Donald v National Assembly of Kenya (Constitutional Petition E004 of 2023) [2024] KEHC 175 (KLR) (19 January 2024) (Judgment)

Neutral citation: [2024] KEHC 175 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CONSTITUTIONAL PETITION E004 OF 2023

OA SEWE, J

JANUARY 19, 2024

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ARTICLES 1(1), 1(3), 2(1), 2(2), 2(4), 25(C), 48, 50(1), 159(1), (2)(B), 160(1), 161(1) AND 169(1) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTION 7 OF THE SIXTH SCHEDULE OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE LAND ADJUDICATION ACT, CHAPTER 284 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE DOCTRINE OF SUPREMACY OF THE CONSTITUTION

AND

IN THE MATTER OF THE DOCTRINE OF SEPARATION OF POWERS

AND

IN THE MATTER OF INDEPENDENCE OF THE JUDICIARY

BETWEEN

RONO DONALD ..... PETITIONER

AND

THE NATIONAL ASSEMBLY OF KENYA ..... RESPONDENT

Constitutionality of provisions of the Land Adjudication Act which give power to the adjudication officer and minister to determine disputes and the applicable procedures

The petition challenged the constitutionality of various provisions of the Land Adjudication Act for being inconsistent with the Constitution to the extent that they went against the doctrine of independence of the Judiciary, separation of powers and access to justice. The court held that sections 9 (2) (b), 10(1), 12(1) and (2), 26(1) and (2) and 29(1)(a) and (4) of the Land Adjudication Act, which gave power to the adjudication officer and minister to determine disputes that arose within the Act and which provided for the applicable procedures, were not inconsistent with any provisions of the Constitution. The court further held that the provision of appeal or lack of it in a statute with a finality clause, did not offend any provisions of the Constitution.

Reported by Kakai Toili

Constitutional Law *– constitutionality of statutes – constitutionality of sections 9(2)(b), 10(1), 12(1) and (2), 26(1) and (2) and 29(1)(a) and (4) of the Land Adjudication Act which gave power to the adjudication officer and minister to determine disputes that arose within the Act (the impugned sections) - whether the impugned sections were inconsistent with the Constitution – Constitution of Kenya, articles 50(1) or 159(1); Land Adjudication Act (cap 284), sections 9(2)(b), 10(1), 12(1) and (2), 26(1) and (2) and 29(1)(a) and (4).*

Constitutional Law *– constitutionality of statutes – constitutionality of a statute with a finality clause - whether the provision of appeal or lack of it in a statute with a finality clause was unconstitutional.*

Words and Phrases *– quasi-judicial - of, relating to, or involving an executive or administrative official's adjudicative acts. Quasi-judicial acts, which are valid if there is no abuse of discretion, often determine the fundamental rights of citizens. They are subject to review by courts - Black's Law Dictionary 11th Edition.*

Brief facts

The petitioner contended that he was served with a preliminary objection in Kwale Land Case No 38 of 2021: *Ndiminro Ngana Kakongo & another v Robert Chimera*, whose root was section 30(1) of the Land Adjudication Act which provided that consent of the adjudication officer was a prerequisite to the institution of a suit. He averred that many sections of the Land Adjudication Act were inconsistent with the Constitution to the extent that they went against the doctrine of independence of the Judiciary, separation of powers and access to justice. The petitioner prayed for among other reliefs; a declaration that sections 9(2)(b), 10(1), 12(1), 12(2), 26(1), 26(2), 29(1)(a), (b), 29(4), 30(3) of the Land Adjudication Act were inconsistent with articles 1(3)(c), 50(1) and 159(1) of the Constitution; and a declaration that section 30(10 and (2) of the Act infringed on article 48 of the Constitution and were inconsistent with article 160(1) of the Constitution.

The respondent stated that the Land Adjudication Act was enacted before the Constitution and made reference to section 7(1) of the Sixth Schedule to the Constitution as the solution to any unconstitutionality. The respondent further averred that, since article 159(2)(c) of the Constitution provided for alternative dispute resolution mechanisms (ADR) outside the court system, dispute resolution was not the preserve of the courts. Consequently, the respondent prayed for the dismissal of the petition with costs.

Issues

i. Whether provisions of the Land Adjudication Act which gave power to the adjudication officer and minister to determine disputes that arose within the Act were inconsistent with the Constitution.
ii. Whether the provision of appeal or lack of it in a statute with a finality clause was unconstitutional.

Relevant provisions of the Law

Fair Administrative Action Act, Cap 7L

Section 2 – Interpretation

"administrative action" includes–

(a)the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or

(b)any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;

Land Adjudication Act, Cap. 284

Section 29 - Appeal

(1) Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Cabinet Secretary by—

(a) delivering to the Cabinet Secretary an appeal in writing specifying the grounds of appeal; and

(b) sending a copy of the appeal to the Director of Land Adjudication,

and the Cabinet Secretary shall determine the appeal and make such order thereon as he thinks just and the order shall be final.

Section 30 - Staying of land suits

(1) Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29(3) of this Act.

