



Malindi Law Society & 12 others (All Suing as Officers of the Mombasa Law Society on their behalf and on behalf of the membership of the society) v Attorney General & 2 others (Petition 19 & 291 of 2016 (Consolidated)) [2021] KEELC 4748 (KLR) (29 October 2021) (Judgment)

Malindi Law Society v Attorney General & another [2021] eKLR

Neutral citation: [2021] KEELC 4748 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
PETITION 19 & 291 OF 2016 (CONSOLIDATED)
CK YANO, JO OLOLA & LC KOMINGOI, JJ
OCTOBER 29, 2021

BETWEEN

MALINDI LAW SOCIETY PETITIONER
ALL SUING AS OFFICERS OF THE MOMBASA LAW SOCIETY ON THEIR
BEHALF AND ON BEHALF OF THE MEMBERSHIP OF THE SOCIETY

AND

THE HON. ATTORNEY GENERAL 1ST RESPONDENT
THE NATIONAL ASSEMBLY 2ND RESPONDENT

AS CONSOLIDATED WITH
PETITION 291 OF 2016

BETWEEN

BENJAMIN NJOROGE 1ST PETITIONER
CHARLES OPULU 2ND PETITIONER
NATASHA ALI ERREY 3RD PETITIONER
ABDULRAHMAN O AMINGA 4TH PETITIONER
CHRISTINE KIPSANG 5TH PETITIONER
ESTHER WANGARE NJUGUNA 6TH PETITIONER
MICHAEL NGURE 7TH PETITIONER
PAULA NGETICH 8TH PETITIONER



ODUOR SIMINYU 9TH PETITIONER
JACQUELINE WAIHENYA MAINA 10TH PETITIONER
MANAZES LUBIA ALWENYA 11TH PETITIONER
TADAYO K MUYALA 12TH PETITIONER
ALL SUING AS OFFICERS OF THE MOMBASA LAW SOCIETY ON THEIR
EHALF AND ON BEHALF OF THE MEMBERSHIP OF THE SOCIETY

AND

THE HON. ATTORNEY GENERAL 1ST RESPONDENT
THE NATIONAL ASSEMBLY 2ND RESPONDENT
THE NATIONAL LAND COMMISSION 3RD RESPONDENT

Section 47 of the Land Laws (Amendment) Act, 2016, which introduced the concept of controlled land, declared unconstitutional for limiting the right to property within a defined controlled land.

Reported by Kakai Toili

***Constitutional Law** – constitutionality of statutes – constitutionality of section 47 of the Land Laws (Amendment) Act, 2016 – where section 47 introduced the concept of controlled land - whether section 47 was unconstitutional for limiting the right to property within the defined controlled land - Constitution of Kenya, 2010, article 40; Land Laws (Amendment) Act, 2016, section 47; Land Act, 2012, section 12.*

***Constitutional Law** – doctrine of separation of powers - independence and autonomy of the three arms of Government - whether the doctrine of separation of powers stopped the court from examining the acts of the Legislature or the Executive – Constitution of Kenya, 2010, articles 1 and 165(3)(d).*

***Constitutional Law** – national values and principles of governance – public participation - nature and degree of public participation - what were the factors to consider in determining whether the nature and degree of public participation were reasonable - whether there was sufficient public participation in the enactment of the Land Laws (Amendment) Act, 2016 - Constitution of Kenya, 2010, article 10.*

***Constitutional Law** – interpretation of the Constitution – proper way of interpreting the Constitution - what was the proper way of interpreting the Constitution of Kenya, 2010 - Constitution of Kenya, 2010, articles 159(2) (e) and 259.*

***Constitutional Law** – fundamental rights and freedoms – right to equality and freedom from discrimination - claim that sections 38, 47, 48, 61 and 98 of the Land Laws (Amendment) Act, 2016, were discriminatory in that they denied landowners their constitutional rights to equitable access to land and equal protection of the law - under what circumstances could distinctions or differential treatment be legitimate - Constitution of Kenya, 2010, article 27; Land Laws (Amendment) Act, 2016, sections 38, 47, 48, 61 and 98.*

Brief facts

The petitioners filed the instant consolidated petition seeking among others a declaration that sections 38, 47, 48 and 61(c), 98 of the Land Laws (Amendment) Act, 2016 were unconstitutional. On August 31, 2016, the President assented to the Land Laws (Amendment) Bill 2015 to amend the laws relating to land to align them with the Constitution of Kenya, 2010 (Constitution). The petitioners stated that the effect of the amendment sought to be made to section 15 of the National Land Commission Act, 2012 by section 38 of the Land Laws (Amendment) Act would be to amend the Constitution through the back door and trample on the rights, privileges, and obligations acquired by land owners.



It was the petitioners' case that sections 47 and 48 of the Land Laws (Amendment) Act were discriminatory in so far as they sought to redefine the meaning of the terms "land" and "persons" as provided under articles 40 and 60 of the Constitution. The petitioners attacked sections 61(c) and 98 of the Land Laws (Amendment) Act terming them an attempt to amend and redefine the protection of the rights to property. They asserted that sections 106 and 107 of the Land Registration Act disallowed retrospective application of laws as purportedly done by the amendments.

The respondents attacked the consolidated petition on the basis that it did not specify how the alleged offensive sections would amend the Constitution through the backdoor as alleged. The respondents accused the petitioners of failing to demonstrate how their rights would be affected by the amendments and how the amendments violated the Constitution. The respondent contended that the right to property was not absolute and that it could be limited.

The respondents further asserted that the Constitution had not placed a time limit for the conduct of investigations on matters relating to historical land injustices and denied that section 47 of the Land Laws (Amendment) Act would operate retroactively. Ultimately, the respondents stated that the controls introduced under section 47 were intended to deal with security issues by ensuring that the security agencies were aware of any movement of people and goods in and out of Kenya's international borders.

Issues

- i. Whether the doctrine of separation of powers stopped the court from examining the acts of the Legislature or the Executive.
- ii. What were the factors to consider in determining whether the nature and degree of public participation were reasonable?
- iii. What was the proper way of interpreting the Constitution of Kenya, 2010?
- iv. Under what circumstances could distinctions be legitimate?
- v. Whether section 47 of the Land Laws (Amendment) Act which introduced the concept of controlled land was unconstitutional for limiting the right to property within the defined controlled land.

Relevant provisions of the Law

Land Laws (Amendment) Act, 2016

Section 38

Section 15 of the National Land Commission Act is deleted and substituted by the following new Section-

15. (1) Pursuant to Article 67(3) of the Constitution, the Commission shall receive, admit and investigate all historical land injustice complaints and recommend appropriate redress.

(2) For the purposes of this section, a historical land injustice means a grievance which-

(a) was occasioned by a violation of right in land on the basis of any law, policy, declaration, administrative practice, treaty or agreement;

(b) resulted in displacement from their habitual place of residence;

(c) occurred between 15th June 1895 when Kenya became a protectorate under the British East African Protectorate and 27th August, 2010 when the Constitution of Kenya was promulgated;

(d) has not been sufficiently resolved and subsists up to the period specified under paragraph (c); and

(e) meets the criteria set out under subsection 3 of this section.

Section 47

The Land Act is amended by inserting the following new section immediately after section 12- Controlled land.

12A. (1) In this part



"controlled land" means land in Kenya which is-

- (a) within a zone of twenty-five kilometres from the inland national boundary of Kenya;*
- (b) within the first and second row from high water mark of the Indian Ocean;*
- (c) any other land as may be declared controlled land under any law or statute.*

"ineligible person" means-

- (i) an individual who is not a Kenyan citizen;*
- (ii) the government of a country other than Kenya or a political subdivision of a country other than Kenya, or any agency of such government or political subdivision, or*
- (iii) a body corporate which has non-citizens as shareholders shall be deemed to be a non-citizen.*

"interest" has the meaning assigned to it in the Act and interest in land shall

include transfer, lease, licence, charge, exchange, partition or other disposal of or dealing with any controlled land.

