



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

PETITION NO. 19 OF 2016

MALINDI LAW SOCIETY.....PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE NATIONAL ASSEMBLY.....2ND RESPONDENT

CONSOLIDATED WITH

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

PETITION NO. 291 OF 2016

1. BENJAMIN NJOROGE

2. CHARLES OPULU

4. ABDULRAHMAN O AMINGA

5. CHRISTINE KIPSANG

6. ESTHER WANGARE NJUGUNA

7. MICHAEL NGURE

8. PAULA NGETICH

9. ODUOR SIMINYU

10. JACQUELINE WAIHENYA MAINA

11. MANAZES LUBIA ALWENYA

12. TADAYO K MUYALA

(All suing as officers of the MOMBASA LAW SOCIETY)

On their behalf and on behalf of the membership of the society.....PETITIONERS

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE SPEAKER OF THE NATIONAL ASSEMBLY.....2ND RESPONDENT

THE NATIONAL LAND COMMISSION.....3RD RESPONDENT

RULING

1. By a Petition dated and filed herein on 6th October 2016, the Malindi Law Society(hereinafter the 1st Petitioner) sought orders against the Honourable Attorney General(the 1st Respondent) and the National Assembly(2nd Respondent) as follows:-

a) A declaration that Sections 2 on the definition of Court, Section 38, 47, 48 and 98 of the Land Laws (Amendment) Act, 2016 are unconstitutional, null and void.

b) Costs of the petition; and

c) Any such other Order(s) as this Honourable Court shall deem just.

2. The facts leading to the Petition are that on 31st August 2016, the President assented to the Land Laws (Amendment) Bill 2015 to amend the Laws relating to land to align them with the Constitution, to give effect to Articles 68(c) (i) and 67 (2) (e) of the Constitution, to provide for procedures on eviction from land, and for connected purposes.

3. Article 68 (c) (i) of the Constitution provides that Parliament shall enact legislation to prescribe minimum and maximum land holding acreage in respect of private land while Article 67(2)(e) thereof mandates the National Land Commission to initiate investigations on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress.

4. The 1st Petitioner contends in its Petition that the provisions of Section 2, 38, 47, 48 and 98 of the Land Laws (Amendment) Act, 2016 which purport to align the Land Laws with the Constitution and to give effect to the said Articles 68(c) (i) and 67 (2) (e) of the Constitution are unconstitutional, null and void and hence the prayers sought in the Petition.

5. On 7th October 2016 when the matter came before Angote J, under Certificate of Urgency, the Learned Judge granted interim orders as follows:-

2. That a conservatory order be and is hereby issued to stay and/or suspend the coming into force of the implementation and/or operation of the provisions of Section 2 of the Land Laws(Amendment) Act, 2016 on Section 2 of the Land Registration Act 2012, Section 38 of the Land Laws (Amendment)Act, 2016 on Section 15 of the National Land Commission Act, 2012, Section 47 of the Land Laws (Amendment) Act, 2016 on Section 13 of the Land Act 2012; and Section 98 of the Land Laws (Amendment) Act 2016 on Section 152 of the Land Act 2012 until 13th October, 2016 when the application will be heard inter-partes.

6. When the said matter came up for the inter-partes hearing of the application filed contemporaneously with the Petition before Angote, J on 13th October 2016, the Learned Judge directed that the matter be forwarded to the Chief Justice for the appointment of an uneven number of judges to hear the Petition and to give any further directions. The interim orders issued remained in force thereafter.

7. Subsequently, by directions given by the Honourable the Chief Justice on 9th November 2017, this Bench was constituted to hear the Petition.

8. As it turned out, some six days after the First Petition was filed in Malindi, a number of Advocates acting under the auspices of the Mombasa Law Society(the 2nd Petitioner) filed Mombasa ELC Petition No. 291 of 2016 against the Honourable Attorney General(named therein as the 1st Respondent), the Speaker of the National Assembly(the 2nd Respondent) and the National Land Commission(the 3rd Respondent).

9. The second Petition similarly prays for a declaration that Sections 38, 47, 48, 61(c) and 98 of the Land Laws (Amendment) Act are unconstitutional, null and void.