(2) Where any such proceedings were begun before the publication of the notice under section 5 of this Act, they shall be discontinued, unless the adjudication officer, having regard to the stage which the proceedings have reached, otherwise directs.

Held

1. Jurisdiction was everything and without it, the court had no option but to down its tools. From article 165(3)(d) of the Constitution, the court had the requisite jurisdiction to determine the petition, to the extent that it alleged that certain provisions of the Land Adjudication Act were inconsistent with the Constitution. The petitioner had invoked the interpretive jurisdiction of the court, and therefore the petition was properly before the court.
2. The petition accorded well with the requirement for specificity. The petition was drafted in accord with the principle laid down in *Anarita Karimi Njeru v Republic* [1979] eKLR.
3. In exercising its interpretive function, the court must bear in mind the precepts set out at article 259 of the Constitution. It was a constitutional imperative, by dint of article 159(2)(c) of the Constitution, that courts and tribunals embrace alternative forms of dispute resolution as far as they were not inconsistent with the Constitution or repugnant to justice and morality. In the same vein, quasi-judicial bodies had the pride of place at under article 169(1)(d) of the Constitution.
4. Administrative actions were anchored under article 47 of the Constitution. Section 2 of the Fair Administrative Action Act (cap 7L), defined the term "administrative action." From the impugned provisions of the Land Adjudication Act, the powers in question had been deliberately donated to the adjudication officer and minister to preside over petitions, objections and appeals respectively on issues with adjudication as provided in a quasi-judicial capacity.
5. The functions of a land adjudication officer were not unbridled but had been circumscribed by the Land Adjudication Act. Additionally, being quasi-judicial, the powers were amenable to review pursuant to article 47 of the Constitution. Further, under section 7 of the Fair Administrative Actions Act, an administrative action could be reviewed if it did not adhere to the provisions of the Constitution. In addition, under article 165(6) of the Constitution, the High Court had supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function.
6. Quasi-judicial and administrative actions were well-founded in the Constitution. In the circumstances, sections 9 (2) (b), 10(1), 12(1) and (2), 26(1) and (2) and 29(1)(a) and (4) of the Land Adjudication Act, which gave power to the adjudication officer and minister to determine disputes that arose within the Act and which provided for the applicable procedures, were not inconsistent with any provisions of the Constitution, and certainly not articles 50(1) or 159(1) of the Constitution.

7. The impugned provisions did not preclude judicial review of administrative decisions of the Minister. A person aggrieved by the decisions of the Minister by way of judicial review would still have access to the judicial review jurisdiction of the court. The Constitution had sufficient safeguards to ensure its letter and spirit were fortified even in situations where quasi-judicial functions were donated to bodies or persons employed to perform executive functions. Indeed, the entire adjudication process as set out in the Land Adjudication Act spoke to an elaborate dispute resolution mechanism, including appeals, to the end that justice was attained in each case. The Land Adjudication Act was revised in 2016 so as to attune it to the current constitutional dispensation.
8. The right to appeal must either be established by the Constitution or statute; and was therefore a right that had limits. Thus, the provision of appeal or lack of it in a statute with a finality clause, did not offend any provisions of the Constitution. Hence, sections 29(1)(b) and 30(3) of the Land Adjudication Act were not unconstitutional. The Constitution must be given a holistic interpretation.
9. Section 30(1) and (2) of the Land Adjudication Act were couched in mandatory terms whereby under section 30(1) parties were prohibited from instituting any civil proceedings without consent in a scenario where the adjudication register was not complete. Section 30(2) on the other hand indicated that any civil suit commenced before a publication notice had been issued under section 5 of the Act shall be dismissed unless the adjudication officer directed otherwise.
10. The Constitution mandated the use of ADR mechanisms which were intended to for realization of access to justice that was swift, fair, and effective. Rather than impinge on access to justice, the employment of alternative justice systems had assisted in the actualization of article 48 of the Constitution in addition to reducing the backlog of cases. Section 30 of the Land Adjudication Act was only enacted to prevent unnecessary abuses. The decisions made under section 30 were also subject to article 47 of the Constitution; and were therefore amenable to judicial review. Section 30(1) and (2) of the Land Adjudication Act did not infringe article 48 of the Constitution on access to justice and neither did they impinge on the independence of the Judiciary as provided for under article 160(1) of the Constitution.

Petition dismissed; each party to bear their own costs.