"corporation" means a body incorporated with or without a share capital under any written law in Kenya and the expression includes a limited liability partnership;

(2) No transaction in controlled land, including a transfer for a consideration or by way of trusts, gift inter vivos or otherwise to an ineligible person, shall be dealt with without the prior written approval of the Cabinet Secretary.

(3) In deciding whether to approve or not approve an application, the Cabinet Secretary shall seek the approval of the relevant authorities.

Section 48

Section 13 of the principle Act is amended by-

(a) deleting subsection (1) and substituting therefor the following new subsection-

(1) Before the expiry of the leasehold tenure, the Commission shall-

(a) within five years, notify the lessee, by registered mail, of the date of expiry of the lease and inform the lessee of his or her pre-emptive right to allocation of the land upon application, provided that such lessee is a Kenyan citizen and that the land is not required by the national or county government for public purposes; and

Held

1. The court was alive to and indeed respected the principles of separation of powers as set out in the Constitution. Article 1 of the Constitution provided for the separation of powers between the three arms of Government by spelling out the respective mandates of the Legislature, the Executive and the Judiciary. The doctrine of separation of powers did not stop the court from examining the acts of the Legislature or the Executive. Under article 165(3)(d) of the Constitution, the Judiciary was charged with the mandate of interpreting the Constitution and determining the constitutionality of any acts done under the authority of the Constitution.
2. The court was clothed with the jurisdiction and competence to pronounce itself on the compliance of a legislative body with the processes prescribed for passing of legislation as the doctrine of constitutional supremacy demanded of the court. There was no basis for the apprehension on the part of the respondents that the court dealing with the matters raised in the consolidated petition would threaten and or infringe upon the doctrine of separation of powers.
3. The Fifth Schedule to the Constitution referred to in article 261(1) of the Constitution capped the period within which legislation on land should be enacted to 18 months from the date of the promulgation of the Constitution of Kenya, 2010. The effective date for the Constitution was August 27, 2010. The National Land Commission Act, 2012 as well as Land Act, 2012 whose provisions the Land Laws (Amendment) Act, 2016 sought to amend, were enacted and came into operation on May 2, 2012. The petitioners did not challenge the enactment of the Acts in the year 2012. The court was



- unaware of any provision in law that would bar the 2nd respondent from amending any statutes that it had previously enacted, from time to time.
4. The perusal of articles 67 and 68 of the Constitution did not reveal any timelines prescribed, therefore, there was no basis for the contention that the Land Laws (Amendment) Act, 2016, was brought outside the timelines provided.
 5. The nature and the degree of public participation that was reasonable in a given case would depend on a number of factors. They included the nature and the importance of the legislation and the intensity of its impact on the public. The more discreet and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the Legislature to be astute to ensure that the potentially affected section of the population was given a reasonable opportunity to have a say. In evaluating the reasonableness of the conduct of the Legislature, the court would have regard to what the Legislature considered appropriate in fulfilling the obligation to facilitate public participation in the light of the content, importance and urgency of the legislation.
 6. Prior to its enactment, the Land Laws (Amendment) Bill, 2015 was considered by both the National Assembly and the Senate. Thereafter the Bill was referred to a Mediation Committee which invited the public to offer their views. Having taken the concerns of the various stakeholders into account, the Mediation Committee compiled a report which it laid before both Houses of Parliament. Thereafter the Bill was debated and passed. The Land Laws (Amendment) Act, 2016 went through sufficient public participation prior to its enactment and the respondents did not violate article 10 of the Constitution.
 7. The Constitution gave guidance on how it ought to be interpreted. Article 259 of the Constitution required the court, in considering the constitutionality of any enactment before it, to make an interpretation in a manner that promoted its purposes, values and principles, advanced the rule of law, human rights and fundamental freedoms in the Bill of rights and that contributed to good governance. Article 159(2)(e) of the Constitution required the court, in exercising its judicial authority, to do so in a manner that protected and promoted the purpose and principles of the Constitution. In interpreting the Constitution, the court was enjoined to give it a liberal purposive interpretation.
 8. There was a general presumption that every Act was constitutional and the burden of proof thus lay on any person who alleged otherwise save that where there were limitations to fundamental rights, the onus was on the body restricting the right to show that such limitation was justified. From a perusal of section 38 of the Land Laws (Amendment) Act, the same was enacted to give effect to the provisions of article 67(2) of the Constitution. Article 67(2) conferred upon the National Land Commission the powers to initiate investigations on its own initiative or on a complaint, into the present or historical land injustices and recommend appropriate redress.
 9. It was unclear how the provisions of section 38 of the Land Laws (Amendment) Act could be discriminatory to the petitioners. Land was one of the most important assets in the lives of the citizens of Kenya. It was a factor of production which was core to the economic activities of the citizens of Kenya. The advent of colonialism and the arrival of settlers in what would later become the Republic of Kenya commoditized land and changed the traditional concepts of land ownership.
 10. With the arrival of the settlers, many indigenous people were displaced from their original homes as the Colonial Government systematically put in processes that took away huge chunks of land from the residents. That fact saw the beginning of a vicious war pitting the indigenous Kenyans on the one side and the colonial administration on the other. After Kenya gained independence from the colonialists in 1963, it was felt that the atrocities committed against the indigenous people in as far as land was concerned would be remedied. That however never came to pass and since then, there had been numerous calls by Kenyans for a new land law regime.



11. It was not lost on the court that in 2010, Kenyans passed the Constitution of Kenya, 2010 which saw reforms and an overhaul of the land law system. Article 67 of the Constitution established the 3rd respondent and defined its functions. In the year 2011, Parliament passed the National Land Commission Act whose provisions *inter alia* the Land Laws (Amendment) Act sought to amend.
12. One of the mandates already given to the 3rd respondent by the Constitution was the power to investigate and make recommendations on historical land injustices. The provisions of section 38 of the Land Laws (Amendment) Act were aimed at the indigenous people of Kenya as those injustices were committed against Kenyans and not non-citizens. The principle of equality and non-discrimination did not mean that all distinctions between people were illegal. Distinctions were legitimate and hence lawful if they pursued a legitimate aim such as affirmative action to deal with inequalities and were reasonable in light of their legitimate aim. The amendments brought about in section 15 of the National Land Commission Act by section 38 of the Land Laws (Amendment) Act were not unconstitutional.
13. . Section 47 of the Land Laws (Amendment) Act had amended section 12 of the Land Act and introduced the concept of controlled land which was defined to mean land in Kenya which was within a zone 25 Km from the inland national boundary of Kenya; within the 1st and 2nd row from the high-water mark of the Indian Ocean and any other land as could be declared controlled under any statute. Under section 47(2), no transaction in such controlled land, including transfer for consideration could be dealt with without the prior approval of the Cabinet Secretary.
14. A party alleging a violation of a constitutional right or freedom had to demonstrate that the exercise of a fundamental right had been impaired, infringed or limited. Once the limitation had been demonstrated, then the party which would benefit from the limitation had to demonstrate a justification for the limitation. From a perusal of section 47 of the Land Laws (Amendment) Act, the same had far-reaching implications on the ownership rights to property.
15. The exercise of the ownership right to property would be greatly limited within the defined controlled land and it was therefore incumbent upon the State to demonstrate that the limitation was justifiable and that the societal need, therefore, outweighed the individual's right to enjoy the right or freedom to deal with their properties. There was no reasonable justification to warrant section 47.
16. Section 48 of the Land Laws (Amendment) Act sought to amend section 13 of the Land Act. The limitation provided was not unreasonable. Article 40 of the Constitution provided for the right to property subject to article 65 of the Constitution which limited the rights of the non-citizens of Kenya to hold land on the basis of a leasehold tenure only, such tenure not exceeding 99 years.
17. The provisions of section 61 of the Land Laws (Amendment) Act on section 79 (9) of the Land Act as well as the provisions of section 98 of the Land Laws (Amendment) Act on section 152 merely served the purpose of streamlining the existing law. The same was neither discriminatory nor unconstitutional and there was no reason to interfere with the same.
18. Equality was better understood and applied not in the abstract, but in its proper context. It recognized that general prepositions of law did not solve concrete cases. The theoretical premise further recognized that human wrongs were the source of human rights and that inequalities in a particular society, rather than in an imagined society, were the appropriate foundation of a better understanding of equality provisions in a national Constitution.