10. On 25th April 2017, parties in the second Petition having learnt of the existence of the First Petition in Malindi raising similar issues agreed to have the second petition transferred to Malindi for hearing and/or directions.

11. Subsequently on 23rd February 2018, the two Petitions were consolidated by the consent of the parties with the First Petition as the Lead File. Arising from consensus by the parties that the issue of Section 2 of the Land Laws (Amendment) Act 2016 had already been dealt with in another petition, it was agreed that the said Section would not be considered as part of the issues for consideration herein.

12. The two consolidated Petitions then proceeded to hearing and were heard by way of submissions. However after the Court reserved the same for judgment, an application was filed herein, dated 11th October 2019 by Messrs Kakuzi PLC seeking to be enjoined in the

consolidated Petition.

13. The Application by Kakuzi PLC also sought an order to have ***Nairobi Constitutional Petition No. 255 of 2018; Kakuzi PLC –vs- Attorney General & Others*** consolidated with the two Petitions already before us and that consequently the Court directs the re-opening of the hearing of those Petitions so that the Applicant can be heard before judgment is delivered.

14. A week later, a Second Application dated 17th October 2019 was filed herein on 23rd October 2019 by Del Monte Kenya Ltd. That application sought stay of further proceedings on the two consolidated petitions pending the hearing and determination of their application to be enjoined as an Interested Party. It also sought orders that ***Nairobi High Court Constitutional Petition No. 48 of 2019; Del Monte Kenya Ltd –vs- National Land Commission and Another*** be consolidated with the Petitions already pending Judgment at Malindi.

15. Subsequently a third Application dated 18th November 2019 was filed by a body known as Kakuzi Division Development Association. The said Association similarly sought to be enjoined in the proceedings as an Interested Party but solely for purposes of opposing the position taken by Kakuzi PLC.

16. The Application by Kakuzi PLC is supported by an Affidavit sworn on 3rd December 2019 together with a further one sworn on 3rd December 2019. The said Application is premised inter alia on the grounds that:-

(i) Kakuzi is the registered proprietor of LR No. 11674 and LR No. 10731. Pursuant to Section 15(1) of the National Land Commission Act, the National Land Commission summoned Kakuzi to participate in various investigations proceedings in respect of its said properties.

(ii) Kakuzi has filed an Amended Constitutional Petition in Nairobi HCCC No. 225 of 2018; Kakuzi PLC –vs- the National Land Commission & Others in which it is seeking conservatory orders in respect of the hearing of the historical land injustice claims and has also filed an Amended Petition challenging the constitutionality of Section 15(3) (b) of the National Land Commission Act. The constitutionality of Section 15 of the National Land Commission Act has also been challenged in the consolidated Petition at Malindi.

(iii) Kakuzi PLC is seeking the Court’s leave for the matters to be consolidated so as to advance its arguments in respect of the constitutionality of the said Section 15 of the National Land Commission Act so that all the pertinent critical aspects of the said section can be addressed holistically and it is just and fair that they be allowed to advance their claims in the consolidated Petition so that they are not locked out at the appeal stage should the need arise.

(iv) The issue of the Constitutionality of Section 15 of the National Land Commission Act is one that raised important public interest issues as the issue of sanctity of the title is no longer guaranteed. The Kenyan economy would be adversely affected by the implementation thereof more so in respect of securities for loans which are issued on the premise that the title deeds issued under the law are valid. The application of Section 15 of the National Land Commission Act would invalidate the titles issued under the repealed land registration statutes and the repealed 1963 Constitution.

(v) There are other additional issues that are not raised in the Malindi Petition such as the permission given to the National Land Commission to investigate claims which are otherwise time-barred under Section 7 of the Limitation of Action Act; the effect of the said section on the right to fair administrative action, the right to a fair hearing as well as protection provided under Article 24(1) of the Constitution that a right or fundamental freedom provided in the Bill of Rights shall not be limited except by law which is reasonable and justifiable.

(vi) In the circumstances it is only fair and just that the Court consolidates the Petitions and thereby re-opens the hearing of the consolidated Petition at Malindi before judgment so that all affected parties can be heard and to facilitate the just determination of all issues concerning the constitutionality of Section 15 of the National Land Commission Act.

