action, or issues from being re-litigated once they have been determined on the merits. It encompasses limits upon both issues and claims, and the issues that may be raised in subsequent proceedings....
- [319] There are conditions to the application of the doctrine of res judicata:
- (i) the issue in the first suit must have been decided by a competent Court;
 - (ii) the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar; and
 - (iii) the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title *Karia and Another v. The Attorney General and Others*, [2005] 1 EA 83, 89. (Emphasis supplied)
65. The elements of res judicata have been held to be conjunctive rather than disjunctive. As such, the elements reproduced below must all be present before a suit or an issue is deemed res judicata on account of a former suit;
- (a) The suit or issue was directly and substantially in issue in the former suit.
 - (b) That former suit was between the same parties or parties under whom they or any of them claim.
 - (c) Those parties were litigating under the same title.
 - (d) The issue was heard and finally determined in the former suit.
 - (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

See Mulla, Procedure *Code Act of 1908* 16th Edition.



66. Expounding on the rationale of the doctrine, the Court of Appeal remarked as follows in the recent appeal; *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* (2017) eKLR:

“The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice.”

See also *William Koros* (Legal Personal Representative of *Elijah, C.A. Koross v. Hezekiah Kiptoo Komen & 4 others* (2015) eKLR.

67. Cognizant of the above principles, the courts called upon to decide suits or issues previously canvassed or which ought to have been raised and canvassed in the previous suits have not shied away from invoking the doctrine as a bar to further suits. As was stated in *Henderson v Henderson* (1843) 67 ER 313, *res judicata* applies not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. In the case of *Mburu Kinyua v Gachini Tutu* (1978) KLR 69 Madan, J. Quoting with approval *Wilgram V.C.* in *Henderson v Henderson* (supra) stated:

“Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case and will not (except in special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have from negligence, inadvertence, or even accident omitted part of their case. The plea of *res judicata* applies except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment but to every point which properly belonged to the subject of litigation, and which parties exercising reasonable diligence, might have brought forward at the time” (emphasis added).

68. The doctrine of sub judice, also known as the rule of sub judice, is a fundamental legal principle that prohibits this Court from proceeding with a trial or hearing a matter that is already being considered by another court or Judge. The purpose of this doctrine is to prevent multiple suits on the same issue and ensure consistency in the administration of justice.

69. The Supreme Court of Kenya in *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* had occasion to pronounce itself on the subject of sub judice. It aptly stated: -

“(67) The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent



jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.

- (68) In the above context, it cannot be denied that the issues and prayers sought by the Petitioner in the two Constitutional Petitions generally call for the interpretation and application of provisions of Chapter Six of *the Constitution*. The issues and orders in the two Constitutional Petitions substantially ascend from the criteria for the implementation of the provisions of Chapter Six of *the Constitution*. For the High Court to sufficiently pronounce itself in the two Constitutional Petitions, it has to interpret and apply the provisions of Chapter Six of *the Constitution* on leadership and integrity.
- (69) In Constitutional Petition No. 142 of 2017, the Petitioner challenges the constitutionality of the Working Group as well as the criteria on the implementation of the provisions of Chapter Six of *the Constitution* as established by the Working Group. The High Court has therefore been tasked to examine the constitutionality or otherwise of the criteria so established by the Working Group.
- [70] In Constitutional Petition No. 68 of 2017 the Petitioner therein challenges requirement for clearance by the state and private organs on grounds that it threatens and violates the provisions of *the Constitution*. For the High Court to determine the constitutionality of the requirement for clearance challenged by the Petitioner in Constitutional Petition No. 68 of 2017 or the Working Group criteria as well as the ‘Resolution on Complimentary Framework of Collaboration by Agencies to Ensure Compliance with Leadership and Integrity Requirements in August 2017 General Elections’ and ‘Compliance with Leadership and Integrity Requirements in the 2017 General Elections’ challenged in Constitutional Petition No. 142 of 2017, it has to examine, interpret and apply the provisions of Chapter Six of *the Constitution*.
- (71) In so doing, the High Court shall be compelled, to determine whether a Constitutional test is set up in Chapter Six of *the Constitution*, whether the set test (if any) is fit and proper, objective or subjective, the scope of application of the test, the implementing organs and bodies. These are substantially the same issues subject of the Advisory Opinion sought by the Applicant comprised at pages 13 to 19 of the Reference before this Court.
- (72) We therefore find that this Reference, as framed, mainly raises issues of constitutional interpretation. These issues are also substantially in issue before the High Court in Constitutional Petition No. 68 of 2017 and Constitutional Petition No. 142 of 2017. In view of Article 165 of *the Constitution*, the High Court is the Court of first instance with regard to jurisdiction for