Citations

Cases

1. Bhaijee & another v Nondi & another (Civil Appeal 139 of 2019; [2022] KECA 119 (KLR)) — Followed
2. Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General (Petition 16 of 2011; [2011] eKLRL [2011] 1 KLR 458) — Mentioned
3. Dry Associates Limited v Capital Markets Authority & Another Interested Party Crown Berger (K) Ltd (Petition 328 of 2011; [2012] KEHC 5568 (KLR)) — Mentioned
4. Law Society of Kenya v Attorney General & another (Application 4 of 2019; [2019] KESC 30 (KLR)) — Mentioned
5. Law society of Kenya v Centre for Human Rights and Democracy & 13 others (Civil Appeal 308 of 2005; [2013] KECA 172 (KLR)) — Explained
6. Law Society of Kenya v Office of the Attorney General & another; Judicial Service Commission (Interested Party) (Constitutional Petition 203 of 2020; [2021] KEHC 454 (KLR)) — Mentioned
7. Macharia & another v Kenya Commercial Bank Ltd & another (Application 2 of 2011; [2012] eKLR; [2012] 3 KLR 199) — Mentioned
8. Martin Nyaga Wambora v Speaker County Assembly of Embu & others (Petition 3 of 2014; [2014] KEHC 6715 (KLR)) — Mentioned
9. Matemu, Mumo v Trusted Society of Human Rights Alliance & 5 others (Civil Appeal 290 of 2012; [2013] eKLR) — Explained

10. Mboya, Apollo v Attorney General & 2 others (Petition 472 of 2017; [2018] KEHC 6933 (KLR)) — Explained
11. Mohamed Ahmed Khalid (Chairman) & 10 others v Director of Land Adjudication & 2 others (Constitutional Petition 3 of 2013; [2013] KEHC 2089 (KLR)) — Mentioned
12. Mutanga Tea & Coffee Company Ltd v Shikara Limited & another (Civil Appeal 54 of 2014; [2015] KECA 469 (KLR)) — Mentioned
13. Ndiminro Ngana Kakongo & another v Robert Chimera (Kwale Land Case No. 38 of 2021) — Mentioned
14. Njeru v Republic (Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR); [1976=80] KLR 1272) — Mentioned
15. Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (Civil Appeal 50 of 1989; [1989] eKLR; [1989] KLR 1) — Mentioned
16. Tukero ole Kina v Attorney General & National Assembly (Petition 6 of 2018; [2019] KEHC 4244 (KLR)) — Mentioned
17. Regina v Medical Appeal Tribunal Ex parte Gilmore ([1957] 1 Q.B. 574) — Explained

Statutes

1. Appellate Jurisdiction Act (cap 9) — section 3A, 3B — Interpreted
2. Civil Procedure Act (cap 21) — section 1A, 1B — Interpreted
3. Constitution of Kenya — article 1(3)(c); 2(4); 22(1); 23; 48; 50(1); 159(1); 160(1); 165(3); 259; section 7 6th Schedule — Interpreted
4. Fair Administrative Action Act (cap 7L) — section 2, 7 — Interpreted
5. Land Adjudication Act (cap 284) — section 9(2)(b); 10(1); 12(1); 12(2); 26(1)(2); 29(1)(a); 30(1) — Interpreted
6. Law Reform Act (cap 26) — In general — Cited

Texts

1. Garner, BA., Black, HC., (Ed) (2014), Black's Law Dictionary (St Paul, Minnesota: Thomson Reuters 10th Edn)

Advocates

None mentioned

JUDGMENT

1 The petitioner, Mr Rono Donald, is an Advocate of the High Court of Kenya, practising as such in Kwale. He filed this Petition on January 27, 2023 contending that, being a prolific practitioner in land law litigation, he was served with a preliminary objection in Kwale Land Case No 38 of 2021: *Ndiminro Ngana Kakongo & another v Robert Chimera*, whose root was Section 30(1) of the *Land Adjudication Act*. chapter 284 of the Laws of Kenya, which provides that consent of the Adjudication Officer is a prerequisite to the institution of a suit. He averred that, in the process of preparing his written submissions, he interrogated the *Land Adjudication Act* at length and found many sections thereof to be inconsistent with the *Constitution* to the extent that they go against the doctrine of independence of the Judiciary, separation of powers and access to justice. He set out the particulars of the alleged inconsistencies at paragraphs 49 to 65 of his Petition and consequently prayed for the following reliefs:

(a) A declaration that sections 9(2)(b), 10(1), 12(1), 12(2), 26(1), 26(2), 29(1)(a), (b), 29(4), 30(3) of the *Land Adjudication Act* are inconsistent with articles 1(3)(c), 50(1) and 159(1) of the *Constitution*.

(b) A declaration that subsections (1) and (2) of Section 30 of the *Land Adjudication Act* infringe on article 48 of the *Constitution* of Kenya and are inconsistent with article 160(1) of the *Constitution*.

(c) Any such order(s) this court deems fit and just in the circumstances.

(d) Costs of the petition.

2. In response to the petition, the respondent relied on the replying affidavit sworn on February 14, 2023 by its Clerk, Mr Samuel Njoroge. The respondent pointed out that the impugned Act was enacted 5 years after independence to guide the ascertainment and recording of interests in Trust Land in independent Kenya, and therefore was enacted way beforethe *Constitution* of Kenya, 2010. He therefore made reference to section 7(1) of the sixth schedule of the *Constitution* as the solution to any unconstitutionality, perceived or actual. Mr. Njoroge further averred that, since article 159(2)(c) of the *Constitution* provides for alternative dispute resolution mechanisms outside the court system, dispute resolution is not the preserve of the courts. Consequently, the respondent prayed for the dismissal of the petition with costs.