17. The Application by Del Monte Kenya Ltd is equally supported by an Affidavit sworn by its Legal Officer Harry Odondi. That application is inter-alia premised on the grounds that:-

(a) Del Monte is the Petitioner in Nairobi High Court Constitutional Petition No. 48 of 2019; Del Monte Kenya Ltd –vs- The National Land Commission & Another.

(b) The Constitutionality of Section 15 of the National Land Commission Act is a common issue in the said Petition filed at Nairobi as well as the Consolidated Petition at Malindi, although there are a number of issues raised in the Nairobi Petition in regard to the constitutionality of the said Section which have not been raised in the consolidated Petitions.

(c) Del Monte has accordingly formed the view that it would be important for it to be heard on the matters raised in the consolidated Petition at Malindi before judgment is delivered therein as it is clear that the National Land Commission which is a party in the consolidated Petition intends to use the decision thereon to affect the outcome of Petition No. 48 of 2019.

(d) Del Monte has come to Court without delay immediately after it learnt of these proceedings and without Del Monte being heard, it shall have been denied the right to be heard under Article 50 of the Constitution.

18. The Application by Kakuzi Division Development Association on the other hand is supported by an Affidavit sworn by the Association’s Secretary Stephen Kuria Mbugua and is premised on the grounds that:-

(i) The members of the Association are residents of Kakuzi area and have lodged a historical land injustice case over LR No. 10731 and LR No. 11674(21211) being leases granted to Kakuzi PLC.

(ii) That pursuant to an order given in High Court Civil Case No. 255 of 2018 Kakuzi PLC has stayed the proceedings and hearing before the National Land Commission.

(iii) That the members of the Association are persons who stand to be directly affected by any orders of this Court and the issues touch on the case they have filed at the National Land Commission.

(iv) That the Applicants are opposed to any joinder of Kakuzi PLC to this suit and/or re-opening of the case.

19. The three applications are all opposed. By Grounds of Opposition dated 24th October 2019 as filed herein on 29th November 2019, the Petitioners give a blow by blow account of the consolidated Petitions from institution to the point when the first of these three applications were filed. Contemporaneously filed with the said Grounds of Opposition is the Petitioners Notice of Preliminary Objection dated 29th November, 2019 wherein the Petitioners objects to the Motion dated 11th October 2019 filed by Kakuzi PLC as well as the one dated 17th October 2019 by Del Monte Kenya Limited on the grounds that the two are hopelessly misconceived, unsupported, frivolous, totally devoid of merit and mala fides for the reasons inter-alia that:-

a) Article 165(6) (b) of the Constitution of Kenya, 2010 ousts the jurisdiction of the High Court in respect of matters falling within the jurisdiction of this Honourable Court.

b) Jurisdiction must exist at the time of filing suit.

c) A judge is appointed to a particular Court and given that appointment and subsequent swearing into that Court, that Judge can only perform the duties of that Court.

d) The High Court has no jurisdiction to entertain Nairobi High Court Constitutional Petition No. 255 of 2018: Kakuzi PLC –vs- The Honourable the Attorney General, The National Land Commission and Others and Nairobi High Court Constitutional Petition No. 48 of 2019; Del Monte Kenya Ltd –vs- The National Land Commission & Another.

e) Nairobi High Court Constitutional Petition No. 255 of 2018 Kakuzi PLC –vs- The Honourable Attorney General, The National Land Commission & Others and Nairobi High Court Constitutional Petition No. 48 of 2019; Del Monte Kenya Ltd –vs- The National Land Commission & Another having been filed in a Court without jurisdiction, the aforesaid Petitions are null and void ab initio and this Honourable Court had no jurisdiction to transfer the aforesaid Petitions.

20. Similarly, the National Land Commission (the 3rd Respondent in the second Petition) is opposed to the application by Kakuzi PLC. By Grounds of Opposition dated 20th November, 2019, the 3rd Respondent objects to the Application on the grounds that:-

(i) Kakuzi PLC has no locus or audience before this Honourable Court since they have neither applied to be enjoined as parties nor has this Honourable Court or the High Court in Nairobi issued any orders for consolidation of the instant Petition with Nairobi HCCC No. 255 of 2018;

(ii) Kakuzi PLC has filed a notice of withdrawal of Petition No. 255 of 2018 and in the circumstances there is no Petition to consolidate with;