interpretation and application of *the Constitution* and that Court has already been moved.

(73) Guided therefore by these principles, and in exercise of our discretion, we decline to exercise our jurisdiction under Article 163(6) of *the Constitution*. This Reference is sub-judice and this Court will not usurp the High Court's jurisdiction under Article 165 (3).

70. The sub judice rule like other maxims of law has a salutary purpose. The basic purpose and the underlying object of sub judice is to prevent the courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject matter and the same relief. This is to pin down the parties to one litigation so as to avoid the possibility of contradictory verdicts by two courts in respect of the same relief and is aimed to prevent multiplicity of proceedings
71. In *Patel & Patel Ltd and another v Commissioner of Customs and Excise & 6 others* [2014] eKLR: The High Court discussed the application of the doctrine of sub judice. The Court held that the doctrine applies where an issue is pending in a Court of law for determination. It emphasized that when a matter is sub judice, it cannot be the subject of collateral attack in the same Court. The Court further noted that the principle of sub judice is grounded on the basis that, in the interest of parties and the system of administration of justice, multiple suits between the same parties should be avoided.
72. In *Ramniklal Gopalbhai Patel & 5 others v Somchandra Kachra Shah & 12 others* [2010] eKLR the High Court considered the doctrine of sub judice in relation to an appeal. The Court held that where a matter is the subject of an appeal, it cannot be made the subject of collateral attack in the same Court. The Court further emphasized that the doctrine of sub judice applies to deprive the Court of jurisdiction to entertain the matter. It highlighted that the principle of sub judice is based on the interest of parties and the system of administration of justice, to prevent a multiplicity of suits and ensure proper resolution of disputes.
73. As the High Court of Uganda held in *Nyanza Garage v Attorney General*:-
- “In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits.”
74. The above case laws illustrate the application and significance of the doctrine of sub judice in Kenyan law. They emphasize the importance of avoiding multiple suits on the same issue and maintaining consistency in the administration of justice. The doctrine serves to protect the integrity of the judicial process and ensure fair and efficient resolution of disputes. Legal professionals should take into account the doctrine of sub judice when considering the filing of a new suit or raising similar issues in ongoing proceedings.
75. In the present case, the Petitioner contends that his claim does not seek to challenge or interfere with the merits of the suits pending in the ELC. Rather, he seeks constitutional redress for what he terms an administrative pattern of targeted and unlawful litigation by the 1st Respondent. He distinguishes his



claim as one concerning procedural propriety, fairness, and constitutional accountability, rather than land adjudication or property disputes.

