REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC JR CASE NO 5 OF 2020

REPUBLIC.....APPLICANT

AND

THE NATIONAL LAND COMMISSION.....1ST RESPONDENT

THE CHIEF LAND REGISTRAR.....2nd RESPONDENT

AND

KIMASAS FARMERS

CO-OPERATIVESOCIETY.....1st INTERESTED PARTY

COUNTY GOVERNMENT OF NANDI.....2nd INTERESTED PARTY

EX-PARTE

EASTERN PRODUCE KENYA LIMITED...THE EX-PARTE APPLICANT

RULING

1. What is coming up before this court is the Ex-parte Applicant's Notice of Motion Application dated 19th May 2020, seeking the following orders:

> **a) That this Honourable court do order that the suit herein to *wit* High Court ELC J.R No 5 of 2020 (*hereinafter referred to as (Eastern produce JR Application*) be forthwith consolidated with High Court ELC J.R Case No 3 of 2020 (*hereinafter referred to as KTGA J.R Application*) and High Court ELC J.R No 4 of 2020 (*hereinafter jointly referred to as Kakuzi J.R Application).***
>
> **b) That this Honourable court be pleased to certify that the Judicial Review Application herein as well as the KTGA Application and the Kakuzi J.R Application, raise substantial questions of law as well as issues of public interest and forthwith refer the cases to his lordship the Chief Justice for appointment of a bench of an uneven number of judges being not less than three (3) pursuant to Article 165(4) of the Constitution.**
>
> **c) That the costs of this application be provided for.**

2. The Application is premised on the grounds set out on the face of the Motion and supported by the Affidavit of Dennis Gitaka, the Legal Manager of the Ex-parte Applicant (hereinafter Applicant), Eastern Produce Kenya Limited.

3. It is deposed that on 1st April 2019, the Applicant filed High Court J.R Miscellaneous Application number 100 of 2019 seeking leave to commence Judicial Review proceedings against the National Land Commission with respect to recommendations made in the Gazette Notice number 1995 dated 18th February 2019, published by the National Land Commission in the *Kenya Gazette* of 1st March 2019 on the grounds that the Applicant's rights to a fair hearing and natural justice were violated and that on the same date, the Ex-parte Applicants in High Court J.R Miscellaneous J.R 94 of 2019 and High Court J.R Miscellaneous J.R 95 of 2019 filed applications seeking substantially similar orders.

4. The Ex parte Applicant's Legal Manager deponed that the three applications were placed before Nyamweya J who granted them leave to commence Judicial Review proceedings and further directed that the leave would operate as a stay of the implementation of the afore-stated

gazette notice; that on 30th October, 2019, the three matters were heard in respect of a Preliminary Objection raised by the Respondents on the issue of the jurisdiction of the High Court and that the High Court partially allowed the Respondents' objection and transferred the matter to the Environment and Land Court in Nairobi.

5. The Ex parte Applicant's Legal Manager deponed that in compliance with the directions by Nyamweya J, the three files being High Court J.R Miscellaneous Application Nos.94, 95 and 100 were transferred to this court and that the three files were allocated new reference numbers being ELC J.R No. 3 of 2020(*KTGA J.R Application*); ELC J.R No. 4 of 2020 (*Kakuzi J.R Application*) and ELC J.R No. 5 of 2020 (*Eastern Produce J.R Application*).

6. According to the Ex parte Applicant's Legal Manager, the final orders sought in all the applications are similar; that it would be in the interests of justice that the matters be heard together as this would be convenient and would avoid divergent and conflicting decisions and that the import of the orders sought vide the applications is that the Respondents are restrained from proceeding with any actions on the basis of the Gazette Notice published on 1st of March 2019 by the National Land Commission.

7. The Ex parte Applicant's Legal Manager deponed that the applications raise substantial questions of law concerning the illegality of the National Land Commission's proceedings and determinations relating to the impugned recommendations in the Gazette Notice published on 1st March 2019; that the applications address the Ex-parte Applicants' constitutional rights under **Articles 47** and **50(1)** of the **Constitution** and **Sections 4(3), 4(4)** and **5** of the **Fair Administrative Actions Act** in respect of the right to a fair hearing.

8. In addition, it is the Ex parte Applicant's Legal Manager's deposition that the Applications raise serious concerns regarding the Ex-parte Applicant's rights under **Article 40(1)** of the **Constitution of Kenya**, **2010** relating to property rights and the legitimate expectation by the Applicants to continue enjoying the proprietary rights noting the substantial amount of investments undertaken by the Applicants in the properties.

9. It was deponed by the Ex parte Applicant's Legal Manager that the issues raised by the Applicant are of general public importance as they concern the performance of the constitutional functions and the exercise of powers by the National Land Commission while undertaking its lawful mandate in accordance with the provisions of the Constitution and the **National Land Commission Act**.

10. The Ex parte Applicant's Legal Manager deponed that the issues raised in the aforesaid Judicial Review Applications raise substantial questions of law and public interest to warrant empanelment of a bench of an uneven number of judges being not less than three (3) and for the consolidation of the three suits to provide for expeditious disposal of the same.

11. Although the present Application was filed in J.R number 5 of 2020, each of the parties in the three files sought to be consolidated had an opportunity to respond to the same. For ease of reference, I will refer to the parties as they appear in their respective cases.

The 2nd Respondent in J.R 5 of 2020

12. In response to the Application, the 2nd Respondent herein filed Grounds of Opposition in which he averred that the Application offends the mandatory provisions of the law; that the Applicant has not met the minimum requirements for the grant of the orders sought; that the suits herein are founded on separate and distinct factual backgrounds arising from different transactions and that the issues in the three suits cannot be conveniently determined in a consolidated suit.

13. It was averred by the 2nd Respondent that although some common questions of law have been raised in the suits, no common question of fact arises in all of them; that the rights or reliefs claimed in the suits are not in respect of or arise out of the same transaction and that for those reasons, it is not desirable to make an order for consolidating them. According to the 2nd Respondent, the impugned hearings were conducted at different times and in respect of different parcels of land.

The 3rd Respondent in J.R No 4 of 2020

14. In opposition to the Application, the 3rd Respondent in JR No. 4 of 2020 filed Grounds of Opposition and averred that the parties in the three suits are different; that the cause of action in the three suits varies and that consolidation of the suits is not suitable in the matters.

The 3rd Respondent in J.R No 3 of 2020

15. The 3rd Respondent in J.R No. 3 of 2020 filed Grounds of Opposition in which it averred that the proceedings herein and particularly the Notice of Motion is fatally defective, unsustainable, incompetent and bad in law for having been lodged before a court that lacks jurisdiction; that the purported Judicial Review (Notice of Motion) application is not properly on record for want of leave from a court of competent jurisdiction and that Nyamweya J conceded to lack of jurisdiction vide her Ruling.

16. The 3rd Respondent averred that the absence of jurisdiction cannot be remedied by effecting transfer of a bad suit to another court; that the purported Judicial Review (Notice of Motion) application contravenes the provision of **Section 8** of the **Fair Administrative Act** and that the leave to lodge the purported Judicial Review (Notice of Motion) application was sought and obtained in contravention of **Article 165(5)** of the **Constitution**.

17. The 3rd Respondent in J.R No. 3 of 2020 finally averred that the Application herein and indeed the purported Judicial Review (Notice of Motion) is clearly aimed at delaying the decision of the National Land Commission (NLC) and ought to be struck out.