(iii) The jurisdiction of this Court under Article 162 of the Constitution is distinct from that of the High Court under Article 165 of the Constitution and this Honourable Court lacks jurisdiction to consolidate the instant Petition with a Petition that has already been filed and admitted to be falling within the jurisdiction of the High Court;

(iv) The instant Petition before Court has been brought by the respective Law Societies in the public interest and the interests of Kakuzi PLC are well taken care of and their participation is not necessary since it would only open a Pandora's box for all citizens who are affected by any of the issues raised in the Petition to move this Court to be heard;

(v) This Honourable Court will render a Judgment in rem that will deal with all the issues pertaining to the constitutionality of Section 15 of the National Land Commission Act and it will not be necessary for Kakuzi PLC to file any Petition in the circumstances or seeks to be heard;

(vi) There are no new or novel issues raised in the Petition No. 255 of 2018 to warrant the grant of the orders sought in the Notice of Motion dated 11th October 2019; and

(vii) The Notice of Motion dated 11th October 2019 is a gross abuse of the Court process.

21. The Honourable Attorney General (the 1st Respondent) is equally opposed to the two Applications by Messrs Kakuzi PLC and Del Monte Kenya Ltd. In their Grounds of Opposition dated 8th November 2019 and filed herein on 14th November 2019, the Attorney General states:-

(i) That the Applications are misconceived, frivolous, vexatious, and an abuse of the process of Court;

(ii) That the Applicants are guilty of material non-disclosure and laches and have been aware of the proceedings which have been in Court since 2016;

(iii) That the Applicants have existing matters pending and filed before Court in a different jurisdiction under Article 165 of the Constitution being Petition No. 48 of 2019.

(iv) That the Application herein is an abuse of the Court process to the extent that it seeks to scuttle ongoing proceedings before another trial Court which proceedings have since been finalized (and are) only pending judgment;

(v) That the Court ought to query the proper legal basis and procedure on the enjoinder of these parties to the proceedings before Court and its logical effect to delivery of justice in terms of delay.

22. We have perused and considered the three Applications, the responses therein as well as the Notice of Preliminary Objection. We have equally perused and considered the detailed written and oral submissions and the Lists of Authorities availed to us by the Learned Advocates for the parties.

23. The dominant prayers in the two applications by Kakuzi PLC and Del Monte are in regard to the consolidation of the two suits the parties have separately filed in the High Court at Nairobi with the consolidated Petitions at Malindi. Del Monte also prays in the alternative to be enjoined in the consolidated Petition as an Interested Party and to be allowed to submit its position. The third application before us similarly seeks the joinder of Kakuzi Division Development Association as an Interested Party in the consolidated Petition.

24. Arising from the Grounds of Opposition and the Notice of Preliminary Objection filed by all the parties in the consolidated Petition, the issues that arise for consideration in our view are:-

1. Whether this Court as empanelled can entertain any other parties other than the parties that were involved in the dispute as at the time the Honourable the Chief Justice empanelled this Bench in accordance with Article 165(4) of the Constitution;

2. Whether this Court has the requisite jurisdiction to hear the matters the applicants are seeking to be consolidated with the Malindi ELC Petition No. 19 of 2016 as consolidated with Mombasa ELC petition No. 291 of 2016; and

3. Whether in the circumstances herein, there are common questions of law or of fact to render it desirable that the consolidated Petition be further consolidated with that filed by Messrs Kakuzi PLC and Del Monte Kenya Ltd at the High Court at Nairobi.

25. In the first instance it was contended by both the Petitioners and the Respondents in the consolidated Petitions that the Honourable the Chief Justice having exercised his mandate pursuant to Article 165(4) of the Constitution in empanelling this Bench to deal with a particular issue, it was not open for the Bench to hear other parties who had not been gazetted as such by the Chief Justice.

26. The said Article 165(4) of the Constitution provides that:-

“Any matter certified by the Court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of Judges, being not less than three, assigned by the Chief Justice.”

27. In accordance with the said provision, when ELC Petition No. 19 of 2016 was placed before the Honourable Angote J on 13th October 2016, the Learned Judge directed that the matter be forwarded to the Honourable the Chief Justice for the appointment of an uneven number of Judges to hear the same and/or give further directions. Subsequently, the matter was forwarded to the Honourable the Chief Justice who proceeded to empanel this Bench on 9th November 2017.