3. The petition was canvassed by way of written submissions, pursuant to the directions given herein on March 21, 2023. I however noted that the respondent opted to file no submissions as there are no such submissions either on the file or in the e-filing portal. On his part, the petitioner filed detailed submissions dated April 4, 2023, in which he proposed the following issues for determination:

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

(b) Whether articles 9(2)(b), 10(1), 12(1), 12(2), 26(1), 26(2), 29(1)(a) and (b), 29(4), 30(3) of the *Land Adjudication Act*, is inconsistent with article 1(3), article 50(1) and article 159(1) of the *Constitution* of Kenya.

(c) Whether article 30(1) and 30(2) of the *Land Adjudication Act* infringes on article 48 of the *Constitution*.

(d) Who bears the costs of the suit.

4. In support of his argument that the court does have the requisite jurisdiction to entertain this petition, the petitioner made reference to articles 2(4), 22(1), 23 and 165(3) of the *Constitution* as well as the cases of *Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & another* [2012] eKLR and urged the court to so find. The petitioner then responded to the respondent's averments and reiterated his stance that any law that is inconsistent with the *Constitution* ought not to stand. He relied on *Apollo Mboya v Attorney General & 2 others* [2018] eKLR in which it was held:

> "One thing is clear. All law must conform to the constitutional edifice. It follows that the impugned sections must not only meet constitutional threshold, but also the process of its enactment must also conform to the constitutional dictates."

5. Accordingly, the petitioner submitted that section 7 of the Sixth Schedule of the *Constitution* is no cure. He gave specific examples at paragraphs 39 and 40 of his written submissions of situations in which section 7 can be invoked. The petitioner then set out the specific provisions of the impugned sections of the *Land Adjudication Act* and endeavoured to demonstrate their inconsistency with the *Constitution*. He likewise made reference to the cases of *Law Society of Kenya v Office of the Attorney General & another; Judicial Service Commission (Interested Party)* (Constitutional and Human Rights) (10th June 2021), *Martin Nyaga Wambora v Speaker County Assembly of Embu & others* [2014] eKLR,

Tukero Ole Kina v Attorney General & another [2019] eKLR and submitted at length on the canons of constitutional interpretation and urged the court to find in his favour.

6. In sum, the petitioner underscored the gist of his application by stating that:

   (a) Judicial power must exist as a power separate from the executive and legislative power;

   (b) Judicial power must repose in the Judiciary as a separate and independent organ of Government.

7. It is plain from the foregoing that the Petitioner is challenging the constitutionality of sections 9, 10, 12, 26, 29, 30(1), (2) and (3) of the *Land Adjudication Act*, chapter 284 of the Laws of Kenya, (erroneously referred to in the Petition as the *Law of Adjudication Act*). His contention was the said sections are inconsistent with the provisions articles 1(1), 1(3), 2(1), 2(2),2(4), 259(c), 48, 50(1), 159(1), 2(b), 160(1), 161(1) and 169(1) of the *Constitution* of Kenya 2010 in so far as the Act delegates a judicial function to a public officer deployed in the executive arm of Government. In the petitioner's view, this amounts not only to a contravention of the doctrine of separation of powers but is also an encroachment on the mandate of the Judiciary. Further, the petitioner asserted that the requirement of consent from the Adjudication Officer to institute a suit as well as the provision that an appeal to the Minister, whose decision is final, amounts to the interference with the independence of the Judiciary.

8. Before engaging in a merit consideration of the petition, it is imperative that the issue of jurisdiction be resolved; and therefore, the first and most important issue for determination is whether this court is vested with the requisite jurisdiction to determine the petition. It is trite that jurisdiction is everything and without it, the court has no option but to down its tools. In the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR, the Court of Appeal (per Nyarangi, JA) aptly stated: -

> "...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 a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction..."

9. This court's jurisdiction is to hear and determine any question respecting the interpretation of the *Constitution* is provided for in article 165 of the *Constitution*. In particular article 165 (3) provides: -

   Subject to clause (5), the High Court shall have—

   (a) unlimited original jurisdiction in criminal and civil matters;

   (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

   (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

   (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

      (i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

10. It is therefore plain from article 165(3)(d), that this court has the requisite jurisdiction to determine this Petition, to the extent that it alleges that certain provisions of the *Land Adjudication Act* are inconsistent with the *Constitution*. The petitioner has invoked the interpretive jurisdiction of this court, and therefore the Petition is properly before the court. There is also no gainsaying that the Petition accords well with the requirement for specificity. At paragraphs 3 to 19 of his Petition, the petitioner set out all the provisions of the *Constitution* that he relied on. He likewise set out the impugned provisions of the *Land Adjudication Act* at paragraphs *20* to *35*. Then, at paragraphs 42 to 65 of the Petition, the petitioner gave detailed particulars of the perceived inconsistencies. There is no gainsaying therefore that the Petition was drafted in accord with the principle laid down in *Anarita Karimi Njeru v Republic* [1979] eKLR 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."

