



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 94 OF 2019

BETWEEN

**IN THE MATTER OF AN APPLICATION FOR LEAVE FOR JUDICIAL REVIEW ORDERS OF CERTIORARI,
PROHIBITION AND DECLARATORY ORDERS**

BETWEEN

REPUBLICAPPLICANT

VERSUS

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

MINISTRY OF LANDS & PHYSICAL PLANNING.....2ND RESPONDENT

COUNTY GOVERNMENT OF MURANGA.....3RD RESPONDENT

AND

KAKUZI DIVISION DEVELOPMENT

ASSOCIATION.....1ST INTERESTED PARTY

GACHANGI MAKUYU IDPS, GAICHANJIRU

SELF HELP GROUP, KIHINGANDA SELF HELP GROUP,

KINYANGI SQUATTERS, KITITO COMMUNITY IDPs,

MAKUYU SISAL IDPs.....2ND INTERESTED PARTY

EXPARTE:KAKUZI PLC

RULING

Introduction

1. The *ex parte* Applicant herein namely, Kakuzi PLC (hereinafter “the Applicant”), is company incorporated in Kenya and registered as under the Companies Act, and is involved in the production and export of agricultural products. The said Applicant filed an application by way of Chamber Summons dated 1st April 2019, seeking leave to commence judicial review proceedings against the Respondents herein, with respect to recommendations in the Gazette Notice 1995 dated 18th February 2019 published by the National Land Commission in the *Kenya Gazette Vol. CXXI-No. 27* of 1st March 2019.

2. The said recommendations arise from historical land injustice complaints made by the Interested Parties herein against the Applicant with respect to leases of land held by the Applicant in Muranga County. The National Land Commission is sued as the 1st Respondent, while the Ministry of Lands & Physical Planning is sued as the 2nd Respondent. The 3rd Respondent is the County Government of Muranga.

3. On 1st April 2019, this Court granted the Applicants leave to seek judicial review orders against the Respondents, and also directed that the said leave operates as a stay of implementation of the afore-stated gazette notice. The Applicants subsequently filed a Notice of Motion dated 12th April 2019 seeking the following orders:

a) **An order of Certiorari to remove into the High Court for purposes of being quashed and quashing the Gazette Notice published on 1st March 2019 in so far it relates to the National Land Commission recommendations dated 18th February 2019 in so far as it relates to NLC/HLI/530/2018, NLC/HLI/069/2017, NLC/HLI/063/2017, NLC/HLI/006/2017, NLC/HLI/049/2017, NLC/HLI/170/2018, NLC/HLI/176/2018 and NLC/HLI/052/2017.**

b) **An order of Prohibition prohibiting the Director of Survey under the Ministry of Lands & Physical Planning, the National Land Commission and the County Government of Muranga from implementing the recommendations in the Gazette Notice published on 1st March 2019 in so far as it relates to the National Land Commission recommendations dated 18th February 2019 in in so far as it relates to NLC/HLI/530/2018, NLC/HLI/069/2017, NLC/HLI/063/2017, NLC/HLI/006/2017, NLC/HLI/049/2017, NLC/HLI/170/2018, NLC/HLI/176/2018 and NLC/HLI/052/2017.**

c) **A Declaratory Order that the National Land Commission proceedings and determinations dated 18th February 2019 in so far as it relates to NLC/HLI/530/2018, NLC/HLI/069/2017, NLC/HLI/063/2017, NLC/HLI/006/2017, NLC/HLI/049/2017, NLC/HLI/170/2018, NLC/HLI/176/2018 and NLC/HLI/052/2017 are unlawful and tainted with illegality for contravening Section 4 (3) and (4) of the Fair Administrative Action Act and Articles 47 and 50 (1) of the Constitution and are consequently null and void.**

d) **Any other or further and consequential orders and/or directions that may be given.**

e) **Costs of the application be awarded to the Applicants.**

The Preliminary Objections

4. Among the responses to the said Notice of Motion was a Notice of Preliminary Objection filed by the 2nd Respondent dated 22nd July 2019, principally objecting to this Court's jurisdiction to hear and determine the Applicants' application. The 2nd Respondent objects to the Applicants' application on the following grounds:

a) *That this Court lacks the jurisdiction to hear and determine the present application since it is a dispute relating to the environment and the use and occupation of, and title to, land by virtue of the provisions of Article 165 (5) of the Constitution*

b) *That section 13(1) of the Environment and Land Court Act provides that the Environment and Land Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution, and shall have power to hear and determine disputes relating to environmental planning and protection, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources; disputes relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land and any other dispute relating to environment and land.*

c) *That section 13(7) of the Environment and Land Court Act provides that the Environment and Land Court can issue prerogative orders, which provision if read together with the provisions of Article 162(2) of the Constitution ousts the jurisdiction of this Court to hear and determine this case.*

d) *That the Applicant's case is premised on the decision on the consequences of the National Land Commission's decision on their rights and interest over land.*

e) *That the Applicant's case being a case that is seeking the exercise of supervisory jurisdiction over an administrative tribunal's decision in respect to interest, rights over, title to land can only be determined by the Environment and Land Court.*

5. This Court directed that the said Notice of Preliminary Objection be heard and determined first, by way of written submissions. Mr. K. Odhiambo, a state counsel in the Attorney General's Office filed submissions dated 29th July 2019 for the 2nd Respondent. . It was argued therein that the Applicants' case is premised on the consequences of the National Land Commission's decision on their rights and interest over land, and which it now seeks to challenge by seeking prerogative orders. Therefore, that the Applicants are seeking the exercise of supervisory jurisdiction over an administrative tribunal's decision in respect to interests, rights over, and title to land, which can only be determined by the Environment and Land Court.

6. The decisions of the Supreme Court of Kenya in **Samuel Kamau Macharia & Another v. Kenya Commercial Bank & 2 Others, Application No. 2 of 2011 [2012] eKLR**, and in **In Re The Matter of the Interim Independent Electoral Commission** which cited with approval the Court of Appeal's decision in **Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited (1989) KLR 1** ,were relied upon by the 2nd Respondent on the source of a Court's jurisdiction.

7. Mr. Odhiambo in this respect submitted that the substratum of the instant application are the recommendations made by the 1st Respondent in the impugned Gazette Notice, and that the implementation of the said recommendations go to the disputes contemplated by under Article 162(2)(b) of the Constitution and section 13(1) of the Environment & Land Court Act, and should be handled by the Environment & Land Court Further, that whereas Article 165 of the Constitution establishes the High Court, Article 165(5) limits the jurisdiction of the High Court to the extent that the High Court shall not have jurisdiction in respect of matters falling within the jurisdiction

of the courts contemplated in Article 162(2) established to hear and determine disputes relating to the environment and the use and occupation of, and title to land.

8. In addition, that even though the Applicants' cause of action is the procedure used by the 1st Respondent in arriving at its decision, the said decision rests on the Applicants' proprietary rights. In any event, that section 13(7) of the Environment and Land Court Act also provides that the Environment and Land Court has jurisdiction to issue the prerogative orders sought in the present application.

9. Mr. Wahome, the counsel for the 1st Respondent, and Mr. Ambani, the counsel for the 1st Interested Party, submitted that they would support the Preliminary Objection, and associated themselves with the 2nd Respondent's submissions.

The Response

10. Kaplan & Stratton Advocates filed submissions dated 11th September 2019 for the Applicant, wherein it was urged that the Applicant is aggrieved by the unfair procedure utilized by the 1st Respondent, as it was denied a reasonable opportunity to state its case before the decision published in the impugned Gazette Notice was made. Further, that the Applicant has instituted the present judicial review proceedings pursuant to the Constitution of Kenya, Law Reform Act, Fair Administrative Action Act, Civil Procedure Act and Civil Procedure Rules.

11. Mr. Fred Ojiambo SC, the counsel for the Applicant, explained that the judicial review remedy is a constitutional remedy embedded in Article 47 of the Constitution, which is available to a party where it is proved that a party has been denied the right to administrative action which is expeditious, lawful, and reasonable and procedurally fair. Reliance was placed on the decisions in **Republic vs Principal Secretary, Ministry of Interior & Others, (2014) eKLR** and **Republic vs Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji, (2014) eKLR** that the purpose of judicial review is to ensure that the individual receives fair treatment, and that judicial review proceedings are concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision.