28. While it was contended by the parties in the consolidated Petitions that the second Petition initially filed at Mombasa went through a similar process, we were unable to find any evidence of the same. From the record, it was apparent to us that on or about 12th October 2016 when the Mombasa Petition was filed, the Honourable Justice Anne Omollo then seized of the matter did indicate that she was aware that a similar matter being the First Petition herein had been instituted earlier at the ELC Malindi.

29. Subsequently on 25th April 2017, the parties in the Mombasa Petition agreed by consent to have the matter transferred to Malindi for hearing and/or disposal. On 23rd February 2018, the same parties appeared before this Court as constituted by the Honourable the Chief Justice to hear Petition No. 19 of 2016 and proceeded to have the two Petitions consolidated by consent. It was thus not entirely true that this Bench had been empanelled to hear the consolidated Petitions.

30. As it were, the Office of the Chief Justice as the head of the judiciary is established under Article 161(2) of the Constitution. Section 5 of the Judicial Service Act sets out the functions of the Chief Justice to include the exercise by the Chief Justice of the judicial and administrative functions as the head of the Judiciary.

31. In terms of the Enforcement of the Bill of Rights, Article 22(3) of the Constitution empowers the Chief Justice to make rules providing for the institution of proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

32. Pursuant to the said Article 22(3) as read together with Article 165(3) (b) of the Constitution, the Chief Justice of Kenya in June 2013 promulgated the Constitution of Kenya (Protection of Rights And Fundamental Freedoms) Practice and Procedure Rules, 2013 (commonly referred to as the Mutunga Rules in reference to the then serving Chief Justice at the time the Honourable Willy Mutunga).

33. In the exercise of its jurisdiction under the **Mutunga Rules**, this Court is required to facilitate the just, expeditious, proportionate and affordable resolution of all cases. In this regard Rule 17 of the said Rules clearly provides that:-

“The Court may on its own motion or on an application by any party consolidate several Petitions on such terms as it may deem just.”

34. Arising from the foregoing, it was our considered opinion that there was no requirement for the Applicants herein to go through the office of the Honourable the Chief Justice seeking to have their Petitions consolidated with the two Petitions already consolidated before the Court. The power to consolidate the same is already vested by the Chief Justice on the Court hearing the Petition and it is therefore left for this Court to determine whether the matters before it can be consolidated as urged by the Applicants.

35. That indeed was the same mandate exercised by this Court on 23rd February 2018 when it ordered that ELC Petition No. 19 of 2016 be and is hereby consolidated with Mombasa ELC Petition No. 291 of 2016.

36. In regard to the second issue for our consideration, it was urged again by all the parties in the already consolidated Petitions that this Court lacks the requisite jurisdiction to hear the matters which the Applicants pray to be consolidated with the Petitions herein and to grant the orders sought.

37. In their submissions before the Court, both Mrs Opiyo and Mr. Thuo, the Learned Counsels for Kakuzi PLC and Del Monte respectively urged the Court to disregard the objections by the Petitioners and the Respondents in the consolidated Petition.

38. The two Applicants submitted that the Environment and Land Court and the High Court both have congruent and concurrent jurisdiction to deal with Constitutional Petitions touching on land matters as well as the Constitutionality of the land statutes. In this regard, the Applicants contended that they had filed the two Petitions being **Nairobi High Court Constitutional Petition No. 255 of 2018 and Nairobi High Court Constitutional Petition No. 48 of 2019** pursuant to the provisions of Article 165(3) (d) (i) of the Constitution which mandates the High Court to hear any question respecting the interpretation of the Constitution including the question of whether any law is inconsistent with or in contravention of the Constitution.

39. The *locus classicus* on the question of jurisdiction is the celebrated case of **Owners of the Motor Vessel “Lillian S” –vs- Caltex Oil (Kenya) Ltd (1989) KLR 1** where the Court stated that:-

“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 jurisdiction.”