The 4th Respondent in J.R No. 3 of 2020

18. The 4th Respondent in J.R No. 3 of 2020 filed a Notice of Preliminary Objection on the grounds that the court lacks jurisdiction to entertain an incompetent suit which was transferred by a court without jurisdiction and that the suit having been commenced in the High Court on matters touching land planning and ownership, the same is a nullity notwithstanding the transfer and ought to be dismissed with costs.

19. The 4th Respondent in J.R No. 3 of 2020 averred that the application is a clear violation of **Article 162(2)** and **165** of the **Constitution of Kenya** and that the suit having been transferred from a court lacking jurisdiction to a court with jurisdiction cannot be remedied by the "O2" principle or the overriding objective under the **Civil Procedure Act**, the Appellate Jurisdiction Act or even **Article 159** of the **Constitution**.

20. The 4th Respondent in J.R No. 3 of 2020 averred that the suit land is located in Kericho and Bomet counties thus the suit should have been filed in the court with the requisite territorial jurisdiction which is the Environment and Land Court in Eldoret and that the entire proceedings are incompetent, invalid, and null and void (and) ought to be dismissed.

The Interested Parties in J.R No. 3 of 2020

21. In response to the Application, the Interested Parties in J.R number 3 of 2020 averred that the Ex-parte Applicant's Application is unmerited as it does not meet the threshold required under **Article 165(4)** of the **Constitution** to allow the empanelment of a bench and that the Judicial Review (Notice of Motion) application does not raise substantial questions of law and does not disclose a contested question of law as envisaged under **Article 165(4)** of the **Constitution**.

22. It was averred that for a matter to be referred to the Chief Justice for empanelment of uneven number of judges, this Court must be satisfied that the matter raises a substantial question of law; that there are several factors which the court ought to consider before a matter is referred for empanelment, which include: whether the matter raises a novel point; whether the matter is complex; whether the matter by its nature requires a substantial amount of time to be disposed of; the effect of the prayers sought in the Petition and the level of public interest generated by the suit.

23. It was averred that the Judicial Review application does not raise any substantial question of law; that the application only challenges the procedure followed by the National Land Commission in making its decision and that there is nothing complex or novel with challenging a process.

24. It was averred by the Interested Parties that the three applications are not similar in nature to necessitate consolidation; that although each of the applications is challenging the procedure that was followed by the NLC to arrive at its decision, the facts arising in each of the files are different and arose in different circumstances and that consolidating the files will only bring bulkiness and unnecessary confusion which can be avoided by hearing each file separately.

SUBMISSIONS

The Ex-parte Applicants' Submissions

25. In support of their application dated 19th May 2020, the Applicants, through their counsel, filed submissions in all the three suits on the 15th of April 2021. Counsel submitted that the Preliminary Objections by the Respondents and their applications to strike out the Judicial Review applications have no merit and are *res-judicata*; that if indeed the Respondents were dissatisfied with the transfer of the suit from the High court to the Environment and Land Court, they ought to have appealed against the said Ruling and that this Court has no jurisdiction to re-determine the objections raised by the Respondents in the High Court.

26. On whether the Applicant has satisfied the conditions to warrant the consolidation of the Judicial Review Applications herein, counsel submitted that the applicant has fulfilled all the necessary conditions to warrant their consolidation. Reliance was placed on the case of ***Law Society of Kenya vs Centre for Human Rights & Democracy & 12 others [2014] eKLR*** where the Supreme Court held as follows:

> ***"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 any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it. In the matter at hand, this Court would have to be satisfied that the appeals sought to be consolidated turn upon the same or similar issues. In addition, the Court must be satisfied that no injustice would be occasioned to the respondents if consolidation is ordered as prayed."***

27. It was the applicants' counsel's contention that the only requirement placed upon an applicant seeking consolidation of suits is to show that the suits raise similar issues and that contrary to the submissions of the Respondents and the Interested Parties, there is no legal requirement for purposes of consolidation that all the parties should be represented by the same advocates or that all the matters should arise from the same transaction.

28. With respect to whether common questions of law arise in the three suits, it was counsel's submission that the applications in the three suits question whether the National Land Commission contravened **Articles 47** and **50 (1)** of the **Constitution 2010** and **Section 4 (3) & (4)** and **5** of the **Fair Administrative Action Act** and that the three suits seek similar reliefs of certiorari, prohibition and declaratory orders in respect of the determinations of the National Land Commission published in the Gazette Notice of 1st March 2019.

29. On the aspect of common questions of fact, counsel submitted that Judicial Review is more concerned with the manner in which a

decision is made rather than the merits or otherwise of the ultimate decision; that the Court has not been called upon to delve into the merits of the National Land Commission's decisions and that the applications herein cite the failure by the National Land Commission to issue proper prior notifications in respect to its hearings.

30. It was submitted by counsel that considering the existence of similar infractions by the National Land Commission in all the four suits, there is indeed a legal necessity for consolidation. On whether there is a legal requirement to have identical parties for consolidation, it was counsel's submissions that the same is not. In support of this contention, counsel cited the case ***EAN Kenya Limited vs John Sawers & 4 others (2007) eKLR,*** where the court held as follows:

> ***"But of course the test to be applied is not whether the parties are the same but but where the same or similar questions of law or fact are involved in the suits. I am satisfied that similar issues of law and fact arise in both suits. For reasons of expediency both suits will be best heard together."***

31. Counsel further relied on the cases of ***Kyalo Kamina vs Kenya Universities and Colleges Central Placement Service & 2 others (2016) eKLR,*** where it was held that:

> ***"Before court are different parties in Petition Nos. 12 of 2015 (Eldoret), Petition No.40 of 2015 (Nakuru) and the instant petition. The only common thing in the three (3) petitions is the similarity of issues raised.***
>
> ***In such instances and as Mumbi, J. correctly stated, the available path to follow is that of consolidation so that the issues are ventilated together."***

32. It was submitted that a greater risk would be posed if the applications were not consolidated because conflicting decisions may issue from the same/similar legal issues and that consolidation would simplify matters and lead to more efficient use of judicial time and resources and one uniform decision. Reliance was placed on the case of ***Hilton Walter Nabongo Osinya & Another vs Savings & Loan (K) Limited & Another Nairobi HCCC No. 274 of 1998*** where Ringera J (as he then was) held as follows:

> ***"The whole point of consolidating suits is to enable common questions of law and fact to be tried together in the same forum with a view to saving judicial time and avoiding the possibility of conflicting decisions on the same issues by different courts."***

33. The Applicant's counsel submitted that the applications raise substantial questions of law to merit the appointment of a bench of an uneven number of judges being not less than three pursuant to **Article 165 (4)** of the **Constitution**. With respect to what constitutes a substantial question of law, counsel cited the case of ***Del Monte Kenya Ltd vs County Government of Muranga and Others [2016] eKLR*** in which Onguto J, in discussing the question of what a substantial question of law in constitutional matters entails stated as follows:

> ***"...one which is of general public importance or which directly and substantially effects the rights of the parties and which have not been finally settled by the Supreme Court, the Privy Council or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be substantial…The substantial question of law is a question to be determined in the circumstances of the case. Substantial issue of law is not necessarily a weighty one or one that raises a novel issue of law or fact or even one that is complex…Public interest may be considered but is not necessarily a decisive factor."***

34. It is counsel's submissions that the matters raised in the Judicial Review applications directly affects the substantial rights of the applicants whose right to a fair hearing, fair administrative action and right to property under **Articles 40, 47** and **50** of the Constitution and **Sections 4 (3) & (4)** and **5** of the **Fair and Administrative Actions Act**, have been infringed.