12. It was thus the Applicant's submission that the instant application is brought *inter alia* under section 9 of the Fair Administrative Action Act which expressly and specifically grants the High Court jurisdiction to determine judicial review proceedings against any administrative action, and does not deal with the merits of the 1st Respondent's decision or raise any issues under section 13 of the Environment and Land Act. Furthermore, that the conduct of proceedings by a decision maker is a matter that falls within the jurisdiction of the High Court under the provisions of section 7 and 9 of the Fair Administrative Action Act.

13. Mr. Ojiambo SC referred the Court to the Notice of Motion application dated 12th April 2019 and the Statutory Statement filed on 10th April 2019, to illustrate that the Applicant has not pleaded any legal issues in respect of the merits of the 1st Respondent's decisions. Counsel submitted that the Applicants' main claim from the pleadings is that the proceedings offended the principles of natural justice as the Applicant was not afforded a fair opportunity to be heard by the 1st Respondent contrary to Articles 47 and 50(1) of the Constitution and the statutory rights granted by the Fair Administrative Action Act.

14. The Applicants relied on the decision by the Court of Appeal on the meaning and source of jurisdiction in **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (supra)**. Article 165(6) of the Constitution was also cited for the submission that it expressly bestows and does not in any way limit the High Court's supervisory jurisdiction over a tribunal and subordinate court. In addition, the decision in **Republic vs The Chief Land Registrar and Another (supra)** was cited for the position that jurisdiction is determined on the basis of pleadings and not the substantive merits or substratum of the case. Further, that the court as a preliminary point ought to consider the cause of action as pleaded in the judicial review proceedings.

15. It was the Applicant's further submission that the Respondents have misconstrued the premise of the case in the instant application. That the main object of the Applicant's case is to challenge the legitimacy of the procedure undertaken by the 1st Respondent and does not deal with the environment and use and occupation of and title to land as set out under Article 162 of the Constitution. Further, that the present application instead falls under Article 47 and 165 (6) of the Constitution and is not an appeal from the 1st Respondent's decision.

16. Therefore, that the Respondents are wrong in concluding that the Applicant's case is in respect to the substance and consequences of the 1st Respondent's determination on their rights and interest over land, which would invoke the jurisdiction of the Environment and Land Court in exercise of its jurisdiction donated to it by Article 162(2) of the Constitution. In addition, that the jurisdiction of the Environment and Land Court can only be invoked in the event a dispute is declared by a party in regards to the provisions of section 13 of the Environment and Land Court Act. Lastly, that the Environment and Land Court only has jurisdiction to issue prerogative orders when it is dealing with issues relating to the substance of a dispute as stated in section 13, but not where the issue is fair administrative action.

17. In conclusion, the Applicants contended that this Court has jurisdiction to hear and determine the instant application pursuant to Article 165(6) of the Constitution and sections 7 and 9 of the fair Administrative Action Act.

The Determination

18. I have considered the arguments made by the Applicant, Respondents and Interested Parties. The main issue for determination is whether this Court has jurisdiction to hear and determine the Applicant's Notice of Motion dated 12th April 2019. This Court is in this respect guided by the often cited decision of the Court of Appeal in **Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd [1989] KLR 1** as follows:

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under

which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”

19. The Court of Appeal's decision was affirmed by the Supreme Court of Kenya in the holdings in **Samuel Kamau Macharia & Another v. Kenya Commercial Bank & 2 Others, Application No. 2 of 2011 [2012] eKLR**, and **In Re The Matter of the Interim Independent Electoral Commission[2011] eKLR**.

20. The 2nd Respondent argued that the High Court does not have jurisdiction for two reasons. The first reason that has been propounded by the 2nd Respondent is that the subject matter in this suit is one that falls within the exclusive jurisdiction of the Environment and Land Court within the meaning of Article 162(2)(b) of the Constitution and section 13 of the Environment and Land Court Act. The second reason is that the Environment and Land Court can also grant judicial review remedies sought by the Applicants under the said provisions.