Consolidated petitions partly allowed.

Orders

- i. *A declaration was made that sections 38, 48, 61 and 98 of the Land Laws (Amendment) Act, 2016, did not violate any article of the Constitution and the same were hence valid and constitutional.*
- ii. *A declaration was made that the amendments sought to be introduced under section 12 of the Land Act vide section 47 of the Land Laws (Amendment) Act were unconstitutional, null and void.*
- iii. *No order as to costs.*



Citations

Cases

East Africa;

1. *Ali Jobo & another v Suleiman Said Shabbal & 2 others*; Petition 10 of 2013; [2013] eKLR — (Explained)
2. *Commission for the Implementation of the Constitution v Parliament of Kenya & 5 others* Petition 454 of 2012; [2013] eKLR — (Explained)
3. *Consumer Federation of Kenya (COFEK) v Public Service Commission & another* Petition 263 of 2013; [2013] eKLR — (Explained)
4. *In the Matter of the Interim Independent Electoral Commission* (Constitutional Application No 2 of 2011; [2012] eKLR — (Explained)
5. *Kenya Wildlife Service v James Mutembei* Civil Appeal 40 of 2018; [2019] eKLR — (Explained)
6. *Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 others* (Civil Appeal 287 of 2016; [2017] eKLR — (Cited)
7. *Nairobi Metropolitan Psv Saccos Union Limited & 25 others v County of Nairobi Government & 3 others* Petition 486 of 2013; [2013] eKLR — (Explained)
8. *RM v Attorney General* [2008] 1 KLR 574 — (Explained)
9. *Robert N Gakuru & others v Governor of Kiambu County & 3 others* [2014] eKLR — (Explained)

South Africa;

1. *Doctors for Life International v Speaker of the National Assembly and others* ((CCT 12/05) (2006) ZACC 11) — (Explained)
2. *S v Zuma & others* (1995) SA 642 (CC)(A3) — (Cited)

United Kingdom;

Mmusi & others v Ramantete & another (MAHLB- 000836-10) (2012) BWHC 12 October 2012) — (Explained)

Statutes

East Africa;

1. Constitution of Kenya, 2010 articles 8(c) (i); 24; 67(2)(e); 68(c)(i); 159(2); 259 — (Interpreted)
2. Environment and Land Court Act, 2011 (Act No 19 of 2011) In general — (Cited)
3. Land Act, 2012 (Act No 6 2012) sections 2, 12, 38, 47, 48 , 98 — (Interpreted)
4. Land Registration Act, 2012 (Act No 3 of 2012) sections 2, 24, 25, 26(1) — (Interpreted)
5. National Land Commission Act, 2012 (Act No 5 of 2012) sections 15, 15(1) — (Interpreted)

Advocates

None mentioned

JUDGMENT

Background

1. By a petition dated and filed herein on October 6, 2016, the Malindi Law Society (hereinafter the 1st petitioner) sought orders against the Honourable Attorney General (the 1st respondent) and the National Assembly (2nd respondent) as follows: -
 - a) A declaration that sections 2 on the definition of court, section 38, 47, 48 and 98 of the [Land Laws \(Amendment\) Act, 2016](#) are unconstitutional, null and void.
 - b) Costs of the petition; and



- c) Any such other Order(s) as this honourable court shall deem just.
2. The facts leading to the petition are that on August 31, 2016, the President assented to the Land Laws (Amendment) Bill 2015 to amend the Laws relating to land to align them with the Constitution, to give effect to articles 68(c) (i) and 67(2)(e) of the Constitution, to provide for procedures on eviction from land, and for connected purposes.
 3. Article 68(c)(i) of the Constitution provides that Parliament shall enact legislation to prescribe minimum and maximum land holding acreage in respect of private land while article 67(2)(e) thereof mandates the National Land Commission to initiate investigations on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress.
 4. The 1st petitioner contends in its petition that the provisions of section 2, 38, 47, 48 and 98 of the Land Laws (Amendment) Act, 2016 which purport to align the Land Laws with the Constitution and to give effect to the said articles 68(c)(i) and 67(2)(e) of the Constitution are unconstitutional, null and void and hence the prayers sought in the Petition.
 5. On October 7, 2016 when the matter came before the Honourable Angote J, under certificate of urgency, the learned judge granted interim orders as follows: -
 2. "That a conservatory order be and is hereby issued to stay and/or suspend the coming into force of the implementation and/or operation of the provisions of section 2 of the Land Laws(Amendment) Act, 2016 on section 2 of the Land Registration Act 2012, section 38 of the Land Laws (Amendment)Act, 2016 on section 15 of the National Land Commission Act, 2012, section 47 of the Land Laws (Amendment) Act, 2016 on section 13 of the Land Act 2012; and section 98 of the Land Laws (Amendment) Act 2016 on section 152 of the Land Act 2012 until 13th October, 2016 when the application will be heard inter-partes."
 6. When the said matter came up for the *inter-partes* hearing of the application filed contemporaneously with the petition before the Honourable Angote, J on October 13, 2016, the Learned Judge directed that the matter be forwarded to the Honourable the Chief Justice for the appointment of an uneven number of judges to hear the petition and to give any further directions. The interim orders issued remained in force thereafter.
 7. Subsequently, by directions given by the Honourable the Chief Justice on November 9, 2017, this Bench was constituted to hear the petition.
 8. As it turned out, some six days after the First Petition was filed in Malindi, a number of Advocates acting under the auspices of the Mombasa Law Society (the 2nd Petitioner) filed Mombasa ELC Petition No 291 of 2016 against the Honourable Attorney General (named therein as the 1st respondent), the Speaker of the National Assembly (the 2nd respondent) and the National Land Commission (the 3rd respondent).
 9. The second petition similarly prays for a declaration that sections 38, 47, 48, 61(c) and 98 of the Land Laws (Amendment) Act are unconstitutional, null and void.
 10. On April 25, 2017, parties in the second petition having learnt of the existence of the first petition in Malindi raising similar issues agreed to have the second petition transferred to Malindi for hearing and/or directions.