35. On whether the questions raised in the applications were of general public importance, counsel submitted that they were as the questions concerned the performance of constitutional functions and exercise of powers by the National Land Commission in accordance with the provisions of the Constitution and the **National Land Commissions Act**; that land issues are emotive and that a decision by a three judge bench would guide the National Land Commission and the public. To buttress this position, counsel cited the case of ***Mohamed Dame Salim vs County Assembly of Tana River County & 2 others [2016] eKLR*** that held;

> ***"It is true that a three judge bench of the High Court is not binding on a fellow single High Court judge. However, where the decision is made by such a bench, it can be persuasive."***

36. It was counsel's further submission that the question of whether the National Land Commission's proceedings which were carried out in the absence of Regulations were a nullity is critical and that the National Land Commission, being a public constitutional body dealing with public interest claims relating to historical land injustice cannot arbitrarily, without following the rules of natural justice, conduct proceedings in the manner it did and that for those reasons, it is critical that a three judge bench is empanelled to deal with the Judicial Review applications.

The 1st Respondent's submissions in J.R No 5 of 2020

37. With respect to the question of empanelment of a bench comprising an uneven number of Judges, it was submitted by counsel that there are numerous principles governing the question of whether a matter raises substantial questions of law warranting its referral to the Chief Justice for empanelment of a bench. Counsel cited the case of ***Katiba Institute vs President of Republic of Kenya & 2 others; Judicial Service Commission & 3 others (Interested Parties) [2020] eKLR*** where the court stated;

"The principles to be considered in making such a reference have been identified in a number of cases, such as Okiya Omtatah Okioti & another vs Anne Waiguru–Cabinet Secretary, Devolution and Planning & 3 others [2017] eKLR, Wycliffe Ambetsa Oparanya & 2 others vs. Director of Public Prosecutions & another [2016] eKLR, and Wanjiru Gikonyo vs. Attorney General & another, Kajiado County Governor & 4 others (Interested Parties) [2020] eKLR, among others. These include that grant of a certificate under Article 165(4) is an exception rather than the rule, the substantial question in issue ought to be determined in the circumstances of the case, public interest, among others. It was underscored that the list of relevant factors is not exhaustive, and that the mere presence or absence of one is not necessarily decisive in a particular case. It has also been stated that the decision should be made only where the same is absolutely necessary, being mindful of the scarcity of judicial resources.

38. It was submitted by counsel for the Respondent that courts have set stringent conditions to be met with respect to the aspect of empanelment of a bench; that the High Court in the case of ***Martin Nyaga & Others vs Speaker County Assembly of Embu and 4 Ors & Amicus Curiae[2014]eKLR,*** urged that the decision to empanel a bench must be absolutely necessary and that the court in ***County Government of Meru vs Ethics And Anti-Corruption Commission [2014] eKLR*** in dealing with a similar issue stated thus;

"The principles which govern the exercise of discretion in an application such as the one before the court can be distilled as follows;

The grant of a certificate under Article 165(4) of the Constitution is an exception rather than the rule.

The substantial question of law is a question to be determined in the circumstances of the case. Substantial issue of law is not necessarily a weighty one or one that raises a novel issue of law or fact or even one that is complex. Many provisions of our Constitution are untested and bring forth novel issues yet is not every day that we call upon the Chief Justice to empanel a bench of not less than three judges.

Public interest may be considered but is not necessarily a decisive factor. It is in the nature of petitions filed to enforce the provisions of the Constitution to be matters of public interest generally.

The court ought to take into account other provisions of the Constitution, the need to dispense justice without delay having regard to the subject matter and the opportunity afforded to the parties to litigate the matter up-to the Supreme Court."

39. It was submitted that the suits herein do not raise substantial questions of law, but instead raise ordinary Judicial Review questions that are not so complex as to constitute a substantial question of law; that "substantial" in the ordinary meaning means "of considerable importance" and that the applicants have not demonstrated that the questions raised in the three suits transcends the circumstances of the particular cases and have significance bearing on the public interest.

40. On whether the cases raise novel issues, it was submitted that whereas it may be argued that historical land injustices concept entails a new dispensation with the potential of nullifying title to land and thus affect the rights of people to property under **Article 40** of the **Constitution**, in the instant matters, the reliefs sought by the Applicants are normal Judicial Review reliefs; that any High Court judge has authority under **Article 165** of the **Constitution** to determine any matter within the jurisdiction of the High Court and that in any event, the decision of a bench is equal in force to that of a single judge.

41. It was counsel's submission that empanelment of judges will likely delay the conclusion of the cases taking into account the limited judicial resources in terms of judicial officers thus stretching the timelines that the matter would have otherwise taken contrary to the constitutional principle as set out in **Article 159(2)(b)** of the **Constitution**.

42. With respect to the prayer for consolidation, counsel submitted that one of the issues to be considered in applications for consolidation was whether it was appropriate to consolidate the cases; that the principles governing consolidation were set out in the case of ***Joseph Okoyo vs Edwin Dickson Wasunna [2014] eKLR*** which cited with approval the case of ***Nyati Security Guards & Services Ltd vs Municipal Council of Mombasa [2004] eKLR*** as follows;

"The situations in which consolidation can be ordered include where there are two or more suits or matters pending in the same court where:-

1. Some common question of law or fact arises in both or all of them; or

2. The rights or relief claimed in them are in respect of, or arise out of the same transaction or series of transactions, or

3. For some other reason it is desirable to make an order for consolidating them."

43. According to the Respondent's counsel, the conditions set above have not been met by the applicants; that despite the fact that the reliefs sought are similar, the parties and causes of action vary and that the court should be careful not to occasion any undue advantage to any party in ordering the consolidation of the cases.

44. According to counsel, other than the National Land Commission, the three suits have different parties; that whereas the applicants are all represented by the same law firm, other parties have different advocates and that a consolidation would cause unnecessary delays.

45. On whether the suits raise common questions of law or fact, it was submitted that whereas the reliefs sought are similar, the facts of each case are different; that the complaints by the applicants differ and have been occasioned by different circumstances and that the Respondents

and the Interested Parties are distinct persons with different causes of action and therefore consolidation is not warranted.