40. It has been said that the authority for this holding by the Court of Appeal is to be found in the writings of John Bacroft Saunders in a treatise headed **Words and Phrases Legally Defined-Volume 3: I-N** where the Learned Author states at page 113 the following on the issue of jurisdiction:-

“By jurisdiction is meant the authority which the Court has to decide matters that are litigated before it or to take cognizance 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 restrictions or limits is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the nature of actions and matters of which the particular Court has cognizance 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 exists. Where a Court takes it upon itself to exercise a jurisdiction which it does not possess its decisions amounts to nothing. Jurisdiction must be acquired before Judgment is given.”

41. Emphasizing the need for a Court to first satisfy itself on the question of jurisdiction as espoused above in the recent case of **Phoenix of E.A. Assurance Company Ltd –vs- S.M. Thiga t/a Newspaper Services Ltd (2019) eKLR**, the Court of Appeal observed that:-

“It is a truism jurisdiction is everything and is what gives a Court or tribunal the power, authority and legitimacy to entertain any matter before it. What is jurisdiction? In common English parlance, jurisdiction denotes the authority or power to hear and determine the judicial disputes or to even take cognizance of the same. This definition clearly shows that before a Court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a Court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such Court will be amenable to being set aside ex debito justitiae.”

42. In the matter before us it is not contested that the two Petitions sought to be consolidated with this matter have been instituted separately by Kakuzi PLC and Del Monte at the High Court at Nairobi. While the Applicants contended that this Court and the High Court are possessed of congruent and concurrent jurisdiction to hear the same, the Respondents retorted that those matters had either been filed in a Court lacking jurisdiction and/or that this Court lacked the wherewithal to order consolidation and transfer of the same on account of lack of jurisdiction.

43. In our view, it is imperative that when an issue is raised as to whether or not a Court has jurisdiction to deal with a particular matter before it, it is crucial that we be clear about what is meant by “jurisdiction”. Luckily for us, there is no need to re-invent the wheel as a number of treatises and judicial pronouncements have been useful in clarifying the meaning thereof.

44. In *Guaranty Trust Company of New York –vs- Hannay & Company (1915) 2KB 536 at 563*, Pickford LJ opted to reject the nuance between the word “jurisdiction” and the expression “the Court has no jurisdiction” to help achieve a meaning when His Lordship stated:-

“The word “jurisdiction” and the expression “the Court has no jurisdiction” are used in two different senses which I think often leads to confusion. The first and in my opinion, the only really correct sense of the expression that the Court has no jurisdiction is that it has no power to deal with and decide the dispute as to the subject matter before it, no matter in what form or by whom it is raised. But there is another sense in which it is often used, that is, that, although the Court has power to decide the questions it will not according to its settled practice do so except in a certain way and under certain circumstances.”

45. Half a century later, Diplock LJ (as he then was) re-affirmed these sentiments in *Garthwaite –vs- Garthwaite (1964) 2 All ER 233, 244*, where he observed as follows:-

“In its narrow and strict sense, the “jurisdiction” of a validly constituted Court connotes the limits which are imposed upon its power to hear and determine issues between persons seeking to avail themselves of its process by reference (i) to the subject matter of the issue, or (ii) to the persons between whom the issue is joined, or (iii) to the kind of relief sought, or to any combination of these factors. In its wider sense, it embraces also the settled practice of the Court as to the way in which it will exercise its power to hear and determine issues which fall within its “jurisdiction” (in the strict sense) or as to circumstances in which it will grant a particular kind of relief which it has jurisdiction (in the strict sense) to grant, including its settled practice to refuse to exercise such powers or to grant such relief in particular circumstances.”

46. In regard to the jurisdiction of the High Court, Article 165(3) of the Constitution stipulates that:-

“(3) Subject to Clause (5), the High Court shall have-

a) Unlimited original jurisdiction in criminal and civil matters;

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

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

d) Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of-

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

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

(iii) Any matter relating to Constitutional powers of State Organs in respect of County governments and any matter relating to the Constitutional relationship between the levels of government ; and

(iv) A question relating to conflict of laws under Article 191; and

(e) Any other jurisdiction original or appellate conferred on it by legislation.”

47. Article 165 (6) further gives the High Court Supervisory jurisdiction in the following terms:-

“(6) The High Court has supervisory jurisdiction over the subordinate Courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior Court.”