76. The constitutional issues advanced by the Petitioner, particularly those relating to procedural fairness and abuse of office, were either addressed or could have been raised in the previous suits. The Petition is therefore procedurally improper.
77. The uncompromising manner in which courts have consistently enforced the sub judice rule was best explained in *Thiba Min Hydro Co. Ltd v Josphat Karu Ndwiga*, which held that it is not the form in which the suit is framed that determines whether it is sub judice, rather it is the substance of the suit, and that, there can be no justification in having the two cases being heard parallel to each other. I find no justification at to sustain the instant suit. This position extinguishes the Petitioner's argument that the instant suit is filed under Article 22 of *the Constitution* and that it raises constitutional issues. A simple test would be whether this court can determine the issues raised in this case and allow or decline the prayers sought in these proceedings without delving into the issues pending in the Environment and Land Courts' and that if the prayers sought are granted in the said cases, whether they will have an impact on the instant suit.
78. The principle of sub judice does not talk about the "prayers sought" but rather "the matter in issue." The matters in issue in the suits are substantially the same, hence, my finding that res judicata would apply if one suit is determined. In *Re the Matter of The Interim Independent Electoral Commission, Constitutional Application No.2 of 2011* [2011] eKLR the Supreme Court cited with approval an Australian decision *In Re Judiciary Act 1903-1920 & In re Navigation Act 1912-1920* {1921} 29 CLR 257 which held: "...we do not think that the word 'matter'...means a legal proceeding, but rather the subject matter for determination in a legal proceeding. In our opinion there can be no matter...unless there is some right, duty or liability to be established by the determination of the Court..."
79. The Petitioner's reliance on Articles 22, 23, and 47 of *the Constitution*, while invoking the right to administrative fairness, does not override the constitutional limits of this Court's jurisdiction. Investigative and enforcement decisions by the EACC are quasi-judicial and not purely administrative acts subject to Article 47. The Petition does not demonstrate any unlawful exercise of power warranting intervention.
80. The Court is persuaded that the Petition, in seeking to bar proceedings or remove the Petitioner from suits already filed in competent forums, amounts to an abuse of court process. The multiplicity of cases is not sufficient reason to invoke constitutional jurisdiction where alternative legal remedies are available and appropriate. The Petitioner's grievances can be addressed within each individual suit by raising appropriate legal objections.
81. In *CIvicon Limited v Kenya Revenue Authority & another* [2014] eKLR, the court stated:

"I agree with the judicial policy that is variously set out by the authorities relied by the 2nd respondent-Peter Ng'ang'a Muiruri v Credit Bank Ltd & another, Court of Appeal Civil Appeal No 203 of 2006 and *Ventaglio International SA and another v The Registrar of Companies and another, Nairobi HC Constitutional Petition No 410 of 2012* (per Lenaola, J) that the High Court's Constitutional Division, indeed any other Division, cannot supervise any other superior court of concurrent jurisdiction or superior jurisdiction. The supervisory jurisdiction is over subordinate courts under Article 165(6) of *the Constitution*. I also consider that it is an abuse of the court process for a litigant to seek to obtain through a constitutional petition or indeed any to other court process before the same court of concurrent jurisdiction a different decision from one already rendered by the court in other



proceedings over the same matter. The aggrieved party must be content with the devices of appeal or review of the decision already delivered by the court but cannot be permitted to re-agitate the matter through a constitutional petition or other originating proceedings. See *Beta Healthcare International Ltd v Commissioner of Customs, and 2 others*. Nairobi HC Petition No 125 of 2010 (per Majanja, J)”

82. In *Bellevue Development Company Ltd v Gikonyo & 3 others; Kenya Commercial Bank & 3 others (Interested Parties)* [2018] KECA 330 (KLR), the Court stated that:

“I have no difficulty upholding the learned Judge’s holding that as a judge of the High Court he had no jurisdiction to enquire into or review the propriety of the decisions of the Judges, who were of concurrent jurisdiction as himself. In our system of courts, which is hierarchical in nature, judges of concurrent jurisdiction do not possess supervisory jurisdiction over each other. No judge of the High Court can superintend over fellow judges of that court or of the superior courts of equal status. That much is plain common sense. It has, moreover, been expressly stated in Article 165(6) of *the Constitution* in these terms: “The High Court has supervisory jurisdiction over the subordinate courts and over any other person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.” (Our emphasis)”

83. Therefore, offends lacks jurisdiction to determine matters falling within the province of the Environment and Land Court or already conclusively adjudicated.