Submissions by the 2nd Respondent in J.R No. 4 of 2020

46. The 2nd Respondent's counsel submitted that the grant of orders of empanelment must meet certain criteria and that what constitutes a substantial question has not been defined in the Constitution and is subject to different judicial interpretation. Reliance was placed on the cases of ***Harrison Kinyanjui vs Hon Attorney General[2012]eKLR*,** where it was stated;

> ***"Therefore, giving meaning to "substantial question" must take into account the provisions of the Constitution as a whole and need to dispense justice without delay particularly given a specific fact situation. In other words, each case must be considered on its merits by the judge certifying the matter. It must also be remembered that each High Court judge, has authority under Article 165 of the Constitution, to determine any matter that is within the jurisdiction of the High Court. Further, and notwithstanding the provisions of Article 165(4), the decision of a three Judge bench is of equal force to that of a single judge exercising the same jurisdiction. A single judge deciding a matter is not obliged to follow a decision of the court delivered by three judges."***

47. Counsel further cited the cases of ***Wycliffe Ambetsa Oparanya & 2 Ors vs Director of Public prosecutions and Anor [2016] eKLR*,** where Odunga J in relying on the case of ***Community Advocacy and Awareness Trust & 8 others vs Attorney General & 6 Others [2012] eKLR*** stated as follows:

> ***"The Constitution of Kenya does not define what constitutes a substantial question of law. It is left to the individual judge to satisfy himself or herself that the matter is substantial to the extent that it warrants reference to the Chief Justice to appoint an uneven number of judges not being less than three to determine the matter."***

48. Counsel also cited the case of ***Sir Chunilal vs Mehta and Sons Ltd vs The Century Spinning and Manufactering Co Ltd*(*supra*)** where it was stated thus**;**

> ***"A substantial question of law is one which is of general public importance or which directly and substantially affects the rights of the parties and which have not been finally settled by the Supreme Court, the privy council or the federal court which or which is not free from difficulty or which calls for discussion or alternative views. If the question is settled by the highest court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be substantial."***

49. It was submitted by counsel that the matters raised in the applications are not complex and can be determined by a single judge and that the applications do not raise novel points of law and none of the questions qualifies to be of public interest or is a substantive question. Reliance was placed on the case of ***Delmonte Kenya Limited Vs County Government of Muranga & 2 others [2016] eKLR*** where it was stated as follows:

> ***"the question as to whether there exists a substantial question of law, even if one adopted the definition in the Chunilal Mehta case, is left to the individual judge to determine depending on the circumstances and unique facts of each case."***

The 3rd Respondent's submissions in J.R No. 3 of 2020

50. The 3rd Respondent's counsel in J.R number 3 of 2020 submitted that the suit before the High Court was a nullity having been filed before the wrong forum. Reliance was placed on the case of ***Phoenix of E.A Assurance Company Limited vs S.M Thiga t/a Newspaper Service[2019]eKLR***, which relied on the principles set out in the case of ***Macfoy vs United Africa Co Ltd [1961] 3 ALLER,1169*** where it was stated as follows:

> ***"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse…"***

51. It was submitted that even if this court has jurisdiction to entertain this matter, the applicants did not make an application for leave to file the Judicial Review proceedings before a competent court; that it has been one year since the ruling transferring the matter to this court and that the applicants not having sought leave, the same has abated. Counsel submitted that there is no jurisdiction vested in the High Court to rectify a nullity and that the applicants, through their Notice of Appeal dated 6th February 2020, have denied the jurisdiction of this court.

52. It was counsel's further submission that the Court of Appeal in **Arprim Consultants** case stated that a High Court judgment delivered outside the mandatory timelines provided by law was a nullity; that the law provides that the High Court shall determine Judicial Review Applications within forty-five days and that the Judicial Review applications having not been determined within 45 days from when they were filed are a nullity.

The 3rd Respondent's Counsel Submissions in J.R No. 4 of 2020

53. It was submitted by counsel that the issue of consolidation of the suits cannot lie as the matters, parties and reliefs sought in the matters are different; that whereas all the matters have one common factor, being the impugned decision of the National Land Commission, it would

be a misnomer if the matters were consolidated and that the matters should be determined separately.

The 4th Respondent's submissions in J.R No. 3 of 2020

54. Counsel submitted that this court lacks jurisdiction to entertain an incompetent suit transferred by a court without jurisdiction and that the proceedings having been commenced in the High Court on matters touching on land planning and ownership are a nullity notwithstanding the transfer of the suit to this court. Reliance was placed on the case of Equity ***Bank Ltd vs Bruce Mutie Mutuhu T/A Diani Tours & Travel (2016) eKLR*****, where** the Court of Appeal stated as follows:-

> ***"In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under Section 18 of the Civil Procedure Act to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign. It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks, parties cannot even seek refuge under the "O2" principle or the overriding objective under the Civil Procedure Act, the Appellate Jurisdiction Act or even Article 159 of the Constitution to remedy the situation. In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through a transfer."***

55. It was counsel's contention that the court in the ***Equity Bank*** case (*supra*) determined that a suit filed in a court without jurisdiction is a nullity in law and that the court cannot purport to transfer "nothing" and mould it into something through a procedure known as "transfer". Counsel submitted that the instant suits do not raise substantial questions of law warranting their referral to the Chief Justice to empanel a bench of an uneven number of judges to hear and determine them.

The Interested Parties submissions in J.R No. 3 of 2020

56. It was counsel's contention that for a matter to be referred for empanelment of a bench of an uneven number of Judges, the court must certify that the matter raises a substantial question of law which is not the case herein. It was submitted that the issues raised in the three suits are basically challenging the procedure used by the National Land Commission in reaching its recommendations; that the issues raised in the Judicial Review application are self-explanatory, simple and do not raise any issues of general importance warranting empanelment of a bench.

57. It was counsel's contention that the suits should not be consolidated; that if consolidated, the court would not be able to arrive at an impartial determination as the facts of each case are different. Counsel submitted that the three applications are not similar in nature to necessitate consolidation; that whereas all the applications are challenging the procedure of how the National Land Commission arrived at its decision, the facts of each case are unique and arose under different circumstances and that whereas there may be identical questions of law, there are no exceptional circumstances to justify the consolidation of the suits.

The 2nd Interested party's submissions in J.R No. 5 of 2020

58. It was submitted that though the prayers in each case arose from the recommendations of the National Land Commission published in the impugned gazzette notice in respect to the various historical land injustice claims, and whereas the legal basis in each claim is similar in that the applicants claim they were denied an opportunity to be heard, the factual basis of each case is different and that it is undesirable to consolidate the cases.

59. Counsel submitted that the principles regarding consolidation were set out in the case of ***Nyati Security Guards and Services Ltd vs Municipal Council of Mombasa(2000)eKLR*** as follows;

> ***"The situations in which consolidation can be ordered include where there are two or more suits for matters pending in the same court where'***
>
> ***a. Some common question of law or fact arises in both or all of them;***
>
> ***b. The rights or reliefs claimed in them are in respect of or arise out of the same transaction;***
>
> ***c. For some reason it is desirable to make an order for consolidating them."***

60. According to counsel, the court in the **Nyati case *(supra)*** indicated that there are circumstances where it may be undesirable to consolidate the suits and that the factual circumstances of the three suits were distinct. It was submitted that the applicants have not demonstrated the prejudice they will suffer if the cases are not consolidated; that consolidation will cause confusion owing to the bulkiness of the files and that the factual basis and complexities of each matter will delay the 2nd Interested Party's right to be heard without unreasonable delay.

Analysis & Determination

61. Having considered the pleadings and submissions made by the parties, the issues that arise for determination are;

i. Whether this court has jurisdiction to entertain this suit?

ii. Whether the Judicial Review applications being ELC J.R Nos. 3, 4 and 5 of 2020 should be consolidated?

iii. Whether a certification should issue for empanelment of an expanded bench of Judges to hear and determine the three suits.