21. In this respect, the relevant provisions that grant the Environment and Land Court jurisdiction are Article 162(2) of the Constitution which provides as follows:

“162. (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).”

22. The Environment and Land Court Act was consequently enacted, which elaborates on the jurisdiction of the Environment and Land Court in section 13 thereof as follows:

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

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

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

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

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

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

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

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

23. The Applicant's argument on the other hand is that the High Court has jurisdiction by virtue of its supervisory jurisdiction to review the lawfulness of the 1st Respondent's decision under Article 165(6) of the Constitution, and section 7 and 9 of the Fair Administrative Action Act. Article 165 (6) of the Constitution provides that the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function in this regard. Therefore, Article 165(6) expressly bestows and does not limit the High Court's jurisdiction over tribunals, subordinate courts and quasi-judicial bodies, except as provided in Article 165(5), which provides that the High Court shall not have jurisdiction in matters reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or falling within the jurisdiction of the courts contemplated in Article 162 (2).

24. The Applicant has also relied on section 7 and 9 of the Fair Administrative Actions Act for the argument that it is the High Court that is given exclusive jurisdiction to hear judicial review applications of administrative action. Section 7 provides that a person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to (a) a court or a tribunal. The section also provides detailed grounds for review. Section 9 on the other hand provides as follows:

(1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction

is conferred pursuant to Article 22(3) of the Constitution. (2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

(5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.

25. The Supreme Court in **Republic vs Karisa Chengo & 2 Others** (2017) e KLR amplified and pertinently held that each of the Superior Courts established by or under the Constitution has jurisdiction only over matters exclusively reserved to it by the Constitution, or by a statute as permitted by the Constitution. The clarification of the nature of a matter or of the cause of actions that is before the Court is therefore a necessary in a determination as to whether a Court has jurisdiction or not, as was emphasized in **Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd** [supra] . The method of clarification was decided by J. Mativo in **Republic v Chief Land Registrar & Another** [2019] e KLR as follows:

"Jurisdiction is determined on the basis of pleadings and not the substantive merits of the case. The South African Constitutional Court[11] had this to say:-

"Jurisdiction is determined on the basis of the pleadings, [12]... and not the substantive merits of the case... In the event of the Court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim ..., one that is to be determined exclusively by.....{another court}, the High Court would lack jurisdiction..."

26. The South African decision referred to by the learned Judge is **In the matter between Vuyile Jackson Gcaba vs Minister for Safety and Security First & Others Case CCT 64/08 [2009] ZACC 26**. Therefore, in essence it is the dispute that is before the Court that will determine whether a Court does or does not have jurisdiction. The nature of the dispute before this Court therefore needs to be clarified from the pleadings filed by the Applicants, in order to make a finding whether or not this Court has jurisdiction to hear and determine the same. A dispute is in this respect defined by the **Blacks Law Dictionary, Tenth Edition** at page 572 as a conflict or controversy that has arisen in a lawsuit, while a cause of action is defined as *"a group of operative facts giving rise to one or more bases of suing; a factual situation that entitles one to obtain a remedy in court from another person."*

27. In the present application, the Applicant is aggrieved by the decision made by the 1st Respondent in the impugned Gazette Notice, in which it made various recommendations as regards complaints made with respect to historical injustices on land. The Applicant's grievance is primarily one of the procedure employed by the 1st Respondent in reaching the said decision. The Applicants' cause of action is stated in paragraph 3 (i) of its Statutory Statement dated 1st April 2019 as follows:

a. **The Decision offends the principles of natural justice as there were no hearings held by the NLC in respect of the claims since there were pending constitutional petitions in HCCC 255 of 2018 Kakuza PLC vs A.G and NLC. The Applicant was not given an opportunity to be heard in its defence in respect of the recommendations relating to the alleged public utilities in the Applicant's properties, which are held privately.**