Whether the 1st Respondent has violated the Petitioner’s constitutional rights through its decisions and actions

84. The Petitioner alleges violations of Articles 47, 48, 50, and 28 of *the Constitution*, asserting that the 1st Respondent has unjustly subjected him to multiple suits without notice or fair hearing. However, this Court notes that the 1st Respondent’s statutory mandate under the *Ethics and Anti-Corruption Commission Act* and *the Constitution* includes investigation and initiation of recovery suits for public land. In doing so, it acts in the public interest.

85. In *Ethics and Anti-Corruption Commission & another v Tom Ojienda, SC t/a Prof. Tom Ojienda & Associates Advocates & 2 others* (Petition 30 & 31 of 2019 (Consolidated) [2022] KESC 59 (KLR), the Supreme Court recognized that the EACC is entitled to investigate and recommend legal action where public resources are at stake. In a synopsis, the facts of that case as summarized by the Apex Court were that:

“A complaint had been lodged before the 1st appellant, the Ethics and Anti-Corruption Commission (EACC), alleging Kshs. 280 million had been fictitiously paid into the 1st respondent’s advocate-client bank account. Based on that allegation, the EACC obtained warrants ex- parte to investigate and inspect the bank account. Aggrieved, the 1st respondent filed a constitutional petition contending that the warrants had been issued ex- parte and had been obtained and enforced secretly without notice. The 1st respondent urged that the EACC’s actions amounted to an infringement of his right to privacy, property, fair administrative action, and fair hearing and contradicted sections 28(1, (2), (3), and(7)of the *Anti-Corruption and Economic Crimes Act* (ACECA), which required the EACC to issue a notice informing him of its intended application and allowing him to be heard before a court could legitimately issue any warrants. The High Court held, among others, that the warrants to investigate the bank account breached the 1st respondent’s rights and fundamental



freedoms under the provisions of articles 47(1), 47(2), and 50(1) of *the Constitution*, hence void for all intents and purposes. Aggrieved, the appellants lodged appeals at the Court of Appeal, while the 1st respondent also filed a cross-appeal against part of the judgment. The Court of Appeal upheld the High Court decision and dismissed both the appeals and cross-appeal for lack of merit. The appellants were further aggrieved and thus filed the instant appeal.”

86. Addressing the issue whether investigations by EACC constitute an administrative action within the meaning of Article 47 of *the Constitution*, the Apex Court held:

“58. Does the 1st appellant’s investigative powers fall within the corners of this definition? Part IV of the ACECA specifically provides for the 1st appellant’s investigative powers. The powers granted therein include powers, privileges and immunities of a Police Officer under section 23(3), to search premises under section 29, to apply for surrender of travel documents under section 31, to arrest persons under section 32 amongst others. Strictly speaking, these powers when exercised cannot be described as “administrative action” within the meaning of article 47. For example, how can “conducting a house search” or “effecting an arrest” be considered as exercising administrative action? On the contrary, these are special powers conferred by a specific legal regime, to be exercised for a special purpose.”

87. The decision to institute suits against the Petitioner arising from his tenure as Commissioner of Lands is therefore within the EACC’s constitutional mandate. The Petitioner has not demonstrated that these actions were motivated by bad faith or were arbitrary.

88. The allegation that the Petitioner has not been served or notified in several suits is a matter that ought to be raised and addressed in the relevant trial forums. This Court cannot assess procedural compliance in suits pending before other courts. The Petitioner has access to legal remedies in each suit, including seeking orders for misjoinder, limitation, or lack of evidence.

89. The claim that the Petitioner’s dignity and reputation have been eroded due to public litigation, while sympathetic, does not amount to a constitutional violation per se. Violations must be proved through evidence showing illegality, arbitrariness, or abuse of power. None has been demonstrated here.

90. The Petition does not meet the threshold under Article 23(3) of *the Constitution* and *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. The Petitioner has not shown that the EACC’s suits have proceeded contrary to due process or that its actions fall outside the scope of its constitutional functions. Mere multiplicity of cases is not evidence of illegality.

91. The EACC has, in several cases, succeeded in proving fraud and unlawful allocation of land, while in others, the Petitioner has been acquitted. This demonstrates that each matter is dealt with on its merits and not through a blanket presumption of guilt. The Court does not find evidence of discriminatory treatment.