11. Subsequently on February 23, 2018, the two Petitions were consolidated by the consent of the parties with the First Petition as the Lead File. Arising from consensus by the parties that the issue of section 2 of the *Land Laws (Amendment) Act 2016* had already been dealt with conclusively in another Petition being *Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 Others* (2017) eKLR, it was agreed that the said Section would not be considered as part of the issues for consideration herein.
12. The two consolidated Petitions then proceeded to hearing and were heard by way of submissions. However, after the Court reserved the same for judgment on March 15, 2019, an application was filed herein, dated October 11, 2019 by Messrs Kakuzi PLC seeking to be enjoined in the consolidated Petition.
13. The application by Kakuzi PLC also sought an order to have Nairobi Constitutional Petition No 255 of 2018; Kakuzi PLC v Attorney General & others consolidated with the two Petitions already before us and that consequently the court directs the re-opening of the hearing of those Petitions so that the applicant can be heard before judgment is delivered.
14. A week later, a second application dated October 17, 2019 was filed herein on October 23, 2019 by Del Monte Kenya Ltd. That application sought stay of further proceedings on the two consolidated petitions pending the hearing and determination of their application to be enjoined as an Interested Party. It also sought orders that Nairobi High Court Constitutional Petition No 48 of 2019; Del Monte Kenya Ltd v National Land Commission & another be consolidated with the Petitions already pending Judgment at Malindi.
15. Subsequently a third application dated November 18, 2019 was filed by a group known as Kakuzi Division Development Association. The said Association similarly sought to be enjoined in the proceedings as an interested party but solely for purposes of opposing the position taken by Kakuzi PLC.
16. Having heard the three applications and the objections raised thereto by both the petitioners and the respondent herein, this court in a Ruling delivered on February 28, 2020 declined to allow the said applications on the ground that the court lacked the jurisdiction to transfer and consolidate the two Petitions filed in the High Court at Nairobi as sought by Messrs Kakuzi PLC and Del Monte Kenya Ltd.
17. As it turned out, sometime in the same year 2018, Messrs Mabroukie Tea and Coffee Estate Ltd had also filed before the High Court at Nairobi Constitutional Petition No. 466 of 2018 against both the Attorney General (the 1st Respondent) and the National Land Commission (the 3rd Respondent) seeking orders to the effect that:
 - a) This honourable court be pleased to declare that sections 15 (3) (b) (i) and section 15(3)(b)(ii) are null and void for being contrary to articles 24, 27 (1), 40 and 50(1) of the Constitution;
 - b) This honourable court be pleased to declare that it is unlawful and contrary to article 50 (1) of the Constitution for the National Land Commission to hear, determine and/or make recommendations on historical land injustice claims in absence of legally enacted regulations to this effect;
 - c) Such other orders as this honourable court shall deem just and
 - d) Costs of the Petition.



18. Exactly two weeks after this court dismissed the applications for consolidation filed by Kakuzi PLC and Del Monte Kenya Ltd, the same Kakuzi PLC and Messrs Mabroukie Tea and Coffee Estate Ltd filed two separate Notice of Motion applications dated March 13, 2020 before the Constitutional and Human Rights Division of the High Court at Nairobi seeking orders that the said Nairobi Constitutional Petition Nos 255 of 2018 and 466 of 2018 be transferred to the Malindi Environment and Land Court for further directions.
19. In two separate Rulings both delivered on October 1, 2020, the Honourable Justice JN Makau allowed the applications by both Kakuzi PLC and Mabroukie Tea & Coffee Estate Ltd and directed that Nairobi Constitutional Petition Nos 466 of 2018 and 255 of 2018 be transferred to the Malindi Environment and Land Court for directions. Upon transfer, the said Petition No. 466 of 2018 was re-designed as Malindi Petition No 10 of 2020 while Nairobi Petition No 255 of 2018 became Malindi Petition No 11 of 2020.
20. Subsequently and vide a notice of motion application filed herein dated October 7, 2020, Messrs Mabroukie Tea and Coffee Estate Ltd sought orders as follows; -
 1. Spent
 2. That this honourable court do order that Constitutional Petition No 10 of 2020, Mabroukie Tea and Coffee Estates Limited v The Honourable the Attorney General and the National Land Commission be hereby consolidated with Malindi ELC Constitutional Petition No 19 of 2016 and 291 of 2016 Malindi Law Society v Attorney General, the National Assembly and Benjamin Njoroge & others v The Honourable Attorney General and Others.
 3. That this honourable court do direct the re-ope (ning and) hearing of the Malindi ELC Constitutional Petition No 19 of 2016 matter so that the Constitutional Petition (No) 10 of 2020 is heard before Judgment is delivered in Malindi ELC Constitutional Petition (No) 19 of 2016; and
 4. That the costs of the application be provided for.
21. That application which was supported by an affidavit sworn by the applicant's Legal Manager Lydia Musili was premised on the grounds stated on the body thereof inter alia as follows: -
 - i) That pursuant to section 15(1) of the [National Land Commission Act](#), the National Land Commission summoned the Petitioner to participate in various investigations proceedings in respect of its property, viz Nairobi NLC/HL1/433/2018 Mbari Ya Gathiru. The petitioner filed a Constitutional Petition in Nairobi HCC 466 of 2018 challenging the Constitutionality of Section 15 of the [National Land Commission Act](#);
 - ii) That on February 28, 2020, the three Judge Bench in Malindi ELC Petition No 19 of 2016, (consolidated with 291 of 2016) Malindi Law Society v Attorney General, National Assembly and National Land Commission dismissed Kakuzi's application for consolidation. The Environment and Land Court held that it did not have jurisdiction to transfer a pending Constitutional Petition in the High Court to the ELC;
 - iii) That on the October 1, 2020, the Hon Justice J Makau delivered a Ruling transferring the said Petition to the Malindi ELC. The court noted in the



Ruling of October 1, 2016 that it would be crucial and very important that the two Petitions and the issues be considered together and the Malindi court deal with the three Petitions to prevent conflicting decisions, on the same legal issues which may embarrass the court; and

- iv) That pursuant to the said Ruling, the petitioner is seeking the consolidation of the present Petition with Malindi ELC Petition No 19 of 2016 and Mombasa ELC Petition No 291 of 2016 so as to advance its arguments in respect of the Constitutionality of section 15 of the [National Land Commission Act](#). This would result in a holistic approach and avoid a piece meal approach. It is just and fair that those parties who are directly affected by section 15 of the [National Land Commission Act](#) are able to participate in the said Petition and not be locked out since the petitioner will suffer the greatest prejudice and risk in respect of its properties if a Judgment is issued without taking into account its arguments.

22. By a near similar application dated the same 7th day of October 2020, and filed in Malindi Petition No 11 of 2020 (formerly Nairobi High Court Constitutional Petition No. 255 of 2018) Kakuzi PLC equally sought orders to have Constitutional Petition No 11 of 2020 consolidated with Malindi ELC Petition No 19 of 2016 as consolidated with Malindi ELC Petition No. 291 of 2016. They also sought orders to re-open the consolidated Petition so that Constitutional Petition No 11 of 2020 could be heard before Judgment was delivered herein.
23. Upon being served with the said applications, the National Assembly of Kenya (the 2nd respondent herein) equally filed two applications both dated November 20, 2020 seeking to be enjoined in the proceedings in Malindi Petition Nos 10 and 11 of 2020 as an interested party in order to as they state, advance their arguments in respect of the Constitutionality of Section 15 of the [National Land Commission Act](#).
24. When we retired to deliver a Ruling on the two applications by Kakuzi PLC and Messrs Mabroukie Tea and Coffee Estates Ltd both dated October 7, 2020, we did observe that the issues raised therein were quite similar in substance to the issues raised before us in the initial applications filed before us by the same Kakuzi PLC and Del Monte Kenya Ltd that were the substance of our Ruling delivered herein on 28th February 2020.
25. That being the case, it was quite apparent to us that the Motion dated October 7, 2020 as filed by Kakuzi PLC was not only res judicata but the same was filed in abuse of the court process as the issues raised therein were the same as those raised in their application herein dated October 11, 2019 which application was the subject of the determination made by this court in its Ruling delivered on February 28, 2020. On that account we reject the application by Kakuzi PLC and dismiss the same with costs.
26. We did similarly observe that the issues raised by Messrs Mabroukie Tea and Coffee Estates Ltd in their application of the same date were rather similar in substance to the issues raised before us in the initial applications filed before us by Messrs Kakuzi PLC and Del Monte Kenya Ltd before this court delivered its ruling herein on February 28, 2020.
27. At paragraph 50 of the said ruling, we did observe as follows: -
- “ 50. We have taken the liberty to cite the above provisions of the Constitution and the [Environment and Land Court Act](#) in extenso given the fact that while the consolidated Petitions are matters that were filed and are pending Judgment before this court, the Petition sought to be consolidated therewith being



Constitutional Petitions Nos 255 of 2018 and 48 of 2019 were filed and are pending before the High Court at Nairobi. The question that arises then, is whether those Petitions as filed and pending before the High Court can be transferred by this court and consolidated with the already consolidated Petitions before us.”