62. At the onset, the court notes that a serious challenge has been raised with regards its jurisdiction to entertain this matter. The basis of this objection by the Respondents is that these proceedings having been commenced in the High Court on matters pertaining to land planning and ownership, they are a nullity notwithstanding the transfer of the three suits from the High Court to this court (ELC) and that by virtue of the High Court not having had jurisdiction, the leave granted therein to commence judicial review proceedings is a nullity.

63. On their part, the applicants in ELC J.R Numbers 3, 4 and 5 contend that while transferring the three matters from the High Court to this court, Nyamweya J held that a court can transfer a suit to another court of equal status in line with the objectives of **Article 159 (2)** of the **Constitution;** that arising from the said Ruling, the Preliminary Objection by the Respondents is *res-judicata*; that if indeed the Respondents were dissatisfied with the transfer of the suit, they ought to have appealed against the said Ruling and that this court has no jurisdiction to re-determine the objections raised by the Respondents in the High Court.

64. The centrality of jurisdiction in judicial proceedings is a well settled principle in law. A court without jurisdiction acts in vain. All it engages in is a nullity. *Nyarangi, JA,* in ***Owners of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd[1989] KLR 1*** stated as follows:

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

65. More recently, the Court of Appeal in ***Kakuta Maimai Hamisi vs- Peris Pesi Tobiko & 2 Others [2013] eKLR*** stated as follows:

> ***"So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain."***

66. The present proceedings were initially instituted in the Judicial Review Division of the High Court at Nairobi as Miscellaneous Judicial Review Applications Nos. 94, 95 and 100 of 2019. Among the responses to the said Motions were Preliminary Objections objecting to the High Court's jurisdiction to hear and determine the applications. The said Preliminary Objections were canvassed before the High Court and vide her Ruling of 20th January 2020, Nyamweya J partially allowed the objections and transferred the matters to this court for hearing and disposal.

67. Before delving into the issue of whether this court has jurisdiction to entertain these proceedings, the court will first consider the issue of whether or not this question is *res judicata* as argued by the applicants. The doctrine of *res judicata* is anchored in **Section 7** of the **Civil Procedure Act** in these terms:-

> ***"No court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."***

68. From the foregoing, the ingredients of *res judicata* are: the issue raised was directly and substantially in issue in the former suit; the former suit was between the same parties or parties under whom they or any of them claim; those parties were litigating under the same title; the issue in question was heard and finally determined in the former suit; and the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.

69. In the instance case, the objection before the High Court was with regards to its Jurisdiction to entertain the three matters. The Respondents have called into question this court's jurisdiction to entertain the matters which were transferred to this court by the High Court. The question of whether the High Court could validly transfer the three suits to this court was canvassed or ought to have been canvassed in the High Court, and a decision was rendered by the court. That issue is therefore *res judicata.*

70. Indeed, while transferring the three suits to this court, the court stated as follows:

> ***"Since the issues that are raised by the pleadings in the instant application are predominantly and substantially decision-making process on a land related matter, and since the question of the process employed by the 1st Respondent will have to be examined not only in light of the applicable principles of the Constitution and the Fair Administrative Act, but also any other applicable procedures that may apply to the 1st Respondent in applicable laws on historical injustices regarding land, it is my holding that this is a matter that is more conveniently and effectively heard by the Environment and Land Court, irrespective of the fact that the High Court also has jurisdiction to hear and determine the said application.***

It is also my view that the Environment and Land Court, being a superior court of the status of the High Court, has similar supervisory jurisdiction as is granted to the High Court by Article 165(6) of the Constitution over subordinate courts and tribunals, where the dominant issue or dispute is a decision on the title, use and occupation of land. It was in this respect held in by the Court of Appeal in the case of Independent Electoral and Boundaries Commission (IEBC) vs The National Super Alliance (NASA) & 7 Others, Civil Appeal No. 224 of 2017 (UR) that the source of power of any judicial review is now found in Article 47 of the Constitution, which can be applied by all superior Courts.

In addition, the supervisory jurisdiction of the Environment and Land Court is evidenced by the appellate jurisdiction granted to the said Court by section 13(4) of the Environment and Land Act. To this extent, the provisions of the Fair Administrative Action Act on review of administrative actions are also applicable to such decisions, particularly since section 7 of the Fair Administrative Action Act provides that any court can hear such an application for review.

Before I conclude, I also need to address the options available to this Court in light of the foregoing findings. It was in this respect held and affirmed by the Court of Appeal in the case of Prof. Daniel N. Mugendi vs Kenyatta University & Others [2013] eKLR, that in the event of concurrent jurisdiction between the High Court and superior Courts of Equal Status, there can be inter-transfer of cases between the said Courts since those courts are constitutionally mandated to hear the cases by virtue of Article 165 of the Constitution. Such a transfer is also in line with the objects of Article 159(2) of the Constitution.

71. It is clear from the foregoing that the Judge did not divest herself of jurisdiction to determine the matter. On the contrary, the Judge stated that she was transferring the suits to this court by virtue of the concurrent jurisdiction held by this court and the High Court with regard to the three matters.

72. That being the case, to purport to hold that the High court had no jurisdiction to transfer the three suits to this court, and that the three suits are void for having been transferred by a court without jurisdiction would be tantamount to sitting on appeal of the decision of a court of equal status, an invitation which this court must decline. Indeed, as the High Court's jurisdiction has not been impeached, it follows that the leave granted therein to commence judicial review proceedings remains valid.

73. Counsel for the Respondents have urged that these suits are a nullity having not been determined within 45 days pursuant to the ***Arpim*** case. In my view, that is an issue that goes into the merits of the suits and should be raised as at the time of hearing the suits.

74. The Applicants are seeking to have the three matters herein consolidated. It is their contention that three matters raise the same or similar issues of law and facts. The Respondents and the Interested Parties opposed the application for consolidation on the basis that despite the fact that the reliefs sought by the applicants in the three suits are similar, the parties, the factual basis and the causes of action in the three suits are different.

75. In discussing whether the suits should be consolidated, the court will first set out a brief summary of the three matters. In **ELC J.R No. 3of 2020**, the Applicants have instituted Judicial Review proceedings seeking orders of *certiorari*, *prohibition* and *declaratory orders* with respect to Gazette Notice number 1995 dated 18th February 2019 and published on 1st March 2019.

76. It is the Applicants' case that the County Governments of Kericho and Bomet, acting on behalf of the *Kipsigis* and *Talai* Clans, amongst others, instituted a historical land injustice claim against the colonial government and the government of Kenya and that in determining the claims, the National Land Commission vide the Kenya Gazette of 1st of March 2019, published its recommendations allowing the claims by the said County Governments.

77. It is the applicants' case that the NLC directed for a resurvey to be done on the parcels of land being held by the applicants to determine if there is any surplus land or residue to be held in trust for the community by the County Governments for public purposes; that the County Governments and the Multi-Nationals were required to sign a Memorandum of Understanding in which the Multi-Nationals (the applicants) were required to provide land for public utilities to the community and that renewal of the leases to these lands was to be withheld until an agreement is reached with the respective County Governments of Kericho and Bomet.

78. With regard to the payable rates and rent registered in favour of the applicants, the commission recommended that these should be enhanced to benefit the national and county governments and that all the 999 year old leases be converted to the constitutional requirement of 99 years.