11. The principle was affirmed by the Court of Appeal in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR as hereunder:

(42) ...the principle in *Anarita Karimi Njeru* (*supra*) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to article 159 of the *Constitution* and the overriding objective principle under section 1A and 1B of the *Civil Procedure Act* (cap 21) and section 3A and 3B of the *Appellate Jurisdiction Act* (cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in *Anarita Karimi Njeru* (*supra*) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, MR said in 1876 in the case of *Thorp v Holdsworth* (1876) 3 Ch. D. 637 at 639 holds true today:

> "The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing."

12. That said, it is instructive to mention at the outset that, in exercising its interpretive function, the court must bear in mind the precepts set out at article 259 of the *Constitution*. The provision states:

(1) This Constitution shall be interpreted in a manner that—

(a) promotes its purposes, values and principles;

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) permits the development of the law; and

(d) contributes to good governance.

(2) ...

(3) Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking and, therefore, among other things—

(a) a function or power conferred by this Constitution on an office may be performed or exercised as occasion requires, by the person holding the office;

(b) any reference in this Constitution to a State or other public office or officer, or a person holding such an office, includes a reference to the person acting in or otherwise performing the functions of the office at any particular time;

(c) a reference in this Constitution to an office, State organ or locality named in this Constitution shall be read with any formal alteration necessary to make it applicable in the circumstances; and

(d) a reference in this Constitution to an office, body or organisation is, if the office, body or organisation has ceased to exist, a reference to its successor or to the equivalent office, body or organisation.

13. Hence, in *Centre for Rights Education and Awareness (CREAW) & 7 others v Attorney General* [2011] eKLR, held:

> "...In interpreting the Constitution, this court is bound by the provisions of section 259 which requires thatthe *Constitution* be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law and the human rights and fundamental freedoms in the bill of rights, permits the development of the law and contributes to good governance. ...
>
> ...In interpreting the Constitution, the letter and the spirit of the supreme law must be respected. Various provisions of the *Constitution* must be read together in order to get a proper interpretation. In the Ugandan case of *Tinyefuza v Attorney Genaral*, Constitutional Appeal No 1 of 1997, the court held as follows:
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> > "The entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution."

14. In the same vein, the canons of statutory interpretation are well settled. For instance, in *Law Society of Kenya v Attorney General & another* [2019] eKLR, the Supreme Court held: -

...[37] At the forefront of these principles is a general but rebuttable presumption that a statutory provision is consistent with the *Constitution*. The party that alleges inconsistency has the burden of proving such a contention. In construing whether statutory provisions offend the Constitution, courts must therefore subject the same to an objective inquiry as to whether they conform with the *Constitution*. That is why in *Hamdarddawa Khana v Union of India and others* 1960 AIR 554 it was stated thus;

> "Another principle which has to be borne in mind in examining the constitutionality of a statute is that it must be assumed that the legislature understands and appreciates the needs of the people and the laws it enacts are directed to problems which are made manifest by experience and that the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is, therefore, in favour of the constitutionality of an enactment."

(38) In addition to the above, and to fully comprehend whether a statutory provision is unconstitutional or not, its true essence must also be considered. This gives rise to the second principle which is the determination of the purpose and effect of such a statutory provision. In other words, what is the provision directed or aimed at? Can the intention of the drafters be discerned with clarity? These were our sentiments expressed in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*, Supreme Court Petition No 26 of 2014 [2014] eKLR, where we opined that a purposive interpretation should be given to statutes so as to reveal the intention of the Legislature and the Statute itself. We thus observed as follows:

In *Pepper v Hart* [1992] 3 WLR, Lord Griffiths observed that the "purposive approach to legislative interpretation" has evolved to resolve ambiguities in meaning. In this regard, where the literal words used in a statute create an ambiguity, the court is not to be held captive to such phraseology. Where the court is not sure of what the legislature meant, it is free to look beyond the words themselves, and consider the historical context underpinning the legislation. The learned Judge thus pronounced himself:

> "The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous, I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted."

(39) Therefore intention is construed by scrutinising the language used in the provision which inevitably discloses its purpose and effect. It is the task of a court to give a literal meaning to the words used and the language of the provision must be taken as conclusive unless there is an expressed legislative intention to the contrary..."

15. The Supreme Court went on to quote the Supreme Court of India thus:

(41) On interpretation, specifically of a statute or eventhe *Constitution* itself, the Supreme Court of India in *Reserve Bank of India v Peerless General Finance and Investment Co. Ltd.* {1987} 1 SCC 424 and others observed that: -

> Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual."

16. In the premises, the twin questions to pose for determination are: -

(a) Whether Sections 9(2)(b), 10(1), 12(1) & (2), 26(1) & (2), 29(1)(a), (b) & (4) and 30 (3) of the *Land Adjudication Act* are inconsistent with articles 1(3) (c), 50(1) and 159 (1) of the *Constitution*.

(b) Whether section 30(1) and 30(2) of the *Land Adjudication Act* infringes article 48 and is inconsistent with article 160(1) of the *Constitution*.