28. Having posed the question, we proceeded to cite various judicial pronouncements on matters regarding this court’s jurisdiction vis-a-vis that of the High Court. We thereafter rendered our answer thereto at paragraph 53 of the Ruling as follows: -

“53. We stand guided by these powerful pronouncements of the apex court and thereby reject the notion that the two Courts have concurrent jurisdiction. Given that the two courts exercise separate and distinct jurisdictions, we did not find any basis for the invitation to take over and determine the Petitions invoking the jurisdiction of the High Court.”

29. Arising from the foregoing, it was clear to us that there was similarly no basis upon which we could presume jurisdiction over what was formerly Nairobi Constitutional Petition No. 466 of 2018. Just like the initial applications filed before us and that were the subject of our previous determination, we find that the same as instituted is incapable of consolidation with the already consolidated Petition herein.

30. At any rate and as was stated in *Kenya Wildlife Service v Mutembei (2019) eKLR*: -

“The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never meant to confer undue advantage upon a Party that seeks it, nor was it intended to occasion any disadvantages towards the party that opposes it.”

31. Considering the circumstances herein, it is our view that an order of consolidation would lead to an unnecessary delay. This matter had already proceeded to conclusion and the original parties had closed their respective cases and filed their final submissions by March 15, 2019. We did not in the circumstances think that an order of consolidation would be proper and we equally dismiss the application for consolidation of Petition No. 11 of 2020 but with no order as to costs.

32. Having dismissed the two applications for consolidation of Malindi ELC Petitions Nos. 10 and 11 of 2020, we did not find it necessary to delve into the two applications both dated 20th November 2020 as filed by the 2nd respondent seeking to be enjoined as an Interested Party to the two Petitions.

33. Arising from the foregoing and conscious of the overriding objective of this court to facilitate a just, expeditious, proportionate and affordable resolution of disputes such as the one before us, we did not think it would be fair for the court to render a separate ruling on the applications that had delayed a determination of the dispute herein and to reserve another date for a Judgment on the issues raised in the petition. On the contrary, we deemed it appropriate that having found no basis for the two applications, we proceed as we hereby do to render our determination on the issues before us.

The Petitioners’ Case

34. Both the Malindi Law Society (the 1st petitioner herein) and the Mombasa Law Society (the 2nd petitioner) are branches of the Law Society of Kenya duly registered on their own as body corporates with perpetual succession and the power to sue and be sued in their respective corporate names. They



- told the court that they were both founded with the object of taking care of the welfare and interests of the Law Society of Kenya Members practicing in Malindi and Mombasa.
35. As branches of the Law Society of Kenya, the petitioners told the Court that they are statutorily charged with the duty of promoting and upholding the Rule of Law and that in that context, they support the implementation and enforcement of the Constitution of Kenya, 2010 in both its letter and spirit.
 36. The Honourable the Attorney General sued as the 1st respondent herein is the designated principal legal adviser of the Government of Kenya who in that capacity is vested with the legal authority to defend any suit instituted against the Government of the Republic of Kenya. The National Assembly (sued as the 2nd respondent) is one of the two houses of Parliament established pursuant to article 93 of the Constitution of Kenya 2010 while the National Land Commission (the 3rd respondent) is a Constitutional Commission created under article 67 of the Constitution and mandated with the management of land.
 37. It is the petitioners case that they expected the respondents herein and all State Officers to uphold and defend the Constitution of Kenya, 2010, as is directed by the same Constitution. In this respect, the petitioners asserted that the Constitution has provided a framework for land and ownership rights in Kenya and further guarantees the persons owning land in Kenya, be they citizens or non- citizens certain rights in respect of land. In addition, they told the court that the Constitution has guaranteed the protection of certain general and universal rights in respect of fundamental rights and freedoms to persons within Kenya.
 38. The petitioners told the court that contrary to their expectations, the President of the Republic of Kenya did on August 31, 2016 assent to the Land Laws (Amendment) Bill 2015 on the purport that the same was to amend the laws relating to land for purposes of aligning them with the Constitution and in particular to give effect to articles 68(c)(i) and 67(2)(e) of the Constitution and to provide for procedures on evictions from land as well as other connected purposes. The said Land Laws (Amendment) Act 2016 came into operation on September 21, 2016.
 39. In separate supporting affidavits sworn on their behalf by Ms Lucy Mwangi Advocate and Mr Benjamin Njoroge Advocate being the Secretary and Chair respectively of the 1st and 2nd petitioners, they contend that the provisions of sections 38, 47, 48, 61(c) and 98 of the Land Laws (Amendment) Act, 2016 are unconstitutional, null and void and urge this court to declare them as so.
 40. The petitioners told the court that the effect of the Amendment sought to be brought on section 15 of the National Land Commission Act, 2012 by the new section 38 of the Land Laws Amendment Act would be to amend the Constitution through the back door and trample on the rights, privileges, and obligations acquired by land owners and that the same are offensive to sections 7 and 8 of the 6th Schedule of the Constitution of Kenya, 2010. They were equally offensive to the Kenya Independence Act, section 203 of the Constitution of Kenya as set out in Schedule 2 of the Independence Order in Council 1963 and section 20 of the Constitution of Kenya (Amendment) Act, 1964.
 41. The two petitioners further told the court that any holder of title documents to any parcel of land in Kenya is entitled to rely on the indefeasibility of such title as conferred by statute to protect their respective rights to property and that the title of any bona fide purchaser of land for value without notice of any defects thereof cannot be impeached.
 42. It was the petitioners case that the provisions of sections 47 and 48 of the Constitution are discriminatory in so far as the same sought to redefine the meaning of the terms “land” and “persons” as provided under articles 40 and 60 of the Constitution. They told the court that apart from the



Constitutional restrictions as to the period for which one can hold land, there was no other restriction for ownership of land by non-citizens.

43. The petitioners have equally attacked the provisions of sections 61(c) and 98 of the [Land Laws \(Amendment\) Act](#) terming the same unconstitutional and an attempt to amend and redefine the protection of the rights to property as provided under article 40 (1) and 60 of the Constitution. They assert that sections 106 and 107 of the [Land Registration Act](#) disallow retrospective application of laws as purported to be done by the amendments and that once a person is registered as proprietor of land, such a person is entitled to enjoy all rights pertaining to the ownership thereof in accordance with sections 24, 25 and 26 (1) of the [Land Registration Act, 2012](#).
44. Accordingly, they urged this court to adopt a liberal, purposive and progressive manner in its interpretation of the constitution and to find that the [Land Laws \(Amendment\) Act, 2016](#) had failed the test of constitutionality and was therefore unconstitutional, null and void.