79. According to the Applicants, the afore stated decision of the NLC offends the principles of natural justice because the National Land Commission did not notify them of the claims by the County Governments of Kericho and Bomet, despite knowing that the decision would adversely affect the interests of the Applicants and that the decision of the NLC contravenes **Articles 47** and **50(1)** of the **Constitution** and **Sections 4(3)** and **(4)** and **5** of the **Fair Administrative Actions Act** which requires parties to be afforded a fair hearing.

80. The applicants have further deponed that the proceedings of the National Land Commission were a nullity because they were conducted in the absence of any regulations governing their proceedings; that the National Land Commission (Historical Injustices) Regulations were annulled by Parliament on 28th March 2018 and that the National Land Commission directives were in reality determinations and directly contravened **Section 15(9)** of the **National Land Commission Act**. According to the applicants, the National Land Commission recommendations were in excess of jurisdiction in so far as it made reference to *inter-alia* the leasing arrangements, rates and rent of the Applicants properties which are private land.

81. In ELC number J.R 4/2020, the Ex-parte Applicant instituted Judicial Review proceedings seeking orders of *certiorari*, *prohibition* and *declaratory orders* with respect to the Gazette Notice number 1995 published on 1st March 2019 dated 18th February 2019. It is the Applicant's case that on various dates in 2018, several parties filed historical land injustice claims against it with respect to various properties owned by the Applicant, which claims were admitted by the National Land Commission.

82. The Applicant averred that it instituted a suit being ***H.C.C.C No 255 of 2018-Kakuzi Plc vs AG & National Land Commission*** in which it sought and was granted interim conservatory orders staying the proceedings before the National Land Commission; that on 15th of October 2018, the National Land Commission served the Applicant with the hearing notice for 1st November 2018 in respect of other historical land injustice claims and that on the 26th of October 2018, the Applicant was granted interim conservatory orders in Petition 369 of 2018 staying the historical land injustice proceedings and any other historical land claims and proceedings.

83. According to the applicant, by the time the National Land Commission matters came up for hearing on the 1st November 2018, all the historical injustice claims against the applicant had been stayed pending the determination of the Petitions in the High Court; that the above notwithstanding, vide the Kenya Gazette of 1st of March 2019, the National Land Commission published recommendations stating *inter alia* that the commission will stay the hearings of the historical land injustice until a final determination is reached by Court; and that however, the NLC recommended that the applicant, Kakuzi Limited, should surrender all public utilities on their land including Schools, Markets, Police Stations, Hospitals, Public Roads of access wayleaves and easements to the National and County government as appropriate.

84. It was averred by the applicant that the NLC further recommended that all leases for land held by the applicant in Murang'a County should not be renewed until the land injustice claim is heard and determined; that the renewal of leases should be held in abeyance until an agreement is reached with the respective County governments; that with regard to rates and rents on such lands, these should be enhanced to benefit the National and County governments and finally that all the 999 year leases to convert 99 years.

85. According to the Applicant in ELC J.R number 4 of 2020, the decision of NLC of 1st March 2019 was contrary to the principle of natural Justice because the National Land Commission did not conduct any hearings in respect to the pending court matters; that the applicant was not given an opportunity to be heard in its defence in respect of the recommendations relating to the alleged public utilities situate on the applicant's privately held properties and that the National Land Commission acted unreasonably and unfairly by issuing its recommendations contrary to **Articles 47** and **50(1)** of the **Constitution** and **sections 4(3)** and **(4)** and **5** of the **Fair Administrative Act.**

86. The Applicant in ELC J.R number 4 of 2020 further argued that that the National Land Commission's proceedings were a nullity because they were conducted in the absence of any regulations governing the proceedings; that the National Land Commission (Historical Injustice) Regulations 2017) which set out the procedures in respect of the admission of historical injustice claims were annulled by Parliament on the 28th March 2018 and finally that the National Land Commission's directives, though couched as recommendations, were determinations contrary to **section 15(9)** of the **National Land Commission Act**.

87. In ELC J.R number 5 of 2020, the Ex-parte Applicant instituted Judicial Review proceedings seeking orders of *certiorari*, *prohibition* and *declaratory orders* with respect to the Gazette Notice number 1995 published on 1st March 2019. It is the Applicant's case that on 7th June 2018, it was served with an invite dated 5th June 2018 to attend a session relating to a complaint by Kimasas Farmers Co-operative Society.

88. According to the applicant, none of the documents indicated in the complaint were served on it; that the letter by the National Land Commission was not addressed to Simeon Kipketer Sawe, the owner of LR 9285/4 who was an affected party and that vide the Kenya Gazette of 1st March 2019, the NLC recommended, *inter-alia*, that all the resultant sub-divisions were done illegally and should be cancelled and that L.R No. 9285/2 was given to Kimasas Co-operative Society Limited.

89. It is the Applicant's case that the afore stated decision of the NLC contravened the principles of natural justice as the Applicant was not afforded a fair opportunity to be heard and that there was no hearing in respect of the suit land; that the omission to provide a fair opportunity to the applicant was a deliberate attempt at disenfranchisement contrary to **Article 41** of the **Constitution of Kenya** and further that the decision of the NLC was in direct contravention of **Articles 47** and **50** of the **Constitution 2010** and **section 4(3)** and **(4)** and **5** of the **Fair Administrative Actions Act** which requires that parties be given a fair hearing.

90. The applicant in JR Number 5 of 2020 argued that the proceedings by the NLC were a nullity because they were conducted in the absence of any regulations; that the Historical Injustices (Regulations) 2017 were annulled on 28th March 2018; that the recommendation of the National Land Commission to revoke L.R 9285 and transfer the same to Kimasas Co-operative Society was contrary to the principles of fair hearing.

91. Black's Law Dictionary (8th Edition) defines consolidation as ;-

> ***"to combine, through court order, two or more actions involving the same parties or issues into a single action ending in a single judgment, or sometimes, separate judgments…"***

92. As correctly submitted by the parties, the Supreme Court in ***Law Society of Kenya vs Centre for Human Rights & Democracy & 12 others [2014] eKLR*** enunciated the general purpose of consolidation of suits as follows:

> ***"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 intended to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party who opposes it."***

93. Consolidation is a process by which two or more suits are by order of the Court combined or united and treated as one cause or matter. The main purpose of consolidation is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. In the English case of ***Harwood vs Statesman publishing Co. Ltd & others (1929) ALL ER 554*****, Sankey LJ** held that an order to consolidate may be made when two or more actions are pending between the same Plaintiff and the same Defendant or between the same Plaintiff and different Defendants. However, there must be some common measure of fact in the two or more cases which it is desired

to consolidate.

