



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 95 OF 2019

BETWEEN

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

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

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

THE DIRECTOR OF SURVEY, MINISTRY OF LANDS.....2ND RESPONDENT

COUNTY GOVERNMENT OF KERICHO.....3RD RESPONDENT

COUNTY GOVERNMENT OF BOMET.....4TH RESPONDENT

AND

DAVID NGASURA TUEI AND 19 OTHERS.....INTERESTED PARTIES

EX PARTE:

1. JAMES FINLAY KENYA LIMITED, SOTIK TEA COMPANY LIMITED,

SOTIK HIGHLANDS TEA CO. LTD, CHANGOI/LELSA TEA ESTATE LTD,

TINDERET TEA ESTATE LTD, KAIMOSI TEA ESTATE LTD, KAPCHORUA

TEA PLC, KIPKEBE LIMITED, NANDI TEA ESTATES LIMITED, AND

KAISUGU LIMITED, BEING MEMBERS OF KENYA TEA GROWERS ASSOCIATION

2. KENYA TEA GROWER ASSOCIATION

RULING

Introduction

1. The first set of *ex parte* Applicants herein, (hereinafter “the Applicants”) namely, James Finlay Kenya Limited, Sotik Tea Company Limited, Sotik Highlands Tea Co. Ltd, Changoi/Lelsa Tea Estate Ltd, Tinderet Tea Estate Ltd, Kaimosi Tea Estate Ltd, Kapchorua Tea Plc, Kipkebe Limited, Nandi Tea Estates Limited, and Kaisugu Limited, are registered as companies under the Companies Act, and own tea estates in *inter alia* Kericho and Bomet Counties. They are also members of the Kenya Tea Growers Association, which is the 2nd Applicant herein. The said Association promotes the interests of the tea plantation sub-sector in the cultivation and manufacture of tea.

2. The said Applicants 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 dated 18th February 2019 published by the National Land Commission in the *Kenya Gazette Vol. CXXI-No. 27* of 1st March 2019. The said recommendations arise from historical land injustice complaints made by the County Governments of Kericho and Bomet on behalf of various Kipsigis clans and the Talai Clans against the colonial Government and the Government of Kenya. The National Land Commission is in this respect sued as the 1st Respondent, while the Director of Surveys in the Ministry of Lands is sued as the 2nd Respondent. The 3rd and 4th Respondents are the County Government of Kericho and County Government of Bomet respectively. A number of affected persons also applied to be joined as Interested Parties.

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 respect of the claims by County Governments of Kericho and Bomet on behalf of the Kipsigis and Talai Clans, Kipsigis Clans and the Borowo and Kipsigis Clans Self Help Group versus The Colonial Government and the Government of Kenya under Ref. NLC/HLI/044/2017, NLC/HLI/546/2018 and NLC/HLI/173/2017.

b) An order of Prohibition prohibiting the Director of Survey under the Ministry of Land and the County Governments of Kericho and Bomet from implementing the recommendations published in the Kenya Gazette Notice of 1st March 2019 and dated 18th February 2019 in respect of the claims by County Governments of Kericho and Bomet on behalf of the Kipsigis and Talai Clans, Kipsigis Clans and the Borowo and Kipsigis Clans Self Help Group versus The Colonial Government and the Government of Kenya under Ref. NLC/HLI/044/2017, NLC/HLI/546/2018 and NLC/HLI/173/2017.

c) A Declaratory Order that the National Land Commission proceedings and determinations dated 18th February 2019 in respect of the claims by County Governments of Kericho and Bomet on behalf of the Kipsigis and Talai Clans, Kipsigis Clans and the Borowo and Kipsigis Clans Self Help Group versus The Colonial Government and the Government of Kenya under Ref. NLC/HLI/044/2017, NLC/HLI/546/2018 and NLC/HLI/173/2017 published in the Kenya Gazette of 1st March 2019 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 were Notices of Preliminary Objection filed by the 2nd and 3rd Respondents, dated 15th July 2019 and 25th April 2019 respectively, 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 Applicants' 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 Applicants' 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. The 3rd Respondent's grounds of objection were similarly as follows:

a) That this Court lacks jurisdiction to entertain this matter which is the preserve of Environment and Land Court established by the Constitution and granted status of a High Court with its jurisdiction clearly spelt out by Environment and Land Court Act, No. 19 of 2011.

b) That the prayers in the application are clearly meant to render impotent the clear provisions of the Constitution and the National Land Commission Act in so far as the Kipsigis and Talai victims of historical injustice rights to redress are concerned.

c) The Applicants are challenging the National Land Commission mandate which is entrenched in the Constitution of Kenya

d) The Applicants have failed to adduce material evidence to invoke the discretion of the Court.

e) A number of Applicants have not made full disclosure and are withholding material evidence on the active role they played in aiding, abetting, being accessory after the facts and becoming the major beneficiaries of the historical land injustices.

f) The Applicants have not disclosed any prejudice that they have suffered nor given alternative reliefs to the recommendations of the National Land Commission.

g) The parcels of land where the recommendations are to be implemented are within Kericho and Bomet Counties and Kericho has both a High Court and an Environment and Land Court.

h) That even without the recommendation of the National Land Commission the County Governments are by law entitled to act on matters of rates, valuation and surveying of land.

i) The Applicants are out to conceal the fact that they have been paying rates that were applicable during colonial era and that current value of land under tea is well over Kshs 10,000,000.

j) That some of the Applicants (Unilever Tea) is subject to enhanced rates in its Kiambu parcels of land pursuant to the Kiambu County legislation.

k) That the Applicants' Notice of Motion runs against the clear provision of law and on the face of the Constitutional and statutory provisions.