The Respondents' Case

45. The three respondents were unanimous in their opposition to the consolidated Petition. The first respondent filed Grounds of Opposition dated June 6, 2016 while the 2nd respondent responded through an affidavit sworn by the Clerk to the National Assembly Michael Sialai filed herein on March 29, 2018. The 3rd respondent equally weighed in by a lengthy affidavit sworn by one Brian Ikol, its Acting Director Legal Services and Enforcement and filed herein on April 20, 2018.
46. The gist of the various responses by the respondents was that the petitioners had failed to make out a case to warrant the nullification of the [Land Laws \(Amendment\) Act, 2016](#). The respondents in particular asserted that before receiving the Presidential assent, the Land Laws (Amendment) Bill, 2015 went through the necessary Parliamentary processes and that there was adequate public participation before the same was promulgated into law.
47. The respondents further attacked the consolidated Petition on the basis that the same did not specify how the alleged offensive sections would amend the Constitution through the backdoor as alleged or at all. The respondents accused the petitioners of failing to demonstrate how their rights would be affected by the amendments and how indeed the amendments violated the Constitution.
48. The respondent contended that the right to property is not absolute and that the same can be limited under article 24 of the [Constitution](#). In this respect, they asserted that the language consistent in the Constitution of Kenya 2010 was that ownership of land by foreigners would be subject to regulatory parameters which the Land Laws (Amendment) Act 2016 sought to address.
49. The respondents further asserted that the [Constitution of Kenya, 2010](#) had not placed a time limit for the conduct of investigations on matters relating to historical land injustices and denied that section 47 of the New Act which sought to amend section 12 of the [Land Act](#) would operate retroactively as stated by the Petitioners.
50. Ultimately, the respondents told the court that the controls introduced under section 47 of the [Land Laws \(Amendment\) Act, 2016](#) were intended to deal with security issues by ensuring that the security agencies were aware of any movement of people and goods in and out of our international borders as accessed either through water or land. They told the court that the requirement for consent to be obtained from the Minister for Interior before a non-citizen could own land in certain areas of the Republic of Kenya were therefore meant to facilitate and guarantee the enjoyment of the rights and freedoms enshrined in the Constitution.



Analysis and Determination

51. We have taken full consideration of the issues raised in both the consolidated Petition and the response thereto. We have again fully considered the detailed written and oral submissions and authorities placed before us by the Learned Counsels appearing for all the parties herein. Arising from those pleadings and submissions, the issues which we find germane for our consideration are as follows: -

1. Whether the consolidated Petition threatens the doctrine of separation of powers between the Legislative and Judicial arms of Government.
2. Whether Parliament can enact any laws relating to land upon the expiry of the time envisaged under article 68(c)(i)-(vii) of the Constitution.
3. Whether the processes which mid-wifed the impugned provisions meet the parameters enumerated under Article 10 of the Constitution of Kenya; and
4. Section 38, 47, 48, 61 and 98 of the Land Laws (Amendment) Act 2015 violates article 9(3) (a), (b) and (c), 40, 60(c) (b), 255 (1) (b) and 260 as well as sections 7 and 8 of the Sixth Schedule of the Constitution of Kenya 2010;

52. Accordingly, we proceeded to consider and examine each of the issues arising and made our observations as below:

i) Whether the Consolidated Petition threatens the doctrine of separation of powers between the Legislative and the Judicial Arms of Government.

53. One of the strongest points taken out especially by the 2nd respondent in opposition to the consolidated Petition was the argument that this court lacked jurisdiction to determine this Petition. It was in this respect the argument of the National Assembly and the Honourable the Attorney General (the 1st respondent) that the consolidated Petition is all about the duties and functions of the Legislative arm of government and that delving into the issues raised would amount to an infringement by this court on the doctrine of separation of powers.

54. From the very onset we must state that this court is alive to and indeed respects the principles of separation of powers as set out in the Constitution. Article 1 thereof clearly provides for the separation of powers between the three arms of government by spelling out the respective mandates of the Legislative, the Executive and the Judiciary.

55. In stating so, we are equally alive to the supremacy of the Constitution in the hierarchy of our laws. Article 2 of the said Constitution makes that position obvious and asserts as follows: -

“

- “(1). This Constitution is the Supreme Law of the Republic and binds all persons and all State Organs at both levels of government.
- (2) No person may claim or exercise state authority except as authorized under this Constitution.
- (3)



- (4) Any law, including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid.

56. Having examined the various provisions of the Constitution however, it was clear to us that the doctrine of separation of powers does not stop this court from examining the acts of the Legislature or the Executive. Under article 165(3)(d) of the Constitution, the Judiciary is charged with the mandate of interpreting the Constitution and determining the Constitutionality of any acts done under the authority of the Constitution.

57. In taking this position, we are fortified by the pronouncement of the Supreme Court In re The Matter of the Interim Independent Electoral Commission Advisory Opinion No 2 of 2011 in which the court advised as follows: -

“The effect of the Constitution’s detailed provisions for the rule of law in the process of governance is that the legality of executive or administrative actions is to be determined by the courts which are independent of the Executive branch. The essence of separation of powers in this context, is that the totality of governance powers is shared out among different organs of government and that these organs play mutually countervailing roles. In this set-up, it is to be recognized that none of the several government organs functions in splendid isolation.”

58. That was indeed the same position taken in the South African case of Doctors for Life International -vs- Speaker of the National Assembly and Others (CCT 12/05) (2006) ZACC 11, where the court observed as follows:

“.....Under our Constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament. When it exercises its Legislative authority, Parliament “must act in accordance with, and within the limits of, the Constitution, and the supremacy of the Constitution requires that the obligations imposed by it must be fulfilled. Courts are required by the Constitution to ensure that all branches of government act within the law and fulfil their Constitutional obligations.”

59. Arising from the foregoing, it was apparent to us that as a court, we are clothed with the jurisdiction and competence to pronounce ourselves on the compliance of a legislative body with the processes prescribed for passing of legislation as the doctrine of constitutional supremacy demands of us. In that respect we did not find any basis for the apprehension on the part of the Respondents that our dealing with the matters raised in the consolidated Petition would threaten and or infringe upon the doctrine of separation of powers.

ii) Whether Parliament can enact any laws relating to land upon the expiry of the time envisaged under article 68(c)(i)- (vii) of the Constitution.

60. Before delving into the main substance of the petition, the second preliminary issue we felt we should deal with was the question of the timelines within which the impugned amendments could be made. According to the petitioners, while Parliament was mandated to enact legislation on land matters by



virtue of article 68 of the Constitution, that duty had to be carried out within the confines of article 261 of the Constitution. The said article 261 on consequential legislation provides as follows: -

- “(1) Parliament shall enact any legislation required by this Constitution to be enacted to govern a particular matter within the period specified in the Fifth Schedule, commencing on the effective date.
- (2) Despite Clause (1), the National Assembly may, by resolution supported by the votes of at least two thirds of all the members of the National Assembly, extend the period prescribed in respect of any particular matter under Clause (1) by a period not exceeding one year.

- 61. As it were, the Fifth Schedule referred to in article 261(1) above caps the period within which legislation on land should be enacted to 18 months from the date of the promulgation of the Constitution and the petitioners fault the respondents for failing to enact the impugned legislation within the prescribed period.
- 62. It was however not lost on this court that the effective date for the Constitution of Kenya 2010 was August 27, 2010. The [National Land Commission Act, 2012](#) as well as [Land Act 2012](#) whose provisions the [Land Laws \(Amendment\) Act, 2016](#) seek to amend, were enacted and came into operation on 2nd May 2012. We did not hear the petitioners to be challenging the enactment of the said Acts in the year 2012 and we are unaware of any provision in law that would bar the 2nd respondent from amending any statutes that it had previously enacted, from time to time.
- 63. Equally our perusal of articles 67 and 68 of the Constitution did not reveal any timelines prescribed therein and it follows therefore that we did not find any basis for the contention that the [Land Laws \(Amendment\) Act 2016](#) were brought outside the timelines provided.

iii) Whether the process which mid-wifed the impugned provisions meet the parameters enumerated under article 10 of the Constitution.