48. Article 162(2) (b) of the Constitution on the other hand empowers Parliament to “establish Courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to land.” In this regard and pursuant to Article 162(3) of the Constitution, Parliament enacted the Environment and Land Court Act, Act No. 19 of 2011.

49. Section 13 of the Environment and Land Court Act outlines the jurisdiction of the Environment and Land Courts 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.*

50. We have taken the liberty to cite the above provisions of the Constitution and the Environment and Land Court Act *in extenso* given the fact that while the consolidated Petitions are matters that were filed and are pending Judgment before this Court, the two Petitions sought to be consolidated therewith being **Constitutional Petitions No. 255 of 2018 and 48 of 2019** were filed and are pending before the High Court at Nairobi. The question that arises then, is whether those Petitions as filed and pending before the High Court can be transferred by this Court and consolidated with the already consolidated Petitions before us.

51. In **Karisa Chengo & 2 Others –vs- Republic (Criminal Appeal Nos. 44, 45 and 76 of 2014) 2015 eKLR**, the Learned Judges of the Court of Appeal were confronted with the question whether or not the Judges of the High Court, the Environment and Land Court (ELC) as well as the Employment and Labour Relations Court (ELRC) have jurisdiction to sit in any and/or all of the three Courts on the notion that the three were of equal status. Rejecting that contention, the Court observed as follows:-

“By being of equal status, the High Court therefore does not have the jurisdiction to superintend, supervise, direct, guide, shepherd and/or review the mistakes, real or perceived, of the ELRC and ELC administratively or judiciously as was the case in the past. The converse equally applies. At the end of the day however, ELRC and ELC are not the High Court and vice versa. However, it needs to be emphasized that status is not the same thing as jurisdiction. The Constitution though does not define the word ‘status’. The intentions of the framers of the Constitution in that regard are obvious given the choice of words they used; that the three Courts...are of the same juridical hierarchy and therefore are of equal footing and standing. To us it simply means that the ELRC and ELC exercise the same powers as the High Court in performance of its judicial functions, in its specialized jurisdiction but they are not the High Court.”

52. Upholding the above dictum of the Court of Appeal in the resultant appeal in **Republic –vs- Karisa Chengo & 2 Others (Supreme Court Petition No. 5 of 2015) 2017 eKLR**, the Supreme Court delivered itself as follows:-

“Flowing from the above, it is obvious to us that status and jurisdiction are different concepts. Status denotes hierarchy while jurisdiction covers the sphere of the Court’s operation. Courts can therefore be of the same status, but exercise different jurisdictions. That is why this Court has reaffirmed its position that the jurisdiction of Courts is derived from the Constitution or legislation.....

In addition to the above, we note that pursuant to Article 162(3) of the Constitution, Parliament enacted the Environment and Land Court Act and the Employment and Labour Relations Act and respectively outlined the separate jurisdictions of the ELC and ELRC as stated above. From a reading of the Constitution and these Acts of Parliament, it is clear that a special cadre of Courts, with sui generis jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal’s decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa. The three are different and autonomous Courts and exercise different and distinct jurisdictions. As Article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court.”

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

54. Besides, the two Petitions remain pending and active before the High Court at Nairobi. The Petitioners have not made any attempt before the two Courts seized of the matter to transfer the Petitions for hearing to this Court. While the matters in issue appear on the surface thereof to be matters falling within the jurisdiction of this Court in accordance with Article 162(2) (b) of the Constitution and Section 13 (2) of the Environment and Land Court Act, this Court as we have seen, does not have the jurisdiction to direct the transfer of the said matters to itself from the High Court and any attempt to do so may precipitate judicial anarchy.

55. Arising from the finding that we lack the jurisdiction to transfer and consolidate the Petitions as sought herein, we did not think it was then within our province to delve into the question as to whether there were sufficient grounds to consolidate the Petitions.

56. In the premises, we decline to allow the two applications filed herein separately by Kakuzi PLC and Del Monte Kenya Ltd. As the Application by Kakuzi Division Development Association was hinged on the success of the Kakuzi PLC application it must also fail. All the three applications before us are accordingly dismissed.

57. We make no orders as to costs.

Dated and delivered at Malindi this 28th day of February 2020

CHARLES YANO

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JUDGE

JAMES. O. OLOLA

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JUDGE

LOIS KOMING'OI

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JUDGE