6. This Court directed that the said Notices 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.

7. 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.

8. 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.

9. 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.

10. These arguments were echoed by Mr. Chelule for the 3rd Respondent, Ms. Chepkoech for the 4th Respondent and Mr. Manyange for Interested Parties. They relied on submissions filed by J.K. Bosek & Company Advocates, Kandie Mutai Mudeizi & Company Advocates and Manyonge Wanyama & Associates Advocates for the said Respondents and Interested Parties, which were dated 22nd October 2019, 4th September 2019 and 28th October 2019 respectively. Mr. Wahome, the counsel for the 1st Respondent, supported the Preliminary Objection, and associated himself with the 2nd Respondent's submissions.

11. Additional judicial authorities were cited by the said parties for the position that it is the Environment and Land Court that has jurisdiction in this matter by virtue of Article 162(2) of the Constitution and section 13 of the Environment and Land Court Act. These included the decisions in **Republic vs Chief Land Registrar and Another, (2019) eKLR**; **Delmonte Kenya Limited vs County Government of Murang'a & Another, (2019) eKLR**; **Mohamed Said vs County Council of Nandi, (2013) eKLR**; **Republic vs National Land Commission & Another ex parte Cecilia Chepkoech Leting & 2 Others, (2016) eKLR**; **Mutanga Tea & Coffee Company Limited vs Shikara Limited & Another [2015] eKLR**, and **Republic vs Chairman, National Land Commission & 2 Others ex parte Peter Njore Wakaba & Macharia Kinyanjui (2016) eKLR**.

12. The 3rd Respondent in addition submitted that the suit herein has abated due to lapse of time, by dint of section 8 of the Fair Administrative Act, 2015, which requires that the application for review of an administration action shall be determined within ninety days of filing the application. That the application herein was filed on 1st April 2019 and accordingly the suit herein has abated as the 90 days

envisioned by the Act lapsed on 29th June 2019. Further, that section 8 of the Fair Administrative Act 2015 uses the word “shall” and connotes a command or duty rather than discretion or wish, and such it was the intention that a matter has to be determined within the stipulated time. The case of **Mary Wambui Munene vs Peter Gichuki King’ara & 2 Others SC Petition No. 7 of 2014** was cited for this position.

13. The 4th Respondent on its part also further submitted that even though Article 159 Constitution of Kenya allows this Court not to have undue regard to procedural technicalities, and to adjudicate over substance by aiding the transfer of the present application before the right forum, that this court having found that it lacks jurisdiction cannot proceed to make such order, since it cannot cure the defect of filing a suit in the wrong forum. The decision by the Court of Appeal in **Equity Bank Limited vs Bruce Murie Mutuku t/a Diani Tour & Travel [2016] eKLR** was relied upon for the position that a Court lacking jurisdiction cannot sanctify an incompetent suit by transferring it to a court with jurisdiction.

The Response

14. Kaplan & Stratton Advocates filed submissions dated 28th October 2019 for the Applicants, wherein it was urged that the Applicants are aggrieved by the unfair procedure utilized by the 1st Respondent, as they were denied a reasonable opportunity to state their case before the decision published in the impugned Gazette Notice was made. Further, that they have 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.

15. Mr. Fred Ojiambo SC, the counsel for the Applicants, 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.

16. It was thus the Applicants’ 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.

17. 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 Applicants have 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 Applicants were 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.

18. 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.

19. It was the Applicants’ further submission that the Respondents have misconstrued the premise of the case in the instant application. That the main object of the Applicants’ 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.

20. Therefore, that the Respondents are wrong in concluding that the Applicants’ 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.

21. Dr. Ojiambo SC, while referring to the pleadings in the instant application, submitted that it has been clearly demonstrated that the dispute does not relate to any interest of the land, but rather specifically challenges the illegality, irrationality and procedural impropriety of the 1st Respondent’s procedure. Consequently, that the present case is distinguished from the decisions in **Republic vs Chief Land Registrar and Another, (supra)** where the dominant issue was a boundary dispute and **Del Monte Kenya Ltd vs County Government of Murang’a and Another (supra)** in which the dominant issue was the right of renewal of the leases over the suit land.