- 64. One of the major grounds on which the petitioners base their challenge to the Land Laws (Amendment) Act is the contention that the enactment thereof failed to meet the Constitutional requirement of public participation. As rightly pointed out by the petitioners, the sacred foundation of the constitutional doctrine of public participation is embedded in the principle of the sovereignty of the people as enshrined under article 1 of the Constitution. In addition, article 2 of the Constitution contemplates direct and indirect exercise of sovereignty by the people through their elected representatives while at all times reserving for themselves the right to directly exercise their sovereignty.
- 65. The significance of public participation is amplified under article 10 of the Constitution which provides as follows:
 - “(1) The national values and principles of governance in this article bind all state organs, State Officers, Public Officers and all persons whenever any of them-
 - a) Applies or interprets the Constitution;
 - b) Enact, applies or interpret any law; or
 - c) Makes or implements public policy decisions.
 - (2) The National values and principles of governance include



- a) Patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
- b) Human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;
- c) Good governance, integrity, transparency and accountability; and
- d) Sustainable development. (Emphasis added).

66. In respect of Parliamentary proceedings, article 118 on “Public Access and Participation” provides that: -

- (1) Parliament shall-
 - a) Conduct business in an open manner, and the sittings and those of its committees shall be open to the public; and
 - b) Facilitate public participation and involvement in the legislative and other business of Parliament and its Committees. (Emphasis added).

67. Indeed the Standing Orders of Parliament also recognize the right to public participation with Standing Order No 127 (3) of the National Assembly Standing Orders providing as follows:

“(3) The Departmental Committee to which a Bill is committed shall facilitate public participation and shall take into account the views and recommendations of the public when the Committee makes its report to the House.”

68. As it were, the respondents do not dispute the fact that there is a constitutional obligation on the part of the National Assembly to facilitate public participation in the process of the enactment of legislation. Their contention, which is contested by the petitioners, is that there was sufficient public participation prior to the enactment of the Land Laws (Amendment) Act.

69. The question of public participation and the circumstances in which it will be deemed sufficient has been the subject of various judicial determinations. In the case of *Doctors for Life International Assembly and Others* (CCT 12/05) (2006) ZACC 11: 2006 (12) BCLR 1399 CC, the Constitutional Court of South Africa in examining what amounts to reasonable public participation stated as follows:

“The nature and the degree of public participation that is reasonable in a given case will depend on a number of factors. These include the nature and the importance of the legislation and the intensity of its impact on the public. The more discreet and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say. In addition, in evaluating the reasonableness of the conduct of the provincial legislatures, the court will have regard to what the legislatures themselves considered to be



appropriate in fulfilling the obligation to facilitate public participation in the light of the content, importance and urgency of the legislation.”

70. Considering the same question in *Robert N Gakuru & Others v Governor of Kiambu County & 3 others (2014) eKLR*, Odunga J observed thus: -

“In my view, public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply “tweet” messages as it were and leave it to those who care to scavenge for it.”

71. Speaking to the same issue in *Consumer Federation of Kenya (COFEK) v Public Service Commission and Another, Petition No 263 of 2013*, the court elaborated on the meaning of public participation as follows: -

“The petitioner has latched onto the phrase “participation of the People” in a selective and selfish manner. I have said that there is no express requirement that participation of the people should be read to mean that the people must be present during interviews but taken in its widest context that their in-put is recognized.”

72. Similarly, in *Nairobi Metropolitan PSV Saccos Union Ltd & 25 others v County of Nairobi Government & 3 Others, Petition No. 486 of 2013*, the court observed as follows:

“.....It does not matter how the public participation was effected. What is needed, in my view, is that the public was accorded some reasonable level of participation and I must therefore agree with the sentiments of Sachs J in *Minister of Health v New Clicks South Africa (PTY) Ltd (supra)* where he expressed himself as follows: -

“The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite evaluation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case”.

73. We stand guided by the Authorities cited herein above and adopt the same in the consolidated Petition. In this respect, we note from the 2nd respondent’s response herein that prior to its enactment, the Land Laws (Amendment) Bill 2015 was considered by both the National Assembly and the Senate. Thereafter the Bill was referred to a mediation committee which invited the public to offer their views thereon, including the Law Society of Kenya to which the petitioners herein are members.

74. The annexures attached to the 2nd respondents affidavit in reply reveal that the Committee received various submissions and memoranda from various institutions, Legal Practitioners as well as members of the public. Having taken the concerns of the various stakeholders into account, the Mediation Committee compiled a report which it laid before both Houses of Parliament. Thereafter the Bill was debated and passed.



75. Considering the said circumstances, we were of the considered view that the [Land Laws \(Amendment\) Act, 2016](#) went through sufficient public participation prior to its enactment and the respondents did not violate article 10 of the [Constitution](#) as alleged or at all.

iv) Whether sections 38, 47, 48, 61 and 98 of the Land Laws (Amendment) Act unconstitutionally limit the rights of the Petitioners and are hence unconstitutional.

76. The petitioners herein strenuously contend that sections 38, 47, 48, 61 and 98 of the [Land Laws Amendment Act](#) are discriminatory and that the same deny landowners their Constitutional rights to equitable access to land and equal protection of the law. They have told the court that sections 47 and 48 of the Act limit the type of persons that have the right to own and enjoy property and that this limitation is not reasonable and justifiable and that the same is hence in contravention of article 24 of the [Constitution](#).

77. In dealing with this issue, it is important to bear in mind the principles applicable to a matter such as the one currently before us, which matter calls for an interpretation of various provisions of the Constitution and a determination of the question whether the impugned enactments by the 2nd Respondent are in compliance or in violation thereof.

78. Luckily for us, the Constitution has given guidance on how it ought to be interpreted. Article 259 thereof requires this Court, in considering the constitutionality of any enactment before it, to make an interpretation in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of rights and that contributes to good governance.

79. In addition, we are cognizant of the fact that article 159(2) (e) of the [Constitution](#) requires this court, in exercising its judicial authority, to do so in a manner that protects and promotes the purpose and principles of the Constitution. In interpreting the Constitution, we are enjoined to give it a liberal purposive interpretation. As was observed by the Supreme Court of Kenya [In re The Matter of the Interim Independent Electoral Commission, Constitutional Application No 2 of 2011](#): -

“The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship between the government and the governed. It is a mirror reflecting the national soul, the identification of ideals and the aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the Constitution must, therefore, prescribe and permeate the processes of the judicial interpretation and judicial discretion.”

80. In the matter before us, we have been called upon to declare various sections of the [Land Laws \(Amendment\) Act, 2016](#) unconstitutional for being in breach of various Articles of the Constitution. As was stated by Majanja J in [Commission for Implementation of the Constitution v Parliament of Kenya & another, High Court Petition No 454 of 2012](#): -

“.....There is a general presumption that every Act is Constitutional and the burden of proof thus lies on any person who alleges otherwise save that where there are limitations to fundamental rights, the onus is on the body restricting the right to show that such limitation was justified (see *Ndyanabo v Attorney General* (2001) EA 495).”



81. In Hassan *Ali Jobo & another v Suleiman Said Shabbal & 2 others (2013) eKLR*, the Court of Appel reaffirmed the position as follows: -

“There is a rebuttable presumption of constitutionality of a statute and also a presumption that the legislature while enacting a statute is aware about other existing statutes. Thus a court in construing a statute *vs- a- vis* the Constitution should endeavor to place a constitutional construction on any statute under challenge and should only find the impugned statute to be inconsistent with the Constitution only if it is not possible to contrive the legislation in a manner consistent with the Constitution.”