92. Consequently, this Court finds no actionable violation of constitutional rights attributable to the 1st Respondent. The claims of infringement under Articles 28, 40, 47, 48 and 50 are unsubstantiated. The Petition lacks legal and factual foundation for redress under *the Constitution*.



Whether the Interested Party and the 2nd Respondent are necessary parties to the Petition, and whether any reliefs are available to the Petitioner

93. The necessity of parties in constitutional litigation is guided by whether their presence is required to enable the Court to effectually and completely adjudicate upon all questions involved in the dispute. As held by the Court of Appeal in *Civicon Limited v Kivuwatt Limited & 2 others* [2015] KECA 588 (KLR), a party is necessary if the dispute cannot be effectively determined without their presence. The Court of Appeal thus stated:

“Generally in exercising this jurisdiction the court will consider whether a party ought to have been joined as plaintiff or defendant, and is not so joined, or without his presence, the question in the suit cannot be completely and effectively decided.

Accordingly, a necessary party is one without whom no order can be made effectively, while a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceedings. Mulla’s of Civil Procedure 16th Edition Volume 2 goes on to state that,

“...What makes a person a necessary party is that he has relevant evidence to give on some of the questions involved; and this would make him a necessary witness. The only reason which makes it necessary to make a person a party to an action is so that they should be bound by the result of the action and the question to be settled therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party. The line has to be drawn on a wider construction of the rule between the direct legal interest and the commercial interest.”

Order 1 Rule 3 of the Kenyan Civil Procedure Rules provides for who may be sued as defendants stating thus:

- “ 3. All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise”

Order 1 Rule 10 (2) provides further that

- (2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit be added. (emphasis provided)



Again the power given under the Rules is discretionary which discretion must of necessity be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined. In the same vein, a party seeking joinder who fails to establish any right over or interest in the subject matter cannot be enjoined. This Court in *Meme vs Republic* (2004) KLR 637 considering an application for joinder held that joinder will be permissible:

- i. Where the presence of the party will result in the complete settlement of all the question involved in the proceedings;
- ii. Where the joinder will provide protection for the rights of a party who would otherwise be adversely affected in law: and
- iii. Where the joinder will prevent a likely course of proliferated litigation.

The Court made reference to the Supreme Court of Uganda case of *Deported Asians Property Custodian Board vs Jaffer Brothers Limited* (1999) I EA 55 (SCU) in which it was held that,

“A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the Court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. A party may be joined in a suit, not because there is a cause of action against it, but because that party’s presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involved in the cause or matter... For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders, which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such a person joined so that he is bound by the decision of the Court in that suit. Alternatively, a person qualifies, (on an application of a Defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person.” (emphasis provided).”

94. In this case, the Court must examine whether the 2nd Respondent and the Interested Party meet this standard. Mere institutional affiliation with the subject matter does not, of itself, justify joinder.
95. The 2nd Respondent asserts that no allegations have been made against it, nor has any evidence been adduced linking it to the matters at hand. The law, as affirmed in *Amon v Raphael Tuck & Sons Ltd* [1956] 1 All ER 273, requires that a necessary party must have a legal obligation that bears upon the relief sought. Devlin, J held at p.286-287:

“What makes a person a necessary party? It is not of course, merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question



involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately ...the Court might often think it convenient or desirable that some of such persons should be heard so that the court could be sure that it had found the complete answer, but no one would suggest that it would be necessary to hear them for that purpose. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party.”