22. With respect to the issue as to whether the judicial review application has abated, the Applicants submitted that it has not abated, due to the fact that section 8 of the Fair Administrative Act is contrary to Article 50 (1) of the Constitution and the time scales of 90 days is unreasonable. Further, that the Applicants cannot be penalized by the fact that it is not administratively possible to have the judicial review claims heard within 90 days. The Applicants relied on the decision in **Republic vs Public Procurement Administrative Board and Another, [2017] e KLR**, and distinguished the Supreme Court decision cited by the 3rd Respondent, **Mary Munene vs Peter Kingara (supra)** on the ground that it is only applicable to election disputes.

23. 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

24. 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 Applicants' 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”

25. 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.

26. 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.

27. 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).”

28. 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.

29. The Applicants' 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).

30. The Applicants have 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.

31. 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..."

32. 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."

33. In the present application, the Applicants are 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 (iv) of its Statutory Statement dated 1st April 2019 as follows:

(iv) The Applicants are seeking an order of Certiorari to quash the Gazette Notice of 1st March 2019 in so far it relates to the

NLC recommendations made in respect of the cited NLC cases for the following reasons:

- (a) **The Decision offends the principles of natural justice because the NLC did not notify the Applicants of the claim by the County Governments of Kericho and Bomet on behalf of the Kipsigis and Talai Clans, Kipsigis Clans and the Borowo and Kipsigis Clans Self Help Group vs The Colonial Government and the Government of Kenya. In addition, the Applicants were not afforded a fair opportunity to be heard by the National Land Commission;**
- (b) **Issuing a Decision without notice to the Applicants when it was apparent that such delivery would adversely affect the interests the Applicants' tea estates in the said Kericho and Bomet counties. The Applicants are an affected party as they have tea estates in Kericho and Bomet and the recommendations are directed to tea estates in these two counties. The omission to notify the Applicants is a deliberate act of malice with the aim of disenfranchisement in respect of the Applicants tea estates contrary to Article 40(1) of the Constitution 2010.**
- (c) **From a review of the Determination, the reliefs sought were that *inter alia*, (a) The Government land that is now under British Multi-national Tea Governments be granted to the Kericho and Bomet County Governments, (b) The British Multi-national Tea Companies be asked to lease land from the Kericho and Bomet County Governments at commercial rates. (c) British Multi-nationals be allowed to remain as tenants in the unexpired period of tenancy. From the reliefs sought, the NLC had a duty under the Fair Administrative Action Act to notify the affected companies in Kericho and Bomet Counties.**
- (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 Commission acted arbitrarily and/or discriminatively in issuing a decision that would affect the interests of the Applicants;**
- (f) **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.**
- (g) **The NLC directives though couched as recommendations are in reality determinations in direct contravention of Section 15 (9) of the National Land Commission Act.**
- (h) **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 arrangements, rates and rent of the Applicants' properties which are private and not public land.**

34. The primary dispute presented by the Applicants 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.

35. 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."

36. 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.

37. 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.

38. 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.

39. Before I conclude, I also need to comment on two additional arguments put forward by the 3rd and 4th Respondents on this Court's jurisdiction. The first was by the 3rd Respondent that this suit has abated by virtue of the provisions of section 8 of the Fair Administrative Actions Act. It is my view that whereas statutory limits must be observed, they must also be constitutional. I subscribe to the holding in **Republic vs Public Procurement Administrative Board and Another, [2017] eKLR** that statutory time limits which limit the constitutional right of a party to be heard by a court of law is unconstitutional, particularly in light of the provisions of Article 50(1) of the Constitution on the right to a fair hearing; Article 159(2) that requires substantive justice be dispensed without undue regard to procedural technicalities; and Article 160 on the independence of the Judiciary which insulate the Judiciary from any direction or control.

40. The decision relied upon by the 3rd Respondent in **Mary Wambui Munene vs Peter Gichuki King'ara & 2 Others SC Petition No. 7 of 2014** is also distinguishable as it is specific to election petitions, whose timelines as to hearing have a constitutional basis under Article 87 of the Constitution.

41. Second, on arguments made about this Court not having power and jurisdiction to transfer a matter to another superior Court for further hearing and determination, it is notable that the decision cited by the 4th Respondent in this regard of **Equity Bank Limited vs Bruce Murie Mutuku t/a Diani Tour & Travel [2016] eKLR** involved the transfer the suit by the High Court from a magistrate's court which had no jurisdiction, to the High Court pursuant to the provisions of section 18 of the Civil Procedure Act. Section 18 gives the High Court had power to transfer suits filed in a subordinate court to the High Court or to another subordinate court with competent jurisdiction.

42. The present application does not involve the jurisdiction of, or transfer of a suit from a subordinate Court, but involves superior courts of equal status, which have concurrent jurisdiction. In addition, in the event of lack of jurisdiction of one of the superior Courts of equal status, or concurrent jurisdiction among them, it was held and affirmed by the Court of Appeal in the case of **Prof. Daniel N. Mugendi vs Kenyatta University & Others [2013] eKLR**, ad that there can be inter transfer of cases between the High Court and Courts of Equal Status since those courts are constitutionally mandated to hear such 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.

43. In light of the foregoing findings, the 2nd and 3rd Respondents' Notices of Preliminary Objection partially succeed, 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 Objections.

44. Orders accordingly.

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

P. NYAMWEYA

JUDGE