A. Whether Sections 9(2) (b), 10(1), 12(1) & (2), 26(1) & (2), 29(1) (a), (b) & (4) and 30 (3) of the *Land Adjudication Act* are inconsistent with Articles 1(3) (c), 50 (1) and 159 (1) of the Constitution:

17. The petitioner made reference to section 4(1) of the Act in connection with the appointment of a land adjudication officer whose function among others under Section 9 is to consider petitions on acts done, omissions and decisions made by a survey officer, demarcation officer or recording officer. An adjudication officer also has power to listen to objections to the Adjudication Register as provided under section 26 of the Act.

18. The petitioner impugned section 10 of the Act, contending that it has given the land adjudication officer judicial functions which, by dint of articles 1 and 50(1) of the *Constitution* are reserved for the Judiciary. In the same vein, the petitioner took the view that the procedure set out under section 12 of the Act is unconstitutional as, for all intents and purposes, the officer is thereby bestowed with judicial functions that under article 160, impinge on the independence of the Judiciary.

19. The petitioner has also challenged the constitutionality of section 29(1) (a)(b) and (4) of the Act, which provide that the Minister has the power to hear and determine appeals that arise from the objections to the register that are provided for under Section 26; and that his decision is final. According to the petitioner, the power of the Minister to hear appeals is an infringement of the doctrine of separation of powers because it allows an executive arm of the Government to perform judicial functions. He also took issue with the finality clause; arguing that it limits the right to access to Justice as envisaged under article 48, whereinthe *Constitution* has also laid down an elaborate procedure of appeal from the subordinate courts to the High Court, Court of Appeal and Supreme Court. The right of the Minister to delegate his powers under section 29(4) has also been challenged for not being specific as to which public officer is being appointed. The petitioner was of the view that the vagueness of the provision makes it retrogressive and intrusive to the doctrine of separation of powers.

20. I have given careful consideration to the foregoing arguments, which seem to propagate the view that dispute resolution is the preserve of the Judiciary. It is noteworthy however that it is a constitutional imperative, by dint of article 159(2)(c), that courts and tribunals embrace alternative forms of dispute resolution as far as they are not inconsistent with the *Constitution* or repugnant to justice and morality.

In the same vein, quasi-judicial bodies have the pride of place at under article 169(1)(d) which provides that:

(1) The subordinate courts are—

(a) the Magistrates courts;

(b) the Kadhis' courts;

(c) the Courts Martial; and

(d) any other court or local tribunal as may be established by an Act of Parliament, other than the courts established as required by article 162(2).

(2) Parliament shall enact legislation conferring jurisdiction, functions and powers on the courts established under clause (1).

21. It is also significant that administrative actions are anchored under article 47 of the Constitution, which provides in peremptory terms that:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. (2) If a right or fundamental freedom of a person has been or is 31 Constitution of Kenya, 2010 likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.

22. And, for purposes of section 2 of the *Fair Administrative Action Act* No 4 of 2015, "administrative action" is defined as: -

(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or

(ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;

23. A careful reading of the impugned provisions of the *Land Adjudication Act*, shows that the powers in question have been deliberately donated to the adjudication officer and minister to preside over petitions, objections and appeals respectively on issues with adjudication as provided in a quasi-judicial capacity. Indeed, according to *Black's Law Dictionary* 11th Edition "quasi-judicial" is defined as: -

> ... Of, relating to, or involving an executive or administrative official's adjudicative acts. • Quasi-judicial acts, which are valid if there is no abuse of discretion, often determine the fundamental rights of citizens. They are subject to review by courts.

24. It is plain then that, the functions of a land adjudication officer are not unbridled but have been clearly circumscribed by the Act. Additionally, being quasi-judicial, the powers are amenable to review pursuant to articles 47 which provides: -

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration.

25. Thus, in the case of *Dry Associates Limited v Capital Markets Authority & another Interested Party Crown Berger (K) Ltd* [2012] eKLR, the court held: -

> ...article 47 and 50(1) protect separate and distinct rights which should not be conflated. Although the two rights embody and give effect to the general rules of natural justice they apply to different circumstances. Article 50(1) applies to a court, impartial tribunal or a body established to resolve a dispute while article 47 applies administrative action generally. Article 50(1) deals with matters of a civil nature while the rest of the Article deals with criminal trials. Article 47 is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law or judicial review under the *Law Reform Act* (cap 26 of the Laws of Kenya) but is to be measured against the standards established by the *Constitution*. "

26. Further, under Section 7 of the *Fair Administrative Actions Act*, an administrative action can be reviewed if it does not adhere to the provisions of the *Constitution*.

27. In addition, under article 165 (6) of the Constitution, the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function. Hence, quasi-judicial and administrative actions are well-founded inthe *Constitution*. In the circumstances, I do not find sections 9 (2) (b), 10(1), 12(1) & (2), 26(1) & (2) and 29(1) (a) & (4) of the *Land Adjudication Act*, which give power to the adjudication officer and minister to determine disputes that arise within the Act and which provide for the applicable procedures, to be inconsistent with any provisions of the Constitution, and certainly not articles 50(1) or 159 (1) of the *Constitution*.