b. **In addition, the fact that the historical land injustice claims were pending for hearing in the High Court as correctly pointed out by the NLC, the NLC acted unreasonably and unfairly by issuing its recommendations. The NLC ought not to have issued any recommendations until the High Court Petitions were finalized.**

c. **Further, there had been no prior notification and documentation issued by the NLC in respect of any claims pertaining to the alleged public utilities so as to afford the Applicant an opportunity to file its defence in this regard. In this regard, if the Applicant had been made aware of the issue in respect of public utilities, it would have prepared its Defence so as to specifically deal with each and every alleged utility in terms of the exact location and size thereof together with the Applicant's explanation on each alleged utility. In addition there was no hearing conducted by the NLC in respect of the recommendation pertaining to the alleged public utilities.**

d. **Consequently, the decision by the NLC is in direct contravention of Articles 47 and 50 (1) of the Constitution 2010 and Section 4 (3) & (4) and 5 of the Fair Administrative Action in respect of the requirement for a fair hearing.**

e. **The NLC proceedings are a nullity as they were conducted in the absence of any Regulations governing their proceedings. The NLC (Historical Injustices) Regulations, 2017 which sets out the procedures in respect of the admission of historical injustice claims and the hearing of the same were annulled by Parliament on 28th March 2018. It was therefore unlawful for the NLC to make the recommendations in the absence of Regulations.**

f. The NLC directives though couched as recommendations are in reality determinations in direct contravention of Section 15 (9) of the National Land Commission Act.

g. The NLC recommendations are in excess of the jurisdiction of NLC under Section 15 (9) of the National Land Commission Act in so far as they make reference to *inter alia* the leasing and rating arrangements of the Applicant's land which is held privately and is not public land.

h. The Applicant was not given any opportunity whatsoever to file its defence in respect of the recommendations pertaining to the conversion of the leases or the recommendation pertaining the rates of its properties. Neither was the applicant afforded an opportunity to be heard prior to the NLC making its determination.

i. The decision by the NLC has no basis in law as it purports to issue final recommendations before any of the claims had been heard substantively contrary to Section 15 (9) of the National Land Commission Act and results in unlawful acquisition of private land for public purposes at an interlocutory stage.

j. The decision further that the NLC calls upon the mandated authority(s) to effect the recommendations herein. Consequently, the Applicant seeks an order of prohibition to prohibit the implementation of the impugned NLC recommendations by the National Land Commission and the Ministry of Lands.

k. The Applicant further seeks that the order granting leave do operate as a stay of the implementation and dealings arising out of the above cited NLC Recommendations published in the 1st March 2019 Gazette Notice until the hearing and determination of the substantive judicial review application.

28. The primary dispute presented by the Applicant in the instant application is on the process employed by the 1st Respondent in reaching the impugned decision, which is one that the High Court has jurisdiction to hear under Article 165(6) of the Constitution and section 9 of the Fair Administrative Action Act. However, to the extent that the impugned decision is one that is related to land, the application also fall within the jurisdiction of the Environment and Land Court, even though the legality and merits of the decision is not the primary dispute in the present application. This application is therefore one of those hybrid cases where both the High Court and the Environment and Land Court have concurrent jurisdiction, as the issues herein cut across the jurisdiction reserved for the two courts.

29. The question of which of the Courts having concurrent jurisdiction should hear and determine a matter has been resolved by inquiring what the most substantial question or issue presented in the controversy is. In Suzanne Butler & 4 Others v Redhill Investments & Another (2017) e KLR the Court stated the test in the following words:

"When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works.

The Court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse.

Ordinarily, the pleadings give the Court sufficient glimpse to examine the transaction to determine whether sale of land or other services was the predominant purpose of the contract. This test accords with what other Courts have done and therefore lends predictability to the issue."

30. 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.

31. 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.

32. 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.

33. 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.

34. In the premises, the 2nd Respondent's Notice of Preliminary Objection partially succeeds, to the extent that this suit is hereby transferred to the Environment and Land Court at Nairobi for further hearing and determination. Each party shall bear its own costs of the said Preliminary Objection.

35. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JANUARY 2020

P. NYAMWEYA

JUDGE