94. The practical considerations for consolidation of suits was well laid down in the case of ***Benson G. Mutahi vs Raphael Gichovi Munene Kabutu & 4 others [2014] eKLR*** where the learned Judge persuasively stated as follows:

> ***"The Civil Procedure Rules mandate Courts to consider consolidation of suits and in so doing, to be guided by the following :-***
>
> ***1. Do the same question of law or fact arise in both cases?***
>
> ***2. Do the rights or reliefs claimed in the two cases or more arise out of the same transaction or series of transaction?***
>
> ***3.Will any party be disadvantaged or prejudiced or will consolidation confer undue advantage to the other party?"***

95. In ***Kimani Waweru & 28 others vs Law Society of Kenya & 12 others [2014] eKLR*****,** the court stated thus:

> ***"Consolidation of suits does not, unlike the principles of sub judice and res judicata, depend on the parties in the different suits being the same or litigating in the same capacity. Consolidation only requires that the same or similar questions of law and fact be present in two or more suits to be consolidated. See Stumberg and Anor. v. Potgieter [1970] E.A. 323, where the traditional considerations in consolidation of suits were given as follows:***
>
> ***"Consolidation of suits under Order 11 of the Civil Procedure (Revised) Rules 1948 should be ordered where there are common questions of law or fact in actions having sufficient importance in proportion to the rest of each action to render it desirable that the whole of the matters should be disposed of at the same time."***

96. From the foregoing, it is clear that the Court has wide discretion in ordering consolidation. Consolidation will be ordered if there is a common question of law or fact in the suits, the reliefs or rights sought arise from the same or a series of transactions, or for any other reason, such as for convenience, avoiding multiplicity of suits, expedition and in order to meet the overriding objective set out in the **Civil Procedure Act**.

97. The three Judicial Review Motions, which are the subject of this application, seek to impugn the recommendations of the National Land Commission published vide gazette notice dated 1st March 2019. The grounds on which the three applications are premised on are that the National Land Commission contravened **Articles 47** and **50 (1)** of the **Constitution 2010** and **Section 4 (3) & (4)** and **5** of the **Fair Administrative Action Act** and further that the determinations by the NLC were a nullity for having been conducted in the absence of any regulations governing its proceedings.

98. The applicants in the three suits have further argued that the National Land Commission (Historical Injustice Regulations) 2017 which set out the procedures in respect of admission of historical land injustice claims were annulled by Parliament on the 28th March 2018.

99. To these extend, it is the finding of the court that the three suits raise similar questions of law, to wit, the right of the applicants to be heard pursuant to the provisions of the Constitution and the Fair Administrative Act, and whether the proceedings of the NLC in respect of the suit land are a nullity on the ground that the same were undertaken in the absence of Regulations, if at all.

100. As I have stated above, the three suits seek similar reliefs of *certiorari*, *prohibition* and declaratory orders in respect of the determination of the National Land Commission published in the Gazette Notice number 1995 of 1st March 2019. The transactions leading to the reliefs sought are the proceedings carried out by the National Land Commission with regard to historical land injustice claims which proceedings led to the recommendations which were published in the impugned gazette notice.

101. That being the case, it is the finding of this court that there is a common question in all the matters of whether the proceedings and/or investigations by the National Land Commission, regardless of the outcome, are a nullity for want of legislation governing them, and whether the applicants were afforded a fair hearing, a central and dispositive issue, which, if left to separate judicial determinations may cause confusion and disrepute to the court.

102. As correctly argued by the Applicants, the mode of determination of a judicial review application is by way of affidavit evidence. The mere fact that there are many different advocates appearing for the Respondents and the Interested Parties does not in itself point to any prejudice that the parties may suffer if consolidation of the suits is ordered. To the contrary, the consolidation of the suits will hasten the hearing and determination of the three matters. In conclusion it is the finding of this court that the application for consolidation of ELC J.R Number 3, 4, and 5 is merited.

103. The law governing applications for empanelment of expanded benches of the High Court or as in this instance, the Environment and Land Court, being a court of equal status with the High Court, is **Articles 165 (4) (d)** of the Constitution which provides that the High Court (ELC) may certify a matter raising a substantial question of law under **clause (3) (b)** or **(d)** to be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.

104. From the foregoing, it is clear that for a matter to be referred to the Chief Justice for empanelment of a bench of an uneven number of judges, this Court must certify that the matter raises a substantial question of law in reference to whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened or pursuant to this court's jurisdiction to hear and determine any question regarding the interpretation of the Constitution.

105. Indeed, this court has the jurisdiction to tackle constitutional questions. This position was affirmed by the Court of Appeal in ***Daniel N Mugendi vs Kenyatta University & 3 others [2013] eKLR*** as follows:

> ***"…we venture to put forth the position that as we have concluded that the Industrial Court can determine industrial and labour relations matters alongside claims of fundamental rights ancillary and incident to those matters, the same should go for the Environment & Land Court, when dealing with disputes involving environment and land with any claims of breaches of fundamental rights associated with the two subjects."***

106. While discussing the question of certification of a matter by a single Judge of the High Court pursuant to **Article 165 (3)** and **(4)** of the Constitution, the Court of Appeal in the case of ***Okiya Omtatah Okoiti & another vs Anne Waiguru - Cabinet Secretary, Devolution and Planning & 3 others [2017] eKLR*** **e**xpressed itself thus:

> ***"There are, in our view, parallels to be drawn between certification for purposes Article 163(4)(b) of the Constitution and certification for purposes of Article 165(4) notwithstanding that the drafters of the Constitution, in providing for certification of matters for purposes of appeal to the Supreme Court under Article 163(4)(b) stipulated that a matter should be of "general public importance", The word, "substantial" in its ordinary meaning, means "of considerable importance". There is therefore wisdom to be gained from the pronouncements of the Supreme Court of Kenya respecting interpretation of Article 163(4)(b). In Hermanus Phillipus Steyn v Giovanni Gnechi- Ruscone [2013] eKLR the Supreme Court of Kenya pronounced governing principles for purposes of certification under Article 163(4)(b) some of which are relevant in the context of certification under Article 165(4). Drawing therefrom, we adopt, with modification, the following principles:***
>
> ***"(i) For a case to be certified as one involving a substantial point of law, the intending applicant must satisfy the Court that the issue to be canvassed is one the determination of which affects the parties and transcends the circumstances of the particular case and has a significant bearing on the public interest;***
>
> ***(ii) The applicant must show that there is a state of uncertainty in the law;***
>
> ***(iii) The matter to be certified must fall within the terms of Article 165 (3)(b) or (d) of the Constitution;***
>
> ***(vi) The applicant has an obligation to identify and concisely set out the specific substantial question or questions of law which he or she attributes to the matter for which the certification is sought."***
>
> ***It is our judgment therefore, that whether a matter raises a substantial point of law for purposes of Article 165(4) of the Constitution is a matter for determination on a case-by-case basis. The categories of factors that should be taken into account in arriving at that decision cannot be closed."***

107. The Applicants contention is that their rights to fair hearing, fair administrative action and the right to property as protected under **Articles 40, 47** and **50** in the bill of rights have been infringed. The issues raised in the current Judicial Review applications, therefore, come under the purview of **Article 165 (3)(b)** and **(d)** of the Constitution.

108. The Applicants contend that there are substantial issues to be tried, which are whether the National Land Commission proceedings, which, according to the applicants, were conducted in the absence of regulations, are a nullity and whether the National Land Commissioner afforded the applicants a fair hearing as provided for under the **Fair Administrative Actions Act** and **Articles 47** and **50** of the Constitution.

109. The Respondents and the Interested Parties have argued that whereas by dint of the fact that historical land injustices entails a new dispensation with the potential of nullifying title to land, the reliefs sought in the instant applications are not so complex as to constitute a substantial question of law and that the applicants have not demonstrated that the questions of law raised in the applications transcend the circumstances of these particular applications.