28. The other sections challenged by the Petitioner are sections 29(1) (b) and 30 (3) of the Act. Section 29(1) of the Act provides that:

(1) Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by—

(a) delivering to the Minister an appeal in writing specifying the grounds of appeal; and

(b) sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.

29. In the same vein, section 30(3) of the Act states:

> "Any person who is aggrieved by the refusal of the adjudication officer to give consent or make a direction under subsection (1) or (2) of this section may, within twenty-eight days after the refusal, appeal in writing to the Minister whose decision shall be final."

30. The petitioner pitched the argument that these finality clauses undermine the appellate jurisdiction of the courts as established underthe *Constitution* and inhibit access to justice, which is a right anchored in article 48 of the *Constitution*. However, as demonstrated hereinabove, the said provisions do not preclude judicial review of administrative decisions of the Minister granted that a person aggrieved by the decisions of the Minister by way of judicial review would still have access to the judicial review jurisdiction of the Court. Indeed, the issue of finality clauses fell for discussion in *Regina v Medical Appeal Tribunal Ex parte Gilmore* [1957] 1 Q.B. 574 where it was held: -

> "The second point is the effect of section 36 (3) of the 1946 Act which provides that
>
> > "any decision of a claim or question ... shall be final".
>
> Do those words preclude the Court of Queen's Bench from issuing a *certiorari* to bring up the decision?
>
> This is a question which we did not discuss in *Rex v Northumberland Compensation Appeal Tribunal*, 1952 1 King's Bench, 338, because it did not there arise. It does arise here, and on looking again into the old books I find it very well settled that the remedy by *certiorari* is never to be taken away by any statute except by the most clear and explicit words. The word "final" is not enough. That only means "without appeal". It does not mean "without recourse to *certiorari*". It makes the decision final on the facts, but not final on the law. Notwithstanding that the decision is by a statute made "final", *certiorari* can still issue for excess of jurisdiction or for error of law on the face of the record...
>
> It was no doubt that train of authority which Lord Sumner had in mind when he said in *Rex v Nat Bell Liquors Ltd.*, 1922 2 Appeal Cases, 128, at page 159:
>
> > "Long before Jervis's Acts, statutes had been passed which created an inferior court and declared its decisions to be 'final' and 'without appeal', and again and again the Court of King's Bench had held that language of this kind did not restrict or take away the right of the Court to bring the proceedings before itself by *certiorari*".
>
> I venture therefore to use in this case the words I used in the recent case of *Taylor v National Assistance Board*, 1957 2 Weekly Law Reports, at page 193,(about declarations) with suitable variations to *certiorari*:
>
> The remedy is not excluded by the fact that the determination of the Tribunal is by Statute made 'final'. Parliament only gives the impression of finality to the decisions of the Tribunal on the condition that they are reached in accordance with the law".

In my opinion, therefore, notwithstanding the fact that the Statute says that the decision of the Medical Appeal Tribunal is to be final, it is open to this court to issue a certiorari to quash it for error of law on the face of the record..."

31. Likewise, in *Law Society of Kenya v Centre for Human Rights and Democracy & 13 others* [2013] eKLR, the Court of Appeal held:

> "I will refer to the Indian decision of *Kihoto Hollohan v Zachillhu and others* 1992 SCR (1) 686. There, the Supreme Court of India was called upon to decide whether an ouster clause seeking to impart a statutory finality on the speaker of Parliament or the chairman could yet be questioned by the court. In a thoroughly well-reasoned judgment, that court arrived at the holding that;

> "Paragraph 69(1) of the Tenth Schedule, to the extent it seeks to impart finality to the decision of the speakers/chairman, is valid. But the concept of statutory finality embodied in paragraph 6(1) does not detract from or abrogate judicial review under articles 136, 226 and 227 in so far as infirmities based on violations of constitutional mandates, mala fides, non-compliance with Rules of Natural Justice and precocity, are concerned."
>
> In arriving at that decision, and after considering many of its own and other courts' decisions, that court rejected the idea that the mere existence of a 'finality', 'no question' or ouster clause ought to have the effect of, to paraphrase, a scare crow, which, once waved should stop the courts in their tracks and so prelude any enquiry of whatever kind in these picturesque terms;
>
> Does the word 'final' render the decision of the speaker immune from Judicial Review? It is now accepted that finality clause is not a legislative magical incantation which has the effect of telling off Judicial Review. Statutory finality of a decision presupposes and is subject to its consonance with the Statute."

32. Hence,the *Constitution* has sufficient safeguards to ensure its letter and spirit are fortified even in situations where quasi-judicial functions are donated to bodies or persons employed to perform executive functions. Indeed, the entire adjudication process as set out in the Act speaks to an elaborate dispute resolution mechanism, including appeals, to the end that justice is attained in each case. It is also significant that the *Land Adjudication Act* was revised in 2016 so as to attune it to the current constitutional dispensation.