96. The Attorney General’s constitutional mandate under Article 156 does not, in this instance, extend to overseeing or directing the EACC’s independent litigation. There being no factual or legal basis implicating the 2nd Respondent, it is improperly joined and should be struck out.
97. The 2nd Respondent has no role in the suits initiated by the EACC, and the Petition discloses no cause of action against it. The Petitioner retains other legal avenues for redress, including seeking to strike his name from suits or invoking protections under Article 236. Accordingly, the 2nd Respondent’s presence in this Petition is unnecessary and unjustified.
98. As for the Interested Party, the Petitioner contends that it holds crucial records relevant to the transactions in question and is the legal successor to the defunct office of Commissioner of Lands. However, the Interested Party correctly argues that it need not be joined, particularly where the allegations concern ultra vires conduct by the Petitioner in his personal capacity. The courts have repeatedly emphasized personal liability in such cases, as seen in *EACC v Judith Marilyn Okungu & Another Civil Appeal No. 183 of 2014*.
99. The Petitioner’s assertion that his defence is prejudiced by the Interested Party’s absence given its custodianship of land records may bear relevance in some instances, but it does not render the Interested Party a necessary party to this Petition. Courts are bound to evaluate cases on the strength of individual culpability. Where a public officer acted outside the scope of their authority, institutional records may be informative but are not determinative. Thus, the Interested Party’s exclusion from the Petitioner’s cases does not occasion any miscarriage of justice.
100. Where fraud or abuse of office is alleged, accountability is personal. The Petitioner’s attempt to shift institutional blame does not align with established jurisprudence. Furthermore, the Interested Party has not actively participated in the acts complained of, and no evidence was tabled to demonstrate its direct involvement.
101. The constitutional threshold for joinder of a party requires more than institutional relevance; it demands necessity for fair adjudication. As was affirmed in *Zephir Holdings Ltd v Mimosa Plantations Ltd & Others [2014] eKLR*, parties should not be enjoined where their participation adds no value to the resolution of core issues. The court thus stated:

“A proper party is one who is impleaded in the suit and qualifies the threshold of a plaintiff or defendant under order 1 rule 1 and 2 respectively, or a third party or as an interested party and whose presence is necessary or relevant for the determination of the real matter in dispute or to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. And the court has a wide discretion to ever order suo moto for a party to be impleaded whose presence may be necessary to enable the court to effectually and completely adjudicate upon and settle all questions involved in a suit.”



102. The Petitioner's argument in this regard is unpersuasive. The Interested Party's presence is not required to determine the legality of the actions undertaken by the Petitioner during his tenure as Commissioner.
103. The Petitioner's request for broad reliefs barring future litigation and attributing procedural unfairness to non-joinder is also misplaced. Reliefs under Article 23 of *the Constitution* are discretionary and must be justified by demonstrable violations. In this case, the Petitioner has not established with clarity how the absence of the Interested Party renders the suits unlawful or unconstitutional. As such, no relief can issue on this basis.
104. Moreover, the Court finds that the Petitioner's invocation of Article 236 of *the Constitution* does not shield public officers from accountability where conduct is outside the law. Article 236 is not a *carte blanche* against legitimate investigations or litigation. As held in Supreme Court Decision in Prof. Tom Ojienda (*supra*), constitutional bodies like the EACC must be allowed to perform their mandates within the confines of the law. The Petitioner's reliance on institutional gaps or passage of time cannot defeat the public interest in accountability.
105. The Court therefore finds that the 2nd Respondent has been improperly joined and shall be struck out from these proceedings. The Interested Party is not a necessary party in this Petition and its continued presence would not facilitate effective resolution of the dispute. The Petitioner's prayers against both entities are consequently declined.
106. In the final analysis, the Court is not satisfied that the Petition meets the constitutional threshold for grant of relief. No specific rights violation has been proven against the Respondents. The Petition is therefore devoid of merit and is dismissed with no orders as to costs.

Orders accordingly. File closed accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 19TH DAY OF JUNE 2025.

BAHATI MWAMUYE

JUDGE

In the presence of: -

Counsel for the Petitioner – Mr. Kiprotich

Counsel for the 1st Respondent – Ms. Kibogi

Counsel for the 2nd Respondent – Mr. Weche h/b Mr. Bitu

Counsel for the Interested Party – Mr. Edeyo h/b Mr. Andachi

Court Assistant – Ms. Neema