110. What constitutes a substantial question of law requiring the empaneling of an uneven number of Judges has not been defined by the Constitution. The Indian Supreme Court in the case of ***Chunilal Mehta vs Century Spinning and Manufacturing Co AIR 1962 SC 1314*****,** laid down the following test for determining whether a question of law raised in a case is substantial question of law or not:

> ***"…The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so, whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest Court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."***

111. The court in the case ***National Super Alliance (NASA) Kenya vs Independent Electoral and Boundaries Commission [2017] eKLR*** stated as follows:

> ***"The test rendered by the Supreme Court of India for determining whether a matter raises substantial question of law are therefore: (1) whether, directly or indirectly, it affects substantial rights of the parties, or (2) whether the question is of general public importance, or (3) whether it is an open question, in the sense that the issue has not been settled by pronouncement of the Supreme Court or the highest court of the land, or (4) the issue is not free from difficulty, or (5) it calls for a discussion for alternative view.***

In my view, the above considerations offer proper guidelines and an insight in determining whether or not a matter raises "a substantial question of law" for the purposes of Article 165(4) of the Constitution. The Court may also consider whether the matter is moot in the sense that the matter raises a novel point; whether the matter is complex; whether the matter by its nature requires a substantial amount of time to be disposed of; the effect of the prayers sought in the petition and the level of public interest generated by the petition. These however are mere examples since the Article employs the word "includes." Accordingly, the list cannot be exhaustive and the Courts are at liberty to expand the grounds as occasions demand."

112. The courts have held that the complexity or novelty of issues does not by themselves constitute sufficient reason to certify the matter for empanelment of a bench of an uneven number of Judges. For instance, in the case of ***J. Harrison Kinyanjui vs Attorney General & another [2012] eKLR*** it was held that:

"Therefore, giving meaning to "substantial question" must take into account the provisions of the Constitution as a whole and need to dispense justice without delay particularly given a specific fact situation. In other words, each case must be considered on its merits by the judge certifying the matter. It must also be remembered that each High Court judge, has authority under Article 165 of the Constitution, to determine any matter that is within the jurisdiction of the High Court. Further, and notwithstanding the provisions of Article 165(4), the decision of a three Judge bench is of equal force to that of a single judge exercising the same jurisdiction. A single judge deciding a matter is not obliged to follow a decision of the court delivered by three judges….

A matter may raise complex issues of fact and law but this does not necessarily imply that the matter is one that raises substantial issues of law. Judges are from time to time required to determine complex issues yet one cannot argue that it means that every issue is one that raises substantial questions of law. Thus, there must be something more to the "substantial question" than merely novelty or complexity of the issue before the court. It may present unique facts not plainly covered by the controlling precedents. It may also involve important questions concerning the scope and meaning of decisions of the higher courts or the application of well-settled principles to the facts of a case."

113. In determining whether the matters herein contain substantial questions of law, it should be noted that this court may, as of necessity, look into the merit of the decisions of the National Land Commission if called upon to do. This was the position that the Court of Appeal took in ***Suchan Investment Limited vs Ministry of National Heritage & Culture & 3 others [2016] eKLR*** where it held as follows:

"Analysis of Article 47 of the Constitution as read with the Fair Administrative Action Act reveals the implicit shift of judicial review to include aspects of merit review of administrative action..."

114. This position was reiterated by the Court of Appeal in ***Judicial Service Commission & another vs Lucy Muthoni Njora [2021] eKLR*** where it held as follows:

"We emphatically find and hold that there is nothing doctrinally or jurisprudentially amiss or erroneous in a judge's adoption of a merit review in judicial review proceedings. To the contrary, the error would lie in a failure to do so, out of a misconception that judicial review is limited to a dry or formalistic examination of the process while strenuously and artificially avoiding merit. That path only leads to intolerable superficiality."

115. However, a perusal of the applications shows that the applicants have not asked the court to look into the merit of the decision of the National Land Commission *per se*, but rather, the process that the commission followed in arriving at the said decision.

116. The National Land Commission's mandate with respect to investigations into historical land injustices is clearly expressed in the Constitution and under the **National Land Commission Act**. **Article 67 (1) (e)** of the Constitution establishes the National Land Commission and provides one of its functions as follows:

"to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress."

117. Section 15 of the **National Land Commission Act**, enacted pursuant to **Article 67 (3)** of the **Constitution**, provides that the commission shall receive and investigate all historical land injustice complaints and recommend appropriate recommendations. The Applicants contends that while purporting to investigate the claims of historical land injustices, the National Land Commission ran afoul the provisions of the **Fair Administrative Actions Act** and **Articles 47** and **50** of the **Constitution**.

118. The principles governing the right to a fair hearing have been the subject of numerous decisions, both in the superior courts and this court. Indeed, the National Land Commission, like any other constitutional body, is mandated to exercise its functions in conformity with the provisions of **Articles 47** and **50** of the **Constitution**, as well as the **Fair Administrative Act**.

119. That being the case, and in view of the numerous decisions of the superior courts on the applicability of **Articles 47** and **50** of the **Constitution**, as well as the **Fair Administrative Act**, it is the finding of this court that the issue of whether the applicants were afforded a fair hearing by the National Land Commission or not is neither novel nor complex to require the empanelment of a bench of an uneven number of Judges.

120. With respect to the question of whether the National Land Commission proceedings are a nullity because they were carried out in the absence of regulations, it is the finding of this court that this cannot be said to be tantamount to a substantial question of law. The constitutionality or lack thereof of administrative actions, *viz a viz* the applicable Regulations, have been litigated upon times without number.

121. That being the case, it is the finding of this court that the issues raised in the Judicial Review applications are neither novel nor complex, and neither is there uncertainty in law regarding them. The issues raised by the applicants call for the application of constitutional and legal principles, which principles have already having been established, and can be applied by a single judge. In this regard this court agrees with the holding of Korir J in the case of ***Wanjiru Gikonyo vs Attorney General & another; Kajiado Country Governor and 4 others (Interested Parties) [2020] eKLR,*** where he stated as follows:

> ***"It is also noted that although the petition raises novel issues which are of public interest, these are the kind of matters that confront judges on a regular basis. The issues call for the application of constitutional and legal principles to the facts of the case at hand. Those constitutional and legal principles are already established and a single judge can apply them in the manner that a panel of judges would do. In this regard I agree with Odunga, J when he observes in Wycliffe Ambetsa Oparanya (supra) that:***
>
> ***"25. In my view a High Court Judge ought not to shy away from his constitutional mandate of interpreting and applying the Constitution. Whereas the Constitution permits certain matters to be heard by a numerically enlarged bench, that is an exception to the general legal and constitutional position and it is in my view an option that ought not to be exercised lightly."***

122. Flowing from the above findings and conclusions, the Application dated 19th May 2020 partly succeeds in the following terms:

> ***i. ELC J.R numbers 3, 4 and 5 be and are hereby consolidated.***
>
> ***ii. The prayer for empanelment of a bench of an uneven number of Judges to hear the consolidated suits is hereby declined.***
>
> ***iii. The Preliminary Objections dated 16th July 2020 and 23rd June 2020 be and are hereby dismissed with no order as to costs.***
>
> ***iv. Each party to bear its/his own costs.***

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 16TH DAY OF DECEMBER, 2021.

O. A. Angote

Judge

In the presence of:

Ms. Muma for Dr. Ojiambo (SC) for the Applicants

Ms Kamwere and Kerubo for the Respondent

Ms Sitati for Mr. Wanyama for the Interested Parties

Court Assistant: Nechesah