33. Similarly, it is trite that the right to appeal must either be established by the *Constitution* or statute; and is therefore a right that has limits. Thus, the provision of appeal or lack of it in a statute with a finality clause, in my view, does not offend any provisions of the *Constitution*. Hence, sections 29(1) /(b) and 30 (3) are not unconstitutional. As pointed out herein above,the *Constitution* must be given a holistic interpretation. Hence it bears repeating the precept expounded in the Ugandan case of *Tinyefuza v Attorney General*, Constitutional Appeal No 1 of 1997, that:

> "The entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution."

B. Whether Section 30(1) and 30(2) of the *Land Adjudication Act* infringes Article 48 and is inconsistent with Article 160(1) of the *Constitution*.

34. The petitioner has challenged the constitutionality of section 30(1) and 30(2), contending that they infringe article 48 and are inconsistent with article 160(1) of the *Constitution*. Section 30(1) & (2) provides: -

(1) Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29(3) of this Act.

(2) Where any such proceedings were begun before the publication of the notice under section 5 of this Act, they shall be discontinued, unless the adjudication officer, having regard to the stage which the proceedings have reached, otherwise directs.

35. The above sections are couched in mandatory terms whereby under section 30(1) parties are prohibited from instituting any civil proceedings without consent in a scenario where the adjudication register is not complete. Section 30(2) on the other hand indicates that any civil suit commenced before a publication notice has been issued under section 5 of the Act shall be dismissed unless the adjudication officer directs otherwise.

36. The Court of Appeal in the case of *Bhaijee & another v Nondi & another* (Civil Appeal 139 of 2019) [2022] KECA 119 (KLR) (18 February 2022) (Judgment), had an opportunity to consider a similar situation. Here is what it had to say:

> The section therefore requires consent to be given before institution of civil proceedings concerning an interest in land in an adjudication section. The said consent is a condition precedent to a valid suit concerning disputes of land in an adjudication section and specifically requires the suits to be discontinued if started without consent. The section therefore clearly affects the power and jurisdiction of courts to hear and determine such disputes. The rationale for the said provisions is that there is an elaborate process that is laid down by the *Land Adjudication Act*, on how to determine which persons are, and the extent to which, they are entitled to interests in the land under adjudication, and it is therefore necessary that it is first employed before resort is made to the courts, and also shielded from unnecessary and unjustified abuses. indeed, it has been severally held by this court that where a dispute resolution mechanism exists outside courts, the same has to be exhausted before the jurisdiction of the courts is invoked. See in this regard the decisions in *Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 others* [2015] eKLR and *Mutanga Tea & Coffee Company Ltd v Shikara Limited & another* [2015] e KLR.

37. Further, in the case of *Mohamed Ahmed Khalid (Chairman) & 10 others v Director of Land Adjudication & 2 others* [2013] eKLR, it was held: -

> 47. The law that was applicable for the ascertainment of land rights and interest over Trust land is the *Land Adjudication Act*, cap 284. The said Act has an elaborate mechanism of appeal in the event an individual is aggrieved by the decisions of the Land Adjudication and Settlement Officer, the Land Adjudication Committee, the Land Arbitration Board and the Minister's Appeal Committee...
>
> 58. Considering that the *Land Adjudication Act*, cap 283 has an elaborate procedure on how complaints arising from the planning, demarcation and surveying of Trust land are supposed to be dealt with, it is my view that this court cannot substitute the established bodies which are supposed to deal with those complaints. The Petitioners can only move this court for declaratory orders and judicial review orders, or by way of an ordinary suit, once they have exhausted the mechanisms that the law has put in place..."

38. As has been pointed out hereinabove,the *Constitution* mandates the use of alternative dispute resolution mechanisms which in my view are intended to for realization of access to justice that is swift, fair, and effective. Rather than impinge on access to justice, the employment of alternative justice systems has assisted in the actualization of article 48 in addition to reducing the backlog of cases. Consequently, I agree with the Court of Appeal in *Bhaijee*(*supra*), that section 30 was only enacted to prevent unnecessary abuses. Indeed, in *Mutunga Tea & Coffee Company Limited v Shikara Ltd & another* [2015] eKLR, which the petitioner relied on, it was acknowledged that:

> "The reason whythe *Constitution* and the law established different institutions and mechanisms for dispute resolution in different sections is to ensure that such disputes as

may arise are resolved by those with the technical competence and jurisdiction to deal with them."

39. Moreover, there can be no doubt that the decisions made under section 30 are also subject to article 47 of the Constitution; and are therefore amenable to judicial review. In conclusion, it is my finding that sub-sections (1) and (2) of Section 30 of the *Land Adjudication Act* do not infringe Article 48 on access to justice and neither do they impinge on the independence of the judiciary as provided for under article 160(1) of the *Constitution*.

40. In the result, the petition dated January 20, 2023 lacks merit and is hereby dismissed. Granted the public interest nature of the Petition, it is hereby ordered that each party shall bear their own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 19TH DAY OF JANUARY 2024

OLGA SEWE

JUDGE