82. Guided by the above legal principles, we must now turn our attention to each of the provisions being challenged as being unconstitutional by the petitioners with a view to establishing its conformity with the Constitution. As the petitioners assert that the effect of the Act is to limit and restrict their rights in a discriminatory manner, we find it proper to first set out the provisions of article 24 of the *Constitution*. That article provides thus: -

“24(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including

- a) The nature of the right or fundamental freedoms;
- b) The importance of the purpose of the limitation;
- c) The nature and extent of the limitation;
- d) The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
- e) The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

83. In this respect, the petitioners aver that the amendment envisioned by section 38 of the *Land Laws (Amendment) Act* upon section 15 of the *National Land Commission Act* is discriminatory and that the same seeks to amend the Constitution through the back door. The said section 38 provides as follows: -

“38. Section 15 of the *National Land Commission Act* is deleted and substituted by the following new Section-

15(1) Pursuant to article 67(3) of the *Constitution*, the Commission shall receive, admit and investigate all historical land injustice complaints and recommend appropriate redress.

(2) For the purposes of this section, historical land injustice means a grievance which-

- a) Was occasioned by a violation of a right in land on the basis of any law, policy, declaration, administrative practice, treaty or agreements.
- b) Resulted in displacement from their habitual place of residence.,



- c) Occurred between June 15, 1895 when Kenya became a Protectorate under the British East African Protectorate and August 27, 2010, when the Constitution was promulgated.
- d) Has not been sufficiently resolved and subsists upto the period specified under paragraph (c); or
- e) Meets the criteria set out under this section.

84. It was clear to us from a perusal of the said section 38 of the [Land Laws \(Amendment\) Act](#) that the same was enacted to give effect to the provisions of article 67(2) of the Constitution. That article confers upon the National Land Commission the powers to initiate investigation on its own initiative or on a complaint, into the present or historical land injustices and recommend appropriate redress.
85. It was unclear to us how the provisions of the said section 38 could be said to be discriminatory to the petitioners. In our view, land is no doubt one of the most important asserts in the lives of the citizens of this Republic. It is a factor of production which is core to the economic activities of the citizens of this Country. It is not in doubt that the advent of colonialism and the arrival of settlers in what would later become the Republic of Kenya commoditized land and changed the traditional concepts of land ownership.
86. With the arrival of the settlers, many indigenous people were displaced from their original homes as the colonial Government systematically put in processes that took away huge chunks of land from the residents. This fact saw the beginning of a vicious war pitting the indigenous Kenyans on the one side and the colonial administration on the other.
87. After Kenya gained independence from the colonialists in 1963, it was felt that the atrocities committed against the indigenous people in as far as land was concerned would be remedied. That however never came to pass and since then, there have been numerous calls by Kenyans for a new land law regime.
88. In that respect, it was not lost on this court that in 2010, Kenyans passed a new Constitution which saw reforms and an overhaul of the land law system. Article 67 of the new [Constitution](#) established the 3rd respondent herein and defined its functions. In the year 2011, Parliament passed the [National Land Commission Act](#) whose provisions *inter alia* the Land Laws (Amendment) Act now seek to amend.
89. Clearly, one of the mandates already given to the 3rd Respondent by the Constitution is the power to investigate and make recommendations on historical land injustices. The provisions of section 38 of the Act are clearly aimed at the indigenous people of Kenya as those injustices were committed against Kenyans and not the non-citizens.
90. As was stated in [RM v Attorney General](#) [2008] 1 KLR 574: -
- “.....the principle of equality and non-discrimination does not mean that all distinctions between people are illegal. Distinctions are legitimate and hence lawful if they satisfy the following (1) pursue a legitimate aim such as affirmative action to deal with inequalities and (2) are reasonable in light of their legitimate aim...”
91. Consequently, we do not agree with the petitioners that the amendments brought about to section 15 of the [National Land Commission Act](#) by section 38 of the Land Laws (Amendment) Act are unconstitutional.



92. Section 47 of the [Land Laws \(Amendment\) Act](#) on the other hand has amended section 12 of the [Land Act](#) and introduced the concept of “controlled land” which is defined therein to mean land in Kenya which is –
- a) Within a zone 25 Km from the inland national boundary of Kenya;
 - b) Within the 1st and 2nd row from the high water mark of the Indian Ocean and
 - c) Any other land as may be declared controlled under any statute.
93. Under section 47(2), no transaction in such controlled land, including transfer for consideration may be dealt with without the prior approval of the Cabinet Secretary. According to the respondents, this provision was brought about due to the need to have security agencies to monitor the movement of people and goods within our international borders.
94. In our view, a party alleging a violation of a Constitutional right or freedom must demonstrate that the exercise of a fundamental right has been impaired, infringed or limited. Once the limitation has been demonstrated, then the party which would benefit from the limitation must demonstrate a justification for the limitation (see [S v Zuma & others \(1995\) SA 642 \(CC\)\(A3\)](#)).
95. From a perusal of the said section 47, it was apparent that the same has far reaching implications on the ownership rights to property. The exercise of such rights would be greatly limited within the defined “controlled land” and it was therefore in our view, incumbent upon the State to demonstrate that the limitation is justifiable, and that the societal need therefor outweighs the individual’s right to enjoy the right or freedom to deal with their properties.
96. In this respect, we are not satisfied on the material presented before us that there was any reasonable justification to warrant the provision. We accordingly find and declare that section 47 of the [Land Laws \(Amendment\) Act](#) is unconstitutional, null and void.
97. In respect to section 48 of the Land Laws (Amendment) Act, the same sought to amend section 13 of the [Land Act](#) as follows: -
- “Section 13 of the principle Act is amended by deleting subsection (1) and substituting therefor the following Sections-
- Before the expiry of the leasehold tenure, the Commission shall within five years, notify the lessee and inform the lessees of his or her pre-emptive right to allocation of land upon application, provided that such lessee is a Kenyan Citizen and that the land is not required by the national or County government for public purposes.”
98. It was contended by the petitioners that the said provisions offend article 40 of the [Constitution](#). It was however clear to us that the limitation provided therein is not unreasonable. article 40 of the [Constitution](#) provides for the right to property subject to article 65 which limits the rights of the non-citizens of Kenya to hold land on the basis of a leasehold tenure only, such tenure not exceeding 99 years.
99. It was also clear to us that the section 79(9) of [Land Act](#) as well as the provisions of section 98 of the Land Laws (Amendment) Act on section 152 similarly merely serve the purpose of streamlining the existing law. The same are in our view neither discriminatory nor unconstitutional and we find no reason to interfere with the same.



100. As the High Court of Botswana stated in *Mmusi and others v Ramantete and another (MAHLB-000836-10) (2012) BWHC 12 October 2012*: -

“The theoretical premise upon which this Judgment is anchored recognizes that equality is better understood and applied not in the abstract, but in its proper context. It recognizes, in the words of the renowned American Judge, Oliver Wendell Holmes, that general prepositions of law do not solve concrete cases (*Lochner v New York* 198 US 45, 76, (1905) (Holmes J dissenting). The theoretical premise further recognizes that human wrongs are the source of human rights and that inequalities in a particular Society, rather than in an imagined Society, are the appropriate foundation of a better understanding of equality provisions in a national Constitution.”

101. Arising from the foregoing, we hereby make the following orders

- a) A declaration is hereby made that sections 38, 48, 61 and 98 of the *Land Laws (Amendment) Act* 2016 did not violate any article of the Constitution and the same are hence valid and Constitutional.
- b) A declaration is hereby made that the Amendments sought to be introduced under section 12 of the *Land Act* vide section 47 of the *Land Laws (Amendment) Act* are unconstitutional, null and void.
- c) As the consolidated Petition partly succeeded and partly failed, and since the issues raised were issues of great public interest and not issues restricted to the petitioners, we make no order as to costs.

DATED AND DELIVERED AT MALINDI THIS 29TH DAY OF OCTOBER ,2021

CHARLES YANO

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JUDGE

JAMES. O. OLOLA

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JUDGE

LOIS KOMINGOI

.....

JUDGE

